

No. 20-542

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IN THE  
**Supreme Court of the United States**

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REPUBLICAN PARTY OF PENNSYLVANIA,  
*Petitioner,*

v.

KATHY BOOCKVAR, SECRETARY OF PENNSYLVANIA,  
*ET AL., Respondents.*

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On Petition for a Writ of Certiorari to the  
Supreme Court of Pennsylvania

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**Brief *Amicus Curiae* of  
Citizens United,  
Citizens United Foundation, and  
The Presidential Coalition, LLC  
in Support of Petitioner**

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

Citizens United is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code (“IRC”) section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization, exempt from federal income tax under IRC section 501(c)(3). The Presidential Coalition, LLC is an IRC section 527 political organization.

*Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

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<sup>1</sup> It is hereby certified that counsel for Petitioner and all Respondents have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

For much of the nation's history, the manner in which elections have been conducted has been of interest primarily to political parties, candidates, and the professional political class. Now, millions of Americans are steeping themselves in the minutiae of election processes after learning that the process can, indeed, be hijacked, and the courts can be complicit in that hijacking.

Particularly beginning with the National Voter Registration Act of 1993 (the "Motor Voter Act"), efforts have been made to change the rules governing elections in an effort to change the outcomes of elections. The politicization of the election process was put on steroids in the run up to the 2020 general election, particularly with the transformation of absentee voting into excuse-less mail-in voting. The Report of the Bipartisan Commission on Federal Election Fraud in 2005 confirmed the well-known fact that it is much easier to perform fraud with respect to absentee ballots than with in-person voting. Yet, those seeking to expand mail-in voting for their own political reasons will loudly deny this fact that they know to be true.

The Pennsylvania Supreme Court had no authority to extend Election Day — a date set by Congress pursuant to an express authorization in Article II, Section 1 of the U.S. Constitution. First, it extended Election Day by requiring ballots received after that date to be counted. Second, it required ballots that may have been cast after Election Day to be counted.

Both rulings exceed its authority. The Free and Equal Elections Clause of the Pennsylvania Constitution gave the Pennsylvania Supreme Court no authority to disregard a decision which Congress has made. The Court's twin justifications for the extension — Postal Service delivery and its uttering the excuse of "COVID-19" — were not just constitutionally inadequate reasons to usurp a congressional power — but they were also factually insufficient. The Court's reliance on inapplicable Postal Service "service standards" was in serious error, and its reliance on COVID-19 was more based on incantation than analysis. Many states accept ballots received after Election Day, and therefore the issue should and must be decided.

These *amici* urge this Court to grant *certiorari* to review both issues presented. The Pennsylvania Supreme Court had no authority to change either the manner or the time of the election, yet it did both. If challenges such as this are not resolved by this Court, it will leave the election process where it is now — in the days of the Wild West, where literally hundreds of lawyers are poised early in each even-numbered year to fashion creative theories to bring in carefully selected jurisdictions to have a judicial imprimatur placed on last-minute election law changes to benefit the litigants. There is good reason why millions of Americans believe that the 2020 election was not honestly conducted, and fear that each election from now on will be even worse.



## ARGUMENT

### **I. THE PENNSYLVANIA SUPREME COURT'S ORDER, USURPING THE AUTHORITY TO SET THE TIMES AND MANNER OF FEDERAL ELECTIONS, REQUIRES REVIEW.**

Act 77 was signed into law by Democrat Governor Thomas W. Wolf on October 31, 2019, to allow Pennsylvanians additional opportunities to vote not previously available in that state, which had allowed only in-person voting on Election Day and traditional absentee voting. Since 1957, the Pennsylvania Constitution has specified that absentee voting is limited to those voters whose circumstances fell under one of four narrow justifications. *See* Pennsylvania Constitution in Article VII, Section 14. That practice was replaced with an entirely new type of excuse-less “mail-in” voting. Nevertheless, the deadline for voting established in Act 77 faithfully adhered to the congressionally established “time” for conducting federal elections — by requiring that mail-in ballots must be received by the appropriate county officers by 8:00 PM on Election Day, November 3, 2020.

