No. ______

In the Supreme Court of the United States

JIM BOGNET, *et al.*,

Petitioners,

v.

KATHY BOOCKVAR, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Pennsylvania General Assembly established an unambiguous election-day deadline for receipt of absentee and mail-in ballots. A majority of the Pennsylvania Supreme Court extended that deadline by three days and created a presumption that mail-in ballots received by its new deadline—even those lacking a legible postmark—would be timely unless a preponderance of the evidence proved that they were mailed after 8:00 p.m. on election day. The questions presented are:

1. Whether Petitioners have standing to raise their Elections Clause, Electors Clause, and Equal Protection Clause claims;

2. Whether the Pennsylvania Supreme Court usurped the Pennsylvania General Assembly's paramount authority to "direct [the] Manner" for appointing electors for President and Vice President, U.S. CONST. art. II, § 1, cl. 2, and to prescribe "[t]he Times, Places and Manner" for congressional elections, *id.* art. I, § 4, cl. 1;

3. Whether the Pennsylvania Supreme Court's extension violates Petitioners' right to have their votes counted without dilution and their right not to have their votes treated in an arbitrary and disparate manner under the Equal Protection Clause, *id.* amend. XIV, § 1; and

4. Whether *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), counsels against enjoining unconstitutional usurpations of authority to regulate federal elections by State courts and executive branch officials.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Jim Bognet, Donald K. Miller, Debra Miller, Alan Clark, and Jennifer Clark were the plaintiffs in the District Court and were the plaintiffs-appellants in the Court of Appeals. Petitioners have no parent corporation, and no publicly held company owns 10% or more of their stock.

Respondents Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania, Adams County Board of Elections, Allegheny County Board of Elections, Armstrong County Board of Elections, Bedford County Board of Elections, Berks County Board of Elections, Blair County Board of Elections, Bucks County Board of Elections, Butler County Board of Elections, Cambria County Board of Elections, Carbon County Board of Elections, Centre County Board of Elections, Chester County Board of Elections, Clarion County Board of Elections, Clinton County Board of Elections, Columbia County Board of Elections, Delaware County Board of Elections, Dauphin County Board of Elections, Elk County Board of Elections, Erie County Board of Elections, Fayette County Board of Elections, Franklin County Board of Elections, Greene County Board of Elections, Huntington County Board of Elections, Indiana County Board of Elections, Jefferson 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, Mercer 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, Snyder County Board of Elections, Susquehanna County Board of Elections, Tioga County Board of Elections, Union County Board of Elections, Venango County Board of Elections, Washington County Board of Elections, Wayne County Board of Elections, Westmoreland County Board of Elections, and York County Board of Elections were the defendants in the District Court and were the defendants-appellees in the Court of Appeals.

Respondent Democratic National Committee was the intervenor defendant in the District Court and was the intervenor appellee in the Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

- *Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214 (3d Cir.) (opinion issued and judgment entered November 13, 2020).

- *Bognet v. Boockvar*, No. 3:20-cv-215 (W.D. Pa.) (opinion issued and preliminary injunction denied October 28, 2020).

Apart from the proceedings directly on review in this case, there are no other directly related proceedings in any court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been published in the Federal Reporter but can be found at 2020 WL 6686120 and is reproduced at App. 1. The District Court's opinion has not yet been published in the Federal Supplement but can be found at 2020 WL 6323121 and is reproduced at App. 59.

JURISDICTION

The Court of Appeals issued its judgment on November 13, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 4 of Article I of the United States Constitution—the Elections Clause—provides in relevant part:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Section 1, Clause 2 of Article II of the United States Constitution—the Electors Clause—provides in relevant part:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.

Section 1 of Amendment XIV of the United States Constitution—the Equal Protection Clause—provides in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 3150.16(a) of Title 25 of the Pennsylvania Statutes provides in relevant part:

> At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot.

INTRODUCTION

This case presents critically important issues about the conduct of federal elections that have split the lower courts. Do State courts and executive officials have authority to alter legislatively established election rules, despite the U.S. Constitution's vesting of authority to set the rules for federal elections in State legislatures? If State courts or executive officials do alter election rules, who has standing to challenge those changes in federal court? And if State courts and executive officials change the rules on the eve of an election (or even after voting has started), should federal courts step aside and let those

changes stand regardless of their constitutionality? These issues were presented in an emergency posture repeatedly in the recently concluded election, including to this Court. *See, e.g.*, *Moore v. Circosta*, No. 20A72, 2020 WL 6305036 (U.S. Oct. 28, 2020); *Republican Party of Pa. v. Boockvar*, No. 20-542, 2020 WL 6304626 (U.S. Oct. 28, 2020). And they are highly likely to recur in the future, particularly without a clear directive from this Court. This case presents an opportunity for the Court to resolve these issues in an orderly manner on full briefing and argument, rather than on the "shadow docket" under the time pressures of an ongoing election.

The conflict and confusion in the lower courts regarding the issues presented is exemplified by the disparate treatment given to claims arising from attempted extensions of legislatively established deadlines for receipt of absentee ballots in Pennsylvania, North Carolina, and Minnesota. The circumstances surrounding the extensions were similar in each of these three states, with state court challengers joining with sympathetic elections officials to obtain judicially sanctioned relief contravening duly enacted receipt deadlines. In Pennsylvania, the Secretary of the Commonwealth agreed with challengers that the State's election day receipt deadline violated the Pennsylvania Constitution's Free and Equal Elections Clause in the context of COVID-19, with the only disagreement being how long of an extension was required. The Pennsylvania Supreme Court sided with the Secretary and extended the deadline by three days. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345,

386 (Pa. 2020). In North Carolina, the North Carolina State Board of Elections joined with challengers to secure a state-court consent judgment extending that state's receipt deadline from three days to nine days after election day. *See Wise v. Circosta*, 978 F.3d 93, 97 (4th Cir. 2020) (en banc) (opinion of Wynn, J.). And in Minnesota, the Secretary of State joined with challengers to secure a state-court consent judgment extending the deadline from election day to seven days after election day. *See Carson v. Simon*, 978 F.3d 1051, 2020 WL 6335967 (8th Cir. 2020).

