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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TIMOTHY R. BONNER, et al.,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official
capacity as Acting Secretary of the
Commonwealth of Pennsylvania, et al.,

Respondents.

Case No. 364 MD 2022

**INTERVENOR-RESPONDENTS DSCC AND DCCC'S COMBINED BRIEF
IN SUPPORT OF THEIR PRELIMINARY OBJECTIONS AND
CROSS-APPLICATION FOR SUMMARY RELIEF**

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Intervenor-Respondents DSCC and DCCC (the “Committees”) present the following combined brief in support of their preliminary objections and cross-application for summary relief.¹

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. Act 77 is best known for expanding voting access by establishing no-excuse mail-in voting, but the bill accomplished much more. For instance, it eliminated straight-ticket voting, created new rules for the decertification of voting machines, 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. The Commonwealth has administered no fewer than five statewide elections and ten legislative special elections under these procedures over the last two years.

Petitioners asked this Court to wipe these reforms from the books and overhaul the Commonwealth’s election apparatus weeks after voters had begun applying to vote by mail for the November election. By the time this Court hears

¹ The Committees incorporate by reference the briefs in support of the preliminary objections and cross-applications for summary relief filed by Respondents and by Intervenor-Respondents Democratic National Committee and Pennsylvania Democratic Party.

oral argument on this case, some voters will already have returned their ballots. Having waited more than two years after their claim arose, Petitioners' belated attempt to disrupt and inject chaos into an active electoral process would not only nullify months of preparation by elections officials and political campaigns for elections this fall and beyond, 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.

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),² 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. *Id.* 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

² This case caption risks some confusion. Linda Migliori, a voter, was the lead plaintiff; Zachary Cohen, a candidate for the judgeship at issue, intervened as plaintiff; and the Lehigh County Board of Elections was the named defendant. Thus, the Third Circuit case should properly be captioned *Migliori v. Lehigh County Board of Elections*. But because WestLaw styles the caption as *Migliori v. Cohen*, the Committees will do the same.

statute. And as this Court recently held, the Date Provision does not disqualify otherwise valid undated ballots. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *25 (Pa. Commw. Ct. Aug. 19, 2022) (interpreting Date Provision not to be mandatory). *Migliori* could not have invalidated a provision of Act 77 by giving it the same directory effect that the General Assembly intended.

The Court should reject Petitioners' challenge and enter judgment in favor of Respondents.

BACKGROUND

In 2019, the General Assembly 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). The Act introduced 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”), and added other lesser-known changes like the requirement that individuals signing a nomination petition include their registration address. *See In re Major*, 248 A.3d 445, 447 (Pa. 2021), *reargument denied* (Apr. 12, 2021). For example, Act 77 eliminated straight-ticket voting, *see* Act 77 § 6; changed voting machine requirements, *id.* § 3; moved the voter registration deadline from 30 to 15 days before an election, *id.* § 4; prohibited

the use of stickers to mark ballots, *id.* § 3.2; allocated funding to provide for upgraded voting systems, *id.* § 3.1; and reorganized the pay structure for poll workers, *id.* § 3.

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 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).

By its terms, Act 77 has 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, May 2022 primary, and multiple special elections. *See* Act 77 § 14.

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.³ 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 v. Dep't of State*, 270 A.3d 1243, 1269 (Pa. Commw. Ct. 2022).

Act 77's various provisions have also endured several rounds of judicial review. In June 2020, at least two Courts of Common Pleas (Bucks and Delaware Counties) ordered county officials not to apply the Act 77-imposed election night 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).⁴ In September 2020, the Pennsylvania Supreme Court entered a similar injunction for the general election, extending by three days the deadline

³ *See* Pennsylvania's Election Stats, Pa. Dep't of State, available at <https://www.dos.pa.gov/VotingElections/BEST/Pages/BEST-Election-Stats.aspx>.

