Nos. 20A53, 20A54

IN THE

Supreme Court of the United States

JOSEPH B. SCARNATI III, ET AL.,

Applicants,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

REPUBLICAN PARTY OF PENNSYLVANIA,

Applicant,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

On Applications to Stay the Mandate of the Supreme Court of Pennsylvania

RESPONSE OF THE PENNSYLVANIA DEMOCRATIC PARTY RESPONDENTS

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Pennsylvania Democratic Party states that it has no parent corporation and that there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

In the decision below, the Pennsylvania Supreme Court ruled narrowly that Pennsylvania's statutory requirement that mail-in ballots be received by Election Day violates the Pennsylvania Constitution's Free and Equal Elections Clause as applied in the extraordinary circumstances that attend the 2020 general election. Based on record evidence and Pennsylvania's recent experience of intractable voting problems in the primary election, the court concluded that the confluence of pandemic-caused demand for mail-in ballots and documented postal service delays made it extremely likely that the existing deadline would disenfranchise numerous voters. The court remedied that as-applied violation of the state constitution by extending the ballot received-by deadline until November 6—a remedy that the court concluded would best effectuate the intent of the Pennsylvania General Assembly—and adopted a standard method of making the factual determination that ballots received after Election Day were properly cast *by* Election Day. Each step of the Pennsylvania Supreme Court's analysis applied settled principles of state law.

Notably, the state officials with authority to enforce and defend the law agree with the Pennsylvania Supreme Court's decision—indeed, they have already implemented it by informing Pennsylvania voters that their ballots may be received up to November 6, rather than November 3, as long as the ballots are mailed by Election Day. Nonetheless, the Republican Party of Pennsylvania ("RPP") and two state legislators ("State Legislators") (collectively, "Applicants") ask this Court to grant an emergency stay of the Pennsylvania Supreme Court's ruling—relief that would have the practical effect of reinstating the November 3 deadline, just weeks after that deadline was extended and sowing confusion about the rules governing the election. What is more, the grounds on which Applicants urge this Court to act would inevitably entangle this Court in innumerable disputes concerning the proper interpretation of state law. Even more untenably, Applicants all but promise that if they do not receive the requested relief now, the election results

will be subject to post-election challenge—even though Applicants offer no reason to think that ballots mailed after Election Day will in fact be counted.

The Court should reject Applicants' arguments, which are wrong under the law and dangerous for the Court as an institution. Applicants' federal-preemption challenge to Pennsylvania's procedure for determining whether a mail-in ballot[1] was mailed on or before Election Day cannot withstand scrutiny; they point to nothing in the text of federal law that overrides Pennsylvania's procedure, their position is contrary to historical practice, and their argument would almost certainly invalidate multiple state election laws on the eve of the election. Their federal constitutional challenge does not fare any better: Accepting that challenge would, in any case bearing on federal election procedures, convert state-law decisions on matters of state law into federal questions, in contravention of the bedrock rule that "state courts are the ultimate expositors of state law." *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). And even if the Elections Clause places some outer bounds on state courts' construction of state constitutions, the Applicants here provide no sound basis to question the Pennsylvania Supreme Court's straightforward interpretation of the Pennsylvania Constitution. Finally, although Applicants were not required to demonstrate Article III standing below, there is some question whether any Applicant has standing to challenge the Pennsylvania Supreme Court's ruling in this Court.

The Applicants are therefore not entitled to an emergency stay. But because the standing and merits questions presented here are implicated in a number of cases pending in the lower courts, merely denying the stay in this case would not provide the certainty that is critical as the election approaches. Rather than permit uncertainty concerning possible federal constraints on

[1] Pennsylvania law allows for both "mail-in" and "absentee" voting. See 25 Pa. Cons. Stat. § 3150.11 (mail-in), § 3146.1 (absentee). Because the decision below and Applicants' challenges apply equally to both categories of voting, this response uses "mail-in" to refer to both categories throughout.

state-court review of election laws under state law—and the validity of Pennsylvania's current mail-in ballot rules, in particular—to persist, this Court should treat the stay applications as petitions for writs of certiorari; grant certiorari on the questions presented (as well as the existence of Article III standing, should the Court conclude that Applicants may lack standing); treat the stay papers as merits briefing; and issue a summary decision as soon as is practicable to allow the citizens of Pennsylvania to know the rules that will govern their balloting well in advance of Election Day.

STATEMENT

This case arises from a petition for review filed in Pennsylvania Commonwealth Court on behalf of the Pennsylvania Democratic Party, Democratic elected officials, and Democratic candidates ("Petitioners") seeking to prevent widespread disenfranchisement of Pennsylvania voters during the 2020 Election. As Petitioners detailed below, Pennsylvania election boards saw "1.8 million requests for mail-in ballots" during the June 2020 primary, "rather than the expected 80,000-100,000, due in large part to the COVID-19 pandemic." Appendix 22, 20A54 (hereinafter, "App."). That "crush of applications created massive disparities in the distribution and return of mail-in ballots." *Ibid.* Some election officials were able to process requests, but "other boards, especially those in areas hard-hit by the pandemic, were unable to provide electors with ballots in time for the electors to return their ballot in accord with the statutory deadline." *Ibid.* The conditions that accompanied the primary have not abated. Cases of COVID-19 are rising throughout the country, afflicting millions of people and causing hundreds of thousands of deaths. Pennsylvania is one of the states experiencing this increase in the renewed spread of the virus. See Gretchen McKay, *COVID-19 Update: Pa. reports 2,251 new cases, 37 more deaths over past 2*

days, Pittsburgh Post-Gazette (Oct. 4, 2020).[2] It is thus no surprise that millions of voters have sought mail-in ballots for the general election.

Concerned that the problems attending the primary would repeat themselves during the general election, Petitioners sought declaratory and injunctive relief on several state-law theories. Among them, Petitioners raised an as-applied state constitutional challenge to Pennsylvania's statutory scheme governing the acceptance of mail-in ballots. Under that scheme, voters may submit an application for a mail-in ballot up until seven days before the election—here, October 27, 2020. See 25 Pa. Cons. Stat. § 3150.12a(a). If the county board determines that the voter meets the requirements for a mail-in ballot, the board must mail or deliver the ballot within two days. See 25 Pa. Cons. Stat. §§ 3146.2a(a.3)(3), 3150.15. And critically, under the language of the law as adopted in October 2019, all ballots mailed by voters to a county election board must be received by the board by 8 p.m. on Election Day, or else they do not count. See 25 Pa. Cons. Stat. § 3150.16(c). Petitioners argued that, in light of the continuing public health emergency and the Commonwealth's recent experience in the primary, this strict ballot-receipt deadline would result in extensive voter disenfranchisement, in violation of the Free and Equal Elections Clause of the Pennsylvania Constitution. Petitioners thus requested that the court grant an injunction ordering that ballots mailed by Election Day and received within one week of Election Day be counted—the same rule that Pennsylvania applies to military and overseas ballots. See App. 26.

