

No. 24A-408

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IN THE  
**Supreme Court of the United States**

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REPUBLICAN NATIONAL COMMITTEE AND  
REPUBLICAN PARTY OF PENNSYLVANIA,  
*Applicants,*

v.

FAITH GENSER AND FRANK MATIS,  
*Respondents.*

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ON APPLICATION FOR A STAY PENDING DISPOSITION OF A PETITION FOR A WRIT OF  
CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

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**RESPONSE IN OPPOSITION OF GENSER AND MATIS**

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court and Circuit Justice for the Third Circuit:

Respondents Faith Genser and Frank Matis<sup>1</sup> respectfully oppose the application for a stay pending certiorari filed by the Republican National Committee and the Republican Party of Pennsylvania.

## INTRODUCTION

On the eve of a major election, Applicants (collectively, “RNC” or “Applicants”), ask this Court to step in to reverse the Pennsylvania Supreme Court’s resolution of a question purely of state law over which this Court ordinarily would have no jurisdiction. *See, e.g., Murdock v. City of Memphis*, 37 U.S. (20 Wall.) 590, 626 (1875). And as federal grounds for this Court’s intervention, the RNC identifies supposed federal constitutional prerogatives that, in its own telling, belong *exclusively* to the Pennsylvania General Assembly (which is not a party here) and that Applicants have no standing to assert, *see, e.g., Raines v. Byrd*, 521 U.S. 811, 821 (1997), and waived in the proceedings below. Applicants argue that this Court urgently must step in because of the timing of the Pennsylvania Supreme Court’s decision, but fail to mention that it *was Applicants themselves* who sought the state court’s expedited review in the first place. Applicants claim that, in *Moore v. Harper*, 600 U.S. 1 (2023), this Court invited the kind of review sought here, even though what the Pennsylvania

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<sup>1</sup> Pursuant to Rule 29.6, Genser and Matis state that they are natural persons.



Supreme Court did here—engage in ordinary appellate review of a lower state-court decision involving a *prior* election—is exactly what this Court in *Moore* recognized as perfectly legitimate, *see id.* at 22. In Applicants’ telling, the Pennsylvania Supreme Court has disrupted election rules in Pennsylvania, but once again the opposite is true: It is Applicants who are now asking this Court to enjoin dozens of county boards of elections (that are not even parties in this case) and to fashion a new statewide provisional ballot segregation regime less than one week before Election Day.

In an effort to cast the decision below as essentially lawless, the RNC quotes selectively from the Pennsylvania Election Code, abandoning any attempt to present accurately or fairly the actual interpretive problem the Pennsylvania Supreme Court faced. The Pennsylvania Election Code states that “the county board of elections ... shall count the ballot if [it] confirms that the individual did not cast any other ballot, including an absentee ballot, in the election,” 25 P.S. § 3050(a.4)(5)(i), except that “[a] provisional ballot shall not be counted if ... the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections,” *id.* § 3050(a.4)(5)(ii)(F). Construing these provisions and other aspects of the Election Code, the Pennsylvania Supreme Court held that where a voter’s mail-ballot packet is defective such that it is set aside and never opened or counted (as Respondents’ were, because they were missing secrecy envelopes), the mailed ballot is legally void for the purposes of the statute and does not trigger § 3050(a.4)(5)(ii)(F). Therefore, and consistent with the General Assembly’s intentions and with the conclusion of a broad majority of state lower courts and county election officials, § 3050(a.4)(5)(i) requires that counties

“shall count” the voter’s provisional ballot. App.Apx. A at 36a<sup>2</sup>. Far from constituting a usurpation of the prerogative of the Pennsylvania General Assembly, the decision below represents purely a state court’s ordinary-course construction of state law using ordinary state methods of statutory interpretation.

In seeking emergency relief from this Court, Applicants also tellingly leave out the actual *status quo*: Since the Pennsylvania General Assembly extended the option to vote by mail to all eligible voters five years ago, most county boards of elections, and most Pennsylvania courts to consider the issue, have counted provisional ballots submitted by voters who had made a disqualifying mistake in attempting to complete their mail ballots. The Butler County Board of Elections (the “Board”), the real defendant below, was among the outliers that refused to count provisional ballots when the voters’ mail-ballot packets were missing secrecy envelopes. After the Board rejected provisional ballots cast by Respondents Faith Genser and Frank Matis in the April 2024 Democratic primary election, they challenged the Board’s decision in state court, and on September 5, the Commonwealth Court issued an unreported decision requiring the Board to count both provisional ballots. Applicants, advancing a divergent interpretation of state law, *asked* the Pennsylvania Supreme Court to take the case and decide it before the 2024 General Election. Last week the Pennsylvania Supreme Court did just that. That the RNC does not like the result is no reason for

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<sup>2</sup> References to “App.Apx.” refer to the Bates-stamped Appendix to the RNC’s October 28, 2024, Emergency Application for Stay.

this Court to intervene on an emergency basis and disrupt the *status quo* on the eve of the election.

Applicants have failed to meet this Court's stay standards, do not have standing, waived a dispositive argument below, and their arguments otherwise fail on the merits. The stay application, and any certiorari petition (if the Court considers the application as such) should be denied.

## STATEMENT OF THE CASE

### A. Statutory Background

Twenty-two years ago, the Pennsylvania General Assembly amended the Pennsylvania Election Code to establish provisional voting. *See* P.L. 1246, Act No. 150 of 2002, § 12, codified at 25 P.S. §§ 3050(a.4) *et seq.* It did so after Congress enacted the Help America Vote Act (“HAVA”), 52 U.S.C. §§ 20901 *et seq.*, which established a provisional-voting regime for federal elections. 52 U.S.C. § 21082(d); 33 Pa.B. 6119 (Dec. 13, 2003) (summarizing HAVA on provisional voting and noting that “Act 150 of 2002, establishes procedures for the implementation of provisional voting in Pennsylvania”).

Provisional ballots generally provide a backup or “last chance” option for voters when there is some issue preventing them from casting a regular ballot at the polling place on the day of the election. They are an important safeguard to ensure that all qualified voters who wish to do so may cast a ballot and have it counted. 25 P.S. § 3050(a.4). Any person who “claims” to be properly registered and eligible to vote may cast a provisional ballot. *See* 25 P.S. § 3050(a.4)(1); *accord* 52 U.S.C.

§ 21082(a).

A ballot is “provisional” when poll workers at the precinct are unable to determine the voter’s eligibility to vote at the polling place on Election Day, and so that assessment must be conducted after the fact by the board of elections. 25 P.S. § 3050(a.4)(4). In assessing a provisional ballot under the relevant provisions of the Pennsylvania Election Code, a board of elections must evaluate two things: (1) whether the voter is a qualified, registered elector in the election district; and (2) whether the voter already successfully voted in the election. *Id.* As the Supreme Court of Pennsylvania recognized, this process serves “the dual purpose of preventing a double vote while simultaneously protecting an elector’s right to have a vote counted.” App.Apx. A at 35a. The provisional voting process ensures that, for each voter, one ballot will be counted—not two ballots, and not zero ballots.

