

Nos. 20-542, 20-574

In the Supreme Court of the United States

REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioner,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS
PENNSYLVANIA SECRETARY OF STATE, ET AL.,
Respondents.

JOSEPH B. SCARNATI, III, ET AL.
Petitioners,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS
PENNSYLVANIA SECRETARY OF STATE, ET AL.,

On Petitions for Writs of Certiorari to the
Pennsylvania Supreme Court

**BRIEF OF THE STATE OF MISSOURI
AND NINE OTHER STATES AS AMICI
CURIAE IN SUPPORT OF PETITIONERS**

OFFICE OF THE MISSOURI ATTORNEY GENERAL
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
John.Sauer@ago.mo.gov

ERIC S. SCHMITT
Attorney General
D. John Sauer
Solicitor General
Counsel of Record
Counsel for Amici Curiae
(additional counsel listed on signature page)

TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICI*
CURIAE AND SUMMARY OF ARGUMENT1

REASONS FOR GRANTING THE PETITIONS3

I. The Election Clauses’ Separation-of-Powers
Provisions Safeguard Liberty.....4

II. Voting by Mail Creates Unique Risks of
Fraud, Including in Pennsylvania.8

III. The Pennsylvania Supreme Court’s Decision
Exacerbated the Risks of Ballot Fraud.....16

Conclusion20

TABLE OF AUTHORITIES

Cases

<i>Alden v. Maine</i> , 527 U.S. 706 (1999).....	7
<i>All. for Retired Americans v. Sec’y of State</i> , 2020 WL 625526 (Me. Oct. 23, 2020)	20
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	2, 6
<i>Anderson v. United States</i> , 417 U.S. 211 (1974).....	2, 3
<i>Arizona Democratic Party v. Hobbs</i> , 976 F.3d 1081 (9th Cir. 2020).....	20
<i>Bond v. United States</i> , 564 U.S. 211 (2011).....	6, 7
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	4, 5
<i>Bush v. Palm Beach Cty. Canvassing Bd.</i> , 531 U.S. 70 (2000).....	4, 5
<i>Com. v. Bailey</i> , 775 A.2d 881 (Pa. Commw. Ct. 2001)	15
<i>Common Cause Indiana v. Lawson</i> , 977 F.3d 663 (7th Cir. 2020).....	20
<i>Crawford v. Marion County Election Bd.</i> , 553 U.S. 181 (2008).....	9

<i>DCCC v. Ziri</i> ax, No. 20-CV-211-JED-JFJ, 2020 WL 5569576 (N.D. Okla. Sept. 17, 2020)	20
<i>Dem. Nat’l Comm. v. Wisc. State Leg.</i> , No. 20A66 (U.S. Oct. 26, 2020)	20
<i>FERC v. Mississippi</i> , 456 U.S. 742 (1982).....	7
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	7
<i>League of Women Voters of Delaware, Inc. v. Dep’t of Elections</i> , No. CV 2020-0761-SG, 2020 WL 5998161 (Del. Ch. Oct. 9, 2020)	20
<i>League of Women Voters of Michigan v. Sec’y of State</i> , No. 353654, 2020 WL 3980216 (Mich. Ct. App. July 14, 2020).....	20
<i>Marks v. Stinson</i> , No. CIV. A. 93-6157, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994).....	15
<i>Missouri State Conference of the National Association for the Advancement of Colored People, et al. v. State of Missouri, et al.</i> , 607 S.W.3d 728 (Mo. banc Oct. 9, 2020)	16
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988).....	6

<i>New Georgia Project v. Raffensperger</i> , 976 F.3d 1278 (11th Cir. 2020).....	20
<i>New York v. United States</i> , 505 U.S. 144 (1992).....	7
<i>Org. for Black Struggle v. Ashcroft</i> , No. 20-3121, 2020 WL 6257167 (8th Cir. Oct. 23, 2020).....	20
<i>Republican Party of Pennsylvania v. Boockvar</i> , No. 20-542, 2020 WL 6304626 (U.S. Oct. 28, 2020)	5

