No. 24A-_____

IN THE SUPREME COURT OF THE UNITED STATES

FAITH GENSER, ET AL.,

Plaintiffs-Respondents,

v.

BUTLER COUNTY BOARD OF ELECTIONS, ET AL.,

Defendants-Respondents,

and

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Intervenor-Applicants.

Application from the Supreme Court of Pennsylvania

(No. 26 WAP 2024, No. 27 WAP 2024)

EMERGENCY APPLICATION FOR STAY PENDING DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

As required by Supreme Court Rule 29.6, Applicants hereby submit the following corporate-disclosure statement.

1. Applicants have no parent corporation.

2. No publicly held corporation owns any portion of either Applicant, and Applicants are not a subsidiary or an affiliate of any publicly owned corporation.

Date: October 28, 2024

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TO THE HONORABLE SAMUEL A. ALITO, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Weeks after mail voting began in Pennsylvania—and less than two weeks before Election Day—a sharply divided 4-3 Pennsylvania Supreme Court departed from the plain terms of the Election Code to dramatically change the rules governing mail voting. It did so in the midst of the ongoing General Election in which millions of Pennsylvanians have already cast ballots for President, U.S. Senate, Congress, and scores of state and local offices.

The Election Code provision at issue could not be 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). Undeterred, the majority below held that election officials *must* 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 lack of signature, date, or secrecy envelope. This holding effectively creates a cure process for mail-ballot errors—a process everyone agrees the General Assembly has *deliberately* chosen not to create. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372-74 (Pa. 2020); Pa. House Bill 1300, Regular Session 2021-2022 (vetoed legislation creating curing process for mail ballots).

As Justice Mundy explained in dissent, the majority's ruling usurps the General Assembly's plenary authority to "direct" the "Manner" for appointing electors for President and Vice President, U.S. Const. art. II, § 1, cl. 2, and its broad power to prescribe "[t]he Times, Places and Manner" for congressional elections, *id.* art. I, § 4,

cl. 1. *See* App. 51a-52a (Mundy, J. dissenting). As the three dissenters recognized, on "this question, the Election Code is clear and unambiguous." App. 54a (Brobson, J, dissenting); *see also* App. 51a (Mundy, J., dissenting) ("[T]his Court has exceeded the scope of judicial review and usurped the General Assembly's power to regulate federal elections.").

This Court bears the constitutional responsibility of ensuring that state courts do not "unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution." *Moore v. Harper*, 600 U.S. 1, 37 (2023). By any standard, however deferential, that line has been crossed here: When the legislature says that certain ballots can *never* be counted, a state court cannot blue-pencil that clear command into *always*. And here, the General Assembly could not have been clearer. *See* Mundy Dissent at 3 ("The Majority's analysis is too far divorced from the legislature's clear directives."). As the Commonwealth Court explained in 2020 when it rejected the same arguments accepted by the majority below, "our General Assembly**,** in clear and unmistakable language, dictated that, in circumstances like this case, the 'provisional ballot[s] *shall not be counted*.'" *In re Allegheny Cnty. Provisional Ballots in the 2020 General Election*, 2020 WL 6867946, at *4-5 (Pa. Commw. Ct. Nov. 20, 2020) (quoting 25 Pa. Stat. § 3050(a.4)(5)(ii)).

The Pennsylvania Supreme Court also erred in changing rules governing mail voting in federal elections *after* mail voting commenced and *less than two weeks* before Election Day. The *Purcell* principle—not to mention common sense—instruct that

"[w]hen an election is close at hand, the rules of the road should be clear and settled." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) ("*DNC*") (Kavanaugh, J., concurral). Wherever the temporal line barring last-minute judicial rule changes lies, the ruling below plainly crossed it. Nor is this a case where this Court's intervention would itself sow confusion or trigger difficult remedial issues. *See Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurral). To the contrary, a stay here would *prevent* chaos by restoring the status quo that existed in Pennsylvania's recent elections—and in this one before Wednesday's ruling. *See, e.g.*, *Allegheny Cnty. Provisional Ballots*, 2020 WL 6867946, at *4-5 (recognizing that provisional ballots like those at issue in this case could not be counted in 2020).

This Court should enter a stay. This case is of paramount public importance, potentially affecting tens of thousands of votes in a State which many anticipate could be decisive in control of the U.S. Senate or even the 2024 Presidential Election. Whether that crucial election will be conducted under the rules set by the General Assembly or under the whims of the Pennsylvania Supreme Court is an important constitutional question meriting this Court's immediate attention. Moreover, if this Court fails to act in the face of such egregious judicial usurpation, *Moore*'s promised enforcement of the Elections and Electors Clauses will become a dead letter that state courts can safely ignore.

Applicants thus respectfully request that the Court enter a stay pending disposition of their forthcoming petition for a writ of certiorari. *See Republican Nat'l*

Comm. v. Democratic Nat'l Comm., 589 U.S. 423, 425 (2020) ("*RNC*").[1] Given that provisional ballots may be canvassed starting on Election Day, time is of the essence. Accordingly, Applicants respectfully request that this Court expedite its decision on this Application and enter an administrative stay to preserve the status quo pending that decision. In particular, Applicants request that the Court set Wednesday, October 30 as the deadline for parties to file any oppositions to this Application and Thursday, October 31 for Applicants to file a reply brief. Applicants further request that the Court rule on this Application by Friday, November 1.

In the alternative, if the Court determines that a full stay is not warranted, Applicants respectfully request that this Court order that provisional ballots cast by individuals whose mail ballots were timely received but invalid (i) be segregated from all other ballots and (ii) if counted, be tallied separately and not included in the official vote tally. This Court took those steps in 2020 to prevent mootness in another case involving Applicant Republican Party of Pennsylvania arising in a similar posture and raising similar issues under the Electors and Elections Clauses. *See* Order, *Republican Party of Pa. v. Boockvar*, No. 20A84, 2020 WL 6536912, at *1 (U.S. Nov. 6, 2020) (Alito, J., Circuit Justice); *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 1-2 (2020) (statement of Alito, J.). As that previous experience confirms, this

[1] Alternatively, this Court may wish to construe this application as a petition for certiorari. *See, e.g.*, *Nken v. Mukasey*, 555 U.S. 1042, 1042 (2008); *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

limited relief would be eminently workable, would not prejudice any party or voter, and would facilitate any eventual review and decision by this Court on the merits.

