Nos. 20A53, 20A54

In the Supreme Court of the United States

JOSEPH B. SCARNATI, III, *ET AL.*,

Applicants,

v.

KATHY BOOCKVAR, SEC'Y OF PENNSYLVANIA, *ET AL.,*

Respondents.

REPUBLICAN PARTY OF PENNSYLVANIA,

Applicant,

v.

KATHY BOOCKVAR, SEC'Y OF PENNSYLVANIA, *ET AL.,*

Respondents.

On Applications for Stay Pending Disposition of a Petition for a Writ of Certiorari

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPLICANTS AND A STAY

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Movant Eagle Forum Education & Legal Defense Fund respectfully requests leave to file the accompanying brief as *amicus curiae* in support of the application to stay the decision and remedy of the Pennsylvania Supreme Court in the above-captioned matter.*

IDENTITY AND INTERESTS OF MOVANT

Eagle Forum Education & Legal Defense Fund ("EFELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty-five years, EFELDF has consistently defended the Constitution's federalist structure and the separation of powers. In the context of the integrity of the elections on which the Nation has based its political community, EFELDF has supported efforts to ensure equality of voters consistent with the written Constitution and validly enacted laws. For the foregoing reasons, movant EFELDF has direct and vital interests in the issues before this Court and respectfully requests leave to file the accompanying *amicus* brief in support of the stay applicants.

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* By analogy to FED. R. APP. P. 29(c)(5) and this Court's Rule 37.6, counsel for movant and *amicus curiae* authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the movant/*amicus* and its counsel make a monetary contribution to preparation or submission of the motions and brief.

REASONS TO GRANT LEAVE TO FILE

By analogy to Rule 37.2(b) of the Rules of the Supreme Court, movant respectfully seeks leave to file the accompanying *amici curiae* brief in support of the stay applicants. By filing this motion contemporaneously with the respondents' deadline to file an opposition, this filing should not disturb the accelerated briefing schedule ordered in this matter.

Movant EFELDF respectfully submits that the proffered *amicus* brief will bring two categories of relevant matters to the Court's attention:

- First, the EFELDF brief discusses the All Writs Act, 28 U.S.C. §1651(a), as well as 28 U.S.C. §2106, which aid this Court's jurisdiction to apply a stay and remedial power not only to issue a stay but also to remedy the eventual merits. *See* EFELDF Br. at 9-13.
- Second, the EFELDF brief addresses the Due Process Clause as a federal basis for this Court to hear the merits of this action, in addition to the federal issues presented by the Elections Clause. *See* EFELDF Br. at 15-17.
- Third, the EFELDF brief applies the preemption analysis that this Court applies to Elections Clause cases – without a presumption of preemption – to show the likelihood of the applicants' prevailing. *See* EFELDF Br. at 18-19.

These issues are all relevant to deciding the stay applications, and movant EFELDF respectfully submits that filing the brief will aid the Court.

For the above reasons, EFELDF respectfully requests that this motion for leave to file the accompanying brief *amicus curiae* be granted.

Dated: October 5, 2020 Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS

Amicus Curiae Eagle Forum Education & Legal Defense Fund ("EFELDF") respectfully submits that the Circuit Justice (or the full Court if referred to the full Court) should stay the decision and remedial orders of the Pennsylvania Supreme Court in this action until the applicants – the leaders of the Pennsylvania House of Representative and Senate in No. 20A53 and the Republican Party of Pennsylvania in No. 20A54 (collectively, hereinafter "Applicants") – timely file and this Court duly resolves petitions for a writ of *certiorari*. *Amicus* EFELDF's interests are set out in the accompanying motion for leave to file.

INTRODUCTION

Purportedly acting under a generally worded clause of the state constitution that "Elections shall be free and equal," PA. CONST. art. I, §5, cl. 1, a bare partisan majority of the Pennsylvania Supreme Court has enacted a new election law weeks before a federal election. This Court has recognized even the fear of election fraud as a harm in its own right, *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006), and the Pennsylvania Supreme Court's action to count even *non-postmarked ballots* received 3 days after Election Day certainly raises that possibility in close elections. In addition, the state court usurped authority that the Elections Clause vests in state legislatures.

