

Note: This is the full document, specific arguments regarding PA Supreme Court and PA Department of State starts on page 7.

No. 20-\_\_

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In the  
**Supreme Court of the United States**

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

*Applicants,*

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

*Respondents.*

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

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**MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF  
FOR MEMBERS OF THE PENNSYLVANIA GENERAL ASSEMBLY, AS  
*AMICUS CURIAE* IN SUPPORT OF APPLICANTS/PETITIONERS**

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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

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December 4, 2020

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## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Members of the Pennsylvania General Assembly, respectfully move for leave to file the accompanying brief as amicus curiae. The consent of Petitioners and Respondents has been obtained.

*Amicus Curiae*, Members of the General Assembly were directly involved in the passage of Act 77 of 2019 (Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”)) and Act 12 of 2020 (Act of Mar. 27, 2020, § 1, P.L. No. 41, No. 12.), and have a direct and substantial interest in ensuring that the province and duty of lawmakers and legislatures of each state to create laws is protected from overreach by the executive and judicial branches. Further, December 8, 2020, is the Federal “Safe Harbor” deadline for the votes of Pennsylvania’s presidential and vice-presidential electors to be included in the counting of electoral votes in Congress when a state has held a successful election and has resolved all related controversies and contests. 3 U.S.C. §§ 2, 5. When a state has failed to choose its electors on election day, one reading of sections 2 and 5 indicates that a state legislature may potentially appoint electors up and until the day prescribed by law for the meeting and voting of electors. 3 U.S.C. §§ 2, 5, 7. Should this Court grant Applicants’ injunctive application, or find in favor of Applicants on the merits, Members of the General Assembly could potentially be called on to play a constitutionally-vested role in the appointment of electors prior to either the Federal Safe Harbor deadline or the day of meeting and voting of electors. *See* U.S. Const. Art I, § 4; U.S. Const. Art. II, §1; 3 U.S.C. §§ 2, 5, 15.

Accordingly, Members of the General Assembly respectfully request leave to file this amicus brief to articulate to the Court the importance, to lawmakers and legislative bodies across the country, of granting Applicants' injunction application and granting certiorari. Granting the application will send a clear message to the highly partisan judicial and executive usurpation of the lawmaking power by co-equal branches of the Pennsylvania government.

Respectfully submitted,

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## INTEREST OF AMICI CURIAE<sup>1</sup>

All 27 *amici curiae* joining in this brief are elected members of the Pennsylvania General Assembly, either Representatives or Senators, and have an interest in the cited case having a hearing on its merits. The complete list follows:

P. Michael Jones, Paul T. Schemel, Robert W. Kauffman, James A. Cox, Jr., Francis X. Ryan, Stephanie P. Borowicz, Barbara J. Gleim, Kathy L. Rapp, Russell H. Diamond, David M. Maloney, Sr., Dawn W. Keefer, Cris E. Dush, David H. Zimmerman, David H. Rowe, Kristin L. Phillips-Hill, Daryl D. Metcalfe, Daniel P. Moul, Eric R. Nelson, Valerie S. Gaydos, Judith F. Ward, Michael R. Regan, Donald Bud Cook, Douglas V. Mastriano, Brett R. Miller, Thomas R. Sankey III, Michael J. Puskaric, and James P. Rigby.

## INTRODUCTION

Petitioners in this case raise an argument as to the constitutionality of recent amendments to the Pennsylvania Election Code permitting, in part, a broad expansion of the state's absentee voting program. The Supreme Court of Pennsylvania dismissed Petitioner's case citing the doctrine of laches, thereby declining to hear and make a determination on the merits of the case. Amici are legislators in the Pennsylvania General Assembly, acting here in their personal

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<sup>1</sup> No party's counsel authored any part of this brief. No person other than *amici* and their counsel contributed any money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice of the intent to file and have consented in writing to the filing of this brief.

capacities, and have an interest in the merits of Petitioners' claims receiving a determination in the courts.

### **SUMMARY OF THE ARGUMENT**

The Supreme Court of Pennsylvania dismissed the Petitioners' case under the doctrine of laches. In defense of its dismissal, the court explains that the Petitioners' claim is based upon changes made to the state's Election Code in 2019 but notes that Petitioners' claim was not raised until after the primary and general elections in 2020. In its dismissal, the court noticeably avoided any comment on the impact of the court's own September 17, 2020 changes to the Election Code to the timeliness of the Petitioners' action. The court likewise remained silent as to the effect of the Secretary of the Commonwealth specific directions interpreting the Election Code to Pennsylvania counties as late as Election Day. Additionally, the Supreme Court of Pennsylvania's dismissal failed to address how the court's own precedent would have barred Petitioners' claim on standing grounds had Petitioners filed their action prior to Election Day.

