No. 24A408

IN THE SUPREME COURT OF THE UNITED STATES

FAITH GENSER, ET AL.,

Plaintiffs-Respondents,

v.

BUTLER COUNTY BOARD OF ELECTIONS, ET AL.,

Defendants-Respondents,

and

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Intervenor-Applicants.

Application from the Supreme Court of Pennsylvania

(No. 26 WAP 2024, No. 27 WAP 2024)

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY PENDING DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Throughout their opposition briefs, Respondents kick up dust in an attempt to complicate what is, at bottom, a straightforward case of bald judicial overreach. Try as they might, however, Respondents cannot obscure five key points.

First, the Pennsylvania Supreme Court changed the rules governing federal elections during early voting and less than two weeks before Election Day. Stay Br. 17-21. Respondents quibble with the *extent* of the change, suggesting some county boards were already defying the Election Code. But prior to the decision below, that defiance was the exception, not the rule, because the Commonwealth Court rejected Respondents' position in 2020. *In re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 2020 WL 6867946, at *4-5 (Pa. Commw. Ct. Nov. 20, 2020). In any event, all agree that many county boards *would* comply with the Election Code but for the decision below—so the majority's ruling undoubtedly changed federal election rules for *significant parts* of Pennsylvania. Nor do Respondents offer any persuasive reason to carve out a self-defeating exception to *Purcell* for cases in which state courts displace rules enacted by the people's elected representatives.

Second, Applicants are likely to succeed on the merits, as demonstrated by Respondents' feeble—and almost entirely atextual—defenses of the majority's ruling. For the first time in this case, Respondents object on standing grounds. That gambit fails. Applicants intervened in defense of the Board to vindicate their well-recognized interest in preserving the rules governing the competitive electoral environment. The Pennsylvania Supreme Court struck down the Board's decision and fundamentally altered the competitive landscape, imposing political injuries on Applicants. *See* Supp. App. 59a-61a (declaration describing injuries); *accord Mecinas v. Hobbs*, 30 F.4th 890, 898 & n.3 (9th Cir. 2022)

(political party's "interest in fair competition" injured when forced "to participate in an illegally structured competitive environment"). The consequences of that adverse judgment, coupled with the parties' evident live dispute, satisfy Article III. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989).

Nor did Applicants waive their merits argument. By their nature, injuries in this context only accrue once a state's highest court "transgress[es] the ordinary bounds of judicial review." *Moore v. Harper*, 600 U.S. 1, 36 (2023). Litigants need not anticipate that state courts will act so unreasonably. Regardless, Applicants *did* present detailed arguments under the Elections and Electors Clauses to the Pennsylvania Supreme Court—as multiple opinions acknowledged.

None of Respondents' procedural arguments can mask the weakness of their substantive defense of the decision below. In Pennsylvania, "[a] provisional ballot shall not be counted if the elector's [mail] ballot is timely received by a county board of elections." 25 Pa. Stat. § 3050(a.4)(5)(ii)(F). That clear command is irreconcilable with the majority's pastiche of statutory interpretation. Respondents lean heavily on *Moore*'s standard of review, insisting it is not only "deferential," 600 U.S. at 39 (Kavanaugh, J., concurring), but *insurmountable*. Denying relief on that basis would strip *Moore* of deterrent effect and declare open season on federal election rules.

Third, this case merits review. Stay Br. 29-32. Respondents acknowledge that this case will have a major impact on Pennsylvania's 2024 General Election. Brief of Respondents (Resp. Br.) 33-35. And it offers a clean vehicle to resolve continuing confusion over the standard of review under the Elections and Electors Clauses.

Fourth, the equities and the public interest favor relief. Stay Br. 32-35. A stay would simply undo the chaos wrought a few days ago by the Pennsylvania Supreme Court. With a stay in place, election officials would merely count provisional ballots, and decline to count defective mail ballots, just as Pennsylvania law required before the decision. This is not a case involving "particular circumstances" that render restoration of the lawful status quo overly disruptive. *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurral). Applicants seek relief that would merely ensure that the 2024 General Election in Pennsylvania—and potentially the Nation—turns on rules set by the people's elected representatives, not courts.

