No. 20-574

In The Supreme Court of the United States

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

V.

PENNSYLVANIA DEMOCRATIC PARTY, ET AL.,
Respondents.

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

Unable to defend the decision of the Pennsylvania Supreme Court, Respondents devote most of their briefing to attacking the Petition on jurisdictional grounds. Respondents' assertions of mootness fail because the issues in this appeal are capable of repetition yet evade review. Respondents' attacks on Petitioners' standing are equally misplaced because the Pennsylvania Supreme Court's decision diminishes Petitioners' constitutionally delegated authority, creating a distinct and palpable injury sufficient to support Article III standing.

I. THE ISSUES IN THIS PETITION FALL UNDER THE CAPABLE OF REPETITION YET EVADING REVIEW DOCTRINE.

The issues in the Petition were not mooted by the November 3, 2020 General Election as they are capable of repetition yet evade review. A longstanding mootness exception is the capable of repetition yet evading review doctrine. *See, e.g., FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) ('WRTL II'). Under this exception, a case is not moot if: (1) the challenged action is too short in duration to be fully litigated prior to the expiration of the action; and (2) "[t]here is a reasonable expectation that the same complaining party will be subject to the same action again." *See id.*; *see also Citizens United v. FEC*, 558 U.S. 310, 334 (2010).

First, "[a] challenged action evades review if it is too short in duration to be fully litigated in this Court before it expires." *Ralls Corp. v. Comm. on*

Foreign Inv., 758 F.3d 296, 321 (D.C. Cir. 2014). As such, some Circuits generally recognize "[t]hat orders of less than two years' duration ordinarily evade review." *S. Co. Servs. v. FERC*, 416 F.3d 39, 43 (D.C. Cir. 2005) (internal citations and quotation marks omitted); *see also Ralls Corp.*, 758 F.3d at 321. The present case arises in "the unique circumstances of election law." *Shays v. FEC*, 424 F. Supp. 2d 100, 111 (D.D.C. 2006). "Election cases often fall within this exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003). As explained in *La Botz v. FEC*,

> the time frame presented by electoral disputes rarely allows for resolution through litigation. Electoral disputes are thus "paradigmatic" examples of cases that cannot be fully litigated before the particular controversy expires.

889 F. Supp. 2d 51, 59 (D.D.C. 2012) (citing *Johnson v. FCC*, 829 F.2d 157, 159 n.7 (D.C. Cir. 1987); *Shays [v. FEC]*,424 F. Supp. 2d at 111; *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009)).

Second, the controversy must be capable of repetition. Importantly, the potential recurrence of the controversy does not have to be more probable than not for this element to be met. *See Ralls Corp.*, 758 F.3d at 324 ("It is enough . . . that the litigant faces some likelihood of becoming involved in the same controversy in the future.") (internal citations omitted). The relevant question is whether the legal wrong complained of is reasonably likely to recur.

See id. This requirement is not applied "[w]ith excessive stringency." *Id.* Thus, a case is capable of repetition "[e]ven if its recurrence is far from certain." *Id*.

The questions in the present case fit squarely within the capable of repetition yet evading review exception. First, the challenged action clearly could not be fully litigated before it expired. As noted above, this Court has repeatedly observed that elections are by definition of limited duration. *See WRTL II*, 551 U.S. at 462; *see also Citizens United*, 558 U.S. at 334; *Ralls Corp*., 758 F.3d at 321. The Pennsylvania Supreme Court's decision came in the thick of the 2020 election cycle, only weeks before the General Election. Although Petitioners were able to file emergency motions for stay with the Pennsylvania Supreme Court and this Court, that is not the relevant time period for the capable of repetition yet evading review inquiry. The relevant period is the time required to "*fully* litigate[]" the matter. *WRTL II*, 551 U.S. at 462 (quoting *Spencer* v. *Kemna*, 523 U.S. 1, 17, (1998)) (emphasis added). There is no possibility that the merits of this matter could have been fully litigated before the General Election, even if an emergency stay had been granted.

