No. 20-542

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.

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

MOTION FOR LEAVE TO FILE BRIEF AND *AMICUS CURIAE* BRIEF OF HONEST ELECTIONS PROJECT

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2(b), the Honest Elections Project respectfully moves for leave to file the accompanying *amicus* brief in support of Petitioner. As required under Supreme Court Rule 37.2(a), all parties were timely notified of Honest Elections Project intent to file this *amicus* brief. Petitioner consented. Petitioner consented. Respondent Potter County Board of Elections and Respondents Boards of Elections of Carbon, Monroe, Pike, Snyder, and Wayne Counties did not consent. All other Respondents either consented to the filing of this amicus brief, did not oppose, or did not respond to counsel's notice and request for consent.

The Petition for Certiorari presents questions of profound consequence to the constitutional order and to the administration of presidential elections. Petitioner requests that the Court handle these questions on a highly expedited basis and resolve them in advance of the 2020 elections. The Court would benefit from briefing on these questions from any and all interested *amici curiae*.

The accompanying brief examines the text, history, and precedent interpreting the Electors Clause of Article II and the Elections Clause of Article I and explains why state legislatures are vested with plenary authority that cannot be divested by state constitution to determine the times, places, and manner of presidential and congressional elections. The *amicus* respectfully submits that this analysis would inform

the Court's consideration of the questions the Petition presents.

The Honest Elections Project's interest in this case is advocating in support of the fair, reasonable measures that voters through their elected representatives in the state legislature put in place to protect the integrity of the voting process so that the right of every lawful voter to participate in free and honest elections is protected.

For the foregoing reasons, the motion should be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

This *amicus curiae* brief addresses the first question presented by the Petition:

Whether the Pennsylvania Supreme Court majority usurped the Pennsylvania General Assembly's plenary authority to "direct [the] Manner" for appointing electors for President and Vice President, U.S. Const. art. II, § 1, cl. 2, and broad power to prescribe "[t]he Times, Places, and Manner" for congressional elections, *id.* art. I, § 4, cl. 1.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters and their elected representatives put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It therefore has a significant interest in this case.

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[1] Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties were notified of the *amicus curiae*'s intention to file this brief pursuant to Rule 37.2(a). Petitioner consented; some Respondents did not.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1944, faced with a conflict between a state constitutional provision requiring ballots to be cast in person and an elections-code provision allowing absentee servicemembers to vote by mail, an exasperated Kentucky Supreme Court exclaimed: "It would seem that a question of such importance as the one we are called upon to decide would have been heretofore adjudicated by the final interpreter of the Federal Constitution, the Supreme Court." *Com. ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 692 (Ky. 1944). The question was whether an act of Kentucky's legislature could lawfully be struck down as violative of the commonwealth's constitution, notwithstanding that the legislature enacted it pursuant to its federal authority under the Electors Clause of Article II and the Elections Clause of Article I. *Id.* at 692–93. In fact, the question *had* been answered in *McPherson v. Blacker*, 146 U.S. 1 (1892), which held that the Electors Clause "leaves it to the legislature exclusively to define the method" of conducting presidential elections, holding that this power "cannot be taken from them or modified by their state constitutions." *Id.* at 35. Today, notwithstanding the resolution *McPherson* afforded 129 years ago, and the Court's holding on that precise point in *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000), state courts continue to approach the question with, at best, "no certainty," *Dummit*, 181 S.W.2d at 692.

At worst, they approach it like the Pennsylvania Supreme Court did in this case, by treating the federal Constitution as irrelevant. The court considered itself empowered not only to strike down duly enacted legislation, but also to replace it with its own free-wheeling policy choices, all under the auspices of a state constitutional provision that affords its ruling no textual supports whatsoever. In doing so, it made hardly a mention of the *federal* dignity the Electors and Elections Clauses bestow on the legislation it altered and afforded no credence to the bipartisan legislative compromise that produced the statute it rewrote, even though that statute provides a far greater right to mail-in voting than either the Pennsylvania or United States Constitutions require. And this was the second time this same court has acted in this way.

