No. 20A53

IN THE
SUPREME COURT OF THE UNITED STATES

Joseph B. Scarnati III, President Pro Tempore, and Jake Corman, Majority Leader of the Pennsylvania Senate,

Applicants,

v.

Pennsylvania Democratic Party, Nilofer Nina Ahmad, Danilo Burgos, Austin Davis, Dwight Evans, Isabella Fitzgerald, Edward Gainey, Manuel M. Guzman, Jr., Jordan A. Harris, Arthur Haywood, Malcolm Kenyatta, Patty H. Kim, Stephen Kinsey, Peter Schweyer, Sharif Street, and Anthony H. Williams,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, MOTION FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11 INCH PAPER, AMICUS CURIAE BRIEF OF BRYAN CUTLER, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND KERRY BENNINGHOFF, MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES IN SUPPORT OF APPLICANTS

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

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MOTION FOR LEAVE TO FILE AN AMICUS BRIEF

This case arises from the Pennsylvania Supreme Court's decision to override a carefully crafted bipartisan legislative framework designed to ensure fairness and predictability in the Pennsylvanian voting process. The court violated sacred federal law in doing so.

In its September 17, 2020 Opinion in *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020 (the "Decision"), the Pennsylvania Supreme Court improperly rewrote Pennsylvania's election law to require election officials to accept absentee and mail-in ballots received three days *after* Election Day, even if those ballots lack any postmark or contain an illegible postmark. The Pennsylvania General Assembly—which, aside from Congress, has the sole authority to enact laws governing the conduct of elections in Pennsylvania—debated, considered, and enacted legislation that required all mail-in and absentee ballots to be received by 8:00 p.m. on Election Day. In addition to plainly violating federal law by requiring ballots in a federal election to be counted even if they may have been cast after Election Day, the Decision will inevitably lead to uncertainty and chaos, and it opens the door for vote fraud that could taint the election.

First, the Decision violates federal law by not respecting the requirement that there be only one national uniform election day. *See* 2 U.S.C. § 7; 2 U.S.C. § 1; 3 U.S.C. § 1. By allowing mail-in and absentee votes to arrive up to three days after Election Day, and to be counted without any evidence that the ballots were timely cast on or before Election Day, Pennsylvania's

county boards of elections – over the express wishes of the elected representatives of Pennsylvania citizens and voters – will now be forced to count ballots that were voted after Election Day. This improperly extends the General Election past November 3, 2020, in violation of 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1.

Second, the Decision violates the Elections Clause of the United States Constitution, which requires that "[t]he Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by *the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1 (emphasis added). In other words, if Congress does not enact a regulation, "the Legislature" in the state is the only party capable of enacting such regulations. The Pennsylvania General Assembly carefully considered and spoke definitively on this subject—it purposefully set a cut-off of the receipt of absentee and mail-in ballots by 8:00 p.m. on Election Day. The Pennsylvania Supreme Court has now imposed its own vision, extending that deadline by three days, in violation of the federal Elections Clause. Only a state legislature has the authority to determine the "Times" for holding elections in a state.

Amici Curiae, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (collectively, the "House Leaders"), were improperly

denied the ability to intervene in *Pennsylvania Democratic Party*. *Amici Curiae* seek to file an amicus brief in support of the Senators' Application so that the entire Pennsylvania General Assembly has a voice in this proceeding. The House Leaders have just as much of an interest in the outcome of this case as the other parties that were permitted to intervene.[1] The House Leaders' institutional and individual stakes as legislators, i.e., their ability to legislate and appropriate for election laws in Pennsylvania, are evidenced by the facts that they were permitted to intervene in a related case, *Crossey v. Boockvar*, No. 108 MM 2020, and that the dissent to the denial of application for stay here referred to the House Leaders as "Intervenors."

The House Leaders therefore respectfully move this Court for leave to file an amicus curiae brief in support of the Emergency Application for Stay.

Respectfully submitted on this 29th day of September, 2020.

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[1] The House Leaders have nonparty standing to file an eventual petition for writ of certiorari because: 1) they petitioned to intervene in the underlying proceedings below, which petition was erroneously denied; and 2) the equities weigh in favor of hearing the appeal to protect their institutional and individual stakes as legislators. *See, e.g.*, *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Commc'ns Workers of Am. v. N.J. Dep't of Personnel*, 282 F.3d 213, 219 (3d Cir. 2002); *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir. 1990).