### **ARGUMENT**

The parties in this case present two sides of an argument concerning the constitutionality of certain amendments to the Pennsylvania Election Code made by Act 77 of 2019, and further amended by Act 12 of 2020 (collectively, "Act 77"). The Supreme Court of Pennsylvania dismissed this case as moot, basing its dismissal of Petitioners' action on the common law doctrine of laches. This brief argues that the



intervening actions of the Supreme Court of Pennsylvania and the Secretary of the Commonwealth in 2020, fundamentally altered the original meaning of key provisions of Act 77, thereby defeating any laches argument and necessitating a hearing of the case on its merits.

Under Article I, Section 4, Clause 1 of the United States Constitution the Pennsylvania General Assembly is empowered to prescribe the “Times, Places, and Manner” of conducting elections within the Commonwealth, which is the authority on which the General Assembly relied in enacting the changes to Pennsylvania’s Election Code under Act 77.

The Pennsylvania Election Code, as amended by Act 77, requires that: (1) all mail-in ballots to be received by eight o’clock P.M. on Election Day, (2) officials at polling places authenticate the signatures of in-person voters, (3) county boards of elections meet to conduct the pre-canvass of absentee and mail-in ballots after eight o’clock A.M. on Election Day, (4) defective absentee and mail-in ballots shall not be counted, and (5) “watchers” selected by candidates and political parties be permitted to observe the process of canvassing absentee and mail-in ballots.

In a decision rendered on September 17, 2020, less than seven weeks before Election Day, the Supreme Court of Pennsylvania unilaterally and in contravention of the express wording of Act 77 extended the deadline for mail-in ballots to be received from Election Day to three days following Election Day, declared ballots mailed without a postmark be presumed to have been received timely, and mandated that mail-in ballots lacking a verified voter signature be accepted.

On the eve of Election Day, but prior to eight o'clock P.M., the Department of State encouraged some counties, but not most, to notify party and candidate representatives of mail-in voters whose ballots contained disqualifying defects thereby enabling voters to cure said defects. *See Hamm v. Boockvar*, Civ. Action No. 600 MD 2020, Petitioners' Application for Special Relief in the Form of A Preliminary Injunction, at 2-3 (Commw. Ct. Pa. Nov. 3, 2020). Act 77 is specific as to the manner in which defects of mail-in ballots are to be treated and provides no authority for county officials to contact campaigns or other political operatives to affect the cure of such defects.

In a November 17, 2020 decision, the Supreme Court of Pennsylvania ruled that county election boards could individually determine the positioning of candidate representatives at ballot canvassing and pre-canvassing activities, even if it meant positioning candidates so far from the canvassing activities that no activities could be observed. *In re Canvassing Observation*, Civ. Action No. 30 EAP 2020 (Pa. Nov. 17, 2020). On November 25, 2020, the Pennsylvania Senate Majority Policy Committee heard witness testimony from "watchers" that were not allowed to meaningfully observe the pre-canvassing and canvassing activities relating to absentee and mail-in ballots in certain counties within the Commonwealth. To the contrary, such "watchers" reported that their physical placement prevented them from viewing election-related activities (Senate Majority Policy Committee hearing, November 25, 2020, available at <https://youtu.be/2712KOYXn7s?t=10605> )

In another decision rendered on November 23, 2020, weeks after the 2020 General Election had taken place, the Supreme Court of Pennsylvania rendered meaningless the mail-ballot security provisions of Act 77 that require mail-in and absentee voters to handwrite their name, address, and date, in addition to the voter's signature, on a mail-in/absentee ballot's outer secrecy envelope. *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, Civ. Action No. 29 WAP 2020 (Pa. Nov. 23, 2020).

The orders and acts of the Supreme Court of Pennsylvania and the Department of State of Pennsylvania contravened, frustrated and substantially modified the express provisions of the Pennsylvania Election Code, as recently amended by the General Assembly. Such orders and acts were made in the days and weeks leading up to, and immediately after, Election Day, thereby affording the Petitioners in this case little opportunity to raise their claim prior to Election Day. Rather than "sitting on their rights" as inferred by the Pennsylvania Supreme Court, the Petitioners acted reasonably expeditiously in raising their claim. In addition, had the Petitioners raised their claim prior to Election Day they would have certainly faced a challenge of standing as their claim of harm would likely have been deemed speculative. If upheld, the decision of the Supreme Court of Pennsylvania effectively places the Petitioners' claim between Scylla and Charybdis, with competing legal doctrines foreclosing their right ever to be heard regardless of the path they chose.

The Petitioners claim that some of the amendments to the Pennsylvania Election Code made in Act 77 of 2019 are unconstitutional. As members of the

General Assembly whose legislation is in question, Amici have an interest in a review of the merits of Petitioners' claim by the Court.

### CONCLUSION

Petitioners' claim impacts and throws a cloud over significant portions of Pennsylvania's Election Code. A resolution of this case will resolve concerns regarding the results of the most recent elections and avoid future claims that may continue to plague elections in Pennsylvania. Since this is an issue of great significance to both the Commonwealth of Pennsylvania and to the nation, Amici request that the writ of injunction and certiorari should be granted.

December 4, 2020

Respectfully submitted,

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