

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 133 MM 2020

PENNSYLVANIA DEMOCRATIC PARTY; *et al.*,
Petitioners,

v.

KATHY BOOCKVAR, *et al.*,
Respondents.

**APPLICATION *NUNC PRO TUNC* OF HOUSE DEMOCRATIC LEADER,
STATE REPRESENTATIVE FRANK DERMODY, AND SENATE
DEMOCRATIC LEADER, STATE SENATOR JAY COSTA, FOR LEAVE
TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENT
SECRETARY KATHY BOOCKVAR'S APPLICATION FOR THE COURT
TO EXERCISE EXTRAORDINARY JURISDICTION**

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September 1, 2020

House Democratic Leader, State Representative Frank Dermody, and Senate Democratic Leader, State Senator Jay Costa, by and through their undersigned counsel, apply pursuant to Pa.R.A.P. 123 for leave to file *nunc pro tunc* the attached proposed *Amici Curiae* Brief in support of Respondent Secretary Kathy Boockvar's Application for Extraordinary Jurisdiction under 42 Pa.C.S. § 726 and Pa.R.A.P. 3309.

State Representative Frank Dermody is a duly elected member of the Pennsylvania House of Representatives representing the 33rd House District, including Allegheny and Westmoreland Counties, and was elected by the members of the House Democratic Caucus to serve as the House Democratic Leader.

State Senator Jay Costa is a duly elected member of the Senate of Pennsylvania representing the 43rd Senate District, including Allegheny County, and was elected by the members of the Senate Democratic Caucus to serve as the Senate Democratic Leader.

On August 16, 2020, Respondent Kathy Boockvar in her capacity as Secretary of the Commonwealth of Pennsylvania filed an Application for the Court to Exercise Extraordinary Jurisdiction over the Commonwealth Court case, *Pa. Democratic Party v. Boockvar*, docketed at 407 MD 2020.

On August 24, 2020, Senate President Pro Tempore Joseph B. Scarnati, III and Senate Majority Leader Jake Corman filed a Motion to Intervene with the

Commonwealth Court in this matter. In response to the Senate Republican Leaders Motion to Intervene, Representative Dermody and Senator Costa are now compelled to file the attached proposed brief to call attention to the fact that the Republican Caucuses do not represent the institutional interests of the General Assembly in this matter or in the other case pending before this Court, *Crossey, et al. v. Boockvar* case, at 108 MM 2020, in which the House and Senate Republican Leaders on behalf of the Republican Caucuses separately filed for intervention.

As more fully stated in the attached proposed brief, Representative Dermody and Senator Costa agree with the Secretary of the Commonwealth that this case, as well as the case of *Crossey, et al. v. Boockvar*, involve issues of immediate and significant public importance that directly affect the constitutional rights of Pennsylvanians.

The General Election is to be held on Tuesday, November 3, 2020, which allows little time for legislative resolution of the outstanding issues raised in the underlying cases. The coordination and preparation between the Department of State and local election officials for an election usually takes months. This year, the Commonwealth faces the added complications of holding the General Election during the COVID-19 pandemic and with serious disruptions in postal services.

Because of the exigency of this matter and the immediate and significant public importance of the issues presented, Representative Dermody and Senator

Costa agree with Secretary Boockvar that the Court should exercise its extraordinary jurisdiction.

Representative Dermody and Senator Costa were unable to comply with the requirements of Pa.R.A.P 531 because of the expedited nature of this matter. Therefore, Representative Dermody and Senator Costa seek leniency from the Court in consideration of this application and respectfully request permission to file the proposed *Amici Curiae* Brief attached hereto as Exhibit A.

Respectfully submitted,

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EXHIBIT

A

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KATHY BOOCKVAR, *et al.*,
Respondents.

**BRIEF OF *AMICI CURIAE*, HOUSE DEMOCRATIC LEADER, STATE
REPRESENTATIVE FRANK DERMODY, AND SENATE DEMOCRATIC
LEADER, STATE SENATOR JAY COSTA, IN SUPPORT OF
RESPONDENT SECRETARY KATHY BOOCKVAR'S APPLICATION
FOR THE COURT TO EXERCISE EXTRAORDINARY JURISDICTION**

Amici Curiae, by and through the undersigned counsel, file the within Brief of *Amici Curiae* in the above-captioned matter pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure.

