Nos. 20-542, 20-574

In the Supreme Court of the United States

REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioner,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents.

JOSEPH B. SCARNATI, III, ET AL.,
Petitioners,

v.

PENNSYLVANIA DEMOCRATIC PARTY, ET AL.,
Respondents.

On Petitions For Writs Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF OF THE PENNSYLVANIA DEMOCRATIC PARTY RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Pennsylvania Supreme Court held that, in light of the COVID-19 public health emergency and severe delays of the U.S. Postal Service, applying Pennsylvania's statutory receipt deadline for mail-in ballots during the November 2020 general election would violate the Free and Equal Elections Clause of the Pennsylvania Constitution. The court remedied that state constitutional violation by permitting mail-in ballots to arrive in the three days following Election Day and adopting a rebuttable presumption that ballots arriving in that short window were timely cast unless a postmark or other evidence showed to the contrary. In Nos. 20-542 and 20-574, two sets of petitioners challenge the Pennsylvania Supreme Court's decision. The questions presented are:

1. Whether petitioners' challenge to the Pennsylvania Supreme Court's decision is moot.

2. Whether this Court may remedy any defect in the Pennsylvania Supreme Court's decision by invalidating votes that were cast in conformity with the rules that governed during the 2020 general election.

3. Whether any petitioner has standing to challenge the Pennsylvania Supreme Court's decision.

4. Whether, if this Court has Article III jurisdiction, the Pennsylvania Supreme Court's decision violates the Elections Clause, U.S. Const. art. I, § 4, cl. 1, and Electors Clause, art. II, § 1, cl. 2.

5. Whether, if this Court has Article III jurisdiction, the Pennsylvania Supreme Court's decision is preempted by federal statutes establishing a nationwide federal Election Day.

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INTRODUCTION

Whatever may have been true when petitioners first invoked this Court's jurisdiction, their persistence in seeking plenary review is now an exercise in the quixotic. President-elect Biden's margin of victory in Pennsylvania is orders of magnitude greater than the total number of ballots petitioners challenge. Nor can the challenged ballots change the result of any other federal race. Petitioners therefore can obtain no meaningful relief from this Court, leaving no case or controversy for the Court to address.

And that is not the only impediment to reaching the questions presented. Bedrock principles of due process and of remedial equity require that voters who reasonably relied on the state law and guidance in effect when they voted have their votes counted—and that is true whether or not petitioners' challenge to the legal sufficiency of those ballots ultimately has any merit. Moreover, the individual legislator petitioners plainly lack standing under this Court's precedents, and there is substantial doubt whether the Republican Party of Pennsylvania can establish standing. For all of these reasons, petitioners are effectively seeking an advisory opinion at this point.

Even if this Court were to overcome all of these obstacles and reach the merits, petitioners have identified no sound basis for overturning the Pennsylvania Supreme Court's decision. That court's reliance on the state constitution to make a sensible, modest adjustment of mail-in voting procedures in response to an extraordinary public health crisis and the U.S. Postal Service's self-declared shortcomings was a far cry from the kind of serious, after-the-fact distortion of state

electoral processes that some members of the Court have indicated might raise constitutional concerns.

Any one of these considerations would justify denying review. In combination, they leave no doubt that the petitions should be denied.

STATEMENT OF THE CASE

This case arises from a petition for review filed in Pennsylvania's Commonwealth Court on behalf of the Pennsylvania Democratic Party (PDP), Democratic elected officials, and Democratic candidates (together, PDP Respondents) seeking to prevent disenfranchisement of Pennsylvania voters during the 2020 election.

PDP Respondents asserted an as-applied state constitutional challenge to Pennsylvania's statutory scheme governing the deadlines for requesting and receiving mail-in ballots. The relevant statute provides that voters may submit an application for a mail-in ballot until seven days before the election—here, October 27, 2020. 25 Pa. Stat. § 3150.12a(a). If the voter meets the requirements for a mail-in ballot, the county board of elections must mail or deliver the ballot to the voter within two days. See 25 Pa. Stat. §§ 3146.2a(a.3)(3), 3150.15. Only ballots received by the county board by 8 p.m. on Election Day will be counted. See 25 Pa. Stat. § 3150.16(c).

PDP Respondents argued that, in light of the COVID-19 public-health emergency, the ballot-receipt deadline threatened to result in voter disenfranchisement during the November 2020 general election in violation of the Free and Equal Elections Clause of the Pennsylvania Constitution. PDP Respondents pointed to the difficulties experienced in connection with the June 2020 primary, in which a "crush of applications"

for mail-in ballots resulting from the pandemic caused "disparities in the distribution and return" of those ballots. Pet. App. 28a-29a (No. 20-542). PDP Respondents requested an injunction ordering that ballots mailed by Election Day and received within seven days of Election Day be counted—the same rule that Pennsylvania law provides for military and overseas ballots. *Id*. at 33a n.19 (citing 25 Pa. Cons. Stat. § 3511).

After initial filings before the Commonwealth Court, the Secretary of the Commonwealth (Secretary) asked the state supreme court to take jurisdiction over the petition. Pet. App. 10a-12a. The Secretary had previously opposed an extension of the ballot-receipt deadline, but she reassessed her position after receiving a letter from the General Counsel of the U.S. Postal Service (USPS). See *id*. at 34a. The General Counsel stated that voters should generally place completed ballots in the mail at least one week before the receipt deadline, given expected mail transit times. App. to Opp. to Petitioner's Mot. to Expedite at A-2, No. 20-542 (Oct. 25, 2020). But under Pennsylvania law, many voters would not even receive their ballot by one week before November 3, thus presenting a "significant risk" that such voters would not be able to "mail the completed ballot back to election officials in time for it to arrive by the state's return deadline." *Ibid.*

The Secretary therefore determined that a three-day extension of the ballot-receipt deadline for the 2020 general election was necessary to guarantee compliance with the Pennsylvania Constitution. Pet. App. 35a-36a. The Secretary proposed that the court ensure the disqualification of votes cast by voters after

Election Day by invalidating any ballot that arrived after the three-day period, was postmarked after Election Day, or was shown by a preponderance of the evidence to have been cast too late. *Id*. at 36a n.20.

