No. 25–967

In the Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

BETTE EAKIN, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Here's where things stand: Of the 74 respondents to the Commonwealth's petition, only a handful have filed substantive briefs—i.e., the two political parties and a smattering of county boards of elections. Few of those briefs meaningfully engage with the Commonwealth's arguments, including its request for GVR. But the cross-talk among these respondents helpfully demonstrates that the Third Circuit's misapprehension of state law and unprincipled application of *Anderson-Burdick* have invited chaos and confusion. This Court has two mechanisms for straightening things out: issuing a GVR or granting plenary review. None of the arguments advanced by any of the respondents undermine the viability of either option.

1. Plaintiff-respondents Bette Eakin, the Democratic Senatorial Campaign Committee, the Democratic Congressional Campaign Committee and AFT Pennsylvania (collectively, "Democratic Respondents") oppose both GVR and plenary review.

A. *GVR.* As to GVR, the Democratic Respondents strain to downplay the significance of the Pennsylvania Supreme Court's decision in *Center for Coalfield Justice v. Washington County Board of Elections*, 343 A.3d 1178 (Pa. 2025), issued just four weeks after the Third Circuit's opinion. Tellingly, though, not a single county board of elections has co-signed that exceedingly narrow construction.

On the other hand, six Third Circuit Judges, a cohort of Pennsylvania legislators, and at least one county board of elections recognize the centrality of *Coalfield Justice*. App.91a (Phipps, J., dissenting from denial of *en banc*) ("This Court's decision evaluated the prior scheme for mail-in voting, not the one now re-

quired by *Coalfield Justice*"); App.101a (Bove, J., dissenting from denial of *en banc*) (*Coalfield Justice* addressed some of panel's "specific concerns"); Br. of *Amici Curiae* Senator Kim Ward, et al. at 10–11 (describing panel opinion as "predicated on an incorrect understanding of Pennsylvania law"); Northampton Board Br. at 3–4. And this chorus is unsurprising given the broad pronouncements of law in *Coalfield Justice*.[1]

The Democratic Respondents briefly suggest that the Third Circuit's "principal focus" was not a mail-in voter's inability to correct mistakes, but the fact that enforcing the date requirement could have an impact on election outcomes. Dem. Resp. Br. at 35; App.34a. That interpretation is belied by the panel opinion itself, as well as the dissenting Judges' understanding of that opinion. App.17a; App.31a; App.34a–37a.

The Democratic Respondents also submit that "nothing" about *Coalfield Justice* "casts doubt on the panel's analysis," because that opinion dealt only with county boards that have "opted to conduct pre-election-day review of mail-in ballot return packets[.]" Dem. Resp. Br. at 34. And they allude to an unspecified number of counties that do not follow this practice. *Id.* at 35; *but see* Pet. at 9 n.7, 14. This Court should not countenance the Democratic Respondents' unsupported assertion.[2]

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[1] *E.g.*, *Coalfield Justice*, 343 A.3d at 1206 ("[T]he statutory right to vote by provisional ballot creates a liberty interest implicating due process."); *ibid.* at 1215 (acknowledging "no additional expense or burden" for county boards "in entering accurate [SURE System] codes"); *ibid.* at 1222 (declining to read "the [Election] Code as allowing county boards to withhold readily available information").

[2] *Cf.* Rich Cholodofsky, *Westmoreland County approves ballot curing process for November election*, PITTSBURGH TRIBUNE (Oct. 7, 2025) ("[Commissioners] said they were required to reverse

Indeed, such naked speculation counsels in favor of GVR to allow the Third Circuit to decide whether supplementing the record is necessary to assess the impact of *Coalfield Justice*. All 67 county boards of elections are parties to this action and were parties before the Third Circuit.

Perhaps the Democratic Respondents are right that *Coalfield Justice* does not change the result. But perhaps not. *See supra* n.2. This Court does not require certainty that the result below will be different after a GVR. "It is precisely because of the uncertainty that we GVR." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 172 (1996) (*per curiam*).

