

In the Supreme Court of the United States



REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioner,

v.

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

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

v.

PENNSYLVANIA DEMOCRATIC PARTY, ET AL.,
Respondents.

**On Petitions for a Writ of Certiorari to the
Supreme Court of Pennsylvania**

**BRIEF OF OKLAHOMA, INDIANA, KANSAS,
NEBRASKA, TENNESSEE, AND WEST VIRGINIA AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

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

THE QUESTIONS PRESENTED ARE:

1. Whether the Pennsylvania Supreme Court majority usurped the Pennsylvania General Assembly’s plenary authority to “direct [the] Manner” for appointing electors for President and Vice President, U.S. CONST. ART. II, § 1, cl. 2, and broad power to prescribe “[t]he Times, Places, and Manner” for congressional elections. U.S. CONST. ART. I, § 4, cl. 1.
2. Whether the majority’s extension and presumption are preempted by federal statutes that establish a uniform nationwide federal Election Day.

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INTERESTS OF *AMICI CURIAE*

The court below enjoined “[t]he most common state deadline for election officials to receive absentee/mailed ballots”—“Election Day when the polls close.”¹ Prior to the pandemic, over thirty states, including many of the *amici* states, had this deadline.² Yet the Pennsylvania Supreme Court took it upon itself to fashion a new deadline, declaring that the one used by the majority of states for many decades must be judicially rewritten because of COVID-19.

Amici states have important interests in enforcing the absentee ballot deadlines created by their legislatures and ensuring such statutes cannot be amended by state courts merely because some voters will not act in a timely fashion to comply. More broadly, this election cycle demonstrates the immense importance to the states of the questions presented in this case: almost five hundred cases have filed in almost every state, many of which sought to alter state election statutes on the eve of—and often in the midst of—the 2020 general election.³ These have resulted in a

¹ Nat’l Conf. of State Legis., *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

² Nat’l Conf. of State Legis., *VOPP: Table 11: Receipt and Postmark Deadlines for Absentee Ballots*, <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx>.

³ See Stanford-MIT Healthy Elections Project, *COVID-Related Election Litigation Tracker*, <https://healthyelections-case-tracker.stanford.edu/>.

patchwork of court rulings that usurp the legislative role and create new election rules in substitution of the judgment made by the people's representatives. *Amici* states therefore have a strong interest in securing this Court's clear direction to courts in every state—for this election and future ones—that the Constitution's election clauses do not countenance judicial alteration of election laws based on little more than inherently-legislative policy judgments.



SUMMARY OF THE ARGUMENT

States legislatures must necessarily chose a point by which to stop receiving ballots and start counting votes, consistent with federal law setting the Election Day for federal officers. The deadline requiring absentee ballots to be received by Election Day promotes an efficient and orderly election, allowing states to expeditiously certify election results to bring certainty, clarity, stability, and legitimacy to our democratic system—sooner rather than later. States also have an interest in choosing not to have postmark deadlines, which can be difficult to implement and enforce, lead to the invalidation of some ballots received after Election Day but not others, increase the risk of voters casting ballots after initial election results are released, and undermine confidence in an election if the Election Day results change from votes that are received days after.

Such deadlines cannot be judicially rewritten merely because some voters will not act in a timely fashion to comply. Pennsylvania voters have 50 days

to return their absentee ballot to ensure that it is received by Election Day, so failure to do so is not the fault of state election law. *See Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973). That is why many courts, both before and during the pandemic, have upheld Election Day receipt deadlines—and COVID-19 does not make these laws unconstitutional. Regardless of the virus and the policy choice of how election laws should be changed due to recent circumstances, balancing interests in counting as many tardy voters as possible with electoral order, legitimacy, efficiency, and certainty is quintessentially a *legislative* judgment. The decision of the court below to strike a different balance, writing in a new postmark deadline with an arbitrary three-day-after-Election-Day cutoff, improperly abrogated the state legislature’s prerogative to set “the *Times, Places and Manner of holding Elections.*” U.S. CONST. ART. I, § 4 (emphasis added).