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MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH PAPER

The effects of the Pennsylvannia Supreme Court's decision will have an impact not only on Election Day on November 3, 2020, which is imminent, but also the entire voting period in the Election for absentee and mail-in ballots, which has already begun. Timing is, thus, of the essence. The House Leaders initially sought to file an independent Emergency Stay Application, but have since altered this intent to ensure compliance with the rules and preferences of this Court. This alteration created delays and logistical issues making it difficult to submit this pleading in booklet form. Because of the urgency and importance of this matter and the logistical complications, the House Leaders respectfully move this Court for permission to file this amicus brief on 8 ½ by 11 inch paper.

Respectfully submitted on this 29th day of September, 2020.

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INTERESTS OF AMICI CURIAE

Amici curiae, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (the "House Leaders"), have a strong interest in the outcome of this case. Indeed, the House Leaders have just as much of an interest in the outcome of this case as the other parties that were permitted to intervene. The Decision affects the House Leaders' institutional and individual stakes as legislators, i.e., their ability to legislate and appropriate for election laws in Pennsylvania.

It is also worth noting that the House Leaders attempted to intervene in the case below but the Pennsylvannia Supreme Court improperly denied the request. (App'x A at 8-9 n.11).[2] This ostensible ruling is especially perplexing because the House Leaders' application for intervention was both timely filed and *unopposed*. In fact, the Petitioners expressly agreed that intervention was appropriate. By contrast, the House Leaders were permitted to intervene by the Pennsylvania Supreme Court in the similar *Crossey* case. (App'x C at 102 and n.2).

BACKGROUND

A. ***Legislative Background.***

In October 2019, less than a year ago, the Pennsylvania General Assembly (the "General Assembly") took the laudable step of enacting bipartisan legislation, Act 77, which allowed, for the first time, all qualified electors to vote by mail without requiring them to show their absence from the voting district. *See* 2019 (P.L. 552, No.

[2] Citations herein to the Appendix are to the Appendix filed with the Application.

77) 2019 Pa. Legis Serv. Act 2019-77 (S.B. 421) (West); 25 P.S. § 3150.11(b). After careful and extensive deliberation, the General Assembly made the policy choice that the deadline for a county board of elections to receive a ballot is 8:00 p.m. on Election Day (November 3, 2020). 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c). The Pennsylvania Election Code, 25 P.S., Ch. 14, further designates October 27 as the last day for electors to request a mail-in ballot. 25 P.S. § 3150.12a(a).[3]

Beyond this added convenience, voters still have numerous other options, including: (1) voting in-person on Election Day, (2) requesting and casting their mail-in ballots beginning 50 days before the Election, and (3) sending in their ballots via overnight mail or delivering their ballots to the county election office. Act 77 was the General Assembly's chosen plan to make Pennsylvania's elections free, fair, and workable. In addition, the General Assembly later adopted additional election-related legislation in response to the coronavirus pandemic. *See* Act of Mar. 27, 2020, (P.L. 41, No. 12), 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West).

B. ***Pennsylvania Democratic Party v. Boockvar.***

On July 10, 2020, the Pennsylvania Democratic Party and several Democratic elected officials and congressional candidates (the "Challengers") commenced this action in Pennsylvania's Commonwealth Court against Secretary of the Commonwealth Kathy Boockvar (the "Secretary") and all 67 county election boards

[3] Before Act 77, absentee ballots were due by 5 p.m. on the Friday *before* Election Day. *See Crossey v. Boockvar*, No. 266 M.D. 2020, at 35 (Pa. Comm. Ct. Sept. 7, 2020) (Leavitt, P.J.) (Report and Recommendation) (App'x C at 101). The change reflects the legislature's policy goal. Pennsylvania has imposed a "received-by" deadline since 1964, and it has never imposed a "mailed-by" deadline. (App'x C at 127-28).

