No. ____

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Petitioners,

v.

FAITH GENSER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Elections and Electors Clauses of the U.S. Constitution vest the power to set federal election rules in the legislature of each state. Exercising that power, the Pennsylvania General Assembly unambiguously directed that election officials "shall not" count an individual's provisional ballot if they "timely received" a mail ballot cast by that person. 25 Pa. Stat. § 3050(a.4)(5)(ii)(F). Turning that requirement on its head, a 4–3 majority of the Pennsylvania Supreme Court decreed that election officials *must* count provisional ballots cast by individuals whose mail ballots were timely received but were defective for some other reason. The questions presented are:

1. What is the legal standard for determining whether a state court's interpretation of state election law exceeds the bounds of ordinary judicial review and therefore violates the Elections and Electors Clauses?

2. Did the Pennsylvania Supreme Court exceed the bounds of ordinary judicial review and thereby usurp the General Assembly's plenary authority to prescribe "[t]he Times, Places, and Manner" for congressional elections, U.S. Const. art. I., § 4, cl. 1., and broad power to "direct" the "Manner" for appointing electors for President and Vice President, *id.* art. II, § 1, cl. 2?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are the Republican National Committee and the Republican Party of Pennsylvania (intervenors below) and the Butler County Board of Elections (defendant below). The Republican Party Petitioners have no parent corporation, and no publicly held company owns 10% or more of their stock.

Respondents are Faith Genser, Frank Matis, and the Pennsylvania Democratic Party.

January 21, 2025

/s/ John M. Gore

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AND STATUTORY AUTHORITIES

OTHER AUTHORITIES

INTRODUCTION

The Elections and Electors Clauses of the U.S. Constitution "expressly vest[] power" to set federal election rules "in 'the Legislature' of each State." *Moore v. Harper*, 600 U.S. 1, 34 (2023). This Court accordingly has "an obligation to ensure that state court interpretations of [state] law do not evade" those grants of authority. *Id.* Indeed, at least four members of the Court have recognized that "the extent of a state court's authority to reject rules adopted by a state legislature for use in conducting federal elections" "presents an exceptionally important and recurring question of constitutional law." *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Alito, J., joined by Thomas, J., and Gorsuch, J., dissenting from denial of application for stay); *id.* (Kavanaugh, J., concurring in denial of application for stay) (agreeing that the issue is "important" and "is almost certain to keep arising until the Court definitively resolves it"); *see also Republican Nat'l Comm. v. Genser*, --- S. Ct. ---, 2024 WL 4647792, at *1 (November 1, 2024) (statement of Alito, J., joined by Thomas, J., and Gorsuch, J.) (noting that this case presents "a matter of considerable importance").

Just two terms ago, the Court "articulated a general principle" for reviewing state-court interpretations of federal election rules, *Moore*, 600 U.S. at 40 (Kavanaugh, J., concurring): "[S]tate courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections," *id.* at 36 (maj. op.). The Court, however, declined to "adopt [a] test by which [it] can measure" whether a state court has crossed the constitutional line. *Id.* Lower

courts thus lack definitive guidance on how to apply the Elections and Electors Clauses, and have predictably split on that question. *See, e.g.*, *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from the denial of certiorari) (acknowledging the "divide"); *compare also Carson v. Simon*, 978 F.3d 1051, 1059-60 (8th Cir. 2020), *with Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 369-72 (Pa. 2020).

The Pennsylvania Supreme Court exacerbated that split in this case. The Pennsylvania General Assembly has unambiguously directed that "[a] provisional ballot *shall not* be counted if … the elector's [mail] ballot is timely received by a county board of elections." 25 Pa. Stat. § 3050(a.4)(5)(ii)(F) (emphasis added).[1] But in a sharply divided 4–3 decision, the Pennsylvania Supreme Court decreed that election officials *shall* count a provisional ballot cast by an individual whose mail ballot was timely received but could not be counted because it violated a mandatory rule, such as by lacking a signature, date, or secrecy envelope. *See* Pet.App. 36a-48a. As Justice Mundy stressed in dissent, that "holding usurps the legislature's unmistakable directives and supplants them with a new" judicially created "procedure for counting provisional ballots." Pet.App. 65a. She therefore rightly described the ruling as "an unconstitutional intrusion upon the role reserved to state legislatures by the Federal Constitution." Pet.App. 66a.

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[1] This Petition uses "mail ballot" to encompass both "absentee" and "mail-in" ballots created in the Election Code. *See, e.g.*, 25 Pa. Stat. § 3050(a.4)(5)(ii)(F).

This case presents an ideal vehicle for the Court to fulfill *Moore*'s promised enforcement of the Elections and Electors Clauses and to "distill" its "general principle" for applying the Clauses "into a more specific standard." *Moore*, 600 U.S. at 40 (Kavanaugh, J., concurring). In particular, this case can be resolved free from the pressure of an impending election, "after full briefing and oral argument," *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay), and thus can "provide invaluable guidance for future elections," *Degraffenreid*, 141 S. Ct. at 739 (Alito, J., dissenting from the denial of certiorari). It also features a straightforward question of statutory interpretation rather than potentially hard questions that might arise when reviewing state-court interpretations of state constitutions. *Moore*, 600 U.S. at 63-64 (Thomas, J., dissenting). And unlike in *Moore*, there are no vehicle problems that would hamper this Court's review.

At bottom, this case is an important test for whether the Court will provide meaningful review of state-court interpretations of federal election rules. One scholar writing about this case and supporting Respondents' legal position has argued that *Moore*'s promise of judicial review should be read out of the opinion. *See* Vikram Amar, *Why the Supreme Court Should Absolutely Not Grant Relief or Review in* Genser v. Butler County Board of Elections, *as the Republican National Committee Requested This Week*, Verdict (Oct. 30, 2024), https://tinyurl.com/35wjtc4x. Failure to correct the Pennsylvania Supreme Court's indefensible distortion of the General Assembly's laws would effectively do just that by sending a strong message that judicial review under the Elections and

Electors Clauses is illusory. The result would directly contravene the Constitution: State courts would be left with "free rein" to usurp legislatures' constitutional function and to rewrite federal election rules with impunity. *Moore*, 600 U.S. at 34. The Court should grant the petition.

OPINIONS BELOW

The Pennsylvania Supreme Court's decision (Pet.App. 1a-57a) is reported at 325 A.3d 458.