Finally, this Court can order ballot segregation against all county boards. The All Writs Act allows this Court to issue temporary injunctive relief against non-parties to preserve the status quo and protect its jurisdiction. 28 U.S.C. § 1651(a). Given this case's unusual circumstances, in which non-party county boards are formally and practically bound by the majority's "definitive[ ] interpret[ation] … of the Election Code," *In re: Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1078 n.6 (Pa. 2020), and where Applicants have no realistic alternative mechanism to challenge ballots counted under the decision below, a segregation order is, at a minimum, appropriate.

I. A STAY IS WARRANTED UNDER *PURCELL*.

Because the court below dramatically altered Pennsylvania's election rules *less than two weeks* before Election Day, this Court should enter a stay. Stay Br. 17-21.

Respondents offer three counterarguments, but all fail. *First*, Respondents try to minimize the disruptive effects of the majority's ruling by claiming that some counties were already flouting the Election Code and counting the disputed provisional ballots. Resp. Br. 3.

Applicants acknowledge that a dispute arose in 2020 over whether such ballots could be counted, *see* Resp. Br. 25 n.13; Sec'y Amicus Resp. Br. 4-5, but the Commonwealth Court settled the dispute by prohibiting their counting. *Allegheny Cnty. Provisional Ballots*, 2020 WL 6867946, at *4-5. Applicants further acknowledge that, in 2024, some county boards began counting these ballots because the Secretary encouraged them to do so through nonbinding guidance, and because of this litigation. *See* Sec'y Amicus Resp. Br. 4-5 & n.3 (admitting Secretary disagreed with Commonwealth Court's opinion). But all agree that the Secretary's guidance documents *cannot* bind county boards to count provisional ballots. *See id.* at 4 (conceding this). And the Commonwealth Court did not repudiate *Allegheny County Provisional Ballots* until September 5, 2024. *See Genser v. Butler Cnty. Bd. of Elections*, 2024 WL 4051375, at *16 (Pa. Commw. Ct. Sept. 5, 2024). Until that date, the law in Pennsylvania was that the disputed provisional ballots could not be counted; Respondents cannot in fairness avoid a stay simply because some county boards, with the Secretary's encouragement, may have defied that law.

More importantly, even if *some* county boards were violating the Election Code before the decision below, it is undisputed that many county boards—including the Butler County Board in this case—were following the Election Code and now will be forced to violate it. *See* Resp. Br. 7-8; Pennsylvania Democratic Party's Opposition Brief ("Dem Br.") 15 (conceding this point). Indeed, Applicants have been in communication with county boards, many of which confirm they must now count the disputed provisional ballots solely because of the decision below. Supp. App. 58a-59a (Alleman Declaration). It is thus undisputed that the majority substantially changed the rules governing mail voting in at least *significant parts* of Pennsylvania.

Second, Respondents suggest that *Purcell* cannot apply because Applicants asked the Pennsylvania Supreme Court to reverse an adverse decision by the Commonwealth Court, Resp. Br. 27; Dem. Br. 15, but that makes no sense. When a lower court changes a federal electoral rule too close to an election, *Purcell* does not permit only the appellee and not the appellant to seek relief. *See, e.g.*, *DNC v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (*Purcell* applied where State had sought review from Seventh Circuit). Here, the trial court honored the unambiguous command of the Election Code, and the Commonwealth Court did not. *See Genser*, 2024 WL 4051375, at *16. Applicants hoped the Pennsylvania Supreme Court would uphold the rule of law and reverse; not only did the majority below not oblige, but it altered the governing rule statewide. *Purcell* prohibits *that* move—not Applicants' request for relief to this Court.

Third, Respondents argue that the *Purcell* principle does not apply because this Court is reviewing a state court's decision. Resp. Br. 27; Dem. Br. 3. But this Court has never placed that self-defeating limit on *Purcell*—and it shouldn't start now. Stay Br. 17-19. Indeed, as Respondents begrudgingly acknowledge, their theory that *Purcell* prohibits this Court from correcting the majority's error is inconsistent with *Bush v. Palm Beach County Canvassing Board*. *See* Resp. Br. 28 n.14 (citing 531 U.S. 70, 76-78 (2000) (per curiam)). And notably, the Pennsylvania Supreme Court *itself* has acknowledged it is bound by the *Purcell* principle, *see New Pa. Project Educ. Fund v. Schmidt*, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024), even though it entirely ignored Applicants' *Purcell* arguments in this case. As an *amicus* points out, other state courts have also acknowledged they are bound by *Purcell*. *See Amicus* Brief of the American Center for Law and Justice 6-8 (citing decisions in other States).

