No. 20A84

In the Supreme Court of the United States

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 APPLICANT AND A STAY

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 669-5135
ljoseph@larryjoseph.com

Counsel for Amicus

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 applicant.

---

* 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 *amicus curiae* brief in support of the stay applicant. Because this motion is filed after the parties' responses to the application, movant EFELDF confines itself to jurisdictional issues raised by this matter but not addressed in the parties' filings. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991) (courts' hesitation to consider arguments raised only by an *amicus* does not apply to jurisdictional arguments); *Demore v. Kim*, 538 U.S. 510, 516 (2003).

Movant EFELDF respectfully submits that the proffered *amicus* brief will bring several jurisdictional issues to the Court's attention:

- First, the EFELDF brief discusses the scope of this Court's appellate jurisdiction under 28 U.S.C. § 1257 over state-court decisions that purportedly rest on state-law grounds but do so by ignoring a significant federal defense. *See* EFELDF Br. at 5-9.
- Second, the EFELDF brief discusses the issue of mootness and the exception – in election cases – for issues capable of repetition yet evading review, *see* EFELDF Br. at 9-10, which could become relevant here if the 2020 election is decided before these cases resolve on the merits.
- Third, 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 10-12.

These issues all are relevant to deciding the stay application, 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.

November 13, 2020 Respectfully submitted,

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 700-1A
WASHINGTON, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Movant

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Statutes

AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANT

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 resolution of the petitions for a writ of *certiorari* by the leaders of the Pennsylvania House of Representative and Senate in No. 20-574 and the Republican Party of Pennsylvania in No. 20-542. *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 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.

STANDARD OF REVIEW

A stay pending the ultimate resolution of timely petitions for a writ of *certiorari* is appropriate when there is "(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).

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).

SUMMARY OF ARGUMENT

With respect to the likelihood of this Court's granting a writ of *certiorari*, four members of this Court have indicated that similar stay applications warrant relief, a new justice has since joined the Court, and the Chief Justice appears to have based his negative vote on an incorrect view of this Court's jurisdiction. Review is thus likely (Section I).

Notwithstanding the state court's purportedly ruling on a state-law ground, this Court has jurisdiction because the state court did so only by ignoring a significant federal defense, which means not only that the state court's decision "arises under" federal law but also that the state-law ground is not fully independent of federal grounds (Section II.B.1). The resolution of the 2020 election will not moot this action because this action fits within the exception for cases capable of repetition yet evading review (Section II.B.2). Moreover, the All Writs Act, 28 U.S.C. §

1651(a) provides a supplemental basis for jurisdiction and relief (Section II.B.3), and 28 U.S.C. § 2106 provides remedial authority (Section II.B.4).

ARGUMENT

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

There is a reasonable possibility that this Court will grant the related petitions for a writ of *certiorari*. Four justices previously voted to stay the state court's judgment, *Scarnati v. Boockvar*, No. 20A53, 2020 U.S. LEXIS 5182 (Oct. 19, 2020) ("Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh would grant the application"), one new justice has joined the Court, and the Chief Justice was mistaken in his jurisdictional analysis of the prior stay application. *Compare Democratic Nat'l Comm. v. Wis. State Legis.*, No. 20A66, 2020 U.S. LEXIS 5187, at *1 (Oct. 26, 2020) ("Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations") (Roberts, C.J., concurring in denial of application to vacate stay) *with* Section II.B.1, *infra*. Under the circumstances, there appear to be at least four – and possibly at least six – votes in favor of granting review. Four is enough.

At some point, moreover, 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. In any of the foregoing scenarios, this Court would grant review. Applicant meets the first criterion for a stay.

II. APPLICANT IS LIKELY TO PREVAIL.

This section demonstrates that Applicant is likely to prevail on the merits. While other *amici* amply make the merits case, *amicus* EFELDF emphasizes that the petitions present a question arising under federal law and the Constitution, notwithstanding the state-court majority's transparent effort to insulate the ruling from review by claiming to have relied on the Pennsylvania Constitution.

A. Applicant's merits case is sound and fully briefed.

Because *amicus* EFELDF files this brief after the parties have filed their briefs and because three *amicus* briefs from States amply support Applicant's merits arguments, *amicus* EFELDF does not further brief the merits. As the briefs show, the "Pennsylvania Supreme Court's decision overstepped its constitutional responsibility, encroached on the authority of the Pennsylvania legislature, and violated the plain language of the Election Clauses." Brief of the State of Missouri & Nine Other States as *Amici Curiae* in Support of Petitioners, at 1, *Republican Party of Pa. v. Boockvar*, Nos. 20-542, 20-574 (U.S.); *accord Republican Party of Pa. v. Boockvar*, No. 20-542, 2020 U.S. LEXIS 5188, at *4 (Oct. 28, 2020) ("there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution") (Alito, J., concurring). Nothing further

is needed on the merits to establish the Applicant's likelihood of prevailing.