JURISDICTION

The Pennsylvania Supreme Court issued its decision on October 23, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Elections Clause and the Electors Clause of the U.S. Constitution, 1 Pa. Stat. § 1921, and 25 Pa. Stat. §§ 3050(a.4)(5)(i)-(ii), 3146.6, 3146.8, 3150.16 are reproduced in the appendix to the petition (Pet.App. 100a-114a).

STATEMENT OF THE CASE

A. Pennsylvania's Mandatory Rules for Mail Ballots

Before the 2020 election cycle, Pennsylvania permitted only a limited subset of voters to vote absentee and to submit their ballots by mail. 25 Pa. Stat. § 3146.6 (2018). That changed in 2019, when the General Assembly enacted and the Governor signed Act 77, one of the most significant pieces of Pennsylvania legislation in decades. 2019 Pa. Leg. Serv. Act 2019-77 (approved Oct. 31, 2019). Act 77 embodied a grand bipartisan compromise: Although

representatives of both parties objected to parts of the bill, they also recognized the reform as a valuable step forward that offered necessary concessions to all sides. *See Legislative Journal – Senate: Senate Concurs in House Amendments,* 203d Gen. Assemb. Sess. 46 at 1000 (Pa. 2019), https://www.legis.state.pa.us/WU01/LI/SJ/2019/0/Sj20191029.pdf (statement of Senator Boscola, a Democrat); *id.* at 1002 (statement of Senator Majority Leader Corman, a Republican). Among much else, Act 77 amended the Pennsylvania Election Code to permit all Pennsylvanians to vote by mail without excuse.

As part of the compromise—which was protected by a non-severability clause, *see* Act 77, § 11—the bill also included certain mandatory rules that Pennsylvanians voting by mail must follow to have their ballots counted. As relevant here, voters who cast mail ballots must seal their ballots in a secrecy envelope, *see* 25 Pa. Stat. §§ 3146.6(a), 3150.16(a), which protects privacy in voting, Pa. Const. art. VII, § 4. Secrecy envelopes, in turn, are placed within mailing envelopes bearing a declaration that voters must sign and date. Pet.App. 3a. The secrecy-envelope, signature, and date requirements are "mandatory," and a voter's "failure to comply … renders the ballot invalid" and ineligible for counting by election officials. *Pa. Democratic Party*, 238 A.3d at 380; *see Ball v. Chapman*, 289 A.3d 1, 20 (Pa. 2023) (confirming date requirement is mandatory).

B. Pennsylvania's Provisional Ballot Rules

The Election Code permits Pennsylvanians to cast provisional ballots on Election Day in certain limited situations. *See Pa. Democratic Party*, 238 A.3d at 375

n.28. For example, an in-person voter who is unable to produce required identification at the polling place, *see, e.g.*, 25 Pa. Stat. § 3050(a.2), or whose registration to vote cannot be verified, *id.* § 3050(a.4)(1), may cast a provisional ballot. Likewise, a voter "who requests [a mail] ballot and who is not shown on the district register as having voted" can vote provisionally. *Id.* §§ 3146.6(b)(2), 3150.16(b)(2). Such a voter will not "hav[e] voted," for example, if he failed to return the mail ballot he requested. *Id.*

At the same time, the Election Code unambiguously directs that a "provisional ballot shall not be counted if … the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." *Id.* § 3050(a.4)(5)(ii)(F).

This provision reflects the General Assembly's policy judgment that electors voting by mail should have "one chance to cast a valid ballot." Pet.App. 97a n.18 (Brobson, J., dissenting). Indeed, the General Assembly has been debating whether to give electors who submit defective mail ballots a do-over, but it has deliberately chosen not to do so. *See, e.g.*, Pa. House Bill 1300, Regular Session 2021-2022 (vetoed legislation creating curing process for mail ballots); *see also Pa. Democratic Party*, 238 A.3d at 372-74 (holding that state constitution gives individuals who submit defective mail ballots no right to cure those ballots). The provision also reduces the burden on county election officials by reinforcing the limits on provisional voting, limiting the number of voters who attempt to vote provisionally on Election Day, and prescribing clear and quick disposition of provisional ballots cast by voters who already submitted timely mail ballots.

C. The Butler County Board of Elections Complied With the Election Code in the 2024 Primary Election.

Respondents Faith Genser and Frank Matis reside in Butler County and submitted mail ballots during the 2024 Primary Election. Pet.App. 4a. Each failed to enclose their ballot in a secrecy envelope before mailing it to the Butler County Board of Elections. Pet.App. 4a-5a. Both simply placed their ballots in the mailing envelope. Pet.App. 4a-5a.

Upon receipt, the Board did not know that Genser and Matis had failed to use secrecy envelopes because, in accordance with the Election Code, the Board does not open mailing envelopes until Election Day. Pet.App. 5a. The Board nonetheless weighed the mailing envelopes and reached a tentative determination that Genser and Matis had not used secrecy envelopes. Pet.App. 5a. The Board then logged the receipt of the ballots in Pennsylvania's electronic election system—the Statewide Uniform Registry of Electors, or "SURE"—and entered a code indicating a preliminary determination that no secrecy envelope was present. Pet.App. 5a-6a. SURE sent Genser and Matis emails informing them that their ballots might not be counted due to a missing secrecy envelope. Pet.App. 6a-7a. If the Board had subsequently opened the mailing envelopes and found that secrecy envelopes were in fact present, it would have counted the ballots.

Unwilling to wait for the Board's final determination on the validity of their mail ballots, Genser and Matis cast provisional ballots during in-person voting on Election Day. Pet.App. 7a. The

Board, however, did not count their mail or provisional ballots. Pet.App. 6a-7a; *see* 25 Pa. Stat. § 3050(a.4)(5)(ii)(F). Their mail ballots turned out to be invalid due to lack of secrecy envelopes, Pet.App. 6a, and the Commonwealth Court previously had held that the Election Code prohibits counting provisional ballots in this scenario, *see In re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 2020 WL 6867946, at *4-5 (Pa. Commw. Ct. Nov. 20, 2020) ("[O]ur General Assembly, in clear and unmistakable language, dictated that, in circumstances like this case, the 'provisional ballot[s] *shall not be counted*.'" (quoting 25 Pa. Stat. § 3050(a.4)(5)(ii)).

D. Procedural History

After Genser and Matis learned that their provisional ballots were not counted, they sued in the Court of Common Pleas of Butler County, Pennsylvania ("trial court"). They argued that the Election Code obligated the Board to count their provisional ballots. Pet.App. 7a. The Republican Party Petitioners intervened to defend the Board's decision while the Pennsylvania Democratic Party intervened to oppose it. Pet.App. 8a.