#### **A. The Partisan Push for Risky Mail-In Ballots.**

Act 77 culminated the push for greater mail-in voting in Pennsylvania. This law and similar laws in other states were enacted despite the warning that they would enhance the risk of voter fraud as detailed in the 2005 Bipartisan Commission on Federal

Election Reform (chaired by former President Jimmy Carter and former Secretary of State James A. Baker III).

Fraud occurs in several ways. **Absentee ballots remain the largest source of potential voter fraud.** A notorious recent case of absentee ballot fraud was Miami's mayoral election of 1998, and in that case, the judge declared the election fraudulent and called for a new election. Absentee balloting is **vulnerable to abuse in several ways:** Blank ballots mailed to the wrong address or to large residential buildings might get intercepted. Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation. Vote buying schemes are far more difficult to detect when citizens vote by mail. States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting "third-party" organizations, candidates, and political party activists from handling absentee ballots. States also should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted. [Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform (Sept. 2005), section 5.2 (emphasis added).<sup>2</sup>]

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<sup>2</sup> See generally J. R. Lott Jr., "Heed Jimmy Carter on the Danger of Mail-In Voting," *Wall Street Journal* (Apr. 10, 2020).

Sounding that same note earlier this year, Attorney General William Barr raised the red flag about the push for greater mail-in voting, declaring it was “grossly irresponsible” and urging that “we should be assuring the integrity of our elections so that government going forward would be legitimate and be accepted as legitimate.”<sup>3</sup>

Despite, and many believe because of, its propensity to voter fraud, many prominent Democrat activists have pushed for no-excuse mail-in voting. Before the November 2020 election, former Attorney General Eric Holder “dismissed fears of widespread voter fraud as ‘nonsense’ and warned that” voter integrity measures such as poll watching were tactics of voter suppression — a loaded term that has long been used as a dog whistle by leftists to demonize opponents by implying racist motives.<sup>4</sup>

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<sup>3</sup> Y. Halon, “Barr warns Democrats ‘playing with fire’ over ‘grossly irresponsible’ mail-in voting push.” *FoxNews* (Aug. 13, 2020).

<sup>4</sup> E. Yu, “At IOP Talk, Eric Holder Dismisses Fears of Voter Fraud, Warns Against Voter Suppression.” *The Chicago Maroon* (Nov. 16, 2020).

## **B. The Supreme Court's Order Amended Act 77.**

The Pennsylvania Supreme Court felt Act 77 did not allow sufficient time for mail-in voting and chose to judicially amend the statute for 2020. Despite three federal statutes establishing November 3, 2020 as Election Day and Act 77's clear "received-by" deadline at 8:00 PM that same day, the court below yielded to the demands of the Pennsylvania Democratic Party and ordered that ballots would be counted even though: (i) ballots were not required to be proven to be mailed on or before Election Day; and (ii) ballots were required to be counted even if received up to three days after Election Day.

The court below believed itself to have vast remedial powers under the Free and Equal Elections Clause of the Pennsylvania Constitution (Article I, Section 5) to address problems it perceived for voters caused by a combination of the supposed delays in processing and delivery of mail by the U.S. Postal Service and the COVID-19 pandemic.

Pennsylvania electors in the November General Election ... face a threat to their ability to vote due to no fault of their own, but instead due to a perfect storm combining the dramatic increase in requested ballots due to the COVID-19 pandemic and the inability of the USPS to meet the delivery standards required by the Election Code. [*Pa. Democratic Party v. Boockvar*, 2020 Pa. LEXIS 4872, \*31 (Sept. 17, 2020).]

The court's reliance on the Free and Equal Elections Clause is unavailing because a state constitutional provision can never provide the basis for a state court to overturn the action of a state legislature acting under authority conferred by the U.S. Constitution. *See* Petition for Certiorari ("Pet. Cert.") at 26 n. 1. As to how presidential electors are selected by states, the U.S. Constitution vests that authority exclusively in state legislatures. The offices of President and Vice President were created by the U.S. Constitution, and when a state legislature exercises the power to determine the manner in which electors are chosen, that power is governed solely by the federal Constitution. *See Leser v. Garnett*, 258 U.S. 130, 137 (1922) (function of state legislature in carrying out a federal function from the U.S. Constitution "transcends any limitations sought to be imposed by the people of a State"). No state constitution, state law, or state court can alter or constrain that grant of power.