After initial filings before the lower court, the Secretary of the Commonwealth filed an application with the Pennsylvania Supreme Court, requesting that it exercise extraordinary jurisdiction over the Petition. App. 8. The Secretary had previously opposed any extension of the

[2] https://www.post-gazette.com/news/health/2020/10/04/COVID-19-pittsburgh-pennsylvania-allegheny-county-data-cases-deaths-3/stories/202010040169.

ballot-receipt deadline, but she reassessed her position after receiving a letter from the General Counsel of the U.S. Postal Service ("USPS"). See App. 27. That letter warned that "certain deadlines for requesting and casting mail-in ballots" in Pennsylvania were "incongruous with the Postal Service's delivery standards." USPS Letter 1.[3] Of specific concern was Pennsylvania's November 3 deadline by which a ballot must be *received* by the relevant county election board, which is only one week after the deadline for the voter to request a mail-in ballot from the board. See *id.* at 2. That compressed schedule presented a problem because "most domestic First-Class Mail is delivered 2-5 days after it is received by the Postal Service, and most domestic Marketing Mail is delivered 3-10 days after it is received." *Id.* at 1. In fact, the USPS General Counsel cautioned that, "[t]o allow enough time for ballots to be returned to election officials, domestic voters should generally mail their completed ballots at least one week before the state's due date." *Id.* at 2. But under Pennsylvania law, many voters would not even receive their ballot at least a week before November 3, thus presenting a "significant risk" that such voters would not be able to "mail the completed ballot back to election officials in time for it to arrive by the state's return deadline." *Ibid.*

In light of that information, the Secretary determined that a modest extension of the ballot-receipt deadline for the 2020 general election was necessary to comport with the Pennsylvania Constitution. See App. 28. Rejecting Petitioners' argument for a seven-day allowance period, she concluded that a three-day extension would suffice to address the expected delays without disrupting election administration. See *ibid.* Moreover, the Secretary proposed that the court ensure that all votes are cast by Election Day by invalidating any ballot that arrives after the three-

[3] See Letter from Thomas J. Marshall, General Counsel and Exec. Vice President, U.S. Postal Service to Hon. Kathy Boockvar, Sec. of the Commonwealth of Pennsylvania (July 29, 2020) ("USPS Letter").

day period, any ballot that is postmarked after Election Day, and any other ballot that, by a preponderance of the evidence, is shown to have been cast or mailed too late. See App. 28 n.20.

With the election fast approaching, the Pennsylvania Supreme Court accepted extraordinary jurisdiction and, after further briefing, decided the state law matters at the heart of the case. The court's decision was a mixed result for each side. On the one hand, the court rejected Petitioners' requests to require local elections boards to provide an opportunity to cure incorrectly completed ballots and to enjoin boards from invalidating "naked ballots"—that is, ballots that fail to use the provided secrecy envelope. See App. 39-54. It also rejected Petitioners' request for a seven-day extension of the ballot-receipt deadline. See App. 38. On the other hand, the court granted Petitioners' requests for declaratory relief confirming that state elections boards had authority to use temporary drop-boxes to collect mail-in ballots and that the state's statutory poll-watcher residency requirement was consistent with the U.S. and Pennsylvania Constitutions. See App. 12-21, 54-63. And, at issue here, the court concluded that the ballot-receipt deadline conflicted with the Pennsylvania Constitution under the circumstances of this particular election, and it remedied that violation by accepting the Secretary's "informed recommendation" concerning the ballot-receipt deadline and postmark rules for the 2020 election. The court did so over objections from the State Legislators and the RPP, which had intervened under state law. App. 38.

The court's order rested on the Pennsylvania Constitution's Free and Equal Elections Clause. Pa. Const. art. I, § 5. There was no disagreement that the state statute unambiguously required that all ballots be received by a county board by 8 p.m. on Election Day. See App. 34 (citing 25 Pa. Cons. Stat. § 3150.16(c)). Nor was there anything "constitutionally infirm" about such a deadline as a general matter. *Ibid.* But, the court concluded, applying "the statutory

language to the facts of the current unprecedented situation [would] result[] in an as-applied infringement of electors' right to vote." App. 34-35.

As the court explained, the Free and Equal Elections Clause protects "a voter's right to equal participation in the electoral process." App. 35 (quoting *League of Women Voters* v. *Commonwealth*, 178 A.3d 737, 804 (Pa. 2018)). In light of that broad protection, Pennsylvania courts had previously recognized their authority to issue necessary orders when a "natural disaster" interferes with an election. App. 36 (quoting *In re General Election-1985*, 531 A.2d 836, 839 (Pa. Commw. Ct. 1987)). The court had "no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster." *Ibid.* The court pointed to the struggle of county election boards during the primary—a problem that was likely to worsen as "numbers of mail-in ballot requests" rise dramatically "during the upcoming highly-contested Presidential Election." *Ibid*; see also App. 37 (noting the Secretary's estimate of three million mail-in ballot requests for the general election, in contrast to 1.5 million mail-in ballots cast in the primary). And it pointed as well to the "USPS's current delivery standards," as explained by the USPS General Counsel. App. 37. In short, the court saw that the compressed schedule for receiving and returning ballots would "unquestionably fail under the strain of COVID-19 and the 2020 Presidential Election, resulting in the disenfranchisement of voters." *Ibid.* As a result, the court had "broad authority to craft meaningful remedies" for the constitutional violation under Pennsylvania Supreme Court precedent, see *ibid.* (citation omitted)—and it did precisely that in adopting the Secretary's recommendation.

Justice Donohue filed a partial dissent, joined in relevant part by Chief Justice Saylor and Justice Mundy.[4] She agreed with the majority that, "[g]iven the deadlines set for the request of and subsequent return of ballots, considered in light of the pandemic and current lagging USPS service standards," there was a "strong likelihood that voters who wait until the last day to apply for a mail-in or absentee ballot will be disenfranchised." App. 84. She likewise agreed that, in light of those circumstances, the deadlines in Pennsylvania law "constitute[d] an interference with the free exercise of the right to vote as guaranteed by [the] Free and Equal Elections Clause." *Ibid.* And she accepted, as Pennsylvania precedent provides, that the court had "wide latitude to craft an appropriate remedy" upon finding such constitutional infirmity. App. 86 (citation omitted). She departed from the majority only in that she would have issued a decision on these matters in a separately pending case, and she would have chosen a different remedy than the majority—one that pushed the deadline for a voter to *request* a ballot earlier, rather than extend the deadline for receipt of the ballot from the voter. See App. 90.

The Pennsylvania Supreme Court denied a stay pending the disposition of a petition for certiorari. The pending applications in this Court followed.

ARGUMENT

This Court may construe applications for a stay as petitions for certiorari and resolve them summarily—a course that is particularly appropriate when an election is fast approaching. See, *e.g.*, *Purcell* v. *Gonzalez*, 549 U.S. 1, 2 (2006). That is the circumstance here. The 2020 general election is less than a month away, and the issues presented here call out for immediate and definitive resolution to provide States and voters with certainty about the rules that will govern

[4] In addition, Justice Wecht filed a concurrence and Chief Justice Saylor filed an opinion concurring in part and dissenting in part.

them this fall, during this pandemic and at a time when COVID-19 cases are rising in Pennsylvania and around the country. If the Court agrees and reaches the merits, it should affirm the decision of the Pennsylvania Supreme Court for the reasons explained below.

