No. 20A98

In the Supreme Court of the United States

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.

OPPOSITION OF RESPONDENTS TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioners ask this Court to undertake one of the most dramatic, disruptive invocations of judicial power in the history of the Republic. No court has ever issued an order nullifying a governor's certification of presidential election results. And for good reason: "Once the door is opened to judicial invalidation of presidential election results, it will be awfully hard to close that door again. . . . The loss of public trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable." Order, *Wis. Voters All. v. Wis. Elections Comm'n*, No. 2020AP1930-OA, at 3 (Wis. Dec. 4, 2020) (Hagedorn, J., concurring).

In seeking such unprecedented relief, Petitioners might be expected to present claims of the utmost constitutional gravity. Instead, the pair of claims they advance are fundamentally frivolous. Neither claim was pressed or passed upon below. Neither claim implicates a circuit split. Both claims are mired in procedural and jurisdictional defects that preclude this Court's review. The first question—which seeks to raise Elections and Electors Clause challenges to Act 77—is not actually presented by this case. And the second question—which argues that the Pennsylvania Supreme Court violated the First and Fourteenth Amendments in its application of laches—asks this Court to constitutionalize huge swaths of state procedural law without any credible basis in constitutional principles or this Court's precedents.

Even if Petitioners could surmount these obstacles, they would still need to justify the relief they seek. This first-of-its-kind injunction raises major constitutional questions. Yet Petitioners address none of them. They do not explain how a remedy

premised on massive disenfranchisement would accord with the Due Process Clause, which requires the counting of votes cast in reasonable reliance on existing election rules as implemented and described by state officials. Nor do they seek to square their position with the separation of powers, the Twelfth Amendment, or basic principles of federalism—all of which foreclose the injunctive relief that Petitioners seek here.

These failings also explain why equity stands as an insuperable obstacle to Petitioners' application. "Democracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our Government honors and respects their votes." *Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522, at *9 (3d Cir. Nov. 27, 2020). But Petitioners would throw all that to the wind. After waiting over a year to challenge Act 77, and engaging in procedural gamesmanship along the way, they come to this Court with unclean hands and ask it to disenfranchise an entire state. They make that request without any acknowledgment of the staggering upheaval, turmoil, and acrimony it would unleash. In issuing equitable relief, this Court rightly seeks to avoid inflaming social disorder. So to say that the public interest militates against Petitioners would be a grave understatement. Their suit is nothing less than an affront to constitutional democracy. It should meet a swift and decisive end.

BACKGROUND

I. State Law Background

A. Pennsylvania Act 77

In 2019, with broad and bipartisan support, the Pennsylvania General

Assembly enacted Act 77 of 2019, which made several important updates and improvements to Pennsylvania's Election Code.[1] Among these were provisions that, for the first time, offered the option of mail-in voting to Pennsylvania electors who did not qualify for absentee voting. *See* 25 P.S. §§ 3150.11-3150.17 (2020). This change was a significant development that made it easier for all Pennsylvanians—including Petitioners—to exercise their right to vote and brought the state in line with the practice of dozens of other states. The mail-in voting system created by Act 77 requires voters to apply for a ballot from the voter's county board of elections. *See* 25 P.S. §§ 3146.2(a), 3150.12(a). A voter must provide proof of identification when requesting a ballot and will not be sent a ballot unless approved as a qualified voter. *See* 25 P.S. § 2602(z.5)(3).

Act 77 added extensive new sections to the Election Code, which distinguished between absentee and mail-in electors and provided procedures for the latter. *See, e.g.*, 25 P.S. §§ 2602(z.6), 3150.11-3150.17. Indeed, the Election Code repeatedly distinguishes between "mail-in" and "absentee" voting and regulates each category differently, including in defining a qualified mail-in versus absentee elector and in regulating servicemember absentee ballots. *See* 25 P.S. § 2602 (defining "qualified mail-in elector"); 25 P.S. § 3146.7 (regulating military servicemember ballots). The legislative history of Act 77 confirms that the General Assembly understood itself to be creating a form of voting distinct from absentee ballots. *See* Pa. H. Journal, at 1705 (2019) ("[W]e do have absentee voting, and by the time this bill passes, we will also

[1] Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. 2019-77 (S.B. 421) (West) ("Act 77").

have no-excuse, mail-in voting."); *see also* Pa. S. Journal, at 1000 (2019) (repeatedly referencing the new "mail-in ballots" scheme).

In passing Act 77, the General Assembly understood that such a significant overhaul of Pennsylvania's voting laws would be a lengthy and complex endeavor. It therefore sought to ensure that any challenges to the law's constitutionality would be resolved before Act 77 was implemented. To that end, the General Assembly included a provision that required all constitutional challenges to Act 77 to be brought within 180 days of its effective date. *See* Act 77 § 13(3).

B. Pennsylvania Constitution

Pennsylvania's Constitution authorizes the General Assembly to pass laws on any matter not prohibited by the Pennsylvania or federal constitutions. *See* PA. CONST. art. II, § 1 (granting "[t]he legislative power of this Commonwealth" to the General Assembly); *Sharpless v. Mayor of Phila.*, 21 Pa. 147 (1853). "[P]owers not expressly withheld from the General Assembly inhere in it." *Stilp v. Pennsylvania*, 974 A.2d 491, 494-95 (Pa. 2009). The Constitution specifically authorizes the General Assembly to determine methods for voting, with only one affirmative limitation: that balloting be secret. *See* PA. CONST. art. VII, § 4.

In 2019, the General Assembly considered, and later moved forward with, a proposed Constitutional amendment that would have expanded the parameters of absentee voting. *See* Pet. at 8-9. During the same period, the General Assembly passed Act 77. The proposed amendment is still pending and applies to absentee (not mail-in) voting. If passed, it would enable the General Assembly to streamline the

Election Code by harmonizing and merging the provisions that apply to mail-in and absentee voting. *See* Senator Mike Folmer, et al., Senate Co-Sponsorship Memoranda (Pa. 2019) (joint resolution was intended to "empower[] voters to request and submit absentee ballots for any reason").

In claiming that the mail-in balloting provisions of Act 77 are unconstitutional, Petitioners rely on nineteenth and early twentieth-century Pennsylvania Supreme Court interpretations of earlier versions of the Pennsylvania Constitution. For example, in *Chase v. Miller,* 41 Pa. 403, 419 (1862), the court relied on the 1838 Constitution's restriction of the franchise to "every white freeman of the age of twenty-one years, having resided in the state one year, and in the election district where he offers to vote ten days immediately preceding such election, and within two years paid a state or county tax." PA. CONST. of 1838, art. III, § 1. Citing concerns with unrestricted absentee voting, 41 Pa. at 419, the Pennsylvania Supreme Court held in *Chase* that this constitutional provision precluded absentee voting. *Id.* Subsequent iterations of the Constitution permitted limited absentee voting. *See, e.g.*, 1864 Pa. Laws 1054 (amendment permitting active duty soldiers to vote by absentee ballot).

