

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’ BRIEF IN
RESPONSE TO GOVERNMENT
RESPONDENTS’ PRELIMINARY
OBJECTIONS AND CROSS-
APPLICATION FOR SUMMARY
RELIEF**

Filed on behalf of Petitioners,
Timothy R. Bonner, P. Michael Jones,
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. BACKGROUND	3
III. RESPONDENTS PRELIMINARY OBJECTIONS SHOULD BE OVERRULED AND CROSS-APPLICATION FOR SUMMARY RELIEF SHOULD BE DENIED	4
A. The dating provisions of Sections 6 and 8 of Act 77 are mandatory.....	4
1. An outer envelope declaration with an undated signature is not “sufficient.”	5
2. Nothing in the history of the Election Code suggests that the dating provisions of Section 6 and 8 of Act 77 are merely directory	6
3. The dating provisions of Sections 6 and 8 of Act 77 are supported by weighty interests	8
B. The Petitioners have standing to challenge the continuing validity of Act 77	13
C. Respondents cannot meet their burden of establishing a laches defense.....	15
CONCLUSION.....	16
CERTIFICATE OF WORD COUNT	
CERTIFICATE OF COMPLIANCE (Public Access Policy)	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

Chapman et al. v. Berks County Board of Elections, et al., No. 355 MD 2022 (August 19, 2022).....	4, 10-12
Commonwealth v. Mihaliak, Docket Nos. MJ-02202-CR-000126-2022; CP-36-CR-0003315-2022.....	10
In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020)	3, 8-9, 15
In re Nov. 3, 2022 Gen. Election, 240 A.3d 591 (Pa. 2020)	7
Kauffman v. Osser, 271 A.2d 236 (Pa. 1970).....	13-14
McLinko v. Commonwealth, 270 A.3d 1243 (Pa.Cmwlth. 2022), reversed in part, affirmed in part by McLinko v. Commonwealth, __ A.3d __, 2022 Pa.LEXIS 1124, 2022 WL 3039295 (Pa. 2022)	15
Migliori v. Cohen, 36 F.4th 153 (3rd Cir. 2022)	4, 15
Ritter v. Lehigh Cnty. Bd. of Elections, 272 A.3d 989 (Pa.Cmwlth. 2022).....	3
Toth v. Chapman, 2022 WL 821175, 2022 U.S. Dist. LEXIS 47108 (M.D. Pa. 2022)	14

Statutes and Regulations

Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”)	passim
1 Pa.Cons.Stat. § 1921(a).....	8
25 Pa.Stat. § 3146.6(a)	5, 8
25 Pa.Stat. § 3146.8(g)	5-7
25 Pa.Stat. § 3150.16(a)	5, 8

25 Pa.Stat. § 3553.....5

Other Authorities

GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN
BALLOT RETURN ENVELOPES,
<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf>.....4

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I. INTRODUCTION

There is nothing perverse or paradoxical about the operation of a nonseverability provision consistent with its clear intent. Giving the nonseverability provision its intended effect in this case ensures that neither side can be robbed of the full benefit of its bargain in the carefully negotiated deal that Act 77 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”)) represents. 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”) wish to uphold only parts of Act 77, while disregarding others. Act 77 was the result of many months of consideration, debate, and compromise in order to win bipartisan support. The drafters of Act 77 decided which provisions were of such importance to their bargain as a whole 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.

For all of the reasons already explained in Petitioners’ Response to the Government Respondents’ Preliminary Objections (“Preliminary Objections”) and Cross-Application for Summary Relief (“Cross-Application”), which Response is

incorporated by reference,¹ the Preliminary Objections should be overruled and the Cross-Application should be denied: (1) the Petitioners have standing to bring their Petition as taxpayers, voters and past and future candidates for office in Pennsylvania and the Petitioners are not required to plead more specifically the legal theories underlying standing, (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 also incorporate by reference their Application for Summary Relief and Brief in support thereof, as well as their Responses to the Intervenor-Respondents' Preliminary Objections and Cross-Applications for Summary Relief, and Briefs in support thereof, 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.

¹ This Brief focuses on new arguments found in the Government Respondents' Briefs in support of their Preliminary Objections and Cross-Application because arguments already raised by the Government Respondents prior to those Briefs were adequately addressed in Petitioners' Response to the Preliminary Objections and Cross-Application.

