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**Motions for Admission Pro Hac Vice Forthcoming
Attorneys for Proposed Intervenors DSCC and DCCC*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TIMOTHY R. BONNER, P. MICHAEL
JONES, DAVID H. ZIMMERMAN, BARRY
J. JOZWIAK, KATHY L. RAPP, DAVID
MALONEY, BARBARA GLEIM, ROBERT
BROOKS, AARON J. BERNSTINE,
TIMOTHY F. TWARDZIK, DAWN W.
KEEFER, DAN MOUL, FRANCIS X.
RYAN, and DONALD "BUD" COOK,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official
capacity as Acting Secretary of the

Case No. 364 MD 2022

Commonwealth of Pennsylvania, and
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF STATE,

Respondents.

**PROPOSED INTERVENOR-RESPONDENTS' PRELIMINARY
OBJECTIONS TO PETITIONERS' PETITION FOR REVIEW IN THE
NATURE OF AN ACTION FOR A DECLARATORY JUDGMENT**

Proposed Intervenor-Respondents DSCC and DCCC present the following preliminary objections to Petitioners' Petition for Review in the Nature of an Action for a Declaratory Judgment. DSCC and DCCC relatedly request that this Court grant summary relief dismissing the petition because, as the preliminary objections below show, Respondents have a "clear" right to dismissal. Pa.R.A.P. 1532(b).

INTRODUCTION

Enacted in 2019, the Commonwealth's omnibus election legislation, Act 77, ushered in widespread reforms that impact just about every aspect of the voting process. Most prominently, Act 77 expanded voting access by establishing no-excuse mail-in voting, which is the focus of Petitioner's claim, but the bill accomplished much more. For instance, it eliminated straight-ticket voting, created new rules for the decertification of voting apparatuses, reduced the number of paper ballots that applicable counties are required to print, prohibited the use of stickers to mark ballots, altered the voter registration deadline from 30 days to 15 days before an election, required counties to post sample ballots online before each election, and even established new guidelines for election worker pay. And the Commonwealth

has administered no fewer than five Pennsylvania-wide elections under these procedures over the last two years.

Petitioners ask this Court to wipe these reforms from the books and overhaul the Commonwealth's election apparatus weeks after voters have begun applying to vote by mail for the November election. Because Petitioners waited until the crunch of election season to bring this claim, which they could have raised as early as 2020, their belated attempt to disrupt and inject chaos into the electoral process would not only nullify months of preparation by elections officials and political campaigns, but it would also impose significant barriers to the franchise for millions of Pennsylvanians who may lose the ability to vote by mail. Any relief Petitioners may seek at this stage is foreclosed by their inexcusable delay—and by the Pennsylvania Constitution.

In any event, Petitioners' claims also fail as a matter of law because the Third Circuit's ruling in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), did not "invalidate" any law and therefore does not trigger Act 77's nonseverability provision. Rather, the court held that a phrase in the statute instructing voters to date the outer envelope containing their mail ballot (the "Date Provision") cannot serve as grounds for discarding the ballot—a topic on which Act 77 itself is silent—and that doing so would violate longstanding federal law. *Migliori*, 36 F.4th at 164. If anything, *Migliori* confirms that the nonseverability provision does not apply: the

Date Provision cannot be at once immaterial while also inseparably connected to every other provision in the statute.

For these reasons, the Petition should be dismissed.

SUMMARY OF ARGUMENT

1. Petitioners' claims are barred by laches. As early as *November 2020*, Pennsylvania courts affirmed the decisions of county boards of elections to count undated mail ballots, just like the *Migliori* decision at issue here. *See, e.g., In re Canvass of Absentee and/or Mail-In Ballots of November 3, 2020 General Election*, No. 20-05786-35, *8-11 (Bucks Cnty. Ct. Com. Pl., Nov. 19, 2020); Order, *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. GD 20-011654 (Allegheny Cnty. Ct. Com. Pl., Nov. 18, 2020); Order, *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100874 (Phila. Cnty. Ct. Com. Pl., Nov. 13, 2020); Order, *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100875 (Phila. Cnty. Ct. Com. Pl., Nov. 13, 2020); *cf.* Order, *Donald J. Trump for President, Inc. v. Montgomery Cnty. Bd. of Elections*, No. 2020-18680 (Montgomery Cnty. Ct. Com. Pl., Nov. 13, 2020). The Pennsylvania Supreme Court affirmed these rulings the same month and held that undated ballots could be counted in that year's general election. *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1076 (Pa. 2020) (opinion announcing judgment) (hereinafter "*In re Canvass*

