No. 24A408

In The Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET. AL,
Applicants,

v.

FAITH GENSER, ET. AL,
Respondents.

On Emergency Application for Stay Pending Disposition of a Petition for a Writ of Certiorari from the Supreme Court of Pennsylvania

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF APPLICANTS

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INTEREST OF *AMICUS CURIAE*[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law, including election integrity and security in the electoral process. ACLJ attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Trump v. Anderson*, 601 U.S. 100 (2024) (unanimously holding that states have no power under the U.S. Constitution to enforce Section Three of the Fourteenth Amendment with respect to federal offices); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); or as *amici*, *e.g.*, *Fischer v. United States*, 144 S. Ct. 2176 (2024); *McDonnell v. United States*, 579 U.S. 550 (2016); and *Bush v. Gore*, 531 U.S. 98 (2000). The ACLJ has a fundamental interest in defending the right of states to set election qualifications. The resolution of this case is a matter of substantial concern to the ACLJ because it raises the issue of whether the Pennsylvania General Assembly may enforce reasonable voting laws in the national election of United States President to ensure that election security and integrity are maintained, or it will instead be superseded by a court that rejects the plain meaning of those laws.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Especially given the clear national impact at hand, this Court should restore the authority of the Pennsylvania General Assembly to set Pennsylvania's election laws. Pennsylvania law is clear and unambiguous: "[a] provisional ballot shall not be counted if . . . [t]he elector's absentee ballot or mail-in ballot is timely received by a county board of elections." 25 P.S. § 3050(a.4)(5)(ii)(F). The Pennsylvania legislature has categorically forbidden counting the provisional ballots of those who already submitted mail-in ballots, but the Pennsylvania Supreme Court has set aside that mandate and ruled that voters may cast a provisional ballot after having already submitted a mail-in ballot. This ruling cast Pennsylvania elections into chaos by taking legislative authority from the Pennsylvania General Assembly and granting it to the courts. The harm is heightened by the fact that Pennsylvania carries 19 electoral votes in the national election of the President of the United States. It should be immediately stayed.

The *Purcell* principle should lead this Court to immediately enter a stay of the Pennsylvania Supreme Court's attempt to rewrite state election law. The *Purcell* principle is a modern moniker for the commonsense doctrine that election laws should remain fixed and not be radically changed by courts shortly before elections occur or, as in this case, after voting has already begun. This doctrine applies with equal rigor to state and federal courts; in either circumstance, the electoral process is threatened when election laws are challenged and litigated at the last minute. Restoring the status quo, which existed until the decision of the Pennsylvania

Supreme Court, of prohibiting the counting of votes by people who have already cast their mail-in ballots would return election officials to the exact same rules for processing provisional ballots that the legislature actually passed. State courts have regularly relied on *Purcell*, acknowledging the basic principles that it articulated as applicable to state courts deciding challenges to election laws. Whether a federal or state court, last-minute changes to election procedures threaten election integrity and the legislature's responsibility to govern election procedures. Pennsylvania law is clear; if an elector votes with a mail-in ballot they are *not eligible* to have another vote counted in Pennsylvania.

State legislatures possess the authority to legislate how federal elections will proceed. Neither state nor federal courts have the authority to ignore those parameters to set up their own procedures. When a state court supplants the state legislature's role, it has taken to itself authority that the Constitution has explicitly placed elsewhere. The Constitution reserves to the state legislatures the plenary authority to set election laws and state supreme courts lack authority to supersede those careful legislative policy judgments. The Pennsylvania Supreme Court's ruling effectively nullifies the Pennsylvania General Assembly's unambiguous command that provisional ballots must not be counted if the voter has already voted by mail. The Elections Clause denies the lower court that authority.

ARGUMENT

I. This Court Should Issue a Stay to Protect the Laws of the Pennsylvania General Assembly from Radical Reinterpretation Shortly Before the National Election.

The Constitution vests the primary authority to set election regulations in state legislatures, not the courts; that authority has been threatened by the Pennsylvania Supreme Court's ruling, in the eleventh hour before the election, that sets aside the plain text of Pennsylvania's election code. The Elections Clause, U.S. Const. art. I, § 4, cl. 1, assigns to the "Legislature" of each State the power to direct the "time, place, and manner" whereby elections will be conducted. The Electors Clause, U.S. Const. art. II, § 1, cl. 2, likewise assigns to the "Legislature" of each State the power to direct the "manner" of choosing presidential electors in federal elections. That authority to govern elections is threatened when a state court rejects the clear dictates of an election code in favor of its own view of how elections should proceed.

