No. 20-___
(Related to No. 20A98)

In the
Supreme Court of the United States

MIKE KELLY, U.S. Congressman; SEAN PARNELL; THOMAS A. FRANK; NANCY KIERZEK; DEREK MAGEE; ROBIN SAUTER; MICHAEL KINCAID; and WANDA LOGAN,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA GENERAL ASSEMBLY; THOMAS W. WOLF, in his official capacity as Governor of the Commonwealth of Pennsylvania; and KATHY BOOCKVAR, in her official capacity as Secretary of the Commonwealth of Pennsylvania,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments of the United States Constitution permit Pennsylvania to rely on the laches doctrine to bar all forms of equitable relief for substantive constitutional challenges to election laws?

2. Do the Elections and Electors Clauses of the United States Constitution permit Pennsylvania to violate its state constitution's restrictions on Pennsylvania's lawmaking power when enacting legislation for the conduct of federal elections?

PARTIES TO THE PROCEEDING

Petitioners are U.S. Congressman Mike Kelly, Sean Parnell; Thomas A. Frank; Nancy Kierzek; Derek Magee; Robin Sauter; Michael Kincaid; and Wanda Logan.

Respondents are Commonwealth of Pennsylvania; Pennsylvania General Assembly; Governor Thomas W. Wolf; Secretary Kathy Boockvar. Respondents Commonwealth of Pennsylvania, Wolf and Boockvar are collectively referred to as "Executive-Respondents."

RELATED PROCEEDINGS

Pennsylvania Supreme Court

- *The Honorable Mike Kelly, et al. v. Commonwealth of Pennsylvania, et al.,* Civ. Action No. 68 MAP 2020 (Pa.) – the court entered an opinion granting Respondents' application for extraordinary jurisdiction, vacating the Commonwealth Court's November 25, 2020 order and dismissing the Petition for Review with prejudice on November 28, 2020, and entered an Order denying a stay of its order pending review by this Court on December 3, 2020.

Pennsylvania Commonwealth Court

- *The Honorable Mike Kelly, et al. v. Commonwealth of Pennsylvania, et al.,* Civ. Action No. 620 M.D. 2020 (Commw. Ct. Pa.) – order entered November 25, 2020 preliminarily enjoining Respondents from taking further steps to certify the results of the November 3, 2020 Election; opinion in support filed November 27, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners U.S. Congressman Mike Kelly, Sean Parnell, Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter, Michael Kincaid, and Wanda Logan respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The order of the Commonwealth Court granting preliminary injunctive relief enjoining Executive-Respondents from taking further action to certify the 2020 General Election results is available at the Appendix to this Petition ("Pet.App."), at 30a-31a. The opinion of the Commonwealth Court supporting its preliminary injunction order is available at Pet.App. 17a-29a. The order of the Supreme Court of Pennsylvania vacating the Commonwealth Court's injunction and dismissing this case with prejudice on the basis of laches is available at Pet.App. 1a-15a; *reported at Kelly v. Commonwealth,* 2020 Pa. LEXIS 6071. The order of the Supreme Court of Pennsylvania denying a stay of its order pending review by this Court is available at Pet.App. 16a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The petition is timely filed within 90 days of the decision below. The Pennsylvania Supreme

Court issued its decision on November 28, 2020 and denied Petitioners' emergency application for stay of the November 28, 2020 order on December 3, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Elections Clause of the U.S. Constitution 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. I, § 4, cl. 1.

The Electors Clause of the U.S. Constitution 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. 2.

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I

The Fourteenth Amendment to the U.S. Constitution provides in part:

> 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 laws.

U.S. Const. amend. XIV, § 1.

Article VII, Section 1 of the Pennsylvania Constitution provides the qualifications for electors and is appended at Pet.App. 239a.

Article VII, Section 4 of the Pennsylvania Constitution provides that: "All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved." Pa. Const. art. VII, § 4.

Article VII, Section 14 of the Pennsylvania Constitution provides the exceptions to the in-person voting requirement for Pennsylvania voters, and is appended at Pet.App. 239a.

Article XI of the Pennsylvania Constitution outlines the procedures necessary to amend the Pennsylvania Constitution, and is appended at Pet.App. 241a.

Act 77, Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77, the legislation subject to challenge in this case, is appended at Pet.App. 242a-310a.

Act 12, Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of March 27, 2020, §

1, P.L. No. 41, No. 12, which amended Act 77, is appended at Pet.App. 311a-335a.

STATEMENT OF THE CASE

I. Facts

The facts in this case are not in dispute. Petitioners outline below the events culminating in this constitutional challenge and the procedural history below.

A. The Pennsylvania General Assembly Began the Process for Amending the Pennsylvania Constitution to Allow for No-Excuse Absentee Voting.

On March 19, 2019, the Pennsylvania General Assembly introduced a joint resolution to amend Article VII, § 14 of the Pennsylvania Constitution to permit no-excuse absentee voting. *See* Senate Bill 411, 2019 (later incorporated into Senate Bill 413); Pet.App. 44a-45a, ¶ 36. The legislative history of the proposed amendment recognizes that "Pennsylvania's current Constitution restricts voters wanting to vote by absentee ballot to [specific] situations…" Sen. Mike Folmer & Sen. Judith Schwank, Senate Co-Sponsorship Memoranda to S.B. 411 (Jan. 29, 2019, 10:46 AM); Pet.App. 45a, ¶ 37. The amendment proposes to "eliminate these limitations, empowering voters to request and submit absentee ballots for any reason—allowing them to vote early and by mail." *Id*.

S.B. 413 was passed by both chambers and filed with the Office of the Secretary of the Commonwealth on April 29, 2020. Pet.App. 46a, ¶ 42. If S.B. 413

passes both chambers again in the next legislative session, it would appear on a future ballot for approval by a majority of Pennsylvania electors in order to be properly ratified. If properly approved and ratified by a majority of electors in 2021, S.B. 413 would amend Article VII, § 14 to allow any voter, for any reason, to vote by absentee ballot. Pet.App. 46a-47a, ¶ 44.