The ballot receipt extensions in each of these three states were met with federal lawsuits seeking preliminary injunctions. Those motions led to disparate results and reasoning on standing, the merits, and *Purcell*.

Standing: The Third Circuit, in the decision giving rise to this Petition, held that neither a congressional candidate nor individual voters had standing to assert claims that the Pennsylvania Supreme Court's receipt deadline extension violated the Elections Clause or the Electors Clause. In reaching this decision, the court acknowledged that it was "depart[ing] from" a recent Eighth Circuit decision, which had held that a candidate for Presidential Elector had standing to assert that the Minnesota receipt deadline extension violated the Electors Clause. App. 25 n.6 (citing *Carson*, 2020 WL 6335967, at *8).

Merits: Having found standing, the Eighth Circuit in *Carson* reasoned that "the Secretary's attempt to re-write the laws governing the deadlines for mail-in ballots in the 2020 Minnesota presidential

election is invalid" under the Electors Clause. 2020 WL 6335967, at *6. Similarly, three dissenting judges in the Fourth Circuit—in what was a panel majority opinion before the en banc court *sua sponte* took up the case before the opinion could be published, *see Wise*, 978 F.3d at 117 (Niemeyer, J., dissenting)—reasoned that the State Board of Elections had "commandeered the North Carolina General Assembly's constitutional prerogative to set the rules for the upcoming federal elections within the State" under the Elections and Electors Clauses, *see id.* at 111 (Wilkinson & Agee, JJ., dissenting). The lead opinion for the majority, by contrast, while not squarely addressing the issue, reasoned that it appeared that the Board had "properly exercised" its authority. *Id.* at 102 (opinion of Wynn, J.). And the Pennsylvania Supreme Court similarly reasoned that neither the Elections Clause nor the Electors Clause stood in the way of its extension. *See Pa. Democratic Party*, 238 A.3d at 370.

Purcell: In *Purcell*, this Court established that federal courts generally should refrain from altering state election rules on the eve of an election. 549 U.S. at 4–5. But as *Bognet*, *Carson*, and *Wise* demonstrate, the lower courts are split on how to apply this principle when a case challenges state executive or judicial alteration of legislatively established election rules. *Carson* and the *Wise* dissenters reasoned that the legislatively established rules are the proper status quo ante, and, therefore, that an order enjoining state officials from unconstitutionally changing those rules close to election day does not run afoul of *Purcell* and indeed vindicates that decision's

underlying principles. *See Carson*, 2020 WL 6335967, at *8; *Wise*, 978 F.3d at 116–17 (Wilkinson & Agee, JJ., dissenting). *Bognet* and the lead opinion for the *Wise* court, by contrast, held that *Purcell* counsels against federal courts correcting changes made by state executive officials and judges, even if those changes are unconstitutional. *See* App. 50–54; *Wise*, 978 F.3d at 103 (opinion of Wynn, J.).

The conflict and confusion in the lower courts over these important issues amply support review in this case. But these are not the only issues that the Third Circuit decided incorrectly and in conflict with another Circuit that should be corrected by this Court. The Third Circuit additionally held that the injury inflicted on individual voters by the counting of unlawful ballots was insufficiently concrete and particularized to support Article III standing. *See* App. 28–44. In so holding, the Third Circuit split with the D.C. Circuit, which held in *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), that the dilution suffered by voters from the decision to allow the District of Columbia's delegates to vote in the House of Representatives was a concrete and particularized injury despite being shared with "every American voter who resides in any state," *id.* at 626. The Third Circuit's contrary conclusion is irreconcilable with the well-established principle that:

> [t]he right to an honest (count) is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or

> privilege secured to him by the laws and Constitution of the United States.

Anderson v. United States, 417 U.S. 211, 226 (1974) (internal quotation marks omitted). Under the Third Circuit's reasoning, unelected State bureaucrats could unilaterally extend voting rights to 16-year-olds or non-citizens, and no individual voter would have recourse to federal court to contest this dilution of the value of his or her vote. That is not and cannot be correct.

The Constitution places the authority to set the rules for federal elections in the hands of the "state legislatures—not . . . state judges, not state governors, not other state officials." *Democratic Nat'l Comm. v. Wis. State Legislature*, No. 20A66, 2020 WL 6275871, at *2 (U.S. Oct. 26, 2020) (Gorsuch, J., concurring in denial of application to vacate stay). Nevertheless, the Pennsylvania Supreme Court did not abide by the Constitution's command. And the Third Circuit concluded that it was powerless to stop it. This Court should grant review to correct the Third Circuit's erroneous decision, vindicate the Constitution's allocation of authority over federal elections, and resolve the conflict and confusion pervading the lower courts on these issues. And the Court should act now rather than waiting for these issues to arise again in an emergency posture during an ongoing election. Acting now not only will allow for deliberate consideration of the important issues presented by this case but also will reduce the likelihood of future conflict by ensuring that all involved know the constitutional principles that apply in advance.