Statutes

U.S. CONST. art. I, § 4, cl. 2	1, 3, 4
U.S. CONST. art. II, § 1, cl. 2.....	4
U.S. CONST. art. II, § 1, cl. 4.....	1, 3, 4

Other Authorities

BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005)	9
Jonathan Dienst et al., <i>NJ NAACP Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Cor- ruption Claims</i> , NBC NEW YORK (May 27, 2020)	14
Federal Farmer, No. 12 (1788), <i>reprinted in</i> 2 THE FOUNDERS' CONSTITUTION	8
Sarah Fenske, <i>FBI, Secretary of State Asking Ques- tions About St. Louis Statehouse Race</i> , RIVERFRONT TIMES (Aug. 16, 2016)	12

GAO-14-634, <i>Elections: Issues Related to State Voter Identification Laws 62-63</i> (U.S. Gov't Accountability Office Sept. 2014)	10, 11, 12, 13, 14
Richard Gonzales, <i>North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud</i> , NPR.ORG, (July 30, 2019)	13
Brian Heffernan, <i>Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud</i> , ST. LOUIS PUBLIC RADIO (Nov. 21, 2019)	12
Bill Heitzel, <i>Six of seven charges against Austin Murphy dismissed</i> , PITTSBURGH POST-GAZETTE (June 22, 1999)	15
Heritage Foundation, <i>Election Fraud Cases</i> (visited Nov. 6, 2020)	11
<i>In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District</i> , North Carolina Board of Elections, Evidentiary Hearing	13
Ben Kochman, <i>Bronx politician pleads guilty in absentee ballot scheme for Assembly election</i> , NEW YORK DAILY NEWS (Nov. 22, 2016)	14
Joseph Kohut, <i>Gallagher resigns from Taylor council pleads guilty to three charges</i> , THE TIMES-TRIBUNE (Apr. 3, 2015)	15
News21, <i>Election Fraud in America</i> (visited Nov. 6, 2020)	11

T. Ove, *Ex-Harmar police chief pleads guilty to ballot tampering*, PITTSBURGH POST-GAZETTE (Sept. 26, 2014) 15

Alex Rose, *Collingsdale man charged with voter fraud*, DELAWARE COUNTY TIMES (Nov. 21, 2018) 15

THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) 8

The Original Scope of the Congressional Power to Regulate Elections, 13 U. PA. J. CONST. L. 1 (2010) 8, 9, 10

U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017) 10, 17

**STATEMENT OF INTEREST OF *AMICI*
CURIAE AND SUMMARY OF ARGUMENT**

The Pennsylvania Supreme Court's decision overstepped its constitutional responsibility, encroached on the authority of the Pennsylvania legislature, and violated the plain language of the Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. Worse still, the decision exacerbated the risk of mail-in ballot fraud by permitting mail-in ballots that are not postmarked or have no legible postmark to be received and counted several days after the election. The decision provided a window of time after Election Day, when the preliminary results were announced, in which unscrupulous actors could attempt to influence a close Presidential election in Pennsylvania and elsewhere. And it enhanced the opportunities for fraud by requiring boards of elections to count late-received ballots even if there is no evidence that those ballots were cast before Election Day, because they have no legible postmark.

Amici are the States of Missouri, Alabama, Arkansas, Florida, Kentucky, Louisiana, Mississippi, South Carolina, South Dakota, and Texas. *Amici* have at least two compelling interests in the outcome of this case. *First*, the States have a strong interest in safeguarding the separation of powers among state actors in the regulation of Presidential elections. The U.S. Constitution's Election Clauses reflect a carefully calibrated balance of power among state actors, and they assign specific functions to the "Legislature thereof" in each State. *Id.* Our system of federalism relies on separation of powers to preserve liberty at every level of government, and the separation of powers in the Election Clauses is no exception to this principle. The States thus have a strong interest in

preserving the proper roles of state legislatures and state courts in the administration of federal elections, and thus safeguarding the individual liberty of their citizens.