B. Act 77, as Amended by Act 12, Becomes the Legislative Vehicle for Implementing No-Excuse Mail-in Voting.

On October 31, 2019, Governor Wolf signed Act 77 into law, implementing sweeping reforms to the Pennsylvania Election Code. Pet.App. 49a, ¶ 54. Among other changes, Act 77 "create[ed] a new option to vote by mail without providing an excuse"; allowed voters to request and submit mail-in or absentee ballots up to 50 days before an election; and established a semi-permanent mail-in and absentee ballot voter list. Press Release, Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting, Governor Tom Wolf (Oct. 31, 2019). Pet.App. 49a, ¶ 55. In March 2020, Pennsylvania further updated its Election Code, including certain changes to mail-in voting provisions implemented by Act 77, when it enacted "Act 12 of 2020". Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of March 27, 2020, § 1, P.L. No. 41, No. 12.

C. Mail-In Ballots were decisive in the November 3, 2020 Election.

The 2020 general election, with Act 77's no-excuse mail-in voting system, was held on November 3 (the

"Election"). Pet.App. 50a, ¶ 61-62. Leading up to the Election, the Secretary of the Commonwealth issued guidance documents on a number of topics related to Election Day procedures, including interpretations of provisions amended by Act 77.[1]

Congress is required by law to meet at 1 p.m. on January 6, 2021 to count the electoral college's votes and announce the results. 3 U.S.C. §§ 15-16.

Petitioner Sean Parnell is a candidate for Pennsylvania's 17th U.S. Congressional District. The overwhelming number of unconstitutional mail-in ballots cast in Petitioner Parnell's race resulted in his opponent being certified the winner. Had the unlawful mail-in ballots been set aside, in accordance with historical practice when unlawful ballots are found to have been cast, Petitioner Parnell would have won his

[1] Among other directives, the Pennsylvania Department of State issued guidelines for accepting mail-in ballots received after election day. *See, e.g.*, Pa. Dep't State, Pennsylvania Guidance for Mail-in and Absentee Ballots Received from the United States Postal Service after 8:00 p.m. on Tuesday, November 3, 2020 (Oct. 28, 2020, Version 1.0), Pet.App. 345a-347a. Pa. Dep't State, Statewide Return and Recount Directive and Procedures (Nov. 1, 2020), Pet.App. 348a-352a.

race.[2] Petitioner Parnell remains subject to the overwhelming disparate impact of Act 77's unlawful mail-in ballot system should he run for office in upcoming Pennsylvania elections.

Each Petitioner is a registered qualified elector residing in counties across Pennsylvania and brought this suit in their capacity as a private citizen.[3] Pet.App 37a-38a, ¶¶ 5-9. The unofficial election results publicly posted by Respondents indicate that one or more of the candidates for whom petitioners voted for in the Election would have been certified the winners if only lawful ballots were counted. For example, Petitioners voted for Donald J. Trump for the office of President of the United States, and Respondents unofficial election results show that President Trump received 2,731,230 in-person votes, 595,538 mail votes, and 50,874 provisional votes. President Trump's opponent, former Vice President Joseph R. Biden, received 1,409,341 in-person votes, 1,995,691 mail votes, and 53,168 provisional votes. Pet.App. 354a.

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[2] The unofficial election results that have been publicly posted by Respondents indicate that Petitioner Parnell received 161,984 in-person votes, 45,987 mail votes, and 3980 provisional votes. Pet.App. 353a. In contrast, Petitioner Parnell's opponent received 80,451 in-person votes, 137,568 mail votes, and 3528 provisional votes. *Id*.

[3] In addition, Petitioners Parnell, Kelly, and Logan also brought this lawsuit in their capacity as candidates for office in the Election.

D. Petitioners Challenge the Constitutionality of Act 77.

Petitioners filed an action in the Commonwealth Court of Pennsylvania on November 21, 2020, seeking injunctive and declaratory relief with regard to certification of the Election results and the unconstitutionality of Act 77 and its no-excuse mail-in voting system. Petitioners argued that the no-excuse mail-in voting system implemented by Act 77 was substantively unconstitutional and violated 158 years of standing legal precedent.

On November 22, Petitioners filed for preliminary injunctive relief to enjoin Respondents from including unlawful mail-in ballots in any certification of Election results. Petitioners sought to preserve the status quo until the Commonwealth Court could make a final determination on the merits.

E. The Commonwealth Court found that Petitioners were likely to succeed on the merits and issued an emergency preliminary injunction prohibiting certification of the Election results.

On November 24, 2020, the Commonwealth Court entered an Order directing Respondents to file answers to Petitioners request for preliminary injunctive relief not later than 12:30 p.m. that same day. Before filing their response, Executive-Respondents took actions to certify the Election and submitted a Certificate of Ascertainment for a slate of electors for Joseph R. Biden as President and Kamala D. Harris as Vice

President of the United States to the Archivist of the United States.

Later that day, Respondents filed their answers to Plaintiffs preliminary injunction request, claiming that the injunctive relief had been rendered moot by the certification activity. Petitioners responded by supplementing their request for injunctive relief, noting that it appeared Respondents' actions may have been accelerated in order to preclude the Court from providing relief to Petitioners.

On November 25, 2020, the Commonwealth Court granted Petitioners request for emergency injunctive relief. The Court enjoined Respondents from taking any further official actions to certify or otherwise finalize the Election results. Pet.App.30a-31a. The Court also scheduled an evidentiary hearing for two days later, on November 27, 2020, at 11:30 AM, to determine the status of certification activity.