I. This Court should grant certiorari and summarily decide this case.

The Pennsylvania Democratic Party Respondents respectfully submit that this Court should grant certiorari and summarily resolve this case in order to provide certainty concerning legal questions that have assumed critical importance in light of the extraordinary circumstances attending the upcoming election. Pennsylvania is not the only State to alter its mail-in ballot rules in view of the unique confluence of the pandemic, unprecedented demand for mail-in ballots, and postal delays. The questions presented here are therefore of overwhelming importance for States and voters across the country. This Court should treat the applications as petitions for certiorari; grant certiorari; treat the briefing on the applications as briefing on the merits; and issue a summary ruling on the questions presented as soon as is practicable to ensure that States and voters will have needed certainty well in advance of Election Day.

A. This Court must definitively resolve the questions presented in this case in order to provide certainty both with respect to the balloting rules governing in Pennsylvania and, should the Court reach the merits, with respect to broader legal questions that are implicated in both this case and in other cases currently proceeding through state courts. Across the country, litigants from both parties are asking state courts to interpret or invalidate state election-law provisions on grounds similar to those asserted here. See, *e.g.*, 20A54 Emergency Application for Stay 34-36 & nn.6-7 (hereinafter, "RPP Stay"). The question whether the Elections Clause curtails state courts' authority to grant such relief is therefore likely to be recurring and, in light of the approaching election and the number of pending cases, of overwhelming importance. Moreover, as the Republican Party Applicants explain, the more specific questions presented here—whether courts

may extend Election Day received-by deadlines and how election officials should treat non-postmarked ballots received after Election Day—are equally important and recurring, as many pending suits involve both federal- and state-law questions related to the treatment of such ballots. *Id.* at 19, 36 n.7 (citing cases).

Unless these questions are definitively resolved now, uncertainty about the legal rules governing election regulation, and about what parties will have standing to challenge or defend them, could persist up to and after Election Day. Merely deciding whether the Applicants are entitled to the stays they seek would not provide the necessary definitive resolution. Denying the stay (or construing the applications as petitions for certiorari and denying certiorari) would not provide an opportunity for definitive resolution or even necessarily reveal the Court's ultimate views as to the standing and merits questions, even in this very case. A stay denial would permit the Applicants to again seek stay relief from this Court closer to Election Day—or, even more disturbingly, to challenge Pennsylvania's election results after Election Day on the ground that the results are allegedly tainted by mail-in ballots that should not have been counted under (what Applicants contend are) the correct legal rules. Conversely, granting the stay would signal merely that a majority of the Court believes there is a "fair prospect" of certiorari and reversal—without facilitating a definitive resolution of the questions presented. Moreover, any certiorari petitions would not be due until well after Election Day, but, by that time, the Pennsylvania Supreme Court's decision will have expired by its own terms (as it governs only the 2020 election) and the case will have become moot. Thus, while granting the stay would effectively determine the mail-in ballot rule governing the 2020 election in Pennsylvania, it would not provide or facilitate the provision of definitive guidance concerning the important and recurring legal questions at issue.

B. It is also critical that this Court issue a definitive ruling as soon as possible to provide Pennsylvania's citizens and officials with certainty concerning the rules that will govern Pennsylvania's mail-in ballot system during the upcoming election. The Pennsylvania Supreme Court extended the deadline for receipt of mail-in ballots from 8 p.m. on Election Day to 5 p.m. three days after Election Day. As of the date of this filing, Pennsylvania's official website guidance to voters informs them, in accordance with the Pennsylvania Supreme Court's decision, that mail-in ballots will be counted if they are "postmarked by 8 p.m. on Election Day and received by [the relevant] county board of election *by 5 p.m. the Friday after Election Day*."[5] (Emphasis added). Millions of voters who are currently applying for, and considering whether to apply for, mail-in ballots are doubtless consulting the State's official guidance concerning voting. They are being told that their ballots may be received by three days after Election Day. Many voters may rely on that guidance in deciding when to request a mail-in ballot and in planning how and when they will mail in their votes—and with assurances that their ballots may be received by three days after Election Day, they may well plan to request and send in their ballots close to Election Day, particularly if, due to COVID-related delays in the postal system, they do not receive their ballots until a couple of days before November 3.

If this Court were to stay or reverse the Pennsylvania Supreme Court's decision, however, the likely effect would be to reinstate the statutory deadline for receipt of mail-in ballots to 8 p.m. on Election Day, albeit only as to federal elections (*i.e.*, Pennsylvania would have to count the votes for state and local elections on ballots received between November 4 and 6, but disregard the votes on those same ballots for federal offices).[6] It is imperative that the deadline for receipt

[5] https://www.pa.gov/guides/voting-and-elections/#VotingbyMailBallot.

[6] For state elections, ballots received after November 3 and before November 6 could be counted.

of mail-in ballots be known, and free of doubt, well before Election Day. State officials must have enough time (to the extent possible) to develop systems ensuring that, as to ballots that arrive after Election Day but before 5 p.m. on November 6, only votes for *state* elections, not *federal* elections, may count in the final tally. They must also have time to inform voters of the reinstated earlier deadline for federal elections, and voters must have enough time to apply for and receive mail-in ballots early enough to accommodate the earlier deadline. Otherwise, many thousands of voters who have relied on the current guidance from state election officials may be disenfranchised through no fault of their own.

C. The course of action that will best foster both certainty and expedition would be to construe the applications as petitions for certiorari; grant certiorari with respect to the questions presented in the application (as well as the additional question whether the Applicants have Article III standing, if the Court finds a substantial question); construe the stay briefing as briefing on the merits; and issue a summary ruling on the questions presented. Should the Court conclude that additional briefing on any topic would be helpful, it could order supplemental briefing as necessary, on a schedule that would enable the Court to dispose of the case sufficiently before Election Day to allow the county boards, and Pennsylvania voters, time to account for any further change in the law.

That course would not prejudice any party. The Republican Party Applicants have suggested that this Court could construe their stay application as a petition for certiorari. RPP Stay 3 n.1. The Pennsylvania Democratic Party Respondents agree that course is appropriate. Additionally construing the stay briefing as merits briefing will not unduly limit the parties' opportunity for briefing, as each side will have had the benefit of approximately 80 pages of briefing. Moreover, that course is the most expeditious one; ordering the parties to submit new

sets of briefs would simply delay the Court's consideration and, given the expedited briefing schedule that would be necessary, the resulting briefs would likely be substantially similar to the stay briefing. To the extent the Court instead concludes further briefing is necessary, it could order supplemental briefing on particular topics. That course would best serve the Court's need for complete vetting of all issues, while fostering expedition and focusing the parties' attention on any issues the Court determines have not been adequately addressed in the stay briefing.

