No. 20-845

In the Supreme Court of the United States

DONALD J. TRUMP FOR PRESIDENT, INC.,

Petitioner,

v.

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

Respondents.

ON PETITION FOR WRITS OF *CERTIORARI*
TO THE
SUPREME COURT OF PENNSYLVANIA

AMICUS CURIAE BRIEF OF TODD C. BANK

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

Amicus curiae, Todd C. Bank ("Bank"), is a citizen of the United States of America. Bank submits the instant brief in support of Petitioners.[1]

Supreme Court Rule 37.2(a) states: "An *amicus curiae* filing a brief . . . shall ensure that the counsel of record for all parties receive notice of [the *amicus curiae*'s] intention to file [the] brief at least 10 days prior to the [brief's] due date . . ., *unless* the *amicus curiae* brief is filed earlier than 10 days before the due date." S. Ct. 37.2(a) (emphasis added). Because the instant brief is being filed "at least 10 days prior to the due date," *id.*, Bank was not required to "ensure that the counsel of record for all parties receive notice of [Bank's] intention to file [his] . . . brief." *Id.*

Supreme Court Rule 37.2(a) also states: "The *amicus curiae* brief shall indicate that *counsel of record received timely notice* of the intent to file the [*amicus curiae*] brief . . . *and* shall *specify whether consent was granted*." *Id.* (emphases added). As it appears that the clause "and shall specify whether consent was granted" is dependent upon the applicability of the preceding clause, and as Bank was not required to provide timely notice to counsel of record, Bank was thereby not required to "specify whether consent was granted." *Id.*

Supreme Court Rule 37.2(b) states: "When a party to the case has *withheld consent*, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a . . . petition for an extraordinary writ . . . [must] be presented to the Court." S. Ct. 37.2(b) (emphasis added). The common understanding of the word

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[1] No counsel for any party authored the instant brief in whole or in part, and neither any party nor any party's counsel made a monetary contribution to fund the preparation or submission of the instant brief. Bank declines to state whether any other person made such a monetary contribution, as non-disclosure of such information is protected by the First Amendment of the Constitution.

"withhold" is to decline to provide, upon a request, something that the recipient of the request could have provided. However, Bank, as set forth above, was not required to "specify whether consent was granted," S. Ct. R. 37.2(a), and, therefore, was implicitly, yet obviously, not required to request consent. Accordingly, Bank did not request consent from any of the parties, whom, as a result, were not in a position to withhold consent. As none of the parties withheld consent, and as only the withholding of consent invokes the requirement to make "a motion for leave to file an *amicus curiae* brief," S. Ct. R. 37.2(b), Bank was not required to make such motion.

SUMMARY OF THE ARGUMENT

A state court, in changing the meaning of laws enacted pursuant to Article II, § 1, cl. 2, of the United States Constitution (the "Electors Clause"), *itself* violates the Electors Clause. Therefore, this Court, in assessing whether the Supreme Court of Pennsylvania, in purporting to *interpret* Pennsylvania laws that had been enacted pursuant to the Electors Clause, *changed the meaning* of those laws and thereby violated that clause, may not apply any deference to the purported interpretations of the Supreme Court of Pennsylvania, but must, instead, perform a genuinely independent review of those interpretations.

ARGUMENT

THE QUESTION OF WHETHER THE SUPREME COURT OF PENNSYLVANIA VIOLATED THE ELECTORS CLAUSE IS GOVERNED BY INDEPENDENT, NOT DEFERENTIAL, REVIEW

In *Bush v. Gore*, 531 U.S. 98 (2000), this Court's three-Justice concurrence stated:

> In most cases, comity and respect for federalism compel us to *defer to the decisions of state courts on issues of state*

> *law*. That practice reflects our understanding that the decisions of state courts are *definitive pronouncements of the will of the States as sovereigns*. *Cf. Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Of course, in *ordinary* cases, the *distribution of powers among the branches of a State's government* raises *no questions of federal constitutional law*, subject to the requirement that the government be republican in character. *See* U.S. Const., Art. IV, § 4. But there are *a few exceptional cases* in which the Constitution imposes a duty or confers a power on a *particular branch of a State's government*.