B. This Court has jurisdiction.

Before deciding the merits of the Applicant's request, 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 lacks jurisdiction to review state-court decisions that "rest[] on an adequate and independent state law ground," *Foster v. Chatman*, 136 S.Ct. 1737, 1745-46 (2016), that does not prevent review when state courts violate federal law.

1. Federal law is implicated, so the state-court judgment does not rest solely on state-law grounds.

Although the Pennsylvania Supreme Court seeks to evade review by premising its holding on an overly 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.[2] First, the state court's remedy and this litigation implicate several strands of federal election

[2] 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). The Pennsylvania Supreme Court's partisan majority changed that in 2018. *See* Section II.B.2, *infra*.

law. *See* Section II.A, *supra*. 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.

At a minimum, the federal-law issues were pressed below, and that is all that this Court requires. *Williams*, 504 U.S. at 41. Although Applicant is likely to prevail, *see* Section II.A, *supra*, parties do not need winning hands on the merits 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*, Applicant 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. Applicant and its *amici* forcefully argue that the Pennsylvania Supreme Court violated the Elections Clause, which is enough for jurisdictional purposes.

Given the plausible federal-law *defense* to the state court's purportedly state-law grounds for the

state-court decision, the Chief Justice was incorrect to assert that the "Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations." *Democratic Nat'l Comm.*, No. 20A66, 2020 U.S. LEXIS 5187, at *1 (Roberts, C.J., concurring in denial of application to vacate stay). The state-law ground here is not "independent" of the federal statutory and constitutional arguments that preclude the state-law judgment, *Fox Film Corp. v. Muller*, 296 U.S. 207, 210-11 (1935), so this Court's appellate jurisdiction is met under both Article III and 28 U.S.C. § 1257. *Cf. City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997) ("even though state law creates a party's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law") (internal quotations and alterations omitted) (collecting cases). This case therefore falls within this Court's appellate jurisdiction.

Specifically, the judicial power extends to cases or controversies that arise under federal law. U.S. CONST. art. III, § 2. The difference between federal-officer removal and general removal demonstrates the wider scope of constitutional arising-under jurisdiction *vis-à-vis* statutory federal-question jurisdiction.

General civil removals require that the action lie within the federal court's "original jurisdiction," 28 U.S.C. § 1441(a), which is a *statutory* term of art that refers to the various forms of statutory subject-matter jurisdiction that Congress has conferred on federal

district courts to resolve federal questions. *See*, *e.g.*, *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 34 (2002). That term of art incorporates the "well-pleaded complaint" rule, which is a *statutory* – not constitutional – interpretation. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (discussing "our longstanding interpretation of the current statutory scheme" for the "the question for removal jurisdiction [under] the 'well-pleaded complaint' rule").

By contrast, federal-officer removal does not incorporate the well-pleaded complaint rule. *Compare* 28 U.S.C. § 1441(a) *with id.* § 1442(a)(1). As this Court explained, the difference (namely, the omission of "original jurisdiction" from § 1442) is intentional:

> Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III "arising under" jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes. *The removal statute itself merely serves to overcome the "well-pleaded complaint" rule which would otherwise preclude removal even if a federal defense were alleged.*

Mesa v. California, 489 U.S. 121, 136 (1989) (emphasis added). Thus, a federal defense falls within constitutional arising-under jurisdiction, even if it

does not fall within the statutory overlay of the well-pleaded complaint rule.

Nothing in § 1257 overlays the restrictions of the well-pleaded complaint rule on this Court's jurisdiction to review state-court judgments that flout federal law, even state-court judgments purportedly based on state law. Indeed, even for federal-question jurisdiction in district courts, "courts will not permit … artful pleading to close off [a] defendant's right to a federal forum." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 n.2 (1981) (citation and quotations omitted). When a state court seeks to nullify federal law by simply ignoring federal law, this Court has jurisdiction to review that state court's judgment for a violation of federal law.

2. <u>The conclusion of this election season will not moot this dispute.</u>

The conclusion of the 2020 election season will not moot this action because the Pennsylvania Supreme Court has a recent history of partisan inventions under its latter-day reading of Pennsylvania's free-and-equal clause. *See Turzai v. League of Women Voters of Pa.*, No. 17A909 (U.S.); *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). Review could outlast even the selection of the next President under the capable-of-repetition exception to mootness. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007) ("the 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial

attacks") (internal quotations omitted). The injuries to the Applicant will remain available for this Court to resolve, even after the next President is sworn in.

3. 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 Court's consideration upon Applicant's appeal to this Court:[3]

> 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

---

[3] *Amicus* EFELDF files this motion and amicus brief in the stay application (No. 20A84), which now is taking place within the context of two petitions for a writ of *certiorari* (Nos. 20-542, 20-574).

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.

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 attempted to seize the Legislature's constitutional power, which easily meets the "judicial usurpation of power" test that this Court has repeatedly set.

4. 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.

CONCLUSION

A stay should be granted, and this Court has jurisdiction for both a stay and the petitions for a writ of *certiorari*.

November 13, 2020

Respectfully submitted,

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 700-1A
WASHINGTON, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Movant