IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook,

Petitioners,

v.

Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State,

Respondents, and

DSCC, DCCC, Democratic National Committee, Pennsylvania Democratic Party,

Intervenor-Respondents.

No. 364 M.D. 2022

PETITIONERS' BRIEF IN RESPONSE TO DSCC AND DCCC INTERVENOR-RESPONDENTS' PRELIMINARY OBJECTIONS AND CROSS-APPLICATION FOR SUMMARY RELIEF

Filed on behalf of Petitioners, Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook

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INTRODUCTION

The Preliminary Objections and Cross-Application for Summary Relief ("Cross-Application") filed by the DSCC and DCCC ("the Committees") in large part overlap the Preliminary Objections and Cross-Applications for Summary Relief filed by Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State (collectively, "the Government Respondents") and the Democratic National Committee ("DNC") and Pennsylvania Democratic Party ("PDP"). Like the Government Respondents, the Committees attempt to argue that Petitioners' claims are barred by laches, that the nonseverability provision of Act 77 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 ("Act 77") was not triggered by *Migliori v. Cohen*, 36 F.4th 153 (3rd Cir. 2022), that the date requirements at issue are severable, and that recognizing that Act 77 is now void would disenfranchise many voters and destroy free and fair elections in Pennsylvania. Those arguments are equally unavailing here. People were able to exercise their right to vote in Pennsylvania in free and fair elections before Act 77, and they will still be able to do so after this Court declares Act 77 void.

For all of the reasons already explained in Petitioners' Response to the Committees' Preliminary Objections ("Preliminary Objections") and Cross-

Application for Summary Relief ("Cross-Application"), which Response is incorporated by reference,[1] the Preliminary Objections should be overruled and the Cross-Application should be denied because (a) and the nonseverability provision of Act 77 is enforceable and the Petitioners are not required to plead more specifically the legal theories underlying the petition, (b) in *Migliori* a court of competent jurisdiction held that the date requirement provisions of Sections 6 and 8 of Act 77 and/or their application to a person or circumstance were invalid, (c) *Migliori* did not and could not hold that Act 77's date requirements are merely directory, and (d) neither the nature of Act 77 nor subsequent amendments prevent the enforcement of its nonseverability provision.

Petitioners incorporate by reference their Application for Summary Relief and Brief in support thereof, as well as their Responses to the Government Respondents' and other Intervenor-Respondents' Preliminary Objections and Cross-Applications for Summary Relief and Briefs in support thereof, to the extent applicable, to avoid duplicative briefing as much as possible. No party has identified any factual issues that would preclude summary disposition of this case and there appear to be no material facts in dispute, except to the extent that the

[1] This Brief focuses on new arguments found in the Committees' Brief in support of their Preliminary Objections and Cross-Application because arguments already raised by them prior to those Briefs were adequately addressed in Petitioners' Response to the Preliminary Objections and Cross-Application.

Committees have attempted to assert without adequate support disputed facts in support of their laches defense.

BACKGROUND

Like the Government Respondents, in the Background section of their Brief in support of their Preliminary Objections and Cross-Application, the Committees present an inaccurate oversimplification of *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020) (hereafter "*In re Canvass*"), explaining only the judgement of the Pennsylvania Supreme Court in that case was "that the ballots in undated envelopes were to be counted in the election at issue." In that case, the Pennsylvania Supreme Court refused to apply its decision retrospectively, and only applied it prospectively, only allowing counting of undated mail-in ballots in the 2020 General Election by virtue of the decision to delay the effectiveness of its holding that the dating requirement was mandatory. *See In Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989, 2022 Pa.Commw.Unpub.LEXIS 1, *7-*25 (Pa.Cmwlth. 2022)(this Court examined the Opinion Announcing the Judgment of the Court (OAJC), the concurring and dissenting opinion of Justice Dougherty, joined by then-Chief Justice Saylor and Justice Mundy (CDO Opinion), and Justice Wecht's concurring and dissenting opinion, concurring in the result (CIR Opinion) in In re Canvass, and found that the collective result of the CDO and CIR were binding on this Court and the CIR

was precedential and persuasive in finding that the dating provisions were mandatory and that undated mail-in ballots were invalid and must be stricken in all elections after 2020). Counting undated mail-in ballots in the 2020 General Election was merely the practical effect of the refusal to grant immediate relief due to equitable concerns.

