

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i>,</p> <p>Petitioners,</p> <p>v.</p> <p>LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, <i>et al.</i>,</p> <p>Respondents.</p>	<p>No. 447 MD 2022</p>
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**PETITIONERS' OMNIBUS REPLY IN SUPPORT
OF ITS APPLICATION FOR SPECIAL RELIEF
IN THE FORM OF A PRELIMINARY INJUNCTION**

Petitioners Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, Republican Party of Pennsylvania, David Ball, James D. Bee, Debra a Biro, Jesse D. Daniel, Gwendolyn Mae Deluca, Ross M. Farber, Connor R. Gallagher, Lynn Marie Kalcevic, Linda S. Kozlovich, William P. Kozlovich, Vallerie Siciliano-Biancaniello, and S. Michael Streib (collectively, "Petitioners"), by and through their undersigned counsel, hereby file this Omnibus Reply in Support of Its Application for Special Relief in the Form of a Preliminary Injunction, as follows:

I. FACTUAL BACKGROUND

On September 7, 2022, Petitioners filed their Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.A.P. 1532 (the “Application”) and memorandum in support (the “Memorandum”). On September 9, 2022, this Court issued a per curiam Order (the “September 9, 2022 Order”) setting a hearing on Petitioners’ Application for September 28, 2022. The September 9, 2022 Order further required any party who opposes the Application to file and serve an answer in opposition by 12:00 noon on Friday, September 16, 2022.

On September 16, 2022, twenty-two Boards, the Commonwealth Respondents, and Proposed Intervenors filed a total of fourteen answers/responses in opposition to Petitioners’ Application (the “Answers”). Two counties filed “no answer letters” and one county requested permission to file a late answer, which was granted by this Court, and filed same on September 20, 2022.

In the Answers, several Respondents and proposed Intervenors claim that Petitioners’ claims are barred by the doctrine of laches (*See Philadelphia County’s Answer at 4; Proposed Intervenor-Respondents’ Brief, at 10*). Additionally, the Commonwealth Respondents allege that this Court lacks subject matter jurisdiction to hear this matter. (*See Commonwealth Respondents’ Brief at 10*).

On September 20, 2022, Petitioners filed an Application for Leave to File a Reply in Support of its Application for Special Relief (the “Reply”), requesting the

Reply be submitted by Sunday, September 25, 2022. On September 21, 2022, this Court entered an Order directing Petitioners to file a Reply by 10:00 p.m. on September 21, 2022. As more fully set forth below, Petitioners' claims are not barred by the doctrine of laches, and this Court does in fact have subject matter jurisdiction over this case. Accordingly, this matter should proceed to the full hearing scheduled to take place on September 28, 2022, and Petitioners' Application for Special Relief in the Form of a Preliminary Injunction should be granted.

II. ARGUMENT

A. PETITIONERS' CLAIMS ARE NOT BARRED BY THE DOCTRINE OF LACHES

Though the majority of Respondents have correctly identified that laches—an equitable bar to prosecution of stale claims, *see Fulton v. Fulton*, 106 A.3d 127 (Pa. Super. 2014)—does not apply to the case at hand, three Respondents (Philadelphia County, Delaware County, and the Proposed Intervenors) have nevertheless raised laches as an affirmative defense. Their argument, however, rests on an improper understanding of both the facts and the law.

Respondents allege that Petitioners have inexcusably delayed bringing suit, and that this suit could properly have been brought any time in the last two years. (*See Answer of Resp't Philadelphia County*, at 4). However, this is an inaccurate assessment of the timeline of events. First, as Petitioners note, it was not until June of 2021 that Governor Wolf vetoed House Bill 1300, which would have addressed

cure procedures for non-compliant mail-in and absentee ballots and rendered this lawsuit moot. (*See* Pet. for Review at 17). It was not until after this point—October 27, 2021—that Petitioner RNC began seeking information about Counties’ ballot-curing measures via Right to Know Law inquiries, although those requests were being formulated prior to that date. Moreover, Petitioners—who include ordinary voters from counties across the Commonwealth—were not aware of the cure procedures being challenged until quite recently. Indeed, it was only in the litigation in *Dondiego v. Lehigh County Board of Elections, et al.*, Civil Action No. 5:22-cv-02111 (E.D. Pa. 2022), that the public was put on notice of the impending cure procedures to be implemented for “Naked Ballots” in the counties involved in that lawsuit. That litigation was not commenced until May 2022 and did not reach a settlement addressing the cure procedures to be implemented until June 15, 2022, a mere two-and-a-half months before Petitioners brought this claim. (*See* Pet. for Review, ex. F).