This case provides a timely opportunity to put these questions to rest. The Court's intervention is essential, and on an expedited basis, because the questions this case presents will not go away simply by the denial of certiorari. Candidates to office in every state that departs from duly enacted legislation of its legislature—whether by virtue of a state-court order or an executive act—will have standing in post-election disputes to challenge ballots cast in violation of Electors Clause legislation. These challenges are meritorious. Rather than confront them after the election, and face the prospect of disqualifying ballots, this Court should immediately grant certiorari and issue a decision before Election Day so that voters have the opportunity to vote in accordance with the law. The Court should grant the Petition and reverse.

ARGUMENT

I. The Constitution Vests Lawmaking Authority in State Legislatures That Cannot Be Divested by State Constitutions

A. The Text Establishes State Legislatures' Plenary Authority Over Federal Elections

Article II of the Constitution establishes state and federal roles in enacting the laws governing presidential elections. The Electors Clause of Article II identifies states' role as: "appoint[ing] in such Manner as the *Legislature* thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2 (emphasis added). The role of Congress is governed by Article II's Elections Day Clause, which provides that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II. § 1, cl. 4. As with the Elections Clause of Article I, the Constitution's Framers "gave no indication that courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing."[2] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019).

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[2] Indeed, the delegation of legislative authority under the Electors Clause is more expansive than under the Elections Clause, because the Electors Clause gives state legislatures unlimited discretion to select the "Manner" of choosing electors, which Congress may not override. Congress's authority over presidential

This delegation confers on Congress and state legislatures a share of federal constitutional lawmaking authority. As this Court unanimously held in *Palm Beach*, "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." 531 U.S. at 76. This provision "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment of electors. *McPherson*, 146 U.S. at 27 (emphasis added). Indeed, because "[t]his power is conferred upon the legislatures of the States by the Constitution of the United States," it "cannot be taken from them or modified" even by "their State constitutions." *Id.* at 35; *see also Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (Rehnquist, J., concurring).

It necessarily follows that only the Pennsylvania General Assembly, not the Pennsylvania Supreme

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elections is limited to laws that do not "interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." *Burroughs v. United States*, 290 U.S. 534, 544 (1934). To hold otherwise, would enable Congress to regulate the manner in which the presidential electors are chosen, thereby improperly enlarging by statute the constitutional cabining of its authority featured in the Electors Clause. The near-plenary authority of state legislatures to select presidential electors gives way only to other applicable provisions of the Constitution. *See Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

Court, may establish regulations governing the upcoming presidential elections. The word "legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). The term "legislature" necessarily differentiates between that body and the "State" of which it is only a subpart. By empowering one body of the state to prescribe election rules, the Constitution impliedly denies it to other state bodies and officials, including the courts.

B. History Confirms State Legislatures' Plenary Authority Over Federal Elections

This was the original public meaning of the Electors Clause. The mechanism for selecting the "Executive Magistrate" was much debated at the Constitutional Convention. Several methods were considered, including selection by one or both houses of Congress, selection by the state governors or legislatures, or direct election by the people. All were found wanting. As James Madison explained at the time: "There are objections against every mode that has been, or perhaps can be proposed." *See* 2 Records of the Federal Convention of 1787 109 (M. Farrand ed. 1911) ("Farrand").

Of particular concern was the proposal of selection by Congress, which the Framers feared would render the President subservient to that body, fatally undermining the separation of powers. Gouverneur Morris, for example, explained that he "was pointedly

ag[ainst] his being" chosen by the "national legislature," since "[i]f the Executive be chosen by the Nat[ional] Legislature, he will not be independent o[f] it; and if not independent, usurpation and tyranny on the part of the Legislature will be the consequence." 2 Farrand at 29, 31.

For his part, Morris favored direct election "by the people at large, by the freeholders of the Country." *Id.* at 29. His sentiments were shared by many delegates (including Madison, to some extent), but ultimately did not carry the day. As Charles Pinckney explained, the people might "be led by a few active & designing men" and this method would also lead to the most populous states choosing the President. *Id.* at 30.

Elbridge Gerry proposed the President's election by state governors, but also without success. Edmund Randolph feared that, in this case, the "small States would lose all chance of an appointme[nt] from within themselves," and noted that the state governors—for all their supposed independence—were "in fact dependent on the State Legislatures [and] will generally be guided by the views of the latter." 1 Farrand at 176. This reference to the small states underscores that the Framers understood the mode of presidential elections to implicate a broad range of the separation-of-powers considerations, at both federal and state levels, making the proper resolution of this issue of vital importance.

