

No. 20-599

In the Supreme Court of the United States

HIRSH SINGH,
Petitioner,

v.

PHIL MURPHY, GOVERNOR OF NEW JERSEY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether the Elections Clause of the U.S. Constitution prohibits the Governor of a State from exercising the authority the Legislature has delegated him to adjust state elections procedures.

II. Whether state mail-in voting procedures violate the federal Freedom of Information Act.

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INTRODUCTION

On July 7, 2020, the State of New Jersey conducted its Primary Election for a range of federal and state offices, including for the U.S. Senate. Petitioner Hirsh Singh participated as one of the candidates in the Republican primary for U.S. Senate and ultimately came up short. On September 14, 2020, over two months after the July 7 Primary Election, Petitioner claimed for the first time that the vote-by-mail procedures governing the Primary Election were established in violation of the Elections Clause. Even though ballots for the General Election had already been distributed, Petitioner demanded that the Primary Election be thrown out, or that he be declared its winner. The State's intermediate appellate court unanimously rejected his claims in an unpublished decision, relying both on the merits and on equitable grounds, and the New Jersey Supreme Court denied certification.

On November 3, 2020, New Jersey (like every other State in the Nation) held its General Election, during which approximately 4.5 million New Jersey residents cast votes for candidates for U.S. Senate. The deadline for filing contests to General Election results passed on December 5, 2020, and results were certified on December 7, 2020. See N.J. Stat. Ann. §§ 19:29-3, 19:21-1; N.J. Exec. Order 177 (Aug. 14, 2020). The winner was sworn in to the U.S. Senate on January 3, 2021. Yet Petitioner continues to claim the results of the *Primary Election* must be thrown out. The upshot of a ruling for Petitioner would require New Jersey to hold a new Primary Election, followed by a new General Election, months after the date set by federal law and months after the winner took his oath of office.

Whatever this Court believes about the proper operation of the Elections Clause, this is not an appropriate vehicle in which to address it. Notably, as the court below found, equitable considerations bar state courts (and would bar this Court) from granting relief, whatever the merits of the claim. And Petitioner has no one to blame but himself for that. Rather than challenge the vote-by-mail procedures when they were announced, Petitioner engaged in a form of heads-I-win-tails-you-lose gamesmanship: seek to prevail in a Primary Election and throw it out if he falls short. This Court has declined to address legal questions relating to an election as voting grows near; that need is substantially greater seven months *after* a primary, when the General Election has been consummated and the victor has been sworn in. And if no relief can be provided, then a request for certiorari lacks merit.

In any event, the decision below does not merit certiorari on its own terms. For one, the decision below has no implications beyond the current dispute: New Jersey rules confirm that unpublished decisions of the intermediate state appellate court carry no dispositive weight beyond the cases they resolve. For another, the state court correctly held as a matter of New Jersey law that the Governor adopted these vote-by-mail procedures based upon authority delegated to him by the Legislature, and that this fact disposes of Petitioner's Elections Clause claim. Finally, the court found evidence of legislative acquiescence to vote-by-mail rules that further undermines Petitioner's argument.

This Court has previously grappled with questions regarding the scope of the Elections Clause. But this is a uniquely poor vehicle in which to address them.

STATEMENT OF THE CASE

1. COVID-19 is a highly contagious, deadly disease that has claimed the lives of over 400,000 Americans, including over 18,000 New Jersey residents. As this crisis began to unfold, on March 9, 2020, Governor Murphy invoked the statutory powers vested in him by the New Jersey Legislature under the Civilian Defense and Disaster Control Act (“CDDCA”), N.J. Stat. Ann. App. § A:9-30 to -63, and the Emergency Health Powers Act (“EHPA”), N.J. Stat. Ann. §§ 26:13-1 to -31, to declare both a State of Emergency and a Public Health Emergency. See N.J. Exec. Order 103 (Mar. 9, 2020). As the virus continued to spread, the Governor declared that a Public Health Emergency continues to exist every thirty days, as required by state law.

Some of the Governor’s emergency measures related to the fact that this unprecedented health emergency unfolded contemporaneously with local, state, and federal elections. On April 8, 2020, Governor Murphy issued Executive Order 120, which moved the Primary Election date from June 2, 2020 to July 7, 2020. See N.J. Exec. Order 120 (Apr. 8, 2020). Thereafter, on May 15, 2020, the Governor issued Executive Order 144 (“EO 144”), which ordered the July 7, 2020 Primary Election be conducted primarily using mail-in ballots. See N.J. Exec. Order 144 ¶ 1 (May 15, 2020). EO 144 noted that the State was making such changes to ensure that voters, candidates, parties, and election officials could safely participate in the election while protecting New Jersey residents from the dangers associated with COVID-19. *Id.* at ¶2. No party filed a challenge to EO 144 prior to July 7, 2020, and the election proceeded primarily by mail. App. 2, at 40.