The issues in this case are capable of repetition. The Pennsylvania Supreme Court repeatedly demonstrated its willingness to interfere with duly enacted election laws on the eve of elections. *See, e.g., League of Women Voters v. Commonwealth*, 645 Pa. 1 (Pa. 2018), *stay denied*, *Turzai v. League of Women Voters*, 138 S. Ct. 1323 (2018); *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), *stay denied*, *Scarnati v. Boockvar*, No. 20A53

(Oct. 19, 2020); *In Re. November 3, 2020 Gen. Election*, 240 A.3d 591 (Pa. 2020). Nearly all of these cases implicate Elections Clause or Electors Clause concerns almost identical to those in this case. The Pennsylvania Supreme Court is bound to repeat itself, and it will undoubtedly alter other election regulations just before future elections, thereby continuing to infringe on the authority of the state legislature.

The present action puts before this Court a factual and legal record upon which to uphold state legislatures' constitutional authority to regulate the conduct of elections – and the case falls squarely within the capable of repetition yet avoiding review exception to the mootness doctrine.

II. PETITIONERS HAVE STANDING.

Respondents wildly mischaracterize Petitioners' arguments regarding standing and attempt to distract the Court with red herrings. The principal, salient point on this issue is that the Pennsylvania Supreme Court's decision deprived Petitioners, and the majority of the Pennsylvania General Assembly members they represent, of the authority delegated to them by the United States Constitution. This confers Article III standing upon Petitioners.

The Pennsylvania Supreme Court's decision confers Article III standing upon Petitioners by eviscerating their constitutional authority. Regardless of whether Petitioners were litigants below, the decision of the Pennsylvania Supreme Court is a "final judgment altering tangible legal rights . . . constitut[ing] a cognizable case or controversy." *ASARCO, Inc. v. Kadish,* 490 U.S. 605

(1989). The tangible legal interest altered by the Pennsylvania Supreme Court is the exclusive authority of the legislature and legislators to set the times, places, and manner of federal elections, subject only to alteration by Congress, as well as the selection of presidential electors. U.S. Const. art. II, § 1, cl. 2; id. art. I, § 4, cl. 1. The Pennsylvania Supreme Court's decision more than alters the legislature's authority—it coopts and significantly diminishes it. This diminishment is a "distinct and palpable" injury suffered by Pennsylvania legislators. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Respondents also side-step Petitioners' arguments distinguishing *Va. House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945 (2019). For the reasons previously discussed and those below, this case remains distinguishable from *Bethune-Hill*.

First, as discussed in the Petition, for standing purposes this case is more akin to *Sixty-seventh Minn. State Senate v. Beens*, 406 U.S. 187 (1972) (per curiam), *Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n*, 576 U.S. 787 (2015), and *Coleman v. Miller*, 307 U. S. 433 (1939), than it is to *Bethune-Hill*. The *Bethune-Hill* Court distinguished the above cases, but none of the distinguishing factors discussed by the *Bethune-Hill* Court apply to the present case. *Bethune-Hill*, 139 S. Ct. at 1953-1955 (distinguishing *Beens*, 406 U. S. 187; *Ariz. Independent Redistricting Comm'n*, 576 U.S. 787; *Coleman*, 307 U. S. 433). Accordingly, *Beens*, *Arizona Independent Redistricting Comm'n*, and *Coleman* are much more applicable to the present circumstances than *Bethune-Hill*.

Second, regardless of whether *Bethune-Hill* is distinguishable from the present case, that case was wrongly decided. As was noted by Justice Alito, who was joined in dissent by the Chief Justice and Justices Breyer and Kavanaugh, the Virginia House of Delegates clearly suffered an injury in fact. *Id.* at 1956-1959 (Alito, J., dissenting).

> [W]e must assume that the districting plan enacted by the legislature embodies the House's judgment regarding the method of selecting members that best enables it to serve the people of the Commonwealth. (Whether this is a permissible judgment is a merits question, not a question of standing. . . .). *It therefore follows that discarding that plan and substituting another inflicts injury in fact.*

Id. at 1957 (emphasis added). The dissenting justices then likened the case to *Beens*, saying that "[t]here can be no doubt that the new districting plan 'directly affects' the House whose districts it redefines and whose legislatively drawn districts have been replaced with a court-ordered map." *Id.* at 1957-1958 (cleaned up). The same is true in the present case: there is no doubt that the Pennsylvania Supreme Court's new election procedures "directly affect" the legislators whose constitutionally vested authority was usurped.