⁴ In that primary election, Governor Wolf also extended the ballot receipt deadline in six counties by one week via Executive Order, citing recent civil disturbances which had led to curfews, travel restrictions, and the evacuation of certain election offices. *See* Executive Order 2020-02, Extension of Deadline for Receipt of Absentee and Mail-In Ballots in Certain Counties (June 1, 2020), available online at <https://www.governor.pa.gov/wp-content/uploads/2020/06/20200601-EO-Deadline-Extention.pdf>.

imposed by Act 77 to allow for the receipt of mail ballots postmarked by Election Day. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 386 (Pa. 2020), *cert. denied*, *Republican Party of Pa. v. Degraffenried*, 141 S. Ct. 732 (2021).

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. As Pennsylvania Republican House and Senate legislative leaders recently explained in an *amicus* brief to the Supreme Court of the United States, this provision is not of recent vintage, but has “remained constant” within the Election Code since absentee voting was extended beyond military voters in 1963.⁵

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 1058, 1062 (Pa. 2020). Consistent with opinions of the Courts of Common Pleas, Justice Donohue

⁵ See Brief of Speaker of the Pennsylvania House of Representatives, Bryan Cutler, et al., as *Amici* Supporting Petitioner, at 3-4, *Ritter v. Migliori*, No. 22-30, available online at https://www.supremecourt.gov/DocketPDF/22/22-30/233169/20220810121620703_SCOTUS%20amicus%20Ritter.pdf.

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.

A similar controversy arose after the November 2021 election for Judge of the Court of Common Pleas of Lehigh County. There, the Court of Common Pleas (on remand from this Court) ordered the Lehigh County Board of Elections not to count 257 timely received ballots from registered, eligible voters where the voters did not date the return envelope. In the ensuing federal 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.

Subsequently, the Acting Secretary challenged the failure of three county boards of elections to include otherwise-valid undated ballots in their certified

results of the May 17, 2022, primary election. *See Chapman*, 2022 WL 4100998, at *1. In a 69-page opinion scrutinizing the Date Provision’s text, context, history, and purpose, this Court concluded: “the General Assembly’s intent was for the ‘shall’ used in the dating provisions to be directory, not mandatory, such that timely received absentee and mail-in ballots of qualified Pennsylvania electors are not invalid only because they lack a handwritten date on the return envelope declaration.” *Id.* at *25. The Court noted that the Date Provision does not “provide that [undated] ballots should not be counted, unlike other provisions of the Election Code,” *id.* at *16; does not support a particular purpose, *id.* at *17-20, 25; was not “designed to prevent fraud, or to protect privacy and secrecy of voting,” *id.* at *20-22; and that interpreting the Date Provision as mandatory would violate the Materiality Provision, *id.* at *25-29. The Court also noted that other jurisdictions interpret similar statutory language to be directory, *id.* at *22. Thus, the Court interpreted Act 77 to *require* counties to include undated ballots in their certified election results. *Id.* at *25.

Petitioners filed the instant petition on July 20, 2022. The Committees’ application to intervene was granted on August 12, and they have filed preliminary objections and a cross-application for summary relief.

LEGAL STANDARD

A party may apply for the court to enter judgment in its favor “any time after the filing of a petition for review.” Pa. R.A.P. 1532(b). “[A]n application for summary relief may be granted if a party’s right to judgment is clear . . . and no issues of material fact are in dispute.” *Myers v. Commonwealth*, 128 A.3d 846, 849 (Pa. Commw. Ct. 2003).

In reviewing preliminary objections in the nature of a demurrer, this Court “must accept as true all well pleaded material allegations in the petition for review, as well as all inferences reasonably deduced therefrom,” but it is not required to accept as true “conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.” *Buoncuore v. Pa. Game Comm’n*, 830 A.2d 660, 661 (Pa. Commw. Ct. 2003). This Court may sustain preliminary objections where it “appear[s] with certainty that the law will not permit recovery.” *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 249 A.3d 598, 604 (Pa. Commw. Ct. 2021). The standard of review is “whether the law under consideration is clear and free from doubt.” *Buoncuore*, 830 A.2d at 662.

