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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 133 MM 2020

PENNSYLVANIA DEMOCRATIC PARTY, *et al.*

Petitioners

v.

KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of Pennsylvania, *et al.*

Respondents

SECRETARY BOOCKVAR'S RESPONSE IN OPPOSITION TO THE APPLICATIONS FOR STAY OF THE COURT'S SEPTEMBER 17, 2020 ORDER

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INTRODUCTION

One week ago, this Court handed down its decision in this case, bringing clarity to several unsettled questions of the Election Code and protecting both the health of Pennsylvanian citizens during a global pandemic and their right to vote as guaranteed by the Free and Equal Elections Clause. Applicants now seek a partial stay of two parts of that decision. The first, directed at the one-time three-day extension for the received-by deadline of mailed ballots. And the second, the presumption regarding the timely mailing of voters' ballots whose envelopes lack a postmark or contain an illegible one or a cancellation mark. But Applicants cannot meet their heavy burden entitling them to a stay.

Applicants have failed to make any showing, let alone a strong showing, that they are likely to prevail on the merits. The extension and timely-mailing presumption do not violate federal law because voters must still cast their ballots by 8:00 p.m. on Election Day. These remedies ensure that voters will not be disenfranchised.

The extension does not violate either the Elections or Electors Clauses of the United States Constitution. The extension prevents the constitutional harm threatened by the confluence of unforeseen and unforeseeable emergencies if the statutory Election Night received-by deadline were not modified for the November 2020 general election. And when an election regulation enacted under the Elections

Clause violates a fundamental constitutional right, it must yield. The Electors Clause is not implicated here because electors will still be appointed by popular vote, just as the General Assembly has provided.

Moreover, the extension is not contrary to the General Assembly's legislative intent in enacting Act 77. Far from being contrary to legislative intent, the action this Court took guards the most fundamental expression of that intent, that Pennsylvanian citizens not be disenfranchised.

Finally, granting the stay will cause irreparable harm rather than prevent it. The very reason this Court exercised extraordinary jurisdiction and promptly decided this matter well in advance of the election was to avoid harm to all Pennsylvania voters. In the midst of a global pandemic, absent this Court's actions, voters would have been forced to choose between exercising their right to vote and protecting their health. This Court's decision allows voters to do both. It should not be stayed.

STANDARD

On an application for a stay pending appeal, the movant must: (1) make a strong showing that he is likely to prevail on the merits of his appeal; (2) show that without the stay, irreparable injury will be suffered; (3) establish that the stay will not substantially harm other interested parties in the proceedings; and (4) will not adversely affect the public interest. *Reading Anthracite Co. v. Rich*, 577 A.2d 881, 884 (Pa. 1990); *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 573 A.2d 1001, 1003 (Pa. 1990). Because "[a]n application for a stay pending appeal always involves a situation in which the merits of the dispute have been fully considered in an adversary setting and a final decree rendered[,] . . . it is essential that the unsuccessful party, who seeks a stay of a final order pending appellate review, make a *strong* showing under [the above factors] in order to justify the issuance of a stay." *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983) (emphasis added).

ARGUMENTS

I. Applicants Fail to Demonstrate a Strong Showing of Likelihood of Success on the Merits on Appeal.

A. The Court's three-day extension to receive mailed ballots and presumption of timely mailing does not violate federal law.

Applicants first attempt to show a strong likelihood of success by asserting this Court's order permits voters to cast ballots after the election in violation of federal law. It does not. Applicants cite to cases standing for the unremarkable holding that states cannot establish their own federal election date.[1] This Court's order, however, does no such thing.

This Court explicitly stated "that voters utilizing the USPS must cast their ballots prior to 8:00 p.m. on Election Day, like all voters, including those utilizing drop boxes[.]" Opinion (Op.) at 37, n. 26. Applicants do not—because they cannot—argue that counting ballots mailed by election day, but received after election day, violate federal law. As this Court noted in its opinion, "Pennsylvania's election laws currently accommodate the receipt of certain ballots after Election

[1] For example, the Republican Party of Pa. (RPP) Intervenors cite to *Foster v. Love*, 522 U.S. 67, 72 (1997), where Louisiana law allowed candidates to be elected to federal office in October. That law is clearly distinguishable to this Court's order, which does not establish a new election date.

