No. 20-542

IN THE
Supreme Court of the United States

REPUBLICAN PARTY OF PENNSYLVANIA,

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

KATHLEEN GALLAGHER
RUSSELL D. GIANCOLA
PORTER WRIGHT MORRIS & ARTHUR LLP
6 PPG Place, Third Floor
Pittsburgh, PA 15222

JOHN M. GORE
Counsel of Record
MICHAEL A. CARVIN
NOEL J. FRANCISCO
ALEX POTAPOV
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
jmgore@jonesday.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. A RECENT EIGHTH CIRCUIT DECISION HAS CREATED A SPLIT IN AUTHORITY 2

II. THIS CASE IS AN IDEAL VEHICLE 4

A. RPP Has Standing 4

B. The Case Is Not Moot 6

C. PDP's Reliance Argument Is Unfounded And Irrelevant 8

III. RESPONDENTS' MERITS ARGUMENTS ARE IRRELEVANT AND WRONG 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,
576 U.S. 787 (2015) 10, 11

Bush v. Gore,
531 U.S. 98 (2000) 11

Bush v. Gore,
531 U.S. 1046 (2000) 6

Bush v. Palm Beach Cnty. Canvassing Bd.,
531 U.S. 70 (2000) 4, 10

Carson v. Simon,
978 F.3d 1051 (8th Cir. 2020) .....*passim*

Davis v. FEC,
554 U.S. 724 (2008) 7, 8

Democratic Nat'l Comm. v. Wis. State Legislature,
No. 20A66, slip op. (U.S. Oct. 26, 2020) 9

FEC v. Wis. Right to Life, Inc.,
551 U.S. 449 (2007) 7, 8

First Nat'l Bank of Bos. v. Bellotti,
435 U.S. 765 (1978) 6, 7, 8

Gill v. Whitford,
138 S. Ct. 1916 (2018) 6

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 4, 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Hunt v. Wash. State Apple Advert. Comm'n,
432 U.S. 333 (1977) 5

Lance v. Coffman,
549 U.S. 437 (2007) 5

McPherson v. Blacker,
146 U.S. 1 (1892) 4

Moore v. Circosta,
No. 20A72, slip op. (U.S. Oct. 28, 2020) 7

Moore v. Hosemann,
591 F.3d 741 (5th Cir. 2009) 7, 8

Moore v. Ogilvie,
394 U.S. 814 (1969) 7, 8

Norman v. Reed,
502 U.S. 279 (1992) 7, 8

Purcell v. Gonzalez,
549 U.S. 1 (2006) 1, 9

Republican Party of Pa. v. Boockvar,
No. 20-542, slip op. (U.S. Oct. 28, 2020)..... 2, 7, 10

Rucho v. Common Cause,
139 S. Ct. 2484 (2019) 10, 11

Storer v. Brown,
415 U.S. 724 (1974) 7, 8

OTHER AUTHORITIES

Sup. Ct. R. 10 3

INTRODUCTION

Respondents' Oppositions only confirm what some Respondents told the Court just weeks ago: that the Court should grant review and resolve the important and recurring questions presented in this case. Pa. Dems. Br. 9, No. 20A54 (Oct. 5, 2020) (advocating for review because the questions presented are "of overwhelming importance for States and voters across the country"); Sec'y Br. 2-3, No. 20A54 (Oct. 5, 2020). Respondents uniformly fail to mention that after the Republican Party of Pennsylvania (RPP) filed its Petition but more than a month before Respondents filed their Oppositions, the Eighth Circuit created a split on the question whether the Electors Clause constrains state courts from altering election deadlines enacted by state legislatures. *See Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). Instead, Respondents seek to obfuscate the matter with a welter of vehicle arguments turning on the fact that Pennsylvania has certified the results of the 2020 general election. In reality, however, this case is an ideal vehicle, in part precisely *because* it will not affect the outcome of this election.