ARGUMENT

I. Petitioners' claim is barred by laches.

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); *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.

A. Petitioners inexcusably delayed bringing their claim.

As early as *January 13, 2020*, 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, 689 (M.D. Pa. 2020). After the district court enjoined the application of this requirement “in the context of the 2020 Republican primary election for President of the United States,” *id.* at 690, the Third Circuit held that *permanent* injunctive relief was warranted for future elections. *Benezet Consulting LLC v. Sec’y Commonwealth of Pa.*, 26 F.4th 580 (3d Cir.

2022).⁶ Each of these rulings should have triggered Act 77’s nonseverability provision under Petitioners’ theory, and yet Petitioners sat on their rights.

In *June 2020*, Pennsylvania courts again held the application of a provision in Act 77 invalid. Because of burdens and delays related to the COVID-19 pandemic, courts of common pleas extended the deadline for the return of mail-in ballots later than Act 77 provides. *See Pa. Democratic Party*, 238 A.3d at 362-63. And in September 2020, the Pennsylvania Supreme Court determined there was “no ambiguity regarding the deadline set by the General Assembly in” Act 77, but held that “the application of the statutory language to the facts of the current unprecedented situation results in an as-applied infringement of electors’ right to vote.” *Id.* at 369, 371-72.

In *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., 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

⁶ Petitioners’ assertion that “the decision in *Benezet Consulting, LLC v. Boockvar*, 433 F. Supp. 3d 670 (M.D. Pa. 2020) was vacated by *Benezet Consulting LLC v. Sec’y Commonwealth*, 26 F.4th 580 (3d Cir. 2022),” Pets.’ Response to DSCC & DCCC’s Prelim. Obj. & Cross-Appl. for Summ. Relief at 3, is simply wrong. The Third Circuit vacated a *different* decision of the district court that had denied plaintiffs’ motion to replace the court’s grant of as-applied relief with facial relief. *Benezet Consulting, LLC v. Boockvar*, No. 1:16-cv-0074, 2020 WL 5095887 (M.D. Pa. Aug. 28, 2020). Thus, far from vacating plaintiffs’ relief, the Third Circuit expanded it by ordering the lower court to grant a permanent injunction.

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); Order, *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); *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) (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.

Under Petitioners' theory, each of these events ostensibly triggered Act 77's nonseverability provision, and Petitioners—each of whom were on the ballot in the 2020 general election—should reasonably have been aware of the consequences of these decisions.⁷ *See Stilp*, 718 A.2d at 294 (“[T]he test for due diligence is not what

⁷ *See 2020 Presidential Election: Official Returns*, PA Department of State, available at <https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G&IsActive=0#>.

a party knows, but what he might have known by the use of information within his reach.”). In fact, 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.⁸ And following their reassessment of the Act’s political consequences after the 2020 election, they have become serial litigators, beseeching courts to undo the new provisions for mail voting. *See McLinko*, 270 A.3d 1243; *Bonner v. Degraffenreid*, No. 293 M.D. 2021 (Pa. Commw. Ct. January 28, 2022).⁹ Only after the prospects for these other claims dimmed—and more than two years after the courts of common pleas first extended Act 77’s ballot receipt deadline—did they decide to pursue this new nonseverability challenge. In the meantime, Pennsylvania conducted three additional statewide elections, during which Petitioners did little to advance their nonseverability claim.

The Pennsylvania Supreme Court has made clear that petitions challenging Act 77 are to be dismissed with prejudice where petitioners fail to file their challenge in a timely manner. In *Kelly v. Commonwealth*, another set of lawmakers challenging Act 77’s expansion of mail voting demonstrated an “unmistakable” lack of due

⁸ *See House RCS No. 781 Roll Call*, Pa. House of Representatives, available at https://www.legis.state.pa.us/CFDOCS/Legis/RC/Public/rc_view_action2.cfm?sess_yr=2019&sess_ind=0&rc_body=H&rc_nbr=781. Two Petitioners were not yet members of the House; only one Petitioner (Mr. Zimmerman) voted against the bill.

