

In the
Supreme Court of the United States

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

Applicants,

v.

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

Respondents.

**EMERGENCY APPLICATION FOR WRIT OF INJUNCTION PENDING THE
FILING AND DISPOSITION OF A PETITION FOR A WRIT OF
CERTIORARI**

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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December 3, 2020

QUESTIONS PRESENTED

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

2. Do the First and Fourteenth Amendments to the U.S. Constitution permit the dismissal of Petitioners' claims with prejudice, on the basis of laches, where doing so foreclosed any opportunity for Petitioners to seek retrospective and prospective relief for ongoing constitutional violations?

PARTIES TO THE PROCEEDING

All parties listed in the caption.

RELATED PROCEEDINGS BELOW

Pennsylvania Supreme Court

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

Pennsylvania Commonwealth Court

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

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

Applicants (“Petitioners”) respectfully request an immediate, emergency writ of injunction to prevent the Respondents, the Commonwealth of Pennsylvania, Governor Thomas W. Wolf, and Secretary of the Commonwealth Kathy Boockvar (“the Executive-Respondents”) from taking any further action to perfect the certification of the results of the November 3, 2020, General Election (the “Election”) in Pennsylvania for the offices of President and Vice President of the United States of America or certifying the remaining results of the Election for U.S. Senators and Representatives. More specifically, Petitioners seek an injunction that prohibits the Executive-Respondents from taking official action to tabulate, compute, canvass, certify, or otherwise finalize the results of the Election as to the federal offices and that prohibits the Executive-Respondents from undertaking the following actions:

i. Secretary Boockvar from taking official action pursuant to 25 Pa. Stat. §§ 3159, 3160, 3163, 3164, 3165, 3166; from receiving, tabulating, computing, canvassing, or laying before the Governor any certificate of election or the votes cast for any candidate for federal office in the Election; from taking official action pursuant to 25 Pa. Stat. § 2621(f) “[t]o receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates” for federal offices; from “proclaim[ing] the results of such primaries and elections”; and from issuing certificates of election to the successful candidates at such elections;

ii. Governor Wolf from taking official action pursuant to 25 Pa. Stat. §§ 3160, 3163, 3165, 3166; from issuing any commission resulting from the Election as

to federal offices; and from transmitting the returns of the Election to the President of the U.S. Senate or the Speaker of the House of Representatives.

To the extent that the above-prohibited actions have already taken place, Petitioners seek an injunction to restore the *status quo ante*, compelling Respondents to nullify any such actions already taken, until further order of this Court.

Petitioners also ask the Court to consider this Application as a petition for certiorari, grant certiorari on the questions presented, treat the Application papers as merits briefing, and issue a merits decision as soon as practicable.

INTRODUCTION

Act 77 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”)), the most expansive and fundamental change to the Pennsylvania Election Code to date, violates the Constitution of the Commonwealth of Pennsylvania (the “Pennsylvania Constitution”) and thereby equally infringes on the powers granted to the Pennsylvania General Assembly under Article I, § 4, and Article II, § 1 of the U.S. Constitution. Under Act 77’s no-excuse absentee ballot scheme, any and all qualified electors are eligible to vote by mail, with no justification required. Beginning with the Military Absentee Ballot Act of 1839, the Pennsylvania Supreme Court consistently rejected all attempts to expand absentee voting by statute – uniformly holding that a constitutional amendment is required to expand absentee voting beyond the categories provided in the Pennsylvania Constitution. Act 77 is the Commonwealth’s latest attempt to override through legislation the protective limitations on absentee

voting contained in the Pennsylvania Constitution, as interpreted by the Pennsylvania Supreme Court over the last 158 years. The Pennsylvania Supreme Court's holdings regarding Article VII of the Pennsylvania Constitution make clear that there are two, and only two, constitutionally-permissible methods of voting : 1) offering your ballot *in propria persona* at the polling place on election day; and 2) exceptions to the first method limited to those persons qualifying under the absentee voting provision, Article VII, § 14 of the Pennsylvania Constitution.

Respondents have begun the steps necessary to certify the results of the Election, which was undertaken pursuant to an unconstitutional, no-excuse absentee voting scheme. Absent intervention by this Court, Respondents will complete the process of certifying the results of an election, and potentially cast electoral college votes for president and vice president, conducted in a manner which the Pennsylvania Supreme Court has long rejected as unconstitutional.

The Pennsylvania Commonwealth Court, finding that Petitioners were likely to succeed on the merits of this case (App. p.26), issued emergency preliminary injunctive relief to prevent irreparable injury to the Petitioners and all Pennsylvania voters. Rather than provide clarity and address this vitally important, and valid constitutional question on the merits, the Pennsylvania Supreme Court exercised its extraordinary jurisdiction to take over the case and dismiss it on the basis of laches. In so doing, the Pennsylvania Supreme Court violated Petitioners' right to petition and right to due process, guaranteed by the First and Fourteenth Amendments of the U.S. Constitution, respectively, by closing all avenues of relief for past and future

harms. Petitioners request this Court to extend the same preliminary injunctive relief initially granted by the Commonwealth Court of Pennsylvania and to further strike down Act 77 as an unconstitutional, *ultra vires* act of the Pennsylvania General Assembly pursuant to the Pennsylvania and U.S. Constitutions. For the reasons stated herein, Petitioners urge this Court to either grant the relief that Petitioners requested, or such other or further relief as this Court may deem proper.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. §1651(a) and 28 U.S.C. § 1257(a).

DECISIONS UNDER REVIEW

The November 28, 2020, decision of the Supreme Court of Pennsylvania dismissing all of Petitioners' claims with prejudice, along with concurring and dissenting statements, are reproduced at Appendix A. *Kelly v. Commonwealth*, Civ. Action No. 68 MAP 2020 (Pa. Nov. 28, 2020).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Constitution Article I, § 4, clause 1 ("Elections Clause"); U.S. Constitution Article II, § 1, clause 2 ("Electors Clause"); U.S. Constitution Amendment 1 ("Petition Clause"); and U.S. Constitution Amendment XIV, § 1 ("Due Process Clause"), all appended at App. pp.109-110.

FACTUAL AND PROCEDURAL BACKGROUND

I. Procedural Background

Petitioners initiated this action by filing a verified Petition for Review styled as a Complaint Seeking Injunctive and Declaratory Relief (“the Petition”) in the Commonwealth Court of Pennsylvania on Saturday, November 21, 2020, seeking to have Act 77 declared unconstitutional and seeking injunctive relief to prohibit Executive-Respondents from certifying the results of the Election which include the tabulation of absentee votes that did not comply with the Pennsylvania Constitution and, instead, to compel Executive-Respondents to certify the results of the election based solely on the legal votes; alternatively, to direct that the Pennsylvania General Assembly choose Pennsylvania’s electors; or such other and further relief as that court deemed just and proper. On Sunday, November 22, Petitioners filed an Application for Relief styled as a Motion for Emergency/Special Prohibitory Injunction (“the Motion”) and Memorandum of Law in support, seeking to preserve the status quo until the Commonwealth Court could make a final determination on the merits of the claims.

