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 Pending the Filing and Disposition of A Petition for A Writ of Certiorari

MOTION FOR LEAVE TO FILE AND BRIEF OF LEHIGH VALLEY TEA PARTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND IN SUPPORT OF EMERGENCY APPLICATION FOR INJUNCTIVE RELIEF

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

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Movant, The 9-12 Project of the Lehigh Valley, Inc. d/b/a The Lehigh Valley Tea Party (hereinafter "Lehigh Valley Tea Party" or "LVTP"), respectfully seeks leave to file the accompanying brief as *amicus curiae* in support of the Emergency Application for Writ of Injunction Pending the Filing and Disposition of a Petition for Writ of Certiorari filed by the Applicants in the above captioned matter.

The Lehigh Valley Tea Party ("LVTP") is a non-profit, non-partisan, IRC 501(c) (4) organization. With over four thousand members, LVTP is the largest local grassroots conservative group in Pennsylvania and one of the most influential in the nation. LVTP's membership is dedicated to the public education of critical governmental topics bearing upon the basic rights and freedoms of our nation's citizenry including, but not limited to, the principles of a constitutionally limited government, taxes/spending/debt, Second Amendment rights, immigration, and energy policy. LVTP advances its vision through its advocacy for the preservation of unalienable individual rights as established by the Declaration of Independence, thereby returning government to the limits placed on it by the Constitutions of the United States and the Commonwealth of Pennsylvania.

Pursuant to Rule 37, Counsel of record for the Applicant and Respondent have been timely notified of the intent to file this *amicus curiae* brief. Counsel for Petitioners consent to LVTP's filing of the proposed *amicus brief*. Counsel for the Respondents were notified on December 6, 2020, and consent was requested, however

no response has yet been received. Therefore, movant requests leave of this Honorable Court to file the appended brief, copies of which have been served upon all parties.

WHEREFORE, based upon the foregoing reasons, The 9-12 Project of the Lehigh Valley, Inc. d/b/a The Lehigh Valley Tea Party, respectfully requests leave from this Honorable Court to file the attached *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

LVTP has a specific interest in the matter before this Court. The majority of its members are citizens of Pennsylvania whose constitutional rights were violated when they were denied the right to determine whether they want their constitution amended to permit no excuse, mail-in ballots. To the extent some of LVTP's members live outside the Commonwealth of Pennsylvania, those members as well have a critical interest given that any vote cast unlawfully for candidates in a national office in one state impacts voters in all other states.

INTRODUCTION

"Well Doctor what have we got[,] a republic or monarchy[?]" Dr. Franklin responded: "A republic, if you can keep it." H.R. Doc. No. 398 (1927) (Documents Illustrative of the Formation of the Union of the American States); *Papers of Dr. James McHenry on the Federal Convention of 1787*, Yale L. School: Avalon Project. Solemn reflection on this famous anecdote from the early days of the American republic is merited in understanding the issues presented to the Court in the instant action. Rephrased today, the question might ask whether we exist as the federal constitutional republic envisioned by the Founders, or whether we have succumb to the vices of our past and resemble the fractured confederacy of our country's early days. What worth, if any, can we give to our cherished constitution – culminated through the greatest democratic experiment that history has seen – if any individual

[1] No counsel for a party authored this brief in whole or in part, and no counsel for party or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amicus Curiae, its members or its counsel made a monetary contribution to its preparation or submission.

state can trample on the rights we share as a nation, which sweat and blood have worked to uphold over time. Pennsylvania's actions ridicule the notions of limited government and individual rights that are fundamental principles of American government. For the reasons laid out herein, the Court should grant Applicants injunctive motion, grant certiorari, and hold in favor of Petitioners on the merits.

STATEMENT OF THE CASE

Constitutional promises must be kept; that is the fundamental principle, simply put, before the court in the instant case. Did Pennsylvania keep its promise to its citizens to allow them to directly approve a constitutional amendment expanding absentee voting? No. And far from Pennsylvania's actions being uncharted territory, the state has a well-memorialized history of attempting to impose on its citizens what they would otherwise not accept if done through the required, lawful process. Neither are these constitutional harms unique to Pennsylvania. Other states in the union have, throughout American history, attempted to shove similar mail-voting systems onto their citizens in violation of their state constitutions. So too have Courts in those states tossed aside such legislation that disregards constitutional law. While federalism generally permits this Court to defer to the state on such matters, it would not be prudent to do so here. Pennsylvania has failed its citizens, and recent history indicates that has abdicated their duty to fairness and justice.

