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, and

DSCC, DCCC, Democratic National Committee, Pennsylvania Democratic Party,

Intervenor-Respondents.

No. 364 M.D. 2022

PETITIONERS' RESPONSE TO GOVERNMENT RESPONDENTS' PRELIMINARY OBJECTIONS AND CROSS-APPLICATION FOR SUMMARY RELIEF

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

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I. INTRODUCTION

Whether one views Act 77 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 ("Act 77")) as an "outstanding legislative success" or not is irrelevant to this case. The issue is whether, pursuant to its nonseverability provision, Act 77 should now be declared void 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. Acting Secretary of Pennsylvania Leigh M. Chapman and the Pennsylvania Department of State (collectively, "the Government Respondents") selectively sing praises of Act 77 while simultaneously urging certain of its provisions be disregarded. Act 77 was the result of months of consideration, debate, and compromise in order to win bipartisan support. A partial nonseverability provision was included, ensuring that neither side could be robbed of the full benefit of its bargain in the carefully negotiated deal that Act 77 represents.[1] The drafters of Act 77 decided which provisions were so important to

[1]*See McLinko v. Commonwealth*, __ A.3d __, 2022 Pa.LEXIS 1124, 2022 WL 3039295, *1 n.2 (Pa. 2022) ("This was the subject of intense legislative debate, with Democratic state legislators in favor of preserving the straight-ticket option and Republican state legislators seeking its elimination. *See, e.g.*, House Legislative Journal, Session of 2019, No. 63, at 1706-11 (Oct. 28, 2019)); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 367 (Pa. 2020) (Respondents noted that it was clear that the severability provision in Act 77 "was intended to preserve the compromise struck" in the bipartisan enactment).

their bargain that, if any of them were invalidated or even if their application to any person or circumstance were held invalid, the entirety of Act 77 is void. The Government Respondents urge this Court to disregard that list of nonseverable provisions.

The Preliminary Objections of the Government Respondents' should be overruled and their Cross-Application for Summary Relief ("Cross-Application") should be denied because (1) the Petitioners have standing to bring their Petition as both taxpayers and past and future candidates for office in Pennsylvania, (2) laches is inapplicable, and (3) 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, and the nonseverability provision of Act 77 is enforceable.

Petitioners incorporate by reference their Application for Summary Relief, as well as their Responses to the Intervenor-Respondents' Preliminary Objections and Cross-Applications for Summary Relief, to the extent applicable, to avoid duplicative briefing as much as possible. No party has identified any factual issues that would preclude summary disposition of this case and there appear to be no material facts in dispute.

II. BACKGROUND

The allegations in the background section of the Government Respondents' Preliminary Objections and Cross-Application are almost entirely legal

conclusions to which no response is required and quotes and characterizations of laws and court opinions which speak for themselves. The number of votes in favor and against Act 77, averred in ¶ 4 is admitted. It is admitted that millions of Pennsylvanians took advantage of mail-in voting in Pennsylvania, as alleged in section B of their Cross-Application. Petitioners take issue with very little in the Affidavit of Jonathan Marks or the numbered paragraphs of the Cross-Application referencing it, other than to dispute his immaterial opinions of the success of the implementation of Act 77 and his speculations as to the likely impact of the elimination of Act 77's mail-in voting procedures and "disenfranchising effects" thereof (found at p.8, ¶¶ 25-27 of the Affidavit of Jonathan Marks), which are denied. Such opinions and predictions are not facts at all, much less undisputed facts upon which an application for summary relief may be premised.

III. RESPONSES TO PRELIMINARY OBJECTIONS AND ARGUMENTS FROM CROSS-APPLICATION FOR SUMMARY RELIEF

A. Petitioners have standing to challenge the continuing validity of Act 77.

The Petitioners have standing to challenge the continuing validity of Act 77. In general, to have standing, a party must have a substantial, direct and immediate interest in the controversy. *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). In this case, all of the Petitioners have substantial, direct and immediate interests in whether the Government Respondents are permitted to continue to enforce and

administer a law previously governing a wide variety of aspects of Pennsylvania elections that has become void by its own terms and those interests are distinguishable from the interests shared by all other citizens, because the Petitioners are past and likely future candidates for office and are registered Pennsylvania voters. Verified Pet. ¶ 23.

As registered voters, the Petitioners are impacted by the application of a void law to Pennsylvania elections. Moreover, they suffer from vote dilution in every election in which improper ballots are counted, that is, ballots that do not meet the requirements of applicable law. In addition, as candidates, the Petitioners likewise suffer from having their election impacted by ballots that do not meet the requirements of applicable law and by having to adapt their campaigns to a void law. Petitioners' Petition contains sufficient averments of fact to recognize this direct, immediate, and substantial injury. There is no need and there would be no point in spelling it out in any greater detail. The Government Respondents' standing Preliminary Objection part 1, as to inadequate specificity, should therefore be overruled.

In the second part of the Government Respondents' standing Preliminary Objection, the Government Respondents' claim that Pennsylvania case law confirms that voters lack standing to challenge Act 77, citing *In re Gen. Election 2014*, No. 2047 CD 2014, 2015 WL 5333364 (Pa.Cmwlth. Mar. 11, 2015). Unlike

here, that case was an election challenge. It involved an appeal of an order granting an emergency application for an absentee ballot to a single voter, because the voter had not submitted a notarized affidavit with the application, and there was a grand total of five absentee ballots at issue. *Id*. at *1.[2] The voters who attempted to appeal were not even parties in the proceeding below, which was the first and foremost reason that this Court found that they lacked standing to appeal. *Id*. at *3. This Court also found that the voters additionally lacked standing because they were not "aggrieved" by the order at issue because their allegation that five absentee ballots in any way affected the outcome of the General Election was unsupported by any evidence. *Id*. at *4.

In so holding, the Court discussed *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970), and Respondents' attempt to rely on that decision as well to assert that voters never have standing to challenge the constitutionality of election laws. Quoting *Kauffman v. Osser*, 271 A.2d 239-240, this Court highlighted the word "assumption" in the following:

> Basic in appellants' position is the *assumption* that those who obtain absentee ballots, by virtue of statutory provisions which they deem invalid, will vote for candidates at the November election other than those for whom the appellants will vote and thus will cause a dilution of appellants' votes. This assumption, unsupported factually, is

[2] It appears that a virtually identical decision regarding one of the other five absentee ballots at issue (*In Re: General Election 2014 Muriel Kauffman*) was reported at 111 A.3d 785 on the exact same date, and had a different docket number of 2043 C.D. 2014.