The Pennsylvania provisional ballot provisions ensure that each voter has one ballot counted by providing as follows:

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

25 P.S. § 3050(a.4)(5)(i) (emphasis added). For the past forty-one statewide elections, Pennsylvania law has ensured that provisional ballots are available to voters for a

variety of reasons, such as when the voter’s name is not in the pollbook and the voter believes she is registered to vote, or the voter is unable to present an acceptable proof of identification when voting in a polling location for the first time.

Most recently, when the General Assembly made mail-in voting available to all Pennsylvania electors with Act No. 77 of 2019, it reaffirmed that provisional voting also serves as a fail-safe for mail-ballot voters, by providing that a mail voter who has not voted her mail ballot “may vote by provisional ballot.” 25 P.S. § 3150.16(b)(2).

This fail-safe is important because Pennsylvania voters must complete a number of steps in order to successfully vote a mail ballot. Those who successfully apply for a mail ballot receive a mail-ballot packet that contains: (1) a ballot; (2) a “secrecy envelope” marked with the words “Official Election Ballot”; and (3) a pre-addressed outer return envelope that contains a voter declaration with spaces to sign and handwrite the date (the “declaration envelope”). 25 P.S. §§ 3146.6(a), 3150.16(a).<sup>3</sup> For a mail ballot to be counted, the voter must appropriately mark the ballot, insert it in the secrecy envelope, place the secrecy envelope inside the declaration envelope, sign and date the declaration on the outer envelope, securely seal it, and return the packet to the board of elections by 8:00 p.m. on Election Day. The Election Code specifies the deadline for delivering “a *completed* mail-in ballot”:

(c) Deadline.—

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<sup>3</sup> Identical procedures govern how voters apply for, complete, and return absentee and mail-in ballots. This brief uses the terms “mail-in” and “mail” ballots to encompass both absentee and mail-in ballots.

Except as provided under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot), a completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

25 P.S. § 3150.16(c).

At every election, thousands of voters make mistakes in completing their mail-ballot packets that prevent their ballot from being opened and counted. The most common disqualifying defects that lead boards of elections to reject a mail-ballot packet include: (a) no voter signature on the declaration envelope; (b) no date or an “incorrect” date on the declaration envelope; or (c) no secrecy envelope. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (“*Pa. Democratic Party*”). The voters in this case made the mistake of mailing in “naked” ballots, *i.e.*, omitting the secrecy envelope from their mail ballot packets. Under Pennsylvania law, their mail ballots were thus void. App.Apx. A at 27a-28a.

In the years since the passage of Act 77, the Secretary of the Commonwealth and most county boards of elections have understood the above provisions to require them to accept provisional ballots cast by eligible voters after learning that their mail-ballot submissions would be rejected and not counted.<sup>4</sup> However, a few counties,

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<sup>4</sup> *Cf.* Resp.Apx. B at 373a (Pa. Dep’t of State, Pennsylvania Provisional Voting Guidance, Version 2.1 (March 11, 2024) (“If a voter’s mail-in or absentee ballot was rejected for a reason unrelated to the voter’s qualifications, and the voter submitted a provisional ballot . . . the provisional ballot shall be counted if the county determines that the voter is eligible to vote”)).

including Butler County, determined that they would not count a voter's provisional ballot where the voter had attempted to vote by mail, but the voter's mail ballot was rejected for lack of a secrecy envelope.

## **B. Factual and Procedural Background**

It is undisputed that Respondents Faith Genser and Frank Matis are qualified Butler County electors who each attempted to vote by mail-in ballot in the April 23, 2024 primary election. Both forgot to include the required secrecy envelope in their mail-ballot packets. Shortly after receiving their flawed mail-ballot packets, the Board entered data into the Pennsylvania Department of State's statewide voter database (the "SURE system"), which generated an automated email notice to them:

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

Resp.Apx B at 381a (emphasis added).<sup>5</sup>

On April 23, 2024 (Primary Day), Respondents each cast a provisional ballot at their respective polling places, following the instructions in the SURE system email and additional information provided to them via telephone by Board employees. During the Board's pre-canvass, it determined not to count their mail-in votes

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<sup>5</sup> References to Resp.Apx refer to the Bates-stamped Appendix to this Response in Opposition to the RNC's October 28, 2024, Emergency Application for Stay.

because they were missing secrecy envelopes. Then, on April 26, 2024, the Board, through its designated Computation Board, reviewed each provisional ballot submitted on Primary Day and voted not to count Respondents' provisional ballots. Resp.Apx. B at 232a (60:2-16).

On April 29, 2024, Respondents commenced this action as an election appeal pursuant to a provision of the Election Code designed to adjudicate election challenges quickly after Election Day: "Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election" to file suit within two days and theoretically obtain speedy judicial review. 25 P.S. § 3157(a). Such election appeals are handled by the respective county courts of common pleas. 25 P.S. § 3157(b).

On May 7, 2024, the trial court held an evidentiary hearing. Before the hearing began, also on May 7, the trial court granted intervenor status to the Republican National Committee, the Republican Party of Pennsylvania, and the Pennsylvania Democratic Party. See App.Apx. A at 6a.

On August 16, 2024, the trial court issued a Memorandum Opinion and Order, Resp.Apx. B at 140a-170a, dismissing the action and affirming the Board's decision not to count Respondents' provisional ballots. *Id.* at 170a. Respondents timely appealed. After expedited briefing, the Commonwealth Court issued an opinion and order on September 5, 2024, *id.* at 104a-137a, holding that the Election Code, properly construed, required the Board to count Respondents' provisional ballots. *Id.* at 137a. At no point in the briefing before either lower court did the RNC raise arguments



regarding the U.S. Constitution’s Elections Clause or Electors Clause.

On September 8, 2024, the Board and the RNC filed petitions for allowance of appeal (or “allocatur”) in the Pennsylvania Supreme Court. In their petition, the RNC specifically implored the Pennsylvania Supreme Court to grant review and “evaluate, interpret, and apply the relevant sections of the Election Code *before the 2024 General Election.*” Resp.Apx. A at 7a-8a (emphasis added). On September 20, 2024, the Pennsylvania Supreme Court granted the RNC’s petition in relevant part, and it denied the Board’s petition. The parties proceeded to expedited briefing.

Last week, on October 23, 2024, the Pennsylvania Supreme Court issued an opinion interpreting and applying the Election Code to the issues at hand prior to the 2024 General Election, as the RNC had requested. The Court affirmed the Commonwealth Court’s order directing the Board to count Respondents’ provisional ballots from the April primary. App.Apx. A at 44a-45a.

The Court concentrated its analysis on 25 P.S. § 3050(a.4), which governs when provisional ballots must be counted or not counted, focusing on the interpretation of the word “ballot” in the statute. App.Apx. A at 30a. The Court determined that a mail ballot that is void because of a defect with the envelope packet, such as a naked ballot, can have no legal effect. Thus, once a board of elections determines that an attempt to vote by mail has failed and that the submitted materials are legally void—because, for example, of a missing secrecy envelope—the Election Code requires the board to count a provisional ballot cast by the voter, since the disqualified mail ballot was a nullity. *See* 25 P.S. § 3050(a.4)(5)(i) (the board “shall count the [provisional] ballot if

the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election”). The Court emphasized that a provisional ballot may be counted only after a board determination that the voter is eligible to vote and “did not cast any other ballot” in the election. *See* App.Apx. A at 34a-36a.

