No. 20A98

In the Supreme Court of the United States

MIKE KELLY, U.S. CONGRESSMAN, ET AL.,
Applicants,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents.

On Emergency Application for a
Writ of Injunction to the Pennsylvania Supreme Court
Pending the Filing and Disposition of a Petition for a Writ of Certiorari

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*,
AND BRIEF OF *AMICUS CURIAE* THE EAGLE FORUM EDUCATION
AND LEGAL DEFENSE FUND IN SUPPORT OF THE APPLICANTS**

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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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The Phyllis Schlafly Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") respectfully moves for leave to file the accompanying *amicus* brief in support of Applicants Mike Kelly, et al. (collectively "Kelly"). Originally, on December 3, 2020, the Court set the deadline for filing a response in opposition as December 9, 2020. But on December 6, 2020, the Court modified this deadline to December 8, 2020. It was only upon this rescheduling of the deadline to come within the safe harbor provision of 3 U.S.C. §5 that Eagle Forum ELDF determined that an amicus brief would be appropriate. Accordingly, on December 7, 2020, it notified counsel for all parties of its intent to file this brief. Counsel for Applicants has consented, but Eagle Forum ELDF has received no response from counsel for any of the Respondents.

In addition, while an *amicus curiae* must normally notify the parties of its intent to file a brief at least 10 days in advance of the due date, the expedited briefing schedule made this notification impossible. *Cf.* S. Ct. R. 37.2(a). Consequently, Eagle Forum ELDF's proposed *amicus curiae* brief is timely. In addition, and pursuant to the Court's order of April 15, 2020, Eagle Forum ELDF is filing both this motion and its accompanying *amicus* brief on 8.5 x 11 inch paper and pursuant to the formatting standards of Rule 33.2.

Founded by the late Phyllis Schlafly in 1981, the Eagle Forum ELDF is an Illinois nonprofit corporation dedicated, among other things, to ensuring that this country's elections are carried out in a fair, transparent manner, and in accordance with the United States Constitution. As such, it has an interest in this lawsuit.

Eagle Forum ELDF agrees with all of the arguments Kelly has raised in his brief about the specific contours of Pennsylvania state law, including how the law purporting to expand mail-in voting violates the Pennsylvania state constitution. Consequently, it will not repeat such arguments here. Rather, Eagle Forum ELDF will focus on how the Court's precedents plainly make a state's constitution just as much part of the legislative power as the legislature itself for purposes of the Elections and the Presidential Electors Clauses, and that courts may not ignore or contradict such state provisions in ruling on the validity of election laws. Pennsylvania's mail-in voting law contradicts Pennsylvania's state constitution. Consequently, the law was not enacted pursuant to Pennsylvania's legislative authority as that authority is defined under the Elections and Presidential Electors Clauses, and is thus invalid under the U.S. Constitution.

Normally, "[t]he filing of *amicus* briefs in connection with emergency applications is strongly discouraged," *see* Memorandum to Those Intending to File an *Amicus Curiae* Brief in the Supreme Court of the United States at 6

(October 2019), but this case—involving questions going to the heart of election law necessitating an expedited briefing schedule—is a major exception to that norm. Accordingly, Eagle Forum ELDF respectfully asks that the Court grant this motion and file the accompanying *amicus* brief.

Respectfully submitted,

/s/

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

Founded by the late Phyllis Schlafly in 1981, the Eagle Forum ELDF is an Illinois nonprofit corporation dedicated, among other things, to ensuring that this country's elections are carried out in a fair, transparent manner, and in accordance with the United States Constitution. As such, it has an interest in this lawsuit.

