

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE &
REPUBLICAN PARTY OF PENNSYLVANIA,

Applicants,

v.

FAITH GENSER, *et al.*,

Respondents.

**ON EMERGENCY APPLICATION FOR STAY PENDING DISPOSITION OF WRIT OF
CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA**

**BRIEF OF COMMONWEALTH OF PENNSYLVANIA &
PENNSYLVANIA DEPARTMENT OF STATE AS *AMICI CURIAE*
IN OPPOSITION TO THE EMERGENCY APPLICATION FOR STAY**

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INTEREST OF *AMICI CURIAE*

The Commonwealth of Pennsylvania and the Pennsylvania Department of State file this brief as *Amici Curiae* in opposition to the Emergency Application for Stay filed by Intervenor-Applicants the Republican National Committee and the Republican Party of Pennsylvania (the “RNC”).

The Commonwealth of Pennsylvania, represented by its chief law officer, the Attorney General, Pa. Const. art. IV, § 4.1, has a significant interest in its sovereignty, in the integrity of its elections, and in the enforcement of its laws as interpreted by its highest court.

The Department of State and its head, the Secretary of the Commonwealth, have similar interests. Both the Department and the Secretary also have vital responsibilities for the administration of Pennsylvania’s elections. The Secretary is Pennsylvania’s Chief Election Official. Among other obligations, the Secretary has the duty “[t]o receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates * * *; to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates at such elections.” 25 Pa. Stat. § 2621(f); *see also id.* § 3159. The Department “shall have the power, and its duty shall be, to care for, compile, publish, and certify, returns of elections.” 71 Pa. Stat. § 273.

As such, the Commonwealth and the Department each have a strong interest in ensuring that counties are canvassing ballots and certifying election results consistent with the requirements of the Pennsylvania Election Code.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Commonwealth of Pennsylvania and the Pennsylvania Department of State submit this brief to highlight aspects of Pennsylvania law and practice that warrant denying the RNC's application.

1. The Pennsylvania Supreme Court's decision in this case did not change Pennsylvania's election rules. As the RNC is well aware, many of Pennsylvania's 67 county boards of elections have, for years, interpreted the Pennsylvania Election Code to require them to count provisional ballots cast by registered, eligible voters whose mail ballots were invalid due to a disqualifying defect.¹ Although the RNC tells this Court that the Pennsylvania Supreme Court has "drastically changed Pennsylvania's election rules," Stay App. at 17, the RNC unsuccessfully challenged this practice of county boards in 2022, correctly calling it "common." See RNC Br. at 40-42, *RNC v. Chapman*, No. 100 MAP 2022, 2022 WL 17298488 (Pa. Oct. 5, 2022). Here, the Pennsylvania Supreme Court's decision confirmed the legality of an existing practice by resolving "a state statutory interpretation question duly raised by the litigants in a case on [the court's] normal appellate docket." App. 47a. And the Pennsylvania Supreme Court issued its decision ahead of the 2024 general election at the RNC's own request; it cannot now take umbrage with the timing.

2. In this case, the Pennsylvania Supreme Court corrected the contrary and erroneous practice of the Butler County Board of Elections and ordered it to count

¹ The Election Code permits voting by absentee ballot, 25 Pa. Stat. §§ 3146.1-3146.9, and by no-excuse mail-in ballot, 25 Pa. Stat. §§ 3150.11-3150.17. *Amici* refer to both as "mail ballots."

two provisional ballots cast in the April 2024 Democratic primary election. The RNC is not entitled to a stay because it is not irreparably injured—or injured at all—by this order. For the same reason, the RNC does not have Article III standing. The RNC does not even try to show it has suffered injury on the facts of this appeal, because it cannot. Moreover, a “stay [of] the Pennsylvania Supreme Court’s order,” Stay App. at 37, would prevent only Butler County from counting two provisional ballots cast in the 2024 Democratic primary election. The RNC provides no prior case in which a stay was issued based only on a lower court decision’s precedential effect.

3. For similar reasons, in the posture of the case that the RNC brings to this Court, an order segregating the “affected provisional ballots,” Stay App. at 37, would require only that Butler County segregate two provisional ballots from the 2024 Democratic primary election. Pennsylvania’s 66 other counties are not parties to this case.

