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, WESTERN DISTRICT**

## BRIEF IN OPPOSITION


Mary M. McKenzie
Benjamin D. Geffen
Olivia Mania
PUBLIC INTEREST LAW CENTER
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102

G. Eric Brunstad, Jr.
*Counsel of Record*
DECHERT LLP
199 Lawrence Street
New Haven, CT 06511
(860) 524-3960
eric.brunstad@dechert.com


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(Additional counsel on inside cover)

Stephen A. Loney
Kate Steiker-Ginzberg
ACLU OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102

Witold J. Walczak
Richard T. Ting
ACLU OF PENNSYLVANIA
P.O. Box 23058
Pittsburgh, PA 15222

Ari J. Savitzky
Sophia Lin Lakin
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Martin J. Black
Jeffrey S. Edwards
Luke M. Reilly
Steven F. Oberlander
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104

Cecillia D. Wang
Evelyn Danforth-Scott
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
425 California Street,
Suite 700
San Francisco, CA 94104

*Counsel for Respondents Faith Genser and Frank Matis*

## QUESTION PRESENTED

The Pennsylvania Election Code provides that a county board of elections "shall count" a voter's provisional ballot "if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election." 25 Pa. Stat. Ann. § 3050(a.4)(5)(i). The Supreme Court of Pennsylvania interpreted this and other provisions of the Pennsylvania Election Code to mean that a registered voter who attempts to vote by mail, but learns that his or her mail ballot cannot be counted because of some defect (such as a missing secrecy envelope), may vote by provisional ballot instead. The court's interpretation of state law was consistent with the majority of lower state courts, the longstanding guidance of the state's top election official, and the established practice of most county election boards.

The question presented is whether the Supreme Court of Pennsylvania's interpretation of the Pennsylvania Election Code was so aberrant and unreasoned that it "transgress[ed] the ordinary bounds of judicial review." *Moore v. Harper*, 600 U.S. 1, 36 (2023).

## RULE 29.6 STATEMENT

Respondents Faith Genser and Frank Matis state that they are natural persons.

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## INTRODUCTION

This matter involves the Supreme Court of Pennsylvania's construction of the Pennsylvania Election Code in accordance with customary principles of statutory interpretation supplied by Pennsylvania's Statutory Construction Act. The relevant controversy centers on the interplay between different provisions of the Election Code governing, on the one hand, procedures for voting by mail and, on the other, casting provisional ballots on Election Day. Respondents in this case attempted unsuccessfully to vote by mail in a Democratic primary election, submitting mail ballots that failed to comply with certain technical requirements. Thus, their mail ballots could not be counted under Pennsylvania law. After receiving notice of this, Respondents went to their local polling places and voted by provisional ballot.

The Election Code directs that a county board of elections "shall count" a voter's provisional ballot "if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election." 25 Pa. Stat. Ann. § 3050(a.4)(5)(i).

Closely reading this requirement and other sub-provisions addressing mail and provisional ballots, the Supreme Court of Pennsylvania concluded that, for the purposes of § 3050(a.4)(5)(i), an individual who submitted a mail ballot packet with a technical defect rendering the mail ballot invalid and uncountable cannot be said to have "cast any other ballot, including an absentee ballot, in the election." Therefore,

Respondents were entitled to have their provisional ballots counted. Petitioners plainly do not agree with the decision below, but their highly exaggerated critique of its reasoning supplies no basis for this Court's review.

Most critically, this case does not involve any outlandish usurpation of the state legislature's prerogatives, as Petitioners suggest. Rather, it involves merely "the ordinary exercise" of state-law statutory interpretation, *Moore v. Harper*, 600 U.S. 1, 22 (2023)—specifically, the workaday interpretation of state statutory text. As Justice Dougherty stated below, far from "transgress[ing] the ordinary bounds" of the judicial function, *id.* at 36, resolving the highly specialized state statutory question here was "quite literally, our job." Pet.App. 60a.

The Supreme Court of Pennsylvania's decision—which Petitioners present in a one-sided, deeply misleading fashion—broke no new ground. In fact, most county boards of elections *already* counted unsuccessful mail-ballot voters' provisional ballots as a matter of course. That practice is consistent with guidance from the Pennsylvania Department of State and the judgments of most lower state court decisions to have addressed the issue. *Cf. Bush v. Gore*, 531 U.S. 98, 114 (2000) (Rehnquist, C.J., concurring) (in assessing state courts' interpretation of state election law, look to "law of the State as it existed prior to the action of the [state] court"). And, in addition to being correct under the plain text of the Election Code, the Supreme Court of Pennsylvania's decision was consistent with governing state law principles of statutory interpretation, wholly ignored by

Petitioners, under which "[l]egislative intent controls," and courts' overarching goal is to "ascertain and effectuate the intention of the General Assembly." 1 Pa. Cons. Stat. § 1921, 1921(a).

No other conceivable basis for certiorari exists. There is no split of authority regarding how to apply *Moore*, notwithstanding Petitioners' half-hearted effort to cobble one together out of pre-*Moore* cases. And Petitioners never even attempt to explain how addressing the particular "legal standard for determining whether a state court's interpretation of state election law exceeds the bounds of ordinary judicial review," Pet. i, might make any difference in the outcome here. To the contrary, they acknowledge that resolving that question would not change the outcome. Pet. 19. Under any standard, the decision below falls comfortably within the wide berth *Moore* provides for reasoned, ordinary state-court adjudications of state law like this one.

Even if any of these questions were certworthy, this case is a poor vehicle. Petitioners—a political party and one local board of elections out of sixty-seven—lack standing to vindicate the claimed prerogatives of the Pennsylvania General Assembly to regulate federal elections. And Petitioners also waived their *Moore* argument as a matter of state law. They never raised the Elections or Electors Clauses in the lower state courts, and they relegated them to a mere footnote when before the Supreme Court of Pennsylvania.

