

IN THE SUPREME COURT OF PENNSYLVANIA

No. 26 WAP 2024 & No. 27 WAP 2024

**FAITH GENSER, FRANK MATIS, and THE PENNSYLVANIA
DEMOCRATIC PARTY,**
Plaintiffs-Appellees,

v.

**BUTLER COUNTY BOARD OF ELECTIONS, REPUBLICAN
NATIONAL COMMITTEE, and REPUBLICAN PARTY OF
PENNSYLVANIA,**
Defendants-Appellants.

Appeal from the Order of the Commonwealth Court of Pennsylvania
(No. 1074 C.D. 2024 & No. 1085 C.D. 2024, Sept. 5, 2024)

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

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October 27, 2024

*Counsel for Amici Curiae Department of State and Secretary of the
Commonwealth Al Schmidt*

The Department of State and Secretary of the Commonwealth Al Schmidt respectfully move, pursuant to Pennsylvania Rule of Appellate Procedure 531, to file the amicus brief attached to this application as Exhibit A. In support of this application, proposed amici curiae state as follows:

1. Secretary Schmidt is Pennsylvania's chief election officer. He and the Department have essential responsibilities for the administration of Pennsylvania's elections.

2. Among other statutory obligations, Secretary Schmidt has the duty "[t]o receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates and upon questions as required by the provisions of this act; to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates at such elections." 25 P.S. § 2621(f); *see also id.* § 3159 ("Upon receiving the certified returns of any primary or election from the various county boards, the Secretary of the Commonwealth shall forthwith proceed to tabulate, compute and canvass the votes cast for all candidates enumerated in section 1408, and upon

all questions voted for by the electors of the State at large, and shall thereupon certify and file in his office the tabulation thereof.”).

3. Among other statutory obligations, the Department “shall have the power, and its duty shall be, to care for, compile, publish, and certify, returns of elections.” 71 P.S. § 273.

4. As such, Secretary Schmidt and the Department have a strong interest in ensuring that counties are canvassing ballots and certifying election results consistent with the requirements of the Election Code so that they may properly fulfill their statutory responsibilities.

5. Secretary Schmidt and the Department filed an amicus brief in this Court during its consideration of this matter. *See Amicus Br., Genser v. Butler Cnty. Bd. of Elections*, Nos. 26 WAP 2024 & 27 WAP 2024 (Pa. Sept. 26, 2024).

6. On October 23, 2024, this Court issued an opinion holding, as a matter of Pennsylvania statutory law, that the Butler County Board of Elections was required to count the provisional ballots cast by Faith Genser and Frank Matis in the 2024 Democratic Primary Election.

Genser v. Butler Cnty. Bd. of Elections, Nos. 26 WAP 2024, 2024 WL 4553285, at *22 (Pa. Oct. 23, 2024).

7. Intervenor-Appellants the Republican National Committee and the Republican Party of Pennsylvania have filed an application purporting to seek a stay of that decision or, in the alternative, a modification of the Court's order.

8. Appellants' application directly bears on the proper execution and resolution of Pennsylvania's elections under the Pennsylvania Election Code, and thus the proper functioning of Pennsylvania's government.

9. Appellants' application also bears on the performance of the statutory duties of the Secretary and the Department. As Pennsylvania's chief election officer, Secretary Schmidt has a strong interest in ensuring that the county boards of elections adhere to the requirements of the Pennsylvania Election Code.

10. Finally, Appellants' application threatens the authority of this Court to effectuate the intent of the General Assembly in accordance with the Pennsylvania Statutory Construction Act, established interpretive principles, and this Court's precedents. Proposed amici

curiae have a strong interest in defending this Court's sound interpretation of Pennsylvania law.

WHEREFORE, the Department and Secretary Schmidt respectfully request that this application be granted and that the amicus brief attached as Exhibit A be docketed.

October 27, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

Date: October 27, 2024

/s/ Aimee D. Thomson
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Exhibit A

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Appeal from the Order of the Commonwealth Court of Pennsylvania
(No. 1074 C.D. 2024 & No. 1085 C.D. 2024, Sept. 5, 2024)

**AMICUS BRIEF IN OPPOSITION TO INTERVENOR-
APPELLANTS' APPLICATION FOR STAY OR
MODIFICATION OF JUDGMENT**

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INTEREST OF AMICI CURIAE

The Department of State and Secretary of the Commonwealth Al Schmidt file this amicus brief in opposition to the Application for Stay Or, In the Alternative, Modification of October 23, 2024 Judgment, *Genser v. Butler Cnty. Bd. of Elections*, Nos. 26 WAP 2024 & 27 WAP 2024 (Pa. Oct. 25, 2024) (“Stay App.”), filed by Intervenor-Appellants the Republican National Committee and the Republican Party of Pennsylvania (the “RNC”).¹

Secretary Schmidt is Pennsylvania’s chief election officer. He and the Department have essential responsibilities for the administration of Pennsylvania’s elections.