Second, States outside Pennsylvania have a strong interest in preventing the effective invalidation of their own voters' choices through illegal voting in Pennsylvania. This Court has long recognized that "in the context of a Presidential election," "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983). "For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Id.*

The decision below raises two concerns about illegal voting. First, ballots cast outside the clear and unambiguous rules established by the Pennsylvania legislature are illegal. Second, by exacerbating the risks of fraud, the Pennsylvania Supreme Court's decision raises the specter of late voting that is not just illegal, but outright fraudulent. As this Court has stated: "Every voter" in a federal election, "whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson v. United States*, 417 U.S. 211, 227 (1974). Regardless of the election's outcome, only *legal* ballots should be counted.

As with other separation-of-powers provisions in the Constitution, the Election Clauses' explicit allocation of authority to state legislatures to regulate federal elections is a structural check on governmental power that preserves liberty.

Encroachment on this authority by another state actor undermines the specific design for separation of powers in the Constitution. The violation of separation of powers in this case threatens the liberty of all Americans, not just Pennsylvanians. And it diminishes one of their most precious liberties—the right to vote for President of the United States.¹

REASONS FOR GRANTING THE PETITIONS

“Our constitutional system of representative government only works when the worth of honest ballots is not diluted by invalid ballots procured by corruption.” U.S. Dep’t of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 1. “When the election process is corrupted, democracy is jeopardized.” *Id.* “Every voter” in a federal election, “whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes.” *Anderson*, 417 U.S. at 227.

The Pennsylvania Supreme Court’s decision overstepped its constitutional authority and encroached on the authority granted to the Pennsylvania legislature by the plain text of the U.S. Constitution’s Election Clauses. *See* U.S. CONST. art. I, § 4, cl. 2; *id.* art. II, § 1, cl. 4. It thus undermined Americans’ liberty by violating the separation of powers set forth in the Election Clauses.

The decision also aggravated the risks of fraud, abuse, and the appearance of fraud and abuse in

¹ This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

voting by mail in Pennsylvania. It permitted unscrupulous actors to know results reported on Election Day before deciding to pursue fraudulent activities. It enhanced opportunities for such illicit acts by ordering boards of elections to count mail-in ballots even if they have no postmark or no legible postmark, and thus no indication that they were sent on or before Election Day.

These choices undermined public confidence in the Presidential election in Pennsylvania and created unwarranted opportunities for fraud. This Court should grant expedited review and reverse the decision below.

I. The Election Clauses' Separation-of-Powers Provisions Safeguard Liberty.

Article II requires that each State “shall appoint” its Presidential electors “in such Manner as the *Legislature thereof* may direct.” U.S. CONST. art. II, § 1, cl. 4 (emphasis added); *see also id.* art. I, § 4, cl. 2 (providing that, in each State, the “Legislature thereof” shall establish “[t]he Times, Places and Manner of holding Elections for Senators and Representatives”).

Thus, “in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.” *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). “[T]he state legislature’s power to select the manner for appointing electors is plenary.” *Bush v. Gore*, 531 U.S. 98, 104 (2000). And a state supreme

court cannot invoke a state constitution to circumscribe that legislative power. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 77.

Here, “[t]he Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office.” *Republican Party of Pennsylvania v. Boockvar*, No. 20-542, 2020 WL 6304626, at *1 (U.S. Oct. 28, 2020) (Statement of Alito, J.). In doing so, the Court (1) admitted that the Legislature’s Election Day deadline was unambiguous, (2) conceded that the Election Day deadline was constitutional on its face, (3) relied on the slimmest of evidentiary rationales for its decision, (4) departed its own prior holding on the exact same question just a few months earlier, and (5) disregarded an admirably clear severability clause that was enacted by the Pennsylvania legislature for the very purpose of *preventing* Pennsylvania courts from making such post-hoc changes to Pennsylvania’s mail-in voting system. *See id.* at *1–2; *see also* App. 43a, 44a, 45a–47a, 48a & n.26. The decision also contradicted the overwhelming weight of authority from other courts, including this Court, that have addressed the same question during this election cycle. *See infra* Part III.