Like so much else at the Convention, the Electoral College was the result of compromise. Oliver Ellsworth appears to have been the first to propose that

the President "be chosen by electors appointed by the Legislatures of the States," 2 Farrand at 108, and this was the mechanism selected after a good deal more debate. For all of its contemporary critics, the Electoral College is genius. As an ephemeral body that is selected and meets only once every four years, the College has no "institutional interests" of its own and no particular stake in the continuing rivalry between Congress and the President as separate and equal departments of government. Not surprisingly, as Alexander Hamilton explained in *The Federalist*, this "mode of appointment of the chief magistrate of the United States is almost the only part of the [proposed constitutional] system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents." The Federalist No. 68, at 457 (J. Cooke ed. 1961) (Alexander Hamilton).

The Convention chose to vest the power to determine how the Electors were to be chosen in state legislatures, because it was the least worst option, avoiding a dependence on the national legislature, but nevertheless having the method of appointing Electors determined by bodies themselves directly accountable to the electorate at the state level. The structure that emerged granted state legislatures authority that is plenary. As Charles Pinckney explained:

> [I]n the Federal Convention great care was used to provide for the election of the President of the United States, independently of Congress; to take the business as far as possible out of their

> hands. The votes are to be given by Electors appointed for that express purpose, the Electors are to be appointed by each State, and the whole direction as to the manner of their appointment is given to the State Legislatures. *Nothing is more clear to [Pinckney] than that Congress had no right to meddle with it at all; as the whole was entrusted to the State Legislatures, they must make provision for all questions arising on the occasion.*

10 Annals of Cong. 29–30 (1800) (emphasis added).

Although Pinckney's comments addressed a proposal that Congress should establish by statute a method for "deciding disputed elections of president"—which he understood to be beyond its constitutional power—they equally reject attempts to intrude on state legislature's Electors Clause power by other officials (such as state governors) or institutions (such as state or federal courts). And, there can also be no question that the Constitution's charge to the state legislatures is entirely a matter of federal constitutional law, which is not subject to control or limitation by state constitutions or law.

This was the conclusion of the Circuit Court for the District of South Carolina in a case arising out of the election of 1876, *Case of Electoral College*, 8 F. Cas. 427 (C.C.D.S.C. 1876) (No. 4,336). There, the Court issued a habeas writ in favor of members of the state

board of elections, who had been imprisoned on a contempt order from the state supreme court. Although state law gave the board the authority to judge, as well as certify, election returns, the South Carolina Supreme Court ordered it simply to certify the results and then held the board members in contempt when they failed to comply.

The federal court reasoned that it had jurisdiction to issue the writ, even in the face of the state-court order, based upon the federal nature of the board's authority under the Electors Clause: "When the legislature of a state, in obedience to that provision, has by law directed the manner of appointment of the electors, that law has its authority solely from the constitution of the United States. It is a law passed in pursuance of the constitution." *Id.* at 432–33. In the exercise of this authority, the board was "in no wise subject to the control, as to what they should do after they had commenced to perform that duty, of the judicial department." *Id.* at 434. Rather, the board was "acting in a federal capacity…in pursuance of the law of the United States, and…they are entitled to the protection of the courts of the United States." *Id.*

C. The Court's Precedents Confirm State Legislatures' Plenary Authority Over Federal Elections

This Court's precedents have repeatedly, and correctly, reaffirmed these principles. Although some state courts remain confused over state legislatures' plenary authority in this area, governing authority is clear.

In *McPherson*, the Court considered a challenge to a Michigan statute apportioning its presidential electors by district, rather than through a statewide vote, and rejected it, reasoning that the Electors Clause "leaves it to the legislature exclusively to define the method of effecting the object." 146 U.S. at 27. The Court surveyed the text and history of, and practice under, the Electors Clause, *id.* at 29–36, and concluded that "[t]he question before us is not one of policy, but of power." *Id.* at 35. "[W]hile public opinion had gradually brought all the states as matter of fact to the pursuit of a uniform system of popular election by general ticket, that fact does not tend to weaken the force of contemporaneous and long-continued previous practice when and as different views of expediency prevailed." *Id.* at 36. In short, the Constitution "recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." *Id.* at 27.

