No. 22O155

In the Supreme Court of the United States

STATE OF TEXAS, *et al.*,

Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Defendants.

On Motion for Leave to File Bill of Complaint

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF FOR CONSTITUTIONAL ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(b), the constitutional attorneys (hereinafter "Constitutional Attorneys") listed below respectfully move for leave to file the accompanying brief as *amici curiae*. Because of the emergency nature of this action, *Amici* have been unable to secure the consent of the parties.

Amici Curiae Constitutional Attorneys are Roy. S. Moore, Chief Justice of the Alabama Supreme Court (Ret.), John A. Eidsmoe, Lt. Colonel, USAF (Ret.), Matthew J. Clark, and Talmadge Butts. The Constitutional Attorneys have an interest in this case because it is especially important to uphold the rule of law when selecting the President and Vice President of the United States. "'In 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., joined by Scalia and Thomas, JJ., concurring) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983) (footnote and alteration omitted).

This brief would be helpful to the Court for two reasons. First, because the Constitution requires Congress to set a specific date for voting in a Presidential election, and because Congress has set that specific date, Respondents' attempts to allow mail-in voting for a long period of time prior to election day violates both Article II, § 1, cl. 4 of the Constitution and 3 U.S.C. § 1.

Second, this brief would also be helpful because of its brevity. *Amici Curiae* understand that the Court must decide this matter quickly, so we have limited our discussion to points that would be helpful to the Court that have not already been raised by the parties without burdening the Court with excessive details.

Pursuant to this Court's order of April 15, 2020, *Amici Curiae* are hereby filing a single paper copy of this motion on 8½ x 11 inch paper under Rule 33.2.

WHEREFORE, premises considered, *Amici Curiae* respectfully request leave to file the attached brief of *Amici Curiae*.

Respectfully submitted December 9, 2020,

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are constitutional attorneys who believe the Constitution should be interpreted strictly as intended by its Framers. They include:

- Roy S. Moore, a West Point graduate and Vietnam veteran who has served as an Etowah County (AL) Circuit Judge, has twice been elected Chief Justice of the Alabama Supreme Court, and is a member of the Bar of this Court;
- John Eidsmoe, a retired Air Force Judge Advocate who serves as Professor of Constitutional Law for the Oak Brook College of Law and Government Policy, has taught constitutional law for the O.W. Coburn School of Law at Oral Roberts University and the Thomas Goode Jones School of Law at Faulkner University, and is a member of the Bar of this Court;
- Matthew J. Clark, a graduate of Liberty University School of Law, a former Staff Attorney for the Alabama Supreme Court, a guest teacher of Constitutional Law at Faulkner University, and a member of the Bar of this Court; and
- Talmadge Butts, a recent graduate of the Thomas Goode Jones School of Law at Faulkner University where he was Articles Editor for the Faulkner Law Review, and is licensed to practice in Alabama.

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[1] Because of the emergency nature of this action, *amici* have been unable to secure the consent of the parties. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

Amici are concerned that the executive branch officials in the Defendant states have violated the United States Constitution, 3 U.S.C. § 1, and the American system of fair and orderly elections.

SUMMARY OF THE ARGUMENT

The Constitution gives Congress the power to set a date for Presidential elections. Congress passed 3 U.S.C. § 1 pursuant to that power and chose a specific date for Election Day. Historically, there is no reason to believe that Congress intended to preempt a state's prerogative to allow absentee voting under the traditional rules that existed at the time, such as being unable to vote in person because of military service. However, allowing citizens to vote almost two months in advance of Election Day, for any reason or for no reason, is another matter altogether. Such a scheme is preempted by 3 U.S.C. § 1 and is unconstitutional under Article II, § 1, Clause 4 of the United States Constitution.

ARGUMENT

I. The United States Constitution and a Federal Statute Established a Fixed Day for Presidential Elections

As Plaintiff State of Texas has correctly observed, the United States Constitution, Article II, Section 1, reserves to the state legislatures the plenary power to set the manner of choosing electors for President and Vice-President.

However, Article II, Section 1 also specifically delegates to Congress the power to set the day of the Presidential election: "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes;

which Day shall be the same throughout the United States." U.S. Const., art. II, § 1, cl. 4.

Pursuant to Article II Section 1, Congress has enacted 3 U.S.C. § 1, which requires that the "electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."

From this constitutional provision, it is clear that the Constitution contemplates a set nation-wide time for choosing Electors, that is, for voting for President and Vice-President. From 3 U.S.C. § 1, it is clear that Congress intended to fix a single day for this election to take place, and that this day should be uniform throughout the United States. It was neither the intent of the Framers nor the intent of Congress that state executive officials, acting without legislative authority, may implement advance voting schemes that begin months in advance of the election date established by Congress, drag out for days past the election, vary widely from one state to another, and sometimes even vary from county to county within a state.

