

Nos. 20A53, 20A54

IN THE
Supreme Court of the United States

JOSEPH B. SCARNATI III, *et al.*,

Applicants,

v.

KATHY BOOCKVAR, SECRETARY
OF PENNSYLVANIA, *et al.*,

Respondents.

REPUBLICAN PARTY OF PENNSYLVANIA,

Applicant,

v.

KATHY BOOCKVAR, SECRETARY
OF PENNSYLVANIA, *et al.*,

Respondents.

ON APPLICATIONS FOR STAY PENDING DISPOSITION
OF A PETITION FOR A WRIT OF CERTIORARI

**MOTION FOR LEAVE TO FILE AND BRIEF
OF TOM RIDGE, PETER KEISLER, CARTER
PHILLIPS, STUART GERSON, CHRISTINE
TODD WHITMAN, *ET AL.* AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS AND
THEIR OPPOSITIONS TO A STAY**

NANCY A. TEMPLE
KATTEN & TEMPLE, LLP
209 South Lasalle Street
Chicago, IL 60604

RICHARD D. BERNSTEIN
Counsel of Record
1875 K Street, NW
Washington, DC 20006
(202) 303-1000
rbernsteinlaw@gmail.com

Counsel for Amici Curiae

October 2, 2020

MOTION FOR LEAVE TO FILE¹

Amici respectfully move for leave to file a short brief as *amici curiae* in support of Respondents and their oppositions to the emergency stay applications in these matters. The Applicants consent to, and the Respondents expected to oppose the stay applications do not object to, the filing of the enclosed *amici* brief in support of the opposition to Applicants' emergency stay applications.

Amici respectfully request that the Court consider the arguments herein and in the enclosed, short *amici* brief in opposition to Applicants' emergency stay applications in Nos. 20A53 and 20A54. If this Court considers the merits,² the attached *amici* brief would be helpful to the Court. The brief demonstrates that the Pennsylvania Supreme Court had the authority to rely on the Free and Equal Clause of the Pennsylvania Constitution because that Clause has been approved by Pennsylvania's General Assembly – its denominated Legislature – as well as by

¹ No counsel for any party authored the *amici* brief in whole or in part and no person or entity other than *amici* made a monetary contribution to its preparation or submission.

² The Seventh Circuit recently held that the Republican Party of Wisconsin and the legislature of Wisconsin did not have the necessary Article III standing to appeal an order extending the deadline for receipt of ballots postmarked by November 3, 2020. *See Democratic Nat'l Committee v. Bostelmann*, Nos. 20-2835, 20-2844, 2020 WL 5796311 (7th Cir. Sept. 29, 2020) (per curiam of Easterbrook, Rovner, St. Eve, JJ.) (relying on *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019)). This *amici* brief does not address whether Applicants have Article III standing to appeal to this Court, or any other non-merits basis to deny a stay.

Pennsylvania's elected constitutional convention and electorate. This satisfies both the majority opinion and the principal dissent in *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787 (2015). Additionally, no federal statute has addressed how to resolve the factual issue of whether a vote was cast on election day – this year, November 3, 2020. Thus, federal statutes leave to each state whether to adopt, for that state only, a reasonable rebuttable presumption in deciding that factual issue.

I. Statement of Movant's Interest.

Amici include lawyers and others who have worked in Republican administrations. *See* Appendix A. Reflecting their experience in supporting the rule of law, *amici* have an interest in seeing that judicial decisions about the forthcoming election are based on sound legal principles. Former Pennsylvania Governor Tom Ridge has an interest in supporting and defending Pennsylvania's Declaration of Rights. *Amici* speak only for themselves personally, and not for any entity or other person.