The Commonwealth Court had the ability to grant emergency relief *ex parte*, but instead, on November 23, 2020, it held a telephonic status conference with counsel for all parties. During that call Respondents noted their intention to object as to jurisdiction and standing, among other things. That same day, the Commonwealth Court issued an Order at 5:47 p.m. directing Respondents to file Preliminary Objections by 11:00 p.m. the same night and Petitioners to file answers

to those Preliminary Objections by 10:00 a.m. the following morning, November 24, 2020. The parties proceeded to file Preliminary Objections and Answers as directed by that Order.

At 9:57 a.m. on November 24, 2020, the Commonwealth Court entered an Order directing Respondents to file answers to the Motion not later than 12:30 p.m. that same day. Before filing answers to the Motion, the Executive-Respondents took steps to certify the Election and submitted a Certificate of Ascertainment for a slate of electors for Joseph R. Biden as president and Kamala D. Harris as vice president of the United States to the Archivist of the United States. Reports of that certification activity began surfacing in the media around 11:00 a.m. on November 24, 2020. Respondents filed answers to the Motion later that day, claiming that the Motion had been rendered moot by the certification activity.

Petitioners filed a Supplemental Application for Emergency Relief at 11:42 p.m. on November 24, 2020, noting that it appeared that Respondents' actions may have been accelerated in response to the Motion and/or the Commonwealth Court's 9:57 a.m. Order on November 24, 2020, and disputing the claim that the Motion had become moot. On November 25, 2020, the Commonwealth Court entered a preliminary Order ("the November 25 Order"), preliminarily enjoining Respondents preliminarily from taking any further official actions to certify or otherwise finalize the Election results. App. p.29-30. The Commonwealth Court further directed Respondents to file answers to the Supplemental Emergency Application by 3:00 p.m. on November 25, 2020, which Respondents did.

The Executive-Respondents filed a Notice of Appeal to the Pennsylvania Supreme Court on November 25, 2020 at 1:29 p.m. and the Executive-Respondents also filed an Application for the Pennsylvania Supreme Court to Exercise Extraordinary Jurisdiction (“the Application”) on November 25, 2020, at 3:34 p.m. The Pennsylvania Supreme Court granted the Application, vacated the November 25 Order and dismissed the entire case with prejudice on November 28, 2020 (“the November 28 Order”). App. pp.1-15. On December 2, 2020, Petitioners filed an Emergency Application for Stay of the Pennsylvania Supreme Court’s Order of November 28, 2020, requesting the same relief sought by the present Application for Writ of Injunction. App. pp.68-106. On December 3, 2020, the Pennsylvania Supreme Court denied that Emergency Application for Stay. App. p.108.

II. Factual Background

In 2019, the Pennsylvania General Assembly desired to implement no excuse absentee voting and initiated the process of proposing an amendment to the Pennsylvania Constitution to allow for no-excuse absentee voting. App. p.42, ¶ 28. Pursuant to the Pennsylvania Constitution, Article XI, §1, an amendment to the constitution must be approved by a majority of the members of both the Senate and House of Representatives in two separate legislative sessions, then submitted as a ballot question to be voted on by Pennsylvania’s qualified electors. If, after approval by two legislative sessions, a majority of Pennsylvania’s qualified electors vote to approve the proposed constitutional amendment, only then will the amendment take effect.

The proposed constitutional amendment initiated by the Pennsylvania General Assembly has not been approved by a majority vote of both the Pennsylvania House and Senate in two consecutive legislative sessions, nor has it been submitted to the qualified electors as a ballot question and approved by a majority vote of Pennsylvania's qualified electors.¹ App. pp.42-43, ¶ 32. The Pennsylvania General Assembly proceeded to implement Act 77 anyway, the substance of which contravenes the Pennsylvania Constitution. App. p.43, ¶ 33.

A. In-progress efforts to amend the Pennsylvania Constitution to allow for no-excuse absentee voting

On March 19, 2019, the Pennsylvania General Assembly introduced a joint resolution to amend Article VII, § 14 of the Pennsylvania Constitution in order to drastically expand absentee voting – permitting all voters to do so without an excuse. See Senate Bill 411, 2019 (later incorporated into Senate Bill 413). App. pp.43-44, ¶ 36. The legislative history of the proposed amendment recognizes that “Pennsylvania’s current Constitution restricts voters wanting to vote by absentee ballot to [specific] situations...” Senator Mike Folmer & Senator Judith Schwank, Senate Co-Sponsorship Memoranda to S.B. 411 (Jan. 29, 2019, 10:46 AM), <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=28056>. App. p.44, ¶ 37. The amendment proposes to “eliminate these limitations, empowering voters to request and submit absentee ballots for any reason – allowing them to vote early and by mail.” *Id.*

¹ The Pennsylvania Constitution also expressly provides for a more expeditious, emergency amendment process. See Pa. Const., Art. XI, § 1(a)-(b).

S.B. 413, in its amended form with the constitutional amendment provisions previously contained in S.B. 411, was passed by a majority of both Houses and filed with the Office of the Secretary of the Commonwealth on April 29, 2020. App. p.45, ¶ 42. S.B. 413 will need to be passed by a majority vote in both the Pennsylvania Senate and House of Representatives in the next legislative session and then appear on the November 2021 Election ballot to be approved by a majority of the Pennsylvania electors in order to be ratified and properly approved pursuant to the established procedures set forth in the Pennsylvania Constitution. If properly approved and ratified by a majority of voters in 2021, S.B. 413 will amend Article VII, § 14 in part as follows:

(a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors ~~who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee,~~ may vote, and for the return and canvass of their votes in the election district in which they respectively reside. **A law under this subsection may not require a qualified elector to physically appear at a designated polling place on the day of the election.**

App. pp.45-46, ¶ 44 (removing strikethrough text and adding bold text).

