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26 WAP 2024 and additional consolidated case(s)

IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 26 WAP 2024 & 27 WAP 2024

FAITH A. GENSER, FRANK P. MATIS, and
THE PENNSYLVANIA DEMOCRATIC PARTY,

Appellees,

v.

BUTLER COUNTY BOARD OF ELECTIONS,
REPUBLICAN NATIONAL COMMITTEE, and
REPUBLICAN PARTY OF PENNSYLVANIA,

Appellants.

OPPOSITION OF THE PENNSYLVANIA DEMOCRATIC PARTY TO APPELLANTS' APPLICATION FOR A STAY OR, IN THE ALTERNATIVE, MODIFICATION OF THE COURT'S OCTOBER 23, 2024 JUDGMENT

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INTRODUCTION

This case is a statutory appeal by two voters challenging the Butler County Board of Elections' refusal to count their provisional ballots—ballots they had been told by the Commonwealth they could cast in the April 2024 primary after the mail ballots they had submitted were deemed defective and uncountable. This Court correctly held, based on principles embodied in the Statutory Construction Act, that the board's refusal to count the votes violated the Election Code. That holding, the Court explained, effectuated the General Assembly's intent, as no "honest voting principle is violated" by "counting … an elector's provisional ballot when the elector's mail ballot is a nullity." Op.44. The Court thus appropriately ordered the board to count the ballots at issue.

Appellants offer no sound reason to stay or modify that judgment. Although appellants never mention the applicable standard for the relief they seek, this Court's precedent requires "a strong showing" that applicants are "likely to prevail on the merits" of a further appeal, or else show both that the other three stay factors—irreparable harm to the movant absent a stay, no substantial harm to others from granting a stay, and the public interest—all "strongly favor" a stay *and* that they have "a substantial case on the merits." *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805, 809 (Pa. 1983) (hereafter *Process Gas*). Appellants come nowhere close to satisfying either standard.

To start, appellants do not make a strong showing that they are "likely to prevail on the merits" of their federal claims in the U.S. Supreme Court, *Process Gas*, 467 A.2d at 808. Appellants advance two federal claims, first that this Court's decision violates the U.S. Constitution's Electors and Elections Clause, and second that it violates the principle that lower federal courts should not enjoin state election laws shortly before an election, *see Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). To the extent either claim is implicated by this case at all, both have been waived. Indeed, this Court expressly noted in its decision that it had declined to take up appellants' federal constitutional claim because that claim had not been properly presented. Op.16 n.18. And until their stay application, appellants had never invoked *Purcell*.

These state-law waivers provide an adequate and independent state ground to reject the federal claims, depriving the U.S. Supreme Court of jurisdiction. And even if it had jurisdiction, the Court almost uniformly refuses to hear federal issues not properly raised in the state courts.

In any event, appellants cannot succeed on the actual merits of this claim, because this Court did not remotely "transgress the ordinary bounds of judicial review," *Moore v. Harper*, 600 U.S. 1, 36 (2023). The Court instead carried out the core judicial function of construing provisions of the Election Code in accordance with the Statutory Construction Act. As Justice Dougherty expressed in his

concurring opinion (at 2), the Court, by providing a "cogent" response to "a state statutory interpretation question duly raised by the litigants in a case on [its] normal appellate docket," was simply doing its "job." And its decision was indeed "cogent," *id.*, as it was consistent with (and in fact dictated by) precedent, the Statutory Construction Act, and "the text of the Election Code," Op.27. Put simply, the Court's holding that a voter whose mail ballot was rejected may vote provisionally rather than automatically be disenfranchised was a correct, ordinary distillation of what the law is; it was in no way the type of extreme departure from the norms of judicial decision-making that could implicate Electors or Elections Clause concerns.

Appellants are likewise wrong to argue that the U.S. Supreme Court's *Purcell* line of cases warrants staying this Court's order rejecting the Butler County Board's aberrant interpretation of the Election Code. For starters, *Purcell* is a federalism-based limit on federal courts; it does not apply to state courts. That aside, this Court's decision prevents rather than engenders the voter confusion *Purcell* seeks to avoid, both by definitively interpreting the Election Code to ensure uniformity across the Commonwealth and by rejecting a board of elections' practice of refusing to count provisional ballots that voters are entitled to cast.