The solution here is easy: stay the Pennsylvania Supreme Court's decision and orders, pending this Court's resolution of timely petitions for a writ of *certiorari*. When late-breaking election-law rulings

surface near an election, this Court has not hesitated to issue stays[2] to avoid electoral chaos and voter confusion. *Purcell*, 549 U.S. at 4-5 ("Court orders affecting elections … can result in voter confusion and consequent incentive to remain away from the polls"). *Amicus* EFELDF respectfully submits that the Court must do so here.

Federal Election Law

The Elections Clause provides that state legislatures shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, §4, cl. 1, subject to the power of "Congress at any time by Law [to] make or alter such Regulations." *Id.* art. I, §4, cl. 2. In addition, state legislatures also have plenary power to set the process for appointing presidential electors: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." *Id.* art. II, §1, cl. 2. Under these powers, Congress has set a uniform nationwide Election Day on the Tuesday next after the first Monday in November. *See* 3 U.S.C. §1; 2 U.S.C. §7.

Pennsylvania Election Law

In 2019, Pennsylvania adopted bipartisan election reforms. *See* 2019 Pa. Legis. Serv. Act 2019-77. The law sets two deadlines relevant here: (1) a deadline of 5:00 p.m. on the Tuesday before an election day for

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[2] *See*, *e.g.*, *Frank v. Walker,* 135 S.Ct. 7 (2014); *Husted v. Ohio State Conf. of the NAACP,* 135 S.Ct. 42 (2014); *North Carolina v. League of Women Voters,* 135 S.Ct. 6 (2014); *Arizona Sect'y of State's Office v. Feldman*, 137 S.Ct. 446 (2016); *North Carolina v. Covington*, 138 S.Ct. 974 (2018); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205 (2020).

voters to apply to vote by mail, 25 PA. STAT. §§3146.2a(a), 3150.12a(a), and (2) a deadline of 8:00 p.m. on an election day for a county board of elections to receive a mail-in ballot. 25 PA. STAT. §§3146.6(c), 3150.16(c). As relevant here, however, Pennsylvania also has a generally worded clause about elections in its Constitution: "Elections shall be free and equal." PA. CONST. art. I, §5, cl. 1. The legislature and voters approved this provision in 1976.

Until very recently, the free-and-equal clause had been held not to authorize judicial tinkering with election laws. *See*, *e.g., Erfer v. Commonwealth*, 568 Pa. 128, 142 n.4, 794 A.2d 325, 334 n.4 (Pa. 2002); *Holt v. 2011 Legislative Reapportionment Comm'n*, 620 Pa. 373, 412, 67 A.3d 1211, 1235 (Pa. 2013). Indeed, investing criteria for apportionment into the free-and-equal clause renders another provision of the same constitution mere surplusage, *see* PA. CONST. art. VII, §9 (expressly setting same criteria for *state* legislative districts). That normally would suggest that the free-and-equal clause does not address apportionment: "[A] *bedrock* principle of statutory construction *requires* that a statute be construed, if possible, to give effect to all its provisions, so that no provision is mere surplusage." *Commonwealth v. Gilmour Mfg. Co.*, 573 Pa. 143, 149, 822 A.2d 676, 679 (Pa. 2003) (interior quotations omitted, emphasis added). But the current majority on the Pennsylvania Supreme Court appear to place more emphasis on electoral results than on norms of judicial conduct.

That enterprise started when the same majority held in 2018 that – for the first time in Pennsylvania's history – the free-and-equal clause allowed that court

to reapportion Pennsylvania's congressional districts. *See League of Women Voters of Pa. v. Commonwealth*, 644 Pa. 287, 175 A.3d 282 (Pa. 2018); *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737 (Pa. 2018). This litigation continues that trend by counting ballots – even *non-postmarked ones* – received 3 days after Election Day, which extends the deadline set by Pennsylvania's legislature.

