

No. 20A98

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

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MIKE KELLY, U.S. Congressman; SEAN PARNELL; THOMAS A. FRANK; NANCY  
KIERZEK; DEREK MAGEE; ROBIN SAUTER; MICHAEL KINCAID; and WANDA  
LOGAN,

*Applicants,*

v.

COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA GENERAL ASSEMBLY;  
THOMAS W. WOLF, in his official capacity as Governor of the Commonwealth of  
Pennsylvania; and KATHY BOOCKVAR, in her official capacity as Secretary of the  
Commonwealth of Pennsylvania,

*Respondents.*

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**MOTION FOR LEAVE TO FILE AMICUS BRIEF, MOTION FOR LEAVE  
TO FILE BRIEF UNDER RULE 33.2, AND BRIEF OF AMICI CURIAE  
STATE SENATOR JAY COSTA AND STATE SENATOR LISA M.  
BOSCOLA, MEMBERS OF THE DEMOCRATIC CAUCUS OF THE  
SENATE OF PENNSYLVANIA, IN SUPPORT OF RESPONDENTS**

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme  
Court of the United States and Circuit Justice for the Third Circuit

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December 8, 2020

**TABLE OF CONTENTS**

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND FOR  
PERMISSION TO FILE BRIEF UNDER RULE 33.2 ..... ii

TABLE OF AUTHORITIES .....v

INTRODUCTORY STATEMENT ..... 1

INTEREST OF AMICI CURIAE..... 1

SUMMARY OF ARGUMENT .....3

ARGUMENT

I. THIS CASE DOES NOT INVOLVE A FEDERAL CONSTITUTIONAL  
OR STATUTORY RIGHT AND NONE WAS RAISED IN THE COURTS  
BELOW .....3

II. ACT 77 COMPLIES WITH THE PENNSYLVANIA CONSTITUTION.....5

CONCLUSION.....9

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**MOTION FOR LEAVE TO FILE AMICUS BRIEF AND FOR  
PERMISSION TO FILE BRIEF UNDER RULE 33.2**

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme  
Court of the United States and Circuit Justice for the Third Circuit

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Movants Senator Jay Costa and Senator Lisa M. Boscola, members of the  
Pennsylvania Senate Democratic Caucus, respectfully seek leave to file the  
accompanying brief as *amici curiae* in opposition to the emergency Application for  
Writ of Injunction Pending the filing and Disposition of a Petition for a Writ of  
Certiorari filed in the above-captioned matter.

*Amici curiae* Senators Jay Costa and Senator Lisa M. Boscola submit this  
motion and accompanying brief. Senators Costa and Boscola submit that members

of the General Assembly voted in support of and in opposition to the legislation that was ultimately enacted as Act 77.<sup>1</sup> Senators Costa and Boscola seek to present herein and in the accompanying brief a unique perspective concerning the actions of the General Assembly in the enactment of Act 77 and the requirement that the enactment be granted the customary broad presumption of constitutionality concerning both the procedures used in its enactment as well as the constitutionality of the act itself. Pursuant to its broad grant of plenary legislative authority under the Pennsylvania Constitution, the General Assembly acted in compliance with state constitutional provisions concerning the enactment of Act 77 that included, *inter alia*, expanded voting opportunities through the use of “mail-in ballots.”

*Amici curiae* also requests permission to file its proposed brief on 8 ½ inch by 11 inch paper pursuant to Rule 33.2. Applicants’ emergency petition seeks the Court’s immediate intervention and time does not allow for the printing of booklets under rule 33.1. Accordingly, *amici* respectfully move this Court to accept the filing of its *amicus* brief using the format specified in Rule 33.2.

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<sup>1</sup> The legislation that was eventually enacted as Act 77 of 2019 was introduced as Senate Bill 421 in the 2019-2020 legislative session by Sen. Lisa Boscola. The legislation, amended in the House of Representatives to include Mail-In Ballots was approved by bipartisan votes of 138 to 61 in the House and 35 to 14 in the Senate. The Governor signed the bill into law as Act 77 on October 31, 2019. *See* Pa. Act of Oct. 31, 2019, No. 77, P.L. 552, Cl. 25, S.B. 421.

For these reasons, *amici curiae* respectfully request the Court's leave to file the attached *amicus curiae* brief containing 1,562 words, and for leave to file the brief pursuant to Rule 33.2.