Nor do the equities favor a stay. Appellants have not "shown that without the requested relief, [they] will suffer irreparable injury," that "[t]he issuance of a stay will not substantially harm other interested parties in the proceedings," or that "[t]he

issuance of a stay will not adversely affect the public interest," *Process Gas*, 467 A.2d at 808-809. In fact, a stay would inflict severe harm on the Commonwealth's voters, as it would "wholly disenfranchise" voters seeking to cast a provisional ballot "for no discernible purpose." Op.41. Appellants, by contrast, will suffer no irreparable harm if a stay is denied. This case arose out of a *Democratic* primary election that ended months ago; appellants have not even attempted to articulate how they are harmed by the counting of votes in that election. Nor would appellants' promised request for U.S. Supreme Court review be mooted (as they claim, *see* Appl.14) by the occurrence of a different election. Appellants simply dislike the precedential effect of this Court's decision. That is not cognizable, let alone irreparable, harm.

Finally, this Court should (indeed must) reject appellants' alternative request that the Court modify its judgment by imposing ballot-segregation procedures on every county elections board in the Commonwealth. Leaving aside the merits, that request exceeds this Court's jurisdiction, as 66 of the Commonwealth's 67 county boards of elections are not parties to this litigation.

Appellants' application should be swiftly denied.

ARGUMENT

I. APPELLANTS DO NOT MAKE THE REQUISITE "STRONG SHOWING" THAT THEY ARE LIKELY TO SUCCEED ON THEIR FEDERAL CLAIMS

Appellants cannot succeed either on the argument they now press under the Elections and Electors Clauses of the U.S. Constitution (art. I, §4, cl. 1; art. II, §4, cl. 2), or on their *Purcell* argument, for the simple reason that procedural bars will preclude the U.S. Supreme Court from considering either. Both arguments have been waived, and that waiver is an adequate and independent state ground for this Court's rejection of the arguments. *See, e.g.*, *Mata v. Baker*, 74 F.4th 480, 486 (7th Cir. 2023) (deeming waiver an adequate and independent state ground); *Hutchison v. Bell*, 303 F.3d 720, 738 (6th Cir. 2002) (same). The U.S. Supreme Court thus lacks jurisdiction to hear either argument, because doing so would be an advisory opinion: Even if that court agreed with appellants on either argument, this Court could and presumably would, when the case returned from the U.S. Supreme Court, again deny relief on the (same) ground that the arguments were never properly presented. *See Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983); *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988).

Even setting that jurisdictional barrier aside, the U.S. Supreme Court "has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision." *Howell v. Mississippi*, 543 U.S. 440, 443

(2005) (per curiam). Again, appellants' federal claims were not "addressed by or properly presented" to this Court (or any lower court, for that matter), *id*., and "the circumstances here justify no exception" to the U.S. Supreme Court's practice of denying review in that situation, *id*. at 446.

In any event, appellants' federal claims each fail on the merits. Their constitutional argument fails because this Court's statutory construction was well within "the ordinary bounds of judicial review," *Moore*, 600 U.S. at 36. And neither *Purcell* nor its animating concerns applies to a state-court decision that prevents (not engenders) voter confusion.

A. Electors And Elections Clauses

1. This Court denied allowance of appeal on appellants' arguments under the Elections and Electors Clauses because the "issues were not developed within [appellants'] petition for allowance of appeal." Op.16 n.18. Indeed, appellants did not even *mention* these arguments in their briefs before either the trial court or the Commonwealth Court. And the Pennsylvania Rules of Appellate Procedure unequivocally provide that "[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa.R.A.P.302(a). Despite this clear rule, appellants' petition for allocatur mentioned these arguments only in a footnote promising to "set forth [these arguments in their] principal brief," Pet.19 n.5. Under Pennsylvania law, however, "arguments raised only in brief footnotes [are] too

undeveloped for review." *Madison Construction Co. v. Harleysville Mutual Insurance Co.*, 735 A.2d 100, 109 n.8 (Pa. 1999). The argument was thus waived twice over, and this Court was well within its authority to deem them waived as a matter of Pennsylvania law. *See* 210 Pa. Code §63.6(B).