STATEMENT

I. The Pennsylvania General Assembly Establishes Multiple Ways to Vote and Clear Deadlines.

In the fall of 2019, the Pennsylvania General Assembly enacted Act 77, a bipartisan reform of Pennsylvania's Election Code. *See* 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421); *see also Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *10 (W.D. Pa. Oct. 10, 2020). Among other things, Act 77 established that all Pennsylvania voters could vote by mail with "no excuse." Thus, following Act 77, Pennsylvanians could vote in person, vote by absentee ballot (if eligible), and vote by mail-in ballot.[1]

In addition to authorizing mail-in ballots, the Pennsylvania General Assembly set a clear receipt deadline for both mail-in ballots and civilian absentee ballots.[2] Act 77 established that a completed ballot

[1] Civilian absentee ballots can only be cast if a voter meets "certain criteria . . . such as . . . the voter [will] be away from the election district on election day." *Donald J. Trump for President, Inc.*, 2020 WL 5997680, at *10. By contrast, mail-in ballots after Act 77 require "no excuse," and any otherwise qualified voter can request and cast a mail-in ballot. *Id.* Unless otherwise noted, this Petition refers to civilian absentee and mail-in ballots collectively as "mail-in ballots."

[2] The only statutory exception to the General Assembly's deadline is that a valid "military-overseas ballot" will "be counted if it is delivered by 5 p.m. on the seventh day following the election." 25 PA. STAT. AND CONS. STAT. ANN. § 3511(a) (articulating deadlines to comply with the congressionally enacted Federal Uniformed and Overseas Citizens Absentee Voting Act); *see also* 52

"must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." 2019 Pa. Legis. Serv. Act 2019-77; 25 PA. STAT. ANN. §§ 3146.6(c), 3150.16(c). The General Assembly indicated how important this deadline was to the entire mail-in balloting regime with a clear non-severability clause. Section 11 of Act 77 provides that the deadline is "nonseverable. If any provision of th[e] act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." 2019 Pa. Legis. Serv. Act 2019-77. In the wake of the COVID-19 pandemic, the General Assembly once again revisited Pennsylvania's election laws. But it did not change the deadlines. *See* 2020 Pa. Legis. Serv. Act 2020-12.

II. The Pennsylvania Supreme Court Creates Deadlines of Its Own.

The Pennsylvania Supreme Court rewrote the election deadlines established by the Pennsylvania General Assembly in *Pennsylvania Democratic Party v. Boockvar*. The case originated after the "Pennsylvania Democratic Party and several Democratic elected officials and congressional candidates, some in their official capacity and/or as private citizens" sought declaratory and injunctive relief in the Pennsylvania Commonwealth Court. *Pa. Democratic Party*, 238

U.S.C. §§ 20301–20311. If a military-overseas ballot lacks a postmark, has a late postmark, or has an unreadable postmark, the ballot will only count if the "voter has declared under penalty of perjury that the ballot was timely submitted." 25 PA. STAT. AND CONS. STAT. ANN. § 3511(b).

A.3d at 352. Secretary of the Commonwealth Kathy Boockvar petitioned for the Pennsylvania Supreme Court to exercise its extraordinary jurisdiction and review the issues in the case immediately. After accepting jurisdiction, the Pennsylvania Supreme Court had two holdings relevant here.

First, the Pennsylvania Supreme Court extended the receipt deadline for mail-in ballots. *Id.* at 386. Although noting that "there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots," the current pandemic required a new judicially set deadline. *Id.* at 369. Accordingly, instead of the deadline set by the General Assembly of 8:00 p.m. on election day, mail-in ballots would now be accepted if they were sent by election day and received by 5:00 p.m. on Friday, November 6, 2020. *Compare id.* at 386, *with* 25 PA. STAT. ANN. §§ 3146.6(c), 3150.16(c).

Second, the Pennsylvania Supreme Court created a Presumption of Timeliness for mail-in ballots that arrive during the three-day extension. When a mail-in ballot otherwise lacking a postmark or other proof of timely mailing arrives, it will be *presumed* to have been cast before election day "unless a preponderance of the evidence demonstrates" otherwise. *Pa. Democratic Party*, 238 A.3d at 386. Although the plaintiffs who filed suit did not request this presumption, Secretary Boockvar "specifically recommend[ed]" its creation. *Id.* at 365 n.20.

A petition for certiorari to review the Pennsylvania Supreme Court's decision remains pending. *See Republican Party of Pa. v. Boockvar*, No. 20-542 (U.S. filed Oct. 23, 2020).

III. Petitioners Challenge Pennsylvania's New Unconstitutional Deadlines.

Petitioners are four individual voters and one congressional candidate who sued Respondents, arguing that the Pennsylvania Supreme Court's policy was unconstitutional under the Elections Clause, the Electors Clause, and the Equal Protection Clause. The basis for the district court's jurisdiction was 28 U.S.C. § 1331. Petitioners sought declaratory and injunctive relief. The district court held a hearing on Petitioners' motion for temporary restraining order and preliminary injunction. Although the district court found that Petitioners had shown a likelihood of success on the merits of one of their Equal Protection Clause claims, the district court relied on *Purcell* to deny Petitioners' preliminary injunction. App. 66, 77–78.

After denying Petitioners' motion to expedite, a panel of the Third Circuit Court of Appeals affirmed on November 13, 2020. App. 54. The panel found that Petitioners lacked standing to bring all of their claims. App. 20. With respect to the Elections Clause and Electors Clause, the panel held that Voter Petitioners did not have standing because "private plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause" and Electors Clause. App. 21. As for Petitioner Bognet, the panel considered any injuries caused by the upending of the deadlines for votes cast for him and his opponent to lack particularization—"all candidates . . . are subject to the same rules." App. 26. The panel considered any injuries suffered by Bognet to be additionally speculative. Alternatively, the panel found Petitioners lacked prudential standing to bring

claims related to the Elections Clause and Electors Clause. App. 23.