> unwarranted and cannot afford a sound basis upon which to afford appellants a standing to maintain this action.

See In re Gen. Election 2014, 2015 WL 5333364 at *4. It was not that vote dilution could never support standing, but rather the speculative nature of the claim that dilution would occur that defeated standing.

In the case at bar, the likelihood of vote dilution impacting the outcome of elections is not remote or speculative as it was in cases where only small numbers of votes are at issue. Of the approximately 6.9 million Pennsylvanians who voted in the November 2020 general election, roughly 2.7 million used mail ballots. *See* Pa. Dep't of State, Official Returns (Nov. 3, 2020) https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G&IsActive=0/. As this court noted in *McLinko v. Commonwealth*, 270 A.3d 1243, 1273 (Pa.Cmwlth. 2022), *reversed in part, affirmed in part by McLinko v. Commonwealth*, __ A.3d __, 2022 Pa.LEXIS 1124, 2022 WL 3039295 (Pa. 2022): "Approximately 1.38 million voters have expressed their interest in voting by mail permanently." The enormous number of ballots cast as no excuse mail-in ballots in the elections pursuant to Act 77 take it out of the realm of speculation. To the contrary, voter dilution will very likely occur if Act 77 is not declared void.

The Government Respondents also argue that Petitioners' status as candidates does not confer standing, relying on *In re Pickney*, 524 A.2d 1074 (Pa.Cmwlth. 1987) and *Nader v. FEC*, 725 F.3d 226, 229 (D.C.Cir. 2013). In *In re*

Pickney, this Court held that a registered Democrat did not have standing to challenge the nomination petition of a candidate in a Republican primary election. *In re Pickney*, 524 A.2d at 1074. It did not stand more generally for the proposition that candidates do not have interests distinct from voters in general in any and all election related cases. Here, the Petitioners' standing as candidates adds to their standing as voters because they also face the harm, distinct from voters, of having to adapt their campaigns to a void law. In addition, some issues in this case such as whether straight-line party voting is restored or not impact candidates differently than they impact voters.

In any event, though a candidate may have no greater interest than any other voter in a case challenging a nomination petition, that voter interest is still sufficiently substantial to confer standing, so long as that voter is eligible to participate in the election in question. *See In re Pasquay*, 105 Pa.Commw. 532, 536 (Pa.Cmwlth. 1987). As this Court explained in *McLinko*, 270 A.3d at 1281-82, *reversed in part, affirmed in part by McLinko v. Commonwealth*, 2022 Pa.LEXIS 1124, 2022 WL 3039295 (Pa. 2022):

> This Court has recognized that voting members of a political party have a substantial interest in assuring compliance with the Election Code in that party's primary election. *In re Pasquay*, 525 A.2d at 14. Likewise, a political party has standing to challenge the nomination of a party candidate who has failed to comply with election laws. *In re Barlip*, 59 Pa.Commw. 178, 428 A.2d 1058 (Pa.Cmwlth. 1981). In *In re Shuli*, 105 Pa.Commw. 462, 525 A.2d 6, 9 (Pa.Cmwlth. 1987), this

> Court concluded that a candidate for district justice had standing to challenge his opponent's nominating petition because his status as a candidate for the same office gave him a substantial interest in the action. *See also In re General Election - 1985*, 109 Pa.Commw. 604, 531 A.2d 836, 838 (Pa.Cmwlth. 1987) (candidate in general election had standing to challenge judicial deferment and resumption of election because it could have jeopardized the outcome of the election, a possibility sufficient to show "direct and substantial harm"). In sum, a candidate has an interest beyond the interest of other citizens and voters in election matters. Because Petitioners have been and will be future candidates, they have a cognizable interest in the constitutionality of Act 77.

Nader is also inapplicable, but to the extent it is at all useful, it provides another example where a court recognized the concept of candidate standing as distinct from voter standing. There the court found lack of standing due to the failure of the candidate to allege harm to his chances in the next election. 725 F.2d. at 228-229. Here, the harm at issue applies to every future election until the now void Act 77 ceases to be applied. That harm is not speculative, as explained above, because of the likely large volume of otherwise improper mail-in ballots that would be allowed in future elections if the Government Respondents continue to apply Act 77 as if it were not void.

Moreover, although to have standing a party must ordinarily have an interest in the controversy that is distinguishable from the interest shared by all other citizens that is substantial, direct and immediate, there are certain cases that warrant the grant of standing even where the interest at issue "arguably is not substantial, direct and immediate." *Sprague v. Casey*, 550 A.2d 184, 187 (Pa.

1988) (citing, *inter alia*, *Application of Biester*, 409 A.2d 848, 852 (Pa. 1979)). "[A]lthough many reasons have been advanced for granting standing to taxpayers, the fundamental reason for granting standing is simply that otherwise a large body of governmental activity would be unchallenged in the courts." *Biester*, 409 A.2d at 852 (citation omitted).

The *Biester* Court elaborated on the benefit of granting standing under such circumstances, holding that:

> The ultimate basis for granting standing to taxpayers must be sought outside the normal language of the courts. Taxpayers' litigation seems designed to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.... Such litigation allows the courts, within the framework of traditional notions of 'standing,' to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts.

Biester, 487 Pa. at 443 n.5 (citation omitted); *see also Consumer Party of Pennsylvania v. Commonwealth*, 507 A.2d 323, 328 (Pa. 1986) (same). Other factors to be considered include: that issues are likely to escape judicial review when those directly and immediately affected are actually beneficially as opposed to adversely affected; the appropriateness of judicial relief; the availability of redress through other channels; and the existence of other persons better situated to assert claims, for example. *Sprague*, 550 A.2d at 187 (citations omitted).

In *Sprague*, the petitioner challenged placing one seat on the Supreme Court and one seat on the Superior Court on the general election ballot. *Id*. at 186. An election to fill Supreme Court and Superior Court offices may not be placed on the ballot during a general election because the Pennsylvania Constitution mandated that all judicial officers were to be elected at the municipal election next proceeding the commencement of their respective terms. *Id*. at 186. Under those circumstances, the Pennsylvania Supreme Court specifically held that if standing were not granted, "the election would otherwise go unchallenged," that "[j]udicial relief is appropriate because the determination of the constitutionality of the election is a function of the courts," and that "redress through other channels is unavailable." *Id*. (citing *Zemprelli v. Daniels*, 436 A.2d 1165 (Pa. 1981); and *Hertz Drivurself Stations, Inc. v. Siggins*, 58 A.2d 464 (Pa. 1948)).