Nevertheless, the Supreme Court of Pennsylvania had "no hesitation in concluding that the ongoing COVID-19 pandemic **equates** to a natural disaster." *Id.* at \*46. Without making any specific findings, the court opined that increased processing time of mail-in ballots was needed "for voters who sought to avoid exposure to the virus." *Id.* at \*47. None of the rationales advanced by the court below withstands examination.

### C. The Postal Service Delay Rationale.

The lower court relied on a cryptic letter from the General Counsel of the Postal Service to the Pennsylvania Secretary of State, which contained a few generalizations about Postal Service service standards on which to: “conclude that the timeline built into the Election Code cannot be met by the USPS’s current delivery standards, regardless of whether those delivery standards are due to recent changes in the USPS’s logistical procedures or whether the standards are consistent with what the General Assembly expected when it enacted Act 77.” *Id.* at \*47-48.

The Pennsylvania Supreme Court majority opinion never discussed an earlier pending case in which it had granted review (*Crossey v. Boockvar*, No. 108 MM 2020 (Pa. Sept. 17, 2020)) where it had appointed a special master to report back on that same issue of Postal Service delays. The special master in that case conducted evidentiary hearings and issued Recommended Findings of Fact and Conclusions of Law. *See* Petition Appendix (“Pet. App.”) at 140a. Since those findings about Postal Service delivery provided no support for what the court below wanted to order, the court dismissed the *Crossey* case (along with the special master’s Recommended Findings) as moot, and the majority disregarded those findings. Pet. Cert. at 8.

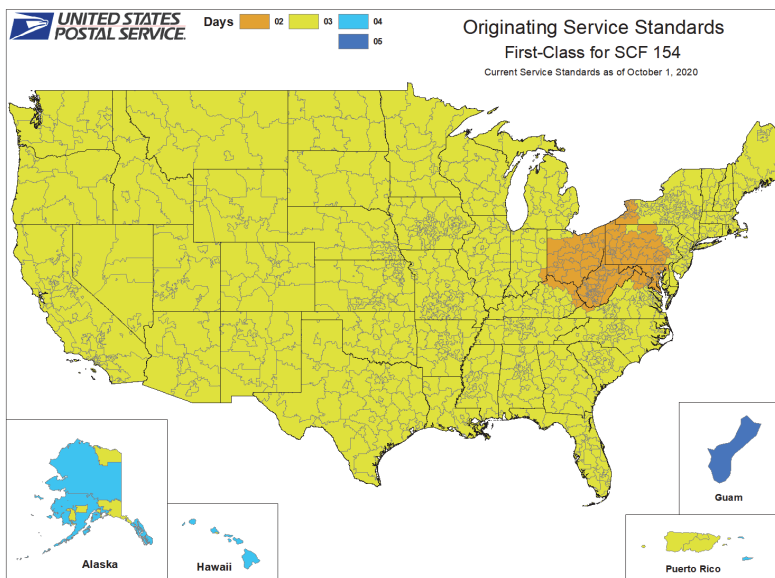
The majority’s reliance on the Postal Service General Counsel’s letter is misplaced. That letter stated that the service standard for First-Class Mail is

2-5 days — a technically accurate but irrelevant fact. First, the term “service standards” is a term of art within the Postal Service, meaning the goals by which the mail system is set to deliver mail within the network. To be sure, from any point in Pennsylvania to anywhere else in the United States (including territories), the First-Class mail service standard is 2-5 days. However, within Pennsylvania, the service standard is 2-3 days.<sup>5</sup>

For example, as shown in the following map, for mail originating (*i.e.*, entered into the mail system) in Pittsburgh, the Postal Service has a 2-day service standard to most of Pennsylvania (shown in orange) and a 3-day service standard to a few remote parts of the Commonwealth, as well as the rest of the continental United States (yellow). There is a 4-day service standard to Hawaii and parts of Alaska and Puerto Rico (light blue). The only 5-day service standard referenced is to Guam (dark blue).

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<sup>5</sup> See <https://postalpro.usps.com/ppro-tools/service-standards-maps>.



Any resident of any county in Pennsylvania requesting a ballot from that county’s elections official will always be within a 2-day First-Class Mail service area. Likewise, for every area in which a ballot is mailed to the voter, the mailings will have a 2-day First-Class Mail service standard.<sup>6</sup> The same is true for submitting completed ballots to county election officials. Thus, the court below misused the General Counsel’s letter describing “service standards.”

