

Adam C. Bonin
THE LAW OFFICE OF ADAM C. BONIN
121 South Broad Street, Suite 400
Philadelphia, PA 19107
Telephone: (267) 242-5014
Facsimile: (215) 827-5300
adam@boninlaw.com

Uzoma N. Nkwonta*
Noah Baron*
Marilyn Gabriela Robb*
Jacob D. Shelly*
ELIAS LAW GROUP LLP
10 G St. NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490
unkwonta@elias.law
nbaron@elias.law
mrobb@elias.law
jshelly@elias.law

**Admitted Pro Hac Vice*
Attorneys for Intervenor-Respondents DSCC and DCCC

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.

Case No. 364 MD 2022

INTERVENOR-RESPONDENTS DSCC & DCCC'S ANSWER TO PETITIONERS' APPLICATION FOR SUMMARY RELIEF

Intervenor-Respondents DSCC and DCCC (the "Committees") present the following Answer to Petitioners' Application for Summary Relief. In support thereof, the Committees incorporate by reference their Preliminary Objections to the Petition for Review and their Cross-Application for Summary Relief.

The Committees answer the paragraphs of Petitioners' Application as follows¹:

1. The Committees admit that Petitioners are seeking declaratory judgment. The Committees deny that Petitioners are entitled to the relief they seek.

2. Petitioners' Application for Expedited Briefing has been granted, thus no further response is required. The Committees admit that county boards of elections may begin processing mail-in ballot applications before September 19, 2020, but they deny that a rushed litigation schedule is appropriate. Petitioners' assertion that "Time is of the essence in voiding Act 77 as far in advance of the November 2022 general election as possible" is inconsistent with their own litigation tactics. Petitioners delayed bringing this action until more than two years after courts first enjoined applications of Act 77, *see In re Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*,

¹ For the Court's ease of reference, the Committees have attached as Exhibit A a copy of Petitioners' Application with paragraph numbers appended. Each numbered paragraph of the Committees' Answer to the Application corresponds to a numbered paragraph in Exhibit A.

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 (Bucks Cnty. Ct. Com. Pl. June 2, 2020), and now seek to manufacture an exigency just before an election that—if successful—will severely prejudice Respondents, the Committees, and voters who have planned for and rely on no-excuse mail voting. The Committees deny that Act 77 may lawfully be voided in advance of the November 22 general election.

3. The Committees admit that Petitioners are members of the Pennsylvania House of Representatives. The Committees are without sufficient information or knowledge to form a belief as to the truth or falsity of the remaining allegations in Paragraph 3.

4. The Committees admit that Acting Secretary Chapman has continued to implement provisions of the Pennsylvania Election Code that were enacted pursuant to Act 77. To the extent Paragraph 4 purports to characterize the Acting Secretary's judicial filings, those filings speak for themselves and no response is required.

5. Paragraph 5 purports to characterize the Acting Secretary's guidance, which speaks for itself, and no response is required. The Committees deny that the Pennsylvania Department of State has rendered Sections 6 and 8 of Act 77 effectively invalid. The Committees further deny that Section 6 and Section 8 of Act

77 contain “express envelope dating requirements.” These sections are completely silent as to whether a mail ballot must be rejected solely on the basis that the signed declaration on the outer envelope is undated.

6. The Committees deny the allegations in the first sentence of Paragraph 6. The Third Circuit did not hold any provision of Act 77 to be invalid; rather, it harmonized Lehigh County’s ballot counting rules with federal law by holding that the Civil Rights Act precludes county election officials from interpreting Act 77 in a manner that would disenfranchise voters for failing to date the outer envelope. The remaining allegations in Paragraph 6 purport to quote from a judicial opinion and a student-authored legal journal comment, which speak for themselves, and to which no response is required.

7. Paragraph 7 purports to quote from Act 77, which speaks for itself, and no response is required.

8. The first sentence in Paragraph 8 purports to characterize a judicial decision, which speaks for itself, and no response is required. The Committees deny that the Third Circuit prohibited the application of the dating provisions of Sections 6 and 8 of Act 77. The Committees further deny the assertion that “Candidate David Ritter received the third most votes in the election,” given that candidate Zachary Cohen was determined to be the victor after all legal votes were counted, but otherwise admit the allegations in Paragraph 8 providing underlying facts and

history related to the November 2, 2021 election to fill vacancies for the office of Judge of the Court of Common Pleas of Lehigh County.

