NO. 20-

IN THE
SUPREME COURT OF THE UNITED STATES

KELLI WARD,
Petitioner,
v.

CONSTANCE JACKSON, FELICIA ROTELLINI; FRED YAMASHITA; JAMES MCLAUGHLIN; JONATHAN NEZ; LUIS ALBERTO HEREDIA; NED NORRIS; REGINA ROMERO; SANDRA D. KENNEDY; STEPHEN ROE LEWIS; AND STEVE GALLARDO,
Respondents;

KATIE HOBBS, IN HER OFFICIAL CAPACITY AS THE ARIZONA SECRETARY OF STATE; ADRIAN FONTES, IN HIS OFFICIAL CAPACITY AS THE MARICOPA COUNTY RECORDER; AND CLINT HICKMAN, JACK SELLERS, STEVE CHUCRI, BILL GATES, AND STEVE GALLARDO, IN THEIR OFFICIAL CAPACITIES AS THE MARICOPA COUNTY BOARD OF SUPERVISORS,
Intervenors.

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

PETITION FOR WRIT OF CERTIORARI

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December 11, 2020

QUESTIONS PRESENTED

I. Does the Electoral Count Act (inclusive of 3 U.S.C. § 5, the "safe harbor" statute) impose unconstitutional deadlines on state courts' final determination of disputes over presidential electors?

II. Was Petitioner denied due process under the Fourteenth Amendment, where because of the "deadlines" found in the Electoral Count Act (inclusive of 3 U.S.C. §§ 5, 7), the trial court allowed only two days to discover and inspect the ballots in a presidential-electors race in which over three million votes were cast?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in Maricopa County Superior Court and the Arizona Supreme Court:

1. Plaintiff/Contestant Kelli Ward
2. Defendants/Contestees Constance Jackson, Felicia Rotellini; Fred Yamashita; James Mclaughlin; Jonathan Nez; Luis Alberto Heredia; Ned Norris; Regina Romero; Sandra D. Kennedy; Stephen Roe Lewis; and Steve Gallardo;
3. Intervenors Katie Hobbs, in her official capacity as the Arizona Secretary of State; Adrian Fontes, in his official capacity as the Maricopa County Recorder; and Clint Hickman, Jack Sellers, Steve Chucri, Bill Gates, and Steve Gallardo, in their official capacities as the Maricopa County Board of Supervisors.

LIST OF ALL PROCEEDINGS

The following is a list of all proceedings in state and federal trial and appellate courts that are directly related to the case in this Court:

1. The underlying trial court proceedings in this matter were styled *Kelli Ward v. Constance Jackson, et al.*, Maricopa County Superior Court Case No. CV2020-015285. The trial court entered judgment on December 4, 2020 (Appendix "B"). That judgment was appealed directly to the Arizona Supreme Court, which accepted jurisdiction on December 7th, and assigned the matter case number CV-20-0343-AP/EL. The decision of the Arizona Supreme Court was filed on December 8th, 2020 (Appendix "A"), from which Petitioner appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Kelli Ward ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court. Because this matter involves dates and deadlines for the appointment of electors for this presidential election, expedited consideration is requested.

OPINIONS BELOW

The opinion of the Arizona Supreme Court is included in the Appendix at Exhibit "A." The judgment of the trial court is included at Exhibit "B."

STATEMENT OF JURISDICTION

The Arizona Supreme Court filed its decision on December 8th, 2020, and jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257. Pursuant to Supreme Court Rule 29(4)(b), 28 U. S. C. §2403(a) may apply and therefore a copy if the Petition is being served on the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws…."

U.S. Const. art. I, § 4, cl. 1 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, 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 chusing Senators."

U.S. Const. art. II, § 1, cl. 2 provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

U.S. Const. art. II, § 1, cl. 3 provides: "The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States,

directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President."

U.S. Const. art. II, § 1, cl. 4 provides: "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."

3 U.S.C.A. § 5 provides: "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determina-

tion shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."

3 U.S.C.A. § 7 provides: "The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct."

The text of 3 U.S.C.A. § 15 is set out in the appendix at Exhibit C.