OPINIONS BELOW

The Pennsylvania Supreme Court majority's merits opinion is attached as Appendix A. Justice Dougherty's concurring opinion is attached as Appendix B. Justice Mundy's dissenting opinion is attached as Appendix C. Justice Brobson's dissenting opinion is attached as Appendix D.

Applicants' application to the Pennsylvania Supreme Court seeking a stay pending certiorari and a ruling from that court by October 27, 2024 is attached as Appendix E. The Pennsylvania Supreme Court had not ruled on that application by the time of this filing on October 28, 2024.

STATEMENT OF THE CASE

A. Pennsylvania's Mandatory Rules For Mail Ballots.

In 2019, as part of an important bipartisan compromise, the General Assembly amended the Election Code to permit all Pennsylvanians to vote by mail without any excuse. 2019 Pa. Leg. Serv. Act 2019-77 ("Act 77"). As part of the compromise, which was protected with an absolute 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.

App. 2a. All agree that the secrecy-envelope, signature, and date requirements are "mandatory"; a voter's "failure to comply . . . renders the ballot invalid" and ineligible for counting by election officials. *Pa. Democratic Party*, 238 A.3d at 372-74, 380; *see Ball v. Chapman*, 289 A.3d 1, 14-16 (Pa. 2023) (confirming mandatory nature of date requirement).

B. Pennsylvania's Provisional Ballot Rules.

All agree, too, that the Election Code permits Pennsylvanians to cast provisional ballots on Election Day in only 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 for a voter "who requests [a mail] ballot and who is not shown on the district register as having voted," which occurs when the voter never returned their mail-ballot package to the county board. *Id.* §§ 3146.6(b)(2), 3150.16(b)(2).

The Election Code, however, 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).

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

Respondents Genser and Matis reside in Butler County and submitted mail ballots during the 2024 Primary Election. App. 3a. They failed to enclose their ballots in secrecy envelopes before mailing them to the Butler County Board of Elections. *Id.* Instead, they simply put their ballots in the mailing envelope. *Id.*

Upon receipt, the Board did not know that Genser and Matis had failed to use secrecy envelopes because, in accordance with the Election Code, it does not open mailing envelopes until Election Day. *Id.* But the Board weighed the mailing envelopes and reached a tentative determination that Genser and Mathis had not used secrecy envelopes. *Id.* The Board then logged the receipt of the ballots in Pennsylvania's electronic election system—"SURE"—and entered a code indicating a preliminary determination that no secrecy envelope was present. *Id.* SURE then sent Genser and Matis emails informing them that their ballots might not be counted due to a missing secrecy envelope. *Id*. at 4a-5a. If the Board had subsequently opened the mailing envelopes and found secrecy envelopes were in fact present, it would have counted the ballots.

Genser and Matis did not want to wait for the Board's final determination on the validity of their mail ballots. Instead, they cast provisional ballots during in-person voting on Election Day. *Id*. at 5a. The Board, however, did not count those ballots because it was well settled that provisional ballots cast by individuals whose mail ballots had been timely received cannot be counted, even if the mail ballots were invalid and thus also could not be counted. Indeed, the Commonwealth Court held precisely that in 2020. *See Allegheny Cnty. Provisional Ballots*, 2020 WL 6867946, at *4-5 ("[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 the Board informed Genser and Matis 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. App. 5a-6a. Applicants intervened to defend the Board's decision while the Pennsylvania Democratic Party intervened to oppose it. *Id.* at 6a.

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 election boards from having provisional ballots counted. *Id.* at 7a-8a.

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. Instead, it deemed the Election Code ambiguous and relied on a substantive canon protecting voters to reverse the trial court. App. 29a (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 Applicants never had a chance to present argument on it. The majority acknowledged that the Election Code prohibits counting a provisional ballot if the elector's mail ballot is timely received by a county board. *Id.* at 29a-30a (citing 25 Pa. Stat. §3050(a.4)(5)(ii)(F)). But it explained that a *prior judicial decision* had referred to mail ballots without secrecy envelopes as "void." *Id.*

at 30a-33a (quoting *Pa. Democratic Party*, 238 A.3d at 375). It then relied on a dictionary definition of the word "void"—a term that never appears in any *relevant* provision of the Election Code—to conclude that mail ballots without secrecy envelopes simply *never existed* as a matter of law.[2] *Id.* at 35a. Thus, the majority reasoned that Respondents' mail ballots without secrecy envelopes were never "received" by the Board in the first place, *id.* at 37a, and that the same is true of mail ballots that violate other mandatory rules—like those without valid signatures or dates, *id.* at 33a & n.29 (extending its rationale to all "mandatory" rules including "signing and dating" requirements). And because these ballots are never "received," *id.* at 37a, anyone who casts such a ballot is eligible to cure the violation by casting a provisional ballot on Election Day. *Id.* at 33a & n.29.

Justice Brobson, joined by Justices Wecht and Mundy, dissented. Because Genser's and Matis's mail ballots were indisputably received by the Board by the deadline, "Section 1210(a.4)(5)(ii)(F) of the Election Code expressly prohibit[s] the Board" from "count[ing] [their] provisional ballots." App. 73a; *see also id.* at 75a n.18 (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

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[2] *Pa. Democratic Party*, in turn, cited an *irrelevant* provision, Pa. Stat. § 3146.8(g)(4)(ii), which states: "If any of the envelopes . . . stamped . . . 'Official Election Ballot' contain any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void." As all agree, that is not the provision which governs Genser's and Matis's *failure to use* secrecy envelopes. *See* App. 2a (majority op.); *id.* at 70a-71a (Brobson, J., dissenting) (explaining this).