In the course of this jurisprudential misadventure, the Pennsylvania Supreme Court encroached upon the “plenary” authority of the Pennsylvania legislature over the conduct of the Presidential election in that State. *Bush*, 531 U.S. at 104. This encroachment on the authority explicitly granted to another state actor in the regulation of

Presidential elections constitutes a clear violation of the separation of powers. “[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.” *Anderson*, 460 U.S. at 794–795.

In every other context, this Court has recognized that the separation-of-powers provisions in the Constitution, which allocate authority to specific governmental actors to the exclusion of others, are designed to preserve liberty. “It is the proud boast of our democracy that we have ‘a government of laws, and not of men.’” *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). “The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government.” *Id.* “Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.” *Id.* “The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom.” *Id.* at 727.

This principle of preserving liberty applies both to the horizontal separation of powers among the branches of government, and the vertical separation of powers between the federal government and the States. “The federal system rests on what might at first seem a counterintuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’” *Bond v. United States*, 564 U.S. 211, 220–21

(2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). “[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *Bond*, 564 U.S. at 221 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). “Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.” *Id.* Moreover, “federalism enhances the opportunity of all citizens to participate in representative government.” *FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O’Connor, J., concurring in part and dissenting in part). “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

The Election Clauses’ grant of authority to state *Legislatures* implements both horizontal and vertical separation of powers. The Clauses allocate to each State—not to federal actors—the authority to dictate the manner of selecting Presidential electors. And within each State, they explicitly allocate that authority to a single branch of state government: to the “Legislature thereof.”

It is no accident that the Constitution allocates such authority to state Legislatures, rather than executive officers such as Governors, or judicial officers such as state Supreme Courts. The Constitutional Convention’s delegates frequently recognized that the Legislature is the branch most responsive to the People and most democratically

accountable. *See, e.g.*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 31 (2010) (collecting ratification documents expressing that state legislatures were most likely to be in sympathy with the interests of the people); Federal Farmer, No. 12 (1788), *reprinted in* 2 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that electoral regulations “ought to be left to the state legislatures, they coming far nearest to the people themselves”); THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (Madison, J.) (stating that the “House of Representatives is so constituted as to support in its members an habitual recollection of their dependence on the people”); *id.* (stating that the “vigilant and manly spirit that actuates the people of America” is greatest restraint on the House of Representatives).

Democratic accountability in the method of selecting the President of the United States is a powerful bulwark safeguarding individual liberty. By identifying the “Legislature thereof” in each State as the regulator of elections for federal officers, the Election Clauses prohibit the very arrogation of power over Presidential elections by non-legislative officials that the Pennsylvania Supreme Court perpetrated in this case. By violating the Constitution’s separation of powers, the Pennsylvania Supreme Court undermined the liberty of all Pennsylvanians, and, in this Presidential election, the liberty of all Americans.

II. Voting by Mail Creates Unique Risks of Fraud, Including in Pennsylvania.

The Pennsylvania Supreme Court’s decision suffers from another critical defect: it enhanced the

risks of fraudulent voting by mail. Overwhelming public evidence demonstrates that voting by mail presents unique opportunities for fraud and abuse, opportunities which unscrupulous actors have often exploited. The decision below exacerbated these risks.

For decades, responsible observers have cautioned about the grave risks of fraud in voting by mail. In *Crawford v. Marion County Election Board*, this Court held that fraudulent voting “perpetrated using absentee ballots” demonstrates “that not only is the risk of voter fraud real but that *it could affect the outcome of a close election.*” *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008) (opinion of Stevens, J.) (emphasis added).

The Carter-Baker Commission on Federal Election Reform emphasized the same concern. The bipartisan Commission—co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker—determined that “[a]bsentee ballots remain the largest source of potential voter fraud.” BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005).² According to the Carter-Baker Commission, “[a]bsentee balloting is vulnerable to abuse in several ways.” *Id.* These abuses include interception of blank ballots, “pressure” and “intimidation” of elderly and vulnerable voters, “vote buying schemes” that are “far more difficult to detect when citizens vote by mail,” and ballot tampering by third-party operatives after a ballot is marked. *Id.* The Commission noted that “absentee balloting in other states has been a major source of fraud.” *Id.* at

² Available at <https://www.legislationline.org/download/id/1472/file/-3b50795b2d0374cbef5c29766256.pdf>.