The Pennsylvania Supreme Court accepted jurisdiction and permitted intervention by the Republican Party of Pennsylvania (RPP) and two state legislators (State Legislators). Pet. App. 12a. The court concluded that the statutory ballot-receipt deadline conflicted with the Free and Equal Elections Clause of the Pennsylvania Constitution under the unprecedented circumstances of the 2020 election. *Id*. at 46a-47a. The court recognized that the statute required that all ballots be received by a county board by 8 p.m. on Election Day. *Id*. at 43a-44a (citing 25 Pa. Stat. § 3150.16(c)). But the court also considered the COVID-19 pandemic, the "USPS's current delivery standards," the county election boards' struggles during the primary, and the increase in mail-in ballot requests for the general election. *Id*. at 47a. The court concluded that the compressed schedule for receiving and returning ballots would "unquestionably fail" under these circumstances, "resulting in the disenfranchisement of voters." *Ibid.*

Under its precedents, the Pennsylvania Supreme Court had "broad authority to craft meaningful remedies" for the constitutional violation. Pet. App. 47a (citing *League of Women Voters* v. *Commonwealth*, 178 A.3d 737, 822 (Pa. 2018)). The court emphasized that a statewide, pre-election order would best protect voters' rights without "creating voter confusion." *Ibid*. The court therefore adopted the Secretary's "informed recommendation" concerning a three-day extension of

the ballot-receipt deadline and postmark rules for the 2020 election. *Id.* at 48a.

Justice Donohue filed a partial dissent, joined in relevant part by Chief Justice Saylor and Justice Mundy.[1] She agreed with the majority that, given the COVID-19 emergency and USPS delays, Pennsylvania's statutory deadlines would violate the Free and Equal Elections Clause. Pet. App. 108a. She further agreed that the court had "wide latitude to craft an appropriate remedy" for the constitutional infirmity. *Id*. at 112a (citation omitted). She would have chosen a different remedy, however—one that pushed the statutory deadline to *request* a ballot earlier. *Id*. at 118a-119a.

The Pennsylvania Supreme Court issued its decision on September 17. In the weeks that followed, both that court and this Court declined to stay that decision prior to the election. On September 24, the Pennsylvania Supreme Court denied a stay pending this Court's resolution of a petition for certiorari. Pet. App. 132a. On September 28, RPP and the State Legislators sought a stay in this Court. Nos. 20A53, 20A54. RPP asked the Court to construe its stay motion as a petition for certiorari and to grant certiorari. See RPP Application 3 & n.1, 20A54. PDP Respondents and the Secretary agreed that the Court should issue a ruling on the merits sufficiently in advance of Election Day to give Pennsylvania's citizens clear notice of the applicable rules. PDP Response 2-3, No. 20A54 (Oct. 5, 2020); Boockvar Response 2-3, No. 20A54 (Oct. 5, 2020). On October 19, the Court denied

[1] Justice Wecht concurred, and Chief Justice Saylor concurred in part and dissented in part.

the stay applications, indicating that it would not disturb Pennsylvania's voting procedures before Election Day. See No. 20A53 (Oct. 19, 2020); No. 20A54 (Oct. 19, 2020).

On October 23, RPP filed a petition for certiorari, together with a motion for expedition. No. 20-542. The State Legislators filed a separate petition for certiorari on October 27. No. 20-574. On October 28, the Court denied RPP's request to take up this case before Election Day.

In the seven weeks leading up to Election Day, the Pennsylvania Supreme Court's decision remained the governing law. Accordingly, election officials in Pennsylvania relied on that decision when advising voters about the rules in Pennsylvania's 2020 elections. The Pennsylvania Department of State's website told voters that their ballots must be postmarked by November 3 at 8 p.m. and received by November 6 at 5 p.m.[2] Cities and county elections boards[3] and media outlets[4]

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[2] See https://web.archive.org/web/20200928010711/https://www.votespa.com/about-elections/pages/upcoming-elections.aspx (Sept. 28, 2020 website capture); see also https://www.pagop.org/register-to-vote/?source=sidebar#critical-deadlines (Pennsylvania Republican Party website, directing voters to Department of State website for information regarding voting by absentee or mail-in ballot).

[3] See, *e.g.*, General election mail-in ballot guide for Philadelphia voters (Sept. 25, 2020), https://www.phila.gov/media/20201005102659/Mail-in-ballot-guide-printer-spread-English-20200925.pdf.

[4] See, *e.g.*, The Philadelphia Inquirer, How to Vote in 2020, https://www.inquirer.com/politics/election/inq/2020-election-

publicized the same timeline. While those sources often urged voters to "cast your ballot as soon as you receive it,"[5] they also explained the parameters set by the Pennsylvania Supreme Court's binding ruling.

The day after the election, Donald Trump's campaign filed a motion to intervene in both proceedings pending in this Court. PDP Response 1, No. 20-542 (Nov. 5, 2020). On November 6, in response to an application by RPP, Justice Alito issued an order directing that all ballots received after 8 pm on Election Day be segregated and "if counted, be counted separately." Order 1, No. 20A84 (Nov. 6, 2020). That order was consistent with the Secretary's existing guidance to county elections authorities, which the Secretary had issued on October 28 and November 1.

About one week later, the Secretary announced that "[a]pproximately 10,000 mail ballots that were cast on or before Nov. 3 were received by counties between 8 p.m. November 3 and 5 p.m. Nov. 6." *Department of State Provides Update on Election Results* (Nov. 13, 2020), https://www.media.pa.gov/Pages/State-details.aspx?newsid=432. That figure was not large enough to change the result of the presidential contest, or even to trigger a recount under state law. See *ibid.*

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pennsylvania-mail-in-person-voting-guide-20200918.html; WHYY NPR, All the deadlines you need to know to vote in Pa., N.J. and Del. (Sept. 29, 2020), https://whyy.org/articles/all-the-deadlines-you-need-to-know-to-vote-in-pa-n-j-and-del/.

[5] *E.g.*, Secretary Of State Reminds Pennsylvanians To Make A Plan To Vote (Oct. 19, 2020), https://www.media.pa.gov/pages/State-details.aspx?newsid=415.