(elector's choice), is consistent with this Commonwealth's longstanding election policy and statutory framework. Electors bear the responsibility to follow the law.").

Those three Justices also sharply criticized the majority's contrary reasoning. *First*, they concluded that mail ballots without secrecy envelopes are not "void" but merely "invalid," *id.* at 63a—and that saying otherwise contradicted precedent and violated "the statutory language itself." *Id.* at 70a. *Second*, they reasoned that the meaning of "void" does not suggest the ballot never legally existed. *See id.* at 70a-71a ("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."). *Third*, they criticized the majority for putting immense weight on the word "void," explaining that its reasoning will "rewrite the history of the election" by pretending that received ballots never existed. *Id.* at 70a. Unlike the majority, the dissenters would have enforced the Election Code's unambiguous command that a "provisional ballot shall not be counted" if the voter's mail ballot was "timely received." *Id.* at 72a-73a.

Justice Mundy wrote separately to explain that the majority's interpretation was so unreasonable as to violate the Elections and Electors Clauses of the U.S. Constitution. *See* App. 51a-52a (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.").

Although the Butler County Board of Elections is the only county board that is a party to the ruling below, the other 66 county boards of elections, as a matter of state law, are expected to adhere to the Pennsylvania Supreme Court's judgment and construction of the Election Code. *See In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1078 n.6 (Pa. 2020) (explaining that the Pennsylvania Supreme Court has "authority to definitely interpret the provisions of the Election Code"). Indeed, on October 24, the Secretary of the Commonwealth released a guidance document that, invoking the majority's decision, says individuals who successfully submit timely but defective mail ballots may cast provisional ballots. *See* Pa. Dep't of State, Pennsylvania Provisional Voting Guidance 5, https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-provisionalballots-guidance-v2.2.pdf. Absent this Court's intervention, all county boards will count provisional ballots submitted by electors who already submitted defective mail ballots that were timely received by county boards of elections.

Applicants filed an application with the Pennsylvania Supreme Court for a stay pending the disposition of a petition for certiorari on October 25, 2024. App. 77a. Applicants asked for a ruling by October 27. *Id.* at 81a. As of this filing, the Pennsylvania Supreme Court has not ruled on the stay request.

Election Day is November 5, 2024. If the Pennsylvania Supreme Court's ruling remains in place, county boards will be forced to ignore the Election Code's clear mandate and count provisional ballots cast on Election Day by those who submitted

defective mail ballots. County boards may start counting provisional ballots on Election Day. 25 Pa. Stat. §§ 3146.8(g)(1.1), 3050(a.4)(4).

JURISDICTIONAL STATEMENT

This Court has certiorari jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or . . . statutes of . . . the United States." 28 U.S.C. § 1257(a). These conditions are satisfied here. The Pennsylvania Supreme Court issued a final judgment. As Applicants argued below, the majority's ruling is so unreasonable that it violates the Elections and Electors Clauses of the U.S. Constitution. *See* App. 51a (Mundy, J., dissenting) (noting this argument); App. 85a-91a.

REASONS FOR GRANTING THE APPLICATION

The Court should grant a stay to preserve the constitutional authority of the Pennsylvania General Assembly and ensure Pennsylvania's elections are conducted according to the laws enacted by its elected representatives.

This Court will grant a stay if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *accord Does 1-3 v. Mills*,

142 S. Ct. 17, 17-18 (2021) (Barrett, J., concurral). Because this case involves a last-minute judicial alteration of a federal electoral rule, this Court can also enter a stay based on the equities alone. *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurral) ("The stay order is not a ruling on the merits").

Independent of the merits, a stay is warranted because the Pennsylvania Supreme Court majority's ruling violates the *Purcell* doctrine. *See id.* The *Purcell* doctrine recognizes that the rules for federal elections must, at some point, "be clear and settled." *DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurral); *see RNC*, 589 U.S. at 424-25. Here, the Pennsylvania Supreme Court dramatically upended the rules governing mail ballots—effectively establishing a cure process for all mail-ballot errors—*after* mail voting commenced and *less than two weeks* before Election Day. The Court should enter a stay to preserve the status quo rule set by the General Assembly, which the Butler County Board of Elections faithfully followed.

Although this Court has not yet had occasion to apply *Purcell* in the context of reviewing last-minute changes to federal electoral rules imposed by state courts, the rationales behind *Purcell* apply with full force here. The majority's decision—not an order from this Court—will sow "judicially created confusion." *RNC*, 589 U.S. at 425**.** Nor is this case one in which "particular circumstances" indicate that correcting the lower court's eleventh-hour alteration would itself cause disruption. *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurral). While the applicants in *Moore* urged this Court to adopt a new congressional map on the eve of an election—an extraordinarily disruptive act—Applicants ask only for this Court to restore the rules that governed

Pennsylvania ongoing election until a few days ago. That relief would impose *zero* burdens on election officials, who would simply process provisional ballots as they did before the majority's belated, judicially ordered rule change.

A stay is also warranted because this Court is likely to grant certiorari and reverse the ruling below. The Elections and Electors Clauses of the U.S. Constitution "expressly vest[] power" to set federal election rules "in 'the Legislature' of each State, a deliberate choice that this Court must respect." *Moore*, 600 U.S. at 34. Consequently, this Court must review state court interpretations of election laws enacted by state legislatures to ensure that "state courts [do] 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.

"Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication." *Id.* at 39 (Kavanaugh, J., concurring). Under *any* standard of review, the majority's interpretation of the Election Code is not remotely plausible and cannot stand. The court below ignored unambiguous statutory language directing that a "provisional ballot shall not be counted if the elector's absentee or mail-in ballot is timely received by a county board of elections," *id.* § 3050(a.4)(5)(ii)(F)—and overrode it with a dictionary definition of a stray word in a *judicial opinion*. App. 35a. This outlandish move "transgress[ed] the ordinary bounds of judicial review" and rewrote the rule enacted by the General Assembly. *Moore*, 600 U.S. at 36. If "the language of an opinion is not always to be parsed as though" it were the "language of a statute," *CBS,*

Inc. v. FCC, 453 U.S. 367, 385 (1981), surely a court may never *replace* the statutory text with terms plucked from judicial opinions, *see, e.g*, *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting) ("Judicial opinions are not statutes, and we don't dissect them word-by-word as if they were.").