⁹ Because these actions, which similarly sought to void Act 77’s authorization of no-excuse mail voting, resulted in “a final valid judgment upon the merits by a court of competent jurisdiction,” *Dempsey v. Cessna Aircraft Co.*, 653 A.2d 679, 680-81 (Pa. Super. Ct. 1995) (en banc), Petitioners’ present action is also barred by the doctrine of *res judicata*.

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). Here, Petitioners waited more than two years—and several 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, and are playing “a dangerous game at the expense of every Pennsylvania voter,” *id.* at 1261 (Wecht, J., concurring).

B. Petitioners’ delay threatens substantial prejudice.

Petitioners’ decision to delay seeking relief until the homestretch of the election season risks electoral chaos and serious prejudice to Respondents and the Committees (as well as voters). Their requested relief would impose new procedures, prohibitions, and deadlines impacting just about all aspects of the electoral process. Voters who relied on Act 77’s promise of no-excuse mail voting would have to quickly make plans for an alternative method of voting. County officials across the state would need to contend with a deluge of new in-person voters for which they, and their facilities, are now ill-equipped. With no-excuse mail voting eliminated, election officials would need to prepare for longer lines, assist a bevy of confused voters, recruit additional poll workers, and, potentially, alter or open additional voting locations—all of which would deplete their limited funds and

administrative capacity. And candidates would have to scrap their existing voter education and get out the vote programs and immediately draft new messaging reflecting different strategies.

The consequences of eliminating the no-excuse mail-in voting scheme alone would be prejudice enough to bar Petitioners from relief here. *Stilp*, 718 A.2d at 294 (“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.”). But that was only “a fraction of the scope of [Act 77].” *McLinko*, 2022 WL 3039295, at *1. Doing away with the entirety of Act 77’s sweeping election reforms would come at a massive, and unjustifiable, cost.

For example, Act 77 authorized \$4 million for a new executive branch agency to ensure a complete and accurate census count, Act 77 § 2 (amending 25 P.S. § 2628), and additional compensation for election judges and officers (*id.* § 3, amending 25 P.S. § 2682.2). Nullification of those provisions—which is what Petitioners seek—could wreak financial havoc. Clawing back the funds for census outreach, which have been long since spent, could force surprise cuts to other essential government agencies. As the U.S. Supreme Court has explained, “where a public expenditure has been made, . . . and where one, having full opportunity to prevent its accomplishment, has stood by and seen the public work proceed, a court of equity will more readily consider laches.” *Penn Mut. Life Ins. Co. v. City of Austin*,

168 U.S. 685, 698 (1898); *see also Tillman v. Pritzker*, 183 N.E.3d 94, 104 (Ill. 2021) (recognizing laches’s “prejudice element is satisfied where the plaintiff waits to file until after the defendant has expended large sums of money”). Meanwhile, local election officers would no longer be compensated for participating in election trainings, making recruitment (and perhaps training attendance) even more difficult in all future elections.

Act 77 also eliminated straight-ticket voting, *see* Act 77 § 6 (amending 25 P.S. § 2963 (2019)), and with it the requirement that voting machines provide such capability. *Id.* § 3 (amending 25 P.S. § 1110). By now—over two years and several elections after Act 77 was enacted—all counties have purchased new voting machines with Act 77’s one-time provision of funding for this purpose. Act 77 § 3.1 (codified at 25 P.S. § 1101-B *et seq.*).¹⁰ Though this funding provision is excluded from Act 77’s nonseverability provision,¹¹ counties that purchased new machines that are not compatible with straight-ticket voting may face a complicated and inordinately expensive process to revert to a straight-ticket option. For example, in

¹⁰ *See All Pennsylvania Counties Select New Voting Systems by Year-End Deadline*, Governor Tom Wolf (Dec. 31, 2019), <https://www.governor.pa.gov/newsroom/all-pennsylvania-counties-select-new-voting-systems-by-year-end-deadline/>.

