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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TIMOTHY R. BONNER, et al., Petitioners, v. LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, et al., Respondents.	364 MD 2022

INTERVENOR-RESPONDENTS DSCC AND DCCC'S REPLY IN SUPPORT OF THEIR PRELIMINARY OBJECTIONS AND CROSS-APPLICATION FOR SUMMARY RELIEF

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Intervenor-Respondents DSCC and DCCC (the "Committees") present the following reply in support of their preliminary objections and application for summary relief. The Committees incorporate by reference their brief, and the briefs filed by Respondents and by Intervenor-Respondents Democratic National Committee and Pennsylvania Democratic Party, in opposition to Petitioners' application for summary relief.

ARGUMENT

Petitioners fail to respond to—let alone rebut—many of the Committees' arguments explaining why Petitioners are not entitled to relief. Instead, they offer only a limited attempt to avoid laches by mischaracterizing relevant precedent and reaching far afield in search of new doctrine. Neither effort is persuasive. Pennsylvania law is clear that Petitioners' two-year delay in pressing their claim, and the resulting prejudice, permanently forecloses this action. For these and the many other reasons offered by the Committees, Respondents, and Intervenor-Respondents, the cross-applications for summary relief should be granted and the petition should be dismissed.

I. Petitioners' claim is barred by laches.

The doctrine of laches requires dismissal here because Petitioners' failure to exercise due diligence resulted in a delay of over two years, and this delay has

prejudiced Respondents, the Committees, and voters. *See Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998).

A. Under Petitioners' theory, Act 77's nonseverability clause was triggered in 2020.

The Committees have identified a series of 2020 judicial decisions that Petitioners should reasonably have been aware of and that would have triggered Act 77's nonseverability clause under Petitioners' own interpretation of that provision. Petitioners' efforts to distinguish or explain away those cases cannot withstand scrutiny.

The first case that should have put Petitioners on notice was *Benezet Consulting, LLC v. Boockvar*, 433 F. Supp. 3d 670 (M.D. Pa. 2020), decided on January 13, 2020. Petitioners' explanation for why they did not bring this claim after that decision continues to evolve. First, they argued that *Benezet* did not trigger the nonseverability provision because the relief was supposedly vacated on appeal. *See* Pet'rs.' Resp. to DSCC & DCCC's Prelim. Obj. & Cross-Appl. at 3. This is flatly wrong: as the Committees explained in their Combined Brief in Support of their Preliminary Objections and Cross-Application for Summary Relief, the Third Circuit *expanded* the scope of the district court's injunction, which, under Petitioners' theory, should have made their case for nonseverability even stronger. *See Benezet Consulting LLC v. Sec'y of Commonwealth of Pa.*, 26 F.4th 580, 587 (3d Cir. 2022).

Now, Petitioners shift tactics and argue they were unaware of *Benezet*. Pet'rs.' Br. in Resp. to DSCC & DCCC Prelim. Objs. & Cross-Appl. for Summ. Rel. ("Pet'rs.' Br.") at 6. But simple ignorance is no excuse. *See In re Thorne's Estate*, 25 A.2d 811, 817 (Pa. 1942) ("Laches is not excused by simply saying, 'I did not know.'") (quoting *Taylor v. Coggins*, 90 A. 633, 635 (Pa. 1914)). Laches asks what a party reasonably should have known "by the use of the means of information within [their] reach, with the vigilance the law requires." *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988) (quoting *Taylor*, 90 A. at 635). An ordinary denizen of this state could have uncovered this public information. And Petitioners should be held to a higher standard: they are legislators and experienced litigators intimately familiar with legal challenges to Act 77 (many of which they have litigated themselves).