The Third Circuit panel also rejected Petitioners' standing to bring their Equal Protection Clause claims based on several grounds. The panel found that when vote dilution occurs because "state actors count[] ballots in violation of state election law" that "is not a concrete harm under the Fourteenth Amendment." App. 33. The panel further held that any vote dilution caused by the Pennsylvania Supreme Court's decision was "suffered equally by all voters and is not 'particularized' for standing purposes." App. 37. As for Petitioners' claims of unconstitutional arbitrary and disparate treatment of their votes, the panel held that the Pennsylvania Supreme Court did not create a "preferred class of voters" and any harm from the Presumption of Timeliness was speculative. App. 44.

REASONS FOR GRANTING THE PETITION

This Court should grant review to resolve the important issues presented by this case and to resolve the conflict in authority that they have engendered. Namely, what parties may challenge unconstitutional changes to election rules in federal court, what entities may constitutionally set those rules, and whether *Purcell* stands in the way of federal courts putting a halt to unconstitutional usurpations of legislative authority. Although election day has passed, the disputes around these questions are not going away.

This Court's intervention is needed to resolve splits in the lower courts. Federal courts of appeals have reached directly contrary holdings for which parties have standing to bring claims under the Elections

and Electors Clauses. Similarly, the decisions of lower courts on the scope of the Elections and Electors Clauses are inconsistent, leaving an uncertainty laid bare by the many efforts to change state election laws this past year.

This Court's guidance is further necessary to confirm the standards for injunctive relief under *Purcell*. Consider how this case unfolded. In Pennsylvania, state election officials sought a judgment from a state supreme court to substantially amend the duly enacted rules set by the General Assembly on the eve of the election. Then adding to the audacity of this action, when Petitioners sought to challenge this unconstitutional usurpation, Respondents repeatedly argued below that it was simply too late to correct their unlawful behavior. This Court should grant certiorari to ensure such gamesmanship cannot be repeated.

"The Constitution provides that state legislatures—not . . . state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." *Democratic Nat'l Comm.*, 2020 WL 6275871, at *2 (Gorsuch, J., concurring in denial of application to vacate stay); *see also id.* at *6 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay); *Republican Party of Pa. v. Boockvar*, No. 20A54 (U.S. Oct. 19, 2020) (Thomas, Alito, Gorsuch, and Kavanaugh, JJ., voting to grant application for stay of Pennsylvania Supreme Court's decision). This Court should grant certiorari to affirm this important principle well in advance of the next nationwide election day.

I. The Court Should Grant Review to Resolve a Circuit Split on Important Questions of Standing in the Elections Context Created by the Third Circuit's Decision.

A. Petitioners Have Standing to Vindicate their Elections Clause and Electors Clause Claims.

Acknowledging that it was creating a circuit split with the Eighth Circuit, the Third Circuit rejected Petitioners' Elections Clause and Electors Clause claims on standing grounds. First, the panel held that Petitioner Bognet as a federal candidate for Congress lacked standing under the Elections Clause. App. 26–28. The panel found that Bognet failed to explain how he was affected "in a particularized way when . . . all candidates in Pennsylvania . . . are subject to the same rules." App. 26. And the panel explained that "for Bognet to have standing to enjoin the counting of ballots arriving after Election Day, such votes would have to be sufficient in number to change the outcome of the election to Bognet's detriment." App. 26. This decision is in direct conflict with the Eighth Circuit's decision in *Carson*, which found that candidates to be Electors have standing to sue for violations of the Electors clause. 2020 WL 6335967, at *4. Unlike the Third Circuit, *see* App. 26–27, the Eighth Circuit did not create a test for candidate standing resting on whether the alleged harm proves to be outcome-determinative. Instead, the Eighth Circuit recognized that candidates have an independent interest in "ensuring that the final vote tally accurately reflects the legally valid votes cast." *Carson*, 2020 WL 6335967, at *4.

The Court should grant certiorari to clarify the appropriate standard for candidate standing.

Second, the Third Circuit split from the Eighth Circuit again by finding all Petitioners lacked "prudential standing." App. 23. *But see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014) (calling into question the continued vitality of prudential standing doctrines). The panel held that only a state legislative body can allege injuries based on the Elections Clause and Electors Clause. *See* App. 22–26. And because this Court's decision in *Bond v. United States*, 564 U.S. 211, 222 (2011) was allegedly a case about "the Tenth Amendment and the reserved police powers," it had no applicability. App. 25 n.6. *Carson*, by contrast, relied on *Bond* in rejecting the argument that prudential standing was lacking. 2020 WL 6335967, at *5.

The Third Circuit's decision cannot be squared with *Bond*. Although it is true that *Bond* itself was a Tenth Amendment case, the decision reaffirmed decades of precedent recognizing "standing to object to a violation of a constitutional principle that allocates power within government." 564 U.S. at 222. "If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Id.* at 223. In line with this age-old truth, this Court has recognized claims by individual plaintiffs regarding many of the Constitution's structural provisions. *See, e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,* 561 U.S. 477 (2010); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Plaut v.*

Spendthrift Farm, Inc., 514 U.S. 211 (1995); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)*; A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Individuals, as well as government actors, can seek to enforce these provisions. *Cf. Clinton*, 524 U.S. at 434 (noting "the self-evident proposition that more than one party may have standing to challenge a particular action or inaction"). This Court should grant certiorari to confirm that the Elections Clause and Electors Clause are no different.