Here, as in *Sprague*, if standing were not granted, Act 77 would otherwise go unchallenged; redress through other channels is unavailable because those directly and immediately affected are actually beneficially as opposed to adversely affected; and the only persons better situated to assert the claims at issue are possibly the Government Respondents, who did not choose to institute legal action. Determination of the continuing validity of election laws remains a function of the courts and granting standing would add judicial scrutiny of the continuing validity of the acts of public officials involved in the elective process. Accordingly, this

Court should determine that all of the Petitioners have standing to maintain this action, overrule the Government Respondents' standing Preliminary Objection and deny their Cross-Application for Summary Relief as to standing.

B. Respondents cannot meet their burden of establishing a laches defense.

Respondents cannot meet their burden of establishing a laches defense. As this Court explained in *McLinko*, 270 A.2d at 1268, *reversed in part, affirmed in part by McLinko v. Commonwealth*, __ A.3d __, 2022 Pa.LEXIS 1124, 2022 WL 3039295 (Pa. 2022):

> Laches is an equitable defense that can result in the dismissal of an action where the plaintiff has been dilatory in seeking relief and the delay has prejudiced the defendant. *Commonwealth ex rel. Baldwin v. Richard*, 561 Pa. 489, 751 A.2d 647, 651 (Pa. 2000); *Smires v. O'Shell*, 126 A.3d 383, 393 (Pa.Cmwlth. 2015). A defendant can establish prejudice from the passage of time by offering evidence that he changed his position with the expectation that the plaintiff has waived his claim. *Baldwin*, 751 A.2d at 651. The question of laches is factual and is determined by examining the circumstances of each case. *Sprague*, 550 A.2d at 188.

This Court has further noted that "Because laches is an affirmative defense, the burden of proof is on the defendant or respondent to demonstrate unreasonable delay and prejudice." *Pennsylvania Federation of Dog Clubs v. Commonwealth*, 105 A.3d 51, 58 (Pa.Cmwlth. 2014).

In *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988), the petitioner, an attorney, brought suit challenging the placement of two judges on a ballot. *Id*.

Respondents raised an objection based on laches because petitioner waited 6.5 months from constructive notice that the judges would be on the ballot to bring suit. In evaluating the facts that petitioner and respondents could have known through exercise of "due diligence," the court found that while petitioner was an attorney and was therefore charged with the knowledge of the constitutional issues presented, the respondents (the Governor, Secretary, and other Commonwealth officials) were also lawyers and similarly failed to apply for timely relief. *Id*. at 188. The Pennsylvania Supreme Court, in denying the laches defense, reasoned that "[t]o find that petitioner was not duly diligent in pursuing his claim would require this Court to ignore the fact that respondents failed to ascertain the same facts and legal consequences and failed to diligently pursue any possible action." *Id*. Courts will generally "hold that there is a heavy burden on the [respondent] to show that there was a deliberate bypass of pre-election judicial relief." *Toney v. White*, 488 F.2d 310, 315 (5th Cir. 1973). The Respondents have not met that burden here. Instead, they pretend that the burden is on Petitioners to disprove laches.

In *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 134-35, 126 A. 199 (1924) (hereinafter *Lancaster City*) and *Chase v. Miller*, 41 Pa. 403, 418-19 (1862) (*both overruled on other grounds by McLinko v. Commonwealth*, __ A.3d __, 2022 Pa.LEXIS 1124, 2022 WL 3039295 (Pa. 2022)),

laches did not bar the Pennsylvania Supreme Court from voiding all unlawful mail-in ballots cast at the elections at issue while also invalidating the underlying mail voting legislation. The legislation at issue in *Chase* was enacted **23 years** prior to its decision, 41 Pa. at 407 ("Act of 2d July 1839, § 155") and in *Lancaster City* the legislation was enacted **one year and two months** prior to its decision, 281 Pa. at 133 (Act May 22, 1923 (P. L. 309; Pa. St. Supp. 1924, § 9775a1, et seq.)). In both cases, the constitutionality of the legislation at issue was successfully challenged after the election had occurred.

In 2018, the Pennsylvania Supreme Court heard a challenge to the state's congressional district plan brought 6 years and multiple elections after the 2011 congressional redistricting map legislation was enacted. *See League of Women Voters v. Commonwealth*, 179 A.3d 1080 (Pa. 2018). On November 23, 2020, well after the election had already taken place, the Pennsylvania Supreme Court also decided another Act 77 case regarding whether Act 77 required county boards of elections to disqualify absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date. *See In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020) (hereafter "*In re Canvass*").

The Government Respondents assert that Petitioners should have brought suit invoking the nonseverability provision of Act 77 immediately after *In re Canvass*, because in that case the Pennsylvania Supreme Court "held that undated ballots should be counted …" Government Respondents' Preliminary Objections, pp. 19-20, ¶ 59; Cross-Application p. 22, ¶ 72. That is an inaccurate oversimplification of *In re Canvass*. In *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989 (Pa.Cmwlth. 2022), 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*, 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.3d 989, 2022 Pa.Commw.Unpub.LEXIS 1, *7-*25.

So, directly contrary to the Government Respondents' characterization, *In re Canvass* instead stands for the proposition that undated mail-in ballots must not be counted. However, the Pennsylvania Supreme Court refused to apply its decision retrospectively, and only applied it prospectively. The Pennsylvania Supreme Court did not hold invalid any provision of Act 77 or its application to any person

or circumstance. On the contrary, it upheld the provisions of Act 77. Deciding whether or not to give effect to a court's decision immediately is a separate matter to the validity of an act or its provisions or to the application of those provisions to any person or circumstance. To illustrate, in this case, if the requested relief is granted, it will be a separate question to determine when to give effect to this Court's decision. For example, at page 8 of this Court's unpublished Memorandum Opinion denying relief from stay pending appeal in *McLinko*, No. 293 M.D. 2021(Feb. 16, 2022), this Court explained that the effect of a declaratory judgment (that Act 77 was unconstitutional) could be deferred beyond the then upcoming May 2022 primary election due to practical concerns, citing *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (judgment deferred 60 days to permit implementation of fallback provisions in statute) and *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294, 299-300 (1955) (courts of equity may consider "complexities arising from the transition to a system of public education freed of racial discrimination" after the declaration that racial discrimination in public education is unconstitutional). A refusal to grant immediate relief due to equitable concerns is not the same as holding a statutory provision or its application to a person or circumstance invalid.

In contrast to *In re Canvass*, in *Migliori v. Cohen*, 36 F.4th 153, 2022 U.S.App.LEXIS 14655, *18 (3rd Cir. 2022), the Third Circuit held 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 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 outer 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.

