No. _____

In the Supreme Court of the United States

CORNEL WEST, MELINA ABULLAH, GERALDINE TUNSTALLE, KATHARINE HOPKINS-BOT, AND CHARLES HIER

Applicants,

v.

PENNSYLVANIA DEPARTMENT OF STATE AND AL SCHMIDT, IN HIS CAPACITY AS SECRETARY OF THE COMMONWEALTH,

Respondents.

EMERGENCY APPLICATION FOR INJUNCTION

To the Honorable Samuel A. Alito, Jr., Associate Justice of the U.S. Supreme Court and Circuit Justice for the Third Circuit

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are Cornel West and Melina Abdullah, candidates for President and Vice-President of the United States, and registered Pennsylvania voters Geraldine Tunstalle, Katherine Hopkins-Bot, and Charles Hier. Applicants were Plaintiffs in the United States District Court for the Western District of Pennsylvania and Appellants in the United States Court of Appeals for the Third Circuit.

Respondents are the Pennsylvania Department of State and Al Schmidt in his official capacity as Secretary of the Commonwealth. Respondents were Defendants in the United States District Court for the Western District of Pennsylvania and Appellees in the United States Court of Appeals for the Third Circuit.

The proceedings below were:

1. *West, et al. v. Department of State, et al.*, No. 24:2913 (3d Cir. 2022) – injunction pending appeal denied October 30, 2024.

2. *West, et al. v. Department of State, et al.*, No. 2:24-CV-1349 (W.D. Pa.) – judgment entered October 10, 2024; injunction pending appeal denied October 19, 2024.

The related proceedings include:

1. *Williams v. Pennsylvania Dep't of State*, 25 WAP 2024, 2024 WL 4195131 (Pa. Sept. 16, 2024).

2. *Williams v. Pennsylvania Dep't of State*, 394 M.D. 2024, 2024 WL 3912684 (Pa. Commw. Aug. 23, 2024).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court and Circuit Justice for the Third Circuit:

This action arises from Respondents election officials' unconstitutional interpretation of the Pennsylvania Election Code provisions as applied to minor political parties, known as political bodies in Pennsylvania. Respondents spent the past few months denying ballot access to Applicants Doctors Cornel West and Melina Abdullah—the presidential and vice-presidential nominees of the Justice for All (JFA) political body. Although the District Court agreed that the likelihood that these efforts were unconstitutional was indisputably clear, it denied injunctive relief because Respondents' delay pushed the dispute too close to the upcoming election.

Applicants immediately appealed and sought an injunction pending appeal from the District Court and the Third Circuit, both of which were denied. Even though Respondents' interpretation of the Election Code violates the United States Constitution, both courts denied that relief based solely on the *Purcell* principle articulated by this Court in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), which counsels caution in granting relief in the election context.

Allowing Respondents' unlawful conduct to preclude candidates access to the ballot in violation of their constitutional rights simply because election officials' delay pushes a dispute close to an election is anathema to the principles embodied by the First and Fourteenth Amendments. Applicants ask this Court to issue an injunction pending appeal to the Third Circuit, directing Respondents to post at all polling locations across Pennsylvania on election day that Cornel West is a candidate for President of the United States and voters can write him in on their ballot provided

they do not vote for any other presidential candidate, and to grant certiorari on the application. Applicants ask this Court to issue this relief to vindicate their constitutional rights and send a clear message that when the government restricts participation in the marketplace of ideas in violation of the Constitution, it cannot avoid accountability by running out the clock. *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.").

OPINIONS BELOW

The Third Circuit's order is not yet reported but is reproduced at App. 15a. The District Court's decision is unreported and reproduced at App. 1a-12a.

JURISDICTION

The district court denied Applicants a preliminary injunction and an injunction pending appeal. The Third Circuit also denied Applicants a preliminary injunction pending appeal. This Court has jurisdiction to issue an injunction and, ultimately, grant certiorari to review the Third Circuit's final decision. 28 U.S.C. § 2101(e), 28 U.S.C. § 1651(a). *See also* S. Ct. Rules 22 and 23.

STATEMENT OF THE CASE

I. Nomination Paper Requirements and Submission

On July 11, Applicant Drs. Cornel West and Melina Abdullah (Candidates) submitted their candidate affidavits and Nomination Papers with Respondents. The Nomination Papers were signed by over 13,000 registered Pennsylvania voters, including Applicants Geraldine Tunstalle, Katherine Hopkins-Bot, and Charles Hier (Voters). Yet Respondents refused to accept and certify Candidates' Nomination Papers unless and until each of the 19 individuals designated as presidential electors

therein submitted separate "candidate affidavits." This refusal was premised on Section 951 of the Pennsylvania Election Code. 25 P.S. § 2911.