The Court also considered and interpreted subsection (a.4)(5)(ii), a counterpart subsection that sets forth circumstances under which a provisional ballot will *not* be counted. One part of that subsection provides:

(ii) A provisional ballot shall not be counted if: ...

(F) the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.

25 P.S. § 3050(a.4)(5)(ii)(F). With respect to this subsection, the Court reasoned that, “[j]ust as a void ballot cannot be given legal effect in Subsection (a.4)(5)(i), it cannot be given effect in Subsection (a.4)(5)(ii)(F).” App.Apx. A at 37a. Because a naked ballot is void, a “ballot” has not been “timely received by a county board of elections” for purposes of this subsection when a voter submits a defective mail-ballot packet. *Id.*

This decision did not change any rules governing mail-in ballots, nor did it change any of the procedures around the provisional voting process. Indeed, as noted, the Board’s practice of not counting provisional ballots cast by voters who had submitted a mail ballot packet lacking a secrecy envelope was an outlier in Pennsylvania. Consistent with longstanding guidance from the Secretary of the Commonwealth, the majority of election boards, including those in all of the most

populous counties, already counted such provisional ballots.

The RNC filed an application in the Pennsylvania Supreme Court on October 25 for a stay of that Court's ruling, arguing for the first time that the Court should *not* have proceeded to apply its interpretation of the Election Code before the upcoming election. The Board took no position on the stay request, which the Pennsylvania Supreme Court denied on October 28.

### **ARGUMENT**

A stay from this Court is available "only under extraordinary circumstances." *E.g., Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). To obtain one, the applicant must first demonstrate a reasonable probability that four Justices are likely to grant certiorari, and a fair prospect that a majority of the Court will vote to reverse the judgment. *See, e.g., Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*). In addition, an applicant must show it is likely to suffer irreparable harm absent a stay and that the balance of the equities favor a stay. *See, e.g., id.* at 190. The RNC comes nowhere close to meeting that demanding standard. The application should be denied.

#### **I. THIS COURT IS NOT LIKELY TO GRANT CERTIORARI OR TO REVERSE THE JUDGMENT.**

The application should be denied because the Court is not likely to grant certiorari or reverse the judgment. The RNC lacks standing to appeal and, in any event, waived its federal constitutional argument. And on the merits, this case could

not be a worse fit for the narrow exception in *Moore v. Harper*.<sup>6</sup>

**A. The RNC Lacks Standing to Assert the Supposed Federal Rights of the Pennsylvania General Assembly.**

The first reason this Court is unlikely to grant certiorari, let alone reverse, is that the RNC lacks Article III standing in this matter, depriving this Court of jurisdiction. A litigant’s desire “to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.” *Allen v. Wright*, 468 U.S. 737, 751 (1984). Its stake in the case must be particularized, personal, and concrete, not mere “value interests.” *E.g.*, *Diamond v. Charles*, 476 U.S. 54, 62 (1986). The RNC has no such stake here, for two reasons.<sup>7</sup>

First, this case involves the rights of two individuals to cast provisional ballots in an election that (1) is already past and (2) was open only *to registered Democrats*—a controversy in which the RNC has no present, tangible stake. The RNC does not even claim otherwise. Rather, it suggests that it will be affected because the *precedent* created by the Pennsylvania Supreme Court’s decision will, through the operation of

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<sup>6</sup> The RNC suggests this Court can construe its application as a petition for certiorari. App. 4 n.1. If it does so, Respondents should have an opportunity to respond. In any event, any petition may be denied for the reasons set forth herein.

<sup>7</sup> Pennsylvania state law construes standing “more liberally than in the federal courts,” and “the federal standing analysis does not control.” *Allegheny Reproductive Health Ctr. v. Pa. Dep’t of Human Servs.*, 309 A.3d 808, 832 (Pa. 2024) (cleaned up). But in this Court, the RNC, as intervenors, must satisfy the federal standing requirements of Article III. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989); *see also, e.g., Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (“standing ‘must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance’”) (citation omitted).

*stare decisis*, result in provisional ballots being counted in future elections. *See* App. 1, 3, 4 (complaining of such future consequences, including that “provisional ballots *may* be canvassed starting on Election Day,” “potentially affecting” votes) (emphasis added). Whether such *stare decisis* effects would actually end up having a tangible effect on the RNC’s interests—and whether such effects would be positive or negative—is conjecture, not a concrete injury. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Applicants’ mere disagreement with a judicial opinion likewise does not give them standing here. This Court, “like all federal appellate courts, does not review lower courts’ opinions, but their *judgments*.” *Jennings v. Stephens*, 574 U.S. 271, 277 (2015) (emphasis in original). Fear that a judicial opinion will eventually be applied to a party’s detriment does not suffice to establish standing where that party lacks any identifiable interest in the judgment itself. As Justice Kennedy observed, as a matter of “basic principles,” “precedential reasoning of general applicability divorced from a particular adverse judgment” cannot be sufficient to generate standing. *Camreta v. Greene*, 563 U.S. 692, 725, 726 (Kennedy, J., dissenting).<sup>8</sup>

Second, the RNC’s asserted *federal* ground for challenging the state law decision below is that the decision purportedly usurps the rights conferred upon the Pennsylvania legislature by the U.S. Constitution. *See* App. 2. Indeed, it claims

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<sup>8</sup> Notably, the majority in *Camreta* did not dispute this premise. 563 U.S. at 703 n.4.

specifically to act in defense of “the constitutional authority of the Pennsylvania General Assembly.” App. 12. But a litigant “must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights” of others. *Powers v. Ohio*, 499 U.S. 400, 410 (1991). Emphatically, the RNC has no authority to speak for the Pennsylvania General Assembly or assert its prerogatives, as this Court’s cases amply illustrate.

For example, in *Raines v. Byrd*, 521 U.S. 811 (1997), six present and former members of the House and Senate sought to challenge the constitutionality of the Line Item Veto Act. Rejecting their standing to assert this claim, the Court concluded that the members’ alleged “loss of political power” and “dilution” of voting authority were insufficient because they did not claim to “have been deprived of something to which they *personally* are entitled.” *Id.* at 821.<sup>9</sup> The RNC’s asserted interests in this case are even more attenuated: It is neither a member of the Pennsylvania General Assembly nor authorized to litigate on its behalf. Rather, it is a political organization that, in the proceedings below, purported to be acting on behalf of Pennsylvanians

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<sup>9</sup> In reaching its conclusion, the Court distinguished its prior decision in *Coleman v. Miller*, 307 U.S. 433 (1939), which recognized the standing of a group of state legislators challenging the Child Labor Amendment on the ground that it had not been properly ratified by the state legislature of which they were members. Significantly, the group was sufficiently numerous to have defeated the measure. See *Raines*, 521 U.S. at 823 (“[O]ur holding in *Coleman* stands (at most ...) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.”). The RNC occupies no such status, or one even remotely analogous.

generally. *See* App.Apx. E at 78a (seeking stay relief “on behalf of all Pennsylvanians.”).