of Absentee and Mail-In Ballots”). Thus, under Petitioners’ theory that such a judicial order triggers Act 77’s nonseverability provision, they could have brought their claim in 2020. Instead, Petitioners delayed filing this petition until just a few months before the 2022 general election, causing substantial prejudice to Respondents, Proposed Intervenors, and voters. Respondents have expended significant resources to implement Act 77 in multiple elections; Proposed Intervenors have similarly invested time and money educating candidates and voters in Pennsylvania about the current election regime; and countless Pennsylvania voters have grown accustomed to—and reliant upon—Act 77’s no-excuse mail voting scheme during the period that Petitioners sat on their claim. Given Petitioners’ unexplained delay and the resulting prejudice, the laches doctrine requires that Petitioners’ requested relief be denied. *See Kelly v. Commonwealth*, 240 A.3d 1255, 1256-57 (Pa. 2020) (per curiam), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021) (applying doctrine of laches and denying with prejudice Petitioner’s challenge to Act 77 because of one-year delay and resulting prejudice).

2. Petitioners’ claim also fails as a matter of law because it misapplies Act 77. By its plain terms, the statute’s nonseverability provision—which purports to void enumerated sections of the Act if any provision or application “is held invalid,” Act 77 § 11—was not triggered by the *Migliori* decision, which did not declare any provision or application of Act 77 to be invalid. Rather, the court held that the Lehigh

County Board of Elections may not reject mail ballots on the sole basis that the voter failed to date the ballot's outer envelope, and there is no corresponding provision in Act 77 that expressly prohibits counting undated ballots.

3. Even if the Court were to undertake a nonseverability analysis, the Date Provision is severable from the rest of the Act. Pennsylvania courts have cautioned that a statute's nonseverability provision is not an "inexorable command," and courts should "effectuate [their] independent judgment concerning severability." *Stilp v. Commonwealth*, 905 A.2d 918, 971-72, 980 (Pa. 2006). Because the Date Provision is irrelevant to Act 77's legislative scheme, the Court should apply the default rule that "[t]he provisions of every statute shall be severable." 1 Pa.C.S.A. § 1925.

4. Finally, the relief Petitioners seek—eliminating universal mail-in voting and a host of other election procedures—is also foreclosed by the Pennsylvania Constitution, which provides that elections "shall be free and equal." Pa. Const. art. I, § 5. As Justice Donohue previously explained, "[i]n the context of the COVID-19 pandemic, applying the non-severability provision to void Act 77 in its entirety would itself be unconstitutional, as it would disenfranchise a massive number of Pennsylvanians from the right to vote in the upcoming election." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 397 n.4 (2020) (Donohue, J., concurring in part and dissenting in part). So too here. Millions of Pennsylvanians have come to rely on Act 77's no excuse mail voting, and with just weeks remaining

until mail ballots are due to be sent to voters (and after thousands of voters have already applied for mail ballots), voiding Act 77 is a recipe for chaos that would threaten to disenfranchise voters in violation of the Pennsylvania Constitution.