In *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 137 (1924), the Pennsylvania Supreme Court held that the Constitution authorized the General Assembly to extend absentee voting only to categories of voters "specifically named" in the Constitution. In 1949, an amendment was adopted providing that "[t]he General Assembly *may*, by general law, provide a manner in which" disabled

war veterans could vote by absentee ballot. 1949 Pa. Laws 2138. Similar amendments in 1953 and 1957 provided that the General Assembly "may" allow certain other categories of absentee voters. 1953 Pa. Laws 1496; 1957 Pa. Laws 1019. In 1967, however, still another amendment (carried over into the 1968 Constitution) provided that "[t]he Legislature *shall*, by general law, provide a manner in which" various categories of voters can vote by absentee ballot. PA. CONST. art. VII, § 14 (emphasis added). Following this change, the General Assembly passed laws allowing other qualified electors not enumerated in the Constitution to vote absentee. S*ee, e.g.*, 25 P.S. § 3146.1(b) (military spouses); *see also, e.g.*, 25 P.S. § 2602(z.3) (electors on vacations, or sabbatical leaves). That history is entirely consistent with the General Assembly's own power to enact the scheme set forth in Act 77.

II. Procedural History

Pennsylvania has conducted two statewide elections since the passage of Act 77: the June 2, 2020 Primary Election and the November 3, 2020 General Election. Three of the eight Petitioners here—Congressman Mike Kelly, Sean Parnell, and Wanda Logan—ran for and won their respective June primaries, and Congressman Kelly won reelection to the U.S. House of Representatives in the November 3 General Election. All three presumably garnered votes cast on the same mail-in ballots that, they now insist, they have only recently concluded are unconstitutional.

On Saturday, November 21, 2020, 18 days after the November 3 General Election and nearly 13 months after the passage of Act 77, Petitioners filed a petition for review in Pennsylvania Commonwealth Court alleging that Pennsylvania's mail-

in voting scheme violates the Pennsylvania Constitution. App. at 31-67. The next day, November 22—just one day before the statutory deadline for Pennsylvania counties to certify their election results, *see* 25 Pa. Stat. § 2642(k)—Petitioners filed a Motion for an Emergency/Special Prohibitory Injunction seeking to prevent Respondents from finalizing the results of the 2020 General Election in Pennsylvania.

The Commonwealth Court held an initial conference on November 23 (the county certification deadline) and indicated that Respondents' jurisdictional briefing would be due the next morning. At 5:50 p.m., however, the Commonwealth Court ordered Respondents to file their preliminary objections and briefs in support by 11:00 p.m. that night. Petitioners, in turn, were directed to file their answers and briefs in opposition by 10:00 a.m. the next day, November 24. On the morning of November 24, the Commonwealth Court ordered Respondents to respond to Petitioners' Motion for an Emergency/Special Prohibitory Injunction by 12:30 p.m. In their response, Respondents explained that Petitioners' request for injunctive relief was moot: Secretary Boockvar had certified the results of the election for president and vice president, and Governor Wolf had signed the Certificate of Ascertainment and submitted it to the Archivist of the United States. *See* Executive Respondents' Brief in Opposition to Petitioners' Motion for Emergency/Special Prohibitory Injunction, *Kelly, et al. v. Commonwealth, et al.*, No. 620 MD 2020 (Pa. Commw. Ct. Nov. 24, 2020).

At 11:42 p.m. on the evening of November 24, Petitioners filed a Supplemental Application for Emergency Relief, in which they disputed that their requested

injunctive relief was now moot and sought to enjoin Respondents from taking any further steps to finalize the results of the 2020 General Election. On the morning of November 25, before Respondents filed their opposition to Petitioners' supplemental application, the Commonwealth Court preliminarily enjoined Respondents from taking any steps to perfect the certification of the results of the 2020 General Election for president and vice president and from certifying the remaining results of the election, pending an evidentiary hearing set for November 27. App. at 29-30.

Respondents promptly filed a Notice of Appeal of the Commonwealth Court's order, which automatically stayed the injunction. *See* Pa. R. App. P. 1736(b). They also filed an application for the Pennsylvania Supreme Court to exercise extraordinary jurisdiction. Shortly thereafter, the Commonwealth Court issued an order continuing the November 27 evidentiary hearing. On November 28, after additional briefing by Petitioners, the Pennsylvania Supreme Court granted Respondents' application, vacated the Commonwealth Court's order preliminarily enjoining the Commonwealth from taking any further action regarding the certification of the 2020 General Election results, and dismissed with prejudice Petitioners' petition for review. App. at 1-3. This decision rested entirely on a single basis: the state law doctrine of laches. As we recount below, none of Petitioners' state court filings up until this point included any federal claims, federal law arguments, or federal constitutional defenses.

On December 1, 2020, Petitioners filed in this Court an "Emergency Application for Writ of Injunction Pending the Filing and Disposition of a Petition for

a Writ of Certiorari." However, they withdrew the application the next day, December 2, filing instead an application with the Pennsylvania Supreme Court seeking to stay that court's November 28 order. App. at 68-106. The Pennsylvania Supreme Court denied Petitioners' application in a *per curiam*, single-line order on December 3. App. at 108. Later that day, Petitioners filed this second application here.

ARGUMENT

To justify the extraordinary remedy of a mandatory injunction from this Court, an applicant must show that the "legal rights at issue" in the underlying dispute are "indisputably clear" in its favor, *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), such that this Court is reasonably likely to grant certiorari and reverse any judgment adverse to the applicant entered upon the completion of lower-court proceedings, *see* Stephen M. Shapiro et al., *Supreme Court Practice* § 17.13(b) (10th ed. 2013). In addition, the applicant must establish that an injunction is "necessary in aid of" this Court's jurisdiction. *Lux*, 561 at 1307; *see also Ohio Citizens for Responsible Energy, Inc., v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia J., in chambers). Petitioners fail to satisfy *either* of these bedrock requirements. Accordingly, their emergency application should be denied.

I. Petitioners' Legal Contentions Are Patently Spurious and Unworthy of Review by this Court.

A. The First Question Presented

Petitioners' first question presented is whether Act 77 violates the Elections and Electors Clauses of the United States Constitution because it was enacted in violation of the Pennsylvania Constitution. This Court is unlikely to review that

question or reverse the judgment below, for four independent reasons: (1) Petitioners' federal constitutional claim was neither pressed nor passed upon below; (2) to the extent Petitioners did in fact present a federal claim to the Pennsylvania Supreme Court, the judgment below rests on adequate and independent state grounds; (3) Petitioners lack Article III standing to assert their claims under the Elections and Electors Clauses; and (4) this question is not actually presented because Act 77 is fully consistent with the Pennsylvania Constitution. We address these points in turn.

1. Petitioners' Claim Under the Elections and Electors Clauses was Neither Pressed nor Passed Upon Below.

This Court has long applied the "traditional rule" that certiorari review should not be granted where—as here—"the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *see also Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). As this Court has repeatedly made clear, it is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

That rule defeats Petitioners' application. As a review of the state court record readily confirms, Petitioners did not present any federal claim to the Pennsylvania courts (including the Pennsylvania Supreme Court) before first seeking emergency relief in this Court. *See, e.g.*, Response to Application for the Court to Exercise Extraordinary Jurisdiction, No. 68 MAP 2020 (Nov. 27, 2020). Instead, their sole claim in the state judicial system was that Act 77 is invalid under the Pennsylvania Constitution. *See id.* From the very outset of this case, Petitioners' attack on Act 77 rested *solely* upon the Pennsylvania Constitution and state court decisions

interpreting it. *See, e.g.*, App. at 31-67 (Petitioners' complaint seeking declaratory judgment solely on the ground that Act 77 exceeds the General Assembly's authority "under the Pennsylvania Constitution"). In consequence of Petitioners' decision to press only state law claims, the Pennsylvania courts never passed upon the federal question that Petitioners seek to raise for the very first time in this Court: namely, whether Act 77 violated the Elections and Electors Clauses of the federal constitution. *See* App. at 1-3; *see also* App. at 16-29 (decision of the state trial court finding likelihood of success only on Petitioners' "Pennsylvania Constitutional claim"). Given Petitioners' strategic choice to seek only state law relief, there is no basis for this Court to depart from its usual practice of denying review where the federal question presented was neither pressed nor passed upon below.