Petitioners are not guilty of any want of due diligence in the instant action and Petitioners are only seeking prospective relief, as to future elections. Conversely, as in *Sprague*, Respondent Chapman and her predecessor Degraffenreid are attorneys, and should be charged with knowledge of the law, and particular knowledge of the Election Code. In *Sprague*, the taxpayer's more than six-month delay in bringing an action challenging the election did not constitute laches thereby preventing the Commonwealth Court from hearing the constitutional claims. 550 A.2d at 188.

In short, the Respondents want this Court to charge Petitioners with failure to institute an action more promptly, while Respondents possess extremely

specialized knowledge, and failed to take any corrective actions (such as by bringing a declaratory judgment action). Accordingly, the Government Respondents' collective failures place the weight of any prejudice squarely on their shoulders. Laches is a shield to protect respondents from gamesmanship, it is not a sword to use against harmed individuals to insulate respondents' unlawful actions.

In contrast to *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020) (*per curiam*), the relief that Petitioners seek here has been specifically tailored to avoid retrospective relief. In *Kelly*, the petitioners sought relief that would "invalidate the ballots of the millions of Pennsylvania voters who utilized the mail-in voting procedures established by Act 77." *Id*. at 1256. Here, Petitioners seek only prospective relief. In *Kelly*, in support of applying laches to dismiss the claim, the Pennsylvania Supreme Court noted and entirely relied upon prejudice in the form of "the disenfranchisement of millions of Pennsylvania voters," *id*., but no such prejudice would ensue from granting the relief that the Petitioners seek here. On the contrary, voters would simply go back to voting just as they had prior to Act 77.

Although the petitioners in *Kelly* also sought prospective relief, the brief Pennsylvania Supreme Court *per curiam* opinion made no mention of it and focused exclusively on retrospective relief when dismissing the case on the

grounds of laches. *Id.*[3] Moreover, the Pennsylvania Supreme Court has made it clear that *per curiam* orders have no *stare decisis* effect. *Commonwealth v. Dickson*, 918 A.2d 95, 108 n. 14 (Pa. 2007). The Government Respondents attempt to treat *Kelly* as if it were binding precedent. The Government Respondents point to no prior case where a *per curiam* opinion was relied upon in such a manner. This Court should reject the Government Respondents' laches arguments and reliance on *Kelly*, just as it did in *McLinko v. Commonwealth*, 270 A.3d 1243, 1269-1270 (Pa.Cmwlth. 2022), *reversed in part on other grounds, affirmed in part by McLinko v. Commonwealth*, __ A.3d __, 2022 Pa.LEXIS 1124, 2022 WL 3039295 (Pa. 2022).

The Government Respondents similarly point to no precedent for using expenses incurred in implementing a void law as support for a laches defense in an action challenging a law's continuing validity.[4] Allowing such a basis for a laches defense would insulate virtually any unconstitutional or voided law from challenge, as governments frequently incur costs in implementing laws.

Granting the relief sought by Petitioners would not disenfranchise anyone, as the Government Respondents suggests at page 21, ¶ 66 of their Preliminary

[3] Only Chief Justice Saylor's partial dissent made any mention of the prospective relief requested.

[4] Likewise, the Intervenor-Respondents fail to cite any precedent for using private party expenses incurred in reliance upon a void law as a basis for a laches defense against challenging the law's continuing validity.

Objections and pages 13-14 of their Cross-Application. No relief is sought as to any past election. Needing to inform voters of changes in applicable election law is not disenfranchisement. Neither would it be "disenfranchisement" if the General Assembly repealed Act 77. There is no rational reason to expect voters to react by lapsing into such confusion that they would fail to vote altogether in some future election just because, under Act 77, they had elected to be on the "permanent" mail-in ballot list file. This Court has the power to fashion relief in this case to avoid any such result. Accordingly, this Court should determine that the Government Respondents have failed to meet their burden of establishing a laches defense, overrule the Government Respondents' laches Preliminary Objection, and deny their Cross-Application for Summary Relief as to laches.

C. Petitioners' claim is meritorious because the mandatory date requirements 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 and the nonseverability provision is enforceable.

Petitioners' claim is meritorious because 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 and the nonseverability provision is enforceable.

1. *Migliori* held that the dating provisions of Sections 6 and 8 of Act 77 were invalid and could not be applied to refuse to count a mail-in or absentee ballot that arrived in an undated outer envelope.

Migliori 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 outer envelope. That constitutes holding the application of those dating provisions to a person or circumstance invalid. The *Migliori* decision need not use the word "invalidate" to judge its effect as such. The discussion of *Migliori* in Petitioners' Application for Summary Relief at pages 4-6 is incorporated by reference as if fully set forth herein.

Moreover, now this Court has followed *Migliori* in *Chapman et al. v. Berks County Board of Elections, et al.*, No. 355 MD 2022 (August 19, 2022), and on the basis of federal law, separately and independently from the state law grounds, has ordered three county boards of elections to include in their certified election results all ballots that they had previously excluded solely due to the failure to date the signatures on the outer envelope declarations. The accompanying opinion was an unpublished memorandum opinion by President Judge Cohn Jubelirer and discussed whether there was an independent basis for that relief under the Federal Civil Rights Act, finding at pages 64 to 65 that:

> invalidating ballots for the sole reason that the declaration on the return envelope does not contain a handwritten date violates the materiality provision of the Civil Rights Act, and the Boards cannot exclude these ballots from their certified results submitted to the Secretary for her certification for that reason.

That also constitutes holding the application of those dating provisions to a person or circumstance invalid.

2. The date requirements of Sections 6 and 8 of Act 77 are mandatory.

The date requirements of Sections 6 and 8 of Act 77 are mandatory. The Government Defendants argue that the result in *Migliori* is consistent with Pennsylvania law, attempting unsuccessfully through their own applications of principals of statutory construction to undermine the conclusion of a plurality of the justices in *In re Canvass*, and the conclusions of this Court in *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989 (Pa.Cmwlth. 2022) and *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1 Petition of Carpenter*, 272 A.3d 993 (Pa.Cmwlth. 2022) that the date requirements of Section 6 and 8 of Act 77 are mandatory. In the process, they cite to the OAJC in *In re Canvass* as if it represented the opinion of the majority of the Pennsylvania Supreme Court, which it did not. Strangely, as if they had not read *In re Canvass*, the Government Defendants avoid any explicit discussion of whether the date requirements of Section 6 and 8 of Act 77 are mandatory or merely directory, or whether those date requirements implicate weighty interests.