Section 951 of the Election Code provides that "nomination of candidates for any public office may also be made by nomination papers signed by qualified electors of the State, or of the electoral district for which the nomination is made, and filed in the manner herein provided." *Id.* at § 2911(a). For presidential candidates, the minimum signature requirement is 5,000. *See id.* at § 2911(b).[1] Section 951(e) further requires that the nomination papers be accompanied by "an affidavit of each candidate nominated therein[.]" *See id.* at § 2911(e) (emphasis added), and Section 954 further requires "each candidate nominated by a nomination paper" must submit "[t]he same filing . . . as required in section 913 for the filing of nomination petitions by candidates for nomination to the same office." *Id.* at § 2914 (citing 25 P.S. § 2873). A $200 filing fee is also assessed. 25 P.S. § 2873.

In these affidavits, the candidate must state: (1) the election district in which he resides, (2) the name of the office for which the candidate seeks office, (3) that the candidate is eligible for the office, and (4) the candidate will not knowingly violate

[1] Although Section 951(b) imposes a substantially higher signature requirement, *see* 25 P.S. § 2911(b), in *Constitution Party of Pa. v. Cortés*, No. 12-2726, Doc. No. 115 (E.D. Pa. Feb. 1, 2018), the United States District Court for the Eastern District of Pennsylvania found the requirement unconstitutional and replaced it with a 5,000 signature minimum for presidential candidates. By its terms, the decision in *Constitution Party of Pa.* only applies to the three political bodies and minor political parties who lodged the complaint. But the Secretary has recognized that the Court's rationale would likely apply with equal force to all bodies and parties that are required to nominate their candidates by nomination papers and, thus, has announced that the Department would accept nomination papers that comply with the minimum signature requirements interposed by *Constitution Party of Pa.*

any provisions of the Election Code. 25 P.S. § 2911(e). Section 951.1 of the Election Code (the "disaffiliation requirement") further provides that "[a]ny person who is a registered and enrolled member of a party during any period of time beginning with thirty (30) days before the primary and extending through the general or municipal election of that same year shall be ineligible to be the candidate of a political body in a general or municipal election held in that same year." *Id.* at § 2911.1.

According to Respondents' interpretation of Section 951 of the Election Code, every individual designated as a presidential elector is a "candidate for public office" and, thus, must submit a candidate affidavit and otherwise comply with the statutory requirements applicable to candidates for public office. 25 P.S. § 2911. The upshot of Respondents' interpretation was that Candidates were required not only to list all 19 presidential electors on their Nomination Papers before they could even begin gathering signatures, but also to submit candidate affidavits from that specific slate of electors by the August 1 deadline for filing nomination papers.

By contrast, the major political parties choose nominees for President and Vice-President of the United States at their respective party's national convention and, within 30 days, merely submit to the Secretary of State their respective slate of presidential electors. *See* 25 P.S. § 2878. No affidavits or fees are required for major party presidential electors. In fact, it is not even fatal to a major political party's candidates if they do not meet the 30-day deadline for submitting electors. *See id.* (allowing presidential electors to be identified "as soon as may be possible after the expiration of the thirty days").

By late July, it became increasingly clear that Candidates would be unable to timely file affidavits from each of the 19 individuals they originally listed as presidential electors; consequently, their Nomination Papers were rejected and returned on August 6. On August 15, several electors commenced an action in the Commonwealth Court of Pennsylvania to compel acceptance of the Nomination Papers. On August 23, the Commonwealth Court denied relief based on laches, which the Pennsylvania Supreme Court affirmed *via* a single-sentence *per curiam* order. *See Williams v. Pennsylvania Dep't of State*, 394 M.D. 2024, 2024 WL 3912684 (Pa. Commw. Ct. Aug. 23, 2024), *aff'd*, 25 WAP 2024, 2024 WL 4195131 (Pa. Sept. 16, 2024).

On September 25, Applicants filed a verified complaint in the District Court, alleging that Appellees' interpretation of Section 951, as applied to them, violates the First and Fourteenth Amendments to the United States Constitution and, simultaneously, lodged a preliminary injunction motion seeking an order directing Respondents to accept the Candidates' Nomination Papers and certify their names for inclusion on the ballot in November.

