No. 20A71

In the Supreme Court of the United States

Patsy J. Wise, et al., *Applicants*,

v.

Damon Circosta, Chair of State Board of Elections, et al., *Respondents*

On Emergency Application for Writ of Injunction

Motion for Leave to File and Brief of Amicus True the Vote, Inc. Supporting Applicants and Writ

James Bopp, Jr.
Counsel of Record
jboppjr@aol.com
Richard E. Coleson
rcoleson@bopplaw.com
Courtney Turner Milbank
cmilbank@bopplaw.com
Angela Stuedemann
astuedemann@bopplaw.com
True the Vote, Inc., Voters' Rights Initiative
THE BOPP LAW FIRM, PC
1 South Sixth St.
Terre Haute, IN 47807-3510
Telephone: 812/232-2434
Counsel for Amicus

Motion for Leave to File[1]

True the Vote, Inc. ("TTV") respectfully moves for leave to file a short brief as amicus curiae in support of Applicants' Emergency Application for Writ of Injunction to stop the North Carolina Board of Election's extension of the deadline for receiving absentee ballots. Respondents and Intervenor-Respondents consented to, and Applicants indicated that they do not oppose, the filing of the enclosed amicus brief.

Amicus respectfully requests that the Court consider the arguments presented in the enclosed amicus brief in support of Applicants' application, No. 20A71. Should this Court consider the merits of the immediate action, the attached amicus brief would also be helpful to the Court.

The brief demonstrates that this case presents a unique opportunity to abate the chaotic flood of near-election litigation inundating this Court and our Republic. In doing so, Amicus suggest that this Court take the opportunity to provide guidance regarding the flawed constitutional analysis employed by lower courts struggling to deal with a flood of current and future near-election changes in election laws by state officials and courts.

Amicus further suggests that this litigation flood will continue to overwhelm the courts if this Court doesn't reaffirm that only legislatures have the authority and expertise to balance election access with election-integrity concerns, such as ballot

[1] No counsel for any party authored the following amicus brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to its preparation or submission.

fraud and a sudden flood of mailed ballots. And it asks that this Court reemphasize the primacy of long-standing legislative enactments and the role of the *Anderson-Burdick* test and the *Purcell* principle in protecting them and explain that near-election changes in state election laws by state officials or courts, overturning long-standing legislative enactments, does not benefit from these two doctrines. Doing so will reassert what the Constitution requires, abate the litigation flood, and restore confidence in elections.

Statement of Movant's Interest

TTV is one of the nation's largest election-integrity and voter-rights organizations, founded to inspire and equip citizen volunteers for involvement at every stage of our electoral process. By providing exclusive training courses, resources on election rules and laws, and access to a nationwide network of volunteers, TTV empowers organizations and individuals across the country to actively protect the rights of legitimate voters, regardless of their political-party affiliation. TTV's overarching mission is to ensure that every American vote counts and is counted.

As such, amicus is dedicated to ensuring that state election laws uphold the tenants of the U.S. Constitution, which guarantee every American's right to vote. It has engaged in numerous legal efforts to challenge state governments and election officials who have sought to change election rules in a manner that violates the will of state legislatures or usurps the rule of law. No election official should have the power to change election rules and procedures on a whim, yet such actions are occurring all across the country. Many are blatant violations of election code at worst

and at best, misguided, last-minute changes that are leading to widespread confusion among voters. Amicus is committed to bringing clarity and rule of law back to election processes in states across the country in order to ensure a free, fair, and secure election for all on November 3, 2020.

Statement Regarding Brief Form and Timing

Given the expected expedited briefing of Applicants' emergency writ application, Amicus respectfully requests leave to file the enclosed brief without 10 days' advance notice to the parties of intent to file. *See* Sup. Ct. R. 37.2(a).

Additionally, in consideration of the expected expedited briefing, Amicus respectfully requests leave to file the enclosed brief pursuant to the guidelines of Rule 33.2, including the reduced number of copies to be submitted, instead of the guidelines of Rule 33.1 as required by Rule 21.2(b).

The expected expedited briefing schedule justifies Amicus's request to file its brief without the 10 days' advance notice and pursuant to the guidelines of Rule 33.2.