in the state. The action took the form of a petition for review seeking declaratory and injunctive relief. As is relevant to this appeal, Challengers raised an as-applied challenge to the Election Code's 8:00 p.m. Election Day deadline for receiving ballots, alleging this deadline would result in voter disenfranchisement in violation of the Free and Equal Elections Clause of Article I, Section 5 of the Pennsylvania Constitution. Challengers alleged that, if ballots were requested up until October 27, they would not arrive back, as cast, at the county boards of elections by Election Day as is required by the Election Code. The Challengers relied heavily on anecdotes from the June primary election and elections in other states, although the coronavirus was then a much newer phenomenon, with said election also taking place amidst upheaval in many of the Commonwealth's cities, and the Election Boards have learned from that experience. The Challengers also relied heavily on a June 29, 2020 letter from United States Postal Service ("USPS") General Counsel and Executive Vice President Thomas Marshall to the Secretary (the "USPS Marshall Letter") that expressed concerns on timely ballot delivery. On this issue it bears noting that, in the *Crossey* case—which, unlike this case, involved the introduction of evidence and witness testimony—the evidence showed that the USPS was capable of delivering ballots within Pennsylvania's statutory timeline for requesting and receiving ballots. (App'x C at 110-11, 130-31, 135).

On August 13, 2020, the Secretary filed an answer. She later requested that the Pennsylvania Supreme Court, as opposed to Pennsylvania's Commonwealth Court, exercise its extraordinary jurisdiction to review the petition, which the court

granted. The Secretary had previously advocated against a similar request for extension of the received-by deadline for absentee and mail-in ballots by the Challengers, but she later shifted her position in July, allegedly due to the USPS Marshall Letter. Notably, the Challengers requested that the received-by deadline be extended by seven days, while the Secretary requested an extension of three days.

On September 17, 2020, the Pennsylvania Supreme Court issued its Decision extending the received-by deadline for absentee and mail-in ballots until 5:00 p.m. on November 6, 2020, three days after Election Day. Remarkably, it concluded that a ballot, even one lacking a postmark or having an illegible postmark, received before then would be "presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day." (App'x A at 37 n.26, 62-63). The court created this mandate even while simultaneously conceding that "there is no ambiguity regarding the deadline set by the General Assembly," and "there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots." (*Id.* at 33).

Supplanting the General Assembly's judgment on the issue with its own, the court found that a balance had to be struck between providing ample time to request mail-in ballots and allowing enough flexibility into the timeline to guarantee that ballots have enough time to travel through the mail and be counted in the election. (*Id.* at 34). The court recognized that this purported balance is "fully enshrined within the authority granted to the Legislature under the United States and Pennsylvania Constitutions." (*Id.* at 34-45). Nevertheless, it relied on cases involving sudden

natural disasters, and used its "extraordinary jurisdiction" to determine that delays would likely occur in the county boards of elections processing mail-in applications. It concluded that the timeline built into the Election Code could not be met by USPS's current delivery standards. (*Id.* at 35-36). Accordingly, the court imposed a three-day extension of the received-by deadline. (*Id.* at 37 n.26, 62-63).

The court also limited its analysis of the issue of ballots lacking a postmark or containing an illegible postmark to a footnote and a clause in the conclusion. (*Id.* at 37 n.26, 63). The court merely incorporated the Secretary's recommendation on the subject, concluding that a ballot received by 5:00 p.m. on November 6, 2020, will be presumed to have been mailed by Election Day, unless a preponderance of the evidence demonstrates that it was mailed after Election Day." (*Id.* at 37 n.26). Given that no postmark is even required, of course, it will be extremely difficult if not impossible for election officials to provide that evidence as to the multitude of ballots that may be mailed in after Election Day, in violation of federal law.

In a mere footnote, the court also denied the House Leaders' application to intervene, notwithstanding their clearly legitimate interest as leaders of the Pennsylvania General Assembly to play a role in these proceedings. (*Id.* at 8-9 n.11). The court did so based on the "expediency of reaching a decision," because it found there was "adequate advocacy" provided by the other parties, and because the request was "moot" due to the issuance of the opinion. (*Id.*). This ostensible ruling is especially perplexing because the House Leaders' application for intervention was both timely filed and *unopposed*. In fact, the Petitioners expressly agreed that intervention was

appropriate. *See Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, Response to Motions to Intervene of Senator Costa and Representatives Dermody, Cutler, and Benninghoff (filed Sept. 9, 2020) ("Petitioners believe the motions to intervene filed by Proposed Intervenors offer the same issues as the motions decided by the Court in its September 3 Order and have no objection to the intervention of the Proposed Intervenors either as individuals or as leaders of their respective caucuses, consistent with this Court's order of September 3."). By contrast, the House Leaders were permitted to intervene by the Pennsylvania Supreme Court in the similar *Crossey* case. (App'x C at 102 & n.2).

