

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

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

*Petitioners,*

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

*Respondents.*

---

On Petition for A Writ of Certiorari to the Supreme Court of Pennsylvania

---

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, AND BRIEF OF 28  
CURRENT MEMBERS OF THE HOUSE OF REPRESENTATIVES AS  
*AMICI CURIAE* IN SUPPORT OF PETITIONERS**

---

Michael F. Smith  
*Counsel of Record*  
The Smith Appellate Law Firm  
1717 Pennsylvania Ave. NW, Ste. 1025  
Washington, D.C. 20006  
(202) 454-2860  
smith@smithpllc.com  
*Counsel for Amici Curiae*

December 23, 2020

---

Movants, 28 current Members of the House of Representatives from Pennsylvania and states around the Nation, respectfully seek leave to file the accompanying brief as *amici curiae* in support of the Petition for a Writ of Certiorari filed in the above captioned matter, and state:

By virtue of the status as current House members, Movants are keenly interested in the issues raised in the Petition relating to Pennsylvania's Act 77 and its legality as it relates to Article II, § 1 and Article I, § 4 of the U.S. Constitution. A list of movants/*amici* is set forth in the Addendum.

Counsel for Petitioners consents to the filing of this *amicus* brief. Counsel for Respondents Commonwealth of Pennsylvania, Thomas W. Wolf, and Kathy Boockvar took no position on consent. Counsel for Respondent Pennsylvania General Assembly was contacted via email on Dec. 23, 2020 but did not respond. Accordingly, movants are filing this motion for leave. Rule 37.2(b).

Pursuant to this Court's Order of April 15, 2020 and Rule 33.2, this motion and accompanying *amicus* brief are being submitted on 8 ½-inch-by-11-inch paper.

Wherefore, Movants respectfully request leave to file the attached *amicus curiae* brief containing 1,714 words.

Respectfully submitted,

THE SMITH APPELLATE LAW FIRM

By: /s/ Michael F. Smith

Michael F. Smith  
1717 Pennsylvania Avenue N.W.  
Suite 1025  
Washington, D.C. 20006  
(202) 454-2860  
smith@smithpllc.com  
**Counsel for *Amici Curiae***

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

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

*Petitioners,*

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

*Respondents.*

---

On Petition for A Writ of Certiorari to the Supreme Court of Pennsylvania

---

**BRIEF OF 28 CURRENT MEMBERS OF THE HOUSE OF REPRESENTATIVES  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

---

Michael F. Smith  
*Counsel of Record*  
The Smith Appellate Law Firm  
1717 Pennsylvania Ave. NW, Ste. 1025  
Washington, D.C. 20006  
(202) 454-2860  
smith@smithpllc.com  
*Counsel for Amici Curiae*

December 23, 2020

---

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
ARGUMENT.....	2
I.    Pennsylvania’s disregard of the federal constitutional framework under which state legislatures set the rules for choosing members of Congress, subject to their own constitutions, presents an issue affecting every American.....	2
CONCLUSION.....	7
ADDENDUM – LIST OF <i>AMICI CURIAE</i>	

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b><u>Constitutional provisions</u></b>	
U.S. Const. Amend. XIV, § 1.....	3, 4
U.S. Const. Art I, § 4.....	1, 2, 4, 5
U.S. Const. Art. II, §1.....	1, 2, 4, 5, 6
Pa. Const. Art. VII § 1.....	4
Pa. Const. Art. VII § 4.....	4
Pa. Const. Art. VII § 6.....	4
Pa. Const. Art. VII § 14.....	3, 4
 <b><u>Cases</u></b>	
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	4, 5
<i>Harper v. Virginia Bd. of Elections</i> , 383 U.S. 663 (1966).....	4
<i>McPherson v. Blacker</i> , 146 U.S. 1, 25 (1892).....	2
<i>Perez v. Mortg. Bankers Ass’n</i> , 575 U.S. 92 (2015).....	3
<i>Republican Party of Pa. v. Boockvar</i> , 592 U.S. ___, 2020 Westlaw 6304626 (Oct. 28, 2020).....	6
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	4
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932).....	2
 <b><u>Statutes</u></b>	
Pennsylvania Act 77 of 2019.....	2, 3, 4, 5, 7
3 U.S.C. § 15.....	1

**Other authorities**

Cooley, Constitutional Limitations (1<sup>st</sup> ed. 1868).....4

Federalist No. 45 (Madison).....5-6

Federalist No. 78 (Hamilton).....3

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

*Amici curiae* are 28 current members of the United States House of Representatives from districts in Pennsylvania and across the nation; they are listed in the Addendum. *Amici* have a constitutional and statutory role in regulating elections for federal office, specifically in the Joint Session of Congress set for January 6, 2021 to count electoral votes and declare results of the presidential election. See U.S. Const. Art I, § 4; U.S. Const. Art. II, §1; 3 U.S.C. § 15. As members of Congress, *amici* also have an interest in ensuring that those constitutional provisions are appropriately construed by this Court and adhered to by the states.