To make it appear as though the Third Circuit gave *Coalfield Justice* adequate consideration, Respondents falsely assert that "the Commonwealth expressly urged rehearing on that basis." Dem. Resp. Br. at 34. But *Coalfield Justice* had not yet been issued when the Commonwealth sought *en banc* review. And precisely for this reason, the Commonwealth urged the Third Circuit to abstain. *See* 3d Cir. ECF 149 at 13–15 & n.8 (Sept. 9, 2025). *Coalfield Justice* was *then* decided on September 26, 2025. So, the Commonwealth informed the Third Circuit of that decision in a 350-word letter. *See* Fed.R.App.P. 28(j); 3d Cir. ECF 152 (Sept. 30, 2025).

In any event, the question is not simply whether the lower court was on notice of an intervening development at *some point* along the way below. *Thomas v. American Home Prod., Inc.*, 519 U.S. 913, 914 (1996)

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course and implement the system following [*Coalfield Justice*]"), https://perma.cc/H9UT-D5CV; Westmoreland County Election Board Meeting Minutes (Oct. 7, 2025), https://perma.cc/5QMK-3VNH. The Court may take judicial notice of this pronouncement. *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977).

(Scalia, J., concurring). Rather, the question is whether the Third Circuit "actually considered" whether *Coalfield Justice* altered its analysis. *Lords Landing Vill. Condo. Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 897 (1997) (*per curiam*). "[A]mbiguous[ly]" declining to address its relevance in an *en banc* denial order is not the same as "consider[ing] and reject[ing]" it. *Ibid.*

Without at least a GVR, the Commonwealth will find itself in the unenviable position of operating under state court and federal court precedents that cannot coexist. *Cf. Moore v. Sims*, 442 U.S. 415, 428 (1979). As discussed in the petition, while the Third Circuit tells mail-in voters who err that they are *precluded* from casting a provisional ballot, *Coalfield Justice* establishes exactly the opposite. Pet. at 15. The Democratic Respondents offer no response to this quandary.[3]

B. *Plenary Review.* The Democratic Respondents also attempt to deny the existence of any Circuit split. Dem. Resp. Br. at 19–20. This argument will come as a surprise to the entire Third Circuit, which openly acknowledged a split across its opinions. App.41a ("[S]ome of our sister Circuits have applied rational basis review, or something close to it, in minimal burden cases, but we decline to adopt their approach."); App.92a n.4 (Phipps, J., dissenting from denial of *en banc*); App.95a (Bove, J., dissenting from denial of *en*

[3] While attempting to minimize *Coalfield Justice*—a decided case—the Democratic Respondents emphasize another still-pending state-court challenge in *Baxter*. Dem. Resp. Br. at 36 (asserting that the Pennsylvania Supreme Court is "poised" to enjoin the date requirement in *Baxter*); Pet. at. 5 n.4. But this emphasis only underscores the need for this Court to address the Third Circuit's incorrect pronouncement of state law and flawed application of *Anderson-Burdick*.

banc). And the Third Circuit will not be alone in its surprise. *Daunt v. Benson*, 999 F.3d 299, 323 (6th Cir. 2021) (Readler, J., concurring) (discussing the "rampant subjectivity inherent in applying" *Anderson-Burdick*).[4]

The Democratic Respondents play semantic games with various Circuit Court opinions to hide any indication of a split. Dem. Resp. Br. at 28–29 (insisting that courts using phrases like "reasonable" and "rational" have not "eschewed *Anderson-Burdick*"); *cf.* App.41a ("[S]ome of our sister Circuits have applied rational basis review, *or something close to it*, in minimal burden cases") (emphasis added). But the basis of the Commonwealth's petition is not what courts *call* their analysis under *Anderson-Burdick*, it is the practical *result* of that analysis. When other states defended nondiscriminatory voting rules—even those that impose minimal burdens—they were not required to demonstrate narrow tailoring or prove with evidence the wisdom of every jot and tittle of their Election Code. *See* Pet. at 18–21. But Pennsylvania was. App.110a (Bove, J., dissenting from denial of *en banc*). The Democratic Respondents' claim of doctrinal harmony is entirely unpersuasive.

In attempting to portray uniformity, the Democratic Respondents also adopt an untenable reading of Justice Scalia's concurrence in *Crawford v. Marion County Board of Elections*, 553 U.S. 181 (2008). Dem. Resp. Br. at 18–19. Improbably, they read Justice Scalia's call for less "amorphous" balancing and stricter

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[4] *See also* James M. Fischer, *What Are "The Usual Burdens of Voting"?*, 40 GA. ST. U. L. REV. 573, 584–86 (2024); Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections*, 17 WM. & MARY BILL RTS. J. 507, 511 (2008).

adherence to a "two-track" approach to mean that "Indiana's law could be allowed *only* because 'the burden at issue [was] minimal and justified.'" *Id.* (quoting 553 U.S. at 204 (Scalia, J., concurring) (emphasis added)).