This question is tremendously important and merits this Court's attention. In recent Pennsylvania elections, *tens of thousands* of ballots have been rejected for violating mandatory election rules—and voters got no mulligan in those elections. In 2020, under the General Assembly's plain directive, about 1% of returned mail ballots were not counted because of missing secrecy envelopes. *See* MIT Election Data + Science Lab, How Many Naked Ballots Were Cast in Pennsylvania's 2020 General Election?, https://electionlab.mit.edu/articles/how-many-naked-ballots-were-cast-pennsylvanias-2020-general-election. Rejection rates for missing signatures and dates have varied in recent elections, but each type of error could disqualify over 10,000 ballots in the 2024 General Election. *See 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*, 322 A.3d 221 (Pa. 2024); Carter Walker, *Redesigned Envelope Leads to Fewer Rejected Mail Ballots*, Spotlight PA (May 31, 2024), spotlightpa.org/news/2024/05/Pennsylvania-election-2024-mail-ballot-rejection-reasons-incorrect-date (noting rejection rate for missing signature of 0.36% in 2024 Primary Election). Now, thanks to the majority's decision, those individuals get a re-do via provisional ballot. Because Pennsylvanians voting by mail already often get

pre-election notice of mail-ballot errors, *see* App. 5a; *post*, at n.3, tens of thousands of provisional votes that are flatly illegal under the Election Code are likely to be counted. That outcome risks tainting—or even flipping—the result of one or more elections in Pennsylvania, including its statewide U.S. Senate race or even the nationwide Presidential Election. That is an unacceptable result by any measure.

Furthermore, failing to correct the majority's untenable distortion of the General Assembly's laws would send a strong message that judicial review under the Elections and Electors Clauses is toothless—and thus liberate state courts to invalidate federal election rules with impunity.

Equitable considerations also strongly weigh in favor this Court's intervention. Absent a stay, Applicants will suffer irreparable injury because there is no remedy for general election results tainted by votes counted in violation of the General Assembly's plain directives. And the public interest favors a stay because Pennsylvania and all its voters suffer irreparable harm when courts refuse to enforce duly-enacted statutes. A stay would ensure that Pennsylvania's pivotal election will be conducted according to rules set by the people's elected representatives, not courts.

Finally, at minimum, the Court should order that provisional ballots cast by individuals whose mail ballots were timely received and defective be segregated from all other ballots and not included in the official vote tally, pending further order of this Court. The Court took this step in 2020 under similar circumstances to prevent a similar case from becoming moot. *See Republican Party of Pa.*, 2020 WL 6536912, at *1; *Boockvar*, 141 S. Ct. at 1-2 (statement of Alito, J.). The same relief would

preserve a clean vehicle for this Court to rectify the lower court's lawless ruling and provide badly needed enforcement of the Elections and Electors Clauses.

I. A STAY IS WARRANTED UNDER *PURCELL*.

This Court should, without opining on the merits, enter a stay under *Purcell*. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Milligan*, 142 S. Ct. at 879 (Kavanaugh, J., concurral) (explaining that Courts can enter *Purcell* stays without opining on the merits). Such a stay would make clear that the rules for the 2024 General Election are set—and that courts must now respect whatever is the status quo, and refrain from any last-minute judicial rewrites. After all, it is a "bedrock tenant of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences." *Id.* at 880-81. Here, the Pennsylvania Supreme Court drastically changed Pennsylvania's election rules *after* mail voting commenced and less than *two weeks* before Election Day. The Court should halt that "[l]ate judicial tinkering"—or, more accurately, sledgehammering—and enter a stay. *Id.*

Respondents will likely argue that the *Purcell* principle does not apply to federal court review of *state* court injunctions. This Court has not embraced that self-defeating exception to *Purcell*. *See, e.g.*, *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76-78 (2000) (per curiam) (unanimously vacating last-minute change to federal electoral rule by state court). Nor should it, because the rationales behind *Purcell* apply in this context, too.

First, *Purcell* ensures that *state legislatures*, not judges, decide how elections—particularly federal elections—are run. This makes perfect sense: "Legislators can be held accountable by the people for the rules they write or fail to write; typically, judges cannot." *DNC*, 141 S. Ct. at 29 (Gorsuch, J., concurral). And state legislatures can "bear the responsibility for any unintended consequences" behind election-rule changes, whereas courts do not. *Id.* at 31 (Kavanaugh, J., concurral).

Second, *Purcell* acknowledges that last-minute judicial rule changes cause voter confusion and public doubt in the integrity of the election. *Purcell*, 549 U.S. at 4-5; *DNC*, 141 S. Ct. at 30 (Gorsuch, J., concurral) (noting that "[l]ast-minute changes to longstanding election rules . . . invit[e] confusion and chaos and erod[e] public confidence in electoral outcomes"); *id.* at 31 (Kavanaugh, J., concurral) ("When an election is close at hand, the rules of the road should be clear and settled."); *id.* (noting that the *Purcell* principle "giv[es] citizens (including the losing candidates and their supporters) confidence in the fairness of the election"). There is no reason why last-minute judicial changes to federal election rules by state courts would be any less destabilizing than last-minute changes by federal courts.

