

No. 20A53

IN THE
Supreme Court of the United States

JOSEPH B. SCARNATI III, *President Pro Tempore*, AND
JAKE CORMAN, *Majority Leader of the Pennsylvania Senate*,
Petitioners,

v.

KATHY BOOCKVAR, *Secretary of Pennsylvania, et al.*
Respondents.

On Application to Stay the Mandate of the
Supreme Court of Pennsylvania

To the Hon. Samuel A. Alito, Jr.
Associate Justice of the United States and
Circuit Justice for the U.S. Court of Appeals for the Third Circuit

**Motion for Leave to File Amicus Brief, Motion for Leave to
File Brief Under Rule 33.2, and Brief of Amici Curiae
Oklahoma and 17 other States in support of Applicants**

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Movant the states of Oklahoma, Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Texas, and West Virginia, respectfully seek leave to file the accompanying brief as *amici curiae* in support of the emergency application to stay the mandate of the Supreme Court of Pennsylvania. Applicants consent to the filing of this *amicus* brief and respondents ; counsel for respondent Kathy Boockvar was contacted on Wednesday, September 30, 2020 for her position on this motion and no response has been received as of the time of this filing.

The majority of states, including many of the *amici* states, have the same Election Day receipt deadline for absentee ballots as the one erased and re-written by the Pennsylvania Supreme Court. And this is just one decision among cases across the

country where a patchwork of court rulings usurp the legislative role and create new election laws in substitution of the judgment made by the people’s representatives. Indeed, there are now over three hundred cases filed in 44 states seeking to alter state election rules on the eve of—and now in the midst of—the 2020 general election.¹

The *amici* states therefore have a strong interest in securing this Court’s clear direction to courts in every state that judicial altering of election laws at this late date, based on little more than policy judgments inherently legislative in nature, will not receive this Court’s approval. *Amici* states seek leave to file this brief to detail the important state interests served by absentee ballot receipt deadlines and the Constitutional authority for state legislatures to set election deadlines without courts taking it upon themselves to create new arbitrary deadlines. This is especially important in states like Pennsylvania, where judicial tinkering with election laws will cause delay and perhaps dispute about the results of the election, sowing discord and forcing upon the rest of the country uncertainty about who our President and Congressional leaders will be.

For these reasons, Oklahoma and the 17 other *amici* states respectfully request this court’s leave to file the attached *amicus curiae* brief in support of the Applicants in this case.

¹ See Stanford-MIT Healthy Elections Project, *COVID-Related Election Litigation Tracker*, <https://healthyelections-case-tracker.stanford.edu/>.

Respectfully submitted,



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MOTION FOR LEAVE TO FILE BRIEF UNDER RULE 33.2

Petitioners in this case filed the instant application on September 28, 2020, and Justice Alito requested a response by 3 P.M. on October 5, 2020. Pursuant to Rule 22.2, petitioners filed their application to stay the mandate under the format specified by Rule 33.2.

In keeping with this format, and because the expedited nature of the emergency application does not allow for the printing of booklets under Rule 33.1, *amici* movants respectfully move this Court to accept the filing of an *amicus* brief using the 8 ½ x 11 inch format specified in Rule 33.2.

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**BRIEF OF AMICI CURIAE OKLAHOMA AND 17 OTHER STATES IN SUP-
PORT OF APPLICATION TO STAY THE MANDATE**

Interests of Amici Curiae

The court below enjoined “[t]he most common state deadline for election officials to receive absentee/mailed ballots”—“Election Day when the polls close.”¹ Prior to the pandemic, thirty-two states, including many of the *amici* states, had this deadline.² Yet the Pennsylvania Supreme Court chose to fashion a new deadline, declaring the one used by the majority of states for many decades suddenly must be changed

¹ Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options, NAT’L CONF. OF STATE LEGIS., <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

² VOPP: Table 11: Receipt and Postmark Deadlines for Absentee Ballots, NAT’L CONF. OF STATE LEGIS., <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx>.

because of the COVID-19 pandemic. The states have important interests in enforcing the Election Day ballot receipt deadlines created by their legislatures. *Amici* also all share an interest in preventing courts from upending legislatively-enacted state election laws in this midst of an election. A stay is warranted to prevent last-minute judicial rewriting of state election laws, which can sow confusion, chaos, and uncertainty in an already-tense election cycle.³

Summary of the Argument

States legislatures must necessarily chose a point by which to stop receiving ballots and start counting votes, consistent with federal law setting the Election Day for federal officers. The deadline requiring absentee ballots to be received by Election Day promotes an efficient and orderly election, allowing states to expeditiously certify election results to bring certainty, clarity, stability, and legitimacy to our democratic system—sooner rather than later. States also have an interest in choosing not to have postmark deadlines, which increase the risk of voters casting ballots after initial results are released and undermines confidence in an election if the Election Day results change from votes that continue to be tallied days and weeks after.

