

No. 21A772

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IN THE SUPREME COURT OF THE UNITED STATES

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DAVID RITTER,

*Applicant,*

v.

LINDA MIGLIORI, FRANCIS J. FOX, RICHARD E. RICHARDS,  
KENNETH RINGER, SERGIO RIVAS, ZAC COHEN,  
AND LEHIGH COUNTY BOARD OF ELECTIONS,

*Respondents.*

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**Emergency Application for Stay  
from the United States Court of Appeals for the Third Circuit (No. 22-1499)**

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**MOTION OF DOCTOR OZ FOR SENATE & DR. MEHMET OZ TO FILE  
*AMICI CURIAE* BRIEF IN SUPPORT OF APPLICANT**

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KATHLEEN A. GALLAGHER  
RUSSELL D. GIANCOLA  
GALLAGHER GIANCOLA LLC  
436 Seventh Avenue, 31st Floor  
Pittsburgh, PA 15219

JOHN M. GORE  
*Counsel of Record*  
MEGAN SOWARDS NEWTON  
E. STEWART CROSLAND  
CALEB P. REDMOND  
JONES DAY  
51 Louisiana Avenue, NW  
Washington, DC 20001  
(202) 879-3939  
jmgore@jonesday.com

*Counsel for Amici Curiae*

Proposed *Amici* respectfully request leave of the Court to (1) file the attached *amici curiae* brief in support of the emergency application to stay the Third Circuit's decision, (2) file the brief in unbound format under Rule 33.2, and (3) file the brief without ten day's advance notice to the parties.

*Amicus* Doctor Oz for Senate is the principal campaign committee for *Amicus* Dr. Mehmet Oz, who is currently leading by 922 votes in the May 17, 2022 primary election to serve as the Republican candidate to represent Pennsylvania in the United States Senate. The Third Circuit panel's judgment in this case issued on May 20, 2022, three days after voting in the primary election was completed. Yet Dr. Oz's principal competitor, David McCormick, has invoked the panel's judgment in a Hail-Mary effort to overturn the apparent result of that election. In particular, Mr. McCormick has asked the Pennsylvania courts to change the rules of the primary election after voting has been completed, to overrule their prior precedent, and to order election officials to count mail-in and absentee ballots that lack a voter-completed date and, thus, are invalid under Pennsylvania law. The Acting Secretary of the Commonwealth has likewise invoked the Third Circuit's reasoning to request an order requiring election officials to count undated mail-in and absentee ballots.

*Amici* fully support Applicant's request for a stay of the Third Circuit's decision. They respectfully seek to submit this brief to bring to the Court's attention additional material regarding the May 2022 primary election that underscores that the public interest strong favors issuing a stay.

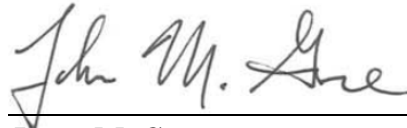
Because of the time-sensitive nature of the emergency application, proposed *Amici* request permission to file the brief in unbound format under Rule 33.2, and without ten days' notice to all parties as ordinarily required by Rule 37.2(a). Applicant filed his emergency application on Friday, May 27, 2022, and this Court called for a response by noon on Tuesday, May 31. In light of this compressed timeline, there was insufficient time for the proposed *Amici* to prepare their brief for printing and filing in booklet form. Nor were proposed *Amici* able to provide the parties with ten days' notice. Proposed *Amici* nonetheless have provided notice to all parties. Applicant consents to this motion and the filing of proposed *Amici's* brief. Plaintiff-Respondents take no position on the filing of proposed *Amici's* brief. Respondent Lehigh County Board of Elections also takes no position on the filing of proposed *Amici's* brief.

\* \* \*

For the foregoing reasons, proposed *Amici* respectfully request that the Court grant this motion to file the attached brief and accept it in the format and at the time submitted.

