No. 20A98

In the Supreme Court of the United States

MIKE KELLY, U.S. Congressman, *et al.*,

Applicants,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

To the Honorable Samuel A. Alito, Jr.,
Associate Justice of the United States Supreme Court and
Circuit Justice for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF FOR CONSTITUTIONAL ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS/PETITIONERS

ROY S. MOORE
JOHN A. EIDSMOE
MATTHEW J. CLARK*
**Counsel of Record*
TALMADGE BUTTS
CONSTITUTIONAL ATTORNEYS
P.O. Box 179
Montgomery, AL 36101
256-510-1828
constitutionalattorneys@gmail.com

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(b), the constitutional attorneys (hereinafter "Constitutional Attorneys") listed below respectfully move for leave to file the accompanying brief as *amici curiae*. Counsel for the Petitioners has consented to the filing of this motion. Counsel for the Respondents has not yet responded to our request for consent.

Amici Curiae Constitutional Attorneys are Roy. S. Moore, Chief Justice of the Alabama Supreme Court (Ret.), John A. Eidsmoe, Lt. Col., USAF (Ret.), Matthew J. Clark, and Talmadge Butts. The Constitutional Attorneys have an interest in this case because it is especially important to uphold the rule of law when selecting the President and Vice President of the United States. "'In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.'" *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., concurring) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983) (footnote and alteration omitted).

This brief would be helpful to the Court for several reasons. First, as the Chief Justice of the Pennsylvania Supreme Court noted, "laches and prejudice can never be permitted to amend the Constitution." *Kelly v. Commonwealth*, No. 68 MAP 2020 (Pa. Nov. 28, 2020) (Saylor, C.J., concurring and dissenting) (citations and quotation marks omitted). Although he did not thoroughly discuss that point,

Amici Curiae believe he was correct because the Supremacy Clause does not allow state judges to use a state-law time bar to overcome a constitutional command. This brief discusses this point in detail.

Additionally, because the Constitution requires Congress to set a specific date for voting in a Presidential election, and because Congress has set that specific date, Respondents' attempts to allow mail-in voting for a long period of time prior to election day violates both Article II, § 1, cl. 4 of the Constitution and 3 U.S.C. § 1.

This brief would also be helpful because of its brevity. *Amici Curiae* understand that the Court must decide this matter quickly, so we have limited our discussion to points that would be helpful to the Court that have not already been raised by the parties without burdening the Court with excessive details.

Pursuant to this Court's order of April 15, 2020, *Amici Curiae* are hereby filing a single paper copy of this motion on 8½ x 11 inch paper under Rule 33.2.

WHEREFORE, premises considered, *Amici Curiae* respectfully request leave to file the attached brief of *Amici Curiae*.

Respectfully submitted December 8, 2020,

/s/ Matthew J. Clark
MATTHEW J. CLARK
Counsel of Record
ROY S. MOORE
JOHN A. EIDSMOE
TALMADGE BUTTS
CONSTITUTIONAL ATTORNEYS
P.O. Box 179
Montgomery, AL 36101
256-510-1828
constitutionalattorneys@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Constitutions and Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are constitutional attorneys who believe the Constitution should be interpreted strictly as intended by its Frames. They include:

- Roy S. Moore, a West Point graduate and Vietnam veteran who has served as an Etowah County (AL) Circuit Judge, has twice been elected Chief Justice of the Alabama Supreme Court, and is a member of the Bar of this Court;
- John Eidsmoe, a retired Air Force Judge Advocate who serves as Professor of Constitutional Law for the Oak Brook College of Law and Government Policy, has taught constitutional law for the O.W. Coburn School of Law at Oral Roberts University and the Thomas Goode Jones School of Law at Faulkner University, and is a member of the Bar of this Court;
- Matthew J. Clark, a graduate of Liberty University School of Law, a former Staff Attorney for the Alabama Supreme Court, a guest teacher of Constitutional Law at Faulkner University, and a member of the Bar of this Court; and
- Talmadge Butts, a recent graduate of the Thomas Goode Jones School of Law at Faulkner University where he was Articles Editor for the Faulkner Law Review, and is licensed to practice in Alabama.

[1] Applicants have consented to the filing of this brief, but *Amici Curiae* have not received an answer from the Respondents as to whether they consent. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

Amici are concerned that Pennsylvania's hastily-contrived scheme for advance voting violates the Pennsylvania Constitution, the United States Constitution, 3 U.S.C. § 1, and the American system of fair and orderly elections.

