

**In the
Supreme Court of the United States**

MIKE KELLY, U.S. Congressman, *et al.*,
Applicants,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Emergency Application for a Writ of Injunction Pending the Filing and
Disposition of A Petition for a Writ of Certiorari

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF
OF THE REPUBLICAN PARTY OF PENNSYLVANIA, AS
AMICUS CURIAE IN SUPPORT OF APPLICANTS/PETITIONERS**

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of
The United States and Circuit Justice for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the Republican Party of Pennsylvania respectfully moves for leave to file the accompanying brief as an *amicus curiae* participant in this case in support of the Emergency Application for Writ of Injunction Pending the Filing and Disposition of a Petition for a Writ of Certiorari filed in this matter.

The Republican Party of Pennsylvania is a political party within the Commonwealth of Pennsylvania, as defined in 25 P.S. §2831, and a statutorily recognized State Committee, as set forth in 25 P.S. §2834 (the “PA Republican Party”). The PA Republican Party was founded on November 27, 1854 as a protector of individual freedom. It seeks to preserve the sanctity of liberty of the individual and the limitation of government. In doing so it looks to ensure that Government acts to preserve freedom. By maintaining these ideals, the PA Republican Party is able to provide this Honorable Court with compelling arguments regarding the doctrine of laches to support the Emergency Application for Writ of Injunction Pending the Filing and Disposition of a Petition for a Writ of Certiorari filed in this matter.

Counsel for the Applicants consents to the Participation of the PA Republican Party as *amicus curiae*. Counsel for Respondents were contacted by telephone, but did not respond prior to the deadline to submit this application.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT.....	5
A. THE SUPREME COURT OF PENNSYLVANIA ERRED IN APPLYING THE DOCTRINE OF LACHES IN ARBITRARILY AND SUMMARILY DISMISSING THIS CASE	5
B. VOTING IS A FUNDAMENTAL RIGHT AND THE DOCTRINE OF LACHES CANNOT BE APPLIED TO IMPEDE IT	7
CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<u>Burdick v. Takushi</u> , 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).....	7
<u>Carrington v. Rash</u> , 380 U.S. 89, 85 S. Ct. 775, 132 L. Ed. 2d 675 (1965).....	9
<u>Donald J. Trump for President, Inc. v. Boockvar</u> , 2020 WL 6537158 (W.D. Pa.).....	5, 6
<u>Dunn v. Blumstein</u> , 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).....	9
<u>Evans v. Cornman</u> , 398 U.S. 419, 90 S. Ct. 1752, 26 L. Ed. 2d 370 (1970).....	9
<u>Florida Democratic Party v. Scott</u> , 215 F. Supp. 3d 1250 (2016)	7
<u>Gill v. Whitford</u> , 138 S. Ct. 1916, 201 L. Ed. 313 (2018).....	6
<u>Harper v. Virginia State Board of Elections, et al.</u> , 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966).....	9
<u>Kelly v. Commonwealth of Pennsylvania</u> , No. 68 MAP 2020, 2020 WL 7018314.....	3, 5
<u>Kramer v. Union Free School District No. 15</u> , 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969).....	9
<u>Reynolds v. Sims</u> , 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506.....	9
<u>Sprague v. Casey</u> , 550 A.2d 38 (1988).....	7, 8
<u>Washington State Grange v. Washington State Republican Party</u> , 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).....	7
<u>Wesberry v. Sanders</u> , 376 U.S. 1, 84 S. Ct. 526 (1964).....	7

Wilson et ux. v. Philadelphia School District, et al.,
328 Pa. 225, 195 A. 90 (1937)..... 8

Statutes & Other Authorities:

U.S. Const. Art. I, § 4 6
U.S. Const. Art. II § 1 6
25 P.S. § 2831 1
25 P.S. § 2834..... 1
General Assembly of the Commonwealth of Pennsylvania,
Act of October 31, 2019, P.L. 552, No. 77 2, 5, 6

INTEREST OF *AMICUS CURIAE*

The Republican Party of Pennsylvania being a political party within the Commonwealth of Pennsylvania as defined in 25 P.S. Section 2831, and a statutorily recognized State Committee as set forth in 25 P.S. Section 2834 has an interest in protecting and preserving individual freedom. Being vested with these ideals, the Republican Party of Pennsylvania will provide this Honorable Court with compelling arguments in support of the Emergency Applicant for Writ of Injunction Pending the Filing and Disposition of a Petition for a Writ of Certiorari as filed in this matter.

INTRODUCTION ¹

“If an election is to be determined by a majority of a single vote, and that can be procured by a party through artifice or corruption, the Government may be the choice of the party for its own ends, not of the nation for the national good.”

John Adams, Inaugural Address, Philadelphia March 4, 1797.