Petitioners may seek to avoid that straightforward conclusion by pointing to the emergency application that they filed in the Pennsylvania Supreme Court on December 2, 2020 (after filing and later withdrawing an emergency application in this Court seeking injunctive relief). In that post-decision filing in the Pennsylvania Supreme Court, Petitioners asserted their forfeited Elections/Electors Clause claim for the very first time, presenting it as a basis to stay the court's earlier laches ruling. *See* App. at 70-85. But that state court filing was itself procedurally deficient.[2] Likely as a result of those clear procedural flaws, the Pennsylvania Supreme Court quickly

[2] That was true in two respects. First, Petitioners sought to raise new arguments (namely, their federal contentions) in their post-decision application, which is not allowed in Pennsylvania. *See, e.g.*, *Commonwealth v. VanDivner*, 983 A.2d 1199, 1200-01 (Pa. 2009). And second, the relief that Petitioners sought does not exist: there is no established state law process for a stay or injunction pending appeal of an order of the Pennsylvania Supreme Court. *See* Pa. R. App. P. 1732(a)-(b); *In re Passarelli Family Trust an Irrevocable Trust Instrument*, 231 A.3d 969, 972 (Pa. Super. Ct. 2020).

rejected Petitioners' post-decision application in a one-line order that did not address any of Petitioners' brand-new federal arguments. *See* App. at 108.

That is reason enough to deny relief. Petitioners failed to present their federal contentions to the Pennsylvania Supreme Court when they should have done so, and that failure was compounded—rather than cured—by their subsequent defective post-decision application. There is no sign that the Pennsylvania courts ever addressed Petitioners' federal contentions on the merits. If anything, there is strong reason to believe that these federal claims are instead precluded by state procedural rules that constitute an adequate and independent state ground for the denial of Petitioners' untimely effort to raise federal claims under the Elections and Electors Clauses. Given all that—not to mention the absence of any published state court reasoning—this Court should not grant review of Petitioners' first question. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("[W]e do not decide in the first instance issues not decided below." (internal quotation marks omitted)); *Illinois v. Gates*, 462 U.S. 213, 222-23 (1983).[3]

2. The Judgment Below Rests Solely on the Adequate and Independent State Law Ground of Laches.

This Court should also deny review and injunctive relief because, to the extent Petitioners presented a federal claim below (presumably lurking somewhere in the

[3] Making matters even worse for themselves, Petitioners do not seek review of the Pennsylvania Supreme Court's denial of their post-decision application (which was the only instance in which Petitioners attempted to present federal claims to the state courts). Instead, in identifying the "Decisions Under Review," Petitioners list only the "November 28, 2020 decision of the Supreme Court of Pennsylvania dismissing all of Petitioners' claims with prejudice." Pet. at 4; *see also* Pet. at I (listing related proceedings below but omitting the Pennsylvania Supreme Court's December 3, 2020 order).

penumbras of their briefs), the Pennsylvania Supreme Court's decision rests on the adequate and independent state law ground of laches. *See* App. at 1-3. The Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "This rule applies whether the state law ground is substantive or procedural," *id.*, and "is based, in part, on 'the limitations of [this Court's] jurisdiction,'" *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945)).

Furthermore, and especially relevant here, the Court has long recognized that the laches doctrine constitutes an independent state law ground that adequately and independently supports a state court's judgment. *See, e.g.*, *Wood v. Chesborough*, 228 U.S. 672, 677 (1913) (dismissing appeal for want of jurisdiction because judgment below rested on "laches and the statute of limitations," neither of which "present[ed] a Federal question"); *Preston v. City of Chicago*, 226 U.S. 447, 450 (1913) (holding that state court's laches ruling "would be sufficient to prevent [the Court] from reviewing the alleged Federal question"); *Moran v. Horsky*, 178 U.S. 205, 215 (1900) (holding that "the defense of laches" is a "non-Federal question, one broad enough to sustain" the judgment of the Montana Supreme Court); *Pierce v. Somerset Ry.*, 171 U.S. 641, 648 (1898) (holding that "the defense of estoppel on account of laches and acquiescence, which is not a federal question" is a ground that "is sufficient upon which to base and sustain the judgment of the state court").

Here, the sole basis for the decision below was laches. Citing state precedent, the Pennsylvania Supreme Court held that "Petitioners' challenge violates the doctrine of laches given their complete failure to act with due diligence in commencing their facial constitutional challenge, which was ascertainable upon Act 77's enactment." App. at 2 (citing *Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998)). That decision did not rest on any federal ground and, tellingly, cited no federal law at all. *See* App. at 1-3. For that reason, this is not a case in which the Court has jurisdiction because "the application of a state law bar depends on a federal constitutional ruling." *Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016) (internal quotation marks omitted). Because the decision below rested purely on state law, "this Court has no power to review" or otherwise opine on Petitioners' forfeited claims under the Elections and Electors Clauses. *See Herb*, 324 U.S. at 125-26 ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

Contrary to Petitioners' application (at 34-35), there is nothing anomalous or arbitrary about the Pennsylvania Supreme Court's application of the laches doctrine in this case. Under Pennsylvania law, laches bars equitable relief where two elements are met: "(1) a delay arising from Appellants' failure to exercise due diligence and (2) prejudice to the Appellees resulting from the delay." *Stilp*, 718 A.2d at 293 (citing *Sprague v. Casey*, 550 A.2d 184, 187-88 (Pa. 1988)). Both elements exist here, for the reasons set forth in the decision below. *See* App. at 1-3. Although Petitioners resist

that conclusion on three grounds, their objections lack merit. *See NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958) (holding that an adequate and independent state ground defeats this Court's jurisdiction unless it is "without any fair or substantial support" (internal quotation marks omitted)); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (acknowledging that "state procedural requirements which are not strictly or regularly followed cannot deprive [the Court] of the right to review").

First, Petitioners insist that laches "does not apply" under state law because they seek to challenge the constitutionality of Act 77. Pet. at 35. This argument misses the point. Regardless of whether Petitioners' challenge is substantive or procedural, their claims are barred because they request retrospective relief—to undo the presidential election and disenfranchise voters who cast ballots in accordance with (and in reliance on) the directions of the General Assembly. The Pennsylvania Supreme Court, in *Stilp v. Hafer*, recognized that although laches may not apply to a challenge "to prevent an unconstitutional act from occurring[,]" laches *does* apply to a "challenge [to] an act that already occurred." *Stilp*, 718 A.2d at 293.[4] Here, Petitioners seek to invalidate the already-passed November 3 General Election. Laches forbids this relief.