Such deadlines cannot be judicially rewritten merely because some voters will not act in a timely fashion to comply. Pennsylvania voters have 50 days to return

³ Although not ordinarily subject to Rule 37.6, *amici* States certify that no party's counsel authored this brief in whole or part and no party or counsel contributed money that was intended to fund preparing or submitting this brief.

their absentee ballot to ensure that it is received by Election Day, so failure to do so is not the fault of state election law. See *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973). That is why many courts, both before and during the pandemic, have upheld Election Day receipt deadlines—and COVID-19 does not make these laws unconstitutional. Regardless of the virus and the policy choice of how election laws should be changed due to recent circumstances, balancing interests in counting as many tardy voters as possible with electoral order, legitimacy, efficiency, and certainty is quintessentially a *legislative* judgment. The decision of the court below to strike a different balance, writing in a new postmark deadline with an arbitrary three-day-after-Election-Day cutoff, improperly abrogated the state legislature’s prerogative to set “the *Times*, Places and Manner of holding Elections.” U.S. CONST. art. I, § 4 (emphasis added).

The contrary conclusion by the Pennsylvania Supreme Court rested on the unjustified assumption that local, state, and federal officials will be unable to properly conduct an election with increased absentee voting. Indeed, since state primaries earlier this year, a scientific consensus has developed about the safety of in-person voting, leading to calls from both sides of the aisle to vote in-person and predictions of a *lower* than once-expected use of absentee voting. Speculation about what might be better election policy cannot justify altering election laws in the middle of an election, after thousands of ballots have been mailed and returned in Pennsylvania—and millions more have been cast nationwide. See *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

But with hundreds of cases filed in courts in almost every state creating mass uncertainty, state legislatures can no longer reliably set election rules without a significant possibility that some court somewhere will think better of them. Now is the time for this Court to signal a clear end to judicial management of the 2020 Election.

Argument

I. States have important interests in Election Day absentee ballot receipt deadlines, which are set pursuant to a quintessentially legislative judgment, even if some proportion of voters fail to comply.

It is well-settled that absentee ballot receipt deadlines serve the “strong” and “important” state interests in “conducting an efficient election, maintaining order, quickly certifying election results, and preventing fraud.” *New Ga. Project v. Raffensperger*, No. 20-13360, slip op. at 6 (11th Cir. Oct. 2, 2020); see *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018) (election deadlines serve “a state’s legitimate interest in providing order, stability, and legitimacy to the electoral process”); *Thomas v. Andino*, 3:20CV1552, 2020 WL 2617329, at *26 (D.S.C. May 25, 2020) (“setting specific election deadlines is part and parcel of a state’s generalized interest in the orderly administration of elections,” noting also the state’s interest in “ensuring a smooth process for [voters] to cast ballots and officials to count those ballots”); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004) (“[T]he State’s interests in ensuring a fair and honest election and to count votes within a reasonable time justifies the light imposition on Plaintiffs’ right to vote.”). After all, states must

have a point at which they stop receiving ballots and start counting them to determine the winner. *Cox*, 892 F.3d at 1077; *Friedman*, 345 F. Supp. 2d at 1377.

While within the discretion of state legislatures, states also have strong interests in *not* using a postmark deadline like the one enacted by the court below. Election Day receipt deadlines “eliminate[] delay that can have adverse consequences[] and eliminate[] the remote possibility that in an extremely close election ... a person who did not vote on or before election day can fill out and submit a ballot later.” *Nielsen v. DeSantis*, No. 4:20CV236, 2020 WL 5552872, at *1 (N.D. Fla. June 24, 2020). This last interest is particularly strong in this case because the decision below to presumptively accept all ballots for three days following the election, even without a legible postmark, creates the very real risk of persons being able to fill out and submit ballots after Election Day and after initial returns have been reported. *Cf. Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (“Extending the date by which ballots may be cast by voters ... fundamentally alters the nature of the election.”).