---

<sup>1</sup> No party's counsel authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel contributed any money intended to fund the preparation or submission of this brief.

## ARGUMENT

### **I. Pennsylvania’s disregard of the federal constitutional framework under which state legislatures set the rules for choosing members of Congress, subject to their own constitutions, presents an issue affecting every American.**

1. The Petition’s Issue 2 raises a question that goes to the very foundation of our federal system of government, and harkens back to its creation. The federal Constitution has delegated to each state’s legislature authority for prescribing the “times, places and manner” of holding Congressional elections and choosing presidential electors. U.S. Constitution, Article I, § 4; Article II, § 1, cl. 2. In their exercise of that authority, legislatures are constrained by the restrictions of their own state constitutions. *Smiley v. Holm*, 285 U.S. 355, 369 (1932), citing *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

Flouting the constitution adopted by its own people, Pennsylvania’s General Assembly enacted Act 77, implementing no-excuse absentee and mail-in voting, under which last month’s general election was held for the state’s House seats and presidential electors. The Pennsylvania Supreme Court brushed aside pre-election challenges as premature, and now has dismissed Petitioners’ post-election act as untimely under the doctrine of laches. Essentially, Pennsylvania’s Supreme Court has insulated Act 77 from *any* judicial scrutiny. This Court now stands as the last bulwark for review of this significant and patently unconstitutional alteration of the means by which the Nation’s fifth-largest state chooses its members of Congress and presidential electors.

Indeed, the first (and only) Pennsylvania court in this case to review Act 77 on the merits declared that Petitioners' constitutional claim was likely to succeed on the merits:

Petitioners appear to have a viable claim that the mail-in ballot procedures set forth in Act 77 contravene Pa. Const. Article VII Section 14 as the plain language of that constitutional provision is at odds with the mail-in provisions of Act 77. Since this presents an issue of law which has already been thoroughly briefed by the parties, this court can state that Petitioners have a likelihood of success on the merits of its [*sic*] Pennsylvania Constitutional claim. [App. 025-26].

The very purpose of this Court is to resolve such disputes. The Court was designed as “an intermediate body between the people and the legislature, in order, among other things, to keep the latter within limits assigned to their authority.” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 122 (2015) (Alito, J., concurring in part and concurring in the judgment), quoting Federalist No. 78, at 467 (Hamilton). Here, all three branches of Pennsylvania’s government have disregarded the constitution of the commonwealth established by their own people, and thus the federal Constitution as well. Keeping them “within the limits assigned to their authority” may only be accomplished by granting the Petition and reviewing the important questions they present. Given the implications for Congressional elections – both in 2020 and in the years ahead – *amici curiae* are gravely concerned by Pennsylvania’s actions, and greatly interested in seeing this Court provide that review.

2. The Petition also raises a significant issue of Equal Protection relating to the manner in which the franchise is executed. “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment,

value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-105 (2000), citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). It is settled that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, 531 U.S. at 105, quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Pennsylvania long has championed the primacy of in-person, Election Day voting. Pet. 28-37; Pa. Const. Art. VII, §§ 1, 4, 6. Its constitution provides only four limited exceptions to that in-person voting requirement, (*see* Article VII, § 14(a)), and additional exceptions thus are permitted only after the gantlet of constitutional amendment is run. Act 77 clearly did not comport with that process, but rather unlawfully expanded the exceptions to in-person voting. Cooley, *Constitutional Limitations* 177 (1<sup>st</sup> ed. 1868) ("...the forms prescribed for legislative action are in the nature of limitations upon [the legislature's] authority. The constitutional provisions which establish them are equivalent to a declaration that the legislative power shall be exercised under these forms, and shall not be exercised under any other. A statute which does not observe them will plainly be ineffectual"). In addition to violating Article I, § 4 and Article II, § 1, cl. 2, Act 77 violates the Equal Protection rights of every Pennsylvanian who properly voted in person, or via one of the four permissible absentee means – their votes were debased and diluted by the untold number of ballots cast unlawfully by reason of Act 77. *Reynolds*, 377 U.S. at 555. Moreover, as the Petition argues, the Pennsylvania Supreme Court wrongfully applied the doctrine

of laches to perpetuate these errors, and shield them from any judicial review. Pet. 23-26.

