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.

PENNSYLVANIA DEMOCRATIC PARTY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* OHIO IN SUPPORT OF PETITIONERS

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J.HENDERSHOT
Chief Deputy Solicitor General
30 E. Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bflowers@
ohioattorneygeneral.gov

Counsel for Amicus Curiae the State of Ohio

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

STATEMENT OF AMICUS INTEREST AND SUMMARY OF ARGUMENT*

Ohio is not here because it objects, as a policy matter, to absentee voting. To the contrary, "[t]here is no dispute that Ohio is generous when it comes to absentee voting—especially when compared to other states." *Mays v. LaRose*, 951 F.3d 775, 779–80 (6th Cir. 2020). Ohio's interest in this case also has nothing to do with any abstract concern about counting ballots received after Election Day. In fact, Ohio itself counts absentee ballots received within ten days of Election Day, as long as those ballots are postmarked by the day before Election Day. Ohio Rev. Code §3509.05(B)(1).

Ohio is interested in this case because reversal is crucial to protecting the Constitution's division of authority over state election laws. The United States Constitution says that "[e]ach State shall appoint" electors "in such Manner *as the Legislature thereof* may direct." Art. II, §1, cl.2 (emphasis added). The Pennsylvania legislature directed that electors for the 2020 election would be chosen through votes cast in person and by absentee ballot. But it expressly mandated that absentee ballots would count *only if* received by 8 p.m. on Election Day. Pet.App.16a (quoting 25 P.S. §3150.16(a)). Instead of respecting that decision, Pennsylvania's Supreme Court rewrote state law, ordering election officials to count ballots—including ballots with no postmarks or illegible postmarks—received within three days *after* Election Day.

---

*Ohio notified all parties, through the parties' attorneys, of its intent to file this *amicus* brief more than ten days before its November 25, 2020 due date. *See* Rule 37.2(a). Ohio is filing this brief pursuant to Rule 37.4.

Pet.App.80a. This judicial policymaking unconstitutionally intruded on the legislature's power to make election law. To ensure that other courts in future elections do not follow the lower court's lead, this Court must reverse.

The respondents and the commentariat will no doubt insist that the Court's involvement here would be unduly "political." No so. "[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution." *Scott v. Sandford*, 19 How. 393, 621 (1857) (Curtis, J., dissenting). Nowhere is it more important to adhere to the "fixed rules [that] govern the interpretation of laws" than in the context of a presidential election. *See id.* The results of such elections have profound effects and inspire passions on all sides. Those passions cool only to the extent the losers can accept the results as reflective of the People's will. That acceptance will never come unless this Court ensures that Pennsylvania counts votes in the manner that state law—and thus, the Constitution—requires.

REASONS FOR GRANTING THE PETITIONS

The Pennsylvania Supreme Court violated the Constitution when it extended the State's deadline for the receipt of absentee ballots in the 2020 general election. This Court should grant *certiorari* and make clear that, under Article II's Elections Clause, Art.II, §1, cl.2, state legislatures, not state courts, set the rules for picking presidential electors.

*

Reasonable minds can disagree about the merits of absentee voting. So too can they differ about the merits of the many deadlines that govern voting generally and absentee voting in particular. Thankfully, our forefathers left us with the best-available tool for resolving these disagreements: representative government. In all fifty States, voters elect legislators to make policy by enacting laws. And in all fifty States, these legislators are free to resolve these policy disputes as they see fit. The States thus serve as "laboratories for devising solutions to difficult" problems. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (quotations omitted). Some of those solutions catch on. Some do not. In either case, state lawmakers remain free to change course—and dissatisfied voters remain free to change lawmakers.

In the laboratory better known as Pennsylvania, state legislators experimented with a number of new policies that would govern the operation of the 2020 general election. In 2019, the legislature passed, and the governor signed, a law known as Act 77, which for the first time ever allowed no-fault absentee voting in the Keystone State. *See* Pet.App.6a. In "Act 77, the legislature permitted all voters to cast their ballots by

mail but unambiguously required that all mailed ballots be received by 8 p.m. on election day." *Republican Party of Pa. v. Boockvar*, 592 U.S. __, slip op. 1 (Oct. 28, 2020) (Statement of Alito, J.) (citing 2019 Pa. Leg. Serv. Act 2019–77). The law further "specified that if" the Election-Day deadline "was declared invalid, much of the rest of Act 77, including its liberalization of mail-in voting, would be void." *Id*. (citing Act 77, §11).