This Court's decision to reject appellants' arguments under the Elections and Electors Clauses as waived is an adequate and independent state ground for its rejection of those arguments, a ground the U.S. Supreme Court lacks jurisdiction to review, *Long*, 463 U.S. at 1037; *see Mata*, 74 F.4th at 486; *Hutchison*, 303 F.3d at 738. State procedural rules are an adequate and independent state ground where they are "strictly or regularly followed." *Johnson*, 486 U.S. at 585. Appellants do not even argue that this Court fails to routinely enforce the state-law procedural rules regarding waiver and the scope of appellate review, no doubt because in reality, "this Court has taken a strict[] approach to waiver," *Schmidt v. Boardman Co.*, 11 A.3d 924, 942 (Pa. 2011).

Finally, even if this Court's waiver holding were somehow not an adequate and independent state ground, the U.S. Supreme Court has made clear that it "almost unfailingly refuse[s] to consider any federal-law challenge" that, like appellants' federal constitutional claim, was "[n]either addressed [n]or properly presented" in state court. *Howell*, 543 U.S. at 443.

2. While the Court need go no further, appellants also will not succeed on the merits because this Court acted well within its authority in construing the Pennsylvania Election Code, as the General Assembly directed in the Statutory Construction Act, and cannot credibly be deemed to have "transgress[ed] the ordinary bounds of judicial review," *Moore*, 600 U.S. at 36.

As the Court observed, "[t]he propriety of counting a provisional ballot is a question of statutory interpretation." Op.27. This Court answered that question by interpreting provisions of the Election Code that had divided the lower courts and Pennsylvania counties in the wake this Court's 2020 ruling that "the failure to follow [certain] requirements for voting by mail nullifies the attempt to vote by mail and the ballot." Op.33 (citing *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020)). Relying on that precedent, the Court here interpreted the Election Code's text concerning provisional voting in accordance with the Statutory Construction Act, 1 Pa.C.S. §1921(a). Op.33. In particular, the Court concluded that "[t]o construe a void ballot as a 'ballot … in this election' is to give it legal effect, in direct contravention of [its] holding in *Pa. Democratic Party* that a mail ballot lacking a Secrecy Envelope is void." Op.36.

Appellants cannot possibly establish that the extremely high standard to show an Elections Clause or Electors Clause violation is met here simply by reiterating the argument this Court rejected. That argument focuses narrowly on a single

sentence in the Election Code: "[A] provisional ballot shall not be counted if the elector's absentee ballot or mail-in ballot is timely received by a county board of elections," 25 P.S. §3050(a.4)(5)(ii)(F). But as this Court explained, a defective (and uncountable) mail ballot is not and cannot be "timely received" within the meaning of section 3050(a.4)(5)(ii)(F), as only a completed mail ballot package received by the close of polls is timely under section 3150.16(c). Op.42. To hold otherwise would disqualify a voter for returning a mail-ballot packet that is not complete, will not be processed, and may not even contain a ballot at all. Appellants' interpretation, this Court explained, "ignores the availability of provisional voting," "manufactures an absurdity," and does nothing to effectuate the Election Code's purpose "to prevent double voting." Op.41. The Butler County Board did not even apply this interpretation as it counted the provisional ballots of voters whose mail ballots were rejected for outer-envelope defects (i.e., no signature or no correct date).

Appellants' argument also conflates provisional voting with curing defective mail ballots (Appl.10-11). As this Court held, "the casting of a provisional ballot is specifically authorized in the Election Code, wholly unlike the amorphous proposed notice and [post-election] cure policy discussed in *Pa. Democratic Party*." Op.26. The right to cast a provisional ballot when a mail ballot is voided, that is, "is a *statutory* right not contemplated in *Pa. Democratic* Party." Op.28 (emphasis added). This case is thus not about whether this Court has the authority to judicially mandate

state-wide notice and cure; it is about the Election Code's distinct provisional-ballot provisions, i.e., the provisions enacted by the General Assembly whose authority appellants purport to want to vindicate. Appellants provide no sound reason for the U.S. Supreme Court to second-guess either a state high court's construction of the state statutes it has been interpreting for generations or a state high court's interpretation of its own precedent. In short, appellants do not come close to establishing that this Court "transgress[ed] the ordinary bounds of judicial review," as would be required to obtain U.S. Supreme Court review, *Moore*, 600 U.S. at 36.

B. *Purcell*

1. Appellants failed to raise *Purcell* until their application for a stay of this Court's final judgment. *Purcell* therefore cannot be a basis for reversal by the U.S. Supreme Court, both because appellants' waiver of the issue (*see* Pa.R.A.P.302(a)) presents an adequate and independent state-law ground for rejecting the claim, *see Long*, 463 U.S. at 1037, and because the U.S. Supreme Court "refuse[s] to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court," *Howell*, 543 U.S. at 443 (quotation marks omitted).