The contrary conclusion by the Pennsylvania Supreme Court rested on the assumption that local, state, and federal officials will be unprepared for increased absentee voting—an assumption that was unjustified and has since proven wrong—and that it would be better policy to change the deadline so that some (but not all) ballots postmarked on Election Day will be counted. In this end, this was nothing more than a state court acting in a legislative capacity to change election rules for a federal election—a job the Constitution instead gives to state legislatures. With hundreds of cases filed in courts in almost every state creating mass uncertainty, state legislatures can no longer reliably set election rules without a significant possibility that some court somewhere will think better of them. This Court should grant certio-

rari to uphold the Constitution’s command that it is the legislative branch of each state, not the judicial branch, that determines federal election rules.



ARGUMENT

I. STATES HAVE IMPORTANT INTERESTS IN ABSENTEE BALLOT RECEIPT DEADLINES.

It is well-settled that absentee ballot receipt deadlines serve the “strong” and “important” state interests in “conducting an efficient election, maintaining order, quickly certifying election results, and preventing fraud.” *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); *see also Common Cause Indiana v. Lawson*, 977 F.3d 663 (7th Cir. 2020) (“Counting the votes, and announcing the results, as soon as possible after the polls close serves a civic interest.”); *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018) (election deadlines serve “a state’s legitimate interest in providing order, stability, and legitimacy to the electoral process”); *Thomas v. Andino*, 3:20CV1552, 2020 WL 2617329, at *26 (D.S.C. May 25, 2020) (“setting specific election deadlines is part and parcel of a state’s generalized interest in the orderly administration of elections,” noting also the state’s interest in “ensuring a smooth process for [voters] to cast ballots and officials to count those ballots”); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004) (“[T]he State’s interests in ensuring a fair and honest election and to count votes within a reasonable time justifies the light imposition on Plaintiffs’ right to vote.”). After all, states must

have a point at which they stop receiving ballots and start counting them to determine the winner. *See Democratic Nat'l Comm. v. Wisconsin State Legislature*, No. 20A66, 2020 WL 6275871, at *1 (U.S. Oct. 26, 2020) (Gorsuch, J., concurring in denial of application to vacate stay) (“Elections must end sometime, a single deadline supplies clear notice, and requiring ballots be in by election day puts all voters on the same footing.”); *Cox*, 892 F.3d at 1077; *Friedman*, 345 F. Supp. 2d at 1377.

While within the discretion of state legislatures, states also have strong interests in *not* using a postmark deadline like the one enacted by the court below. Ballot receipt deadlines avoid the numerous problems with reading sometimes-inscrutable postmarks and determining how to handle missing postmarks—a situation more likely to occur as USPS rushes to deliver late-arriving prepaid ballots. *See DCCC v. ZiriAx*, No. 4:20CV211, 2020 WL 5569576, at *10 (N.D. Okla. Sept. 17, 2020). Such postmark issues have led to bitter election contests and thousands of absentee ballots rejected in states using a postmark deadline. *See Gallagher v. N.Y. State Bd. of Elections*, No. 20CV5504, 2020 WL 4496849, at *18 (S.D.N.Y. Aug. 3, 2020).

The Court below avoided such issues by mandating we *assume* all ballots were postmarked by Election Day unless proven otherwise, *see* Pet. App. 36a n.20, but that only creates other problems, including “the remote possibility that in an extremely close election . . . a person who did not vote on or before election day can fill out and submit a ballot later,” *Nielsen v. DeSantis*, No. 4:20CV236, 2020 WL 5552872, at *1 (N.D. Fla. June 24, 2020). That is, the decision below

to presumptively accept all ballots for three days following the election, even without a legible post-mark, creates the very real risk of persons being able to fill out and submit ballots after Election Day and after initial returns have been reported. *Cf. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (2020) (“Extending the date by which ballots may be cast by voters . . . fundamentally alters the nature of the election.”).