On November 24, 2020, after all counties had certified their presidential vote totals, the Secretary certified the results of the presidential election in Pennsylvania. See *Department of State Certifies Presidential Election Results* (Nov. 24, 2020), https://www.media.pa.gov/Pages/State-details.aspx?newsid=435. Shortly thereafter, Governor Wolf signed the Certificate of Ascertainment for the slate of electors for President-elect Biden. *Ibid*. That Certificate shows 3,458,229 votes for President-elect Biden's electors and 3,377,674 votes for President Trump's electors—a difference of about 80,000 votes. *Ibid.*

ARGUMENT

I. This Case Does Not Warrant This Court's Review Because It Will Not Alter The Election Result.

Petitioners filed their petitions for certiorari before Election Day, when it was possible that ballots received between 8 p.m. on November 3 and 5 p.m. on November 6 might make a difference in the results of a federal election in Pennsylvania. That possibility no longer exists. President Trump lost the popular vote in Pennsylvania by over 80,000 votes, but only approximately 10,000 ballots were received during the three-day period in question. This Court's resolution of this case therefore could not affect the electoral result, or petitioners' interests, in any way. Because the dispute in this case concerns a Pennsylvania Supreme Court ruling that by its terms was applicable only to the now-concluded 2020 election and has no enduring significance, the case is moot and unworthy of this Court's review.

1. a. "It is a basic principle of Article III that a justiciable case or controversy must remain 'extant at all stages of review.'" *United States* v. *Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam) (citation omitted). At all times, a litigant "'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) (citation omitted). Thus, there is "no case or controversy, and a suit becomes moot, 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013) (citation omitted).

That description precisely fits this case. With the 2020 election now over and the winners determined by margins that far outstrip the number of disputed ballots, no petitioner retains a legally cognizable interest here.

That is true with respect to the State Legislators. Even if they had standing to assert the interests of the legislature (but see pp. 20-21, *infra*), the legislature has no concrete interest in the case anymore because the effect of the Pennsylvania Supreme Court's decision has dissipated. That decision was expressly limited to the extraordinary circumstances attending the 2020 election. See pp. 4-5, *supra*; Pet. App. 46a-47a. Now that the 2020 electoral contests have concluded and the statutory deadlines will control all future elections, the legislature lacks any legally cognizable interest in seeing the Pennsylvania Supreme Court's time-limited decision struck down.

RPP likewise no longer has any legally cognizable interest in the outcome of this case (assuming that it ever had any such interest, see pp. 21-22, *infra*). RPP

asserted the interest of a member who intended to vote in the 2020 election, see 20A54 RPP Emer. Stay Reply 2-3 (Oct. 6, 2020) ("Stay Reply"), but that member cannot possibly suffer any injury arising from the mail-in ballots received after November 3 because those ballots cannot change the outcome of any federal race. President-elect Biden's 80,000-vote lead dwarfs the 10,000 or so ballots at issue here.[6] Nor is any congressional race in Pennsylvania subject to change based on the disputed ballots. See *U.S. Election Results By State: Pennsylvania* (Nov. 20, 2020), https://graphics.reuters.com/USA-ELECTION/RESULTS-LIVE/qzjpqadqapx/index.html?st=PA.

RPP also claimed organizational injuries resulting from the Pennsylvania Supreme Court's decision—specifically, that RPP would have to devote new resources to compensate for the extended deadline for mail-in ballots. See Stay Reply 3-4. But any such injuries are no longer redressable because, with the election now over, any additional resources have already been expended.

b. Petitioners have pinned their hopes on an exception to mootness: the doctrine that permits courts to hear cases that are "capable of repetition yet evading review." RPP Mot to Expedite 5 n.1; see State Legislators Pet. 11. That doctrine "applies 'only in exceptional situations,' where (1) 'the challenged action [is]

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[6] For that reason, Donald J. Trump for President, Inc. (which has sought intervenor status) also lacks a cognizable interest here. The Trump campaign argued that there was "no question" it "has standing if the Pennsylvania Supreme Court's decision decides its success or failure in the presidential election." Mot. to Intervene 9. It is now clear, however, that that decision had no such effect.

in its duration too short to be fully litigated prior to cessation or expiration,' and (2) 'there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.'" *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted).

Petitioners can satisfy neither prong of that test. First, the challenged action could have been litigated prior to the election. The Pennsylvania Supreme Court issued its decision on September 17, 2020—about a month and a half before Election Day. The case promptly reached this Court, at which point petitioners and respondents agreed that the Court could adjudicate the merits before Election Day, and accordingly engaged in immediate and substantial briefing on the merits issues. See pp. 5-6, *supra*; RPP Stay App. 20-34; PDP Response 14-31. That history refutes any suggestion now that such review was impossible.

Nor is there any reason to think that Elections Clause cases generally will evade review—or even require expedited review—simply because they sometimes arise in anticipation of a coming election. This Court has had no trouble adjudicating Elections Clause cases on a standard timeline. See, *e.g.*, *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015) (argued March 2, 2015; decided June 29, 2015).

Second, there cannot possibly be a "reasonable expectation" that the "same action" will occur again. *Kingdomware*, 136 S. Ct. at 1976 (citation omitted). The Court has deemed that standard satisfied in the election context when a disputed rule would necessarily control future elections. See *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 188

(1979). Here, however, the Pennsylvania Supreme Court's decision was confined to the "unprecedented" circumstances of the 2020 election, including a massive influx of mail-in ballots during a presidential election, severe postal delays, and a once-in-a-century pandemic. Pet. App. 44a, 46a, see p. 4, *supra*. It strains credulity to suggest that the Pennsylvania Supreme Court will remedy such an as-applied constitutional violation by altering ballot-receipt deadlines in the future.

Petitioners cite *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), but that case does not assist them. There, the plaintiff brought an as-applied challenge to a federal statute that it "credibly claimed" would harm it during future election cycles. *Id.* at 463 (citation omitted). Here, however, there is no statute or other permanent fixture of law that promises to harm RPP in the future. To the contrary, this case concerns a time-limited holding of a state court that addresses highly unusual circumstances and has no remaining effect. See *Illinois State Bd.*, 440 U.S. at 188 (refusing to apply the capable-of-repetition exception where the challenged election-related action "was not a matter of statutory prescription").

2. Mootness aside, this case no longer has any real-world significance. Not surprisingly, then, many of the reasons petitioners advanced in support of certiorari no longer obtain. RPP, for instance, argued that this Court should decide this case to provide clarity on whether courts may "extend Election Day received-by deadlines in light of the COVID-19 pandemic." Pet. 33. But with Election Day now in the past, the urgency of that issue has subsided and, depending on the course of the pandemic, may well never return. RPP

also insisted that the Court should act to ensure that "votes that are of questionable legality" do not "cast[] a cloud" on the "legitimacy of the election." Stay App. 37 (quoting *Bush* v. *Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring)). But that concern no longer has any force, as the allegedly unlawful ballots were segregated and cannot possibly make a difference in the outcome. See p. 7, *supra*.