II. District Court Hearing and Denial of Injunctive Relief

The District Court held a hearing on Appellants' request for injunctive relief on October 7, during which it heard testimony from Dr. West and Jonathan Marks, the Department's Deputy Secretary of Elections.

Dr. West testified about the pervasive obstacles to ballot access political bodies like JFA face. Further, relative to Pennsylvania, Dr. West further explained

the difficulties JFA, a small political body, faced with identifying electors so early in the process and complying with Appellees' interpretation of Section 951.

Marks testified generally regarding the procedures and tasks that county boards of election must complete before every election, including proofing/printing ballots and testing voting machine. According to Marks, after the candidates are certified, the 67 counties work with their respective vendors to proof/print ballots and test voting equipment. Focusing on logic and accuracy testing, which Marks claimed could take up to a week to complete, Marks said it would be difficult but possible that some counties could accommodate late ballot changes. Marks agreed that late ballot changes to candidate lists occurred in the past and that there were methods for notifying voters to a last-minute change to the ballot adding a new candidate, like Dr. West.

Following the hearing, the District Court expressed "serious concerns with the Secretary's application of the election code's restrictions to Dr. West" because the law as applied appears designed to restrict ballot access. *West et al. v. Dep't of State*, No. 2:24-cv-1349, 2024 WL 4476497, at *1 (W.D. Pa. Oct. 10, 2024). The Court concluded that, on the record, Respondents' interpretation and application of the challenged provisions imposed a burden that was more than minimal without sufficiently weighty or logically connected state interests. *Id.* at *3. The District Court found Applicants were "clearly likely to succeed on the merits," and "unquestionably suffered irreparable harm" from the loss of First Amendment rights. *Id.* at *4 (citing *Kim v. Hanlon*, 99 F.4th 140, 159 (3d Cir. 2024)). But,

relying on the *Purcell* principle, the District Court nevertheless denied injunctive relief because of the proximity to the election, citing risk of error and voter confusion. *Id.* at *5-*7.

Applicants appealed and sought an injunction pending appeal, which the District Court denied for the same reasons.

III. Third Circuit Denial of Injunctive Relief Pending Appeal

Applicants immediately sought an injunction pending appeal from the Third Circuit because the District Court's decision on the merits misapprehended the reach of *Purcell* to these circumstances and was not supported by the facts of record. Respondents again contended that the election was too close and a change could not be made. On October 30, 2024 the Third Circuit denied the request for an injunction pending appeal. CA3 Dkt. 10, App. 15a.

Given the limited time before the November 5, 2024 general election, Applicants submit this Application for Emergency Injunction.

REASONS FOR GRANTING THE STAY

This Court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). An injunction pending appellate review is warranted where the applicants show they are likely to prevail and denying relief "would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020) (per curiam).[2]

[2] This Court can grant injunctions pending a Circuit Court appeal and disposition of the petition for a writ of certiorari if one is ultimately sought. *See*

Several factors govern a single Justice's consideration of this application. Namely, "[i]f there is a 'significant possibility' that the Court would note probable jurisdiction of an appeal of the underlying suit and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted, the Justice may issue an injunction." *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987).

I. Respondents' violations of the First and Fourteenth Amendments are clear, and the lower courts' denial of relief is based on a misreading of *Purcell* that conflicts with other courts.

As the District Court recognized, Respondents' interpretation of Section 951 imposes a burden that, on the current record, is not supported by sufficiently weighty state interests. In other words, the District Court concluded that Applicants are likely to succeed on their underlying constitutional claims. The only basis on which the lower courts denied relief was the *Purcell* principle. But *Purcell*, which this Court has never issued a binding opinion interpreting, does not extend beyond changes to rules governing the mechanics of voting. Because the lower courts' interpretation of *Purcell* to apply to ballot changes conflicts with decisions in other circuits, there is a significant possibility that this Court would note probable jurisdiction of an appeal of the underlying action and reverse. *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. at 1308.

Roman Cath. Diocese of Brooklyn, 592 U.S. at 15. *See also Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (granting stay pending circuit court appeal and grant of certiorari if filed).