Respondents' attempts to distinguish *Coleman v. Miller* are also unconvincing. *Coleman* permitted a majority group of state legislators to challenge procedures affecting the legislative process under the United States Constitution. *See Ariz.*

Independent Redistricting Commission, 576 U. S. at 803 (citing *Coleman*, 307 U. S. at 446). That is exactly the situation that Petitioners are in here.

In addition to the injury to Petitioners' legislative authority, the Senate Leaders being litigants below with standing is enough to confer Article III standing upon them. The Pennsylvania Supreme Court recognized the Senate Leaders' standing and interests in regulating the times, places, and manner of federal elections and appointing presidential electors in Pennsylvania when it granted their intervention. *See* Pet. at 7-8. The decision of the Pennsylvania Supreme Court caused "direct, specific, and concrete injury" to the Senate Leaders because it was antithetical to their position in the case below. *See* ASARCO, 490 U.S. 623-24. *See also Virginia v. Hicks,* 539 U.S. 113, 120-21 (2003); *City of Erie v. Pap's A.M.,* 529 U.S. 277, 288-89 (2000). By definition, a decision that is antithetical to litigants injures them.

Furthermore, the House Leaders have nonparty standing. Regardless of whether the Pennsylvania Supreme Court's denial of House Leaders' motion to intervene was appropriate—it was not[1]—this Court "ha[s] never . . . restricted the right to appeal to named parties to the litigation." *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002). Federal appellate courts consistently allow nonparties to appeal "when the nonparty has an interest that is affected by the trial court's judgment." *United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177, 183–84 (2d Cir. 1991) (quoting *Hispanic Soc'y v. N.Y. City Police Dep't*, 806

[1] S*ee* Pet. at 6.

F.2d 1147, 1152 (2d Cir. 1986), *aff'd, Marino v. Ortiz*, 484 U.S. 301 (1988)). Just like the Senate Leaders, the House Leaders' constitutional authority under the Elections Clause and Electors Clause to develop Pennsylvania's election law is diminished by the Pennsylvania Supreme Court's decision, which confers Article III standing as discussed *supra*.

The House Leaders acknowledge that "when [a] nonparty has an interest that is affected by the trial court's judgment . . . the better practice is for such a nonparty to seek intervention for purposes of appeal." *Marino v. Ortiz*, 484 U. S. at 304 (per curiam). Here, the House Leaders attempted to do exactly that by petitioning to intervene in the proceedings below, but were summarily denied in a footnote. *Boockvar*, 238 A.3d at 355 fn. 11.[2]

"It would be a cruel irony to bar an appeal from an order denying permission to participate in litigation for the very reason that the would-be appellants did not participate below." *E.E.O.C. v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir. 1990). To do so here would give undue weight to the procedural mechanism of intervention—the denial of intervention by a lower court could somehow both prevent the House Leaders from participating in the case below, and also permanently waive the House Leaders' legal rights. Crueler still are Respondents' arguments that the denied intervention of the House Leaders forecloses the standing of the Senate Leaders as well, on the basis that both houses of the General Assembly are not parties to this case. This attempt

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[2] Notably, the Pennsylvania Supreme Court did not claim that House Leaders *missed* any deadline of the Court.

at procedural "gotcha" should not prevent Petitioners' meritorious claims from being heard by this Court. Accordingly, the Court should decide this vital case of public concern on the merits.

III. THE PENNSYLVANIA SUPREME COURT'S DECISION VIOLATES FEDERAL LAW.

The decision of the Pennsylvania Supreme Court violates federal law. By altering the times and manner that Pennsylvania held the 2020 General Election, the Pennsylvania Supreme Court violated the United States Constitution by commandeering Pennsylvania legislators' exclusive authority under the Elections and Electors Clauses. U.S. Const. art. I, § 4; U.S. Const. art. II, § 1, cl. 2. Also, by forcing election officials to count ballots received up to three days after Election Day, even if they lack a postmark, the Pennsylvania Supreme Court violated the federal statute that establishes a single federal Election Day. 2 U.S.C. § 7; *see also* 2 U.S.C. § 1; 3 U.S.C. § 1.