STANDARD OF REVIEW

A stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is a "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

Where the All Writs Act, 28 U.S.C. §1651(a) is implicated, the Court also considers the necessity or appropriateness of interim relief *now* to aid the Court's *future* jurisdiction. *See Edwards v. Hope Med. Group for Women,* 512 U.S. 1301 (1994) (requiring "reasonable probability that *certiorari* will be granted," a "significant possibility" of reversal, and a "likelihood of irreparable harm") (Scalia, J., in chambers). Although "a single Circuit Justice has no authority to summarily reverse a judgment of the highest court of a State," he or she can "grant interim relief in order to preserve the jurisdiction of the full

Court to consider an applicant's claim on the merits." *Kimble v. Swackhamer*, 439 U.S. 1385 (1978) (Rehnquist, J., in chambers) (interior quotations omitted).

SUMMARY OF ARGUMENT

With respect to the likelihood of this Court's granting a writ of *certiorari*, this Court will typically grant *certiorari* to vacate a judgment that becomes moot on appeal, as this will unless the Court grants an expeditious review; in any event, this Court has often reviewed Elections Clause cases that go to which state actors have authority to act as the legislature under the Elections Clause (Section I). Notwithstanding the Pennsylvania Supreme Court's purportedly ruling on a state-law ground, this Court has jurisdiction because both the procedure and the substance of the state court's ruling violate not only the Elections Clause and the Due Process Clause but also federal election statutes (Section II.A.1), which of course fall within this Court's jurisdiction. Moreover, the All Writs Act, 28 U.S.C. §1651(a) provides a supplemental basis for jurisdiction and relief (Section II.A.2), and 28 U.S.C. §2106 provides remedial authority (Section II.A.3).

As to the merits, Applicants are likely to prevail because the Pennsylvania Supreme Court usurped the legislature's authority under the Elections Clause (Section II.B.1) and, in doing so, violated due process (Section II.B.2) and federal election law (Section II.B.3). Moreover, for all of these reasons, the state constitutional provision that the Pennsylvania Supreme Court purports to interpret is preempted by federal law (Section II.B.4).

The other stay factors also favor Applicants because the irreparable harm – namely, chaos and voter confusion in the 2020 election – will not be fixable if the elections proceed under the state court's order and this Court later reverses (Section III.A). The other stay factors merge with the merits, which – as indicated – tip to Applicants (Sections III.B-III.C).

ARGUMENT

I. THE GRANT OF A WRIT OF *CERTIORARI* IS LIKELY.

There is a reasonable possibility that this Court will grant Applicants' forthcoming petition for a writ of *certiorari*, either because the case will become moot on appeal – and thus subject to *vacatur*, *see*, *e.g.*, *Bank of Am. Corp. v. City of Miami*, 140 S.Ct. 1259 (2020); *Azar v. Garza*, 138 S.Ct. 1790 (2018) – or because the Court perceives the urgent election and federalism issues at stake here and orders expeditious briefing. At some point, this Court will need to consider the issue of whether the Pennsylvania Supreme Court's actions here run afoul of the Elections Clause's delegation to the "Legislature" of a state, U.S. CONST. art. I, §4, as this Court did for independent commissions in *Arizona State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2652 (2015). Indeed, this Court potentially could consider the issue of federal preemption of the Pennsylvania's Supreme Court's unlawful actions here under the exception for moot actions capable of repetition, yet evading review. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). In any of the foregoing scenarios, this Court would grant review. Applicants meet the first criterion for a stay.

II. APPLICANTS ARE LIKELY TO PREVAIL.

This section demonstrates that Applicants are likely to prevail on the merits. To make that showing, *amicus* EFELDF first shows that Applicants' petition will present a federal question, notwithstanding the state-court majority's transparent effort to insulate their ruling from review by claiming to have relied on the Pennsylvania Constitution. After establishing this Court's jurisdiction to act, *amicus* EFELDF then shows why Applicants will prevail on the federal merits presented here.

A. This Court has jurisdiction.

Before reaching the question of Applicants' likelihood of prevailing on the merits, this Court – or the Circuit Justice – first must establish federal jurisdiction. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). But this Court considers issues either pressed or passed upon in the lower court, *U.S. v. Williams*, 504 U.S. 36, 41 (1992), and a state-court majority cannot avoid a federal question by ignoring it. While this Court would lack authority to review cases solely based on state-law issues, that does not prevent review when state courts violate federal law.