A. Respondents' application of the Election Code violates Applicants' constitutional rights.

The primary values protected by the First Amendment to the United States Constitution—"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"—are "served when election campaigns are not monopolized by existing political parties." *Anderson v. Celebrezz*e, 460 U.S. 780, 794 (1983) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Accordingly, minor political parties are crucial to advancing diversity of thought and ensuring competition in the marketplace of ideas. *See id.* Severe burdens on a political body's access to the ballot without any discernable governmental interest proffered to justify such a restriction are an affront to the First and Fourteenth Amendment of the United States Constitution. In the specific context of presidential elections, such burdens must be examined with particular care because the "uniquely important national interest" that is implicated has "an impact beyond [the state's] own borders." *Id.* at 794-95.

Applicants challenged Respondents' application of the Election Code under both the First and Fourteenth amendment. In the context of ballot access, both constitutional claims are analyzed under the same general analytical framework established by this Court in *Anderson*, 460 U.S. at 789, and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The Court balances the character and magnitude of the injury to the constitutional right against "the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff[s'] rights." *Burdick*,

504 U.S. at 434; *Anderson*, 460 U.S. at 789. If it is a severe burden on the right, strict scrutiny applies and the rule must be narrowly tailored and advance a compelling interest. *Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305, 310 (3d Cir. 1999).

Against this constitutional backdrop, Respondents' interpretation of Section 951 violates Applicants' rights. In judging the severity of the burden, courts "must look to the actual effect that the restriction will have on the party." *Id.* at 259. Such a wholistic examination is necessary because "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737 (1974).[3]

To reiterate, Respondents take the position that each of the 19 presidential electors are "candidates for public office" and insist that minor political parties

[3] *See also Constitution Party of Pennsylvania v. Cortes*, 824 F.3d 386, 398 (3d Cir. 2016) (rejecting "the Commonwealth's attempt to separate the two challenged provisions" because "[p]ermitting such a fragmentation of the Aspiring Parties' claims would prevent meaningful review of the real harm caused by the statutory scheme in place here"), *aff'g The Constitution Party of Pennsylvania*, 116 F.Supp.3d 486, 503 (E.D. Pa. 2015) ("It is the ***combined effect*** of the signature requirement with Section 2937's signature validation procedures which creates the substantial burdens in this case." (emphasis added) (citing *Storer*, 415 U.S. at 737 (1974))); *Molinari v. Powers*, 82 F.Supp.2d 57, 71 (E.D.N.Y. 2000) ("The conclusion that the New York ballot access scheme poses an undue burden in its totality invokes the application of the principle 'that a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights.'" (quoting *Storer*, 415 U.S. at 737)); *McLaughlin v. N. Carolina Bd. of Elections*, 850 F.Supp. 373, 393–94 (M.D.N.C. 1994) ("[T]he Court must examine whether the 'totality' of North Carolina's statutory scheme violates plaintiffs' constitutional rights. In considering this issue, the Court must determine whether the laws, operating in conjunction, 'freeze' the status quo by preventing all candidates, other than the two major parties, from any realistic access to the ballot."), *aff'd*, 65 F.3d 1215 (4th Cir. 1995).

seeking to nominate candidates for President and Vice-President of the United States must identify (by name, address, and occupation) all 19 electors on each sheet of their nomination papers. Under this interpretation, if any one of the 19 individuals identified as presidential electors become unable or unwilling to serve in that role, every single signature obtained until that point are rendered invalid. The practical effect of this was that JFA was required to identify 19 individuals before it could begin circulating its nomination papers and when, shortly before the filing deadline, it discovered some of the 19 identified individuals were unable to serve as electors, ballot access for West and Abdullah became practically impossible.

That the obstacle to ballot access erected by Respondents' interpretation was nearly insurmountable is illustrated by the only "options" that were available to JFA when it learned that some of the individuals originally listed as presidential electors would have to be replaced. Those options were to persuade those individuals who were no longer willing to serve to file an affidavit of candidacy and then appoint a replacement, to strike out the original elector names on the circulated nomination papers and replace them, or to discard the original nomination papers and begin the process anew. But these options are not realistic or practical. Moreover, the Secretary is statutorily required to reject nomination papers that have been materially altered after circulation, rendering the second option entirely illusory. *See* 25 P.S. § 2936. By any measure, the ***combined*** practical effect of treating a political body's presidential electors as "candidates for public office" under Section 951 created a substantial burden on ballot access.

The constitutional burdens are even more pronounced compared to the ballot-access procedure prescribed for the presidential and vice-presidential candidates for major political parties. *See Anderson*, 460 U.S. at 794 (explaining, that "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment" because it "discriminat[es] against both candidates and voters whose political preferences lie outside the existing political parties"); *Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 95 F.3d 253, 261-62 (3d Cir. 1996) (cautioning that "minor political parties are not the step-children of the American political process" and summarizing the line of cases in which "the Supreme Court struck down statutes or practices that unnecessarily burdened the ability of minor political parties to participate in the political process").