Finally, the Third Circuit held that Petitioners' injury—dilution of their validly cast votes—was a nonjusticiable generalized grievance. In so doing, it split with the D.C. Circuit, which has held that an action that diluted the votes of individuals throughout the Nation—allowing delegates from the District of Columbia and other territories to vote in the House of Representatives—inflicted a concrete and particularized injury on individual voters despite the widespread nature of this harm. *Michel*, 14 F.3d at 626.

This Court should grant review to resolve this conflict and to establish that the D.C. Circuit, and not the Third Circuit, is correct. This Court has explained that an impermissible "generalized grievance" should not be confused with a widespread injury-in-fact that affects many people, such as the vote dilution suffered by Petitioners. In *Federal Election Commission v. Akins*, 524 U.S. 11, 34–35 (1998), this Court explained that sometimes the term "generalized grievance" had

been invoked imprecisely because the term "invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the common concern for obedience to law," *id.* at 23 (internal quotation marks omitted). It was this latter lack of concreteness that often led to widespread injuries being considered insufficient for standing. *Id.*; *accord Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

In *Akins*, this Court explained that an injury does not become an impermissible "generalized grievance" merely because a plaintiff's injury is widespread. Instead, "generalized grievance" is most often a shorthand for a widespread injury that was too "abstract," *i.e.*, an injury with no concrete effects on particular plaintiffs. *Akins*, 524 U.S. at 23–24. To clear this up, this Court explained that widely shared injuries, when the harm is concrete, will give rise to an injury in fact, for instance in a mass tort. *Id.*; *see also Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 449–50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint . . . does not lessen appellants' asserted injury."). Additionally, one "particularly obvious . . . hypothetical example" was "where large numbers of voters suffer interference with voting rights conferred by law." *Akins*, 524 U.S. at 24. Such an injury would not be a "generalized grievance" at all. *Id.* at 23. That is because, as this Court has established, "*all* voters in a federal election" have the right "to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots." *Anderson*, 417 U.S. at 226 (emphasis added). There is no

reason in law or in logic why dilution by ballots that are unlawful for reasons other than fraud should be treated any differently.

This Court should grant certiorari to prevent the inevitable consequences of the Third Circuit's standing rule and hold that ordinary individual voters, injured by unconstitutionally promulgated election regulations, have standing to sue. If the Third Circuit's standing test were to prevail, it is unclear whether anyone would have standing to vindicate the rights of voters and challenge blatant violations of the Elections and Electors Clauses, especially if the state legislature did not agree to raise a challenge.

B. Petitioners Have Standing to Raise Equal Protection Claims.

This Court should also confirm that Voter Petitioners have standing to raise their Equal Protection claims because they have alleged concrete, particularized, and non-speculative injuries—the Deadline Extension will result in the dilution of their votes, *see Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964), and will infringe their right to "participate in" the ongoing election "on an equal basis with other citizens in" Pennsylvania, *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), by creating a preferred class of voters that are able to have their ballots counted even if received after the General Assembly's election day deadline.

First, the Third Circuit held that the Petitioners "lack standing to redress their alleged vote dilution because that alleged injury is not concrete as to votes counted under the Deadline Extension." App. 29. The

panel explained that because the "source" of Voter Petitioners' injury was "necessarily a matter of state law," "any alleged harm [is] abstract for purposes of the Equal Protection Clause." App. 29. The court held that "state actors counting ballots in violation of state election law . . . is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment" because "[v]iolation of state election laws by state officials or other unidentified third parties is not always amenable to a federal constitutional claim." App. 33.

The Third Circuit's decision mischaracterizes the source of Petitioners' injury—it is the *federal* Elections and Electors Clauses that render Respondents' vote counting unlawful. *See Democratic Nat'l Comm.*, 2020 WL 6275871, at *6 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay) ("In a Presidential election . . . a state court's 'significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.'" (quoting *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring))). Petitioners do not challenge the *content* of the Deadline Extension in this case, but instead incorporate into their vote dilution claim the contention that the federal Constitution required the *General Assembly* to have issued the Deadline Extension, not the Pennsylvania Supreme Court. *See id.* (explaining that "the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws").

Consequently, Petitioners are concretely injured—through dilution of their votes by the acceptance of unlawful votes—when Secretary Boockvar

and the county boards of elections accept votes in contravention of the General Assembly's duly enacted statutes, thereby transgressing the federal Constitution's Elections and Electors Clauses. Furthermore, this Court has made clear that when considering whether a plaintiff has Article III standing, it must assume that plaintiffs will succeed on the merits of their legal claims. *See Warth v. Seldin*, 422 U.S. 490, 501–02 (1975). In this context, application of this precedent means that the Court must assume that the ballots being counted after election day are illegal ballots and should not be counted.

Second, the Third Circuit found that Voter Petitioners lacked standing to raise their arbitrary and disparate treatment claim. The court reasoned that the Pennsylvania Supreme Court had not created a preferred class of voters that are able to vote after the General Assembly's duly enacted deadline because the Deadline Extension and Presumption of Timeliness "apply to all voters" and an individual voter can *choose* whether to vote by mail or in person and thereby join the "preferred class." App. 45. But this analysis proves too much. If a plaintiff's standing to bring an equal protection claim could be defeated based on mere individual choice, then a swath of valid equal protection claims would be eliminated. For example, individuals living in unconstitutionally gerrymandered districts would not be able to raise an equal protection claim because it was *their choice* to continue to live in that district. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018).