Setting aside the pivotal addition of the word "only," which does not actually appear in that part of Justice Scalia's opinion, it is impossible to square this rule with the rest of the concurrence. *Crawford*, 553 U.S. at 205 (Scalia, J., concurring) ("[W]hat petitioners view as the law's several light and heavy burdens are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters") (emphasis in original); *id.* at 208 (warning against "detailed judicial supervision of the election process"); *ibid.* (legislative judgment "must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class"). Justice Scalia thus addressed, and rejected, an "individual-focused approach." *Id.* at 207–208. And he certainly did not endorse the idea that all voting regulations are inherently subject to judicial review, regardless of how "deferential" that review might be.

C. *Policy Considerations*. Unable to persuasively deny the impact of *Coalfield Justice* or the reality of lower court confusion, the Democratic Respondents resort to naked policy appeals.

They insist that the date requirement is a "relic of a bygone era;" an "anachronism" that "serves no function." Dem. Resp. Br. at i, 7, 11. And, like the Court of Appeals, they repeatedly speculate over the number of ballots that *could be* affected by allowing the date requirement to remain in effect. *Id.* at 7–8, 12; *but see* RNC Pet. No. 25–962 at 9–10 (noting that the rate of noncompliance fell to 0.85% in 2022 and 0.56% in 2024). The Democratic Respondents also attempt to

paint this case as unimportant because the date requirement is a "rare" and "idiosyncra[tic]" edge case as far as state election laws go. *Id.* at 16. But there is nothing novel or rare about a nondiscriminatory, generally applicable ballot-casting rule. *See* App.109a (Bove, J., dissenting from denial of *en banc*). "Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring).

It is for this reason that federal courts decide discrete cases and controversies, and do not evaluate isolated provisions of law in an "abstract, intellectual" sense. *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20–21 (1998) (cleaned up). Instead, courts consider whether a challenged provision is "part of an *electoral scheme* that provides constitutionally sufficient ballot access[.]" *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (emphasis added); *see also Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020) (prioritizing "net effect" of electoral scheme on voting). Like the Third Circuit, the Democratic Respondents' myopic focus on the potential impact of one minute aspect of Act 77 has caused them to overlook how Pennsylvania's electoral scheme guarantees expansive ballot access. And, ironically, their fixation has put that overall scheme in jeopardy. Pet. at 4 (detailing Act 77's non-severability clause).

2. Turning to Respondents the Republican National Committee, National Republican Congressional Committee, and Republican Party of Pennsylvania (collectively, "Republican Respondents"), while they broadly support the Commonwealth's petition, they oppose the GVR request and catalogue certain differences between the two petitions.

A. *GVR.* In their own petition, the Republican Respondents briefly acknowledge the significance of *Coalfield Justice*: it "corrected" a "key premise" underlying

the Third Circuit's decision. RNC Pet. No. 25–962 at 16, 32. But in their response to the Commonwealth's petition, they argue that if this Court remands in light of *Coalfield Justice*, a different result is "far from certain." Republican Resp. Br. at 5. As discussed, certainty is not the standard. *Lawrence*, 516 U.S. at 167.

The Republican Respondents were correct in their original position: *Coalfield Justice* addressed a central issue animating the Third Circuit's opinion. *Cf.* App.91 (Phipps, J., dissenting). Thus, there is at least a reasonable probability of a different result on remand. That is all this Court's precedents require to warrant a GVR.

B. *Plenary Review*. While noting that their separate petition is "broadly aligned" with the Commonwealth's, the Republican Respondents also highlight some differences. Republican Resp. Br. at 3–4. One point warrants a brief response.