SUMMARY OF THE ARGUMENT

Applicants' motion should be granted, certiorari should be granted and the Court should rule on the merits in favor of Applicants. It is clear that unconstitutional attempts to expand absentee voting have struck down by other states that have similar constitutional in person voting requirements to Pennsylvania and this case should not be different. The Pennsylvania Supreme Court should not have been permitted to dismiss this matter without reaching the merits of the case. The Argument contained in this brief will detail the reasons for this Court to find in favor of the Applicants and demonstrate the important equities at stake.

ARGUMENT

I. Fundamental Principles of Limited Government Hold that Pennsylvania's Actions, Undertaken Without the Necessary Constitutional Amendment Process, Have Been Egregiously Unlawful and Have Disenfranchised Pennsylvania Voters of the Right to Approve Constitutional Amendments.

Efforts to vindicate and protect the lawful, constitutionally authorized voting rights of the citizens from and against unconstitutional and unlawful voting is necessary and proper to uphold the rule of law and the integrity of the voting system and *prevent* law-abiding citizens throughout the Commonwealth from being disenfranchised. Beyond the narrow focus on the effect on the voting rights of the citizens, Act 77 has also effectively deprived every citizen of the Commonwealth of Pennsylvania of the fundamental and inalienable right reserved solely to the people to determine whether or not to alter, amend or modify the Pennsylvania Constitution. The Supreme Court of Pennsylvania's decision below evidences an abandonment of the Court's sworn duty to uphold and enforce the constitution without regard to

extraneous influences, particularly political ones, and protect the actual lawful rights of the people guaranteed by the constitution. These factors demonstrate the exigent need for this Honorable Court to grant Applicants' Petition and review this case which could affect citizens nationwide.

There is no dispute that the right to vote is a fundamental right of the qualified citizens of Pennsylvania. Equally important and essential to the proper functioning of the federalist system of limited governance our Constitutional Republic is founded upon, is the right of Pennsylvania citizens to have ultimate authority over decisions to amend the Pennsylvania Constitution, a right which is exclusively reserved to the people under the State Constitution. If the law is applied and interpreted in a neutral, unbiased manner, it is beyond reproach that the effect of Act 77 was to overhaul Pennsylvania's absentee voting provisions through sweeping changes, additions and deletions to Article VII, § 14, thereby amending the constitution. *See Sprague v. Cortes,* 636 Pa. 542, 571, 145 A.3d 1136, 1154 (Pa. 2016) (noting that Black's Law Dictionary (10th ed. 2014) defines "amendment" as "a change made by addition, deletion or correction."). It is only possible to amend the Pennsylvania Constitution in two ways: via a Constitutional Convention, or via the procedures established under Article XI of the Pennsylvania Constitution. *See Friedman v. Corbett,* 620 Pa. 569, 580, 72 A.3d 255, 261 (Pa. 2013) (*citing Stander v. Kelley,* 433 Pa. 406, 250 A.2d 474, 479 (Pa. 1969) ("The Constitution of the State may be legally amended in the manner specifically set forth therein, or a new one may be put in force by a convention duly assembled, its action being subject to ratification by the people,

but these are the only ways in which the fundamental law can be altered."); *and* Harry L. Witte, Amending the Pennsylvania Constitution, The Pennsylvania Constitution: A Treatise on Rights and Liberties, 847 (Ken Gormley ed., 2004)).

Article XI, § 1 of the Pennsylvania Constitution, provides the "complete and detailed process for the amendment of that document," which is a process "standing alone and entirely unconnected with any other subject," which neither contains nor requires reference to any other constitutional provisions, but instead "is a system entirely complete in itself; requiring no extraneous aid, either in matters of detail or of general scope, to its effectual execution." *Wolf v. Scarnati,* 233 A.3d 679, 688 (Pa. 2020) (*quoting Kremer v. Grant,* 529 Pa. 602, 606 A.2d 433, 436 (Pa. 1992); *and Commonwealth ex rel. Att'y Gen. v. Griest*, 196 Pa. 396, 46 A. 505, 506 (Pa. 1900)). The standalone procedure for amending the constitution under Article XI, § 1 is purposefully onerous and burdensome, in order to prevent short-sighted or knee-jerk amendments of the fundamental law established under the Constitution. It is well-settled that "[t]he Constitution is the fundamental law of [the] Commonwealth, and in matters relating to alterations or changes in its provisions, **the courts must exercise the most rigid care to preserve to the people the right assured to them by that instrument**." *Pa. Prison Soc'y v. Commonwealth*, 565 Pa. 526, 537, 776 A.2d 971, 977 (2001) (*quoting Commonwealth ex rel. Schnader v. Beamish*, 309 Pa. 510, 164 A. 615, 616-17 (Pa. 1932)) (*emphasis added*); *see also In re Roca*, 643 Pa. 585, 600, 173 A.3d 1176, 1185 (2017); *Sprague,* 636 Pa. at 568; *Kremer,* 606 A.2d at 438 ("Nothing short of literal compliance with [Article XI, Section 1] will suffice.").