In addition to being improvidently raised, as discussed in Petitioners’ Application for Leave to Reply (*See* Pet’r’s Application for Leave at 2), Respondents fail to meet their burden of proof under the law. “The party asserting laches as a defense must present evidence demonstrating prejudice from the lapse of time.” *Balsbaugh v. Commonwealth Dep’t of Gen. Servs.*, 815 A.2d 36 (Pa. Commw. 2003). This is a high bar, and Respondents fail to sufficiently allege that any small

delay in filing has sufficiently prejudiced them to bar the present request for injunctive relief or this litigation. “Laches arises when a defendant's position or rights are **so prejudiced** by length of time and inexcusable delay, plus attendant facts and circumstances, that it would be an injustice to permit presently the assertion of a claim against him.” *Nilon Bros. Enterprises v. Lucente*, 461 A.2d 1312 (Pa. Super. 1983) (emphasis added). Moreover, any showing of prejudice must be made through “clear, precise and unequivocal evidence.” *Bd. of Ed. of Sch. Dist. of Philadelphia v. Philadelphia Fed'n of Tchrs. Loc. No. 3, AFT, AFL-CIO*, 397 A.2d 1273 (Pa. Commw. 1979).

Here, Respondents have alleged only vague and speculative harms that may occur if a preliminary injunction is granted, such as costs of adjusting their practices and retraining their staff. Nowhere do Respondents make *any* specific evidentiary showing demonstrating that they will actually incur costs, let alone costs sufficient enough to render it unjust to grant an injunction that would prevent potentially illegal election practices from taking place until the Court renders a decision on the propriety of those practices. Moreover, even if the Court were to accept the Respondent's argument that they would incur some harm as a result of a preliminary injunction, this harm is not the type of prejudice that the laches defense is intended to prevent. Generally, Courts look to whether the delay has caused any prejudice that would harm the Respondents' position in the litigation such as evidence “that a

witness has died or become unavailable, that substantiating records were lost, or that the defendant has changed [her] position in anticipation the opposing party has waived his claims.” *Commonwealth ex rel. Pennsylvania Att’y Gen. Corbett v. Griffin*, 946 A.2d 668, 677 (Pa. 2008). Indeed, as the Court accepted in *Pennsylvania Fed’n of Dog Clubs v. Commonwealth*, “[e]ven if compliance with a court order [is] ‘extremely burdensome,’ that is quite different than the kind of prejudice required to successfully invoke laches.” 105 A.3d 51, 58 (Pa. Commw. 2014), *aff’d*, 115 A.3d 309 (Pa. 2015). It is certainly possible that the Respondents may incur some degree of cost if a Court enjoins their potentially illegal vote-curing. These kinds of costs, however, do not constitute “prejudice” for the purpose of invoking the affirmative defense of laches. Respondents have not shown that Petitioners’ choice to file suit after seeking more information on vote-curing processes has negatively impacted their litigation position in any way. Consequently, a defense of laches should be unavailable.

Given the Respondents’ misinterpretation of the factual basis for this action, Respondents’ lack of clear and specific evidence in support of their affirmative defense, as well as the inapplicability of the speculative harms which Respondents *do* allege, it is clear that Petitioners’ Application is not barred by the doctrine of laches.

B. THE COMMONWEALTH COURT HAS ORIGINAL JURISDICTION OVER THIS MATTER BECAUSE THE BOARD OF ELECTIONS IS PART OF THE PENNSYLVANIA COMMONWEALTH GOVERNMENT.

The Commonwealth Respondents contend that this Court lacks subject matter jurisdiction over this matter on the grounds that the boards of election must be sued in the trial court, and that the Commonwealth party is not an indispensable party. That contention is patently erroneous.

This Court's jurisdiction to hear such matters is specifically set forth in 42 Pa. C. S. § 761 which provides that **“the Commonwealth Court shall have original jurisdiction of all civil actions or proceedings: (1) against the Commonwealth government, including any officer thereof, acting in his official capacity. . .”** (emphasis added). Similarly, 42 Pa. C.S. § 764 specifically governing election contests and other matters provides that **“the Commonwealth Court shall have exclusive original jurisdiction** of (1) [c]ontested nominations and elections of the second class under the act of June 3, 1937. . . known as the ‘Pennsylvania Election Code.’ (2) [a]ll matters arising in the Office of the Secretary of the Commonwealth relating to Statewide office, except nomination and election contests within the jurisdiction of another tribunal. It is well settled the county boards of elections *are* included as part of the Commonwealth government as defined in this statute and subject to the jurisdiction of this court for this matter.

In *Phila. Parking Auth. v. AFSCME, Dist. Council 33, Local 1637*, 845 A. 2d 245 (Pa. Commw. 2003), the Commonwealth Court defined a “commonwealth government” as “the departments, **boards**, commissions, authorities and officers and agencies of the commonwealth, but the term does not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority.” *Id.* (emphasis added). A “local authority” is defined in Section 1991 of the Statutory Construction Act of 1972 as “a municipal authority or other body corporate and politic created by one or more political subdivisions pursuant to statute.” 1 Pa. C.S. § 1991.