Day, as it allows the tabulation of military and overseas ballots received up to seven days after Election Day. 25 Pa.C.S. § 3511." *Id.* at 37.

So instead of argument, Applicants proffer unsupported speculation. This Court correctly refused "to disenfranchise voters for the lack or illegibility of a postmark resulting from the USPS processing system, which is undeniably outside the control of the individual voter." Op. at 37, n. 26. This Court held that ballots received within the three-day extension lacking a "postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible, will be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day[.]" Op. at 63. Applicants argue that this presumption will allow voters to cast votes after Election Day. It does not.

First, as this Court correctly noted, voters have no control over whether their mailed ballot will be legibly postmarked or even postmarked at all. Op. at 27, fn. 20. Therefore, the illegal voting that Applicants fear—*i.e.* voting after the election—cannot purposely occur, as the voter will not be able to control the post-stamping of his or her ballot envelope. Further, under USPS regulations, post offices are required to postmark election mail.[2] The vagaries of a federal employee's efforts to perform

[2] As an initial matter, First-Class and Priority mail are postmarked showing the "full name of [the] Post Office, two-letter state abbreviation, ZIP Code, date of mail, and a.m. or p.m." *See* 39 C.F.R. § 211.2(a)(2); Postal Operations Manual at

his or her duties, which is entirely outside of the voter's control, cannot stand as the basis to disenfranchise a voter.

Second, as concluded recently by the District Court for the Southern District of New York, using postmarks to determine ballot eligibility hinges a voter's right to vote "on random chance." *Gallagher v. New York State Bd. of Elections*, 20 CIV. 5504, 2020 WL 4496849, at *19 (S.D.N.Y. Aug. 3, 2020). In that case, the federal court held that "given arbitrary postmarking of absentee ballots, and the State's decision to determine ballot eligibility on the basis of that arbitrary practice, the Court finds [the law's] postmark requirement subjects absentee voters across the state to unjustifiable differences in the way that their ballots are counted." *Id.* at *21.

443.3. But because "the Postal Service recognizes elections as the bedrock of our system of government[,]" beginning in March 2014, the USPS "began applying a cancellation mark to all letter pieces processed on USPS Letter Automation Compatible Postage Cancellation Systems." Your 2020 Official Election Mail Kit 600, United States Postal Service, https://about.usps.com/kits/kit600.pdf at page 25 (last visited 9/23/2020). This improvement in USPS automation prints a cancellation mark on ballot envelopes with pre-paid postage "including identifying the date the Postal Service accepted custody of balloting materials." *Id.*

While these regulations do not guarantee that ballot envelopes will not be missed or that cancellation marks will always be legible, as this Court correctly noted, the voter has no control over this. While Applicants point to President Judge Mary Hannah Leavitt's factual findings in *Crossey v. Boockvar*, 266 M.D.2020 (Pa. Cmlwth. Sept. 4, 2020), she found "no clear evidence presented on whether prepaid postage envelopes, which may be provided by the county boards of elections to voters for mailing their completed ballots, will be postmarked." Findings of Fact at 29, ¶ 24.

"[W]hether the votes of [] two voters—who cast their votes in precisely the same manner—are counted depends entirely on the speed at which their local post office delivered their votes. And it demonstrates that [the law has] created a voting process where arbitrary factors lead the state to valuing one person's vote over that of another—the kind of process specifically prohibited by the Supreme Court." *Id.* at *19 (citing *Bush v. Gore*, 531 U.S. 98 (2000)).

Third, this Court's presumption of timeliness is a protection against such dangers. For that reason, it is consistent with the laws of other states, also protecting against those dangers.[3] *See e.g.* Nev. Rev. Stat. Ann. § 293.317 (West) ("If an absent ballot is received by mail not later than 5 p.m. on the third day following the election and the date of the postmark cannot be determined, the absent ballot shall be deemed to have been postmarked on or before the day of the election."); N.Y. Elec. Law § 8-412 (McKinney's) ("[A]ny absentee ballot received by the board of elections by mail that does not bear or display a dated postmark shall be presumed to have been timely mailed or delivered if such ballot bears a time stamp of the receiving board of elections indicating receipt by such board on the day after the election."); *accord*

[3] It is also entirely consistent with general long-standing assumptions by both the Pennsylvania and Federal courts regarding the time it takes to deliver the mail. Pa. R.A.P. 121(c); (addition of 3 days to respond to items served by mail); Fed. R. App. P. 26(c) (same).