This is not solely an in-state concern. Other states have a strong interest in the outcome of national elections as they play out across the country, and there is a strong federal concern with ensuring the timely and accurate reporting of state votes for federal officers. Thus, both within the state and nationally, an Election Day receipt deadline “secures voter confidence in the election: voters become less sure of the results if a candidate is declared a winner on or shortly after election day, but the

results are changed several days or a week later.” *DCCC v. Ziriox*, No. 4:20CV211, 2020 WL 5569576, at *19 (N.D. Okla. Sept. 17, 2020). As one scholar warns:

Even if absentee voting proceeds smoothly, a massive surge in mail-in ballots means hundreds of thousands of votes will not be counted until days after Election Day. Two weeks after its June 2 primaries, Pennsylvania was still counting absentee ballots. That experience creates one of the greatest risks to ensuring an election outcome widely accepted as legitimate this fall. If one candidate is ahead in key states on the night of the election, but loses those leads — and the race — over the course of the following week, charges of a stolen election will inevitably erupt.

Richard H. Pildes, *Absentee ballots will be critical this fall. But in-person voting is even more essential.*, WASH. POST (June 23, 2020).⁴

To be sure, any election deadline “will invariably burden some voters. . . for whom the earlier time is inconvenient.” *Cox*, 892 F.3d at 1077. But a “generally applicable deadline that applied to all would-be absentee voters would likely survive” constitutional muster, “even if it resulted in disenfranchisement for certain . . . individuals.” *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see also Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (every election law “is going to exclude, either de jure or de facto, some people from voting”). But the decision of the court below to focus on those voters who wait until the very last possible to point to request an absentee

⁴ <https://www.washingtonpost.com/opinions/2020/06/23/absentee-ballots-will-be-critical-this-fall-in-person-voting-is-even-more-essential/>; *see also* Jesse McKinley, *Why the Botched N.Y.C. Primary Has Become the November Nightmare*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/nyregion/nyc-mail-ballots-voting.html>.

ballot (7 days before the election), App. 36,⁵ rather than the opportunity for every voter to request a ballot up to 50 days before the election, 25 P.S. § 3150.12a, is a lean fig leaf for redrafting the deadline. Pennsylvania’s decision to provide a large temporal window to request a ballot does not create “an extremely condensed timeline,” App. 36, it instead provides voters *more opportunities* to vote absentee, leaving it to voters to use those options responsibly.

As this Court explained in *Rosario v. Rockefeller*, if a voter “could have” met an election-related deadline, missing that deadline is due to “their own failure to take timely steps to effect their enrollment.” 410 U.S. at 758. Lack of “sufficient awareness of the relevant circumstances and the likely consequences” of the deadline does not create a valid constitutional claim because such an argument could be maintained against any deadline. *Id.* at 758 n.7. Just this year, this Court observed that voters who wait weeks into absentee voting and request a ballot at the last minute are suffering the typical burden of a “late-requesting voter[],” not a burden improperly imposed by the state. *See Republican Nat’l Comm.*, 140 S. Ct. at 1207. And the Court has long given “little weight” to any alleged interest in “making a late rather than an early decision.” *Burdick v. Takushi*, 504 U.S. 428, 437 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974)).

⁵ References to the appendix filed with petitioners’ application to stay the mandate are designated by the abbreviation “App.”

Thus, while some voters will inevitably fail to comply with *any* deadline—including the postmark-and-three-days-after-Election-Day deadline invented by the Pennsylvania Supreme Court—courts have held in this and other election-related contexts that “voters who fail to get their vote in early cannot blame [state] law for their inability to vote; they must blame ‘their own failure to take timely steps.’” *Thomas*, 2020 WL 2617329, at *26 (quoting *Rosario*, 410 U.S. at 758); *see also New Ga. Project*, No. 20-13360, slip op. at 6 (11th Cir. Oct. 2, 2020) (“Voters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time....”); *id.* at 17 (Lagoa, J., concurring); *Ziriox*, 2020 WL 5569576, at *18 (“Because the State offers voters wishing to vote by absentee ballot options to ensure their votes are timely returned, voters who fail to ensure timely return of their ballots should not blame the law for their inability to vote.”); *Grossman v. Sec’y of the Commonwealth*, 485 Mass. 541, 2020 WL 5033954, at *6 (2020); *Friedman*, 345 F. Supp. 2d at 1377-78; *cf. also Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063, at *38-40 (M.D.N.C. Aug. 4, 2020); *Isabel v. Reagan*, 394 F. Supp. 3d 966, 982-83 (D. Ariz. 2019); *Chelsea Collaborative, Inc. v. Sec’y of Commonwealth*, 100 N.E.3d 326, 335 (Mass. 2018); *Crum v. Duran*, 390 P.3d 971, 976 (N.M. 2017); *Gallagher v. Ind. State Election Bd.*, 598 N.E.2d 510, 516 (Ind. 1992).