This is not solely an in-state concern. Other states have a strong interest in the outcome of national elections as they play out across the country, and there is a strong federal concern with ensuring the timely and accurate reporting of state votes for federal officers. Both within the state and nationally, an Election Day receipt deadline “secures voter confidence in the election: voters become less sure of the results if a candidate is declared a winner on or shortly after election day, but the results are changed several days or a week later.” *Zirix*, 2020 WL 5569576, at *19.

To be sure, any election deadline “will invariably burden some voters . . . for whom the earlier time is inconvenient.” *Cox*, 892 F.3d at 1077. But a “generally applicable deadline that applied to all would-be absentee voters” generally does not pose constitutional problems. *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see also Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (every election law “is going to exclude, either de jure or de facto, some people from voting”).

As this Court explained in *Rosario v. Rockefeller*, if a voter “could have” met an election-related deadline, missing that deadline is due to “their own failure to take timely steps to effect their enrollment,” not due

to a burden on the right to vote. 410 U.S. at 758. Lack of “sufficient awareness of the relevant circumstances and the likely consequences” of the deadline does not create a valid constitutional claim because such an argument could be maintained against any deadline. *Id.* at 758 n.7. Earlier this year, this Court observed that voters who wait weeks into absentee voting and request a ballot at the last minute are suffering the typical burden of a “late-requesting voter[],” not a burden improperly imposed by the state legislature. See *Republican Nat’l Comm.*, 140 S. Ct. at 1207. And the Court has long given “little weight” to any alleged interest in “making a late rather than an early decision.” *Burdick v. Takushi*, 504 U.S. 428, 437 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974)).

Thus, while some voters will inevitably fail to comply with *any* deadline—including the postmark-and-three-days-after-Election-Day deadline invented by the Pennsylvania Supreme Court—courts have held in this and other election-related contexts that “voters who fail to get their vote in early cannot blame [state] law for their inability to vote; they must blame ‘their own failure to take timely steps.’” *Thomas*, 2020 WL 2617329, at *26 (quoting *Rosario*, 410 U.S. at 758); see also *Common Cause Indiana v. Lawson*, 977 F.3d 663 (7th Cir. 2020) (“those who act at the last minute assume risks even without a pandemic”); *New Ga. Project*, 976 F.3d at 1282 (“Voters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time. . . .”); *id.* at 1286 (Lagoa, J., concurring); *Ziriox*, 2020 WL 5569576, at *18 (“Because the State offers voters wishing to vote by absentee ballot options to

ensure their votes are timely returned, voters who fail to ensure timely return of their ballots should not blame the law for their inability to vote.”); *Grossman v. Sec’y of the Commonwealth*, 485 Mass. 541, 2020 WL 5033954, at *6 (2020); *Friedman*, 345 F. Supp. 2d at 1377-78; *cf. also Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063, at *38-40 (M.D.N.C. Aug. 4, 2020); *Isabel v. Reagan*, 394 F. Supp. 3d 966, 982-83 (D. Ariz. 2019); *Chelsea Collaborative, Inc. v. Sec’y of Commonwealth*, 100 N.E.3d 326, 335 (Mass. 2018); *Crum v. Duran*, 390 P.3d 971, 976 (N.M. 2017); *Gallagher v. Ind. State Election Bd.*, 598 N.E.2d 510, 516 (Ind. 1992).

Statistics about how many voters in fact did not comply with the deadline are irrelevant because they do not give the reasons for failure to comply: whether it was because these voters were unable to meet the deadline or instead because they did not take reasonable efforts to comply, perhaps because they chose to wait too long to request or return their absentee ballot. *See Ziriaux*, 2020 WL 5569576, at *18. Regulations that can be complied with by reasonable efforts are not significant burdens on the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008); *New Ga. Project*, 976 F.3d at 1282; *Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016). “An absentee voter is responsible for acting with sufficient time to ensure timely delivery of her ballot,” just like other voters “must take appropriate precautions by heading to the polls with a sufficient cushion of time to account for traffic, weather, or other conditions that might otherwise interfere with their ability to arrive in time to cast a ballot.” *Ziriaux*,

2020 WL 5569576, at *18. It is therefore wrong to characterize these voters as not having their ballots counted due to ‘no fault of their own,’ since such voters assumed the risks of waiting too long to request and/or receive their ballot, even if such risks are exacerbated by outside events. Such voters are not “disenfranchised”—they’re tardy. *See Democratic Nat’l Comm.*, 20A66, 2020 WL 6275871, at *7 (Kavanaugh, J., concurring in denial of application to vacate stay); *New Ga. Project*, 976 F.3d at 1282.