Similarly, in *Virginia House of Delegates v. Bethune-Hill*, 687 U.S. 658 (2019), the Court concluded that the Virginia House of Delegates lacked standing to seek review of a lower court ruling that a redistricting plan constituted an impermissible racial gerrymander. An intervenor in the proceedings, the House had not been authorized “to litigate on the State’s behalf” and there was thus no “legal basis for its claimed authority.” *Id.* at 663; *see also id.* at 667 (“[A] single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.”). Likewise in this case, the RNC has no authority to represent Pennsylvania’s legislative branch on a claim that the Commonwealth’s judicial branch has usurped its power. *See also Hollingsworth*, 570 U.S. at 704, 705 (“[F]or a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm”); *accord Lujan*, 504 U.S. at 561 n.1.

In contrast, this case is unlike *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), in which the state legislature *was* found to have standing to bring an Elections Clause challenge to a state ballot initiative that transferred redistricting authority to a commission. The Court concluded that the legislature had alleged a sufficiently concrete and cognizable injury, distinguishing *Raines* on the ground that while neither the House nor the Senate as a body had authorized the six individual members in that case to act on their behalf, in *Arizona State Legislature*, the legislature itself was the proper

party to assert its own prerogative under the Elections Clause. *See id.* at 801-02. The Court's decision in *Arizona State Legislature* amply demonstrates who may have standing to pursue a valid claim under the Elections Clause on the ground that a legislative body's authority has been trammelled in violation of the Constitution: the legislative body itself. The RNC has no such authority.<sup>10</sup>

Because the RNC lacks standing, this Court lacks jurisdiction and the application should be denied.

**B. Applicants Waived Their Federal Constitutional Argument by Failing to Develop It in State Court.**

The RNC asks this Court to reach out and review the Pennsylvania Supreme Court's decision based on a theory that it exceeded its role, vis-à-vis the Pennsylvania legislature, contravening the U.S. Constitution's Electors and Elections Clauses. App. 22. In their Petition for Allowance of Appeal to the Pennsylvania Supreme Court, the RNC had every opportunity as appellants to develop this argument. Instead, they chose to reference the clauses only in a passing footnote. Resp.Apx. B at 24a n.5. Because the RNC opted not to advance the argument any further, the Pennsylvania Supreme Court concluded it was waived as a matter of Pennsylvania law. App.Apx. A at 16a n.18 ("We did not accept allowance of appeal of the constitutional arguments raised by Appellants. The issues were not developed within their petition for

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<sup>10</sup> In *Moore v. Harper*, by contrast, various "legislative defendants" with authority to represent the legislature actively participated in the case, and the issue of standing was not addressed (although a question of mootness was). *See* 600 U.S. at 13-15.



allowance of appeal.”).

Under Pennsylvania law, “[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal,” Pa.R.A.P.302(a). Moreover, on appeal a litigant in Pennsylvania Court waives an argument when they “only mention[ ] [it] in passing.” *Sutton v. Bickell*, 220 A.3d 1027, 1036 (Pa. 2019); accord *Madison Construction Co. v. Harleysville Mutual Insurance Co.*, 735 A.2d 100, 109 n.8 (Pa. 1999) (argument consisting of one sentence in a footnote was too poorly developed to preserve the issue). Here, the RNC failed to develop its argument concerning an alleged violation of the Elections and Electors clauses. The Pennsylvania Supreme Court was well within its authority to deem it waived under its own rules of decision. App.Apx. A at 16a n.18.

Waiver of an argument in state court is an adequate and independent state law ground for a state court’s decision that can preclude this Court’s review on the issue in a subsequent petition for certiorari. See, e.g., *Lee v. Kemna*, 534 U.S. 362, 375 (2022) (this Court should “not take up a question of federal law presented in a case if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment” and this “rule applies with equal force whether the state-law ground is substantive or procedural”) (internal quotations omitted); *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (state procedural rules are an adequate and independent state ground where they are “strictly or regularly followed”).

In addition, this Court “has almost unfailingly refused to consider any federal-

law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision.” *E.g.*, *Howell v. Mississippi*, 543 U.S. 440, 443 (2005); *accord Adams v. Roberson*, 520 U.S. 83, 86 (1997). Here, the RNC’s purported federal constitutional argument, which was relegated to a brief footnote, was not “addressed by or properly presented to” the Pennsylvania Supreme Court, as that Court concluded. *Howell*, 543 U.S. at 443. That failure is an independently sufficient basis for rejecting the RNC’s application for a stay and any petition for certiorari.

**C. The Pennsylvania Supreme Court’s Interpretation of the Pennsylvania Election Code Comes Nowhere Close to Satisfying the Narrow *Moore* Exception.**

The decision below involved nothing more than a routine state exercise of statutory interpretation by the Commonwealth’s highest court. The Pennsylvania Supreme Court closely read multiple provisions of the Pennsylvania Election Code governing mail ballots and provisional ballots. Those provisions state that a mail-ballot voter who has not actually voted “may vote by provisional ballot.” 25 P.S. § 3150.16(b)(2). And they provide that, where it is “confirm[ed] that [a voter] did not cast any other ballot, including an absentee ballot, in the election,” counties “shall count” a voter’s provisional ballot. 25 P.S. § 3050(a.4)(5)(i). Consistent with the majority of Pennsylvania courts, the Department of State, and a majority of Pennsylvania election administrators, the Pennsylvania Supreme Court held that when a person’s mail ballot packet has some defect, such that it is rejected, never opened, and not counted, then that person cannot be considered to have “cast any

other ballot ,... in the election,” and thus their provisional ballot “shall count.” App.Apx. A at 35a-36a.

The RNC now attempts to point this Court to other Pennsylvania Election Code provisions it wishes to emphasize and says it has the better reading of state law. All of which simply begs the question: is this Court likely to grant certiorari, hold oral argument, and engage in plenary review of the minutiae of the provisional ballot rules in the Pennsylvania Election Code?

It is not. *E.g.*, *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (“Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.”). Nothing about this esoteric issue of Pennsylvania law lends itself to any exercise of this Court’s jurisdiction. And nothing about the Pennsylvania Supreme Court’s interpretation of the Election Code—an exercise the RNC *asked* that Court to conduct—was so anomalous as to fall into the narrow category of circumstances where a state court so “transgresses the ordinary boundaries of judicial review” that it trammels the U.S. Constitution. *See Moore*, 600 U.S. at 36 (majority); *see also id.* at 38-39 (Kavanaugh, J. concurring). As Justice Dougherty stated below, far from venturing outside the boundaries of ordinary judicial review, resolving the close statutory question was “quite literally, our job.” App.Apx. B at 47a.

Indeed, *Moore* forecloses the RNC’s argument. *Moore* involved an appeal from a North Carolina Supreme Court decision striking down a gerrymandered congressional districting plan under the state constitution. 600 U.S. at 9. Petitioners there argued that the North Carolina Supreme Court had violated the federal

Elections Clause, which provides that “the Legislature” in each State makes rules governing the “[t]he Times, Places and Manner of” federal elections. *Id.* (citing U.S. Const., Art. I, § 4, cl. 1); *see also* U.S. Const., Art. II, § 1, cl. 2 (similar use of “Legislature” in Electors Clause). The question presented was whether the U.S. Constitution’s assignment of a role to the state legislatures “insulate[s] state legislatures from the ordinary exercise of state judicial review.” *Id.* at 22.