BACKGROUND

5. In 2019, the Pennsylvania legislature enacted Act 77, an omnibus election bill that “effected major amendments to the Pennsylvania Election Code,” *McLinko v. Dep’t of State*, No. 14 MAP 2022, 2022 WL 3039295, at *1 (Pa. Aug. 2, 2022), including the introduction of no-excuse mail voting, *see* 25 P.S. § 3150.11 (providing that any qualified voter in Pennsylvania “shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth”), as well as lesser-known changes like the requirement that individuals signing a nominating petition include their registration address. *See In re Major*, 248 A.3d 445, 447 (Pa. 2021), *reargument denied* (Apr. 12, 2021). The bill enjoyed bipartisan support, passing the House by a vote of 138-61 and the Senate by a vote of 30-20.¹

6. Act 77 also included a series of instructions and procedures for voting by mail:

At any time after receiving an official mail-in ballot, but on or before eight o’clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same

¹ Pennsylvania Senate Bill 421, LEGISCAN, available at <https://legiscan.com/PA/rollcall/SB421/id/895746>; <https://legiscan.com/PA/rollcall/SB421/id/887402>.

in the envelope on which is printed, stamped or endorsed “Official Mail-in Ballot.” This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

Act 77 § 8 (codified at 25 P.S. § 3150.16(a)); *see also* Act 77 § 6 (amending 25 P.S. § 3146.6(a)) (similar instructions and procedures for voting absentee).

7. By its terms, Act 77 has been applied to all elections held on or after April 28, 2020, including Pennsylvania’s June 2020 primary, November 2020 general elections, May 2021 primary, November 2021 general elections, and May 2022 primary, among others. Act 77 § 14.

8. Over the course of these elections, millions of Pennsylvanians have cast mail ballots. During the 2020 general election, for example, 2.6 million of the 6.8 million Pennsylvanians who voted did so via mail and absentee ballot.² Additionally, over 1.38 million Pennsylvania voters have requested to be placed on the permanent mail-in ballot list that Act 77 authorized. *See McLinko*, 270 A.3d at 1269.

9. Act 77’s various provisions have also endured several rounds of judicial review. In June 2020, at least two Courts of Common Pleas in Bucks County and

² *See* Pennsylvania’s Election Stats, PA. DEP’T OF STATE, available at <https://www.dos.pa.gov/VotingElections/BEST/Pages/BEST-Election-Stats.aspx>.

Delaware County ordered county officials not to apply the Act 77-imposed deadline for the receipt of mail ballots and granted extensions for the receipt of mail ballots postmarked on or before Election Day. *See In re Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-003416 (Delaware Cnty. Ct. Com. Pl. June 2, 2020); *In re Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-02322-37 (Bucks Cnty. Ct. Com. Pl. June 2, 2020). In September 2020, the Pennsylvania Supreme Court entered a similar injunction for the general election, extending by three days the deadline imposed by Act 77 to allow for the receipt of mail ballots postmarked by Election Day. *Pa. Democratic Party*, 238 A.3d at 386, *cert. denied*, *Republican Party of Pa. v. Degraffenried*, 141 S. Ct. 732 (2021); *see also McLinko v. Dep't of State*, 2022 WL 3039295 (Pa. Aug. 2, 2022) (rejecting another challenge by same petitioners as here to Act 77's authorization of no-excuse mail voting).

10. The present action concerns a line of cases analyzing the provision buried in the mail balloting instructions that directs voters to “date” their signature under the declaration on the outer envelope containing their mail ballot. Act 77 §§ 6, 8.

11. After the 2020 general election, Donald Trump’s campaign committee challenged the decision of several county boards of elections to count timely

received mail ballots that arrived in envelopes on which voters had failed to handwrite some of the prescribed information, including, in some instances, a date. *In re Canvass of Absentee and Mail-In Ballots*, 241 A.3d at 1062. Consistent with opinions of the Courts of Common Pleas, Justice Donohue announced the judgment of the Pennsylvania Supreme Court that ballots in undated envelopes were to be counted in the elections at issue. *Id.* at 1079.