2. In any event, *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), and its progeny—under which "lower federal courts should ordinarily not alter the election rules on the eve of an election," *Republican National Committee v.*

Democratic National Committee, 589 U.S. 423, 424 (2020) (per curiam) (collecting cases)—do not support a stay here.

To start, *Purcell* by its terms is a limit on "lower federal courts." *Republican National Committee*, 589 U.S. at 424. It imposes no constraints on state courts—consistent with its grounding, at least partly, in considerations of federalism, *see, e.g.*, *Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 28 (2020) (mem.) (Roberts, C.J., concurring) (a case about "the authority of *state* courts to apply their own constitutions to election regulations" raises "different issues than" a case where "a [federal] District Court intervened in the thick of election season to enjoin enforcement of a State's laws," which "involves federal intrusion on state lawmaking processes" (emphasis added)). The U.S. Supreme Court has never suggested that *Purcell* is a creature of positive federal law that would bind state courts.

State courts are of course free to adopt a *Purcell*-like principle as a matter of state law. Appellants suggest (Appl.6) this Court recently did so in *New PA Project Education Fund v. Schmidt*, 2024 Pa. LEXIS 1476 (Pa. Oct. 5, 2024) (per curiam). But there it was not simply timing but also the extraordinary nature of the request (for King's Bench jurisdiction) that drove the Court's decision—which is why the Court stated that it would "continue to exercise [its] appellate role with respect to lower court decisions that have already come before this Court in the ordinary

course," specifically citing this case. *Id*. at *1 n.2. Appellants offer no reason for this Court to abandon that commitment now.

In any event, neither *Purcell* and its progeny nor *Purcell*'s animating concerns apply here. In particular, the Court's judgment in no way invites "'voter confusion,'" Appl.6 (quoting *Purcell*, 549 U.S. at 4-5), by not "preserv[ing] the status quo," Appl.3. The status quo was disuniformity across the Commonwealth's 67 county boards of elections regarding the validity of provisional ballots cast after a voter failed to successfully vote by mail or absentee ballot. As explained by an *amicus* brief filed by county officials, "[n]umerous" counties "have routinely allowed voters to cast provisional ballots in exactly the scenarios at issue in this litigation," such that "[c]ounting provisional ballots in such circumstances already takes place in many locations." County Officials Br. 2-3, No. 26 WAP 2024 (Pa. Sept. 26, 2024). If anything, then, this Court's decision *prevents* the confusion among voters and election administrators that could result from continued disuniformity across the Commonwealth.

Indeed, it is the Butler County Board of Elections' now-rejected practice that invited voter confusion. As this Court recognized (Op.22, 34), that practice was to refuse to count provisional ballots submitted by voters whose mail ballots were defective due to lack of a secrecy envelope, even though (1) the board *would* count provisional ballots submitted by voters whose mail ballots were defective for other

routine errors and (2) the voters whose provisional ballots the board refused to count were specifically notified that they *could* "go to [their] polling place on election day and cast a provisional ballot," Pennsylvania Department of State, *Changes to SURE VR and PA Voter Services as of March 11, 2024*, at 8-9. By rejecting that misleading approach, the Court's decision prevents—not "engender[s]," Appl.6—confusion.

II. THE EQUITIES WEIGH AGAINST A STAY

Contrary to appellants' claims, a stay would *cause* irreparable harm, not prevent it.

Appellants assert (Appl.15) that "no party would be substantially harmed by … a stay" (quotation marks and alterations omitted). As this Court recognized (Op.41), however, allowing Butler County's practice to stand would "wholly disenfranchise" voters "for no discernible purpose." It is hard to imagine a harm more substantial than that. As this Court has long recognized, "[t]he disfranchisement of even one person validly exercising his right to vote is an extremely serious matter," *Perles v. County Return Board of Northumberland County*, 202 A.2d 538, 540 (Pa. 1964). Indeed, courts consistently find that "[a] restriction on the fundamental right to vote … constitutes irreparable injury." *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *accord, e.g.*, *Democratic National Committee v. Republican National Committee*, 2016 U.S. Dist. LEXIS 153755, at *53 (D.N.J. 2016) (collecting cases). That is because "once the

election occurs, there can be no do-over and no redress." *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). Appellants have no direct answer to this. Instead, they argue (Appl.15-16) that the harm is the burden of "complying with the secrecy envelope," which they aver "is not even significant, let alone 'substantially harm[ful]' to anyone" (alteration in original). That is not the harm a stay would cause. The harm, as this Court recognized, is disenfranchisement. About that, appellants, again, have nothing to say.

