No. 20-____

IN THE

Supreme Court of the United States

REPUBLICAN PARTY OF PENNSYLVANIA,

Petitioner,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Pennsylvania statute unambiguously provides that absentee and mail-in ballots must be received by Election Day. Brushing that requirement aside, a 4–3 majority of the Pennsylvania Supreme Court extended the deadline by three days. The majority also required election officials to presume that any ballot received by its judicially created deadline that lacks an intelligible postmark was mailed by Election Day, unless a preponderance of the evidence demonstrates otherwise. The questions presented are:

1. Whether the Pennsylvania Supreme Court majority usurped the Pennsylvania 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 broad power to prescribe "[t]he Times, Places, and Manner" for congressional elections, *id.* art. I, § 4, cl. 1.

2. Whether the majority's extension and presumption are preempted by federal statutes that establish a uniform nationwide federal Election Day.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is the Republican Party of Pennsylvania. Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Pennsylvania Democratic Party; Secretary of State Kathy Boockvar; State Senator Joseph Scarnati; State Senator Jake Corman; Adams County Board of Elections; Allegheny County Board of Elections; Armstrong County Board of Elections; Bedford County Board of Elections; Berks County Board of Elections; Blair County Board of Elections; Bucks County Board of Elections; Butler County Board of Elections; Cambria County Board of Elections; Carbon County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Clarion County Board of Elections; Clinton County Board of Elections; Columbia County Board of Elections; Delaware County Board of Elections; Dauphin County Board of Elections; Elk County Board of Elections; Erie County Board of Elections; Fayette County Board of Elections; Franklin County Board of Elections; Greene County Board of Elections; Huntingdon County Board of Elections; Indiana County Board of Elections; Jefferson County Board of Elections; Lackawanna County Board of Elections; Lancaster County Board of Elections; Lawrence County Board of Elections; Lebanon County Board of Elections; Lehigh County Board of Elections; Luzerne County Board of Elections; Mercer County Board of Elections; Monroe County Board of Elections; Montgomery County Board of Elections; Montour County Board of Elections; Northampton County Board of Elections; Northumberland County Board of

Elections; Perry County Board of Elections; Philadelphia County Board of Elections; Pike County Board of Elections; Potter County Board of Elections; Snyder County Board of Elections; Susquehanna County Board of Elections; Tioga County Board of Elections; Union County Board of Elections; Venango County Board of Elections; Washington County Board of Elections; Wayne County Board of Elections; Westmoreland County Board of Elections; and York County Board of Elections.

October 23, 2020

/s/ John M. Gore

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INTRODUCTION

Four Justices of this Court already have agreed that there is "'a reasonable probability' that this Court will grant certiorari" and "'a fair prospect' that the Court will then reverse the decision below." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (citations omitted). Those Justices therefore voted to stay the Pennsylvania Supreme Court's judgment extending the General Assembly's Election Day received-by deadline and mandating a presumption of timeliness for non-postmarked ballots received after Election Day but before the judicially created deadline. *See Republican Party of Pa. v. Boockvar*, No. 20A54 (Oct, 19, 2020); *Scarnati v. Boockvar*, No. 20A53 (Oct. 19, 2020). For their part, Respondents Pennsylvania Democratic Party and Secretary of State Boockvar acknowledge that the questions presented are "of overwhelming importance for States and voters across the country" because numerous courts are addressing "state election-law provisions . . . similar to" those at issue here. Pa. Dems. Br. 9, No. 20A54; *see also* Sec'y Br. 2–3, No. 20A54. In fact, Respondents have asked the Court to resolve the questions presented without further briefing. *See* Pa. Dems. Br. 9, No. 20A54; Sec'y Br. 2–3, No. 20A54.

The Court should grant certiorari and decide those important questions. The Pennsylvania Supreme Court majority acknowledged that there is "no ambiguity regarding the deadline set by the General Assembly": to be counted, absentee and mail-in ballots "'must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.'" Pet.App.43a–44a (quoting 25 Pa. Stat. § 3150.16(c)). Nonetheless, on a 4–3 vote,

the majority ordered "a three-day extension" of that deadline for the imminent general election—and even imposed a remedy that creates a serious likelihood that election officials will count ballots *cast or mailed after Election Day*. Pet.App.48a. Specifically, the majority required election officials to presume that any ballot received by its extended deadline that lacks an intelligible postmark was "mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day." Pet.App.80a. Thus, under the majority's presumption, ballots without intelligible postmarks (hereinafter, "non-postmarked ballots") will be counted even if they are cast or mailed after Election Day, except in the extraordinarily rare case where proof of the untimely casting or mailing can be adduced. *See id.*

As this Court recently noted, "[e]xtending the date by which ballots may be cast by voters [until] after the scheduled election day fundamentally alters the nature of the election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). Here, the fundamental alteration worked by the Pennsylvania Supreme Court was unlawful several times over.

In the first place, the majority gave insufficient regard to—and, in fact, *usurped*—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 broad power to prescribe "[t]he Times, Places, and Manner" for congressional elections, *id.* art. I, § 4, cl. 1; *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 77 (2000) (per curiam); *cf. Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020)

(Kavanaugh, J., concurring). As the three dissenting justices explained, the decision below is incompatible with the General Assembly's "clear legislative intent" to ensure that "a timely vote could be cast before the only meaningful milestone [in the legislative scheme], Election Day." Pet.App.113a (Donohue, J., concurring and dissenting); Pet.App.125a–26a (Saylor, C.J., concurring and dissenting). Moreover, the majority's remedy is preempted by a trio of federal statutes that set a uniform nationwide federal Election Day. *See* 3 U.S.C. § 1, 2 U.S.C. §§ 1, 7. That the majority imposed this remedy by judicial fiat at the eleventh hour only underscores its error. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

With courts around the country weighing similar extensions of received-by deadlines that could push voting past Election Day in numerous states, the issues presented are important, recurring, and in need of this Court's immediate resolution. This Court's timely intervention could provide desperately needed clarity, and help states avoid the sort of last-minute changes in election rules this Court has consistently warned against. *See, e.g.*, *id.*

Because the election is imminent, these questions must be answered immediately. Absent quick action by this Court, Petitioner's appellate rights—as well as this Court's jurisdiction over the case—could be lost. Accordingly, Petitioner is concurrently filing a motion for expedited consideration asking this Court to decide the case on the merits before Election Day or, in the alternative, on an otherwise expedited schedule. In addition, Petitioner has asked the Pennsylvania Supreme Court to order county boards of elections to segregate ballots received after the General

Assembly's received-by deadline from those received before the deadline. Should that court decline to act, this Court should enter a similar order to preserve its jurisdiction to resolve this matter and to enter an appropriate remedy.

