No. 24-786

IN THE
Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Petitioners,

v.

FAITH GENSER, ET AL.,

Respondents.

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

REPLY TO BRIEFS IN OPPOSITION

JULIE M. GRAHAM
BUTLER COUNTY
SOLICITOR'S OFFICE
124 W. Diamond St.
Butler, PA 16001
(724) 284-5233

Counsel for Petitioner Butler County Board of Elections

JOHN M. GORE
Counsel of Record
E. STEWART CROSLAND
LOUIS J. CAPOZZI III
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
jmgore@jonesday.com

Counsel for Republican Party Petitioners

(Additional counsel on inside cover)

KATHLEEN GALLAGHER
THE GALLAGHER FIRM, LLC
436 Seventh Ave., 13th Floor
Pittsburgh, PA 15219
(412) 308-5512

THOMAS W. KING, III
THOMAS E. BRETH
DILLON, McCANDLESS,
KING, COULTER &
GRAHAM, LLP
128 W. Cunningham St.
Butler, PA 16001
(724) 283-2200

Counsel for Republican Party Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Respondents' briefs confirm that this case "of considerable importance," *Republican Nat'l Comm. v. Genser*, 145 S. Ct. 9 (2024) (statement of Alito, J.), presents the perfect occasion for the Court to fulfill its promise "to ensure that state court interpretations of [state] law do not evade" the Elections and Electors Clauses, *Moore v. Harper*, 600 U.S. 1, 34 (2023). Far from rehabilitating the decision below, Respondents' arguments underscore that the Pennsylvania Supreme Court "impermissibly distorted" state law when it ordered that election officials *shall* count ballots the General Assembly has unambiguously directed *shall not* be counted. *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring); *Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring); Pet.16-28.

Respondents' various other efforts to evade this Court's review likewise fail. Respondents suggest that the Court already resolved the question presented in *Moore*—but that no doubt comes as a surprise to the Court, which in *Moore* expressly *left open* the question of what standard of review applies under the Clauses. 600 U.S. at 36-37. Respondents also try to downplay the importance of the question presented, even though four Justices have already agreed that the question is consequential and warrants the Court's review. *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurral); *id.* (Alito, J., dissental).

Respondents thus are left with an inapposite discussion of legislator standing, a baffling challenge to this Court's jurisdiction, and a meritless waiver argument. The Court should take advantage of this

ideal case—which involves no imminent election, factual dispute, or thorny question of state constitutional law—to grant certiorari and to reinforce that the Clauses' promise of free and fair elections under rules adopted by state legislatures remains alive, well, and fully enforceable against state-court overreach.

ARGUMENT

I. THE PENNSYLVANIA SUPREME COURT VIOLATED THE U.S. CONSTITUTION.

The Pennsylvania General Assembly has unambiguously mandated that "[a] provisional ballot *shall not be counted* if … the elector's absentee ballot or mail-in ballot is timely received by the county board of elections." 25 Pa. Stat. § 3050(a.4)(5)(ii)(F) (emphasis added). The majority below violated the Elections and Electors Clauses when it ordered precisely the opposite and directed that a provisional ballot *shall be* counted if the timely-received mail ballot is "void." Pet.16-28.[1]

The Pennsylvania Supreme Court thus created a void-ballot exception in subparagraph (ii)(F) where the General Assembly created none. *See id.* In other words, it added its preferred bolded language to the General Assembly's unadorned mandate:

> A provisional ballot shall not be counted if … the elector's absentee ballot or mail-in ballot is timely received by the county

[1] This Brief uses "mail ballot" to encompass both "absentee" and "mail-in" ballots under the Election Code. *See, e.g.*, 25 Pa. Stat. § 3050(a.4)(5)(ii)(F).

> board of elections**, unless that ballot is "void" as the Pennsylvania Supreme Court defines that term.**

Compare 25 Pa. Stat. § 3050(a.4)(5)(ii)(F), *with* Dem.Br.18-19; Resp.Br.13, 20.

