**No. 20-542**

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**IN THE SUPREME COURT OF THE UNITED STATES**

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REPUBLICAN PARTY OF PENNSYLVANIA,

*Petitioner,*

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA SECRETARY OF STATE, ET AL., and PENNSYLVANIA DEMOCRATIC PARTY,

*Respondents.*

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**On A Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania**

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# REPLY IN SUPPORT OF MOTION FOR EXPEDITED CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI AND FOR EXPEDITED MERITS BRIEFING AND ORAL ARGUMENT IN THE EVENT THAT THE COURT GRANTS THE PETITION

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## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

As Petitioner Republican Party of Pennsylvania (RPP) explained in its motion, four Justices of this Court, as well as Respondents Pennsylvania Democratic Party and Secretary Boockvar, have deemed this case worthy of the Court's attention. *See* Mot. 1–2. Moreover, given the imminence of the upcoming election, the Court's review must be conducted on an expedited schedule. *See id.* at 2–5. To avoid this common-sense conclusion, Respondents advance illogical arguments and back away from their earlier positions. Most notably, the Pennsylvania Democratic Party (PDP) now concedes that ballots that arrive after Election Day should be segregated (and potentially invalidated). Pa. Dems. Opp. 7. But PDP offers no explanation as to why invalidating ballots after Election Day is preferable to the Court resolving this case *before* the election. *See id.* Nor could it, had it tried. It is of course preferable to resolve the case now: after all, such a resolution would preserve and promote voting rights for all Pennsylvanians because it would give Pennsylvania voters the information necessary to ensure that their votes are timely cast and counted.

Respondents' remaining arguments fare no better. *First*, PDP attempts to retreat from its previous position that the Court should summarily review this case. Pa. Dems. Opp. 4; *see* Pa. Dems. Br. 9, *Republican Party of Pa. v. Boockvar*, No. 20A54 (U.S. Oct. 5, 2020) (asking the Court to "grant certiorari and summarily decide this case"); Sec'y Br. 2–3, *Republican Party of Pa.*, No. 20A54 (U.S. Oct. 5, 2020). PDP's only explanation for its change of heart is that time has passed and the election has gotten closer. Pa. Dems. Opp. 4; *see also* Sec'y Opp. 2–3. Seizing on the proximity of the election, both PDP and the Secretary invoke the *Purcell* principle to suggest that

this Court should not intervene so late in the game. Pa. Dems. Opp. 2, 7; Sec'y Opp. 3.

This sort of argument has been aptly described as "the legal definition of chutzpah." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020). To be clear, *it was the Pennsylvania Supreme Court* that changed the rules in the run-up to the general election (at Respondents' urging). This Court's intervention would merely fix the Pennsylvania Supreme Court's error and restore the status quo ante that was established by the General Assembly. To be sure, appellate courts "would prefer not to" change election rules again "at this late date," "but when a lower court intervenes and alters the election rules so close to the election date," appellate courts "should correct th[e] error." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *e.g.*, *Merrill v. People First of Ala.*, No. 19A1063 (U.S. July 2, 2020) (staying, nine days before election, a preliminary injunction entered 29 days before the election).

Justice Kavanaugh elaborated on this point just yesterday, explaining why Respondents' argument "defies common sense and would turn *Purcell* on its head." *Democratic Nat'l Comm. v. Wis. State Legislature*, No. 20A66, slip op. at 4 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay). As Justice Kavanaugh noted, "[c]orrecting an erroneous lower court injunction of a state election rule cannot itself constitute a *Purcell* problem," because "[o]therwise, appellate courts could never correct a late-breaking lower court injunction of a state election rule." *Id.* "That obviously is not the law." *Id.* In short, far from counseling

*against* expedited consideration in this case, the *Purcell* principle emphatically supports it.[1]

In addition, PDP's position is at war with itself. PDP shies away, appropriately, from demanding that this Court simply acquiesce in a potentially unlawful and unconstitutional vote counting procedure. Instead, it concedes (at 7) that segregating ballots received after November 3 is an appropriate temporary measure pending this Court's review. RPP welcomes this concession and urges the Court to grant that remedy (which the Pennsylvania Supreme Court denied on Monday, October 26, *see Pa. Democratic Party v. Boockvar*, No. 407 MD 2020 (Pa.)). RPP already requested such an order in its motion (at 3), and in an abundance of caution will also be seeking this remedy by separate application.