The Pennsylvania General Assembly later established a “Select Committee on Election Integrity” to “investigate, review and make recommendations concerning the regulation and conduct of the 2020 general election.” Pa. H. Res. No. 1032, Printer’s No. 4432, Session of 2020 (Sep. 28, 2020). App. p.46, ¶ 45. The resolution establishing the committee noted that the “Commonwealth has traditionally only allowed

absentee voting by individuals with a statutorily defined excuse to do so, such as a physical disability or absence from their municipality on election day,” that “[b]efore the enactment of Act 77 of 2019, for an individual to vote absentee in this Commonwealth, the individual must have provided a permissible reason to do so...,” and that Act 77 “created a new category of mail-in voting ... [whereby] mail-in voters do not have to provide a customary reason to vote by mail and are able to return their ballots several days later than had traditionally been allowed.” *Id.*

B. Act 77 of 2019 and Act 12 of 2020

On October 31, 2019, Governor Wolf signed Act 77 into law, which implemented sweeping reforms to the elections process in Pennsylvania. App. p.48, ¶ 54. Among other changes, Act 77 “create[ed] a new option to vote by mail without providing an excuse”; allowed voters to request and submit mail-in or absentee ballots up to 50 days before an election; and established a semi-permanent mail-in and absentee ballot voter list. *See, e.g.*, Press Release, Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting, Governor Tom Wolf (Oct. 31, 2019). App. p.48, ¶ 55. In March 2020, the Pennsylvania further updated its Election Code, including certain changes to mail-in voting provisions implemented by Act 77, when it enacted “Act 12 of 2020”. Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of March 27, 2020, § 1, P.L. No. 41, No. 12.

Rather than abide by the arduous, but mandated, process for amending the Pennsylvania Constitution to implement no-excuse absentee voting, the Pennsylvania General Assembly neglected this lawful mechanism entirely and

instead attempted to bypass amending the Pennsylvania Constitution by fundamentally overhauling Commonwealth's voting system through the enactment of a general law. In so passing Act 77, Respondents disenfranchised the entire Pennsylvania electorate, who were entitled to a constitutionally-mandated vote to approve this sweeping change to absentee voting before it was implemented.

C. The November 3, 2020 Election

Voting at the Election was held on November 3, 2020. App. p.49, ¶ 61. The Election was administered by Pennsylvania election officials pursuant to Act 77, which included allowing for no-excuse absentee ballots to be filled out, collected and counted, in violation of the Pennsylvania Constitution. App. p.49, ¶ 62. Leading up to the Election, the interpretation of many Pennsylvania Election Code provisions amended by Act 77 was undertaken by the Secretary of the Commonwealth, who also issued guidance documents on a number of topics related to Election Day procedures. *See, e.g.*, Pa. Dep't State, *Statewide Return and Recount Directive and Procedures* (Nov. 1, 2020); Pa. Dep't State, *Pennsylvania Guidance for Mail-in and Absentee Ballots Received from the United States Postal Service after 8:00 p.m. on Tuesday, November 3, 2020* (Oct. 28, 2020, Version 1.0). Congress is required by law to meet at 1 p.m. on January 6, 2021 to count the electoral college's votes and announce the results. 3 U.S.C. §§ 15-16.

Petitioner Sean Parnell is a registered qualified elector residing in Allegheny County, and a candidate for U.S. Representative for the 17th Congressional District of Pennsylvania. Petitioner Wanda Logan is a registered qualified elector residing in

Philadelphia County, Pennsylvania and a candidate for the 190th district of the Pennsylvania House of Representatives. Mr. Parnell and Ms. Logan brought this suit in their capacities as candidates for federal and state offices and as private citizens. App. p.36, ¶ 4. It was not alleged in the Petition, but could easily be alleged in an amended Petition or be recognized through judicial notice based on public election results that, if mail-in ballots that do not meet the Pennsylvania Constitution's requirements are included the certification of Election results, then Mr. Parnell's and Ms. Logan's opponents would be certified as the winners of their respective races, but if only the constitutionally-permitted ballots are included then Mr. Parnell and Ms. Logan would be the winners of their respective races.²

Petitioner the Honorable Mike Kelly (hereinafter "Representative Kelly") is a qualified registered elector residing in Butler County and the U.S. Representative for the 16th Congressional District of Pennsylvania. Representative Kelly won the most votes in the race to represent the 16th Congressional District, regardless of whether the certified election results include mail-in ballots that violate the Pennsylvania Constitution. Representative Kelly brought this suit in his capacity as a candidate for federal office and a private citizen. App. pp.35-36, ¶ 2.

Petitioners Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter and Michael Kincaid are each registered qualified electors residing in Erie, Mercer, and Allegheny Counties, Pennsylvania. Each of them brought this suit in their capacity

² Petitioners requested leave to amend the Petition from the Pennsylvania Supreme Court to add such averments, but instead the Pennsylvania Supreme Court dismissed the action with prejudice without addressing the request for leave to amend.

as a private citizen. Petition ¶ 5-9, App p. __. It was not alleged in the Petition, but could easily be alleged in an amended Petition that, if Respondents are permitted to certify the results of the Election including mail-in ballots that do not meet the Pennsylvania Constitutional requirements, then candidates for whom the Petitioners voted for in federal races would lose their races, but if only the constitutionally-permitted ballots are included, then more of the candidates for whom they voted in federal races would win their elections.

REASONS FOR GRANTING THE APPLICATION

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the full Court to issue an injunction when (1) the circumstances presented are “critical and exigent”; (2) the legal rights at issue are “indisputably clear”; and (3) injunctive relief is “necessary or appropriate in aid of the Court’s jurisdiction.” *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted). Alternatively, pursuant to 28 U.S.C. 2101(f), this Court may stay the “execution and enforcement of such judgment or decree” for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. It would be reasonable for this Court to stay the Pennsylvania Supreme Court’s vacatur of the Commonwealth Court’s preliminary injunction until this Court can make a determination on Petitioners’ petition for a writ of certiorari.

An injunction in this case is essential to protect the integrity of the November 3, 2020, General Election, and prevent further irreparable harm to Petitioners’ federally-protected rights. The standards for injunctive relief are satisfied. And if this

Court does not intervene, the Executive-Respondents and electors will take further actions to certify the results of the Election, potentially limiting this Court's ability to grant relief in the event of a decision on the merits in Petitioners' favor. Granting emergency relief is also necessary to avoid irreparable injury to the voters of Pennsylvania and to the Petitioners from the resulting wrongs of an election conducted pursuant to an unconstitutional and invalid no-excuse absentee voting scheme.

Petitioners seek relief for violation of their due process rights and rights to petition under the Fourteenth and First Amendments to the U.S. Constitution, effected by the Pennsylvania Supreme Court's decision. Pennsylvania's General Assembly exceeded its powers by unconstitutionally allowing no-excuse absentee voting, including for federal offices, in the Election. The opinion below forecloses any means of remedying Petitioners' injuries.

This Court has many options available to it in providing a remedy for when an election is found to have been conducted illegally. The United States form of Constitutional governance, embedded with the principles of comity, federalism, and the separation of powers, allows this Court to leave to the political branches, or even instruct them, to provide remedies for certain harms found here. For the state races, Pennsylvania's Constitution and Election Code provide the political branches with the necessary tools to overcome contested elections and ensure that no voter is disenfranchised by their prior failure in enacting Act 77. With respect to elections for federal office, both state legislatures and the Congress have specified roles inscribed

in the Constitution as fail-safes for state failures in conducting elections. Importantly, any remedy fashioned by this Court must also recognize that upcoming deadlines for the seating of elected officeholders impose an urgency for this Court to act. *See* 3 U.S.C. § 5 (the federal “safe harbor” deadline for resolving election controversies in order to ensure a state’s electoral college votes are counted); 3 U.S.C. § 16 (the date of the joint meeting of the two chambers of Congress where the result of the electoral votes are declared is set to take place on January 6, 2021).