II. BACKGROUND

In the Background sections of their Briefs in support of their Preliminary Objections and Cross-Application, the Government Respondents persist in their inaccurate oversimplification of *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*”), explaining only that ballots returned without a handwritten date on the envelope declaration “were counted” in the 2020 General Election. In that case, the Pennsylvania Supreme Court refused to apply its decision retrospectively, and only applied it prospectively, only allowing counting of undated mail-in ballots by virtue of the decision to delay the effectiveness of its holding that the dating requirement was mandatory. *See In Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989, 2022 Pa.Comm. Unpub. LEXIS 1, *7-*25 (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). Put simply, counting undated mail-in ballots in the

2020 General Election was merely the practical effect of the refusal to grant immediate relief due to equitable concerns.

Meanwhile, in every election since 2020, county boards of elections have refused to count undated mail-in ballots, consistent with the Government Respondents' own guidance to them, which guidance only changed after the decision in *Migliori v. Cohen*, 36 F.4th 153, 2022 U.S.App.LEXIS 14655 (3rd Cir. 2022). See GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf>, and this Court's unreported opinion in *Chapman et al. v. Berks County Board of Elections, et al.*, No. 355 MD 2022, p.11-12 (August 19, 2022) (“Deputy Secretary described the Department’s Guidance issued in September 2020, which reflected that absentee and mail-in ballots that did not contain a handwritten date on the declaration on the return envelope should not be counted”).

III. RESPONDENTS PRELIMINARY OBJECTIONS SHOULD BE OVERRULED AND CROSS-APPLICATION FOR SUMMARY RELIEF SHOULD BE DENIED

A. The dating provisions of Sections 6 and 8 of Act 77 are mandatory.

The dating provisions of Sections 6 and 8 of Act 77 are mandatory.

1. An outer envelope declaration with an undated signature is not “sufficient.”

The Government Respondents’ attempt to argue that the lack of a handwritten date does not render a voter’s declaration “insufficient” under the canvassing provisions of Section 1308 (25 Pa.Stat. § 3146.8). See Brief in Support of Cross-Application at pp. 26-29. They cite a dictionary definition of “sufficient” but nothing in that definition suggests that less than perfect compliance should be deemed sufficient (*see, e.g., id.* at p. 27). The only two things a voter needs to supply to make a declaration sufficient are the voter’s signature and the date of that signature. *See* Preliminary Objections, p. 26, n. 3 and Cross-Application, p. 29, n. 3. The absence of either is no slight imperfection. Requiring a determination that a declaration is “sufficient” is the functional equivalent of requiring that the “declaration complies with § 3146.6(a) and § 3150.16(a)” or that “the declaration is complete.”

By describing what a voter’s outer envelope declaration must include in 25 Pa.Stat. 3146.4 and 25 Pa.Stat. § 3150.14, those sections do not limit the purposes served by the requirement to sign and date such declarations. Likewise, just because 25 Pa.Stat. § 3553 does not make it a crime for a voter to fail to include a date with his or her signature on such declarations does not mean that the dating provisions are not important and serve no purpose.

Likewise, nothing in 25 Pa.Stat. § 3146.8(g)(3) “makes clear that a signature, unlike a handwritten date, is a prerequisite for canvassing an absentee or mail-in ballot because an unsigned declaration is not ‘sufficient.’” *See* Brief in support of Cross-Application at p.28, n.7. Both the voter’s signature and the accompanying date are equally part of what makes an outer envelope sufficient. The Government Respondents’ arguments that a date is not required for a sufficient declaration would apply with equal force to the signature requirement.

2. Nothing in the history of the Election Code suggests that the dating provisions of Section 6 and 8 of Act 77 are merely directory.