Statistics about how many voters in fact did not comply with the deadline are irrelevant because they do not give the reasons for failure to comply: whether it was

because these voters were unable to meet the deadline or instead because they did not take reasonable efforts to comply, perhaps because they chose to wait too long to request or return their absentee ballot. *See Ziriaux*, 2020 WL 5569576, at *18. Regulations that can be complied with by reasonable efforts are not significant burdens to the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008); *New Ga. Project*, No. 20-13360, slip op. at 6 (11th Cir. Oct. 2, 2020) ; *Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016). “An absentee voter is responsible for acting with sufficient time to ensure timely delivery of her ballot,” just like other voters “must take appropriate precautions by heading to the polls with a sufficient cushion of time to account for traffic, weather, or other conditions that might otherwise interfere with their ability to arrive in time to cast a ballot.” *Ziriaux*, 2020 WL 5569576, at *18. Voters who fail to do so are not “disenfranchised”—they’re tardy. *New Ga. Project*, No. 20-13360, slip op. at 6 (11th Cir. Oct. 2, 2020).

Any deadline in election law is a “balance between promoting smooth and accurate elections, on the one hand, and encouraging voter turnout, on the other.” *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 124 (D. Conn. 2005). The balance between these two interests is “**quintessentially a legislative judgment.**” *Id.* (emphasis added) (quoting *Griffin*, 385 F.3d at 1131). The Constitution makes that clear: it is for “each State **by the Legislature thereof**” to prescribe “the **Times**, Places and Manner of holding Elections.” U.S. CONST. art. I, § 4 (emphasis added). State legisla-

tures have “broad powers to determine the conditions under which the right of suffrage may be exercised.” *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013). And they have “significant flexibility in implementing their own voting systems,” *John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010), which includes setting deadlines. The court below acknowledged as much:

We are fully cognizant that a balance must be struck between providing voters ample time to request mail-in ballots, while also building enough flexibility into the election timeline to guarantee that ballot has time to travel through the USPS delivery system to ensure that the completed ballot can be counted in the election. Moreover, we recognize that the determination of that balance is fully enshrined within the authority granted to the Legislature under the United States and Pennsylvania Constitutions.

App. 34-35.

That is why numerous courts across the country have upheld Election Day receipt deadlines for absentee ballots. *New Ga. Project*, No. 20-13360, slip op. at 2 (11th Cir. Oct. 2, 2020) (staying district court order that “manufactured its own ballot deadline”); *Ziriaux*, 2020 WL 5569576, at *18-20; *Nielsen*, 2020 WL 5552872, at *1; *Thomas*, 2020 WL 2617329, at *26; *Friedman*, 345 F. Supp. 2d at 1377; *Grossman*, 485 Mass. 541, 2020 WL 5033954, at *7. As even the court below admitted, “there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the

receipt of ballots.” App. 33. Indeed, because there is no right to vote absentee, a challenge to an absentee deadline “does not implicate the right to vote at all.”⁶

The reality of the coronavirus pandemic does not change the important state interests in enforcing their voting laws as written. As many courts have noted, the states did not create the virus or impose the pandemic’s burden on voters—COVID-19 is not state action that subjects otherwise-valid state laws to abrogation.⁷ At most, COVID-19 is now part of the “usual burden on voting” that arises “arising out of life’s vagaries,” and thus not a burden that renders a state law unconstitutional. *Crawford*, 553 U.S. at 197-98. Following repeated direction from this Court, see *New Ga. Project*, No. 20-13360, slip op. at 8 n.2 (11th Cir. Oct. 2, 2020) (collecting cases), many lower courts have declined to alter election laws during an emergency, including this latest pandemic. See *Sinner v. Jaeger*, No. 3:20CV76, 2020 WL 3244143, at *6 (D.N.D. June 15, 2020); *Williams v. DeSantis*, No. 1:20CV67, Doc. 12 (N.D. Fla. Mar. 17, 2020); see

⁶ *New Ga. Project v. Raffensperger*, No. 20-13360, slip op. at 5 (11th Cir. Oct. 2, 2020); see also *id.* at 16, 20 (Lagoa, J., concurring); *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 807 (1969) (the “claimed right to receive absentee ballots” is not “the right to vote”); *Crawford*, 553 U.S. at 209 (Scalia, J., concurring in the judgment); *Mays*, 951 F.3d at 786, 792 (6th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-04 (5th Cir. 2020); *Griffin*, 385 F.3d at 1130 ; *Tully v. Okeson*, No. 1:20CV1271, 2020 WL 4926439, at *3-4 (S.D. Ind. Aug. 21, 2020).