Moreover, the rest of PDP's position collapses under the weight of this concession. After all, by agreeing that the ballots should be segregated pending this Court's review, PDP accepts that those votes—cast without the benefit of this Court's guidance—might be invalidated. Accordingly, it would be preferable to resolve the issue promptly so that as many voters as possible have an opportunity to ensure that

[1] The Secretary's reliance on *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020), is similarly unavailing. *See* Sec'y Opp. 2–3. In *Andino*, the Court merely specified that "any ballots cast before this stay issues and received within two days of this order" would count. 2020 WL 5887393, at *1. Even assuming the same approach were appropriate here, no ballots received after Election Day would have to be counted as long as this Court resolved this case by November 1. In other words, the Secretary's argument is entirely self-defeating because, if it were valid, it would only demonstrate that prompt review by this Court is *necessary* to ensure that all ballots are counted in a constitutional and lawful manner.

their votes can be counted. PDP complains that not *all* voters may have time to adjust to the Court's ruling, *see* Pa. Dems. Opp. 4–5; *but see supra* 3 n.1—but under PDP's proposed approach, *no* voters would be able to adjust because the rule would be announced *after* the election. There is no logic in that position.

For her part, Secretary Boockvar does not opine on whether the ballots should be segregated. But strategic ambiguity provides no refuge for her position. The Secretary must either accept that the post-Election Day ballots should be segregated (and face the same contradiction as PDP), or reject that remedy (and espouse the radical view that this Court is powerless to prevent unconstitutional and unlawful vote counting). Neither position is sustainable.

The Secretary tries to dodge the issue by blaming RPP for the compressed timeline. Sec'y Opp. 1. This argument is so tenuous that not even PDP has adopted it. RPP filed a stay application with this Court within eleven days of the Pennsylvania Supreme Court's ruling. RPP Stay App., *Republican Party of Pa.*, No. 20A54 (U.S. Sept. 28, 2020). RPP then understandably sought to be guided and informed by this Court's disposition of the stay application. And RPP filed its petition for certiorari and motion to expedite within four days of that disposition.

*Second*, PDP contends that the Court's ruling will also affect ongoing litigation in other states. This is true, *see* Pet. 33–35, but it counsels *in favor* of granting the petition and motion. Indeed, PDP itself used to understand this. Pa. Dems. Br. 9, No. 20A54 (advocating for this Court's review precisely *because* the questions presented are "of overwhelming importance for States and voters across the country").

It is simply illogical to suggest that this Court would somehow promote clarity and predictability by *withholding* guidance on these crucial issues until after the election.

*Third*, both PDP and the Secretary suggest that the requested relief would somehow be at odds with the Court's denial of the stay. Pa. Dems. Opp. 1–4; Sec'y Opp. 1–2. Not so. By exercising its equitable discretion to deny a stay *pending* certiorari review, the Court certainly did not foreclose the *possibility* of certiorari review; nor did the Court dictate whether the Court's review should be expedited.

To the contrary, by voting in *favor* of a stay, four Justices have already taken the position that there is "'a reasonable probability' that this Court will grant certiorari" and "'a fair prospect' that the Court will then reverse the decision below." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (citations omitted). And as RPP has explained and Respondents have not seriously contested, the *only* way to achieve meaningful certiorari review for the imminent general election is to expedite the certiorari- and merits-stage proceedings. Indeed, Respondents have not even attempted to articulate how the Court could consider this case on a regular schedule, given the applicable deadlines, which range from December 8, 2020 (the Electoral College "Safe Harbor" deadline) to January 20, 2021 (inauguration). *See* Mot. 4–5.

*Finally*, PDP complains that there is simply not enough time to adequately brief this case on the schedule that RPP has proposed. Pa. Dems. Opp. 8–9. This argument rings hollow. After all, PDP—along with the Secretary—urged this Court to summarily decide this case *based on the motion to stay briefing*. Pa. Dems. Br. 9,

No. 20A54; Sec'y Br. 2–3, No. 20A54. Needless to say, the Court will now have *more* briefing to consider. If the motion to stay briefing was sufficient to decide the case, then the sum of the motion to stay briefing and the certiorari-stage briefing is more than sufficient. Indeed, the issues presented in this case can be resolved by a straightforward application of the Constitution's text and "230 years of this Court's decisions." *Wis. State Legislature*, slip op. at 2 (Gorsuch, J., concurring in denial of application to vacate stay); *see id.* at 9 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay) ("state courts do not have a blank check to rewrite state election laws for federal elections"). And PDP obviously has the resources necessary to draft an adequate certiorari-stage brief even on a compressed schedule; for example, it produced a detailed opposition to RPP's motion to expedite in a span of two days.

In short, this case presents consequential, recurring, and pressing questions that call out for this Court's resolution. RPP respectfully requests that the Court grant expedited review of the petition for certiorari and of the merits of this case.

Respectfully submitted,

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