No. 24-786

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Petitioners,

v.

FAITH GENSER, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA DEMOCRATIC PARTY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Pennsylvania Supreme Court violated the Elections and Electors Clauses by interpreting Pennsylvania's Election Code, pursuant to principles codified in Pennsylvania's Statutory Construction Act, to require counting provisional ballots cast by voters whose mail ballots will not be counted due to a disqualifying error.

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INTRODUCTION

This case arose because a county board of elections in Pennsylvania—petitioner Butler County Board of Elections—refused to count provisional ballots that the Commonwealth of Pennsylvania told qualified voters they could cast (and have counted) because their mail ballots contained disqualifying errors. Following the state legislature's instructions for statutory interpretation (codified in the Statutory Construction Act, or SCA), the Pennsylvania Supreme Court held that the board's refusal to count such provisional ballots violated the Commonwealth's Election Code. That holding, the court explained, "flows directly from the text of the Election Code." Pet.App.35a. The holding also "effectuate[s] the intention of the General Assembly," which pursuant to the SCA must be "[t]he object of all interpretation and construction of statutes." 1 Pa. Cons. Stat. §1921(a). It effectuates the legislature's intent, the state high court explained, because the manifest purpose of the Election Code's provisional-voting regime is "to assure access to the right to vote while also preventing double voting," and no "honest voting principle is violated" by "counting … an elector's provisional ballot when the elector's mail ballot is a nullity." Pet.App.55a-56a.

Petitioners offer no sound reason for this Court to review this state-court judgment straightforwardly applying state statutory law.

In fact, this Court has no power to do so, as it lacks jurisdiction over the petition, for either of two independent reasons. First, unlike other Elections and Electors Clause cases to come to this Court, this case falls outside the limited circumstances in which 28 U.S.C. §1257 authorizes this Court to review the judgment of a state's

highest court. Second, the Pennsylvania Supreme Court's (indisputably correct) ruling that petitioners failed to preserve their federal constitutional claim is an adequate and independent state ground for the state-court judgment, which deprives this Court of jurisdiction.

Even if this Court could grant review, petitioners offer no good reason to do so. There is no split of authority on the question presented, nor any need for guidance on the only federal issue implicated here, i.e., the "ordinary bounds" of statutory interpretation for purposes of the Elections and Electors Clauses, *Moore* v. *Harper*, 600 U.S. 1, 36 (2023).

The Pennsylvania Supreme Court's interpretation of state law here, moreover, did not remotely "transgress the ordinary bounds of judicial review," *Moore*, 600 U.S. at 36. The court instead faithfully executed its responsibility under Pennsylvania's SCA to determine the meaning of the Election Code based on its text and in a manner that effectuates the General Assembly's intent. As a concurring opinion explained, the court, by providing a "cogent" response to "a state statutory interpretation question duly raised by the litigants in a case on [its] normal appellate docket," was "quite literally" just doing its "job." Pet.App.60a. The state high court's decision was indeed "cogent," *id.*—in fact, it was plainly correct in light of the text of the Election Code, the text of the SCA, and applicable state precedent. Put simply, the Pennsylvania Supreme Court's holding that voters whose mail ballots are not counted may exercise their constitutional and statutory right to vote (rather than being disenfranchised altogether) by casting provisional ballots that will be counted was a straightforward and correct interpretation of Pennsylvania law.

At a minimum, even if reasonable minds could disagree with the Pennsylvania Supreme Court's conclusion, it is miles away from the type of extreme departure from the norms of judicial decision-making that could implicate Elections or Electors Clause concerns. That is especially so given that principles of federalism and "considerations specific to election cases," *Purcell* v. *Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), counsel in favor of restraint when this Court receives petitions to resolve state-law statutory-construction disputes under the Elections or Electors Clause. Granting certiorari here would almost surely engender requests for this Court's review of any and every state-law election case, burdening the Court with invitations to weigh in on all manner of (often time-sensitive) state-election-law disputes. That is not a regime the Court should foster.

STATEMENT

A. Statutory Background

Pennsylvania law gives all qualified and registered voters in the Commonwealth the right to vote by mail in any election. 25 Pa. Stat. §3150.16. And the Commonwealth's Election Code prescribes (1) how voters are to complete and submit mail ballots, (2) when a voter may vote provisionally on election day, and (3) how county boards of elections count mail and provisional ballots.