[4] Petitioners misleadingly truncate a quote from *Stilp*. According to Petitioners, in *Stilp*, the Court cited an earlier decision—*Sprague v. Casey*, 550 A.2d 184 (1988)—for the proposition that "laches and prejudice can never be permitted to amend the Constitution[.]" Pet. at 35. The full quote shows that the *Stilp* Court was actually *rejecting* a reading of *Sprague* whereby laches could never bar relief based on constitutional claims. *See Stilp*, 718 A.2d at 293 ("In addition, to the extent *Sprague* could be construed otherwise, it is factually distinguishable since the taxpayer sought to prevent an unconstitutional act from occurring rather than challenge an act that already occurred.").

Second, Petitioners maintain that the doctrine of laches must yield because they "are not lawyers," and could not have "been reasonably expected to know[] that they had viable legal claims well-before the election occurred." App. at 37. This assertion of ignorance is implausible, given that several Petitioners are current legislators or candidates for legislative office. *See* Compl. ¶¶ 3-4. In any event, "'[l]aches is not excused by simply saying, 'I did not know.' If by diligence a fact can be ascertained, the want of knowledge so caused is no excuse for a stale claim. The test is not what the plaintiff knows, 'but what he might have known by the use of the means of information within his reach with the vigilance the law requires of him.'" *In re Mershon's Est.*, 73 A.2d 686, 687 (Pa. 1950) (quoting *Taylor v. Coggins*, 90 A. 633, 635 (Pa. 1914)). From the moment Act 77 was signed in October 2019, not to mention the June 2020 primary conducted under Act 77's mail-in voting regime, Petitioners have had the incentive and wherewithal to investigate the validity of Act 77.

Finally, Petitioners try to blame their delay on Respondents. But Pennsylvania law does not require the Executive Branch to preemptively seek review of statutes, while at the same time allowing prospective plaintiffs to sit around and hope that someone else files suit. In a similar vein, Petitioners' reliance on *Sprague v. Casey* is misplaced. There, the challenged action was "placing on the ballot in the November 1988 general election one seat on the Supreme Court and one seat on the Superior Court," 550 A.2d at 186, and the parties purportedly prejudiced by the plaintiffs' delay in bringing suit were the respondent-candidates, who had "made no effort to seek judicial approval of the scheduled election." *Id.* at 188 (citation omitted). Here, unlike

in *Sprague*, the election has already occurred, and the parties that Petitioners' requested relief would prejudice are not merely Respondents but also millions of Pennsylvania voters who would be disenfranchised through no fault of their own. *Sprague* is entirely inapposite.[5]

In sum, as the Pennsylvania Supreme Court recognized, the state law doctrine of laches precludes Petitioners' efforts to challenge Act 77 (which, as noted above, was presented to the Pennsylvania Supreme Court solely as a state law challenge). There is no proper basis for this Court to disregard that adequate and independent state law ground for the decision below. This Court therefore lacks jurisdiction to review Petitioners' claims under the Elections and Electors Clauses.

3. Petitioners Lack Article III Standing to Bring Claims Under the Elections and Electors Clauses.

Even if Petitioners' claims were properly before the Court, they would face yet another jurisdictional defect: Petitioners lack Article III standing to raise challenges under the Elections and Electors Clauses. For this reason, too, Petitioners are not likely to succeed on the merits or to obtain this Court's review.

As an initial matter, had Petitioners first filed this case in federal court, they would unquestionably have lacked Article III standing. Petitioners are voters and candidates for legislative office. As such, they cannot show that they have suffered

[5] Equally irrelevant are two other cases relied on by Petitioners. *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), involved a *prospective* challenge to the state's congressional redistricting plan. Unlike this case, no party sought to *retroactively* invalidate completed elections. And there was no laches issue raised in *In re Canvass of Absentee & Mail-In Ballots of November 3, 2020 Gen. Election*, No. 29 WAP 2020, 2020 WL 6866415, at *1 (Pa. Nov. 23, 2020). There, the court upheld the decision of certain county boards of elections to count certain absentee and mail-in ballots; its ruling has nothing to do with this litigation. *Id.* at *16.

any "injury in the form of invasion of a legally protected interest that is concrete and particularized and actual or imminent." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 799-800 (2015) (internal quotation marks omitted). Indeed, this Court and others have held that private parties like Petitioners lack standing to sue for alleged violations of the Elections and Electors Clauses. *See Lance v. Coffman*, 549 U.S. 437, 438-42 (2007) (per curiam); *Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120, at *6-7 (3d Cir. Nov. 13, 2020). Under those decisions, Petitioners' constitutional challenge amounts to nothing more than a "generalized grievance"—shared in common with the public at large—"about the conduct of government." *Lance*, 549 U.S. at 442. That is not enough.[6]

The fact that Petitioners seek certiorari review of a state-court judgment does not change the outcome. "Article III demands that an 'actual controversy' persist throughout all stages of litigation," which "means that standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)); *see also Nike, Inc. v. Kasky*, 539 U.S. 654, 661 (2003) (Stevens, J., concurring in dismissal) (noting that "this Court lacks jurisdiction to

[6] Although the Eighth Circuit recently held that a candidate for the position of presidential elector in Minnesota had Article III standing to bring a claim under the Electors Clause, that decision was linked to the specific interests vested in presidential electors by Minnesota law and by the unique role that presidential electors play. *See Carson v. Simon*, 978 F.3d 1051, 1057-58 (8th Cir. 2020). *Carson* did not purport to articulate a more general rule conferring Article III standing on private parties to advance Electors Clause claims. Thus, even under the appellate decision that has taken the broadest view of Article III standing in this field, Petitioners would still lack Article III standing.

hear [petitioner's] claims" because "neither party has standing to invoke the jurisdiction of the federal courts"). And while the Court will in rare cases relax that standard, it does so only where "the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 623-24 (1989). That standard is plainly not satisfied here: the decision below, which dismissed claims based on laches, did not inflict the kind of "direct, specific, and concrete" injury on Petitioners that could support jurisdiction in this Court.

Accordingly, Petitioners' lack of standing constitutes yet another reason to deny the emergency relief they seek—and to deny review of their case.

4. Petitioners' Federal Claims Are Not Actually Presented Here Because Act 77 is Constitutional.

A fourth and final defect in Petitioners' position is that this case does not, in fact, present the question that they pose. The gravamen of Petitioners' federal claim is that the Pennsylvania legislature violated the *federal* Constitution because Act 77 violates the *Pennsylvania* Constitution. But Petitioners have failed to carry their burden of showing any antecedent violation of the Pennsylvania Constitution.

The General Assembly may lawfully legislate on any matter not prohibited by the Pennsylvania or federal constitutions. *See Stilp v. Pennsylvania*, 601 Pa. 429, 435 (2009) ("[P]owers not expressly withheld from the General Assembly inhere in it."). And the General Assembly has significant latitude within these confines to prescribe how votes may be cast: "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."

PA. CONST. art. VII, § 4. Maintaining secrecy is the Pennsylvania Constitution's *only* affirmative limitation on the General Assembly's prerogative to determine "such other methods" of voting. Act 77 complies with this limitation by requiring mail-in voters to use a secrecy envelope. *See Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020) (finding secrecy envelope provision mandatory).