4. Finally, the Pennsylvania Supreme Court’s decision here is comfortably within “the ordinary bounds of judicial review.” *Moore v. Harper*, 600 U.S. 1, 36 (2023). That court applied Pennsylvania’s well-established rules of statutory interpretation to arrive at its conclusion. Granting certiorari here would require this Court to step into the shoes of the Pennsylvania Supreme Court on a routine question of state statutory interpretation—inviting a barrage of requests for federal court review every time a state court interprets a state election law.

ARGUMENT

I. The RNC seeks to upend the status quo.

Since well before this case was filed, many of Pennsylvania’s 67 county boards of elections have interpreted the Pennsylvania Election Code to require them to count provisional ballots cast by registered, eligible voters whose mail ballots were rendered invalid due to a disqualifying defect. *Contra* Stay App. at 3, 11-12, 13, 17, 19, 36. In other words, those boards have long counted provisional ballots under circumstances like those here.

The RNC has known for years that counties interpreted and implemented Pennsylvania law this way. Indeed, in a 2022 suit against all 67 counties, the RNC correctly described this interpretation as “common” among county boards of elections. *See* RNC Br. at 40-42, *RNC v. Chapman*, No. 100 MAP 2022, 2022 WL 17298488 (Pa. Oct. 5, 2022).

Moreover, since 2020, the Department of State’s guidance—which is not binding, but is routinely solicited by county boards of elections—has advised county boards to count a provisional ballot if the “voter’s mail-in or absentee ballot was rejected for a reason unrelated to the voter’s qualifications,” if the voter “meets other provisional ballot requirements,” and “if the county determines that the voter is eligible to vote.” Pa. Dep’t of State, *Pennsylvania Provisional Voting Guidance*

Version 1.1 (Oct. 21, 2020).² The Department is aware that many county boards have followed this guidance. *See also*, App. 10a n.15 (discussing *Keohane v. Del. Cnty. Bd. of Elections*, No. 2023-4458 (Del. Cnty. Ct. Com. Pl. Sept. 21, 2023), which ordered the Delaware County Board of Election to count provisional ballots under the same circumstances).³

The RNC's suggestion that a stay is needed to avoid late changes to election rules therefore grossly perverts the status quo and has the *Purcell* principle exactly backwards. The Pennsylvania Supreme Court's affirmance maintained the status quo and ensured uniformity across all counties. It is the entry of a stay, on the eve of the election, that would cause maximum disruption and confusion.

² Available at: https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/archived/PADOS_ProvisionalBallots_guidance_1.0.pdf.

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³ In 2020, Pennsylvania's intermediate appellate Commonwealth Court issued an unreported decision that concluded, with little analysis, that provisional ballots could not be counted if the voter had returned an invalid mail ballot. *In re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (Pa. Cmwlth. 2020). This opinion was non-precedential, *see* 210 Pa. Code § 69.414(a), and many counties did not follow it, *contra* Stay App. 2, 3, 7, 8, 28.

But even if the Pennsylvania Supreme Court’s decision could be construed to change any election rule, the decision—and its timing—were at the RNC’s request. In its Petition for Allowance of Appeal, filed on September 8, 2024, the RNC asked the Pennsylvania Supreme Court to “grant allowance of appeal so that the rules and procedures governing Pennsylvania elections are appropriately determined by [the Pennsylvania Supreme] Court before the 2024 General Election is upon us.” RNC Pet. for Allowance of Appeal, at 37, *Genser v. Butler Cnty. Bd. of Elections*, No. 240 WAL 2024 & No. 241 WAL 2024 (Pa. Sept. 8, 2024).⁴ The RNC cannot now complain about timing just because it dislikes the Court’s answer.

II. The RNC has suffered no redressable injury.

The RNC has not only failed to provide this Court with a fair account of the status quo; it has also failed to provide this Court with a fair account of the facts of this case. Properly described, the facts show that the RNC has neither the injury-in-fact necessary for Article III standing nor the irreparable injury necessary for a stay.

To bring a case in federal court, a petitioner must show “(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). These Article III standing rules apply equally to a petitioner requesting federal court review of a state supreme court decision. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 623-

⁴ Available at: <https://www.pacourts.us/Storage/media/pdfs/20241003/172715-sept.8,2024-petitionforallowanceofappeal.pdf>.