The trial court rejected Genser's and Matis's arguments, holding that the Election Code unambiguously prohibits individuals who submit mail ballots that are "timely received" by county boards from having provisional ballots counted. Pet.App. 10a.

The Commonwealth Court reversed in a divided decision. That court declined to follow its prior ruling in *In re Allegheny County Provisional Ballots In The 2020 General Election*. *See* 2020 WL 6867946 at *4-5. Instead, it deemed the Election Code ambiguous and

reversed the trial court by relying on a substantive canon protecting voters. Pet.App. 37a-38a (describing that court's decision).

The Pennsylvania Supreme Court affirmed on different grounds in a 4–3 decision. Notably, the majority's rationale was never adopted by another court nor offered by Respondents, and Petitioners never had a chance to present argument on it.

The majority acknowledged Section 3050(a.4)(5)(ii)(F)'s mandate that election officials "shall not" count an individual's provisional ballot if they "timely received" a mail ballot from the person. Pet.App. 38a. The majority, moreover, identified nothing in the statutory text carving out any exception to subsection (F)'s categorical "shall not be counted" rule. *See* Pet.App. 38a.

The majority nonetheless read such an exception into subsection (F), decreeing that election officials *shall* count a provisional ballot if the voter's mail ballot was timely received but is invalid and cannot be counted. Because the majority could cite no relevant statutory text to support its exception, it sought support elsewhere. It first pointed to its 2020 opinion describing mail ballots without secrecy envelopes as "void." Pet.App. 39a-42a (quoting *Pa. Democratic Party*, 238 A.3d at 375). It next invoked its preferred dictionary definition of "void" to conclude that mail ballots without secrecy envelopes have "no legal effect." Pet.App. 45a. It then equated "no legal effect" with "nonexistent": Because a "void" ballot has "no legal effect," Pet.App. 45a, the majority reasoned, "a void ballot is not a 'ballot'" at all under the Election Code, Pet.App. 54a.

The majority never elaborated on what a "void ballot" *is* if *not* a "ballot." Pet.App. 54a. It also made no attempt to square this conclusion with the Election Code's text, which refers to a mail ballot as a "ballot" at every step of the mail-voting process, including *before* the voter even casts it and *after* election officials determine it is invalid and cannot be counted. *See* Pet.App. 38a-46a, 54a; 25 Pa. Stat. §§ 3050; 3146.1-3146.8; 3150.11-3150.17. The majority also made no attempt to square its conclusion with the very prior decision from which it took the term "void": That decision described "void" mail ballots not as *non*-ballots, but rather as "*ballots*" that are "disqualified" and cannot be counted. Pet.App. 38a-46a, 54a; *Pa. Democratic Party*, 238 A.3d at 380 (emphasis added).

Instead, resting on its conclusion that a "void ballot is not a ballot," the majority treated "void" mail ballots as if they had *never even existed*. Pet.App. 45a, 54a. Specifically, it found—despite the parties' stipulation to the contrary—that the Board never "timely received" Respondents' mail ballots without secrecy envelopes. Pet.App. 42a, 48a. The majority thus held that Section 3050(a.4)(5)(ii)(F) was inapplicable and that the Board was *required* to count Respondents' provisional ballots. Pet.App. 42a, 48a. And it mandated the same outcome whenever a voter's mail ballot does not comply with other mandatory ballot-casting rules, such as the signature and date requirements. *See* Pet.App. 42a & n.29.

The majority thus created a broad new right to provisional voting precluded by the Election Code's unambiguous terms. The General Assembly has limited provisional voting to certain narrow situations, foreclosed it for voters who timely submit a

mail ballot, *see, e.g.*, 25 Pa. Stat. § 3050, and deliberately declined to permit a do-over for voters who cast a mail ballot but fail to comply with the rules for mail voting, *see supra* p. 6. The majority, however, conferred a *right* to such a do-over: Under the majority's decision, voters who timely submit a mail ballot but fail to comply with the General Assembly's mail-voting rules have a right to cast a provisional ballot and have it counted. *See* Pet.App. 38a-46a.

Justice Brobson, joined by Justices Wecht and Mundy, dissented. Those Justices explained that "the Election Code is clear and unambiguous": Because Genser's and Matis's mail ballots were timely received by the Board, Section 3050(a.4)(5)(ii)(F) "expressly prohibit[s] the Board" from "count[ing] [their] provisional ballots." Pet.App. 70a, 95a (Brobson, J., dissenting); *see also* Pet.App. 97a n.18 (Brobson, J., dissenting) (explaining that, while the Code enforces "a *policy choice* that the Majority views as absurd[,] … providing one chance to cast a valid ballot, be it in person or by mail (elector's choice), is consistent with this Commonwealth's longstanding election policy and statutory framework. Electors bear the responsibility to follow the law.").

The Justices also sharply criticized the majority's "untenable" reasoning and explained that it will "rewrite the history of the election." Pet.App. 86a, 92a (Brobson, J., dissenting). *First*, they pointed out that no relevant statutory provision uses the term "void" and, thus, that the majority's decision contravenes "the statutory language itself." Pet.App. 91a-92a (Brobson, J., dissenting). *Second*, they explained that the majority's construction of the term "void" contravenes the 2020 opinion it relied upon, which

treats a "void" ballot as a ballot that was timely received but cannot be counted, not as a *non*-ballot. Pet.App. 92a (Brobson, J., dissenting).

Third, they noted that even the majority's selected dictionary definition of "void" does not suggest the ballot never legally existed. Pet.App. 92a (Brobson, J., dissenting) ("Not even the definition from Black's Law Dictionary of 'void' offered by the Majority ... supports the Majority's position that somehow the effect of the ballot being void causes the ballot to essentially 'disappear' as if it never existed."). As they explained, "'[v]oid' does not and *cannot reasonably* mean that the *very same ballots* that were excluded from the vote as a result of the canvass were … never timely received." Pet.App. 92a (Brobson, J., dissenting) (emphasis added).

Finally, they pointed out that the majority was legislating from the bench: "[W]hat the Majority does is ignore the words that the General Assembly actually used in [subsection] (F), ignore how it used those same or similar words in other parts of the Election Code, and add words to [subsection] (F) that the General Assembly used in other provisions that it could have used, but chose not to use, in [subsection] (F)." Pet.App. 94a (Brobson, J., dissenting). In doing so, argued the dissenters, the majority assumed the "liberty to make additions or modifications to the unambiguous statutory language in order to effectuate [its desired] result." Pet.App. 96a-97a (Brobson, J. dissenting).