Specifically, a person voting by mail in Pennsylvania submits a packet containing a ballot and two envelopes: first, an inner "secrecy" envelope meant to preserve the "secrecy in voting" required by the Pennsylvania Constitution, art. VII, §4, and second, an outer "declaration" envelope, 25 Pa. Stat. §3150.16(a). To vote by mail, Pennsylvania voters are instructed to fill out their ballot, place it within the secrecy envelope, seal the secrecy

envelope, place the secrecy envelope within the declaration envelope, sign and date the declaration, and return the packet to the county board of elections by 8:00 p.m. on election day. *Id.* §3150.16(a), (c).

When a county board receives a mail-ballot packet, county officials review it for compliance with the signature, date, and secrecy-envelope requirements, and they set aside any non-compliant packets. Officials then log the packet into the Statewide Uniform Registry of Electors ("SURE"), which is Pennsylvania's "single, uniform integrated computer system" that county boards use to track registered voters and their ballots. 25 Pa. Stat. §1222(a), (c). When logging a packet into SURE, officials apply one of several available codes. Pet.App.6a. The codes allow voters to follow the status of their ballots on a Department of State website: Pennsylvania Department of State, *Election Ballot Status*, https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx. Certain codes also cause an email to be sent to a voter from the Department of State, explaining that the voter's ballot will not be counted due to error, along with instructions as to what the voter can do to make sure she can nonetheless vote in the election. For example, such an email may (as here) inform the voter that she "can go to [her] polling place on election day and cast a provisional ballot." Pet.App.185a.

As required by the 2002 Help America Vote Act, 52 U.S.C. §21082, Pennsylvania's General Assembly amended the Commonwealth's Election Code in 2004 to provide for provisional ballots, 25 Pa. Stat. §3050. Such ballots are intended to provide "a fail-safe mechanism for voting on election day," even when voters themselves make an error. 148 Cong. Rec. 20,840 (2002) (statement of Sen. Durbin). Under Pennsylvania law, a

person who has requested a mail ballot but "is not shown on the district register as having voted may vote by provisional ballot" at her polling place on election day. 25 Pa. Stat. §3150.16(b)(2). When canvassing provisional ballots, a county board of elections to which such a ballot is submitted "shall count the ballot if the county board … confirms that the individual did not cast any other ballot, including an absentee ballot, in the election." *Id.* §3050(a.4)(5)(i). On the other hand, a "provisional ballot shall not be counted if the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." *Id.* §3050(a.4)(5)(ii)(F).

Before this case, the Pennsylvania Commonwealth Court and courts of common pleas in Delaware and Washington Counties had already concluded that the Election Code requires county boards to count provisional ballots submitted by voters who made disqualifying mistakes on their mail-ballot packets. *See Center for Coalfield Justice* v. *Washington County Board of Elections*, No. 1172 CD 2024 (Pa. Commw. Ct. Sept. 10, 2024); *Center for Coalfield Justice* v. *Washington County Board of Elections*, No. 2024-3953 (Pa. Ct. C.P. Wash. Cnty. Aug. 23, 2024); *Keohane* v. *Delaware County Board of Elections*, No. CV-2023-4458 (Pa. Ct. C.P. Del. Cnty. Sept. 21, 2023). So had many of Pennsylvania's county boards of elections. *See* County Officials Br. 2-3, *Genser* v. *Butler County Board of Elections*, Nos. 26 WAP 2024, 27 WAP 2024 (Pa. Sept. 26, 2024) (attached as Appendix A, 3a).

B. Factual Background

The facts are undisputed. Pet.App.4a. Respondents Faith Genser and Frank Matis were each qualified and registered to vote in Pennsylvania's April 2024 Democratic primary. *Id.* Each timely submitted a mail ballot

in the required outer envelope, which each voter signed and dated as state law requires. 25 Pa. Stat. §3150.16(a). Neither voter, however, placed the mail ballot in the required secrecy envelope before placing it in the outer envelope. Pet.App.4a-5a.