All that remains is petitioners' academic interest in having this Court analyze the meaning of the Elections Clause and the federal Election Day statutes. But there is no reason to think those issues cannot be adjudicated in the context of a case that is still live. Petitioners' abstract interest cannot justify review in *this* case. And, at a minimum, the strong possibility of mootness renders the petitions poor vehicles for resolving the questions presented.

II. Ballots Cast In Reasonable Reliance On Governing Election Rules Cannot Be Retroactively Invalidated.

This Court's review is unwarranted for another reason as well: even if petitioners had any remaining stake in this litigation and could prevail on the merits of their constitutional and statutory claims, they still would not be entitled to any relief. That is because invalidation of votes cast in reasonable reliance on clear state guidance would offend fundamental principles of due process and equity. Accordingly, review of the questions presented would be an exercise in futility.

1. When voters have cast their ballots in conformity with then-existing election rules and in reasonable

reliance on official guidance, a court may not invalidate those ballots.

a. That rule follows from three fundamental principles at the heart of our constitutional system. First, this Court has long held that the Constitution protects the right to vote. *Harper* v. *Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); see *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). It has likewise held that the right to vote encompasses not only citizens' right to cast their ballots but also their right to "have their votes *counted*." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964) (emphasis added). After all, the "right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights," *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964), and "vital to the maintenance" of our "democratic institutions," *Carrington* v. *Rash*, 380 U.S. 89, 94 (1965) (citation omitted).

Second, before individuals are deprived of a constitutionally protected interest like the right to have their votes counted, "[e]lementary considerations of fairness dictate" that they "have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf* v. *USI Film Products*, 511 U.S. 244, 265 (1994); see *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). That is required by the Due Process Clause, which prohibits the government from "officially and expressly" telling a citizen that she is "legally allowed to do something," only to later tell her "just kidding." *PHH Corp.* v. *CFPB*, 839 F.3d 1, 48 (D.C. Cir. 2016) (Kavanaugh, J.), *rev'd on other grounds*, 881 F.3d 75 (2018) (en banc). And it is a critical component of this Court's equity jurisprudence, under which "reliance interests weigh heavily in the

shaping of an appropriate equitable remedy." *Lemon* v. *Kurtzman*, 411 U.S. 192, 203 (1973); see, *e.g.*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944).

Third, in exercising its remedial discretion, this Court consistently takes account of the public interest in stability and order. See *U.S. Bancorp Mortg. Co.* v. *Bonner Mail P'ship*, 513 U.S. 18, 26 (1994) (placing burden on petitioner to show "equitable entitlement to the extraordinary remedy" requested); *Norton* v. *Shelby Cnty.*, 118 U.S. 425, 441 (1886). That obligation counsels against remedies that could provoke "chaos and uncertainty." *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981); see also, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 142-143 (1976) (per curiam).

b. This Court's decisions in election cases have reflected those principles. For instance, this Court has, in the face of reliance interests and considering other pertinent facts and circumstances, refused to invalidate an election after it has occurred, notwithstanding constitutional or other legal infirmities in the election. See, *e.g.*, *Connor* v. *Williams*, 404 U.S. 549, 550-551 (1972) (per curiam) (assuming Fourteenth Amendment violation in conduct of elections but "declin[ing] to disturb" them); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 571-572 (1969) (rejecting request by appellants and Solicitor General that the Court "set aside" elections conducted in violation of federal law).

More recently, *Andino* v. *Middleton*, No. 20A55 (Oct. 5, 2020), involved a similar remedial outcome. That case concerned a federal district court's order enjoining South Carolina's witness requirement for absentee ballots. In the weeks following the order, state officials informed South Carolinians that absentee ballots did not require a witness signature, and many

voters likely mailed their ballots without a signature in reliance on that information. See Respondents' Opposition to Emergency Application for Stay 1-4, 21 (No. 20A55). This Court ultimately ruled that the district court had improperly altered state election law. But rather than disenfranchise the voters who had submitted their ballots in reasonable reliance on the injunction and consequent state guidance, this Court ordered that "any ballots cast before" the issuance of the Court's stay "and received within two days" of the Court's order "may not be rejected for failing to comply with the witness requirement." *Andino* v. *Middleton,* No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). The Court thus ensured that voters who reasonably relied on then-governing rules would not have their votes extinguished, even if their ballots were ultimately not compliant with state election law.

Any doubt as to whether invalidation of votes cast in reasonable reliance on then-governing election rules is proper is resolved by the *Purcell* principle, which dictates that "federal courts ordinarily should not alter state election laws in the period close to an election." *Democratic National Committee* v. *Wisconsin State Legislature*, No. 20A66, 2020 WL 6275871, at *3 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring); see *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006). This Court has routinely ensured that federal courts do not disturb state election rules, even if they have found a federal constitutional violation. See *Wisconsin*, 2020 WL 6275871, at *3 (Kavanaugh, J., concurring) (citing six instances of this Court following *Purcell* this year).

That principle *a fortiori* deprives petitioners of any entitlement to relief. Whereas this Court has routinely prevented federal courts from changing the

rules of an election shortly before or during the time for casting votes, here petitioners seek to change the rules of the election *after* the votes have been cast. That request is contrary to the unmistakable premise of *Purcell*: that voters and election officials should be able to rely on the existing rules when they participate in an election. See *Wisconsin*, 2020 WL 6275871, at *3 (Kavanaugh, J., concurring). Indeed, under petitioners' view, *Purcell* could become a weapon of disenfranchisement, leading voters to follow state election rules that may ultimately be used to invalidate their votes in post-election litigation. Likewise, there would be no logic to withholding pre-election adjudication of constitutional claims for purposes of avoiding "voter confusion" that could dissuade individuals from voting, *Purcell*, 549 U.S. at 4-5, if voters could ultimately have their ballots invalidated through post-election decisions by federal courts. And invalidating votes after an election would enmesh the Court in political disputes that *Purcell* tries to avoid—because when this Court adjudicates a case after an election, there is an unavoidable appearance that the Court is picking the winner. Cf. *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2507 (2019) (refusing an "expansion of judicial authority" into "one of the most intensely partisan aspects of American political life").

2. Voters' reasonable reliance on existing law forecloses petitioners' preferred remedy in this case. In the absence of any possible remedy, denial of the petition is warranted.