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STATEMENT OF INTEREST OF AMICI CURIAE

House Democratic Leader, State Representative Frank Dermody, and Senate Democratic Leader, State Senator Jay Costa, (collectively, “*Amici Curiae*”), by and through their undersigned counsel, file this *Amici Curiae* Brief in support of Respondent Secretary Kathy Boockvar’s Application for Extraordinary Jurisdiction under 42 Pa.C.S. § 726 and Pa.R.A.P. 3309. Pursuant to Pa.R.A.P. 531(b)(2), *Amici Curiae* disclose that no other person or entity other than the *Amici Curiae* or counsel paid, in whole or in part, for the preparation of this *Amici Curiae* brief or authored, in whole or in part, this *Amici Curiae* brief.

State Representative Frank Dermody is a duly elected member of the Pennsylvania House of Representatives representing the 33rd House District, including Allegheny and Westmoreland Counties, and was elected by the members of the House Democratic Caucus to serve as the House Democratic Leader. Representative Dermody has served as the House Democratic Leader since 2010.

State Senator Jay Costa is a duly elected member of the Senate of Pennsylvania representing the 43rd Senate District, including Allegheny County, and was elected by the members of the Senate Democratic Caucus to serve as the Senate Democratic Leader. Senator Costa has served as the Senate Democratic Leader since 2010.

On October 31, 2019, Act 77 of Oct. 31, 2019, P.L. 552, (“Act 77”) was signed into law, amending the Pennsylvania Election Code, Act 320 of Jun. 3, 1937, P.L. 1333, *as amended*, 25 P.S. § 2601 *et. seq.*, (“Election Code”) to, among other things, permit no excuse mail-in voting for qualified electors. 25 P.S. § 3150.11. Qualified electors have until October 27, 2020, to request a mail-in ballot in the upcoming General Election. *See* 25 P.S. § 3150.12a(a). Act 77 sets the deadline of receipt of mail-in ballots by the county board of elections office no later than 8:00 p.m. on election day. 25 P.S. § 3150.16(a). Act 77 was enacted prior to the COVID-19 pandemic. Fortunately, mail-in voting is in place for the 2020 elections being held during the ongoing public safety threat presented by the pandemic. Mail-in voting allows qualified electors the opportunity to securely vote by mail, thus reducing the need for voters to congregate in large numbers at polling places.

In mid-July, the Pennsylvania Democratic Party, among others, filed an action in Commonwealth Court against Secretary Boockvar and all 67 county election boards requesting, among other things, a declaratory judgment that the Election Code permits the return of mail-in ballots to locations other than the election board offices and mandates the counting of otherwise valid ballots not returned in an “Official Election Ballot” envelope. *Pet. for Rev. at 48-54, Pa. Democratic Party v. Boockvar*, 407 MD 2020 (Pa. Cmwth. Ct.).

On August 16, 2020, Respondent Kathy Boockvar in her capacity as Secretary of the Commonwealth of Pennsylvania filed an Application for the Court to Exercise Extraordinary Jurisdiction over the Commonwealth Court case, *Pa. Democratic Party v. Boockvar*, docketed at 407 MD 2020 (“Application”).

On August 24, 2020, Senate President Pro Tempore Joseph B. Scarnati, III and Senate Majority Leader Jake Corman (“Senate Republican Leaders”) filed a motion to intervene in the Commonwealth Court (“Motion to Intervene”). In support of their Motion to Intervene, the Senate Republican Leaders state that they “have been duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitutes a majority of the Pennsylvania Senate as a whole.” Memo. of Law in Support of Motion to Intervene at 2, *Pa. Democratic Party v. Boockvar*, 407 MD 2020 (Pa. Cmwlth. Ct.). The Senate Republican Leaders further allege: “Upon information and belief the Speaker of the Pennsylvania House of Representatives is also moving to intervene as authorized by each of the members of the House Republican Caucus, which constitutes a majority of the House, ***thereby placing the entire legislative branch before this court.***” *Id.* (emphasis added). In response to the Senate Republican Leaders Motion to Intervene, *Amici Curiae* are now compelled to file this brief to call attention to the fact that the Republican Caucuses do not represent the institutional interests of the General Assembly in this matter or in the other case

pending before this Court, *Crossey, et al. v. Boockvar* case, at 108 MM 2020, in which the House and Senate Republican Leaders on behalf of the Republican Caucuses separately filed for intervention. *See* Motion to Intervene (May 11, 2020) and Pet. to Intervene (May 14, 2020) *Crossey, et al. v. Boockvar*, 266 MD 2020; First Am. Pet. to Intervene Aug. 20, 2020), *Crossey, et al. v. Boockvar*, 108 MM 2020.