A. The Pennsylvania Supreme Court Violated The Elections And Electors Clauses Of The United States Constitution.

Legislators alone possess the authority at the state level to set the times, places, and manner of holding federal elections and the manner of

appointing presidential electors. U.S. Const. art. I, § 4, cl. 1, U.S. Const. art. II, § 1, cl. 2.[3]

Nothing in Act 77 or Pennsylvania's laws authorize its judiciary to override the legislative policy judgements for holding elections and selecting presidential electors simply because the judiciary disagreed with those policy decisions. *See* 2019 Pa. Legis. Serv. Act 2019-77 (approved Oct. 31, 2019). The General Assembly never delegated authority to alter these laws to the Pennsylvania judiciary, yet that is exactly what the Pennsylvania Supreme Court did.

Respondents argue that the General Assembly's express grants of authority to the Pennsylvania judiciary in distinct and limited sections of the Commonwealth's Election Code somehow authorized the Pennsylvania Supreme Court to alter election laws at will. For example, Respondents point to grants of authority to some courts over "voter registration controversies" and very specific election contests. *See, e.g.*, Br. of Luzerne Cty. at 7-8. However, contrary to Respondents' arguments, the fact that the Pennsylvania judiciary's role in election matters stems from powers delegated to it by the General Assembly necessarily means that the legislature made the decision to withhold authority over other undelegated matters—specifically altering the times, places, or manner of conducting elections or selecting electors. Respondents'

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[3] 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 this case.

arguments to the contrary have no basis in American jurisprudence.

B. The Pennsylvania Supreme Court Violated Federal Law Establishing A Single Federal Election Day.

The decision of the Pennsylvania Supreme Court forces election officials to accept ballots received after Election Day even if they lack a legible postmark or any postmark whatsoever. This enables votes cast after Election Day to be counted if no legible postmark is on the envelope. Thus, additional "Election Days" were created in violation of federal law. 2 U.S.C. § 7; *see also* 2 U.S.C. § 1; 3 U.S.C. § 1.

Respondents seek shelter in *In re Gen. Election-1985*, 109 Pa. Commw. 604, (Pa. Commw. 1987), which is inapposite to this case. *See, e.g.*, Br. of Luzerne Cty. at 8-9. Most obviously, that case involved the 1985 statewide general election, which did not involve federal or presidential elections in Pennsylvania. Since no federal elections or presidential elections were taking place, that case has no bearing on Elections Clause or Electors Clause jurisprudence. Second, the record does not demonstrate that any legislator or a majority of both chambers of the General Assembly objected to the remedy of the court of common pleas, unlike in the current case. *See generally In re Gen. Election-1985*, 109 Pa. Commw. 604. Accordingly, *In re Gen. Election-1985* cannot be used to buttress the illegal decision of the Pennsylvania Supreme Court.

Respondents also argue that the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") provides support for the Pennsylvania Supreme

Court's decision to extend Election Day because UOCAVA also permits ballots to be received after Election Day. 52 U.S.C. §§ 20301-20311. The Pennsylvania Supreme Court's remedy is clearly distinguishable from UOCAVA. UOCAVA is a federal statutory scheme parallel to U.S.C. § 1, 7 and 3 U.S.C. § 1 rather than a state law fashioned by state courts. Through UOCAVA, Congress, which possesses authority to set the times, places, and manner of elections through the Elections Clause, made the determination to treat military and overseas voters differently. These are individuals whom Congress has determined are under much different circumstances than domestic voters. *VoteVets Action Fund v. Detzner*, No. 4:18cv524-MW/MJF (N.D. Fla. 2018). UOCAVA "gives overseas voters the opportunity to vote on equal terms with domestic voters." *Id.*

UOCAVA is also distinguishable from the Pennsylvania Supreme Court's order because it is a federal statute parallel to 2 U.S.C. § 1, 7 and 3 U.S.C. § 1 and cannot be read to conflict with those statutes. Courts "must read the statutes to give effect to each if [it] can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). *See also Get Oil Out! Inc. v. Exxon Corp.*, 586 F.2d 726, 729 (9th Cir. 1978) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976)). In reading UOCAVA consistent with 2 U.S.C. § 1, 7 and 3 U.S.C. § 1, it does not permit post-election voting. The Pennsylvania Supreme Court's decision does not require such a reading by this Court.

The Pennsylvania Supreme Court's decision, as judge-made-law rather than a statutory scheme

enacted by Congress, conflicts with federal law and must be prevented from happening again.

CONCLUSION

For these reasons, and for the reasons discussed in the Republican Party of Pennsylvania's petition at Docket No. 20-542, Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,

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