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<sup>6</sup> Although partisan attacks have been made against the Postmaster General for slowing delivery, it was the Obama Administration which degraded next-day delivery standards which long had existed for much of Pennsylvania. *See* USPS Delivery Standards and Statistics Fact Sheet, <https://about.usps.com/news/electronic-press-kits/our-future-network/ofn-usps-delivery-standards-and-statistics-fact-sheet.htm>.



Accordingly, the court below erred in concluding that “if a county board were to process and mail a ballot the next day by First Class Mail ... according to the delivery standards of the USPS, the voter might not receive the ballot until five days later...” *Pa. Democratic Party* at \*33. Even Justice Donohue’s concurring and dissenting opinion made the same mistake of relying on the General Counsel’s letter’s broad statement regarding nationwide service standards. That opinion analyzed the impact of 2-5 day service standards and concluded that:

[t]he only way the current statutory framework works is if the ballot is delivered by USPS in two days, the voter immediately returns the ballot, and it is received by the board of elections within three days. All other voters who comply with the statutory framework are disenfranchised, even though they complied with the statute. [*Id.* at \*108.]

Had the court evaluated actual, applicable service standards that applied to local delivery, it should have found that the time period established by the state legislature in Act 77 was workable.

However, the court then made a second mistake in basing its decision on service standards rather than on **service performance**. “Service performance is defined by the Postal Service from acceptance of a mailpiece into our system through delivery, measured

against published service standards.”<sup>7</sup> The special master’s Recommendations in the *Crossey* case correctly rejected the “mismatch” claim based upon the General Counsel’s letter, and instead correctly “found that USPS’s ‘performance’ in Pennsylvania ‘exceeds the national average’ upon which USPS’s delivery standards are based.” Pet. Cert. at 10. Thus, to reach its desired result, the court found it necessary to ignore the special master’s report, dismiss the case in which a conflicting factual record had been developed earlier at its request, and rely exclusively on the USPS General Counsel’s misleading two-page letter.<sup>8</sup> Pet. Cert. 8, 14, 29.

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<sup>7</sup> See, e.g., <https://about.usps.com/newsroom/national-releases/2020/1023-usps-issues-new-service-performance-report-for-the-week-of-oct-10.htm>.

<sup>8</sup> The concurring opinion of Justice Wecht fared worse, relying on recent congressional testimony of Postmaster General Louis DeJoy regarding COVID-related postal delays, and then claiming that there was no “materially contradictory evidence.” *Pa. Democratic Party* at \*93. The dissenting opinion of Justice Donohue likewise was selective in its evidence, focusing on the General Counsel’s letter and noting that it “was accepted into evidence in *Crossey* and was further supported by the testimony of the Deputy Postmaster [General]” — but failed to note that the special master in *Crossey* found a different expert witness’s testimony “more credible and persuasive than those of” the Deputy Postmaster General. Pet. App. at 108a, 168a. The former Deputy Postmaster General whose testimony was relied upon by Justice Donohue previously served as the Democrat staff director of the House Committee overseeing the Postal Service, carrying no relevant skills in the logistics industry from Capitol Hill to L’Enfant Plaza, thus requiring the Postal Service to remove the Deputy Postmaster General position from the line of succession in the case of a vacancy or disability of the Postmaster General.

The erroneous factual observations about mail delivery demonstrate the arbitrariness of the Pennsylvania Supreme Court's results-driven analysis.

**D. The COVID-19 Rationale Was Neither Developed Nor Persuasive.**

The court below failed to conduct any meaningful analysis on its own of the threat posed by COVID-19. When the Pennsylvania Supreme Court issued its decision in mid-September, positive COVID-19 cases were mostly below 1,000 daily "cases" (*i.e.*, positive tests) in the entire Commonwealth of Pennsylvania. The court below did not consider the fact that the level of cases had remained relatively steady since May. Additionally, the number of positive COVID-19 "cases" is directly related to the number of daily tests being administered, which tests had been increasing. (<https://www.health.pa.gov/topics/disease/coronaviruses/Pages/Cases.aspx>.)