Commonwealth Court Judge Patricia A. McCullough issued a November 27, 2020, memorandum opinion supporting court's November 25, 2020 Order. The Commonwealth Court expressly found that Petitioners met all six factors for injunctive relief, and particularly that:

> Petitioners appear to have established a likelihood to succeed on the merits because Petitioners have asserted the Constitution does not provide a mechanism for the legislature to allow for expansion

> of absentee voting without a constitutional amendment. Petitioners appear to have a viable claim that the mail-in ballot procedures set forth in Act 77 contravene Pa. Const. Article VII Section 14 as the plain language of that constitutional provision is at odds with the mail-in provisions of Act 77. Since this presents an issue of law which has already been thoroughly briefed by the parties, this Court can state that Petitioners have a likelihood of success on the merits of its Pennsylvania Constitutional claim.

Pet.App. 26a-27a.

F. The Supreme Court of Pennsylvania vacated the injunction and barred Petitioners from any and all relief.

The Executive-Respondents appealed the emergency preliminary injunction to Supreme Court of Pennsylvania on November 25, 2020 at 1:29 p.m. and on the same day also filed an application for that court to exercise extraordinary jurisdiction and act as the trial court for any remaining proceedings (the "Application").

The emergency preliminary injunction remained in place until late in the day on November 28, 2020, when the Supreme Court of Pennsylvania granted Respondents Application, vacated the November 25 Order, and dismissed the entire case with prejudice (the "November 28 Order"). Pet.App. 1-15. The November 28 Order held that laches applied to Petitioners claims

and that relief could not be granted. The order did not provide any detail as to why Petitioners could not obtain any relief—injunctive, declaratory, prospective, affirmative, or otherwise. The November 28 Order included only a single citation to case law, and provided no analysis of the laches factors, nor indicated what factual conclusions supported each of the factors.

G. The Supreme Court of Pennsylvania Denies Petitioners Request for A Stay of the November 28 Order Pending Appeal to the U.S. Supreme Court.

On December 2, 2020, Petitioners filed with the Supreme Court of Pennsylvania an Emergency Application for Stay of the November 28 Order. Pet.App. 69a-107a. On December 3, 2020, the Supreme Court of Pennsylvania denied Petitioners' Emergency Application for Stay. Pet.App. 16a.

On December 3, 2020, Petitioners filed an emergency application for a writ of injunction directed to the Honorable Samuel A. Alito, Jr., the Associate Justice of the Supreme Court of the United States responsible for emergency applications arising out of Pennsylvania, requesting the same relief that Petitioners sought with the Emergency Application for Stay that the Supreme Court of Pennsylvania denied. On December 8, 2020, Justice Alito referred the emergency application to the Court. Later that day, this Court denied injunctive relief.

II. Federal Questions Raised Below

Petitioners, in both (1) their Memorandum of Law in Support of Motion for Emergency/Special Prohibitory Injunction ("the Motion") filed in the Commonwealth Court of Pennsylvania and (2) their Response to Application for the Court to Exercise Extraordinary Jurisdiction raised the primary federal questions presented in this Petition for a Writ of Certiorari as follows:

> Article I, Section 4 and Article II, Section 1 of the U.S. Constitution grant plenary authority to state legislatures to enact laws that govern the conduct of elections. Yet, while the "legislature may enact laws governing the conduct of elections[,]... 'no legislative enactment may contravene the requirements of the Pennsylvania or United States Constitutions.'" *Kauffmaun v. Osser*, 441 Pa. 150, 157-58 (1970) (Cohen, J. dissenting) (citing *Winston v. Moore*, 244 Pa. 447, 91 A. 520 (1914), and quoting *Shankey v. Staisey*, 436 Pa. 65, 68-69, 257 A.2d 897 (1970), cert denied 396 U.S. 1038 (1970)); *see also, e.g., Smiley v. Holm*, 285 U.S. 355, 369 (noting that state Legislatures are constrained by restrictions imposed by state constitutions on their exercise of the lawmaking power, even when enacting election laws pursuant to U.S. Constitutional authority).

Pet.App. 146a-147a; 194a-195a.

While not expressly passing on that specific question, the Commonwealth Court held, in granting the Motion, that Petitioners demonstrated a likelihood of success on the merits (*see* Pet.App. 10a-11a). The Commonwealth Court also noted that the case involved "not only this provision of the Pennsylvania Constitution but also to the 'one person, one vote' doctrine established by *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), one of the bedrock decisions of the U.S. Supreme Court." Pet.App. 28a, n.5.

While also not expressly passing on that specific question, Justice Wecht, in his Concurring Statement to the November 28 Order discussed the Electors Clause (App. p.8) and the holding in *Smiley v. Holm,* 285 U.S. at 367-368, writing "that the exercise of the authority" to regulate federal elections conferred upon state legislatures by the federal Constitution "must be in accordance with the method which the state has prescribed for legislative enactments," including observance of "the veto power." Pet.App. 10a.

Chief Justice Saylor, joined by Justice Mundy, in his Concurring and Dissenting Statement, found that "the relevant substantive challenge raised by Appellees presents troublesome questions about the constitutional validity of the new mail-in voting scheme" and that "the resolution of the underlying substantive controversy merits close review." Pet.App. 13a-14a.

The Petition for Review filed in the Commonwealth Court also noted that the no-excuse mail-in ballot provisions of Act 77 were "unconstitutional" and

noted the "lack of constitutional authority to pass a universal mail-in voting scheme" and "constitutional constraints." *See* Pet.App. 35a, 44a, 55a at ¶¶ 1, 33-35, 84.

Petitioners also raised the federal question with regard to Act 77, and the violation of federal due process and petition rights within their November 28 application for stay to the Supreme Court of Pennsylvania. *See* Pet.App. 69a-107a.

Petitioners now file this timely petition for review of the Supreme Court of Pennsylvania's decisions.

REASONS TO GRANT THE PETITION

Petitioners request that this Court grant a writ of certiorari to resolve whether, in exercising of federally delegated authority to regulate elections for federal offices, a state may bypass constitutional restrictions on its lawmaking power. This Court should grant this petition for two reasons.