The Government Respondents correctly point out that "the only information that could potentially be reviewed for 'sufficiency' [pursuant to 25 Pa.Stat. § 3146.8(g)(3)] is that which the voter is asked to provide, which is limited to a signature and date." Government Respondents' Preliminary Objections, p. 36, n. 3; Cross-Application, p. 29, n. 3. The meaning of "sufficient" as it is used in 25 Pa.Stat. § 3146.8(g)(3) is not ambiguous, and clearly indicates that the only absentee or mail-in ballots that shall be canvassed are those arriving in outer envelopes that have declarations with the date and signature required by 25 Pa.Stat. §§ 3146.6(a) and 3150.16(a). The Government Respondents suggest that the General Assembly could have used other language, such as requiring that the "declaration fully complies with § 3146.6(a) and § 3150.16(a)" or that "the declaration is complete in all respects" (*see* Government Respondents' Preliminary Objections, p. 26, ¶ 81; Cross-Application, p. 29, ¶ 95), but the language the General Assembly did use is sufficient to clearly convey what it meant.

The Government Respondents argue, citing the nonbinding OAJC from *In re Canvass*, that the date on the declaration is irrelevant to a board of elections duty, under Pa.Stat. § 3146.8(g)(3), to perform a "comparison of the declaration to the applicable voter list." *See* Government Respondents' Preliminary Objections, p. 27, ¶ 82; Cross-Application, p. 29-30, ¶ 96. But comparison of the declaration to the applicable voter list is not the board of elections' only duty. The board of

elections is also charged with determining whether the declaration is "sufficient," and the date is relevant for determining that sufficiency by scrutinizing whether the information that the voter is asked to provide (date and signature) fully complies with § 3146.6(a) and § 3150.16(a). For the same reason, the instruction that county boards of elections assess a declaration's sufficiency is not gratuitous. It describes a process by which the requirements of § 3146.6(a) and § 3150.16(a) are given effect. Likewise, the reference to the 8:00 p.m. deadline in 25 Pa.Stat. § 3146.8(g)(1)(ii) is also not gratuitous. Multiple references to the same requirement in a statute does not violate any rule of statutory construction, and failure to give different effect to each reference does not fail to give effect to all of the provisions of statute.

References in other parts of Act 77 to the mandatory nature of other requirements (such as the 8:00 p.m. requirement, the secrecy envelope requirement, or the requirement that the voter still be alive on Election Day) in different ways does not render the date requirement of § 3146.6(a) and § 3150.16(a) any less mandatory, any more than they render the signature requirement of § 3146.6(a) and § 3150.16(a) any less mandatory. The Government Respondents' arguments, if they were valid, would equally apply to both the date and the signature requirements of § 3146.6(a) and § 3150.16(a) as being merely directory instead of mandatory.

Assigning "shall … date" dispositive weight would not lead to absurd results any more than assigning "shall … sign" dispositive weight does. At p. 20, ¶ 88 of their Preliminary Objections and p. 33, ¶ 102 of their Cross-Application, the Government Respondents cite various other requirements contained in the Election Code which, if determined to also be mandatory, would result in failure to count votes due to noncompliance with relatively trivial directives. But that is the whole point of the "weighty interests" mandatory vs. merely directive analysis framework explained by the Pennsylvania Supreme Court in *In re Canvass* and elsewhere, such as *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020). Only requirements supported by weighty interests are determined to be mandatory. *Id*. It is inexplicable that the Government Respondents completely ignore that well established framework and attempt to ignore it.

The Government Respondents assert that "the date itself serves no purpose relevant to voting" (in their Preliminary Objections at p. 30, ¶ 88, Cross-Application, p. 33, ¶ 103), and conclude that voters would be disenfranchised for failing to write inconsequential information if the date requirement were mandatory. But this argument ignores completely the weighty interests recognized by a majority of the justices in *In re Canvass*. Justice Dougherty, on behalf of the CDO, opined:

> The meaning of the terms "date" and "sign"—which were included by the legislature—are self-evident, they are not subject to interpretation, and the statutory language expressly requires that the elector provide them. Accordingly, I do not view the absence of a date as a mere technical insufficiency we may overlook.
>
> In my opinion, there is an unquestionable purpose behind requiring electors to date and sign the declaration. As Judge Brobson observed below, the date on the ballot envelope provides proof of when the "elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector's eligibility to cast the ballot[.]" The date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes. I recognize there is presently no dispute that all undated ballots at issue here arrived in a timely manner. But I am also cognizant that our interpretation of this relatively new statute will act as precedential guidance for future cases.

In re Canvass, 241 A.3d at 1090-91 (internal citations omitted). The CIR opinion written by Justice Wecht agreed that those arguments were colorable:

> I do not dispute that colorable arguments may be mounted to challenge the necessity of the date requirement, and the OAJC recites just such arguments. But colorable arguments also suggest its importance, as detailed in Judge Brobson's opinion as well as [the CDO].

Id. at 1087 (footnotes omitted).

The Government Respondents argue that the Election Code is silent as to what date a voter is expected to write in next to his or her signature in the declaration on the outer envelope (*see* Government Respondents' Preliminary Objections, pp. 30-31, ¶ 89; Cross-Application, p. 33, ¶ 103), but the context

makes quite clear what date is meant. Voters are instructed to "date and sign" the declaration. 25 Pa.Stat. §§ 3146.6(a), 3150.16(a). Clearly the date referenced is the date of the signature, just as clearly as when one is asked to "date and sign" any other document one is not lost in confusion about what date to put beside one's signature. The facts that some voters may actually put different dates down and some county boards of election will count ballots even if the date provided next to the signature on the declaration clearly was not the date of the signature does not render the date requirement of 25 Pa.Stat. §§ 3146.6(a), 3150.16(a) ambiguous or confusing.

The Government Respondents (at ¶ 89 on page 31 of their Preliminary Objections and at ¶ 103 on page 33-34 of their Cross-Application) correctly point out that "It is absurd to believe that the General Assembly intended to disenfranchise voters that fail to write a date on their envelope declaration but was completely unconcerned about what date they write." The General Assembly was not unconcerned about what date they write. The clear intent is that the date is the date of the signature. In addition, the General Assembly did not intend to "disenfranchise" anyone by including the date requirement, nor do the courts "disenfranchise" anyone by enforcing the mandatory date requirement. On the contrary, as explained by now Justice Brobson when he was a Judge of this Court, and quoted favorably by Justice Wecht in his CIR Opinion in *In re Canvass*:

> While we realize that our decision in this case means that some votes will not be counted, the decision is grounded in law. It ensures that the votes will not be counted because the votes are invalid as a matter of law. Such adherence to the law ensures equal elections throughout the Commonwealth, on terms set by the General Assembly. The danger to our democracy is not that electors who failed to follow the law in casting their ballots will have their ballots set aside due to their own error; rather, the real danger is leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory), providing a patchwork of unwritten and arbitrary rules that will have some defective ballots counted and others discarded, depending on the county in which a voter resides. Such a patchwork system does not guarantee voters an "equal" election, particularly where the election involves inter-county and statewide offices. We do not enfranchise voters by absolving them of their responsibility to execute their ballots in accordance with law.

