

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 J.)
BERNSTINE, TIMOTHY F.)
TWARDZIK, DAWN W. KEEFER,)
DAN MOUL, FRANCIS X. RYAN,)
and DONALD "BUD" COOK,)

Petitioners,

v.

NO. 364 M.D. 2022

LEIGH M. CHAPMAN, in her official)
capacity as Acting Secretary of the)
Commonwealth of Pennsylvania, and)
COMMONWEALTH OF)
PENNSYLVANIA, DEPARTMENT)
OF STATE,)

Respondents.

DEMOCRATIC NATIONAL COMMITTEE AND PENNSYLVANIA
DEMOCRATIC PARTY'S RESPONSE TO PETITIONERS'
APPLICATION FOR SUMMARY RELIEF

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AND NOW, this 2nd day of September 2022, the Intervenor-Respondents Democratic National Committee (“DNC”) and Pennsylvania Democratic Party (“PDP”), through their counsel, file this Response to Petitioners’ Application for Summary Relief.

I. INTRODUCTION

1. Just weeks before Pennsylvania voters begin casting their ballots, Petitioners ask this Court to grant their Application for Summary Relief and unravel Act 77. They claim the Third Circuit's recent decision in *Migliori v. Cohen*, 36 F.4th 153, 163-64 (3d Cir. 2022) invalidated a provision of Act 77, thereby triggering its nonseverability clause and voiding the entire law.

2. Petitioners are not entitled to summary relief because their right to judgment is by no means clear and free of doubt. Indeed, they are not entitled to any relief at all for a multitude of independent reasons.

3. As this Court is aware, the particular provision at issue states that voters shall date the declaration on the outer envelope of their mail-in and absentee ballots (the "Dating Provision"). 25 P.S. §§ 3146.6(a), 3150.16(a).

4. The problem for Petitioners is that the Third Circuit's decision in *Migliori* did not overturn any portion of Act 77, but instead interpreted the Dating Provision in a manner consistent with the Civil Rights Act. *See* 52 U.S.C. § 10101 *et seq.* The Third Circuit concluded the voter-provided date requirement on absentee and mail-in ballots was not material in determining whether the voter was qualified to vote and its absence thus could not be the basis for disenfranchising voters. *Migliori*, 36 F.4th at 163-64. In practical effect, the Third Circuit decision establishes

that the still extant Dating Provision is directory rather than a mandatory requirement.

5. Consistently, this Court recently held that under Pennsylvania law, the Dating Provision is to be interpreted as directory rather than mandatory. *See Chapman et al v. Berks County Bd. of Elections et al.*, 355 MD 2022, Slip Op. at 58 (Pa. Commw. Aug. 19, 2022) (“*Berks County*”). *Berks County* was decided in light of *Migliori*, and the President Judge’s analysis clarified that the Third Circuit did not invalidate the Dating Provision.

6. Even if this Court were to reject *Berks County* and determine that *Migliori* did invalidate the Dating Provision, the nonseverability clause would nevertheless be unenforceable under these facts.

7. The mere presence of a nonseverability clause in a statute does not end the inquiry, but rather begins it. Under the Pennsylvania Statutory Construction Act and *Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006), the nonseverability provision is not implicated in these circumstances.

8. Unlike other provisions of Act 77, the Dating Provision was not mentioned during the debate over Act 77’s passage, and therefore the Dating Provision was not so essentially and inseparably connected with Act 77 that it would trigger the nonseverability provision. Likewise, Act 77 can stand alone without the Dating Provision and there is no basis to suggest otherwise.

9. Subsequent amendments to the Election Code, including amendments that revised provisions that were created or rewritten in Act 77, also show the legislature's subsequent intent for the Election Code changes in Act 77 to remain law in Pennsylvania regardless of courts' interpretation of the Dating Provision.

10. Additionally, this Court must deny Petitioners' Application for Summary Relief because granting their requested relief would lead to absurd results. The Election Code—of which Act 77 and later legislation building upon Act 77 are now integral parts—will be impossible to read, interpret, or administer if Act 77's provisions are stripped away.

11. Finally, there are other grounds for the Court to reject the Petitioners' Application for Summary Relief, including standing, laches, and violations of the Pennsylvania Constitution's Free and Equal Elections Clause. These problems with Petitioners' request for relief have been fully argued by other parties; the DNC and PDP join these arguments as set forth below.

12. Therefore, as set forth more thoroughly below, this Court should deny Petitioners' Application for Summary Relief.

II. STATEMENT OF UNDISPUTED FACTS

13. The DNC and PDP incorporate by reference Respondent's Answer to Petitioners' Application for Summary Relief and Expedited Briefing.