The fact that certain repeat litigants keep filing similar petitions cannot independently justify

granting certiorari. The best way to "stem the tide of these emergency requests and relieve the Court of the now-common demand for it to intervene in national elections," Pet. 15, is to once more confirm that a national political party's mere dissatisfaction with a state supreme court ruling is no basis for this Court to take up technical, one-off questions of state election law. *Cf. Moore*, 600 U.S. at 65 (Thomas, J., dissenting) (warning about "swell[ing] federal-court dockets with state-constitutional questions"). Certiorari should be denied.

## STATEMENT OF THE CASE

### A. Pennsylvania Election Law

Twenty-three years ago, the Pennsylvania General Assembly amended the Pennsylvania Election Code to establish provisional ballot voting. *See* P.L. 1246, Act No. 150 of 2002, § 12, codified at 25 Pa. Stat. Ann. § 3050(a.4). Provisional ballots provide a backup, or "last chance," option for voters when circumstances prevent them from casting a regular ballot. Under Pennsylvania law, any person who believes she is properly registered and eligible to vote may cast a provisional ballot. *See* 25 Pa. Stat. Ann. § 3050(a.4)(1). Election officials then assess the voter's eligibility after Election Day. 25 Pa. Stat. Ann. § 3050(a.4)(4).

In determining whether to count a provisional ballot under the Pennsylvania Election Code, a county board of elections must evaluate two things, and only two things: (1) whether the voter is a qualified, registered elector in the election district; and

(2) whether the voter has already successfully voted in the election. 25 Pa. Stat. Ann. § 3050(a.4)(5)(i).

In particular, the relevant text provides as follows:

> Except as provided in subclause (ii), if it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector's registration form and, if the signatures are determined to be genuine, *shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot*, including an absentee ballot, in the election.

*Id.* (emphasis added). As the Supreme Court of Pennsylvania recognized, this process serves "the dual purpose of preventing a double vote while simultaneously protecting an elector's right to have a vote counted." Pet.App. 45a. It ensures that, for each eligible voter, one ballot will be counted—not two ballots, and not zero ballots.

For the past forty-two statewide elections, Pennsylvania law has ensured that provisional ballots are available to voters for a variety of reasons, such as when the voter's name is mistakenly not in the pollbook, or the voter is unable to present an

acceptable proof of identification when voting in a new polling location for the first time. Most recently, when the General Assembly made mail ballot voting available to all Pennsylvania voters in 2019 via Act 77, it reaffirmed that provisional voting serves as a fail-safe for mail-ballot voters. *See, e.g.*, 25 Pa. Stat. Ann. § 3150.16(b)(2) (providing that a voter "who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot").

This provisional ballot fail-safe is important for would-be mail-ballot voters, who must complete a number of steps to submit a mail ballot and have it counted. In particular, a voter who successfully applies for a mail ballot receives a packet containing: (1) a ballot; (2) a "secrecy envelope"; and (3) a pre-addressed outer return envelope that contains a voter declaration with spaces to sign and handwrite the date (the "declaration envelope"). 25 Pa. Stat. Ann. §§ 3146.6(a), 3150.16(a).[1] For a mail ballot to be opened and counted, the voter must appropriately mark the ballot, seal it within the secrecy envelope,

[1] Act 77, which expanded mail-in ballot voting in Pennsylvania, was an omnibus bill that provided financing to replace antiquated voting machines, Act of Oct. 31, 2019, P.L. 552, No. 77, § 3.1; eliminated straight-ticket voting, *id.* at § 3.2; introduced numerous tweaks to election-administration practices, *see, e.g., id.* at §§ 2, 3, and more. Petitioners misleadingly suggest that with Act 77, legislators deliberately added various mechanical requirements for submitting a mail ballot, such as a requirement to use the secrecy envelope, as part of some "compromise." Pet. 5. But the legislative record does not support this claim; rather, the drafters simply transposed the various mechanical requirements from the preexisting absentee voting statute verbatim. *See* 25 Pa. Stat. Ann. § 3146.6.

place the secrecy envelope inside the declaration envelope, sign and date the declaration on the outer envelope, securely seal it, and return the completed packet in person or by mail to the board of elections by 8:00 P.M. on Election Day. *Id.*

Every election, thousands of voters make mistakes completing their mail-ballot packets, which prevents those packets from being counted as valid votes. Since 2020, the most common defects that have led boards of elections to reject mail-ballot packets include: (1) no voter signature on the declaration envelope; (2) no date or an "incorrect" date on the declaration envelope; or (3) no secrecy envelope. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) ("*Pa. Democratic Party*"). In such circumstances—*i.e.*, where there is an error in the mail ballot materials—the voter has not perfected the process of voting by mail ballot. *See* 25 Pa. Stat. Ann. § 3150.16(c) (specifying the deadline for when "a *completed* mail-in ballot must be received in the office of the county board of elections") (emphasis added). The voter's mail ballot materials are set aside and the ballot itself is uncountable and treated as void.

In the years since the General Assembly passed Act 77, the Secretary of the Commonwealth has advised county boards of elections that these state law provisions require them to accept provisional ballots cast by eligible voters who learned that their mail-ballot submissions would be rejected and not

counted.[2] Three out of four lower state court decisions to consider the issue (outside of this litigation) have agreed. *See* Pet.App. 13a n.15; *Ctr. for Coalfield Justice v. Wash. Cnty. Bd. of Elections*, No. 1172 CD 2024, 2024 WL 4272040 (Pa. Commw. Ct. Sept. 10, 2024), *alloc. granted on other issues*, 327 A.3d 184 (Pa. 2024); *Ctr. for Coalfield Justice v. Wash. Cnty. Bd. of Elections*, No. 2024-3953 (Pa. Ct. Com. Pl. Wash. Cnty. Aug. 23, 2024) (identifying the statutory provisions as ambiguous);[3] *Keohane v. Del. Cnty. Bd. of Elections*, No. CV-2023-4458 (Pa. Ct. Com. Pl. Del. Cnty. Sept. 21, 2023) (requiring counting of such provisional ballots);[4] *but see In re Allegheny Cnty. Provisional Ballots in the 2020 General Election*, No. 1161 CD 2020, 2020 WL 6867946, at *4 (Pa. Commw. Ct. Nov. 20, 2020) (unreported decision devoting four sentences to this issue).