Parallel to this case, several other actions, including the *Crossey* case, on similar election issues have been filed in federal and state courts, including an action filed in late June by the campaign for Donald Trump for President, among others, in the United States District Court for the Western District of Pennsylvania against Secretary Boockvar and all 67 county election boards alleging that procedures for collection and counting mail-in ballots at the 2020 Primary Election deviated from the Election Code, and, as a result, violated the Pennsylvania and United States Constitutions. The federal action is premised on the construction of Act 77 and the Election Code. On August 23, 2020, Judge Nicholas Ranjan issued an opinion that the federal district court will stay the entire *Trump* matter and abstain from ruling “until the Pennsylvania state courts provide clarity on the unsettled state-law issues that underly Plaintiffs’ central claims” with the caveat that the plaintiffs may file a motion to lift the stay if there is a prolonged delay in

the state court. *Trump for President, Inc. v. Boockvar*, 2:20-cv-966 2020 WL4696795 at 36-7 (W.D. Pa. Aug. 13, 2020).

Amici Curiae have a substantial legislative interest in this matter because of the issues surrounding statutory construction and the legislative intent of Act 77 as well as its impact on the constitutional rights of their constituents and the people of Pennsylvania as a whole. *Amici Curiae* agree with the Secretary of the Commonwealth that this case, as well as the case of *Crossey, et al. v. Boockvar*, at 108 MM 2020, involve issues of immediate and significant public importance.

The General Election is to be held on Tuesday, November 3, 2020, which allows little time for legislative resolution of the outstanding issues raised in the underlying cases. The coordination and preparation between the Department of State and local election officials for an election usually takes months. This year, the Commonwealth faces the added complications of holding an election during the COVID-19 pandemic.

Also, *Amici Curiae* have grave concern regarding the warning issued by Thomas J. Marshall, General Counsel for the United States Postal Service, stating that, based on the Postal Service's expected delivery times for mail service at the time of the General Election, "there is a significant risk" that certain voters who timely request an absentee or mail-in ballot "will not have sufficient time to complete and mail the completed ballot[s] back to election officials in time for it to

arrive by [Pennsylvania’s] return deadline.” Resp. App. for Extraordinary Jurisdiction Exhibit A, Letter from Thomas J. Marshall, General Counsel, United States Postal Service (July 29, 2020), *Pa. Dem. Party v. Boockvar*, No. __ MM 2020 (Pa.) (“USPS Letter”).¹

Because of the immediate and significant public importance of the issues raised in this matter that directly affect the fundamental constitutional rights of Pennsylvanians, *Amici Curiae* believe the Court should exercise its extraordinary jurisdiction, assume plenary jurisdiction and enter a final order to resolve the questions presented pertaining to the fast approaching General Election.

¹ On August 14, 2020 after news of the warning from the Postal Service, the Leaders of the Pennsylvania House of Representatives Democratic Caucus sent a letter to Postmaster General Louis DeJoy and carbon copied the entire Pennsylvania Congressional Delegation expressing concern over the disruption in postal services for their constituents and urging General DeJoy to reverse course. Letter from Leaders of the Pennsylvania House of Representatives Democratic Caucus to Louis DeJoy, Postmaster General, United States Postal Service (August 14, 2020) https://www.pahouse.com/files/Documents/2020-08-31_013454__PA%20House%20Democratic%20Leader%20letter%20to%20Postmaster%20General%20DeJoy.pdf.

ARGUMENT

I. The Senate Republican Leaders do not represent the institutional interests of the Pennsylvania General Assembly as a whole.

The institutional authority of the General Assembly consists of 50 state senators and 203 state representatives, of which at least a majority from each chamber are necessary to pass or defeat legislation² and a two-thirds majority is necessary in both chambers to override a gubernatorial veto.³ *Amici Curiae* submit this brief, in part, to respond to the Senate Republican Leaders misleading statement in their Memorandum of Law in Support of Motion to Intervene filed with the Commonwealth Court in this matter that they are speaking on behalf of the entire legislative branch. *See* Memo. of Law in Support of Motion to Intervene at 2, *Pa. Democratic Party v. Boockvar*, 407 MD 2020 (Pa. Cmwlth. Ct.) (“Senators Scarnati and Corman have been duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitutes a

² “The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of *a Senate and a House of Representatives.*” Pa. Const. art. II, § 1 (emphasis added). “No bill shall become law, unless . . . *a majority of the members elected to each House is recorded thereon as voting in its favor.*” Pa. Const. art. III, § 4 (emphasis added).

