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 Writ of Certiorari

Motion for Leave to File *Amicus* Brief, Motion for Leave to File Brief Under Rule 33.2, and Brief of *Amicus Curiae* Landmark Legal Foundation

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MOTION FOR LEAVE TO FILE *AMICUS BRIEF* AND FOR PERMISSION TO FILE BRIEF UNDER RULE 33.2

Movant Landmark Legal Foundation respectfully seeks leave to file the accompanying brief as *amicus 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.

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. For many years Landmark has worked to protect the integrity of elections throughout the country. Specializing in constitutional history and litigation, Landmark seeks to present herein a unique perspective concerning the proper exercise of the Pennsylvania legislature's exercise of its authority under

Art. I, Sec. 4 and Art. II, Sec. 1; and the Supreme Court of Pennsylvania's wrongful exercise of the same power as well as its abuse of its judicial power.

Counsel for Applicants consents to Landmark's participation in this case. Counsel for Respondents was contacted via email on December 3, 2020 but has not responded. Accordingly, movant presents this motion for leave to file.

Landmark also requests permission to file its proposed brief on 8 1/2 inch by 11 inch paper pursuant to Rule 33.2. Applicants' emergency petition seeks the Court's immediate intervention and time does not allow for the printing of booklets under Rule 33.1. Accordingly, Landmark respectfully moves this Court to accept the filing of its *amicus* brief using the format specified in Rule 33.2.

For these reasons, Landmark respectfully respects the Court's leave to file the attached *amicus curiae* brief containing 2,757 words, and for leave to file the brief pursuant to Rule 33.2.

Respectfully submitted,

Dated: December 4, 2020

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INTRODUCTION[1]

The actions of the Supreme Court of Pennsylvania were outrageous. First, it took an unconstitutional statute, Act 77 of 2018, and legislatively changed the statute to accommodate the Democrat majority on the court. Then, when Applicants challenged the constitutionality of Act 77 in this case, the Supreme Court of Pennsylvania took the case from the Commonwealth Court, which had issued a temporary injunction enjoining any further election certifications pending a hearing. And, despite that the Commonwealth Court had scheduled an evidentiary hearing for 48 hours later, the Supreme Court of Pennsylvania reached down into the Commonwealth Court in an extraordinary move, and at the request of the Democrat Attorney General, took the case, shut down the Commonwealth Court and summarily shut down the case in the lamest of procedural arguments, namely laches. And yet, it is obvious the Supreme Court of Pennsylvania would not have taken the case before the election, opining that the Applicants had no standing.

The only relief that exists is in the United States Supreme Court. Otherwise, there is absolutely no ability for a hearing, a ruling, or relief in a matter of great consequence to our nation; namely, the selection of the slate of electors to the electoral college upon which the United States Congress selects our President and Vice President. If this Court does not draw a line here, then any state legislature, and even state courts, will be free to pervert the notion of plenary power into lawless power.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members or its counsel made a monetary contribution to its preparation or submission.

I. THE COURT SHOULD GRANT APPLICANTS' INJUNCTION APPLICATION AND GRANT CERTIORARI TO RESOLVE WHETHER A STATE LEGISLATURE, WITH THE IMPRIMATUR OF ITS STATE SUPREME COURT, MAY VIOLATE ITS STATE CONSTITUTION IN THE EXERCISE OF AUTHORITY VESTED BY THE UNITED STATES CONSTITUTION.

The United States Supreme Court is generally not in the business of looking over the shoulders of state supreme courts when it comes to matters of state law. But when a state law implicates federal constitutional law, the Supremacy Clause compels the Court to preserve the rule of law and adherence to the Constitution. Applicants present such a case. The Supreme Court of Pennsylvania's summary dismissal, with prejudice, of Applicants' cause of action is an egregious abuse of power. This is particularly the case as the Supreme Court of Pennsylvania itself was an active participant in enabling and doubling down on the unconstitutional absentee and mail-in ballot system giving rise to Applicants' cause of action.