STATEMENT OF THE CASE

Due process requires at a minimum the "orderly judicial review of any disputed matters that might arise" in an election. *Bush v. Gore*, 531 U.S. 98, 110 (2000). In this case, the lower courts allowed only two full days of inspection and discovery into the validity of the presidential election in Arizona, in which three million, three hundred thirty-three thousand, eight hundred twenty-nine (3,333,829) ballots were cast. The lower court held an "accelerated evidentiary hearing" due to what it perceived as deadlines in the Electoral Count Act, "[i]n order to permit this matter to be heard and appealed (if necessary) to the Arizona Supreme Court before the Electoral College meets on December 14, 2020." (Exhibit "A," Judgment.) As the Court stated to undersigned counsel at the initial hearing

Nov. 30th hearing: "You may be right on the law, that we've got more time than I think we have, but I'm reluctant to take that chance. And certainly if I set an evidentiary hearing after the 14th of December, I would expect someone to special action me to the Supreme Court and have the Supreme Court tell me, no, we have to do it sooner. But by then they don't move as quickly as we do and we've lost a few days. And so my inclination is to set it on Thursday [December 3rd]…." (See Appendix "F," transcript of initial Nov. 30th hearing, p. 14, lines 16-23.) As a result, even a very limited inspection of twenty-five hundred ballots that was granted by the Court (and/or stipulated to by the parties) simply could not be finished in time for trial, and Petitioner's requests for larger inspections (as detailed below) were denied.

REASONS FOR GRANTING THE WRIT

"The fundamental requisite of due process of law is the opportunity to be heard" in a "meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)(quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The hearing must be "appropriate to the nature of the case" and "the importance of the interests involved." *Id.*; *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). "In short, within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Id.* (internal quotation marks omitted). Where the State courts make a final determination of an action without affording the parties a proper opportunity to present evidence, they violate the due process clause in the Fourteenth Amendment. *See Saunders v. Shaw*, 244 U.S. 317, 318

(1917)(resolution of a case by a state supreme court without a proper opportunity to present evidence was a violation of due process).

Petitioner raised her federal due-process concerns both in the trial court[1] and again at the Arizona Supreme Court.[2] The related federal issues of the validity and effect of the Electoral Count Act dates were also raised in both courts below.[3]

In this case, the question presented to the Court is whether the Electoral Count Act imposes constitutional "deadlines" or limitations on the authority of state courts to decide presidential-elector litigation. If it does, then the trial court admittedly had no choice but to set a quick trial date and to severely limit discovery, in order to comply with the December 14th and/or December 8th dates. But if imposing the Electoral Count Act "deadlines" on state courts' final determination of presidential-elector disputes is unconstitutional, then Petitioner's due process rights were violated when the lower court allowed only two days for discovery into over three million ballots, given the crucial importance of ensuring that every legal vote is counted, that presidential-elector litigation is justly determined, and that the public holds confidence in the *bona fide* winner.[4]

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[1] Appendix "D," Petitioner's "Motion to Compel, or Motion for Continued Inspection" filed on December 2, 2020, page 5.

[2] Appendix "E," Petitioner's "Opening Brief" filed with the Arizona Supreme Court on December 7, 2020, page 2.

[3] See Appendix D, pages 3-4; Appendix E, pages 1 – 9.

[4] *See Bush*, 531 U.S. at 127 (Stevens, J., dissenting).

1. Factual/Procedural Background

Petitioner brought an action contesting the result of Arizona's presidential election on the first possible day under Arizona law (and in fact earlier), which was November 30th.[5] Petitioner requested to inspect the ballots pursuant to state law, A.R.S. § 16-677. However, the Court set a trial date within only two full days of the action being filed, citing the dates given by federal law for a "safe harbor" and/or the date for the electors to "meet and give…votes" found at 3 U.S.C. §§ 5, 7. As a result, even the limited inspection that was granted by the trial court (and/or stipulated to by the parties) could not be finished before trial.