35. And the Commission recommended that “States ... need to do more to prevent ... absentee ballot fraud.” *Id.* at v.

The most recent edition of the U.S. Department of Justice’s Manual on *Federal Prosecution of Election Offenses*, published by its Public Integrity Section, highlights the very same concerns. See U.S. Dep’t of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28-29 (“DOJ Manual”).³ The Manual states: “Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials and the structured environment of a polling place.” *Id.* The Manual reports that “the more common ways” that election-fraud “crimes are committed include ... [o]btaining and marking absentee ballots without the active input of the voters involved.” *Id.* at 28. And the Manual notes that “[a]bsentee ballot frauds” committed both with and without the voter’s participation are “common.” *Id.* at 29.

Similarly, the U.S. Government Accountability Office concluded that many crimes of election fraud likely go undetected. In 2014, discussing election fraud, the GAO reported that “crimes of fraud, in particular, are difficult to detect, as those involved are engaged in intentional deception.” GAO-14-634, *Elections: Issues Related to State Voter Identification Laws* 62-63 (U.S. Gov’t Accountability Office Sept. 2014).⁴

³ Available at <https://www.justice.gov/criminal/file/1029066/download>.

⁴ Available at <https://www.gao.gov/assets/670/665966.pdf>.

Despite the difficulties of detecting fraud schemes, recent experience contains many well-documented examples of absentee ballot fraud. For example, the News21 database, which was compiled to *refute* arguments that voter fraud is prevalent, found 491 known and reported cases of absentee ballot fraud over the 12-year period from 2000 to 2012—approximately 41 cases per year. See News21, *Election Fraud in America* (visited Nov. 6, 2020).⁵ This database reports that “Absentee Ballot Fraud” was “[t]he most prevalent fraud” in America, comprising “24 percent (491 cases)” of all cases reported in the public records surveyed. *Id.* Moreover, the database indicates that this number undercounts the total incidence of reported cases of absentee ballot fraud, because it was based on public-record requests to state and local government entities, many of which did not respond. *Id.*

Likewise, the Heritage Foundation’s online database of election-fraud cases—which includes only a “sampling” of cases that resulted in an *adjudication* of fraud, such as a criminal conviction or civil penalty—identified 207 cases of proven “fraudulent use of absentee ballots” in the United States. The Heritage Foundation, *Election Fraud Cases* (visited Nov. 6, 2020).⁶ This database identifies 24 cases of proven election fraud in Pennsylvania, including four cases of criminal convictions for fraudulent use of

⁵ Available at <https://votingrights.news21.com/interactive/election-fraud-data-base/&xid=17259,15700023,15700124,15700149,15700186,15700191,15700201,15700237,15700242>

⁶ Available at https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24489&page=12.

absentee ballots in Pennsylvania since 2010. *See id.* Again, this database undercounts the incidence of cases of election fraud: “The Heritage Foundation’s Election Fraud Database presents a sampling of recent proven instances of election fraud from across the country. This database is not an exhaustive or comprehensive list.” *Id.*

The public record abounds with recent examples of such fraudulent absentee-ballot schemes, including many examples in *amici* States, and many examples in Pennsylvania. For example, in November 2019, the mayor of Berkeley, Missouri was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019).⁷ Mayor Hoskins’ scheme included “going to the home of elderly ... residents” to harvest absentee ballots, “filling out absentee ballot applications for voters and having his campaign workers do the same,” and “altering absentee ballots” after he had procured them from voters. *Id.* Again, in 2016, a State House race in Missouri was overturned amid allegations of widespread absentee-ballot fraud that had occurred across multiple election cycles in the same community. Sarah Fenske, *FBI, Secretary of State Asking Questions About St. Louis Statehouse Race*, RIVERFRONT TIMES (Aug. 16, 2016).⁸ One candidate stated that it was widely known in the community

⁷ Available at <https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0>

⁸ Available at <https://www.riverfronttimes.com/newsblog/2016/08/16/fbi-secretary-of-state-asking-questions-about-st-louis-statehouse-race>.