It bears noting that the Pennsylvania Supreme Court's Decision was not unanimous. There were two concurring and dissenting opinions. Justice Donohue, joined by two other justices, would have kept the received-by date the same (Election Day), but moved the deadline for *requesting* a ballot up to October 23. (App'x A at 87). Although the House Leaders disagree with the remedy, Justice Donohue correctly recognized that:

> the clear legislative intent was that all ballots were to be cast by 8:00 p.m. on Election Day, the termination of the balloting process. It cannot be viewed as a coincidence that the closing of the polls terminating in-person voting and the receipt of mail-in ballots were designated by the statute to be the same.

(*Id.* at 84).

Chief Justice Saylor, joined by Justice Mundy, found that the Election Code mandated that mail-in ballots only be delivered in-person at manned, office locations, and that unmanned drop boxes should not be permitted. (App'x A at 90-91). This

concurrence also noted the majority's ill-conceived finding that "does not so much as require a postmark." (*Id.* at 91). They found that this, in combination with the allowance of drop boxes, "substantially increases the likelihood of confusion, as well as the possibility that votes will be cast after 8:00 p.m. on Election Day, thus greatly undermining a pervading objective of the General Assembly." (*Id.*).

On September 22, 2020, the House Leaders sought a stay of the Pennsylvania Supreme Court's Order in the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied the request for stay on September 24, 2020. (App'x B at 94). Justice Mundy, however, filed a dissent stating she would have granted the stay "to preserve the public confidence in the integrity of the upcoming election." (App'x B at 98). Justice Mundy also found that it would be reasonable for this Court to determine that the Supreme Court of Pennsylvania's decision to presume ballots lacking a postmark are cast timely "fundamentally alters the nature of the election." (*See id.* (citing *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020)). And, notably, Justice Mundy referred to the House Leaders as "Intervenors." (*Id.* at 97 n.1).

C. ***Crossey v. Boockvar.***

On April 22, 2020, a group of petitioners filed a petition for declaratory and injunctive relief against the Secretary seeking to change rules and procedures governing voting in Pennsylvania's June 2, 2020 primary election. (App'x C at 101). On June 17, 2020, the Commonwealth Court transferred the case to the Pennsylvania Supreme Court. (*Id.* at 102). As is the case here, the petitioners in *Crossey* requested an extension of the received-by deadline and other relief. (*See id.* at 103). President

Judge Leavitt of the Commonwealth Court served as a special master, and held an evidentiary hearing on August 31, 2020. (*Id.* at 104).

Following a lengthy and robust evidentiary hearing, Judge Leavitt found that the petitioners had failed to meet their burden of showing that the statutory received-by deadline was unconstitutional. (*Id.* at 135). She also found that USPS's mail delivery performance in Pennsylvania exceeded the national average, and that issues with mail were unlikely to prevent voters from submitting their ballots on time. (*Id.* at 135-36). Ultimately, on September 7, 2020, Judge Leavitt recommended that the Supreme Court of Pennsylvania deny the petitioners' prayer for relief. (*Id.* at 138).

It is important to note that, unlike in *Crossey*, no evidentiary findings were made in the present case. The Pennsylvania Supreme Court's majority opinion fails to address that evidentiary record, which runs directly contrary to the majority's conclusion in the Decision.

ARGUMENT

I. The Decision Improperly Creates More Than One Election Day.

The case should be considered, and the Decision reversed, because it violates federal law mandating only one election day.

The Elections Clause provides Congress (along with state legislatures) with the authority to make laws prescribing "[t]he times, places and manner of holding elections for senators and representatives . . . ." U.S. Const. art. I, § 4, cl. 1. Consistent with that Clause, Congress established a national uniform election day for each of the several branches holding federal elections, including:

- Choosing members of the House of Representatives, mandating that "[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter." 2 U.S.C. § 7;

- Setting the same day for the selection of presidential electors: "[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 U.S.C. § 1; *see also* U.S. Const. art. II, § 1, cl. 4 ("The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."); and

- Adopting a similar provision for the election of U.S. senators. *See* 2 U.S.C. § 1; *see also Foster v. Love,* 522 U.S. 67, 69-70 (1997).

