

IN THE
Supreme Court of the United States

JOSEPH B. SCARNATI III, PRESIDENT PRO TEMPORE, AND
JAKE CORMAN, MAJORITY LEADER OF THE PENNSYLVANIA SENATE,
Applicants,
v.
PENNSYLVANIA DEMOCRATIC PARTY, ET AL.,
Respondents.

**On Application to Stay the Mandate of the
Supreme Court of Pennsylvania**

**REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR A
STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR
A WRIT OF CERTIORARI**

CRYSTAL H. CLARK, ESQ.
General Counsel,
Senate Republican Caucus
B-51 Main Capitol
Harrisburg, PA 17120
(717) 787-6259
cclark@pasen.gov

LAWRENCE J. TABAS
Centre Square West
1515 Market St., Suite 3400
Philadelphia, PA 19102
(215) 665-3158
lawrence.tabas@obermayer.com

JASON B. TORCHINSKY
Counsel of Record
JONATHAN P. LIENHARD
SHAWN T. SHEEHY
DENNIS W. POLIO
HOLTZMAN VOGEL
JOSEFIAK TORCHINSKY PLLC
15405 John Marshall Hwy
Haymarket, VA 20169
(540) 341-8808
(540) 341-8809
Jtorchinsky@hvjt.law

*Counsel for Applicants Joseph B. Scarnati III, President Pro Tempore, and
Jake Corman, Majority Leader of the Pennsylvania Senate*

October 6, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. APPLICANTS HAVE STANDING TO BRING THIS APPEAL.....	4
II. THE SUPREME COURT OF PENNSYLVANIA HAS CREATED MULTIPLE ELECTION DAYS AFTER NOVEMBER 3, 2020 IN CONTRAVENTION OF FEDERAL LAW.....	9
III. THE PENNSYLVANIA GENERAL ASSEMBLY HAS NOT DELEGATED ITS AUTHORITY TO REGULATE THE TIMES, PLACES, AND MANNER OF ELECTIONS TO THE PENNSYLVANIA JUDICIARY.....	15
IV. THAT THE SUPREME COURT OF PENNSYLVANIA WAS OSTENSIBLY RULING ON STATE SUBSTANTIVE LAW DOES NOT SAVE ITS OPINION FROM VIOLATING FEDERAL LAW.....	21
V. THE <i>PURCELL</i> PRINCIPLE AIDS RATHER THAN HINDERS APPLICANTS.....	23
CONCLUSION.....	24
APPENDIX:	
A: <i>Penn. Dem. Party v Boockvar</i> , Motion To Intervene By Joseph B. Scarnati III, President Pro Tempore, And Jake Corman, Majority Leader Of The Pennsylvania Senate (Penn. Cmwlth. Aug. 24, 2020).	
B: <i>Penn. Dem. Party v Boockvar</i> Order Granting Motion To Intervene By Joseph B. Scarnati III, President Pro Tempore, And Jake Corman, Majority Leader Of The Pennsylvania Senate (Penn. Sept. 3, 2020).	
C: Example Of Vote-By-Mail Educational Materials Received By Pennsylvania Voters.	

TABLE OF AUTHORITIES

CASES

<i>ASARCO, Inc. v. Kadish</i> , 490 U.S. 605 (1989)	4, 5, 6
<i>Alliance for Retired Americans v. Dunlap</i> , No. CV-20-95 (ME Sup. Ct. Sept. 30, 2020)	3
<i>American Federation of Teachers v. Gardner</i> , No. 216-2020-CV-0570 (N.H. Sup. Ct. Oct. 2, 2020)	2
<i>Andino v. Middleton</i> , No. 20A55, 592 U.S. (Oct. 5, 2020)	1
<i>Arizona State Legislature v. Arizona Independent Redistricting Comm'n</i> , 576 U.S. 787 (2015)	7, 18, 19
<i>Arizona State Legislature v. Arizona Independent Redistricting Commission</i> , 135 S. Ct. 2652 (2015)	18, 19, 20, 21
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	22
<i>Calvary Chapel Dayton Valley v. Sisolak</i> , No. 19A1070 (July 24, 2020).....	2
<i>Carson v. Simon</i> , 20-cv-2030 (D. Minn. 2020)	15
<i>City of Erie v. Pap's A.M.</i> , 529 U.S. 277 (2000)	5, 6
<i>Clarno v. People Not Politicians</i> , No. 20A21 (Aug. 11, 2020).....	2
<i>Coleman v. Miller</i> , 307 U.S. 433 (1939)	7, 9
<i>Colo. Gen. Assembly v. Salazar</i> , 541 U.S. 1093 (2004).....	22
<i>Commonwealth ex rel. Dummit v. O'Connell</i> , 181 S.W.2d 691 (Ky. 1944)	21
<i>Crawford v. Marion County Election Board</i> , 553 U.S. 181 (2008).....	11
<i>Crossey et al. v. Boockvar</i> , No. 266 MD 2020 (Leavitt, P.J.) (Pa. Comm. Ct. Sept. 4, 2020).....	10, 11
<i>Driscoll v. Stapleton</i> , DA 20-0295, 2020 MT 247 (Mont. Sept. 29, 2020)	3
<i>Finnegan Appeal</i> , 366 Pa. 6 (Penn. 1950)	17

<i>First Federal Savings and Loan Association v. Swift</i> , 321 A.2d 895 (Pa. 1974)	22
<i>Foster v. Love</i> , 522 U.S. 67 (1997)	12
<i>In re General Election-1985</i> , 531 A.2d 836 (Pa. Cmwlt. 1987)	17
<i>Grossman v. Secretary of the Commonwealth</i> , 485 Mass. 541, 2020 Mass. LEXIS 510, 151 N.E.3d 429 (Mass. Aug. 26, 2020)	3
<i>In Get Oil Out! Inc. v. Exxon Corp.</i> , 586 F.2d 726 (9th Cir. 1978).....	13, 14
<i>LaRose v. Simon</i> , 62-CV-20-3149, Minn. 2d Judicial Cir., Consent Decree, VI.D (July 17, 2020)	14
<i>League of Women Voters of Mich. v. Sec'y of State</i> , 2020 Mich. App. LEXIS 4454 (Mich. Ct. App. July 14, 2020)	3
<i>League of Women Voters of Mich. v. Sec'y of State</i> , S.C.: 161671, 2020 Mich. LEXIS 1565 (Mich. Sept. 11, 2020)	3
<i>Little v. Reclaim Idaho</i> , No. 20A18 (July 30, 2020).....	2
<i>Merrill v. People First Of Ala.</i> , No. 19A1063 (July 2, 2020).....	2
<i>Mich. All. for Retired Am. v. Sec'y of State</i> , S.C.: 161837, 2020 Mich. LEXIS 1417 (Mich. Aug. 28, 2020)	3
<i>Minnesota v. National Tea Co.</i> , 309 U.S. 551 (1940).....	4
<i>Moore v. Circosta</i> , No. 5:20-CV-507-D (E.D. N.C. Oct. 3, 2020).....	4
<i>Morton v. Mancari</i> , 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)	13
<i>New Ga. Project v. Raffensperger</i> , No. 20-13360-D, 2020 U.S. App. LEXIS 31405 (11th Cir. Oct. 2, 2020).....	2
<i>North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections</i> , 20 CVS 8881	3
<i>Ohio ex rel. Davis v. Hildebrant</i> , 241 U.S. 565 (1916).....	18, 19, 21
<i>In re Opinions of Justices</i> , 37 Vt. 665 (Vt. 1864)	21
<i>In re Opinions of Justices</i> , 45 N.H. 595 (N.H. 1864)	21

