

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

THE HONORABLE MIKE KELLY,
SEAN PARNELL, THOMAS A.
FRANK, NANCY KIERZEK, DEREK
MAGEE, ROBIN SAUTER,
MICHAEL KINCAID, and WANDA
LOGAN,

Petitioners,

v.

COMMONWEALTH OF
PENNSYLVANIA, PENNSYLVANIA
GENERAL ASSEMBLY,
HONORABLE THOMAS W. WOLF,
and KATHY BOOCKVAR,

Respondents.

Docket No. 620 M.D. 2020

**BRIEF IN OPPOSITION TO
PRELIMINARY OBJECTIONS OF
RESPONDENTS
COMMONWEALTH OF
PENNSYLVANIA, GOVERNOR
THOMAS W. WOLF, AND
SECRETARY OF THE
COMMONWEALTH KATHY
BOOCKVAR**

Filed on behalf of Petitioners,
The Honorable Mike Kelly, Sean
Parnell, Thomas A. Frank, Nancy
Kierzek, Derek Magee, Robin Sauter,
Michael Kincaid, and Wanda Logan

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INTRODUCTION

Petitioners incorporate by reference their November 22, 2020, Memorandum of Law in Support of Motion for Emergency/Special Prohibitory Injunction, as if fully set forth herein.

ARGUMENT

I. Legal Standard for Preliminary Objections.

Preliminary objections in the nature of a demurrer should be sustained where the contested pleading is legally insufficient. *Cardenas v. Schober*, 2001 PA Super 253, P12, 783 A.2d 317, 321 (Pa. Super. 2001) (citing Pa.R.Civ.P. 1028(a)(4)).

Preliminary objections in the nature of a demurrer admit only well-pleaded material facts and any inferences reasonably deduced therefrom, but not the complaint's conclusions of law, argumentative allegations, or expressions of opinion. *Giffin v. Chronister*, 151 Pa. Commw. 286, 616 A.2d 1070, 1072 (Pa. Commw. 1992). “[P]reliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by a demurrer.” *Mellon Bank, N.A. v. Fabinyi*, 650 A.2d 895, 899 (Pa. Super. 1994) (citation omitted). “If there is any doubt, it should be resolved by the overruling of the demurrer.” *Id.*

II. Preliminary Objection 1 should be overruled because Petitioners have standing.

Preliminary Objection 1 should be overruled because Petitioners have standing. Petitioner the Honorable Mike Kelly (hereinafter “Representative Kelly”) is a qualified registered elector residing in Butler County, a member of the Republican Party, and the United States Representative for the 16th Congressional District of Pennsylvania. Representative Kelly was recently re-elected to represent the 16th Congressional District, which includes all of Erie, Crawford, Mercer, and Lawrence counties, as well as part of Butler County. Representative Kelly constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code Section 102(a) and (t), 25 Pa.Stat. § 2602(a) & (t). Representative Kelly brings this suit in his capacity as a candidate for federal office and a private citizen. Petition for Review (“Petition”) ¶ 2. It was not alleged in the Petition, but could easily be alleged in an amended Petition that, if Respondents are permitted to certify the results of the November 3, 2020 General Elections including mail-in ballots that do not meet the Pennsylvania Constitutional requirements, then one or more candidates for whom Representative Kelly voted would lose their races, but if only the constitutionally permitted ballots are included in the certification, then more of the candidates for whom Representative Kelly voted would have the most votes of any candidate in their races.

Petitioner Sean Parnell is an adult individual who is a registered qualified elector residing in Allegheny County, a member of the Republican Party, and a candidate for U.S. Representative for the 17th Congressional District of Pennsylvania, which includes all of Beaver County, and parts of Butler and Allegheny counties. Mr. Parnell constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code Section 102(a) and (t), 25 Pa.Stat. § 2602(a) & (t). Mr. Parnell brings this suit in his capacity as a candidate for federal office and a private citizen. Petition ¶ 3. It was not alleged in the Petition, but could easily be alleged in an amended Petition or be found through judicial notice based on public election results that, if Respondents are permitted to certify the results of the November 3, 2020 General Elections including mail-in ballots that do not meet the Pennsylvania Constitutional requirements, then Mr. Parnell’s opponent will be certified as the winner of his congressional race, but if only the constitutionally permitted ballots are included in the certification, the Mr. Parnell would have the most votes of any candidate in his congressional race.