12. A similar controversy arose after the November 2021 election for Judge of the Common Pleas of Lehigh County. There, the Court of Common Pleas (on remand from this Court) ordered the Lehigh County Board of Elections to count four ballots that had been returned in misdated return envelopes, but not to count 257 ballots from registered, eligible voters where the voters did not date the return envelope at all. In the ensuing litigation, the Third Circuit ultimately held, in a unanimous decision, that refusing to count undated ballots would violate the “Materiality Provision” of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), and directed the trial court “to enter an order that the undated ballots be counted.” *Migliori*, 36 F.4th at 164, *stay denied*, *Ritter v. Migliori*, 142 S. Ct. 1824 (2022). The Third Circuit determined the Date Provision was not material to a voter’s qualifications because there was no conceivable way in which it helped to “determin[e] age, citizenship, residency, or current imprisonment for a felony.” *Id.* at 163. And while that alone was enough to preclude the rejection of ballots in

undated envelopes, “[t]he nail in the coffin” was that “ballots were only to be set aside if the date was *missing*—not incorrect,” revealing that the content of what a voter supplied on the date line was meaningless. *Id.* at 164.

13. Petitioners filed their petition on July 20, 2022. DSCC and DCCC moved to intervene shortly thereafter.

PRELIMINARY OBJECTION I
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (LACHES)

14. DSCC and DCCC incorporate the foregoing paragraphs as if set forth at length herein.

15. Laches bars claims when there has been “(1) a delay arising from [petitioner’s] failure to exercise due diligence and (2) prejudice to the [opposing parties] resulting from the delay” *Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998) (citing *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988)); *see also Holiday Lounge, Inc. v. Shaler Enters. Corp.*, 272 A.2d 175, 177 (Pa. 1971) (“[I]t is settled that laches may be raised and determined by preliminary objection”). Both elements are met here.

16. Because Petitioners’ theory is that a judicial order to count undated ballots triggers Act 77’s nonseverability provision, they could have brought suit as early as 2020 when multiple Pennsylvania courts held that county boards of elections could count undated mail ballots. *See, e.g., Order, In re Canvass of Absentee and*

Mail-In Ballots of November 3, 2020 General Election, No. 201100874 (Phila. Cnty. Ct. Com. Pl., Nov. 13, 2020) (affirming decision of Philadelphia County Board of Elections to count mail ballots missing, *inter alia*, the date required by the Date Provision); Order, *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 201100875 (Phila. Cnty. Ct. Com. Pl., Nov. 13, 2020) (affirming decision of Philadelphia County Board of Elections to count undated mail ballots); *In re Canvass of Absentee and/or Mail-In Ballots of November 3, 2020 General Election*, No. 20-05786-35, *8-11 (Bucks Cnty. Ct. Com. Pl., Nov. 19, 2020) (ordering Bucks County Board of Elections to count undated mail ballots); *Donald J. Trump for President, Inc. v. Montgomery Cnty. Bd. of Elections*, No. 2020-18680 (Montgomery Cnty. Ct. Com. Pls., Nov. 13, 2020) (affirming decision of Montgomery County Board of Elections to count mail ballots returned in envelopes that lacked the voters' printed address). The Pennsylvania Supreme Court refused to overturn these rulings and affirmed that undated ballots could be counted in the 2020 general election. *In re Canvass of Absentee & Mail-in Ballots*, 241 A.3d at 1076. Notably, every Petitioner was on the ballot in the 2020 general election,³ and therefore every Petitioner should reasonably have been aware of the consequences of that decision. *See Stilp*, 718 A.2d at 294 (“[T]he test for due

³ See *Pennsylvania House of Representatives elections, 2020*, BALLOTPEDIA, available at https://ballotpedia.org/Pennsylvania_House_of_Representatives_elections,_2020.

diligence is not what a party knows, but what he might have known by the use of information within his reach.”).

17. After the *In re Canvass of Absentee & Mail-in Ballots* decision, Pennsylvania conducted three additional statewide elections. Petitioners did nothing to advance this claim.

18. Also in 2020, several Pennsylvania courts, including the Supreme Court, extended the deadline for receipt of mail ballots imposed by Act 77. *See Pa. Democratic Party*, 238 A.3d at 386; *In re Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-003416 (Delaware Cnty. Ct. Com. Pl., June 2, 2020); *In re: Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-02322-37 (Bucks Cnty. Ct. Com. Pl., June 2, 2020). And on January 13, 2022, a Pennsylvania federal court enjoined a provision in Section 3 of Act 77 that required certain circulators of nominating petitions to attest to their status as a qualified Pennsylvania voter. *Benezet Consulting, LLC v. Boockvar*, 433 F. Supp. 3d 670 (M.D. Pa. 2020). These rulings, too, should have triggered the nonseverability provision under Petitioners’ theory, and again they sat on their rights.