Respectfully submitted,

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Dated: December 8, 2020

## TABLE OF AUTHORITIES

### Cases

<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	4
<i>Chase v. Miller</i> , 41 Pa. 403 (Pa. 1862).....	6, 7
<i>Commonwealth v. Hartman</i> , 17 Pa. 118 (1851) .....	5, 8
<i>Commonwealth v. Herman</i> , 161 A.3d 194 (Pa. 2017).....	5
<i>Commonwealth v. Torsilieri</i> , 232 A.3d 567 (Pa. 2020).....	6
<i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945).....	3, 4
<i>In re Contested Election in Fifth Ward of Lancaster City</i> , 26 A. 199 (Pa. 1924) .....	7
<i>In re J.B.</i> ,107 A.3d 1 (Pa. 2014) .....	6
<i>Mixon v. Commonwealth</i> , 759 A.2d 442 (Pa. Commw. 2000).....	6
<i>Patterson v. Barlow</i> , 60 Pa. 54 (1869).....	6
<i>Pennsylvania Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020) .....	6
<i>People of State of New York ex rel. Bryant v. Zimmerman</i> , 278 U.S. 63 (1928) .....	4
<i>Ridgway v. Ridgway</i> , 454 U.S. 46 (1981).....	3

### Constitutional Provisions

PA. CONST. ART. VII, §4.....	3, 7
PA. CONST. ART. VII. §14.....	8

### Statutes

1 Pa.C.S. §1922.....	5
25 P.S. §2602 .....	8
25 P.S. §3150.11 .....	8
Pa. Act of Oct. 31, 2019, No. 77, P.L. 552, Cl. 25 .....	passim

## INTRODUCTORY STATEMENT

**To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Third Circuit:**

*Amici curiae*, State Senator Jay Costa and State Senator Lisa M. Boscola, members of the Democratic Caucus of the Senate of Pennsylvania, submit this *amicus curiae* brief in response to the emergency application for writ of injunction and in support of respondents.

### INTEREST OF AMICI CURIAE<sup>2</sup>

State Senator Jay Costa is a duly elected member of the Senate of Pennsylvania representing the 43<sup>rd</sup> State Senate District including Allegheny County, Pennsylvania. Senator Costa serves as the Leader of the Senate Democratic Caucus. State Senator Lisa M. Boscola is a duly elected member of the Senate of Pennsylvania representing the 18<sup>th</sup> Senate District including Lehigh and Northampton Counties. Senator Boscola was the prime sponsor of the legislation at issue in this matter, which amended the Election Code to include, among other changes, the institution of “mail-in ballots.” It was finally enacted as Act 77 on October 31, 2019. *See* Pa. Act of Oct. 31, 2019, No. 77, P.L. 552, Cl. 25, S.B. 421.

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<sup>2</sup> No party’s counsel authored any part of this brief. No person other than amici and their counsel contributed any money intended to fund the preparation or submission of this brief. Due to the updated timeline for submission of briefs in this case, there has been no opportunity to seek the parties’ consent to this brief.



*Amici curiae* have an interest in the outcome of this matter as members of the Pennsylvania General Assembly that finally approved Act 77 by bipartisan votes of 138 to 61 in the House and 35 to 14 in the Senate.<sup>3</sup> In the state courts below, Petitioners alleged the General Assembly violated state constitutional law in expanding voting opportunities through the use of mail-in ballots via amendments to the Pennsylvania Election Code and challenged the legislative procedures by which it did so. *Amici curiae* have a unique perspective as legislators regarding the constitutionality of both the procedures by which legislation is enacted as well as its substantive compliance with the Pennsylvania Constitution. *Amici curiae* also have a substantial interest in the impact that any outcome of this matter will have on the future constitutional passage of legislation in the Pennsylvania General Assembly and, in particular, the ability of parties to circumvent state court authority in finally determining a challenge to a state legislature's enactment pursuant to state law.