To begin, unlike political bodies who must identify a full slate of presidential electors before even circulating nomination papers, the major political parties are not required to even identify their slate of presidential electors until thirty days after they have chosen their respective candidate for president. *See* 25 P.S. § 2878. And even then, unlike political bodies, the two major political parties may access the ballot without submitting ***any*** affidavits—not even from their candidates for presidential and vice-presidential candidates. Instead, all that is required of major political bodies is ***some*** type of communication furnishing the names and addresses of presidential electors, which does not even need to be completed within the statutory 30 days. Because they are entirely excused from submitting any affidavits, the major political

parties are also granted ballot access entirely free of charge, whereas JFA, under Respondents' approach, was required to pay $4,200 to access the ballot ($200 for West's affidavit, $200 for Abdullah's affidavit, and $200 for each of the 19 presidential elector affidavits).

Further still, major political parties' presidential electors are not required to even be registered voters in the Commonwealth, let alone registered members of their respective parties. But for political bodies, under Respondents' interpretation, only those who have disaffiliated from the major parties may serve as presidential electors for political bodies. These contrived formalities for presidential electors of political bodies skew the electoral landscape against political participation by grassroots upstart parties by imposing a severe burden.

In sum, strict scrutiny applies and, thus, Defendants must show that their interpretation of Section 951 of the Election Code is: (1) necessary to advance a compelling State interest; and (2) narrowly tailored to achieve that objective. Respondents can do neither.

Although the state may have some state interests for imposing additional restrictions on political bodies, none of them can support this construction of Section 951. The Commonwealth, for example, undoubtedly has an interest in ensuring that candidates can demonstrate some level of perceptible support before accessing the ballot. *See, e.g.*, *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate

on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."). But requiring presidential ***electors*** to be listed on those nomination papers does nothing to further that goal, since it is presidential and vice-presidential ***candidates*** that appear on the ballot—not their electors. And any suggestion that those signing the nomination papers do so because they support the presidential electors, rather than the candidates themselves, borders on the absurd. Indeed, absent injunctive relief, a presidential candidate who ***has*** made the "preliminary showing of a significant modicum of support a level of support" required of political bodies by obtaining signatures from over 13,000 supporters will be prevented from participating in the political process. *Jenness*, 403 U.S. at 442.

Similarly, a state has an interest in "protect[ing] the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134, 145 (1972). And if all Respondents required was that a political body's nomination paper be accompanied by candidate affidavits from nineteen individuals willing and eager to serve as presidential electors, reliance on this well-recognized state interest may be understandable. But again, the combined effect of the interpretation is far more severe. Viewing the statutory scheme's overall effect, there is no basis for concluding that "integrity of the political process" is protected by denying ballot access merely because some of the individuals who had originally agreed to serve as presidential electors for an upstart political body were no longer willing or able to do so. *Id.* Nor does the fact that some of the original presidential electors may have

decided that they can longer act in that capacity suggest that the candidacy of the putative presidential and vice-presidential nominees is "frivolous or fraudulent." *Id.*

Similarly, Respondents cannot articulate any interest in requiring a political body to identify its presidential electors before it can even circulate nomination papers, while allowing a major political party 30 days after it has made its nomination. And it is impossible to conceive of any legitimate state interest that is served by precluding political bodies from the ballot for failure to comply with the deadline while refusing to impose the same requirement on major political parties. Finally, there is no plausible reason for exacting a $4,200 fee from political bodies as a precondition to ballot access, while allowing major political parties to access the ballot free of charge.

In closing, it bears emphasis that minor political bodies serve a crucial role in our elections. Indeed, the primary values protected by the First Amendment to the United States Constitution — "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," — are "served when election campaigns are not monopolized by existing political parties." *Anderson*, 460 U.S. at 794 (quoting *Sullivan*, 376 U.S. at 270). And for the same reasons that the unequal burdens placed on Applicants violate the First Amendment, they also violate the Equal Protection Clause of the Fourteenth Amendment by giving "established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate." *Williams*, 393 U.S. at 31.

B. The injunction Applicants sought would not alter election rules and risk confusion; accordingly, *Purcell* did not militate against relief and this Court is likely to grant certiorari and reverse.