Third, *Purcell* reflects the reality that *any* last-minute judicial intervention in elections disrupts election administration. *See id.* ("If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes."); *id.* (*Purcell* principle "not only

prevents voter confusion but also prevents administrator confusion"); *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral) ("[S]tate and local election officials need substantial time to plan for elections."). Once again, there is no distinction between state- and federal-court rule changes on this score. Here, for example, county officials are currently scrambling to determine whether they are legally *required* to give notice of mail-ballot defects to honor the newly minted provisional-ballot right.[3] Relying on the theory accepted by the Pennsylvania Supreme Court majority, the Pennsylvania Commonwealth Court recently held that county boards are *required* to establish notice procedures so that all mail voters who submit defective mail ballots have a chance at a do-over. *See Center for Coalfield Just. v. Washington Cnty. Bd. of Elections*, 2024 WL 4272040 (Pa. Commw. Ct. Sept. 24, 2024). That ruling is under review by the Pennsylvania Supreme Court. Regardless of the outcome, uncertainty reigns across the Commonwealth in the midst of a pivotal national election.

Finally, *Purcell* seeks to discourage last-minute election litigation in favor of suits brought well in advance of the chaos surrounding Election Day. *See DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurral). If this Court holds that *Purcell* does not provide a check on state-court tampering with federal election rules, politically motivated litigants will flood state courthouses in pursuit of just that. Just as the elected Pennsylvania Supreme Court issued a last-minute ruling at the Pennsylvania

[3] Pennsylvania's SURE system gives county boards the *option* to give such notice, and some counties choose to do so, as Butler County did in this case. App. 4a-5a.

Democratic Party's request in this case, litigants may believe that courts in other States will oblige similar requests.

This Court should apply *Purcell* to the late-breaking judicial rule change at issue in this case. There is no basis to adopt a novel exception to shield state courts from *Purcell* scrutiny. As *Bush v. Palm Beach County Canvassing Board* made clear, this Court has a constitutional responsibility to review last-minute judicial changes to federal electoral rules by *all* American courts. 531 U.S. at 76-78; *see Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) (recognizing this point).

This Court's denial of a stay in *Moore v. Harper* does not suggest otherwise. There, this Court denied a requested order "requiring North Carolina to change its existing congressional election districts" before an impeding election. *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurral). That relief would have been uniquely disruptive. As Justice Kavanaugh explained, given the "particular circumstances and timing of the impending primary elections in North Carolina" at issue in *Moore*, ordering new district lines would have been very problematic. *Id.* Indeed, such an order would have required "heroic efforts" by "state and local authorities" over just "the next few weeks." *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral) (analyzing last-minute order for new congressional districts). Entering a stay under those "particular circumstances" would have been inequitable. *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurral).

Here, by contrast, *Purcell* should apply. The lawful status quo under the Elections and Electors Clauses is the rule passed by the General Assembly. *See* U.S.

Const. art. II, § 1, cl. 2; *id.* art. I, § 4. Restoring that status quo, which existed until the majority's decision a few days ago, would not cause any voter confusion or chaos or application of new rules. It would simply require election officials to apply the exact same rules for processing provisional ballots that governed before that decision. *See, e.g.*, *Allegheny Cnty. Provisional Ballots*, 2020 WL 6867946, at *4-5. No voter would be confused or unfairly prejudiced; voters who submit mail ballots and wish them to be counted can follow the rules, as the overwhelming majority of mail voters have successfully done in recent elections. *See Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 669 (2021) ("Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules.").

II. THERE IS A "REASONABLE PROBABILITY" OF CERTIORARI AND A "FAIR PROSPECT" OF REVERSAL.

A stay is also warranted because there is a "reasonable probability" this Court will grant certiorari and reverse the ruling below on the merits. *Hollingsworth*, 558 U.S. at 190. The Pennsylvania Supreme Court's ruling effectively nullifies the General Assembly's unambiguous command that a "provisional ballot *shall not be* counted if the elector's absentee or mail-in ballot is *timely received* by a county board of elections. 25 P.S. § 3050(a.4)(5)(ii)(F) (emphases added). This is an egregious usurpation of the General Assembly's constitutional authority to set rules for federal elections.

A. Pennsylvania Law Unambiguously Prohibits Counting Respondents' Provisional Ballots.

The Constitution's 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). Likewise, 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. *Id.* art. I, § 4, cl. 1 (emphasis added).

"[B]ecause [these clauses] assign[] authority respecting federal elections to state legislatures, . . . state courts do not have free rein" in interpreting state legislative enactments. *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring). This Court has not settled on a governing standard. *See id.* at 36 (majority). Chief Justice Rehnquist and Justice Kavanaugh have asked "whether the state court 'impermissibly distorted' state law 'beyond what a fair reading required.'" *Id.* at 38 (Kavanaugh, J., concurring) (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)). Justice Souter formulated the inquiry as "whether the state court exceeded 'the limits of reasonable' interpretation of state law." *Id.* (quoting *Bush*, 531 U.S. at 133 (Souter, J., dissenting)). Both standards instruct that this Court's review of the Pennsylvania Supreme Court's ruling be "deferential" but "not [an] abdication." *Id.* at 39.

Only utter "abdication" could justify affirming the Pennsylvania Supreme Court's ruling. Just as this Court must adhere to plain statutory text, Pennsylvania's courts cannot "ignore the clear mandates of the Election Code." *In re Canvass of*

Absentee Ballots of Nov. 4, 2003 General Election, 843 A.2d 1223, 1231 (Pa. 2004). As the General Assembly has mandated: "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. Stat. § 1921(b).

There is zero textual justification for the Pennsylvania Supreme Court's ruling. The General Assembly commanded that "[a] provisional ballot *shall not be counted* if the elector's absentee or mail-in ballot is *timely received* by a county board of elections." 25 Pa. Stat. § 3050(a.4)(5)(ii)(F) (emphasis added). Thus, a county board *must not* count *any* provisional ballot cast by a voter whose mail ballot was "timely received" before the deadline of 8 p.m. on Election Day. *Id.*

That should be the end of the case. Respondents each submitted a "mail-in ballot"; the ballots were "timely"; and the ballots were "received" by a "county board of elections." *Id.* The question is whether Respondents' provisional ballots can be counted, and the General Assembly has said they "shall not be." *Id.*

But if more were somehow needed, two other provisions of the Election Code confirm that voters whose mail ballots have been timely received by a county board may not vote provisionally. *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). Therefore, 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). Once again, an individual who submits a defective mail ballot has "cast" a ballot, just as a fisherman will often "cast" his line into the water without catching a fish. *Cast*, American Heritage Dictionary (2024) ("To *deposit* or indicate (a ballot or vote)." (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.