In the Primary Election, Hirsh Singh sought the Republican Party's nomination for U.S. Senate. See *Official Primary Election Results*, N.J. Div. of Elections (Aug. 26, 2020).¹ Singh finished second, receiving 146,139 votes, while Rikin Mehta received a total of 154,866 votes. *Id.* On September 1, 2020, after losing the Primary Election, Singh filed an election contest to contest the results, but he did not challenge the use of vote-by-mail procedures. See App. 2, at 9.

2. On September 14, 2020, Petitioner amended his challenge, for the first time arguing that EO 144 was invalid under the Elections Clause. *Id.* at 10. In response, on September 30, 2020, the trial court transferred the matter to the Superior Court, Appellate Division (the State's intermediate appellate court) under New Jersey Court Rule 2:2-3(a)(2), which vests jurisdiction in the appellate court to hear challenges to final agency actions, including to the Governor's Executive Orders. See App. 2, at 11.

On October 21, 2020, the Appellate Division unanimously rejected Petitioner's request that the results of the Primary Election be set aside. *Id.* at 3-5. In an unpublished decision, the court held that in expanding the use of vote-by-mail procedures for the Primary Election, the New Jersey Governor had properly exercised the authority delegated to him by the New Jersey Legislature under two emergency statutes. *Id.* at 21-25. It followed, the panel explained, that the vote-by-mail procedures were consistent with the Elections Clause too. *Id.* at 17-21. Further, the court went on,

¹ <https://www.state.nj.us/state/elections/assets/pdf/election-results/2020/2020-official-primary-results-us-senate-amended-0826.pdf>

“subsequent events are indicative of an arguable legislative ratification of, or acquiescence to, the health and safety measures undertaken in Executive Order 144.” *Id.* at 28. In fact, a subsequent New Jersey statute likewise “established ... vote-by-mail procedures for the 2020 general election,” and that law “appears to have implicitly ratified the outcomes of the July 7 primary election and, also by implication, the validity of the modified election procedures that were used.” *Id.* at 29. Contemporaneous legislative materials even “expressly reference[d]” EO 144 with approval. *Id.*

The court also explained that beyond the flaws in Petitioner’s merits arguments, Petitioner could “not demonstrate[] a right to the extraordinary and summary injunctive relief he seeks” based upon the equitable factors New Jersey courts use in assessing preliminary relief. See *id.* at 4 (citing *Crowe v. De Gioia*, 447 A.2d 173 (N.J. 1982)). The court found that Petitioner failed to show “alteration of the present status quo is equitably warranted, or that the public interest favors nullification of the statewide primary results and the immediate cessation of the ongoing vote-by-mail processes for the general election.” *Id.* at 4-5.

The court provided detailed reasoning behind its equitable conclusions. While the court found it “need not” determine whether Petitioner’s Elections Clause claim was formally foreclosed by laches or equitable estoppel, see *id.* at 40, Petitioner’s “inaction before the primary took place surely affects the comparative equities.” *Id.* at 40-41. As it laid out, Petitioner “took advantage of the extended opportunity to campaign and attract voters for the primary election and did not attempt to halt the process. It was only after he was not victorious in the primary that he went to court and

argued that Executive Order 144 is unconstitutional.” *Id.* at 41. Indeed, Petitioner “knew weeks before the July primary what Executive Order 144 said, and that it was allowing citizens to vote by mail without an advance request for a ballot. ... There was no need to wait for the election to occur in order to bring a challenge to the procedures.” *Id.* at 41 n.11.

In short, the Appellate Division concluded, just as the “other candidates for the Senate and the House of Representatives, as well as other offices, had their status as nominees (or, as the case may be, defeated candidates) determined,” *id.* at 41, the same was true for Petitioner. See *id.* (adding “there is a wealth of federal precedent that weighs heavily against entertaining on-the-brink challenges to the voting procedures of upcoming elections,” and finding this approach must hold even more strongly in the context of an election that has been consummated).²

Petitioner then applied to the New Jersey Supreme Court to have this matter heard on an emergency basis, but the Court denied his request and rejected his underlying petition for certification. See App. 1.