Finally, this Court may wish to add a question presented concerning Applicants' Article III standing, to the extent the Court concludes there is a substantial question whether at least one Applicant has standing to invoke this Court's jurisdiction on these questions. That question is also important and recurring, as multiple courts have addressed whether various intervenors have standing to defend state election laws when state election officials agree to comply with injunctions. See, *e.g.*, *Democratic Nat'l Comm.* v. *Bostelmann*, No. 20-2835, 2020 WL 5796311 (7th Cir. Sept. 29, 2020). "To appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing." *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Here, there is no question that the individual State Legislator Applicants lack standing. They have no legal authority "to represent the State's interests" in defending the validity of Pennsylvania statute, *ibid.*; 71 Pa. Cons. Stat. § 732-204(c) (Attorney General has sole litigation authority); and they have no standing "to assert the institutional interests of a legislature," *Bethune-Hill*, 139 S. Ct. at 1953-1954; see also *Corman* v. *Torres*, 287 F. Supp. 3d 558, 568-569 (M.D. Pa. 2018), *appeal dismissed on other grounds*, 751 F. App'x 157 (3d Cir. 2018).[7] There may also be a significant question as to RPP's standing. Although RPP was not

[7] In fact, the Pennsylvania Supreme Court explicitly granted the State Legislators intervention below solely to represent the Republican Senate Caucus—not the legislature as a whole. See App. 9.

required to demonstrate Article III standing in order to intervene in state court, RPP's claimed injuries—a generalized interest in the validity of existing Pennsylvania election law and the integrity of the election; and a purported need to expend resources in order to educate its voters about changes in the law and galvanize participation—may be insufficient to demonstrate standing here. See, *e.g.*, Mot. to Intervene 5, 13, 15; *Hollingsworth* v. *Perry*, 570 U.S. 693, 705 (2013) (intervenors' generalized interest in defending state law insufficient for standing); *Republican Nat'l Comm.* v. *Common Cause Rhode Island*, No. 20A28, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020) (no "cognizable interest" despite assertion of expenditure of resources); *CASA de Maryland, Inc.* v. *Trump*, 971 F.3d 220, 237 (4th Cir. 2020); but cf. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 379 (1982) (organization may have standing to challenge action that forces expenditures in a manner that threatens the organization's functioning). To the extent that the Court believes there is a substantial question concerning whether any Applicant has standing, it would be appropriate to add standing as a question presented.

II. Pennsylvania law comports with Congress's selection of a nationwide federal Election Day.

Applicants' principal claim on the merits is that the remedy adopted by the Pennsylvania Supreme Court is preempted by federal law establishing a nationwide federal Election Day. That claim is meritless.

A. Under the Constitution, States are vested with the primary "responsibility for the mechanics" of federal elections. *Foster* v. *Love*, 522 U.S. 67, 69 (1997). They are "given the initial task" of prescribing the time, place, and manner of such elections, *Storer* v. *Brown*, 415 U.S. 724, 729-730 (1974)—an authority that empowers States to "provide a complete code for congressional elections," including as to "protection of voters, prevention of fraud and corrupt practices, [and] counting of votes," *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932). Congress may also

play a role in establishing the rules for federal elections; it has the power to "preempt state legislative choices" in the arena. *Foster*, 522 U.S. at 69; see *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 832-833 (1995). Accordingly, state election regulations must give way to any conflicting regulation that Congress has enacted, though only "so far as the conflict extends." *Ex parte Siebold*, 100 U.S. 371, 384 (1879).

The asserted conflict here concerns a trio of federal statutes that establish a nationwide federal Election Day. Under 2 U.S.C. 7, the "day for the election" of Representatives and Delegates to Congress is the Tuesday after the first Monday in November, every even numbered year. Under 2 U.S.C. 1, Senators "shall be elected" on the same day, whenever an opening is set to occur. And under 3 U.S.C. 1, the "electors of President and Vice President shall be appointed" on the same day, every fourth year. Those provisions collectively "mandate[] holding all elections for Congress and the Presidency on a single day throughout the Union." *Foster*, 522 U.S. at 70. In 2020, that day is November 3.

Here, the Pennsylvania Supreme Court crafted a remedy that not only aligned state law with the state constitution, but heeded "the federal designation of a uniform Election Day." App. 32. The court expressly required that "voters utilizing the USPS must cast their ballots prior to 8:00 p.m. on Election Day, like all voters." App. 38 n.26. That requirement assures that the "election"—the "act of choosing a person to fill an office"—will occur by the close of Election Day. *Foster*, 522 U.S. at 71 (quoting N. Webster, An American Dictionary of the English Language 433 (C. Goodrich & N. Porter eds. 1869)) (internal quotation marks omitted).

B. Applicants' arguments to the contrary cannot withstand scrutiny.

1. The Court can quickly dispense with the apparent suggestion by the State Legislators that all votes must not only be *cast* by Election Day, but also *counted* by Election Day.

See 20A53 Emergency Application for Stay 15 (hereinafter, "Legislators Stay"). The ordinary American voter would be shocked to learn that when she validly casts her ballot on Election Day, her vote is only as good as the ability of state election officials to tally it by midnight. Federal law does not impose such an absurd system. That the "day for the election" is November 3, 2 U.S.C. 7, in no way prohibits States from counting ballots until all valid votes have been tallied.

Indeed, other federal statutory provisions expressly contemplate that the counting of votes may continue past Election Day. The Electoral Count Act, for example, expressly contemplates that States may resolve "any controversy or contest" up to six days before the meeting of presidential electors, 3 U.S.C. 5, or even afterward, until December 14, almost six weeks after Election Day, see 3 U.S.C. 7. Accord 3 U.S.C. 6 (distinguishing the "appointment of the electors," which occurs on Election Day, see 3 U.S.C. 1, from "the final ascertainment," which lacks the same time limit).

Any doubt is conclusively resolved by historical practice and a nationwide consensus in favor of counting votes after Election Day—indeed, in favor of counting votes *received* after Election Day as long as the ballots were mailed by Election Day. States have permitted absentee balloting for "[m]ore than a century." *Voting Integrity Project, Inc.* v. *Bomer*, 199 F.3d 773, 776 (5th Cir. 2000). That includes voting by overseas members of the military and U.S. citizens abroad, whose validly cast ballots have routinely been counted even if they arrive after Election Day. Today, at least 18 States and the District of Columbia permit mailed ballots to arrive after Election Day,[8] and the majority of States (including Pennsylvania) make the same allowance for

[8] See Alaska Stat. § 15.20.081; Cal. Elec. Code § 3020; D.C. Code § 1-1001.05; 10 Ill. Comp. Stat. 5/19-8, 10 Ill. Comp. Stat. 5/18A-15; Iowa Code Ann. § 53.17; Kan. Stat. Ann. 25-1132; Md. Code Ann., Elec. Law, § 9-505; Miss. Code Ann. § 23-15-637; Nev. Rev. Stat. § 293.317; N.J. Stat. Ann. § 19:63-22; N.Y. Elec. Law § 8-412; N.C. Gen. Stat. § 163A-1310; N.D. Cent. Code Ann. § 16.1-07-09; Ohio Rev. Code Ann. § 3509.05; Tex. Elec. Code Ann. § 86.007; Utah Code Ann. § 20A-3a-204; Va. Code Ann. § 24.2-709; Wash. Rev. Code Ann. § 29A.40.091; W. Va.

servicemembers and other U.S. citizens who are abroad.[9] See notes 12, 15, *infra*. Accepting the State Legislators' argument would upend those laws less than a month before Election Day.[10]

2. Given that it is unquestionably permissible for ballots cast by Election Day to arrive after Election Day, the only remaining question is whether Pennsylvania uses a permissible rule of decision to determine whether such late-arriving ballots were validly *cast* by Election Day. That is a factual question that Congress has left to the States. Here, when the Pennsylvania Supreme Court extended the received-by deadline to November 6, it also adopted a method for ensuring that ballots were properly cast by Election Day: a rebuttable presumption that ballots with no postmark or an illegible postmark were timely cast if they are received by 5 p.m. on November 6.