OPINIONS BELOW

The Pennsylvania Supreme Court's decision (Pet.App.1a–81a) is not yet published but is available at 2020 WL 5554644.

JURISDICTION

The Pennsylvania Supreme Court issued its decision on September 17, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Electors Clause and the Elections Clause of the U.S. Constitution, 2 U.S.C. §§ 1, 7, and 3 U.S.C. § 1 are reproduced in the appendix to the petition (Pet.App.198a–200a).

STATEMENT OF THE CASE

A. The General Assembly's Received-By Deadline

Prior to the 2020 election cycle, Pennsylvania permitted only a subset of voters to vote absentee and to submit their ballots by mail. 25 Pa. Stat. § 3146.6 (2018). The law then in force imposed a received-by deadline requiring completed absentee ballots to be received in the office of the county board of elections by 5:00 p.m. on the Friday before the primary or election day in order to count. *See id.*

That all changed in 2019, when the General Assembly enacted and the Governor signed Act 77, one of the most significant pieces of Pennsylvania legislation in decades. *See* 2019 Pa. Legis. Serv. Act 2019-77 (approved Oct. 31, 2019). Act 77 embodied a grand bipartisan compromise: the Pennsylvania House of Representatives passed Act 77 on a bipartisan majority vote, 138–61, and the Pennsylvania Senate passed Act 77 on a bipartisan majority vote, 35–14. *See* Pennsylvania General Assembly, Senate Bill 421, Regular Session 2019–2020, https://www.legis.state. pa. us/cfdocs/billinfo/bill_history.cfm?syear=2019&sind=0 &body=S&type=B&bn=421. While representatives of both parties found much to object to in Act 77, they also recognized the bill as a valuable step forward that offered necessary concessions to all sides. *See Legislative Journal–Senate: Consideration of and Concurrence in House Amendments to S.B. 421,* 203d Gen. Assemb. Sess. 46 1000 (Pa. 2019), https://www.legis.state.pa.us/WU01/LI/SJ/2019/0/Sj2 0191029.pdf (statement of Senator Boscola, a Democrat); *id.* at 1002 (statement of Senator Majority Leader Corman, a Republican).

Act 77 effected a sweeping overhaul of the Pennsylvania Election Code. Among other things, it introduced no-excuse mail-in voting to the Commonwealth. As amended by Act 77, the Pennsylvania Election Code permits all Pennsylvania voters to vote absentee as "[q]ualified absentee electors," 25 Pa. Stat. § 3146.1, or by mail as "[q]ualified mail-in electors," *id.* § 3150.11. Voters can begin applying for absentee or mail-in ballots 50 days before Election Day. *See id.* §§ 3146.2a(a), 3150.12a(a). This statutory 50-day period is the longest such period

in the country. *See* Press Release, Tom Wolf, Governor of Pennsylvania, *Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting* (Oct. 31, 2019), https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/.

Act 77 supplies a comprehensive regime for absentee and mail-in voting and, as relevant here, sets two deadlines that both accommodate voters and guarantee orderly election administration. *See* 2019 Pa. Legis. Serv. Act 2019-77. The first of those deadlines requires voters who wish to apply for an absentee or mail-in ballot to submit their applications to the county board of elections no later than "five o'clock P.M." on the Tuesday before the primary or election day. *See* 25 Pa. Stat. §§ 3146.2a(a), 3150.12a(a). The second, the Election Day received-by deadline, requires that absentee and mail-in ballots "must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." *Id.* §§ 3146.6(c), 3150.16(c). Act 77 thus extended the received-by deadline for absentee ballots by four days compared to pre-Act 77 law and established a matching received-by deadline for mail-in ballots. *Id.*

A linchpin of the bipartisan compromise effected in Act 77 is its non-severability provision. *See Legislative Journal–House: Third Consideration of S.B. 421,* 203d Gen. Assemb. Sess. 64 1740–41 (Pa. 2019), https://www.legis.state.pa.us/WU01/LI/HJ/2019/0/20191029.pdf. That provision establishes that several sections of Act 77—including the entire universal mail-in voting scheme and the Election Day received-

by deadline—are "nonseverable." Act 77, sec. 11; *see* Act 77 §§ 1306, 1306-D; 25 Pa. Stat. §§ 3146.6, 3150.16. Accordingly, if any covered provision of Act 77 "or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." Act 77, sec. 11; *see* Act 77 §§ 1306, 1306-D; 25 Pa. Stat. §§ 3146.6, 3150.16. Thus, under Act 77, invalidation of the Election Day received-by deadline triggers invalidation of the entire mail-in voting scheme.

In early 2020, the General Assembly enacted, and Governor Wolf signed, Act 12, which made changes to the Election Code in response to the COVID-19 pandemic and reports of postal delays. *See* 2020 Pa. Legis. Serv. Act 2020-12 (approved Mar. 27, 2020). Act 12 postponed Pennsylvania's primary election in order to give election officials more time to prepare for in-person voting and an anticipated onslaught of absentee and mail-in ballots. *See* 2020 Pa. Legis. Serv. Act 12 art. XVIII-B; 25 Pa. Stat. § 3584. It also granted county election officials authority to consolidate polling places temporarily, *see* 2020 Pa. Legis. Serv. Act 12 art. XVIII-B; 25 Pa. Stat. § 3582, and to pre-canvass absentee and mail-in ballots received before the primary or election day, 25 Pa. Stat. § 3146.8(1.1). The General Assembly, however, made no changes to the Election Day received-by deadline. *See* 2020 Pa. Legis. Serv. Act 2020-12.

B. Pennsylvania 2020 Primary Election Litigation

Prior to Pennsylvania's June 2020 primary election, two separate groups of petitioners filed actions in the Pennsylvania Supreme Court seeking a judicial

extension of the Election Day received-by deadline. The Pennsylvania Supreme Court dismissed both petitions as unripe. *See Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, 2020 WL 2820467 (Pa. May 15, 2020); *see also id.* at *1 (Wecht, J., concurring); *Delisle v. Boockvar*, No 95 MM 2020, 2020 WL 3053629 (Pa. May 29, 2020); *see also id.* at *1 (Wecht, J., concurring). On June 1, Governor Wolf signed an executive order extending the Election Day received-by deadline in six counties due to "civil unrest." Pa. Exec. Order 2020-02, https://www.governor.pa.gov/wp-content/uploads/2020/06/20200601-EO-Deadline-Extention.pdf.