Justice Mundy wrote separately to emphasize that the majority's interpretation was so unreasonable as to violate the Elections and Electors Clauses. She

stressed that "the Majority has exceeded the bounds of statutory interpretation and supplanted the power vested in our General Assembly to regulate elections." Pet.App. 63a (Mundy, J., dissenting); s*ee also* Pet.App. 65a (Mundy, J., dissenting) ("The Majority's analysis is too far divorced from the legislature's clear directives regarding mail-in voting to withstand any scrutiny …. [Its] holding usurps the legislature's unmistakable directives and supplants them with a new procedure for counting provisional ballots after a canvass has determined that the elector's mail-in ballot is disqualified."). For that reason, "the Majority's decision" is not just wrong; it "is an unconstitutional intrusion upon the role reserved to state legislatures by the Federal Constitution." Pet.App. 66a (Mundy, J., dissenting).

Two days after the Pennsylvania Supreme Court's decision, the Republican Party Petitioners asked that court for a stay pending the disposition of a petition for certiorari. The Pennsylvania Supreme Court denied that request on October 28, 2024, over Justice Mundy's dissent.

The same day, the Republican Party Petitioners filed an emergency stay application with this Court. The Court denied that application on November 1, 2024. Justice Alito, joined by Justices Thomas and Gorsuch, issued a statement recognizing that the case presents "a matter of considerable importance" but concurring in the denial because the Court "could not prevent the consequences" identified in the stay application for the then-imminent 2024 General Election. *Republican Nat'l Comm.*, 2024 WL 4647792, at *1 (statement of Alito, J.).

REASONS FOR GRANTING THE WRIT

The Court should grant review of the "important question[s] of federal law" presented in this petition, which have divided lower courts. Sup. Ct. R. 10(b)-(c). As every member of this Court has acknowledged, the Constitution grants state legislatures a special role in setting the rules for federal elections. *See Moore*, 600 U.S. at 34 (stating that "the Elections Clause expressly vests power to carry out its provisions in 'the Legislature' of each State, a deliberate choice that this Court must respect"); *Moore*, 142 S. Ct. at 1090 (Alito, J., joined by Thomas, J. and Gorsuch, J., dissenting from the denial of application for stay) (explaining that the Elections Clause "specifies a particular organ of a state government" to set federal election rules—"*the Legislature*"—"and we must take that language seriously"). Yet in its decision below, the Pennsylvania Supreme Court decreed that election officials *shall* count ballots that the Pennsylvania General Assembly unambiguously directed *shall not* be counted. Thus, just like in the 2020 presidential election, "[t]he Supreme Court of Pennsylvania … issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office." *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 1 (2020) (statement of Alito, J.). As a result, Petitioners were forced—and, absent this Court's intervention, must continue—to run campaigns and conduct elections under rules set by the Pennsylvania Supreme Court rather than the General Assembly.

That judicial "intru[sion] upon the role specifically reserved to state legislatures by … the Federal Constitution" cries out for this Court's review. *Moore*, 600 U.S. at 37. By granting review, the Court could resolve a split of authority and answer the question left open in *Moore*: What standard of review governs claims under the Elections and Electors Clauses? *See id.* at 39 (Kavanaugh, J., concurring) (noting Court declined to "adopt any specific standard for our review of a state court's interpretation of state law in a case implicating the Elections Clause").

That question is important and recurring. In recent elections, this Court has received a "high number of petitions and emergency applications" raising claims under the Elections and Electors Clauses. *Degraffenreid*, 141 S. Ct. at 732 (Thomas, J., dissenting from the denial of certiorari). And future elections are bound to bring more of the same. *See Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay) ("The issue is almost certain to keep arising until the Court definitively resolves it."). Clarifying the standard of review now—in a non-emergency posture, without the pressure of an imminent election—"would provide invaluable guidance for future elections." *Degraffenreid*, 141 S. Ct. at 739 (Alito, J., dissenting from the denial of certiorari). That guidance could also stem the tide of these emergency requests and relieve the Court of the now-common demand for it to intervene in national elections on an expedited basis and in a manner that could affect electoral outcomes.

I. THE PENNSYLVANIA SUPREME COURT VIOLATED THE U.S. CONSTITUTION.

Because federal offices "arise from the Constitution itself," any "state authority to regulate election to those offices … had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (cleaned up); *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam) (explaining that as "to the selection of Presidential electors, the legislature is not acting solely under the authority given to it by the people of the State, but by virtue of a direct grant of authority under [the Federal] Constitution"). The Constitution effected such delegations to state legislatures through the Elections and Electors Clauses. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2.

The Elections Clause directs that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by *the Legislature thereof*," subject to the directives of Congress. U.S. Const. art. I, § 4, cl. 1 (emphasis added). The Elections Clause thereby vests state legislatures, subject to congressional enactments, with authority "to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 826 (2015) (Roberts, C.J., dissenting) (noting that the Elections Clause "imposes a duty on States and assigns that duty to a particular state actor"); *Wise v. Circosta*, 2020 WL 6156302, at *9 (4th Cir. Oct. 20, 2020) (Wilkinson & Agee, JJ., dissenting) (the "Constitution does not assign these powers holistically to the state governments but rather pinpoints a particular branch

of state government"). This "broad power to prescribe the procedural mechanisms for holding congressional elections," *Cook*, 531 U.S. at 523 (cleaned up), includes authority to enact "the numerous requirements as to the procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved," *Smiley*, 285 U.S. at 366; *Cook*, 531 U.S. at 523-24; *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) (state legislatures may enact election laws in order to ensure that elections are "fair and honest" and that "some sort of order, rather than chaos, is to accompany the democratic processes").

The Electors Clause directs that "[e]ach State shall appoint, in such Manner as *the Legislature thereof* may direct," electors for President and Vice President. U.S. Const. art. II, § 1, cl. 2 (emphasis added). The Electors Clause thus "leaves it to [state] legislature[s] exclusively to define the method of" selecting Presidential electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 76-77; *Bush v. Gore*, 531 U.S. 98, 112-13 (2000) (Rehnquist, C.J., concurring).