Such a dramatic judicial revision of a legislature's duly enacted election law—particularly where it imports an extrinsic, extra-textual exception from a *state-court decision*—is an archetypal Elections-and-Electors-Clauses violation. *See* Pet.16-28. Unsurprisingly, Respondents point to precisely nothing in Pennsylvania law that even supports, let alone justifies, a judicial void-ballot exception to subparagraph (ii)(F). To the contrary, Respondents' arguments actually underscore that the Pennsylvania Supreme Court's void-ballot exception "impermissibly distort[s]" *both* subparagraph (ii)(F) *and* other state laws. *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *Moore*, 600 U.S. at 38-39 (Kavanaugh, J., concurring); Pet.16-28.

First, Respondents argue that the void-ballot exception merely implemented Pennsylvania's Statutory Construction Act, which codifies the General Assembly's instructions for judicial interpretation of statues it enacts. Dem.Br.21-22; Resp.Br.24-26. In particular, they argue that the Pennsylvania Supreme Court followed the Act's instruction to "ascertain and effectuate the intention of the General Assembly." Dem.Br.21-22 (quoting 1 Pa. Cons. Stat. § 1921(a)); Resp.Br.25.

In fact, the Act only further demonstrates the constitutional violation here: In neighboring language

Respondents ignore, the Act instructs that "[w]hen 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." 1 Pa. Cons. Stat. § 1921(b). The Pennsylvania Supreme Court violated this instruction when it reversed the General Assembly's unambiguous "shall not be counted" mandate into its preferred "shall be counted" order. Pet.16-28.

In any event, the Pennsylvania Supreme Court also incorrectly assessed the General Assembly's intention in subparagraph (ii)(F). It asserted that the intention was "to preclude double voting" and that "[n]o party has identified any other purpose." Pet.App.51a (Dem.Br.22; Resp.Br.26). This assertion is baffling, since the dissenting justices explained that the legislative purpose was to give voters "one chance to cast a valid ballot," not solely to preclude double voting. Pet.App.97a n.18 (Brobson, J., dissenting).

Second, Respondents point to subparagraph (i), which appears next to subparagraph (ii)(F). *See* Dem.Br.17-18; Resp.Br.13, 21-22. Subparagraph (i) provides that a county board of elections "shall count" a provisional ballot if it "confirms that the individual did not cast any other ballot, including an absentee ballot, in the election." 25 Pa. Stat. § 3050(a.4)(5)(i) (Dem.Br.17-18, 20-21; Resp.Br.13, 21-22). The Pennsylvania Supreme Court conflated subparagraphs (i) and (ii) into "two sides of the same coin," reasoning that subparagraph (i) "'dictates generally when to count a provisional ballot'" and subparagraph (ii) merely "'fleshes out the negative implications of that rule.'" Resp.Br.13 (quoting

Pet.App.52a). Thus, on its reading, because a void mail ballot is not "cast" under subparagraph (i), it likewise does not trigger subparagraph (ii)'s "shall not be counted" mandate. Pet.App.52a; *see* Dem.Br.17-18, 20-21; Resp.Br.13, 21-22.

Each step in this chain of (il)logic compounds, rather than cures, the Pennsylvania Supreme Court's violation of the Elections and Electors Clauses. The first step contravenes yet another provision of Pennsylvania's Statutory Construction Act, which instructs that "[e]very statute shall be construed, if possible, to give effect to all of its provisions." 1 Pa. Cons. Stat. § 1921(a). The Pennsylvania Supreme Court's treatment of subparagraph (ii)(F) as merely the flip-side implication of subparagraph (i), however, renders it meaningless surplusage with *no* effect.

Moreover, the second step requires repeating the very error of grafting a judicial void-ballot exception onto the statute. After all, the General Assembly's subparagraph (i) says nothing about "void" ballots. The Pennsylvania Supreme Court's version, by contrast, adds the bolded language below in parallel to its version of subparagraph (ii)(F): A county board

> shall count the [provisional] ballot if [it] confirms that the individual did not cast any other ballot, including an absentee ballot, in the election**, unless that other ballot is "void" as the Pennsylvania Supreme Court defines that term**.

Compare 25 Pa. Stat. § 3050(a.4)(5)(i), *with* Dem.Br.17-18, 20-21; Resp.Br.13, 21-22.