RPP argues that Pennsylvania's rebuttable presumption is preempted because it "threatens to allow" impermissible, late voting. RPP Stay 21. But RPP does not dispute that federal law permits ballots cast by Election Day to be received and counted *after* Election Day. *Ibid.* In light of that fact, States counting the ballots must have *some* method of determining, as a factual matter, whether a ballot was properly cast by Election Day. Federal law does not address what methods States may or may not use. Indeed, conspicuously absent from RPP's argument is a connection between its view of federal law and the text that Congress enacted. The pertinent statutes set the day for holding federal "election[s]." 2 U.S.C. 1, 7; see 3 U.S.C. 1. They say nothing about the procedures that States may use to determine whether a mail-in ballot was validly cast by Election

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Code § 3-3-5; see also Nat'l Conference of State Legislatures, *VOPP: Table 11: Receipt and Postmark Deadlines for Absentee Ballots* (Sept. 29, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx/.

[9] See Federal Voting Assistance Program, *Military Voter*, https://www.fvap.gov/military-voter.

[10] If Congress believed that the acceptance of mail-in ballots received after Election Day violated federal law, it could have said so as State laws to that effect proliferated across the country. Yet Congress has done the opposite: It has expressly authorized States to "adopt[] less restrictive voting practices" for absentee voting than Congress has provided, 52 U.S.C. 10502(g), and it has broadly protected the rights of absent uniformed servicemembers and overseas voters to have their voices heard in our elections, see 52 U.S.C. 20301 *et seq.*

Day. Congress certainly could regulate such procedures. See *Foster*, 522 U.S. at 71 n.2; *Smiley*, 285 U.S. at 366. Indeed, it has partially done so in the context of absent uniformed services and overseas voters. See 52 U.S.C. 20303(f)(1) (prohibiting States from refusing to accept a ballot from such voters solely on the basis of notarization requirements). But it has said nothing whatsoever about the general procedures that States may use to determine whether a mail-in ballot was cast by Election Day. It has instead left that question to the States—just as it has many other details of election procedure. See *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917).

That conclusion is reinforced by the fact that States have long employed a variety of methods of making the necessary factual determination. Many States that permit late-arriving ballots do not require an Election Day postmark as the sole indicator of timeliness. Some have enacted or adopted a rebuttable presumption just like Pennsylvania's.[11] Others use alternative procedures, such as examination of a voter's declaration or certification.[12] Others leave room for any alternative source of proof that the ballot was cast by Election Day.[13] All of these methods carry some risk of factual error in a small number of cases, *i.e.*, an erroneous conclusion that a late ballot was in fact timely cast or that a timely cast ballot should not be counted. That risk of error is inherent in any factual determination; perfect certainty and perfect accuracy are *never* attainable. Yet Congress has allowed these various methods to proliferate, with no suggestion that such factual

[11] See Nev. Rev. Stat. AB 4, § 20(2) ("If a mail ballot is received by mail not later than 5 p.m. on the third day following the election and the date of the postmark cannot be determined, the mail ballot shall be deemed to have been postmarked on or before the day of the election."); N.J. Stat. Ann. § 19:63-31(m) (adopting a similar standard as long as the ballot arrives within two days of Election Day); *LaRose* v. *Simon*, 62-CV-20-3149, Minn. 2d Judicial Cir., Consent Decree, VI.D (July 17, 2020) (adopting a presumption that non-postmarked ballots arriving within one week of Election Day were mailed on or before Election Day unless a preponderance of the evidence demonstrates otherwise).

[12] See Cal. Elec. Code. § 3011, 3020(b)(2); 10 Ill. Comp. Stat. 5/19-8(c). In fact, Pennsylvania counts overseas military ballots that arrive within seven days of Election Day even if they have a "late postmark" as long as "the voter has declared under penalty of perjury that the ballot was timely submitted." 25 Pa. Cons. Stat. § 3511.

[13] See D.C. Code § 1-1001.05(a)(10A).

inquiries to determine whether a ballot was cast by Election Day are somehow in conflict with federal law's requirement that ballots be cast by Election Day. Cf. *Wos* v. *E.M.A. ex rel. Johnson*, 568 U.S. 627, 643 (2013) (Medicaid Act does not preempt methods of making factual determinations relevant to application of federal law that are likely to lead to "reasonable results in the mine run of cases").

There can be no question that Pennsylvania's rebuttable presumption is a reasonable way to determine whether a ballot was properly cast by Election Day. Pennsylvania has a clear requirement that "voters utilizing the USPS must cast their ballots" by Election Day. App. 38 n.26. To enforce that rule, the Commonwealth does not permit any late-arriving ballot to count unless it is received within three days of Election Day. App. 38. That requirement is substantial, as it was interposed in response to a warning issued by the USPS General Counsel that, "[t]o allow enough time for ballots to be returned to election officials, domestic voters should generally mail their completed ballots at least *one week* before the state's due date." USPS Letter 2 (emphasis added); see App. 37. A voter who complies with that guidance will cast her vote (that is, mail her ballot) days *before* Election Day. And that is not all. Even a ballot that arrives within three days of Election Day will not count if it is postmarked after Election Day or if (lacking a legible postmark) a preponderance of the evidence demonstrates that it was mailed after Election Day. App. 38. In other words, for a Pennsylvanian to cast a late vote and still have his vote counted, he would have to (i) violate clear election law requiring him to mail his ballot by Election Day; (ii) send his ballot without leaving a postmark (something not within his control) or other proof of late mailing; (iii) manage to get his ballot to election officials within one or two days despite the USPS General Counsel's warning that voters should leave one week for delivery; and (iv) avoid an adverse finding on preponderance-of-the-evidence review. Indeed, there would be no reason to

even try to cheat the system considering the common expectation that every ballot will have a postmark or other proof of mailing. RPP proffers no evidence whatsoever that this chain of contingencies could ever occur, let alone in more than a negligible number of cases. Pennsylvania's rebuttable presumption is calibrated to reasonably determine whether a vote was timely cast. Applicants' assertion that the presumption violates federal law is therefore meritless.