Respondents rightly observe that, in many cases where this Court has applied *Purcell*, federalism principles were at stake. Resp. Br. 27. After all, when federal courts enjoin laws enacted by *state legislatures*, *Purcell* limits "federal intrusion[s] on state lawmaking processes." *DNC*, 141 S. Ct. 28, 28 (Roberts, C.J., concurral). But federalism is *also* implicated here, because the decision below undermines the role of the General Assembly in setting the rules of the road for federal elections. That too is a serious "intrusion[] on [the] state lawmaking process[]." *Id.* Here, for example, Pennsylvania's General Assembly has been engaged in an ongoing debate on whether to provide mail voters who submit defective mail ballots a second chance at compliance. *See* Stay Br. 1. The Pennsylvania Supreme Court took that policy choice out of its hands.

In all events, federalism is a two-way street: Just as federal courts must accord due respect to state-court judgments, state courts must ensure that their judgments do not exceed the boundaries set by "the Federal Constitution." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 827 (2015) (Roberts, C.J., dissenting). Every American has an interest in ensuring that federal election rules are set by the democratically accountable bodies designated in the Constitution: the state legislatures and Congress. *See Moore*, 600 U.S. at 34-37. The *Purcell* principle helps guard that *federal* interest, not just those of individual *States*. *Cf. DNC*, 141 S. Ct. at 29 (Gorsuch, J., concurral); *id.* at 31 (Kavanaugh, J., concurral).

Finally, common sense militates against adopting Respondents' absolutist state-court carveout from *Purcell*. That loophole would expose federal elections to an avalanche of last-minute state judicial changes affecting the whole country. Indeed, that is already happening in Pennsylvania. Just yesterday—a mere six days before Election Day—the Commonwealth

Court struck down as unconstitutional the General Assembly's mandate that undated mail ballots cannot be counted. *See Baxter v. Phila. Cnty. Bd. of Elections*, 2024 No. 02481 (Pa. Commw. Ct. Oct. 30, 2024). Unless this Court reaffirms that, at some point, "the rules of the road" for federal elections "must be cleared and settled," *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurral), the mounting legal chaos afflicting federal elections will only get worse. A stay is warranted under *Purcell*.

II. THERE IS A "FAIR PROSPECT" OF REVERSAL.

The Election Code unambiguously states that "[a] provisional ballot shall not be counted if the elector's [mail] ballot is timely received by a county board of elections." 25 Pa. Stat. § 3050(a.4)(5)(ii)(F). That command foreclosed the decision below under the Elections and Electors Clauses. Conspicuously avoiding analysis of that language, Respondents make several counterarguments, but all fail.

(a) Respondents suggest (for the first time in this litigation) that Applicants lack standing, *see* Resp Br. 13; Dem Br. 12, but that is wrong. Applicants received intervenor-defendant status without opposition, because this case obviously jeopardized several Election Code provisions governing Applicants' participation in elections. App. 6a. Contrary to Respondents' suggestion, Dem Br. 12, Applicants did not *initiate* this case to affect the outcome of the Democratic Primary. Applicants intervened to *defend* against a lawsuit that threatened the enforceability of election rules defining the competitive electoral landscape—an injury courts have repeatedly recognized confers standing. *E.g.*, Stay Br. 34; *Mecinas*, 30 F.4th at 898 & n.3; *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 86-87 (D.C. Cir. 2005). Respondents' various citations to legislative standing cases are thus irrelevant to Applicants' standing to protect their *political* interests. *See* Resp. Br. 14-16. And the majority

infringed *those* interests by dramatically changing the rules under which Applicants compete for votes in Pennsylvania. *See* Supp. App. 59a-62a; *cf. Camreta v. Greene*, 563 U.S. 692, 702-03 (2011) (finding standing to appeal "because the judgment may have prospective effect on the parties").

