No. 20A98

IN THE
SUPREME COURT OF THE UNITED STATES

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

Applicants,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

On Emergency Application for A Writ of Injunction Pending the Filing and Disposition of a Petition for A Writ of Certiorari

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, AND BRIEF OF 23 CURRENT MEMBERS OF THE HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS/PETITIONERS

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December 7, 2020

Movants, 23 current Members of the House of Representatives from Pennsylvania and States around the Nation, respectfully seek leave to file the accompanying brief as *amici curiae* in support of the Emergency Application for Writ of Injunction Pending the Filing and Disposition of a Petition for a Writ of Certiorari filed in the above captioned matter, and state:

By virtue of the status as current House Members, Movants are keenly interested in the issues raised in the Emergency Application relating to Pennsylvania's Act 77 and its legality as it relates to Article II, § 1 and Article I, § 4 of the U.S. Constitution. A list of movants/*amici* is set forth in the Addendum.

Counsel for Applicants consents to the filing of this *amicus* brief. Counsel for Respondents Commonwealth of Pennsylvania, Thomas W. Wolf, and Kathy Boockvar took no position on consent. Counsel for Respondent Pennsylvania General Assembly was contacted via email on Dec. 6, 2020 but did not respond. Accordingly, movants are filing this motion for leave. Rule 37.2(b).

Pursuant to this Court's Order of April 15, 2020 and Rule 33.2, this motion and accompanying *amicus* brief are being submitted on 8 ½-inch-by-11-inch paper.

Wherefore, movants respectfully request leave to file the attached *amicus curiae* brief containing 1,745 words.

Respectfully submitted,

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BRIEF OF 23 CURRENT MEMBERS OF THE HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS/PETITIONERS

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

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INTEREST OF AMICI CURIAE[1]

Amici curiae are 22 current members of the United States House of Representatives from districts in Pennsylvania and across the nation; they are listed in the Addendum. *Amici* have a constitutional and statutory role in regulating elections for Federal office, specifically in the Joint Session of Congress set for January 6, 2021 to count electoral votes and declare results of the Presidential election. See U.S. Const. Art I, § 4; U.S. Const. Art. II, §1; 3 U.S.C. § 15.

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[1] No party's counsel authored any part of this brief. No person other than *amici* and their counsel contributed any money intended to fund the preparation or submission of this brief.

ARGUMENT

I. Pennsylvania's disregard of the Federal Constitutional framework under which State Legislatures set the rules for choosing members of Congress, subject to their own Constitution, presents an issue affecting every American.

1. The Emergency Application raises issues that go to the very foundation of our Federal system of government, and hearken back to its creation. The Constitution has delegated to each State's Legislature authority for prescribing the "times, places and manner" of holding Congressional elections and choosing Presidential electors. U.S. Constitution, Article I, § 4, Article II, § 1, cl. 2. In their exercise of that authority, Legislatures are constrained by the restrictions of their own State Constitutions. *Smiley v. Holm*, 285 U.S. 355, 369 (1932), citing *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

Flouting the Constitution adopted by its own People, Pennsylvania's General Assembly enacted Act 77, implementing no-excuse absentee and mail-in voting, under which last month's General Election was held for the State's House seats and Presidential electors. The Commonwealth's Supreme Court brushed aside pre-election challenges as premature, and now has dismissed Applicant's post-election act as untimely under the doctrine of laches. Essentially, Pennsylvania's Supreme Court has insulated Act 77, a significant and patently unconstitutional alteration of the means by which the Nation's fifth-largest State chooses its members of Congress and Presidential electors, from *any* judicial scrutiny. This Court now stands as the last bulwark capable of providing that review. Indeed, the first (and only)

Pennsylvania court to review Act 77 in this case declared that Applicants are likely to succeed on their constitutional claim:

> 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 [*sic*] Pennsylvania Constitutional claim. [App. 025-26].

Resolving this dispute implicates the very reason for this Court's existence. The Court was designed as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within limits assigned to their authority." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 122 (2015) (Alito, J., concurring in part and concurring in the judgment), quoting Federalist No. 78, at 467 (A. Hamilton). Here, all three branches of Pennsylvania's government have disregarded the Constitution established by their own People, and thus the Federal Constitution, as well. Keeping them "within the limits assigned to their authority" may only be accomplished by granting Applicants the stay/injunction and other emergency relief they seek, to permit review of the important constitutional questions they present. Given the implications for Congressional elections, *amici curiae*, members of the House or Senate, are gravely concerned with Pennsylvania's actions, and are greatly interested in seeing this Court provide that review.

2. The Application also raises significant issues of Equal Protection relating to the manner in which the franchise is executed. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate

treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-105 (2000), citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). It is settled that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, 531 U.S. at 105, quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Pennsylvania long has championed the primacy of in-person, Election Day voting. *See* Application, pp. 19-27; Pa. Const. Art. VII, §§ 1, 4, 6. Its Constitution provides only four limited exceptions to that in-person voting requirement, Article VII, § 14(a), and additional exceptions are permitted only after the gantlet of constitutional amendment is run. Act 77 plainly did not comport with that process, but rather unlawfully expanded the exceptions to in-person voting. Cooley, Constitutional Limitations 177 (1st ed. 1868) ("…the forms prescribed for legislative action are in the nature of limitations upon [the legislature's] authority. The constitutional provisions which establish them are equivalent to a declaration that the legislative power shall be exercised under these forms, and shall not be exercised under any other. A statute which does not observe them will plainly be ineffectual"). In addition to violating Article I, § 4, Article II, § 1, cl. 2, Act 77 violates the Equal Protection rights of every Pennsylvanian who properly voted in person, or via one of the four permissible absentee means – their votes were debased and diluted by the untold number of ballots cast unlawfully by reason of Act 77. *Reynolds*, 377 U.S. at 555.

