No. 20-845

In the Supreme Court of the United States

DONALD J. TRUMP FOR PRESIDENT, INC.,
Petitioner,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

On Petition for Writs of Certiorari to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF FOR CONSTITUTIONAL ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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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, but *Amici* have notified the parties of our intent to file this brief and have requested consent. Petitioner has consented, but Respondent has not yet responded.

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 23, 2020,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Constitutions and Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are constitutional attorneys who believe the Constitution should be interpreted strictly as intended by its Frames. 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, but *amici* have notified the parties of our intent to submit this brief and have requested consent. 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 Respondent state 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.

Furthermore, the Constitution Article II Section 1 delegates to state legislatures the power to set the manner of choosing electors. State legislatures may not delegate that power to executive officials, and executive officials may not usurp that power.

This case is of nation-wide importance, because the electors chosen by Pennsylvania and several other contested states could decide the outcome of the 2020 election, the policies of the executive branch, and the course of the nation for the next four years and for many years beyond that. Every state in the nation, in fact every citizen in the nation is affected by this case. At the present time, there

are many unanswered questions about who can do what during elections, and these questions will continue to plague elections unless and until they are resolved by this Court.

Finally, the law strongly favors deciding cases on their merits. Supporters of President Trump have tried in many cases in many courts in many states to present their evidence of error, irregularity, illegality, and fraud, and been met with dismissals based on laches, standing, and other procedural matters. Donald J. Trump for President, Inc., and their many supporters are entitled to their day in court. Because January 20, 2021 is fast approaching, this may be the Court's last opportunity to give them their day in court.

ARGUMENT

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

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

[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).

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,* No. 68 MAP 2020 (Pa. Nov. 28, 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 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. 68 MAP 2020 (Pa. Nov. 28, 2020) (Saylor, C.J., concurring and dissenting). *Amici*

observe 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 usurpations have simultaneously occurred in other states, namely Georgia, Michigan, Wisconsin, Arizona, and Nevada, giving rise to the inference that a well-coordinated plan existed to usurp the powers of the legislatures of these states and impose by executive fiat a massive system of advance voting that was at the very least vulnerable to fraud and manipulation for the purpose of altering the outcome of the election in these states and, as a result, for the nation.

A voting system which allows voting far in advance of the day set by Congress necessarily restricts knowledge of the character, reputation, and questionable acts of a candidate which are only discovered and/or revealed during the closing days of the campaign.

In this particular election the close relationship between China, Joe Biden, and his son Hunter was revealed by credible evidence only days before the election date, and after hundreds of thousands of votes had been cast by mail-in ballots. Such a relationship would be a threat to national security and of great concern to many voters who had already voted by mail-in ballots.

Voting before a campaign is completed is similar to a verdict given in court by a jury before all the evidence has been presented. Further, mail-in ballots without signature or identity verification is inherently conducive to fraud.

II. The Power Delegated by the Constitution to State Legislatures to Set the Manner of Choosing Electors May Be Neither Re-delegated nor Usurped.

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. This means the people of the United States have determined that this power should rest with the state legislatures, and state legislatures may not thwart that determination by re-delegating that power to another branch of government. It also helps to establish clear lines of authority and accountability, preventing those to whom power has been delegated from "passing the buck" by re-delegating the power to others.

The courts have interpreted the doctrine to mean that although the legislature may not delegate legislative authority, it may delegate "rule-making authority," giving executive agencies the authority to adopt rules that interpret the laws adopted by the legislature. But as the Court recognized in *Mistretta v. United States,* 488 U.S. 361 (1989) and other cases, the fine line between legislative authority and rule-making authority is sometimes difficult to draw. Generally, the

courts will uphold a legislature's delegation as "rule-making authority" if the legislature has given the executive agency reasonably clear guidelines or criteria by which to make the rules, which rules are expected to be interpretations of the law the legislature has adopted. This is the "intelligible principle" rule articulated in *J.W. Hampton, Jr., & Co. v. United States,* 276 US. 394, 409 (1928); see also, *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935), in which the Court struck down regulations on petroleum shipping because the statute authorizing such regulations did not specify circumstances or conditions that would allow regulation, criteria to guide the President's course of regulation, or required findings enabling the President to regulate petroleum transportation. Rather, the Court said, the statute gave "the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id.* at 415. Since that time, the courts have usually upheld delegations, not because they rejected the nondelegation doctrine, but because they found that in each of these cases the doctrine was not violated.