Butler County election officials detected that the voters' packets did not include the secrecy envelope by running them through a machine that measures a packet's dimensions and thickness to confirm, among other things, whether it contains that envelope. Pet.App.5a. The board accordingly coded each packet as "CANC[ELED] – NO SECRECY ENVELOPE" in the SURE system. Pet.App.6a. Genser and Matis then each received an email from the Pennsylvania Department of State (triggered by the code the Butler County board entered) stating: "Your ballot will not be counted because it was not returned in a secrecy envelope." *Id.* The email further advised each voter to "go to your polling place on election day and cast a provisional ballot." Pet.App.7a. Following these instructions, Genser and Matis each visited their respective polling place on primary day and duly submitted a provisional ballot. *Id.*

Even though Genser's and Matis's *mail* ballots were void because they were each returned without a secrecy envelope, the Butler County board refused to count either voter's *provisional* ballot, despite identifying no deficiency with those ballots. This refusal flowed from the board's written policy (attached as Appendix B), which purports to address when Butler County voters may cast provisional ballots that will be counted—even though Pennsylvania's Election Code controls provisional voting. The board's policy provides that a voter who makes a mistake on the *declaration* envelope (for example, by forgetting to sign or date that envelope) *can*

vote provisionally at her polling place on election day, but that a voter who made a mistake with the *secrecy* envelope cannot. Appendix B, 24a-25a. In other words, Butler County allows voters who make certain technical mistakes in completing their mail-ballot packets to vote by provisional ballot while denying the same to voters who make other mistakes, with no explanation for why only the latter category of errors warrants denying the right to vote. The record contains no evidence that other counties follow this practice.

C. Procedural Background

Genser and Matis sued in the Court of Common Pleas of Butler County, contending that the Election Code obligated the Butler County Board of Elections to count their provisional ballots. Pet.App.7a-8a. The court dismissed their claim based on the code's provision stating that a "provisional ballot shall not be counted if the elector's absentee ballot or mail-in ballot is timely received," 25 Pa. Stat. §3050(a.4)(5)(ii)(F). Pet.App.10a. The Commonwealth Court reversed, concluding that for purposes of the relevant Election Code provisions, Genser and Matis had not cast—and therefore the board had not "timely received"—any ballot other than their provisional ballots. Pet.App.10a-11a. The Commonwealth Court accordingly ordered the board to count Genser's and Matis's provisional ballots. Pet.App.15a.

The Pennsylvania Supreme Court affirmed, holding as a matter of Pennsylvania statutory law that the board was required to count Genser's and Matis's provisional ballots. *See* Pet.App.1a-57a. The court's reasoning "flow[ed] directly from the text of the Election Code." Pet.App.35a.

First, the court interpreted the provisional-ballot provisions, *see* 25 Pa. Stat. §3050(a.4), in accordance with

its prior decision in *Pennsylvania Democratic Party* v. *Boockvar*, 238 A.3d 345 (Pa. 2020), concluding that "the failure to follow the mandatory requirements for voting by mail"—e.g., by failing to enclose a ballot in a secrecy envelope—"nullifies the … mail … ballot." Pet.App.42a. Hence, the court explained, because Genser's and Matis's mail-ballot packets each lacked a secrecy envelope, they "had to be set aside" under *Pennsylvania Democratic Party*. Pet.App.45a. Genser and Matis, the court continued, thus each had "failed to cast a ballot" for statutory purposes. *Id.*

Second, the court addressed a provision sometimes referred to as the "timely received clause," *see* 25 Pa. Stat. §3050(a.4)(5)(ii)(F), which provides that a provisional ballot "shall not be counted if the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." The court explained that "[j]ust as a void ballot cannot be given legal effect in Subsection (a.4)(5)(i)"—which states that a provisional ballot shall be counted if the voter did not cast another ballot in the election—"it cannot be given effect in Subsection (a.4)(5)(ii)(F)." Pet.App.48a. The court emphasized that this reading is in harmony with the canvassing process, during which county boards "definitively determine whether [a] Return Packet contains the required Secrecy Envelope clothing the ballot." Pet.App.50a. In contrast, the court characterized petitioners—who argued that receipt of a voter's mail ballot that would *not* be counted nonetheless barred counting that voter's provisional ballot—as "engaging in wordplay to confuse the Code and reach an absurd result whereby a void mail-in ballot renders a provisional ballot uncountable as well." *Id.* The court further explained that its interpretation "dovetails with other provisions of the Election Code that interact with Subsection (a.4)(5)(ii)(F)."

Pet.App.53a. Specifically, the court observed that a mail ballot that cannot be counted because of a defect in the mail-ballot packet is not a "ballot … timely received" within the meaning of section 3050(a.4)(5)(ii)(F) because state law requires a "*completed* mail-in ballot" to be received by the close of polls on election day, 25 Pa. Stat. §3150.16(c) (emphasis added). Because a mail-ballot packet "that is not 'completed' does not satisfy the 'deadline' requirement of [§]3150.16(c)," the court explained, it "cannot be timely received." Pet.App.53a-54a.