Petitioner Wanda Logan is a registered qualified elector residing Philadelphia County, Pennsylvania, a member of the Republican Party, and a candidate for the Pennsylvania House of Representatives for the 190th district. Ms. Logan constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code section 102(a) and (t), 25 Pa.Stat. § 2602(a) & (t). Ms.

Logan brings this suit in her capacity as a candidate for state office and a private citizen. Petition ¶ 4. It was not alleged in the Petition, but could easily be alleged in an amended Petition or be found through judicial notice based on public election results that, if Respondents are permitted to certify the results of the November 3, 2020 General Elections including mail-in ballots that do not meet the Pennsylvania Constitutional requirements, then Ms. Logan’s opponent will be certified as the winner of her Pennsylvania House race, but if only the constitutionally permitted ballots are included in the certification, the Ms. Logan would have the most votes of any candidate in her race.

Petitioners Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter and Michael Kincaid are all registered qualified electors residing in Erie, Mercer, and Allegheny Counties, Pennsylvania. All of them are “qualified electors” as that term is defined in Election Code Section 102(t), 25 Pa.Stat. § 2602(t). All of them bring this suit in their capacities as a private citizens. Petition ¶ 5-9. It was not alleged in the Petition, but could easily be alleged in an amended Petition that, if Respondents are permitted to certify the results of the November 3, 2020 General Elections including mail-in ballots that do not meet the Pennsylvania Constitutional requirements, then candidates for whom they voted would lose their races, but if only the constitutionally permitted ballots are included in the

certification, then more of the candidates for whom they voted would have the most votes of any candidate in their races.

Accordingly, all of the Petitioners have substantial, direct and immediate interests in whether Respondents are permitted to certify the results of the November 3, 2020 General Elections including mail-in ballots that do not meet the Pennsylvania Constitutional requirements and those interests are distinguishable from the interests shared by other citizens. Therefore, Petitioners meet the normal standing criteria.

Moreover, although to have standing a party must ordinarily have an interest in the controversy that is distinguishable from the interest shared by other citizens that is substantial, direct and immediate, there are certain cases that warrant the grant of standing even where the interest at issue “arguably is not substantial, direct and immediate.” *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988) (citing, *inter alia*, *Application of Biester*, 409 A.2d 848, 852 (Pa. 1979)). “[A]lthough many reasons have been advanced for granting standing to taxpayers, the fundamental reason for granting standing is simply that otherwise a large body of governmental activity would be unchallenged in the courts.” *Biester*, 409 A.2d at 852 (citation omitted).

The *Biester* Court elaborated on the benefit of granting standing under such circumstances, holding that:

The ultimate basis for granting standing to taxpayers must be sought outside the normal language of the courts. Taxpayers' litigation seems designed to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.... Such litigation allows the courts, within the framework of traditional notions of 'standing,' to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts.

Biester, 487 Pa. at 443 n.5 (citation omitted); *see also Consumer Party of Pennsylvania v. Commonwealth*, 507 A.2d 323, 328 (Pa. 1986) (same). Other factors to be considered include that issues are likely to escape judicial review when those directly and immediately affected are actually beneficially as opposed to adversely affected; the appropriateness of judicial relief; the availability of redress through other channels; and the existence of other persons better situated to assert claims, for example. *Sprague*, 550 A.2d at 187 (citations omitted).

In *Sprague*, the petitioner challenged the placing of one seat on the Supreme Court and one on the Superior Court on the general election ballot, because an election to fill Supreme Court and Superior Court offices may not be placed on the ballot during a general election because the Pennsylvania Constitution mandated that all judicial officers were to be elected at the municipal election next proceeding the commencement of their respective terms. *Id.* at 186. Under those circumstances, the Court specifically held that if standing were not granted, "the election would otherwise go unchallenged," that "[j]udicial relief is appropriate

because the determination of the constitutionality of the election is a function of the courts,” and that “redress through other channels is unavailable.” *Id.* (citing *Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165 (1981); and *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 58 A.2d 464 (1948)).