³ “Every bill which shall have passed both Houses shall be presented to the Governor; if he approves he shall sign it, but if he shall not approve he shall return it with his objections to the House in which it shall have originated, which House shall enter the objections at large upon their journal, and proceed to re-consider it. If after such re-consideration, *two-thirds of all the members elected to that House shall agree to pass the bill, it shall be sent with the objections to the other House by which likewise it shall be re-considered, and if approved by two-thirds of all the members elected to that House it shall be a law;* but in such cases the votes of both Houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered on the journals of each House, respectively.” Pa. Const. art. IV, § 15 (emphasis added).

majority of the Pennsylvania Senate as a whole. Upon information and belief the Speaker of the Pennsylvania House of Representatives is also moving to intervene as authorized by each of the members of the House Republican Caucus, which constitutes a majority of the House, *thereby placing the entire legislative branch before this court.*”) (emphasis added).

The Senate Republican Leaders (or the Senate and House Republican Caucuses) do not represent the interests of the General Assembly as a whole nor do they have the capacity to assert the institutional interests of the entire legislative branch in their efforts to undermine the Constitutional rights of the voters of Pennsylvania. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997); *Corman v. Torres*, 287 F.Supp.3d 558 (M.D. Pa. 2018).

In *Corman v. Torres*, two state senators - the Republican Leader of the State Senate and the Republican Chair of the Senate State Government Committee - and eight Republican members of the Pennsylvania delegation to the United States House of Representatives sued in federal district court, in their official capacities, after the Pennsylvania Supreme Court declared the 2011 Pennsylvania congressional redistricting map unconstitutional pursuant to the Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const. art. I, § 5. *Corman*, 287 F.Supp.3d at 561. The legislators sought to enjoin the use of the remedial

redistricting map issued by the Pennsylvania Supreme Court in the 2018 election cycle. *Id.* at 562.

The *Corman* court recognized that the United States Supreme Court cautioned, “[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified.” *Id.* at 568 (quoting *Raines*, 521 U.S. at 823). In applying these principles, *Corman* held that the state senators lacked standing. Significantly, the court determined that only two legislators’ votes out of the total 253 members of the Pennsylvania General Assembly could not have defeated or enacted any remedial redistricting legislation and acknowledged that the state senators, despite their leadership roles in the State Senate, could not “command the two-thirds majority necessary in both chambers to override a gubernatorial veto.” *Id.* at 569.

To represent the General Assembly’s interest there must be representation equal to a number necessary to maintain the power to enact or defeat future legislation **and the two-thirds majority necessary in both chambers to override a gubernatorial veto.** *See Corman*, 287 F.Supp.3d at 567 (citing *Raines*, 521 U.S. at 821). Just as two individual legislators out of 253 members of the General Assembly were insufficient in *Corman*, the two leaders of the Senate Republican Caucus even if they are representing the interests of all the members of both

Republican Caucuses in the House and Senate, fall short of the required two-thirds majority necessary to represent the General Assembly’s interest. The four caucuses of the General Assembly often defend the interests of the General Assembly with cooperation and coordination between the in-house counsel for the four caucuses. *See, e.g., Fields v. Speaker of Pennsylvania House of Representatives*, 936 F. 3d 142 (3rd Cir. 2019) (the House Republican Caucus and House Democratic Caucus worked collectively to defend the constitutionality of the House of Representatives’ guest chaplain practice); *Pa. Prof. Liab. Joint Underwriting Ass’n v. Wolf, et al.*, 1:19-cv-1121 (M.D. Pa. July 17, 2019) (“JUA III”) (the four caucuses are defending the legislative and budgetary powers of General Assembly); *Pa. Prof. Liab. Joint Underwriting Ass’n v. Wolf, et al.*, 381 F.Supp. 3d 324 (M.D. Pa. 2018), *appeal docketed*, No. 19-1057 (3rd Cir. Jan. 11, 2019) (“JUA II”) (the leaders of the four legislative caucuses are collectively defending the legislative and budgetary powers of General Assembly); *Pa. Prof. Liab. Joint Underwriting Ass’n v. Wolf, et al.*, 324 F. Supp. 3d 519 (M.D. Pa.) *appeal docketed*, No. 18-2323 (“JUA I”) (the four caucuses as the General Assembly intervened as a party-defendant to collectively defend the legislative and budgetary powers of General Assembly); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (the four caucuses collaborated to represent the institutional interests of the General Assembly in a redistricting

matter); *Bergdoll v. Cortes*, 2017 WL 2960617 (Pa. Cmwlth. Ct. 2017) (the four Caucuses collaborated to represent the entire General Assembly as Respondents regarding a constitutional amendment ballot question); *Scarnati v. Wolf*, 135 A.3d 200 (Pa. Cmwlth. Ct. 2015) (the House Republican Caucus and House Democratic Caucus filed an *Amici Curiae* Brief in support of Appellant Joseph B. Scarnati, Senator and President *pro tempore* of the Senate of Pennsylvania, to protect the General Assembly’s role as a co-equal branch of government instilled with the legislative power of the Commonwealth). The Senate Republican Leaders may speak on behalf of their Caucus, but they do not represent the institutional interests of the General Assembly in their actions to undermine the Constitutional rights of the people of Pennsylvania.