Finally, the court emphasized that its decision was compelled by the Statutory Interpretation Act's requirement that courts "presum[e]" "[t]hat the General Assembly does not intend a result that is absurd … or unreasonable." 1 Pa. Cons. Stat. §1922(1); *see* Pet.App.52a-53a. Since the General Assembly "designed" the Election Code's "[p]rovisional balloting procedures … to assure access to the right to vote while also preventing double voting," Pet.App.55a-56a, the court concluded that petitioners' construction was untenable because it "disenfranch[ed]" voters "for no discernible purpose," Pet.App.52a.

Petitioners sought and were denied an emergency stay by the Pennsylvania Supreme Court, Order (Oct. 28, 2024), and then unanimously by this Court, *see Republican National Committee* v. *Genser*, No. 24A408 (Nov. 1, 2024).

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION

The Court lacks jurisdiction over the petition for two independent reasons. First, the sole jurisdictional basis invoked, 28 U.S.C. §1257, does not apply. Second, the Pennsylvania Supreme Court's waiver ruling is an

independent and adequate state ground that precludes this Court's review.

A. The Provision Petitioners Invoke, 28 U.S.C. §1257, Does Not Confer Jurisdiction

This Court has limited authority to review judgments rendered by state high courts. Under 28 U.S.C. §1257(a), the Court has such jurisdiction in only three categories of cases: (1) "where the validity of a treaty or statute of the United States is drawn in question"; (2) "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States"; and (3) "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

This case falls outside each of those categories. The first and second categories plainly do not apply, as petitioners do not challenge the "validity" of any (1) federal "treaty or statute" or (2) "statute of any State." Far from it, petitioners seek federal-court *enforcement* of a state statute—as they, rather than the state's highest court, interpret it.

As for the third category, this Court explained over a century ago that "it is well settled" that for jurisdiction under the "title, right, privilege, or immunity" language of section 1257 and its predecessors, "the right or immunity must be one of the plaintiff in error, and not of a third person." *Texas & Pacific Railway Company* v. *Johnson*, 151 U.S. 81, 98 (1894). In other words, a "party must claim the right *for himself*, and not for a third person in whose title he has no interest." *Henderson* v.

Tennessee, 51 U.S. (10 How.) 311, 323 (1851) (emphasis added).*

Petitioners—the Butler County Board of Elections, the Republican National Committee, and the Republican Party of Pennsylvania—cannot claim any right or privilege *for themselves* under the Elections or Electors Clauses. To the extent those clauses confer any right or privilege—rather than just a "duty," *Moore*, 600 U.S. at 10—that right or privilege belongs to "each State" and/or "the Legislature thereof," U.S. Const. art. I, §4, cl. 1; *see also id.* art. II, §1, cl. 2. Because the only conceivable federal right or privilege at issue here is "expressly vest[ed]" in actors who are not petitioners, *Moore*, 600 U.S. at 34, section 1257's third category does not apply.

Past Elections and Electors Clause cases, by contrast, have fallen within this Court's jurisdiction under section 1257 or its predecessors. For instance, *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), fell within the equivalent of what today is section 1257's second category, because it involved a state referendum law challenged as "repugnant to" the Elections Clause, *id.* at 569.

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* It makes no difference that today's section 1257 no longer contains the predecessor statutes' language describing the relevant federal right as one claimed "by either party," *Texas & Pacific Railway*, 151 U.S. at 98; *Henderson*, 51 U.S. at 315. What matters is whom the federal right is claimed *for* (i.e., on behalf of), not *by* whom it is claimed. That is why *Henderson* explained that "the party must claim the right *for himself*," 51 U.S. at 323 (emphasis added), not simply that "the party must claim the right." Moreover, this Court has never relied on the phrase "by either party" in interpreting section 1257's predecessor statutes as requiring a party to claim a right "for himself," *id.* And the Pennsylvania Democratic Party is aware of no legislative history or any other authority suggesting that Congress intended to dispense with that requirement.