Moreover, it is important to keep in mind that accepting Applicants' arguments and invalidating the presumption would disenfranchise voters who rely on Pennsylvania's promise that votes received after Election Day will be counted, and whose ballots are not legibly postmarked through no fault of their own. Although the USPS generally assures that all ballots are postmarked, "there can be breakdowns or exceptions to [the postmark] process which would prevent a ballot from receiving a postmark."[14] Pennsylvania's rebuttable presumption that such ballots were timely cast therefore avoids disenfranchising a potentially large number of voters—while operating under circumstances that make it exceedingly unlikely that untimely cast ballots will be mistakenly counted. If this Court holds that Pennsylvania's procedure violates federal law, Pennsylvania and the other States that rely on such presumptions would likely have to scramble to establish a new procedure in the month before Election Day if they wish to avoid disenfranchising voters whose timely cast ballots did not receive a postmark through no fault of their own. In the context of federal-law election challenges, this Court is careful not to change the rules of an election late in the game, for fear that such a change could "result in voter confusion." *Purcell*, 549 U.S. at 4-5. Yet that is precisely what RPP's argument would entail.

[14] Office of the Inspector General, U.S. Postal Service, *Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area*, Report No. 20-235-R20, at 7 (Jul. 7, 2020); see also Legislators Stay 2 n.1.

Finally, to the extent that Applicants would argue that even a *de minimis* number of errors in the ballot assessment process render the entire system invalid, Applicants are in effect arguing that federal law requires complete certainty that all ballots were cast by Election Day. Such a complete certainty requirement lacks any basis in the text of federal law, not to mention common sense. Because it is impossible to guarantee that a late-arriving ballot was cast by Election Day, a complete certainty requirement would effectively equate to a rule that ballots may not be received after Election Day—but that is contrary to longstanding practice and consensus. See pp. 16-17, *supra*. Accepting that position would invalidate state election laws across the country, including the myriad state laws that count ballots of overseas military voters received after Election Day without a postmark.[15] Invalidating such laws would not only depart from the longstanding consensus that States have leeway to craft and apply such rules. It would also risk disenfranchising innumerable voters who have relied on existing rules, including the many men and women who risk their lives for this country.[16] This Court should reject that extreme position.

III. There is no federal constitutional flaw in the Pennsylvania Supreme Court's interpretation of the Pennsylvania Constitution.

Applicants also press a claim that the Pennsylvania Supreme Court ran afoul of the U.S. Constitution's Elections Clause[17] when it interpreted its own state constitution to require a narrow

[15] See Ark. Code Ann. § 7-5-411(a)(1)(B)(ii); Cal. Elec. Code §§ 3117, 3020; Colo. Rev. Stat. Ann. § 31-10-102.8(3), (4); D.C. Code § 1-1061.10; Fla. Stat. Ann. § 101.6952(4); 10 Ill. Comp. Stat. 5/20-8(c); Mo. Ann. Stat. § 115.920(2); Nev. Rev. Stat. § 293.317(2); N.Y. Elec. Law § 10-114(1); Ohio Rev. Code Ann. § 3511.11(C); 25 Pa. Cons. Stat. § 3511(b); R.I. Gen. Laws § 17-20-16; S.C. Code Ann. § 7-15-700(B); Tex. Elec. Code Ann. §§ 86.007, 101.057; Utah Code Ann. § 20A-16-408(2).

[16] In the 2000 presidential election in Florida, for instance, the possibility that overseas military ballots that arrived after Election Day would be rejected if they lacked a postmark led to a public outcry, prompting the Attorney General of Florida to direct local election officials to count such ballots. *Florida Ordered to Count Votes Without Postmarks*, N.Y. Times (Nov. 20, 2000), https://www.nytimes.com/2000/11/20/politics/florida-ordered-to-count-votes-without-postmarks-200011209378764 2459.html.

[17] Applicants rely on the Elections Clause, art. I, § 4, cl. 1, and Electors Clause, art. II, § 1, cl. 2, without meaningfully differentiating the two. Because Applicants place principal reliance on the Elections Clause, and because both clauses give state legislatures the authority to determine, in the first instance, the "manner" in which a State will conduct a federal election, this response refers to the Article I Clause throughout.

extension of the state statute's ballot receipt deadline. That argument too is unfounded. The Pennsylvania Supreme Court's state-law analysis does not raise any federal question. The Applicants' arguments to the contrary would require either departing from unbroken precedent respecting state courts' purview over state-law issues or—in direct conflict with this Court's recent decisions—announcing a sweeping rule barring state constitutional rules regarding federal elections.

A. This Court should not set aside the Pennsylvania Supreme Court's interpretation of the Pennsylvania Constitution.

In the decision below, the Pennsylvania Supreme Court held that Section 3150.16(c)'s Election Day receipt deadline, as applied in the narrow and time-limited circumstances presented by this case, violated the Pennsylvania Constitution's Free and Equal Elections Clause. See App. 34-35. The Applicants disagree with the Pennsylvania Supreme Court's interpretation of the state constitution. In an effort to transform that disagreement into a federal question, RPP argues that the decision below represents such an extreme departure from the legislative scheme that it violates the Elections Clause. But this Court does not second-guess how state courts of last resort interpret their own law—certainly not where, as here, the decision represents an application of settled state-law principles.

1. In rendering its decision, the Pennsylvania Supreme Court relied on established Pennsylvania state-court precedent holding that the "Free and Equal Elections Clause * * * requires that * * * elections [must be] conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." App. 35 (citing *League of Women Voters*, 178 A.3d at 804). The court acknowledged that the legislature may enact "substantial regulation" to ensure "honest and fair" elections. *Ibid*. But it concluded that in the unique circumstances presented

here, the "unprecedented numbers and the near-certain delays that will occur in Boards processing the mail-in applications" meant that applying the typical election code timeline would "result[] in the disenfranchisement of voters," in violation of the Free and Equal Elections Clause. App. 37.

This Court should not second-guess the Pennsylvania Supreme Court's straightforward construction of the Commonwealth's constitution. Federalism takes it as "fundamental * * * that state courts be left free and unfettered by [this Court] in interpreting their state constitutions." *Florida* v. *Powell*, 559 U.S. 50, 56 (2010) (quoting *Minnesota* v. *Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)). As this Court has "repeatedly * * * held[,] * * * state courts are the ultimate expositors of state law." *Mullaney*, 421 U.S. at 691. That means that this Court is, "of course, bound to accept the interpretation of [state] law by the highest court of the State." *Hortonville Joint Sch. Dist. No. 1* v. *Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976). Whether an issue is "decided well or otherwise by the State court, [this Court] ha[s] no authority to inquire." *Murdock* v. *City of Memphis*, 87 U.S. 590, 638 (1874); see also *State of Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 567-568, 570 (1916) (deeming it "obvious that the decision below is conclusive on th[e] subject" of state power and concluding "a dismissal for want of jurisdiction" over that part of the case was proper "because there is no power to re-examine the state questions foreclosed by the decision below").

2. In an attempt to avoid that conclusion, Applicants argue that the decision below represents such an improper "distortion" of the state legislative scheme that it "presents a federal constitutional question" of whether the court usurped the legislature's role under the Elections Clause. RPP Stay 24-25. And they urge this Court to correct that supposed error by conducting an independent analysis of state law. See *id.* at 25. They invoke Chief Justice Rehnquist's concurring opinion in *Bush* v. *Gore*, 531 U.S. 98 (2000). But that concurring opinion cannot

displace the unbroken line of authority holding that this Court defers to a state court's interpretation of its own state constitution.