Similarly, before this case was filed, numerous Pennsylvania county boards of elections consistently read the relevant portions of the Election Code as requiring the counting of provisional ballots cast by voters who had submitted flawed mail-ballot return

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[2] *E.g.*, Pennsylvania Dept. of State, *Pennsylvania Provisional Voting Guidance*, March 11, 2004, at p. 1 of 7 (Respondents' Appendix in Opposition to Application for Stay to this Court, No. 24A-408, Oct. 30, 2024, at 370a) (originally attached as part of Ex. C to Intervenor Republicans' Principal Brief to Supreme Court of Pennsylvania, Sept. 24, 2024).

[3] Respondents' Appendix in Opposition to Application for Stay to this Court, No. 24A-408, Oct. 30, 2024, at 417a-444a.

[4] Respondents' Appendix in Opposition to Application for Stay to this Court, No. 24A-408, Oct. 30, 2024, at 412a-416a.

packets.[5] However, boards of elections in some counties, including Butler County, disagreed and would not count a voter's provisional ballot when the voter had attempted to vote by mail but had submitted a flawed mail-ballot packet. These counties purported to rely on other language in the provisional ballot statute—in particular, language stating 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. Ann. § 3050(a.4)(5)(ii)(F).

### B. Background

Respondents Faith Genser and Frank Matis are qualified Butler County electors who each attempted to vote by mail ballot in Pennsylvania's 2024 Democratic primary. Both inadvertently made the mistake of mailing in "naked" ballots, *i.e.*, omitting the required secrecy envelope from their mail-ballot packets.[6] Upon receipt of Respondents' mail-ballot

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[5] *See* Amici Curiae Brief of County Officials in Support of Appellee-Voters, No. 26 WAP 2024 and 27 WAP 2024 (Pa.) (Sept. 26, 2024), at 2 (Respondents' Appendix in Opposition to Application for Stay to this Court, No. 24A-408, Oct. 30, 2024, at 388a).

[6] Petitioners incorrectly state that the parties had a "stipulation" that the Board "timely received" Respondents' mail ballots. Pet. 10, 25. "[T]imely received" is a term of art whose meaning the parties have disputed. *See, e.g.*, Pet.App. 23a, 53a-54a. The only stipulation the parties made here is that Respondents' defective mail-ballot packets arrived at the board of elections before 8:00 P.M. on Election Day. There was never a stipulation that these facts meant Respondents' mail ballots were "timely received" within the meaning of 25 Pa. Stat. Ann.

packets, staff for Petitioner Butler County Board of Elections (the "Board") screened the packets using automated equipment. That screening indicated that the secrecy envelopes for Respondents' ballots were missing, meaning their packets would not be counted as votes.

The Board set aside Respondents' mail-ballot packets without opening the declaration envelopes before Election Day and recorded the status for both packets into the Pennsylvania Department of State's statewide voter database as "CANC – No Secrecy Envelope." This action by the Board generated an email notice to each Respondent, stating:

> *Your ballot will not be counted because it was not returned in a secrecy envelope.* If you do not have time to request a new ballot before April 16, 2024, or if the deadline has passed, *you can go to your polling place on election day and cast a provisional ballot.*

Pet.App. 6a-7a. (emphases added).[7]

On Election Day, Respondents each cast a provisional ballot at their respective polling places,

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§§ 3050(a.4)(5)(ii)(F) and 3150.16(c), which set a deadline for receipt of a "completed" mail ballot.

[7] Petitioners mischaracterize this email as stating that Respondents' mail ballots "might not be counted" because of a missing secrecy envelope. Pet. 7. The email unequivocally states their mail ballots "will not" count in the election.

following the instructions in that email and additional information provided to them via telephone by Board employees. *Id.* at 7a; May 7, 2024 Hearing Tr., Butler County Court of Common Pleas, 87:25-88:7, 144:9-145:1, 146:13-20, 147:20-149:3.[8] During the Board's canvass, the Board stated it would not count Respondents' mail ballots because of the missing secrecy envelopes. Later during the canvass, the Board voted not to count Respondents' provisional ballots, either. May 7, 2024 Hearing Tr. at 60:2-16.[9]

Respondents then commenced this action in the Butler County Court of Common Pleas. Petitioners the Republican National Committee and the Republican Party of Pennsylvania (collectively, the "Republican Party Petitioners") intervened, and the trial court held an evidentiary hearing. *See* Pet.App. 8a. The trial court affirmed the Board's decision. Pet.App. 10a. Respondents timely appealed.

The Commonwealth Court of Pennsylvania reversed. Pet.App. 11a. It held that the Election Code, as construed using tools of statutory interpretation mandated by Pennsylvania's Statutory Construction Act, 1 Pa. Cons. Stat. §§ 1501-1991, required the Board to count Respondents' provisional ballots. *Id.* at 15a.

At no point in the briefing before either the trial court or the Commonwealth Court did Petitioners

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[8] Respondents' Appendix in Opposition to Application for Stay to this Court, No. 24A-408, Oct. 30, 2024, at 259a-260a, 316a-321a.
[9] Respondents' Appendix in Opposition to Application for Stay to this Court, No. 24A-408, Oct. 30, 2024, at 232a.

raise arguments regarding the U.S. Constitution's Elections or Electors Clauses.