The Third Circuit further reasoned that Voter Petitioners' alleged injuries were conjectural or

hypothetical instead of actual or imminent because it was not guaranteed that Pennsylvania voters would submit a mail-in ballot after election day without a legible postmark and therefore be counted under the Presumption of Timeliness. App. 47–50. But data from the April 2020 Wisconsin primary established that "many ballots arrived with no postmarks, two postmarks or unclear postmarks." *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249, 2020 WL 5627186, at *6 (W.D. Wis. Sept. 21, 2020), *stay entered*, 977 F.3d 369 (7th Cir. 2020), *application to vacate stay denied sub nom. Democratic Nat'l Comm. v. Wis. State Legislature*, 2020 WL 6275871. And in the Pennsylvania June primary, 18,115 ballots were rejected because they arrived late. *See* Brian X. McCrone & Joe Brandt, *20,000 Mail-in Ballots Didn't Count in Pa.'s Primary, Half the '16 Victory Margin*, NBC 10 PHILADELPHIA (Sept. 14, 2020, updated Oct. 6, 2020), https://bit.ly/3kiFSqU. These patterns were repeated here—according to Secretary Boockvar herself, 655 ballots with illegible postmarks have been collected within the Deadline Extension period and therefore will simply be *presumed* to have been mailed on time, thereby allowing the counting of ballots cast or mailed after election day. App. 50. Moreover, 9383 ballots were received between 8:00 p.m. on election day and 5:00 p.m. on November 6 and will only be counted because of the Deadline Extension. App. 50

n.19. Voter Petitioners' injuries are thus actual, not hypothetical.

II. The Court Should Decide Whether the Pennsylvania Supreme Court's Policy is Constitutional.

A. Whether State Entities other than "the Legislatures thereof" Can Rewrite State Election Regulations Has Divided Courts.

The text of the Elections Clause is clear: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. The Constitution thus grants the state "Legislature" primacy in setting the rules for federal elections, subject to check only by Congress. *See, e.g.*, *Ex parte Yarbrough*, 110 U.S. 651, 660 (1884).

The Electors Clause similarly grants exclusive authority to the state legislature. It provides that "[e]ach state shall appoint, in such manner as the *Legislature* thereof may direct, a number of electors." U.S. CONST. art. II, § 1, cl. 2 (emphasis added). Thus, the Constitution establishes a state's "legislature" as the only state entity that may constitutionally regulate federal elections. *See, e.g.*, *Democratic Nat'l Comm.*, 2020 WL 6275871, at *2 (Gorsuch, J., concurring in denial of application to vacate stay).

The Pennsylvania Supreme Court is indisputably not the legislature. PA. CONST. art. II, § 1. Nevertheless, the court relied on the *Pennsylvania* Constitution's Free and Equal Elections Clause to assert a "broad authority to craft meaningful remedies" in federal elections. *Pa. Democratic Party*, 238 A.3d at 371. Using this broad remedial power, the court decided that the deadlines set by the General Assembly should be emended to be consistent with Respondent Boockvar's "informed recommendation." *Id.* Respondent Boockvar is the Secretary of the Commonwealth.

This year, courts have been inundated with similar cases in which state legislatures were cut out of the process for setting the rules for federal elections. Federal courts rewrote and suspended regulations on the eve of the election. *See, e.g.*, *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). State governors did the same. *See, e.g.*, *Donald J. Trump for President, Inc. v. Bullock*, Nos. 20-cv-66, 20-cv-67, 2020 WL 5810556, at *11 (D. Mont. Sept. 30, 2020). And, as here, state courts and state officials acted in concert to pick and choose new deadlines. *See, e.g.*, *Moore*, 2020 WL 6305036.

The Pennsylvania Supreme Court's broad assertion of power puts it together with the North Carolina courts in blessing wholesale changes to election deadlines by non-legislative entities this past year. *See N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. 20-CVS-8881 (N.C. Wake Cnty. Super. Ct. Oct. 5, 2020), *injunction pending appeal denied sub nom. Berger v. N.C. State Bd. of Elections*, No. 20A74, 2020 WL 6326213 (U.S. Oct. 29, 2020).

The recent usurpation of legislative authority by the Pennsylvania Supreme Court and others cannot be squared with the Eighth Circuit's decision in *Carson* that the Electors Clause likely prohibited state officials from using a state-court consent judgment to effectuate an extension of a legislatively established absentee ballot receipt deadline. *See Carson*, 2020 WL 6335967, at *6–8. It also conflicts with a long tradition of state supreme courts rejecting state law authority to negate their state legislature's statutes. *See, e.g.*, *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 694–96 (Ky. App. 1944); *Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinion of the Justices*, 113 A. 293, 299 (N.H. 1921); *In re Opinion of Justices*, 45 N.H. 595, 601 (1864); *see also McClendon v. Slater,* 554 P.2d 774, 776 (Okla. 1976) (noting only limits on legislative power were in the federal constitution and the state's "'initiative' and the 'referendum' processes").

Consider the Nebraska State Supreme Court's decision in *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279 (Neb. 1948). In that case, candidates for the Progressive Party sought to compel the Nebraska Secretary of State to include them on the ballot for the upcoming federal election, including for the office of President and Vice President. *Id.* at 280. But the candidates did not meet the requirements to be put on the ballot under Nebraska law. *Id.* at 286.

Nevertheless, the candidates asserted that Nebraska's Free Elections Clause required their inclusion on the ballot. *Id.*; NEB. CONST. art. I, § 22. But this was a federal election. Accordingly, the Nebraska

Supreme Court held that "this provision may not operate to 'circumscribe the legislative power' granted by the Constitution of the United States. It [is] unnecessary therefore to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature and the state constitutional provision." *Beeson*, 34 N.W.2d at 287. Nebraska's decision and others like it cannot be squared with Pennsylvania's recent (and innovative) constitutional usurpation.