A. This Court Should Enter a *Purcell* Stay to Prevent the Pennsylvania Supreme Court's Last-minute Disruption of the Pennsylvania Election Code.

The *Purcell* principle should lead this Court to immediately enter a stay of the Pennsylvania Supreme Court's attempt to rewrite state election law. The *Purcell* principle is a recent name for what is really a commonsense doctrine; election laws should remain fixed and not be changed shortly before elections occur. Such changes obviously threaten the integrity of and the nation's trust in the electoral system. This Court has warned repeatedly of the dangers of last-minute changes to election procedures: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from

the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). While the doctrine has been applied with rigor to federal courts that have interfered with state election procedures, that risk is still threatened whether it be state courts or federal courts that do the tampering. There is no reason why last-minute judicial changes to state rules for federal election by state courts would be any less destabilizing than the same changes by federal courts.

Here, the lawful status quo under the Elections and Electors Clauses is the rule passed by the General Assembly. That prohibition of double voting, which existed until the decision of the Pennsylvania Supreme Court, would simply require election officials to apply the exact same rules for processing provisional ballots that governed before that decision. But without this Court's intervention, the county boards will count ballots that are clearly unlawful under 25 P.S. § 3050(a.4)(5)(ii)(F) and the Pennsylvania election will have been irretrievably altered. The Pennsylvania Supreme Court has rewritten election law with the stroke of a pen. This is no mere state law matter, however, as Pennsylvania's 19 electoral votes weighs heavily in the Electoral College's calculus. The ruling below impacts the national election.

As Justice Kavanaugh has highlighted, "[l]ate judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). Nothing could be more confusing or disruptive than a state changing its procedures – here, to allow double voting – at the last minute. Here, the Pennsylvania Supreme Court has upended Pennsylvania

election law a mere matter of days before the 2024 national election. This Court's warning against such last-minute changes applies in full force here, to a change that "fundamentally alters the nature of the election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam). Courts, whether federal or state, should seek "to avoid this kind of judicially created confusion." *Id.* at 425.

State courts should not be and are not immune to the *Purcell* principle's warning against last minute changes to election law. Regardless of whether it is a federal or state court, last minute changes to election procedures threaten election integrity – and trust. In fact, state courts have regularly relied on *Purcell* to address their election disputes, acknowledging the basic principles that it articulated and applying its principled caution about the dangers of injunctive relief shortly before the election.

For example, the Maine Supreme Court affirmed a lower court's decision to deny an injunction request made by an organization and group of voters who sought to have the Maine Secretary of State count absentee ballots received ten days after the statutory deadline. *Alliance for Retired Ams. v. Sec'y of State*, 240 A.3d 45, 52 (Me. 2020). The Maine Supreme Court cited and relied on *Purcell* for its decision, emphasizing the need for caution in interfering with state election laws. The court's opinion discussed *Purcell* at length, "find[ing] it instructive" that the Supreme Court stayed a Wisconsin federal court's injunction with the admonition that it "'has repeatedly emphasized that lower federal courts should not ordinarily alter the

election rules on the eve of an election.'" *Id.* (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. at 424). Although the cited language from this Court's decision emphasizes the need for lower federal courts to follow *Purcell*, the Maine Supreme Court showed no hesitancy in acknowledging that *Purcell*'s warning applied to it as it adjudicated similar challenges.

The Connecticut Supreme Court, likewise, has acknowledged the *Purcell* principle as applicable in state proceedings and relied on this Court's precedent as authoritative guidance in addressing the timing of election questions. *Fay v. Merrill*, 256 A.3d 622, 638 n. 21 (Conn. 2021). That court highlighted that the *Purcell* principle would be implicated by a state court declaratory judgment in the plaintiff's favor in an election matter and emphasized that "[t]he *Purcell* principle remains applicable" to the proceedings before it. *Id.*

The Tennessee Supreme Court relied on this principle in *Moore v. Lee*, 644 S.W.3d 59 (Tenn. 2022), a case in which a group of voters challenged a state Senate redistricting plan as violating the Tennessee Constitution. That court emphatically relied on *Purcell* to prohibit any last-minute interference with state voting laws. *Id.* at 65. It emphasized that its own precedent was not in tension with *Purcell* but "similarly has shown restraint when asked to enjoin the effectiveness of constitutionally suspect reapportionment plans." *Id.* at 66.

