

No. 24A408

IN THE SUPREME COURT OF THE UNITED STATES

FAITH GENSER, ET AL.,

Plaintiffs-Respondents,

v.

BUTLER COUNTY BOARD OF ELECTIONS, ET AL.,

Defendants-Respondents,

and

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Intervenor-Applicants.

Application from the Supreme Court of Pennsylvania
(No. 26 WAP 2024, No. 27 WAP 2024)

**AMICI CURIAE BRIEF OF PENNSYLVANIA COUNTY OFFICIALS IN
OPPOSITION TO EMERGENCY APPLICATION**

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STATEMENT OF INTEREST

Amici are elected Pennsylvania county commissioners, councilmembers, and election officials from both the Democratic and Republican parties (“County *Amici*”).¹ Collectively, County *Amici* represent more than half of all Pennsylvanians.

In Pennsylvania, Boards of Elections are tasked with overseeing and administering federal, state, and local elections, including in-person and mail-in voting procedures.² Most County *Amici* represent counties where the county commissioners constitute the Board of Elections; in the remaining counties, County *Amici* oversee and/or fund the work of the Board of Elections. As officials deeply invested in the democratic process, County *Amici* have an interest in ensuring that all eligible electors in their counties can exercise their fundamental right to vote and have those votes counted. Responsible for the day-to-day administration of elections, county officials are experts in the practicalities of how elections are run and have been run across the state. With the current election well underway, County *Amici* are

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *Amici* or *Amici*’s counsel made a monetary contribution to the preparation or submission of this brief. A list of all *Amici* joining this brief in their respective capacities as independently elected officials is available at Appendix A.

² Because absentee and mail-in ballots are largely treated identically under Pennsylvania’s Election Code, they will be referred to together as “mail-in voting” or “mail-in ballots.”

focused on ensuring that eligible voters can participate, election workers understand and follow procedures, and constituents trust the systems in place.

SUMMARY OF ARGUMENT

The Pennsylvania Supreme Court’s decision has not upset the election administration overseen by County *Amici*. Many have long had the practice of counting provisional ballots cast by voters who returned mail-in ballots with fatal defects; the rest are prepared to do so with minimal disruption. County *Amici* are concerned that Intervenor-Applicants’ Emergency Application for Stay would, perversely, upset the *status quo ante* in many if not most Pennsylvania counties and create confusion for millions of voters and countless election administrators and workers less than one week before Election Day. Contrary to the contention that the Pennsylvania Supreme Court’s decision “departed from the plain terms of the Election Code to dramatically change the rules governing mail voting,” Emergency Application for Stay at 1, for years and even decades—well before no excuse mail-in voting was available in Pennsylvania—numerous counties have routinely counted provisional ballots in accordance with the same interpretation of the Election Code.

The Pennsylvania Supreme Court’s decision resulted in no change for those counties. That itself dooms the Application, demonstrating that the decision does not, applying any standard, “transgress the ordinary bounds of judicial review.” *Moore v. Harper*, 600 U.S. 1, 36 (2023). The Pennsylvania Supreme Court’s decision *neither* “impermissibly distorted state law,” *nor* “exceeded the limits of reasonable

interpretation of state law,” *nor* adopted a “truly aberrant interpretation of state law.” *Id.* at 38–39 (Kavanaugh, J., concurring) (internal quotations and citations omitted). Rather, the Pennsylvania Supreme Court affirmed an interpretation of Pennsylvania law that already prevails among many of the counties represented by County *Amici* and across the Commonwealth.

Counting provisional ballots in this manner is not only straightforward and reliable, it is a critical failsafe that already helps many of the undersigned County *Amici* protect the rights of voters. The remaining County *Amici* can easily implement the Pennsylvania Supreme Court’s decision, not only because they agree with making what would be a simple change but because they, like all county election officials in the Commonwealth, use and are familiar with provisional ballots. The decision was narrow in terms of actually changing election administration in Pennsylvania. By contrast, disturbing the Pennsylvania Supreme Court’s ruling would—in the waning days of an election cycle—disrupt the status quo and create further confusion. For all of these reasons, this Court’s intervention is not warranted.

ARGUMENT

I. THE PENNSYLVANIA SUPREME COURT’S DECISION AFFIRMS EXISTING PRACTICE OF MANY COUNTIES, REQUIRES MINOR ADJUSTMENTS FOR OTHERS, AND ALIGNS WITH EXISTING STATEWIDE GUIDANCE

Under “the law of the State as it existed prior to the action of the” Pennsylvania Supreme Court, it was the established practice of many counties to count provisional ballots in the circumstances at issue in this case, *i.e.*, when there were fatal defects

that prevented *Amici* from counting the voters' mail-in ballots. *Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring) (citation omitted). The characterization in the Emergency Application that the Pennsylvania Supreme Court's decision worked a drastic change in elections administration is simply inaccurate. Moreover, the decision below aligns with existing statewide guidance and requires only minor tweaks to the post-Election Day canvassing operations of counties that did not already comply with the ruling.

