

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

**BRIEF IN SUPPORT OF
PETITIONERS’ 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
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I. INTRODUCTION

This Court should grant Petitioners' Application for Summary Relief and declare that, pursuant to Section 11 (the nonseverability provision) 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 courts of competent jurisdiction (including this Court) have held provisions of Sections 6 and 8 of Act 77 (specifically, the dating provisions) and/or their application to a person or circumstance invalid, all of the provisions and applications of Act 77 are now void. Section 11, a partial nonseverability provision, was included to ensure that neither side could be robbed of the full benefit of its bargain in the carefully negotiated deal that Act 77 represents.¹ Legislative compromises are vital to the functioning of our state government but will be much harder to achieve in the future if our courts allow such deals to be undermined piece by piece.

The drafters of Act 77 decided which of its provisions were so important to their bargain that, if any of them were invalidated or even if their application to

¹See *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); *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."; citing H. Legis. J. No. 63, 203rd Sess. (Pa. 2019) at 1706-11).

any person or circumstance were held invalid, the entirety of Act 77 is void. All of the provisions of Section 6 and 8 were included on that list and the dating provisions of Section 6 and 8 (hereafter “the dating provisions”) are so integral to the rest of Act 77 that they would be nonseverable even if Act 77 did not have a nonseverability provision.

Petitioners incorporate by reference their Responses to the Respondents’ and 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. FACTUAL BACKGROUND

Petitioners Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald “Bud” Cook 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.* ¶ 23.²

² However, Representative Ryan decided not to run for reelection.

The Third Circuit in *Migliori v. Cohen*, 36 F.4th 153, 2022 U.S. App. LEXIS 14655, *3 (3rd Cir. 2022) 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 outer³ envelope. Subsequent to the decision in *Migliori*, 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, at her urging, this Court in *Chapman et al. v. Berks County Board of Elections, et al.*, No. 355 MD 2022 (August 19, 2022) (Unpublished Memorandum Opinion by President Judge Cohn Jubelirer, p. 64-65) followed the Third Circuit's interpretation of federal law in *Migliori*.

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

³In a number of instances, Petitioners' Petition and Application for Summary Relief mistakenly reference the dating provisions as applying to the “secrecy” envelope instead of the “outer” envelope. Although the outer envelope is also important to maintaining secrecy, it is the inner envelope that is typically referenced as the secrecy envelope, not the outer envelope. Hopefully this eliminates any confusion that those mistaken “secrecy envelope” references may have caused.

MAIL-IN BALLOT RETURN ENVELOPES,

<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf>. That Guidance further states:

“The county board of elections shall canvass segregated absentee and mail-in ballots that were previously set aside due to being undated or incorrectly dated.”

Id. The Pennsylvania Department of State has, accordingly, taken the official position that absentee and mail-in voters do not need to follow the dating provisions, rendering those provisions effectively invalid and/or their application to a person or circumstance effectively invalid.

III. ARGUMENT

A. Legal standard.

Pursuant to Pa.R.A.P. 1532(b), this Court can grant summary relief “if the right of the applicant thereto is clear.” Because the fact that courts of competent jurisdiction (including this Court) have held that provisions of Sections 6 and 8 of Act 77 (specifically, the dating provisions) and/or their application to a person or circumstance invalid is a matter of public record, there is no need for discovery, and this case presents a pure question of law. Petitioners' right to relief is clear, and summary adjudication is appropriate.

B. This Court should grant Petitioners' Application for Summary Relief because the mandatory dating provisions of Sections 6 and 8 of Act 77 and/or their application to a person or circumstance have been held invalid and the nonseverability provision is enforceable.

This Court should grant Petitioners' Application for Summary Relief because the mandatory dating provisions of Sections 6 and 8 of Act 77 and/or their application to a person or circumstance have been held invalid by courts of competent jurisdiction and the nonseverability provision is enforceable. 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). Section 11 of Act 77 ("the nonseverability provision") 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.

Clearly the second sentence of that nonseverability provision means that if any provision of the sections identified in the first sentence or its application to any person or circumstance is held invalid, the remaining provisions or applications of Act 77 are void. That is why the second sentence of the nonseverability provision refers to "any provision" and not "any section." 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 also 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.