<i>Piper v. Tax Claim Bureau of Westmoreland County</i> , 910 A.2d 162 (Pa. Cmwlth. 2006)	22
<i>In re Plurality Elections</i> , 8 A. 881 (R.I. 1887).....	21
<i>Radzanower v. Touche Ross & Co.</i> , 426 U.S. 148, 96 S. Ct. 1989, 48 L. Ed. 2d 540 (1976)	13
<i>Raines v. Byrd</i> , 521 U.S. 811 (1997).....	7, 8
<i>Republican Nat’l Comm.v. Democratic Nat’l Comm.</i> , 140 S. Ct. 1205 (Apr. 6, 2020)	2
<i>Richardson v. Ramirez</i> , 418 U.S. 24 (1974)	4
<i>Sixty-seventh Minnesota State Senate v. Beens</i> , 406 U.S. 187 (1972).....	7
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	18, 19, 21
<i>South Bay United Pentecostal Church v. Newsom</i> , No. 19A1044 (May 29, 2020)	2
<i>In re Special Election for the 18th Pa. House Dist.</i> , 2020 Pa. Dist. & Cnty. Dec. LEXIS 935 (Pa. Ct. Comm. Pleas Apr. 3, 2020).....	17
<i>Tex. Democratic Party v. Abbott</i> , No. 19A1055 (June 26, 2020)	2
<i>Thompson v. DeWine</i> , No. 19A1054 (June 25, 2020).....	2
<i>Va. House of Delegates v. Bethune-Hill</i> , 139 S. Ct. 1945 (2019)	6, 7, 8, 9
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)	8
<i>Virginia v. Hicks</i> , 539 U.S. 113 (2003).....	5, 6
<i>VoteVets Action Fund v. Detzner</i> , No. 4:18cv524-MW/MJF (N.D. Fla. 2018).....	13
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	6
<i>Watson v. Witkin</i> , 22 A.2d 17 (Pa. 1941).....	19
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981).....	13

CONSTITUTIONS AND STATUTES

U.S. Const. art. I, § 4	5, 17, 18
U.S. Const., Art. VI, cl. 2	1
2 U.S.C. § 1, 7.....	11, 12, 13, 14
3 U.S.C. § 1	11, 12, 13, 14
52 U.S.C. §§ 20301-20311.....	12, 13
42 U.S.C. § 15301 et seq	16
25 P.S. § 3046	15, 16, 17, 18
N.J. Stat. Ann. § 19:63-31(m).....	14
Nev. Rev. Stat. AB 4, § 20(2).....	14
Pa. Const. art. I, § 5.....	15
Pa. Const. art. I, § 26.....	16
Pa. Const. art 2, § 1	19

OTHER AUTHORITIES

https://web.archive.org/web/*/https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx . Compare Penn. Secretary of State, Mail-in and Absentee Ballots, (archived on September 23, 2020 at 6:40:32 GMT), https://web.archive.org/web/20200923064032/https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx (“8 pm November 3 - VOTED BALLOTS must be RECEIVED by your county election office - postmarks are not enough) with Penn. Secretary of State, Mail-in and Absentee Ballots, (archived on September 23, 2020 at 21:55:59 GMT), https://web.archive.org/web/20200923215559/https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx	23
Thomas M. Cooley <i>et al.</i> , Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 903 & n.1 (7th ed. 1903).....	22

The Supremacy Clause explicitly states that “the Judges in every State shall be bound” by federal law. U.S. Const., Art. VI, cl. 2. The Supreme Court of Pennsylvania issued a decision that clearly violates federal law and the United States Constitution. By judicial fiat, that decision removed the principal method by which Pennsylvania structures its post-election process, permitting votes to be cast after Election Day *and* counted after Election Day. By doing so, the decision creates multiple election days after November 3, 2020, in violation of federal law since votes can be cast (*i.e.* voted) after November 3, 2020. The decision also usurped the Pennsylvania General Assembly’s constitutionally-delegated authority to set the times, places, and manner of federal elections in Pennsylvania. This was done without any delegation of power to the state’s Supreme Court or legislative consideration whatsoever. For these reasons, Applicants respectfully request that this Court grant Applicants’ Emergency Motion For Stay. Contrary to the incorrect assertions of Respondents and their supporters, there is more than a reasonable probability that the Court will consider the case on the merits and more than a fair prospect that a majority of the Court will vote to reverse the decision below because applicants have standing to bring an appeal, the decision violates federal law and the United States Constitution, and the public interest favors granting a stay.

This Court has signaled its repeated unwillingness for federal courts to disrupt duly enacted state election policies so close in time to the General Election. *See, e.g., Andino v. Middleton*, No. 20A55, 592 U.S. (Oct. 5, 2020) (staying district

court injunction of South Carolina’s witness requirement for absentee ballots).¹ Other federal courts have done the same. *See, e.g., New Ga. Project v. Raffensperger*, No. 20-13360-D, 2020 U.S. App. LEXIS 31405 (11th Cir. Oct. 2, 2020) (overturning district court decision that enjoined Georgia’s long-standing received-by deadline and manufacturing its own ballot deadline, which mirrors the Supreme Court of Pennsylvania’s remedy.).

Seeing this, Respondents took to forum shopping in state court, and found a receptive forum at the Supreme Court of Pennsylvania. If this Court does not grant a stay, Respondents and their national allies will continue to forum shop by bringing even more challenges in state courts seeking to undermine otherwise legitimate policy determinations by state legislatures. In fact, the decision of the Supreme Court of Pennsylvania is an outlier because most state courts have refused to fundamentally alter state election law via judicial fiat under the guise of COVID-

19. *See, e.g., American Federation of Teachers v. Gardner*, No. 216-2020-CV-0570

¹ *See also, e.g., Republican Nat’l Comm.v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (Apr. 6, 2020) (granting stay of district court order requiring Wisconsin to count late postmarked absentee ballots for primary election, pending final disposition on appeal); *Merrill v. People First Of Ala.*, No. 19A1063 (July 2, 2020) (granting stay of district court order enjoining Alabama’s duly enacted photo identification and witness requirements for absentee voting during the pandemic); *Little v. Reclaim Idaho*, No. 20A18 (July 30, 2020) (granting stay of district court orders relaxing Idaho’s rules for ballot initiatives); *Clarno v. People Not Politicians*, No. 20A21 (Aug. 11, 2020) (granting stay of district court order relaxing Oregon’s election procedures because of the coronavirus pandemic); *Thompson v. DeWine*, No. 19A1054 (June 25, 2020) (denying application to vacate Sixth Circuit stay of district court order suspending Ohio’s enforcement of in-person signature requirements and extending filing deadlines for initiative campaigns); *Tex. Democratic Party v. Abbott*, No. 19A1055 (June 26, 2020) (denying application to vacate Fifth Circuit stay of district court order forcing Texas to implement no-excuse absentee voting). *See also Little v. Reclaim Idaho*, 591 U.S. No. 20A18, 2020 U.S. LEXIS 3585 (Roberts, C.J., concurring) (agreeing with the Court’s stay of a district court order altering initiative petition procedures in light of COVID-19 due in part to the district court’s failure to “accord sufficient weight to the State’s discretionary judgments about how to prioritize limited state resources across the election system as a whole.”). This Court has also repeatedly refused to disrupt states’ efforts to tackle issues related to COVID-19 outside of the election law context. *See, e.g., South Bay United Pentecostal Church v. Newsom*, No. 19A1044 (May 29, 2020); *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070 (July 24, 2020).

(N.H. Sup. Ct. Oct. 2, 2020) (declining to extend mail ballot deadlines in New Hampshire); *Alliance for Retired Americans v. Dunlap*, No. CV-20-95 (ME Sup. Ct. Sept. 30, 2020) (declining to extend mail ballot deadlines in Maine); *Driscoll v. Stapleton*, DA 20-0295, 2020 MT 247 (Mont. Sept. 29, 2020) (Vacating trial court injunction of mail ballot deadlines in Montana); *Mich. All. for Retired Am. v. Sec'y of State*, SC: 161837, 2020 Mich. LEXIS 1417 (Mich. Aug. 28, 2020) denying leave to appeal, No. 20-000108-MM (Mich. Ct. App. Sept. 18, 2020) (extending absentee ballot deadlines); *League of Women Voters of Mich. v. Sec'y of State*, 2020 Mich. App. LEXIS 4454 (Mich. Ct. App. July 14, 2020) (holding received-by deadline for absentee ballots to be constitutional because it did not impose a severe restriction on the right to vote and was a reasonable, nondiscriminatory provision that protects the integrity and reliability of the electoral process); *See also League of Women Voters of Mich. v. Sec'y of State*, SC: 161671, 2020 Mich. LEXIS 1565 (Mich. Sept. 11, 2020) (denying motion for reconsideration of denial of application for leave to appeal Court of Appeals decision); *Grossman v. Secretary of the Commonwealth*, SJC-12996, 485 Mass. 541, 2020 Mass. LEXIS 510, 151 N.E.3d 429 (Mass. Aug. 26, 2020) (September 1 deadline for receipt of mail-in primary election ballots not unconstitutional.); *Cf. North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*, 20 CVS 8881 (N.C. Sup. Ct. Oct. 5, 2020) (accepting settlement agreement between the plaintiffs and certain defendants extending absentee ballot receipt deadline).²