9. The Committees admit that the LCBE convened a public hearing and voted 3-0 to count the undated ballots. The Committees further admit that, after this decision was reversed by the Commonwealth Court, voters sued the LCBE in the United States District Court for the Eastern District of Pennsylvania, arguing that the decision not to count ballots on the basis of an undated outer envelope violated their rights under the Materiality Provision of the Civil Rights Act. The remaining allegations in Paragraph 9 purport to characterize judicial decisions, which speak for themselves, and no response is required.

10. Paragraph 10 purports to characterize a judicial decision, which speaks for itself, and no response is required. The Committees deny that the Third Circuit eliminated a mandatory requirement from Sections 6 and 8 of Act 77 and further deny that any such elimination triggers the nonseverability provisions of Section 11 of Act 77.

11. Paragraph 11 purports to characterize judicial decisions, which speak for themselves, and no response is required.

12. Paragraph 12 purports to characterize judicial decisions, which speak for themselves, and no response is required. The Committees deny that “this Court concluded [in *In re Election in Region 4*] that the ‘prevailing view of our Supreme

Court [in *In re 2020 Canvass*] is that of Justice Wecht[.]” The two-sentence per curiam order in *In re Election in Region 4* did not include any discussion of the Supreme Court’s decision in *In re 2020 Canvass*. See *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 993, 994-95, 2022 WL 96156 (Pa. Commw. Ct. 2022). Petitioners purport to quote from the Memorandum Opinion Stating the View of Senior Judge Leadbetter. The Memorandum Opinion Stating the View of Judge Covey, however, would have permitted the undated ballot to be counted, 2022 WL 06156, at *8-*9, and the Memorandum Opinion Stating the View of Judge Leavitt expressed concurrence with Senior Judge Leadbetter’s “conclusion” as to the undated ballot at issue without any further explanation.

13. The Committees deny the allegations in Paragraph 13. Specifically, the Committees deny that “the dating provisions at issue here” are mandatory provisions. As this Court recently held, the provisions are directory. See *Chapman v. Berks Cnty. Bd. of Elections*, 355 M.D. 2022, at *57-58 (Pa. Cmwlth. Aug. 19, 2022). The Committees deny that Section 11 of Act 77 has been triggered because the Third Circuit’s holding that ballots may not be rejected for a missing date—which is consistent with the General Assembly’s intention for the Date Provision to be directory, see *id.*—did not invalidate any provision of Act 77. The Committees deny that Act 77 and all amendments thereto should be declared void.

14. The Committees deny that Petitioners are entitled to any relief.

Dated: September 2, 2022

Respectfully submitted,

By: Adam C. Bonin

Adam C. Bonin
THE LAW OFFICE OF ADAM C. BONIN
121 South Broad Street, Suite 400
Philadelphia, PA 19107
Telephone: (267) 242-5014
Facsimile: (215) 827-5300
adam@boninlaw.com

Uzoma N. Nkwonta*
Noah Baron*
Marilyn Gabriela Robb*
Jacob D. Shelly*
ELIAS LAW GROUP LLP
10 G St. NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490
unkwonta@elias.law
nbaron@elias.law
mrobb@elias.law
jshelly@elias.law

*Attorneys for Intervenor-
Respondents DSCC and DCCC*

** Admitted Pro Hac Vice*

EXHIBIT A

RETRIEVED FROM DEMOCRACYDOCKET.COM

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 Bernstine, Timothy F.
Twardzik, Dawn W. Keefer, Dan
Moul, Francis X. Ryan, and Donald
“Bud” Cook,

Petitioners,

v.

Leigh M. Chapman, in her official
capacity as Acting Secretary of the
Commonwealth of Pennsylvania, and
Commonwealth of Pennsylvania,
Department of State,

Respondents.