Accordingly, the decision of the court below to focus on those voters who wait until the very last possible point to request an absentee ballot (7 days before the election), Pet. App. 47a, rather than the opportunity for every voter to request a ballot up to 50 days before the election, 25 P.S. § 3150.12a, is a lean fig leaf for redrafting the deadline. Pennsylvania’s decision to provide a large temporal window to request a ballot does not create “an extremely condensed timeline,” Pet. App. 47a; instead, it provides voters *more opportunities* to vote absentee, leaving it to voters to use those options responsibly, *see Democratic Nat’l Comm.*, 20A66, 2020 WL 6275871, at *9 (Kavanaugh, J., concurring in denial of application to vacate stay).

All this is why numerous courts across the country have upheld Election Day receipt deadlines for absentee ballots. *Org. for Black Struggle v. Ashcroft*, No. 20-3121, 2020 WL 6257167, at *3 (8th Cir. Oct. 23, 2020); *Common Cause Indiana v. Lawson*, 977 F.3d 663 (7th Cir. 2020); *Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020); *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081 (9th Cir. 2020); *New Ga. Project*, 976 F.3d at 1280 (staying district court order that “manufactured its own ballot deadline”); *Zirixax*,

2020 WL 5569576, at *18-20; *Nielsen*, 2020 WL 5552872, at *1; *Thomas*, 2020 WL 2617329, at *26; *Friedman*, 345 F. Supp. 2d at 1377; *Grossman*, 485 Mass. 541, 2020 WL 5033954, at *7; *All. for Retired Americans v. Sec’y of State*, 2020 ME 123, 2020 WL 6255526 (Me. 2020); *Am. Women, et al., v. State of Missouri, et al.*, No. 20AC-CC00333 (Mo. Cir. Cole Cty. Oct. 22, 2020); *Michigan All. for Retired Americans v. Sec’y of State*, No. 354993, 2020 WL 6122745 (Mich. Ct. App. Oct. 16, 2020). As even the court below admitted, “there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots.” Pet. App. 44a. Indeed, because there is no right to vote absentee, a challenge to an absentee deadline “does not implicate the right to vote at all.”⁴

The reality of the coronavirus pandemic does not change the important state interests in enforcing their voting laws as written. As many courts have noted, the states did not create the virus or impose the pandemic’s burden on voters—COVID-19 is not state action that subjects otherwise-valid state laws to abrogation.⁵ At most, COVID-19 is now part of the

⁴ *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020); see also *id.* at 16, 20 (Lagoa, J., concurring); *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 807 (1969) (the “claimed right to receive absentee ballots” is not “the right to vote”); *Crawford*, 553 U.S. at 209 (Scalia, J., concurring in the judgment); *Tully*, 2020 WL 5905325, at *1; *Mays*, 951 F.3d at 786, 792 (6th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-04 (5th Cir. 2020); *Griffin*, 385 F.3d at 1130; *Tully v. Okeson*, No. 1:20CV1271, 2020 WL 4926439, at *3-4 (S.D. Ind. Aug. 21, 2020).