Petitioners complain *Benezet* is a "relatively obscure case that, based on a Google search, seems to have generated no press coverage at all." Pet'rs.' Br. at 6. Not only is this statement factually incorrect—Bloomberg Law reported on the Third Circuit's decision, *see* Bernie Pazanowski, "Out-of-State Petition Circulator Can Work Pennsylvania Elections," (Feb 24. 2022)[1]—but it also downplays the diligence required of plaintiffs who assert belated claims and seek to avoid laches. In *Stilp*, for instance, the Pennsylvania Supreme Court applied laches to a lawsuit filed by three

[1] *Available at* https://news.bloomberglaw.com/us-law-week/out-of-state-petition-circulator-can-work-pennsylvania-elections.

individuals who challenged the Low-Level Radioactive Waste Disposal Act based on procedural irregularities in its enactment. 718 A.2d at 294. In doing so, the Court charged the plaintiffs with knowledge of procedures published in the Legislative Journal and available to the public notwithstanding their purported ignorance of the relevant facts. *Id.* at 292. Here, the cases that should have alerted Petitioners of their non-severability claim are published precisely where one would expect to find them: Westlaw, Lexis, and other publicly accessible repositories of court decisions. Moreover, Petitioners Keefer and Ryan serve on the House State Government Committee, which has primary responsibility for election law matters. And all Petitioners were candidates who sought ballot access in the 2022 primary election; as a result, they certainly should have been aware of *Benezet*, which concerned the rules in place for the circulation of their own nomination petitions. Regardless of what Petitioners actually knew, their lack of diligence in discovering facts they *should have known* and pursuing their claim earlier is enough to apply laches.

Tellingly, Petitioners admit that any effort to invoke the nonseverability provision after *Benezet* would have been weak because the state residency requirement enjoined there "predated Act 77 and were not amended in any way by Act 77," and moreover was not "integral to the rest of Act 77." Pet'rs.' Br. at 5, 6. This concession—that the nonseverability analysis requires an inquiry into the structural importance of a "voided" provision—dooms Petitioners' action here

because the date provision, similarly, long predated Act 77 and was not amended in any way by Act 77. *See* DSCC & DCCC's Br. in Resp. to Pet'rs.' Appl. for Summ. Rel. at 12-13. If the express requirement in Act 77's rules for nominating petitions was not essential to the Act's coherence, the cursory direction to date ballot envelopes—with no express consequence for an omission—also cannot be deemed sufficiently essential to trigger the nonseverability provision.

Second, Petitioners do not deny their awareness of the string of decisions in 2020 that enjoined Act 77's ballot receipt deadline. *See In re Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-003416 (Delaware Cnty. Ct. Com. Pl. June 2, 2020); *In re Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-02322-37, 2020 WL 6556840 (Bucks Cnty. Ct. Com. Pl. June 2, 2020); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). Instead, they suggest in passing that "granting temporary equitable relief from a provision" does not trigger the nonseverability provision. Pet'rs.' Br. at 5. But Petitioners conspicuously fail to identify any "temporary" or "equitable relief" exception in the text of the nonseverability provision that they now purport to invoke. It is also inconsistent with Petitioners' own theory in this case: namely, that Act 77 is void if *any* provision is held invalid even in a single "circumstance." Pet. For Decl. J. ¶ 1. It is impossible to square Petitioners' own

purportedly strict approach to the nonseverability provision's text with a gaping exception for temporary relief when it's convenient for their claim.

Third, Petitioners still fail to distinguish *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020), where the Pennsylvania Supreme Court did exactly what Petitioners now argue must void all of Act 77—the Court held that the decision of county boards of elections to count undated ballots was lawful. *Compare id*. at 1079 (affirming initial decisions of Philadelphia and Allegheny County Boards of Elections to count undated ballots) *with Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022) (affirming initial decision of Lehigh County Board of Elections to count undated ballots). Petitioners' latest effort to cut and paste separate *In re Canvass* opinions to generate a different holding again fails. "When a court is faced with a plurality opinion, usually only the result carries precedential weight; the reasoning does not." *Commonwealth v. Bethea*, 828 A.2d 1066, 1073 (Pa. 2003)). Petitioners cannot change *In re Canvass*'s result by pointing to reasoning in concurring and dissenting opinions. They have sat on their claims for two years, which is incompatible with the due diligence that the laches doctrine requires.

