

**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.

No. \_\_ M.D. 2022

**PETITIONERS’ APPLICATION  
FOR SUMMARY RELIEF AND  
EXPEDITED BRIEFING**

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

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## **INTRODUCTION**

This application for summary relief seeks a declaration that, pursuant to Section 11 of Act 77 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”), because 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, the remaining provisions and applications of Act 77 are now void.

Expedited briefing is requested because, pursuant to 25 Pa.Stat. § 3150.12a(a), Pennsylvania counties may begin processing mail-in ballots by default on September 19, 2022, just sixty-one (61) days from the date of filing this Application. Notwithstanding the default date of September 19, 2022, Pennsylvania counties may begin processing mail-in ballots at any time before September 19, 2020 “if a county board of elections determines that it would be appropriate to the county board of elections’ operational needs.” 25 Pa.Stat. § 3150.12a(a). Time is of the essence in voiding Act 77 as far in advance of the November 2022 general election as possible.

## **STATEMENT OF UNDISPUTED FACTS**

Petitioners Timothy R. Bonner (hereinafter “Bonner”), P. Michael Jones (hereinafter “Jones”), David H. Zimmerman (hereinafter “Zimmerman”), Barry J. Jozwiak (hereinafter “Jozwiak”), Kathy L. Rapp (hereinafter “Rapp”), David

Maloney (hereinafter “Maloney”), Barbara Gleim (hereinafter “Gleim”), Robert Brooks (hereinafter “Brooks”), Aaron J. Bernstine (hereinafter “Bernstine”), Timothy F. Twardzik (hereinafter “Twardzik”), Dawn W. Keefer (hereinafter “Keefer”), Dan Moul (hereinafter “Moul”), Francis X. Ryan (hereinafter “Ryan”), and Donald “Bud” Cook (hereinafter “Cook”) are Pennsylvania citizens who are qualified registered electors residing in Pennsylvania and are elected members of the Pennsylvania House of Representatives (“the House”). Verified Pet. ¶¶ 9-22. Each of the Petitioners are past and likely future candidates for office and registered Pennsylvania voters. *Id.* ¶ 23.

Subsequent to the decision in Migliori v. Cohen, 36 F.4th 153, 2022 U.S. App. LEXIS 14655, \*3 (3rd Cir. 2022), Acting Secretary Chapman, in her role as Secretary of the Commonwealth and acting under color of state law, has continued to implement the provisions of the Pennsylvania Election Code that were enacted pursuant to Act 77 and has further urged this Court to follow the Third Circuit’s interpretation of federal law in Migliori (see Chapman v. Berks County Board of Elections, No. 355 MD 2022, MEMORANDUM IN SUPPORT OF PETITIONERS’ EMERGENCY APPLICATION FOR PEREMPTORY JUDGMENT AND SUMMARY RELIEF). Verified Pet. ¶ 30-31.

On May 24, 2022, six days after the Migliori decision, Acting Secretary Chapman, in her role as Secretary of the Commonwealth and acting under color of

state law, issued election guidance to county board of elections directing them to count “ballots with an undated return envelope ... for the May 17, 2022, Primary.”

See GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES,

<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf>. The Pennsylvania Department of State has, accordingly, taken the official position that absentee and mail voters do not need to follow the express envelope dating requirements of Section 6 and Section 8 of Act 77, rendering that provision effectively invalid. Verified Petition, ¶ 27.

## **ARGUMENT**

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, therefore the remaining provisions and applications of Act 77 should now be declared void. The Pennsylvania Supreme Court has observed:

[A]s a general matter, nonseverability provisions are constitutionally proper. There may be reasons why the provisions of a particular statute essentially inter-relate, but in ways which are not apparent from a consideration of the bare language of the statute as governed by the settled severance standard set forth in Section 1925 of the Statutory Construction Act[, 1 Pa.Cons.Stat. § 1925]. In such an instance, the General Assembly may determine that it is necessary to make clear that a taint in any part of the statute ruins the whole.