Among other statutory obligations, Secretary Schmidt has the duty “[t]o receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates and upon questions as required by the provisions of this act; to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates at such elections.” 25 P.S. § 2621(f); *see also id.*

¹ This brief was not authored or paid for, in whole or in part, by any person or entity other than *amici* and their counsel.

§ 3159 (“Upon receiving the certified returns of any primary or election from the various county boards, the Secretary of the Commonwealth shall forthwith proceed to tabulate, compute and canvass the votes cast for all candidates enumerated in section 1408, and upon all questions voted for by the electors of the State at large, and shall thereupon certify and file in his office the tabulation thereof.”).

Among other statutory obligations, the Department “shall have the power, and its duty shall be, to care for, compile, publish, and certify, returns of elections.” 71 P.S. § 273.

As such, the Department and Secretary Schmidt have a strong interest in ensuring that counties are canvassing ballots and certifying election results consistent with the requirements of the Election Code so that they may properly fulfill their statutory responsibilities.

In addition, amici curiae have a strong interest in defending the authority of this Court to effectuate the intent of the General Assembly, which is rooted in principles of federalism and state sovereignty.

DISCUSSION

The RNC’s application is styled as a request for a “stay or, in the alternative, modification of [this Court’s] October 23, 2024 judgment.” But what the RNC asks for is no mere stay or modification. A stay of this Court’s judgment would only prevent the Butler County Board of Elections from counting the two provisional ballots cast by Faith Genser and Frank Matis in the 2024 Democratic Primary Election. A modification of this Court’s judgement, as proposed, would only require Butler County to continue segregating Ms. Genser’s and Mr. Matis’s ballots. Neither of these outcomes is what the RNC actually wants.

Instead, the RNC seeks to transform this lawsuit into a *de facto* King’s Bench petition, in which the RNC is the petitioner, all 67 counties—including the 66 not present here—are respondents, and this Court’s affirmance of the Commonwealth Court’s judgment is an injunction specifically directed to each county with respect to the 2024 General Election. This Court should not countenance such chicanery.

The Court has numerous grounds to reject the RNC’s application; the Secretary and the Department highlight four.

1. The RNC cannot suffer irreparable harm from Butler County’s counting of two provisional ballots cast in the 2024 Democratic Primary Election.

A strong showing of irreparable harm to the movant is a necessary element of any application for stay pending further appeal. *E.g.*, *Pa. Pub. Util. Comm’n v. Process Gas Consumers Grp.*, 467 A.2d 805, 808-09 (Pa. 1983); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The sole effect of this Court’s judgment was to direct Butler County to count Ms. Genser’s and Mr. Matis’s provisional ballots, cast in the April 2024 *Democratic Primary Election*. The RNC must clearly demonstrate how counting these two Democratic primary ballots will cause irreparable harm to the Republican Party’s national or state committees.

The RNC does not even try to meet this standard. Instead, it reimagines this Court’s judgment as an order that all 67 county boards of elections count certain provisional ballots in the 2024 General Election. *E.g.*, Stay App. at 1, 4-5, 7, 14-16.

The precedential effect of this Court’s decision will guide county boards of election in the future. But this Court’s actual judgment concerns only the two Democratic primary ballots. The RNC cites no decision that allowed a court to issue a stay based solely on the future

precedential effect of its reasoning. To the contrary: *every single case* cited by the RNC involved only the relief ordered by that court in that matter.²