II. Under the rules of statutory construction, the Election Code allows county boards of elections to operate in multiple locations, which would include designating ballot return locations and ballot return receptacles or “drop boxes” for receipt of mail-in and absentee ballots.

The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions. A statute’s plain language generally provides the best indication of legislative intent. Only where the words of a statute are not explicit will we resort to other considerations to discern legislative intent. . . . Governing presumptions are that the General Assembly intended the entire statute at issue to be effective and certain, and that the General Assembly does not intend an absurd result or one that is impossible of execution.

Bd. of Revision of Taxes. v. City of Phila., 4 A.3d 610 (Pa. 2010).

Furthermore, when interpreting statutes governing the right to vote or the exercise of the right to vote, courts should liberally construe and resolve all ambiguities in the statute in favor of the right to vote. *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004); *See Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004); *Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993).

When the statutory language is ambiguous, courts are guided by several factors set forth in the rules of statutory construction including “the occasion and necessity for the statute,” “the circumstances under which it was enacted,” “the mischief to be remedied,” “the object to be obtained,” “the former law, if any, including other statutes upon the same or similar subjects,” “the consequences of a particular interpretation,” “the contemporaneous legislative history” and “legislative and administrative interpretations of such statute.” 1 Pa.C.S. § 1921(c). Moreover, “where two parts of a statute relate to the same persons or things, those statutory parts are to be construed and considered concurrently, whenever possible.” *Cozzone v. W.C.A.B. (Pa Mun./E. Goshen Twp.)*, 73 A.3d 526, 536 (Pa. 2013).

The Election Code provides the procedures for voting both absentee ballots and mail-in ballots by mailing the ballot or returning such ballot in person to the county board of elections. 25 P.S. §§ 3146.6(a), 3150.16(a). The Election Code

defines “county board” or “board” as “the county board of elections of any county....” 25 P.S. § 2602(c). The board is a local governmental body with jurisdiction over the conduct of elections in a specific geographic area - throughout a specific county. There are no restrictions in the Election Code requiring the board to operate in just one location in the county. To the contrary, the Election Code authorizes the county board of elections to operate or perform its functions in multiple locations throughout the county as may be necessary. 25 P.S § 2645(b) (“The county commissioners or other appropriating authorities of the county shall provide the county board with suitable and adequate office at the county seat...and shall also provide, such branch offices for the board in cities other than the county seat, as may be necessary”). The logical interpretation of the statutory provisions is that the county board of elections is authorized to operate multiple locations as the board deems necessary for performance of their duties under the Election Code. There is no prohibition on the use of official drop boxes as an extension of the county board of elections for the collection of absentee or mail-in ballots.

As was evidenced by the comments of Senator Lisa Boscola, the prime sponsor of the legislation that was enacted as Act 77,⁴ during final passage on October 29, 2019, the main purpose of the legislation was to “make it easier for

⁴ S.B. 421, 219th Leg. Reg. Sess. (Pa. 2019), https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?year=2019&sind=0&body=S&type=B&bn=421.

people to vote” and encourage “more people [to] participate.”⁵ Reviewing the efforts of other states to increase participation in elections and improve convenience for voters, the legislature included several changes to the Election Code in Act 77 that included among other things, use of no-excuse mail-in ballots by voters. Along with this, Act 77 provided the methods and procedures for the dissemination and collection of this popular and convenient form of voting - including the use of official collection “drop boxes” by county boards of election. The changes made by the General Assembly concerning mail-in ballots, taken with the concurrent interpretation and understanding of the Election Code, clearly authorize county boards of election to use official drop boxes for the collection and eventual canvassing and tabulation of mail-in ballots, as well as traditional absentee ballots.⁶

Further, under the Statutory Construction Act, courts may grant deference to the agency charged with the administration of the statute. 1 Pa.C.S. § 1921(c)(8).

⁵ Pa. Sen. Jour., 219th Leg. Reg. Sess., No. 46, 1000 (October 29, 2019) (remarks of Senator Lisa Boscola), <https://www.legis.state.pa.us/WU01/LI/HJ/2019/0/20191029.pdf>.