SUMMARY OF THE ARGUMENT

In the dissenting part of his statement, Pennsylvania Supreme Court Chief Justice Saylor noted that "laches and prejudice can never be permitted to amend the Constitution." *Kelly v. Commonwealth*, No. 68 MAP 2020 (Pa. Nov. 28, 2020) (Saylor, C.J., concurring and dissenting). Justice Saylor's position is supported by nearly a century of precedent and ultimately by the United States Constitution itself. Under the Supremacy Clause of the United States Constitution, Presidential elections are governed by the Electors Clause. That provision delegates the power of choosing electors to the legislatures of the several states, but under Supreme Court precedent, those legislatures are constrained by their own constitutions. Thus, the Constitution required the Pennsylvania Supreme Court to adjudicate the case before it under the Electors Clause and Pennsylvania law inasmuch as it was consistent with the Pennsylvania Constitution. By disregarding those authorities and deciding the case on the basis of laches, the Pennsylvania Supreme Court elevated a state-law time bar above the Constitution itself. This violated the Supremacy Clause, which holds that the Constitution preempts the law of the states when the two conflict.

Additionally, the Constitution gives Congress the power to set a date for Presidential elections. Congress passed 3 U.S.C. § 1 pursuant to that power and

chose a specific date for election day. Historically, there is no reason to believe that Congress intended to preempt a state's prerogative to allow absentee voting under the traditional rules that existed at the time, such as being unable to vote in person because of military service. However, allowing citizens to vote almost two months in advance of Election Day, for any reason or for no reason, is another matter altogether. Such a scheme is preempted by 3 U.S.C. § 1 and is unconstitutional under Article II, § 1, Clause 4 of the United States Constitution.

ARGUMENT

I. The Supremacy Clause Forbids Laches from Barring the Constitutional Claim in This Case

The Pennsylvania Supreme Court barred Petitioners' claim on the basis of laches. As an initial matter, it defies common sense and the principles of equity to hold that laches bars a constitutional challenge to a statute that is only one year old. But more fundamentally, as the Chief Justice of the Pennsylvania Supreme Court noted, "'laches and prejudice can never be permitted to amend the Constitution.'" *Kelly v. Commonwealth*, No. 68 MAP 2020 (Pa. Nov. 28, 2020) (Saylor, C.J., concurring and dissenting) (quoting *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988)). In *Sprague*, the Pennsylvania Supreme Court explained the basis for that rule as follows:

> "We have not been able to discover any case which holds that laches will bar an attack upon the constitutionality of a statute as to its future operation, especially where the legislation involves a fundamental question going to the very roots of our representative form of government and concerning one of its highest prerogatives. To so hold would establish a dangerous precedent, the evil effect of which might reach far beyond present expectations."

Sprague, 550 A.2d at 188-89 (quoting *Wilson v. Philadelphia Sch. Dist.*, 195 A. 90, 99 (Pa. 1937).

This statement from *Sprague* appears to be correct. Article VI, cl. 2 of the Constitution says, "This Constitution ... shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Therefore, the justices of the Pennsylvania Supreme Court were bound to apply the Constitution itself instead of the state law of laches when the two conflicted. Because they failed to do so, they violated the Supremacy Clause of the Constitution.

Just as the Pennsylvania Supreme Court in *Sprague* could not find any decision holding that laches can bar a constitutional claim, neither can *Amici Curiae* find any decision from this Court holding that laches may bar a constitutional claim. The Court has, however, held that the Supremacy Clause does not allow state-law time bars like laches to bar claims that are regulated by federal law. *See County of Oneida, N.Y., v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 240 n.13 (1985) ("Under the Supremacy Clause, state-law time bars, *e.g.*, adverse possession *and laches*, do not apply of their own force to Indian land title claims") (emphasis added). Although *County of Oneida* dealt specifically with Indian land title claims, the underlying principle was that the application of state law could "not be inconsistent with underlying federal policy." *Id.* at 240.

In this case, as the Pennsylvania Supreme Court noted in *Sprague*, applying laches would be inconsistent with the underlying federal policy because "the

legislation involves a fundamental question going to the very roots of our representative form of government and concerning one of its highest prerogatives." *Sprague*, 550 A.2d at 188-89. The United States Constitution itself delegates to the legislatures of the several States the manner of choosing electors for the Electoral College. U.S. Const., art. II, § 1, cl. 2. In exercising that power, the Pennsylvania legislature is bound by its own constitution in how it executes that function. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) ("What is forbidden or required to be done by a state is forbidden or required of the legislative power under the state constitutions as they exist"); *see also Smiley v. Holm*, 285 U.S. 355, 369 (1932) (citing *McPherson* and holding that the Constitution's delegation of election power to the states does not "justify disregard of established practice in the states"). Therefore, by invoking the state law of laches to bar a claim arising under the Constitution's Electors Clause, the Pennsylvania Supreme Court violated the Supremacy Clause.[2]