B. The Pennsylvania Supreme Court's Contrary Interpretation Is Untenable.

The Pennsylvania Supreme Court's contrary reasoning cannot stand under any standard of review. The majority acknowledged the legislative command that provisional ballots "shall not be counted" when an elector's mail ballot is "timely received." App. 29a-30a (citing 25 Pa. Stat. § 3050(a.4)(5)(ii)(F)). The majority's rationale—not embraced by the lower courts or offered by any party—for ignoring that unambiguous language is, to put it generously, imaginative. It reasoned that mail ballots without secrecy envelopes are "void"; that a "void" ballot has no legal

effect; and that such ballots are somehow never "received" by election officials because they never existed in a legal sense. App. 35a-37a.

Each step in this error-filled syllogism makes no sense. To start, the relevant provisions of the Election Code never use the word "void." The majority lifted that word from a prior *judicial* decision stating that the consequence of not including a secrecy envelope was that "the envelopes and the ballots contained therein shall be set aside and declared void." *Id.* at 31a (quoting *Pa. Democratic Party*, 238 A.3d at 375). And that earlier decision's use of "void" was not drawn from any *relevant* statute; it was simply the court's chosen analogy for describing the ballots' ineligibility for counting. Doubling down, the majority decision here cast about for other judicial decisions that described ballots as "void." *Id.* at 32a-33a. But the fact that the majority was not even purporting to interpret the relevant sections of the Election Code—but rather scattered terminology in judicial opinions, *id.* at 35a—strongly points towards usurpation of the General Assembly's authority. *Cf. CBS*, 453 U.S. at 385.

The majority next used a dictionary to interpret "void"—again, a word of its sole creation not present in any relevant statute. App. 35a. "Void," the court reasoned, means "that something has 'no legal effect.'" *Id.* (quoting *Void*, Black's Law Dictionary (12th ed. 2024). Of course, other definitions of "void" suggest merely that something is "not valid." *E.g., Void*, American Heritage Dictionary (2024) ("To make void or of no validity; invalidate."). But the majority ignored those in favor of the one definition that would enable the next step in its chain of illogic.

Yet the majority's next step is its most bizarre. It reasoned that treating an invalid mail ballot as a "ballot . . . in the election"—*without counting it*—nonetheless "give[s] it legal effect." App. 36a. But the majority could not tolerate that result because it would have conflicted with the majority's cherry-picked 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 state ballot-casting rules. *Id.* at 35a. As the dissent explained, that reasoning "causes" a timely received mail ballot "to essentially 'disappear' as if it never existed." App. 71a (Brobson, J., dissenting).

That makes no sense. A ballot does not cease to be a ballot just because it is ultimately rejected. This Court has recognized that reality when it has repeatedly described rejected ballots as, well, still "ballots." *See, e.g.*, *Brnovich*, 594 U.S. at 682 n.18 (referring to "discarded ballots" rejected by Arizona); *id.* at 719 (Kagan, J., dissenting) (same); *Roudebush v. Hartke*, 405 U.S. 15, 23 (1972). The General Assembly's 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 all steps of the voting process: when it is approved, printed, and sent to individuals who request 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 in prior cases referred to invalid mail ballots as "ballots," not as *non*-ballots. *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 counted. 25 Pa. Stat. § 3050(a.4)(5)(ii)(F).

Rather than endorse the Pennsylvania Supreme Court's disappearing act, the Court should enforce the General Assembly's unambiguous command. "A provisional ballot *shall not be counted* if the elector's absentee or mail-in ballot is *timely received* by a county board of elections." *Id.* (emphases added). All agree that Genser's and Matis's mail ballots were received before the statutory deadline. That should be the end of the matter. *See Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) (state courts cannot "impermissibly distort[]" state statutes).

The majority gestured at two additional considerations to bolster its interpretation, but neither changes the analysis. *First*, the majority speculated about the General Assembly's statutory "purpose." App. 39a-40a. The majority, of course, ignored the fact that the General Assembly created universal mail voting as part of a bipartisan compromise that included mandatory election rules and no cure process. *See* Act 77 § 11 (strict nonseverability provision). In any event, the majority's speculation—unsupported even by citations to any legislative history—cannot displace unambiguous text under Pennsylvania law. *Shafer Elec. & Constr. v. Mantia*,

96 A.3d 989, 994 (Pa. 2014) (explaining "it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include") (quoting *Commonwealth v. Rieck Inv. Corp.*, 213 A.2d 277, 282 (Pa. 1965)); *Ursinus Coll. v. Prevailing Wage Appeals Bd.*, 310 A.3d 154, 173 (Pa. 2024) ("invocations of, and arguments about, public policy cannot override the plain language of" statutes or "contravene the plain meaning of the[ir] term[s]") (quoting *Barnard v. Travelers Home & Marine Ins. Co.*, 216 A.3d 1045, 1054 (Pa. 2019)); *see also Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 777 (2019) ("And if trying to peer inside legislators' skulls is too fraught an enterprise, shouldn't we limit ourselves to trying to glean legislative purposes from the statutory text where we began?"). As the Commonwealth Court previously recognized in this precise provisional-ballot context, courts are "not at liberty to disregard the clear statutory mandate that provisional ballots to which this language applies must not be counted." *Allegheny Cnty. Provisional Ballots*, 2020 WL 6867946, at *4-5.