Petitioners then filed separate petitions for allowance of appeal in the Supreme Court of Pennsylvania. The Republican Party Petitioners asked the court to grant review and "evaluate, interpret, and apply the relevant sections of the Election Code before the 2024 General Election." Pet.App. 175a.

The Supreme Court of Pennsylvania granted allowance of appeal and affirmed, agreeing that Pennsylvania law entitled Respondents to vote provisionally. At the outset, it recognized the issue before it was "narrow." Pet.App. 36. It described its task as only harmonizing statutes prescribing "the effect of a naked mail-in ballot" with "statutory provisions governing the counting of provisional ballots." *Id.* Its analysis thus "beg[a]n and end[ed]" with "the plain text" of Section 3050(a.4), the provisional voting statute. Pet.App. 38a & n.28.

Section 3050(a.4), the Supreme Court of Pennsylvania explained, governs when provisional ballots must be counted or not counted. Among other things, subsection (a.4)(5)(i) unequivocally directs that a Pennsylvania county board of elections "shall count" provisional ballots if it "confirms that the individual did not cast any other ballot, including an absentee ballot, in the election." 25 Pa. Stat. Ann. § 3050(a.4)(5)(i). The court thus considered whether Respondents, by submitting defective mail-ballot packets, had "cast any other ballot" in the election.

To answer that question, the Supreme Court of Pennsylvania looked to its own precedents, including its case law "address[ing] the consequences of submitting a naked ballot." Pet.App. 39a. Those cases dictated that putative mail-in ballots with unfixable defects are legally void ab initio, because failure to adhere to "the mandatory requirements for voting by mail" will "nullif[y] . . . the ballot." *Id.* at 42a. On that basis, the court determined that when a voter submits a naked mail ballot that is void and will not and cannot be counted, the voter has not "cast . . . [a] ballot . . . in the election" within the meaning of subsection (a.4)(5)(i). *Id.* at 45a.

The Supreme Court of Pennsylvania also explained that subsection (a.4)(5)(ii)—which sets forth circumstances under which a provisional ballot will *not* be counted—did not require a different result. Rather, subsections (i) and (ii) were two sides of the same coin: "Subsection (a.4)(5)(i) dictates generally when to count a provisional ballot," whereas Subsection (a.4)(5)(ii) "fleshes out the negative implications of that rule by stating more specifically when the county boards must not count a provisional ballot." Pet.App. 52a.

Although it recognized that one portion of subsection (ii) prohibits counting provisional ballots where another "ballot" has been "timely received" from the same voter, (a.4)(5)(ii)(F), the state high court concluded that "[j]ust as a void ballot cannot be given legal effect in Subsection (a.4)(5)(i)," a void mail ballot also could not qualify as having been "timely

received" for the purposes of (a.4)(5)(ii)(F). Pet.App. 48a.[10]

The court further explained that the Election Code's mail ballot provisions supported this reasoning. In particular, the Election Code defines timeliness for mail-ballot purposes as "a *completed* mail-in ballot [being] received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." 25 Pa. Stat. Ann. § 3150.16(c) (emphasis added). And 25 Pa. Stat. Ann. § 3150.16(a), a nearby subsection, defines a "completed" mail ballot for the purposes of Section 3150.16(c) as one where the voter has performed all of the various technical steps, including "seal[ing] the same in the [secrecy] envelope," "on or before eight o'clock P.M. the day of the primary or election." 25 Pa. Stat. Ann. § 3150.16(a). Based on those statutory definitions, the Supreme Court of Pennsylvania concluded that "a mail-in ballot that is not 'completed' does not satisfy the 'deadline' requirement of Section 3150.16(c), and therefore cannot be timely received" within the meaning of (a.4)(5)(ii)(F)'s statutory pro-

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[10] The court also rejected the Republican Party Petitioners' argument that, even though Respondents' ballots were void and could not be counted, mere receipt of the declaration envelope containing Respondents' ballots was sufficient. The court observed that the General Assembly distinguished "between envelopes and ballots" throughout the relevant statutory provisions. Pet.App. 38a, 48a. It concluded that "[i]f the General Assembly intended to trigger disqualification of a provisional ballot by the timely receipt of the Declaration Envelope," even when it did not contain a countable ballot, then "it would have said so." Pet.App. 49a.

hibition against counting the provisional ballots of voters who already voted by mail. Pet.App. 53a-54a.

The Supreme Court of Pennsylvania emphasized the limits of its holding. It cautioned that, under the relevant Election Code provisions, a provisional ballot should be counted only after a county board of elections determines that the voter is both eligible to vote and truly "did not cast any other ballot" in the election. Pet.App. 44a-46a (citing 25 Pa. Stat. Ann. § 3050(a.4)(5)(i)). Adhering to these rules, the court explained, keeps provisional ballot voting in its intended role, as a "fail-safe." *Id.* at 44a.

A minority of the court's justices dissented, taking a different view of the statutory text. Pet.App. 68a-99a. Only one of dissenters, writing separately, suggested that the Court's decision might implicate the federal Elections and Electors Clauses. Pet.App. 62a-67a.

Days before the November 2024 election, the Republican Party Petitioners filed an emergency application for stay pending disposition of a petition for writ of certiorari in this Court. This Court denied that application.

## REASONS FOR DENYING THE PETITION

### I. THE PETITION IDENTIFIES NO SPLIT OF AUTHORITY OR RECURRING ISSUE.

Petitioners pressed state-law arguments in the state court system and lost repeatedly. They cannot transmogrify their losing state-law arguments into

grounds for certiorari. There is no split here, let alone any outcome-determinative federal legal issue worthy of this Court's attention.

