

No. \_\_\_\_\_

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In The  
Supreme Court of the United States

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

V.

PENNSYLVANIA DEMOCRATIC PARTY, ET AL.,  
*Respondents.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

Just last year, the Pennsylvania General Assembly, consistent with the authority vested in it by the United States Constitution, enacted a statute unambiguously requiring that absentee and mail-in ballots be received by Election Day. Replacing that duly and recently enacted bipartisan policy decision with one entirely of its own making, a 4–3 majority of the Pennsylvania Supreme Court extended the received-by deadline for absentee and mail-in ballots until three days after Election Day. This same narrow majority of the Pennsylvania Supreme Court also required election officials to presume that ballots lacking legible postmarks received during this extended deadline were mailed by Election Day, rather than afterwards. While doing this, the Pennsylvania Supreme Court inexplicably and erroneously denied a motion for intervention by the leaders of the Pennsylvania House of Representatives, who were seeking to intervene on behalf of the majority caucus of the Pennsylvania House of Representatives, one of the very bodies directly harmed by the court’s decision. The important federal questions presented by this case are:

1. Whether the Pennsylvania Supreme Court majority violated the United States Constitution by usurping 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 its broad power to prescribe “[t]he Times, Places, and Manner” for congressional elections, *id.* art. I, § 4, cl. 1.

2. Whether the majority's extension and presumption conflict with and are preempted by federal statutes that establish a uniform nationwide federal Election Day. *See* 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1.

The questions presented in this Petition are identical to those presented by the Republican Party of Pennsylvania in its Petition for a Writ of Certiorari in *Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (filed Oct. 23, 2020).

## **PARTIES TO THE PROCEEDING**

Petitioners are Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore; Jake Corman, Senate Majority Leader (collectively “Senate Leaders”); Bryan Cutler, Speaker of the Pennsylvania House of Representatives; and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (collectively “House Leaders”). Petitioners Scarnati and Corman successfully intervened in the proceeding before the Pennsylvania Supreme Court on behalf of the majority caucus of the Pennsylvania Senate. Petitioners Cutler and Benninghoff attempted to intervene in the case before the Pennsylvania Supreme Court on behalf of the majority caucus of the Pennsylvania House of Representatives, but that court inexplicably denied their intervention.

Respondents are Pennsylvania Democratic Party; Secretary of State Kathy Boockvar; the Republican Party of Pennsylvania; Adams County Board of Elections; Allegheny County Board of Elections; Armstrong County Board of Elections; Bedford County Board of Elections; Berks County Board of Elections; Blair County Board of Elections; Bucks County Board of Elections; Butler County Board of Elections; Cambria County Board of Elections; Carbon County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Clarion County Board of Elections; Clinton County Board of Elections; Columbia County Board of Elections; Delaware County Board of Elections; Dauphin County Board of Elections; Elk County Board of Elections; Erie County Board of Elections; Fayette County Board of Elections;

Franklin County Board of Elections; Greene County Board of Elections; Huntingdon County Board of Elections; Indiana County Board of Elections; Jefferson County Board of Elections; Lackawanna County Board of Elections; Lancaster County Board of Elections; Lawrence County Board of Elections; Lebanon County Board of Elections; Lehigh County Board of Elections; Luzerne County Board of Elections; Mercer County Board of Elections; Monroe County Board of Elections; Montgomery County Board of Elections; Montour County Board of Elections; Northampton County Board of Elections; Northumberland County Board of Elections; Perry County Board of Elections; Philadelphia County Board of Elections; Pike County Board of Elections; Potter County Board of Elections; Snyder County Board of Elections; Susquehanna County Board of Elections; Tioga County Board of Elections; Union County Board of Elections; Venango County Board of Elections; Washington County Board of Elections; Wayne County Board of Elections; Westmoreland County Board of Elections; and York County Board of Elections.

October 27, 2020

/s/ Jason B. Torchinsky  
Jason B. Torchinsky

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## INTRODUCTION<sup>1</sup>

In the middle of an ongoing election, the Pennsylvania Supreme Court altered the rules of the election and extended the 2020 General Election beyond the “Time” established by the state legislature pursuant the authority granted to it by Article I, Section IV of the U.S. Constitution. In doing so, the Supreme Court of Pennsylvania has violated federal law and the federal Constitution.