These sweeping grants of authority to state legislatures mean that "the text of [state] election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Bush*, 531 U.S. at 112-13 (Rehnquist, C.J., concurring). Said another way, "state courts do not have free rein" in interpreting state election laws because the Federal Constitution "expressly vests power" to set election rules "in the Legislature of each State." *Moore*, 600 U.S. at 34 (cleaned up). "As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law"—such

as cases involving the Takings and Contracts Clauses—the Court "ha[s] an obligation to ensure that state court interpretations of that law do not evade federal law." *Id.* Accordingly, any deference owed to state-court interpretations of state law must be "tempered" by the Court's "duty to safeguard limits imposed by the Federal Constitution." *Id.* at 35.

The Court thus reached an inescapable conclusion in *Moore*: "[S]tate courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at 36. But the Court declined to adopt "a more specific standard" to guide "review of state court decisions in federal election cases." *Id.* at 40 (Kavanaugh, J., concurring). That was due, at least in part, to the petitioners there "disclaim[ing] any argument that the North Carolina Supreme Court misinterpreted the North Carolina Constitution or other state law." *Id.* at 39 (Kavanaugh, J., concurring); *id.* at 36 (maj. op.) (observing that the petitioners failed to preserve the issue). Because this case does not present similar hurdles—and because "[t]he issue is almost certain to keep arising until the Court definitively resolves it," *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay)—the Court "should" take this opportunity to clarify the appropriate standard of review, *Moore*, 600 U.S. at 40 (Kavanaugh, J., concurring).

A. A State Court Exceeds the Bounds of Ordinary Judicial Review When It Distorts State Law Beyond What a Fair Reading Requires.

1. Before *Moore*, the Court had last addressed federal-court review of state-court decisions in election cases in *Bush*, 531 U.S. 98. *See Moore*, 600 U.S. at 35. In his concurrence, Chief Justice Rehnquist—joined by Justices Scalia and Thomas—proposed a simple test: whether the state court "impermissibly distorted" state law "beyond what a fair reading required." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring). Justice Souter, in dissent, offered a similar but arguably more deferential standard: whether the state court's decision "transcends the limits of reasonable statutory interpretation." *Id.* at 133 (Souter, J., dissenting).

These "standards convey essentially the same point: Federal court review" in this area "should be deferential, but deference is not abdication." *Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring). Because Chief Justice Rehnquist's "straightforward standard … best sums it up," *id.* (Kavanaugh, J., concurring) (cleaned up), the Court should adopt that standard and hold that a state court exceeds the bounds of ordinary judicial review when it "impermissibly distort[s]" state law "beyond what a fair reading require[s]," *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

2. To see how that standard might apply in practice, consider the Court's decision in *Palm Beach County Canvassing Board*, 531 U.S. 70. There, this Court vacated a Florida Supreme Court decision that restricted the Florida secretary of state's authority to

reject the results of recounts submitted after the statutory deadline. *Id.* at 75-76, 78. The Florida Supreme Court's rationale was difficult to decipher, but appeared to be based "in part upon the right to vote set forth in the Declaration of Rights of the Florida Constitution." *Id.* at 75.

The Court expressed concern that "the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under [the Electors Clause]." *Id.* at 78. Consequently, the Court feared that the Florida Supreme Court might have "construed the Florida Election Code" in light of its construction of the state constitution, "without regard to the extent to which the Florida Constitution *could*, consistent with [the Electors Clause], 'circumscribe the legislative power.'" *Id.* at 77 (emphasis added). The Court accordingly vacated and remanded so that the Florida Supreme Court could clarify whether the state constitution had influenced its decision. *Id.* at 78.

Palm Beach County Canvassing Board provides at least two important insights. *First*, this Court will not blindly defer to a state court's bottom-line interpretation of state laws governing federal elections. Instead, it will sift through the state court's analysis to probe the court's *reasoning*. *See Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring) ("deference is not abdication"). *Second*, a state court risks "impermissibly distort[ing]" state law "beyond what a fair reading require[s]" when it invokes extrinsic sources (such as the vague state constitutional provision in *Palm Beach County Canvassing Board*) to justify departure from the legislature's unambiguous statutory text. *Bush*, 531 U.S. at 115 (Rehnquist, C.J.,

concurring); *see also Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting from the denial of certiorari) (stating that the Pennsylvania Supreme Court may have "overrid[den] the clearly expressed intent of the legislature" by relying on a "vague clause in the State Constitution" (cleaned up)); *id.* at 739 (Alito, J., dissenting from the denial of certiorari) (stating that the Pennsylvania Supreme Court invoked a vague constitutional provision to "override even very specific and unambiguous rules adopted by the legislature for the conduct of federal elections").

The upshot is this: When reviewing state-court decisions in this context, the Court should scrutinize the state court's reasoning and apply the familiar rule that "the authoritative statement is the" unambiguous "statutory text, not … extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). As in all cases, "the clearly expressed intent of the legislature must prevail." *Bush*, 531 U.S. at 120 (Rehnquist, C.J., concurring). And that is especially true here: Because the Elections and Electors Clauses grant federal authority to state legislatures, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Id.* at 113 (Rehnquist, C.J., concurring). When a state court, without clear justification, uses an extrinsic source to break from the unambiguous text of an election statute, that court "impermissibly distort[s]" state law "beyond what a fair reading require[s]," *id.* at 115 (Rehnquist, C.J., concurring), and thus "exceed[s] the bounds of ordinary judicial review" in violation of the U.S. Constitution, *Moore*, 600 U.S. at 37 (maj. op.).

B. The Pennsylvania Supreme Court's Decision Exceeded the Bounds of Ordinary Judicial Review.

The Pennsylvania Supreme Court "impermissibly distorted" the Election Code "beyond what a fair reading required," *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring), when it decreed that election officials *shall* count provisional ballots that the General Assembly has directed they *shall not* count. By so obviously "exceed[ing] the bounds of ordinary judicial review," the Pennsylvania Supreme Court violated the Elections and Electors Clauses. *Moore*, 600 U.S. at 37.

1. The General Assembly could not have been clearer: "A provisional ballot *shall not be counted* if … the elector's [mail] ballot is *timely received* by a county board of elections." 25 Pa. Stat. § 3050(a.4)(5)(ii)(F) (emphasis added). Accordingly, a county board *must not* count *any* provisional ballot cast by a voter whose mail ballot was "timely received" before the deadline of 8:00 p.m. on Election Day. *Id.*; 25 Pa. Stat. § 3150.16(c).