1. Federal law is implicated.

Although the Pennsylvania Supreme Court seeks to evade review by premising its holding on an absurd and expansive interpretation of a state constitutional mandate that "Elections shall be free and equal," PA. CONST. art. I, §5, cl. 1, that evasion must fail for two reasons. First, the state court's remedy and this litigation implicate several strands of federal election law. Second, Pennsylvania's free-and-equal clause is not purely a matter of state law because it applies "not

only to elections to state offices, but also to the election of Presidential electors," meaning that Pennsylvania enacted the clause, in part, "by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution." *See Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). Under the circumstances, this Court has the power to correct the lower court's error of federal law.

Applicants' filings make clear that this case presents an issue under the Elections Clause, even though the state-court majority attempts to evade that issue by offering a purely state-law basis for its holding. At a minimum, the issue was pressed below, and that is all that this Court requires. *Williams*, 504 U.S. at 41. Although *amicus* EFELDF will argue that Applicants are likely to prevail, *see* Section II.B, *infra*, parties do not need winning hands for the Court to have jurisdiction. Instead, jurisdiction exists when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction," even if the right "will be defeated if they are given another." *Bell v. Hood*, 327 U.S. 678, 685 (1946). At least as to *jurisdiction*, Applicants need only survive the low threshold "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 682. Applicants plausibly allege that the Pennsylvania Supreme Court violated the Elections Clause, which is enough for jurisdictional purposes.

In addition to the Elections Clause, *amicus* EFELDF respectfully submits that the Due Process Clause also provides a federal basis for this Court's reviewing the state-court decision, notwithstanding the state-law basis for the ultimate holding. The Due Process Clause prohibits *inter alia* the denial of liberty without due process of law. U.S. CONST. amend. XIV, §1, cl. 3. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Under Pennsylvania's constitution, "[e]very bill shall be considered on three different days in *each House*," PA. CONST. art. III, §4 (emphasis added). Due process in Pennsylvania is thus to have an open several-day process to consider changes in *any law*. A court's non-public deliberations would fail that minimal standard for due process, even if the Elections Clause did not also require that the consideration of election issues take place in a representative body.[3]

2. The All Writs Act gives this Court jurisdiction *now* to preserve its *future* jurisdiction over petitions for a writ of *certiorari*.

The All Writs Act provides an alternate, supplemental form of jurisdiction to stay the Pennsylvania Supreme Court's action here, if only to preserve the full range of the controversy *now* for this

[3] Because justices on the Pennsylvania Supreme Court run for election statewide, that body – unlike the legislature – can be biased toward population centers like Philadelphia.

Court's consideration upon Applicants' *future* appeal to this Court:

> The All Writs Act empowers the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court, and *extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected*.

FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966) (interior quotations and citations omitted, emphasis added) (*citing Ex parte Crane*, 5 Pet. 190, 193 (1832) (Marshall, C.J.); *Ex parte Bradstreet*, 7 Pet. 634 (1833) (Marshall, C.J.)). Although this Court's jurisdiction to provide interim relief does not *require* resort to the All Writs Act, that Act nonetheless ensures the Court's jurisdiction here. The All Writs Act provides "a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels," and that "power has been deemed merely incidental to the courts' jurisdiction to review" the ultimate merits of the future appeal. *Id.* at 604 (alterations omitted). As explained in this section, that power is appropriate in this case.

Without a stay, Pennsylvania's federal election will proceed unlawfully, and – worse – the unlawful result could determine the election's outcome. Cate Barron, *'Battleground PA' puts spotlight on 2020 race*, PATRIOT NEWS, Nov. 03, 2019, at B-3 (Pennsylvania is

a swing or battleground state that might decide the election). That is the type of harm that justifies action under the All Writs Act.

Although resort to the All Writs Act is an extraordinary remedy – as indeed is any stay – the writ "has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. U.S.*, 389 U.S. 90, 95 (1967) (interior quotations omitted). While "only exceptional circumstances … will justify the invocation of this extraordinary remedy," those circumstances certainly include a "judicial usurpation of power" as happened here. *Id.* (interior quotations omitted); *accord Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004). A partisan majority of elected judges on a state supreme court have attempted to seize the Legislature's constitutional power, which easily meets the "judicial usurpation of power" test that this Court has repeatedly set.