⁶ This interpretation is underscored by the introduction of Senate Bill 10, Printer’s No. 1898, which amends the Election Code to require the return of absentee ballots and mail-in ballots to the permanent offices of the county boards of election, a designated location at the county courthouse or the judge of elections in the electors polling place. Clearly, the intention of this legislation is to prohibit the use of “drop boxes” or other ballot collection sites outlined by the Department of State and used by several counties at the 2016 Primary Election for the collection of absentee or mail-in ballots. S.B. 10, P.N. 1898, 219th Leg. Reg. Sess. (Pa. 2020), <https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2019&sInd=0&body=S&type=B&bn=0010>

When an agency's interpretation of a statute is entitled to deference, courts will defer to the agency's proposed interpretation unless the interpretation is erroneous or frustrates legislative intent. *Packer v. Bureau of Professional and Occupational Affairs, Dept. of State, State Bd. of Nursing*, 99 A.3d 965 (Pa. Cmwlth. Ct. 2014), *appeal denied*, 109 A.3d 680, 631 Pa. 715.

The Department of State published “Pennsylvania Absentee and Mail-In Ballot Return Guidance” for the use of counties in the General Election of 2020.⁷ The guidance provides, in part, for the use of “ballot return locations” and “ballot return receptacles” colloquially known as “drop boxes.” Dept. of State *Absentee and Mail-in Ballot Return Guidance* at 3-8. Importantly, the guidance provides detailed instruction for the location, hours of operation, accessibility, notice of sites, signage to be used and specifications for ballot receptacles, including the security of the ballot receptacles or “drop boxes.” *Id.* Further, the guidance provides clear direction to counties and county board of elections on chain of custody procedures to be utilized for ballot return locations and ballot receptacles. *Id.* at 7-8.

⁷ Bureau of Election Security and Technology, Pa. Dep’t of State, *Pa. Absentee and Mail-In Ballot Return Guidance*, (August 19, 2020), https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf.

In addition to the guidance issued by the Pennsylvania Department of State, the United States Cybersecurity and Infrastructure Security Agency (“CISA”) Election Infrastructure Government Coordinating Council and Subsector Coordinating Council’s Joint COVID Working Group issued guidance on election security and how to administer and secure election infrastructure during the pandemic.⁸ The CISA guidance states “[a] ballot drop box provides a secure and convenient means for voters to return their mail in ballot and that such drop boxes should be placed in convenient, accessible locations” and recommends a drop box for every 15,000-20,000 registered voters. *CISA Ballot Drop Box* Guidance at 1.

The use of remote ballot collection sites and receptacles or “drop boxes” was clearly contemplated and anticipated in the enactment of both Act 77 and the corrective amendments in Act 12 of Mar. 27, 2020, P.L. 41. The guidance of the Pennsylvania Department of State is a reasonable and correct interpretation and implementation of the statutory requirements for the use by counties of such devices as an alternative for the collection of absentee and mail-in ballots by the voters of Pennsylvania and deference should be given to it.

⁸ CISA Election Infrastructure Gov’t Coordinating Council and Subsector Coordinating Council’s Joint COVID Working Grp., *Ballot Drop Box*, (July 22, 2020), https://www.eac.gov/sites/default/files/electionofficials/vbm/Ballot_Drop_Box.pdf.

III. For this General Election to be held during the ongoing pandemic with serious disruptions in postal services, the deadline for the receipt of returned mail-in ballots should be extended to protect the fundamental constitutional rights of Pennsylvanians.

Article 1, Section 5 of the Pennsylvania Constitution mandates: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5. The Free and Equal Elections Clause is one of the enumerated “fundamental individual human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish.” *League of Women Voters*, 178 A.3d at 804.

In *In re General Election-1985*, the Commonwealth Court affirmed suspending the General Election in precincts suffering from emergency conditions and completion of the election in those precincts on a date shortly thereafter finding “the variation was necessary to ensure voter equality in the most important respect, that of equal opportunity to exercise the franchise.” *In re General Election-1985*, 531 A.2d 836, 838–39 (Pa. Cmwth. Ct. 1987). In coming to that conclusion, the Court analyzed the purpose of the election laws:

The purpose of the election laws is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process. *In re Mayor, City of Altoona, Blair County*, 413 Pa. 305, 196 A.2d 371 (1964). Thus, we conclude that the language of 25 P.S. § 3046 implicitly grants the court authority to suspend voting when there is a natural disaster or emergency such as that which confronted voters in Washington County on the election date here involved. ***To 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. (emphasis added).