The answer was a resounding “no.” Consistent with fundamental principles of federalism and separation of powers, this Court explained that “state courts are the appropriate tribunals ... for the decision of questions arising under their local law, whether statutory or otherwise.” *Moore*, 600 U.S. at 34 (quoting *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875)). And the Court then squarely held that is no less true when it comes to the interpretation of local election laws. *Id.* at 37 (“State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause.”); *id.* at 38 (Kavanaugh, J., concurring) (“[S]tate laws governing federal elections are subject to ordinary state court review.”).

The Court left open a narrow window to review state-court actions that “transgress the ordinary bounds of judicial review such that they arrogate to themselves power vested in state legislatures to regulate federal elections.” *Moore*, 600 U.S. at 36. After asking the Pennsylvania Supreme Court to interpret the Election Code provisions at issue, the RNC now argues that this case somehow falls within that exceedingly narrow exception, in which a state court essentially ceases to

behave like a court at all. The RNC comes nowhere close to making such a showing.

Pennsylvania courts interpreting the Election Code operate under a particular legislative remit: “The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa.C.S. § 1921(a). Here, the court below applied exactly this principle in construing the statute before it. On the one hand, the provisional ballot statute provides that, where it is “confirm[ed] that [a voter] did not cast any other ballot, including an absentee ballot, in the election,” counties “shall count” a voter’s provisional ballot. 25 P.S. § 3050(a.4)(5)(i). On the other hand, it also provides that a provisional ballot “shall not be counted if...the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections. 25 P.S. § 3050(a.4)(5)(ii)(F). And then another provision in the mail-ballot portion of the Election Code provides that a person who requests a mail ballot but does not end up voting it “may vote by provisional ballot.” 25 P.S. § 3150.16(b)(2).

The Pennsylvania Supreme Court considered these and other Election Code provisions and dutifully endeavored to read them in harmony. App.Apx. A at 33a-44a. The Court reasoned that if a person’s mail-ballot packet is defective, such that it is deemed void under state law during the pre-canvass, and therefore is not counted, then the voter cannot be considered to have “cast any other ballot...in the

election.” 25 P.S. § 3050(a.4)(5)(i); see App.Apx. A at 35a-36a.<sup>11</sup> Accordingly, when the board proceeds to adjudicate provisional ballots, it is required to count provisional ballots cast by voters whose mail ballots were void because of a disqualifying defect in the mail ballot packet. *Id.* at 36a. Reading § 3050(a.4) in full, the Court concluded that subsection (a.4)(5)(ii)—which includes the provision that the RNC emphasizes—“is the flipside of Subsection 3050(a.4)(5)(i), as Subsection (a.4)(5)(i) describes when a provisional ballot must be counted and Subsection (a.4)(5)(ii) describes when it must not be counted.” *Id.* at 37a.<sup>12</sup> Subsection (a.4)(5)(ii) therefore was not an independent bar to counting a voter’s provisional ballot. Continuing its close read, the court further noted that the General Assembly had clearly distinguished “between envelopes and ballots” in the various subsections dictating when a

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<sup>11</sup> See also *Pa. Democratic Party*, 238 A.3d at 378, 380 (mail ballots with defects, such as missing secrecy envelopes, are void); accord App.Apx. A at 33a (“The import of our holding in *Pa. Democratic Party* is clear: the failure to follow the mandatory requirements for voting by mail nullifies the attempt to vote by mail and the ballot.”). The RNC falsely implies some inconsistency between *Pa. Democratic Party* and the decision here because *Pa. Democratic Party* rejected a constitutional claim that notice and cure was required for defective mail ballots. App. 29. There is none. As the court explained in addressing its own prior decision: “*Pa. Democratic Party* addressed only ‘the ‘notice and opportunity to cure’ procedure sought by Petitioner.” App.Apx. A at 26a. But “no ballot is cured when a provisional ballot is counted after a mail ballot is rejected due to a fatal defect.” *Id.* at 27a. As with the other quibbles and overstatements that make up the RNC’s merits argument, none of this comes close to a transgression of the judicial role itself that might justify this Court’s review.

<sup>12</sup> See also App.Apx. A at 40a (“Subsection (a.4)(5)(i) dictates generally when to count a provisional ballot, and Subsection (a.4)(5)(ii)(F), like Subsections (a.4)(5)(ii)(A)-(E), fleshes out the negative implications of that rule by stating more specifically when the county boards must not count a provisional ballot.”).

provisional ballot would count. *Id.* at 38a. Subsection 3050(a.4)(5)(ii)(F), which the RNC emphasizes, says that a voter’s provisional ballot will not be counted if their “mail-in *ballot* is timely received by a county board of elections.” *See* App.Apx. A at 37a (emphasis added). But where the ballot packet is rejected because of some defect like a missing secrecy envelope or a mistake on the outer envelope form, the voter’s *ballot* never even leaves the outer envelope, and the timely receipt of the *ballot* is never completed. *Id.* at 38a. (“If the General Assembly intended to trigger disqualification of a provisional ballot by the timely receipt of the Declaration Envelope, it would have said so.”).

The RNC simply disagrees with this close textual analysis. In so doing, it badly misrepresents the Pennsylvania Supreme Court’s actual analysis in its presentation of the case. *See* App. 23-29. But what the RNC never, ever does is explain how this utterly quotidian disagreement over how to parse technical language from the Pennsylvania Election Code amounts to a usurpation of any federal constitutional rights granted to the Pennsylvania General Assembly.

The RNC tries to make something out of nothing by pronouncing that the subsection of the statute that it likes to emphasize is so clear that any disagreement with its position amounts to a violation of the U.S. Constitution and a transgression of the judicial function itself. That claim, wrong on its face, is conclusively refuted by the fact that the majority of lower courts across the Commonwealth that have considered this provisional-ballot issue have reached the same conclusion as the Pennsylvania Supreme Court here. *See Ctr. for Coalfield Justice v. Wash. Cnty. Bd.*

*of Elections*, No. 1172 CD 2024, 2024 WL 4272040 (Pa. Commw. Ct. Sept. 24, 2024) (reaching same conclusion as Pennsylvania Supreme Court regarding provisional ballots); Resp.Apx. E at 412a (*Keohane v. Del. Cnty. Bd. of Elections*, No. CV-2023-4458 (Pa. Ct. Com. Pl. Del. Cnty. Sept. 21, 2023) (requiring counting of such provisional ballots)); Resp.Apx. F at 417a (*Ctr. for Coalfield Justice v. Wash. Cnty. Bd. of Elections*, No. 2024-3953 (Pa. Ct. Com. Pl. Wash. Cnty. Aug. 23, 2024) (identifying the statutory provisions as ambiguous)).<sup>13</sup> Similarly, a majority of Pennsylvania county boards of elections had consistently read the relevant part of the Election Code as requiring the counting of provisional ballots cast by voters who had submitted flawed mail-ballot return packets. *See* Resp.Apx. C at 388a (*Amici Curiae* Brief of County Officials in Support of Appellees (Sept. 26, 2024)).