That should have been the end of this case. *See Moore*, 600 U.S. at 37; *Bush*, 531 U.S. at 113-15 (Rehnquist, C.J., concurring); *Exxon Mobil Corp.*, 545 U.S. at 568; *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004) (Pennsylvania's courts cannot "ignore the clear mandates of the Election Code."). It is undisputed that the Board timely received Respondents' mail ballots by the deadline of 8:00 p.m. on Election Day. Respondents therefore did not qualify for one of the narrow circumstances in which the General Assembly

has granted a right to provisional voting and, thus, their provisional ballots "shall not be counted." 25 Pa. Stat. § 3050(a.4)(5)(ii)(F).

If more were somehow needed, two other provisions of the Election Code confirm that such ballots cannot be counted. *First*, every voter who casts a provisional ballot must first sign an affidavit that states:

> I do solemnly swear or affirm that my name is _____, that my date of birth is _____, and at the time that I registered I resided at _____ in the municipality of _____ in _____ County of the Commonwealth of Pennsylvania and that *this is the only ballot that I cast in this election.*

Id. § 3050(a.4)(2) (emphasis added). Thus, every voter who seeks to cast a provisional ballot after submitting a defective mail ballot and signs this affidavit makes a false statement. Every such voter is attempting to vote provisionally because they *did* cast another (defective) ballot in the election, not because they *did not* cast another ballot. *See id.*

Second, the provision governing the canvassing of provisional ballots states that such ballots cannot be counted unless a county board of elections "confirms that the individual did not cast any other ballot, including [a mail] ballot, in the election." *Id.* § 3050(a.4)(5)(i). But an individual who submits a defective mail ballot has "cast" a ballot, just like a fisherman may "cast" his line into the water without catching a fish. *Cast*, American Heritage Dictionary (2022) ("To *deposit* or indicate (a ballot or vote)."

(emphasis added)). Indeed, the Election Code makes clear that "casting" a ballot is an action undertaken by the voter *before* election officials make any determination regarding the ballot's validity. *See, e.g.*, 25 Pa. Stat. § 3050(a.4)(5)(i)-(ii) (directing county boards to determine a provisional ballot's validity *after* the ballot has been "cast"); *id.* § 3146.8(g)(1)(i)-(ii) (directing county boards to determine the validity of a mail ballot "cast by any absentee elector" during the canvass *after* Election Day); *see also Pa. Democratic Party*, 238 A.3d at 375 ("[T]he Act directs that mail-in ballots *cast* by electors who died prior to Election Day shall be rejected and not counted." (emphasis added)). Individuals whose mail ballots have been timely received by the county board have cast those ballots and, thus, any provisional ballots they cast cannot be counted.

2. The Pennsylvania Supreme Court's decree that election officials *shall* count provisional ballots that the General Assembly has directed they *shall not* count—and its concomitant creation of a new right to provisional voting at odds with the Election Code—far "exceed the bounds of ordinary judicial review." *Moore*, 600 U.S. at 37. The majority's decision not only "impermissibly distort[s]" the Election Code "beyond what a fair reading require[s]," *id.* at 38 (Kavanaugh, J., concurring) (cleaned up); it is simply *irreconcilable* with the plain statutory text. That alone is enough to show the majority's violation of the Elections and Electors Clauses. *See id.* at 36-37 (maj. op.); *see also Bush*, 531 U.S. at 113-15 (Rehnquist, C.J., concurring).

And there is more—a *lot* more. The majority opinion acknowledged (as it must) the legislative command that provisional ballots "shall not be counted" when an

elector's mail ballot is "timely received." Pet.App. 38a (citing 25 Pa. Stat. § 3050(a.4)(5)(ii)(F)). The majority's rationale (which was not embraced by the lower courts or offered by any party) for ignoring that unambiguous language was, to put it generously, imaginative. It reasoned that mail ballots cast without the mandatory secrecy envelopes are "void"; that "void" ballots have no legal effect; and that such ballots therefore never existed at all and thus could not be "received" by election officials. Pet.App. 45a-48a. Following this reasoning, the majority concluded that, despite the parties' *stipulation* that the Board timely received the mail ballots cast by Genser and Matis, those ballots had not, in fact, been "timely received" under Section 3050(a.4)(5)(ii)(F). Pet.App. 45a.

Each step in the majority's bizarre and error-filled syllogism fails. To start, the majority never explained what a "void ballot" *is* if it is *not* a "ballot." Apparently, the majority instead thought it could make "void" mail ballots disappear at the wave of its hand. *See* Pet.App. 91a-93a (Brobson, J., dissenting).

More to the point, the relevant provisions of the Election Code never use the word "void." The majority thus had to turn to an extrinsic source to find that word—a textbook way of violating the Elections and Electors Clauses. *See, e.g.*, *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 75-78; *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting from the denial of certiorari); *id.* at 739 (Alito, J., dissenting from the denial of certiorari); *see also Exxon Mobil Corp.*, 545 U.S. at 568.

To add insult to injury, the extrinsic source relied on by the majority was not a state constitutional provision adopted by the people of Pennsylvania. The majority instead merely plucked the word "void" from its own prior *judicial* decision. Pet.App. 40a (quoting *Pa. Democratic Party*, 238 A.3d at 375). Yet, as this Court has explained, "the language of an opinion" should not "be parsed as though" it were the "language of a statute." *CBS, Inc. v. FCC*, 453 U.S. 367, 385 (1981); *see Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting) ("[J]udicial opinions are not statutes, and we don't dissect them word-by-word as if they were.").

And the majority even adopted a definition of the term "void" at odds with the way the word was used in the prior opinion. The majority's cherry-picked definition of "void" means "that something has 'no legal effect.'" Pet.App. 45a (quoting *Void*, Black's Law Dictionary (12th ed. 2024)). But in *Pennsylvania Democratic Party*, the court had equated the word with "disqualified," not nonexistent. 238 A.3d at 380; Pet.App. 91a (Brobson, J., dissenting). And indeed, other dictionary definitions of the word "void" suggest something that is "void" is merely "not valid." *E.g.*, *Void*, American Heritage Dictionary (2022) ("To make void or of no validity; invalidate."). The majority ignored those definitions in favor of the one definition that would, in its mind, enable the next step in its chain of illogic.