Many state courts have regularly acknowledged this same principle and refused to condone last-minute attacks on election legislation. *See League of United Latin Am. Citizens v. Pate*, 950 N.W.2d 204, 215–16 (Iowa 2020) (declining, "on the

eve of this election[,] to invalidate the legislature's statute providing additional election safeguards," particularly given that "[t]he United States Supreme Court has repeatedly warned that courts 'should ordinarily not alter the election rules on the eve of an election'") (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. at 424).

In short, *Purcell* is not a doctrine for federal courts alone. As a basic jurisprudential principle, whether it is a state court or federal court performing the change, election laws should not be radically revisited at the last minute. Such last-minute changes threaten the right to vote and attack the authority of state legislatures to govern elections. "When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences." *Milligan*, 142 S. Ct. at 880-81 (Kavanaugh, J., concurring).

The principles underlying the *Purcell* doctrine are not limited to federalism; they reflect the basic interest of the American people in ensuring that elections are free and fair and not disrupted by last minute threats to the electoral process. *Purcell* is no esoteric doctrine: "[c]all it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so." *DeVisser v. Sec'y of State & Dir. of the Bureau of Elections*, 981 N.W.2d 30, 35 (Mich. 2022) (Welch, J., concurring) (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016)). That basic idea applies here; Pennsylvania's unambiguous election laws should not be disrupted immediately

before the election by any court, including the Pennsylvania Supreme Court – and especially not to allow double voting in a national election.

B. Pennsylvania Law Mandates That Voters Cannot Vote a Second Time After Casting a Mail-In Ballot.

Pennsylvania law is clear and unambiguous: "A provisional ballot shall not be counted if . . . [t]he elector's absentee ballot or mail-in ballot is timely received by a county board of elections." 25 P.S. § 3050(a.4)(5)(ii)(F). The use of the word "shall" creates a mandatory and nondiscretionary obligation. *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 362 (2018) ("The word 'shall' generally imposes a nondiscretionary duty."); *see Murphy v. Smith,* 583 U.S. 220, 223 (2018) ("[T]he word 'shall' usually creates a mandate, not a liberty."); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998) (This Court emphasized that shall is mandatory and "normally creates an obligation impervious to judicial discretion."). Regardless of this mandatory "shall," the Pennsylvania Supreme Court has created, from nothing, an exception to this statutory mandate, in situations where a mail-in ballot is later determined to be disqualified for failing to follow statutory obligations. But no such exception exists or can be justified under the law; the law imposes a plain mandate.

Pennsylvania law provides a specific procedure for mail-in voting. 25 P.S. § 3150.16 prescribes the procedure by which electors vote a mail-in ballot. It requires electors to mark ballots, fold those ballots, and "enclose and securely seal the same in the envelope on which is printed, stamped or endorsed 'Official Election Ballot.' This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector[.]" *Id.* § 3150.16(a). This procedure is *mandatory*, with each

step required as an application of the state's crucial interest in protecting election integrity and security. And electors who submit mail-in ballots "shall not be eligible to vote at a polling place on election day." *Id.* § 3150.16(b).

The law here is clear; if an elector votes with a mail-in ballot, they are not eligible to vote again in Pennsylvania. Nothing about the law creates any kind of exception for those voters who have voted by mail, but their vote is determined ultimately invalid for some reason. Instead, 25 P.S. § 3050(a.4)(5)(ii)(F) imposes an unambiguous mandate. As a dissent below emphasized, "[a] timely received mail ballot is a vote of the elector, even if it might ultimately be excluded from the certified election returns as part of the pre-canvass and canvass." App. 63a (Brobson, J., dissenting). Once a voter has voted by mail, they simply have voted; the possibility that their vote might not be counted at some future time due to disqualification does not change that fact. 25 P.S. § 3050(a.4)(5)(ii)(F) contains a clear and unambiguous mandate. The directive to the county boards of elections is mandatory—the provisional ballot of someone who has voted by mail is invalid. Period. "This directive is not difficult to understand, interpret, or apply." App. 50a (Mundy, J., dissenting). The Butler County Board of Elections in this case, therefore, did exactly what it was required by law to do; it refused to count the second votes of individuals who had already voted by mail. This was its statutory obligation, and this was the obligation that the Pennsylvania Supreme Court evaded.