First, the Supreme Court of Pennsylvania's decision to apply the laches defense as a bar to any and all relief for a substantive constitutional challenge to election laws conflicts with this Court's precedents, precedents of U.S. Courts of Appeal in numerous federal circuits, and precedents of other states. The indefensible application of laches violates basic principles of due process and abdicates the state judicial role and responsibility in addressing the harmful impact of unconstitutional legislation on federal elections.

Second, states may not ignore their state constitution's restrictions on the lawmaking power. Doing so in purported exercise of the plenary authority to regulate federal elections, authority delegated by the U.S. Constitution, presents a federal question of great significance and nationwide implication.

This Court should not turn a blind eye to unconstitutional election laws that permit massive vote dilution and have a significant impact on election outcomes, as the Pennsylvania Supreme Court did.

As the Commonwealth Court opinion supporting injunctive relief below stated:

> [C]ompelling exigencies raised in this case … are of statewide and national concern. Petitioners raise matters that go to the core of the electoral process and involve the constitutionality of how the citizens of this Commonwealth may cast their votes, not only for the offices sought by Petitioners, but also, for the office of president and vice president of the United States of America as well as statewide, regional and local offices.

Pet.App. 17a-18a. The questions presented by this Petition are vitally important, not just as to the 2020 elections, but with respect to future elections as well. Voting rights are, indeed, "of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

When fundamental rights are so plainly violated, the Court must not idly stand by and permit judicial

acquiescence in the name of comity. To acquiesce here would allow open defiance of the plain meaning and intent of constitutional provisions.

I. Applying laches to bar any and all relief for substantive constitutional challenges to election laws conflicts with this Court's precedents, precedents of multiple U.S. Courts of Appeal, and precedents of other states.

As a final adjudication on the merits of the case below, the Supreme Court of Pennsylvania held that the doctrine of laches barred any equitable remedy—injunctive, declaratory, retrospective, prospective, affirmative, or otherwise—for Petitioners' constitutional challenges to Pennsylvania's no-excuse mail-in ballot system.

> [W]e hereby dismiss the petition for review with prejudice based upon Petitioners' failure to file their facial constitutional challenge in a timely manner. Petitioners' challenge violates the doctrine of laches given their complete failure to act with due diligence in commencing their facial constitutional challenge, which was ascertainable upon Act 77's enactment
> ***
> Petitioners filed this facial challenge to the mail-in voting statutory provisions more than one year after the enactment of Act 77.

Pet.App. 2a. This holding creates a striking conflict with precedent in this Court and in nearly every jurisdiction in the nation with regard to the availability of equitable remedies in after-the-fact challenges to unlawful elections.

For example, this Court held in *Menendez v. Holt*, 128 U.S. 514, 529 (1888), that "Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right unless it has been continued so long and under such circumstances as to defeat the right itself." This Court has also held that, "[u]nder the Supremacy Clause, state-law time bars, *e.g.*, … laches, do not apply on their own force to [underlying federal policy]." *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 240 n.13 (1985); *see also McCarthy v. Briscoe*, 429 U.S. 1317, 1322 (1976) (Powell, J., in chambers) (accepting lower court's factual findings underlying a laches determination but holding that doing so "does not in this case require acceptance of the conclusion that violation of the applicants' constitutional rights must go unremedied").

Dismissing Petitioners' claims on the basis of laches—as applied to all forms of equitable relief—the Supreme Court of Pennsylvania also created a conflict with:

(1) Federal appellate court precedent in at multiple circuits, including the Third Circuit, that permits injunctive and other equitable relief—including decertification of election results—in post-election challenges to the legality of absentee ballots;

(2) Federal appellate court precedent in multiple circuits that does not permit laches to completely bar post-election remedies to facial constitutional challenges to election laws; and

(3) Precedent in multiple state courts of last resort for post-election remedies in cases challenging the constitutionality of state election laws.

A. First Circuit – *Griffin v. Burns*

In *Griffin* the First Circuit held that ordering a new election is the appropriate remedy for a post-election challenge that seeks to invalidate a large number of unlawfully cast absentee ballots; even when voters relied upon the (innocent) advice of state officials to vote by absentee ballot in a manner that was contrary to state law. *See Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978).

B. Third Circuit – *Marks v. Stinson*

In *Marks*, the Third Circuit affirmed the lower court's findings in a Pennsylvania post-election case that appropriate post-election remedies—if unlawful absentee ballots are cast in such amount to decide a winner—included:

- preliminary injunctive relief;
- the decertification of the inferred winner when including the unlawful absentee ballots;
- setting aside and not counting unlawful absentee ballots;
- certifying the winner of the election based only on the lawful in-person votes cast; and

- ordering a special election if the trial court could not determine what the results would have been without the unlawfully cast ballots.

Marks v. Stinson, 19 F.3d 873 (3rd Cir. 1994).

C. Fifth Circuit – *Bell v. Southwest*

In *Bell*, the Fifth Circuit affirmed the use of injunctive relief and suggested that a special election was a necessary remedy when "state-imposed, state-enforced racial discrimination and the absence of effective judicial remedy prior to the holding of an election" were present. *Bell v. Southwest*, 376 F.2d 659, 664 (5th Cir. 1967).

D. Sixth Circuit

1. *Heitmanis v. Austin*

In *Heitmanis*, the Sixth Circuit rejected an argument by Michigan officials that laches barred post-national-convention challenges to the constitutionality of a state law conflicting with national party rules for the selection of national convention delegates. *See Heitmanis v. Austin*, 899 F.2d 521 (6th Cir. 1990).

2. *Warf v. Board of Elections of Green County, Ky.*

In *Warf*, the Sixth Circuit upheld the voiding of unlawful absentee ballots cast in such amount to change the election outcome, and that voiding such ballots did not violate the due process of voters whose ballots were voided. *See Warf v. Board of Elections of Green County Ky.*, 619 F.3d 553, 563 (6th Cir. 2010).