And that next step is the most bizarre. The majority reasoned that treating a "void" mail ballot as "timely received" under subsection (F)—*even without counting it*—would nonetheless "give it legal effect." Pet.App. 46a. Of course, the majority could not tolerate that

result because it would have conflicted with the majority's preferred definition of the (non-statutory) term "void." Thus, according to the majority, mail ballots that were "timely received" by election officials were not, in fact, "timely received" if they turn out to violate the General Assembly's ballot-casting rules. Pet.App. 45a. As the dissent explained, that reasoning would mean that a "ballot" ceases to be a "ballot," and thus cannot be "received," even if election officials *later* (and only after *receiving* the ballot) discover an error that renders the ballot ineligible for counting. Pet.App. 92a (Brobson, J., dissenting). Under the majority's reasoning, such a ballot simply "disappear[s]" as if it never existed in the first place. Pet.App. 92a (Brobson, J., dissenting).

That makes no sense. A ballot does not cease to be a ballot—and an item "received" does not disappear from a county board's possession—merely because the ballot is ultimately deemed ineligible for counting. This Court has recognized that reality by repeatedly describing rejected ballots as nothing other than "ballots." *See, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 682 n.18 (2021) (referring to "discarded ballots" rejected by Arizona); *id.* at 719 (Kagan, J., dissenting) (same); *Roudebush v. Hartke*, 405 U.S. 15, 23 (1972).

The Pennsylvania Election Code is in accord, referring to an invalid mail ballot that "shall not be counted" as a "*ballot*," not something else. 25 Pa. Stat. § 3146.8(h)(3) (a mail "ballot" that is not supported by requisite proof of identification "shall not be counted"). Indeed, the Election Code refers to a mail ballot as a "ballot" at each step of the voting process: when it is approved, printed, and sent to the individual who

requested it; when the individual attempts to complete it and returns it to election officials; and when election officials canvass it and decide whether it is valid or invalid and must or must not be counted. *See id.* §§ 3050; 3146.1-3146.8; 3150.11-3150.17. Following the Election Code's lead, the Pennsylvania Supreme Court has also previously referred to invalid mail ballots as "ballots," not as *non*-ballots—including in the very 2020 decision it purported to invoke here. *See, e.g.*, *Pa. Democratic Party*, 238 A.3d at 380 ("mail[] *ballot* that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified" because "the *ballot* [is] invalid" (emphasis added)). Thus, no matter where one looks, a mail ballot is a "ballot," regardless of whether it is ultimately deemed invalid or counted. 25 Pa. Stat. § 3050(a.4)(5)(ii)(F).

The majority's decision thus not only runs roughshod over the Election Code; it is also nonsensical. It is difficult to imagine a more blatant judicial "arrogat[ion]" of "the power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36. The majority cast aside the General Assembly's unambiguous statutory text, decreed that election officials *shall* count ballots the General Assembly has directed they *shall not* count, and created a new right to provisional voting based solely on its reinterpretation of a stray word in its own prior judicial opinion. If state courts can so easily dispose of unambiguous state election laws under the guise of "judicial review," *id.*, then the Elections and Electors Clauses are a pointless formality that state courts can simply ignore.

II. THIS PETITION RAISES IMPORTANT AND RECURRING QUESTIONS THAT IMPLICATE A SPLIT OF AUTHORITY.

This case is both legally and factually important. At least four Justices have recognized that the question of what standard of review applies under the Elections and Electors Clauses is "exceptionally important and recurring." *Moore*, 142 S. Ct. at 1089 (Alito, J., dissenting from denial of application for stay); *id.* (Kavanaugh, J., concurring in denial of application for stay) (agreeing that the question "is important" and "is almost certain to keep arising until the Court definitively resolves it"); *Republican Nat'l Comm.*, 2024 WL 4647792, at *1 (statement of Alito, J.) ("The application of the State Supreme Court's interpretation in the upcoming election is a matter of considerable importance ….").

The volume of cases received by the Court presenting this question reinforces the urgency of answering it. In recent years, the Court has received "an unusually high number of petitions and emergency applications contesting" changes to state election laws by state courts. *Degraffenreid*, 141 S. Ct. at 732 (Thomas, J., dissenting from the denial of certiorari); *see, e.g.*, Emergency Application for Stay, *Scarnati v. Pennsylvania Democratic Party*, No. 20-542 (Sept. 28, 2020); Pet. for Cert., *Republican Party of Pennsylvania v. Degraffenreid*, No. 20-542 (Oct. 23, 2020); Pet. for Cert., *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-845 (Dec. 21, 2020); Emergency Application for Stay, *Moore v. Harper*, No. 21A455 (Feb. 25, 2022); Pet. for Cert., *Huffman v. Neiman*, No. 22-362 (Oct. 14, 2022). That includes petitions pending this term. *See Jacobsen v. Mont.*

Democratic Party, No. 24-220 (Aug. 26, 2024). The issue was even litigated in merits briefing last term, though the Court decided the case on other grounds. *See* Br. of Petitioner at 46, *Trump v. Anderson*, No. 23-719 (Jan. 18, 2024). And still more emergency requests have arisen from changes to state election rules by other nonlegislative officials. *See, e.g.*, Emergency Application for Writ of Injunction, *Wise v. Circosta*, No. 20A71 (Oct. 22, 2020); Emergency Application for Injunction Pending Appeal, *Moore v. Circosta*, No. 20A72 (Oct. 22, 2020).

This case also implicates a split of authority between the federal appellate and state supreme courts over the extent to which nonlegislative officials may alter election rules enacted by state legislatures. *Compare*, *e.g.*, *Carson*, 978 F.3d at 1059 (holding that "the Secretary's actions in altering the deadline for mail-in ballots likely violates the Electors Clause of Article II, Section 1 of the United States Constitution"), *with Pa. Democratic Party*, 238 A.3d at 371 (extending the statutory receipt deadline for mail ballots); *Degraffenreid*, 141 S. Ct. at 734 (Thomas, J., dissenting from the denial of certiorari) (acknowledging the "divide").

Standard of review aside, this case is also important to the future of elections in Pennsylvania. Whether voters who submit defective mail ballots get a do-over by voting provisionally could affect *tens of thousands* of ballots every time Pennsylvania holds elections—and place a corresponding additional burden on county election officials to process those voters in person on Election Day and canvass and count provisional ballots thereafter. In 2020, under the General Assembly's plain directive, about 1% of

returned mail ballots were not counted because of missing secrecy envelopes. *See* Daniel J. Hopkins *et al.*, *How Many Naked Ballots Were Cast in Pennsylvania's 2020 General Election?*, MIT Election Data + Science Lab (Aug. 26, 2021), https://tinyurl.com/3awed4jv. Rejection rates for missing signatures and dates have varied in recent elections, but each type of error could disqualify over 10,000 ballots in a given election. *See, e.g.*, *Black Political Empowerment Project v. Schmidt*, 2024 WL 4002321, at *6 (Pa. Commw. Ct. Aug. 30, 2024) (noting that over 10,000 mail ballots were rejected in the 2022 General Election for missing dates), *vacated by* 322 A.3d 221 (Pa. 2024). Thus, it is unsurprising that, in recent years, several election results have flipped only because invalid mail ballots were unlawfully counted. *See, e.g.*, *Degraffenreid*, 141 S. Ct. at 734-35 (Thomas, J., dissenting from the denial of certiorari); *In re Canvass of Absentee and Mail-in Ballots*, 241 A.3d 1058; *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), *cert. granted and judgment vacated*, *Ritter v. Migliori*, 143 S. Ct. 297 (2022); Pet.App. 218a-220a. Because Pennsylvania is one of the Nation's most important swing states, the provisional ballots implicated by this case could easily swing important federal elections in the future.