⁵ See *Tully*, No. 20-2605, 2020 WL 5905325, at *1, *5, & *7; *New Ga. Project*, 976 F.3d at 1284; *Thompson v. DeWine*, No. 20-3526, 2020 WL 5542883, at *1 (6th Cir. Sep. 16, 2020); *Thompson v.*

“usual burden on voting” that arises “out of life’s vagaries,” and thus not a burden that renders a state law unconstitutional. *Crawford*, 553 U.S. at 197-98. Following repeated direction from this Court, see *New Ga. Project*, 976 F.3d at 1283-84 & n.2 (collecting cases), many lower courts have declined to alter election laws during an emergency, including this latest pandemic. See *Carson v. Simon*, No. 20-3139, 2020 WL 6335967, at *6 (8th Cir. Oct. 29, 2020); *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 408 (5th Cir. 2020); *Sinner v. Jaeger*, No. 3:20CV76, 2020 WL 3244143, at *6 (D.N.D. June 15, 2020); *Williams v. DeSantis*, No. 1:20CV67, Doc. 12 (N.D. Fla. Mar. 17, 2020); see also *Bethea v. Deal*, No. 2:16CV140, 2016 WL 6123241, at *2-3 (S.D. Ga. Oct. 19, 2016) (Hurricane Matthew). Because of the states’ important interests in Election Day ballot receipt deadlines, and in not subjecting themselves to the problems created by postmark deadlines, the decision to change between one and the other is properly left to state legislatures.

DeWine, 959 F.3d 804, 810 (6th Cir. 2020); *Tex. Democratic Party*, 961 F.3d at 405; *id.* at 415-16 (Ho, J., concurring); *Clark v. Edwards*, Nos. 20CV283, 20CV308, 2020 WL 3415376, at *10-11 (M.D. La. June 22, 2020); *Coalition for Good Governance v. Raffensperger*, No. 1:20CV1677, 2020 WL 2509092, at *3 n.2. (N.D. Ga. May 14, 2020).

II. REVIEW IS WARRANTED BECAUSE, LIKE THE COURT BELOW, STATE COURTS ARE WITH INCREASING FREQUENCY ASSUMING THE CONSTITUTIONAL ROLE ASSIGNED TO STATE LEGISLATURES.

Because states have strong reasons to adopt receipt deadlines instead of postmark deadlines, the choice between the two, like any deadline in election law, requires a “balance between promoting smooth and accurate elections, on the one hand, and encouraging voter turnout, on the other.” *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 124 (D. Conn. 2005). That balance is “*quintessentially a legislative judgment.*” *Id.* (emphasis added) (quoting *Griffin*, 385 F.3d at 1131); see also *Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *1, *7 (7th Cir. Oct. 6, 2020). Put another way, “any deadline has aspects of arbitrariness to it, including one crafted by the court,” *All. for Retired Americans v. Sec’y of State*, 2020 WL 6255526, at *6, and while “ultimately any deadline” means some “ballots will arrive too late to be counted[.]. . . [w]hat that deadline should be is a policy decision”—that is, a legislative decision. *League of Women Voters of Michigan v. Sec’y of State*, No. 353654, 2020 WL 398 0216, at *8 (Mich. Ct. App. July 14, 2020), *appeal denied*, 946 N.W.2d 307 (Mich. 2020), *reconsideration denied*, 948 N.W.2d 70 (Mich. 2020).

The Constitution grants the power to prescribe such policy decisions about “the Times, Places and Manner of holding Elections” to “each State *by the Legislature thereof.*” U.S. CONST. ART. I, § 4 (emphasis added). State legislatures have “broad powers to determine the conditions under which the right of suffrage may be exercised.” *Shelby Cnty. v. Holder*,

570 U.S. 529, 543 (2013). And they have “significant flexibility in implementing their own voting systems.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010). The court below acknowledged as much:

We are fully cognizant that a balance must be struck between providing voters ample time to request mail-in ballots, while also building enough flexibility into the election timeline to guarantee that ballot has time to travel through the USPS delivery system to ensure that the completed ballot can be counted in the election. Moreover, we recognize that the determination of that balance is fully enshrined within the authority granted to the Legislature under the United States and Pennsylvania Constitutions.

Pet. App. 45a.