⁷ See *New Ga. Project*, No. 20-13360, slip op. at 10 (11th Cir. Oct. 2, 2020); *Thompson v. DeWine*, No. 20-3526, 2020 WL 5542883, at *1 (6th Cir. Sep. 16, 2020); *Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020); *Tex. Democratic Party*, 961 F.3d at 405 ; *id.* at 415-16 (Ho, J., concurring); *Clark v. Edwards*, Nos. 20CV283, 20CV308, 2020 WL 3415376, at *10-11 (M.D. La. June 22, 2020); *Coalition for Good Governance v. Raffensperger*, No. 1:20CV1677, 2020 WL 2509092, at *3 n.2. (N.D. Ga. May 14, 2020).

also *Bethea v. Deal*, No. 2:16CV140, 2016 WL 6123241, at *2-3 (S.D. Ga. Oct. 19, 2016) (Hurricane Matthew). The court below infringed on the state legislature’s constitutional prerogative when it refused to do the same.

II. The Pennsylvania Supreme Court’s reasoning cannot justify its rewriting of election laws in the midst of the general election, undermining the selection of our federal government leaders.

The Pennsylvania Supreme Court chose to “alter” the legislature’s duly-enacted election law based on the state’s experience with its recent primary. App. 37-38 & n.25. But speculation about the state and local officials’ inability to handle a long prepared for general election during COVID-19 cannot properly be based on its performance early in the pandemic. By the court’s own recounting, problems in the primary occurred because “the Boards were inundated with over 1.8 million requests for mail-in ballots, rather than the expected 80,000 - 100,000, due in large part to the COVID-19 pandemic, which caused many voters to be wary of congregating in polling places.” App. 22. But unlike in June, where the number of absentee ballot requests far exceed expectations, election administrators now *expect* “that 3 million electors will seek mail-in or absentee ballots for the General Election.” App. 24; *see also id.* at 36. Indeed, recent state primaries have seen *lower* absentee voting rates and smoother elections, while polls show more and more voters are planning to vote in person than once expected.⁸ Courts cannot simply assume that state and local public

⁸ Nathan Rakich, *We’ve Had 56 Statewide Elections During The Pandemic. Here’s What We Learned From Them.*, FIVETHIRTYEIGHT (Oct. 1, 2020),

servants will refuse to learn the lessons of the past and won't take significant steps to address the expected increased volume of absentee ballot requests. Judicial conjecture about the abilities of executive officials cannot suffice to justify usurpation of the legislative role.

Moreover, the same aversion to in-person voting in June cannot be assumed to hold November, now that much more is known about the virus. Only after state primaries in the early months of the pandemic (when fear of the unknown was at its height) did a scientific consensus develop that in-person voting does not pose a high risk of causing a viral outbreak. For example, in Wisconsin, the first state to hold elections after the stay-at-home orders that nonetheless saw large in-person voting, a CDC study concluded: "No clear increase in cases, hospitalizations, or deaths was observed after the election."⁹ Similarly, an earlier study stated: "There was no increase in COVID-19 new case daily rates observed for Wisconsin or its three largest counties following the election on April 7, 2020, as compared to the US, during the

<https://fivethirtyeight.com/features/weve-had-56-statewide-elections-during-the-pandemic-heres-what-we-learned-from-them/>; Miles Parks, *Fewer People May Vote By Mail Than Expected. That Could Mean Election Day 'Chaos'*, NPR (Oct. 1, 2020), <https://www.npr.org/2020/10/01/916494111/fewer-people-may-vote-by-mail-than-expected-that-could-mean-election-day-chaos>.