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<sup>3</sup> *Amici curiae* include members who voted for and in opposition to passage of Act 77. Curiously, 30 of the 32 proposed *amici curiae* in the “Brief for Members of the Pennsylvania General Assembly, as *Amicus Curiae* in Support of Applicants/Petitioners,” filed with this Court on December 4, 2020, voted in favor of Act 77. Specifically, P. Michael Jones, Paul T. Schemel, Robert W. Kauffman, James A. Cox, Jr., Francis X. Ryan, Stephanie P. Borowicz, Barbara J. Gleim, Kathy L. Rapp, Russell H. Diamond, David M. Maloney, Sr., Dawn W. Keefer, Cris E. Dush, David H. Rowe, Kristin L. Phillips-Hill, Daryl D. Metcalfe, Daniel P. Moul, Eric R. Nelson, Valerie S. Gaydos, Judith F. Ward, Michael R. Regan, Donald Bud Cook, Douglas V. Mastriano, Brett R. Miller, Thomas R. Sankey III, Michael J. Puskaric, James P. Rigby, Matthew D. Dowling, Richard S. Irvin, Jerome P. Knowles, and Aaron J. Bernstine. Only proposed *amicus curiae* David H. Zimmerman voted against Act 77. Additionally, proposed *amicus curiae* David Arnold, Jr. did not vote on passage of Act 77 as it predated his first term as state senator.

## SUMMARY OF THE ARGUMENT

Article VII, Section 4 of the Pennsylvania Constitution provides that, “[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law.” PA. CONST. ART. VII, §4. In Act 77 of 2019, the Pennsylvania General Assembly enacted mail-in voting pursuant to its constitutional authority. Therefore, the state constitutional claims asserted here fail. Moreover, those claims do not implicate federal rights that petitioners urge this Court to address. Finally, this case does not involve the principle that state courts may not intrude on state legislatures’ powers over Elector selection and federal elections. In the instant matter, the Pennsylvania Supreme Court did not interfere with the legislature’s exercise of its authority when it enacted Act 77. For these reasons, *Amici* requests that the Court deny the application.

## ARGUMENT

### **I. This case does not involve a federal constitutional or statutory right and none was raised in the courts below.**

This case does not present an adjudication of federal rights. Rather, this matter only involves the petitioners’ disagreement with a state judgment based on state law grounds. This Court’s “only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.” *Ridgway v.*

*Ridgway*, 454 U.S. 46, 54 (1981) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26

(1945)). As this Court recognized, this principle “is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction.” *Herb*, 324 U.S. at 125; *see also Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (“comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law,” a “practice that reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns”).

In accordance with this longstanding principle of state-federal court relations, this Court requires that a party asking to litigate matters of federal constitutional law on appeal first make such a federal constitutional claim with the state court in a timely manner and with “fair precision” such that the state court is able to consider it. *People of State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (“There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor[e] be brought to the attention of the state court with fair precision and in due time.”). Therefore, this Court lacks authority to review state judgments where no federal rights are “adjudged” or raised with precision before the state court.

In this matter, petitioners' complaint and application for injunctive relief deal exclusively with claims under state law. Specifically, their filings cite Act 77 and its alleged lack of compliance with various provisions of the Pennsylvania Constitution. Nowhere in petitioners' filings or in the Pennsylvania state court rulings are assertions of federal violations. Since no federal rights were claimed or adjudged below, this Court lacks any basis to act.

## **II. Act 77 complies with the Pennsylvania Constitution.**

Even though *Amici*'s position is that Act 77 is constitutional pursuant to state law, *Amici* will address its constitutionality.

For nearly 160 years, Pennsylvania courts have opined that the General Assembly has the constitutional authority to enact laws on "all subjects on which its legislation is not prohibited."<sup>4</sup> *Commonwealth v. Hartman*, 17 Pa. 118, 119 (1851). This applies equally to elections under Pennsylvania Constitution Article VII: "undoubted legislative power is left by the Constitution to a discretion

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<sup>4</sup> The wide leeway entrusted to the General Assembly has led Pennsylvania's courts to find that those challenging a statute as unconstitutional face "a very heavy burden of persuasion." *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017). A statute "will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution," and all "doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster." *Id.* The General Assembly has also expressed by statute that it always intends to comply with the state and federal charters. *See* 1 Pa.C.S. §1922 ("[i]n ascertaining the intention of the General Assembly in the enactment of a statute" it is to be presumed "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth").