While the All Writs Act perhaps may seem too obvious to mention, *amicus* EFELDF respectfully submits that it bears explicit emphasis because it can provide the difference in a close case: "where a case is within the appellate jurisdiction of the higher court a writ may issue in aid of the appellate jurisdiction which might otherwise be defeated." *Dean Foods*, 384 U.S. at 604. It is irrelevant that Applicants did not cite the All Writs Act in their stay applications. *First,* if "jurisdiction … actually exists," plaintiffs – or, here, applicants – can cite that jurisdiction for the first time on appeal. *Newman-Green, Inc. v. Alfonzo-Larrain,*

490 U.S. 826, 831 (1989); 28 U.S.C. §1653. *Second,* subject-matter jurisdiction does not require specific citations where the "facts alleged and the claim asserted … were sufficient to demonstrate [jurisdiction's] existence." *Schlesinger v. Councilman,* 420 U.S. 738, 745 (1975). *Third,* failure to raise jurisdictional arguments does not waive those arguments. *Sochor v. Florida,* 504 U.S. 527, 534 n.* (1992). Certainly, Applicants can cite the All Writs Act in their respective replies. Accordingly, *amicus* EFELDF respectfully submits that the Circuit Justice or the full Court should consider the appropriateness of relief to preserve the full controversy for review.

3. 28 U.S.C. §2106 gives this Court further remedial authority.

In addition to the All Writs Act, this Court also can rely on §2106 for additional authority to resolve this matter:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. §2106. As §2106 makes clear, this Court can not only alter the judgment from the lower court but also require further proceedings. Indeed, given the questions about the partisanship of the Pennsylvania Supreme Court majority and their expert, this Court could even assign a special master to work with the

General Assembly to resolve any state-law issues, assuming that any state-law issues remained after this Court's review of the federal issues.

B. Applicants will prevail on the merits.

In order to warrant a stay, there must be a "fair prospect" of Applicants' prevailing. *Hollingsworth*, 558 U.S. at 190. As explained in the next four sections, Applicants likely will prevail under the Elections and Due Process Clauses, federal election law, and federal preemption.

1. <u>The Pennsylvania Supreme Court violated the Elections Clause.</u>

While *amicus* EFELDF disagrees with *Arizona State Legislature* that independent agencies can take the place of a legislature under the Elections Clause, the initiative passed in Arizona expressly supplanted the legislature: "There is a critical difference between allowing a State to *supplement* the legislature's role in the legislative process and permitting the State to *supplant* the legislature altogether." 135 S.Ct. at 2687 (Roberts, C.J., dissenting). Although *Arizona State Legislature* rejected that position and allowed supplanting legislatures, it in no way allowed supplanting them *sub silentio* with vaguely worded general clauses like Pennsylvania's free-and-equal clause.

Even accepting that the Pennsylvania Supreme Court correctly interpreted that state's constitution, the remedy that the state court imposed usurped the power that the Elections Clause gives to the General Assembly. This Court has taken a jaundiced view of courts' claiming to need to usurp legislative power in order to remedy a case properly before the court:

> The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so.

Knowlton v. Moore, 178 U.S. 41, 109-10 (1900). As with the tax in *Knowlton*, the election deadlines here are not so egregiously out of the norm to justify a judicial remedy so egregiously out of the norm.

With statutes, this Court has readily recognized the judiciary's role as arbiter, not author, of our laws: "it is not this Court's function to sit as a super-legislature and create statutory distinctions where none were intended." *Securities Industry Ass'n v. Bd. of Governors of Fed'l Reserve Sys.,* 468 U.S. 137, 153 (1984) (interior quotations omitted). The same is true in Pennsylvania, as it would have to be true under our Constitution. U.S. CONST. art. IV, §4, cl. 1. When asked what form of government the Framers had given us, Benjamin Franklin reportedly replied "A republic … if you can keep it." Terence Ball, "*A*