that the incumbent ran an “absentee game” that resulted in the mail-in vote tipping the outcome in her favor in multiple close elections. *Id.*

Other States have similar experiences. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives were indicted for fraud, in an absentee-ballot fraud scheme that sufficed to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, (July 30, 2019).⁹ The indicted operatives “had improperly collected and possibly tampered with ballots,” and were charged with “improperly mailing in absentee ballots for someone who had not mailed it themselves.” *Id.*

In the North Carolina case, the lead investigator testified that the investigation was “a continuous case” over two election cycles, and that the scheme involved collecting absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the ballots. *See In re: Investigation of Irregularities Affecting Counties Within the 9th Congressional District*, North Carolina Board of Elections, Evidentiary Hearing, at 2-3.¹⁰ The investigators described it as a “coordinated, unlawful, and substantially resourced absentee ballots scheme.” *Id.* at 2. According to the investigators’ trial presentation, the investigation involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone

⁹ Available at <https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud>.

¹⁰ Available at https://images.radio.com/wbt/Voter%20ID_%20Website.pdf.

records. *Id.* at 3. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The congressional election at issue was decided by margin of less than 1,000 votes. *Id.* at 4. The scheme involved the submission of well over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles before it was detected. *Id.* at 14.

Similarly, in 2016, a politician in the Bronx was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election*, NEW YORK DAILY NEWS (Nov. 22, 2016).¹¹ Despite pleading guilty to 242 felonies involving absentee ballot fraud in an election that was decided by two votes, the defendant received no jail time and vowed to run for office again after a short disqualification period. *Id.*

The increases in mail-in voting due to the COVID-19 pandemic increased such opportunities for fraud. For instance, in May 2020, the leader of the New Jersey NAACP called for an election in Paterson, New Jersey to be overturned due to widespread mail-in ballot fraud. *See Jonathan Dienst et al., NJ NAACP Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims*, NBC NEW YORK (May 27, 2020).¹² “Invalidate the election. Let’s do it again,”

¹¹ Available at <http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009>.

¹² Available at <https://www.nbcnewyork.com/news/politics/nj-naacp-leader-calls-for-paterson-mail-in-vote-to-be-canceled-amid-fraud-claims/2435162/>.

[the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with voter fraud allegations.” *Id.*

Hundreds of other reported cases highlight the same concerns about the vulnerability of voting by mail to fraud and abuse. Most notable here, the public reports indicate recurring issues of absentee-ballot fraud in Pennsylvania in particular. *See, e.g.,* Alex Rose, *Collingsdale man charged with voter fraud*, DELAWARE COUNTY TIMES (Nov. 21, 2018) (*available at* <https://bit.ly/356c5wd>) (perpetrator confessed to having third parties sign absentee ballots of deceased voters); Joseph Kohut, *Gallagher resigns from Taylor council pleads guilty to three charges*, THE TIMES-TRIBUNE (Apr. 3, 2015) (*available at* <https://bit.ly/36i3HcJ>); T. Ove, *Ex-Harmar police chief pleads guilty to ballot tampering*, PITTSBURGH POST-GAZETTE (Sept. 26, 2014) (*available at* <https://bit.ly/32j4HMk>) (defendant “admitted that he violated election laws by soliciting absentee ballots for his wife and a running mate in the 2009 Democratic primary for township supervisor”); *Com. v. Bailey*, 775 A.2d 881, 883 (Pa. Commw. Ct. 2001) (candidate convicted of absentee ballot fraud); Bill Heitzel, *Six of seven charges against Austin Murphy dismissed*, PITTSBURGH POST-GAZETTE (June 22, 1999) (*available at* <https://bit.ly/2I9KlxU>) (grand jury found that three individuals “forged absentee ballots for nursing home residents,” amid allegations that “fraudulent voting has been practiced for decades, is widespread and benefits several entrenched elected officials” in the county); *Marks v. Stinson*, No. CIV. A. 93-6157, 1994 WL 146113, at *7–22 (E.D. Pa. Apr. 26, 1994) (documenting a coordinated and extensive campaign of absentee ballot fraud).