The decision of the Pennsylvania Supreme Court to use its jurisdiction to take over the within case from the Commonwealth Court of Pennsylvania and arbitrarily and summarily dismiss it on the basis of laches fails to provide the clarity necessary to address the pending constitutional question on its merits. Specifically, it chose, in error, to dismiss the case on the basis of laches, and failed to address the issue of whether Act 77 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”)) violates the Constitution of the Commonwealth of Pennsylvania. The Republican Party of Pennsylvania (the “PA Republican Party”) has a clear and vested interest in requesting this Honorable Court to act to prevent the Pennsylvania Supreme Court’s summary dismissal of a case seeking to protect the fundamental right of voting solely on the basis of laches, without any consideration of the facts or merits.

Specifically, on November 28, 2020, the Supreme Court of Pennsylvania granted an application for “extraordinary jurisdiction” filed by Respondents and dismissed the Petition for review filed by Applicants in the Commonwealth Court of Pennsylvania on November 21, 2020.

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

The sole reason provided by the Pennsylvania Supreme Court for its decision was that the Petitioners’ fail[ed] to file their . . . challenge in a timely manner.” Kelly v. Commonwealth of Pennsylvania, No. 68 MAP 2020, 2020 WL 7018314. The case involves one of every American’s most “precious and fundamental right” being the right to vote and it was quickly dismissed without any consideration of this fact or any of the merits of the case, thereby setting a precedent that could fundamentally erode now and in the future full and equal right to vote.

SUMMARY OF THE ARGUMENT

The Pennsylvania Supreme Court acted in an arbitrary manner to dismiss this case on the basis of laches and failed to address the merits of this case. This case is seeking to protect the fundamental right of voting and should not have been dismissed without any consideration of the merits. Laches is not a viable way for the Pennsylvania Supreme Court to dismiss the case, as it involves the fundamental right to vote. This cannot be taken away by applying the doctrine of laches as will be stated in this Brief. This Honorable Court has held time and time again that a citizen of the United States of America has a constitutionally protected right to participate in elections.

Even if this case did not involve the fundamental right to vote, the doctrine of laches still could not be applied to dismiss the case. There would not be standing to file the case prior to the time that it was filed due to no injury existing – this being a critical element to standing. Not only should the doctrine of laches not be applied to the Applicants, but they could not have filed their action any sooner than they did.

ARGUMENT

A. THE SUPREME COURT OF PENNSYLVANIA ERRED IN APPLYING THE DOCTRINE OF LACHES IN ARBITRARILY AND SUMMARILY DISMISSING THIS CASE.

The Supreme Court of Pennsylvania stated in its Opinion that the Applicants' failure to file their challenge in a "timely manner" 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." The Court goes on to state further in its Opinion, in a manner that could be considered to be chastising the Applicants, that they exhibited a "complete failure to act with due diligence" in commencing their action as it "occurred to none of them to challenge the constitutionality of Act 77 before [this] . . . and that "the procedures used to enact Act 77 were published in the Legislative Journal and available to the public . . .and yet the Petitioners [Respondents] did nothing." *Kelly v. Commonwealth of Pennsylvania*, No. 68 MAP 2020, 2020 WL 7018314.

What the Supreme Court of Pennsylvania failed to consider was that the very issue of whether the mail-in ballots as permitted by Act 77 are unconstitutional had been raised in the United States District Court for the Western District of Pennsylvania (the "District Court") in the case of *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 6537158 (W.D.Pa.). In that case, the District Court in its Opinion discussed standing under a constitutional challenge. In examining the issue of standing, the District Court looked to the United States Supreme Court's disposition of the issue and found that in examining the elements of standing, the "foremost" element is injury and that, in fact, is dispositive. *Donald J. Trump for President, Inc., v.*

Boockvar, Id., citing *Gill v. Whitford*, 138 S.Ct. 1916, 1929, 201 L.Ed 313 (2018). Specifically, the District Court in *Gill* found that the theory raised by the Plaintiffs of “vote dilution” being caused by mail in ballots was insufficient to establish standing because the injury in fact was not sufficiently “concrete.” Further, the Supreme Court has made clear that an injury must not only be “concrete” but “particularized” to create standing. *Spokeo*, 136 S.Ct. at 1548 as cited in *Trump v. Boockvar*. The Plaintiffs in the *Trump* case relied on what the Court considered to be a “chain of theoretical events”. *Trump v. Boockvar*, p. 36. Specifically, the Plaintiffs argued that the lack of safeguards relative to the mail in ballots creates risks of improper or illegal voting and even fraud; and that this in turn will lead to voter fraud being conducted and potential ballot destruction. If this were to happen, the Plaintiffs argued, each vote cast in contravention of the Election Code will, in Plaintiffs’ view, dilute Plaintiffs’ lawfully cast votes, resulting in a constitutional violation. *Id.* The District Court found that even accepting all of the evidence as true, the Plaintiffs had only proven the “possibility of future injury” based on a series of speculative events – which falls short of the requirement to establish a concrete injury. *Id.*

Applying this decision to the case at hand, the Applicants could not have filed for review of Act 77 and its potential infringement on the powers granted to the Pennsylvania General Assembly under Article I, Section 4, and Article II, Section 1 of the United States Constitution prior to when it filed as it would have lacked a “concrete injury” and would have been basing its case on speculation. As such, a concrete injury could not have occurred until the November 3, 2020 General Election. Applicants claiming that they have suffered a concrete injury acted immediately in order to preserve their voting rights.

