IN THE SUPREME COURT OF PENNSYLVANIA

THE HONORABLE MIKE KELLY, SEAN PARNELL, THOMAS A. FRANK, NANCY KIERZEK, DEREK MAGEE, ROBIN SAUTER, MICHAEL KINCAID, and WANDA LOGAN,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GENERAL ASSEMBLY, HONORABLE THOMAS W. WOLF, and KATHY BOOCKVAR,

Respondents.

Docket No. 68 MAP 2020

EMERGENCY APPLICATION FOR STAY OF COURT'S ORDER OF NOVEMBER 28, 2020

Filed on behalf of Petitioners, The Honorable Mike Kelly, Sean Parnell, Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter, Michael Kincaid, and Wanda Logan

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EMERGENCY APPLICATION FOR STAY OF COURT'S ORDER OF NOVEMBER 28, 2020

Petitioners, the Honorable Mike Kelly, Sean Parnell, Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter, Michael Kincaid, and Wanda Logan, by and through their undersigned counsel, jointly submit this Emergency Application for Stay of this Court's Order of November 28, 2020 ("the Order"), pending the filing and disposition of a Petition for Writ of Certiorari in the Supreme Court of the United States. It would be reasonable for this Court to stay its vacatur of the Commonwealth Court's preliminary injunction until the Supreme Court of the United States can make a determination on Petitioners' petition for a writ of certiorari. To the extent that the actions prohibited by the vacated Commonwealth Court preliminary injunction have already taken place, Petitioners request an injunction to restore the status quo ante, compelling Respondents to nullify any such actions already taken, until the Supreme Court of the United States can make a determination on Petitioners' petition for a writ of certiorari.

ARGUMENT

On an application for stay pending appeal, the movant must (1) "make a substantial case on the merits," (2) "show that without the stay, irreparable injury will be suffered," and (3) that "the issuance of the stay will

not substantially harm other interested parties in the proceedings and will not adversely affect the public interest." *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 573 A.2d 1001, 1003 (1990); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (enunciating similar considerations for stay applications to the U.S. Supreme Court). All of these elements are met here.

I. Petitioners are likely to succeed on appeal.

There is, at a minimum, a "reasonable probability" that the Supreme Court of the United States will take the Petitioners' appeal and a "fair prospect" that it will reverse this Court's decision. *See Hollingsworth*, 558 U.S. at 190 (enunciating stay standards). This Court's decision violates Petitioners due process rights and rights to petition under the Fourteenth and First Amendments to the U.S. Constitution and also does not reach the critical issue that Pennsylvania's General Assembly exceeded its powers by unconstitutionally allowing no-excuse absentee voting, including for federal offices, in the November 3, 2020 General Election ("the Election"). The opinion below forecloses any means of remedying Petitioners' injuries.

A. 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, clause 1 ("Elections Clause"), 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 ("Electors Clause") 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).

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).

1. 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 the Supreme Court of the United States 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 domicil. 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.

2. 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.[1]

[1.] In an attempt to create the distinction between absentee and mail-in, the Pennsylvania General Assembly defined "qualified mail-in elector" is 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.

This 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 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 Act of 1839, and legal challenges came soon after. In 1862, this Court decided *Chase v. Miller*, analyzing the constitutionality of the Military Absentee Ballot Act of 1839 under the Pennsylvania Constitution. This

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 this Court's invalidation of the 1839 Military Absentee Voting 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, this 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*, this Court reaffirmed *Chase*'s analysis of the Pennsylvania Constitution's in-person voting requirements. *Lancaster City*, 281 Pa. at 135. This 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).

3. Article VII, § 1 and § 4 of the Pennsylvania Constitution have not materially changed since this 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.

a. 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.

B. This 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, this 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, the U.S. Supreme 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,* the U.S. Supreme 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. The U.S. Supreme 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. The U.S. Supreme 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. a*t 376. The U.S. Supreme 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, the U.S. Supreme 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.

1. This Court foreclosed any and all meaningful review of Petitioners' claims.

This 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 7, § 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, this 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 Partitioners 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 this 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. This Court went so far as to dismiss with prejudice Petitioners' claim for prospective declaratory relief as to future elections. *Id*.

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.

C. This Court erred in finding laches and the U.S. Supreme Court may review the error because significant federal interests are at stake and the decision does not amount to adequate and independent state grounds.

This Court's application of laches was erroneous and is subject to review by the U.S. Supreme 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 the U.S. Supreme 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 the U.S. Supreme 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, the U.S. Supreme 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 springes 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 the U.S. Supreme 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 v. Alabama*, 380 U.S. 415, 422-23 (1965)). The reliance on laches by this Court is likewise insufficient to bar federal review.

The U.S. Supreme 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 this 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 this 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*, 550 A.2d at 187-88). In *Sprague*, the petitioner (an attorney), brought suit challenging the placing on an election ballot of two judges. *Sprague*, 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*, 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*, Respondent Boockvar is an attorney, and should be charged with knowledge of the Constitution, and particular knowledge of the Election Code. In *Sprague*, 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.[2]

In short, this 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

[2] If Act 77 is not declared unconstitutional, and if/when the amendment purporting to allow for no-excuse mail in voting is voted upon by the electorate, that ratification process will utilize the very no-excuse absentee 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.

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 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)). This 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 this Court can be found by examining recent substantive constitutional challenges to legislative enactments in the state. This 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, this 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 the U.S. Supreme Court to abstain review, but this 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.

II. The equitable factors support a stay.

An injunction in this case is essential to protect the integrity of the Election and prevent further irreparable harm to Petitioners' federally protected rights. If a stay is not granted, the Executive-Respondents and electors will take further actions to certify the results of the Election, potentially limiting this Court's and the Supreme Court of the United States' 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.

CONCLUSION

For the foregoing reasons, this Court should stay its Order of November 28, 2020 pending the filing and disposition of a Petition for Writ of Certiorari in the Supreme Court of the United States.

Respectfully submitted,

OGC Law, LLC

/s/Gregory H. Teufel
Gregory H. Teufel, Esq.
Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Date: December 2, 2020

/s/Gregory H. Teufel
Gregory H. Teufel

CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I certify that the EMERGENCY APPLICATION FOR STAY OF COURT'S ORDER OF NOVEMBER 28, 2020 is 7510 words as measured in accordance with Pennsylvania Rule of Appellate Procedure 2135.

Dated: December 2, 2020 /s/Gregory H. Teufel
Gregory H. Teufel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record on December 2, 2020 by this Court's electronic filing system.

/s/Gregory H. Teufel
Gregory H. Teufel

IN THE SUPREME COURT OF PENNSYLVANIA

THE HONORABLE MIKE KELLY, *et al.*,

Petitioners,

Docket No. 68 MAP 2020

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

[PROPOSED] ORDER GRANTING APPLICATION FOR STAY OF THIS COURT'S ORDER OF NOVEMBER 28, 2020

AND NOW, this_____day of December 2020, upon consideration of Petitioners' Emergency Application for Stay of Court's Order of November 28, 2020, it is hereby ORDERED that the Application is GRANTED. This Court's Order of November 28, 2020 is stayed pending the Petitioners' filing and disposition of a Petition for Writ of Certiorari in the Supreme Court of the United States.

BY THE COURT:

_____

J.