Moreover, regardless of whether Applicants would have had standing to *initiate* this case in federal court, they have standing because, "as a result of the state-court judgment, th[is] case has taken on such definite shape that [Applicants] are under a defined and specific legal obligation"—namely, to compete under less-favorable election rules set by courts rather than the General Assembly. *See ASARCO*, 490 U.S. at 618. As *ASARCO* recognizes, those on the wrong side of state-court judgments can suffer cognizable Article III injuries even if they would have lacked standing to initiate the case. *See id.* That was why no one contested the Bush Campaign's standing to appeal the Florida Supreme Court's ruling in 2000, *see Bush v. Gore*, 531 U.S. 98 (2000), and it is true here. Applicants are now indisputably subject to different electoral rules in Butler County than they were prior to the ruling below. And Respondents do not dispute that the Pennsylvania Supreme Court's ruling, as both a practical and formal matter, *binds* all courts and election officials throughout the Commonwealth. *See 2020 Gen. Election*, 241 A.3d at 1078 n.6 (explaining that the Pennsylvania Supreme Court has "authority to definitively interpret … the Election Code"). Consequently, Applicants must run campaigns under rules set by the Pennsylvania Supreme Court instead of the General Assembly. That is why, as Applicants have consistently explained and now substantiate with a sworn declaration, Applicants are scrambling to change their electoral strategy and educate their candidates, poll watchers, and voters about the last-minute rule changes

imposed by the majority below. Suppl. App. 59a-62a. Applicants have standing. *See ASARCO*, 490 U.S. at 618.

(b) Respondents next claim that Applicants waived their arguments under the Elections and Electors Clause. Resp. Br. 17; Dem Br. 13. This is easily disproven. To start, an injury in this context does not accrue until the state's highest court actually "transgress[es] the ordinary bounds of judicial review" by displacing a rule set by a state legislature. *Moore*, 600 U.S. at 36. Litigants need not assume and anticipatorily argue that state courts will behave unconstitutionally. Moreover, Applicants *did* invoke the Elections and Electors Clause below—both in their petition for allowance, Resp. Br. 17, and at length in their merits briefs, Supp. App. 51a-52a. Indeed, both Justice Dougherty's concurrence and Justice Mundy's dissent acknowledged and analyzed these arguments. App. 47a, 49a-52a. Because the merits question presented here was both pressed and passed on below, it is properly before this Court. *E.g.*, *United States v. Williams*, 504 U.S. 36, 41 (1992).

(c) Respondents' halfhearted defense of the majority's textual analysis only underscores its fatal deficiencies. Indeed, rather than offer any *justification* for the majority's analysis, Respondents merely *describe* it, while offering valedictory asides about the court's "close read" and "dutiful[ ] endeavor[s]." Resp. Br. 22-23. And while they fault Applicants for focusing on 25 Pa. Stat. § 3050(a.4)(5)(ii)(F), Applicants did so because *that is the dispositive provision* of the Election Code that instructs county boards when *not* to count provisional ballots. Respondents do not (and cannot) dispute the fact that the majority's purported "interpretation" of that all-important provision hinged on a cherry-picked dictionary definition of a word *in a judicial opinion* that appears nowhere in the provision itself. *See* Dem. Br. 17; *see also* Stay Br. 14-15. Instead, they parrot the majority's view that

a "ballot" ceases to be a "ballot," and thus cannot be "received," if election officials later discover an error that renders the ballot ineligible for counting. *See* Resp. Br. 23-24.[1] To get there, Respondents focus on terms, like "completed," that are irrelevant to the discrete (and straightforward) interpretive question at hand. *See* Dem. Br. 18. Respondents simply ignore that this Court, Pennsylvania's courts, and the Election Code all refer to rejected ballots as "ballots." *See* Stay Br. 26. Under any reasonable interpretation, a ballot does not cease to be a ballot—and an item "received" does not disappear from a county board's possession—merely because the ballot is ineligible for counting. Stay Br. 14-15. Tellingly, while Respondents assert that "a void vote is, as a matter of state law, no vote at all," Dem. Br. 18, Respondents never explain the *source* of that "state law" principle—because it *did not exist* prior to the decision below.

Given all this, the majority's reasoning is so bizarre that it "transgress[es] the ordinary bounds of judicial review." *Moore*, 600 U.S. at 36. That is especially clear when one considers that no party below pressed this understanding of the Code's text, and neither inferior state court adopted it. Those departures from the ordinary appellate role confirm what the majority's tortured logic attests: This was not an exercise in *resolving* statutory ambiguity, but in *creating* it to reach a desired result.