First, Petitioners halfheartedly suggest the Court could use this case to resolve a "split of authority" among lower courts on how to apply *Moore v. Harper*. Pet. 1-2; *see also id.* at 15, 30. But Petitioners identify no case in which any lower court suggests it is diverging from any other court in applying the narrow "transgressing the ordinary bounds of judicial review" test outlined in *Moore*. Instead, Petitioners' supposed "split" appears to be based on two cases that *predate Moore*. Pet. 30. Needless to say, pre-*Moore* cases cannot be evidence of any division in applying the guidance *Moore* offered just two Terms ago.

Petitioners also suggest this Court might grant review to decide the precise "legal standard for determining whether a state court's interpretation of state election law exceeds the bounds of ordinary judicial review." Pet. i, 29-30. This ostensible federal legal question, Petitioners promise, is a "recurring" and important one that urgently requires this Court's resolution. Pet. 29-30.

Petitioners' assertion that this question is "recurring" conveniently omits *who* keeps trying to raise it before this Court. In fact, Petitioners rely primarily on *their own* unsuccessful prior stay applications and certiorari petitions, including in this very case. *See* Pet. 29-30 (citing, *e.g., Republican Nat'l Comm. v. Genser*, 145 S. Ct. 9[11] (2024) (denial of stay

[11] Cited by Petitioners at 2024 WL 4647792.

application of Republican Party Petitioners); *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021) (denial of certiorari petition by Republican Party of Pennsylvania); *Wise v. Circosta*, 141 S. Ct. 658 (2020) (denial of stay application by RNC). Of course, a litigant cannot single-handedly transform its losing legal claim into a matter of exceptional national importance through sheer repetition.

But there is a deeper problem: by Petitioners' own acknowledgment, the standard-of-review question does not matter. In their telling, the various standards the Court has contemplated to identify the outer bounds of ordinary judicial review all "convey essentially the same point." Pet. 19 (quoting *Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring)). Thus, Petitioners appear to agree with Justice Kavanaugh that the "precise formulation" of the "deferential" outer-bounds-of-judicial-review standard will not make a "material difference"—let alone serve as a "decisive factor," *Moore*, 600 U.S. at 39 n.1 (Kavanaugh, J., concurring). This Court certainly should not grant review to address a question that Petitioners themselves effectively concede makes no difference to the outcome of the case.

## II. THE PETITION IDENTIFIES NO FEDERAL-LAW ISSUE OF NATIONAL IMPORTANCE.

### A. The Supreme Court of Pennsylvania's Interpretation of the Pennsylvania Election Code Was a Run-of-the-Mill Exercise of State-Law Statutory Interpretation.

Once Petitioners' illusory split and admittedly irrelevant standard-of-review question are set aside, what remains is a pure question of state statutory law: whether the Supreme Court of Pennsylvania correctly interpreted technical provisions of the state's Election Code as allowing Respondents to vote provisionally after they learned that their mail ballots were legally void and uncountable because of a paperwork error with their mail-ballot packets. Pet.App. 29a-57a.

Such questions are typically left to state courts. As this Court explained just two Terms ago, consistent with fundamental principles of federalism and separation of powers, "'[s]tate courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise.'" *Moore*, 600 U.S. at 34 (quoting *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875)). After all, "state courts are the ultimate expositors of state law," and federal courts are "bound by their constructions except in extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Thus, the "general rule" is that this Court will "accept[] state

court interpretations of state law." *Moore*, 600 U.S. at 35.

Petitioners point to the narrow window this Court left open in *Moore*: that this Court's review of state-court, state-law decisions may be warranted when state courts "transgress the ordinary bounds of judicial review such that they arrogate to themselves power vested in state legislatures to regulate federal elections." *Moore*, 600 U.S. at 36. But nothing about the Supreme Court of Pennsylvania's interpretation of the Election Code—which it reached by "applying the plain text" to "the facts before us," Pet.App. 39a n.28, and drawing on "understanding[s]" from its own precedents, *id.* at 42a—was so anomalous as to fall into this narrow category. The court's bread-and-butter interpretation of state statutory law was firmly within the "ordinary bounds." *Moore*, 600 U.S. at 36.

The Supreme Court of Pennsylvania described its analysis as "begin[ning] and end[ing]," with the plain language of 25 Pa. Stat. Ann. § 3050(a.4). Pet.App. 38a-39a & n.28. That portion of the Election Code "dictates generally when to count a provisional ballot." *Id.* at 52a; *see also id. at* 44a. Specifically, it directs county boards of elections to count provisional ballots where registered voters "did not cast any other ballot, including an absentee ballot, in the election." 25 Pa. Stat. Ann. § 3050(a.4)(5)(i). Based on this text, the court concluded that Respondents' statutory entitlement to vote by provisional ballot boiled down to whether, by dint of their unsuccessful mail-in packets, they had "cast any other ballot[s] . . . in the election" within the meaning of this statute. *See* Pet.App. 44a-46a.