Indeed, this Court has repeatedly emphasized the imperative of settling the governing rules *in advance of* the next election, in order to promote the public "[c]onfidence in the integrity of our electoral processes [that] is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). This case presents a vital and unique opportunity to do precisely that. By resolving the important and recurring questions now, the Court can provide desperately needed guidance to state legislatures and courts across the country *outside* the

context of a hotly disputed election and *before* the next election. The alternative is for the Court to leave legislatures and courts with a lack of advance guidance and clarity regarding the controlling law—only to be drawn into answering these questions in future after-the-fact litigation over a contested election, with the accompanying time pressures and perceptions of partisan interest.

In short, Respondents offer no basis to depart from the conclusion of four Justices that the case is worthy of the Court's attention. *Republican Party of Pa. v. Boockvar*, No. 20A54 (U.S. Oct. 19, 2020). Respondents also offer no basis to dispute that "there is a strong likelihood that the [Pennsylvania Supreme Court's] decision violates the Federal Constitution" or that "the question presented … calls out for review by this Court." *Republican Party of Pa. v. Boockvar*, No. 20-542, slip op. at 3 (U.S. Oct. 28, 2020) (Statement of Alito, J.). Nor could they: the Pennsylvania Supreme Court's decision cannot be reconciled with the Constitution or federal statutes, and the same issues have arisen and will continue to arise throughout the country. The Court should grant review.

ARGUMENT

I. A RECENT EIGHTH CIRCUIT DECISION HAS CREATED A SPLIT IN AUTHORITY

Neither the Pennsylvania Democratic Party (PDP) nor Luzerne County so much as mentions the Eighth Circuit's recent decision in *Carson*. For her part, the Secretary makes passing reference to *Carson* only in connection with her flawed challenge to RPP's standing. *See* Sec'y Opp. 12 n.9; *see also infra* Part II.A. Respondents' disregard of *Carson* is puzzling,

since that decision irreconcilably conflicts with the decision below and, thus, provides yet another reason for this Court's review. *See* Sup. Ct. R. 10(a).

At issue in *Carson* was the constitutionality of a consent decree between the Minnesota Secretary of State and private plaintiffs entered as an order of a state court. *See Carson*, 978 F.3d at 1054. Like the Pennsylvania General Assembly in this case, the Minnesota Legislature enacted an Election Day received-by deadline for absentee ballots. *See id.* at 1055. And like the Pennsylvania Supreme Court's judgment in this case, the Minnesota consent decree extended the Election Day received-by deadline and mandated a presumption of timeliness for non-postmarked ballots received before the judicially created deadline. *See id.* at 1056.

The Eighth Circuit majority ordered entry of a preliminary injunction requiring Minnesota election officials to segregate ballots received after the Legislature's Election Day received-by deadline but before the judicially created deadline. *See id.* at 1062-63. The Eighth Circuit held that "the Secretary's actions in altering the deadline for mail-in ballots" and the resulting consent decree "likely violate[] the Electors Clause." *Id.* at 1059. In fact, the Eighth Circuit thought the analysis "relatively straightforward": because "the Electors Clause vests the power to determine the manner of selecting electors exclusively in the 'Legislature' of each state," "only the Minnesota Legislature, and not the Secretary" or the state court, "has plenary authority to establish the manner of conducting the presidential election in Minnesota." *Id.* at 1059-60.

The Eighth Circuit continued: "[A] legislature's power in this area is such that it 'cannot be taken from them or modified' even through 'their state constitutions.'" *Id.* at 1060 (quoting *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) and citing *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76-77 (2000)). Thus, the attempt "to re-write the laws governing the deadlines for mail-in ballots in the 2020 Minnesota presidential election is invalid." *Id.*

There is simply no way to square the Eighth Circuit's invalidation of an extension of an Election Day received-by deadline and a non-postmarked ballots presumption with the Pennsylvania Supreme Court's judgment granting exactly the same relief. *Compare id.* at 1059-60, *with* Pet.App.43a-49a; *see also* Pet. 16-30. The Court should grant review.

