

ELECTION MATTER

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100 MAP 2022

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

100 MAP 2022

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Appellants,

v.

LEIGH M. CHAPMAN, in her capacity as
Acting Secretary of the Commonwealth of Pennsylvania, *et al.*,

Appellees.

BRIEF OF APPELLEE LUZERNE COUNTY BOARD OF ELECTIONS

Appeal from the September 29, 2022, Order of the Commonwealth Court
(Ceisler, J.), denying Appellants' Application for Special Relief
in the Form of a Preliminary Injunction

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**ARGUMENT IN ADDITION TO BRIEF FILED
IN COMMONWEALTH COURT**

Pursuant to Pa.R.A.P. 2139, Appellee Luzerne County Board of Elections ("Board") submits the brief it filed in this matter in Commonwealth Court, and includes the present additional argument.

In that prior brief, *infra*, along with noting that the Board's nearly two-year old policy regarding defective mail-in ballots is inoffensive to the Election Code, the Board argued that the doctrine of laches applies and bars this action due to Appellants' delay. While the Board continues to advance the position that Appellants cannot sustain their burden to obtain injunctive relief (consistent with the decision below), it urges this Court to apply laches and preclude this matter from proceeding.

The relief which laches affords is particularly appropriate here. The Board's policy regarding defective mail-in ballots has been implemented in each election conducted in Luzerne County since 2020, yet Appellants waited until September of this year to initiate the present challenge. Coupled with this inexcusable delay is the prejudice it has fostered. In its argument below, the Board stressed the prejudice it has experienced in the interruption of its efforts to effectuate an efficient and fair election next month. But the Board also recognized the prejudice befalling the electorate which has come to rely on the Board's nearly two-year old policy.

In election matters, it is essential that such ancillary prejudice, in addition to that which a governmental respondent may suffer, is recognized as equally important to the laches question. *See, e.g., Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Cmwlth. 2004)(a late challenge to implementation of a referendum "prejudice[d] th[e Election] Board since it ha[d] already begun to act upon the referendum's terms, and ***prejudice[d] the electorate*** that ha[d] enacted the provision and await[ed] its implementation.")(emphasis added). In *Kelly v. Commonwealth*, — Pa. —, 240 A.3d 1255, 1257 (2020), *cert. denied sub nom. Kelly v. Pennsylvania*, — U.S. —, 141 S. Ct. 1449, 209 L. Ed. 2d 171 (2021), this Court likewise addressed a late electoral challenge, finding that the “disenfranchisement of millions of Pennsylvania voters [established] “substantial prejudice” for laches purposes.

As election challenges continue to be mounted, often at the eleventh hour, it is important for this Court to affirm that the prejudice prong of laches in manifest not only in the impeding of governmental bodies, but (even more importantly) in how the electorate is harmed. The *Koter* reasoning is solid law, but is precedent of Commonwealth Court, not this Court. The *Kelly* holding would suffice if it were not found in a *per curiam* decision.¹

¹ As this Court has held, "the legal significance of *per curiam* decisions is limited ... and [] such decisions are not precedential, even when they cite to binding authority." *Cagey v. Commonwealth*, 645 Pa. 268, 179 A.3d 458, 467 (2018) (internal citations omitted).

Given the firm foundation upon which the present case rests with regard to the laches implication, and given the harm which Appellants' actions have inflicted (at least in the context of this Board and the Luzerne County electorate it serves), it is respectfully suggested that the Court articulate the principles outlined in both *Koter* and *Kelly* in a precedential decision that will preclude litigants from engaging in future deferred electoral mischief.

The remainder of this brief is, pursuant to Pa.R.A.P. 2139, the argument content submitted to Commonwealth Court.

Introduction:

The Court has directed the parties and Intervenors (parties) to file and serve briefs regarding two issues: (1) the potential of laches as a bar to the relief Petitioners seek; and (2) any argument relative to the remaining criteria for issuance of a preliminary injunction. In addition, the Court has directed the parties to file a joint stipulation of exhibits. The Luzerne County Board of Elections (Board)² has submitted its exhibit for that joint filing (attached as Exhibit 1). In so doing, the Board takes no position regarding the acceptance or consideration of any exhibit submitted by any other party. Further, the Board takes no position regarding any argument which may be submitted by any other party in its brief, but instead offers the present submission relative to the impact Petitioners' position has and will continue to have on the Board's duties until this matter is resolved.