That case also fell within what today is section 1257's third category, as did *Smiley* v. *Holm*, 285 U.S. 355 (1932), because "[e]ach of th[o]se cases was filed by a relator on behalf of the State," *Lance* v. *Coffman*, 549 U.S. 437, 442 (2007) (per curiam). *Moore* v. *Harper* likewise fell within section 1257's third category, as the petitioners there were state legislative leaders acting in their official capacity. As these examples illustrate, section 1257 does not preclude Elections or Electors Clause review by this Court in appropriate cases.

Here, however, petitioners do not challenge the "validity" of any state or federal enactment, 28 U.S.C. §1257(a), nor can they claim for themselves any relevant federal "title, right, privilege, or immunity," *id.* This Court therefore lacks jurisdiction over the petition.

B. The Pennsylvania Supreme Court's Waiver Ruling Is An Independent And Adequate State Ground For Its Judgment

The Pennsylvania Supreme Court's decision expressly stated that the court declined to allow an appeal on petitioners' argument under the Elections and Electors Clauses because that argument was "not developed within their petition for allowance of appeal." Pet.App.20a n.18. Indeed, petitioners did not even *mention* the issue in their briefs before either the trial court or the Pennsylvania Commonwealth Court. And the Pennsylvania Rules of Appellate Procedure unequivocally provide that "[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa. R. App. P. 302(a). Even petitioners' petition for allowance of appeal to the Pennsylvania Supreme Court, moreover, mentioned the issue only in a footnote, promising to "set forth [the argument in their] principal brief," Pet.App.191a n.5. Under Pennsylvania law,

however, "arguments raised only in brief footnotes [are] too undeveloped for review." *Madison Construction Company* v. *Harleysville Mutual Insurance Company*, 735 A.2d 100, 109 n.8 (Pa. 1999). Petitioners thus waived the argument twice over, and the Pennsylvania Supreme Court properly concluded it had been waived as a matter of Pennsylvania law. *See* 210 Pa. Code §63.6(B).

This unambiguous waiver ruling deprives this Court of jurisdiction, as the ruling is an adequate and independent state ground for the state high court's judgment. *See, e.g.*, *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945); *Michigan* v. *Long*, 463 U.S. 1032, 1041-1042 (1983); *Mata* v. *Baker*, 74 F.4th 480, 486 (7th Cir. 2023) (deeming waiver an adequate and independent state ground); *Hutchison* v. *Bell*, 303 F.3d 720, 738 (6th Cir. 2002) (same). State procedural rules are an adequate and independent state ground where they are "strictly or regularly followed." *Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988). Petitioners do not even argue that the Pennsylvania Supreme Court fails to routinely enforce the state-law procedural rules regarding waiver and the scope of appellate review, no doubt because that court "has taken a strict[] approach to waiver," *Schmidt* v. *Boardman Company*, 11 A.3d 924, 942 (Pa. 2011).

Disputing the court's waiver ruling, a single dissenting justice below cited *HTR Restaurants, Inc.* v. *Erie Insurance Exchange*, 307 A.3d 49 (Pa. 2023), for the proposition that petitioners had no obligation to preserve their federal constitutional argument because they were the respondents and appellees in the lower state courts. *See* Pet.App.66a n.4; Pet.33-34. But that exception to Pennsylvania's ordinary waiver rules applies only where lower-court respondents or appellees raised the relevant argument as soon as they "ha[d] an

opportunity to" do so, *HTR Restaurants*, 307 A.3d at 61 n.38. In *HTR Restaurants*, for example, the Pennsylvania Supreme Court found no waiver because the lower-court appellees' "opportunity" to raise the relevant argument arose "[o]nly when" the lower-court appellants raised the argument to which the appellees' new argument was responsive, at which point the appellees "did" respond. *Id.* That is consistent with the more general (and established) Pennsylvania rule that an issue is "preserved for appellate review" *only* where it was raised at a party's "first opportunity to raise the[] issue." *Cagnoli* v. *Bonnell*, 611 A.2d 1194, 1196 (Pa. 1992); *accord Abramovich* v. *Pennsylvania Liquor Control Board*, 416 A.2d 474, 476 n.3 (Pa. 1980). Here, petitioners could have raised their federal constitutional argument when they first intervened in the trial court, or on intermediate appeal in the Commonwealth Court. "[B]ecause [they] had a prior opportunity to" raise the issue, their "failure to do so resulted in waiver." *Commonwealth* v. *Allen*, 107 A.3d 709, 711 (Pa. 2014).