The Court unanimously enforced that principle in *Palm Beach*, which considered a ruling by the Florida Supreme Court governing the 2000 presidential recount. 521 U.S. at 72–76. The Court reaffirmed *McPherson* and expressed the concern that the Florida Supreme Court may have "construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'" *Id.* at 76–77 (quoting *McPherson*, 146 U.S. at 25). Because the Florida Supreme Court's application of the Elections Code prescribed by the state legislature may

have been tainted by consideration of the state constitution, this Court vacated the state-court ruling and remanded. *Id.* at 78.

The Court was soon confronted with the same problem in *Bush v. Gore*, 531 U.S. 98 (2000), which adjudicated the Florida Supreme Court's persistence in rewriting the Florida Elections Code. Although the majority opinion did not directly address the Electors Clause implications of that court's actions, its ultimate holding was predicated on privileging the text of Florida statute, and the legislative intent it clearly expressed, over the state supreme court's aberrant reading of that statute and its application of state constitutional law. The Florida Supreme Court had ordered a recount to proceed and rested its authority on a provision of Florida law authorizing it to issue "any relief appropriate under [the] circumstances." *Id.* at 102, 110–11. This Court reversed that decision, holding that the Florida Elections Code reflected the intent to resolve election disputes by the congressional safe harbor established in 3 U.S.C. § 5 and therefore the Florida Supreme Court's order "could not be part of an 'appropriate' order authorized by" the Florida Elections Code. *Id.* at 111.

The concurring opinion of Chief Justice Rehnquist provided further explanation. It reasoned that, by operation of the Electors Clause, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Id.* at 113 (Rehnquist, J., concurring). Although "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law," the

Electors Clause renders "[a] significant departure from the legislative scheme for appointing Presidential electors" to "present[] a federal constitutional question." *Id.* at 112–13. "In order to determine whether a state court has infringed upon the legislature's authority, [the Court] necessarily must examine the law of the State as it existed prior to the action of the court." *Id.* at 114.

II. The Decision Below Contravenes the Federal Delegation of Lawmaking Authority to the Pennsylvania Legislature and Deepens the Existing Split of Authority on This Question

Notwithstanding the clarity of the Constitution's plain text and meaning, and this Court's precedent, the Pennsylvania Supreme Court had no qualms about rewriting the plain language of Pennsylvania's election laws. This was the second time this same court, split along partisan lines, seized the legislature's constitutional lawmaking authority and established the regulation of federal elections directly from the bench. *See League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (invalidating congressional redistricting plan under the Free and Equal Elections Clause on a partisan vote); *League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083 (Pa. 2018) (adopting a court-drawn congressional districting plan). If this Court does not intervene, more disruptions are sure to follow.

A. The Decision Below Claims the Unfettered Right To Promulgate Election Laws Outside the Legislative Process

Without this Court's enforcement of the Constitution's plain text, there will be no limiting principle on courts' (or executive actors') prerogative to establish election laws outside the legislative process. The texts of state constitutions have proven to provide no limiting principle on the state courts because they have shown a remarkable inclination to ignore them in these highly contentious and partisan cases.

The decision below determined that an Election Day ballot-receipt deadline violates the Free and Fair Elections Clause and proceeded to establish a new November 6 deadline. Pet.App.80a. But there is nothing about the phrase "[e]lections shall be free and equal," Pa. Const., art. I, § 5, that favors a November 6 deadline over a November 3 (i.e., Election Day) deadline. Like voting-age qualifications, the choice of a receipt deadline "is a matter of legislative judgment which cannot be properly decided under" a constitutional provision guaranteeing freedom or equality. *Oregon v. Mitchell*, 400 U.S. 112, 127 n.10 (1970) (plurality opinion).

These questions are inherently unfit for judicial determination because the choices available are virtually infinite. If the standard is simply to choose anything that would make voting easier, the court could have extended the deadline 7 days, *see Carson v. Simon*, 2020 WL 6018957, at *9 (D. Minn. Oct. 12,

2020), or 14 days, *see Michigan All. for Retired Americans v. Sec'y of State*, 2020 WL 6122745, at *1 (Mich. Ct. App. Oct. 16, 2020), or anything else. Similarly, if election officials can be ordered to establish two ballot drop-box locations per county, they can be ordered to establish 10, or 30, or 200. *See Texas League of United Latin Am. Citizens v. Hughs*, 2020 WL 6023310, at *6 (5th Cir. Oct. 12, 2020). "The wide range of possibilities makes the choice 'inherently standardless,'" *Holder v. Hall*, 512 U.S. 874, 885 (1994) (quoting *id.* at 889 (O'Connor, J., concurring in part and concurring in judgment)), which is why the Framers vested the authority to set election *policy* with lawmakers, not judges.