Whether or not one agrees with the result (and losing litigants rarely do), resolving such interpretive disputes is the judicial role. The RNC cannot prevail based on its risible theory that the Pennsylvania Supreme Court engaged in patently unreasonable, essentially lawless behavior simply because it granted the RNC's *own request* for review of a state statutory interpretation issue, on an expedited timeline

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<sup>13</sup> The RNC repeatedly cites the Commonwealth Court's unpublished decision reaching a contrary conclusion in *In re Allegheny Cnty. Provisional Ballots in the 2020 General Election*, 2020 WL 6867946 (Pa. Commw. Ct. Nov. 20, 2020). App. 2, 3, 7, 8, 28. The RNC repeatedly says that *In re Allegheny* represented "the status quo that existed in Pennsylvania's recent elections" and the "rule[] for processing provisional ballots that governed before that decision." App. 3, 21. This is false. Because *In re Allegheny* was an unpublished, non-precedential decision, it was not binding on any county.



the RNC itself requested, and then interpreted the code in a way that the RNC did not like.

## II. THE APPLICATION SHOULD BE DENIED BECAUSE GRANTING IT WOULD BE A CLEAR VIOLATION OF *PURCELL*.

Even if the RNC had standing and valid federal grounds to seek review in this Court, *Purcell* separately forecloses the relief the RNC seeks. *Purcell v. Gonzalez*, 549 U.S. 1 (2006). *Purcell* is a prudential doctrine limiting the power of federal courts—a rule of caution that “a federal court’s last-minute interference with state election laws is ordinarily inappropriate.” *Democratic Nat’l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). The opinions discussing *Purcell* consistently hold that it is *federal courts* in particular that are constrained by that principle. *See, e.g., Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring) (“[F]ederal courts ordinarily should not alter state election laws in the period close to an election.”) (emphasis added); *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring, joined by Alito, J.) (“It is one thing for a State on its own to toy with its election laws close to a State’s elections. But *it is quite another thing for a federal court to swoop in and re-do a State’s election laws* in the period close to an election.” (emphasis added)); *Democratic Nat’l Comm.*, 141 S. Ct. at 28 (Roberts, C.J., concurring) (*Purcell* limits “*federal intrusion[s]* on state lawmaking processes” (emphasis added)); *id.* at 30 (Kavanaugh, J., concurring) (*Purcell* counsels that “*federal courts* ordinarily should not alter state election laws in the period close to an election” (emphasis added)); *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh,

J., concurring) (“[T]his Court has repeatedly emphasized that *federal courts* ordinarily should not alter state election rules in the period close to an election.” (emphasis added)); *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (“This Court has repeatedly emphasized that lower *federal courts* should ordinarily not alter the election rules on the eve of an election.” (emphasis added)).

*Purcell* is grounded not simply in a generalized concern about changes in election rules, but in a specific concern with election-eve changes wrought by *federal courts*. Even before *Purcell*, courts recognized that “[f]ederal court intervention that would create such a disruption in the state electoral process” would raise “important equitable consideration[s]” that “go[] to the heart of our notions of federalism.” *E.g.*, *Page v. Bartels*, 248 F.3d 175, 195–96 (3d Cir. 2001) (Becker, C.J.).

The RNC’s application is impossible to square with *Purcell*. As the RNC admits, we are now “in the midst of the ongoing 2024 General Election.” App. 6. In advance of that election, the RNC took an appeal to the Pennsylvania Supreme Court, asking it to grant review and decide the provisional ballot issue presented. The Court granted the RNC’s request and resolved the case according to ordinary state law decisional rules. And now, less than a week before Election Day, the RNC asks a federal court to swoop in and alter the election laws of Pennsylvania, as interpreted by its Supreme Court, the majority of county election boards, and the Pennsylvania Department of State. It is hard to imagine a clearer *Purcell* violation should the RNC succeed here.

The RNC’s unprincipled response is that the Court can just remake *Purcell*. It argues that, from now on, *Purcell* should apply to the decisions of state courts, too. But this Court has *never* suggested that it may intervene in state courts’ interpretation of state election laws based on *Purcell*.<sup>14</sup> Rather, consistent with federalism principles, *Purcell* restricts intervention in the state lawmaking process, which *includes* the role played by state courts. *See Democratic Nat’l Comm.*, 141 S. Ct. at 28 (Roberts, C.J., concurring) (distinguishing between “the authority of state courts” applying state law and “federal intrusion[s] on state lawmaking processes,” and explaining that “[d]ifferent bodies of law and different precedents govern these two situations,” such that *Purcell* applies to the latter but not the former); *see also*, *e.g.*, *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays, joined by Alito, J.). *Purcell* has no bearing on the “authority of state courts to apply their own constitutions to election regulations”—let alone to interpret conflicts and ambiguities in those regulations. *Democratic Nat’l Comm.*, 141 S. Ct. at 28 (Roberts, C.J., concurring).

Recent redistricting cases illustrate the distinction with clarity. In *Merrill*, in

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<sup>14</sup> *See* Casey Schmidt, *Disrupting Election Day: Reconsidering the Purcell Principle As A Federalism Doctrine*, 110 Va. L. Rev. 1493, 1535 (2024) (after reviewing every decision in which this Court has cited or discussed *Purcell*, concluding that “[n]owhere has the Court suggested that *Purcell* applies to late-breaking injunctions entered by state courts”). The one supposed counterexample the RNC cites (at 17) is *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76-78 (2000) (per curiam), a post-election case that necessarily did not involve any “last-minute” changes to voting rules and did express or describe any limitation on the ability of state courts to decide matters of state law close in time to any election.

which an Alabama federal court ordered redistricting, this Court granted a stay of the lower federal court’s injunction based on *Purcell* because “federal courts ordinarily should not enjoin a state’s election laws in the period close to an election.” 142 S. Ct. at 881. In *Moore*, by contrast, where new lines were ordered by the North Carolina Supreme Court, the Court denied a stay, because *this Court* was the federal court being asked to intervene close to an election. As Justice Kavanaugh explained, “[i]n light of the *Purcell* principle ..., it is too late for the federal courts to order that the district lines be changed for the 2022 primary and general elections, just as it was too late for the federal courts to do so in the Alabama redistricting case last month.” 142 S. Ct. at 1089 (Kavanaugh, J., concurring).