Even if the state high court's waiver ruling did not divest this Court of jurisdiction, petitioners' failure to preserve their federal claim would still amount to a serious vehicle problem. When "reviewing state court judgments under 28 U.S.C. § 1257," this Court generally "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam). (That is presumably why this Court requires petitions for review of a state-court judgment to specify "the stage in the proceedings," including "in the court of first instance …, when the federal questions sought to be reviewed were raised," S.Ct. R. 14.1(g)(i).) For example, in *Moore*, this Court "decline[d] to address whether the

North Carolina Supreme Court strayed beyond the limits derived from the Elections Clause," 600 U.S. at 36, because, as petitioners here note (Pet.18), the *Moore* petitioners "failed to preserve the issue." This case presents the same "vehicle problem[]," Pet.33. That preservation failure creates a "prudential" reason for this Court to "refuse[] to consider" the petition, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).

II. NEITHER QUESTION PRESENTED WARRANTS REVIEW

A. This Case Does Not Implicate Any Split Of Authority Or Issue Requiring This Court's Guidance

Petitioners assert (Pet.30) that certiorari is warranted because this case "implicates a split of authority." That is incorrect.

The only conflict petitioners identify (Pet.2, 30) is a purported split between two pre-*Moore* decisions: *Carson* v. *Simon*, 978 F.3d 1051 (8th Cir. 2020), and *Pennsylvania Democratic Party*. Petitioners no doubt make this argument because three members of this Court—in another pre-*Moore* case—described *Carson* and *Pennsylvania Democratic Party* as "divided" about "whether the Elections or Electors Clauses … are violated when a state court holds that a state constitutional provision overrides a state statute governing the manner in which a federal election is to be conducted," *Republican Party of Pennsylvania* v. *Degraffenreid*, 141 S.Ct. 732, 738 (2021) (Alito, J., dissenting); *accord id.* at 734 (Thomas, J., dissenting). But this Court has since answered that question, holding in *Moore* that state election laws are "subject to the ordinary constraints on lawmaking in the state constitution," 600 U.S. at 30.

Even if there were lingering uncertainty on that subject, review in this case would not rectify it. That is because this case involves a state-court decision seeking to *effectuate* the legislature's will through *statutory* interpretation, not a state-court decision arguably "overrid[ing]" the legislature's will through "constitutional" interpretation, *Republican Party of Pennsylvania*, 141 S.Ct. at 738 (Alito, J., dissenting). It is the latter—i.e., "the extent of a state court's authority to reject rules adopted by a state legislature" on the ground that those rules "violat[e] congeries of state constitutional provisions," *Moore* v. *Harper*, 142 S.Ct. 1089, 1089-1090 (2022) (Alito, J., dissenting)—and not the former that several "Justices have recognized" as "important" for this Court to resolve (Pet.29). And the latter, contrary to petitioners' assertion, is simply not implicated in "[t]his case" (*id.*).

This is not a meaningless distinction, as "[d]ifferent bodies of law and different precedents govern these two situations," *Democratic National Committee* v. *Wisconsin State Legislature*, 141 S.Ct. 28, 28 (2020) (Roberts, C.J., concurring). Indeed, this distinction is drawn by the very opinions petitioners cite (Pet.29-30) to demonstrate this Court's supposed interest in future Elections Clause cases. One opinion stated that "there is a significant difference between" cases where "the state court's judgment was based on an interpretation of state statutory law" and cases where "there [i]s no doubt that the state court departed from the clearly expressed intent of the legislature" because the state court "rejected the legislature's enactment as unconstitutional." *Moore*, 600 U.S. at 63 (Thomas, J., dissenting). The Electors Clause standard in the latter circumstance, the opinion noted, is "far more uncertain," because "[w]hen 'it is a *constitution* [courts] are expounding,' … the standards to judge

the fairness of a given interpretation are typically fewer and less definite." *Id.* at 64.

Petitioners suggest (Pet.3) that this distinction *supports* review here because it means the Court would not have to grapple with the "potentially hard questions that might arise when reviewing state-court interpretations of state constitutions." *Accord* Pet.33. That is unavailing: If there are no "hard questions" to answer in the context this case presents, and if there is no longer any divide post-*Moore*, then all that is left is a plea for error correction. That does not warrant this Court's limited resources. *E.g.*, *Halbert* v. *Michigan*, 545 U.S. 605, 611 (2005).