B. Petitioners' delay has prejudiced Respondents, the Committees, and voters.

Petitioners do not contest that Respondents, the Committees, and voters will be prejudiced if Petitioners are successful in obtaining any relief in advance of the

2022 general election. Indeed, Petitioners appear to concede that relief should be "delayed until after that election is completed" to avoid prejudice. Pet'rs.' Br. at 7. But Petitioners ignore that the costs and strains that voiding Act 77 would impose on election officials would be highly prejudicial if required in any future cycle. That prejudice is the direct result of Petitioners' inexplicable delay: while Petitioners sat on their rights, the Counties and the Committees devoted enormous sums of money to transition to Act 77's new rules and systems; these harms persist even if Petitioners are granted relief that is "delayed" until after this election. This significant prejudice could have been avoided if Petitioners had acted with anything resembling requisite diligence.

Petitioners' delay also prejudices the Committees because the Committees have expended significant money and time educating voters and candidates about mail voting opportunities under Act 77. *See* Aff. of Pavitra Abraham ¶¶ 6-11, Aff. of Lauren Breinerd ¶¶ 5-7. Petitioners' claim that this prejudice is insufficient to support a laches defense is simply incorrect. *See Rivers v. Moore*, 239 A.3d 77 (Table) (Pa. Super. Ct. 2020) (laches barred claim because delay prejudiced parties who made "significant investment in time and money" in reliance on state of affairs that petitioner belatedly challenged); *see also Stilp v. Hafer*, 701 A.2d 1387, 1392 (Pa. Cmwlth. 1997), *aff'd*, 718 A.2d 290 (same).

C. Pennsylvania courts regularly apply laches to bar prospective relief.

Petitioners' attempt to rewrite the doctrine by suggesting that laches is inapplicable in actions seeking prospective relief has no basis in law. Pennsylvania courts have repeatedly applied laches to dismiss cases in which plaintiffs seek only prospective relief. *See, e.g.*, *In re Wilkinsburg Taxpayers & Residents Int. in Green St. Park Sale to a Priv. Dev. & Other Park-Sys. Conditions*, 200 A.3d 634, 643 (Pa. Cmwlth. 2018); *Vicchiarelli v. Hrabovsky*, No. 520 MDA 2015, 2016 WL 153276, at *5 (Pa. Super. Ct. Jan. 13, 2016); *Stilp*, 701 A.2d at 1392; *Holiday Lounge, Inc. v. Shaler Enters. Corp*., 272 A.2d 175, 177 (Pa. 1971). It is this law, and not the out-of-state authority upon which Petitioners rely, that controls.

But even Petitioners' out-of-state authority does not hold that claims for prospective relief are immune to laches. *See* Pet'rs.' Br. at 6. In *Democratic Executive Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1025-26 (N.D. Fla. 2018), for example, the court recognized that "it is not clear" in the Eleventh Circuit whether laches may apply to prospective injunctive relief; it went on to reject a laches defense only after answering the "factually-intense question" that the doctrine requires. Similarly, in *Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990), the court held laches did not apply where plaintiffs' delay was excusable by the fact that their injury "has been getting progressively worse" over time. Petitioners here do not (and could not) allege that whatever injury they propose to

have suffered from Act 77 has worsened over the past two years. Nor does *Peter Letterese & Associates, Inc. v. World Institute of Scientology Enterprises, International*, 533 F.3d 1287 (11th Cir. 2008), help Petitioners. That case declined to apply laches to bar a claim for copyright infringement that was filed within the express statute of limitations period. *Id*. at 1319, 1321. Notably, that rule is contrary to Pennsylvania law, which *permits* laches as a defense even within the statute of limitations. *See United Nat. Ins. v. France Refractories*, 668 A.2d 120, 124-25 (Pa. 1995) ("[T]his Court has noted that laches may bar an action even though it would not be barred by the analogous statute of limitations").