**II. THE PENNSYLVANIA SUPREME COURT DECISION TO EXTEND THE DEADLINE TO RECEIVE BALLOTS VIOLATES THE FEDERAL STATUTORY SCHEME.**

*Amici* also urge this Court to grant review to address the second question presented by the Petition, namely, whether the Pennsylvania Supreme Court's extension of the deadline to receive votes for federal office and presumption concerning postmarks violates three separate federal statutes setting the date of the election which preempted the field.

No federal constitutional problem existed with Act 77, as that law required that all ballots be received by 8:00 PM on the date established in federal law for the election — November 3, 2020.<sup>9</sup> The problem arose with the decision of the Supreme Court to “adopt the Secretary’s informed recommendation of a three-day extension of the absentee and mail-in ballot received-by deadline to ... reduce voter disenfranchisement” (*Pa. Democratic Party* at \*49) and its presumption that ballots received within three days were mailed on or before Election Day.

Prior to extending the deadline, the court opinion summarized the Republican Party’s argument that “moving the received-by deadline until after Election Day would undermine the federal designation of a uniform Election Day, as set forth in three federal statutes” (*Pa. Democratic Party* at \*40-41) and briefly summarized those statutes. However, there followed no analysis whatsoever explaining how the Pennsylvania court, after recognizing these statutes as having preempted the field, could decide to ignore what Congress had decreed.

Because of the importance of this issue, we briefly review those three statutes here. With respect to elections to the House of Representatives, Article I, Section 4 of the U.S. Constitution states that, the States shall set the rules for the “**Times, Places and Manner** of holding Elections,” but that Congress may alter the rules for the **Times and Manner** (but not

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<sup>9</sup> *See also* Pennsylvania Constitution, Article VII, Section 2.

the Places). (Emphasis added.) Congress exercised that authority when it set the date for election of Representatives as the Tuesday after the first Monday in November in even-numbered years (*e.g.*, November 3 of this year). *See* 2 U.S.C. § 7. Congress set the date for the election of Senators on the same day as for Representatives. *See* 2 U.S.C. § 1. With respect to the process for the selection of the third category of elected federal officials — Presidential Electors — Article II, Section 1 established a somewhat different system. The Constitution vested in State legislatures the plenary authority to choose the “**Manner**” in which Presidential Electors are selected, without the ability of Congress to override that selection. However, again, Congress was given the exclusive authority to “determine **the Time** of chusing the Electors....” Art. II, Sec. 1, cl. 4. Congress acted on this grant of authority and set the Time for appointing electors on the same day as for House and Senate elections — but only once every four years. *See* 3 U.S.C. § 1.

There is no confusion in these statutes as to what constitutes Election Day in the federal system. In setting the time of the election of House members, Senators, and Presidential Electors, Congress was acting pursuant to an express constitutional grant of authority. Accordingly, no state, no state governor, no state legislature, and certainly no state court has the authority to alter that Election Day. After recognizing the Election Day federal statutes, the Pennsylvania court went on to discuss interesting but irrelevant issues, including whether there was ambiguity in the state statute as to the deadline for receiving votes (concluding there wasn’t) and whether the state

statutory deadline was facially unconstitutional (concluding it wasn't).

The decision of the Pennsylvania Supreme Court which effectively moved Election Day to a date three days later was based solely on pragmatic considerations — whether the legislature gave enough time to voters — saying that “a balance must be struck,” and demonstrating again that courts love judge-empowering balancing tests, it concluded that the legislature “enacted an extremely condensed timeline...” *Pa. Democratic Party* at \*45, \*48. In other words, the legislature got it wrong. And, the Supreme Court believed the “Free and Equal Elections Clause of the Pennsylvania Constitution” (Article I, Section 5) gave it the authority to “craft meaningful remedies when required.” *Id.* at \*90, \*92 (citation omitted).

If the court had carefully considered the real issue — whether the state court has the constitutional authority to extend Election Day — it could not have done what it did. And so it ignored the federal constitutional constraint, changed the issue to a state constitutional concern, and ruled as it willed.

Other state courts have not treated Election Day as merely a suggestion, but rather than a fixed date. The Montana Supreme Court considered the constitutionality of a state law which provided for the counting of ballots of military members received after Election Day. *Maddox v. Board of State Canvassers*, 116 Mont. 217 (1944). There, the court concluded that

the [state] legislature could not constitutionally have extended beyond the statutory election day the time for depositing ballots, so far as **presidential electors** are concerned.