Here, as in *Sprague*, if standing were not granted, the November 3, 2020, General Election would otherwise go unchallenged, and redress through other channels is unavailable because those directly and immediately affected are actually beneficially as opposed to adversely affected, and the only persons better situated to assert the claims at issue are possibly the Respondents, who did not choose to institute legal action. Determination of the constitutionality of the election remains a function of the courts and granting standing would add judicial scrutiny of the statutory and constitutional validity of their acts to the controls over public officials inherent in the elective process.

The case of *In re Gen. Election 2014 Kauffman*, 111 A.3d 785 (Pa. Commw. Ct. 2015) is distinct from the case at bar. In that case, this Court quashed an appeal of objectors who challenged an order granting an emergency application for absentee ballots because the objectors were not parties in the proceedings before the trial court and, thus, did not have standing. *Id.* The objectors claimed they had standing because they were registered voters in the relevant area and they had an interest in seeing that the Election Code was obeyed and that absentee ballots were

prevented from affecting the outcome of the election. *Id.* at 792. The election at issue had not yet occurred and it was speculative for the objectors to suggest that five absentee ballots might affect the outcome of the election. *Id.* at 793. Quoting *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970), this Court highlighted “assumption” in the following:

Basic in appellants’ position is the *assumption* that those who obtain absentee ballots, by virtue of statutory provisions which they deem invalid, will vote for candidates at the November election other than those for whom the appellants will vote and thus will cause a dilution of appellants’ votes. This assumption, unsupported factually, is unwarranted and cannot afford a sound basis upon which to afford appellants a standing to maintain this action.

In re Gen. Election 2014 Kauffman, 111 A.3d. at 793.

Unlike in that case, here Petitioners have already been affected by the allowance of mail-in ballots that do not meet the Pennsylvania Constitutional requirements, or will be if those ballots are included in the certified results. The harms they allege are not based on speculation or assumption. Accordingly, this Court should determine that the Petitioners have standing to maintain this action and overrule Preliminary Objection 1.

III. Preliminary Objection 2 should be overruled because statutes cannot place limit on the time within which their constitutionality can be challenged.

Preliminary Objection 2 should be overruled because statutes cannot place limit on the time within which their constitutionality can be challenged. Petitioners

incorporate by reference Section III of the Argument in their Brief in Opposition to Preliminary Objections of Respondent Pennsylvania General Assembly as if fully set forth herein.

IV. Preliminary Objection 3 should be overruled because this Court has jurisdiction.

Preliminary Objection 3 should be overruled because this Court has jurisdiction. This is not an action to resolve an election dispute. This is an action to challenge the constitutionality of Act 77 (Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”)) and to enjoin unconstitutional actions taken pursuant thereto.

Respondents attempt to characterize this as an action to resolve an election dispute recognized under the Election Code, to then assert that any such actions must be grounded in statutory provisions for the resolution of election disputes. There are no provisions in election dispute statutes for addressing unconstitutional laws.

Respondents point to none. The Election Code provides no relevant procedure applicable to this type of action and does not preclude this Court’s jurisdiction to hear constitutional challenges to laws and to provide equitable relief. *See William Penn School District v. Pa. Dep’t of Ed.*, 170 A.2d 412, 418 (Pa. 2017) (“The idea that any legislature ... can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our

institutions.” *Smyth v. Ames*, 169 U.S. 466, 527, 18 S.Ct. 418, 42 L.Ed. 819 (1898)). Accordingly, this Court should overrule Preliminary Objection 3.

V. Preliminary Objection 4 should be overruled because Respondents cannot meet their burden of establishing a laches defense.

Preliminary Objection 4 should be overruled because Respondents cannot meet their burden of establishing a laches defense. Inconsistently, Respondents simultaneously claim that Petitioners were not particularly harmed, such that they lacked standing, but also that they should have brought this action sooner, before the general election occurred and the harms to Petitioners from the unconstitutional mail-in voting became a reality. Had they brought an action sooner, Respondents would instead have contended that the harms that the Petitioners claim are merely speculative. For the same reason that the objectors did not have standing in *In re Gen. Election 2014 Kauffman*, Petitioners also lacked standing to assert their claims until after they were harmed by the general election and the vote totals were announced. Respondents have negated their own argument that Petitioners sat on their rights for a year.