19. Petitioners have long been familiar with Act 77’s provisions—eleven of them voted to enact the law as members of the Pennsylvania House of

Representatives.⁴ And following their reassessment of the Act's political consequences after the 2020 election, they have been serial litigators, beseeching courts to undo the new provisions for mail voting. *See McLinko*, 270 A.3d 1243; *Bonner*, No. 293 M.D. 2021. Only after the prospects for these other claims dimmed—18 months after the *In re Canvass of Absentee & Mail-in Ballots* order—did they decide to pursue this new nonseverability challenge.

20. The Pennsylvania Supreme Court has made clear that petitions challenging Act 77 are to be dismissed with prejudice where petitioners failed to file their challenge in a timely manner. In *Kelly v. Commonwealth*, another set of Republican officeholders challenging Act 77's expansion of mail voting demonstrated an “unmistakable” lack of due diligence when they waited to file until November 21, 2020—“more than one year after the enactment of Act 77 [and after] millions of Pennsylvania voters had already expressed their will” in primary and general elections earlier that year. 240 A.3d 1255, 1256-57 (Pa. 2020).

21. Here, Petitioners waited more than a year and a half—and additional election cycles—after their claim arose to bring this suit. Like the petitioners in *Kelly*, they have evinced a “complete failure to act with due diligence,” *id.* at 1256,

⁴ *See Pennsylvania Election Results*, PHILA. INQUIRER, available at <https://www.inquirer.com/politics/election/inq/pennsylvania-election-results-2020-20201103.html>.

and are playing “a dangerous game at the expense of every Pennsylvania voter,” *id.* at 1261 (Wecht, J., concurring).

22. Respondents and Proposed Intervenors (as well as voters) have been prejudiced by Petitioners’ delay. “Prejudice may be found where there has been some change in the condition or relations of the parties which occurs during the period the complainant failed to act.” *Stilp*, 718 A.2d at 294. Here, the change has been considerable, as Respondents have expended substantial resources and effort to implement mail voting for the 2022 elections, and DSCC and DCCC have similarly invested time and money educating candidates and voters in Pennsylvania about the mail voting opportunities. These resources would all be wasted if Act 77 were invalidated—and DSCC and DCCC will have to spend more still as a result.

23. Prejudice to voters will also be substantial, as millions of voters have relied on Act 77’s no-excuse mail-in voting scheme to exercise their right to vote during the period that Petitioners failed to Act. Petitioners’ decision to delay seeking relief until the homestretch of the election season risks total pandemonium. Election administration would be turned upside-down as new requirements, new prohibitions, and new deadlines take effect. Voters who relied on Act 77’s promise of no-excuse mail voting would have to quickly reconcile a court order with the text of the Election Code and make plans for an alternative method of voting. And candidates would have to scrap their existing voter education and get out the vote programs and

immediately draft new messaging reflecting different strategies. Should Petitioners prevail, the resulting chaos and confusion attributable to their delay would threaten nothing short of mass disenfranchisement. *See Kelly*, 240 A.3d at 1257 (finding “substantial prejudice” from Petitioners’ delay because “such inaction would result in the disenfranchisement of millions of Pennsylvania voters”).

24. Because Petitioners offer no explanation for their nearly two-year delay before invoking Act 77’s nonseverability provision, and because Respondents and the DSCC and DCCC (as well as voters) would be prejudiced if Petitioners’ requested relief were granted, laches forecloses Petitioners’ claims and requires dismissal of this action.