The simple fact is the word "Legislature" in both the Elections Clause and the Electors Clause was "not . . . of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And "the Legislature" means now what it meant then, "the representative body which ma[kes] the laws of the people." *Id.*; *see, e.g.*, THE FEDERALIST NO. 27, at 174–175 (Alexander Hamilton) (C. Rossiter ed., 1961) (defining "the State legislatures" as "select bodies of men"); *Legislature*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (Noah Webster) ("[T]he body of men in a state or kingdom, invested with power to make and repeal laws."); *Legislature*, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (Samuel Johnson) ("The power that makes laws.").

By specifying "Legislature" rather than State generally, the Constitution does not grant the power to regulate elections to states as a *whole*, but only to the state's legislative branch—or at most to the State's legislative *process*. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 814 (2015); *id.* at 839 (Roberts, C.J., dissenting). This

Court should grant certiorari to ensure federal *and* state courts understand this principle.

B. This Court Should Decide Whether the Pennsylvania Supreme Court's Policy Violates the Equal Protection Clause.

State election laws may not "deny to any person within" the state's "jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Constitution thus ensures "the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds*, 377 U.S. at 554. "Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." *United States v. Classic*, 313 U.S. 299, 315 (1941). And counted means "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (internal quotation marks omitted). For instance, this Court has held that ballot-box stuffing is unconstitutionally dilutive of citizens' votes. *See id.* at 555; *United States v. Saylor*, 322 U.S. 385, 387 (1944); *Ex parte Siebold*, 100 U.S. 371, 388–89 (1879). The number of unlawful ballots cast "whether in greater or less degree is immaterial." *Anderson*, 417 U.S. at 226. As this Court has explained, "[t]he deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election." *Id.*

The Pennsylvania Supreme Court's policy that Respondents must follow ensures that votes that are invalid under the duly enacted laws of Congress and the General Assembly *will* be counted in two ways: (1) ballots that were received as late as 5:00 p.m. on November 6, 2020 are timely and (2) ballots cast *after*

election day are treated presumptively as timely ballots. *See Pa. Democratic Party*, 238 A.3d at 398 (Mundy, J., dissenting) (noting the "substantial case" that the "presumption opens the door to illegally and untimely cast or mailed ballots being counted in, and tainting the results of, the imminent general election"). Since these ballots would have been late, and therefore would not have counted, Petitioners' votes will be unconstitutionally diluted.

Second, as the District Court correctly found, to ensure equal weight is afforded to all votes, the Equal Protection Clause further requires states to "avoid arbitrary and disparate treatment of the members of its electorate." *Bush*, 531 U.S. at 105. "[T]reating voters differently" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *Charfauros v. Bd. of Elections,* 249 F.3d 941, 954 (9th Cir. 2001). Judicial fiat cannot be used to create a "preferred class of voters." *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

Respondents are administering Pennsylvania's election in an arbitrary fashion pursuant to nonuniform rules that result in the unequal evaluation of ballots. Erasing the General Assembly's deadlines, the Pennsylvania Supreme Court arbitrarily set new ones. In fact, the presumption created by the Pennsylvania Supreme Court—that allows for the counting of votes cast *after* election day—was not even relief requested by the voting plaintiffs initially seeking changes to Pennsylvania's voting laws. *See* Emergency Appl. For a Stay Pending the Filing and Disposition of a Pet. For a Writ of Cert., *Scarnati v. Pa. Democratic Party*, No. 20A53, 2020 WL 5898732, at *7

(U.S. filed Sept. 28, 2020). Instead, Secretary Boockvar recommended it. *Pa. Democratic Party*, 238 A.3d at 365 n.20. And the Pennsylvania Supreme Court created this presumption "[w]ithout further explanation." *Id.* at 398 (Mundy, J., dissenting). This arbitrary alteration of Pennsylvania's voting rules, when it does not appear that voting plaintiffs sought the specific relief granted, is of the same kind of "unusual" change that this Court has held should not be made "on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206–07 (2020).

This arbitrary change disparately impacts a distinct set of voters. It impacts those voters like the Voter Petitioners (the Millers and Clarks), who lawfully voted in person and submitted their ballots *on time*. It is easy to identify this disparate effect. Respondents would not have been able to show up to their local voting place and vote in-person after 8:00 p.m. on election day. Nor could they decide to vote on November 5, 2020. Yet, as a consequence of the Pennsylvania Supreme Court's Deadline Extension and corresponding Presumption of Timeliness, ballots that could have been cast *after* election day on November 5, 2020 will count. The Equal Protection Clause does not countenance this type of arbitrary and disparate treatment of voters by how they vote, especially since this relief was not even requested by the private plaintiffs seeking judicial relief, *id.* at 1207, and was imposed "[w]ithout further explanation," *Pa. Democratic Party*, 238 A.3d at 398 (Mundy, J., dissenting).

The Court should grant certiorari to ensure state courts do not engage in these Equal Protection violations.

C. This Court Should Resolve the Circuit Split Over Whether *Purcell* Counsels Against Enjoining Unconstitutional Usurpations of Authority to Regulate Federal Elections by State Courts and Executive Branch Officials.

"This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 140 S. Ct. at 1207. In *Republican National Committee*, the District Court for the Western District of Wisconsin *itself* altered Wisconsin's election rules on the eve of an election, issuing a preliminary injunction that extended certain absentee ballot deadlines. By contrast, this case raises the important question of the appropriate scope of lower federal courts' authority to enjoin unconstitutional meddling with a state's election laws in the leadup to federal elections *by state courts and state executive officials themselves*.