Even if the concurring opinion in *Bush* were controlling, it would not help Applicants. The opinion asserted that only "[a] *significant* departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Id.* at 113 (Rehnquist, C.J., concurring) (emphasis added); see also *id.* at 114 (expressing concern with a "judicial interpretation" that would "wholly change the statutorily provided" scheme); cf. *Mullaney*, 421 U.S. at 691 & n.11 (acknowledging that "in extreme circumstances" the Court may "re-examine[] a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue'" (citation omitted)). And it emphasized that any federal review of a state law holding would have to be "deferential" to the state court. *Bush*, 531 U.S. at 114 (Rehnquist, C.J., concurring).

Applicants cannot come close to establishing that the Pennsylvania Supreme Court engaged in a "significant departure" that would warrant reversal under the deferential review envisioned by Chief Justice Rehnquist's concurrence. RPP argues at great length that the Pennsylvania Supreme Court's remedy of extending the ballot-receipt deadline conflicts with the statutory text. See RPP Stay 25-27. But that misses the point. The Pennsylvania Supreme Court explained that it was not being "asked to interpret the statutory language." App. 34. Instead, the court concluded that the statutory deadline could not constitutionally be applied in this election in view of the record evidence. That evidence established that the combination of unprecedented demand for mail-in ballots and postal delays would cause a "mismatch" between the time it would take USPS to deliver mail and the election code's deadlines, "creat[ing] a risk that ballots requested near the deadline under state law will not be returned by mail in time to be counted." App. 27-28

(quoting USPS Letter 1). And the risk is not merely hypothetical: real-world evidence of the Commonwealth's experience during the primary elections showed that election "boards, especially * * * in areas hard-hit by the pandemic, were unable to provide electors with ballots in time for the electors to return their ballot in accord with the statutory deadline."[18] App. 22. Thus, although RPP criticizes the Pennsylvania Supreme Court's rationale as "vague," RPP Stay 28, the court relied on its established construction of the Free and Equal Elections Clause and uncontroverted evidence in the record. App. 34-39. That straightforward instance of judicial review for consistency with the state constitution is hardly a "significant departure" from ordinary state-law principles that would require setting aside the decision on "deferential" review. *Bush*, 531 U.S. at 113, 114 (Rehnquist, C.J., concurring).

RPP also contends that the Pennsylvania Supreme Court should have "adopt[ed] a remedy that would do the least violence to the General Assembly's chosen scheme" by moving the deadline for voters to request mail-in ballots earlier. RPP Stay 31. But the court chose to remedy the constitutional violation by extending the received-by deadline only after assuring itself that its chosen remedy would ensure the "least * * * variance with Pennsylvania's permanent election calendar," App. 39, and would best comport with the legislature's intent to provide an "equal opportunity for all eligible electors" to vote, App. 36. That RPP would prefer as a policy matter to make the ballot request deadline earlier does not mean that moving up the deadline would better effectuate legislative intent. Either way a statutory deadline would be changed and, contrary to

[18] RPP argues that the Pennsylvania Supreme Court erred by not deferring to recommended findings of fact by a special master in separate litigation. See RPP Stay 31-32. Those findings, however, were never adopted by the court in that separate litigation. RPP's insistence that this Court should give effect to those findings (again) ignores Pennsylvania law, which treats special masters' findings as advisory until adopted by a court. See *Appeal of 322 Blvd. Associates*, 600 A.2d 630, 633 (Pa. Commw. Ct. 1991). Because the court never adopted those findings, they "ha[d] no effect whatsoever." *Id.*

RPP's unsupported assertions, it makes sense to think that a modest extension of a deadline would result in less disruption of the legislatively set election plan, minimizing voter confusion and preventing local election officials from having to ramp up preset timelines.[19]

At bottom, RPP's argument layers state-law issue on top of state-law issue. Accepting RPP's arguments would require this Court to function as a nationwide state court of last resort, reviewing countless questions of state law decided by state courts in order to determine whether they reflect a significant departure from state-law principles. And this Court would have to do so on the eve of an election that is already putting an unprecedented strain on state election officials. This Court should, instead, respect long-settled and fundamental principles of federalism, and refuse to second-guess the state court's straightforward interpretation of its own law.

B. State constitutional limitations on the legislature's power generally or its authority to prescribe the manner of federal elections do not violate the U.S. Constitution.

Applicants also press a second—and far broader—argument for setting aside the decision below: in their view, the Elections Clause bars *any* substantive state constitutional limitations on legislation regarding elections, entirely disabling the state courts from performing any judicial review of whether state election laws comport with the substantive requirements of the state constitution. See Legislators Stay 24; RPP Stay 29-30. That argument cannot be reconciled with this Court's precedents. It also fails to take account of the legislative role in enacting the particular constitutional limitation at issue here.

[19] RPP also suggests that the state court's modest remedy conflicted with the statutory severability clause. RPP Stay 26. But even the partial dissent questioned both whether that severability clause would come into play at all and, if it did, whether it was enforceable, noting that state law does not give effect to "boilerplate non-severability provision[s] [that] 'set[] forth no standard for measuring non-severability.'" App. 90 n.4 (Donohue, J., concurring and dissenting) (quoting *Stilp* v. *Commonwealth*, 905 A.2d 918, 978 (Pa. 2006)). RPP skips over that inconvenient state law rule, inviting this Court to ignore Pennsylvania principles for interpreting severability clauses and to conduct a de novo review of Pennsylvania statutory law without any reference to how Pennsylvania courts would (and did) interpret that statute.

1. To begin, "[n]othing in th[e] [Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817-818 (2015); see *id.* at 841 (Roberts, C.J., dissenting) (explaining that when a state legislature "prescribes election regulations" it "may be required to do so within the ordinary lawmaking process," and that the Court had established in *Smiley*, *supra*, and *Hildebrant*, *supra*, that the Elections Clause does not "prevent a State from applying the usual rules of its legislative process—including a gubernatorial veto—to election regulations prescribed by the legislature," at least as long as the legislature is not "displaced" from the process); see also *Smiley*, 285 U.S. at 365 (the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws"). To the contrary, as the Court recognized just two Terms ago, "[p]rovisions in * * * state constitutions can provide standards and guidance for state courts to apply" when considering legislative action taken under the Elections Clause. *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2507 (2019).

The Pennsylvania General Assembly, like every other state legislature, enacts legislation against the backdrop of its constitution, and in particular, the well-settled principles that the constitution is the "supreme law of this Commonwealth to which all acts of the Legislature and of any governmental agency are subordinate," *Amidon* v. *Kane*, 279 A.2d 53, 55 (Pa. 1971), and that the state judiciary ordinarily interprets enacted statutes and assesses their consistency with the state constitution. Indeed, the General Assembly has conferred on the state courts jurisdiction to undertake those responsibilities. See, *e.g.*, 42 Pa. Cons. Stat. §§ 726, 3046. Thus, when the Pennsylvania General Assembly enacts election laws, it does so subject to both the state constitution's limitations on its powers and the judicial review provisions of that document.