Article VII, § 14 of the Pennsylvania Constitution is not to the contrary. Petitioners contend that by requiring the General Assembly to allow certain voters to cast absentee ballots, Article VII, § 14 somehow forbids the General Assembly from allowing others to vote by mail. But the inclusion of a particular legislative duty in the Pennsylvania Constitution does not prevent the General Assembly from crafting other legislation on that topic.[7] In fact, the Pennsylvania Constitution originally said "may" and now says "shall" in Article VII, § 14—a change meant to further clarify that this provision provides a floor, not a ceiling, for absentee voting in Pennsylvania. *See, e.g.*, *Mathews v. Paynter*, 752 F. App'x 740, 744 (11th Cir. 2018) (distinguishing "shall" from "may" and noting that former term does not impliedly limit government authority). Thus, the Pennsylvania Constitution provides that the General Assembly *must* allow voters in the enumerated four categories to cast absentee ballots, but *may* also go further—by exercising its broad power to "prescribe[]" the permissible

[7] Nor do the cases Petitioners cite limit the General Assembly's power to legislate in this area. Both *Chase* and *Lancaster City* construed prior iterations of the Pennsylvania Constitution, not the current 1968 version, and are therefore not binding; in fact, under the modern Constitution, the Election Code has long allowed categories of voters not named in Article VII, § 14 to vote absentee. *See, e.g.,* 25 P.S. § 3146.1(b) (military spouses); *accord* 25 P.S. § 2602(z.3) (electors on vacations, or sabbatical leaves). The Pennsylvania Supreme Court rejected a challenge to some of these expansions when they were still young, albeit on standing grounds. *Kauffman v. Osser*, 441 Pa. 150 (1970). These cases also grounded their holdings in the then-unregulated nature of absentee voting—a condition that has long since been remedied through legislative improvements.

"method[s]" of voting, PA. CONST. art. VII, § 4—and allow other categories of voters to vote by mail, including by allowing any voter to opt to cast a mail-in ballot.

Petitioners are thus erroneous, not indisputably right, in their claim that Act 77 violates the Pennsylvania Constitution. Therefore, the Elections and Electors Clause issues that they ask this Court to review are not actually presented here. At minimum, the strong state law constitutional arguments supporting Act 77 are sufficient to constitute yet another ground for denying Petitioners' application.

B. The Second Question Presented

Petitioners ask this Court to address whether the application of laches by the Pennsylvania Supreme Court was itself a violation of their rights under the Petition Clause and Due Process Clause. That effort falls flat. To start, this Court should not grant review of this issue, which was neither pressed nor passed upon below and which does not implicate any disagreement within the lower courts. In addition, Petitioners' contentions are frivolous. There is no federal constitutional right to sue whenever you want. Petitioners' failure to adhere to Pennsylvania's procedural rules properly resulted in dismissal of their claims; this dismissal does not raise any federal constitutional question and, in all events, was the right outcome under state law.

1. The Court is Unlikely to Review Petitioners' Claims.

"It is only in exceptional cases . . . that questions not pressed or passed upon below are reviewed." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). That rule governs here. Petitioners were well aware of Respondents' laches defense in the Pennsylvania courts. But *nowhere* in the 155 pages of briefing that they filed in the

state courts before first seeking emergency relief here is there any suggestion that it would somehow violate the Constitution to apply laches. This dooms Petitioners' position. And for the reasons given above, their post-decision application in the Pennsylvania Supreme Court (where they also presented their constitutional objections to laches for the very first time) does not salvage this Court's jurisdiction.

But there is more: this question is not only precluded; it is also splitless. Petitioners do not identify—and we have not found—any published appellate authority stating that the application of laches doctrine in circumstances remotely like those here violates the Due Process Clause or the Petition Clause. For that reason, too, the Court should not grant review of Petitioners' second question.

2. Petitioners' Claims Are Meritless.

If this Court were to consider Petitioners' claims on the merits, it would surely deem them meritless. The gravamen of Petitioners' arguments is that the application of a state procedural rule (laches) violated the Constitution because it precluded them from raising state constitutional arguments against a state statute in a state court. They insist that this deprived them of an "opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), and of the right of access to judicial proceedings, *see Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

These claims have no foundation whatsoever in this Court's jurisprudence. This Court has never suggested that the "opportunity to be heard" protected by the Due Process Clause makes it unconstitutional for state courts to apply longstanding procedural rules that exist to avoid prejudicial, untimely filings. And it is a flagrant

category error for Petitioners to invoke this Court's access-to-court jurisprudence: those cases concern official action that makes it difficult or impossible for a person to access the legal system in the first place, or that (through a cover-up or other such gross malfeasance) results in the loss, failure to file, or inadequate settlement of a meritorious case. *See Christopher v. Harbury*, 536 U.S. 403, 415 (2002). These cases exist to help the likes of inmates who need access to the law library; they do not exist for the benefit of legislators who wait too long before asserting claims and then face dismissal based on laches within the course of an active judicial proceeding.

Petitioners had their day in court. They filed suit too late. The Constitution does not preclude dismissal of their claims on that basis; to hold otherwise would improperly constitutionalize a wide range of settled state procedural rules.

3. Petitioners' Claims Misdescribe State Law.

Although Petitioners' federal claims fail for the reasons given above, it bears emphasis that those claims rest on an erroneous description of state law. Petitioners repeatedly assert that neither they nor anybody else could ever file a suit to challenge Act 77. *See* Pet. at 29-32. But that is untrue under Pennsylvania standing doctrine. *See Armstead v. Zoning Bd. of Adjustment of City of Philadelphia*, 115 A.3d 390, 401-02 (Pa. Commw. Ct. 2015) (Pellegrini, J., concurring) ("Pennsylvania courts are much more expansive in finding standing than their federal counterparts.").

As Petitioners argued below (but neglect to mention here), Pennsylvania law recognizes a form of "taxpayer standing" under which they might well have pursued their claims well in advance of the 2020 election. *See* Petitioners' Brief in Opposition

to Preliminary Objections of Commonwealth of Pennsylvania, Governor Thomas W. Wolf, and Secretary of the Commonwealth Kathy Boockvar, at 5 (Nov. 24, 2020). At the very least, this would have been a colorable ground on which to assert standing, especially in light of the Pennsylvania Supreme Court's decision in *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988), which recognized an early election challenge to ensure the availability of judicial review. But Petitioners never filed such a suit. Instead, they deliberately waited until after Election Day. This decision cannot be blamed on Pennsylvania law. It was made by Petitioners and belongs to them alone.

4. Petitioners' Claim Does Not Support the Remedy They Seek.

A final flaw in Petitioners' position is the glaring mismatch between the claim they press and the remedy they seek. Even if Petitioners were to prevail on the second question they present to this Court, that would justify nothing more than an order remanding this case to the Pennsylvania Supreme Court. At that point, the state courts would have to consider in the first instance whether any other state law procedural defects—including potential lack of standing and Act 77's 180-day statutory limit for constitutional challenges—prohibit Petitioners' underlying claims. Only if those state law procedural hurdles were overcome could the Pennsylvania Supreme Court turn to the merits of Petitioners' claims. Thus, at best, Petitioners could obtain a limited-purpose remand to the Pennsylvania Supreme Court, rather than an injunction relating to the ultimate certification of election results.

II. Petitioners Seek Unconstitutional Relief.

For the reasons given above, Petitioners come nowhere close to demonstrating an entitlement to injunctive relief. But their motion should also be denied for still another reason: the injunctive relief that they request is plainly unconstitutional.