II. Statement Regarding Brief Form and Timing.

Given the expedited briefing of the emergency stay applications, *amici* respectfully request leave to file the enclosed brief supporting Respondents and their opposition to Applicants' stay applications without 10 days' advance notice to the parties of intent to file. *See* Sup. Ct R. 37.2(a). The emergency applications for stay were filed on September 28, 2020. On September 29, 2020, this Court ordered a response by 3 p.m. on October 5, 2020. On September 28-30, 2020, counsel

for *amici* gave notice to all parties below of the intent to file an *amici* brief in opposition to the emergency applications for stays. The Applicants in No. 20A53 and 20A54 consented on September 30, 2020. Respondents Boockvar and the Pennsylvania Democratic Party replied that they did not object on September 29, 2020. The other parties below are 67 Pennsylvania county election boards. *Amici* do not expect those boards to file briefs concerning the stay applications. Six of these boards replied with consent, 46 replied that they did not object, and 15 did not reply before this motion was filed. The above justifies the request to file the enclosed *amici* brief supporting Respondents and their opposition to the stay applications without 10 days' advance notice to the parties of intent to file.

CONCLUSION

The Court should grant *amici curiae* leave to file the enclosed brief in support of Respondents and their oppositions to the stay applications.

Respectfully submitted,

Of Counsel
NANCY A. TEMPLE
Katten & Temple, LLP
209 S. LaSalle Street
Chicago, IL 60604

RICHARD D. BERNSTEIN
Counsel of Record
1875 K Street, N.W.
Washington, D.C. 20006-
1238
(202) 303-1000
rbernsteinlaw@gmail.com

October 2, 2020

Counsel for *Amici Curiae*

TABLE OF CONTENTS

INTEREST OF *AMICI*.....1

INTRODUCTION AND
SUMMARY OF ARGUMENT.....1

ARGUMENT.....3

I. IN 1967, THE PENNSYLVANIA GENERAL
ASSEMBLY APPROVED THE
DECLARATION OF RIGHTS, INCLUDING
THE FREE AND EQUAL CLAUSE, AS ITS
OWN.....3

II. BECAUSE PENNSYLVANIA’S GENERAL
ASSEMBLY AND ELECTORATE EACH
APPROVED PENNSYLVANIA’S
DECLARATION OF RIGHTS AS
PENNSYLVANIA’S SUPREME LAW, THE
FEDERAL CONSTITUTION’S
“LEGISLATURE” REQUIREMENT HAS
BEEN SATISFIED.5

A. The General Assembly’s Approval Of The
Declaration of Rights As Its Own Satisfies The
“Legislature” Requirement.....6

B. Independently, The “Legislature” Requirement
Was Satisfied When Pennsylvania’s Voters
Approved The Free And Equal Clause8

C. Pennsylvania May Legislate General Standards For A Federal Election And Delegate To Its Judiciary The Interpretation And Enforcement Of Those Standards 8

III. NO FEDERAL STATUTE PRECLUDES A STATE FROM USING A REASONABLE REBUTTABLE PRESUMPTION IN DETERMINING THE FACTUAL ISSUE OF WHETHER A VOTE WAS CAST BY NOVEMBER 3, 2020. 10

CONCLUSION 14

LIST OF *AMICI CURIAE* 1a

TABLE OF AUTHORITIES

Cases	Pages
<i>Arizona State Legislature v. Arizona Independent Redistricting Comm’n</i> , 576 U.S. 787 (2015)	<i>passim</i>
<i>Bush v. Gore</i> , 531 U.S. 98 (2000)	8, 9, 12
<i>Bush v. Palm Beach County Canvassing Bd.</i> , 531 U.S. 70 (2000)	9
<i>Democratic Nat’l Committee v. Bostelmann</i> , Nos. 20-2835, 20-2844, 2020 WL 5796311 (7 th Cir. Sept. 29, 2020) (per curiam)	1
<i>Hawke v. Smith (No. 1)</i> , 253 U.S. 221 (1920)	8
<i>McPherson v. Blacker</i> , 146 U.S. 1 (1892)	9, 10
<i>Ohio ex rel. Davis v. Hildebrant</i> , 241 U.S. 565 (1916)	6, 7
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	6, 7
<i>United States Postal Serv. Bd. of Governors v. Aikens</i> , 460 U.S. 711 (1983)	12