(d) Surely aware of this, Respondents and their *amici* assert—again and again—that judicial review under the Elections and Electors Clause is "exceedingly narrow" and only applies when "a state court essentially ceases to behave like a court at all." Resp. Br. 21-22;

[1] The Democrat Respondents suggest Applicants' reading is complicated by the fact that mail-ballot envelopes *without* ballots could be "timely received." Dem. Br. 18. In that case, the analysis is simple; no "ballot" has been "timely received" and the individual can vote provisionally.

Dem Br. 18 ("extremely high standard"); Brief of Former Government Officials as *Amici Curiae* at 4 (review available "in only the narrowest of circumstances"). But to shield the majority's interpretive mess from review, Respondents would convert a "deferential" standard into an utter "abdication" of constitutional responsibility. *Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring). This Court did no such thing in *Moore*, and it should not change course now. Indeed, if this Court takes no action in this case, state courts across the country will receive a clear message that judicial review under the Elections and Electors Clause is a parchment promise. Indeed, one scholar supporting Respondents' legal position has argued the Court should deny the application *because* he thinks the Court should not have provided for any judicial review in *Moore*. *See* Vikram Amar, *Why the Supreme Court Should Absolutely Not Grant Relief or Review in* Genser v. Butler County Board of Elections, Verdict (Oct. 30, 2024) (arguing *Moore*'s section on judicial review is "at complete war with" remainder of decision), https://verdict.justia.com/2024/10/30/why-the-supreme-court-should-absolutely-not-grant-relief-or-review-in-genser-v-butler-county-board-of-elections-as-the-republican-national-committee-requested-this-week. Rather than render *Moore*'s final section a nullity—and strip its deterrent value—this Court should reaffirm that meaningful judicial review exists to police state-court alteration of the rules governing federal elections. *See Moore*, 600 U.S. at 34-36 (majority); *id.* at 38-39 (Kavanaugh, J., concurring).

III. THERE IS A "REASONABLE PROBABILITY" OF CERTIORARI.

Certiorari is warranted in this case, which presents an issue of great factual and legal importance. Respondents do not really dispute that this case is factually important and could affect tens of thousands of ballots in Pennsylvania. That is true not just for the 2024 General Election, but for all future Pennsylvania elections.

Moreover, this case is legally important because it implicates the open question of what standard of review governs claims under the Elections and Electors Clause. As discussed, Respondents think reversal applies only when "a state court essentially ceases to behave like a court at all"—whatever that means. Resp. Br. 21-22. Applicants believe *Moore* forecloses Respondents' extreme understanding. Regardless, this is an important question implicated by both pending cases, *see Mont. Democratic Party v. Jacobsen*, 545 P.3d 1074 (Mont. 2024) (petition for certiorari docketed Aug. 28, 2024), and future ones. Days ago, the Nevada Supreme Court read state law to permit non-postmarked ballots received after Election Day, even though state law provides that a "postmark" must be present. *See RNC v. Aguilar*, No. 89149 (Nev. Oct. 28, 2024). Clarifying the standard of review in this case could stem the tide of incoming cases, in part by reminding state courts that *Moore*'s guardrails are merely forgiving, not (as Respondents would have it) essentially nonexistent.

IV. THE EQUITIES JUSTIFY A STAY.

Granting a stay would prevent multiple forms of irreparable harm to the Commonwealth, its voters, and Applicants. Stay Br. 32-35. Respondents do not contest that, if county boards must comply with the order below, the result of the 2024 General Election in Pennsylvania—and the Nation—could be tipped. Nor do they dispute that *several* elections in the past few years have been flipped by mail ballots subsequently determined to have been unlawfully cast. Supp. App. 60a-61a. Or that Applicants are scrambling to change their electoral strategy and to educate their candidates, poll watchers, and voters. *Id.* at 59a-60a. Indeed, Respondents acknowledge that *many* actors have rushed to educate Pennsylvanians about the majority's last-minute changes. Resp. Br. 33-34.