In the limited inspection that was conducted (a sampling of one hundred, and then an additional one thousand five hundred twenty-five ballots), Petitioner was able to prove that candidate Trump received at least hundreds more votes in Maricopa County than candidate Biden as the result of uncounted or even "flipped" votes; and that the ratio of uncounted votes for Trump to uncounted votes for Biden

[5] Under Arizona law, the first possible day to file an elections contest was November 30th. *See* A.R.S. § 16-672. However in an effort to "start early," Petitioner filed a Verified Petition for Rule 27 Discovery (to obtain and preserve evidence) on November 24th, 2020. Due to the holidays, a hearing on the Rule 27 Petition was not set until November 30th anyway, on which date Petitioner filed an Amended Complaint to "convert" the Rule 27 Petition into a formal statutory elections contest. The record reflects Petitioners have been more than diligent in pursuing discovery to the extent not unconstitutionally curtailed by the Electoral Count Act.

was eight to one.[6] Based on these rates of error, Petitioner sought to expand discovery into all of the kinds of ballots that had proven to be a source of error,[7] county-wide and statewide—likely over four hundred fifty thousand ballots statewide, and potentially enough to change the outcome of the election. However, at that point the trial date was up; and the trial court declined to stay the trial due to the federal "deadlines." As a result, and with only the limited "hard" evidence that a mere two days of discovery could turn up (a few hundred miscounted/flipped votes against candidate Trump), the lower court simply affirmed the election.

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[6] On Monday December 7th, the trial court allowed a sample of 100 "duplicate" ballots, which was conducted on Tuesday, December 8th. Of the initial sample of 100, two (2) were found to have been miscounted to Trump's prejudice, and none to Biden's prejudice (with one vote being erroneously "flipped" from Trump to Biden, and the other simply uncounted). This was a two percent (2%) error in the sample.

On December 9th, the county agreed in open court to sample an additional 2,500 "duplicate" ballots; and 1,525 were sampled that same day. Of the 1,525 ballots that were sampled that day, seven were found to have been erroneously counted – with five to the prejudice of Trump, and two to the prejudice of Biden. This brought the total rate of error to just over half a percentile (0.5%) – which is still a material rate of error, given that the candidates' total vote counts were less than half a percentile apart (0.3%).

A quick note on the numbers: the ratio of errors to the prejudice of Trump vs. errors to the prejudice of Biden would at first appear to be 7 to 2 (or 3.5 to 1); but since one of the uncounted votes for Trump was actually "flipped" to Biden, then the rate of "prejudice" is actually eight to one (8 to 1), based on this sample. Finally, the total number of "duplicated" ballots in Maricopa County appears to be around 27,859 – and so based on these samples, at least several hundred votes for Trump went uncounted or were "flipped" to Biden (in just the "duplicated" ballots in Maricopa county alone).

[7] Petitioner sought discovery into both "duplicated" ballots, as well as "adjudicated" ballots—both of which the discovery and trial testimony had shown were subject to substantial rates of "human error" of between two percent (2%) and half a percentile (0.5%). Given that the race was less than half a percentile apart statewide, and that there were approximately 450,000 duplicated or adjudicated ballots in the State, these rates are significant.

2. The Electoral Count Act imposes unconstitutional "deadlines" on the authority of state courts to decide presidential-elector litigation.

The States and their courts possess a plenary power to decide the timing of presidential-elector disputes, into which Congress may not intrude. Pursuant to U.S. Const., Art. II, § 1, cl. 2 (hereinafter referred to as the "Presidential Electors Clause"), the State possesses a "plenary power…in the matter of the appointment of electors." *McPherson v. Blacker*, 146 U.S. 1, 7, 10 (1892). Specifically, the Presidential Electors Clause reads: "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," the electors for President. The language in the Presidential Electors Clause is markedly different from the kind of language used to describe States' authority to hold Congressional elections in Article I, Section 4 (hereinafter referred to as the "Congressional Elections Clause"). That clause reads: "The Times, Places and Manner of holding Elections for Senators and Representatives, 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 chusing Senators*." (Emphasis added.) The latter language ("Congress may at any time by Law make or alter such Regulations…") does not appear in the Presidential Electors Clause; and the omission of this kind of broad language must be seen as deliberate. *See e.g. National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458 (1974)(discussing the "ancient maxim" of "expressio unius est exclusio alterius" and the principles of construction that are derived from it); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929)(when the law