Eagle Forum ELDF agrees with all of the arguments Kelly has raised in his brief about the specific contours of Pennsylvania state law, including how the law purporting to expand mail-in voting violates the Pennsylvania state constitution. Consequently, it will not repeat such arguments here. Rather, Eagle Forum ELDF will focus on how the Court's precedents make a state's constitution just as much part of the legislative power as the legislature itself for purposes of the Elections and the Presidential Electors Clauses, and that courts may not ignore or contradict such state provisions in ruling on the validity of election laws. Pennsylvania's mail-in voting law contradicts Pennsylvania's state constitution. Consequently, the law was

[1] Eagle Forum ELDF provided notice to all parties of its intent to file this *amicus curiae* brief on December 7, 2020. While all Applicants have consented to this brief, Eagle Forum ELDF has received no response from any of the Respondents. No counsel for any party authored this brief in whole or in part, nor did counsel for any party make any monetary contribution intended to fund the preparation or submission of this brief.

not enacted pursuant to Pennsylvania's legislative authority as that authority is defined under the Elections and Presidential Electors Clauses, and is thus invalid under the U.S. Constitution.

SUMMARY OF THE ARGUMENT

Twenty years ago, the Court refused to allow the Florida Supreme Court to change Florida election law into something other than what its state legislative authority had enacted. *See Bush v. Gore*, 531 U.S. 98 (2000). "In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law….But there are a few exceptional cases [to this]." *Id.* at 112 (Rehnquist, C.J., concurring). Such exceptional cases include the construing of state legislative power under the Elections and Presidential Electors Clauses[2] of the United States Constitution.

Under the Court's precedent, and in the context of the Elections and Presidential Electors Clauses, the legislative power includes not only the state legislature itself, but also any restraints and limitations imposed upon that body by the state constitution. *See Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 804-08 (2015); *Smiley v. Holm*, 285 U.S. 355, 365-400 (1932); *Davis v. Hildebrant*, 241 U.S. 565, 566-69 (1916).

[2] The Elections Clause and the Presidential Electors Clause have "considerable similarity" to each other. *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting). Accordingly, Eagle Forum ELDF refers to them synonymously throughout this brief.

As even a dissenting opinion in *Bush v. Gore* recognized, a state legislature is bound by its constitution in deciding what types of election laws to enact under the Presidential Electors Clause. *See Bush v.Gore*, 531 U.S. at 124 (Stevens, J., dissenting) ("[N]othing in Article II of the Federal Constitution frees the state legislature from the constraints in the [s]tate [c]onstitution that created it."). In this case, Pennsylvania's constitution prevented its legislature from enacting no-excuse mail-in voting absent a constitutional amendment. Consequently, the Pennsylvania mail-in voting law is invalid.

ARGUMENT

I. The Pennsylvania law allowing no-excuse mail-in voting was not enacted pursuant to what, under this Court's precedents, constitutes state legislative power, and consequently is invalid.

A. For purposes of the Constitution, the term "legislature" depends on the context in which it is used. In the context of election law, "legislature" includes the lawmaking process, and consequently all the limitations and requirements a state constitution may impose on it.

The Court has consistently held that the meaning of the term "legislature" depends on the context in which the Constitution uses it. *See Ariz. State Leg.*, 576 U.S. at 805-09 (2015); *Smiley*, 285 U.S. at 365-400 (1932). "The question…is not with respect to the 'body' as thus described but as to the function to be performed." *Smiley*, 285 U.S. at 365. Consequently, "[w]henever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view." *Id.* at 366.

In the context of ratifying proposed amendments to the U.S. Constitution, for example, the term "legislature" means the state legislative branch itself—nothing more, nothing less. *See Hawke v. Smith*, 253 U.S. 221 (1920) (invalidating a provision of Ohio law requiring a general, statewide referendum as part of ratifying the Eighteenth Amendment). This is because the act of ratifying a constitutional amendment "is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment." *Id.* at 229. Consequently, "the

legislature's ratifying function may not be abridged by a state [constitution]." *Dyer v. Blair*, 390 F.Supp. 1291, 1303 (N.D. Il. 1975) (Stevens, Circuit Judge, writing for a 3-judge district court panel). Likewise, the term "legislature" referred solely to the legislative body when it came to electing senators prior to the passage of the Seventeenth Amendment. *See Smiley*, 285 U.S. at 365.