B. The Pennsylvania Supreme Court Acted Well Within "The Bounds Of Ordinary Judicial Review"

Review is further unwarranted because the Pennsylvania Supreme Court's statutory construction here did not remotely "exceed the bounds of ordinary judicial review," *Moore*, 600 U.S. at 37. To the contrary, the court acted well within its authority in construing the Pennsylvania Election Code—following the method of statutory interpretation prescribed by the General Assembly in the SCA. As the court stated, "[t]he propriety of counting a provisional ballot is a question of statutory interpretation that … flows directly from the text of the Election Code." Pet.App.35a.

As the Pennsylvania Supreme Court explained, the Election Code includes several relevant statutory provisions. *See* Pet.App.36a-38a. First, a registered voter "who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot." 25 Pa. Stat. §3150.16(b)(2). Second, "the

county board of elections … shall count the [provisional] ballot if [it] confirms that the individual did not cast any other ballot, including an absentee ballot, in the election." *Id.* §3050(a.4)(5)(i). Third, under the timely received clause, a "provisional ballot shall not be counted if … the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." *Id.* §3050(a.4)(5)(ii)(F). And finally, an absentee- or mail-ballot package must be "completed" in order to be timely received. *Id.* §3150.16(c). While the intermediate appellate court had concluded here that these "provisions read together … are ambiguous" (and then relied on principles of statutory construction to resolve the ambiguity in favor of counting the ballots), the Pennsylvania Supreme Court harmonized the provisions, i.e., recognized that there is no ambiguity, by "focus[ing] … specifically on the term 'ballot' which is used in both [the second and third] provisions" just discussed. Pet.App.37a-38a.

As the state high court noted, "the term[] … 'ballot' in these provisions" is not "defined within the Election Code or the Statutory Construction Act." Pet.App.12a. To define "ballot," then, the court looked to *Pennsylvania Democratic Party*, the precedent all parties agreed was controlling. That case held that "the failure to follow [certain] requirements for voting by mail"—including the requirement to enclose a ballot in a secrecy envelope—"nullifies the … mail … ballot." Pet.App.42a. That holding, the state high court explained here, establishes that a mail ballot that is not counted for failure to comply with state-law requirements is not considered a ballot cast in the election for purposes of the timely received clause.

Pennsylvania Democratic Party does so because it rejected the argument that the Election Code's secrecy provision was "merely directory," instead holding that it "is mandatory." 238 A.3d at 379-380. And under longstanding Pennsylvania principles of statutory interpretation, a "'mandatory provision is one [for which] the failure to follow … renders the proceeding to which it relates illegal and **void**.'" Pet.App.39a (alteration and omission in original) (quoting *In re Nomination Papers of American Labor Party*, 44 A.2d 48, 49 (Pa. 1945)). The high court accordingly concluded here that "[t]o construe a void ballot as a 'ballot … in th[is] election' is to give it legal effect, in direct contravention of [the] holding in *Pa. Democratic Party* that a mail ballot lacking a Secrecy Envelope is void." Pet.App.46a. Therefore, "once the Board confirmed that [the voters'] ballots were void, … the Board was required to count [the voters' provisional] ballots," because a void vote is, as a matter of state law, no vote at all. *Id.*

The state high court thus was not importing the word "void" into the Election Code, as petitioners suggest (Pet.25). The court's ruling was not based on a determination that the Election Code formally labels the ballots at issue here "void." Rather, the court applied the established (and intuitive) principle of Pennsylvania law that the Election Code does not treat disqualified, uncountable ballots the same as properly executed, countable ballots.

Petitioners come nowhere close to showing that the foregoing holding and reasoning "transgress[ed] the ordinary bounds of judicial review," *Moore*, 600 U.S. at 36. Petitioners focus (Pet.22) on a single sentence in the Election Code, the timely received clause, which as noted provides that a "provisional ballot shall not be

counted if … the elector's absentee ballot or mail-in ballot is timely received by a county board of elections," 25 Pa. Stat. §3050(a.4)(5)(ii)(F). But as the Pennsylvania Supreme Court explained, construing state law, a mail ballot that cannot be counted because of a defect in the mail-ballot packet is not a "ballot … timely received" within the meaning of the timely received clause. Pet.App.53a-54a. As the court recognized, the mail-ballot deadline itself establishes this, requiring a "completed mail-in ballot" to be received by the close of polls on election day, 25 Pa. Stat. §3150.16(c). Because a mail-ballot packet "that is not 'completed' does not satisfy the 'deadline' requirement of §3150.16(c)," it "cannot be timely received." Pet.App.53a-54a.