24 (1989). In addition, to obtain a stay pending appeal, a movant must make a strong showing of irreparable harm. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

This case is about two ballots cast in the 2024 Democratic primary. In April 2024, two Democratic voters attempted to vote in that election by mail ballot but forgot to enclose their ballots in a secrecy envelope, rendering the ballot invalid. App. 3a. Seeking nonetheless to vote once—and only once—in that election, the two voters each filled out a provisional ballot at their polling place, as Pennsylvania and federal law entitle them to do. App. 24a; *In re Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900, 905 (Pa. 2024) (“When an elector arrives at the polling place, if there is any doubt about his eligibility to vote, he may cast a provisional ballot.”); 25 Pa. Stat. § 3050(a.2), (a.4)(1); 52 U.S.C. § 21082(a); *contra* Stay App. at 6. No party, including the RNC, disputed the right of these voters to cast a provisional ballot. App. 28a n.26.

The Butler County Board of Elections rejected the provisional ballots because the two Democratic voters had previously tried, but failed, to return a mail ballot. App. 5a. Then, six months ago, the two Democratic voters challenged Butler County’s decision under a provision of the Election Code that permits “[a]ny 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 an appeal with two days in that county’s court of common pleas. 25 Pa. Stat. § 3157(a); *see* App. 5a-6a. The Butler County Court of Common Pleas subsequently granted intervenor status to the RNC

and to the Pennsylvania Democratic Party. App. 6a. On August 16, 2024, the trial court issued an opinion dismissing the challenge. App. 7a.

The voters promptly appealed. On September 5, 2024, after an expedited briefing schedule, the Commonwealth Court reversed the trial court and held that the Election Code required Butler County to count the provisional ballots for the 2024 Democratic primary. App. 8a.

The RNC asked the Pennsylvania Supreme Court to review Commonwealth Court's decision and issue a decision ahead of the 2024 general election. *See generally* RNC Pet. for Allowance of Appeal, *Genser v. Butler Cnty. Bd. of Elections*, No. 240 WAL 2024 & No. 241 WAL 2024 (Pa. Sept. 8, 2024). After granting the RNC's request, the Pennsylvania Supreme Court affirmed the Commonwealth Court's order that the Election Code required Butler County to count the two provisional ballots in the 2024 Democratic primary. App. 44a-45a.

The RNC is not harmed by an order that two ballots be counted in Butler County's 2024 Democratic primary election, nor does it attempt to explain how it could be. Without such harm, it lacks standing.

Similarly, the RNC's sole articulations of irreparable harm—unspecified injuries to “political operations” and a passing reference to the 2024 general election mooted a forthcoming petition for a writ of certiorari, Stay App. at 34, 32—distort the facts. For one, the RNC has known for years that many counties count these provisional ballots, *supra* at 4, and offers no reason why uniformity harms its political operations. For another, a case is moot “when the issues presented are no longer live

or the parties lack a legally cognizable interest in the outcome.” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (cleaned up). Nothing about the forthcoming 2024 *general* election would moot any petition for writ of certiorari for an order related to the 2024 *primary* election. *Cf. John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1308-09 (1989) (Marshall, J., in chambers) (absent stay, order requiring disclosure of *Vaughn* index would moot appellate challenge to disclosure of *Vaughn* index).

In the posture of this case, a stay of the “Pennsylvania Supreme Court’s order,” Stay App. at 37, would prevent only Butler County from counting two provisional ballots cast in the 2024 Democratic primary election. What RNC seeks instead is a stay of the Pennsylvania Supreme Court decision’s precedential effect. But the RNC cites no decision in which this Court stayed a lower court ruling based solely on the future precedential effect of its reasoning. To the contrary: in *every single case* cited by the RNC, a stay was requested because of *the relief* ordered by the lower court in that matter.⁵