Despite the flagrant constitutional violations at issue, *Purcell* became the lynchpin of this case and the basis on which both lower courts denied injunctive relief. But the District Court and Third Circuit read *Purcell* too broadly in applying it to candidate changes on the ballot. This is a departure from the context of *Purcell* itself and its application across federal courts. Notably, this Court has never issued binding precedent explaining *Purcell* and the lower courts' decisions conflict with its application by state and federal courts. Because the District Court and Third Circuit's interpretation is not grounded in the *Purcell* jurisprudence and deviates from the usual context in which *Purcell* may warrant denying relief, there is a "'significant possibility' that the Court would note probable jurisdiction of an appeal of the underlying suit and reverse[.]" *Am. Trucking Ass'ns, Inc.*, 483 U.S. at 1308; *see also* S.Ct. Rule 10 (considerations for granting certiorari include a court of appeals deciding an important question of federal law that has not been, but should be, settled by this Court or is in conflict with relevant decisions of this Court). Thus, an injunction pending appeal and, ultimately, certiorari is warranted.

Purcell stands for the following proposition: courts should "weigh considerations specific to election cases, in addition to the traditional considerations for injunctive relief." *Kim*, 99 F.4th at 160 (cleaned up). Before this Court in *Purcell* was requests for relief from Arizona and some of its counties from an interlocutory injunction entered by the Ninth Circuit Court of Appeals related to implementation of a new voter identification law on election day. 549 U.S. at 2. Arizona residents and

Indian tribes challenged these requirements, seeking injunctive relief that the District Court ultimately denied. The plaintiffs appealed and a briefing schedule was issued that concluded weeks after the upcoming election. So, the plaintiffs sought an injunction pending appeal, which the Ninth Circuit granted.

This Court vacated the Ninth Circuit's order, emphasizing that it "express[ed] no opinion here on the correct disposition . . . of the appeals." *Id.* at 8. Rather, "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes," vacating the Ninth Circuit's order "allowe[ed] the election to proceed without an injunction suspending the voter identification rules." *Id.* The Ninth Circuit needed to weigh considerations for election cases in addition to the harms, this Court reasoned, because "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5. In sum, *Purcell* related to widespread changes ***in how voters would and could cast a vote on election day***. It was that type of change coupled with the proximity to the election that counseled against injunctive relief in *Purcell*.

"The *Purcell* principle is not new[,]" *Pierce v. N. Carolina State Bd. of Elections*, 713 F.Supp.3d 195, 242 (E.D.N.C. 2024), and, "instead, is steeped in a line of cases going back to the 1960s[.]"[4] *Purcell* merely cautions courts to remain mindful that the realities of the election process are such that, *sometimes*, an injunction aimed at vindicating the rights of voters can have the opposite effect. *Purcell* is a

[4] Harry B. Dodsworth, *The Positive and Negative Purcell Principle*, 2022 Utah L. Rev. 1081, 1127 (2022).

"consideration" rather than a "prohibition" with a chief focus on avoiding election issues that could lead to voter confusion shortly before an election." *Kim*, 99 F.4th at 160. Although the Third Circuit recognized these limitations of *Purcell* in *Kim*, it nonetheless used *Purcell* here as a strict bar to deny injunctive relief that would put Candidates on the ballot, not change voting mechanics.

The Third Circuit in *Kim* was not the only federal court to observe that *Purcell* is principally concerned with avoiding voter confusion. *See, e.g.*, *Voto Latino v. Hirsch*, 712 F.Supp.3d 637, 681 (M.D. N.C. 2024); *VoteAmerica v. Raffensperger*, 609 F.Supp.3d 1341, 1369 (N.D. Ga. 2022); *A. Philip Randolph Inst., of Ohio v. LaRose*, 493 F.Supp.3d 596, 615 (N.D. Ohio 2020). Moreover, the few Courts that have applied *Purcell* in the absence of a specific showing of confusion that disincentivizes voting, have nevertheless emphasized that its prudential bar is generally implicated only where the 11th-hour change in election rules could have a deleterious impact on the right to exercise the franchise.[5] In other words, *Purcell* applies when courts are asked to interfere with election processes and procedures governing the mechanisms of an election. That's not what this case is about.