1. The Third Circuit in *Migliori* held that the dating provisions were invalid and could not be applied to refuse to count a mail-in or absentee ballot that arrived in an undated outer envelope.

The Third Circuit in *Migliori v. Cohen*, 36 F.4th 153, 2022 U.S. App.

LEXIS 14655, *3 (3rd Cir. 2022) held that the dating provisions were invalid and could not be applied to refuse to count a mail-in or absentee ballot that arrived in an undated outer envelope. In *Migliori*, the court held that the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101 (“the Materiality Provision”),

prohibited the application of the dating provisions and directed the District Court to enter an order that the undated ballots in that case be counted.

The underlying facts and history in *Migliori* 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.

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.w.Ct. 2022)). Voters then sued the LCBE in the United State District Court for the Eastern

District of Pennsylvania arguing that the decision not to count votes because they lacked a date on the outer 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.

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 prohibited the application of the dating provisions and directed the District Court to enter an order that the undated ballots in that case be counted. *See 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 dating provisions were 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 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.

2. This Court in *Berks County Board of Elections* followed *Migliori* and 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.

This Court 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, 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 dating provisions and/or the application of those dating provisions to a person or circumstance invalid.

3. The dating provisions are mandatory.

The dating provisions are mandatory. 25 Pa.Stat. § 3146.8(g)(3) provides:

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the

board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information thereon with that contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters’ list and/or the “Military Veterans and Emergency Civilians Absentee Voters File,” whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is **sufficient** and the information contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters’ list and/or the “Military Veterans and Emergency Civilians Absentee Voters File” verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

(emphasis added). The only information that could potentially be reviewed for “sufficiency” pursuant to 25 Pa.Stat. § 3146.8(g)(3) is that which the voter provides, which is limited to a signature and date, pursuant to Sections 6 and 8 of Act 77. *Accord* Government Respondents’ Preliminary Objections, p. 36, n. 3 and Cross-Application, p. 29, n. 3. The meaning of “sufficient” as it is used in 25 Pa.Stat. § 3146.8(g)(3) is therefore clear, 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 Sections 6 and 8 of Act 77, 25 Pa.Stat. §§ 3146.6(a) and 3150.16(a). It is clear because that is the only thing that it could possibly mean. It admits of only one rational meaning. Courts should never ascribe an unreasonable intent to a statute. *See* 1 Pa.Cons.Stat. § 1922(1). The instruction that county boards of elections assess a declaration’s sufficiency is not gratuitous. It describes a specific process by which the

requirements of § 3146.6(a) and § 3150.16(a) are given effect. Stating that only ballots meeting certain requirements shall be canvassed is the contrapositive and of equal effect to saying that ballots not meeting those certain requirements shall not be canvassed.

The context makes quite clear what date is meant when voters are instructed to “date and sign” the declaration in 25 Pa.Stat. §§ 3146.6(a) and 3150.16(a).

“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. 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 should not be lost in confusion about what date to put beside one’s signature. There is no other date that could rationally have been intended. The dating provisions admit of only one rational meaning as to what date is intended.

Of course, voters are not being directed to enter their birth dates or some other random date beside their signatures on the declarations on the outer envelopes. The facts that some voters may actually write different dates than the date of signature and that 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 dating provisions ambiguous or confusing. If any voters are getting confused about what date to write next to their signatures,

the solution would be to provide better instructions to voters, not to declare the dating provisions ambiguous, meaningless or purposeless. The law is not changed by noncompliance, by nonenforcement, or by incorrect or insufficient instructions from the Secretary of State to the electors to complete the outer envelope declarations and to the county boards of elections to ensure compliance.

Therefore, the statutory intent is clear that the dating provisions should have mandatory effect. Clear statutory intent, however, is not the end of the inquiry as to whether a provision is given mandatory effect as opposed to merely directory effect by our courts. The Pennsylvania Supreme Court has explained, in case such as in *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1073 (Pa. 2020) (hereafter “*In re Canvass*”) and *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020) that only such requirements supported by “weighty interests,” such as fraud prevention or ballot secrecy, are given mandatory effect. In *Pa. Democratic Party*, the Pennsylvania Supreme Court determined that the secrecy envelope provision was mandatory and that a mail-in ballots that were not enclosed in the statutorily mandated secrecy envelope must be disqualified. 284 A.2d at 378-380.