Second, the majority hinted in a throw-away sentence that enforcing the Election Code's plain terms would violate the Pennsylvania Constitution's Free and Equal Elections Clause. App. 41a. The majority did not actually issue that holding, as Justice Dougherty's concurrence made clear. *Id.* at 47a (Dougherty, J., concurring) (claiming the majority "merely resolv[ed] a state statutory interpretive question"). And for good reason: The Pennsylvania Supreme Court has *never* struck down a ballot-casting rule under the Free and Equal Elections Clause. *See, e.g.*, A. McCall, Elections, *in* K. Gormley et al., The Pennsylvania Constitution: A Treatise on Rights

and Liberties 215-232 (identifying the types of cases the Clause has been applied in). And it has certainly never suggested that any right to vote *obligates* the General Assembly to provide mail voters with a do-over when they make mistakes. Just the opposite: The Pennsylvania Supreme Court recently held the Free and Equal Elections Clause does *not* require the General Assembly to adopt a cure procedure for mail-ballot errors. *Pa. Democratic Party*, 238 A.3d at 372-74. The decision whether to give mail voters who make a mistake a do-over, the court explained, was the General Assembly's to make. *Id.* at 374. The majority unceremoniously tossed that decision, like so much else in Pennsylvania election law, onto the judicial scrap-heap.

By exalting a dictionary definition of a word in a judicial opinion over the language enacted by the General Assembly, the Pennsylvania Supreme Court "transgress[ed] the ordinary bounds of judicial review" so as to "arrogate to [itself] the power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36. If *that* reasoning can escape or survive scrutiny under *Moore*, then judicial review under the Elections and Electors Clauses is an empty formality that state courts can safely ignore.

C. Immediate Attention From This Court Is Needed To Safeguard The Already-Commenced 2024 General Election.

This case presents a question of serious national importance that justifies granting certiorari. *See ante*, n.1; *Does 1-3*, 142 S. Ct. at 18 (Barrett, J., concurral).

This case could plausibly tip control of the U.S. Senate or even the outcome of the 2024 Presidential Election. As Pennsylvania's Secretary of the Commonwealth has explained, Pennsylvania is the Nation's "biggest swing state." Nat'l Pub. Radio,

Pennsylvania's Top Elections Official on Conspiracies, the Voting Process, and What to Expect on Election Night (Oct. 22, 2024), https://www.npr.org/2024/10/22/nx-s1-5157599/al-schmidt-pennsylvania-elections-official-on-voting-process. Multiple election forecasters have noted Pennsylvania is the most likely tipping-point state. *See, e.g.*, 538, *Who is Favored to Win the 2024 Presidential Election* (last visited Oct. 27, 2024), projects.fivethirtyeight.com/2024-election-forecast. As explained, the Pennsylvania Supreme Court's ruling will likely require election officials to count tens of thousands of ballots that are illegal under the General Assembly's enactments. *See ante,* at 15. In a close race, those votes could easily tip the State and the national result. The question of whether those votes can be counted is "an important federal question." Sup. Ct. R. 10.

This Court has frequently granted stays and certiorari in cases of national importance even in the absence of any split of appellate authority. *See, e.g.*, *Labrador v. Poe*, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J., concurral) ("[S]ome of the most significant and difficult emergency applications will readily clear the certworthiness bar."); United States Petition for a Writ of Certiorari at 30, *Garland v. VanDerStok*, No. 23-852 (Mar. 8, 2024), *cert. granted* Apr. 22, 2024 ("The absence of a conflict in the courts of appeals does not counsel against certiorari here."). In any event, similar cases presenting questions under the Elections and Electors Clauses are currently before the Court, *see, e.g.*, *Mont. Democratic Party v. Jacobsen*, 545 P.3d 1074 (Mont. 2024) (petition for certiorari docketed Aug. 28, 2024), and more will surely come soon. There are significant open questions over how this Court will review state-court

interpretations of federal election rules, including which standard of review applies. *See, e.g.*, *Moore*, 600 U.S. at 38-39 (Kavanaugh, J., concurring). This case provides an ideal and clean vehicle to answer those questions: It features a straightforward question of statutory interpretation and does not involve potentially difficult questions that can arise from the review of state court interpretations of state constitutions. *See DNC*, 141 S. Ct. at 28 (Roberts, C.J., concurral) (recognizing that review of state-court rulings under state constitutions presents difficult questions under Elections and Electors Clauses). As Justice Thomas recognized in *Moore*, applying the Elections and Electors Clauses is easier when interpreting state statutes than state constitutions. 600 U.S. at 64 (Thomas, J., dissenting).

More fundamentally, this case is an important test of whether this Court will provide meaningful review of state-court interpretations of federal electoral rules. In *Moore v. Harper*, this Court promised that such review would not be "abdication." 600 U.S. at 39 (Kavanaugh, J., concurring). If this Court will not intervene in a case with facts as stark as these, politically-aligned entities will be emboldened to seek favorable last-minute rule changes for federal elections, expecting the same reward the Pennsylvania Supreme Court handed the Pennsylvania Democratic Party in this case. Given the "particular circumstances and timing" of this decision, there is no one else who can intervene except for this Court—and every reason for it to do so. *See, e.g.*, *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurral).

III. APPLICANTS WILL SUFFER IRREPARABLE HARM ABSENT A STAY, AND THE BALANCE OF THE EQUITIES CLEARLY FAVORS A STAY.

The equities also weigh strongly in favor of granting a stay. *First*, Applicants would suffer irreparable injury because, without a stay or other relief, their request for certiorari will become moot and they will forever lose their ability to obtain such review. Election Day is in 8 days. County boards of elections may start canvassing provisional ballots on Election Day. 25 Pa. Stat. §§ 3146.8(g)(1.1), 3050(a.4)(4). Without this Court's intervention, the county boards will count ballots that are unlawful under the Election Code. Once that happens, it will be impossible to repair election results that have been tainted by illegally counted ballots: The Court "cannot turn back the clock and create a world in which [Pennsylvania] does not have to administer the [2024] election under the strictures of the [challenged ruling]." *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015); *see Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020) ("And absent a stay, the intervenors would lack any meaningful right to appeal the preliminary injunction, given [the deadline by which] ballot order decisions must be made."). This impending mootness is classic irreparable harm and "'perhaps the most compelling justification'" for a stay. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (quoting *New York v. Kleppe*, 429 U.S. 1037, 1310 (1976) (Marshall, J., in chambers)); *accord Chafin v. Chafin*, 568 U.S. 165, 178 (2013) ("When . . . the normal course of appellate review might otherwise cause the case to become moot,

issuance of a stay is warranted.") (quoting *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers)).