No. __ M.D. 2022

**PETITIONERS’ APPLICATION
FOR SUMMARY RELIEF AND
EXPEDITED BRIEFING**

Filed on behalf of Petitioners,
Timothy R. Bonner, P. Michael Jones,
David H. Zimmerman, Barry J.
Jozwiak, Kathy L. Rapp, David
Maloney, Barbara Gleim, Robert
Brooks, Aaron Bernstine, Timothy F.
Twardzik, Dawn W. Keefer, Dan
Moul, Francis X. Ryan, and Donald
“Bud” Cook

Counsel of Record for Petitioners:

Gregory H. Teufel
Pa. Id. No. 73062
Robert Cowburn
Pa. Id. No. 328198
OGC Law, LLC
1575 McFarland Road, Suite 201
Pittsburgh, PA 15216
412-253-4622
412-253-4623 (facsimile)
gteufel@ogclaw.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
STATEMENT OF UNDISPUTED FACTS.....	1
ARGUMENT	3
CONCLUSION.....	9
CERTIFICATE OF WORD COUNT	
CERTIFICATE OF COMPLIANCE (Public Access Policy)	
CERTIFICATE OF SERVICE	

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Cases

<u>In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election</u> , 241 A.3d 1058 (Pa. 2020)	7-8
<u>In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1 Petition of Carpenter</u> , 272 A.3d 993 (Pa.Comm. Ct. 2022).....	7-8
<u>Migliori v. Cohen</u> , 36 F.4th 153, 2022 U.S. App. LEXIS 14655 (3rd Cir. 2022).....	2, 4, 6
<u>Ritter v. Lehigh Cnty. Bd. of Elections</u> , 272 A.3d 989 (Pa.Comm. Ct. 2022)...	5-8
<u>Stilp v. Commonwealth</u> , 905 A.2d 918 (Pa. 2006)	3-4

Statutes and Rules

Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of Mar. 27, 2020, Section 1, P.L. No. 41, No. 12 (“Act 12”).....	8
Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”)	passim
25 Pa.Stat. § 3146.6(a).....	4-6
25 Pa.Stat. § 3150.12a(a).....	1
25 Pa.Stat. § 3150.16(a).....	4-6

Other Authorities

GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES, https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf	3
---	---

Israel E. Friedman, Comment, Inseverability Clauses in Statutes, 64 U. Chi. L.
Rev. 903 (1997)4

RETRIEVED FROM DEMOCRACYDOCKET.COM

INTRODUCTION

1. This application for summary relief seeks a declaration that, pursuant to Section 11 of Act 77 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”), because provisions of Sections 6 and 8 of Act 77 and/or their application to a person or circumstance has been held invalid by a court of competent jurisdiction, the remaining provisions and applications of Act 77 are now void.

2. Expedited briefing is requested because, pursuant to 25 Pa.Stat. § 3150.12a(a), Pennsylvania counties may begin processing mail-in ballots by default on September 19, 2022, just sixty-one (61) days from the date of filing this Application. Notwithstanding the default date of September 19, 2022, Pennsylvania counties may begin processing mail-in ballots at any time before September 19, 2020 “if a county board of elections determines that it would be appropriate to the county board of elections’ operational needs.” 25 Pa.Stat. § 3150.12a(a). Time is of the essence in voiding Act 77 as far in advance of the November 2022 general election as possible.

STATEMENT OF UNDISPUTED FACTS

3. Petitioners Timothy R. Bonner (hereinafter “Bonner”), P. Michael Jones (hereinafter “Jones”), David H. Zimmerman (hereinafter “Zimmerman”), Barry J. Jozwiak (hereinafter “Jozwiak”), Kathy L. Rapp (hereinafter “Rapp”), David

Maloney (hereinafter “Maloney”), Barbara Gleim (hereinafter “Gleim”), Robert Brooks (hereinafter “Brooks”), Aaron J. Bernstine (hereinafter “Bernstine”), Timothy F. Twardzik (hereinafter “Twardzik”), Dawn W. Keefer (hereinafter “Keefer”), Dan Moul (hereinafter “Moul”), Francis X. Ryan (hereinafter “Ryan”), and Donald “Bud” Cook (hereinafter “Cook”) are Pennsylvania citizens who are qualified registered electors residing in Pennsylvania and are elected members of the Pennsylvania House of Representatives (“the House”). Verified Pet. ¶¶ 9-22. Each of the Petitioners are past and likely future candidates for office and registered Pennsylvania voters. *Id.* ¶ 23.