¹¹ The nonseverability provision is, at best, internally inconsistent. Bonds for new voting machines are authorized by Section 3.1 of Act 77, which is not included in Section 11’s enumeration of nonseverable sections. But the nonseverability provision also provides that “[i]f 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.” Act 77 § 11 (emphasis added). Given this contradictory language, it is thus entirely unclear whether the nonseverability provision would also operate to void the voting machine bonds—if so, even greater chaos would be unleashed.

2019, one county preparing to replace its voting machines estimated that doing so would cost \$8,000,000.¹² Even as Petitioners appear to concede that the Court would need to “fashion relief” to avoid prejudice in the 2022 election, Pets.’ Response to DSCC & DCCC at 4, the costs and strains that voiding Act 77 would impose on election officials would remain highly prejudicial in any future cycle. Counties and the Committees have devoted enormous sums of money to transition to Act 77’s new rules and systems, and those sunk costs cannot be recovered by postponing relief.

Prejudice to voters would also be substantial. 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”). Millions of Pennsylvanians 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. Many have joined the permanent mail-in voting list authorized by Act 77 and are thus presently expecting to receive a mail-in ballot for all future elections this cycle. By the time this case is argued, most voters will likely have received their mail-in ballots, and

¹² *See* Deb Erdley, *Elections experts say cybersecurity threats demand federal funding*, Pittsburgh Tribune-Review (July 20, 2019), <https://triblive.com/news/politics-election/elections-experts-say-cyber-security-threats-demand-federal-funding/>.

many may even have marked and returned them. If Act 77 is voided, all of these ballots would be instantly invalidated without warning.

The Committees have similarly relied on the election rules set by Act 77. For example, they have spent substantial time and financial resources over the past two years educating Pennsylvania voters about the mail voting process and connecting them with the resources they need to cast a mail ballot. *See* DSCC Affidavit ¶ 5; DCCC Affidavit ¶ 7. Had Petitioners raised their claim as soon as it arose, these extensive investments could have been redirected to other strategies and programs. Because of Petitioners' delay, these expenditures may all be wasted.

Indeed, the entire weight of the equities disfavors Petitioners' requested relief. Their own interests in this action are largely ephemeral. In Petitioners' capacities as voters, the expansion of mail voting is an unambiguous benefit. And in their capacities as candidates, each Petitioner has successfully competed under Act 77's legal regime. Even in their role as legislators, which Petitioners disclaim as the basis for this action, treating the Date Provision as directory could not possibly upset Act 77's legislative scheme. Petitioners have presented no indication that the Legislature considered the Date Provision to be any part of a broader compromise—and this Court's review of Act 77's legislative history has revealed no evidence that the Date Provision was seriously debated or a part of any bargain; rather, it was simply carried forward intact as it had been since 1963. *See Chapman*, 2022 WL 4100998, at *18

("[I]t is apparent that the General Assembly did not identify the date on the return envelope declaration as supporting a particular purpose."); *see also* Pa. Sen. J., 2019 Reg. Sess. Nos. 12, 18, 19, 30, 31, 32, 33, 34, 35, 45, 46 (omitting meaningful discussion of Date Provision); Pa. Governor's Message, October 29, 2019 (same); Pa. Governor's Message, October 31, 2019 (same).¹³

Because Petitioners offer no explanation for their 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, the doctrine of laches permanently forecloses Petitioners' claims and requires dismissal of this action with prejudice.

II. Act 77's nonseverability provision has not been triggered.

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; but the Third Circuit's opinion did no such thing. 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

¹³ Petitioners' self-serving affidavits are not persuasive evidence to the contrary. They fail to disturb the conclusions compelled by regular methods of statutory interpretation, *see Chapman*, 2022 WL 4100998, at *13-*22; *infra* at 19-24, and the private preferences of 14 House members were irrelevant to the enactment of Act 77, which passed that chamber by 77 votes, *see* Pennsylvania Senate Bill 421, LEGISCAN, available at <https://legiscan.com/PA/rollcall/SB421/id/895746>.

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.* Far from nullifying 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 with missing dates.