I. The power delegated to the Pennsylvania General Assembly by the U.S. Constitution to determine the manner of holding federal elections and select presidential electors is constrained by restrictions imposed by the Pennsylvania Constitution.

The U.S. Constitution delegates the power to determine the manner of holding federal elections and to select presidential electors in Pennsylvania to the Pennsylvania General Assembly. Article I, § 4, of the U.S. Constitution provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article II, § 1, Clause 2 of the U.S. Constitution provides:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

In exercising those delegated powers, the General Assembly is constrained by restrictions imposed onto it by the Pennsylvania Constitution. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (“What is forbidden or required to be done by a state is forbidden or required of the legislative power under the state constitutions as they

exist.”); *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (citing *McPherson* and noting that state legislatures are constrained by restrictions imposed by state constitutions on their exercise of the lawmaking power, even when enacting election laws pursuant to U.S. Constitutional authority); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015) (holding that redistricting is a legislative function to be performed in accordance with a state constitution’s prescriptions for lawmaking, which may include referendums).

As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1 cl. 2, of the United States Constitution.

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

A. In-Person voting is a criterion for qualifying to vote under the Pennsylvania Constitution, subject only to specified absentee voting exceptions.

Article I, § 4 and Article II, § 1 of the U.S. Constitution grant plenary authority to state legislatures to enact laws that govern the conduct of elections. Yet, while the “legislature may enact laws governing the conduct of elections[,]... ‘no legislative enactment may contravene the requirements of the Pennsylvania or United States

Constitutions.” *Kauffman v. Osser*, 441 Pa. 150, 157, 271 A.2d 236, 240 (Pa. 1970) (Cohen, J. dissenting) (citations omitted).

At issue here is the Pennsylvania General Assembly’s attempt, and success if this Court should not hear this case, in implementing by legislation a no-excuse absentee voting system for state and federal elections that violates the Pennsylvania Constitution and U.S. Constitution. Under 158-year-old Pennsylvania Supreme Court precedent, voting in-person at the election in the district for which a voter is registered is a qualification for voting under the Pennsylvania Constitution. *See* Pa. Const. Art. VII, § 1; *Chase v. Miller*, 41 Pa. 403, 418-19 (1862); *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 134-35, 126 A. 199 (1924) (hereinafter *Lancaster City*).

The current Pennsylvania Constitution sets out the following qualifications for voting: (1) 18 years of age or older; (2) citizen of the United States for at least one month; (3) has residence in Pennsylvania for the 90 days immediately preceding the election; and (4) has residence in the “election district where he or she **shall offer to vote** at least 60 days immediately preceding the election” Pa. Const. Art. VII, § 1 (emphasis added). “For the orderly exercise of the right resulting from these qualifications ... the Legislature must prescribe necessary regulations But this duty and right inherently imply that such regulations are to be subordinate to the right As a corollary of this, no constitutional qualification of an elector can in the least be abridged, added to, or altered by legislation or the pretence of legislation.” *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924).

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

Our Constitution and laws treat the elective franchise as a sacred trust.... All of which the [1839 act] reverses and disregards, and opens a wide door for most odious frauds, some of which have come under our judicial cognizance.

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

Article VII, § 14(a) provides the only such exceptions to the *in propria persona* voting requirement of the Pennsylvania Constitution, in four specific circumstances.

It states:

(a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

Pa. Const. Art. VII, § 14(a). Outside of these four enumerated exceptions, the Pennsylvania Constitution prohibits absentee voting.

B. Act 77 is illegal and void ab initio because the General Assembly does not have the authority to enact legislation in contravention of the powers delegated to it by the Pennsylvania and U.S. Constitutions.

“The Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed.” *Lancaster City*, 281 Pa. at 137 (citation omitted). Act 77 unconstitutionally expands the scope of absentee voting to all voters in contravention of the Pennsylvania Constitution. Act 77, as amended, defines a “qualified mail-in elector” as “a qualified elector.” 25 Pa. Stat. § 2602(z.6). A “qualified elector” is “any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election.” *Id.* § 2602(t). In short, Act 77 qualifies all electors as mail in electors.

Moreover, newly created 25 Pa. Stat. § 3150.11 states:

Qualified mail-in electors.

(a) General rule.-- A qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article.

(b) Construction.-- The term “qualified mail-in elector” shall not be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition in section 102(t).

Separately, absentee voting is defined in 25 Pa. Stat. § 3146.1, which outlines a variety of categories of eligibility that are each consistent with Article VII, § 14 of the Pennsylvania Constitution. *See also* 25 Pa. Stat. § 2602(w) (defining 14 types of qualified absentee electors). While Act 77 purports to create a distinction between the existent “absentee voting” and “mail-in voting,” there is no distinction – except that

mail-in voting is simply absentee voting without any of the inconvenient conditions precedent that the Pennsylvania Constitution requires.³

The Pennsylvania Supreme Court in *Chase v. Miller* struck down unconstitutional military absentee voting during the Civil War. Pennsylvania was one of the first states in the nation to allow for absentee voting, originating with the Military Absentee Act of 1813, which allowed “members of the state militia and those in the service of the United States to vote as long as the company the soldier was serving was more than two miles from his polling place on election day.” John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 497 (2003). At the time the Military Absentee Act was passed, the Pennsylvania Constitution imposed no restrictions with regard to absentee voting. However, in 1838, Pennsylvania amended its constitution to require voters to “reside in the election district where he offers to vote, ten days immediately preceding such election.” *Id.* (citing Pa. Const. Art. III, § 1 (1838)). This created a conflict with the Military Absentee Ballot Act as re-enacted in 1839, which allowed for absentee voting, and the newly amended Pennsylvania Constitution, which no longer did. *Id.*

In the 1861 election, Pennsylvania soldiers voted under the Military Absentee Ballot Act of 1839, and legal challenges came soon after. In 1862, the Pennsylvania

³ In an attempt to create the distinction between absentee and mail-in, the Pennsylvania General Assembly defined “qualified mail-in elector” as a “qualified elector who is not a qualified absentee elector.” The definitional distinction is non-yielding because there is no longer any functional purpose to applying for an absentee ballot.

Supreme Court decided *Chase v. Miller*, analyzing the constitutionality of the Military Absentee Ballot Act of 1839 under the Pennsylvania Constitution. The Pennsylvania Supreme Court held that the act was unconstitutional because the purpose of the 1838 constitutional amendment was to require in-person voting in the election district where a voter resided at least 10 days before the election. *Chase*, 41 Pa. at 418-19.