Shiflett v. U.S. Postal Serv., 839 F.2d 669, 672 (Fed. Cir. 1988) (discussing prior version of regulation when timing was triggered by mailing of appeal to the Merit Systems Protection Board, explaining that "[t]he date of a filing by mail shall be determined by the postmark date; if no postmark date is evident on the mailing, it shall be presumed to have been mailed 5 days prior to receipt"); *Wells v. Peake*, No. 07-913, 2008 WL 5111436, at *3 (Vet. App. Nov. 26, 2008) (relying on prior regulation where timing of appeal was triggered by its mailing, to explain that "[s]ince there was no postmark, the BVA applied 38 C.F.R. § 20.305(a), which presumes the postmark date to be five days before the date VA receives the document, excluding Saturdays, Sundays, and legal holidays").[4]

Fourth, on page 9 of their application, Scarnati, Corman, and Benninghoff (Legislative Intervenors) insinuate that the Court's order will enable voters to cast ballots after Election Day through "this Court's sanctioning of unmanned, unsecured dropboxes[.]" This is nonsense. As this Court noted in its opinion, drop-off boxes must be secure and staffed on election night. Op. at 20, n. 15. "At 8:00 p.m. on election night, or later if the polling place hours have been extended, all ballot return

[4] The mail-in ballot envelope contains a Voter's Declaration that must be signed and dated by the qualified elector. If the postmark is illegible, the date on this declaration can serve as proof of when the voter sealed the envelope for mailing. Even absent a legible postmark, declarations signed after election day would provide election officials evidence that the ballot was untimely mailed, and therefore, would not be counted.

sites, and drop-doxes *must be closed and locked*. Staff must ensure that no ballots are returned to ballot return site after the close of polls." *See* Secretary's Post-Submission Communication dated 8/24/2020, setting forth the Secretary's Absentee and Mail-in Ballot Return Guidance at 3.3 (emphasis added); Op. at 20, n. 15. No ballots will be collected through drop-boxes after the polls close, and Legislative Intervenors provide no evidence to the contrary.

Finally, Applicants' reliance on *Republican Nat. Comm. v. Democratic Nat. Comm.*, __ U.S. __, 140 S.Ct. 1205 (2020) is misplaced. In that case, the United States Supreme Court stayed a federal district court's eleventh-hour order directing Wisconsin "to count absentee ballots postmarked *after* [election day]" because of COVID-19. *Id.* at 1206 (emphasis added). Detailing its reasons for the stay, the United States Supreme Court explained that it "has repeatedly emphasized that *lower federal courts* should ordinarily not alter the election rules on the eve of an election." *Id*. at 1207 (emphasis added). Nevertheless, and importantly, the High Court allowed the counting of ballots mailed by election day but received six days later. *Id.* at 1208.

This Court's decision not to disenfranchise voters based upon the arbitrary actions of postal employees fulfills the mandate of the Free and Equal Elections Clause of the Pennsylvania Constitution that "all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our

Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). This order certainly does not violate federal law. Applicants' argument to the contrary fails.

B. The Court's three-day extension to receive mailed ballots does not violate the Election or Electors Clauses of the United States Constitution.

Applicants' second attempt to show a strong likelihood of success likewise fails. Faced with a confluence of emergencies that threatened the right to vote, this Court sought to safeguard that right and it did so. The federal constitutional provisions surrounding the election process, far from being inconsistent with this Court's actions, support it.