<i>Virginia House of Delegates v. Bethune-Hill</i> , 139 S. Ct. 1945 (2019)	1
<i>Whitman v. American Trucking Ass'ns, Inc.</i> , 531 U.S. 457 (2001)	9
<i>Wilson v. Sellers</i> , 138 S. Ct. 1188 (2018)	12
Constitutional and Statutory Authorities	Pages
U.S. Const., art. I, § 4	<i>passim</i>
U.S. Const., art. II, § 1	<i>passim</i>
U.S. Const., art. III	1, 2
U.S. Const., amend. XIV	13
U.S. Const., amend. XXVI	13
2 U.S.C. § 1a	11
2 U.S.C. § 7	2, 10, 11
2 U.S.C. § 9	12
3 U.S.C. § 1	2, 10, 11
3 U.S.C. § 5	12
3 U.S.C. § 6	11

Pa. Const. of 1790 (available at https://www.paconstitution.org/texts-of-the-constitution/)	3
Pa. Const. of 1790, art. IX, § V (available at https://www.paconstitution.org/texts-of-the-constitution/)	3
Pa. Const. of 1790, art. IX, § XXVI (available at https://www.paconstitution.org/texts-of-the-constitution/)	3, 4, 5, 7
Pa. Const. of 1838, art. IX, § V (available at https://www.paconstitution.org/texts-of-the-constitution/)	4
Pa. Const. of 1838, art. IX, § XXVI (available at https://www.paconstitution.org/texts-of-the-constitution/)	4
Pa. Const. of 1874 (available at https://www.paconstitution.org/texts-of-the-constitution/)	4
Pa. Const. of 1874, art. I, § 5 (available at https://www.paconstitution.org/texts-of-the-constitution/)	<i>passim</i>
Pa. Const. of 1874, art. I, § 26 (available at https://www.paconstitution.org/texts-of-the-constitution/)	4
Pa. Const. of 1967 (available at https://www.paconstitution.org/texts-of-the-constitution/)	3

Pa. Const. of 1968 (available at https://www.paconstitution.org/texts-of-the-constitution/)	5
Pa. Act of Mar. 24, 1789 (available at https://www.paconstitution.org/historical-research/)	3
Pa. Act of Sept. 15, 1789 (available at https://www.paconstitution.org/historical-research/)	3
Pa. Act of Apr. 14, 1835 (available at https://www.paconstitution.org/historical-research/)	4
Pa. Act of Mar. 29, 1836 (available at https://www.paconstitution.org/historical-research/)	4
Pa. Act of Apr. 11, 1872, § 4 (available at https://www.paconstitution.org/historical-research/)	4
Pa. Act of Mar. 15, 1967, P.L. 2, No. 2, § 1 (available at https://www.legis.state.pa.us)	5, 7
Pa. Act of Mar. 15, 1967, P.L. 2, No. 2, § 7 (available at https://www.legis.state.pa.us)	5

INTEREST OF *AMICI*

Amici include lawyers and others who have worked in Republican administrations. *See* Appendix A.¹ Reflecting their experience in supporting the rule of law, *amici* have an interest in seeing that judicial decisions about the forthcoming election are based on sound legal principles. Former Pennsylvania Governor Tom Ridge has an interest in supporting and defending the Pennsylvania Declaration of Rights. *Amici* speak only for themselves personally, and not for any entity or other person.

INTRODUCTION AND SUMMARY OF ARGUMENT

Validated by applicable legal principles, a denial by this Court of a stay in this case by the broadest majority possible will benefit this Court, our country, and its precious tradition of the peaceful retention or transfer of power. To that end, if this Court considers the merits,² this brief shows that, in the narrow

¹ No counsel for any party authored the brief in whole or in part, and no person other than *amici* made a monetary contribution to its preparation or submission. Applicants and Respondents have consented to the filing of this brief.