C. By Directly Superseding the Legislative Judgment About Mail-In Ballots, the Pennsylvania Supreme Court Violated the Elections Clause.

Under the Elections Clause, state legislatures possess the authority to legislate how federal elections will proceed. Neither state nor federal courts have any role in creating those procedures. When a state court supplants the state legislature's role, as the Pennsylvania Supreme Court did here, it has taken to itself authority that the Constitution instead expressly vests in another branch of state government. The Pennsylvania Supreme Court deviated from the plain language of the statute, and in so doing, improperly took to itself the authority to legislate elections. It is as simple as this: 25 P.S. § 3050(a.4)(5)(ii)(F) categorically prohibits the counting of ballots that the Pennsylvania Supreme Court has now ordered to be counted. "The Election Code provisions at issue are clear, and they dictate that the Board shall not count an elector's provisional ballot if the elector's mail ballot is timely received by the Board." App 74a (Brobson, J., dissenting).

The Constitution reserves to the state legislatures the authority to set election laws, not the whims of a court. No state supreme court has authority to supersede those careful legislative policy judgments. The Constitution's Elections Clause vests in state legislatures, specifically, the plenary power to set election laws. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. 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. Moreover, the Constitution specifies that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1; (providing qualifications for the House of Representatives); *see* U.S. Const. amend. XVII (providing the same qualifications for the Senate). In no place is authority given to state courts to countermand the decisions of these state legislatures as they establish their election law.

This Court has recently emphasized the primacy of state legislatures in creating election legislation. In *Moore v. Harper*, 600 U.S. 1, 10 (2023), this Court confirmed that it is state legislators that have the primary, mandatory responsibility to determine the election laws for their states. This Court made emphatically clear "that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at 36. The Elections Clause does not "exempt state legislatures from the ordinary constraints" of state law, *Id.* at 34, but this Court was careful to remind the parties of its "obligation to ensure that state court interpretations of that law do not evade federal law." *Id.* It is the state legislature's authority which is preserved and given primacy. As Justice Kavanaugh emphasized, "[f]ederal court review of a state court's interpretation of state law in a federal election case 'does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures.'" *Id.* at 38 (Kavanaugh, J., concurring) (quoting *Bush v. Gore*,

531 U. S. 98, 115 (2000) (Rehnquist, C. J., concurring)).

Moore ultimately left unaddressed the full scope of the Elections Clause standard. But it did make the outer bounds of that inquiry very clear. This Court left no doubt that "state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution." *Id.* at 37. The Elections Clause may mean other things as well, but what it at least means is that state courts may not go beyond "ordinary judicial review" to intrude on the decisions of state legislatures. That is precisely what the Pennsylvania Supreme Court has done here. In the face of a clear and unambiguous statutory mandate, it has nonetheless altered the express command of the legislature. This Court has concluded that "state courts do not have free rein" in conducting judicial review. *Id.* at 34, but must instead be carefully bound by statutory text. The Pennsylvania Supreme Court has taken just such free rein to radically reinvent a statute's meaning, with national consequences.

There is simply no textual justification for the Pennsylvania Supreme Court's ruling. By rejecting a clear statutory mandate, it "usurps the legislature's unmistakable directives and supplants them with a new procedure." App. 50a-51a (Mundy, J., dissenting). The ruling nullifies the Pennsylvania General Assembly's unambiguous command that provisional ballots must not be counted if the voter has already voted by mail. 25 P.S. § 3050(a.4)(5)(ii)(F). This is a usurpation of the General Assembly's constitutional authority to set rules for federal elections and is *ultra vires*.

"[T]he Elections Clause expressly vests power to carry out its provisions in 'the Legislature' of each State, a deliberate choice that this Court must respect." *Moore*, 600 U.S. at 34. The Pennsylvania Supreme Court lacked authority to supplant Pennsylvania law and interfere in the national election of the next President of the United States.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* the American Center for Law and Justice respectfully asks this Court to issue a stay of the Pennsylvania Supreme Court's decision.

Respectfully submitted,

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