⁹ Paradis et al., Public Health Efforts to Mitigate COVID-19 Transmission During the April 7, 2020, Election — City of Milwaukee, Wisconsin, March 13–May 5, 2020 (July 31, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6930a4-H.pdf>.

post-incubation interval period.”¹⁰ And a third study using different methods reached the same result: “There is no evidence to date that there was a surge of infections due to the April 7, 2020 election in Wisconsin.”¹¹ South Korea also held a national in-person election with record turnout and zero transmission of the coronavirus from voting.¹² Thus, unlike in June, the conventional wisdom is to encourage, rather than discourage, in-person voting as a safe and secure way to cast a ballot.¹³

Ultimately, the Pennsylvania Supreme Court made an election policy judgment based on uncertain predictions of the future, contrary to the judgments of that branch of the Pennsylvania government the Constitution specifically vests with the

¹⁰ Berry, Mulekar, & Berry, Wisconsin April 2020 Election Not Associated with Increase in COVID-19 Infection Rates (April 28, 2020), <https://www.medrxiv.org/content/10.1101/2020.04.23.20074575v1>.

¹¹ Leung & Wu, No Detectable Surge in SARS-CoV-2 Transmission due to the April 7, 2020 Wisconsin Election (April 29, 2020), <https://www.medrxiv.org/content/10.1101/2020.04.24.20078345v1.full.pdf>.

¹² Do Kyung Ryuk, Jeong Hyeon Oh, & Yewon Sung, *Elections During a Pandemic: South Korea Shows How to Safely Hold a National Election During the COVID-19 Crisis*, THE WILSON CENTER (May 19, 2020), <https://www.wilsoncenter.org/blog-post/elections-during-pandemic-south-korea-shows-how-safely-hold-national-election-during>.

¹³ See Abby Phillip, Jeremy Herb, & Kristen Holmes, *Democrats scramble to soothe voter fears about in-person voting ahead of November election*, CNN (Sept. 17, 2020), <https://www.cnn.com/2020/09/17/politics/election-2020-democrats-in-person-voting/index.html>; Russel Berman, *If You Can Grocery Shop in Person, You Can Vote in Person: Experts now say the health risk of casting an in-person ballot is relatively low. Will Democrats tell their voters that?*, THE ATLANTIC (Sept. 8, 2020), <https://www.theatlantic.com/politics/archive/2020/09/voting-during-pandemic-pretty-safe/616084/>.

authority to make election policy choices: the state legislature. But because federal elections are at issue, the consequences of that usurpation will ripple nationally. As the Court has warned, decisions like the one by the court below to change the rules in the midst of an election cycle may “result in voter confusion and consequent incentive to remain away from the polls.” *Purcell*, 549 U.S. at 4-5 . 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, which avoids “serious disruption of [the] political process,” *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). As judicial rulings like the one below start to pour in, the Court must recognize that we are no longer “on the eve of an election—we are in the middle of it, with absentee ballots already printed and mailed,” across the country starting last month. *New Ga. Project*, No. 20-13360, slip op. at 9 (11th Cir. Oct. 2, 2020). Tens of millions of ballots have already been requested and several million votes have already been cast,¹⁴ meaning that changing the rules now can subject voters to disparate voting conditions.

Voter confusion from late-breaking decisions on absentee ballots is inevitable, since states have “already mailed absentee ballots with instructions that the Election

¹⁴ Prof. Michael McDonald, *2020 General Election Early Vote Statistics*, U.S. ELECTIONS PROJECT, <https://electproject.github.io/Early-Vote-2020G/index.html> (last visited Oct. 2, 2020) (counting over 3 million votes already cast from the 20 states reporting these statistics and over 60 million ballots already requested from the 30 states reporting).

Day deadline applies.” *New Ga. Project*, No. 20-13360, slip op. at 10 (11th Cir. Oct. 2, 2020). And as explained above, delays in certifying election results because of late-arriving ballots stresses public confidence in the election, especially in close local contests or nationally important ones like selecting a new President. The Court should not condone adding such strain to an already-tense election year.

Instead, this Court must provide clear direction: now is not the time for courts to rewrite election laws. Over 300 cases have been filed flooding the courts in almost every state with demands to judicially alter election rules; regrettably, some courts have acceded to these requests.¹⁵ Election law has become so chaotic that it is now impossible for state legislatures to know in advance whether the election rules they have enacted will or will not be reimagined by courts. This ever-worsening reality is hardly what the Constitution envisions: “The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof” U.S. CONST. art. I, § 4.

Conclusion

For the foregoing reasons, the Court should grant the application to stay the mandate of the Pennsylvania Supreme Court.

¹⁵ See Stanford-MIT Healthy Elections Project, *COVID-Related Election Litigation Tracker*, <https://healthyelections-case-tracker.stanford.edu/>.

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