4. Subsequent to the decision in Migliori v. Cohen, 36 F.4th 153, 2022 U.S. App. LEXIS 14655, *3 (3rd Cir. 2022), Acting Secretary Chapman, in her role as Secretary of the Commonwealth and acting under color of state law, has continued to implement the provisions of the Pennsylvania Election Code that were enacted pursuant to Act 77 and has further urged this Court to follow the Third Circuit’s interpretation of federal law in Migliori (see Chapman v. Berks County Board of Elections, No. 355 MD 2022, MEMORANDUM IN SUPPORT OF PETITIONERS’ EMERGENCY APPLICATION FOR PEREMPTORY JUDGMENT AND SUMMARY RELIEF). Verified Pet. ¶ 30-31.

5. On May 24, 2022, six days after the Migliori decision, Acting Secretary Chapman, in her role as Secretary of the Commonwealth and acting under color of

state law, issued election guidance to county board of elections directing them to count “ballots with an undated return envelope ... for the May 17, 2022, Primary.”

See GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES,

<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf>. The Pennsylvania Department of State has, accordingly, taken the official position that absentee and mail voters do not need to follow the express envelope dating requirements of Section 6 and Section 8 of Act 77, rendering that provision effectively invalid. Verified Petition, ¶ 27.

ARGUMENT

6. Provisions of Sections 6 and 8 of Act 77 and/or their application to a person or circumstance has been held invalid by a court of competent jurisdiction, therefore the remaining provisions and applications of Act 77 should now be declared void. The Pennsylvania Supreme Court has observed:

[A]s a general matter, nonseverability provisions are constitutionally proper. There may be reasons why the provisions of a particular statute essentially inter-relate, but in ways which are not apparent from a consideration of the bare language of the statute as governed by the settled severance standard set forth in Section 1925 of the Statutory Construction Act[, 1 Pa.Cons.Stat. § 1925]. In such an instance, the General Assembly may determine that it is necessary to make clear that a taint in any part of the statute ruins the whole.

Stilp v. Commonwealth, 905 A.2d 918, 978 (Pa. 2006) (citations omitted). The Pennsylvania Supreme Court quoted Israel E. Friedman, Comment, Inseverability Clauses in Statutes, 64 U. Chi. L. Rev. 903, 914 (1997) ("[I]nseverability clauses serve a key function of preserving legislative compromise;" they "bind[] the benefits and concessions that constitute the deal into an interdependent whole.") and explained that, "[i]n an instance involving such compromise, the General Assembly may determine, the court's application of the logical standard of essential interconnection set forth in Section 1925 might undo the compromise; a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place." Id.

7. Sections 6 of Act 77 at Section 1306(a) (25 Pa.Stat. § 3146.6(a)) and Section 8 of Act 77 at Section 1306-D(a) (25 Pa.Stat. § 3150.16(a)), both provide in relevant part that "The elector shall then fill out, date and sign the declaration printed on such envelope." (underlining added, hereafter the "dating provisions").

Section 11 of Act 77 provides as follows:

Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.

8. In Migliori v. Cohen, 36 F.4th 153, 2022 U.S. App. LEXIS 14655, *3 (3rd Cir. 2022), the court held that the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101, prohibited the application of the dating provisions of

and 8 of Act 77 (25 Pa.Stat. §§ 3146.6(a) and 3150.16(a)) and directed the District Court to enter an order that the undated ballots in that case be counted. The underlying facts and history were that the Lehigh County Board of Elections (LCBE) held an election on November 2, 2021, to fill vacancies for the office of Judge of the Court of Common Pleas of Lehigh County. Six candidates ran for three available judgeships. Candidates Thomas Caffrey and Thomas Capehart received the most votes and were sworn into office. During the counting of the ballots, the LCBE set aside 257 out of approximately 22,000 mail-in or absentee ballots that lacked a handwritten date next to the voter declaration signature (“the undated ballots”), all of which were received by the deadline of 8:00 p.m. on election day. Candidate David Ritter received the third most votes in the election, which was seventy-four votes more than the candidate in fourth place, Zachary Cohen.

9. The LCBE convened a public hearing to consider whether to count the disputed (*i.e.*, undated) ballots. and voted 3-0 to count the undated ballots. Ritter appealed the decision to the Lehigh County Court of Common Pleas, which affirmed the LCBE's decision to count the disputed ballots. Ritter then appealed to this Court, which determined that the undated ballots should not be counted (see Ritter v. Lehigh Cnty. Bd. of Elections, 272 A.3d 989 (Pa.Comm. Ct. 2022)).