Conclusion

The Court should grant amicus curiae leave to file the enclosed brief in support of Applicants' emergency application for a writ to stay the North Carolina Board of Election's extension of the deadline for receiving absentee ballots.

October 23, 2020

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
jboppjr@aol.com
Richard E. Coleson
rcoleson@bopplaw.com

Courtney Turner Milbank
cmilbank@bopplaw.com
Angela Stuedemann
astuedemann@bopplaw.com
True the Vote, Inc.
Voters' Rights Initiative
THE BOPP LAW FIRM, PC
1 South Sixth St.
Terre Haute, IN 47807-3510
Telephone: 812/232-2434
Counsel for Amicus

Table of Contents

Table of Authorities

Cases

Constitutions, Statutes, and Rules

Other Authorities

Interest of Amicus[2]

True the Vote, Inc. ("TTV") is one of the nation's largest election-integrity and voter-rights organizations, founded to inspire and equip citizen volunteers for involvement at every stage of our electoral process. By providing exclusive training courses, resources on election rules and laws, and access to a nationwide network of volunteers, TTV empowers organizations and individuals across the country to actively protect the rights of legitimate voters, regardless of their political-party affiliation. TTV's overarching mission is to ensure that every American vote counts and is counted.

As such, amicus is dedicated to ensuring that state election laws uphold the tenants of the U.S. Constitution, which guarantee every American's right to vote. TTV has engaged in numerous legal efforts to challenge state governments and election officials who have sought to change election rules in a manner that violates the will of state legislatures or usurps the rule of law. No election official should have the power to change election rules and procedures on a whim, yet such actions are occurring all across the country. Many are blatant violations of election code at worst and at best, misguided, last-minute changes that are leading to widespread confusion among voters. Amicus is committed to bringing clarity and rule of law back to election processes in states across the country in order to ensure a free, fair, and secure election for all on November 3, 2020.

[2] No counsel for any party authored the brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to its preparation or submission. Respondents and Intervenor-Respondents consented to, and Applicants indicated that they do not oppose, the filing of the enclosed amicus brief.

Introduction and Summary of the Argument

This case presents a unique opportunity to provide guidance regarding the flawed constitutional analysis employed by lower courts struggling to deal with a flood of current and future near-election changes in election laws by state officials and courts. To date, there have been 411 COVID-19-related, election-law cases. This chaotic flood arises primarily from failure to follow the mandate that *only legislatures* have the authority and expertise to "prescribe" the "Manner" of elections involving federal candidates. By providing guidance in this case as outlined next, this chaotic flood of litigation can be abated and order and the rule of law restored to our elections. *See* Part I.

Properly integrating the Elections Clause, *Anderson-Burdick* test, and *Purcell* principle to protect long-standing, authoritative, expert balancing of election access and integrity concerns resolves this case and abates the flood. *See* Part II.

The strong dissent by Judges Wilkinson and Agee below, joined by Judge Niemeyer, establishes the primacy of state legislature's authoritative, expert balancing of election access and integrity concerns. That authority cannot be usurped by other branches, and the legislature's actual statutory language is especially important given legislatures' independent authority. Emergency claims must be carefully analyzed to assure state legislatures are not stripped of constitutional authority. The long-standing legislative balancing is the status quo to be safeguarded, and the *Purcell* principle does not allow others to make near-election changes and claim those changes are the status quo and may not be altered. *See* Part II.

Amicus endorses the dissent's analysis. It further argues that the legislative balancing authoritatively and expertly establishes what is safe and dangerous for a particular state and election, so that allowing what the legislature barred creates as a matter of law a cognizable, substantial risk of the harm (e.g., vote fraud) that the legislature acted to avoid. Amicus further argues that *Anderson-Burdick* balancing and the *Purcell* principle must be interpreted to protect legislatures' long-standing, authoritative, expert balancing of election access and integrity concerns. *See* Part II.

Argument

I.

This case presents a unique opportunity to abate the chaotic flood of near-election litigation inundating this Court and our Republic.