The Pennsylvania Supreme Court, however, concluded that Act 77 did not go far enough, at least in its application to this election. Given the difficulties associated with voting during a pandemic, the court concluded, ballots should be treated as timely if received within *three days after* Election Day. Pet.App.48a. The Court further determined that ballots received by this deadline would be presumed timely even if they contained no postmark or an illegible postmark. Pet.App.48a, n.26. The Pennsylvania Supreme Court "expressly acknowledged that the statutory provision mandating receipt by election day was unambiguous and that its abrogation of that rule was not based on an interpretation of the statute." *Republican Party of Pa.*, 592 U.S.__, slip op. 2 (Statement of Alito, J.). "It further conceded that the statutory deadline was constitutional on its face." *Id*. But the court changed the law anyway, claiming a "broad power to do what it thought was needed to respond to a 'natural disaster.'" *Id*. (quoting Pet.App.46a). The court "justified its decree as necessary to protect voters' rights under the Free and Equal Elections Clause" of the Pennsylvania Constitution. *Id*.

*

The Pennsylvania Supreme Court's ruling violates the United States Constitution. The Constitution generally leaves States free to arrange governmental authority within the State as they see fit. And in the kiln-run case, nothing would stop a state court from invalidating a state law under the State's constitution. But this is not a kiln-run case: this is a case about appointing electors for President of the United States. That context matters, because "state courts do not have a blank check to rewrite state election laws for federal elections." *Democratic Nat'l Comm. v. Wis. State Legis.*, 592 U.S. __, slip op. 9, n.1 (Oct. 26, 2020) (Kavanaugh, J., concurring). To the contrary, the Constitution "expressly provides that the rules for Presidential elections are established by the States "'in such Manner as the *Legislature* thereof may direct.'" *Id.* (quoting Art. II, §1, cl. 2). Properly understood, this means "that 'the clearly expressed intent of the legislature must prevail' and that a state court may not depart from the state election code enacted by the legislature." *Id.* (quoting *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring)); *see also McPherson* v. *Blacker*, 146 U. S. 1, 25 (1892). Here, there is no dispute that the Pennsylvania Supreme Court departed from the state election code—it expressly copped to doing so. Pet.App.43a. To let that ruling stand would be to "abdicate" this Court's "responsibility to enforce the explicit requirements of Article II." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

The petitioners and the other *amici* have made these arguments at length, and Ohio will not belabor them. It is, however, worth making two additional points.

First, even if the Pennsylvania Supreme Court did not violate Article II in rewriting Pennsylvania election law, it is important for this Court to say so. For one thing, the Court has never definitively answered the important question whether (or to what extent and on what basis) state courts may depart from state election codes. The States need an answer to that question, which is certain to arise again in future elections. And it is important to provide that answer now because, without a ruling from this Court, doubts will continue to linger about whether the vote count in Pennsylvania was performed in conformity with the Constitution. Elections stoke passions on all sides. Those passions can cool only when all sides are confident that the election was carried out pursuant to rules laid down in advance and followed throughout. This Court is the only one that can provide that assurance. Its failure to do so risks "cheat[ing] both sides, robbing the winners of" the pride that comes from an indisputably honest victory, "and the losers of the peace that comes from a fair defeat." *United States v. Windsor*, 570 U.S. 744, 802 (2013) (Scalia, J., dissenting).

Second, the Pennsylvania Supreme Court's ruling, if allowed to stand, will serve as a model for a form of adjudication that is bound to politicize state judiciaries. If this Court is unable or unwilling to enforce the Elections Clause, partisan litigants will constantly drag the state courts into election-law disputes, hoping to secure some advantage that they believe is beyond this Court's authority to check. This will transform the state courts into powerful tools for altering the results of presidential elections. Once state courts enter the "political thicket," *Colegrove v. Green*, 328 U.S. 549, 556 (1946), they will stay there. After all, if

state-court judges are destined to make the policies that determine elections, voters and their representatives will insist on having judges inclined to make whatever policies favor their preferred candidates. In so political a climate, it seems rather unlikely that every judge will continue "striving to be 'perfectly and completely independent, with nothing to influence or controul him but God and his conscience.'" *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 447 (2015) (quoting Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829-1830, p. 616 (1830)). To the contrary, politicized state courts will behave politically. And state courts charged with revising the rules of presidential elections will become irreparably politicized.

CONCLUSION

The Court should grant *certiorari* and reverse.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Amicus Curiae
the State of Ohio

NOVEMBER 2020