II. THIS CASE IS AN IDEAL VEHICLE

Respondents' Oppositions rely primarily on the argument that, because Pennsylvania has certified the results of the 2020 general election, the case is an improper vehicle. *See* Sec'y Opp. 8-16; PDP Opp. 8-22. To the contrary—as nineteen States have agreed—the case is an ideal vehicle because it gives the Court the opportunity to provide crucial guidance on these important and recurring questions for *future* elections, outside of the context and constraints of a hotly disputed *current* election. *See* Ohio Br. 6-7; Okla. Br. 12-18; Mo. Br. 16-20.

A. RPP Has Standing

Alone among Respondents, the Secretary asserts that RPP lacks standing to seek the Court's review. *See* Sec'y Opp. 11-13. PDP takes a pointedly more cautious line and even cites *Havens Realty Corp. v.*

Coleman, 455 U.S. 363 (1982), for the proposition that RPP *may* have standing. *See* PDP Opp. 21-22. PDP is right to be cautious, as the two affidavits RPP submitted below demonstrate that it *does* have standing.

First, RPP submitted an affidavit from Ms. Melanie Stringhill Patterson, a Pennsylvania voter and RPP member who "do[es] not want [her] vote diluted or cancelled by votes that are cast in a manner contrary to [legislatively-enacted] requirements." Pet.App.195a, 196a. She therefore has a continuing interest in upholding "the rules established by the General Assembly in the Election Code," which was harmed by the majority's remedy. Pet.App.196a; *compare Carson*, 978 F.3d at 1058 ("[a]n inaccurate vote tally [was] a concrete and particularized injury"), *with Lance v. Coffman*, 549 U.S. 437 (2007) ("The only injury plaintiffs allege is that the law … has not been followed."). RPP has associational standing to invoke this Court's review "on behalf of itself and its members, including its voters" like Ms. Patterson. Pet.App.191a; *see Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

Second, RPP submitted the affidavit of its executive director, Ms. Vonne Andring, who described RPP's expenditure of "substantial resources toward educating, mobilizing, assisting, and turning out voters in Pennsylvania." Pet.App.191a. Those efforts "rel[y] upon, utilize[], and [are] built upon the clear language of the Election Code." *Id.* Accordingly, when courts require elections to be administered in a manner inconsistent with the Election Code, RPP's previous expenditures go to waste and RPP must spend additional resources to overhaul its programs

and operations. Pet.App.191a-192a. Such a "drain on [RPP's] resources" establishes its organizational standing. *Havens Realty*, 455 U.S. at 379.

B. The Case Is Not Moot

Respondents' various mootness arguments, PDP Opp. 8-13; Sec'y Opp. 8-11, fail for two principal reasons.

First, Respondents all assert that the *only* possible interest RPP could have is in changing the outcome of some election. PDP Opp. 10; Sec'y Opp. 8; Luzerne Cnty. Opp. 13 n.12. This assertion is simply wrong: RPP has interests in preventing the dilution of its members' votes and in maintaining the integrity of the vote count. These interests suffice to preserve a live controversy. *See Bush v. Gore*, 531 U.S. 1046, 1046-47 (2000) (Scalia, J. concurring in grant of stay) ("The counting of votes that are of questionable legality … threaten[s] irreparable harm."); *Gill v. Whitford*, 138 S. Ct. 1916, 1930-31 (2018) (recognizing that individual voters have an interest in avoiding vote dilution); *Carson*, 978 F.3d at 1058.

Second, even if that were not the case, the "capable of repetition, yet evading review" doctrine would apply. The test is whether "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 (1978) (internal quotation marks omitted). Both criteria are satisfied here.

As to the first, this Court has repeatedly found that election controversies unfold sufficiently rapidly to

evade review. *See, e.g., Bellotti*, 435 U.S. at 775; *Davis v. FEC*, 554 U.S. 724, 735 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Norman v. Reed*, 502 U.S. 279, 288 (1992); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *see Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009) ("Election controversies are paradigmatic examples of cases that cannot be fully litigated before the particular controversy expires."). This case provides a vivid illustration: despite RPP's best efforts, it proved impossible to resolve the case before the election. *Republican Party of Pa.*, slip op. at 3 (Statement of Alito, J.) ("I reluctantly conclude that there is simply not enough time at this late date to decide the question before the election.").