This case presents a unique opportunity to provide guidance regarding the flawed constitutional analysis employed by lower courts struggling to deal with a flood of current and future near-election changes in election laws by state officials and courts. The Stanford-MIT Healthy Elections Project lists 411 (as of October 22, 2020) COVID-related cases. healthyelections-case-tracker.stanford.edu/cases. The central flaw is failure to follow the mandate that *only legislatures* have the authority and expertise to "prescribe" the "Manner" of elections involving federal candidates. U.S. Const. art. I, § 4, cl. 1 ("Elections Clause"). "[S]triking ... the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). The long-held expectation is that election-law changes must come from *legislatures* and *well before* elections, but of late, courts, governors, and election adminis-

trators have suspended state laws and, as a result, imposed new election laws close to elections. By providing guidance in this case as outlined next, the chaos of this flood of litigation can be abated and order and the rule of law restored to elections.

II.

Properly integrating the Elections Clause, *Anderson-Burdick* test, and *Purcell* principle resolves this case and abates the flood.

As outlined here, this case presents a unique opportunity to reemphasize the primacy of long-standing legislative enactments and the role of the *Anderson-Burdick* test, *Anderson v. United States*, 417 U.S. 211 (1974); *Burdick v. Takushi*, 504 U.S. 428 (1992), and the *Purcell* principle, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), in protecting them and to explain that near-election changes in state election laws by state officials or courts, overturning long-standing legislative enactments, does not benefit from these two doctrines. Doing so will reassert what the Constitution requires, abate the litigation flood, and restore confidence in elections.

Notably, the dissent authored by Judges Wilkinson and Agee below, joined by Judge Niemeyer, presents like arguments to those outlined below. *Wise v. Circosta*, No. 20-2104, slip op. at 21 (4th Cir. Oct. 20, 2020) (en banc).[3] For example, the Wilkinson-Agee opinion notes "the accelerating pace of pre-election litigation in this country, and all the damaging consequences ensuing therefrom." *Id.* at 21. It identifies the problem as "nonrepresentative entities changing election law immediately preceding or during an election" and "undo[ing] the work of the elected state legislatures, to which the Constitution clearly and explicitly delegates the power to [estab-

[3] Slip op. available at https://www.ca4.uscourts.gov/opinions/202104R1.P.pdf.

lish how elections must be conducted]." *Id.* at 21 (quoting U.S. Const. art. I, § 4, cl. 1). "This power is not given to the state courts, and it is not given to the states' executive branches." *Id.* at 36. "When the state legislatures exercise this power, they are exercising a federal constitutional power that cannot be usurped by other branches of state government." *Id.* at 37. So "'the text of [state] election law itself, and not just its interpretation by the courts of the State, takes on independent significance.'" *Id.* at 38 (quoting *Bush v. Gore*, 531 U.S. 98, 112-113 (2000) (Rehnquist, C.J., concurring)). Claims of emergency delegated power may be reviewed for credibility under state law because "[i]f non-representative state officials can disregard a clear mandate from the state legislature merely by *claiming* state-law authority, . . . state officials will be able to strip the state legislatures of their federal constitutional power whenever they disagree with legislative priorities." *Id.* at 42 (emphasis in original). "The status quo is the election law enacted by the [relevant legislature]." *Id.* at 22. The *Purcell* principle should not allow state officials or courts to make near-election changes and then claim what they have done is the status quo and may not be altered. *Id.* at 22; *see also id.* at 34 ("*Purcell* . . . operates to bar the Board from changing the rules at the last minute through a state-court consent decree."); *id.* at 44-45 (not applying *Purcell* to return to the legislative status quo, "incentivizes an avalanche of partisan and destabilizing litigation against election rules enacted by state legislatures."). "Only by repairing to state legislative intent can we extricate ourselves from this debilitating condition. The statutes of state legislatures are our sole North Star." *Id.* Ami-

cus endorses that analysis and adds the following supplemental arguments.