The Pennsylvania Supreme Court rewrote Pennsylvania’s law governing federal elections and violated the United States Constitution, sowing chaos into the electoral process mere weeks before the already complicated November General Election. The Pennsylvania Supreme Court’s decision forces election administrators to count ballots received up to three days after Election Day even if they lack a legible postmark or any postmark whatsoever. This is an open invitation to voters to cast their ballots after Election Day, thereby injecting chaos and the potential for gamesmanship into what had been an orderly and secure schedule of clear, bright-line deadlines. Pennsylvania’s statutorily enacted and orderly election deadlines were the product of federal law, the Pennsylvania General Assembly’s deliberations and negotiations over election law policy, and duly enacted state laws. The new rules imposed by the decision of the Supreme Court of Pennsylvania undermine the constitutionally delegated responsibilities of the legislature and, if

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<sup>1</sup> Petitioners adopt in full the appendix to the Republican Party of Pennsylvania’s Petition for a Writ of Certiorari in *Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (filed Oct. 23, 2020).

left unchecked, would be license for state courts to undermine the authority of legislatures nationwide.

*First*, the Supreme Court of Pennsylvania's decision violates the United States Constitution's Elections Clause and Electors Clause by seizing the authority to set the times, places, and manner of federal elections and the manner of appointing presidential electors from the legislature. The Elections Clause and Electors Clause of the United States Constitution vests authority to regulate the times, places, and manner of federal elections and the manner of appointing presidential electors directly with Pennsylvania's General Assembly, subject only to alteration by Congress, not the Supreme Court of Pennsylvania. U.S. Const. art. I, § 4; U.S. Const. art. II, § 1, cl. 2. The General Assembly has not delegated authority to alter these regulations to the Pennsylvania Judiciary. In spite of that, a majority of the Pennsylvania Supreme Court took it upon itself to overrule and fundamentally change the policy decisions reflected in the General Assembly's duly enacted election laws. Simply put, that court substituted its will for the will of the General Assembly. This substitution usurps the authority vested in the General Assembly by the Elections Clause and the Electors Clause of the United States Constitution. U.S. Const. Art. I, § 4; U.S. Const. art. II, § 1, cl. 2.

*Second*, the Pennsylvania Supreme Court violates federal law establishing a single uniform Federal Election Day. Federal law mandates holding all elections for Congress and the Presidency on a single day throughout the Union: "the Tuesday next after the 1st Monday in November[.]" 2 U.S.C. § 7; *see also* 2 U.S.C. § 1; 3 U.S.C. § 1. However, the

Pennsylvania Supreme Court's Order extends this Federal Election Day by forcing election officials to accept ballots received after Election Day even if these ballots lack a legible postmark. This decision allows ballots to be both voted and counted after election day, extending the Federal General Election past November 3, 2020, and clearly violating 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1.

### **OPINIONS BELOW**

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

### **JURISDICTION**

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

### **CONSTITUTIONAL PROVISIONS AND STATUTES**

The Electors and the Elections Clauses of the U.S. Constitution, 2 U.S.C. §§ 1, 7, and 3 U.S.C. § 1 are reproduced in the appendix to the Republican Party of Pennsylvania's Petition for a Writ of Certiorari in *Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (filed Oct. 23, 2020) (Pet.App.198a–200a).

## STATEMENT OF THE CASE

The Petitioners adopt in full the statement of the case from the Republican Party of Pennsylvania's Petition for a Writ of Certiorari. *Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (filed Oct. 23, 2020). Petitioners add that on September 8, 2020, the House Leaders filed a motion to intervene in this matter. The House Leaders' application for intervention was timely filed, and was unopposed, with even the petitioners below agreeing that the House Leaders' intervention was appropriate. See *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, Response to Motions to Intervene of Senator Costa and Representatives Dermody, Cutler, and Benninghoff (filed Sept. 9, 2020) ("Petitioners believe the motions to intervene filed by Proposed Intervenors offer the same issues as the motions decided by the Court in its September 3 Order and have no objection to the intervention of the Proposed Intervenors either as individuals or as leaders of their respective caucuses, consistent with this Court's order of September 3."). Moreover, the House Leaders had successfully intervened in a related Pennsylvania Supreme Court case, *Crossey, et al. v. Boockvar, et al.*, No. 108 MM 2020, which also concerned Pennsylvania's received-by deadline for absentee and mail-in ballots. Nevertheless, the Pennsylvania Supreme Court inexplicably denied intervention to the House Leaders in a footnote of the Opinion.

## REASONS FOR GRANTING RELIEF

For the reasons stated in the Republican Party of Pennsylvania’s Petition for a Writ of Certiorari, *Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (filed Oct. 23, 2020), the Court should review the paradigmatic “important question[s] of federal law” presented in this case. U.S. Sup. Ct. R. 10(c). The Constitution reserves authority to set the rules for conducting federal elections to the state legislatures. By extending the Election Day received-by deadline by judicial fiat and establishing a presumption of timeliness that will allow voters to cast or mail ballots after Election Day, the Pennsylvania Supreme Court impermissibly altered both the “Time” and the “Manner” established by the General Assembly for “appoint[ing] . . . Electors” and by Congress and the General Assembly for “holding Elections.” U.S. Const. art. II, § 1, cl. 2; *id.* art. I, § 4, cl. 1. Furthermore, the Petitioners here have standing to bring this Petition and the issues in this appeal will not be mooted by the November 3, 2020 General Election because they fall under the capable of repetition, yet evading review doctrine.