E. Ninth Circuit - *S.W. Voter Registration Ed. Project v. Shelley*

In *Shelley*, the Ninth Circuit reiterated the well-settled notion that "laches does not bar future injunctive relief." *S.W. Voter Registration Ed. Project v. Shelley*, 344 F.3d 882, 906 (9th Cir. 2003), *rev'd on reh'g en banc*, 344 F.3d 914 (9th Cir. 2003) (reversing on other grounds).

F. Eleventh Circuit

1. *Democratic Exec. Comm. Of Fla. V. Lee*

In *Lee*, the Eleventh Circuit upheld the district court's issuance of a preliminary injunction in a case challenging the facial constitutionality of an amendment to Florida's mail ballot signature-matching requirements. *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1326 (11th Cir. 2019). The district court found that it was not clear laches could ever apply to prospective injunctive relief and, in any case, laches had never been used in that manner, by Eleventh Circuit courts, to preclude prospective injunctive relief just before an election. *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1025-1026 (N.D. Fla. 2018). Further, "even if laches were to apply, it is a factually-intense question that requires a court to determine whether the delay is excusable based not only on the period of the delay, but the reasons for the delay." *Id.* at 1026.

In evaluating all of the relevant factors considered by the district court—(1) that the mail-in signature-matching amendment was passed in **June 2017**, (2)

that plaintiffs brought suit after the 2018 General Election had occurred, and (3) that the only opportunity to effectively evaluate the constitutionality of the new law prior to the 2018 General Election had been during the 2018 Primary Election—the Eleventh Circuit found that the appellants could not "satisfy the laches elements." 915 F.3d at 1326.

2. *Ga. Muslim Voter Project v. Kemp*

In *Kemp*, the Eleventh Circuit upheld the district court's issuance of a prospective preliminary injunction in a case raising a facial constitutional challenge to Georgia's mail-in and absentee ballot signature mismatch law that was passed **15 years prior**. *See Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1274 (11th Cir. 2018) (mem. op.). It was undisputed that an October news report on absentee ballot applications being rejected during the 2018 election cycle "sparked" the plaintiffs' actions, and there had not been sufficient factual development at the time of the Secretary's appeal to determine otherwise. *Id.* ("To succeed on a laches claim, the Secretary must show that the plaintiffs inexcusably delayed bringing their procedural due process claim and that the delay caused undue prejudice. He cannot at this stage do so." (citations omitted)).

G. State Courts of Last Resort[4]

Precedent in state courts of last resort across the nation also show a unison body of law with regard to laches as applied to the availability of any remedy in post-election constitutional challenges.

For example, in *McNally v. Tollander*, the Supreme Court of Wisconsin ordered that a special election was necessary when it was discovered, after the election, that "election statutes were intentionally ignored by public officials who were anxious to put the referendum issue on the November 1976 general election." 100 Wis.2d 490, 498-499, 302 N.W.2d 440, 444-445 (1981).

In *Rogers*, the Supreme Court of Mississippi, in a post-election challenge, ordered that a special election was the appropriate remedy in a case where absentee ballots that did not comply with mandatory statutory provisions were included in final returns. This was so, even though the number of unlawful absentee ballots cast would not change the election results, and in total amounted to "only sixteen hundredths of one percent (.16%) of the total votes cast." *Rogers v. Holder*, 636 So. 2d 645, 651 (Miss. 1994).

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[4] There is also a body of case law from intermediary state appellate courts, not overturned by state courts of last resort, that support Petitioners arguments. *See, e.g.*, *Frese v. Camferdam*, 76 Ill. App. 3d 68, 394 N.E.2d 845 (1979) (overturning election for assessor of township, finding the delivery and return of a number of absentee ballots violated state law and were therefore void).

The immense, uniform, national body of state and federal case law supports Petitioners' fundamental right to an equitable remedy in this case. Whether such relief is prospective, retrospective, injunctive, declaratory, affirmative, or otherwise has yet to be adequately determined by a court of law. The Supreme Court of Pennsylvania's decision to deny any and all relief dispenses with an important federal question in a manner that conflicts with the holdings of this Court, federal appellate courts, other state courts of last resort, creating a federal question that should be settled by this Court. This conflict can only be resolved by this Court granting certiorari.

II. Pennsylvania violated Petitioners' First and Fourteenth Amendment rights by dismissing the case with prejudice and thereby shielding Act 77 from constitutional challenge.

By dismissing this case with prejudice, on the basis of laches, the Supreme Court of Pennsylvania foreclosed, without adequate due process, any relief for Petitioners' harms—*both those occurring before they filed suit, as well as those that remain ongoing*. "Dismissal with prejudice constitutes an adjudication of the merits as fully and completely as if the order had been entered after trial." *Gambocz v. Yelencsics*, 468 F.2d 837, 840 (3rd Cir. 1972). "Res judicata precludes the parties to a law suit, and their privies, from relitigating issues that were or might have been raised between them in that suit." *Griffin v. Burns*, 570 F.2d 1065, 1071 (1st Cir. 1978).

No person may be deprived of a fundamental right without due process of law. Indeed, it is axiomatic that the inability to challenge the deprivation of a right is tantamount to the elimination of any protection of that right. Petitioners were denied due process when the Supreme Court of Pennsylvania took over the case and quickly dismissed it with prejudice on the basis of an indefensible application of laches. The combination of the lack of standing under Pennsylvania law to challenge Act 77 prior to the election (discussed *infra*), along with an arbitrary application of laches to bar any retrospective and prospective equitable relief after an election, results in the unlawful deprivation of due process and equal protection; a violation of both the First and Fourteenth amendments to the U.S. Constitution.

A fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). It is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citations omitted). Central to the principle of due process is a requirement that an individual be allowed a fair hearing before the government may deprive him or her of a protected interest. *See Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985).