More still, Pennsylvania's courts have repeatedly made clear that they will creatively stretch the General Assembly's commands to reach their preferred outcomes. During the 2020 election, as Justice Thomas noted, this Court was presented with "no fewer than four other decisions of the Pennsylvania Supreme Court implicat[ing] the same issue" of revising the Election Code by judicial fiat.

See Degraffenreid, 141 S. Ct. at 737 (Thomas, J., dissenting from the denial of certiorari). Justice Thomas even predicted that "there is a reasonable expectation that these petitioners," including the Pennsylvania Republican Party, "will again confront nonlegislative officials altering election rules." *Id.* (Thomas, J., dissenting from the denial of certiorari).

That prediction proved prescient. With this petition, the Pennsylvania Republican Party is once again before the Court asking it to enforce the Elections and Electors Clauses against a Pennsylvania Supreme Court bent on rewriting the General Assembly's election laws. If this Court does not intervene now, the pattern of state judicial interference in federal elections will likely only continue. *See id.* This Court should grant the petition and make clear that the rules for federal elections in Pennsylvania—and the Nation—will be determined by the people's elected representatives, not judges. *See, e.g.*, *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay).

III. THIS CASE IS AN IDEAL AND CLEAN VEHICLE FOR RESOLVING THESE EXCEPTIONALLY IMPORTANT AND RECURRING QUESTIONS.

For at least three reasons, this case is an ideal and clean vehicle for answering the questions presented.

First, the Court can resolve them without the added pressure of an impending election. "[T]he judicial system is not well suited to address these kinds of questions in the short time period available immediately [before or] after an election[.]"

Degraffenreid, 141 S. Ct. at 737 (Thomas, J., dissenting from the denial of certiorari). This case, however, comes to the Court "outside that truncated context," *id.*, so "the Court can carefully consider and decide the issue … after full briefing and oral argument." *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay). And in doing so, the Court can "provide clear rules for future elections." *Degraffenreid*, 141 S. Ct. at 738 (Thomas, J., dissenting from the denial of certiorari); *see also id.* at 739 (Alito, J., dissenting from the denial of certiorari) ("[A] decision would provide invaluable guidance for future elections.").

Second, this case features a straightforward question of statutory interpretation, not the "far more uncertain" task of reviewing a state-court interpretation of a state constitution. *Moore*, 600 U.S. at 64 (Thomas, J., dissenting); *Democratic Nat'l Comm.*, 141 S. Ct. at 28 (Roberts, C.J., concurring in denial of application to vacate stay) (recognizing that review of state-court rulings under state constitutions presents difficult questions under Elections and Electors Clauses).

Finally, there are no vehicle problems that would prevent the Court from answering the questions presented. The Republican Party Petitioners preserved the Elections and Electors Clauses issue by raising it in their petition for allowance, Pet.App. 176a-177a, 191a n.5, and in their merits briefing, Pet.App. 164a. Indeed, both Justice Dougherty's concurrence and Justice Mundy's dissent acknowledged and analyzed these arguments, Pet.App. 60a, 63a-66a, and Justice Mundy specifically

observed that the Republican Party Petitioners preserved the issue, Pet.App. 66a nn.4-5. And because the Pennsylvania Supreme Court's rationale was neither adopted by another court nor offered by Respondents, Petitioners cannot be faulted for failing to divine that the court would engage in such an irrational, text-defying analysis—and for then failing to preemptively rebut it.

Moreover, there are no jurisdictional barriers to the Court's review. The Board clearly has standing to appeal an adverse judgment against it. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989). After all, this Court previously found standing where "[t]he state proceedings ended in a … judgment adverse to [the] petitioners, an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts." *Id.*

The decision below also places an additional burden on Butler County election officials. It requires them to make provisional voting available to—and canvass and count provisional ballots cast by—voters whom the General Assembly has granted no right to provisional voting. And if the decision is permitted to stand, the number of voters who show up on Election Day and cast a provisional ballot is likely to grow exponentially, as voters who cast a timely mail ballot will also cast a provisional ballot as a backstop against any failure to comply with the mail-voting rules.

More still, the Republican Party Petitioners will continue to participate in many elections in Butler County, and the judgment below will force them to do so in an unlawfully structured competitive environment. *See* Pet.App. 217a-220a (declaration

describing injuries); *accord Mecinas v. Hobbs*, 30 F.4th 890, 898 & n.3 (9th Cir. 2022) (political party's "interest in fair competition" injured when forced "to participate in an illegally structured competitive environment" (cleaned up)). Indeed, because the Pennsylvania Supreme Court's interpretation of the Election Code is binding statewide, *see 2020 Gen. Election*, 241 A.3d at 1078 n.6 (explaining that the Pennsylvania Supreme Court has "authority to definitively interpret … the Election Code"), the decision below will force the Republican Party Petitioners to compete under an illegally altered competitive environment across Pennsylvania, *cf. Camreta v. Greene*, 563 U.S. 692, 702-03 (2011) (finding standing to appeal "because the judgment may have prospective effect on the parties").

* * *

When the legislature says that certain ballots *shall not* be counted, the Elections and Electors Clauses prohibit state courts from blue-penciling that clear command into *shall be*. But that's precisely what the Pennsylvania Supreme Court did here. As a result, the 2024 federal elections in Pennsylvania were conducted under rules set by a state court rather than the state legislature, in direct defiance of the Federal Constitution. And without this Court's intervention, future elections will be too. If the Court will not intervene in a case with facts as egregious as these, state courts across the country will receive a clear message that the Court did not really mean what it said in *Moore*—and that judicial review under the Elections and Electors Clause is nothing more than a parchment promise.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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