The most fundamental and indispensable requirement for amending the constitution under Article XI is that a "proposed amendment or amendments shall be submitted to the qualified electors of the State." *Sprague,* 636 Pa. at 568 (*quoting* PA Const. Art. XI, § 1). In fact, the exclusive right to decide whether to amend the Pennsylvania Constitution is explicitly reserved to the people under Article XI, and is further reinforced through Declaration of Rights, specifically Article I, §2, which "reserves to the people 'an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.'" *Sprague v. Cortes*, 636 Pa. 542, 568, 145 A.3d 1136, 1153 (2016) (*quoting* PA. Const. art. I, § 2);[2] *see also Driscoll v. Corbett*, 620 Pa. 494, 511, 69 A.3d 197, 207-08 (Pa. 2013). Notably, earlier this year the Pennsylvania Supreme Court reaffirmed the longstanding precedent that the rights enumerated in the Declaration of Rights are held to be "inviolate and may not be transgressed by government," further explaining that:

> The Declaration of Rights exists to protect Commonwealth citizens from government tyranny, not to delineate the powers of any branch of government. See Senators' Reply Brief at 24 (opining that the placement of the clause in the Declaration of Rights is to "prevent tyranny of the Governor in capriciously ordering citizens to do something through the suspension of law"). To this end, the Declaration of Rights itself warns: "To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate." PA. CONST. art. I, § 25. The Declaration of Rights, including Article I, Section 12, serves to protect individuals from an overbearing government in general, not to empower any department of that government...

[2] Article I, § 2 of the Pennsylvania Constitution provides that: "All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper."

Wolf v. Scarnati, 233 A.3d 679, 701 (Pa. 2020); *see also Spayd v. Rigning Rock Lodge No. 665*, *Brotherhood of Railroad Trainmen*, 270 Pa. 67, 113 A. 70 (1921); *Driscoll v. Corbett*, 620 Pa. 494, 510, 69 A.3d 197, 208 (Pa. 2013) (recognizing that the concept that certain rights are inherent and "thus secured rather than bestowed by the Constitution, has a long pedigree in Pennsylvania that goes back at least to the founding of the Republic.").

Accordingly, the sole and exclusive right to alter, modify or amend the constitution and the government in general which is reserved to the people through Article I, §2 of the Declaration of Rights in conjunction with Article XI, § 1 is a fundamental natural right of the citizens and foundational principle upon which our Constitutional Republic was founded, and cannot be violated or infringed upon by any branch of the government. *Id*.

II. Unconstitutional Attempts to Expand Absentee Voting Have Historically Been Struck Down by Other States That Have Similar, Constitutional In-Person Voting Requirements to Pennsylvania.

Attempts to pass unconstitutional absentee voting legislation are not unique to Pennsylvania,; the question of voter qualifications has been considered previously in a number of cases relating to absentee ballot laws, arising in two waves – first following the Civil War, and again during and after World War II. Each in reaction to different stimuli, but with respect to the same expansion of the time, place and manner of how votes could be cast. Absentee voter laws passed by a number of state legislatures were sometimes limited to those serving in the military, while in other states they were applicable to all voters who were unable to vote in person on election day.

In response, a number of state constitutional challenges were brought against these acts arguing against the reasonableness and extent of the legislatures' enactments. Where the actions argued that the state constitutions did not expressly provide for absentee balloting, the outcome depended on whether the state constitutions were specific as to the time, place and manner of conducting elections. If the state constitution specifically articulated the requirements for the time, place and/or manner of voting, the decisions uniformly hold that the legislatures lacked authority to change those requirements. *Bourland v. Hildreth*, 26 Cal. 161 (1864) (California constitution's residency requirement violated by absentee voting laws) *Chase v. Miller*, 41 P. 403 (1862) (Pennsylvania absentee voting act declared unconstitutional as repugnant to the residence requirement of the Pennsylvania constitution). *Opinion of Judges of the Supreme Court*, 30 Conn. 591, 1862 WL 941 (1862) (Connecticut absentee law declared unconstitutional as violative of the constitutional requirements of the manner of conducting elections); *In Re Contested Elections*, 281 Pa. 131, 126 A. 199 (1924) (Absentee voter act unconstitutional violation of the constitutional residence provision). *State v. Lyons*, 5 A.2d 495 (Del. 1939) (absentee voting law unconstitutionally violated state constitution, which provided for).