The Elections Clause imposes upon the states "the duty . . . to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013).[5] But this power conferred

[5] The Elections Clause specifically provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators." U.S. Const., Art. I, § 4, cl. 1.

by the federal government to the states to regulate elections "does not justify, without more, the abridgment of fundamental rights, such as the right to vote." *Tashijan v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). Indeed, the Framers "understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power . . . to evade important constitutional restraints." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995); *see In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014) ("*Subject to constitutional limitations*, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania" (emphasis added)). Thus, when a procedural regulation violates a fundamental right, that regulation must yield. And the Judiciary has not hesitated when called upon to vindicate those rights. *See Thornton*, 514 U.S. at 832 (amendment to state constitution imposing term limits on congressional representatives violated Qualifications Clauses and so was not permissible exercise of state power under Elections Clause).

But Applicants[6] not only disregard but denigrate the role of the Judiciary and its obligation to secure constitutional rights. They even accuse this Court of having

[6] It is questionable whether the RPP Intervenors even possess standing to claim an injury under the Elections or Electors Clauses. *See Arizona State Legislature v. Arizona Ind. Redistricting Comm'n*, 576 U.S. 787, 799-804 (2015).

legislated its own "policy judgment." Legislative Intervenors App. at 18; *see also* Republican Party of Pa. (RPP) Intervenors App. at 7-8. This Court did no such thing. To the contrary, this Court was unanimous in finding that the statutory Election Night received-by deadline, because of a confluence of unforeseen emergencies, would undermine the Free and Equal Elections Clause. Op. at 35-37; Concurring Op. (Wecht, J.) at 6-7; Concurring and Dissenting Statement at 6, 12 (Donahue, J.,). The only dispute among the Justices was what remedy to fashion. Confronted with a potential violation of a fundamental constitutional right, this Court exercised its power to protect it. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 952-53 (Pa. 2013); *see also Brown v. Secretary of State of Fla.*, 668 F.3d 1271, 1278 (11th Cir. 2012) (noting that when the Framers adopted the Elections Clause, they recognized that "the state legislature can be constrained by restrictions imposed by the state's constitution"). That power arose not just from equity but also from legislative enactments.

The General Assembly itself has recognized that when unforeseen emergencies arise that threaten the fundamental right to vote, the courts are in the best position to ensure those rights are secured. That is why the General Assembly enacted 25 P.S. § 3046. As this Court noted, "Section 3046 provides courts of common pleas the power, on the day of an election, to decide 'matters pertaining to the election as may be necessary to carry out the intent' of the Election Code," which

includes "providing 'an equal opportunity for all eligible electors to participate in the election process.'" Op. at 35, quoting 25 P.S. § 3046 and *In re General Election-1985*, 531 A.2d 836, 839 (Pa. Cmwlth. 1987). Because this Court possesses the "supreme judicial power" – and even more so when, as here, it acts pursuant to its extraordinary jurisdiction power – it must also be empowered to respond to emergencies like those inferior tribunals. Pa. Const. art. V, § 2(a); 42 Pa.C.S. § 501; *In re Bruno*, 101 A.3d 635, 676 (Pa. 2014). Consistent with that power, in order "to prevent the disenfranchisement of voters," Op. at 36, this Court provided for a "three-day extension of the absentee and mail-in ballot received-by deadline," *id.* at 37.

Given that this Court acted to secure the right guaranteed to Pennsylvanians by the Free and Equal Elections Clause that was threatened by a confluence of emergencies – as it was obligated to do and as the federal judiciary has also done when facing similar threats – Applicants have failed to make any showing, let alone a strong showing, that they are likely to prevail on this ground.

As for the received-by deadline violating the Electors Clause,[7] Applicants make only a fleeting argument that can be summarily addressed. Initially, the Court should not countenance this undeveloped argument. *See e.g. Sutton v. Bickell*, 220

[7] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." U.S. Const., Art. II, § 1, cl. 2.

A.3d 1027, 1036 (Pa. 2019). In any event, the Electors Clause is not implicated here. That Clause "vests the power to determine the manner of appointment in 'the Legislature' of the State." *Arizona State Legislature v. Arizona Ind. Redistricting Comm'n*, 576 U.S. 787, 839 (2015). For example, over the course of American history, electors have been "appointed by the legislatures," "by popular vote for a general ticket," or "elected by districts." *McPherson v. Blacker*, 146 U.S. 1, 31 (1892). The three-day extension in no way affects the manner in which electors will be appointed: voters will choose the electors who choose their representatives. *Cf. id.* at 24 (state legislature, as a body of representatives, could divide authority to appoint electors across each of the State's congressional districts).