² The settlement accepted by the North Carolina Superior Court in *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*, 20 CVS 8881 was then enjoined via a

I. APPLICANTS HAVE STANDING TO BRING THIS APPEAL.

A review of this Court’s jurisprudence and the posture of Applicants in this case demonstrates that any attack on Applicants’ standing is meritless because the decision of the Supreme Court of Pennsylvania has deprived, and continues to deprive, Applicants, and the majority of the Pennsylvania General Assembly they represent of their federal and constitutional rights. This deprivation confers Article III standing upon Applicants.³

This Court is responsible for assuring “that state courts will not be the final arbiters of important issues under the federal constitution.” *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940). “The predominant interest promoted by this apparent exception to normal preclusion doctrines is to assure that the binding application of federal law is uniform and ultimately subject to control by this Court.” *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 622 (1989) (citing *Richardson v. Ramirez*, 418 U.S. 24, 42, n. 13 (1974)). *See also Richardson v. Ramirez*, 418 U.S. at 42, n. 13 (this Court may review a declaratory

temporary restraining order granted by the United States District Court for the Eastern District of North Carolina. *Moore v. Circosta*, No. 5:20-CV-507-D (E.D. N.C. Oct. 3, 2020) (Doc. 47). The *Moore* action was brought in federal court because the plaintiffs argued that memoranda issued by the North Carolina State Board of Elections, in conjunction with the settlement negotiations (and ultimately a settlement on October 2, 2020) in the state court lawsuit concerning absentee ballots, violated the Elections Clause because the memoranda are inconsistent with the North Carolina General statutes and improperly usurp legislative power to regulate federal elections. *Id.* After the state action was enjoined by temporary restraining order, the case was transferred to the Honorable William L. Osteen, Jr., United States District Judge in the Middle District of North Carolina. *Id.* A hearing on a motion for preliminary injunction is scheduled for Thursday, October 8, 2020 at 10:30 a.m.

³ In a procedural sleight of hand, the Pennsylvania Supreme Court denied intervention to the leadership of the Pennsylvania House. This court should not countenance an attempt by state supreme courts to deny this Court jurisdiction by permitting intervention in state cases by one house of a state legislature while denying another, when issues are related to power directly delegated to state legislatures by the United States Constitution, as is the case here. The House leadership is on record in this matter supporting the relief sought.

judgment granted by a state court, for “any other conclusion would unnecessarily permit a state court of last resort, quite contrary to the intention of Congress in enacting 28 U.S.C. § 1257, to invalidate state legislation on federal constitutional grounds without any possibility of state officials who were adversely affected by the decision seeking review in this Court”)).

Furthermore, this Court enunciated that it may exercise its jurisdiction on certiorari from a state court decision “if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.” *ASARCO*, 490 U.S. 623-24. *See also Virginia v. Hicks*, 539 U.S. 113, 120-121; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288-89.

On August 24, 2020 Applicants here filed their ultimately-successful Motion to Intervene before the Commonwealth Court. *See* Reply Appendix A. In their Motion to Intervene, Applicants argued that: (1) they could have been joined as an original party in the action; and (2) that the determination of the action will affect their legally-enforceable interests. *Id.* Specifically, Applicants’ argued that granting Respondents’ requested relief would diminish and usurp the rights and obligations that the United States Constitution vests in the Pennsylvania General Assembly,⁴ namely the right to enact the times, places, and manner of holding elections under the Constitution’s Elections Clause. *See id.* at ¶¶ 14-21 (citing U.S. Const. art. I, §4). On September 3, 2020, the Supreme Court of Pennsylvania granted Applicants’

⁴ Including the Pennsylvania Senate, of which Applicants and the House leadership who attempted to intervene represent a majority.

Motion to Intervene, indicating that Applicants had standing below and the determination of the action indeed implicates Applicants' legally-enforceable interests under the Elections Clause. *See* Reply Appendix B.

Applicants have suffered, as a consequence of the Supreme Court of Pennsylvania's "final judgment altering tangible legal rights," *ASARCO*, 490 U.S. at 619, an actual injury in fact—the diminishment of their authority under the United States Constitution—that is sufficiently "distinct and palpable" to confer standing under Article III. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Applicants, as they did below, allege a specific injury stemming from the Supreme Court of Pennsylvania's decision, a decision which violates federal law.

Applicants, therefore, have standing to bring an appeal to this Court because: (1) they had standing in the case below as determined by the state Supreme Court; and, (2) the decision of the Supreme Court of Pennsylvania injures them sufficient to confer Article III standing independently. *See ASARCO*, 490 U.S. 623-24. *See also Virginia v. Hicks*, 539 U.S. 113, 120-121; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288-89.

Moreover, this appeal is distinguishable from that of *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019). The primary distinguishing characteristic of this case from *Bethune-Hill* is that this case concerns the diminishment of the *authority* of the Pennsylvania General Assembly to regulate the times, places, and manner of federal elections in Pennsylvania under the Elections and Electors Clause of the United States Constitution. *See id.* at 1953-54. In this way, this case

is more akin to the standing of the litigants in *Sixty-seventh Minnesota State Senate v. Beens*, 406 U. S. 187 (1972) (per curiam) and *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 576 U.S. 787 (2015) where the decision to reduce the size of the legislative body and remove the primary authority for redistricting from a legislative body rendered the portions of the legislatures appropriate legal entities for appeals *Beens*, 406 U. S. at 194; *Arizona State Legislature*, 576 U.S. at 791-92. In essence, this case is not about the legislators’ general interest in their laws, but about their concrete interest in their own constitutionally-delegated authority.

In this way, this case is more akin to *Coleman v. Miller*, 307 U. S. 433, (1939), than to *Bethune-Hill*. In *Coleman*, plaintiffs were 20 (of 40) Kansas State Senators, whose votes “would have been sufficient to defeat [a] resolution ratifying [a] proposed [federal] constitutional amendment.” 307 U.S. at 446. The Court held they had standing to challenge, as impermissible under Article V of the Federal Constitution, the State Lieutenant Governor’s tie-breaking vote for the amendment. *Id. Coleman*, as later explained in *Raines*, stood “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.” 521 U.S., at 823. That Applicants have standing here fits that bill. The Supreme Court of Pennsylvania’s decision “completely nullif[ied]” a vote by the Legislature, now and “in the future,” purporting to set the time to accept mail-in and absentee ballots.

Raines, 521 U.S., at 823-824. This dispute, in short, “will be resolved . . . in a concrete factual context conducive to a [realistic appreciation of the consequences of judicial action.].”]. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982).

This case is further distinguishable from *Bethune-Hill* because of the attempted participation of the Pennsylvania House of Representatives throughout the pendency of the litigation. The Pennsylvania House of Representatives, through its leadership, has attempted to participate in the case on an equal and parallel footing as the Senators by intervening in the case below. *See* Amicus Brief of Cutler, *et al.* The Pennsylvania House of Representatives attempted to speak with the same voice as the majority of the Pennsylvania Senate, as represented by Applicants. *See, e.g.*, Amicus Brief of Cutler, *et al.* (mirroring Applicants’ Emergency Application for Stay). The Supreme Court of Pennsylvania inexplicably denied the Pennsylvania House of Representatives’ motion to intervene, possibly in an effort to evade this Court’s jurisdiction. Regardless, the attempted participation of the Pennsylvania House of Representatives in this case, and their participation as Amici supporting the Applicants before this Court, sufficiently distinguish this case from *Bethune-Hill*. The Supreme Court of Pennsylvania should not be permitted to diminish the General Assembly’s constitutional authority, then simultaneously insulate that decision from review by this Court through no fault of Applicants or the Pennsylvania House of Representatives.