C. *Crossey v. Boockvar*, No. 108 MM 2020 (Pa.)

A third group of petitioners also challenged the Election Day received-by deadline prior to the June primary election, but they did so in Pennsylvania Commonwealth Court. The Commonwealth Court denied the petitioners' application for a preliminary injunction, and the Pennsylvania Supreme Court dismissed the petitioners' appeal as moot after the primary election. *See Crossey v. Boockvar*, 32 MAP 2020, 2020 WL 2986146 (Pa. June 4, 2020).

The Commonwealth Court eventually transferred *Crossey* to the Pennsylvania Supreme Court under a special jurisdictional provision enacted as part of Act 77. *See Crossey v. Boockvar*, 108 MM 2020 (Pa.). Like petitioners in this case, the *Crossey* petitioners' challenge to the Election Day received-by deadline rested upon the purported "mismatch" between Act 77's application and received-by deadlines, on the one hand, and mail delivery standards of the U.S. Postal Service ("USPS"), on the other. *See* Pet.App.35a. In

particular, the various petitioners feared that alleged USPS delivery delays meant that a voter who requested a ballot on October 27, 2020—seven days before the election, and "the last day for electors to request a mail-in ballot"—could not be assured that she had enough time to receive her ballot from election officials and mail it back before the deadline. *Id.* (citing 25 Pa. Stat. § 3150.12a(a)).

To address this claim, the Pennsylvania Supreme Court in *Crossey* appointed "Commonwealth Court President Judge Mary Hannah Leavitt as Special Master to conduct all necessary proceedings so as to create an evidentiary record[,] including on the ability of the United States Postal Service to comply with deadlines for the November 3, 2020 general election." Order, *Crossey v. Boockvar,* No. 108 MM 2020 (Pa. Aug. 26, 2020). After conducting an evidentiary hearing, Judge Leavitt filed "her proposed findings of facts and conclusions of law and recommended disposition" on September 4, 2020. *See id.*

Judge Leavitt recommended rejecting the *Crossey* petitioners' request to extend the Election Day received-by deadline. Pet.App.176a–77a. She specifically referenced a July 29, 2020 letter that the USPS General Counsel sent to Secretary Boockvar and pointed out that the letter "does not advocate for changes in Pennsylvania's election law to accommodate the USPS's delivery standards." Pet.App.148a.

Judge Leavitt recommended that the Pennsylvania Supreme Court reject the claim that any "mismatch" between the Election Code's deadlines and USPS delivery standards—or any postal delays related to the

COVID-19 pandemic—warranted extension of the Election Day received-by deadline. *See* Pet.App.147a, 171a. In particular, Judge Leavitt found that USPS's "performance" in Pennsylvania "exceeds the national average" upon which USPS's delivery standards are based. Pet.App.171a "The USPS delivery standards are set in ranges," and the delivery standard within Pennsylvania is "2 to 3 days." *Id.* "There is no evidence that USPS performance in Pennsylvania extends beyond that range." *Id.* To the contrary, "the USPS performance in Pennsylvania falls within th[at] range over 98% of the time." *Id.* In fact, "[i]n the first quarter of 2020 for Pennsylvania, 99.5% of USPS outbound Presort First-Class Mail was delivered within 3 days," and "[m]ore than 98% was delivered within 1 day." *Id.* Even during the second quarter of 2020—when the COVID-19 pandemic was sweeping across the Commonwealth—"99.4% of USPS outbound Presort First-Class Mail was delivered within 3 days" in Pennsylvania and "[m]ore than 98% was delivered within 1 day." *Id.*

Moreover, Judge Leavitt found that even a massive surge in absentee and mail-in voting in the 2020 general election would not lead to postal delays. To the contrary, "[i]f all 8.5 million registered voters in Pennsylvania elect to vote by absentee or mail-in ballot, the quantity of mail generated will represent only 1.2% of USPS'[s] capacity in the Eastern service area and will not overwhelm the system." Pet.App.172a.

For these reasons, Judge Leavitt concluded that the *Crossey* petitioners had failed to "prove that disruptions to USPS operations are likely to occur in November 2020 that will cause timely mailed ballots

to go uncounted in the general election." Pet.App.175a. There was "no evidence upon which the Court c[ould] find, as fact, that the USPS will not be able to deliver absentee and mail-in ballots within 2 to 3 days of their being posted." Pet.App.176a. Rather, the "credible evidence shows just the opposite, *i.e.*, the USPS is unlikely to be overwhelmed in November." *Id.* Accordingly, Judge Leavitt determined that "'the possibility that votes may be suppressed due to late ballot delivery . . . is too remote at this time to constitute a cognizable injury'" and recommended denial of the petitioners' request to extend the Election Day received-by deadline. Pet.App.176a–77a (citation omitted).

D. The Federal Lawsuit and the Pennsylvania Supreme Court's Decisions in This Case and *Crossey*

On June 29, 2020, Donald J. Trump for President, Inc. and the Republican National Committee, together with other parties (collectively, "the Republican Plaintiffs"), commenced an action in the United States District Court for the Western District of Pennsylvania, under the caption *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966-NR. The Republican Plaintiffs raised an array of constitutional claims related to the Election Code, but none related to the Election Day received-by deadline. *See* Am. Compl., *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966-NR (W.D. Pa.) (Doc. 234).

Eleven days later, the Pennsylvania Democratic Party filed this suit in Pennsylvania Commonwealth Court. The Pennsylvania Democratic Party raised mirror-image claims to many of the claims raised by

the Republican Plaintiffs in the federal lawsuit, *see* Pet.App.7a n.3, and sought extension of the Election Day received-by deadline, *see* Pet.App.8a–9a.

Secretary Boockvar initially defended this lawsuit on the merits. *See* Pet.App.10a. As she had in *Disability Rights Pennsylvania*, *Delisle*, and *Crossey*, she opposed the request to extend the Election Day received-by deadline. *See id.* On August 16, 2020, however, Secretary Boockvar petitioned the Pennsylvania Supreme Court to exercise its extraordinary jurisdiction over this case. *See* Pet.App.11a. In her Application seeking that relief, the Secretary informed the Pennsylvania Supreme Court of her change in position in this case and in *Crossey*, and of her change in position on other issues in this case. *See* Secretary Boockvar's Application for the Court to Exercise Extraordinary Jurisdiction, *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020 (Aug. 16, 2020).