Republic - If You Can Keep It", in CONCEPTUAL CHANGE AND THE CONSTITUTION 35, 137 (Terence Ball & J.G.A. Pocock eds., 1988). It now falls to this Court to keep the republic.[4]

2. The Pennsylvania Supreme Court violated the Due Process Clause.

Our constitutional structure and heritage of divided power and dual federal-state sovereignty protects liberty. *Mistretta v. U.S.*, 488 U.S. 361, 380 (1989); *U.S. v. Munoz-Flores*, 495 U.S. 385, 394-96 (1990). Indeed, the "history of liberty has largely been the history of observance of procedural safeguards" *Corley v. U.S.*, 556 U.S. 303, 321 (2009) (interior quotations omitted), and thus "'procedural rights' are special." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992) (interior quotations omitted). In addition to violating the Elections Clause – and indeed because of that violation – the Pennsylvania Supreme Court also violated the Due Process Clause.

While the "power to interpret the Constitution … remains in the Judiciary," *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997), the power to *amend* the Constitution remains with the states. U.S. CONST. art. V; PA. CONST. art. XI, §1. "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process." *Ullmann v. U.S.*, 350 U.S. 422, 428 (1956), which is a principle that applies equally in

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[4] Although enforcing the Guarantee Clause for all state-court usurpations may be non-justiciable under *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912), and *Rucho v. Common Cause*, 139 S.Ct. 2484, 2506 (2019), enforcing the Elections Clause is entirely justiciable.

Pennsylvania. *Pa. Prison Soc'y v. Commonwealth*, 727 A.2d 632, 635 (Pa. Commw. Ct. 1999) (invalidating a constitutional amendment because the process of its adoption violated another provision of the Pennsylvania Constitution).

In his farewell address, President Washington warned of the type of amendment through interpretation that the Pennsylvania Supreme Court has inflicted on the citizens of Pennsylvania:

> If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

GEORGE WASHINGTON, FAREWELL ADDRESS (Sept. 19, 1796), *reprinted in* THE WASHINGTON PAPERS 308 (Saul K. Padover, ed. 1955). In this season of tearing down statues, *amicus* EFELDF implores this Court to stand with President Washington and legal norms.

Constitutions are not blank checks with which judges can remake this Nation or a state, wholly apart from the states' and the People's intent in ratifying a constitution's general provisions. *U.S. v. Lopez*, 514 U.S. 549, 602 (1995) (Thomas, J., concurring). "[The] job [is] to call balls and strikes, and not to pitch or bat." Confirmation Hearing on the Nomination of

John G. Roberts, Jr. to Be Chief Justice of the United States Before the Senate Comm. on the Judiciary, 109th Cong. 56 (2005) (Statement of Hon. John G. Roberts, Jr.). Accordingly, this Court already has recognized the limits posed on using the generally worded Due Process Clause to legislate beyond "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997). *Amicus* EFELDF respectfully submits that this Court should adopt a state-law version of *Glucksberg* to pare judicial activism.

3. The Pennsylvania Supreme Court's remedy violates federal law.

By requiring the counting of ballots – even non-postmarked ones – received 3 days after Election Day, the Pennsylvania Supreme Court violates the statutes that set Election Day as the Tuesday after the first Monday in November. *See* 3 U.S.C. §1; 2 U.S.C. §7. States rationally may believe that having elections decided on Election Day would foster voter confidence and eliminate the opportunity for fraud. The Founders intended that elections bind this Nation together. *Ex parte Yarbrough,* 110 U.S. 651, 661 (1884) ("the election of members of congress occurring at different times in the different states" would give rise to "more than one evil"). Acting through their legislatures, states plausibly may enact legislation toward that public goal, as Pennsylvania did here. In addition to violating the Elections Clause and the Due Process Clause, the Pennsylvania Supreme Court's remedy also violates federal election law by counting

ballots – even non-postmarked ones – received 3 days *after* Election Day to count toward the election.

4. Federal law preempts the state free-and-equal clause.

Given these conflicts between federal election law and Pennsylvania's judicial interpretation of its free-and-equal clause and the fact that this Court cannot adopt a narrowing construction of state law to save a law from unconstitutionality, *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972) ("it is not within our power to construe and narrow state laws"), *amicus* EFELDF respectfully submits that this Court could accept Pennsylvania's interpretation, declare that law preempted by federal election law, and enjoin its use in election cases involving federal candidates.