B. VOTING IS A FUNDAMENTAL RIGHT AND THE DOCTRINE OF LACHES CANNOT BE APPLIED TO IMPEDE IT.

Courts throughout the United States have consistently found that voting is a fundamental right.

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”

Wesberry v. Sanders, 376 U.S. 1, 17, 84 S.Ct. 526, (1964) cited in Florida Democratic Party v. Scott, 215 F. Supp. 3d 1250 (2016).

Voting is, indisputably, a right “of the most fundamental significance under our constitutional structure.” Burdick v. Takushi, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L.Ed.2d 245 (1992). State and local laws that unconstitutionally burden that right are impermissible. Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 451, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). The doctrine of laches is an equitable doctrine, as even acknowledged by the Pennsylvania Supreme Court in this case. It cannot be applied in any way that would burden the constitutionally guaranteed voting process.

In the case of Sprague v. Casey, the Pennsylvania Supreme Court ruled on a case brought by a taxpayer for declaratory and injunctive relief challenging a judicial election on state constitutional grounds. 550 A.2d 38 (1988). The Court found that the taxpayer’s more than six-month delay in bringing an action challenging an election did not constitute laches such as would

prevent the Supreme Court from hearing constitutional claims. The Court held that “laches and prejudice can never be permitted to amend the Constitution.” (*Id.*) It cited to the earlier case decided by the Pennsylvania Supreme Court in *Wilson et ux. V. Philadelphia School District, et al.*, 328 Pa. 225, 195 A. 90 (1937). The decision in this case provided that

“We have not been able to discover any case which holds that laches will bar an attack upon the constitutionality of a statute as to its future operation, especially where the legislation involves a fundamental questions going to the very roots of our representative form of government and concerning one of its highest prerogatives. To so hold would establish a dangerous precedent, the evil effect of which might reach far beyond present expectations.” *Id.* at 242, 195 A. at 99.

The Pennsylvania Supreme Court failed to follow its own previous decisions and arbitrarily held that the case at hand should be dismissed due to “laches” without any consideration to the fundamental right of voting at stake or that laches cannot be used at all in this case as it involves a constitutional challenge.

For the Supreme Court of Pennsylvania to summarily dismiss this case on the basis of laches goes against the principle that this Honorable Court has long stood for – that voting is a fundamental right.

“Undoubtably, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservation of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and

meticulously scrutinized.” Reynolds v. Sims, 377 U.S. 533, 561-562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 as quoted in Harper v. Virginia State Board of Elections et al., 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966).

The Pennsylvania Supreme Court failed to even address the issue on the merits let alone “carefully and meticulously scrutinize” the issue at hand to ensure that there was no infringement placed upon the citizens’ of Pennsylvania’s right to vote. Reynolds at 561.

This Honorable Court again opined that voting is a citizen’s fundamental right in the case of Dunn v. Blumstein, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). In Dunn an action was brought challenging state durational residence laws for a voter. In the Court’s opinion authored by Mr. Justice Marshall, he confirmed that

“In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” Citing to Evans v. Cornman, 398 U.S. 419, 421-422, 426, 90 S.Ct. 1752, 1754-1755, 1756, 26 L.Ed. 2d 370 (1970), Kramer v. Union Free School District No. 15, 395 U.S. 621, 626-628, 89 S.Ct. 1886, 1889-1890, 23 L.Ed. 2d 583 (1969), Carrington v. Rash, 380 U.S. 89, 93, 85 S.Ct. 775, 778, 779, 132 L.Ed.2d 675 (1965).

The Pennsylvania Supreme Court clearly did not offer the deference that this fundamental, inalienable right, possessed by all citizens of the United States of America required, when it chose to dismiss the matter on the unfounded basis of laches. This decision of the Pennsylvania State Supreme Court to dismiss a voting rights claim summarily on the basis of

laches without even considering the facts and merits, if allowed to stand, will now and in the future severely impair and chill the constitutionally protected equal right of citizens to participate and vote in elections.

For these reasons, laches should not have been used by the Pennsylvania Supreme Court to dismiss this case. Laches is an equitable doctrine and was applied erroneously to this case.

CONCLUSION

For the foregoing reasons, the Emergency Application for Writ of Injunction Pending the Filing and Disposition of a Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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