As this Court has established, these provisions "mandate[] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster*, 522 U.S. at 69-70.

This Court has previously decided to hear similar issues in other cases. For example, in *Foster v. Love*, the Court considered whether Louisiana's "open primary" statute conflicted with federal election statutes. 522 U.S. 67, 68 (1997). Under Louisiana law, an open primary was held for congressional offices in October where all candidates appeared on the same ballot. If any candidate received a majority of votes in the primary, he or she was considered "elected" without any further action on federal election day. *Id*. The Court held that this conflicted with federal law because the "final selection" of candidates could be "concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress . . ." *Id*. at 72.

Foster is instructive on the meaning of "election" under 2 U.S.C. § 7. 522 U.S. at 68. The Court observed that:

> When the federal statutes speak of "the election" of a Senator or Representative, they plainly refer to *the combined actions of voters and officials meant to make a final selection of an officeholder* . . . . *See* N. Webster, An American Dictionary of the English Language 433 (C. Goodrich & N. Porter eds. 1869) (defining "election" as 'the act of choosing a person to fill an office'). By establishing a particular day as 'the day' on which these actions must take place, the statutes simply regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say.

Id. at 71-72 (emphasis added).

The key is that the final selection take place on a single day. *See, e.g.*, *Lamone v. Capozzi*, 396 Md. 53, 83-84 (Md. 2006) ("there is no dispute that the 'combined actions' must occur, *that voting must end*, on federal election day.") (emphasis added)) (interpreting 2 U.S.C. § 7, *Foster*, 522 U.S. 67, and Maryland Law); *Fladell v. Elections Canvassing Comm'n of Fla*., CL 00-10965 AB, CL 00-10970 AB, CL 00-10988 AB, CL 00-10992 AB, CL 00-11000 AB, 2000 Fla. Cir. LEXIS 768, *6-*17 (Fla. 15th Jud. Cir. 2000) ("[T]he Constitution of the United States . . . require[s] that Presidential 'electors' be elected on the *same day* throughout the United States.") (emphasis added)).

The Pennsylvania Supreme Court's three-day extension of the federal election violates these hallowed principles. The Decision allows votes cast after Election Day to be counted even without a legible postmark, or even any direct evidence of when the ballot was mailed. (App'x A at 37 n.26, 63). This allowance creates a virtual guarantee that votes will be cast and counted after Election Day. (App'x A at 91).

("[T]he majority does not so much as require a postmark. Particularly in combination with the allowance of drop boxes, this substantially increases the likelihood of confusion, as well as the possibility that votes will be cast after 8:00 p.m. on Election Day, thus greatly undermining a pervading objective of the General Assembly."). Accordingly, the Decision creates multiple federal election days, most disturbingly after Election Day. In short, not only has a majority of Pennsylvania's Supreme Court decided to replace the General Assembly's chosen method of conducting elections in Pennsylvania, it has replaced that legislatively-determined system with one that will necessarily permit votes cast after Election Day to be counted, in direct violation of federal law.

Cases that have found early voting to be valid do not address the separate problem of late voting. Early voting is fundamentally different than late voting because "the final selection [of candidates] is not made before the federal election day." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000); *see also Millsaps v. Thompson*, 259 F.3d 535, 545-46 (5th Cir. 2001); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175-76 (9th Cir. 2001). Indeed, that is what the General Assembly recognized in allowing no excuse mail-in voting. But that policy choice is fundamentally different than the Pennsylvania Supreme Court's edict allowing for voting after Election Day. Voting after Election Day is a combined action of voters and officials that makes a final selection of an officeholder. *See Foster*, 522 U.S. at 71. For early voting, early votes are not counted immediately, but are held until the close of all polling places on Election Day and then recorded along with

absentee votes. *See, e.g., Millsaps*, 259 F.3d at 537. By contrast, this Court has found that allowing votes *after* a scheduled day "fundamentally alters the nature of the election." *Republican Nat'l Comm.*, 140 S.Ct. at 1207. Under the Decision, individuals will be able to vote and have those votes counted by election officials after Election Day. *See Foster*, 522 U.S. at 71. Because a final selection of an officeholder cannot be made until all votes are counted, post-election voting necessarily requires a final selection on a day other than Election Day. This creates multiple election days and violates 2 U.S.C. § 7, 2 U.S.C. § 1, and 3 U.S.C. § 1.