² Separately, the court also dismissed Petitioner’s Freedom of Information Act (FOIA) claim for lack of jurisdiction. *Id.* at 5. Although Petitioner alleged that New Jersey’s mail-in law violated FOIA, and “that the United States Postal Service has failed to produce records relating to the election that he has requested,” *id.* at 33, the court explained that “State courts do not have jurisdiction over a FOIA claim.” Instead, 5 U.S.C. § 552(a)(4)(B) clarifies that such claims must be filed in federal district court. See App. 2, at 34. In short, Petitioner’s “FOIA claims against the United States Postal Service or any other federal agency must be brought in federal court, should he choose to pursue them.” *Id.*

3. The State proceeded to conduct its General Election. On August 14, 2020, the New Jersey Governor issued Executive Order 177, which clarified that the General Election would likewise take place primarily using vote-by-mail procedures. See N.J. Exec. Order 177 at 4-5 (finding changes needed to ensure “public participation in the democratic process, particularly among elderly and immune-compromised voters”).

Unlike for the Primary Election, however, one candidate did file challenge Executive Order 177 on Elections Clause grounds before the election. See Complt., *Donald J. Trump for President, Inc. v. Murphy*, No. 20-10753 (D.N.J.) (Aug. 18, 2020). But just nine days later, the New Jersey Legislature codified the actions that the Governor had taken in establishing the vote-by-mail election, which rendered the Elections Clause claim moot. See N.J. Stat. Ann. §19:63-31.

New Jersey then conducted the November 3, 2020 General Election, as part of which approximately 4.5 million New Jersey residents cast their votes for candidates for U.S. Senate. The deadline for filing election contests to the General Election results passed on December 5, 2020, and results were certified on December 7, 2020. See N.J. Stat. Ann. §§ 19:29-3, 19:21-1; N.J. Exec. Order 177. The incumbent, Cory Booker, prevailed in the election, receiving 2,541,178 votes to Rikin Mehta’s 1,817,052. See *Official General Election Results*, N.J. Div. of Elections, (Dec. 7, 2020).³ The winner was sworn in on January 3, 2021.

³ <https://nj.gov/state/elections/assets/pdf/election-results/2020/2020-official-general-results-us-senate.pdf>

REASONS FOR DENYING THE PETITION

Although the instant Petition presents a question regarding the meaning of the Elections Clause, certiorari must be denied because antecedent vehicle problems preclude this Court from addressing that question here. Most importantly, in the decision below, the intermediate appellate state court not only denied Petitioner's Elections Clause claim on the merits but also held that equitable factors prevented him from obtaining relief. That is fatal to this Petition in two ways: it provides an adequate and independent state law basis for the decision below, and in any event, would similarly require this Court to deny Petitioner relief whatever the merits of his claims. In short, Petitioner only challenged the procedures for the election after it took place, and his request would require New Jersey to hold a new Primary Election *and* a new General Election—even as the date for the General Election under U.S. law already passed, and even though the victor took his seat in the Senate weeks ago. Since this Court cannot grant Petitioner relief regardless of the merits, certiorari is patently inappropriate.

Nor is that the only reason certiorari should be denied. For one, the decision below is an unpublished decision by an intermediate appellate court that will not dispose of any future cases. For another, the decision correctly rejected the Elections Clause challenge given the Legislature's delegation of authority to the Governor. And finally, the court's identification of evidence that the Legislature ratified or acquiesced to vote-by-mail procedures makes this an especially poor case in which to address Elections Clause questions.

I. Equitable Considerations Render This An Inappropriate Vehicle For Addressing The Question Presented.

Although Petitioner presents this as a straightforward Elections Clause case, he overlooks vehicle problems that preclude review. Most importantly, equitable factors independently bar Petitioner from obtaining relief, whatever the merits of his claim. That inability to grant relief renders the Petition meritless.