PRELIMINARY OBJECTION II
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM)

25. DSCC and DCCC incorporate the foregoing paragraphs as if set forth at length herein.

26. Act 77’s nonseverability provision purports to void enumerated sections of the Act if any provision “is held invalid.” Act 77 § 11. Petitioners allege that the nonseverability provision was triggered when the Third Circuit “invalidated the provisions of Section 6 and Section 8 of Act 77 of 2019, which require absentee and mail-in voters to date their secrecy envelopes.” Pet. ¶ 5.

27. But the Third Circuit did not invalidate any provision; rather, it determined that federal law prohibited the Lehigh County Board of Elections from “refus[ing] to count undated ballots that have been set aside in the November 2, 2021, election for Judge of the Common Pleas of Lehigh County.” *Migliori*, 36 F.4th at 164. Because ballots for that election were counted if the outer envelope included an incorrect date—“including a date from decades past or future”—the court held that the Civil Rights Act precluded voters from being disenfranchised where the date line on the outer envelope was left blank. *Id.*

28. Far from invalidating any section of Act 77, *Migliori* simply harmonized Lehigh County’s ballot counting rules with federal law. Pennsylvania may still instruct voters to date their mail ballot envelopes, but counties may not selectively punish noncompliance by refusing to count otherwise valid ballots.

29. Petitioners’ cursory allegations mischaracterize both the Third Circuit’s decision and the text of Act 77. Nowhere did *Migliori* say that federal law preempts or otherwise invalidates Act 77’s requirement that undated ballots be discarded because—critically—Act 77 *does not contain any such requirement*. Rather, the Date Provision is included among a series of instructions that mail ballots are to be marked “in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen”; the ballot shall be enclosed in a security envelope that is then placed in an outer envelope; and the voter should then “fill out, date and sign the

declaration printed on such envelope.” Act 77 § 8. An entirely separate section of Pennsylvania law provides, in language that predates Act 77, that these ballots shall be counted if the county board “is satisfied that the declaration is sufficient.” 25 P.S. § 3146.8(g)(3).

30. The balloting instructions do not conclusively resolve which of the prescribed steps are “directory,” and which are mandatory. Over the years, the Pennsylvania Supreme Court has puzzled over these many ambiguities. *See In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) (interpreting ink color instruction to be directory); *Pa. Democratic Party*, 238 A.3d at 380 (interpreting secrecy envelope instruction to be mandatory). And in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d at 1079, the Justices were unable to reach agreement on the appropriate interpretation of the Date Provision, but ultimately upheld decisions from Courts of Common Pleas holding failure to comply with the Date Provision should not result in disenfranchisement in that year’s election.

31. *Migliori* did not parse Act 77’s text and structure, study its legislative history, or deploy any of the other judicial tools of statutory interpretation to resolve whether the Date Provision would have applied as a directory or mandatory instruction in Lehigh County’s 2021 judicial elections. Instead, its holding constrained the Lehigh County Board of Elections’ discretion under 25 P.S.

§ 3146.8(g)(3) to regard a misdated declaration as satisfactory but an undated declaration as unsatisfactory.

32. Because Act 77 does not contain an express prohibition against counting undated ballots, it necessarily follows that *Migliori* could not have invalidated this imaginary requirement. Petitioners' entire action hinges on the allegation that *Migliori* "invalidated" the Date Provision. Pet. ¶¶ 5-7; *see id.* ¶ 28. With no citation to support it, this misrepresentation is fatal to their Petition.

PRELIMINARY OBJECTION III
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM)

33. DSCC and DCCC incorporate the foregoing paragraphs as if set forth at length herein.

34. Even if the Third Circuit had invalidated the Date Provision, that provision would still be severable from the rest of Act 77.

35. The Legislature has codified the default rule that "[t]he provisions of every statute shall be severable." 1 Pa.C.S.A. § 1925. If a court holds any statutory provision to be invalid, the remaining provisions "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." *Id.* Otherwise, the valid provisions may be

altered only if “the court finds that [these provisions], standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” *Id.*

36. Section 11 of Act 77 purports to render nonseverable virtually all of the provisions in the Act, including the Date Provision. But a statute’s nonseverability provision is not an “inexorable command[.]” *Stilp*, 905 A.2d at 971-972. Instead, it “provide[s] a rule of construction” to which the Court need not defer when it “sets forth no standard for measuring nonseverability” and instead “purports to dictate to the courts how they must decide severability.” *Id.* at 973. In such cases, courts should “effectuate [their] independent judgment concerning severability” by evaluating the invalidated provision’s place in the overall legislative scheme—exactly as the default rule provides. *Id.* at 980.