Thus, the fact that the Decision creates multiple election days creates much more than a "reasonable probability" that this Court will grant the forthcoming petition for writ of certiorari and at least a "fair prospect" that this Court will reverse the Decision. *See Hollingsworth*, 558 U.S. at 190.

II. The Decision Violates Article I, Section 4 of the U.S. Constitution by Usurping the Legislature's Duties and Altering the Ballot-Receipt Deadline.

A. The plain text of the Elections Clause, and other authorities, show that the Pennsylvania legislature, not its courts, has the authority to regulate the administration of Pennsylvania's elections.

The Elections Clause provides that "[t]he Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1 (emphasis added).

The plain text of the Elections Clause provides that, to the extent Congress does not institute any election regulations, the power to regulate congressional elections is reserved for "the legislature," not a court. And "when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, (2000)). These legal predicates alone establish that the Pennsylvania Supreme Court's majority Decision to usurp the General Assembly's role in rewriting the election code was erroneous and reversible.

The term "legislature" restricts the States' actions in regulating federal elections. The power to regulate federal elections is not an inherent state power, but rather is incidental to the Constitution's establishment of a federal government, and therefore had to be delegated to the states. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806 (1995); *Cook v. Gralike*, 531 U.S. 510, 522 (2001). Because delegation necessarily confines the scope of power, the term "legislature" is therefore "a limitation upon the state in respect of any attempt to circumscribe the legislative power" over federal elections. *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

The related Electors Clause, found in U.S. Const. art. I, § 1, cl. 2, is another helpful point of reference. The Electors Clause "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointing electors. *McPherson*, 146 U.S. at 27. "Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent

significance." *Bush v. Gore*, 531 U.S. 98, 112-13 (2000) (Rehnquist, J., concurring). Specifically, "with respect to a Presidential election," state courts must be "mindful of the legislature's role under Article II in choosing the manner of appointing electors." *Id.* at 114.[4]

Accordingly, the Elections Clause provides that, when states are able to decide the times, places and manner of holding elections, that power is exclusively reserved for state legislatures, not state courts. The Decision is in conflict with this provision.

B. The Pennsylvania Supreme Court improperly usurped the carefully considered laws enacted by the legislature.

Pennsylvania's period for absentee and mail-in ballot submission is unquestionably a regulation of the times, places, or manner of elections because it regulates the time during which absentee and mail-in ballots may be submitted to elections officials. *See* 25 P.S. § 3150.16(c). This deadline is a quintessential example of the General Assembly exercising its directly delegated authority under the Elections Clause. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 822-23 (2015) (citing voter registration deadlines, absentee voting deadlines, and vote counting laws as instances of time, place, or manner regulations under Elections Clause). Even the Pennsylvania Supreme Court necessarily recognizes the

[4] Pennsylvania law provides that, every four years, the voters of the Commonwealth elect presidential electors during the general election. 25 P.S. § 3191 ("At the general election to be held in the year 1940, and every fourth year thereafter, there shall be elected by the qualified electors of the Commonwealth, persons to be known as electors of President and Vice-President of the United States, and referred to in this act as presidential electors, equal in number to the whole number of senators and representatives to which this State may be entitled in the Congress of the United States.").

constitutional authority of Pennsylvania's General Assembly to act in this context. *See also In re Nomination of Driscoll,* 847 A.2d 44, 45 n.1 (Pa. 2004) (recognizing that a candidate for federal office must "abide by the election procedures in the Pennsylvania Election Code" because, unless altered by Congress, Pennsylvania's General Assembly prescribes the Times, Places and Manner of holding Elections for Senators and Representatives); *In re Guzzardi*, 99 A.3d 381, 385-86 (Pa. 2014) ("Elections are appropriately regulated by the political branch precisely because they are inherently political. This essential legislative governance fosters orderly, efficient, and fair proceedings."). This federal constitutional delegation of authority provides state legislatures with "a wide discretion in the formulation of a system for the choice by the people of representatives in Congress." *In re Nomination of Driscoll*, 847 A.2d at 45 n.1 (quoting *United States v. Classic*, 313 U.S. 299, 311 (1941)).