On July 29, 2020, Thomas J. Marshall, General Counsel for the United States Postal Service, mailed a letter to the Secretary of the Commonwealth warning that, based on the Postal Service's expected delivery times for mail service at the time of the General Election, "there is a significant risk" that voters who timely request an absentee or mail-in ballot "will not have sufficient time to complete and mail the completed ballot[s] back to election officials in time for it to arrive by [Pennsylvania's] return deadline." USPS Letter at 2. The Postal Service advises that to ensure timely delivery of mail-in ballots, voters should mail their completed ballots "no later than Tuesday, October 27." *Id.* Under the Election Code, as amended by Act 77, qualified electors have until October 27, 2020, to request a mail-in ballot. *See* 25 P.S. §§ 3146.2a(a), 3150.12a(a). As a result, the Postal Service warns that "there is a significant risk that...ballots may be requested in a manner that is consistent with [Pennsylvania's] election rules and returned promptly, and yet not be returned in time to be counted." USPS Letter at 2.

As evidenced by the floor remarks of the prime sponsor of the legislation that was enacted as Act 77, the legislative intent behind the mail-in ballots in Act 77 was to increase participation by having the convenience of voting from home. Pa. Sen. Jour., 219th Leg. Reg. Sess., No. 46, at 1000. The deadline for receipt of mail-in ballots was established by Act 77 pre-pandemic and prior to the announcement of serious disruptions to postal services. Mail-in voting allows qualified electors the opportunity to securely vote by mail, thus reducing the need for voters to congregate in large numbers at polling places.

With the health and safety risks surrounding in-person voting during the ongoing pandemic and the serious disruptions to postal services, the relief requested to extend the deadline to receive mail-in ballots for this General Election under these extraordinary circumstances is reasonable, protects the fundamental constitutional rights of Pennsylvanians and is consistent with the legislative intent behind Act 77 and judicial precedent.⁹

⁹ Other states and courts are dealing with the same election issues surrounding the pandemic. Most recently, on August 31, 2020, the United States District Court for the Northern District of Georgia issued an order granting the plaintiffs' Motion for Preliminary Injunction in part enjoining the enforcement of Georgia's election law provision, Ga. Code Ann. § 21-2-386(a)(1)(F), which requires absentee ballots to be received by 7:00 p.m. on Election Day to be counted. *The New Georgia Project v. Raffensperger*, 1:20-cv-01986-ELR at 68-9 (N.D. Ga. Aug. 31, 2020). The Court ordered valid absentee ballots from qualified voters that are postmarked by Election Day and arrive at their respective county's office within three (3) business days of Election Day by 7 p.m. to be accepted and counted. *Id.*

IV. Mail-in ballots returned to county election boards without the inner secrecy envelope must be counted consistent with the rules of statutory construction because the Election Code does not invalidate a mail-in ballot for that reason.

The Statutory Construction Act provides that the object of interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. *See* 1 Pa.C.S. §§ 1903(a), 1921(b). *Martin v. Com., Dep't of Trans., Bureau of Driver Licensing*, 905 A.2d 438, 443 (Pa. 2006). The provisions of the Election Code must be liberally and intelligently construed to effectuate the legislative intent and purpose. *Lurie v. Republican All.*, 192 A.2d 367, 369 (Pa. 1963). As a general rule, the plain language of a statute is the best indicator of such legislative intent. *Cmwlth. v. Kerstetter*, 94 A.3d 991, 1001 (Pa. 2014). Another basic tenant of statutory construction is if certain things are specifically designated in a statute, omissions are to be understood as exclusions. *City Council of Hazelton v. City of Hazelton*, 578 A.2d 580, 583 (Pa. Cmwth. Ct. 1990) *aff'd*, 528 Pa. 604, 600 A.2d 191 (1992). Moreover, if one provision of a statute utilizes certain language, the omission of that language from another provision of the same statute indicates a different legislative intent for the two provisions. *In re Vencil*, 152 A.3d 235, 244 (Pa. 2017).