The Pennsylvania Supreme Court's decision simply effectuated those basic principles. Rather than "usurp[ing] the role of the General Assembly," RPP Stay 33, the Pennsylvania Supreme Court applied established state constitutional principles and then endeavored to discern the remedy that the General Assembly would have wanted where, as here, an otherwise constitutional election law has a discrete unconstitutional application. That is, the remedy represents an attempt to *effectuate* legislative intent. See, *e.g.*, App. 39. If the General Assembly disagrees with the Pennsylvania Supreme Court's extension of the deadline, it is free to overturn that remedy, so long as whatever it puts into place complies with the state constitution. Like a governor's veto, see *Smiley*, 285 U.S. at 373, the as-applied invalidation here simply enforces a pre-existing limitation on the legislature's authority to make law, and it merely forecloses one way of regulating elections. See also *Arizona State Legislature*, 576 U.S. at 840 (Roberts, C.J., dissenting) (finding no constitutional flaw in referendum "veto" of legislation that "sen[t] *the Ohio Legislature* back to the drawing board to do the redistricting" (citing *Hildebrandt*, 241 U.S. at 569)). The remedy therefore does not "displace[]" the General Assembly, *id.* at 840, 841 (Roberts, C.J., dissenting), from its role in establishing "[t]he Times, Places and Manner of holding Elections," U.S. Const. art. I, § 4, cl. 1.

RPP argues that the Elections Clause, by contemplating a role for state legislatures in directing the manner of selecting presidential electors, prevents a state from vesting some responsibility for construing or reviewing election laws in an organ other than the state legislature. RPP Stay 29; but cf. *Arizona State Legislature*, 576 U.S. at 817-818. But even if the Elections Clause places *some* constraints on judicial review of election laws, RPP cites no authority for the extraordinary proposition that the Elections Clause forbids *all* judicial review of substantive state constitutional parameters. The only decision on which RPP relies—*Bush* v. *Palm Beach County*

Canvassing Board, 531 U.S. 70 (2000) (per curiam)—does not support RPP's argument. There, this Court stated that the Florida Supreme Court's assertion that state election laws were subject to a roving and strict state constitutional review for determination of whether they were "unreasonable or unnecessary" was potentially in tension with the Elections Clause's grant of authority to the state legislature. *Id*. at 77. But it does not follow that *any and all* judicial review would violate the Elections Clause. The Court in *Palm Beach* was evidently concerned that the Florida Supreme Court's assertion that it could alter Florida's election laws after Election Day if those laws "unreasonabl[y]" restricted the counting of votes might amount to a claim of sweeping authority to substitute the court's policy judgment for that of the legislature. That is a far cry from the restrained pre-election judicial review for constitutionality that state courts ordinarily perform, and that the Pennsylvania Supreme Court engaged in here. The Pennsylvania court made clear that the legislatively set deadlines were presumptively valid, entitled to judicial "respect," and not to be "alter[ed] lightly." App. 39. And it took pains to adopt the narrowest remedy possible for a discrete unconstitutional application in the unusual context of this year's election, opting to extend the receipt-by deadline only after concluding that alternative remedies would not effectuate the legislature's intent, and rejecting the petitioners' request for a seven-day extension of the statutory deadline. See App. 26-27, 38-39.

Accepting the Applicants' categorical suggestion would have staggering consequences. For one thing, Applicants' arguments would throw into doubt untold numbers of common state constitutional provisions that have long been applied to state election laws affecting federal elections. As this Court recognized in *Arizona State Legislature*, numerous statute constitutions regulate "[c]ore aspects of the electoral process." *Arizona State Legislature*, 576 U.S. at 823. Applicants' theory would threaten to nullify numerous state constitutional provisions regarding

"voting by 'ballot' or 'secret ballot,' voter registration, absentee voting, vote counting, and victory thresholds." *Id.* (footnotes omitted) (citing constitutions of Arizona, Arkansas, Hawaii, Louisiana, Mississippi, Montana, Oregon, North Carolina, North Dakota, Pennsylvania, Virginia, Washington, and West Virginia); see also *id.* at 848 (Roberts, C.J., dissenting) (distinguishing these provisions from ones that "set up an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process"). It would, as here, result in severe disparities between the application of laws to state elections, which are undoubtedly subject to state constitutional limits, and the application of those same laws to federal elections, which would be free from such constraints. For example, if Applicants' position prevailed here, it would create a class of ballots that would count in Pennsylvania's state and local races, but not the federal races listed on those same ballots. Imposing such a dual-track system would contravene the decision of the Pennsylvania legislature to have a general election code, which treats all voting and counting procedures the same way. Accepting Applicants' position would also disrupt the States' chosen form of government, by circumscribing state constitutional judicial review for an entire category of statutes—even though, as in Pennsylvania, all statutes have long been subject to review for consistency with the state constitution. The Framers could hardly have intended such a grave interference with state government when they conferred authority on state legislatures to set election rules.

2. In any event, even if the Elections Clause places limits on constitutional provisions imposing substantive constraints on the legislature's enactment of election laws, here the constitutional provision at issue—the Free and Equal Elections Clause—itself arises from the actions of the Pennsylvania General Assembly. In 1789, the Pennsylvania General Assembly passed resolutions requiring a state constitutional convention, which resulted in adoption of the

predecessor to the Free and Equal Elections Clause—the constitutional provision at issue here. See Act of Sept. 15, 1789; Act of Mar. 24, 1789; Pennsylvania Constitution of 1790, article IX, § V. Over the next two centuries, the General Assembly called for three additional conventions. See Act of Mar. 29, 1836; Act of Apr. 11, 1872; Act of Mar. 15, 1967, P.L. 2, No. 2 § 1. And, in two of the statutes it passed requiring a constitutional convention (including the most recent one), it forbade the convention from narrowing the constitution's declaration of rights, which included the Free and Equal Elections Clause. See Act of Apr. 11, 1872, § 4; Act of Mar. 15, 1967, P.L. 2, No. 2 § 7(a). In other words, enforcement of the Free and Equal Elections Clause does not "*supplant* the legislature altogether," but instead gives effect to constitutional provisions that exist as a direct result of the General Assembly's legislation. *Arizona State Legislature*, 576 U.S. at 841 (Roberts, C.J., dissenting); see also *id.* at 841-842 (explaining that "the state legislature need not be exclusive in congressional districting, but neither may it be excluded").[20] Whatever general limits the Elections Clause might place on state constitutions, it has no significance here, where the General Assembly played an integral role in establishing and protecting the constitutional provision at issue.

CONCLUSION

The Court should treat the stay applications as petitions for writs of certiorari; grant certiorari on the questions presented (as well as the existence of Article III standing, should the

[20] It is no answer to contend that the General Assembly must have made a determination that the received-by deadline was consistent with the Free and Equal Elections Clause in enacting 25 Pa. Cons. Stat. § 3150.16(c) or in not extending the deadline in Act 12. Those statutes were passed in 2019 and on March 27, 2020, respectively—*i.e.*, before the USPS General Counsel's Letter and the lived experience of the June primary made clear that the statutory deadline would result in disenfranchising thousands of voters. Cf. App. 27 (noting that Secretary of State had initially opposed extending the received-by deadline but "reassessed her position following receipt of the USPS General Counsel's Letter").

Court conclude that Applicants may lack standing); treat the stay papers as merits briefing; and summarily affirm.

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Respectfully submitted,

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