The reliance interests here are extremely strong. Thousands of Pennsylvania voters exercised their fundamental right to vote by casting mail-in ballots in the

days preceding Election Day. They did so in conformity with then-existing election rules that permitted timely cast mail-in ballots to arrive by November 6 and in reasonable reliance on public statements to the same effect. See pp. 6-7, *supra*. If the Court were to grant review and hold that the appropriate receipt deadline was actually November 3, voters would learn that information long after they cast their ballots, and long after Election Day has passed. Thus, voters would be entirely deprived of the "opportunity to know what the law is" at the time they cast their ballots and to "conform their conduct accordingly." *Landgraf*, 511 U.S. at 265.

Without such fair notice, those voters cannot be stripped of their constitutionally protected right to "have their votes counted." *Wesberry*, 376 U.S. at 17. The procedural history of this case hammers that point home. This Court declined to stay the Pennsylvania Supreme Court's decision or otherwise adjudicate this case weeks before Election Day, at a time when state officials and voters could have taken account of a change in the rules to ensure that as many ballots as possible arrived by November 3. Having left the November 6 deadline in place, this Court permitted voters and state election officials to continue participating in Pennsylvania's elections under the rules then in existence. Throwing out ballots from voters who reasonably relied on those rules would be an intolerable bait and switch—one that *Purcell* could not possibly envision and equity could not possibly countenance. It would also represent a severe incursion on the sovereignty of Pennsylvania, which has an overriding interest in conducting its election under the rules that exist during the election. See, *e.g.*, *Lemon*,

411 U.S. at 208-209 (federalism requires federal courts to respect state officials' reliance on state law).

Nothing weighs on the other side of the balance. First, ballots received after Election Day are not somehow intrinsically defective or invalid—or somehow more likely to be defective or invalid than ballots received before Election Day. Second, the Commonwealth's voting rules are neutral, generally applicable rules designed to make it easier for *all* voters to cast their ballots, not to advantage or disadvantage any particular party or candidate. Finally, this is not a case in which a state adopted an election rule in defiance of this Court's precedent or otherwise acted in flagrant violation of federal law. Compare, *e.g.*, *Allen*, 393 U.S. at 571-572, with *Perkins* v. *Matthews*, 400 U.S. 379, 395 (1971); cf. *Chaidez* v. *United States*, 568 U.S. 342, 347 (2013).

For all of these reasons, to the extent that the questions presented are otherwise worthy of review, this case is not a suitable vehicle for considering them.

III. This Case Is A Poor Vehicle Because There Are Substantial Questions Whether Any Petitioner Has Standing.

Not only do all of the petitioners lack any ongoing concrete interest in this case; they also may lack standing to invoke this Court's jurisdiction in the first place. Because the officials responsible for enforcing and defending Pennsylvania's election laws have determined not to challenge the Pennsylvania Supreme Court's ruling before this Court, petitioners must demonstrate that they have standing to defend the statute. See *Va. House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *Hollingsworth* v. *Perry*,

570 U.S. 693, 705 (2013). The State Legislators unquestionably lack standing, and there is a substantial question whether RPP can demonstrate standing.[7]

A. The State Legislators lack standing. This Court held in *Bethune-Hill* that to challenge a decision invalidating a statute, a legislative intervenor must have either (1) the legal authority "to represent the State's interests," or (2) standing in "its own right." 139 S. Ct. at 1951. The State Legislators have neither.

First, those legislators have no legal authority to represent the State's interests in defending the validity of Pennsylvania statutes. Pennsylvania law vests that authority in the Attorney General (and in others to whom the Attorney General delegates specific authority). 71 Pa. Stat. § 732-204(c). The legislators therefore may not claim standing based on the Commonwealth's interests. *Bethune-Hill*, 139 S. Ct. at 1952.

Second, the State Legislators have no standing in their own right. They have no personal interest in the validity of enacted legislation. *Raines* v. *Byrd*, 521 U.S. 811, 821 (1997). Nor can they assert any institutional injury, as that injury belongs solely to the General Assembly; "individual members lack standing to assert the institutional interests of a legislature." *Bethune-Hill*, 139 S. Ct. at 1953-1954. Although the State Legislators rely on *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U.S. 787 (2015), that decision does not support their claim to standing. It holds only that a state legislature *as a*

[7] Granting intervention to the Trump campaign would not fix an absence of standing among the present petitioners. See n.6, *supra*.

whole has standing to challenge an alleged deprivation of its prerogative to enact election legislation. See *Bethune-Hill*, 139 S. Ct. at 1953-1954.

The State Legislators also argue (Pet. 9) that they have standing under *Coleman* v. *Miller*, 307 U.S. 433 (1939), because the Pennsylvania Supreme Court's decision "nullified" their votes. But this Court has rejected that argument too. *Bethune-Hill* explained that although *Coleman* permits a majority group of state legislators to challenge the result of the legislative process in certain circumstances, *Coleman* does not suggest that individual legislators have standing to defend the validity of enacted legislation.[8] 139 S. Ct. at 1954.

B. There is also a significant question as to RPP's standing. RPP contends that (1) it has associational standing to assert the rights of a voter who has a generalized interest in "upholding the rules established by the General Assembly in the Election Code," and (2) it has standing on its own behalf based on its purported expenditure of resources to educate voters. Stay Reply 3 (citation omitted). As explained, pp. 9-10, *infra*, those claimed injuries are no longer live. Further still, they may never have been sufficient to demonstrate standing here. See, *e.g.*, *Hollingsworth*, 570 U.S. at 705-706 (intervenors' generalized interest in defending state law insufficient for standing); *CASA de Maryland, Inc.* v. *Trump*, 971 F.3d 220, 237 (4th Cir. 2020); but cf. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363,

[8] The State Legislators complain (Pet. 10) that the state courts denied "a majority" of legislators leave to intervene. But they did not seek certiorari on that question, and *Bethune-Hill* establishes that individual legislators—no matter how numerous—lack a concrete interest in defending the statute. 139 S. Ct. at 1953.

379 (1982) (organization may have standing to challenge action that forces expenditures in a manner that threatens the organization's functioning). If the Court were to grant review, therefore, it would be appropriate to add standing as a question presented.

No petitioner has a continuing interest in this case. And it may well be that no petitioner had standing to invoke this Court's jurisdiction in the first place. This Court should deny review.

IV. The Pennsylvania Supreme Court's Decision Comports With Federal Law.

A. There is no federal constitutional flaw in the Pennsylvania Supreme Court's interpretation of the Pennsylvania Constitution.