⁵ *E.g., Moore v. Harper*, 142 S. Ct. 1089 (2022) (declining to grant stay of North Carolina Supreme Court judgment striking down congressional districting map); *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (granting stay of federal district court order striking down Alabama’s redistricting plan and ordering development of a new plan); *Republican Party of Pa. v. Boockvar*, No. 20A84, 2020 WL 6536912 (Nov. 6, 2020) (in application for stay of this Court’s judgment ordering counties to count certain mail ballots received after Election Day in 2020, ordering segregation of those ballots); *DNC v. Wisc. State Legis.*, 141 S. Ct. 28 (2020) (affirming stay of federal district court order extending state law deadline to receive absentee ballots for the 2020 General Election); *RNC v. DNC*, 589 U.S. 423 (2020) (granting stay of federal district court order enjoining enforcement of certain Wisconsin statutory requirements for its April 7, 2020, election); *Abbott v. Perez*, 585 U.S. 579 (2018) (reversing orders of three-judge panel directing Texas to not conduct that year’s elections using certain districting plans); *Chafin*, 568 U.S. 165 (discussing stays and mootness in the context of court *(continued...)*)

Even if the RNC could seek a stay based on the Pennsylvania Supreme Court's authority to establish state precedent, the RNC does not identify any concrete, particularized, actual, and irreparable harms from the decision. All voters are entitled to cast a provisional ballot at their polling place if they registered but there is doubt about their eligibility to vote. Republican voters, just as Democratic voters, would have that ballot counted if their mail ballot were void due to a disqualifying defect. The RNC's allegations of harm are entirely speculative.

III. The RNC's requested segregation order exceeds the facts and parties of this case.

The RNC's alternative request to "order[] the segregation of the affected provisional ballots," Stay App. at 37, would mean only that the Butler County Board of Elections continues to segregate Ms. Genser's and Mr. Matis's ballots—the only provisional ballots implicated by the order entered below.

Nonetheless, the RNC asks this Court to order all 67 county boards of elections in Pennsylvania to segregate and separately tally certain provisional ballots that will

order returning a child to the country of their habitual residence); *Hollingsworth*, 558 U.S. 183 (granting stay of federal district court order permitting the broadcast of a federal trial); *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (vacating federal court of appeals order enjoining Arizona from enforcing state measure while appeals were pending); *Bush v. Gore*, 531 U.S. 1046 (2000) (granting stay of Florida Supreme Court judgment ordering tabulation and manual recounts in certain Florida counties in the 2000 General Election); *John Doe Agency*, 488 U.S. 1306 (granting stay of federal district court order requiring disclosure of *Vaughn* index); *Garrison v. Hudson*, 468 U.S. 1301 (1984) (Burger, C.J., in chambers) (granting stay pending disposition of writ of certiorari of lower court order directing retrial, where petition for certiorari challenged lower court's decision); *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020) (granting stay of federal district court order enjoining Ohio's application of its general election and ballot-initiative laws to plaintiffs ahead of the 2020 General Election).

be cast during the 2024 general election. Stay App. at 4-5, 16-17, 35-36. Such an order would be well beyond the scope of this case.

All 67 county boards of elections are not before the Court in this matter—only Butler County is. And every provisional ballot yet to be cast in the forthcoming election is likewise not before the Court—only two provisional ballots from the 2024 Democratic primary are.

For this reason, the segregation order in *Republican Party of Pa. v. Boockvar*, No. 20A84, 2020 WL 6536912 (Nov. 6, 2020) from November 2020 is wholly inapt, *contra* Stay App. at 36. There, this Court had before it as parties all 67 county boards of elections (and the Secretary) and was presented with an order that required certain conduct for the 2020 general election. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 352-53 (Pa. 2020). Due to the COVID-19 pandemic and U.S. Postal Service delays, the petitioners had asked the Pennsylvania Supreme to declare the Election Code's statutory deadline for receiving mail ballots, which is 8 p.m. on Election Day, unconstitutional under the circumstances. *Id.* at 362-65. The Pennsylvania Supreme Court granted relief and ordered all 67 county boards of elections to count mail ballots received up to three days after Election Day in November 2020. *Id.* at 386.

No such order exists here. Had the RNC wished to bring all 67 counties together in one action, it could have sued them years ago—as it did, unsuccessfully, in 2022. *See supra* at 4. Having not done so here, the RNC cannot transform this case into something it is not and obtain relief beyond the facts and parties before the Court.