C. The three-day extension of the received-by deadline is consistent with the General Assembly's intent.

RPP Intervenors, in their application for partial stay, argue that the one-time equitable three-day extension of the deadline for county boards of election to receive mail-in ballots is contrary to the General Assembly's legislative intent in enacting Act 77 of 2019 (enacted Oct. 31, 2019) and Act 12 of 2020 (enacted Mar. 27, 2020). Since Act 12 was enacted after the beginning of the COVID-19 pandemic, the RPP Intervenors maintain that the General Assembly implicitly considered and rejected the need to move the received-by deadline for ballots. RPP Intervenors App. at 8. However, in making this argument, the RPP Intervenors fail to recognize both: (1) the significance of the USPS subsequent change in policies (Letter to Secretary

Boockvar from USPS dated July 29, 2020) which put into question the ability of the postal service to deliver mail-in ballots on time; and (2) the long standing equitable powers of the courts to make temporary, minor changes to established deadlines under the Election Code to prevent the disenfranchisement of Pennsylvania voters.

The Election Code provides that mail-in ballots shall be received by 8 p.m. on Election Day. 25 P.S. §§ 3146.6(c) and 3150.16(a). However, it is now clear that the existing timeline under the Election Code cannot be met by USPS's current delivery standards. This is a change in circumstance which could not have been anticipated or considered by the General Assembly when Act 77 and Act 12 were enacted.

Moreover, a temporary extension to address the exigencies of a natural disaster is simply not the invalidation of the statutory deadline. That deadline remains for the next election when mail-in and absentee ballots will have to be received by 8:00 pm Election Day in accordance with 25 P.S. §§ 3146.6(c) and 3150.16(a). The Court's equitable order to provide relief for mail-in voters in the convergence of the COVID-19 pandemic and an unprecedented change in policies of the USPS is not only a reasonable exercise of this Court's authority, but necessary to guarantee the right to vote. Far from being contrary to legislative intent, this Court's actions guard the most fundamental expression of that intent, that Pennsylvanian citizens not be disenfranchised. The RPP Intervenors overlook that

the Election Code and Act 77 were enacted consistent with this intent underlying the Free and Equal Elections Clause of Article I, Section 5 of the Pennsylvania Constitution.

In the past, pursuant to the judiciary's equitable powers, lower courts have extended election deadlines in the face of natural disasters imperiling some electors' ability to vote. *See In re Gen. Election 1985*, 531 A.2d at 836. In that case, the Commonwealth Court stated that "[t]o permit an election [to] be conducted where members of the electorate could be deprived of their opportunity to participate because of circumstances beyond their control, such as a natural disaster, would be inconsistent with the purpose of the election laws." *Id*. at 839. This Court adopted the analysis in *In re Gen. Election 1985*. Op. at 35. Clearly, if the Commonwealth Court, consistent with legislative intent (as expressed in 25 P.S. § 3046), could extend an election deadline due to an emergency, so may this Court.

II. A Stay Will Irreparably Harm the Public by Disenfranchising Voters Suffering Under a Global Pandemic.

A stay of this Court's decision would be inconsistent with the very reason this Court exercised extraordinary jurisdiction over this matter in the first place. This Court decided this issue well in advance of the election in order to avoid the harm to all Pennsylvania voters who, through no fault of their own, would have been forced to choose between exercising their right to vote and protecting their health during a

deadly pandemic. This Court's decision allows voters to do both. It should not be stayed.

Applicants make the remarkable claim that a stay of this Court's decision will *prevent* harm to the voters, suggesting that the Court's decision will engender voter confusion, erode public confidence in the electoral process, and provides for some sort of incentive not to vote. In fact, it is precisely the opposite. It is a stay that would engender voter confusion, erode public confidence in the electoral process, and provide for some sort of incentive not to vote.