In their petition, they urge this Court to double down on the concept of a "threshold rule" from *Crawford* regarding usualness. RNC Pet. No. 25–962 at 25–27. The Commonwealth submits that *Crawford*'s allusions to "usual burdens" and "[b]urdens *** arising from life's vagaries," 553 U.S. at 186, 199 (plurality), simply reflect the notion that enforcing familiar, generally applicable voting rules is *unlikely* to violate the Constitution.[5] But the inquiry does not necessarily end there. Indeed, the *Crawford* plurality recognized that what constitutes a "usual burden" for some voters can represent a significant burden for others. *Ibid.* ("posing

[5] *Cf. Crawford*, 553 U.S. at 191 (plurality) (disclaiming suggestion of a "litmus test" in *Anderson-Burdick* cases); Fischer, *What Are "The Usual Burdens of Voting?"*, 40 GA. ST. U. L. REV. at 577 (concluding that "the 'usual burdens of voting' is a dynamic rather than static concept").

for a photograph" is not a substantial burden for most but could present "special burden" for "persons with a religious objection to being photographed"); *League of Women Voters of Florida, Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018) (while "[a]t first blush, the burden of "waiting in line and commuting" may "appear slight," it "lopsidedly impacts Florida's youngest voters").

Notwithstanding *Crawford*, some federal courts have twisted *Anderson-Burdick* to justify enhanced oversight of non-discriminatory, generally-applicable voting rules. This Court should not grant *certiorari* to simply rehabilitate *Crawford*'s reliance on "usual burdens." Rather, it should clarify to lower courts the importance of engaging with *Anderson-Burdick*'s first step and harmonizing any application of that framework with broader case law. *See* Pet. at 23–25 (citing *Burdick*, 504 U.S. at 433 ("the right to vote in any manner is not absolute"); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) ("[T]he Constitution does not confer the right of suffrage upon any one *** [and] the right to vote, *per se*, is not a constitutionally protected right.")).

3. *County Boards.* Three county boards of elections have taken a position on the Commonwealth's petition.

a. The Northampton County Board of Elections offers an interpretation of *Coalfield Justice* that is slightly narrower than the Commonwealth's. *See* Northampton Board Br. at 2–3. Still, it acknowledges that the decision has "reduced the damage caused by the date requirement by putting a stop to active misinformation" about the status of mail-in ballots and provided relief to voters who submit a defective mail-in ballot "early enough" before Election Day "that notice would allow [them] to [cast] a provisional ballot." *Id.* at 3–4.

b. The Berks County Board of Elections rightly supports the Commonwealth's petition. Berks provides a helpful summary of the protracted legal battle over the date requirement and correctly describes these challenges as a "results-oriented" search for a colorable legal theory. Berks Board Br. at 1, 3–4. Like the Commonwealth, Berks sees the date requirement for what it is: "a facially nondiscriminatory and neutrally applied vote-casting rule duly adopted by the Legislature and signed into law by the Governor." *Id.* at 1.

c. The Luzerne County Board of Elections opposes the Commonwealth's petition, but not on the merits. Luzerne Board Br. at 1. Standing alone, it argues that "the *Purcell* principle strongly cautions against" this Court taking any action, lest it create confusion for Pennsylvania voters and election officials. *Id.* at 1, 6–7. (discussing *Purcell v. Gonzales*, 549 U.S. 1 (2006) (*per curiam*)). But its argument misses the mark considerably.

Purcell informs the exercise of a court's *equitable* authority, while this Court's power to grant discretionary review and its concomitant GVR power are both *statutory* in nature. *See* 28 U.S.C. §§1254(1), 2106; *Malliotakis v. Williams*, 146 S. Ct. 809, 811 (2026) (Alito, J., concurring in stay); *id.* at 816–17 (Sotomayor, J., dissenting from stay); *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring in stay). Granting the petition does not require the issuance of an injunction or a stay, and *Purcell* has never been wielded to insulate errors of law from appellate review. *See Trump v. International Refugee Assistance Proj.*, 582 U.S. 571, 578–79 (2017); *Merrill*, 142 S.Ct. at 882 n.3 (Kavanaugh, J., concurring in grant of stay). Because what results from a GVR is, axiomatically, up to the court to which jurisdiction returns, *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (*per curiam*), so too

is the possibility that such equitable action is forthcoming. *Cf. In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 845 (6th Cir. 2013) (addressing post-GVR request for additional remand to district court).

CONCLUSION

The Court should grant, vacate, and remand in light of *Coalfield Justice*. Alternatively, the Court should grant the petition for a writ of certiorari, exercise plenary review, and resolve the question presented.

Respectfully submitted,

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