Finally, *Bethune-Hill* is distinguishable from this case because the lower court in that case had given the Virginia House of Delegates an opportunity to address the issue of redistricting through the legislative process. 139 S. Ct. at 1950. Specifically, “Recognizing the General Assembly’s ‘primary jurisdiction’ over redistricting, the District Court gave the General Assembly approximately four months to adopt a new redistricting plan that eliminated the constitutional infirmity.” *Id.* (cleaned up) (internal quotation marks and citations omitted). When the legislature failed to do so, it deprived itself of standing under *Coleman*’s reasoning. *Id.* at 1954. Here, the General Assembly was attempting to react to the COVID-19 pandemic and attempting to negotiate with state leaders to reach practicable solutions. Rather than giving the General Assembly an opportunity to act legislatively, the Supreme Court of Pennsylvania interrupted those delicate legislative procedures and issued its decisions altering duly enacted election law.

Accordingly, Applicants have standing to appeal the Supreme Court of Pennsylvania’s decision. Therefore there is more than a reasonable probability that the Court will consider the case on the merits, and more than a fair prospect that a majority of the Court will vote to reverse the decision below.

II. THE SUPREME COURT OF PENNSYLVANIA HAS CREATED MULTIPLE ELECTION DAYS AFTER NOVEMBER 3, 2020, IN CONTRAVENTION OF FEDERAL LAW.

With a wink and a nod, Respondents and their supporters argue that the Supreme Court of Pennsylvania’s decision does not *actually* extend the federal Election Day in Pennsylvania because it says it doesn’t. They argue that the court’s

judicially-created “rebuttable presumption” is enough. However, the Supreme Court of Pennsylvania’s decision guts the State’s ability to police post-election Day voting by removing the requirement for legible postmarks. Without a postmark, it is unclear how anyone could establish that a mail-in ballot or absentee ballot was completed or mailed before or after Election Day. Take, for example, the voter who signed their ballot on Election Day, saw national election night returns, and dropped their ballot in the mailbox that evening or the next morning. If that ballot arrived with an illegible postmark – perhaps smeared in the rain that Wednesday or Thursday during the delivery and processing procedures – it would be counted under the state Supreme Court’s decision. Or perhaps that same ballot did not receive a postmark because of the pre-paid postage on the envelope. The same late-cast ballot would still be counted under the order at issue here.

Respondents incorrectly argue that there is no guarantee that post-election voting will occur under the Supreme Court of Pennsylvania’s order and that a voter would “have to bribe a postal employee not to postmark the envelope.” Secretary Br. at 27. This is simply not true.

The Supreme Court of Pennsylvania’s own Special Master, in related litigation, found that “Postmarks’ are applied to stamped mail to prevent reuse of the stamp” rather than a measure to gauge when the envelope was mailed. *Crossey et al. v. Boockvar*, No. 266 MD 2020 at 22 (Leavitt, P.J.) (Pa. Comm. Ct. Sept. 4, 2020) (Report and Recommendation) (Appendix C). “Commercial mail”, such as the pre-paid envelopes sent to vote-by-mail voters in Pennsylvania, “generally bears

evidence of payment, such as permit imprints, that are linked numerically to postage accounts. This mail does not bear traditional ‘postmarks’ readable by the human eye.” *Id.* “The marks imprinted by the USPS on [election mail] are not readable by the human eye and would require scanners and software to decode.” *Id.* at 22-23. In the end, the Supreme Court of Pennsylvania’s own Special Master found no credible evidence as to “whether prepaid postage envelopes, which may be provided by the county boards of elections to voters for mailing their completed ballots, will be postmarked. A postmark would evidence the date the voter placed the ballot in the mail.” *Id.* at 29.

Permitting mail-in ballots and absentee ballots to be counted if they are received after Election Day and lack any legible postmark undoubtedly will result in votes being voted and cast after election day. Counting votes that have been cast after Election Day allows ballots to be cast on multiple days after the nationally-mandated uniform Election Day in violation of federal law. The Supreme Court of Pennsylvania’s decision will result in precisely the kinds of problems that motivated the establishment of 2 U.S.C. § 1, 7 and 3 U.S.C. § 1, such as fraud, undue advantage, and non-uniformity. *See, e.g.,* Application at 12, 16. As this Court recognized in *Crawford v. Marion County Election Board*, the fact that voter fraud is a felony does not mean that it does not occur and a lack of evidence of such fraud occurring in a particular jurisdiction does not detract from the legitimacy or importance of the State’s interest in counting only eligible votes. 553 U.S. 181, 194-197 (2008).

Respondents and their supporters also attempt to lure this Court into believing that Applicants are arguing that the fault in the Supreme Court of Pennsylvania’s decision is its permission to *count* votes after Election Day. There can be no other explanation for this argument other than a blatant attempt to misdirect this Court because a very simple reading of Applicants’ Emergency Application for Stay demonstrates that Applicants’ primary issue with the court’s decision is its allowance of the *casting* of votes (*i.e.* voting) after November 3, 2020, as well as the counting of those votes after November 3, 2020. *See, e.g.*, Application at 15-17. This is because, in the words of this Court, “When the federal statutes speak of “the election” of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder” *Foster v. Love*, 522 U.S. 67, 71-72 (1997). When this Court referred to “the combined actions”, it plainly referred to voting—the actions of voters—and counting of ballots—the actions of officials—which together make a final selection of officeholders. *Id.* Under the Supreme Court of Pennsylvania’s decision, *both* of these actions can occur on and after November 3, 2020. This results in additional federal election days after November 3, 2020 in violation of federal law. Arguing that Applicants claim anything to the contrary is nothing but a red herring and a misconstruction of Applicants’ arguments.

The Supreme Court of Pennsylvania’s remedy is clearly distinguishable from the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”). 52 U.S.C. §§ 20301-20311. UOCAVA is a federal statutory scheme parallel to U.S.C. § 1, 7 and

3 U.S.C. § 1 rather than a state court fashioned state law. Through UOCAVA, Congress, which possesses authority to set the times, places, and manner of elections through the Elections Clause, made the determination to treat military and oversees voters differently. These are individuals whom Congress has determined are under much different circumstances than other domestic voters. For example, “a uniformed voter on a desolate, isolated outpost in Afghanistan. When he or she receives care packages from family members back home in the United States, it is only because his or her family sent the package weeks before. And when his or her family receives a letter from that uniformed voter, it is only because that uniformed voter sent it weeks before as well. The same holds true for the uniformed voter’s ballot.” *VoteVets Action Fund v. Detzner*, No. 4:18cv524-MW/MJF (N.D. Fla. 2018). UOCAVA “gives overseas voters the opportunity to vote on equal terms with domestic voters.” *Id.*

UOCAVA is also distinguishable from the Supreme Court of Pennsylvania’s order because it is a federal statute parallel to 2 U.S.C. § 1, 7 and 3 U.S.C. § 1 and cannot be read to conflict. Courts “must read the statutes to give effect to each if [it] can do so while preserving their sense and purpose.” *Watt v. Alaska*, 451 U.S. 259, 267 (1981). *In Get Oil Out! Inc. v. Exxon Corp.*, 586 F.2d 726 (9th Cir. 1978), this Court said:

It is our obligation to so construe federal statutes so that they are consistent with each other, as by this means congressional intent can be given its fullest expression. "When two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S. Ct. 1989,

1993, 48 L. Ed. 2d 540 (1976), quoting *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).

586 F.2d at 729. In reading UOCAVA consistent with 2 U.S.C. § 1, 7 and 3 U.S.C. § 1, it does not permit post-election voting. The Supreme Court of Pennsylvania's decision, as the action of a branch of a state government, does not require such a reading by this Court.

The Pennsylvania Democratic Party also argues that the policy judgment of the Supreme Court of Pennsylvania is valid because everybody else is doing it. Specifically, the Pennsylvania Democratic Party argues that because a small portion of states “that permit late-arriving ballots do not require an Election Day postmark as the sole indicator of timeliness”, the Supreme Court of Pennsylvania's decision is sound. However, these presumptions are either very new, untested, or the subject of ongoing litigation. The Pennsylvania Democratic Party only points to Nevada,⁵ New Jersey,⁶ and Minnesota⁷ as having a presumption that late-received non-postmarked ballots are valid. Of those states, the presumption in Nevada was adopted by the legislature and signed by the Governor (both of the same political party) this year and has not yet been subject to challenge. The presumption in New Jersey was adopted by the legislature and signed by the Governor (both of the same political party) specifically for 2020 and has not yet been subject to challenge.