Compounding this problem is the unwillingness of many state courts to stop at *invalidating* legislation found to violate the state's constitution. Courts have persistently taken the next step of imposing *new law*, as occurred here where the court replaced one deadline with another. Had the court below simply invalidated the Election Day deadline in "the manner traditional for English and American courts," *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion), it would have exposed the error of its program. Because the General Assembly expressly provided that the law is not severable, the court would have been required to invalidate all of the mail-in voting benefits the legislature adopted, leaving voters in a more restricted position as to their ability to vote by mail than without an injunction. Pet.App.38a. To act like a court would have defeated the entire point of the court's *legislative* agenda, because the right to vote by mail is

itself a legislative choice, not a legal one. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969).

This approach was no different from the same court's approach in the 2018 congressional redistricting case, where a partisan majority invalidated a map enacted by a bipartisan legislative majority and replaced it with a map that the New York Times concluded was itself partisan. Nate Cohen et al., The New Pennsylvania Congressional Map, District by District, The New York Times (Feb. 19, 2018)[3] ("Democrats couldn't have asked for much more from the new map. It's arguably even better for them than the maps they proposed themselves."). Similarly, the Colorado Supreme Court invalidated a legislatively enacted congressional redistricting plan in favor of one imposed by the Colorado courts. *See People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1234 (Colo. 2003). These sorts of decisions are materially identical to the one in *Palm Beach*, where the Florida Supreme Court went beyond ordering election officials to "ignore[]" statutory provisions and established completely new procedures. 531 U.S. at 75–76.

"[T]o be consistent with" the Constitution, "there must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts." *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., Thomas, Scalia,

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[3] *Available at* https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html.

JJ., dissenting from denial of certiorari). Yet experience shows that state courts that claim the power to strike down legislation based on state constitutions inevitably claim the right to establish the "Manner" of federal elections entirely outside the legislative process. And the policy arguments for this unlawful transfer of constitutional power—in addition to being legally irrelevant—are baseless. The court below opined that it *must* have the power to change election deadlines because courts may be called on to exercise this power in the wake of a "natural disaster" or other emergency. Pet.App.45a. But Congress has already addressed this problem, providing that states may schedule special elections in the event of "a failure to elect at the time prescribed by law," 2 U.S.C. § 8(a); *see also* 3 U.S.C. § 2, a provision courts have read to apply in the event of "a natural disaster," *Busbee v. Smith*, 549 F. Supp. 494, 526 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983*); Pub. Citizen, Inc. v. Miller*, 813 F. Supp. 821, 830 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993). The premise that courts must solve problems because legislatures are impotent is factually wrong and far afield from the constitutional order courts are bound to respect. *See Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018).

To be sure, state courts may ordinarily engage in as much activism as the people of their respective states are willing to tolerate. *See Palm Beach*, 531 U.S. at 76. But, in federal elections, the impact of these choices extends beyond state boarders, since federal elected officials govern the Nation as a whole.

It is for this reason that the Constitution carefully allocates authority over federal elections and renders questions regarding that allocation matters of federal law.

B. The Decision Below Deepens a Split of Authority on the Electors and Elections Clauses

Not all state courts have followed the path of the decision below. Some, beginning more than 100 years ago, have adhered to their proper roles and rejected the temptation to encroach upon state legislatures' constitutionally defined prerogative. The result is a split of authority that further underscores why this Court's review is so desperately needed.