² The Seventh Circuit recently held that the Republican Party of Wisconsin and the legislature of Wisconsin did not have the necessary Article III standing to appeal an order extending the deadline for receipt of ballots postmarked by November 3, 2020. *See Democratic Nat'l Committee v. Bostelmann*, Nos. 20-2835, 20-2844, 2020 WL 5796311 (7th Cir. Sept. 29, 2020) (per curiam of Easterbrook, Rovner, St. Eve, JJ.) (relying on *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019)). The enclosed *amici* brief does not address whether Applicants have

context presented, the merits arguments raised by applicants are wrong – and also not worthy of *certiorari* – under legal principles that cut across judicial philosophies.

First, the “Legislature” requirement in Article I, § 4 (the “Elections Clause”), and in Article II, § 1 (the “Electors Clause”), is satisfied under the reasoning of each of the majority opinion and the principal dissent in *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 576 U.S. 787 (2015). The principal dissent is satisfied because the denominated Pennsylvania Legislature, the General Assembly, in a 1967 statute, approved the Pennsylvania Constitution’s Declaration of Rights, including the Free and Equal Clause. *See* Parts I and II.A., *infra*. The majority opinion in *Arizona Redistricting* is additionally satisfied because, in 1873, the elected Pennsylvania Constitution Convention and the Pennsylvania electorate also approved the Free and Equal Clause. *See* Parts I and II.B., *infra*. The Applicants ignore the 1967 and the 1873 history.

Second, whether a vote was mailed by 8 p.m. on November 3, 2020, is a factual issue. Neither 2 U.S.C. § 7 nor 3 U.S.C. § 1 addresses how to resolve the factual issue of whether a vote was cast by election day. Consistent with the Elections Clause and the Electors Clause, Congress has left to each state how to resolve that factual issue. *See* Part III, *infra*. Accordingly, Pennsylvania’s Supreme Court had

Article III standing to appeal to this Court, or any other non-merits basis to deny a stay.

authority to adopt, and did adopt, a reasonable rebuttable presumption to assist in resolving that factual issue in that state. *Id.* Nothing in the decision of the Pennsylvania Supreme Court, especially its reliance on Pennsylvania law, requires any other state to adopt a similar or any rebuttable presumption. *Id.*

ARGUMENT

I. IN 1967, THE PENNSYLVANIA GENERAL ASSEMBLY APPROVED THE DECLARATION OF RIGHTS, INCLUDING THE FREE AND EQUAL CLAUSE, AS ITS OWN.

The Applicants ignore the ample history showing the crucial role of the General Assembly in the approval of the Free and Equal Clause of the Pennsylvania Constitution. The Pennsylvania Constitution of 1790 was the first Pennsylvania Constitution to include a “free and equal” election clause. In 1789, the Pennsylvania General Assembly adopted resolutions providing for a state constitutional convention. Pa. Act of Sept. 15, 1789; Pa. Act of March 24, 1789.³ The ensuing Convention of 1790 adopted the Pennsylvania Constitution of 1790 (the “1790 Constitution”).⁴ Article IX of the 1790 Constitution contained a Declaration of Rights. Section V of Article IX provided: “That elections shall be free and equal.” Section XXVI of the Article IX (the “Inviolable Clause”) provided that all of the rights in

³ The Pennsylvania statutes from 1789, 1835, 1836, and 1872 cited in Part I are available at <https://www.paconstitution.org/historical-research/>, a website of the Duquesne University School of Law.

⁴ The texts of the Pennsylvania Constitutions are available at <https://www.paconstitution.org/texts-of-the-constitution/>.

the Declaration “shall forever remain inviolate.”

In 1835, the General Assembly enacted a statute providing for an election to advise whether to have a constitutional convention. Pa. Act of Apr. 14, 1835. At that election, the voters supported a constitutional convention. In 1836, the General Assembly enacted a statute providing for a convention, the election of delegates to that convention, and an election to adopt or reject the convention’s proposed changes to the Constitution. Pa. Act of Mar. 29, 1836. The Convention of 1837 did not change the “free and equal” clause or the Inviolable Clause and those remained Sections V and XXVI of Article IX of the Pennsylvania Constitution of 1838.