⁵ 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.”).

⁶ N.J. Stat. Ann. § 19:63-31(m) (adopting a similar standard as long as the ballot arrives within two days of Election Day).

⁷ *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).

Neither of these states' changes were a result of a state court order. Finally, the presumption in Minnesota was the product of a state court judicial settlement (in which the executive branch agreed with the relief the Plaintiffs sought), which is subject to challenge in *Carson v. Simon*, 20-cv-2030 (D. Minn. 2020) (Preliminary injunction hearing held on October 2, 2020) (decision pending).

III. THE PENNSYLVANIA GENERAL ASSEMBLY HAS NOT DELEGATED ITS AUTHORITY TO REGULATE THE TIMES, PLACES, AND MANNER OF ELECTIONS TO THE PENNSYLVANIA JUDICIARY.

Respondents, and their supporters attempt to undercut Applicants' merits by arguing that the Pennsylvania General Assembly has essentially delegated its Elections Clause authority to the Pennsylvania Judiciary in a blanket manner by approving the Pennsylvania Constitution's Declaration of Rights, including the Free and Equal Elections Clause. Similarly, the majority of the Supreme Court of Pennsylvania argued that it possesses authority to alter the times of federal elections because of a state statute that does no such thing. *See* Slip Op. 21 n. 17, 35 (citing 25 P.S. § 3046). These arguments have no basis in reality or law. A plain reading of both Pennsylvania's Free and Equal Elections Clause and Section 3046 demonstrates that neither of them conveys blanket authority upon the Pennsylvania judiciary to set or alter the timing of federal elections in contravention of the express intent of the General Assembly.

Pennsylvania's Free and Equal Elections Clause states "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5. Nothing in the plain

language of the Free and Fair Elections Clause authorizes the Pennsylvania judiciary to set or alter the times of federal elections. Certainly nothing in the rest of the Pennsylvania Declaration of Rights or its Inviolate Clause does so either. *See, e.g.,* Pa. Const. art. I, § 26.

Nevertheless, the Supreme Court sought authority to alter the timing of the November 2020 General Election through Section 3046 of the Pennsylvania Election Code specifically. Section 3046 of the Pennsylvania Election Code states:

The court of common pleas of each county of the Commonwealth or a judge or judges thereof, shall be in continuous session at the courthouse of said county, or, in judicial districts composed of more than one county, at the courthouse of the county in which such judge or judges reside, on the day of each primary and election from 7 o'clock A. M. until 10 o'clock P. M. and so long thereafter as it may appear that the process of said court will be necessary to secure a free, fair and correct computation and canvass of the votes cast at said election. In judicial districts having but one judge of the court of common pleas, such judge shall not be required to be in session, as aforesaid, between the hours of 12 o'clock noon and 2 o'clock P. M., nor between the hours of 5:30 o'clock P. M. and 7 o'clock P. M. During such period said court shall act as a committing magistrate for any violation of the election laws; shall settle summarily controversies that may arise with respect to the conduct of the election; shall issue process, if necessary, to enforce and secure compliance with the election laws; and shall decide such other matters pertaining to the election as may be necessary to carry out the intent of this act. When an individual is seeking a judicial order to vote, the court shall, pursuant to the provisions of the Help America Vote Act of 2002 (Public Law 107-252, 42 U.S.C. § 15301 et seq.), inform the individual of the provisional ballot process set forth in section 1210(a.4) and shall direct the individual to follow the procedure in section 1210(a.4). In counties of the third class the court shall have power to appoint additional clerks at the polling places where needed and requested by the election board: Provided, That for each clerk appointed from the majority political party, a clerk from the minority political party must also be appointed.

25 P.S. § 3046. This section sets forth statutory duties and powers of the Courts of Common Pleas throughout the Commonwealth to “carry out the applicable laws *on the day of an election* and safeguard compliance with the Code to ensure elections run smoothly and fairly for all voters.” *In re Special Election for the 18th Pa. House Dist.*, 2020 Pa. Dist. & Cnty. Dec. LEXIS 935 (Pa. Ct. Comm. Pleas Apr. 3, 2020) (emphasis in original). Nothing in Section 3046 delegates to the Pennsylvania judiciary the blanket authority to change the timing of Pennsylvania’s federal elections more than a month in advance of the scheduled election. Furthermore, in the words of the Supreme Court of Pennsylvania itself, jurisdiction under Section 3046:

by the very terms of the grant, does not attach until seven o’clock a.m. on the day of each primary or election and then endures only until ten o’clock p.m. of the same day or for the relatively brief period of time thereafter “necessary to secure a free, fair and correct computation and canvass of the votes cast at said election.” The express designation by the statute of the time and instances in which the jurisdiction may be exercised implies a negative on the exercise of such power at any other time or in any other cases

Finnegan Appeal, 366 Pa. 6, 7-8 (Penn. 1950). Contrary to the Supreme Court of Pennsylvania’s bald assertions below, there is simply no blanket authority vested by Section 3046 to alter the timing of Pennsylvania’s federal elections weeks in advance of an election. In fact, in the previous opinion of the Supreme Court of Pennsylvania, what authority is vested in the Pennsylvania judiciary by Section 3046 is limited and necessarily restricts it from acting beyond those limits. *Id.* Accordingly, Section 3046 opposes, rather than supports, Supreme Court of Pennsylvania’s decision below.

The Supreme Court of Pennsylvania’s reliance on a 33-year old trial court opinion, *In re General Election-1985*, 531 A.2d 836, 838-39 (Pa. Cmwlth. 1987), bears no weight on Applicants’ arguments under the Elections Clause, U.S. Const. art. I, § 4. That case is inapposite here because it did not involve the alteration of the timing of a federal election—only a state election. *See generally id.* State elections of course fall outside the purview of the Elections Clause. *See* U.S. Const. art. I, § 4.

The sections of Pennsylvania’s Free and Equal Elections Clause, Section 3046, and Pennsylvania Declaration of Rights at issue here are plainly distinguishable from the laws at issue in *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 576 U.S. 787 (2015), *Smiley v. Holm*, 285 U.S. 355 (1932), and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). According to this precedent, a referendum (*Hildebrant*, 241 U.S. at 569), a gubernatorial signature (*Smiley*, 285 U.S. at 368), or a ballot initiative and redistricting commission (*Arizona*, 135 S. Ct. at 2668) belong to “the method which the state has prescribed for legislative enactments.” *Smiley*, 285 U.S. at 367. Pennsylvania’s Free and Equal Elections Clause is different because it does not create a legislative “method.”

Although the Pennsylvania General Assembly could be said to have had a role in enacting Pennsylvania’s Free and Equal Elections Clause, 25 P.S. § 3046, and Pennsylvania’s Declaration of Rights, it has never delegated to the judiciary its legislative authority over the times, places, and manner of federal elections. *See*

supra. In *Arizona State Legislature*, the Arizona Legislature had reserved to the people of Arizona some of its legislative power via ballot initiative. *Arizona State Legislature*, 576 U.S. at 795-96. Commensurate with that legislative power, the people of Arizona adopted a new manner of redistricting, which set the places of elections under the Elections Clause. *Id.* at 795-98. Here, contrary to *Arizona State Legislature*, the General Assembly has not delegated any of its legislative power to the body altering federal election procedures, in this case the Pennsylvania judiciary rather than the people of Arizona. The Pennsylvania judiciary does not and cannot legislate. *See, e.g.*, Pa. Const. art 2, § 1 (vesting legislative power in Pennsylvania’s General Assembly and only the General Assembly); *Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941) (“This is an argument which should be addressed to the legislature and not to the courts, for the duty of courts is to interpret laws, not to make them.”). Accordingly, unlike the people of Arizona in *Arizona State Legislature*, the Supreme Court of Pennsylvania has no authority under the Elections Clause to alter the times, places, or manner of Pennsylvania’s federal elections in direct conflict with the Pennsylvania General Assembly’s express legislative enactments.