3. The issue of whether Pennsylvania’s General Assembly has properly enacted, and its Supreme Court properly interpreted, Act 77, does not present a question of state law only. A legislature’s authority over the times, places and manner of Congressional elections, and selection of presidential electors, comes directly from the federal Constitution, and is subject to compliance with its own state constitution. By violating the latter, the Pennsylvania legislators who enacted and the Governor who signed Act 77 – and the commonwealth Supreme Court that failed to review it – have directly violated both the Elections Clause and the Presidential Electors Clause. By granting certiorari and reviewing this matter, this Court will not be impinging on any proper state role, but rather will be fulfilling its obligation properly to construe and uphold the federal Constitution. *See, e.g., Bush*, 531 U.S. at 115 (Rehnquist, C.J., Scalia & Thomas, JJ., concurring) (reviewing Florida Supreme Court’s interpretation of Florida election laws to determine if it impermissibly distorted them in violation of U.S. Const., Article II, “does not imply a disrespect for state *courts*, but rather a respect for the constitutionally prescribed role of state *legislatures*” (emphasis in original)).

Nowhere must the gears of federal-state comity mesh more smoothly than in a state’s conduct of elections to the Congress and the Presidency:

Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps in most cases, of themselves determine it....Even the House of Representatives, though

drawn immediately from the people, will be chosen very much under the influence of that class of men whose influence over the people obtains for themselves and election into the State legislatures. [Federalist No. 45, at 287-288 (Madison)].

Article II sets forth a carefully balanced system under which state legislatures hold significant sway over those elections, but are still subject to their own constitutions. Where a state's highest court invokes the doctrine of laches and declines even to consider whether a given piece of legislation comports with (or violates) the state constitutional framework, and thus the authority granted by the federal Constitution, it certainly falls to this Court to do so. *Republican Party of Pa. v. Boockvar*, 592 U.S. \_\_\_, 2020 Westlaw 6304626, at \*2 (Oct. 28, 2020) (Statement of Alito, J.) (“The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election”).

4. As they noted in supporting Petitioners' earlier Emergency Application for Writ of Injunction, *amici* believe strongly that the additional cynicism and rot that Pennsylvania's actions will inflict on our national body politic if unchecked, warrant this Court's prompt review. Events surrounding the 2020 election have gripped the Nation for months, and continue to do so with the new Congress and the presidential inauguration looming just weeks away. There is a sizable portion of the American public – tens of millions of people – who not only are convinced the general election was not above-board, but who are seething that their complaints about it still have

not even received a proper airing. High on the list of things fueling that discontent are the unlawful enactment of Act 77 and resulting unconstitutional mail-in voting, and the Pennsylvania Supreme Court's invocation of standing and laches as excuses with which to avoid any judicial review of them, both before and after the election. Pet. 24-26. Consider, for just one example, Petitioner Parnell – for whom unlawful mail-in voting appears to have made a sweepingly dispositive difference in his attempt to gain election to the Congress. Pet. 6-7 & fn.2; Pet. App. 353a.

The American people know when they are not getting a straight deal. As elected representatives charged with carrying out the people's legislative business, *amici* have been firsthand witnesses to the increasing stridency and polarization that plague our political processes. They are deeply concerned that if Pennsylvania's unconstitutional Act 77 goes unreviewed and continues not only to plague the recent election but carry forward into future ones, the Nation's political discourse will continue to spiral downward.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THE SMITH APPELLATE LAW FIRM

By: /s/ Michael F. Smith

Michael F. Smith

1717 Pennsylvania Avenue N.W.

Suite 1025

Washington, D.C. 20006

(202) 454-2860

smith@smithpllc.com

**Counsel for *Amici Curiae***

**ADDENDUM – *AMICI CURIAE***

<b>Rep. John Joyce, M.D.</b>	Pennsylvania
<b>Rep. Fred Keller</b>	Pennsylvania
<b>Rep. Dan Meuser</b>	Pennsylvania
<b>Rep. Scott Perry</b>	Pennsylvania
<b>Rep. Guy Reschenthaler</b>	Pennsylvania
<b>Rep. Lloyd Smucker</b>	Pennsylvania
<b>Rep. Glenn “GT” Thompson</b>	Pennsylvania
<b>Rep. Mo Brooks</b>	Alabama
<b>Rep. Andy Biggs</b>	Arizona
<b>Rep. Debbie Lesko</b>	Arizona
<b>Rep. Matt Gaetz</b>	Florida
<b>Rep. Bill Posey</b>	Florida
<b>Rep. Ted Yoho</b>	Florida
<b>Rep. Jody Hice</b>	Georgia
<b>Rep. Mike Johnson</b>	Louisiana
<b>Rep. Andy Harris</b>	Maryland
<b>Rep. Dan Bishop</b>	North Carolina
<b>Rep. Ted Budd</b>	North Carolina
<b>Rep. Warren Davidson</b>	Ohio
<b>Rep. Jim Jordan</b>	Ohio
<b>Rep. Jeff Duncan</b>	South Carolina
<b>Rep. Ralph Norman</b>	South Carolina
<b>Rep. Scott DesJarlais</b>	Tennessee
<b>Rep. Michael Cloud</b>	Texas
<b>Rep. Louie Gohmert</b>	Texas
<b>Rep. Chip Roy</b>	Texas
<b>Rep. Randy Weber</b>	Texas
<b>Rep. Alex X. Mooney</b>	West Virginia