[5] *See, e.g.*, *Get Loud Arkansas v. Thurston*, __F.Supp.3d__, __, 5:24-CV-5121, 2024 WL 4142754, at *23 n.24 (W.D. Ark. Sept. 9, 2024) ("*Purcell* is not at issue where, . . . the preliminary injunction does not fundamentally alter the nature or rules of the election, create voter confusion, or create an incentive for voters to remain away from the polls[.]" (internal quotation marks omitted)); *Curling v. Kemp*, 334 F.Supp.3d 1303, 1326 (N.D. Ga. 2018) (focusing inquiry on "how injunctive relief at this eleventh-hour would impact the public interest in an orderly and fair election, with the fullest voter participation possible and an accurate count of the ballots cast." (emphasis added)).

And although this Court has never issued a binding decision interpreting *Purcell*, references to its principle almost always relates to late changes to election rules, i.e., the mechanics of voting. *See, e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring) ("That principle—known as the *Purcell* principle—reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled."); *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., concurring) (dissenting from denial of certiorari and noting, in relevant part, that this Court repeatedly "blocked rule changes made by courts close to an election (citing *Purcell*, 549 U.S. at 1)); *Dem. Nat'l Committee v. Wisconsin State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring) (concluding an injunction was unwarranted where it, *inter alia*, "changed election rules too close to the election" contrary to *Purcell*); *Republican Nat'l Committee v. Dem. Nat'l Committee*, 589 U.S. 423, 424 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." (citing *Purcell*, 549 U.S. at 1)); *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) ("[T]his Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election." (citing *Purcell*, 549 U.S. at 1)).

These rules that this Court referenced fundamentally alter how voters exercise the franchise, spanning from changes in mail-in ballot deadlines, to changes absentee ballot deadlines, to altering witness requirements for absentee ballots, and even congressional redistricting. The rules did ***not*** address late additions or exclusions of

candidates from the ballot; such changes are not of the same character as changes to election rules on the eve of election that may cause voter confusion. Indeed, it is hard to fathom how having an additional choice of candidate can lead to ***any*** voter confusion, much less risk exercising the franchise.

Purcell itself and the framework that emerges from courts applying it make evident that late changes to include (or exclude) a candidate from the ballot are not changes to election procedure covered by *Purcell*. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423 (2006) (extending absentee ballot deadlines); *La Union Del Pueblo Entero*, __F.4th at__, 2024 WL 4487493 at *3 (ballot handling rules); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 679 (11th Cir. 2020) (extension of mail-in ballot deadlines). Indeed, in delineating *Purcell*'s contours, numerous courts have emphasized that *Purcell* is not implicated merely because an injunction pertains to an election; rather, it only applies where the injunction would change election rules or procedures. *See, e.g.*, *Bryan v. Fawkes,* 61 V.I. 416, 469 (V.I. 2014) (granting relief and distinguishing *Purcell* because it "did not involve challenges to a candidate's access to the ballot, but instead . . . large-scale changes to the election process itself that affected both voters and poll workers"); *Democratic Cong. Campaign Comm. v. Kosinski*, 614 F.Supp. 3d 20 (S.D. N.Y. 2022) (determining *Purcell* did not bar injunctive relief for curing absentee ballots because it does not alter any "'voter-facing aspects of the upcoming elections"); *Nat'l Ass'n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 464 F.Supp.3d 587, 590 (S.D.N.Y. 2020) (rejecting "concerns that the injunction will

disrupt the election process, create confusion and delays, pose administrative challenges, and cause waste" because *Purcell* and its progeny involved "circumstances risking voter confusion or involving ***complicated changes in voting procedures***").

In sum, "*Purcell* is not a magic wand that [election-official] defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists." *People First of Ala. v. Sec'y of State for Ala.*, 815 F. App'x 505, 514 (11th Cir. 2020) (Rosenbaum, R., and Pryor, J., concurring). And it certainly "does not ***command*** judicial abstention in late-breaking election cases." *Harding v. Edwards*, 484 F.Supp.3d 299, 318 (M.D. La. 2020) (emphasis added)).

In conflict with all of the above-cited decisions, the District Court and the Third Circuit extended *Purcell*'s reach in a manner inconsistent with *Purcell* itself and the numerous other courts that have interpreted it to apply to changes in election rules that deter the right to exercise the franchise on the eve of an election. The addition of a new candidate to the ballot serves only to advance "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," by breaking the monopoly on existing political parties. *Anderson*, 460 U.S. at 794. Because the Third Circuit and District Court's application of *Purcell* to these circumstances is contrary to *Purcell* and its interpretation by numerous other courts, there is a significant possibility that this Court would note probable jurisdiction of an appeal of the underlying action and reverse. *Am. Trucking Ass'ns, Inc.*, 483 U.S. at 1308.