In 1872, the General Assembly enacted a statute that provided for a constitutional convention, an election of delegates to that convention, and an election to adopt or reject the convention’s changes to the Pennsylvania Constitution. Pa. Act of April 11, 1872 (“1872 Act”). Importantly, this *statute precluded* the ensuing 1873 Convention from narrowing the “declaration of rights.” 1872 Act § 4.

The Pennsylvania Constitutional Convention of 1873 framed a revised Constitution (the “1874 Constitution”) that the voters approved on December 16, 1873. Pa. Const. note. The 1874 Constitution moved the Declaration of Rights to Article I. Section 5 of Article I (the “Free and Equal Clause”) now read: “Elections shall be free and equal; and no power of, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” The Inviolable Clause became Section 26 of Article I.

The current Pennsylvania Constitution is the Constitution of 1968. Pa. Const. note. In 1967, the General Assembly enacted a statute authorizing an election to determine whether to have a constitutional convention but only “with limited powers.” Pa. Act of Mar. 15, 1967, P.L. 2, No. 2 § 1 (“1967 Act”), available at <https://www.legis.state.pa.us>. Importantly, that *statute precluded* both voters and the convention from narrowing the Declaration of Rights contained in Article I of the 1874 Constitution. *Id.* §§ 1, 7. The voters authorized a convention. In compliance with the 1967 Act, the convention did not propose, and voters did not approve, any change to the Free and Equal Clause and merely renumbered the Inviolable Clause as Section 25 of Article I.

II. BECAUSE PENNSYLVANIA’S GENERAL ASSEMBLY AND ELECTORATE EACH APPROVED PENNSYLVANIA’S DECLARATION OF RIGHTS AS PENNSYLVANIA’S SUPREME LAW, THE FEDERAL CONSTITUTION’S “LEGISLATURE” REQUIREMENT HAS BEEN SATISFIED.

Applicants contend that, concerning a federal election, a state supreme court may not rely, even in part, on its state’s constitution to limit or modify, on an as-applied basis, a state statute because the state “Legislature” has not approved the state’s constitution. Emergency Application for a Stay, No. 20A53, at 24 (“Scarnati Application”); Emergency Application for a Stay, No. 20A54, at 30 (“RPP Application”). That issue is not presented by this case. Under the reasoning of both the majority opinion and

the principal dissent in *Arizona Redistricting*, the Pennsylvania legislature has approved the Free and Equal Clause as the supreme law of Pennsylvania.

A. The General Assembly's Approval Of The Declaration of Rights As Its Own Satisfies The "Legislature" Requirement.

Arizona Redistricting interpreted the meaning of "Legislature" in the Elections Clause. Applicants do not contend "Legislature" in the Electors Clause has a different meaning. *Cf.* 576 U.S. at 839 (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ., dissenting) (the two provisions have "considerable similarity").

Arizona Redistricting's principal dissent explained that the federal Constitution's "Legislature" requirement is satisfied when the body denominated a state's legislature has a "role in the legislative process" that adopts the law governing the state's federal elections, 576 U.S. at 841. So long as the denominated legislature has a role, "the state legislature need not be exclusive." *Id.* at 841-42. Rather, a state may authorize other actors "to *supplement* the legislature's role." *Id.* at 841 (emphasis in original). For example, the "Legislature" requirement had been satisfied when a denominated legislature passed a law but, pursuant to the state constitution, the law was rejected by the voters or a governor's veto. *See id.* at 840-41 (discussing and approving *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), and *Smiley v. Holm*, 285 U.S. 355 (1932)).

Here, the denominated Pennsylvania legislature, the General Assembly, had a critical role in causing

the Free and Equal Clause to constitute Pennsylvania's currently applicable supreme election law. In the 1967 Act, the General Assembly had the *final* word by precluding the state's voters and constitutional convention from changing the Free and Equal Clause and the Inviolable Clause. *See* Part I, *supra*. The 1967 Act not only effectively approved the Free and Equal Clause and Inviolable Clause as the General Assembly's own, these approvals ensured that through the Inviolable Clause, the Free and Equal Clause took precedence over statutory election laws. In every sense that matters, the General Assembly in 1967 caused the Free and Equal Clause to remain inviolable law for all elections in Pennsylvania.