Second, "[t]he counting of votes that are of questionable legality . . . threaten[s] irreparable harm" not only to Applicants, their voters, and its supported candidates, but also to all Pennsylvanians and even "the country, by casting a cloud upon . . . the legitimacy of [the nationwide Presidential] election." *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurral). And here, the "issue" presented is "precisely whether the votes that have been ordered to be counted" under the Pennsylvania Supreme Court's order are "legally cast vote[s]" under "[Pennsylvania] law" and the U.S. Constitution. *Id.* at 1046–47 (Scalia, J., concurral). A stay should be "granted" for this reason alone. *Id.* at 1046.

Third, an injunction barring the State "from conducting this year's elections pursuant to . . . statute[s] enacted by the Legislature"—where no party has shown those statutes to be unconstitutional—"would seriously and irreparably harm the State," the General Assembly, and its voters. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *see also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). In other words, it "serves the public interest" to "giv[e] effect to the will of the people by enforcing the laws they and their representatives enact." *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020). And the public's interest in "uphold[ing] the will of the people, as expressed by acts of the state legislature" does

not wane simply because—as here—the State itself does not choose to defend the law. *Pavek*, 967 F.3d at 909.

Fourth, a stay would prevent significant injuries to Applicants' political operations. Courts have repeatedly recognized that political parties suffer cognizable injuries when courts force them to compete under election rules other than those enacted by legislatures. *See, e.g.*, *Mecinas v. Hobbs*, 30 F.4th 890, 898 & n.3 (9th Cir. 2022) (candidates and political parties have a "shared interest in fair competition" and suffer injury when forced "to participate in an illegally structured competitive environment") (cleaned up); *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 86-87 (D.C. Cir. 2005) (candidates suffer injury when changes to election laws and procedures "alter the competitive environment's overall rules" and force them to "adjust their campaign strategy"). Here, the Pennsylvania Supreme Court is forcing Applicants to compete under rules contradicting those enacted by the General Assembly. Consequently, Applicants are scrambling to "adjust their campaign strategy," *Shays*, 414 F.3d at 87, and also to educate candidates, poll watchers, and voters about the new cure procedures suddenly established by the majority's decision.

Fifth, a stay would not significantly harm any party. A stay would merely preserve the status quo that existed until the recent court decisions in this case. Those who vote by mail are provided clear instructions on how to comply; indeed, Respondents have never claimed otherwise. Individuals who fail to follow those instructions are not denied any right to vote. "Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires

compliance with certain rules." *Brnovich*, 594 U.S. at 669. "Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right." *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissental). So too here: Voters who fail to Pennsylvania's commonsensical election rules suffer no constitutional harm from being unable to cast provisional ballots the General Assembly has expressly forbidden.

IV. AT MINIMUM, THE COURT SHOULD ORDER THE SEGREGATION OF BALLOTS TO PRESERVE THE POSSIBILITY OF JUDICIAL REVIEW.

Finally, at minimum, the Court should preserve its jurisdiction and Applicants' right to seek review by ordering that any provisional ballot cast by an individual whose mail ballot was timely received but defective (i) be segregated, and kept separate, from all other ballots and (ii) if counted, be counted separately and not included in the official vote tally. The Court took precisely this step in 2020 to prevent potential mootness of a petition for review brought by Applicant Republican Party of Pennsylvania from a Pennsylvania Supreme Court decision in an identical posture and raising the Electors and Elections Clause issue. *See* Order, *Republican Party of Pa. v. Boockvar*, No. 20A84, 2020 WL 6536912, at *1 (U.S. Nov. 6, 2020) (Alito, J., Circuit Justice); *Boockvar*, 141 S. Ct. at 1-2 (statement of Alito, J.); *see also* 28 U.S.C. § 1651(a) (recognizing this Court's power to "issue all writs necessary or appropriate in aid of [its] jurisdiction[]"). This limited relief is easily feasible because election officials record both the identity of individuals whose mail ballots are timely received

and the identity of individuals who cast provisional ballots. *See* App. 3a-5a. Nor would it impose substantial burdens on county boards, who complied with the Court's segregation order in 2020 without any reported problems.

Importantly, such an order would facilitate this Court's review of the decision below after Election Day. Even if the Pennsylvania Supreme Court's decision does not change the outcome of any election, the question of whether the provisional ballots can be added to the vote total would remain a concrete dispute this Court can review. *See Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 735-38 (2021) (Thomas, J., dissental); *id.* at 738-40 (Alito, J., dissental). As this Court knows, this is the second consecutive presidential election in which the Pennsylvania Supreme Court has changed important election rules at the last minute. *See id.* at 737 (Thomas, J., dissental) (noting "no fewer than four other decisions of the Pennsylvania Supreme Court" in 2020 "implicat[ing] the same issue" under the Elections and Electors Clauses). Reviewing that court's authority to do so—even after Election Day (when the pressure of an imminent election would be absent)—would "provide invaluable guidance for future elections." *Id.* at 739 (Alito, J., dissental).

In sum, beyond its potential impact on the 2024 General Election results, this case presents a clean and ideal vehicle for this Court to clarify the standard of review applicable to state-court rulings under the Elections and Electors Clauses. The opportunity to provide that much-needed clarity could be lost here if the Court denies a stay and the alternative request to segregate the affected ballots.

CONCLUSION

The Court should stay the Pennsylvania Supreme Court's order or, at a minimum, preserve its jurisdiction and Applicants' rights by ordering the segregation of the affected provisional ballots.

Respectfully submitted,

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