II. An injunction is needed to prevent irreparable harm.

Applicants face not just a likelihood of irreparable harm but inevitable irreparable harm without an injunction. Indeed, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 19 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Respondents' interpretation of the Pennsylvania Election Code immediately precludes ballot access for an election that is mere days away. There will be no equitable remedy for this violation if election day comes and goes without Candidates names on the ballot.

III. An injunction will not harm the public interest.

Finally, an injunction will not harm the public interest. The Constitution and its mandates cannot be ignored simply because the Election draws closer. *Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28 (2020) (Kagan, J., dissenting) ("At its core, *Purcell* tells courts to apply, not depart from, the usual rules of equity … And that means courts must consider all relevant factors, not just the calendar. Yes, there is a danger that an autumn injunction may confuse voters and suppress voting. But no, there is not a moratorium on the Constitution as the cold weather approaches.").

Respondents may object that absentee ballots have already been mailed and votes cast, that early voting is in progress, and that it is impossible for them to remedy the constitutional violation. But millions of Pennsylvania residents will still go to the polls next Tuesday, November 5th, and Drs. West and Abullah have the constitutional right to be candidates. Indeed, if they receive a sufficient percentage of

the Pennsylvania vote, JFA may qualify for major political-party status and be able to avoid the pre-designation-of-electors nonsense that has impeded Drs. West and Abullah here. Accordingly, Applicants request an injunction directing Respondents to post at all polling locations across Pennsylvania on election day that Cornel West is a candidate for President of the United States and voters can write him in on their ballot provided they do not vote for any other presidential candidate. And while preparing these notices for polling locations on a condensed timeline may tax Respondents, that is a reasonable price for them to pay for violating Applicants' rights and dragging this dispute out to a point where emergency relief is necessary.

At a time when "many face a crisis of confidence in our electoral system[,]" *In re Petitions to Open Ballot Box Pursuant to 25 P.S. §3261(A)*, 295 A.3d 325, 328 (Pa. Commw. Ct. 2023), "[t]he public must have confidence that our Government honors and respects their votes." *Donald J. Trump for President, Inc. v. Secretary of Pa.*, 830 Fed. App'x 377, 390-91 (3d Cir. 2020). And because "[o]ther rights, even the most basic, are illusory if the right to vote is undermined[,]" this Court should not hesitate to act. *McInerney v. Wrightson*, 421 F.Supp. 726, 733 (D. Del. 1976) (internal citations omitted) (ordering candidate's name on the ballot, despite expressing reluctance about entanglement of federal judiciary in state election laws).

More fundamentally still, allowing Respondents to avoid all accountability for their unconstitutional conduct will have a significant deleterious impact on the public. For one thing, it sends a clear message to state election officials: using

technical jargon for voting equipment testing (*e.g.*, logic and accuracy testing, or "functional testing") and a few buzzwords, like "voter confusion" and "risk of error", complete with a citation to *Purcell* excuses any constitutional violations.

The message to the public is also clear—and equally troubling: as long as there is an election on the horizon, the government can act with impunity where the right to ballot access is concerned. The result can only be disillusionment that further entrenches the dominance of the two-party system. As Dr. West aptly relayed during the hearing, "the two-party system does not allow the best of America, which [is] … the legacy of Martin Luther King and others."

Put simply, the public interest "clearly favors the protection of constitutional rights, including the voting and associational rights of alternative political parties, their candidates, and their potential supporters." *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997)). As for Respondents' interests, if any bureaucratic difficulties or additional costs may result from an injunction pending appeal, those are not a sufficient basis for denying relief. *See, e.g.*, *Robinson v. Ardoin*, 37 F.4th 208, 231 (5th Cir. 2022) ("[T]he *Purcell* doctrine is about voter confusion and infeasibility, not administrative convenience."); *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) (highlighting "the problem of sacrificing voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-resourcing"). Indeed, it is the price that must be paid for violating Applicants' most sacred and cherished constitutional rights.

CONCLUSION

For all these reasons, Applicants ask this Court for an injunction pending the appeal in the Third Circuit Court of Appeals, and disposition of a petition for a writ of certiorari if filed, directing Respondents to post at all polling locations across Pennsylvania on election day that Cornel West is a candidate for President of the United States and voters can write him in on their ballot provided they do not vote for any other presidential candidate. Applicants request that this Court grant relief by Friday, November 1, in order to ensure sufficient time to prepare these postings for election day.

Respectfully submitted,

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