The Supreme Court of Pennsylvania concluded that they had not "cast any other ballots." Drawing on its own prior decisions holding that critical defects with mail-ballot packets such as missing secrecy envelopes render mail ballots void, the court reasoned that naked ballots like those submitted by Respondents are a legal nullity. Pet.App. 42a-44a (citing, *inter alia*, *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 378, 380 (Pa. 2020)). If a voter's mail-ballot packet is fatally defective, such that the voter's mail ballot cannot and will not be counted, then the county board of elections has "no other ballot attributable to" the voter in those circumstances. *Id.* The voter cannot have "cast any other ballot . . . in the election" within the meaning of Section 3050(a.4)(5)(i) and is thus entitled to vote provisionally (and the provisional ballot "shall count" in the election). *See* Pet.App. 45a-46a (citing 25 Pa. Stat. Ann. § 3050(a.4)(5)(i)).[12]

Reading Section 3050(a.4) in context with interrelated provisions, the Court next explained that subsection (a.4)(5)(ii)—which includes the "shall not count" provision that Petitioners now underscore—"is

[12] Looking to the word "cast" in isolation and pointing to one dictionary definition, Petitioners argue, Pet. 23-24, that a ballot may be "cast" even when it is defective because a fishing line can be "cast" even when the fisherman ultimately does not reel in a catch. The Supreme Court of Pennsylvania was not required to accept this fishy reasoning in order to remain within the bounds of legitimate state statutory interpretation. And, in any case, Petitioners' and other ballot-related definitions of "cast" make clear that the term refers not just to depositing a ballot but also to indicating or registering one's vote. *E.g.*, OXFORD ENGLISH DICTIONARY (Oxford 3d ed. 2022) (defining "cast" to include "to give a vote").

merely "the flipside of Subsection 3050(a.4)(5)(i), as Subsection (a.4)(5)(i) describes when a provisional ballot must be counted and Subsection (a.4)(5)(ii) describes when it must not be counted." Pet.App. 46a-48a. As for (a.4)(5)(ii)(F)'s specific prohibition on provisional voting where the voter's mail ballot has been "timely received," the court further explained, based on statutory definitions set forth in the Election Code's provisions regarding mail ballots, that an incomplete mail ballot packet is legally void and therefore cannot have been "timely received" within the meaning of the Code. *See supra* pp. 13-14 & n.10.

Obviously, Petitioners disagree with the Supreme Court of Pennsylvania's extensive textual analysis. But their own reading is blinkered and unsupported by relevant state authorities. It zooms in on their preferred sub-subsection, 25 Pa. Stat. Ann. § 3050(a.4)(5)(ii)(F), to the exclusion of all else—ignoring other statutory language, the overall statutory scheme, and the legislative goal of ensuring a fail-safe for voters. Examining (a.4)(5)(ii)(F) in isolation, they insist a "ballot" for purposes of the Election Code's provisional ballot statute must mean any paper ballot form, even if it is uncountable, incurable, and legally meaningless. Pet. 26-28. They pronounce that "cast" and "received" must mean the physical deposit of that paper form, even if it can never be removed from its envelope, counted, or used to register a voter's preferences in the election. Pet. 22-24.

Petitioners point to no compelling state authorities for these propositions. They barely mention the sub-provision that requires that boards of elections "shall

count" a voter's provisional ballot when it is "confirm[ed] that [a voter] did not cast any other ballot, including an absentee ballot, in the election." *Id.* § 3050(a.4)(5)(i). They brush off another, later-added provision in the mail-ballot portion of the Election Code that confirms a person who requests a mail ballot but does not end up successfully voting it "may vote by provisional ballot." 25 Pa. Stat. Ann. § 3150.16(b)(2). They disregard statutory definitions for valid, "completed" mail ballots upon which the Supreme Court of Pennsylvania relied. And, most perplexingly of all, they scold the state high court for relying on its own binding precedent, suggesting the court's past opinions interpreting relevant Election Code provisions were an "extrinsic source" that should not have informed its statutory interpretation here. Pet.App. 26.[13]

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[13] Petitioners point (Pet. 23) to the attestation that a provisional ballot voter must sign stating that "this is the only ballot that I cast in this election," 25 Pa. Stat. Ann. § 3050(a.4)(2), as if to suggest Respondents cannot have properly made this attestation. But the record conclusively shows Respondents acted properly. For example, when Respondent Matis learned his mail ballot would not be counted and he sought to vote provisionally, *the Board told him he could do so*. *See* May 7, 2024 Hearing at 87:24-88:7 (Respondents' Appendix in Opposition to Application for Stay to this Court, No. 24A-408, Oct. 30, 2024, at 259a-260a). Indeed, the Board repeatedly conceded below that Respondents had done nothing wrong in submitting provisional ballots, which included signing the provisional ballot attestation. May 7, 2024 Hearing at 42:16-18, 175:5-11, 177:24-178:13 (Respondents' Appendix in Opposition to Application for Stay to this Court, No. 24A-408, Oct. 30, 2024, at 214a, 347a and 349a-350a).

Perhaps some might think Petitioners have the better reading of these various sub-provisions. Undoubtedly, others would instead agree with a majority of the Supreme Court of Pennsylvania, the majority of Pennsylvania lower courts that have considered the issue, the Secretary of the Commonwealth, and numerous Pennsylvania county governments, who have all read the Pennsylvania Election Code to allow voters in Respondents' position to cast provisional ballots and have them counted. *See supra* pp. 7-9.

Either way, Petitioners do not and cannot explain how the Supreme Court of Pennsylvania's parsing of a few sub-provisions in a highly technical section of the Pennsylvania Election Code is not merely wrong, but so indefensible and unreasonable that it exceeds the bounds of *Moore*. 600 U.S. at 36. The court's thorough, reasoned opinion relied on the traditional tools of statutory interpretation—text, precedent, and context—to arrive at a coherent reading of a complex web of technical election administration statutes. Far from abandoning the judicial role, what the court did here was "quite literally, our job." Pet.App. 60a (Dougherty, J., concurring).

Indeed, it is unlikely—to put it mildly—that the Supreme Court of Pennsylvania "arrogate[d] to [itself] the power vested in [the] state legislature[]," 600 U.S. at 36, when it adopted the same reading of the Pennsylvania Election Code as most Pennsylvania jurists and election officials to have considered the question over the years. *Cf. Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring) ("[I]n reviewing state court interpretations of state law, 'we necessarily

must examine the law of the State as it existed prior to the action of the [state] court.'" (quoting *Bush v. Gore*, 531 U.S. 98, 114 (2000) (Rehnquist, C.J., concurring)).