As Petitioners explain on the very first page of their application, they seek "an injunction that prohibits the Executive-Respondents from taking official action to tabulate, compute, canvass, certify, or otherwise finalize the results of the Election as to the federal offices," and that prohibits Secretary Boockvar and Governor Wolf from taking certain enumerated acts. Pet. at 1. "To the extent that [these] actions have already taken place," Petitioners ask this Court to decertify the election results. *Id.* at 2 (requesting "an injunction to restore the *status quo ante,* compelling Respondents to nullify any such actions already taken, until further order of this Court.").

Most of Petitioners' requests are moot. Secretary Boockvar has certified the results of the election. *See* Appendix A. And Governor Wolf has signed the Certificate of Ascertainment for the slate of electors for Joseph R. Biden as president and Kamala D. Harris as vice president of the United States. That certificate has already been submitted to the Archivist of the United States. *See* Appendix B. This precludes most of the relief that Petitioners seek. *See, e.g.*, *Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, at *1 (11th Cir. Dec. 5, 2020) ("[B]ecause Georgia has already certified its election results and its slate of presidential electors, Wood's requests for emergency relief are moot to the extent they concern the 2020 election.").

At this point, Petitioners are left only with a request that the Court overturn the results of the election in Pennsylvania. Such "breathtaking relief" would be "drastic and unprecedented, disenfranchising a huge swath of the electorate." *Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522, at *1, *7 (3d Cir. Nov. 27, 2020); *see also Pearson v. Kemp*, Hearing, 1:20 Civ. 4809 (N.D. Ga. Dec. 7, 2020) ("[T]he Plaintiffs essentially ask the Court for perhaps the most extraordinary relief ever sought in any federal court in connection with an election. They want this Court to substitute its judgment for that of two and a half million Georgia voters who voted for Joe Biden – and this I am unwilling to do."); *King v. Whitmer*, ECF 62, No. 2:20 Civ. 13134 (E.D. Mich. Dec. 7, 2020) ("[Plaintiffs] seek relief that is stunning in its scope and breathtaking in its reach. If granted, the relief would disenfranchise the votes of the more than 5.5 million Michigan citizens who, with dignity, hope, and a promise of a voice, participated in the 2020 General Election. The Court declines to grant Plaintiffs this relief."); *Wis. Voters All.*, No. 2020AP1930-OA, at 3 (Hagedorn, J., concurring) ("We are invited to invalidate the entire presidential election in Wisconsin by declaring it 'null'—yes, the whole thing .. . . [s]uch a move would appear to be unprecedented in American history.").

Petitioners' request is not only unprecedented; it is also unconstitutional. The relief they seek would violate the Due Process Clause, the separation of powers, and core federalism principles. For these reasons, Petitioners' motion must be denied.

A. The Due Process Clause Prohibits The Retroactive Invalidation of Ballots Cast in Reasonable Reliance on Election Rules.

Federal courts have repeatedly held that the Due Process Clause requires the counting of votes cast in reasonable reliance on existing election rules as implemented and described by state officials—even if those rules are later held to be unlawful. *See, e.g.*, *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012); *Bennett v. Yoshina*, 140 F.3d 1218, 1226–27 (9th Cir. 1998); *Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1978); *Briscoe v. Kusper*, 435 F.2d 1046, 1054-55 (7th Cir. 1970); *see also* Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 590 (2018) ("Changing the rules governing an election after it has occurred also raises a serious threat of due process violations.").

This rule follows directly from first principles of constitutional law. The Constitution protects the right to vote—and to have votes counted. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *see also, e.g.*, *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted."). The Constitution also guards against retroactive government action that unsettles vested rights or expectations. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494

U.S. 827, 855 (1990) (Scalia, J., concurring) ("The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."); *PHH Corp. v. CFPB*, 839 F.3d 1, 48 (D.C. Cir. 2016) (Kavanaugh, J.), *rev'd on other grounds*, 881 F.3d 75 (D.C. Cir. 2018) (en banc) ("When a government agency officially and expressly tells you that you are legally allowed to do something, but later tells you 'just kidding' and enforces the law *retroactively* against you and sanctions you for actions you took in reliance on the government's assurances, that amounts to a serious due process violation.").

Together, these principles protect voters from retroactive disenfranchisement if they reasonably relied on election rules in place when they voted. This Court has therefore declined to overturn election results even where it later found flaws in the election process. *See, e.g.*, *Connor v. Williams*, 404 U.S. 549, 550-51 (1972); *Allen v. State Bd. of Elections*, 393 U.S. 544, 571-72 (1969). And just two months ago, the Court declined to prohibit the counting of votes in South Carolina that had already been cast in reasonable reliance on a district court opinion (which the Court stayed) enjoining state law witness requirements for absentee ballots. *See Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020) ("The order is stayed except to the extent that any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement.").[8]

[8] Similar concerns animated *Bush v. Gore*, 531 U.S. 98 (2000). *See* Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 696 (2001) (observing that "'[n]othing is more infuriating than changing the election rules after the outcome of the election, conducted under the existing rules, is known,'" and so "the prospective possibility that rules would be changed in the middle

The *Purcell* principle rises from similar roots. The reason why "federal courts ordinarily should not alter state election laws in the period close to an election"—even if those rules are flawed or indeed unconstitutional—is that doing so risks confusing voters, sowing doubt about election results, and inviting litigation. *Democratic National Committee v. Wisconsin State Legislature*, No. 20A66, 2020 WL 6275871, at *3 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring); *accord Purcell v. Gonzalez*, 549 U.S. 1 (2006). Those concerns would be realized many times over if voters learned that they could follow all the rules and then still see their own ballots (and many others) discarded based on post-election legal disputes. Of course, the harm that would inflict on the democratic process would only be exacerbated by the risk of a public impression that the Court—in invalidating certified presidential election results—is itself deciding who won the presidential election. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (refusing an "expansion of judicial authority" into "one of the most intensely partisan aspects of American political life").

Accordingly, a straightforward application of due process principles confirms that the injunction sought by Petitioners would itself violate the Constitution.

B. Separation of Powers and Federalism Principles Preclude An Injunction Requiring Decertification of Presidential Electors.

The Due Process Clause is not the only impediment to Petitioners' prayer for relief. Separation of powers and federalism principles similarly foreclose their request for an injunction overturning Governor Wolf's ascertainment of electors.

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of the game also formed one grounding for the per curiam opinion" (quoting Richard A. Posner, *Breaking the Deadlock: The 2000 Election, The Constitution, and The Courts* 159 (2001))).