The county boards of elections are part of the “commonwealth government” and are not “local authorities” under these definitions. First, the County Boards of Elections are formed by statute (specifically, Section 301(a) of the Election Code); they are *not* created by a political subdivision. *See* 25 P.S. § 2641(a); *see also In re Nomination Petition of Griffis*, 259 A.3d 542 (Pa. Commw. 2021) (citing § 2641(a)); *Cnty. of Fulton v. Sec’y of the Commonwealth*, 276 A.3d 846 (Pa. Commw. 2021) (“Whether prevention [with the tampering of election equipment] is the responsibility of the Secretary or the county boards of elections, or both, is not clear. **Both are government agencies created by the General Assembly** with discrete and separate roles to fulfill toward the end of honest elections in Pennsylvania.... **The county board of elections** are not bureaus within the Department of State subject to

management by the Secretary of the Commonwealth. They *are separate and standalone government agencies*. *Id.* at 861.

Similarly, the Pennsylvania Election Code grants boards limited authority to promulgate regulations consistent with the laws that are necessary for effective election administration. This provision of the election code has not been altered in 85 years. *See* Election Code at § 302(f) (granting county boards of elections the authority “[t]o make and issue such rules, regulations and instructions, **not inconsistent with law**, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” P.L. 1333, art. III, § 302(f) (emphasis added). In addition, § 2642(f) of the Election Code grants county boards of elections the authority “[t]o make and issue such rules, regulations and instructions, **not inconsistent with law**, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” 25 P.S. § 2642(f) (emphasis added). *See also* *Cnty. of Fulton* (“Section 302 imposes mandatory duties upon the county boards of elections as well as discretionary authority and powers, such as the power to promulgate regulations.”); *In re Canvassing Observation*, 241 A.3d 339, 350 (Pa. 2020), *cert. denied sub nom.* Accordingly, the Boards are part of the “commonwealth government” as set forth in 42 Pa. C.S. § 761 and therefore the Commonwealth Court has original jurisdiction over this matter.

Moreover, all of the named Respondents in this matter are indispensable parties to this case. Respondents contend that the Acting Secretary of the Commonwealth and the Director of the Pennsylvania Bureau of Election Services and Notaries (the “Department of State Respondents”) are not indispensable parties because the Petition does not challenge any decision or exercise of authority by the Department of State Respondents. This is simply incorrect.

A party is indispensable when his rights are so connected with the claims of the litigants that no decree can be made without impairing those rights. *Banfield v. Cortes*, 922 A. 2d 36 (Pa. Commw. 2007). Here, the Department of State Respondents are indispensable. In fact, the Acting Secretary has previously opined on the issues in this case by taking the position that the Election Code does not provide for cure procedures to address voters’ failure to comply with signature and secrecy envelope requirements, and in other contexts has argued that the Election Code’s silence on a matter does not vest the boards of elections with discretion to take matters into their own hands. *See* Petitioners’ Memorandum of Law in Support of Petitioners’ Application for Special Relief in The Form of a Preliminary Injunction Under Pa. R.A.P. 1532 at pp. 27-28. *See also* May 28, 2020 email from the Secretary addressing questions regarding proper disposition of absentee/mail-in ballot which did not enclose the voted ballots in the official election ballot envelope (secrecy envelope) which states:

Though the Election Code requires county boards of elections to set aside absentee or mail-in ballots enclosed in official election ballot envelopes that contain “any text, mark or symbol which reveals the identity of the elector,” there is no statutory requirement, nor is there any statutory authority, for setting aside an absentee or mail-in ballot solely because the voter forgot to properly insert it into the official election ballot envelope, See 25 P.S. § 3146.8(g)(4)(11). To preserve the secrecy of such ballots, the board of elections in its discretion may develop a process by which the members of the pre-canvass or canvass boards insert these ballots into empty official election ballot envelopes or privacy sleeves until such time as they are ready to be tabulated. Please consult with your solicitor about your plans to deal with such instances should they occur during the pre-canvass or canvass.

This email clearly shows that the Commonwealth Respondents were intricately involved in the issues currently before this Court and for the Respondents to now argue that the Application “does not challenge any action by the Department of State Respondents” is disingenuous. *See* the Commonwealth Respondents’ Brief in Opposition to Petitioners’ Application at 14. As such, the failure to join the Department of State Respondents would in fact be the failure to join an indispensable party in this case as they are intimately connected with the claims set forth in Petitioners’ Application and have adopted the position of Petitioners on its website (no cures) allowed.

CONCLUSION

For all of these reasons, as well as the arguments previously set forth in Petitioners’ Application for Special Relief in the Form of a Preliminary Injunction

and the Memorandum in Support, Petitioners' Application for a Preliminary Injunction should be granted.

Respectfully submitted,

Dated: September 21, 2022

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VERIFICATION

I hereby aver that the statements of fact contained in the attached **Petitioners' Omnibus Reply in Support of Its Application for Special Relief in the Form of a Preliminary Injunction** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: Benjamin Mehr

**Benjamin Mehr, Litigation Counsel
Republican National Committee**

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**CERTIFICATE OF COMPLIANCE
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I certify that this filing complies with the provisions of the *Public Access Policy of the United 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.

GALLAGHER GIANCOLA LLC

Dated: September 21, 2022

/s/ Kathleen A. Gallagher

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