1. In 1887, the Rhode Island Supreme Court, facing a conflict between the state's constitution, which required that elections in the state be decided by a majority vote, and a state statute governing congressional and presidential elections, which handed victory to the plurality vote-winner, chose the statute over the constitution, reasoning that the former "is manifestly in conflict with section 4 of article 1 of the constitution of the United States, if it be construed to extend to elections of representatives to congress." *In re Plurality Elections*, 8 A. 881, 881 (R.I. 1887). It reached the same conclusion under the Electors Clause. *Id.* Many courts have followed suit. *See, e.g.*, *In re Opinions of Justices*, 45 N.H. 595, 601–07 (1864); *Wood v. State*, 142 So. 747, 755 (Miss. 1932) (concurring opinion); *Com. ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 694 (Ky. 1944); *Parsons v. Ryan*, 60 P.2d

910, 912 (Kan. 1936); *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286–87 (Neb. 1948). Of particular note is *Beeson*, which held that the Nebraska Constitution's Free and Equal Elections Clause, which is materially identical to Pennsylvania's, has no application in presidential elections. 34 N.W.2d at 287. The conflict between the decision below and *Beeson* could not be more square and stark.

2. More recent cases have split from these holdings, including the Pennsylvania Supreme Court in *Erfer v. Commonwealth*, 794 A.2d 325, 331 (Pa. 2002), and the Colorado Supreme Court in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1232 (Colo. 2003). But these decisions are unsound. *Erfer* simply called the position it rejected "radical" and said nothing of the Constitution's text, structure, or history and addressed no precedent on the Elections Clause applicable to the congressional redistricting plan at issue. *See* 794 A.2d at 331.

The Colorado Supreme Court's *Salazar* decision provided a more detailed, but erroneous, analysis. *Salazar* reasoned that decisions of this Court interpreting the Elections Clause, including *Smiley v. Holm*, 285 U.S. 355 (1932), and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), have read "the word 'legislature' in Article I to broadly encompass any means permitted by state law," and the court reasoned from this that "the word 'legislature,' as used in Article I of the federal Constitution, encompasses court orders." *Salazar*, 79 P.3d at 1232. But this is a *non sequitur*. *Smiley* simply held that, under the Elections Clause, legislation governing the times, places,

and manner of congressional elections "must be in accordance with the method which the state has prescribed for legislative enactments." 285 U.S. at 367. *Smiley* considered Minnesota's constitution, which authorized the governor, as part of the lawmaking process, to veto legislation, and determined that the veto was operative against legislation governing congressional districts. The holding depended on the fact that "the Governor of the state" had "a part in the making of state laws." *Id.* at 368.

It does not follow that "court orders" are lawful exercises of authority under the Elections Clause (much less the Electors Clause). The premise that the term "Legislature" in the Elections Clauses encompasses legislative actors outside the formal "Legislature" hardly supports the conclusion that *non*-legislative actors exercising *non*-legislative functions may set the times, places, and manner of elections. Because courts do not play a role in the lawmaking process—the Pennsylvania Supreme Court certainly does not, *see* Pa. Const. § 17(d)—*Smiley* does not in any way suggest that court orders may validly establish election regulations. The Kentucky Supreme Court explained this distinction in *Dummit*:

> While the opinion in the case of *Smiley v. Holm*, Secretary of State of Minnesota, holds that a legislature must function in the method prescribed by the State Constitution in directing the times, places, and manner of holding elections for senators and representatives in Congress, since in so doing it is

> exercising the function of lawmaking, it does not necessarily follow that when functioning in the manner prescribed by the State Constitution, the scope of its enactment on the indicated subjects is also limited by the provisions of the State Constitution.

181 S.W.2d at 694; *see also* James C. Kirby, Jr., Limitations on the Power of State Legislatures Over Presidential Elections, 27 Law & Contemp. Probs. 495, 503 (1962) (drawing this same distinction).

For the same reason, the Court's more recent decision in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015), has no bearing on the issues in this case. *Arizona* held that a ballot initiative process, like the gubernatorial veto power in *Smiley* and the referendum in *Hildebrant*, qualified as "an alternative legislative process" that satisfied the Elections Clause. *Id.* at 817. As with *Smiley* and *Hildebrant*, nothing in *Arizona* remotely suggests that *non*-legislative actors, like judges, exercising *non*-legislative functions, like judging cases, may, consistent with the Elections Clause, establish the times, places, and manner of congressional elections.

