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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA SENATE INTERGOVERNMENTAL OPERATIONS COMMITTEE, *Petitioner*, v. PENNSYLVANIA DEPARTMENT OF STATE AND LEIGH CHAPMAN, IN HER CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH, ET AL., *Respondents*.	No. 95 MD 2022

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COMMITTEE'S ANSWER TO APPLICATION FOR RELIEF DISMISSING THE PETITION FOR REVIEW AS MOOT

Moot cases should be resolved if any one of three exceptions to the mootness doctrine apply. Here, all three are triggered. This warrants denying Respondents' Application for Relief Dismissing the Petition for Review as Moot (the Application). In turn, Petitioner Pennsylvania Intergovernmental Operations Committee (the Committee) asks the Court to resolve the merits of this dispute.

I. BACKGROUND

As the underlying facts have been thoroughly briefed in previous filings, the Committee does not recite them at length here. Instead, it writes only to respond to a particular dimension of the Application.

Specifically, Respondents' brief infers the Committee has been dilatory in pursuing relief. This is factually incorrect.

On September 15, 2021, the Committee issued the subpoena and served it on the then-Acting Secretary, with a return date of October 1, 2021. PFR at ¶ 20, Ex. A. Just two days later, on September 17, 2021, various Democrat Senators filed a Petition for Review with this Court, challenging the subpoena. *See* 310 MD 2021. Next, on September 23, 2021, just eight days after the subpoena was issued (before a response to it was yet due), the Department of State and the Acting Secretary filed their Petition for Review challenging the subpoena. *See* 322 MD 2021. Yet another Petition for Review followed on September 28, 2021, this one by Senator Arthur Haywood and Julie Haywood. *See* 323 MD 2021. All three matters were consolidated on October 4, 2021 (hereafter, the Consolidated Action).

Next, throughout October 2021, the parties to the Consolidated Action moved for summary relief, and the Court, on October 26, 2021, granted the parties' joint application to expedite briefing and review. The Court also listed the matter for oral argument in December 2021, and argument was, in fact, held on December 15, 2021. Thereafter, on

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January 10, 2022, the Court denied all applications for summary relief, save one (by Secretary-Parliamentarian Megan Martin).

Just two days later, on January 12, 2022, the Court held a status conference in the Consolidated Action to discuss next steps. A short time thereafter, the Court entered an order on January 25, 2022, questioning jurisdiction over the Consolidated Action and asking for briefing. That jurisdiction briefing closed on February 22, 2022.

Just three weeks after the close of briefing on jurisdiction in the Consolidated Action, the Committee filed its Petition for Review in this matter on March 11, 2022, doing so solely to acknowledge the possibility that the Court might dismiss the Consolidation Action. Respondents timely filed preliminary objections on April 15, 2022. After the Committee answered the preliminary objections on May 13, 2022, it then filed for summary relief the same day. Next, various filings and answers related to intervention were submitted throughout May and June 2022, and the Court held a hearing on intervention in July, ultimately granting relief on July 13, 2022. That same day, the Court also listed the preliminary objections and the summary relief application for argument in September 2022. The order also listed for

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argument the jurisdiction question briefed in the Consolidated Action. Thereafter, throughout August 2022, further briefing was submitted by the parties in this matter—all on an expedited schedule set by the Court. Argument on all issues was held on September 12, 2022.

As of the date of this filing, the Court has not issued an opinion on the issues argued on September 12. Respondents filed the Application on December 5, 2022.

The foregoing history reveals that *continuous* proceedings before this Court have been underway on *multiple* dockets under *multiple* expedited briefing schedules since September 2021. This hardly shows any dilatory action by the Committee in seeking to enforce the subpoena. Thus, Respondents' suggestion that any mootness here was *caused* by the Committee's purported "inactivity" is meritless.

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II. ARGUMENT

Respondents are correct that this matter is now moot, but that alone does not compel dismissal. Even where a case has become moot, the Court may proceed to the merits if any one of three exceptions apply. *See Sierra Club v. Pa. Pub. Util. Comm'n*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997) (*en banc*), *aff'd*, 731 A.2d 133 (Pa. 1999). Those

exceptions arise "[1] where the conduct complained of is capable of repetition yet likely to evade review, [2] where the case involves issues important to the public interest or [3] where a party will suffer some detriment without the court's decision." *Id.* (numbers added). In this matter, all three of the foregoing apply, and, in consequence, the Court should deny the Application.