As to the second, the decision below demonstrates the Pennsylvania Supreme Court's willingness to modify legislatively-enacted rules governing a federal election, even when it finds "no ambiguity" in those rules, Pet.App.43a, and the only record before it belies any claim for such a modification, *see* Pet. 23-30. It is inevitable that this case will become a model for future litigation: having witnessed PDP's success in this matter, future litigants will surely try to obtain similar relief. Accordingly, there is every reason to believe that RPP will face the same issues in future cases. That those cases may differ in "legally relevant" ways from this case does not defeat the Court's jurisdiction here. *Wis. Right to Life*, 551 U.S. at 463.

Moreover, other litigants across the country are certain to encounter these issues as well—indeed, some already have. *See, e.g.*, *Carson*, 978 F.3d at 1060; *Moore v. Circosta*, No. 20A72, slip op. (U.S. Oct. 28, 2020); Pet. 33-36. Yet like RPP, these litigants will

lack sufficient time to secure the Court's review on the eve of an election. This is further reason why the Court should grant review and decide these issues now, well in advance of the next election. *See, e.g.*, Ohio Br. 6-7; Okla. Br. 12-18; *Storer,* 415 U.S. at 737 n.8 (case not moot because "effects on independent candidacies … [would] persist").

C. PDP's Reliance Argument Is Unfounded And Irrelevant

PDP—but no other Respondent—also argues that, because the disputed ballots were cast "in conformity with then-existing election rules," it is impermissible to invalidate them now. PDP Opp. 13-14. Of course, this argument creates significant tension with PDP's prior statement to the Court that once the late-arriving ballots were segregated, "RPP [could not] contend that there is any need for this court to issue a decision before the election." PDP Opp. to Mot. to Expedite 7.

Regardless, this argument misses the point: the Court can grant review and resolve the questions presented *without invalidating a single ballot*. After all, the very premise of the capable of repetition yet evading review doctrine under which the Court can—and should—grant review, *see supra* Part II.B, is that it is no longer possible to provide effective relief for the original injury. *See, e.g., Bellotti*, 435 U.S. at 775; *Davis*, 554 U.S. at 735; *Wis. Right to Life, Inc.*, 551 U.S. at 462; *Norman*, 502 U.S. at 288; *Storer*, 415 U.S. at 737 n.8; *Ogilvie*, 394 U.S. at 816; *Hosemann*, 591 F.3d at 744.

If more were somehow needed, PDP's reliance argument is legally flawed and reflects fundamental

confusion about the Court's *Purcell* principle. *See* PDP Opp. 16-18. PDP posits that the Court cannot correct "then-governing election rules" and that the relevant rules here are those set by the Pennsylvania Supreme Court. *See id.* This turns *Purcell* on its head: as the Petition explained, the relevant rules for the *Purcell* analysis are *the rules enacted by the General Assembly*; it was *the Pennsylvania Supreme Court* that violated *Purcell*; and this Court does not violate *Purcell* by fixing that *Purcell* error, whether before or after an election. *See* Pet. 35-36; *Democratic Nat'l Comm. v. Wis. State Legislature,* No. 20A66, slip op. at 4 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (explaining that "[c]orrecting an erroneous lower court injunction of a state election rule cannot itself constitute a *Purcell* problem").

Ultimately, Respondents' vehicle arguments are self-defeating. This is simply not a case in which the Court risks creating an "appearance that [it] is picking the winner" by "invalidating votes" and becoming "enmesh[ed] … in political disputes." PDP Opp. 17. Quite the opposite: precisely because this case cannot change the outcome of this election, it *removes* any such risk and presents an ideal opportunity for the Court to address these important and recurring questions before the next election and free of the concerns Respondents raise.

III. RESPONDENTS' MERITS ARGUMENTS ARE IRRELEVANT AND WRONG

Respondents dedicate substantial effort to defending the decision below on the merits. *See* PDP Opp. 22-35; Sec'y Opp. 16-27; Luzerne Cnty. Opp. 4-

13. But the question before the Court now is whether it should grant certiorari, not the merits. In any event, Respondents' various arguments only highlight that their merits positions are untenable. *See Republican Party of Pa.*, slip op. at 3 (Statement of Alito, J.) (noting "a strong likelihood that the [Pennsylvania Supreme Court] decision violates the Federal Constitution").