The General Assembly had a much greater role than any role of any denominated legislature in *Arizona Redistricting*, *Smiley*, and *Hildebrandt*. The body denominated the Arizona legislature never approved the law being applied in *Arizona Redistricting*. That law, Proposition 106, was approved only by a voter referendum that had been authorized only by voters pursuant to the Arizona constitution. 576 U.S. at 795-97. In *Hildebrandt* and *Smiley*, the denominated legislature had a sufficient role even though the law it passed was rejected by the voters or the governor. The greater role here of the General Assembly in approving the Free and Equal Clause readily satisfies the federal Constitution.

B. Independently, The “Legislature” Requirement
Was Satisfied When Pennsylvania’s Voters
Approved The Free And Equal Clause.

The majority opinion in *Arizona Redistricting* is binding precedent for proceedings in all lower state and federal courts. Applicants do *not* ask this Court to overrule that majority opinion.

Arizona Redistricting held that in adopting laws governing federal elections, voter approval satisfies the “Legislature” requirement in the Elections Clause. 576 U.S. at 814. The voters of Pennsylvania approved the Free and Equal Clause in ratifying the 1874 Constitution. Part I, *supra*. Moreover, the 1873 Convention that framed Pennsylvania’s 1874 Constitution was also a legislature under the majority opinion in *Arizona Redistricting*. This is because the 1873 Convention was a body of elected *representatives* framing the supreme law of Pennsylvania. *See* Part I, *supra*; *cf.* 576 U.S. at 829 (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ., dissenting) (“A legislature’ is ‘the representative body which ma[kes] the laws of the people.’”) (brackets in original; quoting *Hawke v. Smith (No. 1)*, 253 U.S. 221, 227 (1920)).

C. Pennsylvania May Legislate General
Standards For A Federal Election And
Delegate To Its Judiciary The Interpretation
And Enforcement Of Those Standards.

Under the concurrence in *Bush v. Gore* cited by the applicants, a state satisfies a “Legislature” requirement when its legislature approves the standards for a presidential election and “delegate[s]

the authority to run the election and to oversee election disputes” to state administrative officials “and to state . . . courts.” *Bush v. Gore*, 531 U.S. 98, 113-14 (2000) (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.) (citations omitted). Here, under both the majority opinion and the principal dissent in *Arizona Redistricting*, the legislature in Pennsylvania has approved the standards in the Free and Equal Clause in Pennsylvania’s Constitution, which naturally is interpreted and applied by Pennsylvania’s courts. *See* Part II, A and B, *supra*. The Pennsylvania Supreme Court thus had authority to interpret and apply the properly approved Free and Equal Clause.

Nothing in the federal Constitution requires legislative promulgation of standards more specific than those in the Free and Equal Clause. Indeed, the standards in the Free and Equal Clause would easily pass muster under the non-delegation standards applicable to laws enacted by Congress. *See Whitman v. American Trucking Ass’ns, Inc.*, 531 U.S. 457, 472-76 (2001).

The dicta in *McPherson v. Blacker*, 146 U.S. 1 (1892), is completely inapposite. Most important, *McPherson’s* dicta did not address a situation where, as here, a state’s legislature had approved the pertinent state constitutional provision.⁵ Moreover, *McPherson’s* reference to the power of “the legislature

⁵ Likewise, in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), which “decline[d] . . . to review the federal questions asserted to be present,” *id.* at 78, no one argued that any part of the Florida constitution had been approved by the state’s legislature.

exclusively to define the method,” *id.* at 27, in no way suggests the legislature may override its own state’s constitution. To the contrary, *McPherson* already had said, “[w]hat is forbidden or required to be done by a State is forbidden or required of the legislative power *under state constitutions as they exist.*” *Id.* at 25 (emphasis added).