State courts have varied in the ways they have applied the nondelegation doctrine. But in this case state variations do not matter, because this delegation of power to the state legislatures came not from state constitutions but from the United States Constitution.

The Pennsylvania Legislature had no authority to delegate to executive officials the authority to enact the voting scheme they implemented in 2020. But in fact the Legislature did not delegate this authority. Rather, Respondents usurped

this authority with no semblance of authority from the U.S. Constitution, the U.S. Congress, the Pennsylvania Constitution, or the Pennsylvania Legislature. This is a constitutional violation of equal if not greater magnitude. Such drastic changes should never have been made by hasty executive fiat. 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 Petitioners have clearly substantiated.

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]

III. The Law Favors Deciding Cases on Their Merits.

Although procedure is important, it is not an end in itself. The purpose of procedural due process is to protect substantive due process. The purpose of procedural rules is to ensure a just result, a result in accord with the law and the facts. For this reason, the law favors deciding cases on their merits.

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[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.

Moore's Federal Practice § 55.02 states, "...there is a strong desire to decide cases on the merits rather than on procedural violations. For this reason, most courts traditionally disfavor the entry of a default judgment. This is a reflection of the oft-stated preference for resolving disputes on the merits."[4]

As the Second Circuit stated in *Pecarsky v. Galaxiworld.com Ltd.,* 249 F.3d 167, 174 (2d Cir. 2001), "...default judgments are disfavored. A clear preference exists for cases to be adjudicated on the merits." Likewise, the District Court for the District of Columbia stated, "Because courts strongly favor resolution of disputes on their merits, ...default judgments are not favored by modern courts." *United States v. Gant,* 268 F.Supp. 2d 29, 32 (D.D.C. 2003).

As of this writing, supporters of President Trump have filed in excess of fifty lawsuits in various courts seeking to present the evidence of fraud and error and asking the courts to examine the law and the evidence and issue judgment on the merits. In all but a very few of these cases, their cases were denied or dismissed for a variety of procedural reasons. A notable exception was in *Kelly v. Commonwealth of Pennsylvania,* No. 20A98 (U.S. Dec. 3, 2020), in which the trial court examined the law and the evidence and held that this executive usurpation of legislative power violated both Pennsylvania law and the Pennsylvania Constitution. However, the Pennsylvania Supreme Court reversed on the basis of laches, without in any way disputing the trial judge's legal and constitutional analysis.

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[4] 10 James Wm. Moore et al., *Moore's Federal Practice* § 55.02 (3rd ed. 2012).

In October 2020, this Court by a 4-4 vote rejected a Republican request for a stay on a Pennsylvania Supreme Court decision that would allow ballots to be counted up to three days after Election Day, relying in part on a subsequently-broken promise by Pennsylvania election officials that they would count advance ballots separately from those cast at the polls on election day. Then, on December 11, 2020, in *Texas, et al. v. Pennsylvania, et. al.,* this Court with two dissenting votes declined to hear an original-jurisdiction lawsuit brought by the State of Texas challenging the election procedures of Pennsylvania, Wisconsin, Michigan, and Georgia, because Texas allegedly failed to show it was affected by election procedures in those states.

And now, as the clock is ticking toward January 6 and January 20, the Donald J. Trump for President Campaign has brought this petition to this Court. Throughout all of these lawsuits, the basic plea has been the same: Please examine the evidence and the statutes and render a just decision on the merits.

Because of the urgency of the hour and the vital issues at stake, and because of the procedural history of all of these cases, *Amici* urge this Court to resolve any procedural issues in the light most favorable to Petitioner, to grant this Petition for Certiorari, and to promptly decide this case on its merits.

CONCLUSION

The Constitution itself and a federal statute dictate the date on which the Presidential election must occur, and 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 deprived of their chance to select the President and Vice President of the United States.

One way to disenfranchise a person is to deny him/her the right to vote. But another way, equally serious and even more sinister, is to cancel out that person's vote by an illegal vote. And that is exactly what has happened here.

This Court is the only court that can remedy that injustice, and it should do so by granting this Petition for Writ of Certiorari and ruling in favor of Petitioners.

Respectfully submitted December 23, 2020,

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