This case does not involve allegations of fraud or claims of conspiracy. Applicants present claims reminiscent of those the Supreme Court of Pennsylvania held "clearly, plainly and palpably violates the Pennsylvania Constitution." *League of Women Voters v. Commonwealth of Pennsylvania,* Action No. 159 MM 2017 (Pa. Feb. 7, 2018). The Supreme Court of Pennsylvania's attempt to sweep under the rug its own unconstitutional conduct and that of the Pennsylvania legislature must not stand.

A. U.S. Supreme Court Deference to State Supreme Court Decisions Does Not Extend to Decisions Overtly Contravening the State Constitution's Limits on the Legislature's U.S. Const. Art II, Section 1 Authority.

"As a general rule, this Court defers to a state court's interpretation of a state statute." *Bush v. Palm Beach County Canvassing Bd,* 531 U.S. 70, 76 (2000). But when a state statute establishing criteria for selecting presidential electors pursuant to its legislature's Art. II, Sec. 1 power is at issue, a fundamental federal question warranting the U.S. Supreme Court's attention

is present. *Id.* The same principle applies to a legislature's exercise of its Art. I, Sec. 2 power to establish the time, place, and manner of elections. *See Republican Party of Pennsylvania v. Boockvar*, 592 U.S. ___ (2020) (Statement of Alito, J., slip opinion at 3).

As Chief Justice Rehnquist emphasized in his concurring opinion in *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring), "We deal here not with an ordinary election, but with the election for the President of the United States." The Chief Justice emphasized the importance of presidential elector cases citing the Court's 1934 decision in *Burroughs v. United States,* 290 U.S. 534, 535 (1934). "The importance of [the President's] election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." *Bush v. Gore,* 531 U.S. at 112.

Applicants' case raises a serious challenge to the constitutionality of Pennsylvania's Act 77 no-excuse absentee and mail-in voting provisions, which explicitly violate the Pennsylvania State Constitution. The Supreme Court of Pennsylvania compounded the state constitutional violation by adding its own last-minute amendments to Act 77 (in violation of Art. VII, Sec. 14 of the Pennsylvania Constitution and in contravention of U.S. Const. Art. II, Sec. 1).[2]

The problem for Act 77's provisions, as amended by the Supreme Court of Pennsylvania, is that they do not comport with the unambiguous limitations on absentee voting in Art. VII, Sec. 1 of the Pennsylvania Constitution, which strictly limits voting by means other than in person at designated polling places. Put simply, Act 77's "no excuse" provisions are prohibited by Art. VII, Sec. 1. (For a full examination of Act 77's infirmities, see Applicants' Emergency

[2] The Supreme Court of Pennsylvania's extension of Act 77's deadline for receipt of mailed ballots presents the additional impropriety of the court frustrating the legislature's (albeit unconstitutional) pre-election procedures in violation of the legislature's exclusive Art. II, Sec. 1 power to set the procedures for selecting presidential electors.

Application for Writ of Injunction Pending the Filing and Disposition of a Petition for Writ of Certiorari, pp. 16-22.).

In *Bush v. Gore,* the Court faced the Supreme Court of Florida's repeated and inconsistent tinkering with the statutory framework for ballot counting established by the Florida legislature. Chief Justice Rehnquist concluded in his concurring opinion that the Supreme Court of Florida's actions imposed a "significant departure from the legislative scheme for appointing Presidential electors" and thus presented a federal question for the Court's review. *Bush v. Gore,* 531 U.S., at 113.

Applicants' present a doubly significant case with the Pennsylvania legislature enacting -- and the state supreme court upholding (with its own tweaks) -- an act that violates the Pennsylvania Constitution. To have an election system in which the people may have confidence, laws must comport in every way with both the federal and state constitutions, which did not happen this year in Pennsylvania. Having before it an important federal question, the Court should review the Supreme Court of Pennsylvania's decision below.

B. State Legislatures and State Courts Must Comply With State Constitutional Limitations, Particularly in the Exercise of Authority Vested by the United States Constitution.

The Court has held that state legislatures exercising authority granted by the Constitution must do so within the confines of the state's constitution. While addressing a legislature's Art. I, Sec. 4 power to establish the time, place, and manner for elections, a particularly instructive case is *Smiley v. Helm,* 285 U.S. 355 (1932). In that case the Minnesota state legislature proposed and passed legislation pursuant to the Minnesota Constitution adopting new congressional districts. On presentation, however, the governor vetoed the bill and returned it to the legislature, which

did not attempt to override the veto. Rather, the legislature adopted a resolution directing the secretary of state to implement the vetoed districts.