In fact, *Arizona State Legislature*, *Smiley*, and *Hildebrant* support Petitioners’ position because they draw a line between state procedural requirements and substantive requirements. State constitutional manner-of-legislation provisions are consistent with the Elections Clause because its term “Legislature” refers to the state constitution’s “prescriptions for lawmaking.”

Arizona, 135 S. Ct. at 2668. By contrast, the term “Legislature” in no way refers to state substantive constitutional terms, such as free-speech or equal-protection provisions. And affording states power to define their legislature (*i.e.*, how laws must be passed) is not to afford them power to tie the legislature’s hands with policy prescriptions that must be interpreted and applied by other bodies that are not “the Legislature.” The argument that Pennsylvania’s Free and Equal Elections Clause enjoys the imprimatur of “the people,” but that four state judges can rewrite any state statute at will, runs afoul of *Arizona State Legislature*’s vociferous defense of “modes of legislation that place the lead *rein in the people’s hands*.” 135 S. Ct. at 2762 (emphasis added).

Permitting courts to read any state constitutional or statutory provision that so much as brushes against election regulation as delegating blanket authority under the Elections Clause to set and alter the times, places, and manner of federal elections would gut the Elections Clause of any meaning or power whatsoever. It would permit judges—partisan and nonpartisan alike—to alter and set federal election procedures on a whim, even on the eve of an impending election with national significance in the 26 states noted by Respondent in their brief. Brief of Respondent Secretary at 5, n. 2. This cannot and should not be permitted under the Elections Clause, or else this Court risks making the Elections Clause entirely meaningless.

IV. THAT THE SUPREME COURT OF PENNSYLVANIA WAS OSTENSIBLY RULING ON STATE SUBSTANTIVE LAW DOES NOT SAVE ITS OPINION FROM VIOLATING FEDERAL LAW.

By delegating exclusive power to regulate the times of federal elections in each state to “the Legislature thereof,” the Constitution necessarily denies that power to other state actors—absent a separate, affirmative grant of authority. *See supra* at Sec. III. Indeed, nothing in the Constitution’s text or structure suggests that a state legislature acting under the Elections Clause can be subject to a state constitution’s substantive provisions.

Any claim that cases such as *Smiley v. Holm*, 285 U.S. 355 (1932), *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), hold that state constitutions trump legislative enactments pursuant to the Elections Clause is completely false. Those cases hold only that “the Legislature” must pass Elections Clause legislation through the state’s “manner” of lawmaking. *Smiley*, 285 U.S. at 368. *See also supra* at Sec. III.

The Elections Clause itself provides that congressional enactments override state legislative enactments. Indeed, many courts have enforced a state statutory election law over a state substantive constitutional provision as to federal elections. *Commonwealth ex rel. Dummit v. O’Connell*, 181 S.W.2d 691, 692, 694 (Ky. 1944) (finding absentee voting, though “denied by the State Constitution,” available because “the Legislature” was “empowered” to legislate it under the Elections Clause); *In re Opinions of Justices*, 45 N.H. 595, 605-06 (N.H. 1864) (upholding allowance of absentee voting by “the legislature” which “exercise[d] that authority untrammelled by the provision of the State constitution, which requires the elector

of State representatives to give his vote in the town or place wherein he resides”); *In re Opinions of Justices*, 37 Vt. 665 (Vt. 1864) (applying state constitutional provision to state elections but not congressional elections); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887) (construing state constitutional provision as inapplicable to congressional elections because “to that extent it is...of no effect”); Thomas M. Cooley *et al.*, *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 903 & n.1 (7th ed. 1903).

Even if Pennsylvania’s Free and Equal Elections Clause could be applied, there must be some limiting principle on state courts’ purported “interpretations” in light of the Elections Clause. Indeed, multiple Justices of this Court have expressed that there “must be some limit on the State’s ability to define lawmaking by excluding the legislature itself in favor of the courts.” *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1094 (2004) (Rehnquist, C.J., dissenting from the denial of certiorari); *See also, e.g., Bush v. Gore*, 531 U.S. 98, 112-13 (2000) (Rehnquist, C.J., concurring).

As stated by the Supreme Court of Pennsylvania’s own Special Master, “it is a mistake to suppose that a court of equity is amenable to no law, either common or statute, and assumes the role of an arbitrary legislator in every particular case. When the rights of a party are clearly established by defined principles of law, equity should not change or unsettle those rights. Equity follows the law.” App. C at 32 (cleaned up) (quoting *Piper v. Tax Claim Bureau of Westmoreland County*, 910 A.2d 162, 165 (Pa. Cmwlth. 2006); *First Federal Savings and Loan Association v. Swift*, 321 A.2d 895, 897 (Pa. 1974)).

V. THE *PURCELL* PRINCIPLE AIDS RATHER THAN HINDERS APPLICANTS.

The *Purcell* Principle counsels against the Supreme Court of Pennsylvania's relief, not this Court's grant of Applicants' Emergency application for stay.

Prior to the Supreme Court of Pennsylvania's decision, Pennsylvania voters were educated that their ballots must be received by their county election office by 8 p.m. on November 3, 2020. *See* Reply Appendix C. Some of this education and guidance was even occurring after September 17, 2020. *See id.*; Furthermore, the Pennsylvania Secretary of State did not even update her website to reflect the change until September 23, 2020, after Applicants filed their application for a stay at the Supreme Court of Pennsylvania. *See* https://web.archive.org/web/*/https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx. Compare Penn. Secretary of State, Mail-in and Absentee Ballots, (archived on September 23, 2020 at 6:40:32 GMT), <https://web.archive.org/web/20200923064032/https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx> ("8 pm November 3 - VOTED BALLOTS must be RECEIVED by your county election office - postmarks are not enough) with Penn. Secretary of State, Mail-in and Absentee Ballots, (archived on September 23, 2020 at 21:55:59 GMT), <https://web.archive.org/web/20200923215559/https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx>.

Accordingly, it is the Supreme Court of Pennsylvania's decision, and not any stay from this Court, that has disrupted the orderly administration of elections. The Secretary, a Respondent in opposition to Applicants' stay here, should not be able to

insulate the decision of the Supreme Court of Pennsylvania by issuing guidance and then claiming a reliance interest after Applicants already applied for a stay.

CONCLUSION

For the aforementioned reasons, Applicants respectfully request this Court grant a stay of the portions of the Supreme Court of Pennsylvania's decision: (1) forcing election officials to accept ballots received after Election Day to be counted even if they lack a legible postmark; and (2) extending the absentee and mail-in ballot deadline past Election Day, pending the disposition of Applicants' forthcoming petition for writ of certiorari.

Respectfully submitted,

JASON B. TORCHINSKY
Counsel of Record
JONATHAN P. LIENHARD
SHAWN T. SHEEHY
DENNIS W. POLIO
HOLTZMAN VOGEL
JOSEFIAK TORCHINSKY PLLC
15405 John Marshall Hwy
Haymarket, VA 20169
(540) 341-8808
(540) 341-8809
Jtorchinsky@hvjt.law

CRYSTAL H. CLARK, ESQ.
General Counsel, Senate Republican Caucus
B-51 Main Capitol
Harrisburg, PA 17120
(717) 787-6259
cclark@pasen.gov

LAWRENCE J. TABAS
Centre Square West
1515 Market St., Suite 3400
Philadelphia, PA 19102
(215) 665-3158

lawrence.tabas@obermayer.com

*Counsel for Applicants Joseph B.
Scarnati III, President Pro Tempore,
and Jake Corman, Majority Leader of
the Pennsylvania Senate*

APPENDIX A

Pennsylvania Democratic Party, Nilofer Nina Ahmad, Danilo Burgos, Austin Davis, Dwight Evans, Isabella Fitzgerald, Edward Gainey, Manuel M. Guzman, Jr., Jordan A Harris, Arthur Haywood, Malcolm Kenyatta, Patty H. Kim, Stephen Kinsey, Peter Schweyer, Sharif Street, And Anthony H. Williams, Petitioners, v. Kathy Boockvar, in her capacity as Secretary of the Commonwealth of Pennsylvania, and the 67 County Boards of Elections, Respondents,	IN THE COMMONWEALTH COURT OF PENNSYLVANIA No. 407 MD 2020
--	--

**MOTION TO INTERVENE BY JOSEPH B. SCARNATI III,
PRESIDENT PRO TEMPORE, AND JAKE CORMAN, MAJORITY
LEADER OF THE PENNSYLVANIA SENATE**

Proposed Intervenors, Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader (“Applicants”), by and through the undersigned counsel, respectfully submit this motion to intervene as respondents in the above-captioned proceeding, pursuant to Rule 2327 of the Pennsylvania Rules of Civil Procedure.