"limits a thing to be done in a particular mode, it includes the negative of any other mode"). Further, the Tenth Amendment expressly provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"—effectively codifying the principle of *expressio unius* with respect to States' powers. *Cf. U.S. Term Limits v. Thornton*, 514 U.S. 779, 870 (1995) (Thomas, J. dissenting) (citing *Nevada v. Hall*, 440 U.S. 410, 425 (1979) for the "suggest[ion] that in light of the Tenth Amendment and the Constitution's express prohibitions on the States, "caution should be exercised before concluding that unstated limitations on state power were intended by the Framers"). Therefore, the Court should strictly scrutinize any intrusion by Congress into the States' authority to appoint electors, and construe any Congressional powers very narrowly.

The only powers that Congress appears to have with respect to the appointment of presidential electors are specified in Article II, Section 1, clause 4 (hereinafter referred to as the "Elector Dates Clause"), which provides that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." The issue therefore becomes whether applying the "deadlines" given in the Electoral Count Act to state-court litigation is consistent with this very limited grant of constitutional authority to Congress, in light of the narrow construction that it deserves. *See Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (citing U.S. Const. art. II, § 1; U.S. Const. amend. XII) (describing these delegations as "[t]he *only* rights and duties,

expressly vested by the constitution in the national government, with regard to the appointment or the votes of presidential electors . . . . ") (emphasis added).

For some historical background: the Electoral Count Act of 1887 was enacted "after the close 1876 Hayes–Tilden Presidential election." *Bush*, 531 U.S. at 153–54. During Congressional debate over the proposed Act, an objection was voiced to whether the law was constitutional. *See* Eric Schickler et. al., *Safe at Any Speed: Legislative Intent, the Electoral Count Act of 1887, and Bush v. Gore*, 16 J.L. & Pol. 717 (2000); 18 Cong. Rec.46. Specifically, it was argued that the "safe harbor" date was an unconstitutional interference with the States' "complete control" of the selection of presidential electors. *Id.* A member of the eventual voting majority in the House of Representatives in favor of the Act, Representative Caldwell of Tennessee, did little to assuage these fears, arguing that the two Houses of Congress had broader powers with respect to the appointment of electors and that their powers were "not ministerially merely, not as witnesses, [c]apable of nothing but inexplicable dumb show and noise…" 18 Cong. Rec. 31. Caldwell also acknowledged the Act's potential to put pressure on States, conceding that "this law puts a premium upon diligence in the discharge" of States' duties with respect to presidential electors. *Id.* (emphasis added). But Congress has no such broad constitutional authority to set a "premium" on the State courts' process for the determination of electoral disputes.

In short, the provision in the Electoral Dates Clause that "Congress may determine the Time of chusing the Electors" does not also give Congress authority

to define the date by which judicial disputes about the "chusing" of electors must be determined. Indeed, Presidential electors act solely "by authority of the state that in turn receives its authority from the federal constitution." *Ray v. Blair*, 343 U.S. 214, 224 (1952). Again, and in contrast to the Congressional Election Clause, the Presidential Elector Clause does not grant broad authority in Congress to "make or alter" the State's own laws or judicial processes for resolving disputes about electors. *See Johnson v. Fankell*, 520 U.S. 911, 922-23 (1997) (noting that the court will "respect the 'principles [that] are fundamental to a system of federalism . . .'" particularly with respect to rules that would "restructur[e] the operation of its courts")(quoting *Howlett v. Rose*, 496 U.S. 356, 372-73 (1997); *cf. Oregon v. Mitchell*, 400 U.S. 112, 211 n.89 (1970) (Harlan, J., concurring in part)(noting that state electors are not federal officials)). The power to resolve judicial disputes, including the authority to regulate when disputes are resolved and their resolution is binding, belongs to the States alone; and therefore the Electoral Count Act "safe harbor" deadline is unconstitutional, as well as the deadline to "meet and give…votes," to the extent that it infringes on the state courts' power to regulate the timing of litigation. In short, the only authority granted to Congress by the Electoral Dates Clause is the authority to set dates for the "chusing" (original election) of electors and the "day on which they shall give their votes"; but Congress has no authority with respect to state judicial disputes. The only real deadlines for the state courts in this regard are whatever deadlines may be set by state law, and/or the *de facto* deadline of ensuring that