In *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989 (Pa.Cmwlt. 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.2d 989, 2022 Pa.Commw.Unpub.LEXIS 1, *7-*25.

Likewise, in *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1 Petition of Carpenter*, 272 A.3d 993 (Pa.Cmwlt. 2022), 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, but 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.Commw.Unpub.LEXIS 15, *8.

This Court should in this case likewise recognize 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).

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 and prosecution 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, 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 residents in 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 and could provide a specific date on which to focus an investigation and prosecution as to illegal ballot harvesting. With no requirement to date the elector's signature on the outer envelope certification, 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 and prosecution or other litigation would become substantially more difficult. If the date is not required to be supplied, then potential challengers are robbed of one of the important possible ways to ferret out a basis to challenge an individual ballot.

There was an actual instance where the date on the outer envelope declaration led to a criminal fraud investigation where the date written next to the signature was after the date of the elector's death, as indicated by the SURE system, because clearly someone must have forged the elector's signature on the declaration. *See Commonwealth v. Mihaliak*, Docket Nos. MJ-02202-CR-000126-2022; CP-36-CR-0003315-2022 cited at Unpublished Memorandum Opinion at 49 in *Chapman et al. v. Berks County Board of Elections, et al.*, No. 355 MD 2022

(August 19, 2022). Without the dating provisions, the fraud never would have been detected. One would not expect the dating provisions to routinely trip up fraudsters, but it is still an important component of overall election integrity in Act 77.⁴ That importance is also highlighted by the dating provisions being included among the provisions identified as nonseverable by Act 77's nonseverability provision, which is discussed in the next section of this brief.

4. 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

⁴In addition, in the *Berks County Bd. of Elections* case, 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.

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[, 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. *See generally* Kameny, *Are Inseverability Clauses Constitutional?*, 68 Alb.L.Rev. at 1000 (arguing that severability determinations are

⁵The affidavits filed with Petitioners’ Response to the Government Respondents’ Preliminary Objections and Cross-Application for Summary Relief 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 dating provisions had been eliminated instead of included, because they viewed those dating provisions as being important to the integrity of mail-in and absentee ballots.

"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 dating provisions in this case are integral to the rest of Act 77. As explained above in section III.B.3 of this Brief, “there is an unquestionable purpose behind requiring electors to date and sign the declaration.” See *In re Canvass*, 241 A.3d at 1090-91. 1 Pa. Cons. Stat. § 1921 (Legislative intent controls) provides:

- (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 Court should not discount the unquestionable purpose behind the dating provisions and interpret them as pointless, meaningless requirements. 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.

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 dating provisions, removing the dating provisions chips away at accountability and confidence in the integrity of mail-in voting. Even if there were not a nonseverability provision in Act 77, this Court should hold that the dating provisions are nonseverable.

With the benefit of the partial nonseverability provision of Act 77, it becomes even more clear that the dating provisions 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 dating provisions is 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 dating provisions are germane to the statutory scheme, as a component of election integrity assurance, for the reasons explained above. The dating provisions are a functional and purposeful part of that political compromise. Act 77's nonseverability provision serves clearly permissible purposes under the standards explained in *Stilp*.

Blocking the application of a mandatory provision like the dating provisions at issue here triggers the clearly enforceable nonseverability provision of Act 77, which is triggered not only by expressly striking provisions as invalid but also by holding their application to any person or circumstance invalid. Clearly that is what occurred in *Migliori* and *Berks County Board of Elections*, and now, across the state, the dating provisions are consequently being and will continue to be disregarded in favor of counting ballots where no signature date is provided on the declaration on the outer envelope. Accordingly, Petitioners' Application for Summary Relief should be granted and Act 77 and all amendments thereto, such as Act No. 12 of 2020 should be declared void.

CONCLUSION

For the aforementioned reasons, Petitioners respectfully urge this Court to grant their Application for Summary Relief.

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

I certify that this Response contains 5,835 words, as determined by the word-count feature of Microsoft Word.



Date: September 9, 2022

Gregory H. Teufel, Esq.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Date: September 9, 2022



Gregory H. Teufel, Esq.

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