Id. at 112 (emphases added) (Rehnquist, *C.J.*, conc.). Regarding one of the issues in *Bush*, *i.e.*, "whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5," *id.* at 103, the concurrence explained:

> This is one of . . . [the] *exceptional cases* in which the Constitution imposes a duty or confers a power on a *particular branch of a State's government*. . . . Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, *the text of the election law itself*, and *not just its interpretation by the courts of the States*, takes on *independent significance*.

Id. at 112-113 (emphases added) (Rehnquist, *C.J.*, conc.). Accordingly, the concurrence noted, "[i]n *McPherson v. Blacker*, 146 U.S. 1 (1892), [the Court] explained that Art. II, § 1, cl. 2, 'convey[s] the *broadest power of determination*' and 'leaves it to the legislature *exclusively* to define the method' of appointment." *Id.* at 113 (emphases added) (Rehnquist, *C.J.*, conc.), quoting *McPherson*, 146 U.S. at 27. Therefore, "[a] significant departure from the legislative scheme for appointing Presidential electors presents a *federal constitutional question*." *Id.* (emphasis added) (Rehnquist, *C.J.*,

conc.).

As the concurrence further explained regarding a state court's interpretation of state laws that are enacted pursuant to the Electors Clause, "[i]solated sections of [a state's] code [regarding the appointment of Presidential electors] may well admit of more than one interpretation, but the general coherence of the legislative scheme *may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies*." *Id.* at 114 (emphasis added) (Rehnquist, *C.J.*, conc.). Therefore, "with respect to a Presidential election, the [Supreme] [C]ourt must be both mindful of *the legislature's role under* [*the Electors Clause*] *in choosing the manner of appointing* [*Presidential*] *electors* and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate." *Id.* (emphasis added) (Rehnquist, *C.J.*, conc.). The concurrence concluded as follows:

> In order to determine whether a state court has infringed upon the legislature's authority [under the Electors Clause], we necessarily must examine the law of the State as it existed *prior to the action of the* [*state*] *court*. Though we *generally* defer to state courts on the interpretation of state law[,] there are of course areas in which the Constitution requires this Court to undertake an *independent, if still deferential*, analysis of state law.

Id. (emphases added; citation omitted) (Rehnquist, *C.J.*, conc.). Chief Justice Marshall further explained as follows with respect to the obligation of federal courts to defer to state courts' interpretation of state law:

> This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognised, that *the judicial*

> *department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government*. Thus, no Court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the Courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into *a tribunal which should correct such misunderstanding*. We receive the construction given by the Courts of the nation as *the true sense of the law*, and feel ourselves no more at liberty to depart from *that construction*[] than to depart from *the words of the statute*. On this principle, the construction given by *this Court* to the *constitution and* [*federal*] *laws* . . . is received by all as the *true construction*; and on the *same principle*, the construction given by the Courts of the several *States* to the *legislative acts of those States*, is received as *true*, ***unless they come in conflict with the constitution, laws, or treaties of the United States***.

Elmendorf v. Taylor, 23 U.S. 152, 159-160 (1825) (emphases added).

A more recent exposition is as follows:

> A state acts no less in its *sovereign capacity* when its *highest court* interprets a state statute as when its *legislature* enacts one. *Cf. Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (the "law of the state" is the law "declared by its *Legislature* in a statute *or by its highest court in a decision*"). Thus, to say that a state's highest court has no right to speak authoritatively on its state's [statutes] runs afoul of "the preeminent purpose of state sovereign immunity[,] [which] is to accord States the dignity that is consistent with their status as sovereign entities." *See Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002). Moreover, "[i]t would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *See Stringer v. Black*, 503 U.S. 222, 235 (1992). That a state's highest court is the final arbiter of a state statute is *a* fundamental tenet of federalism . . ., *see Elmendorf* [], 23 U.S. [at] 159 [], and yet thriving, *see Johnson [v. Fankell*,] 520 U.S. [911] at 916 [(1997)].