37. The Court should do that here. Like the “identically worded non-severability provision” in *Stilp*, Act 77’s “boilerplate non-severability provision ‘sets forth no standard for measuring non-severability, but instead simply purports to dictate to the courts how they must decide severability.’” *Boockvar*, 238 A.3d at 397 n.4 (Donohoe, J., concurring in part and dissenting in part) (quoting *Stilp*, 905 A.2d at 973).

38. Rather than “allow[ing] the General Assembly to ‘dictate the effect of a judicial finding that a provision in an act is invalid,’” *id.* (quoting *Stilp*, 905 A.2d at 976), the Court should follow the default rule set forth in Section 1925. *Cf. Stilp*,

905 A.2d at 973 (“The severability standard adopted in Section 1925’s presumption does not [threaten the separation of powers] because it is not a boilerplate directive.”); *id.* at 972 (citing cases where courts declined to enforce nonseverability provisions).

39. Even if the Court interprets the nonseverability clause to create a nonbinding “presumption” of nonseverability, that presumption can be overcome where severing the invalid terms would not “clearly do violence to the fundamental legislative scheme.” *Biszko v. RIHT Fin. Corp.*, 758 F.2d 769, 774 (1st Cir. 1985); *see Stiens v. Fire and Police Pension Assoc.*, 684 P.2d 180, 184-85 (Colo. 1984) (finding that nonseverability clause “is not conclusive as to legislative intent” and that “the presumption of unseverability has been overcome”).

40. Petitioners make no effort to meet Section 1925’s high standard, or any standard. Indeed, they cannot do so.

41. The Date Provision instructs absentee voters to “fill out, date and sign the declaration” printed on the return envelope. 25 Pa.C.S.A. §§ 3146.6(a), 3150.16(a). But the printed date is “not entered as the official date received in the [Statewide Uniform Registry of Electors] system, *nor used for any other purpose.*” *Migliori*, 36 F.4th at 164 (emphasis added); *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *11 (Pa. Commw. Ct. June 2, 2022) (quoting *Migliori* and agreeing). *Accord Migliori*, 36 F.4th at 164 (describing Date Provision as “serv[ing] no purpose other than disenfranchising otherwise qualified

voters”). Because the dates are “not used for any . . . purpose,” the Date Provision cannot be “inseparably connected with” any other provision in the statute, nor can the other provisions be “incomplete” without it.

42. The Date Provision is also severable because Act 77’s many other provisions have virtually nothing to do with whether mail-in ballot envelopes include a dated signature line. For example, Act 77:

- a. Eliminated straight-ticket voting, *see* Act 77 § 6 (amending 25 P.S. § 2963 (2019));
- b. Provided 15 additional days to register to vote, *see* Act 77 § 4 (amending 25 P.S. § 3071);
- c. Adjusted requirements for signatories and circulators of nomination petitions, Act 77 § 3 (amending 25 P.S. § 2868);
- d. Required each county board of elections to publish sample ballots online, Act 77 § 3 (amending 25 P.S. § 2968);
- e. Restricted the ability to change the boundaries of election districts within certain dates, Act 77 § 3 (amending 25 P.S. § 2746);
- f. Created requirements for decertification of voter machines, Act 77 § 2 (amending 25 P.S. § 2627); and

g. Authorized funds for census outreach, Act 77 § 2 (amending 25 P.S. § 2628), and compensation of district election officers (*id.* § 3, amending 25 P.S. § 2682.2).

43. Whether or not a voter writes the date on the exterior envelope containing his or her mail ballot has no conceivable bearing on any of these provisions; they are entirely unrelated to and unaffected by the Date Provision.