² *E.g.*, *NPPEF v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884 (Pa. Oct. 5, 2024) (denying King’s Bench application that would order all 67 counties to count mail ballots with missing or incorrect declaration dates); *Com. v. Melvin*, 79 A.3d 1195 (Pa. Super. 2013) (granting stay of order requiring defendant to write letters of apology); *Moore v. Harper*, 600 U.S. 1 (2023) (affirming judgment of North Carolina Supreme Court striking down congressional districting map); *Republican Party of Pa. v. Boockvar*, No. 20A84, 2020 WL 6536912 (Nov. 6, 2020) (in application for stay of this Court’s judgment ordering counties to count certain mail ballots received after Election Day in 2020, ordering segregation of those ballots); *DNC v. Wi. State Legis.*, 141 S. Ct. 28 (2020) (affirming stay of federal district court order extending state law deadline to receive absentee ballots for the 2020 General Election); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (granting stay of federal district court order enjoining enforcement of certain Alabama statutory requirements for its July 14, 2020, runoff election); *RNC v. DNC*, 589 U.S. 423 (2020) (granting stay of federal district court order enjoining enforcement of certain Wisconsin statutory requirements for its April 7, 2020, election); *Abbott v. Perez*, 585 U.S. 579 (2018) (reversing orders of three-judge panel directing Texas to not conduct that year’s elections using certain districting plans); *Chafin v. Chafin*, 568 U.S. 165 (2013) (discussing stays and mootness in the context of court order returning a child to the country of their habitual residence); *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (granting stay of federal district court order permitting the broadcast of a federal trial); *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (vacating federal court of appeals order enjoining Arizona from enforcing state measure while appeals were pending); *Bush v. Gore*, 531 U.S. 98 (2000) (reversing Florida Supreme Court judgment ordering tabulation and manual recounts in certain Florida counties in the 2000 General Election); *Bush v. Gore*, 531 U.S. 1046 (2000) (granting stay of Florida Supreme Court judgment ordering tabulation and manual recounts in certain Florida counties in the 2000 General Election); *John Doe Agency* (*continued...*)

The RNC’s sole articulation of irreparable harm is the specter of mootness. Stay App. at 14. A case is moot “when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *Chafin*, 568 U.S. at 172 (cleaned up). But nothing about the forthcoming 2024 General Election will moot the RNC’s petition for writ of certiorari to the U.S. Supreme Court, because this case did not concern the 2024 General Election and the Court did not order any relief specific to the 2024 General Election. *Cf. John Doe Agency*, 488 U.S. at 1308-09 (Marshall, J., in chambers) (absent stay, order requiring disclosure of *Vaughn* index would moot appellate challenge to disclosure of *Vaughn* index).

2. The RNC’s request for a modification of this Court’s order is improper and impossible.

The RNC’s alternative request for the Court to “modify” its judgment, Stay App. at 16-17, is nonsensical. The RNC’s proposed “modification” would have the Court order all 67 county boards of

v. John Doe Corp., 488 U.S. 1306 (1989) (Marshall, J., in chambers) (granting stay of federal district court order requiring disclosure of *Vaughn* index); *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020) (granting stay of federal district court order enjoining Ohio’s application of its general election and ballot-initiative laws to plaintiffs ahead of the 2020 General Election).

elections to segregate and separately tally certain provisional ballots during the 2024 General Election. Stay App. at 16. Respectfully, the Court lacks jurisdiction to enter such an order. All 67 county boards of election are not before the Court in this matter—only Butler County is. And every provisional ballot yet to be cast in the forthcoming election is likewise not before the Court—only the provisional ballots of Ms. Genser and Mr. Matis cast in the 2024 Democratic primary are.

The RNC’s invocation of Justice Alito’s 2020 order relating to this Court’s decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), is wholly inapt. *Contra* Stay App. at 16; *see generally* *Republican Party of Pa. v. Boockvar*, No. 20A84 (U.S.).³ *Pennsylvania Democratic Party* was an action brought against all 67 county boards (and the Secretary) that specifically sought relief relating to the upcoming 2020 General Election. The order at issue in that case directed all 67 county boards of election to count mail ballots received up to three days after Election Day in November 2020. *Pa. Democratic Party*, 238

³ Available at: <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a84.html>.

A.3d at 386. No such forward-looking order against all 67 counties exists here.

3. This Court’s decision was correct and certainly did not “transgress the ordinary bounds of judicial review.”

As Justice Dougherty succinctly stated: “the fact that the majority and my learned colleagues in dissent interpret the relevant statutes differently does not in any way suggest this Court has exceeded the scope of judicial review and usurped the General Assembly’s power to regulate federal elections.” *Genser*, 2024 WL 4553285, at *22 (Dougherty, J., concurring) (cleaned up); *contra* Stay App. at 8-9. Instead, this Court’s careful interpretation of the Pennsylvania Election Code’s plain language “**effectuates** the intent of our General Assembly to enable provisional voting, even if the dissenters disagree.” *Genser*, 2024 WL 4553285, at *22 (Dougherty, J., concurring).