Lee-Thomas v. Prince George's County Pub. Schs., 666 F. 3d 244, 252, n.8 (4th Cir. 2012) (emphases added). Where a state court, particularly a state's *highest* court, has

provided an interpretation of a state law that, in the view of a federal court, has rendered that law un-Constitutional, the duty of a federal court in confronting that law is not to make it Constitutional by giving it a different interpretation, but, rather, to accept the state court's interpretation as if it were part of the text of the law itself and thereupon rule that the law is un-Constitutional. It is in this sense that "the construction given by the Courts of the several States to the legislative acts of those States, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States." *Elmendorf*, 23 U.S. at 160. *See also Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 154-155 (1896) ("[i]f the act of the state legislature *as construed by its highest court* conflicts with the *federal constitution*, or with any valid act of congress, it is the duty of the [federal] circuit court and of this court to *so decide*, and to thus *enforce the provisions of the federal constitution*." (emphases added)); *Morehead v. People of State of New York ex rel. Tipald*, 298 U.S. 587 (1936) (holding a state statue un-Constitutional, *see id.* at 618, and explaining: "[t]his court is *without power* to put a different construction upon [a] state enactment from that adopted by the highest court of the state. We are not at liberty to consider [an] argument based on [a] construction repudiated by that court. The meaning of [a] statute *as fixed by its decision must be accepted* here *as if the meaning had been specifically expressed in the enactment*," *id.* at 609 (emphasis added)); *Chicago, M., St. P. & P.R. Co. v. Risty*, 276 U.S. 567 (1928) (addressing (and rejecting) Constitutional challenge to state statues, *see id.* at 573-575, and stating that, "[t]h[e] construction of the [challenged] state statutes by the highest court of the state we, of course, accept," *id.* at 571).

If, with respect to a state law that was enacted pursuant to the Electors Clause,

the state's highest court were to interpret such law as having a meaning that violated a provision of the Constitution *other than* the Electors Clause, a federal court would be bound to accept, that is, defer to, that interpretation, but, upon doing do, would be equally obligated to hold the law un-Constitutional whether the state court had: (i) so held, (ii) held that the law is Constitutional, or (iii) made no ruling on the law's Constitutionality. That is because a federal court, although not permitted to change the meaning that a state supreme court gives to state law, is obligated to make an *independent judgment* of whether the law, *in light of that meaning*, is Constitutional, for, as "[t]h[e] Constitution . . . [is] the supreme Law of the Land," U.S. Const., Art. VI, cl. 2 (the "Supremacy Clause"), a law that abides by the Constitution *must* be held to be Constitutional, and a law that does not so abide must be held to be un-Constitutional. Thus, were a court, whether federal or state, to give deference to *another* court's ruling on the Constitutionality of a law (whether the law is state or federal), the former court would thereby have treated the *latter* court, instead of the Constitution *itself*, as controlling the question of the law's Constitutionality. That is not only a violation of the Supremacy Clause, but also of the next provision of the Constitution, which states: "all . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to *support this Constitution*." U.S. Const., Art. VI, cl. 3 (emphasis added).

The Petition states that the Supreme Court of Pennsylvania: (i) "ratif[ied] [Secretary of State Kathy Boockvar's] decision to dispense with the signature verification requirements," Pet. at 7; (ii) "declared *sua sponte* that . . . statutory provisions allowing for the challenge of non-conforming absentee ballots . . . were also

of no effect," *id.* at 8; (iii) "held that mere presence at one end of a 'room' as large as the Philadelphia Convention Center[,] . . . even when that resulted in the statutorily-authorized observers being as far as 100 feet away from some of the canvassing tables[,] . . . was sufficient [because] . . . the requirements of state law mandating that campaign representatives be allowed 'to be present' and 'to remain in the room' during the canvassing process – 25 P.S. §§ 3146.8(b), 3146.8(g)(1.1) – did not actually require 'meaningful' observation," *id.* at 10; and (iv) "determined that the statutory requirement that mail voters '*shall* then fill out, date, and sign' the declaration on the outer envelope, 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added), was not mandatory." *Id.* at 11.