### I. PETITIONERS HAVE STANDING.

Petitioners have standing to file this Petition because the decision of the Supreme Court of Pennsylvania has deprived, and continues to deprive, Petitioners, and the majority of the Pennsylvania General Assembly they represent, of their federal and constitutional rights. This deprivation confers Article III standing upon Petitioners. However, in a procedural sleight of

hand, the Pennsylvania Supreme Court wrongly denied intervention to the House Leaders. This court should not countenance an attempt by state courts to deny this Court jurisdiction by permitting intervention in state cases by one house of a state legislature while denying another, when issues are related to power directly delegated to state legislatures by the United States Constitution, as is the case here. Because the House Leaders suffer direct constitutional injury as a result of the Pennsylvania Supreme Court's decision, identical to that of the Senate Leaders, they join this Petition.

This Court is responsible for assuring "that state courts will not be the final arbiters of important issues under the federal constitution." *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940). "The predominant interest promoted by this apparent exception to normal preclusion doctrines is to assure that the binding application of federal law is uniform and ultimately subject to control by this Court." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 622 (1989) (citing *Richardson v. Ramirez*, 418 U.S. 24, 42, n. 13 (1974)). *See also Richardson v. Ramirez*, 418 U.S. at 42, n. 13 (this Court may review a declaratory judgment granted by a state court, for "any other conclusion would unnecessarily permit a state court of last resort, quite contrary to the intention of Congress in enacting 28 U.S.C. § 1257, to invalidate state legislation on federal constitutional grounds without any possibility of state officials who were adversely affected by the decision seeking review in this Court").

Furthermore, this Court enunciated that it may exercise its jurisdiction on certiorari from a state court decision "if the judgment of the state court

causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.” *ASARCO*, 490 U.S. 623-24. *See also Virginia v. Hicks*, 539 U.S. 113, 120-121; *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 288-89.

On August 24, 2020, the Senate Leaders filed their ultimately-successful Motion to Intervene before the Commonwealth Court. In their Motion to Intervene, Applicants argued that: (1) they could have been joined as an original party in the action, and (2) that the determination of the action will affect their legally-enforceable interests. Specifically, Applicants argued that granting Respondents’ requested relief would diminish and usurp the rights and obligations that the United States Constitution vests in the Pennsylvania General Assembly,<sup>2</sup> namely the right to enact the times, places, and manner of holding elections under the Constitution’s Elections Clause and Electors Clause. *See* U.S. Const. art. I, §4. On September 3, 2020, the Supreme Court of Pennsylvania granted the Senate Leaders’ Motion to Intervene, indicating that they had standing below, and the determination of the action indeed implicates Applicants’ legally-enforceable interests under, *inter alia*, the Elections Clause. However, the Pennsylvania Supreme Court dubiously denied the House Leaders’ motion for intervention despite the fact that they suffer identical diminishment and usurpation of rights and obligations under the United States Constitution as the Senate Leaders. *See* U.S. Const. art. I, § 4; U.S. Const. art. II, § 1, cl. 2.

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<sup>2</sup> Including the Pennsylvania Senate and House of Representatives, of which Petitioners represent a majority.

The Pennsylvania Senate, Pennsylvania House of Representatives, and the Petitioners who represent a majority of both chambers have suffered, as a consequence of the Pennsylvania Supreme Court's "final judgment altering tangible legal rights," *ASARCO*, 490 U.S. at 619, an actual injury in fact—the diminishment of their authority under the United States Constitution—that is sufficiently "distinct and palpable" to confer standing under Article III. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Petitioners, as they did below, allege a specific injury stemming from the Pennsylvania Supreme Court's decision, a decision which violates federal law.

Petitioners therefore have standing to bring an appeal to this Court because the decision of the Supreme Court of Pennsylvania injures them sufficient to confer Article III standing. *See ASARCO*, 490 U.S. 623-24. *See also Virginia v. Hicks*, 539 U.S. 113, 120-121; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288-89.

Moreover, this appeal is distinguishable from that of *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019). The primary distinguishing characteristic of this case from *Bethune-Hill* is that this case concerns the diminishment of the authority of the Pennsylvania General Assembly to regulate the times, places, and manner of federal elections and to appoint presidential electors in Pennsylvania under the Elections and Electors Clause of the United States Constitution. *See id.* at 1953-54. In this way, this case is more akin to the standing of the litigants in *Sixty-seventh Minnesota State Senate v. Beens*, 406 U. S. 187 (1972) (per curiam) and *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787 (2015) where,

respectively, the decisions to reduce the size of the legislative body and to remove the primary authority for redistricting from a legislative body rendered the portions of the legislatures appropriate legal entities for appeals. *Beens*, 406 U. S. at 194; *Arizona State Legislature*, 576 U.S. at 791-92. In essence, this case is not about the legislators' general interest in their laws, but about their concrete interest in their own constitutionally delegated authority.