Argument:

I. Laches

As noted in its submission to the stipulated facts as directed by this Court's September 9, 2022 Order (attached as Exhibit 2), the Board has implemented a procedure regarding defective mail-in and/or absentee ballots (mail-in ballots) since the November 2020 election, and each primary, general, municipal and

² Pursuant to Section 8.04 of the Luzerne County Home Rule Charter (as amended), the official name of the Board is the "Luzerne County Board of Elections and Registration."

special election thereafter. This procedure is quite anodyne, and encompasses no offense with which Petitioners' requests seek to address.³ While that fact alone should extract the Board from Petitioners' efforts, it also makes clear that if the Board's mail-in correction procedure were somehow violative of any electoral or constitutional provision, remedial action could have been sought long before the date the present petition was filed. As such, Petitioners' action is barred by laches.

As this Court is well aware, county boards are already in the midst of administering the November 2022 election. Mail-in ballot processes are underway (as are those relative to overseas and military voters), but those who have relied on the Board's protective procedures since November 2020 regarding defective mail-in ballots are now in limbo given the Board's tabling of consideration of those procedures in light of this litigation. Exhibit 1. That disruption has already negatively impacted the voters of Luzerne County and interfered with the Board's statutory and constitutional duties to effectuate a smooth electoral process. This is the height of prejudice to the Board and its obligations to the electorate.

"Equity has established the doctrine of laches to preclude actions that are brought without due diligence and which result in prejudice to the non-moving

³ As noted in its stipulated fact submission, the Board simply compiles a list of those defective mail-in ballots as they are pre-canvassed on Election Day, and several times that day notifies the major political party (and other party) representatives who have provided contact information, and also provides this information to the Election Bureau. The Board takes no further action such as contacting the elector.

party." *In re Wissahickon Playground*, No. 2492 CD 2015, 2017 WL 1152563, at 2, n.5 (Pa. Cmwlth. Mar. 28, 2017)(cited pursuant to Commonwealth Court I.O.P. § 69.414; quoting *Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Cmwlth. 2004)).

In *Koter*, this Court addressed a challenge to the results of a referendum dealing with the Home Rule Charter of the City of Wilkes-Barre. Although the challenging petitioners had waited "nearly thirteen months following the election" to mount their challenge, the trial court accepted their position and overturned the referendum results. *Id.* at 31, 34. In reversing, this Court held that the trial court "erred in failing to apply the equitable doctrine of laches to preclude the suit." *Id.* at 35.

The *Koter* court explained further that the petitioners' argument that its reason for delay, i.e., that the election board had not implemented the results of the referendum for nearly a year after the election, was incorrect since "the triggering event for the challenge was not the government's implementation of the referendum," but was when the election results were clear: "A determination as to whether the complaining party acted with due diligence will depend on what the party might have known based on the information within its reach." *Id.* at 34.

In the present case, the nearly two year old procedure which the Board has implemented to address defective mail-in ballots was adopted in public session, provided to the representatives of the political parties (including those party

entities affiliated with Petitioners) and has been functioning undisturbed through repeated elections since 2020. The "triggering event" for Petitioners' to take action so vastly preceded the date upon which it instituted the present case as to unquestionably satisfy the "lack of due diligence" prong of the laches doctrine.

With equal certainty, requisite "prejudice" has likewise been established.

As noted above, the Board has disrupted its usual conduct of elections by deferring further implementation of the defective mail-in ballot procedure. Exhibit 1. As further noted, this disruption coincides with the conduct of the November election which is *already* underway through processing of mail-in and overseas ballot requests and other electoral mandates. Long ago, our Supreme Court (in a different but analogous context) noted the wisdom of applying the doctrine of laches so as to assure "government service may be disturbed as little as possible ..." *Com. ex rel. Oliver v. City of Wilkes-Barre*, 73 A.2d 420, 421 (Pa. 1950)(internal citation omitted). In such circumstances, "the application of the doctrine of laches [is] peculiarly appropriate in the interests of justice and sound public policy." *Id.*

The *Koter* court echoed a similar sentiment. Finding that "[p]rejudice can be found where a change in the condition or relation of the parties occurs during the time the complaining party failed to act," the Court noted that the petitioners' "challenge at this late date prejudices the Board since it has already begun to act

upon the referendum's terms, and *prejudices the electorate* that has enacted the provision and awaits its implementation." *Koter*, 844 A.2d at 34 (emphasis added).

In the present case, the Board has "already begun to [en]act" procedures for conduct of the instant election which is being conducted at this moment. This "disturb[ance]" to "government service," *Com. ex rel Oliver, supra*, is precisely the type of prejudice laches is designed to abate.