By contrast, the harm appellants claim would befall them is illusory. They contend (Appl.15) that denying a stay would "cast[] a cloud upon … the legitimacy of the" pending election. But this Court already fully addressed that point, stating (Op.44) that it was "at a loss to identify what honest voting principle is violated" by "counting … an elector's provisional ballot when the elector's mail ballot is a nullity." Appellants, again, tellingly have nothing to say in response to this explanation. If anything, it is *granting* a stay that would cast a cloud over the pending elections, both by suggesting that boards of elections may (in this Court's words) "wholly disenfranchise" voters "for no discernible purpose," Op.41, and by perpetuating confusion among voters and election administrators engendered by disuniformity across the Commonwealth, *see supra* part I.B.2.

Finally, appellants are wrong that "without a stay," they cannot obtain Supreme Court review. Appl.14. This case arose out of a primary election that

ended over six months ago. *See* Op.3. Today, therefore, this case is *post*-election litigation, not (as appellants suggest) *pre*-election litigation. Whether "the [November] election has come and gone," Appl.14, has no bearing on whether this case is reviewable. Appellants may dislike the *precedential effect* this case may have on their ability to dispute particular results of the November election, but that does not render this post-election litigation moot or create an equitable basis to perpetuate confusion about the Election Code's proper construction.

III. THE COURT SHOULD NOT MODIFY ITS JUDGMENT

Appellants' alternative request—that this Court "modify its judgment to require that any provisional ballot cast by an individual whose mail ballot was timely received but defective" be "segregated … by the county board[s]" and "not … included in the official vote tally," Appl.16—is a non-starter. The Court's judgment here was to "affirm the Commonwealth Court's order directing the [Butler County Board of Elections] to count Electors'"—i.e., Faith Genser's and Frank Matis's—"provisional ballots," Op.45. The judgment thus pertains to *two ballots*, cast in *a single county*, in an election that ended months ago—not to "*any* provisional ballot cast by an individual whose mail ballot was timely received but defective," Appl.16. And it applies to the Butler County Board of Elections, not to the other 66 "county boards," *id.*, whose policies and practices were not at issue or a part of the record here. Hence, appellants' "minimum" request, *id.*, is not merely to *modify* the

judgment but to dramatically expand its scope, and in doing so to impose a provisional-ballot policy on all 67 county elections boards two weeks after this Court declined to do just that in *New PA Project Education Fund*. This Court cannot do so, however, because it lacks jurisdiction to issue a judgment in this case binding all 67 of the Commonwealth's "county boards," Appl.16, with an order directing them to segregate and not to count a subset of provisional ballots. Only one of the 67 boards is a party to this case, and it is a longstanding tenet of Pennsylvania law that "no person is bound by a judgment or decree but those who are parties to the suit or privies," *Garber v. Commonwealth*, 7 Pa. 265, 266 (1847).[*]

Contrary to appellants' suggestion, their requested "modification" finds no support in *Republican Party of Pennsylvania v. Boockvar*, 2020 WL 6536912 (U.S. Nov. 6, 2020) (Alito, J.). The judgment under review there was "in the form of declarations of law regarding Act 77," *Pennsylvania Democratic Party*, 238 A.3d at 355, not an order respecting particular individuals' ballots. More importantly, "all 67 county election boards" were parties to that litigation. *Id*. at 352. Again, that is not the situation here.

CONCLUSION

The application for a stay or to modify the judgment should be denied.

[*] The *precedent* set by this Court's decision would of course be binding in disputes involving any county elections board, but the judgment itself—which is what appellants ask this Court to modify—applies only to Butler County.

October 27, 2024

Respectfully submitted,

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CERTIFICATION OF COUNSEL

I hereby certify that this brief contains 3,824 words within the meaning of Pennsylvania Rule of Appellate Procedure 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Clifford B. Levine

CERTIFICATE OF SERVICE

On October 27, 2024, I caused the foregoing to be electronically filed and to be served via the Court's electronic filing system on counsel of record for each party listed on the docket.

/s/ Clifford B. Levine