14. The DNC and PDP also incorporate by reference the Factual Background section in its Application for Summary Relief.

III. PETITIONERS ARE NOT ENTITLED TO SUMMARY RELIEF.

A. Legal Standard

15. “Summary relief under Pa. R. A. P. 1532(b) is similar to the relief envisioned by the rules of civil procedure governing summary judgment.” *Brittain v. Beard*, 974 A.2d 479, 484 (Pa. 2009). Further, “[a]n application for summary relief may be granted if a party’s right to judgment is clear and no material issues of fact are in dispute.” *Jubelirer v. Rendell*, 953 A.2d 514, 521 (Pa. 2008) (quoting *Calloway v. Pa. Bd. of Probation & Parole*, 857 A.2d 218, 220 n. 3 (Pa. Commw. Ct. 2004)). *See also* Pa. Appellate Law and Practice § 1532.7 (“summary relief and summary judgment are generally treated as interchangeable.”).

16. For the reasons explained below, this Court must deny Petitioners’ Application for Summary relief because not only is their right to judgment not clear, but instead it is Respondents who are entitled to summary relief.

B. The *Migliori* Court Did Not Invalidate Any Portion of Act 77 But Rather Found the Dating Provision Immaterial Under Federal Law.

17. As a starting point, Petitioners’ argument is based on the faulty premise that the Third Circuit in *Migliori* “invalidated” the Dating Provision in Sections 6 and 8 of Act 77.

18. In *Migliori*, the Third Circuit examined under the Materiality Provision of the Civil Rights Act whether the Lehigh County Board of Elections’ (“Lehigh Board”) had properly counted the plaintiffs’ mail-in ballots, which were returned with no flaw other than that they lacked a date on the outer envelope. *Migliori*, 36 F.4th at 162. The Third Circuit held that a voter’s failure to date the outer envelope of their mail-in or absentee ballot is not material in determining whether “such individual is qualified to vote under Pennsylvania law”; in other words, the presence or absence of a date did not impact or determine a voter’s “age, citizenship, residency, or current imprisonment for a felony.” *Id.* at 163.

19. Because the Third Circuit found the Dating Provision was immaterial under the Materiality Provision, “[t]here [] was no basis . . . to refuse to count undated ballots that ha[d] been set aside in the November 2, 2021 election for Judge of the Common Pleas of Lehigh County.” *Id.*

20. In reality, the Third Circuit concluded that federal law preempted any interpretation of the Dating Provision that would have used the absence of a date as a basis to disqualify ballots. *Id.*

21. The *Migliori* decision does not trigger or implicate Act 77’s nonseverability clause, as Petitioners themselves even acknowledge. Indeed, the best Petitioners can muster is that *Migliori* “effectively” invalidated the Dating Provision

in Sections 6 and 8 of Act 77 (25 P.S. §§ 3146.6(a) and 3150.16(a)). *See* Pet. Application for Summary Relief at 6.

22. Nothing in *Migliori* prohibits the Commonwealth from directing voters to date the ballot envelopes, as Act 77 continues to do. Instead, it merely prevents county boards from rejecting ballots from otherwise qualified voters solely on the basis that the voter did not follow that direction.

C. This Court in *Berks County* Recently Held the Dating Provision is Directory, Not Mandatory.

23. Petitioners also incorrectly argue the Dating Provision is a mandatory requirement and that through its interpretation of the Dating Provision, the *Migliori* Court triggered Act 77's nonseverability provision.

24. In support of this argument, Petitioners cite two outdated, nonprecedential opinions in which this Court held that the Dating Provision is mandatory. *See Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989, 2022 WL 16577 (Pa. Commw. Ct. Jan. 3, 2022) ("*Ritter*"); *In re Election in Region 4 in Downingtown Sch. Bd. Precinct Uwchlan 1 Petition of Carpenter*, 272 A.3d 993, 2022 WL 96156 (Pa. Commw. Ct. Jan. 10, 2022) ("*In re Election in Region 4*").

25. On August 19, 2022, however, this Court held the Dating Provision was directory and not mandatory. *Berks County*, Slip Op. at 58.

26. This Court explained:

Upon “consideration of the entire [Election Code], its nature, its object, and the consequences that would result from construing it one way or the other,” *Deibert [v. Rhodes]*, 140 A.515, 517 (Pa. 1928)], the Court concludes that the General Assembly’s intent was for the “shall” used in the dating provisions to be directory, not mandatory, such that timely received absentee and mail-in ballots of qualified Pennsylvania electors are not invalid only because they lack a handwritten date on the return envelope declaration.

*Id.*¹

27. Not only does this Court’s ruling in *Berks County* align with the Third Circuit’s holding in *Migliori*, but *Berks County* also confirms that neither this Court nor the Third Circuit have invalidated any part of Act 77.