A. The conduct complained of is capable of repetition yet evading review.

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For this exception to apply, two elements must be shown: "(1) that the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration; and (2) that there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Philadelphia Pub. Sch. Notebook v. Sch. Dist. of Philadelphia*, 49 A.3d 445, 449 (Pa. Cmwlth. 2012). Where both elements are satisfied, a technically moot matter can be resolved. *See Clinkscale v. Dep't of Pub. Welfare*, 101 A.3d 137, 139-40 (Pa. Cmwlth 2014) (applying exception where records requester would likely again need her DPW file for appearance before DPW Bureau of Hearing and Appeals); *Philadelphia Pub. Sch. Notebook*, 49 A.3d at 449 (applying exception where School Reform Commission had pattern of voting on

proposed resolutions just two weeks after public discussion, but was denying access to such resolutions); *see also Sierra Club*, 702 A.2d at 1134 (applying exception where Court held PUC policy regarding providing hearing transcripts was "likely to be repeated"). Both elements are satisfied in this matter.

As to the first element, the challenged action is Respondents' non-compliance with a lawfully issued Senate subpoena, seeking records the Committee is entitled to under both the Senate's constitutional power to conduct legislative investigations and the Administrative Code. *See* PFR at ¶¶ 6-7, 12, 41-43, 51, 56; *see also* Pa. Const. art. II, § 11; 46 P.S. § 61; 71 P.S. §§ 272 & 801. Next, because the General Assembly is a continuing body for just two years, *see* Pa. Const. art. II, § 4; *see also* 101 Pa. Code § 7.21(a), and because after adjournment *sine die* pending *legislative* matters expire, *see Brown v. Brancato*, 184 A. 89, 93 (Pa. 1936); *see also* 101 Pa. Code § 7.24(b),[1] the challenged action is too short to be fully litigated before becoming moot. Indeed, here, despite

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[1] In contrast to the power to pursue *legislative* matters, the power of the House and the Senate to conduct *impeachment* matters—which are "judicial in nature"—does not expire with adjournment *sine die*. *See* Order, *Krasner v. Ward*, No. 563 MD 2022, at ¶ 7 (Pa. Cmwlth. Dec. 30, 2022); *see also* Brief of Sen. Ward, No. 563 MD 2022, at 16-36 (Pa. Cmwlth. Dec. 16, 2022).

expedited briefings and summary relief applications in both this matter and in the Consolidated Action, this dispute remains unresolved some 16 months after the subpoena was served in September 2021. This is so because the significant—and rare[2]—issues posed by this matter have taken, appropriately, meaningful time for this Court to resolve. And even if these important issues had been resolved before now without this Court's thoughtful consideration, an appeal by the non-prevailing party(ies) would have followed, virtually ensuring the review would not have been completed within two years. This will *always* be the case: adjournment *sine die* always happens after two years under the State Constitution.

As to the second element, there is a reasonable expectation that the Committee will be subjected to the same action again. On this element, this Court has explained that satisfying it does not require the petitioning party to show identical facts will arise in the future, instead, the party need only show that the same "legal issue," which is "not dependent upon any particular underlying facts," will "recur[.]" *See*

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[2] Disputes regarding legislative subpoenas are infrequently brought before Pennsylvania Courts, which is precisely why so many issues of substance and procedure have arisen here.

Philadelphia Pub. Sch. Notebook, 49 A.3d at 449 n.3. Here, under the Constitution and the Rules of the Senate, the Committee will in the future have the same power of subpoena. *See, e.g.*, Pa. Const. art. II, § 11; *see also* Senate Rule 14(d)(2)-(3), Senate Resolution No. 3, Session of 2023 (adopted Jan. 3, 2023; adopting the Rules of the Senate for the 207th and 208th Regular Session).[3] It will likewise continue to have the same power to make administrative demands on the Secretary of the Commonwealth and the Department of State under the Administrative Code and the Senate Rules. *See* 71 P.S. §§ 272 & 801; Senate Rule 14(d)(2) ("In order to carry out its duties, each standing committee is empowered with the right and authority to inspect and investigate the books, records, papers, documents, data, operation and physical plant of any public agency in this Commonwealth."). The legal issue of whether this Acting Secretary, or any in the future, can refuse to comply with a duly issued subpoena and/or an administrative demand will recur, and it will not depend on any given set of facts. Hence, this element is satisfied as well.

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[3] *Available at* https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2023&sessInd=0&billBody=S&billTyp=R&billNbr=0003&pn=0003.

As a final note on this exception, the Committee urges the Court to consider the incentives created by an order dismissing this case without reaching the merits. If so resolved, future recipients of legislative subpoenas (and administrative record demands), who do not wish to comply, will be incented to delay, delay, delay—knowing they just have to "run out the clock." Further, incentives will be created on the other side of the transaction. Senate committees will be forced to rush out subpoenas as early as possible in each two-year term, and will be *disincentivized* from offering extensions, negotiating terms, or extending any time-consuming courtesy. Such future committees will also have every reason to rush to this Court to demand immediate compliance, knowing that if the case is not tried to an end within two years, the demands for records or information can simply be ignored or stalled by the subpoena recipient. None of the foregoing is in the interest of justice or good government, but all will be on the table if this matter is simply dismissed.