The Court’s principled adherence to federalism in its application of *Purcell* makes sense, and Pennsylvania law shows why. In Pennsylvania, the state Election Code provides for the rapid adjudication of election-related legal challenges, typically while the canvassing process remains ongoing. *See* 25 P.S. § 3157. The entire point of this statutory mechanism and the judicial process it creates is to furnish a vehicle for election challenges to be quickly decided after Election Day—challengers initiate an action within two days of a decision of a board of elections, the court schedules a hearing within three days of the filing of the challenge, and appeals can be had up to Commonwealth Court and beyond. *See* 25 P.S. § 3157(a). This case arose under that provision. State court decisions under dispute-resolution provisions like § 3157 necessarily arise *only* in the throes of an election—and yet Pennsylvania courts can and do decide them. Attempting to impose *Purcell*, a principle designed for limited-

jurisdiction federal courts, on the workaday activities of the state courts that administer and interpret state election rules would be a disaster not only for the federalist balance but also in practice.<sup>15</sup>

All of the considerations that this Court has referred to in the *Purcell* context support denying the application. The RNC seeks what can only be described as an election-eve change in state law from a federal court—a change that, at least in the RNC’s own telling, would be highly disruptive, altering the treatment of “tens of thousands of provisional votes” and could even involve “flipping” the result of “one or more elections in Pennsylvania.” App. 16. The *Purcell* principle is premised on the “State’s extraordinarily strong interest in avoiding . . . changes to its election laws and procedures,” e.g., *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (emphasis added). And on the question whether the relief sought is “feasible” “without significant cost, confusion, or hardship,” *id.*, it is clear that the relief the RNC seeks would be highly infeasible. County boards have long allowed voters whose mail ballots have been set aside because of a defect in the envelope packet to *cast* provisional ballots, and the decision in this case merely clarified that, as a matter of state law, those ballots must be *counted*. That decision eliminated a source of

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<sup>15</sup> The RNC also argues that *Purcell* should apply in state court because “[l]egislators can be held accountable by the people for the rules they write or fail to write; typically, judges cannot.” App. 18 (quoting *Dem. Nat’l Cmte.*, 141 S. Ct. at 29 (Gorsuch, J., concurring)). But they ignore the fact that judges in Pennsylvania, including State Supreme Court Justices, are elected and must stand for retention. This too is federalism in action.

confusion and dis-uniformity in state law, alleviated the burden and uncertainty of adjudicating the status of certain provisional ballots, and ameliorated the hardship and injustice for voters whose voices might otherwise be excluded. The RNC asks the Court to insert itself into state law to revive a legal regime that is less uniform and more burdensome for counties, more confusing for voters and candidates, and more unjust for all.

And all that is before even considering the RNC's proposed administrative stay, which amounts to a sweeping injunction against scores of counties that are not even parties in this case. The RNC ultimately asks the Court for an order requiring that "any provisional ballot" in the Commonwealth of Pennsylvania—*i.e.*, in *all counties*, even non-party counties that have long counted the provisional ballots of voters whose mail-ballot return packets contained defects—be segregated in the upcoming election. App. 35-36. Such sweeping, election-eve injunctive relief against non-parties would be a wanton violation not only of *Purcell*, but also basic principles of due process—*i.e.*, by imposing an onerous burden on parties not before the Court.

*Purcell* does not just exist to serve the RNC's litigation aims. It advances a basic principle of restraint. If that principle means anything, it forecloses the request for a federal court to swoop in at the eleventh hour and rewrite Pennsylvania law on the eve of the election.

### **III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST FAVOR DENYING THE APPLICATION.**

Setting aside the merits and *Purcell*, the RNC still cannot obtain a stay without

demonstrating “a likelihood that irreparable harm will result from the denial of a stay.” *Hollingsworth*, 558 U.S. at 190. They cannot do so.

Denying a stay will not cause “irreparable harm,” or indeed any harm, to the RNC. The challenged judgment requires nothing more than that the Board count two provisional ballots and add them to the totals for the April 23, 2024 primary election. Respondents voted in the Democratic primary, Resp.Apx. B at 265a (93:11-2), 278a (106:15-17), and it is undisputed that their two provisional ballots cannot change the outcome of any race. Staying the counting of these two provisional ballots simply would not prevent any injury to the RNC. In contrast, a stay would “substantially harm other interested parties in the proceedings,” namely Respondents, by continuing to deprive them of their right to have their votes counted. And the RNC’s exceedingly broad request to prospectively modify county board of elections operations in Butler County or statewide would do incalculable harm to voters, who now have made plans to use this Election Day provisional ballot option, and to elections officials who have already incorporated the Court’s ruling (and subsequent administrative guidance) into their operational plans.

Although the RNC has requested a *stay* of the *judgment*, what they really want is *withdrawal* of the Pennsylvania Supreme Court’s *Opinion*. No such remedy properly lies in this instance. And even if it were possible to nullify the precedential effect of the Pennsylvania Supreme Court’s opinion via a stay, the RNC is conspicuously equivocal about how a stay would impact future elections in Pennsylvania, including next week’s general election.

In some places, they soothingly (and misleadingly) ask the Court to “merely preserve the *status quo* that existed until the recent court decisions in this case.” App. 34; *accord* App. 3, 4. This implies a preservation of a longstanding consensus. But under the actual *status quo*, most county boards would accept and count provisional ballots cast by voters whose return packets were fatally defective, while a minority of boards (including the Board here) would not count them.

Elsewhere the RNC reveals its true goal: jettisoning the *status quo* and immediately instituting a statewide *ban* on counting such provisional ballots. *E.g.*, App. 32 (“Without this Court’s intervention, the county boards will count ballots ....”). This would not be a mere stay of the judgment, preserving the status of two ballots. Nor would it return the state of the law to the *status quo*, with each county board deciding how to handle provisional ballots. Rather, the RNC seeks a full reversal of the Opinion, and imposition of a new, disenfranchising rule on all sixty-seven counties.

Aside from blocking the counting of potentially thousands of Pennsylvanians’ provisional ballots after the election next week, such a change would be detrimental in other ways to “the public interest,” *Ohio v. Envtl. Prot. Agency*, 144 S. Ct. 2040, 2052 (2024) (reiterating stay factors set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Since the Pennsylvania Supreme Court decided this case on October 23, the Pennsylvania Department of State has issued updated guidance to reflect the



Opinion,<sup>16</sup> and county boards of elections and voter activation groups across the Commonwealth have been actively notifying voters who have submitted flawed mail-ballot packets of their option to salvage their franchise via provisional voting. Again, many of these voters have accordingly made plans to go to their polling places on November 5 to take advantage of this option, and in counties that allow voters to cure defective mail ballot packets in person at the board of elections on or before Election Day, some voters have by now forgone opportunities to cure their return packets by traveling to their county seats, choosing instead to cast a provisional ballot closer to home. In addition, counties have responded to the Pennsylvania Supreme Court's decision by training board of elections staff and poll workers on how to handle voter inquiries; forcing counties to re-train them in the final push toward Election Day would add new burdens to already-stretched personnel.

The RNC claims that denying their application would “seriously and irreparably harm the State, the General Assembly, and [Pennsylvania’s] voters.” App. 33 (internal quotation marks and citation omitted). Neither the State nor the General Assembly has alleged any such harm, and the RNC does not speak for either. As for Pennsylvania’s voters, insofar as the RNC may act as an advocate for voters from their political party, they have not explained how denying a stay would specifically

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<sup>16</sup> Pa. Dep’t of State, *Pennsylvania Provisional Voting Guidance* (Oct. 24, 2024), at 5 & n.2, available at <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-provisionalballots-guidance-v2.2.pdf>

harm those voters. Voters of all parties and persuasions make mistakes in complying with the Pennsylvania Election Code's technical rules for mail voting. Indeed, the claim that counting the provisional ballots of two unquestionably eligible voters who would otherwise have no vote counted somehow constitutes irreparable harm is absurd, illogical, and unprecedented.