This Court has held that the right of access to judicial proceedings is a component of the right to petition government for a redress of grievances and is constitutionally protected. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)

("The right of access to the courts is indeed but one aspect of the right of petition." (citations omitted)). Consistently, this Court has reviewed such deprivation of access to the courts under a Due Process Clause, and Equal Protection framework. *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Ortwein v. Schwab*, 410 U.S. 656 (1973); *but* s*ee Sosna v. Iowa*, 419 U.S. 393 (1975) (declining to apply *Boddie* because the restriction of access did not amount to a "total deprivation").

The deprivation of access to courts is not commonly raised as an element of due process. But when "the legitimacy of the State's monopoly over techniques of final dispute settlement" becomes problematic, this Court has stepped in. *Boddie*, 401 U.S. at 375. Particularly when "the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." *Id.* at 376.

Pennsylvania does not permit electors and candidates to bring substantive constitutional challenges to laws governing the conduct of federal elections. An elector or candidate may not bring a challenge prior to an election for failure to meet standing requirements. *See, e.g.*, *Kauffman v. Osser*, 441 Pa. 150, 271 A.2d 236 (1970) (appellants interest in not having their in person votes diluted by absentee ballots claimed to be unconstitutional had no standing prior to election because their interests were "too remote and too speculative"); *see also In re Gen. Election 2014*, 111 A.3d 785 (Commw. Ct. Pa. 2015) (appellants assumption that allegedly invalid absentee ballots would vote in a way

that would cause dilution of appellants' votes was unwarranted and could not afford a basis for standing). To overcome such speculative harm requires waiting until after the election takes place. But now that harm has materialized and is no longer speculative, it is too late.

Petitioners seek both prospective and retrospective relief in this case. "Count I" of the Petition seeks declaratory relief, and "Count II" seeks injunctive relief. Pet.App. 51a-58a. To prevent future harm resulting from Act 77, Petitioners seek that Act 77 be declared unconstitutional. Pet.App. 56a. To mitigate current harms, and provide relief for harm already caused by Act 77, Petitioners seek injunctive relief. Pet.App. 58a.

By shielding Act 77 from any meaningful merits review and using laches to dismiss a case seeking prospective relief, the Supreme Court of Pennsylvania has insulated the legislation from any attack thereby amending the Pennsylvania Constitution absent any authority to do so. Such attempted de facto constitutional amendment is itself unconstitutional. And, while the indefensible application of the laches doctrine is addressed *supra*, its indefensible misapplication in this case denies due process review of an ongoing harm implicating federal interests.

III. Pennsylvania's enactment of Act 77 directly conflicts with this Court's decisions prescribing the federally-delegated lawmaking authority of state legislatures to regulate elections for federal office.

State legislatures derive the authority to regulate federal elections and to select presidential electors from the U.S. Constitution. *See* U.S. Const. art. I, § 4, art. II, § 1. In exercising its federal powers, the General Assembly is constrained by restrictions imposed onto it by the Pennsylvania Constitution. *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."); *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (citing *McPherson* and noting that state legislatures are constrained by restrictions imposed by state constitutions on their exercise of the lawmaking power, even when enacting election laws pursuant to U.S. Constitutional authority); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015) (holding that redistricting is a legislative function to be performed in accordance with a state constitution's prescriptions for lawmaking, which may include referendums).

> As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the

> authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.

Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000). When a state legislature violates its state constitution, purportedly in furtherance of its plenary authority to regulate federal elections and appoint electors, it also violates the U.S. Constitution. "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., Scalia J., Thomas, J., concurring).

A. Voting in person is a mandatory qualification for electors under the Pennsylvania Constitution.

At issue here is the Pennsylvania General Assembly's attempt—and success if this Court should not hear this case—to implement by legislation a no-excuse absentee voting system for state and federal elections that violates the Pennsylvania Constitution and thereby the U.S. Constitution.

Under 158-year-old Supreme Court of Pennsylvania precedent, voting in-person at the election is a qualification for voting under the Pennsylvania Constitution. *See* Pa. Const. art. VII, § 1; *Chase v. Miller*, 41 Pa. 403, 418-19 (1862); *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 134-35, 126 A. 199 (1924) (hereinafter *Lancaster City*).

The current Pennsylvania Constitution sets out the following qualifications for voting: (1) 18 years of age or older; (2) citizen of the United States for at least one month; (3) has residence in Pennsylvania for the 90 days immediately preceding the election; and (4) has residence in the "election district where he or she **shall offer to vote** at least 60 days immediately preceding the election …." Pa. Const. art. VII, § 1 (emphasis added).

> To "offer to vote" by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. The ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil. We cannot be persuaded that the constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. The constitution meant, rather, that the voter, *in propria persona*, should offer his vote in an appropriate election district, in order that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.
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> Our Constitution and laws treat the elective franchise as a sacred trust…. All of

> which the [1839 act] reverses and disregards, and opens a wide door for most odious frauds, some of which have come under our judicial cognizance.

Chase, 41 Pa. at 418-425 (1862); *Lancaster City*, 281 Pa. 134-35, 126 A.2d at 200 (upholding the same).

Article VII, § 14 provides the only such exceptions to the *in propria persona* voting requirement of the Pennsylvania Constitution, in four specific circumstances: (1) absence from municipality due to duties, occupation, or business; (2) illness or physical disability; (3) observance of a religious holiday; or (4) county election day duties. Pa. Const. art. VII, § 14(a). Outside of these four enumerated exceptions, the Pennsylvania Constitution prohibits absentee voting. *Lancaster City*, 281 Pa. at 136-37, 126 A.2d. at 201.

B. The U.S. Constitution's delegation of lawmaking authority for regulating elections to federal office does not permit the General Assembly to enact laws in contravention of the Pennsylvania Constitution.

"What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist." *McPherson v. Blacker*, 146 U.S. 1, 25 (1892). Under the Supreme Court of Pennsylvania's interpretation of the Pennsylvania Constitution, the legislative power "can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations

therein fixed." *Lancaster City*, 281 Pa. at 137 (citation omitted).