"We find no suggestion in [the Constitution] of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley,* 285 U.S., at 367-68. The Court in *Smiley* rejected the Minnesota legislature's unilateral designation of the State's congressional districts following the 1930 census. "As the authority [to legislate] is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.*

In *McPherson v. Blacker,* 146 U.S. 1 (1892) the Court observed that "[t]he legislative power is the supreme authority except as limited by the constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed." 146 U.S., at 25. The compact between the people and their legislators is that elected representatives will be faithful to the "fundamental law," i.e., the state constitution.

Article IV, Section 4 of the U.S. Constitution guarantees that each state shall have a republican form of government. When a state government ignores the rule of law in favor of the rule of factions made up of legislators and judges, it threatens to lose its republican nature. *See* Joseph Story, *Commentaries on the Constitution of the United States*, Vol. II, Sec. 1814 (4th Ed. 2011, Joseph Cooley, Ed.). While the Guarantee Clause is generally enforceable only by Congress, it serves as a reminder of what is at stake in this case. The Pennsylvania legislature

and Supreme Court of Pennsylvania's failure to comply with the Commonwealth's constitution does not defeat the Court's review of the important federal questions in this litigation.[3]

II. THE PENNSYLVANIA SUPREME COURT'S DISMISSAL WITH PREJUDICE BASED ON LACHES VIOLATES APPLICANTS' FEDERAL DUE PROCESS AND EQUAL PROTECTION RIGHTS.

As Applicants have well established, the Supreme Court of Pennsylvania has deprived them of their right to vindicate their constitutional rights in violation of the First and Fourteenth Amendments. Emergency App., pp. 27-32. *Amicus Curiae* writes to expand on the lower court's utterly defective reliance on laches to dismiss Applicant's case. The Supreme Court of Pennsylvania's ruling is improper for four reasons. First, the court disregarded its earlier holding that laches cannot bar constitutional challenges to the substance of a statute. Second, Pennsylvania's failure to act in an equitable manner in enacting Act 77 bars invocation of laches. Third, the court incorrectly applied laches' second element – prejudice – to a nonparty when determining whether the doctrine applied. And fourth, the court failed to engage in any factual inquiry when it concluded that laches applied.

First, the Commonwealth has previously conceded in court that laches does not apply in constitutional challenges to the substance of a statute. *Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998). While laches applies in constitutional challenges to statutes based on procedural deficiencies, it does not bar challenges based on substantive deficiencies. The Pennsylvania Supreme Court incorrectly relied on *Stilp v. Hafer*, which involved claims of constitutional

[3] Respecting the issue of disenfranchisement, the disenfranchisement of Pennsylvania voters occurred at the time Act 77 was unconstitutionally passed. The process for amending the constitution of Pennsylvania is an arduous one, requiring among other steps, the direct input of the citizens of Pennsylvania to vote on whether they want their constitution amended. This crucial and decisive vote was to have been the predicate to passage of Act 77. Therefore, it was the Pennsylvania General Assembly and the Supreme Court of Pennsylvania that disenfranchised the entire electorate of Pennsylvania in violation of their own constitution.

procedural violations by Pennsylvania in its enactment of the Low-Level Radioactive Waste Disposal Act. *Kelly v. Commonwealth*, Civ. Action No. 68 MAP 2020 (Pa. Nov. 28, 2020). *Stilp's* reliance on laches to bar the constitutional claims rested on the fact that these claims involved procedural violations of the Pennsylvania Constitution – not substantive challenges. *Stilp*, 718 A.2d at 291.

Applicants are challenging the substance of Act 77 – specifically whether Act 77 violates the protective limitations on absentee voting in the Pennsylvania Constitution. Unlike the Applicants in *Stilp*, they are not disputing the procedural mechanisms by which the legislature enacted Act 77. App. pp.50-55, ¶¶ 65-87. Laches may bar procedural challenges, not substantive constitutional challenges. *Stilp* at 292. And Amicus has been unable to locate any Pennsylvania case law supporting the court's reliance on laches to dismiss a substantive constitutional challenge. In fact, the court in *Stilp* lists several cases in which laches applies to constitutional procedural challenges to a statute's enactment – it does not list any cases refuting the earlier conclusion that "laches and prejudice can never be permitted to amend the Constitution" as applied to substantive challenges. *Stilp*, 718 A.2d at 293.