Senators Scarnati and Corman have been duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitute a majority of the Pennsylvania Senate as a whole.

BASES FOR PROPOSED INTERVENORS' APPLICATION

1. Pursuant to Pennsylvania Rule of Appellate Procedure 106, the practice and procedures relating to original jurisdiction matters are to be in accordance with the Pennsylvania Rules of Civil Procedure.

2. Pennsylvania Rule of Civil Procedure 2327 allows a person not named as a party to seek leave to intervene by filing an application with the court.

3. Proposed Intervenor seek to intervene pursuant to Pennsylvania Rule of Civil Procedure 2327(3)-(4), which states, in pertinent part, as follows:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if . . .

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa.R.C.P. 2327.

4. Proposed Intervenor meet the requirements for intervention under Pa.R.C.P. 2327(3)-(4). They seek to protect the Pennsylvania Senate's exclusive constitutional rights, together with the Pennsylvania House of Representatives, of determining the times, places, and manner of holding elections under Art. 1, §4 of

the U.S. Constitution and Art. 2, §1 of the Pennsylvania Constitution; and of suspending laws under Art. 1, §12 of the Pennsylvania Constitution.

5. Importantly, when evaluating whether the General Assembly’s asserted interests satisfy Pa.R.C.P. 2327(4), this Court must not “confus[e] weakness on the merits with the absence of ... standing.” *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2663 (2015). This is because the analysis here is dependent upon the source and nature of the interest asserted, not on the merits of the claim. *See id.* (quoting and citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Additionally, the threshold to satisfy Pa.R.C.P. 2327(4) is lower than the threshold to establish standing. *See Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Servs.*, 225 A.3d 902, 910-911 (Pa. Comm. Ct. 2020).

PETITIONERS CLAIMS

6. Petitioners want to disrupt Pennsylvania’s carefully crafted deadline for county boards to receive ballots by 8pm on Election Day. Instead, Petitioners ask this Court to rewrite the legislation to compel state officials to accept ballots after 8 p.m. on Election Day. Petitioners request that this Court require Respondents to count ballots that are postmarked no later than 8 p.m. on Election Day and received

by the respective county board within one week of Election Day. Pet. ¶ 178 (Count II).¹

7. Alternatively, Petitioners want this Court to order Respondents to offer a “more tailored ballot extension deadline to the date that is 21 days after the particular voter’s ballot is mailed by the county.” Pet. ¶ 179. This extension cannot be past November 10, 2020 and the extension does not apply if the county board of elections mails the voter’s ballot within 24 hours of the board receiving the ballot request. Pet. ¶ 179.²

8. Petitioners also request that the county boards provide each mail-in elector whose ballot is incomplete or contains errors, an opportunity cure the defect, so long as the defect is cured prior to November 10, 2020. Pet. ¶ 187 (Count III).

9. In addition to Counts II and III which seek to alter Pennsylvania’s carefully crafted election-related deadlines, the Petitioners seek to alter what the Legislature determined was the “Place” for the election, namely at the offices of the county board. Pet. ¶ 165 (Count I). Petitioners ask that this Court declare that each county board has the discretion to provide additional “secure, easily accessible locations” for voters to drop-off their mail-in ballots. Pet. ¶ 165. Petitioners also seek a

¹ On June 1, 2020, the Governor issued an emergency order extending the deadline for the receipt of mail-in ballot in certain counties in advance of the June primary. *See* Executive Order 2020-02, *Extension of Deadline for Receipt of Absentee and Mail-In Ballots in Certain Counties* (June 1, 2020) (attached to the accompanying memorandum of law as Ex. B). Although the Executive Branch believes it has authority to grant at least some relief sought to Petitioners, the Senators do not agree that the Governor has the authority to unilaterally alter election related deadlines.

² *See* fn. 1, *supra*. It is unclear the scope of the authority the Executive Branch claims here.

mandatory injunction from this Court ordering the county boards to “evaluate the particular facts and circumstances in their jurisdictions and develop a reasonable plan reflecting the needs of the citizens of the county to ensure the expedient return of mail-in ballots.” Pet. ¶ 166.

10. Petitioners next seek an injunction prohibiting the county boards from invalidating ballots if the voter forgot to place the ballot inside an official election ballot envelop or otherwise displays the identity of the voter. Pet. ¶¶ 197-99 (Count IV).

11. Finally, Petitioners seek a declaration that Pennsylvania’s statute requiring poll watchers to serve only in counties where they are not also a qualified registered elector is constitutional. Pet. ¶¶ 206-07 (Count V).

12. Although Respondents Secretary Boockvar and the County Boards of Elections oppose the relief Petitioners seek with respect to notifying voters of curable defects on their ballots (Count III) and the residency restrictions for poll watchers (Count V), they are agreeable to a three-day extension of the deadline for mail-in ballots, allowing the use of drop-boxes for delivery of mail-in ballots, and counting “naked” ballots. See Respondents’ *Application for Extraordinary Jurisdiction* before the Pennsylvania Supreme Court, 133 MM 2020.

13. Therefore, Respondents do not adequately represent Proposed Intervenor’s interests regarding Petitioners’ requests for relief in Counts I, II, and IV.

14. Proposed Intervenor, together with the House of Representatives, seek to protect rights and obligations that the U.S. Constitution vests in the Pennsylvania legislature, namely the right to enact the times, places, and manner of holding elections under the Constitution's Elections Clause. *See* U.S. Const. art. I, §4.

15. Additionally, Art. 2, §1 of the Pennsylvania Constitution vests the legislative power in Pennsylvania's General Assembly.

16. In enacting Act 77, the Legislature permitted all Pennsylvania voters to vote by mail, but chose not to disrupt the election-related deadlines by extending the received-by deadline beyond Election Day. 25 P.S. §§ 3146.6(c), 3150.16(c). Petitioners' requested relief diminishes and encroaches on the constitutionally granted investment of authority by creating instability in the carefully crafted administration of elections. *See, e.g.,* Pet. ¶¶ 178-179.

17. Petitioners' requested relief, therefore, diminishes the General Assembly's authority to enact a comprehensive elections code including the enactment of deadlines, locations, and canvassing of ballots, which is invested in the legislature by the United States Constitution.

18. Claim I, Pet. ¶ 165, affects the General Assembly's constitutionally vested authority to establish the "Places" of elections as well as enact provisions to protect the integrity and uniformity of elections by preventing acts that invite fraudulent practices.

19.Count II, Pet. ¶¶ 178-79, asks that this Court use its equitable powers to alter the statutorily mandated deadlines, particularly the deadline by which county boards must receive ballots. This request for relief infringes on the legislature's constitutionally vested authority to establish the "Time" of elections as well as enact provisions to protect the integrity and uniformity of elections by preventing acts that invite fraudulent practices and therefore directly harms the legislature's interest in enacting comprehensive election codes.

20.Count IV, Pet. ¶¶ 197-99 also infringes the right of the legislature to devise rules for the counting of ballots, which relates to the "Manner" of conducting elections.

21.Because Petitioners request that this Court modify election laws, laws whose creation the U.S. Constitution and the Pennsylvania Constitution have vested in the Pennsylvania legislature, and because Respondents are not interested in defending the legislature's prerogatives, this Court should grant intervention.

WHEREFORE, for the reasons set forth above and more fully set forth in the accompanying Memorandum of Law, Senators Scarnati and Corman respectfully request the Court's permission to intervene on behalf of the legislative houses whose majorities they represent with respect to Counts I, II and IV the Petition for Review.