Insofar as the Petition argues that the Supreme Court of Pennsylvania, in purporting to *interpret* Pennsylvania law, instead *changed the meaning* of that law, and thereby violated the Electors Clause, the question before this Court is only whether the Pennsylvania court violated that clause, not whether the court's purported interpretations are *substantively* Constitutional; that is, not whether the laws, as the court purportedly interpreted them, violate a provision of the Constitution *other than* the Electors Clause. Because the Electors Clause prohibits *all* non-legislative persons from making changes to laws that had been enacted pursuant to that clause, the *type* of person that makes such changes, *i.e.*, a court, secretary of state, local election official, etc., is irrelevant, and any such changes are *ultra vires* by definition.

Because the Supreme Court of Pennsylvania, like any other non-legislative person, violates the Electors Clause by changing laws that were enacted pursuant to that clause, the deference that a federal court ordinarily gives to a state court's, or any

other non-legislative person's, interpretation of state law is inapplicable. Of course, the question of whether a state court, or any other non-legislative person, violated the Electors Clause by changing a law that had been enacted pursuant to that clause is a *purely legal question*; and, "[t]raditionally, decisions on questions of *law* are reviewable *de novo*," *Highmark Inc. v. Allcare Health Mgmt. System, Inc.*, 572 U.S. 559, 563 (2014) (emphasis added; citation and quotation marks omitted), meaning that "the deference 'due' is *no* deference." *Buford v. United States*, 532 U.S. 59, 64 (2001) (emphasis added).

Perhaps unsurprisingly, neither of the two cases that the *Bush* concurrence cited as ones "in which the Constitution require[d] this Court to undertake an *independent, if still deferential*, analysis of state law," *Bush*, 531 U.S. at 114 (emphasis added) (Rehnquist, *C.J.*, conc.), *i.e.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Bouie v. City of Columbia*, 378 U.S. 347 (1964), *see Bush*, 531 U.S. at 114-115 (Rehnquist, *C.J.*, conc.), had given any indication of according any deference to the state courts whose rulings were at issue. The same is true of a third case that the concurrence cited, *i.e.*, *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1813), which the concurrence addressed as follows: "[i]n one of our oldest cases, we similarly made an *independent* evaluation of state law in order to protect federal treaty guarantees. In *Fairfax's Devisee* [], we disagreed with the Supreme Court of Appeals of Virginia that a 1782 state law had extinguished the property interests of one Denny Fairfax, so that a 1789 ejectment order against Fairfax supported by a 1785 state law did not constitute a future confiscation under the 1783 peace treaty with Great Britain." *Bush*, 531 U.S. at 115, n.1 (Rehnquist, *C.J.*, conc.), citing *Fairfax's Devisee*, 11 U.S. at 623.

The notion of "an independent, if still deferential, analysis of state law," *Bush*, 531 U.S. at 114 (Rehnquist, *C.J.*, conc.), in addition to being self-contradictory, is, for the reasons set forth above, inapplicable to this Court's assessment of whether the Supreme Court of Pennsylvania violated the Electors Clause; again, *de novo* review, *i.e.*, *genuinely independent* review, must be performed. Thus, the word "definitive" in the following quotation from the *Bush* concurrence should have been "any": "[t]o attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of [the Electors Clause]." *Id.* at 115 (Rehnquist, *C.J.*, conc.). Likewise, the *Bush* concurrence's statement that, with respect to the meaning of a law enacted pursuant to the Electors Clause, "the text of the election law itself, and *not just its interpretation by the courts of the States*, takes on independent significance," *id.* at 113 (Rehnquist, *C.J.*, conc.) (emphasis added), is erroneous, as *only* "the text of the election law itself" is relevant to the meaning of the law when determining whether a state court has violated the Electors Clause. Indeed, this Court would *assist* the Supreme Court of Pennsylvania in violating the Electors Clause, and thus *itself* violate that clause, if it were to: (i) find, based on a genuinely independent analysis, that the Supreme Court of Pennsylvania changed the meaning of the state laws at issue, but (ii) rule, based upon 'deference," that the Supreme Court of Pennsylvania did *not* change that meaning and therefore did not violate the Electors Clause.

CONCLUSION

The question of whether the Supreme Court of Pennsylvania violated the Electors Clause is governed by independent, not deferential, review.

December 28, 2020

Respectfully submitted,

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