See In re Canvass, 241 A.3d at 1087.

There is nothing inconsistent about the mandatory nature of the date requirement in 25 Pa.Stat. § 3146.6(a) and § 3150.16(a) and the "structure of the Election Code" (as described by the Government Respondents' Preliminary Objections, pp. 31-32, ¶ 90 and Cross-Application, p. 34, ¶ 104). It is simply not true that "[a]cross the board, the answers to what absentee or mail-in ballots are canvassed or counted are in section 3146.8." *See id*. For example, there is no specific mention of the requirement of voter's signature on the outer envelope in 25 Pa.Stat. § 3146.8. The absence of specific reference to the date requirement there either is not structurally shocking. Both the date and signature requirements

are referenced indirectly by the directive to determine that the declaration is "sufficient." See 25 Pa.Stat. 3146.8(g)(3).

The Government Respondents explore potential interpretive results if the directive to determine that the declaration is "sufficient" is deemed ambiguous, but it is not ambiguous, as explained above. To interpret the Election Code as requiring the exclusion of ballots without a handwritten date (in other words to enforce the date requirement as mandatory) does not disenfranchise voters as is also explained above. The Government Respondents also argue (at their Preliminary Objections, p. 35, ¶ 94 and Cross-Application, p. 37, ¶ 108) that "[i]mposing the drastic consequence of disenfranchisement presents an acute risk … of violating the Free and Equal Elections Clause," but ensuring that invalid votes will not be counted ensures equal elections for all of the reasons explained by then Judge now Justice Brobson in the quote discussed above. *See also Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 389 (Pa. 2020) (Wecht, J. concurring opinion) ("… the failure to 'fill out, date and sign the declaration printed on' the ballot return envelope, as required by 25 P.S. § 3150.16(a), is a deficiency that can be readily observed. Absent some proof that the enforcement of such a uniform, neutrally applicable election regulation will result in a constitutionally intolerable ratio of rejected ballots, I detect no offense to the Free and Equal Elections Clause.").

Finally, the Government Respondents argue (at their Preliminary Objections, p. 35, ¶ 95 and their Cross-Application, p. 37, ¶ 109) that the date requirement should be interpreted as not excluding undated ballots (in other words, determined to be merely directory) to avoid conflict with preemptive federal law, but the argument hinges on ambiguity that is not present and arguments as to the trivial unimportance of the date requirements, which are amply rebutted above. Accordingly, the date requirements of Sections 6 and 8 of Act 77 are mandatory, and by prohibiting the application of the dating provisions of 25 Pa.Stat. §§ 3146.6(a) and 3150.16(a) and directing the District Court to enter an order that undated ballots be counted, the decision in *Migliori* invalidated those date requirements and/or held their application to a person or circumstance invalid.

3. The nonseverability provision of Act 77 is enforceable.

The nonseverability provision of Act 77 is enforceable. While a nonseverability provision is not an "inexorable command," such clauses provide a rule of construction in determining legislative intent and establish a presumption of nonseverability. *Stilp v. Commonwealth*, 905 A.2d 918, 972 (Pa. 2006). The general rule of construction as to severability, 1 Pa.Cons.Stat. § 1925 ("Constitutional construction of statutes") provides:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected

> thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

"Partial nonseverability clauses purport to permit severability of some provisions of a statute, but require invalidation of the entire statute if other specific provisions are struck." *Id.* at 976, n.42. The nonseverability provision in Act 77 is a partial nonseverability provision. A partial nonseverability provision like that found in Act 77 is an especially strong indication that it cannot be presumed that the General Assembly would have enacted the remaining valid provisions without the invalid one.[5]

The Pennsylvania Supreme Court in *Stilp* further explained:

> [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. 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. *See generally* Kameny, *Are Inseverability Clauses Constitutional?*, 68 Alb.L.Rev. at 1000

[5]The affidavits attached hereto as Exhibit A further undermine any such presumption, as a number of House members who voted in favor of Act 77 confirm that they would not have voted in favor of passage of Act 77 if those date requirements had been eliminated instead of included, because they viewed those date requirements as being important to the integrity of mail-in and absentee ballots.

> (arguing that severability determinations are "guesswork by definition, and it is understandable for legislators to fear that the courts might guess wrong."). Or, there may be purely political reasons for such an interpretive directive, arising from the concerns and compromises which animate the legislative process. *See* Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 Harv. J. on Legis. 227, 267-68 (2004) ("When [a legislature] includes an inseverability clause in constitutionally questionable legislation, it does so in order to insulate a key legislative deal from judicial interference."); 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."). In 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. Once again, this is a concern that would not necessarily be apparent to a court analyzing the bare language of the statute.

Stilp, 905 A.2d at 978. On the other hand, courts will not enforce a nonseverability provision when it appears aimed at securing a coercive effect on the judiciary because that would violate the separation of powers. *Id*.

In *Stilp*, the Pennsylvania Supreme Court held that a legislative unvouchered expense allowance violated the constitutional prohibition on legislators' receiving mid-term salary increases, and further held that the unconstitutional unvouchered expense allowance provision was severable, despite the presence in the relevant statute of a "boilerplate nonseverability provision," which read as follows:

> The provisions 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.

905 A.2d at 973. The Pennsylvania Supreme Court refused to enforce the boilerplate nonseverability provision in *Stilp* because under the general severability rule the provision at issue was severable from the rest of the statute, and the nonseverability provision did appear to have been used as a "sword against the Judiciary" because the statute at issue also included compensation provisions for the Judiciary. *Id*. at 978-980.