Second, the Commonwealth's failure to act equitably bars invocation of laches. The Commonwealth acted improperly in two respects: (1) implementing a process it apparently knew violated the Pennsylvania Constitution; and (2) not seeking judicial affirmation of Act 77. State officials appear to have been aware that Act 77's use of "no-excuse" mail-in balloting expanded the limitations on absentee voting in violation of Art. IV, Sec. 14 of the Pennsylvania Constitution. Their simultaneous introduction of new legislation, S.B. 411, proposing an amendment to Section 14 shows as much. App. pp.43-44, ¶ 36. Indeed, the legislative history of S.B. 411 shows that at least some members of the Pennsylvania legislature were aware of the

constitutional constraints regarding absentee voting. "Pennsylvania's current Constitution restricts voters wanting to vote by absentee ballot to [specific] situations..." Senator Mike Folmer & Senator Judith Schwank, Senate Co-Sponsorship Memoranda to S.B. 411 (Jan. 29, 2019, 10:46 AM). App. p.44, ¶ 37. In fact, the Pennsylvania legislature began the proper process for expanding absentee voting under Pennsylvania's constitution by passing the required preliminary legislation to do so, which would be subjected to a plebiscite by Pennsylvania voters in 2021. App. pp. 45-46, ¶ 44. Despite this knowledge, state officials still implemented Act 77's absentee voting provisions. Their failure to seek judicial approval of their action further evinces their bad faith. *Sprague v. Casey*, 520 Pa. 38, 46 (Pa. 1988).

The failure by the Commonwealth to act equitably bars invocation of laches. Parties who seek equitable relief must act equitably. *Id.* (citing *Mazer v. Sargent Elec. Co.*, 407 Pa. 169, 180 A.2d 63 (1962)). In an earlier case, laches did not save attempts to place judicial positions on the general election ballot in violation of Pennsylvania's constitution. *Sprague*, at 47. Similarly, laches cannot protect a law that circumvents the Pennsylvania Constitution's absentee voting provisions.

Third, the court erred in concluding that Pennsylvania voters have suffered prejudice because of Applicant's delay. To establish laches, a party must show: (1) a delay arising from a petitioner's failure to exercise due diligence; and (2) prejudice to the opposing party resulting from the delay. *Sprague* at 45. To satisfy the second element, the court found that Pennsylvania's voters would be prejudiced unless the lower court's order was vacated. *Kelly v. Commonwealth*, Civ. Action No. 68 MAP 2020 (Pa. Nov. 28, 2020) (per curiam). But Pennsylvania's voters are not a party to this suit and therefore cannot assert the equitable defense of laches. What's more, rejecting the Commonwealth's request to vacate the lower court's order

would not prejudice the voters. Such action only allows the case to proceed – it does not lead to disenfranchisement of Pennsylvania voters.

Finally, the court failed to engage in any kind of factual finding to support its reliance on laches. Rather, the court only considered the "parties' filings in Commonwealth Court." *Id.* A finding of laches is intensely fact-based and generally requires a hearing. *Long v. Kistler*, 457 A.2d 591 (Pa. Cmwlth. 1983). Had the court conducted a hearing it could have determined whether the Commonwealth (rather than nonparty voters) had suffered prejudice because of any alleged delays in filing the case. It could have asked about whether the Commonwealth was aware of the unconstitutionality of certain provisions of Act 77. Or it could have inquired as to why the Commonwealth did not seek judicial approval of Act 77. The court failed, however, to engage in a substantive inquiry as to whether laches applied. Instead, it brazenly issued a superficial decision so as to dispose of this matter quickly.

For these reasons, laches should not be a justification for dismissing this case. And the Supreme Court of Pennsylvania's invocation of this equitable doctrine should not survive the Court's scrutiny.

CONCLUSION

For the foregoing reasons, the Emergency Application for Writ of Injunction Pending the Filing and Disposition of a Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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