disputes are resolved before Congress meets on January 6th, 2021 to count the votes. Art. II, Section 1, cl. 3.

Finally, Arizona has plainly provided for its own timetable with respect to elections contests surrounding presidential electors by enacting A.R.S. § 16-676, which provides that "the court shall set a time for the hearing of the contest, not later than ten days after the date on which the statement of contest was filed, which may be continued for not to exceed five days for good cause shown. *The court shall continue in session to hear and determine all issues arising in contested elections.* After hearing the proofs and allegations of the parties, and within five days after the submission thereof, the court shall file its findings and immediately thereafter shall pronounce judgment, either confirming or annulling and setting aside the election." A.R.S. § 16-676(A),(B).

Indeed, Arizona courts have themselves taken note of the procedural due process rights inherent in election contests as in any other domain of law. In *Mandraes v. Hungerford*, the Arizona Supreme Court noted that with respect to election actions, "[d]ue process requires that a party have an opportunity to be heard at a meaningful time and in a meaningful manner," and the trial court may not deprive a party of their opportunity to present their evidence. 127 Ariz. 585, 588 (1981); *see also McClung v. Bennett*, 225 Ariz. 154, 157, ¶¶ 13-15 (2010). As confirmed by the trial judge's remarks in this case, if not for the artificial and unconstitutional dates/deadlines in the Electoral Count Act, the lower court would have granted additional time for discovery and case preparation in a manner that comports with

procedural due process principles. *Cf. Matheiu v. Mahoney*, 174 Ariz. 456, 459-60 (1993)([d]elay and resulting truncated discovery and case preparation surrounding suit to invalidate statewide petition was "unreasonable and prejudicial because it strains the quality of decision making and is ultimately unfair to all involved.").

In this case, the discovery schedule was severely curtailed due to the perceived "deadlines" imposed by the Electoral Count Act. Petitioner therefore asks the Court to declare the Electoral Count Act deadlines unconstitutional as applied to state-court litigation, and to reverse and remand this case to the lower courts to proceed in a manner not inconsistent with this Court's Opinion. The lower courts should be given to decide whether Petitioner should be granted additional time for inspection of ballots, without regard for the Electoral Count Act deadlines.

3. Petitioner has the right to inspect the ballots under Arizona law

Finally, A.R.S. § 16-677 and the general rules of civil discovery plainly provide that Petitioner has the right to have ballots inspected before preparing for trial. Again, the lower court curtailed this right because of what it perceived to be the deadlines in 3 U.S.C. §§ 5, 7 and the Electoral Count Act. One of the Intervenors in the case, Maricopa County, even expressly agreed in open court to allow an inspection of 2,500 ballots (which is binding under Rule 80); but it was only able to get through 1,526 before trial. Petitioner moved the lower court to continue the trial so as to allow the county to process the remaining nine hundred seventy-four (974) ballots; but the Court declined, due to the deadlines under the Electoral Count Act.

CONCLUSION

For the foregoing reasons, Petitioner asks the Court to (1) accept this Petition; (2) declare the Electoral Count Act "safe harbor" date and deadline to "meet and cast…votes" to be unconstitutional restrictions on the States' plenary authority to resolve litigation surrounding presidential electors; and (3) remand this case to the lower courts to proceed in a manner not inconsistent with this Court's Opinion, by deciding whether Petitioner should be granted additional time for the inspection of ballots without regard for the Electoral Count Act "deadlines" contained at 3 U.S.C. §§ 5, 7.

Respectfully submitted,

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