Stilp v. Commonwealth, 905 A.2d 918, 978 (Pa. 2006) (citations omitted). The Pennsylvania Supreme Court quoted Israel E. Friedman, Comment, Inseverability Clauses in Statutes, 64 U. Chi. L. Rev. 903, 914 (1997) ("[I]nseverability clauses serve a key function of preserving legislative compromise;" they "bind[] the benefits and concessions that constitute the deal into an interdependent whole.") and explained that, "[i]n an instance involving such compromise, the General Assembly may determine, the court's application of the logical standard of essential interconnection set forth in Section 1925 might undo the compromise; a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place." Id.

Sections 6 of Act 77 at Section 1306(a) (25 Pa.Stat. § 3146.6(a)) and Section 8 of Act 77 at Section 1306-D(a) (25 Pa.Stat. § 3150.16(a)), both provide in relevant part that "The elector shall then fill out, date and sign the declaration printed on such envelope." (underlining added, hereafter the "dating provisions").

Section 11 of Act 77 provides as follows:

Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.

In Migliori v. Cohen, 36 F.4th 153, 2022 U.S. App. LEXIS 14655, \*3 (3rd Cir. 2022), the court held that the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101, prohibited the application of the dating provisions of Sections 6



and 8 of Act 77 (25 Pa.Stat. §§ 3146.6(a) and 3150.16(a)) and directed the District Court to enter an order that the undated ballots in that case be counted. The underlying facts and history were that the Lehigh County Board of Elections (LCBE) held an election on November 2, 2021, to fill vacancies for the office of Judge of the Court of Common Pleas of Lehigh County. Six candidates ran for three available judgeships. Candidates Thomas Caffrey and Thomas Capehart received the most votes and were sworn into office. During the counting of the ballots, the LCBE set aside 257 out of approximately 22,000 mail-in or absentee ballots that lacked a handwritten date next to the voter declaration signature (“the undated ballots”), all of which were received by the deadline of 8:00 p.m. on election day. Candidate David Ritter received the third most votes in the election, which was seventy-four votes more than the candidate in fourth place, Zachary Cohen.

The LCBE convened a public hearing to consider whether to count the disputed (*i.e.*, undated) ballots. and voted 3-0 to count the undated ballots. Ritter appealed the decision to the Lehigh County Court of Common Pleas, which affirmed the LCBE's decision to count the disputed ballots. Ritter then appealed to this Court, which determined that the undated ballots should not be counted (see Ritter v. Lehigh Cnty. Bd. of Elections, 272 A.3d 989 (Pa.Commw.Ct. 2022)). Voters then sued the LCBE in the United State District Court or the Easter District

of Pennsylvania arguing that the decision not to count votes because they lacked a date on the secrecy envelope violated their rights under the Materiality Provision of the Civil Rights Act. The Eastern District dismissed the case on summary judgment on the basis that there was no private right of action to enforce the Materiality Provision.

The Third Circuit reversed, holding that a private right of action to enforce the Materiality Provision did exist, and further holding that the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101, prohibited the application of the dating provisions of 25 Pa.Stat. §§ 3146.6(a) and 3150.16(a) and directed the District Court to enter an order that the undated ballots in that case be counted. Migliori, 2022 U.S.App.LEXIS 14655 at \*18. In so holding, the court explained that the LCBE's refusal to count the undated ballots (pursuant to this Court's order in Ritter) violated the Materiality Provision because, in the Third Circuit's view, the date requirement was not material in determining whether the voters were qualified to vote under Pennsylvania law. Id. at \*13-\*17. In so doing, the court effectively held that the dating provisions of Sections 6 and 8 of Act 77 (25 Pa.Stat. §§ 3146.6(a) and 3150.16(a)) were invalid and could not be applied to refuse to count a mail-in or absentee ballot that arrived in an undated secrecy envelope. Thereby the court eliminated a mandatory requirement from Sections 6

and 8 of Act 77 and that triggers the nonseverability provisions of Section 11 of Act 77.