Date: May 30, 2022

Respectfully submitted,



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JOHN M. GORE

*Counsel of Record*

MEGAN SOWARDS NEWTON

E. STEWART CROSLAND

CALEB P. REDMOND

JONES DAY

51 Louisiana Avenue, NW

Washington, DC 20001

(202) 879-3939

jmgore@jonesday.com

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**Emergency Application for Stay  
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**DOCTOR OZ FOR SENATE & DR. MEHMET OZ'S BRIEF OF *AMICI CURIAE*  
IN SUPPORT OF APPLICANT'S EMERGENCY REQUEST FOR STAY  
PENDING DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI**

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KATHLEEN A. GALLAGHER  
RUSSELL D. GIANCOLA  
GALLAGHER GIANCOLA LLC  
436 Seventh Avenue, 31st Floor  
Pittsburgh, PA 15219

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*Counsel of Record*  
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E. STEWART CROSLAND  
CALEB P. REDMOND  
JONES DAY  
51 Louisiana Avenue, NW  
Washington, DC 20001  
(202) 879-3939  
jmgore@jonesday.com

*Counsel for Amici Curiae*

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amicus* Doctor Oz for Senate is the principal campaign committee for *Amicus* Dr. Mehmet Oz, who is currently leading by 922 votes in the May 17, 2022 primary election to serve as the Republican candidate to represent Pennsylvania in the United States Senate. The Third Circuit panel’s judgment in this case issued on May 20, 2022, three days after voting in the primary election was completed. Yet Dr. Oz’s principal competitor, David McCormick, has invoked the decision in a Hail-Mary effort to overturn the apparent result of the primary election. In particular, Mr. McCormick has asked the Pennsylvania courts to change the rules of the primary election after voting has been completed, to overrule their prior precedent, and to order election officials to count mail-in and absentee ballots that are invalid under Pennsylvania law because they lack a voter-completed date. The Acting Secretary of the Commonwealth has likewise invoked the Third Circuit’s reasoning to seek a similar order.

*Amici* fully support Applicant’s request for a stay of the Third Circuit’s decision. They respectfully submit this brief to bring to the Court’s attention additional material regarding the May 2022 primary election that underscores that the public interest strong favors issuing a stay.

---

<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no person other than *Amici* made a monetary contribution to its preparation or submission. Applicant consents to the filing of proposed *Amici’s* brief. Plaintiff-Respondents take no position on the filing of proposed *Amici’s* brief. Respondent Lehigh County Board of Elections also takes no position on the filing of proposed *Amici’s* brief.



## ARGUMENT

*Amici* Doctor Oz for Senate and Dr. Mehmet Oz support and seek to uphold the will of Pennsylvania’s voters, Pennsylvania’s free and fair elections, and the General Assembly’s duly enacted laws governing those elections. Unfortunately, the Third Circuit’s thinly reasoned and erroneous decision—which addressed a county judicial election conducted more than six months ago—is now being weaponized to undermine the apparent result of a statewide primary election for the Republican nomination to represent Pennsylvania in the United States Senate. The public interest strongly favors issuing a stay in this case to prevent the Third Circuit’s decision from eroding public confidence, disrupting “the functioning of our participatory democracy,” and creating “voter confusion and consequent incentive to remain away from the polls” in Pennsylvania’s 2022 elections. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

### I. THE PUBLIC INTEREST STRONGLY FAVORS A STAY

The Court should grant a stay for the reasons Applicant has explained. *See* App. 9–26.

The public interest strongly favors a stay for an additional reason. The Third Circuit’s non-final decision was limited to “th[e] record” before it and “the November 2, 2021, election for Judge of the Common Pleas of Lehigh County.” App. App’x 16a–17a. Now, however, it is being wielded in an effort to overturn the apparent result of a completely different election—the May 2022 U.S. Senate Republican primary. Dr. Oz currently leads that election by 922 votes. *See* Pa. Dep’t of State, *2022 General*

*Primary Unofficial Returns*, <https://www.electionreturns.pa.gov/> (last visited May 29, 2022). This margin of apparent victory has triggered an automatic recount under Pennsylvania law, see Pa. Pressroom, *Acting Secretary of State Gives Notice of Statewide Recount in U.S. Senate Race* (May 25, 2022), <https://tinyurl.com/mr98zc7j>, which the “defeated candidate,” Mr. McCormick, declined to waive, 25 Pa. Stat. § 3154(h).