The Pennsylvania Democratic Party joined the request for an exercise of extraordinary jurisdiction. *See* Petitioner's Answer to Application for Extraordinary Relief, *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020 (Aug. 19, 2020). Petitioner Republican Party of Pennsylvania ("RPP"), Donald J. Trump for President, Inc., the Republican National Committee, and the National Republican Congressional Committee—which had sought leave to intervene—opposed an exercise of extraordinary jurisdiction. *See* Republican Committee Respondents' Answer to Secretary Boockvar's Application, *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020 (Aug. 20, 2020). On September 1, the Pennsylvania Supreme Court granted the Secretary's Application

and ordered the parties and intervenors "to file supplemental briefing and/or affidavits to support their respective positions on the claims raised in this case on or before Tuesday, September 8, 2020 at 5:00 p.m." Order, *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020 (Sept. 1, 2020).

No party ever moved for an injunction in this case. The Pennsylvania Supreme Court, moreover, did not appoint a special master, and no evidentiary hearing or oral argument was held.

The Pennsylvania Supreme Court issued its decision on September 17, 2020, 47 days before Election Day. The court granted intervention to RPP but denied intervention to RPP's co-movants. *See* Pet.App.12a–13a. On the merits, the court granted in part and denied in part the Pennsylvania Democratic Party's petition for review. In doing so, it addressed five issues, including the request to extend the Election Day received-by deadline for the imminent 2020 general election. *See* Pet.App.28a–49a.

The Pennsylvania Supreme Court acknowledged that the Election Day received-by deadline contains "no ambiguity" and, therefore, did not purport to "interpret the statutory language." Pet.App.43a. The majority also acknowledged that the deadline is "facially []constitutional as there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots." Pet.App.44a. And it even acknowledged that setting a received-by deadline "is fully enshrined within the authority granted to the Legislature under the United States and Pennsylvania Constitutions." Pet.App.45a.

Nonetheless, invoking "natural disaster[s]," "emergency situation[s]," and the "Free and Equal Elections Clause" of the Pennsylvania Constitution, the majority granted the request to extend the Election Day received-by deadline. Pet.App.46a–48a. In particular, it ordered "a three-day extension of the absentee and mail-in ballot received-by deadline . . . such that ballots mailed by voters via the [USPS] and postmarked by 8:00 p.m. on Election Day . . . shall be counted if they are otherwise valid and received by the county boards of election on or before 5:00 p.m. on November 6, 2020." Pet.App.80a. The majority further ordered that "ballots received within this period that lack a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible, 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.* The majority suggested that its chosen remedy "protects voters' rights while being at least variance with Pennsylvania's permanent election calendar, which we respect and do not alter lightly, even temporarily." Pet.App.49a.

That same day, the Pennsylvania Supreme Court entered an order in *Crossey*. In relevant part, that order dismissed the *Crossey* petitioners' request to extend the Election Day received-by deadline as moot. *See* Order, *Crossey v. Boockvar*, No. 108 MM 2020 (Pa. Sept. 17, 2020). Neither the Pennsylvania Supreme Court's order in *Crossey*, *see id.*, nor its opinion in this case, *see* Pet.App.28a–49a, so much as mentioned, let alone addressed, Judge Leavitt's Recommended Findings of Fact and Conclusions of Law.

Three justices dissented from the majority's remedy on the Election Day received-by deadline. Justice Donohue, joined by Chief Justice Saylor and Justice Mundy, objected to the majority's decision to resolve the issue in this case rather than in *Crossey*, where "this Court ordered the creation of a complete evidentiary record to determine whether the petitioners there had met their high burden to prove the existence of a constitutional injury entitling them to relief." Pet.App.105a (Donohue, J., concurring and dissenting).

Moreover, while Justice Donohue agreed that the existing election timeline was "unworkable under current circumstances," Pet.App.119a, she explained that the majority adopted an improper remedy incompatible with the General Assembly's intent. She noted that the General Assembly clearly intended "that all ballots were to be cast by 8:00 p.m. on Election Day" and that it was hardly 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." Pet.App.113a. By contrast, "[t]he last date on which applications for ballots would be accepted" was not "of any institutional importance" on its own, but instead was "tied to an assumption that a timely vote could be cast before the only meaningful milestone, Election Day." *Id.*

Thus, according to the dissent, "the remedy to best effectuate the legislative intent" was not to move the received-by deadline forward, but to "move back, i.e., make earlier, the final date on which applications for mail-in ballots may be submitted to the county boards of elections." *Id.* Justice Donohue therefore would have preserved the Election Day received-by deadline

and instead changed the deadline for requesting a ballot from Tuesday, October 27, to Friday, October 23. Pet.App.118a. Justice Donohue and her dissenting colleagues agreed that "this remedy is the least disruptive to the enacted statutory scheme." *Id.*

Chief Justice Saylor, in a separate opinion joined by Justice Mundy, noted that Justice Donohue's approach "most closely hews to the express legislative intent that the election be concluded by 8:00 p.m. on election night." Pet.App.126a (Saylor, C.J., concurring and dissenting). He also observed that, "although the majority decision appears to be designed to accommodate only ballots actually mailed on Election Day or before, the majority does not so much as require a postmark." *Id.* "[T]his 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.*

RPP asked the Pennsylvania Supreme Court for a stay pending the disposition of a petition for certiorari on September 21, 2020. The Pennsylvania Supreme Court denied that application on September 24, 2020. *See* Pet.App.132a. Justice Mundy dissented. *See* Pet.App.133a–39a.

RPP also sought a stay in this Court. The stay was denied on October 19 by an equally divided vote, with four Justices noting they would have granted the stay. *Republican Party of Pa. v. Boockvar*, No. 20A54 (Oct. 19, 2020).

REASONS FOR GRANTING THE WRIT

The Court should grant review of the paradigmatic "important question[s] of federal law" presented in

this case. U.S. Sup. Ct. R. 10(c). As multiple Justices of this Court have acknowledged, the Constitution reserves a special role for state legislatures in setting the rules for federal elections. By extending the Election Day received-by deadline and establishing a presumption of timeliness that will allow voters to cast or mail ballots *after* Election Day, the Pennsylvania Supreme Court impermissibly altered both the "Time" and the "Manner" established by the General Assembly for "appoint[ing] . . . Electors" and "holding Elections." U.S. Const. art. II, § 1, cl. 2; *id.* art. I, § 4, cl. 1.

In addition, like the district court in *Republican National Committee*, the Pennsylvania Supreme Court created a strong likelihood that ballots cast or mailed "after the scheduled election day" will count in the upcoming general election in which millions of Pennsylvanians will cast their votes for President and U.S. Representative. *See* 140 S. Ct. at 1205–07. This outcome cannot be reconciled with federal statutes establishing a uniform nationwide Election Day.