III. NO FEDERAL STATUTE PRECLUDES A STATE FROM USING A REASONABLE REBUTTABLE PRESUMPTION IN DETERMINING THE FACTUAL ISSUE OF WHETHER A VOTE WAS CAST BY NOVEMBER 3, 2020.

Applicants contend that a state violates 2 U.S.C. § 7 and 3 U.S.C. § 1 if it authorizes voting after November 3, 2020. *E.g.*, Scarnati Application at 15; RPP Application at 20-21. Again, that issue is not presented here. This is because the Pennsylvania Supreme Court emphasized casting votes by mail must cease by 8 p.m. on November 3, 2020. Scarnati Application, Appendix A (“Op.”) at 37 n.25. Thus, mail-in ballots postmarked on or after November 4, 2020, will not be counted. The Pennsylvania Supreme Court merely approved a rebuttable presumption to assist in deciding the factual issue of whether a vote received by November 6, 2020, in an envelope without a legible postmark was cast by being mailed on or before the November 3, 2020, deadline for voting.

To start, the Scarnati Applicants’ suggestion that federal law is violated if state officials continue to “*count*,” after midnight on November 3, 2020, votes cast before that deadline, is insupportable. Scarnati

Application at 15-16. Indeed, the RPP Applicants abjure this argument. RPP Application at 22. When 130 million or more Americans vote, many timely-cast votes in many states, including many in-person votes, will be counted after midnight on election day, as has occurred for almost two centuries. And recounts, by definition, are conducted after election day. The statutes Congress has enacted about certifying congressional and presidential election results pointedly omit any provision requiring counting of timely-cast votes to be completed on election day. *See* 2 U.S.C. § 1a (not requiring any date for a governor to certify a Senator’s election); 3 U.S.C. § 6 (providing only that a governor certify “as soon as practicable after . . . the *final* ascertainment”) (emphasis added). Thus, with respect to timely-cast votes, federal statutes do not limit a state to counting these votes by election day.

Whether a ballot was *cast* by being mailed by November 3, 2020, is a factual issue. For over two centuries, state administrative officials and courts have decided factual issues concerning whether a ballot was cast legally in a federal election. Nothing in any federal statute – including 2 U.S.C. § 7 and 3 U.S.C. § 1 – disables a state’s courts and administrative officials from using reasonable inferences and reasonable rebuttable presumptions in deciding such factual issues. Nor does any legislative history or case bar the use of such reasonable inferences or reasonable rebuttable presumptions.

Under both the Electors Clause and the Elections Clause, the power of the states over the “manner” of a federal election includes the authority to provide rules

and processes for deciding what is a “legal vote,” for “counting the votes,” for a “recount,” and for resolving a “protest” or “contest.” *Bush v. Gore*, 531 U.S. at 116-20 (Rehnquist, C.J., concurring, joined by Scalia and Thomas, JJ.). Congress has refrained from exercising any preemptive power under the Elections Clause or the Electors Clause to specify one, nationwide federal rule for determining whether a ballot was cast by November 3, 2020. *See* 2 U.S.C. § 9 (disqualifying votes for Representatives *only* if they are not cast by “written or printed ballot, or voting machine the use of which has been duly authorized by the State law”); 3 U.S.C. § 5 (one predicate for the safe harbor is when a state, before election day, provides its *own* rules to govern a “final determination of *any controversy or* contest concerning” which candidate won the state’s presidential electoral votes) (emphasis added).

Because no federal statute sets a nationwide rule for how to resolve that factual issue, the Pennsylvania Supreme Court had authority to adopt a reasonable rebuttable presumption to assist in resolving that factual issue in its state. When courts or administrative officials decide factual issues pertinent to the application of statutes, they may use – and often do use – reasonable rebuttable presumptions. *See, e.g., Wilson v. Sellers*, 138 S. Ct. 1188, 1193-94 (2018) (adopting the rebuttable presumption for federal habeas cases that the last explained state decision was the rationale for an unexplained state-court decision); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983) (establishment of *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964 creates rebuttable presumption to assist triers of fact in deciding the

factual issue of whether discrimination occurred).