As the Delaware Court eloquently stated when striking down the absentee provision that it found was similarly beyond the Delaware legislature's constitutional authority:

> It can make no difference that we should have preferred to have arrived at a different conclusion. Our personal approval of a limited provision

> for absentee voting can have no effect when the provisions of the Constitution are, in our opinion, entirely clear.
> ***
> When, however, a statute plainly violates the organic law as expressed in the Constitution, if this is to remain a government of law and not of men, it is the plain duty of the Court to hold the statute unconstitutional, leaving the perfection of the statute to be brought about by proper constitutional amendment.

Lyons, 5 A.2d 495, 503.

Even more poignant is the Pennsylvania Supreme Court's own determination in *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 126 A. 199 (1924), the court held that the Pennsylvania state legislature could not provide for general absentee voting because the state's constitution included specific residence requirements. (This case is addressed extensively in the Applicants' brief, and thus we do not repeat the cogent arguments advanced there). The fact that the state constitution included those requirements preempted legislative authority to expand the qualifications that could apply. After determining that the challenged act of the assembly should "be examined in light of the controlling constitutional provisions," the court concluded:

> However 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.
>
> 126 A. at 201.

During and after World War II, despite the strong emotional desire to ensure that members of the armed forces serving overseas could exercise their right to vote, courts continued to apply these same standards. In *Chase v. Lujan*, 149 P. 1003 (NM 1944), for example, the New Mexico Supreme Court reconfirmed its prior decision

that the state's legislature could not enact an absentee voting measure where that act violated the state's clear and longstanding constitutional requirements to the contrary. The New Mexico court found instructive that the legislature had previously initiated, but not seen through, amendments to the state's constitution that would have provided the authority for such absentee balloting. 149 P. at 1011. Like the Pennsylvania Court in *Lancaster*, the New Mexico court resisted the urge to uphold a law that garnered certain empathies, and instead held to the important requirements of the state's constitution:

> In closing this opinion, it may be proper to say that we regret the conditions which will deny to many thousands of our patriotic service men and women, serving at home and abroad but absent from their home precincts on the day of election, the privilege of exercising their voting franchise. Those conditions, however, are beyond our control as a court. They inhere in our fundamental law and can be changed only as therein provided. The difficulty of bringing about a change likewise is beyond our control.
>
> 149 P. at 1011.

The absentee ballot decisions are particularly instructive because they were similarly consistent in upholding absentee ballot laws where the state constitution did not contain specific provisions as to the time, place and manner of conducting elections. *Morrison v. Springer*, 15 Iowa 304 (1863); *Lehman v. McBride*, 15 Ohio St. 573 (1863); *State ex rel. Chandler v. Main*, 16 Wis. 398 (1863). Collectively, these cases create a comprehensive body of law that makes clear -- only where the state constitution has not defined the time, place and manner of holding the election can the legislature step in to fill the void. Legislative enactments that go beyond the criteria set forth in a state's constitution are necessarily void as a result.

CONCLUSION

The reasons for this Court to find in favor of applicants are numerous, and this Court should do so. In weighing the number of important equities at stake, *amicus* leave the Court with some historical wisdom on its province and duty in the context of our federal constitutional system:

> A circumstance which crowns the defects of the confederation, remains yet to be mentioned . . . the want of a judiciary power. Laws are a dead letter, without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point, as there are courts. There are endless diversities in the opinions of men. … To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one tribunal paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort an uniform rule of civil justice.
>
> This is the more necessary where the frame of the government is so compounded, that the laws of the whole are in danger of being contravened by the laws of the parts. In this case, if the particular tribunals are invested with a right of ultimate decision, besides the contradictions to be expected from difference of opinion, there will be much to fear from the bias of local views and prejudices, and from the interference of local regulations. As often as such an interference should happen, there would be reason to apprehend, that the provisions of the particular laws might be preferred to those of the general laws, from the deference with which men in office naturally look up to that authority to which they owe their official existence.
>
> The treaties of the United States, under the present constitution, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole union, are

> thus continually at the mercy of the prejudices, the passions, and the interests of every member of which these are composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honour, their happiness, their safety, on so precarious a foundation?

Federalist No. 22 (Alexander Hamilton). For the foregoing reasons, Applicants' injunctive motion should be granted, certiorari should be granted, and the Court should rule on the merits in favor of Petitioners.

December 8, 2020

Respectfully submitted,

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