Starting with the separation of powers: Plaintiffs' proposed remedy collides with the structure of the Constitution and may well pose a non-justiciable political question. *See Rucho*, 139 S. Ct. at 2494. The Twelfth Amendment provides a textual commitment to Congress—not the Judiciary—of responsibility for receiving and counting certificates identifying slates of presidential electors. *See Nixon v. United States*, 506 U.S. 224, 228 (1993); *see also* U.S. CONST. amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."). Pursuant to that exclusive constitutional power—as well as its authority under the Necessary and Proper Clause of Article I—Congress has enacted a statute, the Electoral Count Act (ECA), that establishes procedures for raising, debating, and resolving objections to particular certificates. *See, e.g.*, 3 U.S.C. §§ 5, 6, 15. This statute delegates to the "executive of each State" the duty to certify to the Archivist "the final ascertainment" of electors under state law. *Id.* § 6. Where a governor has already discharged his duty under § 6 and transmitted a certificate of ascertainment to the Archivist (who, in turn, conveys certificates to Congress in the exercise of its Twelfth Amendment power), it is highly doubtful that an Article III court can issue an order nullifying that certificate or otherwise purporting to de-certify a slate of presidential electors.[9]

The separation of powers problems posed by Petitioners' request also give rise to grave federalism concerns. As the Seventh Circuit has observed, "[a] federal court

[9] In all events, any such injunction would be both unprecedented and in tension with the constitutional structure—and in that respect would collide with settled legal and prudential limits on this Court's exercise of its equitable authority. *See, e.g.*, *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999).

reaching into the state political process to invalidate an election necessarily implicates important concerns of federalism and state sovereignty. It should not resort to this intrusive remedy until it has carefully weighed all equitable considerations." *Bowes v. Ind. Sec'y of State*, 837 F.3d 813, 817 (7th Cir. 2016) (quotation omitted). That caution is triply true in the setting of a presidential election. Under 3 U.S.C. § 6, the "executive of each State" is directed to make a certification "under and in pursuance of the laws of [the] State." That is precisely what Governor Wolf has done in Pennsylvania. A federal judicial intervention into that state determination—on the improbable theory that the state legislature misapplied the state constitution in enacting a state election law—would be extraordinarily intrusive. Indeed, there are few conceivable federalism violations more substantial than the disenfranchisement of an entire state in the Electoral College. *See Stein v. Cortés*, 223 F. Supp. 3d 423, 442 (E.D. Pa. 2016) (warning against federal judicial action that "abrogate[s] the right of millions of Pennsylvanians to select their President and Vice President").

For all these reasons, Petitioners seek an unconstitutional injunction and so their emergency application should be denied.

III. The Equities Cut Strongly Against An Injunction.

The constitutional grounds set forth above preclude Petitioners' requested injunction. They also speak directly to the equities. This case raises questions "far more fundamental than the winner of [Pennsylvania's] electoral votes. At stake, in some measure, is faith in our system of free and fair elections, a feature central to the

enduring strength of our constitutional republic." *Wis. Voters All.*, No. 2020AP1930-OA, at 3 (Hagedorn, J., concurring). Issuing an injunction following Pennsylvania's certification of presidential election results would inequitably reward Petitioners after they delayed in filing this lawsuit, grievously undermine the public's trust in the electoral system and the Judiciary, and strike a blow to our democratic form of government.

First, Petitioners' unjustifiable delay in filing suit not only supports the application of laches, but also weighs against issuing an injunction. Petitioners waited over a year after Act 77 passed—and then weeks after Election Day—to first bring their claims. Petitioners should not receive extraordinary relief after unduly delaying in a manner that created the very exigent circumstances that supposedly animate their rush to this Court. *See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) ("[H]e who comes into equity must come with clean hands."). And Petitioners' gamesmanship—in waiting to bring claims; in failing to present their federal claims to the state courts; in rushing to this Court and then back to state court and then back to this Court; and in failing to proceed as diligent litigants would—further counsels against an injunction. *See Lonchar v. Thomas*, 517 U.S. 314, 338 (1996) (Rehnquist, J., concurring) ("'[A]busive delay'—waiting until the last minute to submit a claim that could have been submitted earlier—and 'obvious attempt[s] at manipulation'—in that case, asking the court to exercise its equitable powers in defiance of a clearly applicable legal rule precluding relief on the merits—constitutes equities to be considered in ruling on the prayer for relief.").

Second, the public interest in avoiding mass disenfranchisement of an entire state militates overwhelmingly against Petitioners' request for relief. As Judge Sutton has explained, "[c]all it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so." *Crookston v. Johnson*, 841 F.3d 396, 399 (6th Cir. 2016). Whatever it is called, that idea applies with exponentially greater force after an election has been completed and certified. Especially where millions of people cast their ballots under truly extraordinary circumstances, sometimes risking their very health and safety to do so, throwing out the election results on so flimsy a basis as Petitioners present would do violence to the Constitution and the Framers' vision. *See* The Federalist No. 37, at 223 (Madison) ("The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those [e]ntrusted with it should be kept in dependence on the people.").

Finally, granting an injunction would sow chaos and confusion across the Nation while inflaming baseless concerns about electoral impropriety and ensnaring the Judiciary in partisan strife. This case reaches the Court against the backdrop of unfounded claims—which have been repeatedly rejected by state and federal courts—that wrongly impugn the integrity of the democratic process and aim to cast doubt on the legitimacy of its outcome. Given that context, the Court should not plunge itself into a firestorm by issuing the first ever judicial order decertifying the results of a presidential election. Instead, it should stay true to "the trust of a Nation that here, We the People rule." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020).

CONCLUSION

Petitioner's application for a writ of injunction should be denied.[10]

Respectfully submitted,

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[10] Petitioners suggest that, as an alternative to injunctive relief, the Court should "stay the Pennsylvania Supreme Court's vacatur of the Commonwealth Court's preliminary injunction until this Court can make a determination on Petitioners' petition for a writ of certiorari." Pet. at 13. For all the reasons set forth in this brief, that alternative request should be denied—and so should Petitioners' additional request that the Court treat these papers as merits briefs and rule on that basis.

APPENDIX A

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

November 24, 2020

TO THE GOVERNOR:

In accordance with Section 1409 of the Pennsylvania Election Code, I do hereby certify that the attached is a true and correct copy of the returns received from the sixty-seven County Boards of Elections for the office of President of the United States for the General Election held November 3, 2020.

Witness my hand and the seal of my office this twenty-fourth day of November, 2020.

Kathy Boockvar
Secretary of the Commonwealth

SECRETARY OF THE COMMONWEALTH
302 North Office Building | 401 North Street | Harrisburg, PA 17120-0500 | 717.787.6458 | Fax 717.787.1734 | www.dos.pa.gov

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF STATE OFFICIAL RETURNS
2020 General Election
November 3, 2020

