

IN THE SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA DEMOCRATIC PARTY,)
et al.,)

Petitioners,)

v.)

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

Respondents.)

ELECTION MATTER

No. 133 MM 2020

**RESPONSE BY PROPOSED INTERVENORS COMMON CAUSE PENNSYLVANIA;
LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; THE BLACK POLITICAL
EMPOWERMENT PROJECT; MAKE THE ROAD PENNSYLVANIA, A PROJECT OF
MAKE THE ROAD STATES; PATRICIA M. DEMARCO; DANIELLE GRAHAM
ROBINSON; AND KATHLEEN WISE TO THE APPLICATION OF SECRETARY
BOOCKVAR’S APPLICATION FOR THE COURT TO EXERCISE EXTRAORDINARY
JURISDICTION OVER THIS ACTION**

TABLE OF CONTENTS

INTRODUCTION 1
STATEMENT IN SUPPORT OF APPLICATION..... 1
CONCLUSION..... 4

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Coombes v. Getz</i> , 285 U.S. 434 (1932).....	2
<i>Fuente v. Cortes</i> , 207 F. Supp. 3d 441 (M.D. Pa. 2016).....	2
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018).....	1
Docketed Cases	
<i>Crossey v. Boockvar</i> , No. 108 MM 2020 (Pa.).....	2
<i>NAACP Pennsylvania State Conference v. Boockvar</i> , No. 364 MD 2020 (Pa. Commw. Ct.).....	2
<i>Pennsylvania Democratic Party v. Boockvar</i> , No. 407 MD 2020 (Pa. Commw. Ct.).....	3
<i>Trump for President, Inc. v. Boockvar</i> , No. 20-cv-996 (W.D. Pa.)	2, 3
Other Authorities	
Jonathan Lai, <i>Pennsylvania’s Mail Ballot Problems Kept Tens of Thousands from Voting in a Pandemic Primary</i> , Phila. Inquirer (July 30, 2020), https://www.inquirer.com/politics/election/pa-mail-ballot-deadlines-disenfranchisement-20200730.html	3
Zak Hudak, <i>U.S. Postal Service warns that Pennsylvania’s mail-in ballot laws could cause some votes not to be counted</i> , CBS News, (Aug. 14, 2020) https://www.cbsnews.com/news/postal-service-pennsylvanias-mail-in-ballot-laws-election-issues/	4

INTRODUCTION

In response to the Office of the Prothonotary's request, dated August 17, 2020, Proposed Intervenor Common Cause Pennsylvania; the League of Women Voters of Pennsylvania; The Black Political Empowerment Project ("B-PEP"); Make the Road Pennsylvania, a project of Make the Road States ("Make the Road PA"); Patricia M. DeMarco; Danielle Graham Robinson; and Kathleen Wise (together, "Intervenor"), submit this response in support of Secretary Boockvar's application and request that the Court exercise extraordinary jurisdiction over this action of immediate public importance.

STATEMENT IN SUPPORT OF APPLICATION

The Supreme Court of Pennsylvania should exercise extraordinary jurisdiction to resolve matters of immediate public importance affecting the integrity of the state's democratic institutions. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (exercising extraordinary jurisdiction over redistricting case with only months to go before the election). Exercising extraordinary jurisdiction is necessary here because the issues in the series of pending lawsuits involve interpretations of Pennsylvania's newly enacted election laws and less than three months remain before the November 2020 elections. The interpretation of those laws directly affect how Pennsylvanians will vote in November. Moreover, many of the unresolved issues of Pennsylvania election law relate to voting by mail, which has taken on importance and urgency amidst the worst public health crisis in over a century. The centrality of the vote-by-mail issues further emphasizes the need for speedy resolution, as that process must begin well in advance of Election Day. It is therefore necessary that this Court, the highest authority on Pennsylvania law, definitively interpret the state's relevant election laws.

Between April and July 2020, litigants filed at least three separate lawsuits in Pennsylvania state and federal courts seeking declaratory judgments regarding the statutory requirements of Pennsylvania election law. *See, e.g.*, Application at 10–14 (citing *Crossey v. Boockvar*, No. 108 MM 2020 (Pa.), *Trump for President, Inc. v. Boockvar*, No. 20-cv-966 (W.D. Pa.), and *Penn. Democratic Party v. Boockvar*, No. 407 MD 2020 (Pa. Commw. Ct.)); *see also NAACP Pa. State Conference v. Boockvar*, No. 364 MD 2020 (Pa. Commw. Ct.); *League of Women Voters v. Boockvar*, 20-cv-03850 (E.D. Pa.). Each lawsuit, brought during a global pandemic, presents significant questions of state statutory interpretation, the results of which govern the Pennsylvania General Election on November 3, 2020. This Court’s decisions on Pennsylvania statutes are binding on all other courts, including the federal courts. *See Coombes v. Getz*, 285 U.S. 434, 436 (1932) (“The decision of the Supreme Court of a state construing and applying its own Constitution and laws generally is binding upon [the United State Supreme Court].”). Concurrent litigation in state and federal courts creates the potential for conflicting interpretations of the Pennsylvania Election Code with scant time for appeal or certification to this Court. These cases present novel legal issues of immediate public importance and they call for clear guidance from the Court as the ultimate authority on Pennsylvania law.