Begin with the state court's extensive discussion of these equitable considerations. The decision below explained that pursuant to "well settled principles under New Jersey civil law," five factors dictate whether the state courts may grant preliminary and/or permanent injunctive relief in any case. *Id.* at 36. The five factors include a claimant's likelihood of success on the merits; whether the right underlying the claim is well-settled; whether a claimant will suffer irreparable harm; the relative hardship to the parties; and the public interest. See *id.* As the court found, the hardships and public interest "manifestly tip against granting the extraordinary measures [Petitioner] seeks," considerations distinct from the merits of his claim. *Id.*

The court's reasoning, as recounted above, begins with the fact that Petitioner strategically but inappropriately filed a late claim. The Governor established vote-by-mail rules for the Primary Election on May 15, 2020, 53 days before the election. Petitioner knew of this order, as it governed an election in which he was a candidate. See App. 2, at 40 (agreeing "candidates such as [Petitioner], were on notice as of May 15 when [EO] 144 was issued" but "no one ... filed suit to enjoin that process before the primary election took place"). Petitioner could have filed his suit then. *Id.* at 41 n.11.

Instead, Petitioner did not challenge the vote-by-mail procedures until two months after he lost—122 days after the Executive Order. See *id.* at 41 (“[Singh] took advantage of the extended opportunity to campaign and attract voters for the primary election and did not attempt to halt the process. It was only after he was not victorious in the primary that he went to court and argued that [EO] 144 is unconstitutional.”).

As the decision below found, the prejudice from Petitioner’s delay in seeking to invalidate the rules governing an election also cannot be overstated. Even by October 21, 2020, when the state court ruled, the prejudice was apparent. For one, “[t]he voters and other candidates who participated in that primary election had a right to expect that the votes would be counted and that the results would be certified and used in the general election.” *Id.* at 40. For another, the General Election had been “underway for many weeks”; “over a million New Jersey voters ha[d] already marked and mailed in their ballots”; and “[d]isrupting that process now would inevitably cause widespread upheaval and potential voter disenfranchisement.” *Id.* Finally, as the State noted, it would be literally impossible for the State to hold another Primary Election, re-print General Election ballots, mail them to all voters, and allow votes to be cast by the deadlines set by U.S. and state law. See 2 U.S.C. §§ 1, 7 (establishing the date for the U.S. Senate election as November 3, 2020, which was just thirteen days away); 52 U.S.C. § 20302(a)(8) (requiring state officials to send “validly requested absentee ballot to an absent uniformed services voter or overseas voter ... not later than 45 days before the election”); N.J. Stat. Ann. § 19:63-9 (requiring voters be mailed ballots by October 5, 2020).

Those equitable considerations preclude review for two reasons: they provide an adequate and independent state law ground on which the state court decision rests, and in any event, the same considerations likewise prevent this Court from fashioning relief for Petitioner regardless of the merits. First, these equitable findings supply an independent state law ground that bars certiorari. Longstanding doctrine confirms that whether an individual is barred from relief based on the lateness of his claim is a matter of state law. See, e.g., *Wood v. Chesborough*, 228 U.S. 672, 677 (1913) (dismissing appeal for want of jurisdiction because decision below relied on laches, which did not “present[] a Federal question”); *Preston v. Chicago*, 226 U.S. 447, 450 (1913) (holding state court’s laches ruling “would be sufficient to prevent [the Court] from reviewing the alleged Federal question”).

The same is true here. Though the state court did not make a formal finding of laches or estoppel, it explicitly made that choice only because equitable considerations applicable to injunction requests already disposed of the suit. See App. 2, at 40-41 (noting that “inaction before the primary took place surely affects the comparative equities,” and discussing the equities); *id.* at 41 n.11 (finding that “[e]ven if plaintiff’s complaint is not time barred or estopped, its timing bears upon the balancing of *Crowe* factors for obtaining injunctive relief,” referring to the seminal New Jersey case establishing criteria for injunctive relief).⁴

⁴ There is also little doubt that, had the equitable factors not sufficed, laches would formally foreclose the suit. See, e.g., *Two Guys from Harrison, Inc. v. Furman*, 160 A.2d 265, 283 (N.J. 1960) (rejecting claim filed after election concluded on basis that “the objection comes too late. The time to protest is before the election, and not, as here, after the event.”); *Knorr v. Smeal*, 836

Since equitable considerations bar relief under state law—an analysis that does not turn on the merits of the federal constitutional claim—certiorari is improper.

Second, even if these considerations do not qualify as an adequate state ground, they preclude review because this Court would similarly be unable to fashion relief for Petitioner. Even more so than on October 21, 2020, when the state court ruled, granting injunctive relief to Petitioner today would be impossible and unprecedented. Petitioner does not shy away from the relief he is demanding: an order that New Jersey hold a new Primary Election for the U.S. Senate seat,⁵ print and distribute General Election ballots, hold an additional General Election, and then swear in the winner of *that* election to represent New Jersey in the U.S. Senate. But Petitioner does not explain how any of his demands could comport with laws governing the dates for the General Election. See *supra* at 10 (quoting 2

A.2d 794, 800 (N.J. 2003) (explaining that in New Jersey courts, laches “is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party”).