Voters then sued the LCBE in the United State District Court or the Easter District

of Pennsylvania arguing that the decision not to count votes because they lacked a date on the secrecy envelope violated their rights under the Materiality Provision of the Civil Rights Act. The Eastern District dismissed the case on summary judgment on the basis that there was no private right of action to enforce the Materiality Provision.

10. The Third Circuit reversed, holding that a private right of action to enforce the Materiality Provision did exist, and further holding that the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101, prohibited the application of the dating provisions of 25 Pa.Stat. §§ 3146.6(a) and 3150.16(a) and directed the District Court to enter an order that the undated ballots in that case be counted. Migliori, 2022 U.S.App.LEXIS 14655 at *18. In so holding, the court explained that the LCBE's refusal to count the undated ballots (pursuant to this Court's order in Ritter) violated the Materiality Provision because, in the Third Circuit's view, the date requirement was not material in determining whether the voters were qualified to vote under Pennsylvania law. Id. at *13-*17. In so doing, the court effectively held that the dating provisions of Sections 6 and 8 of Act 77 (25 Pa.Stat. §§ 3146.6(a) and 3150.16(a)) were invalid and could not be applied to refuse to count a mail-in or absentee ballot that arrived in an undated secrecy envelope. Thereby the court eliminated a mandatory requirement from Sections 6

and 8 of Act 77 and that triggers the nonseverability provisions of Section 11 of Act 77.

11. That the dating provisions of Sections 6 or 8 are mandatory has at least twice been confirmed by the persuasive analysis of this Court in two unpublished opinions in Ritter v. Lehigh Cnty. Bd. of Elections, 272 A.3d 989 (Pa. Commw. Ct. 2022) and In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1 Petition of Carpenter, 272 A.3d 993 (Pa. Commw. Ct. 2022). In Ritter, this Court examined the Opinion Announcing the Judgment of the Court (OAJC), the concurring and dissenting opinion of Justice Dougherty, joined by then-Chief Justice Saylor and Justice Mundy (CDO Opinion), and Justice Wecht's concurring and dissenting opinion, concurring in the result (CIR Opinion) in In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020) (hereafter "In re 2020 Canvass"), and found that the collective result of the CDO and CIR were binding on this Court and the CIR was precedential and persuasive in finding that the dating provisions were mandatory and that undated mail-in ballots were invalid and must be stricken in all elections after 2020. Ritter, 272 A.2d 989, 2022 Pa. Commw. Unpub. LEXIS 1, *7-*25.

12. Likewise, in In re Election in Region 4, where the issues included whether to count one undated mail-in ballot, this Court again examined the OAJC, the CDO and CIR in In re 2020 Canvass. This Court did not find In re 2020 Canvass to be a

binding precedent on the issue of whether an mail-in ballot without a date must be set aside and not counted, this Court concluded that the “prevailing view of our Supreme Court is that of Justice Wecht, *i.e.*, that the requirement that the outer envelope be dated by the voter is mandatory and must be strictly enforced in elections held after that of 2020.” 272 A.3d 993, 2022 Pa.Comm. Unpub. LEXIS 15, *8.¹

13. Blocking the application of a mandatory provision like the dating provisions at issue here triggers Section 11 of Act 77, which is triggered not only by expressly striking provisions as invalid but also by holding its application to any person or circumstance invalid. Clearly that is what has occurred in Migliori, and now, across the state, the dating provisions are consequently being and will continue to be disregarded in favor of counting undated ballots. The situation is exactly the same as if the dating provisions were expressly stricken from Act 77 or deleted by amendment, as they no longer have any mandatory effect. Accordingly, Act 77 and all amendments thereto, such as Act No. 12 of 2020 should be declared void.

¹ Cf, unpublished Memorandum Opinion by President Judge Cohn Jubelirer in McCormick v. Chapman, No. 286 M.D. 2022 (filed June 2, 2012), analyzing Migliori, In re 2020 Canvass, and Ritter.

CONCLUSION

14. For the aforementioned reasons, Petitioners respectfully urge this Court to grant this Application for Summary Relief and enter the attached proposed order or grant such other or further relief as this Court may deem proper.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "G. H. Teufel". The signature is fluid and cursive.

Gregory H. Teufel
Robert Cowburn
Attorney for Petitioners

RETRIEVED FROM DEMOCRACYDOCS.COM