Proposed Intervenors are correct, that “laches may bar a challenge to a statute based upon procedural deficiencies in its enactment.” *Stilp*, 718 A.2d 290, 294 (Pa. 1998) (emphasis added). However, the Pennsylvania Supreme Court in *Stilp* found that “Appellees concede[d] that laches may not bar a constitutional challenge to the substance of a statute. . .” *Id.* (emphasis added) Indeed, the holding

in *Stilp* stands in the face of Respondent’s argument, holding that while the principle of laches may apply when a constitutional challenge is on procedural grounds, it does not apply with respect to the substance of a statute. *Id.* (citing *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988) (Stating that “laches and prejudice can never be permitted to amend the Constitution.”)); *see also Wilson v. School Distr. of Philadelphia*, 195 A. 90 (Pa. 1937).

Petitioners constitutional claim is purely substantive, and therefore cannot be defeated by laches. Unlike *Stilp* where the plaintiffs argued that a bill was not referred to the appropriate committee, and that the bill was not considered for the requisite number of days, *Stilp*, 718 A.2d at fn. 1, here Petitioners argue that the substance of Act 77 directly contravenes the Pennsylvania Constitution. *See* Petition ¶¶ 65-87. Petitioners make no challenge to the procedural mechanisms through which Act 77 was passed – *e.g.*, bicameralism and presentment – but rather, what is substantively contained within the legislative vehicle that became Act 77. As stated in prior filings before this court, the General Assembly attempted to unconstitutionally expand absentee voting through Act 77, despite specific enumerated limitations to such expansion. Act 77 itself is not a constitutional amendment, which would be the type of procedural laches challenge raised by Respondents (and would fail in any case). Such a patent and substantive violation of the Constitution cannot be barred by the mere passage of time – “To so hold

would establish a dangerous precedent, the evil effect of which might reach far beyond present expectations.” *Wilson*, 195 A. at 99. To be clear, amending the constitution to expand a protected and fundamental right is not a mere procedural step, but rather one of substance.

Respondents admit that laches would not apply to prospective relief pursued by petitioner. *See* Commonwealth Prelim. Obj. at fn 5. Even assuming, arguendo, that laches can apply to retrospective relief of a substantive constitutional challenge, the Objection still fails. Laches can only bar relief where “the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another.” *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). The two elements of laches are “(1) a delay arising from Appellants’ failure to exercise due diligence and (2) prejudice to the Appellees resulting from the delay.” *Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998) (citing *Sprague*, 550 A.2d at 187-88)

Sprague is on point. In *Sprague*, the petitioner, an attorney, brought suit challenging the placing on a ballot of two judges. *Id.* Respondents raised an objection based on laches because petitioner waited 6.5 months from constructive notice that the judges would be on the ballot to bring suit. In evaluating the facts that petitioner and respondents could have known through exercise of “due diligence,” the court found that while petitioner was an attorney, and was therefore

charged with the knowledge of the constitution, the respondents (the Governor, Secretary, and other Commonwealth officials) were also lawyers and similarly failed to apply for timely relief. *Id.* at 188. The Pennsylvania Supreme Court, in denying the laches defense, reasoned that “[t]o find that petitioner was not duly diligent in pursuing his claim would require this Court to ignore the fact that respondents failed to ascertain the same facts and legal consequences and failed to diligently pursue any possible action.” *Id.* To be clear, a citizen with an actionable claim cannot just wait to file a grievance it is aware of. However, courts will generally “hold that there is a heavy burden on the [respondent] to show that there was a deliberate bypass of pre-election judicial relief.” *Toney v. White*, 488 F.2d 310, 315 (5th Cir. 1973). Respondents have not met that burden here, and instead pretend that the burden is on Petitioners to disprove laches.

There is no evidence, and Respondents have not alleged, that Petitioners deliberately bypassed pre-election relief in the instant action. Unlike in *Sprague*, Plaintiffs here are not lawyers, they did not actually, nor could they have known with reasonable diligence the arguments presented before this Court in the instant action. With respect to the candidate-Petitioners, neither have participated in state legislature, has no responsibilities with respect Pennsylvania Election Code, or its constitutionality. Conversely, as in *Sprague*, Respondent Boockvar is an attorney, and should be charged with knowledge of the Constitution, and particular

knowledge of the Election Code. In *Sprague*, the taxpayer's more than six month delay in bringing an action challenging the election did not constitute laches such as would prevent the Commonwealth Court from hearing the constitutional claims. 550 A.2d at 188.