⁵ Petitioner expresses a desire either for relief that mandates a new Primary Election or that outright declares him the winner of the July 7, 2020 Primary Election (on the basis that Petitioner won a greater share of the in-person votes in the Republican Primary). But courts do not simply throw out ballots by voters cast in reasonable reliance on the voting rules in effect. See *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020) (requiring State to count ballots cast in reliance on a district court’s order, even though Court later invalidated the order). That is especially so where, as here, New Jersey’s rules had not even been challenged at the time of the election.

U.S.C. §§ 1, 7, 52 U.S.C. § 20302(a)(8)). The requested injunction is, quite simply, impossible to grant.

Even were such relief *possible*, it would still create so much prejudice as to be transparently inappropriate. This Court has repeatedly held that courts should reject claims filed on the eve of an election for fear of the confusion and disruption they may cause. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections ... can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”); *Democratic Nat’l Comm. v. Wis. State Legislature*, No. 20A66, 2020 WL 6275871, at *3 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring) (finding “federal courts ordinarily should not alter state election laws in the period close to an election,” and citing repeated instances in which this Court applied the so-called *Purcell* Principle in 2020 alone).

The logic of *Purcell* applies even more strongly to a lawsuit initially filed *after* an election took place, let alone where granting relief would require the invalidation of two elections after the victor has been sworn in. That is why courts have consistently rejected post hoc challenges to voting procedures. See, e.g., *Perry v. Judd*, 471 F. App’x 219 (CA4 2012); *Nader v. Keith*, 385 F.3d 729, 736-37 (CA7 2004); cf. *Andino*, 2020 WL 5887393, at *1. Said another way, if voters and state elections officials must have certainty in an election, see, e.g., *Wis. State Legislature*, 2020 WL 6275871, at *3 (Kavanaugh, J., concurring), then suits challenging elections procedures after an election has taken place must be dismissed out of hand. That is why Petitioner

cannot identify examples of this Court taking such action, and there are none.⁶

This Court does not sit to hear academic questions regarding the Elections Clause. Because equitable factors foreclose relief whatever the merits of Petitioner's claim, this Petition must be denied.

II. This Case Does Not Otherwise Merit Certiorari.

Beyond the vehicle problems that preclude certiorari, the Petition should be denied. That is so for three reasons: the decision has no dispositive impact on any future case; it accurately resolved the merits; and it identified evidence of legislative ratification that complicates review of this Elections Clause question.

1. As a threshold matter, the instant Petition seeks review of an unpublished intermediate appellate state court opinion that will have no dispositive impact on any future case. See App. 2. Indeed, under New Jersey Court Rule 1:36-3, “no unpublished opinion shall constitute precedent or be binding upon any court.” See N.J. Ct. R. 1:36-3. And with few exceptions, the strict state rules says “no unpublished opinion shall be cited by any court.” *Id.* The limited impact of this decision—

⁶ Post-election Elections Clause suits are especially inappropriate because they do not put the Legislature on notice of the alleged need for ratification. This case is a perfect example. In the General Election, the Governor again expanded use of vote-by-mail via an Executive Order. After a candidate timely filed an Elections Clause claim, the Legislature immediately ratified the vote-by-mail procedures the Governor had established. See N.J. Stat. Ann. § 19:63-31. It stands to reason that the Legislature could have done the same had a challenge been timely filed to the Primary Election. By filing his claim after losing his election, Petitioner deprived the Legislature of that notice.

which does not stop the New Jersey Supreme Court, New Jersey lower courts, U.S. District Court for the District of New Jersey, or Third Circuit from taking a different approach in the future—plainly undermines the need for this Court to grant certiorari.

2. In any event, the decision correctly resolved the case. The Elections Clause provides that the “Times, Places and Manner of holding Elections ... shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of choosing Senators.” U.S. Const., art. I, § 4, cl. 1. Petitioner claims that use of “Legislature” prevents the Governor from having a role in establishing election procedures, even during an emergency. But as the court found below, that view is contrary to the text, “history and purpose of the [Elections] Clause,” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 813 (2015) (“*AIRC*”), as well as a consistent body of this Court’s precedent. The claim is especially weak in this case, where the State found the Governor acted with power squarely delegated to him.