Intervenors agree with the Secretary that a prompt resolution of the state law issues by the Court would (1) potentially obviate the constitutional claims asserted in the federal court action; and (2) eliminate potentially inconsistent rulings as between the state and federal courts regarding the interpretation of Pennsylvania state law. *See Fuente v. Cortes*, 207 F. Supp. 3d 441, 452–53 (M.D. Pa. 2016); Intervenors’ Motion to Dismiss, *Trump for President, Inc. v. Boockvar*, No. 20-cv-996 (W.D. Pa. 2020), Dkt. 299 (“Mot.”). All of the issues presented in the

federal action are issues of statutory construction or require interpretation of state law to reach the federal constitutional challenge.¹ These include whether: (1) the county boards of elections have the authority to establish drop-boxes for collection of absentee and mail-in ballots; (2) ballots lacking secrecy envelopes must be discarded; and (3) poll watchers must reside within the county in which they wish to watch polls. *See* Mot. at 2–10. A dispositive decision from the state’s highest court will provide clear guidance to Pennsylvania voters, thereby alleviating the confusion that would flow from conflicting state and federal court decisions.

Confusion surrounding mail-in voting detrimentally affected some voters during the June primary. Some voters received mail-in ballots just prior to the June Election Day without sufficient time to mail those ballots back. Pet. ¶ 35. To ensure their ballots were counted, some voters were forced to risk their health by travelling to deliver their mail-in ballots in person during a global pandemic. *Id.* ¶ 33. The impact on voters was particularly severe in counties that consolidated polling places and failed to establish no-contact drop-boxes. *Id.* Voters across Pennsylvania were disenfranchised due to the state’s tight deadlines for mail-in ballots coupled with mail delays and COVID-19.² A prompt ruling from the Pennsylvania Supreme Court will

¹ The issues presented in state court raise similar legal issues, including: (1) the date for acceptance of ballots mailed by 8:00 p.m. on November 3; (2) whether some defects in ballots can be cured; and (3) the date for delivery of ballots to voters. Intervenors’ Pet. for Declaratory and Injunctive Relief, *Pa. Democratic Party v. Boockvar*, No. 407 MD 2020, at Counts II, III, V & VI (Penn. Comm. Ct. Aug. 10, 2020) (“Pet.”).

² Jonathan Lai, *Pennsylvania’s Mail Ballot Problems Kept Tens of Thousands from Voting in a Pandemic Primary*, Phila. Inquirer (July 30, 2020), <https://www.inquirer.com/politics/election/pa-mail-ballot-deadlines-disenfranchisement-20200730.html> (“Before May 12, almost 90% of voters who requested mail ballots ultimately voted, and the vast majority did so by mail. But many mail ballot applications, almost two out of five, were processed within three weeks of the election. And for those voters, only about 76% ended up voting. ... Without that drop-off, about 92,000 more Pennsylvanians would have voted in the primary, according to the Inquirer analysis.”)

permit election officials to be prepare adequately prepare for the November general election and help ensure all Pennsylvanians can vote safely.

A swift and ultimate conclusion on the requirements of Pennsylvania election law from the highest authority is necessary to give the counties time to implement any procedures affecting the administration of the General Election, such as those explained above. Such prompt conclusion cannot be provided by the Commonwealth Court, despite its aim to expedite the proceedings. Because any determination by the Commonwealth Court is likely to be appealed to this Court by the losing side, it would be more economical for the Court to take up jurisdiction now and provide clear and definitive guidance.

Finally, any election procedures ordered by a federal court are sure to be challenged and may end up before this Court via a petition for certification, *see* Pa.R.A.P. 3341. And any such appeals that are not resolved until after the election would create the potential for post-election challenges to the results. The Court can prevent this potential for confusion by exercising its jurisdiction now.

CONCLUSION

For the foregoing reasons, Intervenors support the Secretary's application for Extraordinary Relief. The Court should take jurisdiction of the matter and to ensure that

Moreover, these problems seem likely to recur in the General Election, as the Postal Service has informed Secretary Boockvar that Pennsylvania's current mail-in ballot system "creates a risk that ballots requested near the deadline under state law will not be returned by mail in time to be counted under your laws as we understand them." Zak Hudak, *U.S. Postal Service warns that Pennsylvania's mail-in ballot laws could cause some votes not to be counted*, CBS News, (Aug. 14, 2020), <https://www.cbsnews.com/news/postal-service-pennsylvanias-mail-in-ballot-laws-election-issues/>.

Pennsylvania's most vulnerable voters are not disenfranchised by an incorrect interpretation of Pennsylvania law by Federal Courts.

Dated: August 20, 2020

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PUBLIC ACCESS POLICY CERTIFICATE OF COMPLIANCE

It is hereby certified by the undersigned 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.

Respectfully submitted,

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