County *Amici* know from experience that the circumstances that gave rise to this litigation are fairly commonplace in Pennsylvania. Eligible electors submit absentee or mail-in ballots to county election administrators, and then a defect is detected. Many County *Amici* and their Boards of Elections have allowed electors to do exactly what Faith Genser and Frank Mattis attempted to do in Butler County: once they learn of the defect, cast a provisional ballot on Election Day that would enable the county to count exactly one vote cast by that voter in the election. This practice ensures a reasonable opportunity for voters to have their votes counted while falling in line with processes clearly established by the legislature.

Allowing voters to use this remedy presents only a minimal change for counties not previously counting these provisional ballots. To start, many Pennsylvanians already vote by provisional ballot every year.³ The process is neither onerous nor

³ For example, a report from Chester County's Voter Services Director notes that dozens of Chester County electors were able to use the failsafe mechanism of casting a provisional ballot to be able to vote in the 2024 primary, the election cycle at issue

unusual. Further, reviewing and counting provisional ballots is not a complicated or new burden for the Boards of Elections. It is a familiar process that already exists and is mandatory. *See* 25 P.S. § 3050(a.4)(4). The Pennsylvania Supreme Court’s decision noted the longstanding nature of the practice. App. at 22a-24a (reviewing the over 20-year history of voting via provisional ballots in Pennsylvania). Counties have been on notice of the ruling for nearly two months,⁴ and at most the ruling below simply requires some counties to count provisional ballots in one more situation than before.

Pre-existing guidance that Pennsylvania’s voters and all 67 counties had received from the Commonwealth prior to the Pennsylvania Supreme Court decision further demonstrates that the decision is consistent with the “law of the State as it existed prior to the action of the state court.” *Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring) (internal quotation omitted). State and county guidance to voters whose

in the underlying litigation. *See* Chester County, *Voter Services Director’s Report* (May 13, 2024), https://www.chesco.org/DocumentCenter/View/75903/2024_05_13-BoE-Directors-Report?bidId= (last visited Oct. 30, 2024).

Federal data indicates that almost one percent of all ballots cast in 2022 and 1.85% cast in 2020 in Pennsylvania were provisional. *See* MIT Election Data + Science Lab, “Elections Performance Index,” <https://elections.mit.edu/#/data/indicators> (see 2020 and 2022 Indicators, “Provisional Ballots Cast” and “Provisional Ballots Rejected” charts) (last visited Oct. 30, 2024).

⁴ The decision of the Pennsylvania Commonwealth Court, which reached the same substantive outcome as the decision of the Pennsylvania Supreme Court, issued September 5, 2024, and thus Butler County, at the very least, should have been operating on the assumption that provisional ballots would be used in this particular circumstance for the two months prior to Election Day.

mail-in ballots will not be accepted reflects the fact that provisional ballots cast on Election Day are routinely counted. The State’s “Voter Support” website informs voters that they “may be issued a provisional ballot” if “[y]ou were issued an absentee or mail-in ballot but believe you did not successfully vote that ballot . . .” or if “[y]ou returned a completed absentee or mail-in ballot that was rejected, or you believe will be rejected, by the county board of elections and you believe you are eligible to vote.”⁵ Counties previously distributed their own instructional materials to voters and staff in reliance on this understanding of Pennsylvania law. For example, an educational video from Chester County instructs voters that they may cast a provisional ballot if “you were issued but did not successfully cast an absentee or mail-in ballot, and you did not surrender your ballot at the polling place to be voided,” reflecting the county’s practice of counting such ballots.⁶ This is well-established and long-standing guidance about how to interpret Pennsylvania’s Election Code.

As a result, millions of voters in County *Amici*’s counties have become familiar with this protocol, having been educated by election officials, exposed to news articles reporting counties’ practices, and repeatedly instructed in several consecutive election cycles to submit provisional ballots if their mail-in ballots are likely to be

⁵ Commonwealth of Pennsylvania, *Voting by Provisional Ballot*, <https://www.pa.gov/en/agencies/vote/voter-support/provisional-ballot.html> (last visited Oct. 30, 2024).

⁶ Chester County, *Chester County – Voting by Provisional Ballot*, YOUTUBE, <https://youtu.be/5hWGbyKseqY> at 0:41 (last visited Oct. 30, 2024).

disqualified.⁷ Counties have already trained poll workers in this cycle and they are familiar with these protocols as well.

Simply put, by confirming that Pennsylvania’s Election Code allows provisional ballots to be counted in a particular circumstance, the Pennsylvania Supreme Court did not “dramatically upend[] the rules governing mail ballots.” Emergency Application at 13; *see also id.* at 17 (suggesting the Pennsylvania Supreme Court “drastically changed Pennsylvania’s election rules”). The Pennsylvania Supreme Court’s decision to affirm the ruling of the Commonwealth Court does not present major, eleventh-hour alterations to routine processes. Many counties were already doing what the Pennsylvania Supreme Court now requires, and other counties can easily adjust given that they all have systems for counting provisional ballots cast for any reason at all.

II. THE *PURCELL* PRINCIPLE COUNSELS AGAINST THIS COURT’S INTERVENTION AT THIS LATE STAGE

The Emergency Application leverages its mischaracterization of the *status quo ante* to contend that the Pennsylvania Supreme Court decision constitutes a “last minute judicial rewrite[].” Emergency Application at 17. There was no “rewrite.”