Applying the general severability rule, the Pennsylvania Supreme Court in *Stilp* explained as follows:

> We have no doubt that the unconstitutional legislative unvouchered expense provision is severable from the remaining, valid (although now repealed) provisions of Act 44, under the substantive standard set forth in Section 1925. In Act 44, the General Assembly adopted a comprehensive new compensation system governing the three branches of government, a system which employed formulas tying the compensation paid Pennsylvania officials to that provided for corresponding federal officials, albeit in a stepped-down fashion. Insofar as the Act adopted the new compensation system for the legislative branch, that system could go into effect, without violating Article II, Section 8 of the Pennsylvania Constitution, with the commencement of the next term of office for each legislative seat. A major and new perceived benefit of this system of compensation consisted in the fact that, by tying salary to the federal structure, the issue of raising official compensation would be de-politicized. This new system of compensation, however, was not "essentially and inseparably connected with" the legislative unvouchered expense provision, much less did it "depend upon" that provision. See 1 Pa.C.S. § 1925. The remaining valid (but repealed) provisions are easily capable of being executed in accordance with the General

> Assembly's manifest intention of providing a new and permanent compensation structure for officials in all three branches of government. In contrast, the legislative unvouchered expense provision had nothing to do with the new, comprehensive compensation system. Instead, that provision sought to avoid a constitutional limitation particular only to the legislative branch, which cannot increase its own salary or mileage during the same legislative term in which such a law is passed. Whatever may have been the motivation behind the unvouchered expense provision, it is clear that the provision was not integral to the workings of the comprehensive system of governmental compensation otherwise adopted in Act 44.

905 A.2d at 973.

Unlike in *Stilp*, the date requirements in this case are integral to the rest of Act 77. As explained above, "there is an unquestionable purpose behind requiring electors to date and sign the declaration":

> … the date on the ballot envelope provides proof of when the "elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector's eligibility to cast the ballot[.]" The date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes.

In re Canvass, 241 A.3d at 1090-91 (internal citations omitted).

In addition, the date of signature is a data point of accountability that helps ensure election integrity with respect to mail-in and absentee ballots as it provides a potentially important piece of information for investigation of vote fraud, coercion, vote buying or ballot harvesting. For example, if the date winds up being a date on which the voter could not have signed the ballot due to a voter's death

prior to that date,[6] or incapacity or mutually exclusive activities on that date, the date can be useful in helping prove and investigate fraud. If many outer envelopes from the same nursing home are all signed on the same date, that could be a signal that ballot harvesting or improper voter coercion may have occurred on that date. With no date requirement, it is easier to break the law and avoid leaving an information trail for investigators. With no particular date or dates to focus on, investigation becomes more difficult.[7]

Requirements for mail-in voting like dating and signing the declaration on the outer envelope are integral to the entire Act 77 because without such integrity requirements, the massive expansion of voting by mail that Act 77 represented would not have been as acceptable and may not have had sufficient support to pass. While the state could still administer mail-in voting without the date requirements,

[6]There is already at least one reported instance where election officials noticed a signature date on an outer envelope declaration that was after the date of death of the voter, leading to an ongoing criminal investigation. *See Commonwealth v. Mihaliak*, Docket Nos. MJ-02202-CR-000126-2022; CP-36-CR-0003315-2022, cited in this Court's unreported opinion in *Chapman et al. v. Berks County Board of Elections, et al.*, No. 355 MD 2022 (August 19, 2022).

[7]In the *Berks County Bd. of Elections* case cited above at footnote 6 to this Response, Christian Leinbach, Commissioner in Berks County, testified that the voter-provided date on the outer envelope can sometimes be relevant to investigations, if circumstances cause election officials to "look at that date." *See* Intervenor-Respondents Democratic National Committee and Pennsylvania Democratic Party's Cross-Application for Summary Relief ("DNC and DNP Cross-Application") at Exhibit 11 (transcript of testimony of Mr. Leinbach), p. 163:21-164:1.

removing the date requirement chips away at accountability and confidence in the integrity of mail-in voting. The Government Respondents' arguments hinge on the date requirements being completely superfluous and immaterial, but that just is not the case, and their dismissal of any possible purpose to the date requirement flies in the face of the first rule of statutory construction, found at 1 Pa.Cons.Stat. § 1921 (Legislative intent controls):

> (a) Object and scope of construction of statutes.--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.

The Government Respondents are encouraging this Court to give no effect at all to the date requirement, as the premise of their arguments. Even if there were not a nonseverability provision in Act 77, this Court should hold that the date requirements are nonseverable.

With the benefit of the partial nonseverability provision of Act 77, it becomes even more clear that the date requirements are nonseverable. Unlike the "boilerplate" nonseverability provision in *Stilp*, the nonseverability provision in Act 77 is only a partial nonseverability provision and is more narrowly targeted toward those particular sections and provisions that the General Assembly viewed as so integral to the legislative compromise that Act 77 represented, that if any of the provisions of those sections or their application to any person or circumstance were declared invalid, then all of Act 77 must be voided. Whittling away at

election integrity provisions like the date requirements seems clearly something that the General Assembly sought to avoid based on the particular sections of Act 77 that they identified in the partial nonseverability provision.

Also, unlike *Stilp*, where the nonseverability provision appeared to have been used as a "sword against the Judiciary" because the statute at issue also included compensation provisions for the Judiciary (*see* 905 A.2d at 978-980), here there is no indication whatsoever that the Act 77 nonseverability provision was in any way aimed at securing a coercive effect on the judiciary. It was instead clearly aimed at preserving specific important parts of a carefully negotiated deal; aimed at preventing one part or side of the deal from being diminished while the other side/other parts remained fully intact. The date requirement is germane to the statutory scheme, as a component of election integrity assurance, for the reasons explained above. The date requirement is a functional and purposeful part of that political compromise. Act 77's nonseverability provision serves clearly permissible purposes under the standards explained in *Stilp*. Only by swallowing whole the Government Respondents' arguments that the date requirement serves no purpose at all could one even begin to question the enforceability of Act 77's nonseverability provision in this case.

The nonseverability provision of Act 77 could have been drafted with greater clarity, but it is hardly "incoherent," as the Government Respondents'

assert at pp. 39-40, ¶ 103 of their Preliminary Objections and p. 41, ¶ 117 of the Cross-Application. Clearly the second sentence of that section means that if any provision of the identified sections or its application to any person or circumstance is held invalid, the remaining provisions or applications of Act 77 are void.[8] The Government Respondents' contention that the nonseverability provision is only triggered by invalidation of whole sections (id. at p. 40, ¶ 104) is belied by the use of the use of "any provision" and not "any section" in the second sentence of the nonseverability provision. It would not have been any clearer or better to refer instead to "any one or more provision, section, subsection, sentence, clause, phrase or word," which the Government Respondents for some reason consider to be

[8]The second sentence is verbatim the language that legislators are directed to use "in substantially the following form" by 101 Pa.Code. § 15.70(b). The legislative history reflects that the only provisions that are intended to be nonseverable are those found in the sections designated in the nonseverability provision. *See* H. Legis. J. No. 64, 203rd SESS. at 1740-41 (Pa. 2019) (DNC and DNP Cross-Application, Ex. 4):

> Mr. EVERETT. Thank you, Mr. Speaker. There is a nonseverability clause, and there is also the section that you mentioned that gives the Supreme Court of Pennsylvania jurisdiction, because the intent of this is that this bill works together, that it not be divided up into parts, and there is also a provision that the desire is, and of course, that could be probably gotten around legally, but that suits be brought within 180 days so that we can settle everything before this would take effect. So those are the provisions that have to do with nonseverability.
> Mrs. DAVIDSON. So in effect, if a suit was brought to the Supreme Court of Pennsylvania and they found it to be unconstitutional, it would eliminate the entire bill because it cannot be severed.
> Mr. EVERETT. Yes; that would be just in those sections that have been designated as nonseverable.