The U.S. Supreme Court’s decision in *Moore v. Harper* makes clear that a federal court may step in only when state courts “arrogate to themselves the power vested in state legislatures to regulate federal elections.” 600 U.S. 1, 36 (2023). This Court’s decision is nowhere near that red line: rather, it is a quintessential exercise of statutory interpretation—guided by the Pennsylvania Statutory Construction Act,

established interpretive principles, and this Court’s precedents—to “ascertain and effectuate the intention of the General Assembly.” *Genser*, 2024 WL 4553285, at *16 (quoting 1 Pa.C.S. § 1921(a)). For the U.S. Supreme Court to grant certiorari here, it must set aside principles of federalism and state sovereignty and conclude that it can better effectuate the General Assembly’s intent than this Court—and then commit to do so for every case in which a state court interprets any part of its statutory election law. That is not what *Moore* anticipated or what the Elections Clause permits. *See Moore*, 600 U.S. at 35-36.

4. This Court’s decision did not substantially alter existing laws and procedures.

The RNC argues that a stay is warranted because this Court’s decision substantially altered existing laws and procedures. Stay App. at 6-7. Not so. This matter simply corrected the Butler County Board of Elections’ erroneous interpretation of the Election Code. The RNC offers no evidence that all counties were likewise mistaken.

Indeed, in prior elections, many county boards have counted provisional ballots cast by voters whose mail ballots were void due to a disqualifying defect. Since 2020, the Department’s guidance has advised county boards to count a provisional ballot if the “voter’s mail-in or

absentee ballot was rejected for a reason unrelated to the voter’s qualifications,” if the voter “meets other provisional ballot requirements,” and “if the county determines that the voter is eligible to vote.” Pa. Dep’t of State, *Pennsylvania Provisional Voting Guidance Version 1.1* (Oct. 21, 2020)⁴; see also *Keohane v. Del. Cnty. Bd. of Elections*, No. 2023-4458 (Del. Cnty. Ct. Com. Pl. Sept. 21, 2023) (ordering Delaware County Board of Elections to count provisional ballots consistent with the reasoning of this Court’s decision). The Department’s guidance is not binding, but counties routinely solicit and follow it.

The RNC could have, at any time in the past four years, filed an action against these counties. That it has never done so makes its

⁴ Available at: https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/archived/PADOS_ProvisionalBallots_guidance_1.0.pdf.

Accord Pa. Dep’t of State, *Pennsylvania Provisional Voting Guidance Version 2.2* (Oct 24, 2024), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-provisionalballots-guidance-v2.2.pdf>; Pa. Dep’t of State, *Pennsylvania Provisional Voting Guidance Version 2.1* (Mar. 11, 2024), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-ProvisionalBallots-Guidance-2.1.pdf>; Pa. Dep’t of State, *Pennsylvania Provisional Voting Guidance Version 2.0* (Oct. 12, 2023), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/archived/2023-ProvisionalBallots-Guidance-2.0.pdf>.

attempt to turn this case into an action involving all 67 counties even more egregious.

Finally, the RNC claims, without offering any evidence whatsoever, that this Court’s decision will require substantial alternation in county procedures because “many county boards do not even permit individuals who submit a defective and timely mail ballot to cast a provisional ballot.” Stay App. at 7. But as this Court reaffirmed, “HAVA creates a right to **cast** a provisional ballot.” *Genser*, 2024 WL 4553285, at *11; *see also* 52 U.S.C. § 21082(a); 25 P.S. § 3050(a.2), (a.4)(1); *In re Canvass of Provisional Ballots in 2024 Primary Election*, No. 55 MAP 2024, 2024 WL 4181584, at *3 (Pa. Sept. 13, 2024). A county board refuses to comply with federal law at its peril; its failure to do so is no reason to stay a decision on a tangential question of state law.

CONCLUSION

For the reasons set forth above, this Court should deny the RNC’s application for stay or modification of judgment.

October 27, 2024

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Date: October 27, 2024

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CERTIFICATE OF LENGTH

I certify that this brief complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 531(b)(3). Excluding matters identified in Pennsylvania Rule of Appellate Procedure 2135(b), this brief is 2,273 words. I have relied on Word's word count function to determine the length of this brief.

Date: October 27, 2024

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