A. The Elections Clause requires that the "Manner" of an election be "prescribed by the Legislature."

The Elections Clause mandates that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." U.S. Const. art. I, § 4, cl. 1.[4] That applies to the November 3 general election, as does the similar Electors Clause, Art. II, § 1, cl. 2, which also entrusts the electors' election to the manner determine by the legislature.[5]

An underlying reason why the Elections Clause authorizes legislatures to prescribe election procedures is that legislatures have the expertise to balance election access with integrity issues, along with the cost of elections given available resources. The U.S. Constitution thus "confers on states broad authority to regulate the conduct of elections, including federal ones." *Griffin*, 385 F.3d at 1130 (citing U.S. Const. art I, § 4, cl.1). "[S]triking . . . the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment . . . ." *Id.* at 1131 (emphasis added).

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[4] The "Manner" encompasses "supervision of voting, protection of voters, prevention of fraud and corrupt practices . . . ." *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (citation omitted).

[5] The Elections Clause provides a cause of action (asserted under 42 U.S.C. § 1983) because this Court has twice recognized that a candidate's claim under the parallel Electors Clause, Art. II, § 1, cl. 2, is a cognizable issue. *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 72 (2000) (granted certiorari on Electors Clause claim); *Bush v. Gore*, 531 U.S. at 103 (same). In *Bush v. Gore*, three Justices would have reached the Electors Clause issue as "additional grounds." *Id.* at 111(Rehnquist, C.J,, joined by Scalia and Thomas, JJ.) ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."). So more than legislatures may raise this issue.

So for example, regarding mail-in ballots that are frequently at issue in these cases, "states that have more liberal provisions for absentee voting may well have different political cultures . . . . One size does not fit all." *Id.* There is no right to vote by mail and mailed ballots pose special fraud risks, so only the legislature has been given the authority to design voting procedures because it is equipped to balance election access and integrity issues, including in the mail-balloting context. *Id.* at 1130-31. The legislative balancing, taking into account all the factors of access and integrity, may be illustrated as follows:

Safe Zone • what is permitted	*Danger Zone* • what is banned

Protect Access ***Legislative Balance*** ↑(safe point) *Protect Integrity*

A key factor in this legislative balancing is vote fraud, which poses two serious problems. First, it violates the right to vote of legitimate voters by diluting their votes. "[T]he Constitution of the United States protects the right of all qualified citizens to vote" and have that vote counted, *Reynolds v. Sims*, 377 U.S. 533, 554 (1964), which right "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," *id.* at 555. Second, "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust in government"—"confidence in the integrity of our electoral processes is essential top the functioning of our participatory democracy," *Purcell*, 549 U.S. at 1, 4.

As a matter of law, a substantial risk of vote fraud connected to mailed ballots is not speculative. It is well established as a cognizable harm, along with the related

needs to protect election integrity and safeguard voter confidence. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 192-97 (2008) (citing and relying on (inter alia) the Report of "the Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James A. Baker III"); *see also Griffin*, 385 U.S. at 1130-31 (absentee ballots require the legislature to balance to limit risk). "As Justice Stevens noted, 'the risk of voter fraud' is 'real.'" *Texas Democratic Party v. Abbott*, 961 F.3d 389, 413 (5th Cir. 2020) (Ho, J., concurring) (quoting *Crawford*, 553 U.S. at 196 (plurality op. of Stevens, J.). According to the bipartisan Carter-Baker Report, mailed ballots are "the largest source of potential voter fraud" and "likely to increase the risk of fraud and contested elections." *Building Confidence in U.S. Elections* 35, 46 (Sept. 2005) (at bit.ly/3dXH7rU). Legislatures may also employ prophylactic laws to eliminate potential harms that they find require such protection, *see, e.g.*, *Crawford*, 553 U.S. at 196; *Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976).

Once the legislature performs its authoritative, expert balancing, it has as a matter of law established what is safe and what is dangerous in a particular state for a particular election. Consequently, allowing what the legislature banned (as too dangerous to allow) *inherently* and *automatically* imposes on voters and the election a substantial risk of the harm that the legislature found unacceptable. That harm need not be proven because the legislature already established it as a matter of law based on its authoritative, expert balancing. So in litigation it must be taken as a given, not subject to a proof requirement.