D. Even If the Third Circuit Invalidated the Dating Provision, Act 77’s Nonseverability Provision Is Unenforceable Under *Stilp v. Commonwealth* and the Pennsylvania Statutory Construction Act.

28. Petitioners also incorrectly assert that because the nonseverability provision exists, it is automatically enforceable, without any additional analysis.

29. The presence of a nonseverability provision in a statute, is the beginning, not the end, of the inquiry.

¹ In *Berks County*, this Court specifically found *Ritter* was not controlling because (1) the record in *Ritter* did not, unlike in *Berks County*, include boards of elections counting ballots that had return envelopes with incorrect or inaccurate dates on them, consistent with the language of the statute; and (2) *Ritter* involved a challenge of a single county board, not a challenge to several county boards involving some statewide elections, and therefore, the *Ritter* Court did not need to consider “unequal treatment of Pennsylvania electors casting ballots for the same candidates for the same office.” *Id.* at 55-56. This Court also noted that *Ritter* was not binding authority under Rule 126(b) of the Pennsylvania Rules of Appellate Procedure.

30. The enforceability of the nonseverability provision is guided by Pennsylvania's Statutory Construction Act. 1 Pa. C.S. §§ 1501-1991. The Statutory Construction Act establishes a presumption that statutes are severable unless certain exceptions are met. *Id.* at § 1925. Nonseverability provisions run counter to Section 1925's severability presumption and thus have an additional burden. *See Stilp v. Commonwealth*, 905 A.2d 918, 977-81 (Pa. 2006).

31. Consequently, the enforceability of a nonseverability provision is a question of judicial review; a nonseverability provision is not just automatically applied. A nonseverability clause that evades any judicial review necessarily implicates substantial separation of powers concerns. *See id.*

32. In *Stilp*, the Pennsylvania Supreme Court explained that a similarly worded nonseverability provision to the one here "sets forth no standard for measuring nonseverability, but instead, simply purports to dictate to the courts how they must decide severability." *Id.* at 973.

33. Further, the Pennsylvania Supreme Court explained "courts have not treated legislative declarations that a statute is severable, or nonseverable, as 'inexorable commands,' but rather have viewed such statements as providing a rule of construction." *Id.* at 972.

34. In this case, Act 77's nonseverability clause, like the one in *Stilp*, sets no standard for measuring nonseverability. Instead, it attempts to dictate how courts decide severability, which instead should be determined by existing precedent.

35. Because the plain language of the nonseverability provision is not outcome determinative, the Court must analyze whether Act 77 is today nonseverable under Section 1925 of the Statutory Construction Act.

36. Provisions of every statute are severable unless one or both of two exceptions applies: (1) a court finds the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provisions or applications, that it cannot be presumed the General Assembly would have enacted the remaining provisions without the void one; or (2) the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. 1 Pa. C.S. § 1925.

37. In this case, the undisputed material facts show neither exception applies.

38. The legislative history of Act 77 shows the statute as a whole, which concerns many topics unrelated to universal mail-in voting, was not so essentially and inseparably connected with, and so depend on, the Dating Provision that the General Assembly would have enacted Act 77 without the Dating Provisions. *See*

Section II.A. of DNC and PDP's Application for Summary Relief (discussing the legislative history of Act 77).

39. Further, the undisputed material facts establish the Dating Provision was not critical to the legislative compromise that the General Assembly ultimately enacted. *Id.*; see also *McLinko v. Commonwealth, et al.*, ___ A.3d ___, 2022 WL 3039295, at *1 n. 2 (Pa. Aug. 2, 2022) (explaining Act 77 involved a bipartisan compromise involving funding for upgraded voting systems, the expansion of mail-in voting, and the elimination of straight-ticket voting).

40. Nor are the remaining provisions of Act 77 incomplete or incapable of being executed without the Dating Provision. In fact, the *Migliori* Court found the Dating Provision to be immaterial when applied to ballots that have no flaw other than the missing voter-provided date on the envelope. *Migliori* forecloses any argument that Act 77 is now incomplete or incapable of being executed without application of an immaterial provision.

E. Subsequent Amendments to Act 77 Confirm the Intent of the Legislature for Act 77 to Be Part of Pennsylvania Law.

41. The undisputed facts show the General Assembly has amended the Election Code four times since enacting Act 77. However, each subsequent amendment lacked a nonseverability provision, and none of the subsequent bills amended Act 77's nonseverability provision to incorporate the post-Act 77 amendments.

42. If the General Assembly wanted to ensure a nonseverability clause applied to the post-Act 77 amendments so as to preserve the legislative trade-offs at the core of Act 77 in perpetuity, it could have done so. The General Assembly could have achieved this end through express provisions in subsequent Election Code amendments that continued to clarify which provisions of the Election Code were potentially subject to the nonseverability clause. But the General Assembly did nothing of the kind.