Following the Pennsylvania Supreme Court's invalidation of the 1839 Military Absentee Ballot Act, the Pennsylvania General Assembly amended the Pennsylvania Constitution (in 1864) to include, for the first time, a provision allowing for absentee voting by active military personnel. See Josiah Henry Benton, *Voting in the Field: A Forgotten Chapter of the Civil War*, at 199 (1915). From 1864 to 1949, only qualified electors engaged in actual military service were permitted to vote by absentee ballot under the Pennsylvania Constitution. Pa. Const. Art. VIII, § 6 (1864). However, this limitation did not prevent the legislature from, again, attempting to pass unconstitutional legislation to expand absentee voting.

In 1924, the Pennsylvania Supreme Court decided *Lancaster City*, striking down as unconstitutional the Act of May 22, 1923 (P.L. 309; Pa. St. Supp. 1924, §9775a1, *et seq.*), providing civilians the right to vote by absentee ballot. Quoting *Chase*, the Pennsylvania Supreme Court reaffirmed *Chase's* analysis of the Pennsylvania Constitution's in-person voting requirements. *Lancaster City*, 281 Pa. at 135. The Pennsylvania Supreme Court held the Act of May 22, 1923 unconstitutional because the Pennsylvania Constitution still required electors to

“offer to vote” in the district where they reside, and that those eligible to “vote other than by personal presentation of the ballot” were specifically named in the Constitution (i.e., active military). *Id.* at 136-37. The Court relied on two primary legal principles in its ruling:

[1] ‘In construing particular clauses of the Constitution it is but reasonable to assume that in inserting such provisions the convention representing the people had before it similar provisions in earlier Constitutions, not only in our own state but in other states which it used as a guide, and in adding to, or subtracting from, the language of such other Constitutions the change was made deliberately and was not merely accidental.’ *Com v. Snyder*, 261 Pa. 57, 63, 104 Atl. 494, 495.

* * *

[2] The old principle that the expression of an intent to include one class excludes another has full application here.... ‘The residence required by the Constitution must be within the election district where the elector attempts to vote; hence a law giving to voters the right to cast their ballot at some place other than the election district in which they reside [is] unconstitutional.’

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

C. Article VII, § 1 and § 4 of the Pennsylvania Constitution have not materially changed since the Pennsylvania Supreme Court struck down legislation unconstitutionally expanding mail-in voting in *Lancaster City*.

While the Pennsylvania Constitution has been amended many times, for purposes not relevant here, since *Lancaster City*, the determinative constitutional

provisions relied upon by *Chase and Lancaster City* remain either entirely unchanged, or materially so. Previously numbered Article VIII, § 1, and Article VIII, § 8, those provisions are now found in the Pennsylvania Constitution as Article VII, § 1, and Article VII, § 4. Article VII, Section 4 remains **exactly** the same as it did when the 1924 case was decided. *See* Pa. Const. Art. VII, § 4 (“All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.”). Article VII, § 1 has only distinctly changed in three ways since the 1924 case: (1) the voting age requirement was changed to 18, from 21; (2) the state residency requirement was lowered from 1 year, to 90 days; and (3) Clause 3 of Article VII, § 1 was amended to allow a Pennsylvania resident who moves to another Pennsylvania county within 60 days of an election to vote in their previous county of residence. Pa. Const. Art. VII, § 1. None of these changes to Article VII, Section 1 have any material importance to the case at hand and were not relevant to this Court’s decision in *Lancaster County*. The Pennsylvania Constitution thus remains, for all purposes relevant to the holding in *Lancaster City*, unchanged since 1924 with regard to the qualifications and requirements for voting at an election. *Chase and Lancaster City* are not only instructive to this case, but indeed are determinative as still-valid, precedential case law on the issues in question.

1. Post-World-War-II and the modern absentee voting provision in the Pennsylvania Constitution

In 1949, the Pennsylvania Constitution was amended to also allow bedridden or hospitalized war veterans the ability to vote absentee. Pa. Const. Art. VIII, § 18

(1949). In 1957, the Pennsylvania General Assembly began the process of amending the constitution to allow civilian absentee voting in instances where unavoidable absence or physical disability prevented them from voting in person. *See In re General Election, November 3, 1964*, 423 Pa. 504, 508, 224 A.2d 197 (1966). Because of the restrictions and safeguards under Article XI, the 1957 amendment to the constitution did not go into effect until 1960. *Id.* The constitutional amendment effectively expanded eligibility for absentee voting to include only two categories of qualified electors: (1) those who on election day would be absent from their municipality of residence because of their duties, occupation, or business; and (2) those who are unable to attend their proper polling place because of illness or physical disability. Pa. Const. Art. VII, § 19 (1957).

Issues arose immediately with the canvassing and computation of ballots under the newly expanded absentee voting system, and any challenges to absentee ballots that were rejected by the board of elections resulted in the challenged ballots being placed with ballots that were not challenged, making it impossible to correct upon a subsequent determination that the decision to reject the challenge was incorrect. *See In re General Election, November 3, 1964*, 423 Pa. 504, 509. In response, “the legislature added further amendments by the Act of August 13, 1963, P.L. 707, 25 Pa. Stat. § 3146.1 et seq. (Supp. 1965)” to require the board of elections to mark any ballot that was disputed as “challenged,” hold a hearing on the objections, and the decision was opened up to review by the court of common pleas in the county involved. *Id.* Until all challenges were resolved, the board of elections was required

to desist from canvassing and computing all challenged ballots to avoid the possible mixing of valid and invalid ballots. *Id.* In 1967 following the Constitutional Convention, the Pennsylvania Constitution was reorganized and Article VII, § 19 was renumbered to Article VII, § 14.

On November 5, 1985, the citizens of Pennsylvania approved another amendment to Article VII, § 14 of the Pennsylvania Constitution, which added religious observances to the list of permissible reasons for requesting an absentee ballot (the “1985 Amendment”). The 1985 Amendment began as HB 846, PN 1963, which would have amended the Pennsylvania Election Code to provide absentee ballots for religious holidays and for the delivery and mailing of ballots. *See* Pa. H. Leg. J. No. 88, 167th General Assembly, Session of 1983, at 1711 (Oct. 26, 1983) (considering HB 846, PN 1963, entitled “An Act amending the ‘Pennsylvania Election Code,’ ... further providing for absentee ballots for religious holidays and for the delivery and mailing of ballots.”). In doing so, the Pennsylvania General Assembly recognized that because the Pennsylvania Constitution specifically delineates who may receive an absentee ballot, a constitutional amendment was necessary to implement these changes. HB 846, PN 1963 was thus changed from a statute to a proposed amendment to the Pennsylvania Constitution. *Id.* (statement of Mr. Itkin) (“[T]his amendment is offered to alleviate a possible problem with respect to the legislation. The bill would originally amend the Election Code to [expand absentee balloting] Because it appears that the Constitution talks about who may receive

an absentee ballot, we felt it might be better in changing the bill from a statute to a proposed amendment to the Pennsylvania Constitution.”).