This does not necessarily prohibit the use of absentee ballots when voters have reasons for voting absentee such as travel or illness. Absentee voting began in the 1860s when Union soldiers were given the opportunity to vote in home district elections. At first, absentee voting was limited to those in active military service, but in the latter half of the 1800s and early 1900s, the opportunity to vote absentee was extended to others who had valid reasons for being away from home on election

day.[2] Thus, when 3 U.S.C. § 1 was adopted in 1948, Congress clearly understood that a few people needed to vote absentee, and there is no reason to think that by setting a uniform day for national elections, Congress intended to abolish absentee voting.

However, Congress certainly did not intend to open the floodgates to allow anyone to vote weeks or months in advance of the federally-established election date, whether in person or by mail or by ballot harvesting or other means which might vary dramatically from one state to another. The Framers of the Constitution in 1787 and those who adopted the Twelfth and Twentieth Amendments, as well as the Congress of 1948 that adopted 3 U.S.C. § 1, clearly contemplated a system of uniform dates for holding the Presidential election, assembling the Electors in their respective States to cast their votes, and opening and counting the ballots of the Electors.

Pennsylvania's scheme of early voting, adopted by executive fiat rather than by an act of the Legislature or an amendment to the State Constitution, clearly violates both the spirit and the letter of the United States Constitution and 3 U.S.C. § 1. In *Kelly v. Commonwealth of Pennsylvania,* __ U.S. __ (2020), the trial court held that this executive usurpation of legislative power violated both Pennsylvania law and the Pennsylvania Constitution, but the Pennsylvania Supreme Court reversed on the basis of laches, without in any way disputing the trial judge's legal

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[2] *Absentee Voting*, U-S-History.com, https://u-s-history.com/pages/h3313.html (last visited Dec. 8, 2020); *see also Voting by Mail and Absentee Voting*, MIT Election Data & Science Lab, https://electionlab.mit.edu/research/voting-mail-and-absentee-voting (last visited Dec. 8, 2020) (same).

and constitutional analysis. But as Pennsylvania Supreme Court Chief Justice Saylor said in his dissent, "laches and prejudice can never be permitted to amend the Constitution." *Kelly v. Commonwealth,* No. MAP 2020 (Pa. Nov. 28, 2020) (Saylor, C.J., concurring and dissenting). *Amicus* observes that it is anomalous to apply laches to a statute that is only about a year old, and to a voting system that was later implemented by executive usurpation, especially when the harm occurred only a few weeks ago and a pre-election challenge to the voting scheme likely would have been dismissed for lack of ripeness.

Similar usurpation occurred in of Georgia, in which the Secretary of State unilaterally abrogated the Legislature's requirement concerning signatures and verification of absentee ballots and thereby set aside or "amended" state law.

Likewise, the Michigan Secretary of State, without authority from the Legislature, unilaterally set aside state law and state constitutional provisions by sending unsolicited absentee ballots throughout the state.

And similarly, the Wisconsin Election Commission and various mayors deliberately ignored Wisconsin statutes safeguarding ballot security by setting up over 500 unmanned dropboxes for the reception of absentee ballots.

The common maxim, *delegata potestas non potest delegari* means that powers which have been delegated to one branch of government cannot be re-delegated to another branch. This is especially true when the United States Constitution has specifically delegated a power to state legislatures, as in this case the plenary power to direct the manner of choosing electors. But in this case, executive officials in

Pennsylvania, Georgia, Michigan, and Wisconsin usurped these powers without the Legislature's consent. The changes this usurpation has made in our electoral system are nothing short of monumental, and because they have been made without proper safeguards, they have resulted in mass confusion, fraud, ballots lost, fake ballots found, ballots not counted, ballots counted multiple times, and much more, as the Brief of Texas substantiates. Such drastic changes should never have been made by hasty executive fiat.

As a federal district court in North Carolina held in *Berean Baptist Church v. Cooper,* "There is no pandemic exception to the Constitution of the United States." *Berean Baptist Church v. Cooper*, No. 4:20-cv-81-D, slip op. at 2 (E.D.N.C. May 16, 2020). And as Justice Gorsuch said recently, "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical." *Roman Catholic Diocese of Brooklyn, N.Y. v. Cuomo*, No. 20A87, slip op. at 10 (U.S. Nov. 25, 2020) (Gorsuch, J., concurring).[3]

CONCLUSION

The Defendants refused to acknowledge that the Constitution itself and a federal statute dictate the date on which the Presidential election must occur, and that the Constitution also delegates to the state legislatures, not executive officials, the power to determine the manner in which these elections will take place. Consequently, the People who voted legally have been robbed of their chance to

[3] *Amici Curiae* do not necessarily believe that the Constitution can take a holiday during a pandemic, but as the language of his statement indicates, Justice Gorsuch may not believe so either. *Amici* simply observe that the COVID-19 pandemic does not justify an unconstitutional statute, especially since it was passed in 2019 before the pandemic hit the United States.

select the President and Vice President of the United States. This Court is the only court that can remedy that injustice, and it should do so by ruling in favor of Plaintiffs.

Respectfully submitted December 9, 2020,

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