Under the Constitution's Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three ways in which the Supremacy Clause can preempt state laws: express preemption, "field" pre-emption, and implied or conflict pre-emption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). Preemption analysis *begins* with a federal provision's plain wording, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). In election cases, preemption analysis *ends* there, too: "We have never mentioned [a presumption against preemption] in our Elections Clause cases." *Arizona v. Inter Tribal Council of Ariz., Inc.,* 570 U.S. 1, 13 (2013) ("*ITCA*"). For the reasons already explained, federal election law both expressly preempts and conflict

preempts the free-and-equal clause as Pennsylvania's Supreme Court has interpreted that clause.

ITCA dooms the Pennsylvania Supreme Court's usurpation of the legislature's plenary power under the Elections Clause. Because the state legislature and voters never intended to confer a roving commission under the free-and-equal clause, voiding that power would have the beneficial effect of giving Pennsylvania's actual sovereigns – its People – the chance to adopt a new constitutional provision to protect the People and their elections from interference from any corner.

III. THE OTHER STAY CRITERIA FAVOR APPLICANTS.

Although the likelihood of this Court's granting a writ of *certiorari* and ruling for Applicants on the merits would alone justify granting a stay, *amici* EFELDF addresses the three other potential stay factors. All of these factors weigh in favor of staying the Pennsylvania Supreme Court's actions until the resolution of any timely filed petitions for a writ of *certiorari*.

A. Applicants' harms are irreparable.

For stays, the question of irreparable injury requires a two-part "showing of a threat of irreparable injury to interests that [the applicant] properly represents." *Graddick v. Newman,* 453 U.S. 928, 933 (1981) (Powell, J., for the Court[5]). "The first, embraced by the concept of 'standing,' looks to the status of the

[5] Although *Graddick* began as an application to a circuit justice, the Chief Justice referred the application to the full Court. *Graddick,* 453 U.S. at 929.

party to redress the injury of which he complains." *Id.* "The second aspect of the inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant." *Id.* Applicants meet both tests.

As to standing, the legislative Applicants have standing not only to defend state law (*i.e.*, the statute they enacted), *Diamond v. Charles,* 476 U.S. 54, 62-63 (1986), but also to defend the legislative prerogatives under the Elections Clause from encroachment by the partisan state-court majority. *Karcher v. May,* 484 U.S. 72, 82 (1987). As to irreparable harm, it would be essentially impossible to restore the *status quo ante* if this Court allows the election to proceed under the state court's new rule. Closer to Election Day, some people might rely on those new rule, and invalid ballots might be impossible to remove from valid ones if the election proceeds under the state court's new rule. Most importantly, the stain of illegitimacy will hang over the election results if the election goes forward under the new rule.

B. The equities tip in Applicants' favor.

The third stay criterion is the balance of equities, which tips in Applicants' favor. If this Court grants a stay now, with the deadline for mail-in ballots weeks away, no one who seeks to vote by mail will be prejudiced.

C. The public interest favors a stay.

The last stay criterion is the public interest. While the Pennsylvania Supreme Court majority has injected itself into this litigation as a judicial challenger to state law, the case began as – and, for this Court's purposes, remains – litigation between interested parties. Where the parties dispute the

lawfulness of government actions, the public interest collapses into the merits. 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. Civ.2d §2948.4; *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (interior quotation omitted); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (recognizing "greater public interest in having governmental agencies abide by the federal laws"); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("no public interest in the perpetuation of unlawful [government] action"). If the Court accepts Applicants' merits views, the public interest will tilt decidedly toward Applicants: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943). Mandamus relief "has the unfortunate consequence of making a … judge a litigant," *Daiflon, Inc.*, 449 U.S. at 35, but it would not have been this Court's or Applicants' doing: the Pennsylvania Supreme Court majority made themselves litigants here. As between Applicants and the original petitioners, the public-interest factor heavily favors Applicants.

CONCLUSION

A stay should be granted.

Dated: October 5, 2020 Respectfully submitted,

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