⁷ In fact, Intervenor-Appellants have been aware Philadelphia County has followed this practice since at least 2020. *See* Pet. for Review ¶ 70, *Republican National Committee v. Chapman*, No. 447 MD 2022 (Pa. Commw. Ct.) (No. 1) (Noting that, in Philadelphia, “[v]oters whose ballots would be canceled for these defects were instructed that they could vote by provisional ballot or request a replacement ballot at a satellite election office.”). And Intervenor-Appellants administratively challenged Philadelphia’s decision to count nearly 600 of those ballots in 2020, but did not subsequently appeal the Board’s decision to court.

Interpreting the Election Code to decide whether to count ballots for the *already past* 2024 primary election, the Pennsylvania Supreme Court wrote nothing new at all, and instead merely analyzed language in various provisions of the Pennsylvania Election Code in an ordinary act of state statutory interpretation. *See Moore*, 600 U.S. at 36 (“We hold only that state courts may not transgress the *ordinary bounds of judicial review* such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.”) (emphasis added); *see also id.* at 34 (“The State courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise.”) (quoting *Murdock v. City of Memphis*, 87 U.S. 590, 626 (1874)). Moreover, the fact that the Pennsylvania Supreme Court decision did not work any change in the use of provisional ballots in numerous counties further demonstrates the narrowness of the decision. It was hardly an act of judicial “sledgehammering.” Emergency Application at 17.

Given this mis-framing of the decision below, Intervenor-Applicants’ reliance on *Purcell v. Gonzalez*, 549 U.S. 1 (2006), is misplaced. Here, Intervenor-Applicants seek a stay and a revision of an understanding of the Pennsylvania Election Code on the immediate eve of an election based on a sweeping application of general principles that have been addressed only in federal court. By contrast, the Pennsylvania Supreme Court affirmed a lower-court decision regarding an already-conducted election that had been in place for nearly two months and issued a narrow and detailed ruling relying on a full record and with no factual disputes.

Purcell, on its own terms, is inapposite. There, this Court was “left . . . in the position of evaluating the Court of Appeals’ bare order” and had “inadequate time to resolve the factual disputes.” 549 U.S. at 5–6. Importantly, *Purcell* implicated this Court’s superintendency of lower federal courts. It did not involve a federal court stepping in to disrupt a state supreme court’s interpretation of its own election code; rather, it involved a federal court injunction as to a state law.

The concepts underlying *Purcell*—timing and the potential for confusion—also counsel against this Court’s intervention here. This Court “has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election.” *Democratic Nat’l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring). That is because “[r]unning a statewide election is a complicated endeavor” requiring “thousands of state and local officials and volunteers” to participate in a “massive, coordinated effort.” *Id.* at 31.

It bears emphasizing, from the perspective of County *Amici*, what a relatively minor adjustment the Pennsylvania Supreme Court’s decision requires. The Pennsylvania Supreme Court did not create a new substantive rule or substitute legislative judgment for its own policy preference. *See also id.* at 29 (Gorsuch, J., concurring) (highlighting that the district court had substituted its policy preference for that of the state legislature). All it did was examine the Pennsylvania Election Code to understand how it applies to a particular set of circumstances. In doing so, it decided the Election Code requires county Boards of Elections to count provisional

ballots—a tool already provided for in the Pennsylvania Election Code and that is already used by many counties in these precise circumstances—cast by voters who had not successfully returned any other ballot in that election.⁸

In the experience of County *Amici*, it is the relief sought by the Intervenor-Applicants, and not the decision of the Pennsylvania Supreme Court, that would jeopardize the smooth administration of the election in Pennsylvania and subvert the status quo. In the present circumstances, granting the requested stay, or otherwise upsetting the Pennsylvania Supreme Court’s decision, would effectuate a judicial change to the rules when the election is close at hand.

And to be clear, that subsequent change would cause confusion among County *Amici*’s constituents and across the state. The Pennsylvania Supreme Court’s decision aligns with County *Amici*’s understanding and, for many, implementation of Pennsylvania law. On the other hand, granting the relief sought would require significant and immediate changes, stripping voters and county election officials of an important failsafe, just days before the election. It would lead to voters making futile attempts to cast provisional ballots on Election Day and impose burdens on election staff in addressing this Court’s intervention. Even if County *Amici* can invest in last-minute education efforts, many of their constituents would face needless

⁸ Intervenor-Applicants anticipate that “Respondents will likely argue that the *Purcell* principle does not apply to federal court review of state court injunctions,” Emergency Application at 17, but in so framing the anticipated argument, they overstate the decision. The Pennsylvania Supreme Court did not stay the Pennsylvania Election Code or bar the application of state law.

confusion, frustration, and disenfranchisement on Election Day. That is the precise outcome that *Purcell* is intended to guard against, not cause.

CONCLUSION

For all the foregoing reasons, the Emergency Application for Stay should be denied.

Dated: October 30, 2024

Respectfully submitted,

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Bob Harvie

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