Instead, Respondents fault Applicants for seeking relief from the practical, formal, and inevitable consequences of the majority's judgment, which they depict as limited to two ballots in a long-completed primary. Resp. Br. 32-33. But Respondents *do not contest* that state election officials and courts view themselves as bound by the order below. *See Nov. 3, 2020 Gen. Election*, 241 A.3d at 1078 n.6. Indeed, they *concede* the point. Resp. Br. 30-31 (celebrating elimination of "dis-uniformity in state law").

Next, Respondents point to the efforts different actors have taken since the majority's decision to educate voters about the last-minute rule change, suggesting a stay would disrupt those efforts. Resp. Br. 33-34. But any disruption is the *consequence* of the majority's brazen last-minute rule change. In any event, the impact would be minimal. *See* Stay Br. 20-21. Election officials would count ballots *exactly* as they should have a few days ago. *Id.* And no voter would lose any legally protected interest; voters have no right to cast provisional ballots after they already had a full opportunity, when submitting their mail ballots, to comply with the General Assembly's mandatory and easily followed rules. *See id.*

V. EITHER SEGREGATION OR A STAY IS NECESSARY TO PREVENT HARMS WITH RESPECT TO THE 2024 GENERAL ELECTION.

Finally, Respondents argue that this Court cannot order any county board other than the Butler County Board—the only county board formally a party in this case—to segregate the disputed ballots and preserve the status quo. Respondents are wrong. The All Writs Act authorizes this Court to "issue all writs necessary or appropriate" in "aid of [its] . . . jurisdiction[]." 28 U.S.C. § 1651(a). This Court has consistently recognized that the Act allows it to issue orders against non-parties "as aids in the performance of its duties" and to "achieve the ends of justice entrusted to it." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 173 (1977). One recurring situation in which this Court has sanctioned temporary orders against

non-parties is to "maintain the status quo" to "preserve the [C]ourt's jurisdiction." *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966); *see Adams v. United States* ex rel. *McCann*, 317 U.S. 269, 273 (1942); *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985).

Here, a segregation order would "maintain the status quo" and "preserve the [C]ourt's jurisdiction." *Dean Foods*, 384 U.S. at 604; *see N.Y. Tel. Co.*, 434 U.S. at 273. As a formal and practical matter, other county boards will adhere to the majority's order just as closely as the Butler County Board. *Nov. 3, 2020 Gen. Election*, 241 A.3d at 1078 n.6. That is why Respondents seemingly concede that, without this Court's intervention, all county boards will now count the disputed ballots. Resp. Br. 30-31. And the Secretary of the Commonwealth is already relying on the majority's opinion to urge precisely that course. Stay Br. 11.

Moreover, once the county boards comply with the majority's order, it may not be possible to challenge the counting of those provisional ballots. After all, when election officials count a provisional ballot, they rely on the outer declaration envelopes to identify the elector and his status. The actual provisional ballots contain no identifying information, only a vote. Once ballots are separated from their outer envelopes, there is no way to retroactively figure out *which ballots* were illegally cast. In other words, once the egg is scrambled, it cannot be unscrambled.

As in 2020, this limited, temporary relief to maintain the status quo would not burden election officials, who would simply set aside affected ballots into different piles during canvassing. *Cf. N.Y. Tel. Co.*, 434 U.S. at 174 (considering burdens). Under Respondents' approach, Applicants' only opportunity to resist the counting of the disputed ballots would be to object before each county's canvassing board. But the Pennsylvania Supreme Court has

held that county boards can distance election observers so that they cannot actually observe the counting of ballots, *In re Canvassing Observation*, 241 A.3d 339, 349-51 (Pa. 2020), and seemingly nothing prevents that from happening again. And even if objections are possible, Applicants will be forced to litigate piecemeal lawsuits *in all 67 counties*, with all cases doomed by the majority's ruling. Such litigation is simply not realistic. Under these unique circumstances, a segregation order against all county boards is "necessary" "in aid of" this Court's "jurisdiction[]." 28 U.S.C. § 1651(a).

If this Court declines to issue a segregation order, a pre-Election Day stay is all the more urgent. Without a segregation order, only a stay will prevent the all-important 2024 General Election for Pennsylvania—and potentially the whole Nation—from being decided under rules set by the courts instead of the General Assembly.

CONCLUSION

This Court should stay the Pennsylvania Supreme Court's order or preserve its jurisdiction by ordering the segregation of the affected provisional ballots.

Respectfully submitted,

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