Third, Respondents point to two other Election Code provisions, but neither supports the void-ballot exception. The first states that a voter "who requests a [mail] ballot and who is not shown on the district register as having voted may vote by provisional ballot." 25 Pa. Stat. §§ 3146.6(b)(2), 3150.16(b)(2) (Dem.Br.17; Resp.Br.6, 22). But that provision addresses when a voter may *vote* a provisional ballot, not when the county board shall or shall not *count* that ballot. The reason is plain: Because mail ballots are timely received until the close of polls on election day, *see id.* §§ 3146.6(c), 3150.16(c), a voter who seeks to vote provisionally *on* election day will not be shown to have voted a timely but yet-unreceived mail ballot. The Election Code thus instead leaves subparagraphs (i) and (ii) to govern whether county boards shall or shall not count provisional ballots at the canvass *after* election day. *See id.* § 3050(a.4)(5)(i), (ii)(F).

The second provision states that "a completed [mail] ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on" election day. *Id.* §§ 3146.6(c), 3150.16(c) (Dem.Br.18; Resp.Br.14). While this provision makes clear the receipt deadline for a voter's completed ballot to be counted, it says *nothing* about "void" or incomplete ballots or subparagraph (ii)(F). It therefore provides no license for a void-ballot exception in subparagraph (ii)(F). *See* Pet.22-28; Pet.App.82a-83a (Brobson, J., dissenting).

Fourth, Respondents invoke the absurdity canon, suggesting no reasonable legislator could support giving voters only one chance to cast a ballot. Dem.Br.21-22. But that has long been Pennsylvania's

policy. Pet.App.97a n.18 (Brobson, J., dissenting). And there are good reasons for it, including reducing the burdens on election officials during the taxing election season, *see* Pet.34, and not favoring mail voters who return their ballots early (and thus might receive notice of defects) with a second chance at voting unavailable to in-person voters or mail voters who return their ballots later.

Fifth, Respondents suggest the term "ballot" in subparagraph (ii) must refer only to valid ballots because a voter could be precluded from voting provisionally if he returns a mail-ballot packet without a ballot. Dem.Br.20. Subparagraph (ii) provides otherwise: It applies only when a "*ballot*," not a packet with *no ballot*, is timely received. 25 Pa. Stat. § 3050(a.4)(5)(ii)(F) (emphasis added). In any event, that issue is not presented here because Individual Respondents *did* timely return their mail ballots.

Finally, Respondents parrot the Pennsylvania Supreme Court's observation that "the term ballot in these provisions is not defined within the Election Code or Statutory Construction Act." Dem.Br.18 (quoting Pet.App.12a) (cleaned up). As Petitioners have explained, however, the Election Code refers to a mail ballot as a "ballot" throughout the voting process, including when election officials canvass it and decide whether it shall or shall not be counted. *See* Pet.27-28. The Election Code thus forecloses, rather than facilitates, the Pennsylvania Supreme Court's treatment of a "void" ballot as a *non*-ballot. *See* Pet.App.92a-93a (Brobson, J., dissenting). The Pennsylvania Supreme Court's impermissible

distortion of the General Assembly's Election Code violates the Constitution.

II. THIS CASE IS CERTWORTHY.

As four Justices have recognized, the question of what standard of review applies under the Elections and Electors Clauses is "exceptionally important and recurring." *Moore*, 142 S. Ct. at 1089 (Alito, J., dissental); *id.* (Kavanaugh, J., concurral). It also implicates a split of authority and "is almost certain to keep arising until the Court definitively resolves it." *Id.* (Kavanaugh, J., concurral); Pet.29-32. Indeed, three Justices have already agreed that *this* case carries "considerable importance." *Genser*, 145 S. Ct. at 9 (Alito, J.).

Respondents nonetheless dispute that this case is certworthy. They are wrong. Respondents concede there is a split of authority but attempt to brush it aside on the view that *Moore* resolved it. Dem.Br.1, 15; Resp.Br.15-17. *Moore*, however, expressly left open the question of what standard of review applies under the Clauses. *See* 600 U.S. at 36-37.