1. The Elections and Electors Clauses do not unmoor state legislative power from ordinary constitutional constraints.

The Elections Clause provides that state legislatures will "prescribe[]" the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. The Electors Clause specifies that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President.[9] U.S. Const. art. II, § 1, cl. 2.

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[9] This Court has interpreted the two Clauses in "parallel[]," *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 805 (1995), and petitioners rely on precedent regarding both Clauses without contending that any meaningful distinction between the two exists for purposes of this case.

Nothing in the constitutional text or this Court's precedents supports petitioners' contention that those Clauses disable state courts from reviewing election laws governing federal elections for consistency with state constitutions' "substantive limits on lawmaking." RPP Pet. 25.

1. As petitioners all but concede, see RPP Pet. 25 (inviting the Court to overturn its 2015 decision in *Arizona State Legislature*), this Court has already rejected petitioners' argument. In *Arizona State Legislature*, the Court held that "[n]othing in th[e] [Elections] Clause instructs, nor has this Court ever held, that a state legislature may 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 817-818. And just two Terms ago, the Court stated that "state constitutions can provide standards and guidance for state courts to apply" when reviewing state congressional districting laws enacted under the Elections Clause. *Rucho*, 139 S. Ct. at 2507. Petitioners have not come close to making the showing necessary to justify reconsidering that settled precedent. See, *e.g.*, *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015) (requiring "'special justification'—over and above the belief 'that the precedent was wrongly decided'" (citation omitted)).

2. Even apart from this Court's recent decisions, petitioners' extreme position fails. It is foreclosed by the Clauses' text, construed in light of relevant historical practice, as well as by 100 years of this Court's precedents.

Both Clauses provide that the "Legislature" of a State may direct the "manner" of holding federal elections. That undoubtedly confers authority on the state

legislature in the first instance. But this Court long ago unanimously held that the Elections Clause's reference to the "Legislature" "neither requires nor excludes * * * participation" in the lawmaking process by other organs of state government. See *Smiley* v. *Holm*, 285 U.S. 355, 368 (1932).

Specifically, *Smiley* held that the Elections Clause does not place limits on state constitutional provisions imposing *procedural* constraints on the legislature's enactment of election laws. Because it was "well known" at the time of the Framing that state legislatures' lawmaking processes were subject to procedural "restriction[s]," the Court held, some "indication of a contrary intent" would be necessary to justify holding that the Elections Clause exempted the legislature from complying with those restrictions. *Smiley*, 285 U.S. at 367-368. Finding no such "suggestion" in the Clause, the Court held that state election laws are subject to the ordinary "conditions which attach to the making of state laws." *Id*. at 365, 368; see also, *e.g.*, *State of Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916); *Koenig* v. *Flynn*, 285 U.S. 375 (1932); *Carroll* v. *Becker*, 285 U.S. 380 (1932).[10]

Smiley's reasoning applies equally to *substantive* constitutional limits on lawmaking. Like procedural limitations, substantive limitations on lawmaking

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[10] *Smiley* makes clear that dicta from *McPherson* v. *Blacker*, 146 U.S. 1 (1892), cannot bear the weight petitioners put on it. Unlike *Smiley*, *McPherson* did not address any state constitutional limitation on legislative power, but instead considered whether the *U.S. Constitution* and *federal* law barred the legislature's chosen method of appointing electors. See *id.* at 24.

arising from state constitutions were well known at the time of the Framing. Indeed, several state constitutions included provisions that were analogous to the Free and Equal Elections Clause at issue here.[11] The Framers undoubtedly also were aware that state courts had authority to review state legislation for compliance with those constitutional limitations. See Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 933-935 (2003) (discussing Framers' "understanding" of state courts' power of judicial review and citing Founding-era cases).

Against that backdrop, the Elections and Electors Clauses' provisions that the "Legislature" of a State will "prescribe[]" and "direct" the manner of elections are best understood to incorporate existing state constitutional limitations on the legislature's lawmaking authority. As in *Smiley*, there is no textual indication that the Framers intended to abrogate substantive principles of state constitutional law that otherwise would have guided the enactment of election laws. See *Smiley*, 285 U.S. at 366-367; accord *Rucho*, 139 S. Ct. at 2507 ("state constitutions can provide standards and guidance for state courts to apply").

The Clauses' silence on that point is dispositive. The Constitution seeks to preserve the States' sovereignty to the greatest extent possible. See *Texas* v. *White*, 74 U.S. 700, 725 (1868), *overruled on other grounds in part by Morgan* v. *United States*, 113 U.S.

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[11] Maryland Constitution of 1776, Declaration of Rights, art. V; Massachusetts Constitution of 1780, art. IX; New Hampshire Constitution of 1784, art. XI; Pennsylvania Constitution of 1776, art. VII.

476 (1885). A core attribute of a State's sovereignty is the power to establish fundamental law through a constitution. See *Chisholm* v. *Georgia*, 2 U.S. 419, 471 (1793). Under petitioners' view, however, the Clauses alter the ordinary organization of state government by placing a single category of state-law enactments—laws governing federal elections—beyond the reach of the state constitution. If the Framers truly meant to disable the people of the States from exercising a fundamental attribute of state sovereignty in this sole area, one would expect to see a clear indication in the constitutional text. See Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions* 19 (Revised Nov. 2, 2020) (noting absence of debate on the issue at the constitutional conventions), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530136. But there is nothing. The Court should not construe the Clauses' use of a single word—"Legislature"—implicitly to create such a significant exception to the principles of state sovereignty that guided the Framers.

3. For much the same reasons, accepting petitioners' approach would disrupt States' chosen form of government by throwing into doubt numerous state constitutional provisions placing substantive limits on the kinds of election laws that state legislatures may enact. State constitutional provisions have long regulated "[c]ore aspects of the electoral process." *Arizona State Legislature*, 576 U.S. at 823 (citing such provisions regulating "voting by ballot or secret ballot, voter registration, absentee voting, vote counting, and victory thresholds") (footnotes and internal quotation marks omitted). Under petitioners' view, all of those substantive constitutional provisions may not validly be applied to laws governing federal elections.

2. The Pennsylvania Supreme Court's decision is consistent with the Elections and Electors Clauses.

The Elections and Electors Clauses permit state courts to review state election laws for compliance with "standards and guidance" contained in the state constitution. *Rucho*, 139 S. Ct. at 2507. So long as the state court does not "impermissibly distort" pre-existing state law, *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring), its decision is consistent with the federal constitution. The Pennsylvania Supreme Court's decision satisfies that requirement.