Importantly, while the Election Code provides the procedures for mail-in voting and the setting aside of and permissible challenges to mail-in ballots, it does

not provide for invalidating mail-in ballots that are returned without being placed in the inner secrecy envelope, commonly referred to as “naked ballots.” *See* 25 P.S. § 3150.16. The General Assembly detailed the specific provisions for canvassing of absentee and mail-in ballots in Act 77, including when such ballots are to be set aside and not counted. 25 P.S. § 3146.8. When an absentee or mail-in elector who has returned a ballot has died before election day, the ballot of the deceased elector shall be rejected. 25 P.S. § 3146.8(d). When the ballot of an elector whose right to vote or identification has not been verified by the county election board in accordance with 25 P.S. § 3146.8(g)(3) or is subject to a challenge made only on the ground that the applicant was not a qualified elector in accordance with 25 P.S. § 3146.2b or § 3150.12b, the ballot shall be set aside. When the “Official Election Ballot” has “any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.” 25 P.S. § 3146.8(g)(4)(ii). All other absentee and mail-in ballots “shall be counted and included with the returns of the applicable election district.” 25 P.S. § 3146.8(g)(4). By explicitly providing for when a ballot may be challenged and when a ballot may not be counted in the Election Code, and by omitting provisions about naked ballots among them, the legislative intent is clear that naked ballots must be counted. *City Council of Hazelton*, 578 A.2d at 583.

A separate section of the Election Code requires a provisional ballot shall not be counted if “a provisional ballot envelope does not contain a secrecy envelope.” 25 P.S. § 3050(a)(5)(ii)(C). However, the General Assembly omitted that language from the mail-in ballot provisions. Therefore, the omission of the directive that a naked ballot shall not be counted indicates a different legislative intent for the handling of the secrecy envelope for mail-in ballots in contrast to provisional ballots. *In re Vencil*, 152 A.3d at 244.

Additionally, should the court find any ambiguity regarding the counting of naked ballots, the Statutory Construction Act provides that the intention of the General Assembly may be ascertained by considering, among other matters, legislative and administrative interpretations of such statute. 1 Pa.C.S. § 1921(c)(8). “Courts should give great weight and deference to the interpretation of a statutory or regulatory provision by the administrative or adjudicatory body that is charged with the duty to execute and apply the provision at issue.” *In re Thompson*, 896 A.2d 659, 669 (Pa. Cmwh. Ct. 2006), *appeal denied*, 916 A.2d 636 (Pa. 2007).

On August 19, 2020, the Pennsylvania Department of State issued guidance to the county election boards stating that the boards should develop a process for

counting naked ballots that are discovered during the pre-canvass or canvass.¹⁰ *Amici Curiae* agree with the Department's position that counting naked ballots furthers the right to vote under both the Pennsylvania and United States Constitutions.^{11 12} Dept. of State *Guidance for Missing Official Election Ballot Envelopes* at 2. Further, the failure to include the inner secrecy envelope does not in any way undermine the integrity of the voting process and, therefore, no voter should be disenfranchised by virtue of returning a naked ballot to the county board of elections. *Id.* Consistent with case precedent, naked ballots should be counted so as not to disenfranchise voters. *See Shambach*, 845 A.2d at 798.

¹⁰ Bureau of Election Security and Technology, Pa. Dept. of State. *Pa. Guidance for Missing Official Election Ballot Envelopes ("Naked Ballots")* (August 19, 2020) https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_NakedBallot_Guidance_1.0.pdf.

¹¹ Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Pa. Const. art. I, § 5. Congress shall make no law abridging the freedom of speech. U.S. Const. amend. I. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. U.S. Const. amend. XV. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. U.S. Const. amend. XIX. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. U.S. Const. amend. XXVI.

¹² State Representative Garth Everett, Republican Chairman of the House State Government Committee, the committee tasked with handling election issues, also appears to be in consonance with the Department of State's guidance saying, "he doesn't have a problem with the state's guidance on handling ballots without secrecy envelopes. While lawmakers could still weigh in, it is not a sticking point," adding, "[i]t may be a moot point now." Mark Levy, *Gray area of mail-in voting law up to Pennsylvania court*, Associated Press News (August 24, 2020), <https://apnews.com/465a14c3e8325f4758175a9e2e866e16> (last visited August 31, 2020).

The legislative intent is clear that mail-in ballots returned to county election boards without the inner secrecy envelope must be counted. The position that naked ballots should be invalidated violates the Pennsylvania and United States Constitutions by disenfranchising voters. The guidance of the Pennsylvania Department of State is a reasonable and correct interpretation and implementation of the statutory requirements to promote consistency by the county boards of elections to ensure and maintain the integrity of the voting process while protecting Pennsylvanians from disenfranchisement.

CONCLUSION

For the forgoing reasons, *Amici Curiae* respectfully request that this Court grant Respondent Boockvar's Application and grant the relief requested by the Secretary of the Commonwealth.

Respectfully submitted,

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I hereby certify that this brief contains 5,975 words within the meaning of P.A.R.A.P. 531(b)(3). In making this certification, I have relied upon the word count function of the word-processing system used to prepare this Brief.

I further certify that this brief 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.

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