This is no hypothetical concern. In the April 2020 Wisconsin primary, "many ballots arrived with no postmarks, two postmarks or unclear postmarks." *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249, 2020 WL 5627186, at *6 (W.D. Wis. Sept. 21, 2020), *stay entered*, Nos. 20-2835 & 20-2844, 2020 WL 5951359 (7th Cir. Oct. 8, 2020). And a ballot mailed as late as November 5, 2020 (two days after Election Day) in Pennsylvania has "[m]ore than [a] 98%" chance of being delivered by the Pennsylvania Supreme Court's judicial received-by deadline of November 6, 2020. Pet.App.171a. Thus, just as in *Republican National Committee*, the decision below

"fundamentally alters the nature of the election" by mandating a non-postmarked ballots presumption that allows counting of ballots cast or mailed after Election Day. 140 S. Ct. at 1207.

The question of whether courts may extend Election Day received-by deadlines and how election officials should treat non-postmarked ballots received after Election Day is important and recurring. It is implicated by lawsuits pending in numerous courts across the country. The question is not going away, and this Court should intervene now to preserve the electoral schemes enacted by state legislatures and to provide guidance to lower courts before the rapidly approaching federal general election. *See, e.g.*, *Purcell*, 549 U.S. at 4–5.

I. THE PENNSYLVANIA SUPREME COURT'S REMEDY VIOLATES THE U.S. CONSTITUTION

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).

The Pennsylvania Supreme Court's judicial extension of the General Assembly's Election Day received-by deadline and non-postmarked ballots presumption—adopted in contravention of the special master's findings, in the place of "le[ss] disruptive"

available remedies, and in contradiction of the General Assembly's "clear legislative intent," Pet.App.113a–18a (Donohue, J., concurring and dissenting)—violates the Electors and Elections Clauses.

A. The Electors and Elections Clauses Required the Pennsylvania Supreme Court to Uphold the General Assembly's Election Day Received-By Deadline

Because federal offices "arise from the Constitution itself," any "state authority to regulate election to those offices . . . had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001). The Constitution effected such delegations to State Legislatures through the Electors and Elections Clauses. *See* U.S. Const. art. II, § 1, cl. 2; *id.* art. I, § 4, cl. 1.

The Electors Clause "leaves it to [state] legislature[s] exclusively to define the method of" selecting Presidential electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Palm Beach Cnty.*, 531 U.S. at 76–77; *Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring). The Elections Clause likewise vests State Legislatures, subject to congressional enactments, with authority "to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 826 (2015) (Roberts, C.J., dissenting) (noting that the Elections Clause "imposes a duty on States and assigns that duty to a particular state actor"); *Wise v. Circosta*, No. 20-2107, 2020 WL 6156302, at *9 (4th Cir. Oct. 20, 2020) (Wilkinson, J., dissenting) (the

"Constitution does not assign these powers holistically to the state governments but rather pinpoints a particular branch of state government"). This "broad power to prescribe the procedural mechanisms for holding congressional elections," *Cook*, 531 U.S. at 523 (internal quotation marks omitted), includes authority to enact "the numerous requirements as to the procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved," *Smiley*, 285 U.S. at 366; *Cook*, 531 U.S. at 523–24; *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) (state legislatures may enact election laws in order to ensure that elections are "fair and honest" and that "some sort of order, rather than chaos, is to accompany the democratic process").

This sweeping grant of authority means that "the text of [state] election law itself, and not just its interpretation by the courts of the States, takes on independent significance," *Bush*, 531 U.S. at 112–13 (Rehnquist, C.J., concurring), and the federal Constitution "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the [delegated] legislative power," *Palm Beach Cnty.*, 531 U.S. at 76; *McPherson*, 146 U.S. at 25. "A significant departure from the legislative scheme for appointing Presidential electors" or for electing U.S. Representatives—including when such departure is carried out by the state judiciary—thus "presents a federal constitutional question." *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring); *see also Palm Beach Cnty.*, 531 U.S. at 76; *McPherson*, 146 U.S. at 25.

Here, the General Assembly has "created a detailed . . . statutory scheme" via Act 77 to govern the conduct of federal elections. *Bush*, 531 U.S. at 116

(Rehnquist, C.J., concurring). In doing so, it was "not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under" the federal Constitution. *Palm Beach Cnty.*, 531 U.S. at 76. Accordingly, "the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law" as it existed "prior to" the Pennsylvania Supreme Court's "action" to determine "whether [that court] infringed upon the legislature's authority." *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring).

This analysis must begin with the text of the received-by deadline, which provides that all absentee and mail-in ballots must be cast and "received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." 25 Pa. Stat. §§ 3146.6(c), 3150.16(c). As even the majority admitted, there is "no ambiguity regarding th[is] deadline." Pet.App.43a. Simply put, it amounts to an "express legislative intent that the election be concluded by 8:00 p.m. on election night." Pet.App.126a (Saylor, C.J., concurring and dissenting).

Without a doubt, this deadline was significant to the General Assembly. "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." Pet.App.113a (Donohue, J., concurring and dissenting); 25 Pa. Stat. § 3045 ("At all primaries and elections the polls . . . shall remain open . . . until 8 P.M., Eastern Standard Time."). Indeed, establishing a definitive end to the balloting process was so important to the General Assembly that it included

the received-by deadline in Act 77's non-severability clause, meaning Pennsylvania's *entire mail-in voting scheme* would be invalidated if that deadline were abrogated. *See supra* pp. 6–7. Even the COVID-19 pandemic and alleged mail delays could not alter the General Assembly's views: when it updated the Commonwealth's election laws to address those concerns via Act 12, it retained the Election Day received-by deadline. *See* Pa. Legis. Serv. Act 2020-12 (approved Mar. 27, 2020).

Thus, by imposing its judicial extension and non-postmarked ballots presumption, the Pennsylvania Supreme Court "impermissibly distorted" the General Assembly's comprehensive statutory scheme—including the Election Day received-by deadline, Act 77's non-severability clause, and Act 12—"beyond what a fair reading required." *Bush*, 531 U.S. at 116 (Rehnquist, C.J., concurring). Ultimately, "in a Presidential election the clearly expressed intent of the legislature must prevail." *Id.* at 120. Instead, the Pennsylvania Supreme Court majority—literally—rewrote both the "Time" and the "Manner" set by the General Assembly for "holding Elections" and "appoint[ing] . . . electors." U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. This Court's review and reversal are warranted. *See id.* art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2; *see also McPherson*, 146 U.S. at 25; *Smiley*, 285 U.S. at 366; *Palm Beach Cnty.*, 531 U.S. at 76; *Bush*, 531 U.S. at 120 (Rehnquist, C.J., concurring); *Cook*, 531 U.S. at 523–24.