Respondents also dispute the case's factual importance because, in their view, it merely affects up to "'*tens of thousands* of ballots' in every future Pennsylvania election." Resp.Br.27 (quoting Pet.30-31); *id.* at 7 (conceding that "[e]very election, thousands of voters" fail to follow the General Assembly's mandatory rules for mail ballots). But that is precisely *why* this case is factually important, as those ballots could change the outcome of local, state, or even national elections. Pet.30-31.

Finally, Respondents suggest that the standard of review under the Clauses does not matter. Dem.Br.16-17; Resp.Br.17. Yet at least four Justices have *already* acknowledged that it does. Pet.29. This case proves the point. In defending the decision below, Respondents lean heavily on what they see as an "exceedingly demanding standard for relief." Dem.Br.22; *accord* Resp.Br.18-19 ("extreme circumstances"). Whether that is the correct standard is precisely the important question this Court should decide.

III. THIS CASE IS A CLEAN VEHICLE.

This case is an ideal vehicle. As even Respondents concede, cases seeking this Court's review under the Clauses are "often time-sensitive." Dem.Br.23. This one is not. Pet.32-33. All agree the "facts are undisputed." Resp.Br.5; *see* Pet.33-35. And this case presents a straightforward question of statutory interpretation, not the "far more uncertain" task of reviewing a state-court interpretation of a state constitution. *Moore*, 600 U.S. at 64 (Thomas, J., dissenting); *see Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020) (Roberts, J., concurral); Pet.33; Dem.Br.16-17.

Respondents' three procedural objections all fail.

A. Petitioners Have Standing.

Individual Respondents alone contest Petitioners' appellate standing, Resp.Br.3, 27-30, but they are wrong.

The Board's standing is obvious. It has standing to appeal the judgment, which is adverse to, and imposes

compliance burdens on, the Board. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989); Pet.30-31.

The Board's standing alone is sufficient, *see Massachusetts v. EPA*, 549 U.S. 497, 518 (2007), but the Republican Party Petitioners also have standing to appeal the Pennsylvania Supreme Court's unlawful restructuring of the competitive environment in which they, their voters, and their candidates seek to win elections, *see* Pet.34-35.

Respondents' invocation of legislator standing cases, Resp.Br.27-30, is therefore beside the point. Petitioners do not seek to redress the harm to the General Assembly but instead the discrete and separate harm to themselves. Pet.30-31.

B. This Court Has Jurisdiction.

The Democratic Respondents alone argue this Court lacks jurisdiction under 28 U.S.C. § 1257. Dem.Br.10-12. This argument fails.

Section 1257 broadly permits appeals from an adverse state-court decision where a petitioner asserts "any title, right, privilege, or immunity … under the Constitution." 28 U.S.C. § 1257(a). This language is broad, and the Court has long found "§ 1257(a) [to] cover[] the entire range of federal questions that can arise … in state court." S. Shapiro, *et. al.*, Supreme Court Practice 3:16-17 (11th ed. 2019) (section 1257 reaches "[c]ases that involve the construction and application of the federal Constitution"). Petitioners assert that the judgment below violates their rights "under the Constitution" to conduct (the Board) and to participate in (the Republican Party Petitioners)

elections whose rules are set in accordance with the Elections and Electors Clauses. 28 U.S.C. § 1257(a).

Respondents posit that *only* state legislatures may invoke this Court's § 1257 jurisdiction to enforce the Clauses. *See* Dem.Br.10-12. They cite zero cases adopting that view. *See id.* And they ignore the prior cases where this Court reviewed state-court holdings under the Clauses even though the state legislature was not a party. *See McPherson v. Blacker*, 146 U.S. 1, 2-3 (1892); *Moore*, 600 U.S. at 14-19. Those have included cases brought by a political candidate or party. *See Bush*, 531 U.S. at 103 (per curiam); *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 73 (2000) (per curiam); *see also Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1 (2020) (statement of Alito, J.); *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 732-38 (2021) (Thomas, J., dissental); *id.* at 738-40 (Alito, J., dissental). This makes perfect sense. State legislatures are frequently not parties to cases implicating the Clauses, such as election challenges or contests. *See, e.g.*, *Bush*, 531 U.S. at 103; *Bush*, 531 U.S. at 73. And their current partisan composition may place them at odds with election officials seeking to conduct, and candidates and parties seeking to compete in, elections governed by rules enacted by a prior legislature. This Court has jurisdiction to vindicate the "right[s]" of such parties to constitutional elections under the Clauses. 28 U.S.C. § 1257(a).