43. The Statutory Construction Act presumes that laws are severable. So when the General Assembly decided not to extend and expand the nonseverability provision in Act 94, Act 12, Act 66, or Act 88, that decision demonstrated there was no legislative intent whatsoever that provisions of Act 77, now extensively integrated into the Election Code, would be stripped out based on how the Dating Provision is interpreted.

44. Moreover, each post-Act 77 amendment to the Election Code, including Act 12, acted as an authorization to build upon the underlying portion of the Election Code, including the portions amended or created by Act 77. *See e.g.*, 1 Pa. C.S. § 1953 (“Whenever a section or part of a statute is amended, the amendment shall be construed as merging in to the original statute, become part thereof, and replace the part amended, and the remainder of the original statute and the

amendment shall be read together and viewed as one statute passed at one time”).

45. The post-Act 77 amendments made substantive changes to the Election Code, including changes to sections of Act 77 that are purportedly subject to Act 77’s nonseverability provision. *See e.g.*, Section 1302-D(f) (Act 12’s changes to Section 8 of Act 77); Section 1303-D(a.1) (Act 94’s changes to Section 8 of Act 77). Thus, the post-Act 77 amendments show the General Assembly viewed Act 77 as an important and integral revision of the Election Code upon which legislation should be incorporated. The amendments show the General Assembly never intended that an interpretation of the Dating Provision would somehow invalidate an entire piece of comprehensive legislation and all the amendments that followed it.

F. Subsequent Amendments to the Election Code Make Clear the Absurd Result Sought by Petitioners and Why the Nonseverability Provision Cannot be Applied Under These Circumstances.

46. Further, granting Petitioners’ requested relief would render large swaths of the Election Code nonsensical, vague, and impossible to administer.

47. “The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions. 1 Pa. C.S. § 1921(a). Likewise, “the General Assembly does not intend a result that is absurd, impossible or execution or unreasonable. 1 Pa. C.S. § 1922(1).

48. But that is exactly what would occur if this Court grants Petitioners' Application for Summary Relief because, as noted above, post-Act 77 amendments did not include a nonseverability provision.

49. The result is that Act 77 would vanish but the subsequent amendments would remain intact. In turn, portions of the Election Code would be reduced to word salad. Most, if not all, of Act 12 amendments would make little logical or linguistic sense without Act 77. For example, the Election Code would include references to a defined term ("qualified mail-in elector") but the definition of "qualified mail-in elector" would be stripped out of the Election Code. *See* Section III.B.viii of the DNC and PDP's Application for Summary Relief.

50. Likewise, if the post-Act 77 amendments remained intact, but Act 77 did not, the Election Code would consistently include multiple superfluous terms, including the term "mail-in ballots" – which would be neither a defined term nor a permissible way for electors to vote because Section 8 (Voting by Qualified Mail-In Electors) would be void. *See id.*

51. The Statutory Construction Act prohibits the relief Petitioners request because it would lead to absurd results.

G. Additional Reasons to Deny Petitioners' Application for Summary Relief.

52. In the interest of judicial economy, the DNC and PDP incorporate by reference and join in the arguments referenced below against Petitioners' Application for Summary Relief.

53. Petitioners are not entitled to summary relief because they lack standing to challenge the validity of Act 77. In support of this argument, the DNC and PDP incorporate by reference Section III.A of the Application for Summary Relief filed by Respondents.

54. Petitioners are not entitled to summary relief because their claim is barred by laches. In support of this argument, the DNC and PDP incorporate by reference Section I of the Cross Application for Summary Relief filed by Intervenors-Respondents Democratic Senatorial Campaign Committee ("DSCC") and Democratic Congressional Campaign Committee ("DCCC"), Preliminary Objection 1 of the Preliminary Objections filed by the DSCC and DCCC, and Section III.B of the Application for Summary Relief filed by Respondents.

55. Petitioners are also not entitled to summary relief because granting Petitioners' Application would disenfranchise voters in violation of the Free and Equal Elections Clause of the Pennsylvania Constitution. In support of this argument, the DNC and PDP incorporate by reference Section IV of the Cross-

Application for Summary Relief and Preliminary Objection IV of the Preliminary Objections filed by DSCC and the DCCC.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Petitioners' Application for Summary Relief.

Respectfully Submitted,

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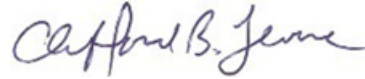
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Dated: September 2, 2022

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CERTIFICATE OF COMPLIANCE

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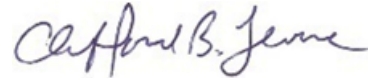


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A true and correct copy of the foregoing document was served upon all counsel of record on September 2, 2022 by this Court's electronic filing system.



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