ARGUMENT

The Committees cannot meet their burden of establishing a laches defense.

The Committees cannot meet their burden of establishing a laches defense. To quickly reiterate the applicable standards and burden of proof, as this Court explained in *McLinko*, 270 A.3d 1243, 1268 (Pa.Cmwlth. 2022), *reversed in part, affirmed in part by McLinko v. Commonwealth*, __ A.3d __, 2022 Pa.LEXIS 1124, 2022 WL 3039295 (Pa. 2022):

> Laches is an equitable defense that can result in the dismissal of an action where the plaintiff has been dilatory in seeking relief and the delay has prejudiced the defendant. *Commonwealth ex rel. Baldwin v. Richard*, 561 Pa. 489, 751 A.2d 647, 651 (Pa. 2000); *Smires v. O'Shell*, 126 A.3d 383, 393 (Pa.Cmwlth. 2015). A defendant can establish prejudice from the passage of time by offering evidence that he changed his position with the expectation that the plaintiff has waived his claim. *Baldwin*, 751 A.2d at 651. The question of laches is factual and is determined by examining the circumstances of each case. *Sprague*, 550 A.2d at 188.

This Court has further noted that "Because laches is an affirmative defense, the burden of proof is on the defendant or respondent to demonstrate unreasonable

delay and prejudice." *Pennsylvania Federation of Dog Clubs v. Commonwealth*, 105 A.3d 51, 58 (Pa.Cmwlth. 2014).

In addition to misplaced reliance on a mischaracterization of the decisions in *In re Canvass* (*see* discussion above in the Background Section) and *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (*see* discussion at Petitioners Response to the Government Respondents' Preliminary Objections and Application for Summary Relief at pp. 38-39: "There is a stark difference between granting temporary equitable relief from a provision due to a natural disaster and holding a provision or its application invalid."), the Committees also rely for their laches arguments on the order in *Benezet Consulting, LLC v. Boockvar*, 433 F.Supp.3d 670 (M.D.Pa. 2020) that enjoined enforcement of the state residency requirement for witnesses of nomination petitions, set forth in 25 Pa.Stat. § 2869, against two out-of-state petition circulators. 25 Pa.Stat. § 2869 was amended by Act 77, Section 3, but the state residency requirements for witnesses of nomination petitions predated Act 77 and were not amended in any way by Act 77. Because Section 3 is among the sections referenced as nonseverable by Act 77's nonseverability provision, someone could have constructed a similar but somewhat weaker argument that Act 77 should have been declared void as a result of the *Benezet* court holding a portion of Section 3 invalid as applied to those two persons in those particular circumstances. The argument would have been weaker because

it is less arguable that the state residency requirement was integral to the rest of Act 77, an argument that the Committees do not even attempt to make.

Petitioners were not aware of the *Benezet* case and the Committees make no argument as to why they should have been aware of this relatively obscure case that, based on a Google search, seems to have generated no press coverage at all. Petitioners can hardly be called dilatory for failing to make weaker but similar arguments based on a case of which they were unaware and as to which they had no reason to be aware. Moreover, only a relatively short period of time has passed since the decision in *Benezet*.

Moreover, the Committees cannot meet their burden of proving that they were specifically prejudiced (or that anyone else was prejudiced, for that matter) by Petitioners failing to immediately seek to have Act 77 declared void after *Benezet* was decided. It is not clear that laches is ever available as a defense to an action seeking only prospective relief. For example, in *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1025-1026 (N.D. Fla. 2018), the court explained:

> [I]t is not clear laches applies when a plaintiff seeks prospective relief for continuing constitutional violations. *See Garza v. Cty. of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990); *see also Peter Letterese & Assocs. Inc., v. World Inst. of Scientology Enters. Int'l*, 533 F.3d 1287, 1321 (11th Cir. 2008) (stating in a copyright case "laches serves as a bar only to the recovery of retrospective damage, not to prospective relief"). And laches has not prevented courts in this Circuit from

> entering prospective injunctive relief in close temporal proximity to an election. *See, e.g., Ga. Coal. for the People's Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345-46 (S.D. Ga. 2016); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1376 (N.D.Ga. 2005); *Fla. Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 U.S. Dist. LEXIS 143620, 2016 WL 6090943 at *9-*10 (N.D.Fla. Oct. 16, 2016).