Finally, it should be remembered that it is the RNC that asked for the decision below. After the Commonwealth Court issued an unreported opinion that did not have binding precedential effect, the RNC sought *discretionary* review, telling the court below:

- “With the 2024 General Election fast approaching, this case requires the Court’s review and intervention.” Resp.Apx. A at 6a.
- “The Court should accept this Petition to correctly evaluate, interpret, and apply the relevant sections of the Election Code before the 2024 General Election.” *Id.* at 7a-8a.
- “The Court should grant allowance of appeal so that the rules and procedures governing Pennsylvania elections are appropriately determined by this Court before the 2024 General Election is upon us.” *Id.* at 42a.

Having successfully petitioned the Pennsylvania Supreme Court to issue a precedential decision on this question before November 5, the RNC should not now be heard to complain they are irreparably harmed because that court agreed to hear the case *at their urging* and *on their proposed timeframe* and then decided it against them. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (explaining that “judicial estoppel[] generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another

phase” (internal quotation marks and citation omitted)).

#### **IV. APPLICANTS’ REQUEST FOR A PRELIMINARY INJUNCTION IN THE GUISE OF AN ADMINISTRATIVE STAY SHOULD BE DENIED**

Petitioners request the Court “order the segregation of ballots to preserve the possibility of judicial review.” App. 35-37. But the order under review is a judgment requiring the Board to include the votes of two Butler County citizens in the totals for the April 2024 Democratic primary. The only action the Board must take to satisfy the judgment is simply to update its voting records to reflect the amended tally.

In context, the relief the RNC seeks is not a stay, which is a remedy that “instead of directing the conduct of a particular actor...operates on the judicial proceeding itself.” *Nken*, 556 U.S. at 428. Rather, what it really seeks is a backdoor mandatory preliminary injunction against all sixty-seven county boards of elections in Pennsylvania, enjoining them to segregate ballots during the vote canvass that will begin next week. The RNC seeks that relief here when the constitutional issue it now hopes to raise was not even developed below, requiring this Court to effectively act as a Court of first view—something it routinely declines to do. Even ignoring that granting the requested relief would send an unprecedented message that the federal courts are available to issue issuing injunctions in such settings without exhausting state court remedies, the injunction request is hopelessly defective on numerous other grounds.

First, it is an elementary principle of injunction practice—and due process for that matter—that a party is entitled to notice before being subjected to preliminary

injunctive relief. Fed. R. Civ. P. 65(a) (A federal court may “issue a preliminary injunction only on notice to the adverse party”). The RNC’s proposed Pennsylvania-wide injunction should be rejected for the fundamental reason that 66 of the parties it seeks to enjoin are not before the Court.

Second, the requested relief is also barred by the doctrines of waiver and laches. As discussed above, the RNC waived the right to bring any challenge to current practice as violating the Electors and Elections Clauses by failing to raise the issue below. Similarly, laches bars a tardy request for injunctive relief. *Russell v. Todd*, 309 U.S. 280, 287 (1940) (noting that “equity will not aid a plaintiff” who acts with “unexcused delay”). Election boards across Pennsylvania have been counting the provisional ballots of failed mail-in voters for the past nine elections, and Republican Party representatives have been present at hundreds of election board meetings where they could have challenged the practice. The Secretary of the Commonwealth issued guidance on the subject in 2020, and Applicants opted not to challenge the guidance over the intervening years. The belated request to this Court to intervene now is both waived and barred by laches.

Third, it is a fundamental principle of injunction practice that, in order to obtain relief, the movant must demonstrate that it will be irreparably injured if left to its remedies at law. *Nken*, 556 U.S. at 434 (2009). To try to satisfy that burden, the RNC asserts that unless the Court requires the segregation of provisional ballots, there will be no way to address the validity of the ballots following the election. Not so. Pennsylvania state law has a detailed procedure governing the treatment of

provisional ballots, which includes guaranteed access to the count for candidates and political parties and the right to challenge and have segregated any challenged provisional ballots. 25 P.S. § 3050(a.4)(4) (providing detailed procedure for challenging and segregating provisional ballots). Indeed, this litigation arose from just such a challenge. Following the refusal to count their ballots, Respondents appealed the denial to the Court of Common Pleas of Butler County under 25 P.S. § 3157. Pennsylvania has a well-developed system for handling provisional ballot challenges at the board of elections level and in court proceedings.

Finally, the RNC wrongly argues that this case is in an “identical posture” with the 2020 litigation in *Republican Party of Pa. v. Boockvar*, No. 20A84, 2020 WL 6536912 (U.S. Nov. 6, 2020) (“*Boockvar*”). App. 35. But the RNC fails to describe the salient facts of that case. The issue in dispute was the validity of a Pennsylvania Supreme Court decision extending a statutory, received-by deadline for mail ballots and mandating a presumption of timeliness for non-postmarked ballots. All sixty-seven county boards of elections were parties to the case. The Pennsylvania Supreme Court explicitly found no ambiguity in the relevant Election Code provision but nonetheless granted a one-time extension to the received-by deadline under the Pennsylvania Constitution. *Pa. Democratic Party*, 238 A.3d at 369, 371. The Secretary of the Commonwealth issued non-binding guidance to all county boards encouraging them to segregate ballots received after 8:00 P.M. on election day pending disposition of the litigation. *Boockvar*, 2020 WL 6536912, at \*1. The Democratic Party agreed that that the ballots should be segregated, but in light of

the Secretary's guidance, it took the position that no injunction was necessary. Pa. Dem. Party Br. in Opp., *Republican Party of Pa. v. Boockvar*. Given the inability to confirm whether all county boards were, in fact, following the guidance, this Court (per Justice Alito) ordered all counties to do so while it considered a petition for certiorari. *Boockvar*, 2020 WL 6536912, at \*1.

*Boockvar* is a far cry from this case. The Pennsylvania Supreme Court has not issued an order that overrides the Pennsylvania Election Code, but has interpreted it, a power explicitly vested in that court by the Pennsylvania Constitution and the Statutory Construction Act, 1 Pa.C.S. § 1921, et seq. The issue in *Boockvar* was squarely presented in a proceeding involving all 67 county boards of elections. Here, the issue was not presented at all, and 66 counties are not even parties to this proceeding. Nor was there a viable post-election remedy in *Boockvar*, as there is here. For all these reasons, *Boockvar* is inapposite and provides no support for issuing the extraordinary relief Petitioners now request.

Finally, the RNC accuses the Pennsylvania Supreme Court of changing the voting rules just before the election. The charge is simply false. As the RNC is well aware, the Secretary issued guidance years ago directing counties to count provisional ballots submitted by failed mail-in voters. The Butler County Board refused to conform to that widely followed practice or to the Secretary's guidance, which is why Respondents were forced to bring suit. That the decision in this appeal over the April 2024 primary came down shortly before the next election is of no moment. Pennsylvania has an election every six months, and there is nothing

unusual, much less untoward, about the Pennsylvania Supreme Court doing its job.

## CONCLUSION

The application should be denied in its entirety.

Respectfully submitted,

/s/ G. Eric Brunstad Jr.

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