

No. 220155

In the
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Defendants.

On the Motion for Leave to File Bill of Complaint

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

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the
United States

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December 10, 2020

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 Plaintiff has been obtained and Defendants have been notified and neither consented nor objected to the filing of this brief.

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.

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 Plaintiff’s MOTION FOR LEAVE TO FILE BILL OF COMPLAINT and granting the requested stay or injunctive relief pending a hearing by the Court on the merits of the case. Granting the motion will help to clarify to all branches of state government the important boundaries of judicial, legislative and executive authority when making election related policy.

Respectfully submitted,

/s/

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INTEREST OF AMICI CURIAE¹

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

Rep. David H. Zimmerman

Rep. Aaron J. Bernstine

Rep. Paul T. Schemel, Esq.

Rep. David M. Maloney, Sr.

Rep. Robert W. Kauffman

Rep. Timothy Hennessey, Esq.

Rep. Eric R. Nelson

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Rep. Matthew D. Dowling

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

Rep. Richard S. Irvin
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Rep. Aaron D. Kaufer, JD
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INTRODUCTION

The Plaintiff in this case raises an argument as to, *inter alia*, the constitutionality of recent decisions of the Supreme Court of Pennsylvania and directives of the Secretary of the Commonwealth relating to the Pennsylvania Election Code and the conduct of the 2020 general election. Plaintiff claims that said decisions and directive effectively modified the Election Code (Title 25 of Pennsylvania Statutes), violating the prerogative of the state legislature to determine the times, places and manner of conducting elections in Pennsylvania. *Amici* are legislators in the Pennsylvania General Assembly and have an interest in the merits of Plaintiff's claims receiving a determination on their merits from the Court.

SUMMARY OF THE ARGUMENT

Under Article I, Section 4, Clause 1 of the United States Constitution state legislatures are given the singular authority to prescribe the times, places and manner of elections for federal office. Pursuant to that authority, the General Assembly of Pennsylvania, by statute, enacted and has from time to time amended the Commonwealth's Election Code which, in turn, details the times, places and manner of conducting elections within the Commonwealth.

On September 17, 2020, subsequent to the last enacted amendment to the Elections Code, the Supreme Court of Pennsylvania issued an order changing the times, places and manner of our elections, effectively amending the Election Code by judicial fiat. On November 2, 2020 the office of the Secretary of the Commonwealth

issued a directive to every county which effectively amended the Election Code by changing the manner of the conduct of elections. Both the decision of the Supreme Court of Pennsylvania and the directive of the Secretary of the Commonwealth violated the prerogative of the state legislature to make election policy as prescribed under the United States Constitution.

ARGUMENT

The parties in this case present two sides of an argument concerning the administration of the 2020 election under the Electors Clause of Article II, Section 1, Clause 2 and the Fourteenth Amendment of the U.S. Constitution. *Amici* here address only those facts and questions in Plaintiff's Bill of Complaint concerning the Commonwealth of Pennsylvania, specifically the constitutionality of certain orders of the Supreme Court of Pennsylvania and directives of the Pennsylvania Secretary of the Commonwealth.

In 2019 the Pennsylvania General Assembly amended the Pennsylvania Election Code by Act 77 of 2019, and further amended the Election Code in 2020 by Act 12 of 2020 (collectively, "Act 77"). Among other things, Act 77 expanded the ability of Pennsylvanians to vote by mail by introducing no-excuse vote by mail provisions into the Election Code. 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 abrogating the constitutional prerogative of the Pennsylvania legislature to be the

exclusive maker of election policy and touching on the Pennsylvania component of the complaint of the State of Texas in the instant case.

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 when enacting the changes to Pennsylvania’s Election Code under Act 77.

Among other things, the Pennsylvania Election Code, as amended by Act 77, requires that: (1) all mail-in ballots must be received by eight o’clock P.M. on Election Day, (2) officials at polling places shall 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 that 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. *See In re: November 3, 2020 General Election*, Civil Action No. 149 MM 2020.

On November 2, 2020, the day before Election Day, the Department of State directed county election officials to notify party and candidate representatives of the names of mail-in voters whose ballots contained disqualifying defects, thereby enabling those entities to contact voters and invite them to cure their ballot defects or vote with provisional ballots on Election Day. *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. *See* 25 P.S. § 3146.8. Owing to the patent conflict between the Election Code and the directions received from the Department of State some of Pennsylvania's counties opted not to follow the directions from the Department of State whereas other did, creating a disparity between voters in different counties.

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 reasonably 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 altogether. (Senate Majority Policy Committee hearing, November 25, 2020, *available at* <https://youtu.be/2712KOYXn7s?t=10605>)

In another decision made 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.

The Plaintiff claims that said non-legislative modifications to the Pennsylvania Election Code are unconstitutional. As members of the General Assembly whose legislative prerogative to determine the times, places and manner of conducting elections has been usurped by officials from other branches of state government, *Amici* have an interest in a review of the merits of Plaintiff’s claim by the Court.

CONCLUSION

Plaintiff's claim highlights the conflict between the apparent and exclusive authority of the legislature when making election policy under Article I, Section 4, Clause 1 of the United States Constitution and the recent decisions and directives of other branches of the government, usurping legislative authority. 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 MOTION FOR LEAVE TO FILE BILL OF COMPLAINT should be granted.

December 10, 2020

Respectfully submitted,

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