In short, Petitioners' disagreement regarding an esoteric state statutory issue plainly does not satisfy the narrow test laid out in *Moore*. And this Court should not allocate its limited docket space to a state law question that will ultimately be "quickly resolved with generic statements of deference to the state courts," *Moore*, 600 U.S. at 65 (Thomas, J., dissenting).

### B. Petitioners' Alternative Interpretation Would Countermand the Pennsylvania Legislature.

If anything, *Petitioners'* reading of the Pennsylvania Election Code, if accepted, would have required the Pennsylvania courts to transgress the ordinary bounds of judicial review.

As the Supreme Court of Pennsylvania explained, its decision was rooted in the "plain text" of the state provisional voting statutes. Pet.App. 39a n.28. But even if it had not been, the Pennsylvania General Assembly expressly *requires* the kind of purpose-based statutory interpretation that Petitioners accuse the state high court of conducting here.

In Pennsylvania's Statutory Construction Act of 1972, 1 Pa. Cons. Stat. §§ 1501-1991, the Pennsylvania General Assembly set forth interpretive rules that courts are obligated to observe when

construing Pennsylvania statutes. *Id.* § 1901. In the Act, the General Assembly assigned purposivism a central role in Pennsylvania jurisprudence. *Id.* That command is emphatic: "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." *Id.* § 1921(a). As part of that project, the General Assembly provides that ambiguous statutes may be interpreted by consideration of "occasion and necessity for the statute," legislative history, and other extrinsic materials. *Id.* § 1921(c). And courts are required to depart from ordinary interpretive rules to avoid "a construction inconsistent with the manifest intent of the General Assembly." *Id.* § 1901. Heeding that statutory directive, the Supreme Court of Pennsylvania has long considered "the polestar of statutory construction" to be "determin[ing] the intent of the General Assembly." *In re Nomination Papers of Lahr*, 842 A.2d 327, 330 (Pa. 2004) (citing 1 Pa. Cons. Stat. § 1921(a)).[14]

To be clear, the Supreme Court of Pennsylvania did not depart from the plain language of the statutes at issue. But it did properly acknowledge that its interpretation comported with the General Assembly's purpose, in accord with the Statutory Construction Act. *See* Pet.App. 50a (noting that "[t]he General Assembly wrote the Election Code with the

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[14] *See also* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. Chi. L. Rev. 137, 179 & n.222 (2023) (noting that "[m]any states have law—sometimes embodied in statutes—requiring courts to engage in purposivist statutory construction in at least some circumstances" and citing as an example 1 Pa. Cons. Stat. § 1921(a)).

purpose of enabling citizens to exercise their right to vote, not for the purpose of creating obstacles to voting"); Pet.App. 53a ("Our interpretation of Subsection (a.4)(5)(ii)(F) gives effect to its purpose of preventing double voting, and it averts unnecessary disenfranchisement."). It likewise followed the General Assembly's instructions to avoid interpreting the Election Code as leading to an "unreasonable" result, 1 Pa. Cons. Stat. § 1922(1), or as violating the Pennsylvania Constitution, *id.* § 1922(3). Pet.App. 52a-53a.

Petitioners ignore this state law and instead insist (without explaining how it would have made any difference in the outcome) that the Pennsylvania Election Code must be construed using federal law interpretive principles, which they claim would bar the supposed use of "'extrinsic material'" to "break from the unambiguous text of an election statute." *E.g.*, Pet. 21 (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). But their argument would have this Court substitute a federally derived, judge-made interpretive approach in place of the approach chosen by the Pennsylvania General Assembly. *Contra Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (stating that "the weight to be given to the legislative history of an Alabama statute is a matter of Alabama law"); *In re Trustees of Conneaut Lake Park, Inc.*, 855 F.3d 519, 523 (3d Cir. 2017) ("When interpreting Pennsylvania law, we apply its rules of statutory interpretation."). Applying federal interpretive methodology would contravene the approach commanded by the very "Legislature" whose primacy Petitioners claim to champion—and would send this Court running headlong down the

"uncertain path" of reviewing state courts' interpretive "methods" that the dissent in *Moore* cautioned against. 600 U.S. at 65 (Thomas, J., dissenting).

## III. NOTHING ELSE ABOUT THIS CASE WARRANTS REVIEW.

### A. The Opinion Below Concededly Lacks National Significance.

Petitioners do not even attempt to argue that the question here has *national* importance, claiming only that it implicates at most "the future of elections in Pennsylvania." Pet. 30.

Of course, as a matter of pure state statutory interpretation, the resolution of this case has no implications whatsoever for elections anywhere but Pennsylvania. And even if matters of mere state-level importance were worthy of certiorari, Petitioners' assertions that the decision below "could affect *tens of thousands* of ballots" in every future Pennsylvania election, or swing elections against Republicans, Pet. 30-31, are completely speculative. If anything, the record below and the 2024 election results show that the actual number of affected ballots has been steadily *decreasing*.

### B. Petitioners Lack Standing.

Even if the Petition presented a credible question of nationwide importance otherwise worthy of the Court's consideration, Petitioners lack Article III standing.

Petitioners seek to vindicate an interest that is simply not theirs to pursue. They claim, as the sole basis for federal jurisdiction in this state-law case, that the decision below usurped rights conferred on the Pennsylvania General Assembly by the U.S. Constitution. *See* Pet. 1-4. Petitioners thus seek to pursue and enforce rights belonging not to themselves but to the state legislature. But Article III precludes this gambit: a litigant "must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights" of others. *Powers v. Ohio*, 499 U.S. 400, 410 (1991).