C. Petitioners Did Not Waive Their Argument.

Finally, Respondents' assertion that Petitioners waived their argument below, Dem.Br.12; Resp.Br.31-32, is wrong several times over.

In the first place, a state-law ground does not preclude this Court's review when a litigant should "not have foreseen" the issue. *Lee v. Kemna*, 534 U.S. 362, 378 (2002). The Pennsylvania Supreme Court did not violate the Clauses—and give rise to Petitioners' injury—until it issued its decision. *See Moore*, 600 U.S. at 36 (reviewing only the decision of highest state court). Accordingly, there was nothing for Petitioners to raise before then.

Moreover, even if there were some requirement for Petitioners to foresee the possibility that the Pennsylvania Supreme Court might violate the Clauses, *see* Dem.Br.12; Resp.Br.31-32, Petitioners did so. They expressly *preserved* their argument in both their petition for allowance and prominently in the body of their merits brief below. Pet.App.161a-164a; Pet.App.191a n.5. That was sufficient to satisfy their state-law preservation obligations. Pet.App.66a n.4 (Mundy, J., dissenting). Indeed, Petitioners' argument was "pressed" and even "passed on below," *Illinois v. Gates*, 462 U.S. 213, 221 (1983), in both a concurring opinion and a dissenting opinion, Pet.App.60a (Dougherty, J., concurring); Pet.App.63a-66a (Mundy, J., dissenting).

Respondents nevertheless fault Petitioners for not invoking the Clauses "in their briefs before either the trial court or the Pennsylvania Commonwealth Court."

Dem.Br12. But as Justice Mundy explained, Petitioners were not required to do so because they were "the respondents in the trial court and the appellees in the Commonwealth Court," which meant "they had no issue preservation obligations" under state law. Pet.App.66a n.4 (Mundy, J., dissenting); *accord Sherwood v. Elgart*, 117 A.2d 899, 901 (Pa. 1955). And because this Court reviews the ruling of the State's *highest* court for compliance with the Clauses, *Moore*, 600 U.S. at 36, Petitioners' injury simply did not arise in the lower courts, *see ASARCO*, 490 U.S. at 618.

Respondents also suggest that the Pennsylvania Supreme Court found forfeiture when Petitioners sought discretionary review. Dem.Br.12-13. Not so. Rather, it briefly noted that it "did not accept allowance of appeal" on this issue and that such arguments "were not developed within their petition for allowance of appeal." Pet.App.20a & n.18. The granting of petitions for allowance is "a matter of … discretion." Pa. R.A.P. R. 1114. Thus, denying the petition on that issue is not equivalent to a forfeiture finding. And even if the majority's ruling could be understood as a forfeiture finding, its decision should not be insulated from scrutiny. After all, this Court's review under the Clauses exists to police state courts. *Moore*, 600 U.S. at 35-36. Allowing state courts to block that policing through self-serving forfeiture findings would inappropriately frustrate this Court's review and open the door to state courts flouting the Clauses. *See Gates*, 462 U.S. at 221-22; *Beard v. Kindler*, 558 U.S. 53, 63-64 (2009) (Kennedy, J., concurring).

CONCLUSION

The Court should grant certiorari.

May 12, 2025

Respectfully submitted,

JULIE M. GRAHAM
BUTLER COUNTY
SOLICITOR'S OFFICE
124 W. Diamond St.
Butler, PA 16001
(724) 284-5233

Counsel for Petitioner Butler County Board of Elections

JOHN M. GORE
Counsel of Record
E. STEWART CROSLAND
LOUIS J. CAPOZZI III
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
jmgore@jonesday.com

KATHLEEN GALLAGHER
THE GALLAGHER
FIRM, LLC
436 Seventh Ave., 13th
Floor
Pittsburgh, PA 15219
(412) 308-5512

THOMAS W. KING, III
THOMAS E. BRETH
DILLON, MCCANDLESS,
KING, COULTER &
GRAHAM, LLP
128 W. Cunningham St.
Butler, PA 16001
(724) 283-2200

Counsel for Republican Party Petitioners