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*. *E.g.*, *Chapman*, 2022 WL 4100998, at *25. The Date Provision is included among a series of instructions, including 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.” Act 77 § 8. A separate section of Pennsylvania’s Election Code 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).

These balloting instructions do not conclusively resolve which of the prescribed steps are “directory” and which are mandatory, but the Pennsylvania Supreme Court has rejected attempts to nullify ballots cast by eligible voters simply because they failed to comply with these administrative requirements. *See In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) (interpreting ink color instruction to be directory). In *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d at 1079, the Justices, unable to reach agreement on the appropriate interpretation of the Date Provision, ultimately upheld decisions from Courts of Common Pleas holding that the failure to date the ballot envelope would not result in disenfranchisement in that year’s election.

More recently, this Court confirmed that the Date Provision is directory, and not mandatory. *See Chapman*, 2022 WL 4100998, at *25. The Court recognized that for over 70 years, “the overarching principle guiding the interpretation of the Election Code is that it should be liberally construed so as not to deprive electors of their right to elect a candidate of their choice.” *Id.* at *13 (citing *Pa. Democratic Party*, 238 A.3d at 356). After scrutinizing Act 77’s text and “other provisions in the Election Code relating to declarations and important dates,” the Court concluded “it is apparent that the General Assembly did not identify the date on the return envelope declaration as supporting a particular purpose.” *Id.* at *18. The Court specifically rejected the argument, recycled by Petitioners here, that the Date Provision is

important to identify ballots post-dated after an elector's death because Pennsylvania's ballot processing system is already programmed to flag the ballots of deceased individuals. *See id.* at *18-19. Thus, “[w]hen there is **no factual or legal basis** for concluding that” the Date Provision serves any interests related to ballot confidentiality, an elector's qualifications, or the timeliness of the ballot, the Court concluded “these interests no longer support interpreting the word ‘shall’ as mandatory, causing the disenfranchising of qualified electors whose ballots were timely received.” *Id.* at *18 (emphasis in original).

Unlike *Chapman*'s careful analysis of the matter, *Migliori* did not study or purport to answer whether the Date Provision would have applied as a directory or mandatory instruction in Lehigh County's 2021 judicial elections. Instead, its holding simply upheld the Lehigh County Board of Elections' initial decision not to treat undated ballots any differently than it had been instructed to treat misdated ballots. Because Act 77 does not contain a prohibition against counting undated ballots, it necessarily follows that *Migliori* could not have invalidated it even implicitly.

To the contrary, *Migliori* is in perfect harmony with this Court's interpretation that the Date Provision is directory. *See Chapman*, 2022 WL 4100998, at *28 (observing that the “reasoning in *Migliori* is similar to this Court's analysis supporting” conclusion that Date Provision is directory). The Third Circuit's

conclusion that the Date Provision serves no discernable purpose under state law is not merely *consistent* with treating the Date Provision as directory; it is compelling evidence that the General Assembly *intended* the Date Provision to be directory. *Compare id.* at *18 (“[I]t is apparent that the General Assembly did not identify the date on the return envelope declaration as supporting a particular purpose.”) *with Migliori*, 36 F.4th at 164 (concluding Date Provision “serves no purpose other than disenfranchising otherwise qualified voters”). First, as this Court explained, the General Assembly could not have intended to disenfranchise voters for failing to comply with a provision that is immaterial to voter qualifications or any other discernable legislative interest. *See Chapman*, 2022 WL 4100998, at *19-20. Second, the General Assembly does not intend ambiguous provisions to be interpreted in a manner that would violate federal law. The General Assembly has codified several presumptions to guide statutory interpretation, including that the General Assembly does not intend a result that is “impossible of execution” or that will prevent the entire statute from being “effective and certain.” Pa. C.S.A. § 1922(1), (2). Because the Date Provision would be impossible of execution under federal law and thus ineffective only if it is mandatory, that provision is presumptively directory. Additionally, the General Assembly has clarified that it “does not intend to violate the Constitution of the United States,” *id.* § 1922(3), which prescribes that federal statutes take priority over conflicting state statutes,

U.S. Const. art. VI, cl. 2. It necessarily follows, then, that the General Assembly did not intend the Date Provision to be interpreted in a manner that would violate the federal Materiality Provision. *Cf. Pacific Cap. Bank, N.A. v. Connecticut*, 542 F.3d 341, 354 (2d Cir. 2008) (inferring “that the Connecticut legislature did not intend [statutory provision to] conflict with federal law”).