That the dating provisions of Sections 6 or 8 are mandatory has at least twice been confirmed by the persuasive analysis of this Court in two unpublished opinions in Ritter v. Lehigh Cnty. Bd. of Elections, 272 A.3d 989 (Pa.Comm. Ct. 2022) and In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1 Petition of Carpenter, 272 A.3d 993 (Pa.Comm. Ct. 2022). In Ritter, 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 of Absentee and Mail-In Ballots of November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020) (hereafter "In re 2020 Canvass"), and found that the collective result of the CDO and CIR were binding on this Court and the CIR was precedential and persuasive in finding that the dating provisions were mandatory and that undated mail-in ballots were invalid and must be stricken in all elections after 2020. Ritter, 272 A.2d 989, 2022 Pa.Comm. Unpub. LEXIS 1, \*7-\*25.

Likewise, in In re Election in Region 4, where the issues included whether to count one undated mail-in ballot, this Court again examined the OAJC, the CDO and CIR in In re 2020 Canvass. This Court did not find In re 2020 Canvass to be a

binding precedent on the issue of whether an mail-in ballot without a date must be set aside and not counted, this Court concluded that the “prevailing view of our Supreme Court is that of Justice Wecht, *i.e.*, that the requirement that the outer envelope be dated by the voter is mandatory and must be strictly enforced in elections held after that of 2020.” 272 A.3d 993, 2022 Pa.Comm.w.Unpub.LEXIS 15, \*8.<sup>1</sup>

Blocking the application of a mandatory provision like the dating provisions at issue here triggers Section 11 of Act 77, which is triggered not only by expressly striking provisions as invalid but also by holding its application to any person or circumstance invalid. Clearly that is what has occurred in Migliori, and now, across the state, the dating provisions are consequently being and will continue to be disregarded in favor of counting undated ballots. The situation is exactly the same as if the dating provisions were expressly stricken from Act 77 or deleted by amendment, as they no longer have any mandatory effect. Accordingly, Act 77 and all amendments thereto, such as Act No. 12 of 2020 should be declared void.

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<sup>1</sup> Cf, unpublished Memorandum Opinion by President Judge Cohn Jubelirer in McCormick v. Chapman, No. 286 M.D. 2022 (filed June 2, 2012), analyzing Migliori, In re 2020 Canvass, and Ritter.

## CONCLUSION

For the aforementioned reasons, Petitioners respectfully urge this Court to grant this Application for Summary Relief and enter the attached proposed order or grant such other or further relief as this Court may deem proper.

Respectfully submitted,

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Gregory H. Teufel  
Robert Cowburn  
*Attorney for Petitioners*

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**ORDER GRANTING SUMMARY RELIEF**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2021, pursuant to Rule 1532(b)  
of the Pennsylvania Rules of Appellate Procedure and upon consideration of  
Petitioners' Application for Summary Relief along with Respondents' responses,  
the Court finds that Petitioners' right to relief is clear.

NOW, THEREFORE, it is ORDERED AND DECREED that:

1. Petitioners' Application for Summary Relief is granted.

2. Act No. 77 of October 31, 2019, P.L. 552, No. 77 (“Act 77”) and all amendments thereto, such as Act No. 12 of 2020 are declared void.

IT IS SO ORDERED.

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J.

**CERTIFICATE OF WORD COUNT**

I certify that this application/brief contains 7666 words, as determined by the word-count feature of Microsoft Word.

Date: July 20, 2022

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Gregory H. Teufel, Esq.



**CERTIFICATE OF COMPLIANCE**

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

Date: July 20, 2022

A handwritten signature in black ink, appearing to read "G. H. Teufel". The signature is written in a cursive style with a large initial "G" and "H".

Gregory H. Teufel, Esq.