Just a few weeks ago, a Missouri court considered extensive expert testimony reviewing absentee-ballot fraud cases like these, and it aptly summarized their common features. *Findings of Fact, Conclusions of Law, and Final Judgment in Mo. State Conference of the NAACP v. State*, No. 20AC-CC00169-01 (Circuit Court of Cole County, Missouri Sept. 24, 2020), *aff'd*, 607 S.W.3d 728 (Mo. banc Oct. 9, 2020). The court held that cases of absentee-ballot fraud “have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting, (4) common techniques of signature forging, (5) fraud that persisted across multiple elections before it was detected, (6) massive resources required to investigate and prosecute the fraud, and (7) lenient criminal penalties.” *Id.* at 17. The court concluded that “fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close elections.” *Id.* For the same reasons, this Court should also recognize that “the threat of mail-in ballot fraud is real.” *Id.* at 2.

III. The Pennsylvania Supreme Court’s Decision Exacerbated the Risks of Ballot Fraud.

In addition to violating the Election Clauses, the decision below exacerbated the risks fraud and abuse in mail-in voting in Pennsylvania. First, it created a post-election window of time during which nefarious actors could wait and see whether the Presidential election would be close, and whether perpetrating

fraud in Pennsylvania would be worthwhile. Second, it enhanced the opportunities for fraud by mandating, in a cursory footnote, that late ballots must be counted even when they are not postmarked or have no legible postmark, and thus there is no evidence they were mailed by Election Day. This decision created needless vulnerability to actual fraud and undermined public confidence in a Presidential election.

First, the U.S. Department of Justice's Manual on *Federal Prosecution of Election Offenses* emphasizes that election fraud typically occurs when the parties anticipate a close election, creating a strong motive to try to flip the outcome of the election through fraudulent activity. DOJ Manual, at 2-3, 27. As the Manual states, "the conditions most conducive to election fraud are close factional competition within an electoral jurisdiction for an elected position that matters." *Id.* at 2-3. "Election fraud does not normally occur in jurisdictions where one political faction enjoys widespread support among the electorate, because in such a situation it is usually unnecessary or impractical to resort to election fraud in order to control local public offices." *Id.* at 27. "Instead, election fraud occurs most frequently when there are fairly equal political factions, and when the stakes involved in who controls public offices are weighty." *Id.* "In sum, election fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters." *Id.*

The cases of absentee-ballot fraud discussed above confirm the DOJ's insight. They repeatedly show that the motive for absentee-ballot fraud is strongest, and fraud is most likely to occur, when the expected outcome of the decision is close. For example, the

notorious absentee-ballot fraud in the 2018 North Carolina congressional race occurred in an election that was decided by less than 1,000 votes of over 280,000 cast. The Hoskins indictment in St. Louis, Missouri occurred after a series of elections that were decided by tiny margins of less than 100 votes. The indictment of Bronx assemblyman Hector Ramirez occurred after an election that was decided by two votes. The public record contains many other similar examples of absentee ballot fraud in close elections.

In a typical Presidential election, it is often hard to predict in advance whether the outcome will be close in any particular State, and whether that State's decision will affect the outcome of the election. But the Pennsylvania Supreme Court's decision in this case created a window of time for unscrupulous actors to wait and see until after Election Day whether the outcome would be close enough—both in Pennsylvania, and in the nation as a whole—to make attempting fraud worthwhile.

To be sure, certain designated categories of ballots, such as military and overseas ballots, may be received after Election Day in any election, and for good reasons. But the Pennsylvania decision here extended that post-Election Day deadline to many more voters in Pennsylvania. And, in the process, it stripped away critical safeguards against fraud, as discussed below. Combined, these factors created an unnecessary risk of fraud in voting by mail.

Second, the Pennsylvania Supreme Court's decision enhanced the opportunities to commit such fraud. Footnote 26 of the Supreme Court's decision states as follows:

We likewise incorporate the Secretary's recommendation addressing ballots received

within this period that *lack a postmark or other proof of mailing*, or for which *the postmark or other proof of mailing is illegible*. Accordingly, in such cases, we conclude that a ballot received on or before 5:00 p.m. on November 6, 2020, will be *presumed to have been mailed by Election Day* unless a preponderance of the evidence demonstrates that it was mailed after Election Day.