Thus, the Third Circuit’s recognition, endorsed by this Court, that the Materiality Provision prohibits officials from treating Act 77’s Date Provision as mandatory further confirms that the Date Provision is properly interpreted to be directory—this is the only interpretation that is consistent with the text of Act 77 and complies with the parameters that Congress imposed on state lawmaking in this area. *See Migliori*, 36 F.4th at 164; *Chapman*, 2022 WL 4100998, at *28-29. Because the Date Provision is not mandatory, it could not have been invalidated by *Migliori*; because the Date Provision was not invalidated, Act 77’s nonseverability provision could not have been triggered; because the nonseverability provision was not triggered, the Petition must be dismissed.

III. The Date Provision is severable from the rest of Act 77’s sweeping provisions.

The Committees join and incorporate by reference the arguments by the Acting Secretary, Democratic National Committee, and Pennsylvania Democratic Party explaining why *Migliori* did not trigger Act 77’s nonseverability clause even if it did “invalidate” the Date Provisions.

IV. Invalidating the entirety of Act 77 would disenfranchise millions of voters in violation of the Free and Equal Elections Clause.

The inescapable result of Petitioners’ requested relief would be the mass disenfranchisement of qualified voters. That outcome is irreconcilable with the Free and Equal Elections Clause of the Pennsylvania Constitution, which 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.

The Pennsylvania Supreme Court ascribes “expansive meaning to the terms ‘free and equal.’” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 809 (Pa. 2018). The “broad and wide sweep” of the Clause requires that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.” *Id.* at 804. To that end, election laws must be “liberally construed” so as not to deprive qualified voters of the franchise. *See McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *14 (Pa. Commw. Ct. June 2, 2022). The Court has explained that elections are “free and equal” under the Pennsylvania Constitution only “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 Comm'n*, 609 A.2d 132, 142 (Pa. 1992)).

Under this rubric, the Free and Equal Elections Clause prohibits regulations that either “deny the franchise itself” or “make it so difficult as to amount to a denial.” *McCormick for U.S. Senate*, 2022 WL 2900112, at *13 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)). As a result, “efforts must be made to avoid disenfranchisement even when it happens ‘by inadvertence.’” *Id.* (quoting *League of Women Voters*, 178 A.3d at 812). For instance, in *Pennsylvania Democratic Party*, Justice Donohue recognized that applying the nonseverability provision to enjoin Act 77 “[i]n the context of the COVID-19 pandemic . . . 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*, 238 A.3d at 397 n.4 (Donohue, J., concurring in part and dissenting in part).

It is just as true today as when *Pennsylvania Democratic Party* was decided that voiding the entirety of Act 77—especially with a statewide general election just around the corner— would “disenfranchise a massive number of Pennsylvanians.” *Id.* Millions of Pennsylvanians now 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. § 3146.1.¹⁴

Though perennial, 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. 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, and Act 77 in its entirety, would sow chaos and place millions of voters at risk of disenfranchisement.

¹⁴ The option to vote by absentee ballot is available only to narrow categories of qualified electors who are unable to vote in person because of military service, religious observance, employment obligations, or illness or disability. *See* 25 P.S. § 3146.1.

CONCLUSION

For the reasons set forth above, the Committees respectfully request that this Court sustain their Preliminary Objections, grant their Cross-Application for Summary Relief, deny Petitioners' Application for Summary Relief, and enter judgment in favor of Respondents and Intervenor-Respondents dismissing the Petition for Review with prejudice.

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Respectfully submitted,

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