For a ballot in an envelope without a legible postmark, based on the recommendation of the Pennsylvania Secretary of State, the Pennsylvania Supreme Court adopted a presumption, rebuttable by other evidence, that when a ballot is received by November 6, 2020, it was mailed by 8 p.m. on November 3, 2020. This presumption is reasonably supported by “the current USPS delivery standards, given the expected number of Pennsylvanians opting to use mail-in ballots during the [Covid-19] pandemic.” Op., at 37. This rebuttable presumption is further supported by the common sense inference that voters will know and seek to comply with the widely-publicized November 3 deadline for mailing ballots.

Because the Elections Clause, the Electors Clause, and Congress allow each state to decide for itself how to resolve factual issues concerning when a vote was cast, nothing in the Pennsylvania Supreme Court’s decision, based on Pennsylvania law, requires any other state to adopt a similar or any rebuttable presumption. Nor does it conflict with decisions cited in the RPP Application at 34-35 decided under another state’s law. By definition, under federalism, different states often follow different state law rules, especially on how to resolve factual issues.

Nor does this case raise any issue of whether the Fourteenth or Twenty-Sixth Amendments to the federal Constitution require an extension of any state’s otherwise applicable deadline for the receipt of mail-in ballots. That distinguishes lower federal court cases cited in the RPP Application at 34-35.

CONCLUSION

For the foregoing reasons, the applications for stay should be denied.

Respectfully submitted,

Of Counsel
NANCY A. TEMPLE
Katten & Temple, LLP
209 S. LaSalle Street
1238
Chicago, IL 60604

RICHARD D. BERNSTEIN
Counsel of Record
1875 K Street, N.W.
Washington, D.C. 20006-
(202) 303-1000
rbernsteinlaw@gmail.com

October 2, 2020

Counsel for *Amici Curiae*

APPENDIX A

LIST OF *AMICI CURIAE*

Tom Ridge, Governor of Pennsylvania, 1995-2001; United States Secretary of Homeland Security, 2003-2005; Assistant to the President for Homeland Security, 2001-2003.

Peter Keisler, Acting Attorney General, 2007; Assistant Attorney General for the Civil Division, 2003-2007; Principal Deputy Associate Attorney General and Acting Associate Attorney General, 2002-2003; Assistant and Associate Counsel to the President, 1986-1988.

Carter Phillips, Assistant to the Solicitor General, 1981-1984.

Stuart M. Gerson, Acting Attorney General, 1993; Assistant Attorney General for the Civil Division, 1989-1993; Assistant United States Attorney for the District of Columbia, 1972-1975.

Christine Todd Whitman, Administrator, Environmental Protection Agency, 2001-2003; Governor, New Jersey, 1994-2001.

John Bellinger III, Legal Adviser to the Department of State, 2005-2009; Senior Associate Counsel to the President and Legal Adviser to the National Security Council, 2001-2005.

Edward Larson, Counsel, Office of Educational Research and Improvement, United States Department of Education, 1986-1987; Associate Minority Counsel, Committee on Education and Labor, United States House of Representatives, 1983-1986.

Connie Morella, Representative of the Eighth Congressional District of Maryland in the United States House of Representatives, 1987-2003; Permanent Representative from the United States to the Organisation for Economic Co-operation and Development, 2003-2007.

Alan Charles Raul, Associate Counsel to the President, 1986-1988; General Counsel of the Office of Management and Budget, 1988-1989; General Counsel of the United States Department of Agriculture, 1989-1993; Vice Chairman of the Privacy and Civil Liberties Oversight Board, 2006-2008.

Paul Rosenzweig, Deputy Assistant Secretary for Policy, Department of Homeland Security, 2005-2009; Office of Independent Counsel, 1998-1999; United States Department of Justice, 1986-1991.

Robert Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, 1981-1984.

Stanley Twardy, U.S. Attorney for the District of Connecticut, 1985–1991.

Richard Bernstein, Appointed by this Court to argue in *Cartmell v. Texas*, 529 U.S. 513, 515 (2000); *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).