App. 48a, n.26 (emphases added). In other words, the court ordered that any ballot received within three days after Election Day would be deemed timely cast even if there was no evidence that it was submitted before Election Day. *Id.*

As the numerous cases discussed above show, *see supra* Part II, fraud in voting by mail frequently involves the interception, alteration, and fraudulent submission of absentee or mail-in ballots. This was true in the North Carolina absentee-ballot fraud scheme in 2018, in both Missouri examples discussed above, in the Bronx assemblyman scheme, and in some of the Pennsylvania examples cited above, among many others. *See supra* Part II. Many such schemes have occurred in recent years, and that they have evaded detection over multiple election cycles. It is unknown how many such schemes may simply go undetected permanently. The Pennsylvania court's decision, therefore, needlessly exacerbated the risk of fraudulent voting.

Finally, there was no strong reason to create these risks of fraud. The Pennsylvania decision in this case is an outlier that rests on a feeble justification of putative mailing delays, unsupported by hard evidence. Many similar cases in States across the country sought to extend Election-Day receipt

deadlines, and the vast majority of them were rejected. *See, e.g., Dem. Nat'l Comm. v. Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020) (affirming the Court of Appeals' stay of a six-day extension to receive ballots after Election Day). As the Seventh Circuit stated, "laws setting an Election-Day deadline for receipt of all ballots are valid during a pandemic, as they are valid without one." *Common Cause Indiana v. Lawson*, 977 F.3d 663 (7th Cir. 2020); *see also Org. for Black Struggle v. Ashcroft*, No. 20-3121, 2020 WL 6257167, at *3 (8th Cir. Oct. 23, 2020); *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 2020 WL 5877588 (11th Cir. 2020); *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081, 2020 WL 5903488 (9th Cir. 2020); *Dem. Nat'l Comm. v. Wisc. State Leg.*, No. 20A66 (U.S. Oct. 26, 2020); *League of Women Voters of Delaware, Inc. v. Dep't of Elections*, No. CV 2020-0761-SG, 2020 WL 5998161, at *4 (Del. Ch. Oct. 9, 2020); *All. for Retired Americans v. Sec'y of State*, 2020 WL 625526, *7 (Me. Oct. 23, 2020); *League of Women Voters of Michigan v. Sec'y of State*, No. 353654, 2020 WL 3980216, at *12 (Mich. Ct. App. July 14, 2020), *appeal denied*, 946 N.W.2d 307 (Mich. 2020); *DCCC v. Ziriox*, No. 20-CV-211-JED-JFJ, 2020 WL 5569576, at *20 (N.D. Okla. Sept. 17, 2020).

CONCLUSION

This Court should grant the petitions, grant expedited review, and reverse the Pennsylvania Supreme Court's judgment.

November 9, 2020

Respectfully submitted,

ERIC S. SCHMITT

Attorney General

D. John Sauer

Solicitor General

Counsel of Record

Jeff P. Johnson

Deputy Solicitor General

OFFICE OF THE MISSOURI

ATTORNEY GENERAL

Supreme Court Building

207 West High Street

P.O. Box 899

Jefferson City, MO 65102

John.Sauer@ago.mo.gov

(573) 751-8870

Counsel for Amici Curiae

ADDITIONAL COUNSEL

Steve Marshall

Attorney General

STATE OF ALABAMA

Leslie Rutledge

Attorney General

STATE OF ARKANSAS

Ashley Moody

Attorney General

STATE OF FLORIDA

Daniel Cameron
Attorney General
STATE OF KENTUCKY

Jeff Landry
Attorney General
STATE OF LOUISIANA

Lynn Fitch
Attorney General
STATE OF MISSISSIPPI

Alan Wilson
Attorney General
STATE OF SOUTH CAROLINA

Jason R. Ravensborg
Attorney General
STATE OF SOUTH DAKOTA

Ken Paxton
Attorney General
STATE OF TEXAS