In this instance, the General Assembly's priorities in decisively not extending the received-by deadline could not be any clearer. Before late 2019, Pennsylvania's General Assembly permitted mail-in ballots to be counted only if they were received by election officials by 5:00 p.m. on the Friday before Election Day. *See* 2019 (P.L. 552, No. 77) 2019 Pa. Legis Serv. Act 2019-77 (S.B. 421) (West). In late 2019, the General Assembly carefully considered this issue and passed a comprehensive bipartisan reform of the state's election laws. *See id*. Among other reforms, Act 77 included provisions setting a deadline of 8:00 p.m. on Election Day for the receipt of absentee and mail-in ballots, which lengthened the vote-by-mail period by more than four days. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). Even in March 2020, when the

legislature further amended the election law in response to the coronavirus, it did not extend the received-by date. *See* Act of Mar. 27, 2020, (P.L. 41, No. 12), 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West).

Tellingly, the Decision admits that "there is no ambiguity regarding the deadline set by the General Assembly." (App'x A at 33). The court also noted it was "not asked to declare the language facially unconstitutional as *there is nothing constitutionally infirm* about a deadline of 8:00 p.m. on Election Day for the receipt of ballots." *Id*. (emphasis added). Rather, the Pennsylvania Supreme Court simply replaced Pennsylvania's elected representatives' judgments with its own.

The General Assembly provided Pennsylvania voters with many options. They can vote in person on Election Day. They can request and cast their mail-in ballot beginning 50 days before an election. 25 P.S. § 3150.12a. Voters can choose to wait a week before Election Day to request their ballot. (App'x C at 135). Or voters can send their ballot via overnight mail or deliver their ballot to the county election office. (*See id*. at 135-36). By setting a deadline for the received-by date for 8:00 p.m. on Election Day, the General Assembly did not disenfranchise voters. Significantly, in *Crossey*, where a hearing was held and a record developed on the ballot received-by deadline, the court found that the USPS's on-time delivery rate in Pennsylvania is higher than the national average, with 99% of presort First Class mail being received within three

days of mailing. (*See id.* at 121, 136). The General Assembly established a voting regime that is easy and accessible, even in the midst of a pandemic.[5]

The Decision's reliance on certain "natural disaster" cases was also erroneous and does not support its conclusion. Like all courts, the Pennsylvania Supreme Court does not exercise a legislative function when it decides cases, because "the duty of courts is to interpret laws, not to make them." *Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941). Indeed, the General Assembly has never given plenary power to its courts (nor could it) to override duly enacted legislation regarding federal elections. Rather, only in very limited circumstances, are courts permitted "on the day of an election" to decide "matters pertaining to the election as may be necessary to carry out the intent" of the Election Code." (App'x A at 35) (emphasis added) (citing 25 P.S. § 3046 and *In re General Election-1985*, 531 A.2d at 839). By contrast, the court below made a decision in advance of Election Day and ignored the expressed legislative intent in the Election Code. The Pennsylvania Supreme Court has no authority to alter the General Assembly's duly enacted prescriptions for federal elections.

[5] The Supreme Court of Pennsylvania heavily relies on the USPS' Marshall Letter. (App'x A at 24-27). But in *Crossey*, where witnesses testified concerning the Postal Service's abilities and were subject to cross-examination, both the *Crossey* Petitioners' Postal Service expert and the Senate Intervenors' expert agreed that the Postal Service was capable of delivering ballots within Pennsylvania's statutory timeline for requesting and receiving ballots. (App'x C at 110-11, 130-31, 135). In fact, the Secretary is spending taxpayer dollars to inform voters to request and mail in their ballot as early as possible. (*See id.* at 128). There is no evidence establishing that Pennsylvania's ballot receipt-by deadline is plainly and palpably unconstitutional. (*See id.* at 135).