1. a. In the related context of statutory construction, Members of this Court have explained that if a state court "impermissibly distort[s]" established state-law principles, or grossly departs from its own precedent to reach a "novel" and unjustifiable result, the state court's decision impinges on the legislature's authority to set the manner of elections. *Bush*, 531 U.S. at 114-115 (Rehnquist, C.J., concurring). As those formulations reflect, this Court's review is "deferential." *Id*. at 114. That deference follows from this Court's traditional deference to state courts' construction of state law, *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975), as well as from the legislature's operation against the backdrop of state courts' authority to definitively construe resulting enactments. The legislature therefore should be presumed to craft its statutes in light of established state-law statutory-construction principles. Only when a state court sharply deviates from those principles can its decision be said to inappropriately "supplant the legislature," in violation of the federal constitution. *Arizona State Legislature*, 576 U.S. at 841 (Roberts, C.J., dissenting).

That reasoning applies equally to judicial review for consistency with the state constitution. The state legislature crafts election laws against the backdrop of established state constitutional norms. Only when a state court "impermissibly distort[s]" those principles are the legislature's expectations defeated. See *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

That deferential rule also follows from this Court's consistent insistence that state courts, not federal courts, are the primary reviewers of state election rules, including for federal elections. See, *e.g.*, *Rucho*, 139 S. Ct. at 2507; *Growe* v. *Emison*, 507 U.S. 25, 33 (1993) ("state courts have a significant role in redistricting"). More rigorous review of state courts' application of their own States' constitutions would be difficult to square with those decisions, and would threaten to make this Court, not state courts, the primary reviewer of state election rules.

b. When a state court finds that an election law violates the state constitution, it has authority to craft a remedy in line with established remedial principles. For instance, this Court has repeatedly recognized that state courts may formulate congressional redistricting plans to remedy state constitutional violations. See, *e.g.*, *Growe*, 507 U.S. at 37; *Scott* v. *Germano*, 381 U.S. 407, 409 (1965). As congressional redistricting is governed by the Elections Clause, see *Arizona State Leg.*, 576 U.S. at 792, the Clause clearly does not prohibit state-court remedial action. There is no reason a different rule should apply here.

2. The Pennsylvania Supreme Court's decision represents an application of settled state-law principles.

a. The court unanimously held that the six-day window between the October 27 ballot-request deadline and the November 3 received-by deadline, as applied in the extraordinary circumstances of the 2020 election, would "result[] in the disenfranchisement of voters" in violation of the Pennsylvania constitution. Pet. App. 37a, 44a, 47a, 108a. In view of the ongoing pandemic, unprecedented demand for mail-in ballots, and USPS's own representation that it would be "unable to meet Pennsylvania's statutory election calendar," *id*. at 45a-47a, the court concluded that voters who lawfully requested their mail-in ballots close to October 27 risked having them received by election officials after the November 3 deadline. The majority remedied that as-applied violation by extending the received-by deadline by three days.

b. The court's constitutional and remedial holdings are each supported by well-established state-law principles.

As to the merits, the court relied on precedent holding that the Free and Equal Elections Clause requires that "elections [be] conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process." Pet. App. 44a (citing *League of Women Voters*, 178 A.3d at 804). "[F]or 150 years," the Pennsylvania Supreme Court has relied on the Free and Equal Elections Clause to invalidate "legislative scheme[s]" that had the effect of denying some voters an "equal" opportunity to have their vote counted. *League of Women*

Voters, 178 A.3d at 809 (citing cases).[12] This case falls squarely within that longstanding tradition.

The court's remedy is equally well grounded in a state legislative grant of remedial power. Section 726 of the Pennsylvania judicial code empowers the Pennsylvania Supreme Court to "assume plenary jurisdiction" of any matter "involving an issue of immediate public importance" and "enter a final order or otherwise cause right and justice to be done." 42 Pa. Stat. § 726. Just as it had done in elections cases in the past, see, *e.g.*, *League of Women Voters*, 178 A.3d at 821-824; *Mezvinsky* v. *Davis*, 459 A.2d 307 (Pa. 1983), the court appropriately relied on that broad remedial authority here. Pet. App. 47a.

3. Petitioners cannot come close to establishing that the Pennsylvania Supreme Court engaged in the sort of "significant[] depart[ure]" from pre-existing state law that would warrant concluding that the court effectively usurped the legislature's role. *Bush*, 531 U.S. at 122 (Rehnquist, C.J., concurring).

Petitioners first argue (RPP Pet. 21-22) that the Pennsylvania Supreme Court's remedy of extending the ballot-receipt deadline conflicts with the statutory text. But the court was not being "asked to interpret

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[12] Because the General Assembly played an integral role in establishing and protecting the Free and Equal Elections Clause, see Amici Curiae Br. of Tom Ridge *et al.* (Nos. 20A53, 20A54), petitioners' argument that the Pennsylvania Supreme Court supplanted the legislature's role by enforcing that Clause is particularly dubious.

the statutory language." Pet. App. 43a. The court assessed the statute's consistency with the state constitution. That constitutional review was permissible for the reasons stated above.

Petitioners next contend that the Pennsylvania Supreme Court's constitutional rationale was "vague." RPP Pet. 24. But far from being "vague,"[13] the Pennsylvania court's application of the Free and Equal Elections Clause was grounded in decades of precedent, see pp. 29-30, *supra*, and supported by detailed factual evidence, including the USPS's representations and real-world experience regarding difficulties during the Commonwealth's primary.[14] Pet. App. 28a-29a.

Turning to the remedy, petitioners incorrectly assert (RPP Pet. 23-24) that the Pennsylvania Supreme Court purported to draw its remedial authority from 25 Pa. Stat. § 3046. To the contrary, the court located

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[13] *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000), provides an instructive contrast. There, the Court was evidently concerned that the Florida Supreme Court claimed sweeping authority to substitute the court's policy judgment for that of the legislature by altering Florida's election laws *after* Election Day if those laws "unreasonabl[y]" restricted vote counting. *Id.* at 77. That is a far cry from the restrained *pre*-election judicial review for constitutionality that state courts ordinarily perform, and that the Pennsylvania Supreme Court engaged in here.