Quite the opposite, *Arizona* emphatically proclaimed that congressional "[r]edistricting involves lawmaking in its essential features and most important aspect," *id.* at 807, and reasoned that the Elections "Clause doubly empowers *the people*" to "control the State's law*making* processes in the first

instance" or to "seek Congress' correction of regulations prescribed by state legislature." *Id.* at 824 (emphasis added); *see also id.* at 813 (emphasizing that "*the people* of Arizona"); *id.* at 791 (emphasizing the "endeavor by *Arizona voters*"); *id.* at 793 (emphasizing the "[d]irect lawmaking by the people"); *id.* at 795 n.3 (emphasizing "the people's sovereign right to incorporate themselves into a State's lawmaking apparatus"); *id.* at 795 (emphasizing "direct lawmaking" under the "initiative and referendum provisions" of the Arizona Constitution); *id.* (emphasizing the role of the "electorate of Arizona as a coordinate source of legislation"); *id.* at 796 (emphasizing "the people's right…to bypass their elected representative and make laws directly"). If anything, the decision cuts *against* the notion that non-legislative and non-democratic bodies like courts play any role under the Elections Clause.

3. *Arizona* is inapposite here for the additional reason that it addressed only the Elections Clause of Article I, not the Electors Clause of Article II. The *Arizona* holding depends on the theory that "[t]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise." *Id.* at 808 (quotation marks omitted). For example, "appointing," "consenting," and "ratifying" functions exclude any state actors other than the legislature itself—e.g., governors, referendums, initiatives—whereas "legislative" functions do not. *Id.* at 808 n.17.

The Electors Clause differs from the Elections Clause in several respects, the most important being that it concerns the power to "appoint." *See McPherson*, 146 U.S. at 28 (observing that "[t]he appointment of delegates was, in fact, made by the legislatures directly" in many states for generations after the founding). Indeed, *McPherson* explained that the "power" under the Electors Clause "is conferred upon the legislatures of the states…and cannot be taken from them or modified by their state constitutions *any more than can their power to elect senators of the United States*" (before the Seventeenth Amendment). *Id.* at 35 (emphasis added). All Justices in *Arizona* agreed that senators before the Seventeenth Amendment could be appointed *only* by the legislature—without restriction by governors, referendums, or initiatives. 576 U.S. at 807–08. It follows that the power under the Electors Clause likewise lacks any such restraint, as *McPherson*, *Palm Beach*, and *Bush* hold.

III. The Court's Intervention Is Urgently Needed

The Court's immediate guidance is urgently needed because voters need to know the ballot deadline *before* they vote. The issues raised in the Petition will not simply go away if the Court denies certiorari; they will continue to fester and several immediate consequences will result.

First, voters in the Commonwealth have been told that their ballots may arrive three days after Election Day, but as explained, federal law mandates that they arrive on Election Day per the General Assembly's

statutory directive, which controls by virtue of the Electors Clause. Candidates will have the ability to challenge late-received ballots during the counting process, and the issue will be litigated then. If, as is likely, the federal-law principles described above prevail, an untold number of votes will be cast aside. The Court can and should avoid that outcome by adjudicating these issues now.

Second, the Pennsylvania Supreme Court's change disqualifies the Commonwealth from binding Congress to its choice of electors under 3 U.S.C. § 5, which "creates a 'safe harbor' for a State insofar as congressional consideration of its electoral votes is concerned." *Palm Beach*, 531 U.S. at 77. Under this provision, "[i]f the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors." *Id.* This provision only applies if the method is set in "*laws enacted*" by the state's legislature. 3 U.S.C. § 5 (emphasis added). Because the Pennsylvania Supreme Court's order does not qualify as the "laws enacted" by the General Assembly, the decision forces the Commonwealth out of safe-harbor protection and threatens to disenfranchise all its voters. This Court in *Bush* terminated the Florida recount to avoid that precise result. 531 U.S. at 111.

Third, under the Pennsylvania Supreme Court's new timeline, there is every likelihood that controversies and contests over contested votes will continue

straight through the December 8 deadline and perhaps even through the Electoral College's vote on December 14. 3 U.S.C. § 7. Because the court has ordered ballots to be accepted after Election Day, canvassing boards now have fewer days to certify their results, which must occur after any recounts. If the boards are unable to meet this deadline, the votes of all Pennsylvania citizens are in danger of counting for nothing.

The Court can prevent all of these potentially devastating results by granting the Petition, promptly resolving it, and reversing the judgment below.

CONCLUSION

The Court should grant the Petition and reverse.

Respectfully submitted,

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