C. Other factors show that it is reasonably probable that this Court will consider this case on the merits.

Notably, this Court has stayed or overturned nearly every effort this year to alter state election laws, on the basis of arguments citing the coronavirus pandemic, when there has been opposition from state government officials. *See, e.g., Republican Nat'l Comm.*, 140 S. Ct. 1205 (granting stay of district court order requiring Wisconsin to count late postmarked absentee ballots for primary election, pending final disposition on appeal); *Merrill v. People First Of Ala.*, No. 19A1063, 2020 WL 3604049 (July 2, 2020) (granting stay of district court order enjoining Alabama's duly enacted photo identification and witness requirements for absentee voting during the pandemic); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (granting stay of district court orders relaxing Idaho's rules for ballot initiatives); *Clarno v. People Not Politicians*, No. 20A21, 2020 WL 4589742 (Aug. 11, 2020) (granting stay of district court order relaxing Oregon's election procedures because of the coronavirus pandemic); *Thompson v. DeWine*, No. 19A1054, 2020 WL 3456705 (June 25, 2020) (denying application to vacate Sixth Circuit stay of district court order suspending Ohio's enforcement of in-person signature requirements and extending filing deadlines for initiative campaigns); *Tex. Democratic Party v. Abbott*, No. 19A1055 (June 26, 2020) (denying application to vacate Fifth Circuit stay of district court order forcing Texas to implement no-excuse absentee voting). *See also Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring) (agreeing with the Court's stay of a district court order altering initiative petition procedures in light of COVID-19 due in part to the district court's failure to "accord sufficient weight to the

State's discretionary judgments about how to prioritize limited state resources across the election system as a whole."). This Court has also repeatedly refused to disrupt certain states' efforts to tackle issues related to COVID-19 outside of the election law context. S*ee, e.g., S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1614 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020). This is another in the line of cases in which this Court has had to step in to address the overreach of lower courts.

This Court has permitted only one case to alter state election law in response to COVID-19, *Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151 (Aug. 13, 2020). That case is readily distinguishable and inapposite because the state policy makers there agreed to the modification of state election law and "no state official ha[d] expressed opposition." *Id*. Here state officials are divided and, importantly, the General Assembly is opposed to altering the ballot receipt deadline.

The fact that the court below usurped the power of the General Assembly, and the citizens of Pennsylvania for that matter, warrants a stay pending appeal.

III. Denial of a Stay Will Create Irreparable Harm to Pennsylvania Voters and the House Leaders.

Without a stay of the Decision, irreparable injury is certain. "[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." *Maryland v. King*, 133 S. Ct. 1, 3 (2012). This conclusion is particularly true for statutes relating to elections because "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214,

231 (1989). Accordingly, the Pennsylvania Supreme Court's rewriting of the General Assembly's duly enacted election laws is itself sufficient irreparable injury to warrant a stay—even if, as is likely, the Court grants certiorari and reverses.

The irreparable injury is all the more acute given the eleventh-hour intrusion into the Commonwealth's electoral processes, and the confusion it could inject into a federal election. With each passing day, more and more voters will learn that the deadline is not Election Day—as established by statute—but three days after Election Day. A stay is particularly warranted given the court's last-minute ruling. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207 ("when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error.").

An independent basis for a stay also lies in this Court's decisions holding that judicial intrusion into elections must take account of "considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). "Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5. "As an election draws closer, that risk will increase." *Id.* at 5. The Court therefore should weigh such factors as "the harms attendant upon issuance or nonissuance of an injunction," the proximity of the upcoming election, the "possibility that the nonprevailing parties would want to seek" further review, and the risk of "conflicting orders" from such review. *Id.*

The circumstances here overwhelmingly warrant a stay. The Pennsylvania Supreme Court's opinion will engender confusion and uncertainty regarding the rules

and processes governing the imminent election. The public's interest in election integrity and predictable procedures outweighs the highly speculative private interests advanced by Petitioners here. Applicants and the House Leaders are intimately familiar with those procedures, especially because they enacted them in the first place. Pennsylvania citizens, Applicants, and the House Leaders have the right to one Election Day at a predictable time and according to predictable procedures, that do not confuse the average person or change so close to Election Day. The public interest weighs heavily in favor of a stay.

This Court should therefore follow its "ordinary practice" and prevent the Pennsylvania Supreme Court's order "from taking effect pending appellate review." *Strange v. Searcy*, 135 S. Ct. 940, 940 (2015) (Thomas, J., dissenting) (citing *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), and *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers)).

CONCLUSION

For the foregoing reasons, this Court should issue a stay of the Pennsylvania Supreme Court's September 17, 2020 order pending resolution of Applicants' and the House Leaders' petition for certiorari.

Respectfully submitted,

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