Especially because Petitioners seek only prospective relief, there is no identifiable prejudice to the Committees or anyone else from the fact that Petitioners did not immediately seek to have Act 77 declared void after *Benezet* was decided. There is no risk of prejudice to the Committees as to the 2022 General Election because relief can simply be delayed until after that election is completed. Because Petitioners only seek prospective relief, there is no risk of "financial havoc" from "clawing back funds for Census outreach" because clawing back funds would be prospective relief that Petitioners are not seeking.

The Committees suggest, without any evidence at all, that counties may have purchased voting machines "that are not compatible with straight-ticket voting" and "may face a complicated and expensive process to revert to a straight-ticket option." Committees' Brief in support of their Preliminary Objections and Cross-Application ("Committees Brief") at p. 16. The facts in support of Cross-Application require not only evidence but also must be undisputed, and facts in support of Preliminary Objections must

be clear from the face of the petition or complaint. To find some sort of prejudice based on counties needing to purchase new voting machines would require an evidentiary hearing. Moreover, even if such expenses were proved likely at a hearing and proved likely to have been substantially less if Petitioners had brought suit sooner on the basis of *Benezet*, such expenses would not be prejudice to the Committees, and such an expense is not so much prejudice as it is the natural consequence of voiding Act 77 pursuant to wishes of the General Assembly as expressed in the nonseverability provision.

The Committees having spent money educating voters about the voting process is also not prejudice sufficient to support a laches defense. It is not clear that any such expenses would have been any less had Petitioners brought suit based on similar arguments immediately after *Benezet*. Moreover, such expenses were not wasted in that they were useful in all of the prior elections where mail-in voting occurred. That is simply not the type of prejudice that would support a laches defense, in that laches typically focuses on the prejudice to parties in defending the claims, not just expenses that parties could have possibly avoided or reduced if suit was brought sooner. The Committees cite no cases supporting a laches defense on the basis of such expenses.

The expansion of mail voting is not an "unambiguous benefit" if it is not conducted in a sufficiently accountable way and with sufficient safeguards against fraud, coercion, bribery and ballot harvesting. The Committees have clearly not established undisputed facts sufficient to meet their burden of proof as to a laches defense and its Preliminary Objections on the basis of that defense should be overruled just as summary relief on that basis should also be denied.[2]

[2] Petitioners attempt to raise a meritless *res judicata* defense in footnote 8 of their Brief. "Res judicata, or claim preclusion, applies only when there exists a 'coalescence of four factors: (1) identity of the thing sued upon or for; (2) identity of the causes of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued.'" *Robinson v. Fye*, 192 A.3d 1225, 1230 (Pa.Cmwlth. 2018). The Committees made no attempt to show that each of these elements were met. The cause of action in the prior Act 77 case was not identical to the cause of action here, so *res judicata* is inapplicable.

CONCLUSION

For the aforementioned reasons and the reasons stated in Petitioners Response to the Preliminary Objections and Cross-Application, Petitioners respectfully urge this Court to enter the proposed orders denying the Committees' Cross-Application for Summary Relief and overruling their Preliminary Objections.

Respectfully submitted,

Gregory H. Teufel
Attorney for Petitioners

CERTIFICATE OF WORD COUNT

I certify that this Brief contains 2,154 words, as determined by the word-count feature of Microsoft Word.

Date: September 22, 2022

Gregory H. Teufel, Esq.

CERTIFICATE OF COMPLIANCE

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

Date: September 22, 2022

Gregory H. Teufel, Esq.