Dated: August 24, 2020

Respectfully submitted,
Obermayer Rebmann Maxwell & Hippel

LLP

By: /s/ Richard Limburg

Lawrence J. Tabas (ID No. 27815)

Mathieu J. Shapiro (ID No. 76266)

Richard Limburg (ID No. 39598)

Centre Square West

1515 Market St., Suite 3400

Philadelphia, PA 19102

Attorneys for Joseph B. Scarnati III and Jake Corman

Holtzman Vogel Josefiak Torchinsky PLLC

By: /s/ Jason B. Torchinsky

Jason B. Torchinsky (Va. ID No. 47481)

Jonathan P. Lienhard (Va. ID No. 41648)

Philip M. Gordon (DC. ID No. 1531277)

Shawn T. Sheehy (Va. ID No. 82630)

45 North Hill Drive, Suite. 100

Warrenton, VA 20186

[\(540\) 341-8808](tel:5403418808) (P)

[\(540\) 341-8809](tel:5403418809) (F)

Attorneys for Joseph B. Scarnati III, and Jake Corman pending approval of application for admission pro hac vice

APPENDIX B

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

PENNSYLVANIA DEMOCRATIC PARTY,	:	No. 133 MM 2020
NILOFER NINA AHMAD, DANILO	:	
BURGOS, AUSTIN DAVIS, DWIGHT	:	
EVANS, ISABELLA FITZGERALD,	:	
EDWARD GAINEY, MANUEL M. GUZMAN,	:	
JR., JORDAN A. HARRIS, ARTHUR	:	
HAYWOOD, MALCOLM KENYATTA,	:	
PATTY H. KIM, STEPHEN KINSEY, PETER	:	
SCHWEYER, SHARIF STREET, AND	:	
ANTHONY H. WILLIAMS	:	

v.

KATHY BOOCKVAR, IN HER CAPACITY	:	
AS SECRETARY OF THE	:	
COMMONWEALTH OF PENNSYLVANIA;	:	
ADAMS COUNTY BOARD OF ELECTIONS;	:	
ALLEGHENY COUNTY BOARD OF	:	
ELECTIONS; ARMSTRONG COUNTY	:	
BOARD OF ELECTIONS; BEAVER	:	
COUNTY BOARD OF ELECTIONS;	:	
BEDFORD COUNTY BOARD OF	:	
ELECTIONS; BERKS COUNTY BOARD OF	:	
ELECTIONS; BLAIR COUNTY BOARD OF	:	
ELECTIONS; BRADFORD COUNTY	:	
BOARD OF ELECTIONS; BUCKS COUNTY	:	
BOARD OF ELECTIONS; BUTLER	:	
COUNTY BOARD OF ELECTIONS;	:	
CAMBRIA COUNTY BOARD OF	:	
ELECTIONS; CAMERON COUNTY BOARD	:	
OF ELECTIONS; CARBON COUNTY	:	
BOARD OF ELECTIONS; CENTRE	:	
COUNTY BOARD OF ELECTIONS;	:	
CHESTER COUNTY BOARD OF	:	
ELECTIONS; CLARION COUNTY BOARD	:	
OF ELECTIONS; CLEARFIELD COUNTY	:	
BOARD OF ELECTIONS; CLINTON	:	
COUNTY BOARD OF ELECTIONS;	:	
COLUMBIA COUNTY BOARD OF	:	
ELECTIONS; CRAWFORD COUNTY	:	

BOARD OF ELECTIONS; CUMBERLAND :
COUNTY BOARD OF ELECTIONS; :
DAUPHIN COUNTY BOARD OF :
ELECTIONS; DELAWARE COUNTY :
BOARD OF ELECTIONS; ELK COUNTY :
BOARD OF ELECTIONS; ERIE COUNTY :
BOARD OF ELECTIONS; FAYETTE :
COUNTY BOARD OF ELECTIONS; :
FOREST COUNTY BOARD OF :
ELECTIONS; FRANKLIN COUNTY BOARD :
OF ELECTIONS; FULTON COUNTY :
BOARD OF ELECTIONS; GREENE :
COUNTY BOARD OF ELECTIONS; :
HUNTINGDON COUNTY BOARD OF :
ELECTIONS; INDIANA COUNTY BOARD :
OF ELECTIONS; JEFFERSON COUNTY :
BOARD OF ELECTIONS; JUNIATA :
COUNTY BOARD OF ELECTIONS; :
LACKAWANNA COUNTY BOARD OF :
ELECTIONS; LANCASTER COUNTY :
BOARD OF ELECTIONS; LAWRENCE :
COUNTY BOARD OF ELECTIONS; :
LEBANON COUNTY BOARD OF :
ELECTIONS; LEHIGH COUNTY BOARD OF :
ELECTIONS; LUZERNE COUNTY BOARD :
OF ELECTIONS; LYCOMING COUNTY :
BOARD OF ELECTIONS; MCKEAN :
COUNTY BOARD OF ELECTIONS; :
MERCER COUNTY BOARD OF :
ELECTIONS; MIFFLIN COUNTY BOARD :
OF ELECTIONS; MONROE COUNTY :
BOARD OF ELECTIONS; MONTGOMERY :
COUNTY BOARD OF ELECTIONS; :
MONTOUR COUNTY BOARD OF :
ELECTIONS; NORTHAMPTON COUNTY :
BOARD OF ELECTIONS; :
NORTHUMBERLAND COUNTY BOARD OF :
ELECTIONS; PERRY COUNTY BOARD OF :
ELECTIONS; PHILADELPHIA COUNTY :
BOARD OF ELECTIONS; PIKE COUNTY :
BOARD OF ELECTIONS; POTTER :
COUNTY BOARD OF ELECTIONS; :
SCHUYLKILL COUNTY BOARD OF :
ELECTIONS; SNYDER COUNTY BOARD :
OF ELECTIONS; SOMERSET COUNTY :
BOARD OF ELECTIONS; SULLIVAN :

COUNTY BOARD OF ELECTIONS;	:
SUSQUEHANNA COUNTY BOARD OF	:
ELECTIONS; TIOGA COUNTY BOARD OF	:
ELECTIONS; UNION COUNTY BOARD OF	:
ELECTIONS; VENANGO COUNTY BOARD	:
OF ELECTIONS; WARREN COUNTY	:
BOARD OF ELECTIONS; WASHINGTON	:
COUNTY BOARD OF ELECTIONS; WAYNE	:
COUNTY BOARD OF ELECTIONS;	:
WESTMORELAND COUNTY BOARD OF	:
ELECTIONS; WYOMING COUNTY BOARD	:
OF ELECTIONS; AND YORK COUNTY	:
BOARD OF ELECTIONS	:
	:
	:
	:
PETITION OF: KATHY BOOCKVAR, IN	:
HER CAPACITY AS SECRETARY OF THE	:
COMMONWEALTH OF PENNSYLVANIA	:

ORDER

PER CURIAM

AND NOW, this 3rd day of September, 2020, the motion to intervene filed by Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader, representing the Republican Senate Caucus, is **GRANTED**. The application to intervene filed by the Republican Party of Pennsylvania is **GRANTED**. The applications to intervene filed by Donald J. Trump for President, Inc., and the Republican National Committee; Common Cause of Pennsylvania, the League of Women Voters of Pennsylvania, the Black Political Empowerment Project, Make the Road Pennsylvania, Patricia M. DeMarco, Danielle Graham Robinson, and Kathleen Wise are **DENIED**. The denial of the motions to intervene is without prejudice to the parties' ability to file briefs as *amicus curiae* pursuant to Pa.R.A.P. 531.

Justice Wecht files a concurring and dissenting statement.

APPENDIX C

MAIL-IN VOTING



SECURE & PRIVATE



EASY TO APPLY



EASY TO VOTE



All voters can choose to vote by mail or in person.
Learn more and apply online at: [VotesPA.com](https://www.VotesPA.com)

**APPLY
EARLY
RETURN
EARLY**

The deadlines for the **November 3** general election are;

- **October 19:** Last day to update your voter registration
- **October 27:** Last day to apply for a mail-in ballot
- **November 3, 8pm:** Deadline to return your voted mail-in ballot or to vote in-person.

If you want to be mailed a paper application or have questions, call **1-877-VOTESPA** (1-877-868-3772). Voted mail-in ballots can be returned by mail or dropped off at your county's election office. **If you've already applied to be a permanent annual mail-in voter, you do not need to reapply.** To check your ballot status, visit [VotesPA.com](https://www.VotesPA.com).

Si necesita información en español, visite [VotesPA.com/español](https://www.VotesPA.com/español), o llame al **1-877-868-3772**.