B. The Pennsylvania Supreme Court Offered No Cognizable Basis for Usurping the General Assembly's Constitutional Authority

The reasoning underpinning the Pennsylvania Supreme Court's departure from the General Assembly's unambiguous enactment was tortured at best. The majority recognized that the power to enact a received-by deadline "is fully enshrined within the authority granted to the Legislature under the United States and Pennsylvania Constitutions." Pet.App.45a. It also found that the General Assembly's Election Day received-by deadline is "facially []constitutional as there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots." Pet.App.44a. And because the statute contains "no ambiguity," the majority did not "interpret the statutory language establishing the received-by deadline." Pet.App.43a.

Nevertheless, the majority proffered at least two justifications for its actions. At times, the majority suggested that it was acting under statutory authority to address the "natural disaster" of COVID-19. Pet.App.46a. At other times, the majority purported to exercise "broad authority to craft meaningful remedies" under the Pennsylvania Constitution's Free and Equal Elections Clause. Pet.App.48a. Neither claim has merit nor justifies the majority's usurpation of the General Assembly's constitutional prerogative.

First, the "natural disaster[s]" and "emergency situation[s]" the majority invoked, Pet.App.46a, do not justify overriding the Election Day received-by deadline. The majority recognized that nothing in the

Pennsylvania Constitution or the Election Code authorizes it to make changes to the Election Code to address these scenarios. *Id.* Case in point: the statute that the majority invoked grants courts of common pleas certain powers on Election Day, but does not endow the Pennsylvania Supreme Court with authority to change the rules of an election 47 days in advance. *See* 25 Pa. Stat. § 3046. And the lone case the majority cited involved a state election, not a federal election covered by the Electors and Elections Clauses. *See In re General Election-1985*, 531 A.2d 836 (Pa. Commw. Ct. 1987) (cited at Pet.App.89a n.10).

Moreover, the majority is simply wrong that the Election Code does not address the "natural disaster" of the "COVID-19 pandemic." Pet.App.46a. To the contrary, the General Assembly was well aware of the COVID-19 pandemic and the alleged postal delays when it enacted Act 12 earlier this year—and while it enacted a host of measures to address the pandemic, it *chose to leave the Election Day received-by deadline in place*. Thus, the General Assembly *did* legislate on the "procedure to follow" during the COVID-19 pandemic, *id.*—and that procedure involves adherence to the Election Day received-by deadline.

Second, the majority cannot cloak its departure from the General Assembly's deadline through vague appeals to the Pennsylvania Constitution's Free and Equal Elections Clause. According to the majority, that provision requires elections to be "conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process," and affords courts "broad authority to craft meaningful remedies when required." Pet.App.44a, 48a (citations omitted). Far from

authorizing disregard for the General Assembly's directives, such "expressions" appear "to indicate that [the Pennsylvania Supreme Court] construed the [Pennsylvania] Election Code without regard the extent to which the [Pennsylvania] Constitution could, consistent with [the Elections Clause], 'circumscribe the legislative power.'" *Palm Beach Cnty.*, 531 U.S. at 77 (criticizing the Supreme Court of Florida for appealing to the Florida Constitution for the principle that "[b]ecause election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote" (citation omitted)).

To be sure, a five-Justice majority concluded in *Arizona State Legislature* that the Elections Clause does not permit a state legislature to "prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." 576 U.S. at 817–18. To the extent that the *Arizona State Legislature* majority was referring to the "lawmaking *process*" enshrined in a State Constitution—which was the issue presented in that case, *see id.* at 804 (emphasis added); *see also id.* at 808–13—its conclusion is of no moment here because the General Assembly adhered to the lawmaking process in the Pennsylvania Constitution when it enacted the Election Day received-by deadline with the Governor's signature, *see supra* pp. 4–6; *see also* Pa. Const. art. III; art. IV § 15. And to the extent that the *Arizona State Legislature* majority was referring to the *substantive* limits on lawmaking enshrined in a State Constitution, it did not reconcile that statement with prior pronouncements of the Court. *Compare* 576 US. at 817–18 (maj. op.) *with McPherson*, 146 U.S. at

25; *Palm Beach Cnty.*, 531 U.S. at 76.[1] Indeed "[t]his case is governed . . . by the Federal Constitution," and "[i]n a conflict between the [Pennsylvania] Constitution and the Elections Clause, the State Constitution must give way." *Ariz. State Legislature*, 576 U.S. at 827 (Roberts, C.J., dissenting). If *Arizona State Legislature* points to a different conclusion in this case, it should be overruled to that extent. *See, e.g.*, *Franchise Tax Bd. of Ca. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (stare decisis is "not an inexorable command" and "is at its weakest when we interpret the Constitution" (internal quotation marks omitted)).

Of course, the General Assembly might "*authorize* . . . the supreme court of the state" to alter the procedures it has established for conducting elections in case of emergency, *see McPherson*, 146 U.S. at 34–35 (emphasis added), but even the majority below acknowledged that it has done no such thing, *see* Pet.App.46a; *see also* Pa. Const. art. II § 1 (vesting the "legislative power of this Commonwealth in [the] General Assembly"). Accordingly, it belonged to the General Assembly, not the Pennsylvania Supreme Court, "exclusively to define the method of" selecting Presidential electors, *McPherson*, 146 U.S. at 25; *Palm*

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[1] State courts of last resort have likewise held that a state constitutional provision cannot limit a state legislature's delegated authority to regulate the procedure of federal elections under the U.S. Constitution. *See, e.g.*, *Opinion of the Justices*, 45 N.H. 595, 599–605 (1864); *State v. Williams*, 49 Miss. 640, 665–66 (1873); *In re Plurality Elections*, 8 A. 881, 881–82 (R.I. 1887).

Beach Cnty., 531 U.S. at 76, and "to provide a complete code for congressional elections," *Smiley*, 285 U.S. at 366.

In all events, the majority's barebones analysis under the Pennsylvania Constitution boiled down to the belief that its remedy was required because "the timeline built into [Pennsylvania's] Election Code" for requesting and submitting an absentee or mail-in ballot "cannot be met by the USPS's current delivery standards." Pet.App.47a. This conclusion is doubly flawed.