On the other hand, when it comes to taking action under the Election and Presidential Electors Clauses, the term "legislature" has a very different, more nuanced, meaning. The Court has long held that, within this context, the term "legislature" includes lawmaking, and consequently encompasses not only the legislative body itself, but also all of the relevant state constitutional limitations on that body. *See id.* at 365-68. As the next section demonstrates, any attempt to alter election law—even one by the state legislative body itself—that runs afoul of a state's relevant constitutional provisions is invalid under the U.S. Constitution.

B. Under the Elections and Presidential Electors Clauses, the term "legislature" includes not only a state's legislative branch, but also all restraints imposed upon that branch under the state's constitution.

The Elections Clause declares that the "manner of holding elections for senators and representative shall be prescribed in each State by the legislature thereof…." U.S. Const. Art. I, §4 cl.1. The Presidential Electors Clause provides that "[e]ach State shall appoint, in such a manner as the legislature thereof may direct, a number of [Presidential] electors…." U.S.

Const. Art. II, §2 cl. 2." For well over 100 years, the Court has consistently ruled that the term "legislature" under the Elections and Presidential Electors Clauses is not limited the actual legislative branch forming part of a state's government—rather, the term also includes any restrictions that the state's constitution may impose upon that legislative body. *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 state constitutions as they exist."). In at least one case, the Court has held that a state legislature may dispense with itself altogether under the Elections Clause and vest such election authority with an independent commission that its citizens have created in a statewide referendum. *See Ariz. State Leg.*, 576 U.S. at 793.

The Court confronted a situation similar to the present one in *Davis*. There, Ohio's constitution provided that any law enacted by the state legislature could be invalidated by the state's voters in a referendum. *Davis*, 241 U.S. at 566. After the state legislature passed, and the governor signed, a law redistricting the state in the context of congressional elections, the voters set the law aside in a referendum. *Id*. The Court held that such a provision allowing a redistricting law to be set aside via a statewide referendum did not violate the federal constitution. *Id*. at 567-69. "[W]here, by the state [c]onstitution and laws, the referendum was treated as part of the legislative

power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Id.* at 568.

In *Smiley*, the Minnesota state legislature passed legislation purporting to reapportion its federal election districts, but the governor vetoed it. *Smiley*, 285 U.S. at 361-63. Following the veto, the Minnesota state legislature deposited the legislation with the secretary of state, intending that it still be treated as valid election law. *Id.* at 361. The Court ruled that this legislation was unconstitutional under the Elections Clause, as the Minnesota constitution required the governor's signature for all laws, and that because such legislation amounted to "lawmaking," it was void without that signature. *Id.* at 366-73. "[T]he exercise of the [legislative] authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367. "We find no suggestion in the federal constitutional provision of an attempt to endow the [l]egislature of the state with power to enact laws in any manner other than that in which the [c]onstitution of the state has provided that laws shall be enacted." *Id.* at 367-68.

Finally, in *Ariz. State Leg.* the Court upheld a provision of the Arizona constitution that stripped the state legislature of any role whatsoever in the redistricting process and placed such authority in an independent commission. *Ariz. State Leg.*, 576 U.S. at 792-93. The Court held that, under

the rationales of *Davis* and *Smiley*, the term "legislature" in the context of election law did not need to encompass, strictly speaking, the legislative body itself—it could include other entities under the state constitution as well. *Id.* at 805-08. While four justices dissented from this conclusion, *see id.* at 824 (Roberts, C.J., dissenting, joined by Scalia, Thomas, and Alito, J.J.), the dissenting opinion explicitly recognized the continuing validity of both *Davis* and *Smiley*. *See id.* at 838-41. According to the dissent, *Davis* and *Smiley* stand for the proposition that, while a state constitution can subject a state legislature's lawmaking authority to additional constraints and requirements in the context of election law, it cannot abrogate the state legislature's role altogether. *See id.* at 841 ("Nothing in [*Davis*], *Smiley*, or any other precedent supports the majority's conclusion that imposing some constraints on the legislature justifies deposing it entirely."