To hold otherwise would disqualify a voter for returning a mail-ballot packet that is not complete, will not be processed, and may not even contain a ballot at all. Indeed, the director of the Butler County Board of Elections confirmed in testimony before the trial court here that, under the board's position, an individual who submits a mail-ballot packet with no "actual ballot inside" would be disqualified from voting provisionally because "they've already turned in a ballot." *See* Appendix C, 28a. That cannot be the law because "[t]he text of the provision plainly refers to a 'ballot,' not an envelope," and the Election Code "conclusively establish[es] that the General Assembly knows the distinction between envelopes and ballots." Pet.App.48a. Petitioners tellingly ignore all this.

Petitioners' next argument (Pet.23-24) is that their interpretation is compelled by the Election Code's requirements (1) that provisional-ballot voters affirm that their provisional ballot "is the only ballot that [they] cast in this election" and (2) that county boards "confirm[]

that the individual did not cast any other ballot," Pet.23 (quoting 25 Pa. Stat. §3050(a.4)(2), (5)(i)). But again, the Pennsylvania Supreme Court held that a disqualified, uncountable ballot is not a "ballot" within the meaning of these provisions. Pet.App.54a. Indeed, outside this litigation, not even the Butler County Board of Elections interprets the Election Code as the board and its co-petitioners urge here, i.e., as precluding the counting of *any* provisional ballot cast by a voter whose mail ballot was timely submitted but defective. Rather, that board's policy (Appendix B) is to count provisional ballots cast by voters whose mail ballots were defective for reasons *other than* the one here (i.e., the lack of a secrecy envelope).

Finally, petitioners fault the state high court (Pet.25) for "turn[ing] to an extrinsic source"—its prior decision in *Pennsylvania Democratic Party*—for the principle that a void ballot is not a "ballot" within the meaning of the relevant Election Code provisions. That criticism is misplaced. There is nothing extraordinary about construing a state statute to operate in accordance with an established principle of state law—much less where that principle was articulated in precedent that all parties agree is controlling. And contrary to petitioners' suggestion (Pet.20), applying precedent to discern a statute's effect and thus *effectuate* the legislature's will is wholly unlike "invok[ing] extrinsic sources" such as "vague state constitutional provision[s] … to justify *departure*" from the legislature's will (emphasis added).

As the Pennsylvania Supreme Court explained, moreover, petitioners' interpretation "manufactures an absurdity" and does nothing to effectuate the Election Code's purpose "to prevent double voting." Pet.App.52a. In accordance with the SCA—which is

among the "rules set by the … [Pennsylvania] General Assembly," Pet.14, and which instructs courts to "ascertain and effectuate the intention of the General Assembly," 1 Pa. Cons. Stat. §1921(a)—the Pennsylvania Supreme Court ascertained that "[t]he procedures for counting provisional ballots cast by putative mail in voters are designed to preclude double voting," Pet.App.51a. Indeed, "[n]o party has identified any other purpose." *Id.* The state high court's decision "effectuate[s]" that intent, 1 Pa. Cons. Stat. §1921(a), while petitioners' interpretation defeats it.

Again, most Pennsylvania courts—and county boards of elections across the Commonwealth—that have considered this issue have reached the same conclusion as the decision below. *See supra* p.5. That underscores that the decision below is well within the bounds of ordinary statutory interpretation. Apart from the trial court here, petitioners identify only one Pennsylvania decision supporting their view: a non-precedential Commonwealth Court decision from 2020, *In re Allegheny County Provisional Ballots in the 2020 General Election*, 241 A.3d 695 (Pa. Commw. Ct. 2020), which the same court in this case declined to follow because its earlier decision "improperly analyzed [the timely received provision] in isolation, without addressing the other relevant provisions," Pet.App.12a n.14. That improper analysis does nothing to show that the decision below "exceed[ed] the bounds of ordinary judicial review," *Moore*, 600 U.S. at 37. Even if reasonable minds could disagree with the decision below, such disagreement would not remotely satisfy the exceedingly demanding standard for relief under *Moore*.

In sum, petitioners provide no sound reason for this Court to intrude deeply on state sovereignty by second-

guessing either a state high court's construction of the state statutes it has been interpreting for generations or that court's interpretation of its own precedent. As noted at the outset, doing so would pave the way for this Court's unnecessary injection into all manner of politically charged and often time-sensitive state-election-law disputes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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