Given the realities of Pennsylvania's election calendar, the strain of the COVID-19 pandemic, and the USPS's professed delivery standards during this time, there was a real and substantial risk that Pennsylvania voters would be disenfranchised due to circumstances beyond their control. Far from creating confusion, this Court, by exercising extraordinary jurisdiction over this matter and granting temporary equitable relief, brought much needed clarity for voters and election officials alike.

By rendering its decision 47 days before Election Day, this Court ensured that the upcoming election would not be subject to the kinds of "last minute changes" to election rules that the United States Supreme Court has repeatedly admonished. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1 (2006). As this Court aptly stated in its opinion, "voters' rights are better protected by addressing the impending crisis at this point

in the election cycle on a statewide basis rather than allowing the chaos to brew, creating voter confusion regarding whether extensions will be granted, for how long, and in what counties." Op., at 36-37. "Instead, we act now to allow . . . the voters in Pennsylvania to have clarity as to the timeline for the 2020 General Election mail-in ballot process." *Id.* at 37. It is quite revealing that Applicants believe that tabulating ballots that are lawfully cast on Election Day will cause *them* irreparable injury. In requesting a stay of this Court's decision, Applicants seek to revive uncertainty, rather than prevent it.

Applicants' invocation of *Bush v. Gore* in support of their arguments that the equities favor a stay in this case is not only misguided but perverse. Insofar as the Fourteenth Amendment Equal Protection issues surrounding the post-election recount in *Bush v. Gore* have any bearing on the issues here, the Court's opinion actually supports the Court's uniform equitable remedy in this case.[8]

In *Bush v. Gore*, 531 U.S. 98 (2000), the Court confronted an Equal Protection challenge to Florida's recount procedures established nearly one month *after* the election. More specifically, the Court confronted the standards (or lack thereof) for

[8] Though applicants place heavy reliance upon Justice Scalia's stand-alone concurring statement in support of the Court's stay order, *see Bush v. Gore*, 531 U.S. 1046, 1047 (2000), and Chief Justice Rehnquist's concurring opinion in support of the Court's decision on the merits, *see Bush v. Gore*, 531 U.S. 98, 112-122 (2000), neither opinion reflects the views of a majority of Justices, nor binding Supreme Court precedent. Those opinions merely reflect the views of those Justices.

counting ballots that were insufficiently cast, *i.e.*, ballots with dimpled or hanging chads. *Id.* at 101-05. The amorphous and arbitrary standard enunciated by the Florida Supreme Court without uniform rules resulted in unequal evaluation of ballots across Florida counties. *Id.* at 105-06. In some counties, so-called "dimpled chads" were counted, but in others they were not. *Id.* at 106. Other counties changed their ballot evaluating standards in the middle of the recount. *Id.* For this reason, the Court stayed the Florida recount, *see Bush v. Gore*, 531 U.S. 1046 (2000) (staying mandate of the Florida Supreme Court and granting petition for writ of certiorari), and concluded that the process for gleaning a voter's intent lacked "sufficient guarantees of equal treatment." 531 U.S. at 107.

Nothing about the Court's remedy here has anything to do with gleaning a voter's intended choice of candidate in the context of an equal protection claim. As to this Court's actual decision, its equitable remedy passes constitutional muster for all the reasons the High Court stated that the Florida recount failed to. This Court's solution 47-days before the election established a uniform standard for all Pennsylvania counties and was based upon procedures already enshrined in Pennsylvania law, *see* 25 Pa.C.S. § 3511 (military and overseas ballots are counted if received within seven days of election day), which bears no resemblance to the Florida Supreme Court's *ad hoc*, county-by-county standard during the 2000

recount. *Bush v. Gore* thus lends no support to – and indeed undermines – Applicants' request for a stay.

CONCLUSION

The Court should deny the applications to stay its September 17, 2020 order.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this response contains 4,653 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ J. Bart DeLone

J. BART DeLONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section

CERTIFICATE OF SERVICE

I, J. Bart DeLone, Chief Deputy Attorney General, hereby certify that I am this day serving the foregoing Response to Applications for Stay upon all counsel of record via PACFile eService, which service satisfies the requirements of Pa.R.A.P. 12.

/s/ J. Bart DeLone

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September 24, 2020