No. 20-882

In the Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

JOSEPH R. BIDEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE
SUPREME COURT OF WISCONSIN

AMICUS CURIAE BRIEF OF TODD C. BANK

TODD C. BANK
TODD C. BANK,
ATTORNEY AT LAW, P.C.
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125
tbank@toddbanklaw.com

Counsel to Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

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

---

[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

The Constitution authorizes state legislatures to determine the manner in which their states appoint Presidential electors. *See* U.S. Const., Art. II, § 1, cl. 2 (the "Electors Clause"). Accordingly, if the Supreme Court of Wisconsin changed the meaning of any Wisconsin law that had been enacted pursuant to the Electors Clause, that court would thereby *itself* have violated the Constitution. Therefore, this Court, which ordinarily gives deference to a state court's interpretation of state law, must instead engage in a genuinely independent review of whether the Supreme Court of Wisconsin changed the meaning of any Wisconsin law that had been enacted pursuant to the Electors Clause.

ARGUMENT

THIS COURT MUST ENGAGE IN INDEPENDENT, NOT DEFERENTIAL, REVIEW OF WHETHER THE SUPREME COURT OF WISCONSIN VIOLATED THE ELECTORS CLAUSE

This Court's three-Justice concurrence in *Bush v. Gore*, 531 U.S. 98 (2000), 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 [the Electors Clause]," *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. . . . [The Electors Clause] 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.).

The Electors Clause "'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 v. Blacker*, 146 U.S. 1, 27 (1892). Therefore, "[a] significant departure from the legislative scheme for appointing Presidential electors presents a *federal constitutional question*." *Id.* (emphasis added) (Rehnquist, *C.J.*, conc.).

The concurrence further explained:

> In Florida, the legislature has chosen to hold statewide elections to appoint the State's 25 electors. Importantly, the legislature has delegated the authority to run the elections [of Presidential electors] and to oversee election disputes to the [Florida] Secretary of State [], and to state circuit courts. Isolated sections of [the state's] code [regarding 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; citations omitted) (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.).

With respect to a state court's interpretation of a state law that was *not* enacted pursuant to the Electors Clause, this Court owes deference to that interpretation; and, upon deferring to it, this Court is obligated to make an *independent judgment* of whether the law, *in light of that interpretation,* is Constitutional, and is obligated to do so whether or not the state court had addressed the question of Constitutionality. That is because "[t]h[e] Constitution . . . [is] the supreme Law of the Land," U.S. Const., Art. VI, cl. 2 (the "Supremacy Clause"), such that a law that abides by the Constitution *must* be treated as Constitutional, and a law that does not so abide must be treated as un-Constitutional. Consistent with the significance of the Supremacy Clause is 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).

Because a state legislature, when enacting laws concerning the appointment of Presidential electors, does so pursuant *not* to the authority of its *state*, but, instead, the authority that the **Constitution**, *i.e.*, the Electors Clause, grants to state legislatures to enact such laws, "the decisions of state courts," *Bush*, 531 U.S. at 112 (Rehnquist, *C.J.*, conc.), with respect to the meaning of those laws, are *not* "definitive pronouncements of the will of the States as sovereigns." *Id.* (Rehnquist, *C.J.*, conc.). Accordingly, a court, like any other non-legislative person, that prevents the operation of such laws *itself* violates the Constitution, *i.e.*, the Constitutional right of the legislature to exercise "plenary . . . power to select the manner for appointing [Presidential] electors." *Id.* at 104, citing *McPherson*, 146 U.S. at 35. Thus, to the

extent, if any, that Petitioners were entitled to any of the relief they requested as a result of violations of a Wisconsin law that had been enacted pursuant to the Electors Clause, the denial of that entitlement by the Supreme Court of Wisconsin *ipso facto* altered that law and thereby violated the Constitution, *i.e.*, the Electors Clause. Because the Petition raises the question of whether the Supreme Court of Wisconsin *itself* violated the Constitution, deference has no place in this Court's addressing of that question. In addition, the question of whether a state court, or any other non-legislative person, violated the Electors Clause by effecting a change to 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) (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.), gave 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), in which "[this Court] similarly made an *independent* evaluation of state law in order to protect federal treaty guarantees." *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 (emphasis added) (Rehnquist, *C.J.*, conc.), is not only inapplicable to this Court's assessment of whether the Supreme Court of Wisconsin violated the Electors Clause, but also self-contradictory; again, this Court must engage in *de novo*, *i.e.*, *genuinely independent,* review. 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 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. Indeed, this Court would *assist* the Supreme Court of Wisconsin 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 Wisconsin altered Wisconsin law that had been enacted pursuant to the Electors Clause, but (ii) rule, upon applying "deference" of any degree, that the Supreme Court of Wisconsin did *not* do so and therefore did not violate the Electors Clause.

CONCLUSION

This Court must engage in independent, not deferential, review of the merits of the Petition.

January 4, 2021

Respectfully submitted,

s/ *Todd C. Bank*

TODD C. BANK
TODD C. BANK,
ATTORNEY AT LAW, P.C.
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125
tbank@toddbanklaw.com

Counsel to Amicus Curiae