Additionally, and most importantly, as demonstrated in the filings, Respondent General Assembly, had apparent knowledge of the violation and attempted to rectify the situation with a constitutional amendment, a process that is ongoing. Petition ¶¶ 28-30.¹

In short, Respondents want this court to charge Petitioners, who had no specialized knowledge, with failure to institute an action more promptly, while Respondents possessed extremely specialized knowledge, and failed to take any corrective actions. Petitioners did not hedge their bets, they simply brought an action within mere days of being harmed by an unconstitutional election, as soon as they reasonably could have hired counsel and identify the constitutional issues after they gained standing to bring their claims. It could not have in any way served the Petitioner's interests in this matter to delay action for even one day. To suggest they did so deliberately is ridiculous and unsupported.

¹ If that process proceeds and the amendment is placed on the ballot, and Act 77 is not declared unconstitutional, then Pennsylvania voters could someday cast no excuse ballots by mail to decide whether to allow no excuse voting by mail. In the meantime, all Pennsylvania voters were disenfranchised of their right to vote on such an amendment prior to institution of widespread no excuse voting by mail.

In light of Respondents' collective failures in enacting and enforcing Act 77, they should have acted; that they did not do so puts the weight of any necessary and curative disenfranchisement squarely on their shoulders. Laches is a shield to protect respondents from gamesmanship, it is not a sword to use against harmed individuals to insulate Respondents' unconstitutional actions.

Finally, Respondents reliance on *In re Contest of Election for Off. of City Treas. from Seventh Legis. Dist. (Wilkes-Barre City) of Luzerne County*, 162 A.2d 363, 365-66 (Pa. 1960) for the premise that voters should not be disenfranchised because of "errors or wrongful acts of election officers" is misplaced in this context. *In re Contest*, stands for the proposition that disenfranchisement of voters is not necessary because "[s]ociety's weapon against election frauds is the power to arrest those that violate the Code." *Id.* That however is not the case, where the code itself is illegally and unconstitutionally promulgated. Where, as is the case here, the illegality is of an unconstitutional nature, intervention is necessary. *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994) (If the district court finds a constitutional violation, it will have authority to order a special election, whether or not it is able to determine what the results would have been in the absence of that violation.). Accordingly, this Court should determine that the Respondents have not met their burden in establishing a laches defense and overrule Preliminary Objection 4.

VI. Preliminary Objection 5 should be overruled because the Petition states a valid claim.

Preliminary Objection 5 should be overruled because the Petition states a valid claim. Respondents refer to binding Supreme Court precedent interpreting provisions of the Pennsylvania Constitutional, which remain unchanged since those cases were decided, as “outdated” and “not reflected in other current, constitutional voting practices provided by the Election Code.” Respondents argue that absentee balloting is more acceptable and less prone to fraud in modern times than it was in the past. This Court does not have the discretion to disregard binding precedent on such a basis. The way to change the Pennsylvania Constitution is through amendment, not reinterpretation contradictory to the original intent and meaning of its terms. Petitioners incorporate by reference Section IV of the Argument in their response to the Preliminary Objections of Respondent Pennsylvania General Assembly as if fully set forth herein.

CONCLUSION

For the foregoing reasons, the Preliminary Objections of Respondents the Commonwealth of Pennsylvania, the Honorable Thomas W. Wolf, and Kathy Boockvar should be overruled.

Respectfully submitted,

OGC Law, LLC

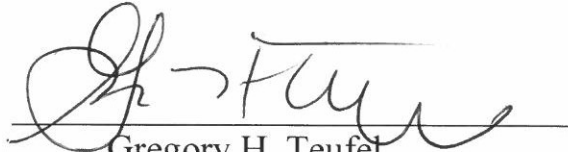


Gregory H. Teufel, Esq.
Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

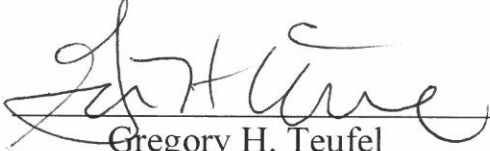
I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Date: November 24, 2020


Gregory H. Teufel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record on November 24, 2020 by this Court's electronic filing system.


Gregory H. Teufel