That rule applies with full force when third parties seek to vindicate rights possessed by legislative bodies that they do not represent, even if those parties have some stake in the vindication of those rights. For example, in *Raines v. Byrd*, 521 U.S. 811 (1997), six present and former members of Congress sought to challenge the constitutionality of the Line Item Veto Act. The Court held that these members lacked standing: they were not authorized by Congress to sue and did not represent a majority of that body, and their alleged "loss of political power" and "dilution" of voting authority were insufficient in the absence of a deprivation of something "to which they *personally* are entitled." *Id*. at 821, 826. Here, Petitioners are not even members of the General Assembly, let alone designated to litigate on its behalf. The Republican Party Petitioners are political organizations that below purported to be acting on behalf of Pennsylvanians generally, *see* Republican Applicants' Application for Stay to Supreme Court of Pennsylvania, Oct. 25, 2024, at 1 (seeking stay relief

"on behalf of all Pennsylvanians"),[15] and the Board is part of a single county's government.

This Court has repeatedly reaffirmed the controlling principle from *Raines*. In *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658 (2019), it concluded that one house of the Virginia General Assembly, which had intervened as a defendant, lacked standing because it not been authorized "to litigate on the State's behalf" and there was thus no "legal basis for its claimed authority." *Id*. at 663; *see also id*. at 667 ("[A] single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.").

Likewise in this matter, no Petitioner has authority to represent Pennsylvania's legislative branch on a claim that the Commonwealth's judicial branch has usurped its power. *See Corman v. Torres*, 287 F. Supp. 3d 558, 567-74 (M.D. Pa. 2018) (three-judge panel) (holding that individual members of the Pennsylvania General Assembly and the U.S. House of Representatives lacked Article III and prudential standing to assert Elections Clause claims); *see also Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) ("[F]or a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm"); *accord Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 n.1 (1992).

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[15] Applicant's Appendix to Application for Stay to this Court, No. 24A-408, Oct. 28, 2024, at 78a.

The cases well illustrate that claims involving the supposed authority of the state legislature under the Elections and Electors Clauses should be raised by the legislature whose federal rights are actually at stake. That was the case in *Moore*. It was also the case in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), an Elections Clause challenge to a state ballot initiative that transferred redistricting authority to a commission. In holding that the Arizona Legislature had standing, the Court distinguished *Raines*, which (as noted) involved merely a handful of individual legislators, not the body as a whole nor its legal representative. *See id.* at 801-02.

Here, though, Petitioners are neither the Pennsylvania General Assembly nor authorized to act on its behalf. They accordingly lack standing to pursue their claims in this federal court. The Petition could be rejected on this basis even if the questions it raised were otherwise worthy of this Court's attention.[16]

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[16] The Republican Party Petitioners also lack standing for another reason. This case involves the right of two voters to have their ballots counted under applicable state law in a *Democratic* primary conducted a year ago. The rights of two voters to cast provisional ballots in last spring's Democratic primary election is simply not a controversy in which the Republican Party Petitioners have any current, tangible interest. *Cf. Republican Nat'l Comm. v. Genser*, 145 S. Ct. 9, 9 (2024) (Alito, J., statement respecting the denial of application for stay).

### C. Petitioners Waived Their Argument Below.

Petitioners also waived their federal constitutional argument by never properly asserting it in any of the state court proceedings.

Petitioners never mentioned the Elections or Electors Clauses when they intervened in the trial court, nor on appeal in the Commonwealth Court. Rather, Petitioners referenced their federal constitutional argument for the first time in a passing footnote in their state supreme court brief. Pet.App. 191a n.5. Because Petitioners opted not to develop the argument, the Supreme Court of Pennsylvania concluded they had waived it as a matter of Pennsylvania law. Pet.App. 20a n.18 ("[T]he constitutional arguments . . . were not developed within their petition for allowance of appeal."); *see Sutton v. Bickell*, 220 A.3d 1027, 1036 (Pa. 2019) (on appeal a litigant waives an argument when it "only mentions [it] in passing"); *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 109 n.8 (Pa. 1999) (same).

Waiver of an argument in state court is an adequate and independent state law ground for a state court's decision that can preclude review of the issue in a subsequent petition for writ of certiorari. *See*, *e.g.*, *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This Court routinely refuses to consider federal law challenges to state court decisions "unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting

*Adams v. Robertson*, 520 U.S. 83, 86 (1997)). Here, Petitioners' putative federal law argument was not properly presented, and this waiver is an(other) independent ground for denying the Petition.

* * *

A petition for a writ of certiorari should rise or fall on the worthiness of the questions presented, not on how persistently the same intervenor raises it. Here, the Petition identifies no splits, no important federal law issues, and, at most, invites the Court to engage in mere error correction on a hyper-technical issue of state statutory interpretation, on a claim Petitioners lack standing to even pursue in the first place. Certiorari is not warranted in such circumstances.

## CONCLUSION

The Petition should be denied.

Respectfully Submitted,

Mary M. McKenzie
Benjamin D. Geffen
Olivia Mania
PUBLIC INTEREST LAW CENTER
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102

Stephen A. Loney
Kate Steiker-Ginzberg
ACLU OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102

Witold J. Walczak
Richard T. Ting
ACLU OF PENNSYLVANIA
P.O. Box 23058
Pittsburgh, PA 15222

Ari J. Savitzky
Sophia Lin Lakin
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

G. Eric Brunstad, Jr.
*Counsel of Record*
DECHERT LLP
199 Lawrence Street
New Haven, CT 06511
(860) 524-3960
eric.brunstad@dechert.com

Martin J. Black
Jeffrey S. Edwards
Luke M. Reilly
Steven F. Oberlander
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104

Cecillia D. Wang
Evelyn Danforth-Scott
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street,
Suite 700
San Francisco, CA 94104

*Counsel for Respondents*
*Faith Genser and Frank Matis*

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