Act 77 unconstitutionally expands the scope of absentee voting to all voters in contravention of the Pennsylvania Constitution. Act 77, as amended, defines a "qualified mail-in elector" as "a qualified elector." 25 Pa. Stat. § 2602(z.6). A "qualified elector" is "any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election." *Id.* § 2602(t). In short, Act 77 qualifies all electors as mail-in electors.

In doing so, Act 77 directly conflicts with standing Pennsylvania precedent going back 158 years. In 1838, Pennsylvania amended its constitution to require voters to "reside in the election district where he offers to vote, ten days immediately preceding such election." John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 497 (2003). (citing Pa. Const. art. III, § 1 (1838)). This created a conflict with the Military Absentee Act as reenacted in 1839, which allowed for absentee voting, and the newly amended Pennsylvania Constitution, which no longer did. *Id.* Analyzing the constitutionality of the Military Absentee Act of 1839 under the Pennsylvania Constitution, the Supreme Court of Pennsylvania held that the Act was unconstitutional because the purpose of the 1838 constitutional amendment was to require in-person voting in the election

district where a voter resided at least 10 days before the election. *Chase*, 41 Pa. at 418-19.

From 1864 to 1949, only qualified electors engaged in actual military service were permitted to vote by absentee ballot under the Pennsylvania Constitution. *See* Josiah Henry Benton, Voting in the Field: A Forgotten Chapter of the Civil War, at 199 (1915); Pa. Const. art. VIII, § 6 (1864).

In 1924, *Lancaster City* struck down as unconstitutional the Act of May 22, 1923 (P.L. 309; Pa. St. Supp. 1924, §9775a1, *et seq*.), which provided civilians the right to vote by absentee ballot. *Lancaster City* reaffirmed *Chase*'s analysis of the Pennsylvania Constitution's in-person voting requirements. *Lancaster City*, 281 Pa. at 135. The Supreme Court of Pennsylvania held the Act of May 22, 1923 unconstitutional because the Pennsylvania Constitution still required electors to "offer to vote" in the district where they reside, and that those eligible to "vote other than by personal presentation of the ballot" were specifically named in the Constitution (i.e., active military). *Id.* at 136-37. The court relied on two primary legal principles in its ruling:

> [1] 'In construing particular clauses of the Constitution it is but reasonable to assume that in inserting such provisions the convention representing the people had before it similar provisions in earlier Constitutions, not only in our own state but in other states which it used as a guide, and in adding to, or subtracting from, the language of such other

> Constitutions the change was made deliberately and was not merely accidental.' *Com v. Snyder*, 261 Pa. 57, 63, 104 Atl. 494, 495.
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> [2] The old principle that the expression of an intent to include one class excludes another has full application here…. 'The residence required by the Constitution must be within the election district where the elector attempts to vote; hence a law giving to voters the right to cast their ballot at some place other than the election district in which they reside [is] unconstitutional.'

Id. The court went further to note that "[h]owever laudable the purpose of the Act of 1923, it cannot be sustained. If it is deemed necessary that such legislation be placed upon our statute books, then an amendment to the Constitution must be adopted permitting this to be done." *Id.* at 138. This principle was affirmed between 1864 and 1924 in many other states with similar constitutional provisions, both with regard to absentee voting by regular citizens as well as by soldiers away from home. *Id.* (citations omitted).

C. The provisions of the Pennsylvania Constitution determinative to *Lancaster City* remain materially the same as when that opinion was issued.

While the Pennsylvania Constitution has been amended many times, for purposes not relevant here,

since *Lancaster City*, the determinative constitutional provisions relied upon by *Chase and Lancaster City* remain either entirely unchanged, or materially so. *Smiley* speaks directly to this importance of longstanding practice in the interpretation of the state power to regulate elections pursuant to the U.S. Constitution:

> The practical construction of article 1, s 4, is impressive. General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights, and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the states.

Smiley v. Holm, 285 U.S. 355, 369 (1932). Longstanding interpretations of the Pennsylvania Constitution have not changed since *Lancaster City* as relates to the restrictions on expanding absentee voting.

Previously numbered Article VIII, § 1, and Article VIII, § 8, those provisions are now found in the Pennsylvania Constitution as Article VII, § 1, and Article VII, § 4. Article VII, Section 4 remains **exactly** the same as it did when the 1924 case was decided. *See* Pa. Const. art. VII, § 4 ("All elections by the citizens

shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.").

Article VII, § 1 has only distinctly changed in three ways since the 1924 case: (1) the voting age requirement was changed to 18, from 21; (2) the state residency requirement was lowered from 1 year, to 90 days; and (3) Pennsylvania amended Clause 3 of Article VII, § 1 to allow a Pennsylvania resident who moves to another Pennsylvania county within 60 days of an election to vote in their previous county of residence. Pa. Const. art. VII, § 1. None of these changes to Article VII, Section 1 have any material importance to the case at hand and were not relevant to this Court's decision in *Lancaster County*.

The Pennsylvania Constitution thus remains, for all purposes relevant to the holding in *Lancaster City*, unchanged since 1924 with regard to the qualifications and requirements for voting at an election. *Chase* and *Lancaster City* are not only instructive to this case, but indeed are determinative as still-valid, precedential case law on the issues in question.

In 1949, Pennsylvania amended its constitution to also allow bedridden or hospitalized war veterans the ability to vote absentee. Pa. Const. art. VIII, § 18 (1949).

In 1957, Pennsylvania amended its constitution to allow civilian absentee voting in instances where unavoidable absence or physical disability prevented them from voting in person. *See In re Gen. Election,*

November 3, 1964, 423 Pa. 504, 508, 224 A.2d 197 (1966); Pa. Const. art. VII, § 19 (1957).

In 1967, following a constitutional convention, the Pennsylvania Constitution was reorganized and Article VII, § 19 was renumbered to Article VII, § 14.