44. Additionally, the General Assembly amended several of Act 77's new provisions, including provisions related to mail voting, in March 2020. *See* Act of March 27, 2020, P.L. 41, No. 12 ("Act 12"). Notably, Act 12 does not contain a nonseverability clause or otherwise mention how its provisions should apply if any provision of Act 77 is found invalid—let alone if Act 77 is voided nearly in its entirety. Thus, if Act 77's nonseverability provision is found to be triggered by the purported invalidation of the Date Provision, then elections officials tasked with administering the Elections Code would face the nonsensical task of applying still-valid Act 12 provisions on mail voting even though mail voting would have been eliminated. That cannot be, and further supports treating the Date Provision as severable.

PRELIMINARY OBJECTION IV
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM)

45. DSCC and DCCC incorporate the foregoing paragraphs as if set forth at length herein.

46. The Free and Equal Elections Clause of the Pennsylvania Constitution declares: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

47. Elections are “free and equal” under the Pennsylvania Constitution “when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, ... and when no constitutional right of the qualified elector is subverted or denied him.” *Banfield v. Cortes*, 922 A.2d 36, 48 (Pa. Commw. Ct. 2007) (quoting *In re 1991 Pa. Legis. Reapportionment Commission*, 609 A.2d 132, 142 (Pa. 1992)).

48. The Free and Equal Elections Clause further requires that “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial.” *McCormick for U.S. Senate v. Chapman*, 2022 WL 2900112, at *13 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)).

“Moreover, efforts must be made to avoid disenfranchisement even when it happens ‘by inadvertence.’” *Id.* (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 812 (Pa. 2018)).

49. As a result, “[i]n the context of the COVID-19 pandemic, applying the non-severability provision to void Act 77 in its entirety would itself be unconstitutional, as it would disenfranchise a massive number of Pennsylvanians from the right to vote in the upcoming election.” *Boockvar*, 238 A.3d at 397 n.4 (Donohoe, J., concurring in part and dissenting in part).

50. It is just as true today as when *Boockvar* was decided that voiding the entirety of Act 77 with a statewide general election just around the corner would “disenfranchise a massive number of Pennsylvanians.” *Boockvar*, 238 A.3d at 397 n.4. Millions of Pennsylvanians rely on mail-in voting. The sudden elimination of that method of voting would be devastating to those who are unable to vote in person yet excluded from the narrow categories of those permitted to vote by absentee ballot. *See* 25 P.S. § 3146.1.

51. These concerns are especially acute in the thick of election season. Act 77 requires elections officials to send a mail-ballot application to eligible voters in February each year. Act 77 § 8. In 2020, the General Assembly further provided that “[a]ny qualified registered voter may request to be placed on a permanent mail-in ballot list file at any time during the calendar year.” Act 12 § 12.1. And the

Pennsylvania Department of State has already been publicly encouraging voters to apply for a mail-in ballot for the November 8 general election.⁵ Thus, voters who have applied for a mail ballot through one of these mechanisms have already taken all necessary steps to receive a mail ballot and are relying on mail-in ballots to exercise their right to vote. Boards of Elections will begin distributing these mail ballots on September 19, 2022, 50 days before the election—“or at such earlier time as the county board of elections determines may be appropriate.” 25 P.S. § 3150.12a(b). Repealing vote-by-mail shortly before the November election would sow chaos and place millions of voters at risk of disenfranchisement.

WHEREFORE, DSCC and DCCC respectfully request that this Honorable Court sustain its preliminary objections, grant summary relief, and dismiss the petition with prejudice.

⁵ See PA Dep’t of State tweet, <https://twitter.com/PASStateDept/status/1547264737884491776> (July 13, 2022, 1:00 pm EDT) (“Mail-in and absentee ballot applications are NOW available for PA voters. Apply today for the November 8 general election. Apply online: <http://vote.pa.gov/ApplyMailBallot>. Learn more: <http://vote.pa.gov/MailBallot>”).

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Respectfully submitted,

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**Motions for Admission Pro Hac
Vice Forthcoming*