Indeed, Mr. McCormick has refused to concede defeat and has instead insisted upon mounting a last-gasp post-election effort to change the result. On the one hand, Mr. McCormick has asked election officials to *exclude* certain provisional ballots from the vote total. See Karen Shuey, *Primary 2022: McCormick loses challenge to some votes in Berks County*, *READING EAGLE* (May 26, 2022), <https://tinyurl.com/6hwmyrj6>. On the other, Mr. McCormick has claimed that the Third Circuit’s decision *requires* election officials to count ballots that are invalid under Pennsylvania law because they lack a voter-completed date.

The total number of undated absentee and mail-in ballots cast in the May Republican primary election in 65 of Pennsylvania’s 67 counties is only around 860—fewer than the 922-vote margin of Dr. Oz’s apparent victory. See Jonathan Lai & Jeremy Roebuck, *McCormick and Oz are fighting over tiny batches of votes in county after county. That’s how tight the Pa. GOP Senate primary is*, *THE INQUIRER* (May 27, 2022), <https://tinyurl.com/tuw43uf2>. Moreover, of course, no candidate would receive 100% of the votes cast on such ballots. Even in Mr. McCormick’s hometown stronghold of Allegheny County, 17 votes from undated Republican ballots went for

Mr. McCormick, 10 went for Dr. Oz, and the remainder went for other candidates. See Allegheny County Elections Division, *Election Day Updates (May 17, 2022 Primary)*, [https://www.alleghenycounty.us/elections/election-day-updates-\(may-17,-2022-primary\).aspx](https://www.alleghenycounty.us/elections/election-day-updates-(may-17,-2022-primary).aspx) (last visited May 29, 2022). Thus, the undated ballots alone appear to be insufficient to overturn Mr. McCormick’s apparent loss in the May 17, 2022 primary election.

Nonetheless, as part of his broader effort to thwart the apparent will of Pennsylvania’s voters, Mr. McCormick filed a post-election suit asking the Pennsylvania Commonwealth Court to adopt the Third Circuit’s reasoning and to order election officials to count mail-in and absentee ballots that lack the mandatory voter-completed date. See Pet. ¶¶ 14–20, *Dave McCormick for U.S. Senate v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. May 23, 2022), <https://tinyurl.com/39xxh2ye>. That relief would require Pennsylvania courts to reverse their precedent that governed the free and fair May 17, 2022 primary election. Indeed, just a few months ago the Pennsylvania Commonwealth Court upheld application of the date requirement under both state law and the federal materiality statute, 52 U.S.C. § 10101(a)(2)(B), *in the same election at issue in this case*. The Pennsylvania Supreme Court denied review and allowed that decision to stand. See *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989 (Pa. Commw. Ct. 2022) (Table), *appeal denied*, 271 A.3d 1285 (Pa. 2022) (Table). The Pennsylvania Supreme Court and the Commonwealth Court have also previously upheld the date requirement under state law. See *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen.*

*Election*, 241 A.3d 1058, 1079–80 (Pa. 2020) (Wecht, J., concurring and dissenting); *id.* at 1090–91 (Dougherty, J., concurring and dissenting); *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 993 (Pa. Commw. Ct. 2022) (Table), *appeal denied*, Nos. 20 MAL 2022, 21 MAL 2022, 22 MAL 2022, 23 MAL 2022, 24 MAL 2022, 2022 WL 536196 (Pa. Feb. 23, 2022).

Mr. McCormick is not content to litigate his apparent defeat in the Commonwealth Court. He has also asked the Pennsylvania Supreme Court to exercise immediate jurisdiction and to direct election officials to count undated mail-in and absentee ballots in contravention of the General Assembly’s date requirement. Mr. McCormick has specifically asked that court to issue such an order based upon “the Third Circuit’s construction” of the federal materiality provision. App. for Court to Exercise King’s Bench Powers at 7, *Dave McCormick for U.S. Senate v. Chapman*, No. 46 MM 2022 (Pa. May 24, 2022), <https://tinyurl.com/3wx9v862>.