Being within the powers expressly ceded to the limited federal sovereignty by the people of the United States, and having been exercised by the Congress, it is apparent that the **states have no power to interfere**. [*Id.* at \*222 (emphasis added).]

The Montana Court explained the historic meaning of the unusual term “cast” ballots:

Nothing short of the **delivery** of the ballot to the election officials for deposit in the ballot box constitutes **casting** the ballot, which fact was unmistakable so long as the ballot continued to be, as originally, a ball or marble or other marker which was “**cast**” or **deposited** in an official receptacle or custody....

Thus Webster’s New International Dictionary defines “cast” as “to deposit (a ballot) formally or officially.” **It is not the marking but the depositing of the ballot in the custody of the election officials which constitutes casting** the ballot or vote. Obviously, **unless it reaches the officials it is never cast at all**, whether or not it is marked for any candidate, or forwarded by mail or otherwise. The fact that the ballot has to be marked before its casting can indicate

the voter's intent, should not obscure the fact that it is still of no effect until it is deposited with the election officials, by whom the will of the voters must be ascertained and made effective. [*Id.* at \*223-\*24 (emphasis added).]

The Montana court then correctly concluded that a state law allowing post-Election Day ballots to be counted conflicted with the Election Day as established by Congress.

Therefore in so far as [state law] purports to extend beyond the election day the time within which voters' ballots may be **received** by the election officials for the election of presidential electors, it is in **conflict** with the constitutional congressional Act which requires the electing to be done on election day. It is, accordingly, unconstitutional to that extent. A diligent search has disclosed no authorities nor precedents to the contrary. [*Id.* at \*224 (emphasis added).]

This Court, in *Foster v. Love*, 522 U.S. 67 (1997) (discussed in Pet. Cert. at 30-32), determined that a State statute which could have resulted in a federal election being held on a different day than that set by Congress was invalid.

This Court recently refused to overturn the Seventh Circuit's stay of a district court injunction in *Democratic National Committee v. Wisconsin State Legislature*, 2020 U.S. LEXIS 5187 (Oct. 26, 2020). The Seventh Circuit and the three concurring opinions



from this Court addressed whether a federal court could encroach upon the state legislature's authority to set rules for the "manner" of federal elections, determining that it could not. By preserving the Seventh Circuit's stay, this Court did not need to address whether the federal court could encroach upon **Congress's** authority to set the "times" for federal elections. The three dissenting Justices complained that the Seventh Circuit "never even addressed the constitutional issue." *Id.* at \*37. The dissent considered the constitutional issue to be the right to vote — not whether the district court could override the prerogative granted to Congress by the Constitution to determine the times for the elections. With a flourish, the dissent stated that "protecting the right to vote in a health crisis outweighs conforming to a deadline created in safer days," failing entirely to consider whether the court had authority to alter Election Day. *Id.* at \*39.

### **III. THE PETITION SHOULD BE GRANTED BECAUSE THE ISSUES RAISED HERE AFFECT MANY OTHER STATES.**

The petition raises a significant constitutional question that affects not only Pennsylvania, but also many other states. As the petition noted, "[e]ven now, there are numerous pending cases seeking to overturn Election Day received-by deadlines.... This case thus provides the perfect vehicle for this Court to address the confusion that is mounting around the country and resolve these important issues once and for all." Pet. Cert. at 35-36.

The U.S. Court of Appeals for the Third Circuit recently noted — in rejecting a challenge to Pennsylvania vote count based on the lack of standing of the plaintiffs in that case — “[a]t least 19 other States and the District of Columbia have post-Election Day absentee ballot receipt deadlines.” *Bognet v. Secretary Commonwealth of Pennsylvania*, 2020 U.S. App. LEXIS 35639, \*29 (3d Cir. Nov. 13, 2020). There is a serious question about whether those 19 other States have laws which impermissibly change the national election day set by Congress for federal elections in 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1.

The issue of Congress’s authority to set the time for choosing presidential electors under Article II, Section 1 and for elections for Congress under Article I, Section 4 should be decided by this Court as soon as possible.

**CONCLUSION**

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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