On November 4, 1997, the citizens of Pennsylvania approved another amendment to Article VII, § 14 of the Pennsylvania Constitution, which expanded the ability to vote by absentee ballot to qualified voters that were outside of their *municipality of residence* on election day; where previously absentee voting had been limited to those outside of their *county of residence* (the “1997 Amendment”). Pa. H. Leg. J. No. 31, 180th General Assembly, Session of 1996 (May 13, 1996) (emphasis added). The legislative history of the 1997 Amendments recognized the long-known concept that there existed only two forms of voting: (1) in-person, and (2) absentee voting and that the 1997 Amendment would not change the status quo; namely that “people who do not work outside the municipality [or county] or people who are ill and who it is a great difficulty for them to vote but it is not impossible for them to vote, so they do not fit in the current loophole for people who are too ill to vote but for them it is a great difficulty to vote, they cannot vote under [the 1997 Amendment].” *Id.* at 841 (statement of Mr. Cohen).

Because the Pennsylvania Constitution has not been amended, pursuant to Article XI, to allow for no-excuse mail-in voting, the legislative efforts to authorize no-excuse mail-in voting are fatally defective and inherently unconstitutional, having no lawful basis or effect. *See, e.g., Kremer v. Grant*, 529 Pa. 602, 613, 606 A.2d 433, 439 (1992) (“[T]he failure to accomplish what is prescribed by Article XI infects the amendment process with an incurable defect”); *Sprague v. Cortes*, 636 Pa. 542, 568,

145 A.3d 1136, 1153 (2016) (holding that matters concerning revisions of the Pennsylvania Constitution require “the most rigid care” and demand “[n]othing short of literal compliance with the specific measures set forth in Article XI.”) (citation omitted). This amounts to a violation of both the Pennsylvania Constitution and the U.S. Constitution, the latter which, while granting the General Assembly plenary authority to enact laws governing the conduct of elections and for the appointment of electors, does not allow the General Assembly to violate the Pennsylvania Constitution in doing so.

II. The Pennsylvania Supreme Court violated Petitioners’ First and Fourteenth Amendment rights by depriving petitioners of their right to vote in lawful elections and right to petition, without the requisite due process.

At least with respect to federal elections, the Pennsylvania Supreme Court was not free to deny the Petitioners any practical means of remedying their injuries that were caused by the Pennsylvania General Assembly implementing no-excuse absentee balloting in Pennsylvania by means of a statute rather than a Pennsylvania Constitutional amendment. A fundamental requirement of due process is “the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). It is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Central to the principle of due process is a requirement that an individual be allowed a fair hearing before the government may deprive him or her of a protected interest. *See Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985).

This Court has held that the right of access to judicial proceedings is a component of the right to petition government for a redress of grievances and is constitutionally protected. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“The right of access to the courts is indeed but one aspect of the right of petition.” (citations omitted)). Consistently, this Court has reviewed such deprivation of access to the courts under a Due Process Clause, and Equal Protection framework. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371 (1971); *Ortwein v. Schwab*, 410 U.S. 656 (1973); *but see Sosna v. Iowa*, 419 U.S. 393 (1975) (declining to apply *Boddie* the restriction of access did not amount to a “total deprivation”).

In *Boddie* this Court found that the collection of fees and costs required to bring an action for divorce was in violation of the Fourteenth Amendment’s due process guarantee. This Court noted that access to the courts is seldom an element of due process because courts are “not usually the only available, legitimate means of resolving private disputes.” *Boddie*, 401 U.S. at 375. This Court explained that where a “judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant’s full access to that process raises grave problems for its legitimacy.” *Id.* at 376. This Court concluded: “In short, ‘within the limits of practicability, a state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.’” *Id.* at 377. (internal citations omitted). Weighing the burden of the fees, with the countervailing justifications for the fee, this Court concluded that none of the government considerations (recouping costs and preventing frivolous litigation) were “sufficient

to override the interest of these plaintiff-appellants.” *Id.* at 381. When a state fails to correct a violation of the state’s constitution in the context of federal elections and fails to provide any avenue for relief for federal election challengers, it violates the U.S. Constitution.

A. The Pennsylvania Supreme Court foreclosed any and all meaningful review of Petitioners’ claims.

The Pennsylvania Supreme Court foreclosed any and all meaningful review of the Petitioners’ claims *both before and after* the Election. Under controlling Pennsylvania law, Petitioners were foreclosed from challenging Act 77 prior to the Election occurring due to a lack of standing. *See Kauffman v. Osser*, 441 Pa. 150, 271 A.2d 236 (Pa. 1970) (appellants interest in not having their in person votes diluted by absentee ballots claimed to be unconstitutional had no standing prior to election because their interests were “too remote and too speculative”); *see also In re Gen. Election 2014*, 111 A.3d 785 (Pa. Commw. Ct. 2015) (appellants assumption that allegedly invalid absentee ballots would vote in a way that would cause dilution of appellants’ votes was unwarranted and could not afford a basis for standing).

Kauffman involved a challenge substantially similar to that brought by Petitioners in the instant case. Plaintiffs in *Kauffman*, *inter alia*, challenged provisions of legislation expanding absentee voting as being violative of Article VII, § 14 of the Pennsylvania Constitution; the challenge was brought prior to an election taking place. In upholding the lower court’s dismissal for lack of standing, the Pennsylvania Supreme Court held that “the interest of appellants is not peculiar to them, is not direct, and is too remote and too speculative to afford them, either in

their individual capacities or in their claimed class representative capacity, a standing to attack these statutory provisions.” *Kauffman*, 441 Pa. at 157. The only conceivable way to make this harm adequately non-speculative and factually supported, under *Kauffman*, would be to wait for an election to take place. Unfortunately, as the instant case has shown, when the standing would otherwise be met – when harm crosses the realm of speculative – laches is always a reliable crutch to lean on. Thus, under controlling Pennsylvania law Petitioners were *required to wait* until after the election to gain standing. And while Petitioners promptly brought this action after the Election – as soon as they reasonably could hire counsel and identify the constitutional infirmities of Act 77 – the court below disingenuously “retreat[ed] behind the facade” of the amorphous doctrine of laches in order to deny Petitioners their day in court. *Id.* at 159.

The decision of the court below denied Applicants access to judicial relief indefinitely, without adequate process and without deciding the issue of declaratory relief on the merits. *Kelly v. Commonwealth*, Civ. Action No. 68 MAP 2020 (Pa. Nov. 28, 2020) (per curiam). Applicants plead for declaratory relief in asking for Act 77 to be declared unconstitutional, as well as injunctive relief in asking to prohibit the Executive Respondents from including no-excuse absentee ballots in the final, certified results of the Election. The Commonwealth Court granted a preliminary injunction pending an evidentiary hearing, finding that Petitioners demonstrated a likelihood of success on the merits. Before such hearing could be held, the Supreme

Court exercised its powers of extraordinary jurisdiction giving the court original and final jurisdiction over the controversy.