As an initial matter, even if its analysis were correct, the majority at a minimum had a responsibility to adopt a remedy that would do the least violence to the General Assembly's chosen scheme for conducting federal elections. *See, e.g.*, *Palm Beach Cnty.*, 531 U.S. at 76–77. As the three dissenting justices explained, another remedy was "le[ss] disruptive to the enacted statutory scheme" and "best effectuate[d]" the "clear legislative intent" to ensure that "a timely vote could be cast before the only meaningful milestone, Election Day." Pet.App.113a–18a (Donohue, J., concurring and dissenting); *see also* Pet.App.126a (Saylor, C.J., concurring and dissenting). Specifically, the proper remedy would have been to "move back, i.e., make earlier, the final date on which applications for mail-in ballots may be submitted," not to extend the Election Day received-by deadline that formed a cornerstone of the General Assembly's comprehensive regulation of federal elections in the Commonwealth. Pet.App.113a (Donohue, J., concurring and dissenting). Nonetheless, the Pennsylvania Supreme Court decided not only to adopt the more intrusive remedy of

extending the Election Day received-by deadline, but also to establish a presumption that will allow votes to be cast after the date set by the General Assembly for "the termination of the balloting process." *Id.*

More fundamentally, the record is devoid of evidence to support the majority's *factual* conclusion that an extension of the Election Day received-by deadline was necessary. Quite to the contrary, the only developed record before the Pennsylvania Supreme Court foreclosed that relief. Indeed, as explained, after an evidentiary hearing, Judge Leavitt issued Recommended Findings of Fact and Conclusions of Law concluding that the USPS is more than equipped to process election mail and that alleged postal delays *do not justify extending the Election Day received-by deadline*. *See supra* pp. 8–11; *see also* Pet.App.140a–88a. Judge Leavitt's findings comport with the USPS's own public statements that it is prioritizing delivery of, and is prepared to timely deliver, all election mail across the country. *See* Pet.App.40a–41a; Protecting the Timely Delivery of Mail, Medicine, and Mail-in Ballots Before the House Comm. on Oversight & Reform, 116th Cong. 13–15 (2020) (statement of Louis DeJoy, Postmaster Gen.), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/PMG%20DeJoy%27s%20Testimony%20COR%20hearing%20Aug%2024%20%20FINAL.pdf.

The majority, however, refused to allow that record to stand in the way of overriding a clear enactment from the General Assembly. Instead, it employed judicial sleight-of-hand to side-step the record it specifically commissioned in *Crossey*. Rather than rule on the validity of the received-by deadline in *Crossey*—where it would have had to confront Judge

Leavitt's Recommended Findings of Fact and Conclusions of Law—the majority extended the received-by deadline in this case, where no factual record had been developed and no hearing or argument were ever held. It then dismissed the received-by challenge in *Crossey* as moot on the basis of its decision in this case. *See Crossey v. Boockvar*, No. 108 MM 2020 (Pa. Sept. 17, 2020). At no point in either of these decisions did the Pennsylvania Supreme Court majority even mention, much less address, Judge Leavitt's findings.

In short, the Pennsylvania Supreme Court ordered the creation of a factual record; when that record proved inconvenient, the majority ignored it, instead using a case with *no factual record* as a vehicle to "fundamentally alter" the nature of the Commonwealth's upcoming election. *Republican Nat'l Comm.*, 140 S. Ct. at 1207. This chicanery only demonstrates the lengths to which the Pennsylvania Supreme Court was willing to go in its efforts to usurp the role of the General Assembly, and further confirms that the resulting "departure" from the Election Day received-by deadline is "significant" and of a constitutional dimension. *Bush*, 531 U.S. at 112 (Rehnquist, J., concurring); *see also McPherson*, 146 U.S. at 25; *Palm Beach Cnty.*, 531 U.S. at 76.[2]

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[2] The sole piece of evidence regarding alleged mail delays to which the Pennsylvania Supreme Court pointed was a letter from the USPS General Counsel. Pet.App.47a. But that letter addressed only the one-week turnaround time between Pennsylvania's statutory deadlines for applying for and returning absentee or mail-in ballots. *See id.* Thus, it was the

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Ultimately, the Pennsylvania Supreme Court believed extension of the Election Day received-by deadline and adoption of the non-postmarked ballots presumption were necessary to address the COVID-19 pandemic. Pet.App.33a–34a. However, any "virtues" of this approach "as a policy innovation cannot redeem its inconsistency with the Constitution." *Ariz. State Legislature*, 576 U.S. at 846 (Roberts, C.J., dissenting). Whatever "concerns" the majority might have about "the process of [selecting presidential electors] in their State" in the current environment, "[f]or better or for worse, the Elections Clause of the Constitution does not allow them to address those concerns by displacing [the electoral scheme enacted by] their legislature." *Id.* at 849.

II. THE PENNSYLVANIA SUPREME COURT'S REMEDY VIOLATES FEDERAL LAW

"[I]t is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." *Foster v. Love*, 522 U.S. 67, 69 (1997) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–33 (1995)). "[T]he regulations made by Congress are paramount to those made by the State

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General Assembly's generosity in permitting voters an expanded period to apply for absentee or mail-in ballots, not COVID-19, that created the problem the majority deemed a constitutional violation. *See id.* Moreover, Judge Leavitt had the letter from the USPS General Counsel before her and it did not alter her conclusion. *See supra* pp. 8–11.

legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ex parte Siebold*, 100 U.S. 371, 384 (1879); *see also Foster*, 522 U.S. at 69.

Congress has prescribed a single nationwide federal Election Day in three federal statutes. The first, 3 U.S.C. § 1, provides that "[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." The second, 2 U.S.C. § 7, directs 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." And the third, 2 U.S.C. § 1, mandates that "[a]t the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress . . . is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter."

This trio of statutes "mandates holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster*, 522 U.S. at 70. The term "election" within these statutes means the "combined actions of voters and officials meant to make a final selection of an officeholder." *Id.* at 71. In other words, "election" is the consummation of a process to elect an official. *See id.* Thus, these three federal statutes require the 2020 general election to be

consummated on Election Day (November 3, 2020). *See id.*; *see also* 3 U.S.C. § 1; 2 U.S.C. §§ 2, 7.

Consistent with these federal statutes, courts have held that counting ballots cast on or before Election Day is permissible. *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 778 (5th Cir. 2000) (emphasis added); *see also* 52 U.S.C. § 10502(d). But whatever latitude states retain under federal law to define the process of casting mail-in or absentee ballots through the USPS, they cannot create a process under which ballots cast or mailed *after* Election Day can be considered timely. Such a process would permit a voter to take "actions . . . meant to make a final selection of an officeholder" beyond the uniform deadline set by Congress. *Foster*, 522 U.S. at 71; 3 U.S.C. § 1; 2 U.S.C. §§ 1, 7.