II. The United States Constitution and a Federal Statute Established a Fixed Day for Presidential Elections

The United States Constitution, Article II, Section 1 provides in part that: "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." U.S. Const., art. II, § 1, cl. 4. Although Article II also provides that

[2] This position is not inconsistent with the position taken by the State of Texas in *Texas v. Pennsylvania*, No. 22O155. A central theme in that case is that officials of the executive branch in Pennsylvania, Georgia, Wisconsin, and Michigan failed to follow legislative commands as required by the Electors Clause. In this case, *Amici Curiae* simply notes, as this Court's precedents have noted since 1892, that even the legislatures of the several States are bound by their own constitutions.

the States set the manner of choosing electors,[3] by this provision the people of the United States have delegated the power to set the day of the election to Congress. Pursuant to Article II Section 1, Congress has enacted 3 U.S.C. § 1, which requires that the "electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."

From this constitutional provision, it is clear that the Constitution contemplates a set nation-wide time for choosing Electors, that is, for voting for President and Vice-President. From 3 U.S.C. § 1, it is clear that Congress intended to fix a single day for this election to take place, and that this day should be uniform throughout the United States.

This does not necessarily prohibit the use of absentee ballots when voters have reasons for voting absentee such as travel or illness. Absentee voting began in the 1860s when Union soldiers were given the opportunity to vote in home district elections. At first, absentee voting was limited to those in active military service, but in the latter half of the 1800s and early 1900s, the opportunity to vote absentee was extended to others who had valid reasons for being away from home on election day.[4] Thus, when 3 U.S.C. § 1 was adopted in 1948, Congress clearly understood that a few people needed to vote absentee, and there is no reason to think that by

[3] U.S. Const., art. II, § 1, cl. 2.

[4] *Absentee Voting*, U-S-History.com, https://u-s-history.com/pages/h3313.html (last visited Dec. 8, 2020); *see also Voting by Mail and Absentee Voting*, MIT Election Data & Science Lab, https://electionlab.mit.edu/research/voting-mail-and-absentee-voting (last visited Dec. 8, 2020) (same).

setting a uniform day for national elections, Congress intended to abolish absentee voting.

However, Congress certainly did not intend to open the floodgates to allow anyone to vote weeks or months in advance of the federally-established election date, whether in person or by mail or by ballot harvesting or other means which might vary dramatically from one state to another. The Framers of the Constitution in 1787 and those who adopted the Twelfth and Twentieth Amendments, as well as the Congress of 1948 that adopted 3 U.S.C. § 1, clearly contemplated a system of uniform dates for holding the Presidential election, assembling the Electors in their respective States to cast their votes, and opening and counting the ballots of the Electors.

Pennsylvania's scheme of early voting, adopted by executive fiat rather than by an act of the Legislature or an amendment to the State Constitution, clearly violates both the spirit and the letter of the United States Constitution and 3 U.S.C. § 1. As a federal district court in North Carolina held in *Berean Baptist Church v. Cooper,* "There is no pandemic exception to the Constitution of the United States." *Berean Baptist Church v. Cooper*, No. 4:20-cv-81-D, slip op. at 2 (E.D.N.C. May 16, 2020). And as Justice Gorsuch said recently, "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical." *Roman Catholic Diocese of Brooklyn, N.Y. v. Cuomo*, No. 20A87, slip op. at 10 (U.S. Nov. 25, 2020) (Gorsuch, J., concurring).[5]

[5] *Amici Curiae* do not necessarily believe that the Constitution can take a holiday during a pandemic, but as the language of his statement indicates, Justice Gorsuch may not believe so either.

CONCLUSION

The Pennsylvania Supreme Court violated the Supremacy Clause when it elevated a state-law time bar over the Constitution of the United States. It also refused to acknowledge that the Constitution itself and a federal statute dictate the date on which the Presidential election must occur. Consequently, in addition to the reasons raised by the Applicants themselves, the judgment of the Pennsylvania Supreme Court is due to be reversed.

Respectfully submitted December 8, 2020,

/s/ Matthew J. Clark
MATTHEW J. CLARK*
*Counsel of Record
ROY. S. MOORE
JOHN A. EIDSMOE
TALMADGE BUTTS
CONSTITUTIONAL ATTORNEYS
P.O. Box 179
Montgomery, Alabama 36101
256-510-1828
constitutionalattorneys@gmail.com

Amici simply observe that the COVID-19 pandemic does not justify an unconstitutional statute, especially since it was passed in 2019 before the pandemic hit the United States.