As the Pennsylvania state constitution does not remove the state legislature from the lawmaking process in the context of election law, the present situation is one in which both the majority and dissenting sides in *Ariz. State Leg.* are in full agreement—the Pennsylvania state constitution imposes additional requirements beyond the ordinary legislative process for allowing no-excuse mail-in voting, but does not dispose of that process altogether. As the Pennsylvania state legislature did not follow that process here, the relevant mail-in voting law is invalid.

II. Absent the Court's intervention, the various states will face an incentive to ignore their own constitutions and laws in enacting and enforcing election legislation.

Very tellingly, the Pennsylvania Supreme Court did not attempt to defend the law's validity under the state constitution. As Kelly demonstrates in his brief, this is not surprising, as there is no way to defend it under that constitution. Its passage as regular legislation, rather than as a constitutional amendment, is a fatal defect to its validity that no after-the-fact justifications can rectify. Rather than engaging in any serious analysis of the law as it relates to Pennsylvania's state constitution, the Pennsylvania Supreme Court tried to avoid the matter altogether by falling back on the weak argument that Kelly had waited too long to bring the lawsuit, and that he had forfeited the right to a ruling on the merits.

As this issue goes to the fundamental structure of the U.S. Constitution in vesting state legislatures—as defined and limited by their respective constitutions—with the authority to make election law, this is a matter too important to leave unaddressed. The late Chief Justice Rehnquist argued that intervention in *Bush v. Gore* was justified in part in order to prevent the Florida Supreme Court from interfering with the state legislature's enactments on election law. *See Bush*, 531 U.S. at 120-21 (Rehnquist, C.J., concurring) ("The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the 'legislative wish' to take advantage of the safe

harbor provided by 3 U.S.C. §5."). The Chief Justice observed, among other things, that the state "court's interpretation of 'legal vote,' and hence its decision to order a contest-period recount, plainly departed from the legislative scheme." *Id*. at 118.

Just as the Florida Supreme Court departed from the Florida legislative scheme in *Bush v. Gore*, so too the Pennsylvania Supreme Court—and indeed the Pennsylvania General Assembly itself—has departed from the Pennsylvania legislative scheme in the context of the mail-in voting law at issue here. As Kelly notes in his briefing, there is no question that the mail-in voting law violates the Pennsylvania state constitution, despite being passed by the Pennsylvania General Assembly. Because the Pennsylvania General Assembly violated the limitation imposed on it under the state constitution, and because the legislative power includes the state constitution just as much as the legislature itself, it departed from the Pennsylvania legislative scheme in enacting the mail-in voting statute. This departure from the Pennsylvania legislative scheme cannot be justified under the Election and Presidential Electors Clauses.

Certainly, it is understandable that the Pennsylvania Supreme Court may have feared the political implications of invalidating the mail-in voting law. But such fears cannot intimidate a court into refraining from declaring what the law is. To the extent the invalidation of the mail-in voting law may

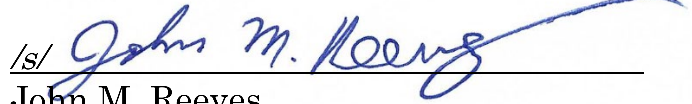
also invalidate the votes of certain individuals, the fault with that lies not with any court, but rather with the Pennsylvania state legislature itself when it failed to follow the proper procedures under the state constitution. A court cannot be faulted for declaring the simple truth.

Absent the Court's intervention, lower state courts will face an incentive to decline to rule on such matters. They will attempt to avoid ruling one way or the other on such matters, thus making it more likely that the legislative power under the Elections and Presidential Electors Clauses will be weakened. The Court should not allow that to happen.

CONCLUSION

In light of the above, the Court should grant Kelly's requested relief.

Respectfully submitted,



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