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B. This case involves issues important to the public interest.

Exactly what constitutes a sufficiently important public interest to warrant reaching the merits of a moot case has taken many forms, including, but not limited to:

- Conduct that "imperils" public trust, including claims implicating "official competency, candor and accountability," *see Musheno v. Dep't of Pub. Welfare*, 829 A.2d 1228, 1233 (Pa. Cmwlth. 2003);
- Access to public records, *see Sierra Club*, 702 A.2d at 1134;
- Claims implicating the proper interpretation of a statute governing an agency, *see SEPTA v. Weiner*, 426 A.2d 191, 192-93 (Pa. Cmwlth. 1981) (*en banc*); and
- Issues "important to the public's economic interest." *See Cytemp Specialty Steel Div., Cyclops Corp. v. Pa. Pub. Util. Comm'n*, 563 A.2d 593, 597 (Pa. Cmwlth. 1989).[4]

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This case likewise involves issues of sufficient public importance to justify reaching the merits.

Specifically, this case implicates the public's interest in elected officials in the Senate being able to fulfill their constitutionally committed legislative function to investigate and legislate. It also implicates, at least according to Respondents, the public's interest in

[4] The *Cytemp* Court did not find the issue presented to be technically moot, but reasoned that even if the case were moot, the Court would still reach the merits based on exceptions to mootness. *See id.* at 597.

the appropriate level of information sharing between branches of Commonwealth government, particularly where individual rights are purportedly implicated. Further, the merits of this case will set a baseline on various aspects of legislative subpoenas and information demands, including, specifically, when and how Executive Branch officials can refuse such demands, and what, if any, balancing of claimed rights needs completed before responses are given by such officials.

In the end, that this case involves public officials on both sides of the caption—each claiming to vindicate rights of Pennsylvania's citizens—should underscore the inherent public interests at stake. This warrants review, not dismissal for mootness.

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C. The Committee will suffer detriment without the Court's decision.

This exception generally requires a showing that if the case is not resolved, some legacy of the dispute will continue to cause harm to the petitioner. *See J.J.M. v. Pa. State Police*, 183 A.3d 1109, 1112 (Pa. Cmwlth. 2018) (finding detriment where without court declaration, petitioner would have to register as offender in other states); *Haas v. West Shore Sch. Dist.*, 915 A.2d 1254, 1258 (Pa. Cmwlth. 2007) (finding

detriment where without ruling, appellant would have incident involving school discipline on school record and it might require future disclosures). Such a detrimental legacy stands to emanate from this case if it is declared moot without reaching the merits.

This is so because Respondents' steadfast refusal to comply with a valid and lawful Senate subpoena—and now apparently successful effort to "run out the clock" on the ability to enforce it—will stand as a harmful factual playbook for future Commonwealth officials and agencies. The harm is that the Committee was *attempting* to formulate remedial election-related legislation, but received no information under the subpoena (indeed, the Acting Secretary refused to acknowledge its legitimacy of enforceability), instead receiving only a handful of "voluntary" productions from the Acting Secretary that proved inadequate. The Senate's job, along with the House, is to legislate, and to do so well, it needs information. A legislative subpoena is one of the ways it gets that information. But the legacy of this case will be the blunting of this important information-gathering tool by showing future officials that if they do not wish to help in a legislative endeavor they can go to this Court and allow the natural pace of such proceedings to

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stall the matter. And to be clear, the Committee is not suggesting Respondents acted inappropriately in pursuing judicial relief; instead, it is simply underscoring that even appropriate requests for judicial review take time to resolve, and here there is precious little of that time given the two-year tenure of Senate committees.

Accordingly, the Court should likewise find the detriment exception to mootness is satisfied here.

III. CONCLUSION

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Even though this dispute is now moot, under any of the three exceptions to mootness, this Court can and should resolve the merits. Above all else, such a result would be beneficial to the public, since a merits disposition—in favor of the Committee *or otherwise*—would set important rules for future disputes of this kind, and perhaps obviate the need for future judicial involvement in what should otherwise be the mundane functioning of government. Therefore, the Committee respectfully requests that the Court deny Respondents' Application and thereafter proceed to the merits of this dispute.

Respectfully submitted,

Dated: January 5, 2023

/s/ Matthew H. Haverstick

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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.

Dated: January 5, 2023 /s/ Matthew H. Haverstick

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