In 1985, Pennsylvania amended its constitution to add religious observances to the list of permissible reasons for requesting an absentee ballot *See* Pa. H. Leg. J. No. 88, 167th General Assembly, Session of 1983, at 1711 (Oct. 26, 1983) (considering HB 846, PN 1963, entitled "An Act amending the 'Pennsylvania Election Code,' … further providing for absentee ballots for religious holidays and for the delivery and mailing of ballots."); *see also Id.* (statement of Mr. Itkin) ("T]his amendment is offered to alleviate a possible problem with respect to the legislation. The bill would originally amend the Election Code to [expand absentee balloting] …. Because it appears that the Constitution talks about who may receive an absentee ballot, we felt it might be better in changing the bill from a statute to a proposed amendment to the Pennsylvania Constitution.").

In 1997, Pennsylvania amended its constitution to expand the ability to vote by absentee ballot to qualified voters that were outside of their *municipality of residence* on election day; where previously absentee voting had been limited to those outside of their *county of residence*. *See* Pa. H. Leg. J. No. 31, 180th General Assembly, Session of 1996 (May 13, 1996) ("people who do not work outside the municipality [or county] or people who are ill and who it is a great difficulty for them to vote but it is not impossible for

them to vote, … they cannot vote under [the 1997 amendment]).” *Id.* at 841 (statement of Mr. Cohen).

The Pennsylvania Constitution has not been amended to allow for other categories of absentee voting since 1997. This is a mandatory requirement to implement the no-excuse mail-in ballot system that Respondents sought with Act 77. *See, e.g., Kremer v. Grant*, 529 Pa. 602, 613, 606 A.2d 433, 439 (1992) (“[T]he failure to accomplish what is prescribed by Article XI infects the amendment process with an incurable defect”); *Sprague v. Cortes*, 636 Pa. 542, 568, 145 A.3d 1136, 1153 (2016) (holding that matters concerning revisions of the Pennsylvania Constitution require “the most rigid care” and demand “[n]othing short of literal compliance with the specific measures set forth in Article XI.”) (citation omitted). This violates the Pennsylvania and U.S. Constitutions.

IV. Pennsylvania’s erroneous laches holding does not support its judgment below and is without any fair or substantial support under the law.

As a threshold matter, it is the duty of this Court “to ascertain, ‘… in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment.’” *N.A.A.C.P. v. Ala. ex. rel. Patterson*, 357 U.S. 449, 455 (1958) (citation omitted). Here, it does not. “The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity.” *Holmberg v. Ambrecht*, 327 U.S. 392, 395 (1946) (citations omitted).

Voting in federal elections is a right guaranteed by the U.S. Constitution, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), and states draw directly from the U.S. Constitution the authority to regulate such elections. U.S. Const. art. I, §4, art. II, §1.

Further, "federal jurisdiction is not defeated if the nonfederal ground relied on by the state court is 'without any fair or substantial support ….'" *N.A.A.C.P.*, 357 U.S. at 454 (quoting *Ward v. Board of County Commissioners*, 253 U.S. 17, 22 (1920)). Laches, as applied to this case, is entirely inconsistent with Pennsylvania precedent (and precedent across the nation, discussed *supra*) and is contradicted by recent Supreme Court of Pennsylvania decisions.

First, laches is a fact-intensive inquiry that requires the defendant to prove "(1) a delay arising from [the] failure to exercise due diligence and (2) prejudice to the [respondent] resulting from the delay." *Stilp v. Hafer*, 553 Pa. 128, 718 A.2d 290, 293 (1998) (citing *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184, 187-88 (1988)). No evidentiary hearing was held to gather the necessary facts for a laches determination.

The holding in *Stilp* also contradicts the Pennsylvania Supreme Court's holding in this case. *Stilp* held that while the principle of laches may apply to a constitutional challenge on procedural grounds, it does not apply with respect to the substance of a statute. *Id.* However, "laches and prejudice can never be permitted to amend the Constitution." *Id.* (citations omitted). Petitioners' constitutional claims in this case are substantive, and therefore cannot be defeated by laches.

In *Lancaster City* and *Chase*, laches did not bar the Pennsylvania Supreme Court from voiding all unlawful mail-in ballots voted at the elections at issue. The legislation at issue in *Chase* was enacted **23 years** prior to its decision, 41 Pa. at 407 ("Act of 2d July 1839, § 155") and in *Lancaster City* the legislation was enacted **one year and two months** prior to its decision, 281 Pa. at 133 (Act May 22, 1923 (P. L. 309; Pa. St. Supp. 1924, § 9775a1, et seq.)). In both cases, the constitutionality of the legislation at issue was **challenged after the election had occurred**.

Further evidence of the irregular application of laches by Pennsylvania can be found in examining recent constitutional challenges to state legislation. As recently as 2018, Pennsylvania heard a challenge to the state's congressional district plan brought **6 years, and multiple elections**, after the 2011 congressional redistricting map legislation was enacted. *See League of Women Voters v. Commonwealth*, No. 159 MM 2017 (Pa. Feb. 7, 2018). On November 23, 2020, well after the election had already taken place, the Pennsylvania also decided another Act 77 case regarding whether Act 77 required county boards of elections to disqualify absentee ballots (including no-excuse absentee ballots) based on the lack of a signature on the outer secrecy envelope. *See In re Canvass of Absentee and Mail-In Ballots*, Civ. 34 EAP 2020 (Pa. Nov. 23, 2020).

As in *N.A.A.C.P.*, here there is no "reconcil[ing] the procedural holding of the [Pennsylvania] Supreme Court in the present case with its past unambiguous holdings." 357 U.S. 449, 455. Thus, not only is laches

an inadequate ground to bar this Court's review, but Pennsylvania also applied the doctrine to avoid addressing the merits of a federal question of fundamental importance.

Granting certiorari will allow this Court to remedy the inexcusable use of the laches doctrine to deprive Petitioners of a resolution on the merits.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

December 11, 2020

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