"model language" (in ¶ 205 at p. 41 of their Preliminary Objections and in ¶ 119 at p. 42 of their Cross-Application) in the next breath right after arguing that "a single word" ("date") could not possibly be integral to Act 77 (in ¶ 104 at pp. 40-41 of their Preliminary Objections and in ¶ 118 at p. 42 of their Cross-Application). Note that "date" is not a functionally isolated word in 25 Pa.Stat. § 3146.6(a) and § 3150.16(a), but rather is coupled with the signature requirement by being placed in the phrase "date and sign" in both sections. There are many individual words that could be removed from Act 77 without even altering the meaning of any of its provisions much less the function of Act 77 as a whole, but "date" is not one of them.

The Government Respondents contend (at p. 42, ¶ 107 of their Preliminary Objections and at pp. 43-44, ¶ 121 of their Cross-Application) that, in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) the Pennsylvania Supreme Court "invalidated the requirement that an absentee or mail-in ballot must be returned by 8:00 p.m. on Election Day" which requirement is in Section 7 of Act 77, and note that the Republican Party of Pennsylvania argued in that case that such invalidation would trigger the nonseverability provision of Act 77. That is a mischaracterization of the case. The Secretary of State herself noted in that case that the remedy sought there was "not the invalidation of the Election Code's received-by deadline, but rather the grant of equitable relief to extend temporarily

the deadline to address 'mail-delivery delays during an on-going public health disaster.'" *Id.* at 366 (citation omitted). She further explained:

> As no party is seeking the invalidation of the received-by deadline, the Secretary rejects the suggestion of Respondent and the Caucus that the remedy would trigger the nonseverability provision of Act 77, reasoning that the Court would be granting "a temporary short extension to address the exigencies of a natural disaster" rather than "the invalidation of a statutory deadline." She emphasizes that the statutory deadline would remain unchanged for future elections.

Id. (citations omitted). The Pennsylvania Supreme Court only granted temporary equitable relief in that case, and did not hold Section 7 of Act 77 invalid nor hold its application to any person or circumstance invalid as a general matter:

> Moreover, we are not asked to declare the language facially unconstitutional as there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots. The parties, instead, question whether the application of the statutory language to the facts of the current unprecedented situation results in an as-applied infringement of electors' right to vote.

Id. at 369. There is a stark difference between granting temporary equitable relief from a provision due to a natural disaster and holding a provision or its application invalid. The Pennsylvania Supreme Court explained as follows:

> Under our Extraordinary Jurisdiction, this Court can and should act to extend the received-by deadline for mail-in ballots to prevent the disenfranchisement of voters. We have previously recognized that, in enforcing the Free and Equal Elections Clause, this "Court possesses broad authority to craft meaningful remedies when required."

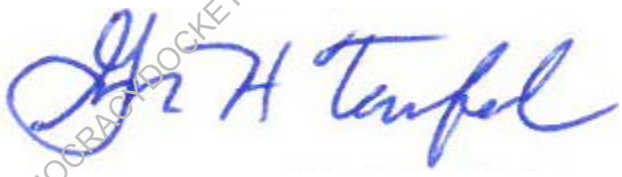
Id. at 371 (citation omitted).

Because Petitioners' claim is meritorious, the Government Respondents' Preliminary Objection as to the merits should be overruled and Cross-Application on this same basis be denied.

CONCLUSION

For the aforementioned reasons, Petitioners respectfully urge this Court to deny the Government Respondents' Cross-Application for Summary Relief, overrule their Preliminary Objections, and enter the attached proposed orders.

Respectfully submitted,



Gregory H. Teufel
Attorney for Petitioners

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, and

DSCC, DCCC, Democratic National Committee, Pennsylvania Democratic Party,

Intervenor-Respondents.

No. 364 M.D. 2022

ORDER DENYING SUMMARY RELIEF

AND NOW, this ____ day of _____, 2022, pursuant to Rule 1532(b) of the Pennsylvania Rules of Appellate Procedure and upon consideration of Respondents' Cross-Application for Summary Relief along with Petitioners'

response, it is ORDERED AND DECREED that Respondents' Cross-Application for Summary Relief is denied.

IT IS SO ORDERED.

_____

J.

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,

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Respondents, and

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Intervenor-Respondents.

No. 364 M.D. 2022

ORDER OVERRULING PRELIMINARY OBJECTIONS

AND NOW, this ____ day of _____, 2022, pursuant to Rule 1532(b) of the Pennsylvania Rules of Appellate Procedure and upon consideration of Respondents' Preliminary Objections, along with Petitioners' responses, it is ORDERED AND DECREED that Respondents' Preliminary Objections are overruled.

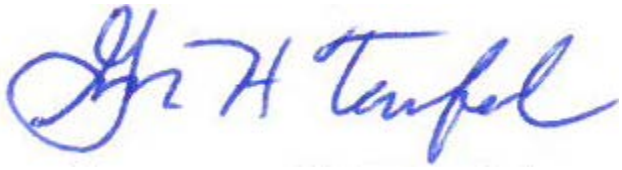
IT IS SO ORDERED.

_____

J.

CERTIFICATE OF WORD COUNT

I certify that this Response contains 10,192 words, as determined by the word-count feature of Microsoft Word.

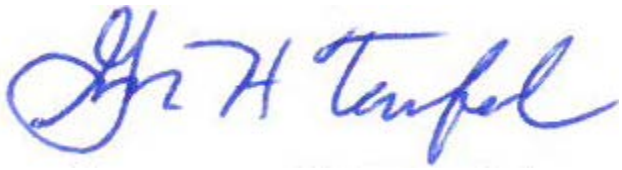


Date: September 2, 2022

Gregory H. Teufel, Esq.

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.



Date: September 2, 2022

Gregory H. Teufel, Esq.