Similarly, Petitioners' suggestion that prospective relief will not impose any prejudice ignores the relevant facts. Laches is a permanent bar for these Petitioners; it does not toggle on and off after even further delay. *See Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020), cert. denied sub nom. *Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021) (barring legislator-plaintiffs from challenging constitutionality of no-excuse mail-in voting due to "complete failure to act with due diligence"). Prospective relief would still squander the massive investments Respondents and the Committees have expended transitioning Pennsylvania voters to no-excuse mail-in voting. Many of these voters, for example, are on a permanent mail voting list; scrapping that list for future elections will generate more expense and more work for

the counties, and the Committees, that could have been avoided if Petitioners prosecuted their claim with the required diligence.

Because all of the relevant elements are met, the Court should apply laches to dismiss Petitioners' claim.

II. The Committees' remaining arguments are unrebutted.

Perhaps most apparent from Petitioners' cursory reply and related filings is just how much they concede. Petitioners appear to recognize that the question they present as decisive—whether *Migliori* invalidated the Date Provision—turns on whether the Date Provision is mandatory or directory. Yet they have never pointed to any text in that decision that characterizes the Date Provision as mandatory or even broaches this issue at all. Nor can they point to any text in Act 77 that requires undated ballots to be set aside. Because the plain text does not resolve these questions in Petitioners' favor, they turn to other methods of statutory construction. And after countless rounds of briefing, Petitioners never contest that codified presumptions in the Statutory Construction Act require interpreting the Date Provisions as directory—the upshot of at least three canons of construction is that the General Assembly does not intend statutes to be interpreted in a manner that would render them incompatible with federal law. *See* 1 Pa.C.S.A. §§ 1922(1), (2), (3). The obvious way to harmonize the Date Provision's text, the Third Circuit's explanation of federal law in *Migliori*, and these presumptions in ascertaining

legislative intent is to read the Date Provision as directory. *See* DSCC & DCCC's Br. in Resp. to Pet'rs.' Appl. for Summ. Rel. at 8-10 (explaining that the Date Provision should be read as directory to align with its text, context, purpose, and precedent, and also so as not to violate the Materiality Provision of the federal Civil Rights Act) (citing *In re Canvass*, 241 A.3d at 1089 n.54 (Wecht, J., concurring in part) and *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, *13-25 (Pa. Cmwlth. Aug. 19, 2022)).

Petitioners' failure to rebut stretches still further. They do not contest that the mayhem that would follow from any relief granted before Election Day would be catastrophic for counties, voters, and the Committees; instead, Petitioners propose delaying relief until future election cycles. Pet'rs.' Br. at 7. But they also do not deny that they were aware of at least several of the 2020 judicial decisions that should have triggered their claim. While Petitioners quibble some with the interpretation of these cases, they do not deny that *Pennsylvania Democratic Party* enjoined the application of one of Act 77's express provisions, or that the result of *In re Canvass* was to permit undated ballots to be counted.

Simply put, Petitioners are asking this Court to accomplish what they have been unable to as legislators: the repeal of no-excuse mail-in voting in Pennsylvania. To arrive at their position, they have been forced to contort themselves into ignoring

relevant precedent that they clearly knew about, as well as case law they at least *should* have known about, making arguments rife with internal contradictions.

CONCLUSION

For the reasons set forth above, the Committees respectfully request that this Court sustain their Preliminary Objections, grant their Cross-Application for Summary Relief, deny Petitioners' Application for Summary Relief, and enter judgment in favor of Respondents and Intervenor-Respondents dismissing the Petition for Review with prejudice.

Dated: September 30, 2022

Respectfully submitted,

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