This case is also more akin to *Coleman v. Miller*, 307 U. S. 433, (1939), than to *Bethune-Hill*. In *Coleman*, plaintiffs were 20 (of 40) Kansas State Senators, whose votes "would have been sufficient to defeat [a] resolution ratifying [a] proposed [federal] constitutional amendment." 307 U.S. at 446. The Court held they had standing to challenge, as impermissible under Article V of the Federal Constitution, the State Lieutenant Governor's tie-breaking vote for the amendment. *Id. Coleman*, as later explained in *Raines*, stood "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U.S., at 823. That Petitioners have standing here fits that bill. The Pennsylvania Supreme Court's decision "completely nullif[ie]d" a vote by the Legislature, now and "in the future," purporting to set the time to accept mail-in and absentee ballots. *Raines*, 521 U.S., at 823-824. This dispute, in short, "will be resolved . . . in a concrete factual context conducive to a [realistic appreciation of the consequences of judicial action.]" *Valley Forge Christian College v. Americans United for*

*Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

This case is further distinguishable from *Bethune-Hill* because of the participation of a majority of both chambers of the Pennsylvania General Assembly in this Petition and throughout the pendency of the litigation. The Pennsylvania Supreme Court wrongly and inexplicably denied the House Leaders' motion to intervene, possibly in an effort to evade this Court's jurisdiction. The denial is baffling because the House Leaders' intervention was filed timely, unopposed, and the same court granted the House Leaders' intervention in an analogous case. *See Crossey v. Boockvar*, No. 108 MM 2020, Order (Penn. Aug. 21, 2020). This erroneous denial does not impact the House Leaders' ability to petition this Court for a writ of certiorari here. Indeed, federal appellate courts have consistently allowed 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 F.2d 1147, 1152 (2d Cir. 1986), *aff'd*, *Marino v. Ortiz*, 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988)). Here, the House Leaders' interest in developing and enacting Pennsylvania's election laws is diminished. The House Leaders have standing to join this Petition for Writ of Certiorari because: 1) they petitioned to intervene in the underlying proceedings below, which was erroneously denied; and 2) the equities weigh in favor of hearing their appeal to protect their interests in establishing Pennsylvania election law. *See EEOC v. Pan American World Airways, Inc.*, 897

F.2d 1499 (9th Cir. 1990) (“[N]onparties are permitted to appeal where the equities favor hearing the appeal, where the nonparties participated in the settlement agreement, and where the nonparties had a stake in its proceeds discernable from the record”). Regardless, the House Leaders’ participation as Petitioners here, and attempt to participate below, sufficiently distinguish this case from *Bethune-Hill*. The Pennsylvania Supreme Court should not be permitted to usurp the General Assembly’s constitutional authority and then simultaneously insulate that decision from review by this Court through no fault of Petitioners or the House Leaders.

Accordingly, Petitioners have standing to appeal the Pennsylvania Supreme Court’s decision.

Further, both issues in this Petition will not be mooted by the November 3, 2020 General Election. If the full disposition of this appeal does not occur until after the November 3rd election occurs, the issues are not moot because they are capable of repetition yet evade review. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Citizens United v. FEC*, 558 U.S. 310, 334 (2010). This is especially true given the “the unique circumstances of election law” presented by this case, *Shays v. FEC*, 424 F. Supp. 2d 100, 111 (D.D.C. 2006); *see also Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003), and the Pennsylvania Supreme Court’s repeated willingness to interfere in duly enacted election regulations on the eve of elections. *See, e.g., League of Women Voters v. Commonwealth*, 645 Pa. 1 (Penn. Feb. 7, 2018), *stay denied*, *Turzai v. League of Women Voters*, 138 S. Ct. 1323 | 200 L. Ed. 2d 466 (2018); *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 Pa. LEXIS 4872 (Penn. Sept. 17,

2020), *stay denied*, *Scarnati v. Boockvar*, No. 20A53 (Oct. 19, 2020; *In Re. November 3, 2020 General Election*, No. 149 MM 2020, 2020 Pa. LEXIS 5560 (Penn. Oct. 23, 2020)).

### CONCLUSION

For these reasons, and for the reasons discussed in the Republican Party of Pennsylvania's Petition for a Writ of Certiorari in *Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (filed Oct. 23, 2020), Petitioners respectfully request that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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