unfettered by rule or *provisio*, save the single injunction “that elections shall be free and equal.”” *Mixon v. Commonwealth*, 759 A.2d 442, 450 (Pa. Commw. 2000) (quoting *Patterson v. Barlow*, 60 Pa. 54, 75 (1869)). Furthermore, Pennsylvania courts have long recognized that legislative enactments – including in the context of state and federal constitutional challenges to election-related legislation – enjoy “the presumption that the General Assembly did not intend to violate constitutional norms . . . Accordingly, a statute is presumed to be valid, and will be declared unconstitutional only if it is shown to be ‘clearly, palpably, and plainly [violative of] the Constitution.’” *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 384 (Pa. 2020) (internal quotations marks and citations omitted). Any party challenging a legislative enactment “must meet the high burden of demonstrating that the statute clearly, palpably, and plainly violates the Constitution.” *Commonwealth v. Torsilieri*, 232 A.3d 567, 575 (Pa. 2020) (citing *In re J.B.*, 107 A.3d 1, 14 (Pa. 2014)).

This sweeping legislative authority is confirmed by the cases petitioners cite for their state constitutional claims. In *Chase v. Miller*, 41 Pa. 403 (Pa. 1862), the Pennsylvania Supreme Court acknowledged that it is only “[w]hen [legislators] have not exercised their power nor attached to [a] word any other than its ordinary legal signification” that the language of Article VII is “to be received according to its primary meaning.” *Id.* at 420 (emphasis added). Here, the General Assembly

“exercised its power” to define permissible methods of voting and what it means to “offer to vote.”<sup>5</sup> *Id.*

More importantly, Act 77 is an exercise of authority granted to the legislature by a provision of the Pennsylvania Constitution, which was added after *Chase* was decided, that expressly allows the legislature to pass laws on voting methods. *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.” (emphasis added)). Act 77 is both a product of the General Assembly’s authority to interpret, implement and define parameters of the Commonwealth’s elections and an exercise of this express constitutional power. As a result, regardless of the meaning of the phrase “offer to vote” during the Civil War, the General Assembly has the authority to “prescribe” new methods and definitions of voting “by law,” including what it means to “offer to vote in the Commonwealth.

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<sup>5</sup> Petitioners also misread *Chase*—and, by extension, *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924)—in arguing the Pennsylvania Constitution prohibits the method of mail-in voting. *Chase* addressed where an “offer to vote” takes place. Its holding was rooted not in voting method but the limits of legislative power. The court ruled that the General Assembly could not create an “election district” outside the state or delegate election administration to military officers. *See Chase*, 41 Pa. at 422 (“If, then, the legislature did not and could not authorize the military commander to form an election district, how could there be any constitutional voting under the 43d section? Without an election district there can be no constitutional voting.”). Act 77 does not generate such questions. *Chase* also pre-dates adoption of Article VII, Section 4 of the Pennsylvania Constitution. Together, these facts show that any reading of *Chase* as requiring a finding of constitutional infirmity in mail-in voting cannot be correct.

Petitioners' two remaining constitutional arguments similarly fail. Act 77 does not conflict with the voter qualification requirements in Article VII, Section 1 of the Pennsylvania Constitution. PA. CONST. ART. VII. §1.<sup>6</sup> The Act adopts the same voter qualifications without alteration and, therefore, there cannot be a conflict. *See* 25 P.S. §2602(t), (z.6), §3150.11(b). Additionally, the Act does not violate the absentee voting provisions of Article VII, Section 14. Section 14 requires the passage of laws to enable absentee voting. PA. CONST. ART. VII. §14 (“the Legislature shall, by general law, provide a manner in which, and the time and place at which” absent voters may vote). Section 14 acts as a constitutional floor for additional voting methods the General Assembly must provide, but nothing in the section limits the General Assembly’s plenary power to permit other voting methods such as mail-in ballots *See Hartman*, 17 Pa. at 119-20.

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<sup>6</sup> Article VII, §1 of the Pennsylvania Constitution states:

Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.

1. He or she shall have been a citizen of the United States at least one month.
2. He or she shall have resided in the State 90 days immediately preceding the election.
3. He or she shall have resided in the election district where he or she shall offer to vote at least 60 days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within 60 days preceding the election.

For these reasons, the Pennsylvania General Assembly had the constitutional authority to pass Act 77, therefore the enactment complies with the Pennsylvania Constitution.

### CONCLUSION

For these reasons, the application should be denied.

Respectfully submitted,

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