The Circuits have split in determining how to apply *Purcell* in this context. In *Carson*, the Eighth Circuit properly concluded that the proper status quo ante was the duly enacted laws of the state legislature, and therefore *Purcell* did not stand in the way of halting an unconstitutional alteration of those laws by executive and judicial officials. *See* 2020 WL 6335967, at *8. The en banc dissenters in *Wise*—the original panel majority—concluded the same. *See* 978 F.3d at 116–17 (Wilkinson & Agee, JJ., dissenting). The Third

Circuit in the decision below, by contrast, as well as the lead opinion in *Wise*, concluded that *Purcell* counsels in favor of letting stand unconstitutional usurpations of state legislatures' authority to regulate federal elections. *See* App. 53 (holding that *Purcell* "constitutes an alternative and independent reason for concluding that an injunction was unwarranted" (internal quotation marks and brackets omitted)); *Wise*, 978 F.3d at 103 (opinion of Wynn, J.) (explaining that even though the district court determined that plaintiffs were likely to succeed on their equal protection claims, the district court properly concluded that, under *Purcell*, "injunctive relief was inappropriate" at that "late date."). These courts have thus provided a clear roadmap for displacing validly enacted voting laws that regulate federal elections—simply wait until shortly before an election to act, and then plead that it is too late for those actions to be challenged in federal court. This Court should not countenance such gamesmanship, and indeed, this Court's precedents do not.

This Court should confirm that the election rules established by the legislature are the proper status quo ante for purposes of *Purcell*. *See* 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 2948 (3d ed.) (explaining that courts have defined the status quo as "the last peaceable uncontested status" existing between the parties before the dispute developed); *see also Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004) (noting that "it is

sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions," but "[s]uch an injunction restores, rather than disturbs, the status quo ante"). After all, the Constitution clearly answers the question of "who sets the status quo"—"the state legislature." *Carson*, 2020 WL 6335967, at *8.

Furthermore, exactly which courts *Purcell* applies to is an important question that this Court should consider. While it is true that *Purcell* has traditionally applied against federal courts changing the rules shortly before elections, there is no principled reason for why *Purcell* should not apply against interference by state courts and administrative bodies acting in violation of the federal Constitution. *See Democratic Nat'l Comm.*, 2020 WL 6275871, at *6 n.1 (Kavanaugh, J., concurring in denial of application to vacate stay). Attempts to change election rules, whether facilitated in federal or state court, cause the uncertainty, confusion, and chaos that the *Purcell* principle is designed to guard against.

The Court should grant certiorari to ensure that the lower federal courts' ability to enjoin unconstitutional usurpations of the state legislatures' constitutional authority is not hamstrung by gamesmanship based on an improper application of this Court's precedents.

III. The Questions Presented Are Important and Recurring.

When the constitutional allocation of the authority to structure the time, place, and manner of federal

elections is at stake—a structural element the Framers enshrined in the federal Constitution to preserve liberty—this Court should not stay its hand and let a conflict in the lower courts fester. As the numerous cases implicating these clauses that have reached this Court leading up to the November 2020 election have demonstrated, the question of what entity gets to structure a state's federal elections can have real effects that implicate the right to vote of thousands of voters. *See, e.g.*, *Democratic Nat'l Comm.*, 2020 WL 6275871; *Andino*, 2020 WL 5887393. And these questions are not going away, even after election day has passed. It is therefore important that this Court grant certiorari to resolve the important constitutional questions at issue to prevent uncertainty for future elections and to consider them with a full hearing on the merits, not in a posture of emergency relief.

The Elections and Electors Clauses are structural provisions designed to preserve liberty that this Court should not allow state entities to trammel. These clauses are an embodiment of the security afforded by our federalist system that this Court should protect, ensuring the states' most representative bodies have primacy in regulating elections. THE FEDERALIST NO. 51 (James Madison) (C. Rossiter ed., 1961); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 253, 254 (Philip B. Kurland & Ralph Lerner eds., 1987) (noting "state legislatures" come "nearest to the people themselves"). To vindicate the authority of state legislatures is to vindicate the liberty endowed by our Constitution's structural commands. *See* Antonin Scalia, *Foreword: The Importance of Structure In Constitutional Interpretation*, 83

NOTRE DAME L. REV. 1417, 1418–19 (2008) ("Structure is everything . . . . Those who seek to protect individual liberty ignore threats to this constitutional structure at their peril.").

The case also presents the important question of what parties have standing to challenge unconstitutional changes in a state's election laws. Without guidance from this Court, lower courts may follow the Third Circuit's untenable rationale under which no voter could ever challenge even patently unconstitutional changes. The Constitution's deliberate allocation of authority meant to preserve liberty would be for naught if no voter had standing to challenge violations.

Furthermore, this case also raises important questions implicating the *Purcell* principle. This Court should confirm that the lower federal courts have authority to enjoin unconstitutional meddling with a state's election laws in the leadup to federal elections, that the proper status quo ante of a state's election regime under *Purcell* is the election rules established by the legislature's duly enacted statutes, and that *Purcell* applies to interference in election rules by state courts and administrative bodies acting in violation of the federal Constitution.

The questions presented in this case do not lie at the periphery of constitutional law. Instead, they go to the very core of this nation's democratic republic: what entity has the constitutional authority to set the rules of the road for federal elections, who has standing to challenge violations of that structural allocation, and what is the scope of lower courts' power to

enjoin those violations. This Court should grant certiorari to address these important questions and provide guidance and prevent uncertainty for future elections.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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