IV. The Pennsylvania Supreme Court did not “transgress the ordinary bounds of judicial review.”

As this Court has said, “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. For state laws regulating federal elections, federal courts may police the margins of state court review to ensure state courts do “not transgress the ordinary bounds of judicial review.” *Id.* at 36. While this Court has not established a “test by which [it] can measure state court interpretation of state law in cases implicating the Elections Clause,” *id.*, the Pennsylvania Supreme Court’s interpretation of the state laws involved here survives any standard.

As Justice Dougherty succinctly stated in concurrence below: “the fact that the majority and my learned colleagues in dissent interpret the relevant statutes differently does not in any way suggest this Court has exceeded the scope of judicial review and usurped the General Assembly’s power to regulate federal elections.” App. 47a (cleaned up). Instead, he observed that the court’s careful interpretation of the Pennsylvania Election Code’s plain language “**effectuates** the intent of our General Assembly to enable provisional voting, even if the dissenters disagree.” *Id.* (emphasis in original).

Indeed, although Justices Brobson and Wecht disagreed with the majority’s interpretation of the Election Code, neither joined Justice Mundy’s dissent suggesting the majority’s reasoning was too far afield. And despite dissenting on the merits, Justices Brobson and Wecht joined with their colleagues in the majority and rejected the RNC’s application to stay or modify the judgment based on the same legal theory

presented to this Court now. Just as federal court jurists disagree about how to interpret a federal statute, so too do state court Justices; such disagreement is not evidence of unconstitutional arrogation.

In the end, this is a quintessential case of state statutory interpretation. Following the rules of statutory interpretation that Pennsylvania's legislature has determined apply in Pennsylvania, *see generally* 1 Pa. Const. Stat. §§ 1501-1991, the Pennsylvania Supreme Court interpreted the plain language of the Pennsylvania Election Code "to ascertain and effectuate the intention of the General Assembly," *id.* § 1921(a); *contra* Stay App. at 27-28. In Pennsylvania, state courts must construe each statute "to give effect to all of its provisions." 1 Pa. Const. Stat. § 1921(a). When "the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Id.* § 1921(b). State courts must presume that the General Assembly "intends the entire statute to be effective and certain" and "does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa. Const. Stat. § 1922(1)-(2).

Consistent with the rules of statutory interpretation, the Pennsylvania Supreme Court carefully examined the Election Code's plain language in statutory context and in the light of the court's precedents. App. 27a-45a. The court reasoned that giving "legal effect" under 25 Pa. Stat. § 3050(a.4)(5) to a defective or incomplete mail ballot so as to preclude acceptance of a provisional ballot—even though that mail ballot could not itself be counted—would violate its unambiguous holding in *Pennsylvania Democratic Party*, 238 A.3d at 378, that such ballots are void, App. 35a-

40a. Indeed, that court acknowledged that a contrary reading would nullify a provisional ballot in favor of a timely-received *envelope*, even if that envelope does not contain a ballot. *See App. at 38a.*⁶ It found support for this reading in related provisions of the Election Code, which contemplate only “a *completed* mail-in ballot” being received by the relevant deadline. *App. 42a.* The court’s conclusion is faithful to the letter of the Election Code and effectuates the General Assembly’s intent to provide for a provisional voting mechanism that allows qualified voters to vote once and only once. *App. 39a-41a.*

For this Court to grant certiorari here, it must conclude that the Pennsylvania Supreme Court’s routine application of statutorily defined interpretive principles was something other than ordinary judicial review. Should this Court go down that uncharted path, federal courts will be asked to do so every time a state court interprets any part of its statutory election law. Whatever test this Court might adopt to ensure that state courts do not “arrogate to themselves the power vested in state legislatures to regulate federal elections,” *Moore*, 600 U.S. at 36, it does not forbid the familiar form of statutory interpretation that took place here.

⁶ While the *Genser* dissent offers a technical analysis of the statutory provisions at issue, its conclusion builds upon a premise that defies common sense: that an elector “completes the act of voting” when a county board *receives* a timely mail-in ballot envelope containing a ballot it cannot lawfully count. *See App. at 56a.* The majority persuasively recognized that absurdity would result and that the dissent’s reading was at odds with the “reality” and “actual process of canvassing.” *App. at 38a-39a.*

CONCLUSION

For the reasons set forth above, and for those given by Plaintiff-Respondents, the Court should deny the Emergency Application for Stay.

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