The majority's decision below threatens to allow precisely that. By its very nature, the extension of the received-by deadline means that election officials will receive ballots after Election Day. More problematically, the majority's non-postmarked ballots presumption will allow election officials to count those ballots even if they bear no proof, such as a postmark, that they were cast and mailed on or before Election Day. Counting such ballots in federal elections violates the federal laws establishing a nationwide federal Election Day. *Foster*, 522 U.S. at 70–71; *see also* 3 U.S.C. § 1; 2 U.S.C. §§ 1, 7. The majority's non-postmarked ballots presumption therefore "ceases to be operative" to the extent it permits the counting of such ballots in federal elections. *Foster*, 522 U.S. at 69; *see also* 3 U.S.C. § 1; 2 U.S.C. §§ 1, 7.

The only response offered by the majority below—in a footnote—was that the "tabulation of ballots received after Election Day does not undermine the existence of a federal Election Day." Pet.App.42a n.23. That response misses the point because federal law preempts the counting in federal elections of *ballots that were not cast or mailed by Election Day*, including non-postmarked ballots received after Election Day. The Court should grant review and reverse.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING

Numerous courts around the country have considered—and continue to consider—requests to extend Election Day received-by deadlines in light of the COVID-19 pandemic. Consistent with this Court's acknowledgement that election-related deadlines are constitutional, *see Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973), many of those courts have upheld state received-by deadlines. [3] That included the

[3] *See, e.g., New Ga. Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588 (11th Cir. Oct. 2, 2020); *Grossman v. Sec'y of the Commonwealth*, 151 N.E.3d 429 (Mass. 2020); *Stapleton v. Thirteenth Judicial Dist. Ct.*, No. OP 20-0293, DA 20-0295 (Mont. Sept. 29, 2020); *Mich. All. for Retired Ams. v. Sec'y of State*, No. 354993 (Mich. Ct. App. Oct. 16, 2020), *appeal denied*, 946 N.W.2d 307 (Mich. 2020); *League of Women Voters of Mich. v. Sec'y of State*, No. 353654, 2020 WL 3980216 (Mich. Ct. App. July 14, 2020); *Yazzie v. Hobbs*, No. CV-20-08222 (D. Ariz. Sept. 25, 2020), *aff'd*, No. 20-16890, 2020 WL 6072861 (9th Cir. Oct. 15, 2020); *Democratic Cong. Campaign Comm. v. Ziriax*,

Pennsylvania Supreme Court during Pennsylvania's primary election earlier this year. *See Disability Rights Pa.*, 2020 WL 2820467; *Delisle*, 2020 WL 3053629.

Other courts, however, have concluded that the pandemic requires extensions of legislatively enacted received-by deadlines. And any time such relief is granted, it necessarily raises the question of how election officials should treat non-postmarked ballots received after Election Day. Some courts have addressed this issue by requiring ballots to be postmarked on or before Election Day. *E.g.*, *Driscoll v. Stapleton*, No. DV 20-408, 2020 WL 5441604 (Mont. 13th Jud. Dist. May 22, 2020), *aff'd in part, vacated in part*, No. DA 20-0295 (Mont. Sept. 29, 2020). Others have allowed non-postmarked ballots to be deemed valid if they are received within a specified time frame. *E.g.*, *Gallagher v. N.Y. State Bd. of Elections*, No. 20 CIV. 5504 (AT), 2020 WL 4496849, at *23 (S.D.N.Y. Aug. 3, 2020). And still others have endorsed presumptions akin to that set forth by the Pennsylvania Supreme Court. *E.g.*, *Bostelmann*, 2020 WL 5627186, at *22 n.21; *LaRose v. Simon*, No. 62-CV-20-3149, (Minn. Dist. Ct. Ramsey Cnty. Aug. 18, 2020) (approving consent decree). The result is a judicial and legislative patchwork, where despite State Legislatures exercising their authority under the Electors and Elections Clauses and congressional

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No. 20-CV-211-JED-JFJ, 2020 WL 5569576 (N.D. Okla. Sept. 17, 2020); *Nielsen v. DeSantis*, No. 4:20-cv-236-RH-MJF, 2020 WL 5552872, at *1 (N.D. Fla. June 24, 2020).

efforts to provide nationwide uniformity, the treatment of non-postmarked ballots varies by jurisdiction, raising the very real possibility that ballots cast *after* Election Day will be counted.

Absent this Court's intervention, these inconsistencies will only become more pronounced. Even now, there are numerous pending cases seeking to overturn Election Day received-by deadlines.[4] And still other cases have challenged legislative presumptions in favor of non-postmarked ballots. *See, e.g.*, *Donald J. Trump for President, Inc. v. Murphy*, No. 3:20-cv-10753 (D.N.J.).

It is not surprising, then, that four Justices of this Court—and even Respondents themselves—have deemed this case worthy of the Court's attention. Any suggestion that it is now too late to remedy the Pennsylvania Supreme Court majority's gross judicial rewrite of the Commonwealth's Election Code is "the legal definition of chutzpah." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020). Of course,

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[4] *See, e.g.*, *Wise v. Circosta*, No. 20-2107 (4th Cir.); *Lewis v. Hughs*, No. 20-50654 (5th Cir.); *New Ga. Project v. Raffensperger*, No. 20-13360 (11th Cir.); *Common Cause Ind. v. Lawson*, No. 20-2911 (7th Cir.); *Yazzie v. Hobbs*, No. 20-16890 (9th Cir.); *Democratic Cong. Campaign Comm. v. Ziriax*, No. 20-CV-211-JED-JFJ (N.D. Okla.); *League of Women Voters of Del. v. State of Del. Dep't of Elections*, C.A. No. 2020-0761 (Del. Ct. Chancery); *Am. Women v. State of Missouri*, No. 20AC-CC00333 (Mo. Cir. Ct., Cole Cnty.); *Am. Fed'n of Teachers v. Gardner*, No. 216-2020-CV-570 (N.H. Super. Ct. Hillsborough Cnty.).

this Court "would prefer not to" change election rules again "at this late date," "but when a lower court intervenes and alters the election rules so close to the election date," this Court "should correct the error." *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *e.g., Merrill v. People First of Ala.*, No. 19A1063 (U.S. July 2, 2020). After all, it is the Pennsylvania Supreme Court majority's last-minute upsetting of the rules established by the General Assembly that threatens public "[c]onfidence in the integrity of our electoral processes" on the eve of a historic general election. *Purcell*, 549 U.S. at 4–5. This case thus provides the perfect vehicle for this Court to address the confusion that is mounting around the country and resolve these important issues once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

October 23, 2020

Respectfully submitted,

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