The Acting Secretary of the Commonwealth has also gotten in on the act. On May 24, the Acting Secretary issued a (non-binding) guidance document stating that “in light of the conclusion of the Third Circuit in *Migliori* it is the Department’s position that ballots with an undated return envelope must also be counted for the May 17, 2022, Primary.” Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-In Return Envelopes 2* (May 24, 2022), <https://tinyurl.com/2r9v6hd6>. The Acting Secretary has filed briefs in the Commonwealth Court and the Pennsylvania Supreme Court asking those courts to adopt the Third Circuit’s reasoning and to issue an order requiring election officials

to count undated mail-in and absentee ballots in the May primary election. See Acting Secretary Chapman’s Answer to the Motion for Immediate Special Injunction at 2, 10–13, *Dave McCormick for U.S. Senate v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. May 27, 2022) (App’x A); Acting Secretary Chapman’s Answer to the Application for the Court to Exercise Jurisdiction at 2, 13–16, *Dave McCormick for U.S. Senate v. Chapman*, No. 46 MM 2022 (Pa. May 26, 2022) (App’x B).

Given Mr. McCormick’s and the Acting Secretary’s reliance on the Third Circuit’s decision, a stay in this case would serve the public interest by preventing the rules of not just one, but two, elections from being changed after the fact. A stay here would promote “[c]onfidence in the integrity of our electoral processes” and “the functioning of our participatory democracy.” *Purcell*, 549 U.S. at 4. Changing election rules on the eve of an election is “bad enough”—and generally warrants a stay from this Court, *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 735 (2021) (Thomas, J., dissenting from the denial of certiorari)—because “[l]ate judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others,” *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of applications for stays). But changing the rules “after election day” is even worse: it risks “severely damag[ing] the electoral system on which our self[-]governance so heavily depends,” *Republican Party of Pa.*, 141 S. Ct. at 734–35 (Thomas, J., dissenting from the denial of certiorari), by engendering “the chaos and suspicions of impropriety” that follow when invalid ballots are counted “after election day and

potentially flip the results of an election,” *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). Such post-election judicial changes to election rules also undercut the finality vital to functioning democracy because they encourage losing candidates to invoke the judicial process “to undo the ballot results.” *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988).

To say the least, extending the Third Circuit’s erroneous reasoning to require post-election changes to the rules for the May primary “is not a prescription for [voter] confidence.” *Republican Party of Pa.*, 141 S. Ct. at 735 (Thomas, J., dissenting from the denial of certiorari). Moreover, permitting that reasoning to govern the imminent November 2022 general election would likewise undermine voter confidence, disrupt “the functioning of our participatory democracy,” and create “voter confusion and consequent incentive to remain away from the polls.” *Purcell*, 549 U.S. at 4–5. This is no way to run an election. The Court should safeguard the integrity of Pennsylvania’s elections and stay the Third Circuit’s decision.<sup>2</sup>

## CONCLUSION

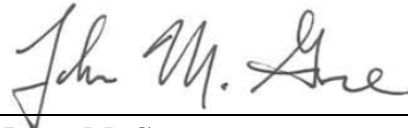
The Court should grant Applicant’s request for a stay.

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<sup>2</sup> Of course, if the Pennsylvania courts abrogate the General Assembly’s date requirement for the May 2022 primary election or the November 2022 general election as Mr. McCormick and the Acting Secretary request, a stay from this Court will be warranted in that case as well.

Date: May 30, 2022

Respectfully submitted,



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JOHN M. GORE

*Counsel of Record*

MEGAN SOWARDS NEWTON

E. STEWART CROSLAND

CALEB P. REDMOND

JONES DAY

51 Louisiana Avenue, NW

Washington, DC 20001

(202) 879-3939

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KATHLEEN A. GALLAGHER

RUSSELL D. GIANCOLA

GALLAGHER GIANCOLA LLC

436 Seventh Avenue, 31st Floor

Pittsburgh, PA 15219

*Counsel for Amici Curiae*