But the *Koter* court recognizes an additional aspect of prejudice when laches is considered in the electoral context. In *Koter*, laches was appropriately applied given the prejudice to the "*electorate*" itself, which had a right to rely on the provision at issue. The same is true in the present case, where, as noted previously, the voters of Luzerne County have come to rely with equal value on the procedures the Board has implemented regarding defective mail-in ballots. This reliance has now so rooted in the repeated election cycles since November 2020 that allowing Petitioners' claim to advance further will only exacerbate the already existing prejudice.

Elections abhor uncertainty. As Election Day approaches, Petitioners' delay in bringing this action becomes more damaging to the certainty voters are entitled to assume in their elections. Principles of equity provide a remedy to that uncertainty in a case such as this. That remedy is application of the doctrine of laches which will bring this matter to the swift end it deserves.

II. Preliminary injunction: Petitioners cannot succeed on the merits

Without conceding Petitioners' ability to satisfy any of the six prongs necessary to obtain preliminary injunctive relief, the Board wishes to direct the Court's attention to the question of "success on the merits." As Petitioner cannot so prevail, the preliminary injunction must be denied.

At the status conference the Court held on September 22, 2022, part of the discussion addressed the question of whether county boards of election are authorized to enact any "notice and cure" policies regarding defective mail-in ballots. This discussion centered on the Supreme Court's refusal to *require* boards to implement such policies as noted in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) and the U.S. District Court for the Middle District of Pennsylvania's recognition that the boards *may* adopt such policies. *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D.Pa. 2020). It is the Board's position that its policy is lawful and consistent with the discretion vested in it by law: "[I]t is perfectly rational for a state to provide counties *discretion* to notify voters that they may cure procedurally defective mail-in ballots." *Id.* at 920 (emphasis added).⁴ It is this "discretion" which the Board has

⁴ As noted, the Board's procedure is so passive as to leave any notification of voters to others if they so wish.

exercised in its defective mail-in ballot procedure. As the Supreme Court has recognized, the "legislature[]" has made a "deliberate choice" regarding "the informed discretion of county boards of elections, who are empowered by Section 2642(f) of the Election Code '[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of ... elections officers.'" *In re Canvassing Observation*, 241 A.3d 339, 350 (Pa. 2020), *cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid*, 209 L. Ed. 2d 172, 141 S. Ct. 1451 (2021)(citing 25 P.S. § 2642(f)).

Unless otherwise directed (or actually prohibited) by amendment to the Election Code, the defective mail-in ballot procedure which the Board has implemented (and which is now disrupted by the present action) is well within the "informed discretion" of the Board. Against this backdrop, Petitioners' cannot sustain their claim and will not prevail on the merits. Their request for injunctive relief must fail.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified 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.

Respectfully submitted,

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Exhibit 1

September 21, 2022 Election Board Meeting

Radick, Paula <Paula.Radick@luzernecounty.org>

Sat 9/24/2022 8:20 PM

To: Joseph Cosgrove <JCosgrove@getyourselfagoodlawyer.com>;

Dear Judge Cosgrove:

On behalf of the Luzerne County Board of Elections and Registration (Board), please be advised that on Wednesday, September 21, 2022, on the advice of the Luzerne County Office of Law, the Board deferred action to reaffirm for the General Election 2022 the same procedure relative to defective mail-in and absentee ballots that it has implemented since the General Election of 2020, pending resolution of RNC, et al., v. Chapman, et al.

Paula L. Radick

Paula L. Radick, Esquire

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Exhibit 2

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee, <i>et al.</i> ,	:	
	:	
Petitioners,	:	
	:	
v.	:	447 MD 2022
	:	
Leigh M. Chapman, in her official capacity	:	
as Acting Secretary of the Commonwealth	:	
<i>et al.</i> ,	:	
	:	
Respondents.	:	

SUBMISSION OF RESPONDENT LUZERNE COUNTY BOARD OF ELECTIONS REGARDING STIPULATED FACTS

Pursuant to the Court's Order directing the parties to file a joint stipulation of facts, Respondent Luzerne County Board of Elections submits the following:

The Luzerne County Board of Elections has implemented a procedure regarding "notice and cure" of defective mail-in ballots since the November Election of 2020. This procedure essentially consists of an Election Day pre-canvass of ballots, with those defective mail-in ballots being identified and set aside. At several points during Election Day, a list of those electors whose mail-in ballots have been identified as defective is provided to the Bureau of Elections and designated representatives of the major political parties (and those other parties for whom contact information has been provided to the Board) who may (or may not) thereafter contact the electors.

The Board takes no position regarding other proposed stipulations submitted by the other parties.

Respectfully submitted,

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Respectfully submitted,

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