The Pennsylvania Supreme Court nonetheless chose to “alter” the legislature’s duly-enacted election law based on the state’s experience with its June primary. Pet. App. 48a-49a & n.25. But speculation about the state and local officials’ ability to handle a long prepared for general election during COVID-19 cannot properly be based on their performance early in the pandemic. By the court’s own recounting, problems in the primary occurred because “the Boards were inundated with over 1.8 million requests for mail-in ballots, rather than the expected 80,000-100,000, due in large part to the COVID-19 pandemic, which caused many voters to be wary of congregating in polling places.” Pet. App. 28a. But unlike in June, where the number of absentee ballot requests far exceeded expectations, election administrators *expected* “that 3 million electors will seek mail-in or absentee

ballots for the General Election.” Pet. App. 31a-32a. Indeed, it appears that Pennsylvania election officials overestimated the number of absentee ballots. Pennsylvania Department of State, *Unofficial Returns*, <https://www.electionreturns.pa.gov/> (around 2.6 million mail ballots cast for President). Not surprisingly, state primaries that took place later during the pandemic have seen smoother elections,⁶ and the recent general election largely has not shown massive problems with voters being able to receive timely-requested ballots.

This shows why courts cannot simply assume that state and local public servants will refuse to learn the lessons of the past and won’t take significant steps to address the expected increased volume of absentee ballot requests. Pennsylvania did not in fact suffer the sorts of delays caused by unprepared local election officials during the general election as it did during the primary—the most significant delays were instead caused by litigation.⁷ Contrary to predictions about hundreds of thousands of ballots not being counted in Pennsylvania and other states absent a deadline extension, one Respondent here claims only a tiny fraction of ballots have so far trickled in after Election Day. See Response of Luzerne County Board of Elections to Emergency Application for Injunction Pending

⁶ Nathan Rakich, *We’ve Had 56 Statewide Elections During The Pandemic. Here’s What We Learned From Them*, FIVETHIRTY EIGHT (Oct. 1, 2020), <https://fivethirtyeight.com/features/weve-had-56-statewide-elections-during-the-pandemic-heres-what-we-learned-from-them/>.

⁷ See Kristen Holmes, Ellie Kaufman, and Kelly Mena, *Start of Pennsylvania’s Election on Hold Because of Ballot Delay*, CNN (Sept. 13, 2020), <https://www.cnn.com/2020/09/13/politics/2020-election-pennsylvania-ballot-delay/index.html>.

Certiorari Review at 3 (Nov. 7, 2020). Clearly, voters are easily able to comply with the deadline enacted by the Pennsylvania Legislature.

Moreover, the same policy concerns with in-person voting in June cannot be assumed to hold in November, now that much more is known about the virus. Only after state primaries in the early months of the pandemic (when fear of the unknown was at its height) did a scientific consensus develop that in-person voting does not pose a high risk of causing a viral outbreak. For example, in Wisconsin, the first state to hold elections after the stay-at-home orders that nonetheless saw large in-person voting, a CDC study concluded: “No clear increase in cases, hospitalizations, or deaths was observed after the election.”⁸ Similarly, an earlier study stated: “There was no increase in COVID-19 new case daily rates observed for Wisconsin or its three largest counties following the election on April 7, 2020, as compared to the US, during the post-incubation interval period.”⁹ And a third study using different methods reached the same result: “There is no evidence to date that there was a surge of infections due to the April 7, 2020 election in Wisconsin.”¹⁰ South Korea also held a

⁸ Paradis et al., *Public Health Efforts to Mitigate COVID-19 Transmission During the April 7, 2020, Election—City of Milwaukee, Wisconsin, March 13–May 5, 2020* (July 31, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6930a4-H.pdf>.

⁹ Berry, Mulekar, & Berry, *Wisconsin April 2020 Election Not Associated with Increase in COVID-19 Infection Rates* (April 28, 2020), <https://www.medrxiv.org/content/10.1101/2020.04.23.20074575v1>.

¹⁰ Leung & Wu, *No Detectable Surge in SARS-CoV-2 Transmission Due to the April 7, 2020 Wisconsin Election* (April 29, 2020),

national in-person election with record turnout and zero transmission of the coronavirus from voting.¹¹ Thus, unlike in June, the conventional wisdom was to encourage, rather than discourage, in-person voting as a safe and secure way to cast a ballot,¹² which perhaps explains why Pennsylvania saw lower-than-expected absentee voting.