3. The issue of whether Pennsylvania's General Assembly has properly enacted, and its Supreme Court properly interpreted, Act 77, does not present a question of State law only, as Respondents will object. A Legislature's authority over the time, place and manner of Congressional elections, and selection of Presidential electors, comes directly from the Federal Constitution, and is subject to compliance with its own State Constitution. By violating the latter, the Pennsylvania legislators who enacted and the Governor who signed Act 77 – and the state Supreme Court that failed to review it – necessarily have implicated the Federal Constitution, as well. By granting the injunction/stay Applicants request, this Court will not be impinging on any proper State role, but rather will be fulfilling its obligation properly to construe and uphold the Federal Constitution. *See, e.g.*, *Bush*, 531 U.S. at 115 (Rehnquist, C.J., Scalia & Thomas, JJ., concurring) (reviewing Florida Supreme Court's interpretation of Florida election laws to determine if it impermissibly distorted them in violation of U.S. Const., Article II, "does not imply a disrespect for state *courts*, but rather a respect for the constitutionally prescribed role of state *legislatures*" (emphasis in original).

The Framers envisioned a state of affairs where elections to the Congress were left entirely in the hands of the States, and rejected it:

> If we are in a humor to presume abuses of power, it is as fair to presume them on the part of the state governments, as on the part of the general government. And as it is more consonant to the rules of a just theory, to intrust the union with the care of its own existence, than to transfer that care to any other hands; if abuses of power are to be hazarded on the one side or on the other, it is more rational to hazard them where the power would naturally be placed, than where it would unnaturally be placed. [Federalist No. 59, at 361 (A. Hamilton)]

Article II sets forth a carefully balanced system under which State Legislatures hold significant sway over elections to certain Federal offices, subject to their own Constitution. Where a State's highest Court declines even to consider whether a given piece of legislation comports with (or violates) that schema, it certainly falls to this Court to do so. *Republican Party of Pa. v. Boockvar*, 592 U.S. __, 2020 Westlaw 6304626, at *2 (Oct. 28, 2020) (Statement of Alito, J.) ("The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election").

4. Lastly, *amici* believe strongly that the additional cynicism and rot that Pennsylvania's actions will inflict on our national body politic if unchecked, warrant this Court's prompt review. Events surrounding the 2020 election have gripped the American public for months, and continue to do so. As elected representatives charged with carrying out the People's legislative business, *amici* have been firsthand witnesses to the increasing stridency and polarization that plague our political processes. They are deeply concerned that if Pennsylvania's election-related machinations go unreviewed, the Nation's political discourse will simply spiral further downward.

The message will be sent that two branches of a State government can ignore the plain meaning of their own Constitution – violating the Federal Constitution in

the process – and have that misdeed swept under the rug by the third branch, without any negative consequences whatsoever. Broad alterations to our mechanisms of voting (such as Act 77), if they escape judicial review, can only lead to more discord and corruption: political leaders will discover that they can easily loosen safeguards on their own elections and those of their allies, and will soon become perpetual tyrants who can neither be checked nor unseated. This time the wrong was carried out by Democrats in Pennsylvania, but if it is allowed to pass unreviewed, there will be little to stop similarly egregious wrongs from taking place in other States, at the hands of any political party.

Might does not make right – or shouldn't. At this critical juncture in the Nation's history, the Court should sew the stich in time that could well save many more down the road.

CONCLUSION

One way or another, this Court's decision on the Emergency Application will send a message throughout the Nation – either Pennsylvania will get away with flouting the Federal Constitution, or this Court will step in to defend and reaffirm it. *Amici curiae* strongly suggest that the message should be in favor of respecting the constitutional limits on a State's ability to alter the means by which members of Congress and Presidential electors are chosen. For the foregoing reasons, Applicants' request for a stay/injunction, and the other relief they seek, should be granted.

Respectfully submitted,

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ADDENDUM – *AMICI CURIAE*

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Rep. Fred Keller	Pennsylvania
Rep. Dan Meuser	Pennsylvania
Rep. Scott Perry	Pennsylvania
Rep. Guy Reschenthaler	Pennsylvania
Rep. Lloyd Smucker	Pennsylvania
Rep. Glenn Thompson	Pennsylvania

Rep. Mo Brooks	Alabama
Rep. Andy Biggs	Arizona
Rep. Debbie Lesko	Arizona
Rep. Matt Gaetz	Florida
Rep. Ted Yoho	Florida
Rep. Jody Hice	Georgia
Rep. Steve King	Iowa
Rep. Andy Harris	Maryland
Rep. Dan Bishop	North Carolina
Rep. Ted Budd	North Carolina
Rep. Warren Davidson	Ohio
Rep. Jim Jordan	Ohio
Rep. Ralph Norman	South Carolina
Rep. Michael Cloud	Texas
Rep. Louie Gohmert	Texas
Rep. Randy Weber	Texas