Nothing in the history of the Election Code suggests that the dating provisions are merely directory. The Government Respondents suggest that “the date on a return envelope was *once* a basis for disqualifying a mailed ballot—as established by an express requirement *added to Section 1308’s canvassing criteria*—but the General assembly then *removed* that requirement ...” with *italics* for dramatic effect. *See id.* at pp. 29-30. Just because dates of postmarks, jurats, or declarations are no longer used to screen out late ballots because ballots are now required to be received by Election Day does not mean that the inclusion of the date with the signature on a declaration has nothing to do with its sufficiency and serves no purpose. It is not the case that the declaration signature date was once expressly required for sufficiency of the declaration and that requirement was removed. Whether a ballot is timely completed on or before Election Day and

whether a declaration is “sufficient” for purposes of 25 Pa.Stat. § 3146.8(g)(3) are two entirely separate questions. The General Assembly never “specifically eliminated” checking for a signature date from the sufficiency criteria for outer envelope declarations.

In *In re Nov. 3, 2022 Gen. Election*, 240 A.3d 591, 608 (Pa. 2020), the Pennsylvania Supreme Court expressly held that “in determining whether the declaration is ‘sufficient’ for a mail-in or absentee ballot at canvassing, the county board is required to ascertain whether the declaration on the return envelope has been filled out, dated, and signed.” The Government Respondents are trying to use that case to get this Court to hold the opposite (in their Brief in support of their Cross-Application at pp. 35-36): that whether the declaration has been dated has nothing to do with determining whether it is “sufficient” and really only the presence of the signature is necessary for that purpose. That case merely held that signature comparisons are not involved in determining the sufficiency of outer envelope declarations. It did absolutely nothing to negate the importance of the signature dates in determining that sufficiency, no more than it negated the importance of the presence of the voter’s signature for determining that sufficiency.

The Government Respondents’ attempt to argue that because the signature date on the declaration no longer serves any purpose related to the timeliness of the

vote, therefore the signature date no longer serves any purpose whatsoever. *See* Brief in support of Cross-Application at p. 36, n.10. But if the General Assembly wanted to remove the date requirement from 25 Pa.Stat. §§ 3146.6(a) and 3150.16(a), it could have done so. The fact that it left those provisions intact suggests they intended the provisions to serve some continuing purpose. To read them as serving no purpose would violate the rule of construction that requires courts to give effect to all provisions of every statute. *See* 1 Pa.Cons.Stat. § 1921(a).

3. The dating provisions of Sections 6 and 8 of Act 77 are supported by weighty interests.

The dating provisions are supported by weighty interests. Having completely ignored the “weighty interests” mandatory vs. directive analysis in their Preliminary Objections and Cross-Application, the Government Respondents belatedly acknowledge this controlling framework in their Briefs in support. But they acknowledged and addressed only some of the weighty interests identified by Petitioners. To recap, the weighty interests identified by Petitioners are again set forth below.

In *In re Canvass*, Justice Dougherty, on behalf of the CDO, opined:

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 there were colorable arguments as to the necessity of the date requirement:

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. By way of example, 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 77.²

The Government Respondents only address the issue of whether the declaration signature date really can serve any role in determining the voter's eligibility to vote at the time of the signature. The Government Respondents insist, as this Court did in the *Berks County Bd. of Elections* case, that the signature date serves no such purpose because eligibility to vote is assessed as of Election Day and time stamps as to when a ballot was received are the exclusive dates used to determine whether ballots are timely. But those arguments ignore the possibility that, on the dates the voter signed the declaration, the voter may not have been eligible to vote, such as because the voter was incarcerated for a felony crime, or the voter was a minor on that date. Even if a voter is no longer a minor on Election Day and is released from prison by Election Day, the voter still cannot vote until after the voter is actually released and reaches age 18. It is possible for a voter to be ineligible because the voter voted prematurely, even if the voter later became

²In 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.

eligible to vote. So it simply is not correct that the signature date cannot possibly serve any purpose as to voter eligibility.

Moreover, the Government Respondents offer no response to the many other weighty interests identified by Petitioners other than to brush off suggested usefulness as to fraud issues relying entirely on this Court's unpublished opinion in *Berks County Bd. of Elections*. But this Court did not adequately address even the fraud purposes served by the dating provisions in that case. This Court in *Berks County Bd. of Elections* was unimpressed even by an actual instance, described above, where the date on the declaration was after the date of the elector's death, as indicated by the SURE system, which prompted a criminal vote fraud investigation because clearly someone else must have forged the elector's signature on the declaration, because the ballot "would have been rejected anyway because the elector had died prior to the Primary Election Day." Unpublished Memorandum Opinion at 49. The date being actually useful in finding fraud did not convince this Court that the dating requirement serves any purpose in preventing, investigating or detecting fraud. Even though the ballot at issue would still not have been canvassed even if the date on the declaration were not after the elector's death, this Court overlooked the point that, because the election day was also after the elector's death and votes received from elector's who died before election day are

not counted, without the dating provisions, the fraud never would have been detected.