Petitioners were foreclosed from bringing their claims in any judicial forum after the Election when the Pennsylvania Supreme Court refused to consider Petitioners' claims as to both the prior and continuing harms resulting from an unconstitutional Act 77 that remains standing law in Pennsylvania. Instead, the court dismissed Petitioners' claims, with prejudice, on the purported basis of laches. App. p3. The Pennsylvania Supreme Court went so far as to dismiss with prejudice Petitioners' claim for prospective declaratory relief as to future elections. *Id.*

In a concurring and dissenting statement, Chief Justice Saylor pointed out the worrisome effect of the outright dismissal by the Pennsylvania Supreme Court:

I find that the relevant substantive challenge raised by [Respondents] presents troublesome questions about the constitutional validity of the new mail-in voting scheme.

One of [Respondents'] main responses is that the citizenry, and perhaps future generations, are forever bound by the Legislature's decision to insert, into Act 77 itself, a 180-day time restriction curtailing challenges to the substantive import of the enactment.... However, I find this assessment to be substantially problematic. ... Thus, Appellees raise a colorable challenge to the viability of this sort of limitation, which can result in effectively amending the Constitution via means other [than] those which the charter itself sanctions. See PA. CONST., art. XI (Amendments).

App. pp.13-14 (Saylor, C.J. concurring and dissenting statement).

Thus, *res judicata* attaches to the claims, and Petitioners may not raise them in any other court. In the meantime, Act 77 remains in effect and unconstitutional, and Petitioners continue to suffer their harms without any ability to obtain relief. Should Petitioners want to raise the issue of constitutionality of Act 77 in 2021, in

anticipation of the November 2022 election, *res judicata* would bar Petitioners from raising same facial constitutional challenges to Act 77. Notably, there are no countervailing government interests that necessitate barring any further challenge on these issues by Applicants. Obviously, Judicial economy is a compelling interest for *res judicata*, generally, but that cannot justify barring Applicants from reaching the merits of their challenge to a law that will continue to harm them. Petitioners were denied any opportunity to have their claims heard, in violation of their federal due process rights and petition rights.

III. The Pennsylvania Supreme Court erred in finding laches and this Court may review the error because significant federal interests are at stake and the decision does not amount to adequate and independent state grounds.

The Pennsylvania Supreme Court's application of laches was erroneous and is subject to review by this Court because significant federal interests are at issue. "The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity." *Holmberg v. Ambrecht*, 327 U.S. 392, 395 (1946) (citations omitted). Unlike the situation where a court is situated in diversity jurisdiction and deciding an entirely state-law matter, as presented in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), in this action this Court has "no duty ... to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State." *Holmberg*, 327 U.S. at 395. Rather, the duty here is that "of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right" created under the U.S. Constitution. *Id.*

“[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.” *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., Scalia J., Thomas, J., concurring) (citation omitted). Article I, § 4, and Article II, § 1 of the U.S. Constitution impose duties and powers on the legislature of each state, as does a state’s own constitution by the contours through which it provides the lawmaking power. “A significant departure from [this] legislative scheme ...presents a federal constitutional question.” *Id.* at 113. “[T]he text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance” in this Court’s review of such constitutional questions. *Id.* “Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court.” *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930) (citations omitted).

In determining its jurisdiction, this Court must ask "whether the question of laches is so intermingled with that of Federal right that the former cannot be considered an independent matter." *Moran v. Horsky*, 178 US 205, 208 (1900). This is so for state election laws governing the conduct of federal elections. “[T]he adequacy of state procedural bars to the assertion of federal questions,’ we have recognized, is not within the State's prerogative finally to decide; rather, adequacy ‘is itself a federal question.” *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Douglas v.*

Alabama, 380 U.S. 415, 422 (1965)); see also *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) (“Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.”).

As a threshold matter, it is the duty of this Court “to ascertain, ‘... in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment.’” *N.A.A.C.P. v. Ala. ex. rel. Patterson*, 357 U.S. 449, 455 (1958) (citation omitted). Here, it does not. “[F]ederal jurisdiction is not defeated if the nonfederal ground relied on by the state court is ‘without any fair or substantial support’” *Id.* at 454 (quoting *Ward v. Board of County Commissioners*, 253 U.S. 17, 22 (1920)).

“State procedural rules have been held insufficient to bar federal review if they are ‘not strictly or regularly followed,’ if they are ‘novel and unforeseeable,’ ... or if they impose undue burdens on the assertion of federal rights.” Roosevelt, Kermit III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 *Columbia L. Rev.* 1888, 1890 (citing *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 *Harv. L. Rev.* 1128, 1137-45 (1986); *Douglas*, 380 U.S. at 422-23 (1965)). The reliance on laches by the Court below fails to meet the sufficiency needed to overcome each of these historical grounds.

This Court “ha[s] often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive [it] of the right to review.” *Barr*,

378 U.S. at 149 (citations omitted). Laches, as applied to the case below by the Pennsylvania Supreme Court, is entirely inconsistent with that court's consistent historical precedent and is contradicted by the court's recent practices in hearing analogous, substantive constitutional challenges.

"Laches may bar a challenge to a statute based upon procedural deficiencies in its enactment." *Stilp v. Hafer*, 553 Pa. 128, 718 A.2d 290, 294 (Pa. 1998). However, in *Stilp*, the court found that "Appellees concede[d] that laches may not bar a constitutional challenge to the substance of a statute" *Id.* The holding in *Stilp* contradicts the Pennsylvania Supreme Court's holding in the instant action. *Stilp* teaches that while the principle of laches may apply to a constitutional challenge on procedural grounds, it does not apply with respect to the substance of a statute. *Id.* (citing *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988) (stating that "laches and prejudice can never be permitted to amend the Constitution")); see also *Wilson v. School Distr. of Philadelphia*, 328 Pa. 225, 195 A. 90 (Pa. 1937).

Petitioners' constitutional claims are substantive, and therefore cannot be defeated by laches. Unlike *Stilp* where the plaintiffs argued that a bill was not referred to the appropriate committee, and that the bill was not considered for the requisite number of days, here Petitioners argue that the substance of Act 77 directly contravenes the Pennsylvania Constitution. See App. pp.50-55, ¶¶ 65-87. Petitioners make no challenge to the procedural mechanisms through which Act 77 was passed – e.g., bicameralism and presentment – but rather, what is substantively contained within the legislative vehicle that became Act 77. The Pennsylvania General

Assembly attempted to unconstitutionally expanded absentee voting through Act 77, despite constitutional limitations to such expansion. Act 77 itself is not a constitutional amendment, which would be the type of procedural laches challenge raised by the Executive-Respondents (and would fail in any case). Such a patent and substantive violation of the state Constitution cannot be barred by the mere passage of time – “To so hold would establish a dangerous precedent, the evil effect of which might reach far beyond present expectations.” *Wilson*, 195 A. at 99. Amending the constitution to expand a protected and fundamental right is not a mere procedural step, but rather one of substance.