A legislature's authoritative, expert balancing cannot be gainsaid based on what other states do because only *this* state's legislature has authority to balance and to mandate what is needed in *this* state. "[S]tates that have more liberal positions ... may well have different political cultures . . . cultures less hospitable to election fraud." *Griffin*, 385 F.3d at 1131. So "[o]ne size need not fit all." *Id.*

Nor can a legislature's authoritative, expert balancing be gainsaid on the notion that a particular safeguard isn't needed because a legislature provided others. The legislature thought they *all* were required in its balancing. So, for example, as *Griffin* and *Crawford*, 553 U.S. at 193-96, recognized, there is a known greater integrity risk with mailed ballots, so legislatures control mailed-ballot access based on perceived risk to confine the risk to a level it finds acceptable, given the resources it has. Maintaining the legislative balance is vital because "confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy" and "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell*, 549 U.S. at 4.

In sum, the primacy of, and deference to, legislative balancing is fully justified and enshrined in the Elections Clause. The Constitution mandates respect for legislative balancing because (i) only legislatures have expertise for it, (ii) election integrity requires it, and (iii) harm and a litigation flood flow from not protecting it.

B. The *Anderson-Burdick* test and the *Purcell* principle protect long-standing legislatively adopted state election laws.

Because of the Elections Clause's mandate giving primacy to legislative enactment of state election laws, this Court has the *Anderson-Burdick* test, *Anderson*,

417 U.S. 211; *Burdick*, 504 U.S. 428, and the *Purcell* principle, 549 U.S. 1, to *protect* the legislative balancing in those laws.

Burdick, 504 U.S. 428, is used to evaluate "state election law[s]," *id.* at 434, and is relatively deferential to duly enacted state election laws, as evidenced in its application to upholding voter ID laws in *Crawford*, 553 U.S. 181. However, it is inappropriate to use the *Anderson-Burdick* test when state officials or state courts displace a legislature's balancing. Such displacement should be presumed unconstitutional, not deferred to as under *Anderson-Burdick*, and any claimed authority (such as emergency authority) by state officials to act on the legislature's behalf should be rejected if the authority is used to displace legislative enactments and create new election law.

Purcell, 549 U.S. 1, was designed to also protect long-standing state election laws adopted by legislatures from being displaced by court orders near an election. But the *Purcell* principle does not protect state officials or state courts from upsetting "long-established expectations that might have unintended consequences," *Lair v. Bullock*, 697 F.3d 1200, 1212-14 (9th Cir. 2012), near elections. *Purcell* favors maintaining long-established expectations arising from long-standing state election laws to prevent "voter confusion and consequent incentive to remain away from the polls," *Purcell*, 549 U.S. at 4-5, if the long-established expectations are upset near an election.

A recent Eleventh Circuit opinion in *The New Georgia Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588 (11th Cir. Oct. 2, 2020), illustrates some of the

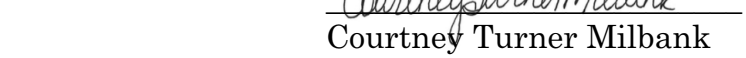
foregoing in rejecting a lower-court extension of the absentee-ballot deadline. It said "the district court misapplied the *Anderson-Burdick* framework when it enjoined the State defendants' enforcement of a *long-standing* Georgia absentee ballot deadline," *id.* at *1 (emphasis added), and the Eleventh Circuit's stay put the "decades-old" law back into force. *Id.* at *2. And where there is no emergency because voters have other options, the Eleventh Circuit decided that the statutory "deadline does not implicate the right to vote at all," because voters had many other options to get their vote counted. *Id.* It then applied *Purcell* in support of that long-standing statutory deadline. *Id.* at *3-4.

Conclusion

Because "a State legislature's decision either to keep or to make changes to election rules to address COVID-19 ordinarily "should not be subject to second-guessing by [an election board that] lacks the background, competence, and expertise to assess public health," *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring) (citation omitted), the Court should issue the requested relief.

October 23, 2020

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
jboppjr@aol.com
Richard E. Coleson
rcoleson@bopplaw.com

Courtney Turner Milbank
cmilbank@bopplaw.com
Angela Stuedemann
astuedemann@bopplaw.com
True the Vote, Inc., Voters' Rights Initiative
THE BOPP LAW FIRM, PC
1 South Sixth St.
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Telephone: 812/232-2434
Counsel for Amicus