The Government Respondents make no attempt to respond to any of the other purposes identified by the Petitioners, such as aiding in investigation and prosecution of coercion, vote buying or ballot harvesting. Throwing around terms like “straw-grasping” and “disenfranchising” does not address these additional weighty interests.

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

The Petitioners have standing to challenge the continuing validity of Act 77. The Government Respondents insist that insufficient facts were plead to support standing, but they refer not to facts but to legal arguments, which are not required to be included in a petition to support standing. The basic facts of the status of Petitioners as registered voters and candidates are included in the Petition in this case. If the Court requires the Petitioners’ obvious status as taxpayers as well to be included in the Petition, it should grant leave to amend to add that rather than dismiss the Petition on that basis.

As registered voters, the Petitioners are impacted by the application of a void law to Pennsylvania elections. Again the Government Respondents attempt to rely on *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970) to assert that voters never have standing to challenge the constitutionality of election laws, but they fail to address

the point that, in *Kauffman*, the Pennsylvania Supreme Court did not hold that vote dilution could never support standing, but rather that the speculative nature of the claim in that case (that dilution could occur) 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.

The Government Respondents also argue that Petitioners' status as candidates does not confer standing, arguing that "every candidate must conform his or her campaign to the operative law, whatever it may be." *See* Brief in support of Cross-Application at p. 62. This response ignores the point that the candidate's interests are distinct from voters in general, even if they are not distinct from other candidates.

Moreover, the interest at issue is not merely being forced to conform campaigns to operative law but rather to void law. The candidates need to know with certainty what law applies to their campaigns, and what laws do not because they are void. 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.

It is not the case that the only candidate interests that can support standing are issues that put certain candidates at a competitive disadvantage. *Toth v. Chapman*, 2022 WL 821175, at *11, 2022 U.S. Dist. LEXIS 47108 at *32 (M.D. Pa. 2022) is inapplicable because that case merely held that the candidates in that

case had no legally cognizable interest in the composition of their district and the likelihood of redistricting was far from certain. In this case, there is no issue of the Petitioners inflicting harm on themselves, and the voidness of Act 77 is not the result of bringing this suit by rather the result of the decision in *Migliori*. The Government Respondents made no attempt to address the reasoning of this Court as to standing in *McLinko v. Commonwealth*, 270 A.3d 1243, 1281-1282 (Pa.Cmwlt. 2022), *reversed in part, affirmed in part by McLinko v. Commonwealth*, 2022 Pa.LEXIS 1124, 2022 WL 3039295 (Pa. 2022), which is equally applicable here. With respect to taxpayer standing, the Government Respondents have not identified other persons better situated to assert their claims.

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

Respondents cannot meet their burden of establishing a laches defense. The Government Respondents mischaracterize Petitioners' argument as to *In re Canvass*, as suggesting that case did not trigger the nonseverability provision because "that case concerned only the ballots cast in one election." *See* Brief in support of Cross-Application at p. 66, n. 24. That is not Petitioners' argument. The reason that *In re Canvass* did not trigger the nonseverability provision in Act 77 was that the Pennsylvania Supreme Court upheld the mandatory nature of the dating provisions but simply 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.

CONCLUSION

For the aforementioned reasons and the reasons stated in Petitioners Response to the Preliminary Objections and Cross-Application, Petitioners respectfully urge this Court to enter the proposed orders denying the Government Respondents' Cross-Application for Summary Relief and overruling the Preliminary Objections.

Respectfully submitted,



Gregory H. Teufel
Attorney for Petitioners

CERTIFICATE OF WORD COUNT

I certify that this Brief contains 3,675 words, as determined by the word-count feature of Microsoft Word.



Date: September 22, 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 22, 2022



Gregory H. Teufel, Esq.

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