As this Court has explained, founding-era dictionaries broadly “define the word ‘legislature’” to mean the lawmaking power and not a particular body. *Id.* at 813-14 (collecting dictionary definitions that Legislature means the “Authority of making Laws, or power which makes them”). Indeed, “[t]he dominant purpose” of the Clause “was to empower Congress to override state election rules, not to restrict” how the States legislate. *Id.* at 814-15. There is “no suggestion” in the Clause “of an attempt to endow the Legislature of the state with power to enact laws in any manner other

than that which the Constitution of the state has provided that laws shall be enacted.” *Smiley v. Holm*, 285 U.S. 355, 368 (1932). Simply, the purpose of the Elections Clause was to delineate the role of state governments in elections, not to decide which branches in the state government enjoyed what authority.

In accordance with this reasoning, the Court consistently has held that the term “Legislature” as used in the Elections Clause cannot and does “not mean the representative body alone.” *AIRC*, 576 U.S. at 805. Instead, it refers to the State’s legislative power, “performed in accordance with the State’s prescriptions for lawmaking.” *Id.* at 808. That can include the State’s decision to adopt laws by referendum or to give a Governor a role to play in state elections laws (such as via the veto power), among other examples. After all, this Court’s cases confirm, because “the [Elections] Clause surely was not adopted to diminish a State’s authority to determine its own lawmaking process,” *id.* at 824, the State retains its usual sovereign authority to determine, in a manner permitted by the state constitution, who may craft election procedures.

This case provides an especially compelling example. Here, a state court found as a matter of state law that the Governor was not abrogating the New Jersey Legislature’s elections statutes but instead using the authority it had delegated him. See App. 2, at 21-25. As the court explained, the Legislature in two statutes empowered the Governor to take whatever steps were needed to protect public health in an emergency, and “the measures undertaken to reduce in-person contact at the polls are aimed at promoting the health and safety of voters and poll workers in the midst of a deadly pandemic that still has yet to be contained.” *Id.*

at 25. Moreover, under black letter principles of New Jersey law, if the Governor “acts pursuant to an express or implied authorization from the Legislature ... he exercises not only his own powers but those of the Legislature” as well. *Id.* at 23. Said another way, to rule against New Jersey, this Court would have to find not only that the Elections Clause prohibits governors from abrogating any state statutes, but that governors cannot even exercise the discretion their legislatures gave them as a matter of state statutory law. That is not, and has never been, the law.

3. Finally, review of the Elections Clause question here is complicated by the state court’s discussion of implicit legislative ratification of the vote-by-mail procedures. Although not necessary to its ultimate holding, the court did note that “subsequent events are indicative of an arguable legislative ratification of, or acquiescence to, the health and safety measures undertaken in Executive Order 144.” *Id.* at 28.

The court identified two sources of evidence for this conclusion. First, the New Jersey Legislature adopted a statute establishing similar vote-by-mail procedures for the 2020 General Election, and that statute refers to the results of the Primary Election, which “appears to have implicitly ratified the outcomes of the July 7 primary election and, also by implication, the validity of the modified election procedures that were used in that election.” *Id.* at 29. Second, the legislative materials put together in conjunction with that legislation “expressly reference[]” EO 144, and note that their requirements “coincide with those of” that order. *Id.*; see also *id.* at 30 (explaining that in New Jersey, legislative history materials bear on legislative intent). Sep-

arately, the court added, it was notable that “the Legislature has not brought suit or moved to intervene in this litigation.” *Id.* at 30-31. Taken together, the court treated this all as “an indication that the Legislature itself evidently has not concluded that its institutional lawmaking powers were usurped.” *Id.* at 30.

While the intermediate state appellate court found that it “need not and do[es] not” rely on ratification to uphold EO 144, *id.*, this discussion nevertheless adds to the myriad ways in which this case is a poor vehicle for review. If this Court wishes to take up the question whether the Elections Clause requires all changes to state elections procedures to come from the legislative branch, it should not do so where a state court has already identified evidence of legislative ratification to the procedures being challenged.⁷

⁷ Petitioner’s request for certiorari to address his FOIA claim is meritless. The court below did not pass on the merits of Petitioner’s FOIA claim; instead, it simply (and correctly) dismissed for lack of jurisdiction on the bases that Petitioner had not named any federal agency as a defendant and that “State courts do not have jurisdiction over a FOIA claim.” *Id.* at 34.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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