[14] Petitioners' argument (RPP Pet. 18) that the Pennsylvania Supreme Court erred by not deferring to recommended factual findings by a special master in separate litigation ignores that those findings were never adopted by the court in that litigation and thus, under Pennsylvania law, had "no effect." *Appeal of 322 Blvd. Associates*, 600 A.2d 630, 633 (Pa. Commw. Ct. 1991).

its remedial authority in Section 726. The court invoked Section 3046 only as evidence of the legislature's background intent that the Election Code should be applied so as not to disenfranchise voters in the event of an "emergency." Pet. App. 45a-46a. Once again, the court relied on established precedent. *Ibid*. (citing *In re General Election-1985*, 531 A.2d 836, 839 (Pa. Commw. Ct. 1987)).

Petitioners also assert that the Pennsylvania Supreme Court should have set the ballot request deadline earlier, as the dissenting justices argued, rather than extending the received-by deadline. Tellingly, under petitioners' theory, either remedy would violate the Elections Clause. In any event, as the Pennsylvania Supreme Court pointed out, petitioners' argument that a November 3 deadline was the "cornerstone" of the statutory scheme founders on the legislature's determination that overseas and military ballots may be received until seven days after Election Day. Pet. App. 9a. Petitioners' contention therefore collapses into an invitation for this Court to overturn a permissible discretionary determination by the Pennsylvania Supreme Court.

B. Pennsylvania law comports with Congress's selection of a nationwide federal Election Day.

Finally, petitioners briefly argue that the remedy adopted by the Pennsylvania Supreme Court is preempted by federal statutes establishing a nationwide federal Election Day. See RPP Pet. 30-33. That argument lacks merit.

Petitioners do not dispute that States act in full compliance with those federal statutes when accepting

and counting ballots that are mailed by Election Day but arrive after Election Day. Rather, petitioners' quarrel is with Pennsylvania's method for determining whether a ballot was timely cast on or before Election Day—that is, with the presumption that a ballot was timely cast if it arrived within three days of Election Day and the preponderance of the evidence does not demonstrate that the ballot was mailed after Election Day. Petitioners insist that the presumption "threatens to allow" ballots that were actually cast after Election Day and therefore conflicts with federal law. RPP Pet. 32.

But that claim has no basis in the text of the relevant federal statutes. Those statutes set the day for holding federal "election[s]." 2 U.S.C. 1, 7; see 3 U.S.C. 1. They say nothing about the procedures that States may use to determine whether a mail-in ballot was validly cast on or before Election Day. Congress certainly could regulate such procedures. Indeed, it has partially done so in the context of absent uniformed service-members and overseas voters. See 52 U.S.C. 20303(f)(1) (prohibiting States from refusing to accept ballots from such voters solely due to notarization requirements). But Congress has not spoken to the general procedures that States may use to determine whether a mail-in ballot was cast by Election Day. It has instead left that question to the States—just as it has many other details of election procedure.

Failing to find a textual hook for their argument, petitioners ask this Court to create a rule of its own—that "non-postmarked ballots received after Election Day" do not count. RPP Pet. 33. Such a rule is not only unmoored from any statutory text but also would

upend mail-in voting practices across the country. Most glaringly, it would invalidate the many state laws that count ballots of overseas military voters received after Election Day *even when those ballots lack a timely postmark*.[15] That would sharply break from the consensus view that States have leeway to count such ballots from the men and women who risk their lives for this country.

Petitioners' preferred rule also would wreak broader havoc. Many States that permit ballots to arrive after Election Day do not use a postmark as the sole indicator of timeliness. Some have enacted a rebuttable presumption just like Pennsylvania's.[16] Others examine a voter's declaration or certification.[17] Still others leave room for any alternative source of proof.[18] All of these methods carry some risk of factual error in a small number of cases. Yet Congress has allowed the states to select their own appropriate methods, with no suggestion that they are somehow in conflict with federal law.

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[15] See Ark. Code Ann. § 7-5-411(a)(1)(B)(ii); Cal. Elec. Code §§ 3117, 3020; Colo. Rev. Stat. Ann. § 31-10-102.8(3), (4); D.C. Code § 1-1061.10; Fla. Stat. Ann. § 101.6952(4); 10 Ill. Comp. Stat. 5/20-8(c); Mo. Ann. Stat. § 115.920(2); Nev. Rev. Stat. § 293.317(2); N.Y. Elec. Law § 10-114(1); Ohio Rev. Code Ann. § 3511.11(C); 25 Pa. Cons. Stat. § 3511(b); R.I. Gen. Laws § 17-20-16; S.C. Code Ann. § 7-15-700(B); Tex. Elec. Code Ann. §§ 86.007, 101.057; Utah Code Ann. § 20A-16-408(2).

[16] See Nev. Rev. Stat. AB 4, § 20(2); N.J. Stat. Ann. § 19:63-31(m).

[17] See, *e.g.*, Cal. Elec. Code. § 3011, 3020(b)(2); 10 Ill. Comp. Stat. 5/19-8(c).

[18] See D.C. Code § 1-1001.05(a)(10A).

There can be no question that Pennsylvania's rebuttable presumption, like the other methods used throughout the country, is a reasonable way to determine whether a ballot was properly mailed by Election Day. Cf. *Wos* v. *E.M.A. ex rel. Johnson*, 568 U.S. 627, 643 (2013) (federal law does not preempt rule that is likely to lead to "reasonable results in the mine run of cases"). Pennsylvania has a clear requirement that "voters utilizing the USPS must cast their ballots" by Election Day. Pet. App. 49a n.26. To help enforce that rule, the Commonwealth does not permit any late-arriving ballot to count unless it is received within three days of Election Day. Pet. App. 48a. Moreover, even a ballot that is received on time does not count if it is postmarked after Election Day or if (lacking a legible postmark) a preponderance of the evidence demonstrates that it was mailed after Election Day. Pet. App. 48a.

In other words, for a Pennsylvanian to have cast a ballot after Election Day and still have his vote counted, he would have had to (i) violate clear state election law; (ii) send his ballot through the mail without USPS leaving a legible postmark; (iii) somehow ensure that USPS delivered his ballot to election officials within one or two days of mailing, despite the USPS General Counsel's warning that voters should allow at least one week for delivery, see Pet. App. 47a; and (iv) avoid an adverse finding on preponderance-of-the-evidence review. It beggars belief that such a chain of contingencies could ever occur, let alone in more than a negligible number of cases. And petitioners have proffered no evidence to the contrary.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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