None of this is to say that had the predictions of the court below been correct, its decision would have been justified. Rather, it demonstrates the problem with courts making legislative judgments—balancing policy considerations based on speculative predictions and competing electoral values. The sort of conjecture relied upon by the court below is not factfinding or legal interpretation, but simply usurpation of this legislative role. To say otherwise is to hold there is no meaningful distinction between judicial and legis-

<https://www.medrxiv.org/content/10.1101/2020.04.24.20078345v1.full.pdf>.

¹¹ Do Kyung Ryuk, Jeong Hyeon Oh, & Yewon Sung, *Elections During a Pandemic: South Korea Shows How to Safely Hold a National Election During the COVID-19 Crisis*, THE WILSON CENTER (May 19, 2020), <https://www.wilsoncenter.org/blog-post/elections-during-pandemic-south-korea-shows-how-safely-hold-national-election-during>.

¹² See Abby Phillip, Jeremy Herb, & Kristen Holmes, *Democrats Scramble to Soothe Voter Fears About in-Person Voting Ahead of November Election*, CNN (Sept. 17, 2020), <https://www.cnn.com/2020/09/17/politics/election-2020-democrats-in-person-voting/index.html>; Russel Berman, *If You Can Grocery Shop in Person, You Can Vote in Person: Experts Now Say the Health Risk of Casting an in-Person Ballot Is Relatively Low. Will Democrats Tell Their Voters That?*, THE ATLANTIC (Sept. 8, 2020), <https://www.theatlantic.com/politics/archive/2020/09/voting-during-pandemic-pretty-safe/616084/>.

lative functions and no substance to the foundational American concept of the separation of powers.

Consider a counterfactual: suppose the Pennsylvania Legislature had created a postmark deadline that accepted absentee ballots received within three days of Election Day. What is to prevent a state court from rewriting this deadline, perhaps at the suggestion of the state secretary, to require accepting ballots for an extra (fourth) day after the election, using the same reasoning as that below? Nothing. After all, that new deadline will also result in some extra votes being counted—we are told the magnitude matters not—and would better accommodate predicted delays in processing applications and the mail system without affecting the rest of the election calendar. *See* Pet. App. 48a-49a; *compare also Democratic Nat'l Comm.*, 2020 WL 6275871, at *2 (Gorsuch, J., concurring) *and id.* at *10 (Kavanaugh, J., concurring) *with id.* at *15 & n.5 (Kagan, J., dissenting). Almost no deadline the legislature could set would be secure from alteration by the courts in the exact same factual scenario of this case. Here, the Pennsylvania Supreme Court made an election policy judgment based on uncertain predictions of the future, contrary to the judgments of that branch of the Pennsylvania government the Constitution specifically vests with the authority to make election policy choices: the state legislature. The inescapable reality is that it is now the judiciary that sets the times and manner of federal elections, occasionally with the consent of some executive official, not the state legislature.

The consequences of such state court usurpation could ripple nationally in the future, even if not in this present election. The experience of the states during

the 2020 election cycle confirms the immense importance of the questions presented. Almost 500 cases were filed flooding the courts in almost every state, many with demands to judicially alter election rules; regrettably, some courts like the one below have acceded to these requests.¹³ Election law has become so chaotic that it is now impossible for state legislatures to know in advance whether the election rules they have enacted will or will not be reimaged by courts. This ever-worsening reality is hardly what the Constitution envisions: “The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .” U.S. CONST. art. I, § 4.



CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Pennsylvania Supreme Court’s clear encroachment on the state legislature’s federal constitutional prerogative to set the times and manner of holding federal elections. Review is warranted now, even after the election, to secure the constitutional framework for our most fundamental democratic processes. The Court need not wait for the next election cycle to precipitate yet another deluge of litigation allowing state courts to once again amend state law right before the election—and for the beneficiaries of these unconstitutional actions to argue that there is once again not enough time for this Court’s careful merits review.

¹³ See Stanford-MIT Healthy Elections Project, *supra* note 3.

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