President of the United States

COUNTY	JOSEPH R BIDEN DEMOCRATIC	DONALD J TRUMP REPUBLICAN	JO JORGENSEN LIBERTARIAN
ADAMS	18,207	37,523	810
ALLEGHENY	429,065	282,324	8,344
ARMSTRONG	8,457	27,489	424
BEAVER	38,122	54,759	1,241
BEDFORD	4,367	23,025	182
BERKS	92,895	109,736	2,909
BLAIR	17,636	45,306	653
BRADFORD	8,046	21,600	513
BUCKS	204,712	187,367	4,155
BUTLER	37,508	74,359	1,438
CAMBRIA	21,730	48,085	759
CAMERON	634	1,771	29
CARBON	11,212	21,984	433
CENTRE	40,055	36,372	1,066
CHESTER	182,372	128,565	3,565
CLARION	4,678	14,578	237
CLEARFIELD	9,673	29,203	546
CLINTON	5,502	11,902	221
COLUMBIA	10,532	20,098	541
CRAWFORD	12,924	28,559	521
CUMBERLAND	62,245	77,212	2,138
DAUPHIN	78,983	66,408	1,977
DELAWARE	206,423	118,532	2,976
ELK	4,522	12,140	244
ERIE	68,286	66,869	1,928
FAYETTE	20,444	41,227	468
FOREST	728	1,882	36
FRANKLIN	22,422	57,245	1,116
FULTON	1,085	6,824	68
GREENE	4,911	12,579	179
HUNTINGDON	5,445	17,061	286
INDIANA	12,634	28,089	475
JEFFERSON	4,527	17,960	337
JUNIATA	2,253	9,649	141
LACKAWANNA	61,991	52,334	1,085
LANCASTER	115,847	160,209	4,183
LAWRENCE	15,978	29,597	501
LEBANON	23,932	46,731	989
LEHIGH	98,288	84,259	2,166
LUZERNE	64,873	86,929	1,519
LYCOMING	16,971	41,462	821
MCKEAN	5,098	14,083	285
MERCER	21,067	36,143	744
MIFFLIN	4,603	16,670	229
MONROE	44,060	38,726	1,043
MONTGOMERY	319,511	185,460	5,186
MONTOUR	3,771	5,844	156
NORTHAMPTON	85,087	83,854	2,001
NORTHUMBERLAND	12,677	28,952	654
PERRY	5,950	18,293	409
PHILADELPHIA	603,790	132,740	4,847
PIKE	13,019	19,213	322

President of the United States

COUNTY	JOSEPH R BIDEN DEMOCRATIC	DONALD J TRUMP REPUBLICAN	JO JORGENSEN LIBERTARIAN
POTTER	1,726	7,239	99
SCHUYLKILL	20,727	48,871	1,005
SNYDER	4,910	13,983	247
SOMERSET	8,654	31,466	423
SULLIVAN	921	2,619	55
SUSQUEHANNA	6,236	15,207	309
TIOGA	4,955	15,742	378
UNION	7,475	12,356	284
VENANGO	7,585	18,569	374
WARREN	6,066	14,237	347
WASHINGTON	45,088	72,080	1,310
WAYNE	9,191	18,637	261
WESTMORELAND	72,129	130,218	2,350
WYOMING	4,704	9,936	218
YORK	88,114	146,733	3,624
PENNSYLVANIA	3,458,229	3,377,674	79,380

APPENDIX B

Commonwealth of Pennsylvania

Governor's Office

CERTIFICATE OF ASCERTAINMENT OF PRESIDENTIAL ELECTORS

IN THE NAME AND BY THE AUTHORITY OF THE

COMMONWEALTH OF PENNSYLVANIA

Pursuant to the Laws of the United States, I, Tom Wolf, Governor of the Commonwealth of Pennsylvania, do hereby certify that in accordance with the provisions of the Pennsylvania Election Code, Act of June 3, 1937 (P.L. 1333, No. 320), the Secretary of the Commonwealth, on receiving and computing the returns of the election of Presidential Electors, shall lay them before the Governor, who shall enumerate and ascertain the number of votes given for each person so voted for, and shall cause a certificate of election to be delivered to each person so chosen. It appears from the returns so laid before me by the Secretary of the Commonwealth, that at an election for that purpose held on the Tuesday next following the first Monday in November, being the third day of November, A.D. 2020, the votes given for each person so voted for were:

Nina Ahmad	3,458,229	Jordan Harris	3,458,229
Val Arkoosh	3,458,229	Malcolm Kenyatta	3,458,229
Cindy Bass	3,458,229	Gerald Lawrence	3,458,229
Rick Bloomingdale	3,458,229	Clifford Levine	3,458,229
Ryan Boyer	3,458,229	Virginia McGregor	3,458,229
Paige Gebhardt Cognetti	3,458,229	Nancy Mills	3,458,229
Daisy Cruz	3,458,229	Marian Moskowitz	3,458,229
Kathy Dahlkemper	3,458,229	Josh Shapiro	3,458,229
Janet Diaz	3,458,229	Sharif Street	3,458,229
Charles Hadley	3,458,229	Connie Williams	3,458,229

as Presidential Electors for Joseph R. Biden for President and Kamala D. Harris for Vice President of the United States;

Bob Asher	3,377,674	Ash Khare	3,377,674
Bill Bachenberg	3,377,674	Thomas Marino	3,377,674
Lou Barletta	3,377,674	Lisa Patton	3,377,674
Ted Christian	3,377,674	Pat Poprik	3,377,674
Ted Coccodrilli	3,377,674	Andy Reilly	3,377,674
Bernadette Comfort	3,377,674	Lance Stange	3,377,674
Sam DeMarco	3,377,674	Lawrence Tabas	3,377,674
Marcela Diaz-Myers	3,377,674	Christine Toretti	3,377,674
Josephine Ferro	3,377,674	Calvin Tucker	3,377,674
Robert Gleason	3,377,674	Carolyn "Bunny" Welsh	3,377,674

as Presidential Electors for Donald J. Trump for President and Michael R. Pence for Vice President of the United States;

Kyle Burton	79,380	Paul V. Nicotera	79,380
Henry William Conoly	79,380	Paul Rizzo	79,380
Daniel A. Cooper	79,380	Richard Schwartzman	79,380
Thomas H. Eckman	79,380	William Martin Sloane	79,380
Greg Faust	79,380	Kathleen S. Smith	79,380
Kevin Gaughen	79,380	Jake Towne	79,380
Willie J. Harmon	79,380	Glenn J. Tuttle	79,380
Ken V. Krawchuk	79,380	Stephen Wahrhaftig	79,380
Brandon M. Magoon	79,380	John M. Waldenberger	79,380
Roy A. Minet	79,380	Daniel S. Wassmer	79,380

as Presidential Electors for Jo Jorgenson for President and Jeremy Spike Cohen for Vice President of the United States;

WHEREUPON it appears by the final ascertainment, under and in pursuance of the laws of the United States of America and of this Commonwealth, of the number of votes given or cast for each and all qualified persons voted for, for whose election or appointment any votes have been given or cast, that

Nina Ahmad	Jordan Harris
Val Arkoosh	Malcolm Kenyatta
Cindy Bass	Gerald Lawrence
Rick Bloomingdale	Clifford Levine
Ryan Boyer	Virginia McGregor
Paige Gebhardt Cognetti	Nancy Mills
Daisy Cruz	Marian Moskowitz
Kathy Dahlkemper	Josh Shapiro
Janet Diaz	Sharif Street
Charles Hadley	Connie Williams

have received the greatest number of votes for Electors of President and Vice President of the United States for the Commonwealth of Pennsylvania, and therefore are the persons duly elected and appointed Electors of President and Vice President of the United States, to meet at the seat of Government of this Commonwealth (being in the city of Harrisburg) on the first Monday after the second Wednesday in December next following their appointment, being the fourteenth day of December, A.D. 2020, agreeably to the laws of this Commonwealth and of the United States, then and there to vote for President and Vice President of the United States for the respective terms prescribed by the Constitution of the United States, to begin on the twentieth day of January, A.D. 2021, and to perform such other duties as devolve upon them under the Constitution and Laws of the United States.

GIVEN under my hand and the Great Seal of the State, at the City of Harrisburg, this twenty-fourth day of November in the year of our Lord two thousand and twenty, and of the Commonwealth the two hundred and forty-fifth.

Tom Wolf

Governor

Attest:

Kathy Boockvar

Secretary of the Commonwealth