1. As to the extension of the received-by deadline, PDP and the Secretary assert that states have free reign to impose substantive limitations on the legislature's authority over federal elections. PDP Opp. 23; Sec'y Opp. 20. But if that were true, the Electors and Elections Clauses would be a dead letter. Indeed, nothing would prevent a state from adopting a constitutional provision that stripped the legislature of *all* authority to set the rules of federal elections and reallocated that authority to the state executive branch or judiciary. This cannot be. *See* Pet. 19-20.

Respondents' paeans to federalism and the constitutional structure, *e.g.*, PDP Opp. 26, Sec'y Opp. 16-21, also miss the mark because the Electors and Elections Clauses are targeted delegations of federal power specifically to state legislatures, not organic authority reserved by the states, *see, e.g.*, *Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 75.

Respondents similarly go astray in invoking *Arizona State Legislature v. Arizona Independent Redistricting Commission* and *Rucho v. Common Cause*. *See* PDP Opp. 23; Sec'y Opp. 20-25. *Arizona State Legislature* concerned "lawmaking *processes*" and the allocation of "legislative power" between the legislature and the State's voters. 576 U.S. 787, 824

(2015) (emphasis added). But here it is undisputed that the General Assembly adhered to the Pennsylvania Constitution's lawmaking process and solely wields the "legislative power" in Pennsylvania. *See* Pet. 25-26.

For its part, *Rucho* confirmed that the Elections Clause *forecloses* federal judicial review of claims that a legislature's redistricting plan is an impermissible partisan gerrymander. 139 S. Ct. 2484, 2506 (2019). And any statement in *Rucho* regarding state constitutional limits on partisan gerrymanders, *see id.* at 2507, is dicta.

In all events, both *Arizona State Legislature* and *Rucho* addressed *only* the Elections Clause; *neither* addressed the Electors Clause. *See Ariz. State Legislature*, 576 U.S. at 824; *Rucho*, 139 S. Ct. at 2506. In short, these cases do not resolve whether a state court's "significant departure," *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring), from a legislature's duly enacted election laws—in contravention of unambiguous statutory text and the record the court itself commissioned—violates the Electors Clause. Pet. 19-30.

2. Respondents fare no better in their defense of the non-postmarked ballots presumption. The Secretary appears to believe that federal law says *nothing* about "the evidence that may properly be considered in determining when ballots were cast." Sec'y Opp. 27. But this extreme position would mean that states could render nugatory the federal statutes establishing a nationwide Election Day simply by adopting "evidentiary" rules that count ballots received long after the election.

Perhaps attuned to this concern, PDP appears to acknowledge that the presumption must at least be "a reasonable way to determine whether a ballot was properly mailed by Election Day." PDP Opp. 35. And it insists that the decision below satisfies this test because it would allow for invalid ballots to be counted in at most "a negligible number of cases." *Id.* This is pure assertion. All that is necessary to activate the presumption is for a ballot to arrive within three days of Election Day without an intelligible postmark (as happened with many ballots in the April 2020 Wisconsin primary, Pet. 17). At that point, the ballot *will* count absent affirmative evidence that it was cast after Election Day. Thus, the presumption virtually guarantees that *some* invalid ballots will be counted, and creates the risk that *many* invalid ballots will be counted. It therefore is preempted. *See* Pet. 30-33.

CONCLUSION

The petition for a writ of certiorari should be granted.

December 15, 2020

Respectfully submitted,

KATHLEEN GALLAGHER
RUSSELL D. GIANCOLA
PORTER WRIGHT MORRIS & ARTHUR LLP
6 PPG Place, Third Floor
Pittsburgh, PA 15222

JOHN M. GORE
Counsel of Record
MICHAEL A. CARVIN
NOEL J. FRANCISCO
ALEX POTAPOV
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
jmgore@jonesday.com

Counsel for Petitioner