Even assuming *arguendo* that laches could apply to retrospective relief in a substantive constitutional challenge, laches can only bar relief where “(1) a delay arising from Appellants' failure to exercise due diligence and (2) prejudice to the Appellees resulting from the delay.” *Stilp*, 718 A.2d at 293 (citing *Sprague v. Casey*, 550 A.2d at 187-88). In *Sprague v. Casey*, the petitioner (an attorney), brought suit challenging the placing on an election ballot of two judges. 550 A.2d 184. Respondents raised an objection based on laches because the petitioner waited 6.5 months from constructive notice that the judges would be on the ballot to bring suit. In evaluating the facts that the petitioner and respondents could have known through exercise of “due diligence,” the court found that while the petitioner was an attorney, and was therefore charged with the knowledge of the constitution and laws, the respondents (the Governor, Secretary, and other Commonwealth officials) were also lawyers and similarly failed to seek timely relief. *Id.* at 188. In denying the laches defense, the

court reasoned that “[t]o find that petitioner was not duly diligent in pursuing his claim would require this Court to ignore the fact that respondents failed to ascertain the same facts and legal consequences and failed to diligently pursue any possible action.” *Id.*

To be clear, a citizen with an actionable claim cannot just wait to file a grievance it is aware of. However, courts will generally “hold that there is a heavy burden on the [respondent] to show that there was a deliberate bypass of pre-election judicial relief.” *Toney v. White*, 488 F.2d 310, 315 (5th Cir. 1973). The Executive-Respondents were never required to meet that burden here. There is no evidence or reason to believe that Petitioners deliberately bypassed pre-election relief in the instant action. Unlike in *Sprague v. Casey*, Petitioners here are not lawyers, they did not know, nor could they have been reasonably expected to know, that they had viable legal claims well-before the election occurred. With respect to the candidate-Petitioners, none are members of the state legislature, and none have responsibilities with respect Pennsylvania Election Code or its constitutionality.

Conversely, as in *Sprague v. Casey*, Respondent Boockvar is an attorney, and should be charged with knowledge of the Constitution, and particular knowledge of the Election Code. In *Sprague v. Casey*, the taxpayer’s more than six-month delay in bringing an action challenging the election did not constitute laches thereby preventing the Commonwealth Court from hearing the constitutional claims. 550 A.2d at 188. Additionally, Respondent Pennsylvania General Assembly appears to have had knowledge of the constitutional issues involved and began the process of

amending the constitution to allow no-excuse mail-in ballots. That process appears to be ongoing to this day. App. p.42, ¶¶ 28-30.⁴

In short, the Pennsylvania Supreme Court charged Petitioners, who had no specialized knowledge, with failure to institute an action more promptly, while Respondents possessed extremely specialized knowledge, and failed to take any corrective actions. Petitioners did not hedge their bets, they simply brought an action within mere days of gaining enough information to know that they had been harmed by an unconstitutional election, as soon as they reasonably could have hired counsel to research and identify the constitutional issues and after they gained standing to bring their claims. They did not even wait for certified election results to confirm that they had been harmed. It could not have in any way served the Petitioners' interests in this matter to delay action for even one day. To suggest they did so deliberately is unsupported.

Respondents' collective failures in enacting Act 77 or to remedy its constitutional problems at any point puts the weight of any necessary curative disenfranchisement squarely on their shoulders. Laches is a shield to protect Respondents from gamesmanship, it is not a sword to use against harmed individuals to insulate Respondents' unconstitutional actions. It also bears noting that both *Chase* and *Lancaster City*, involved substantive constitutional challenges to

⁴ If Act 77 is not declared unconstitutional, and if/when the amendment purporting to allow for no-excuse absentee voting is voted upon by the electorate, that ratification process will utilize the very no-excuse mail-in voting the amendment seeks to authorize. In the meantime, the entire Pennsylvania electorate has been disenfranchised of their right to vote on amending their constitution to grant authorization for no-excuse voting by mail.

legislation expanding absentee voting; the legislation challenged in *Chase* was enacted 23 years prior to its decision, 41 Pa. at 407 (“Act of 2d July 1839, § 155”) and in *Lancaster City* the legislation was enacted one year and two months prior to its decision, 281 Pa. at 133 (“Act May 22, 1923 (P. L. 309; Pa. St. Supp. 1924, § 9775a1, et seq.)”). In both cases, the constitutionality of the legislation at issue was challenged after the election had occurred. In both cases, mail-in ballots that violated the state constitution’s prohibition were not counted. Meanwhile, this action challenges legislation passed in October 2019, *see* Act 77, amended by legislation in March 2020, *see* Act 12, and further amended through judicial edict, one and a half months prior to this action being commenced, by the same court refusing to hear this challenge, *see Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. Sept. 17, 2020)). Pennsylvania’s Supreme Court arbitrarily applied a new, unique, and surprising version of the laches doctrine to the constitutional challenge in this case.

Further evidence of the irregular application of laches by the Pennsylvania Supreme Court can be found by examining recent substantive constitutional challenges to legislative enactments in the state. The Pennsylvania Supreme Court, as recently as 2018, decided a challenge to the state’s congressional district plan brought **6 years, and multiple elections**, after the 2011 congressional redistricting map legislation had been enacted. *See League of Women Voters v. Commonwealth*, No. 159 MM 2017 (Pa. Feb. 7, 2018). On November 23, 2020, well after the election had already taken place, the Pennsylvania Supreme Court heard another case regarding whether Act 77 required county boards of elections to disqualify absentee

ballots (including no-excuse absentee ballots) based on the lack of a signature on the outer secrecy envelope. *See In re Canvass of Absentee and Mail-In Ballots*, Civ. Action No. 34 EAP 2020 (Pa. Nov. 23, 2020).

As in *N.A.A.C.P.*, here there is no “reconcil[ing] the procedural holding of the [Pennsylvania] Supreme Court in the present case with its past unambiguous holdings.” 357 U.S. 449, 455. Thus, not only is laches here an inadequate state ground for this Court to abstain review, but the Pennsylvania Supreme Court’s application of the doctrine was used as an offensive sword against Petitioners, to avoid addressing the merits of a federal question of fundamental importance.

CONCLUSION

For the foregoing reasons, this Court should grant Applicants’ request for an emergency writ of injunction (or alternatively a stay of lower proceedings), grant certiorari on the questions presented herein, treat the Application papers as a merits briefing, and issue a merits decision as soon as practicable.

Respectfully submitted,

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