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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TIMOTHY BONNER, et al.,

Petitioners,

v.

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

Respondents.

No. 364 MD 2022

**RESPONDENTS' ANSWER TO PETITIONERS' APPLICATION FOR
SUMMARY RELIEF AND EXPEDITED BRIEFING**

Respondents, Acting Secretary of the Commonwealth Leigh M. Chapman and the Department of State of the Commonwealth of Pennsylvania, hereby present this Answer to Petitioners’ Application for Summary Relief and Expedited Briefing (the “Application”).¹ In support thereof, Respondents incorporate by reference their Preliminary Objections to the Petition for Review and their Cross-Application for Summary Relief. As explained therein and below, Petitioners’ request for summary relief should be denied because their claim is procedurally flawed and substantively meritless.

The Court should also deny Petitioners’ request for expedited briefing. The premise of that request—that the Court can and should adjudicate their claim in time to grant relief with respect to the November 2022 general election—is false. Even if Petitioners’ claim had merit (and it does not), invalidating Act 77 at this juncture would throw the November 2022 election into chaos and violate every principle of equity. Petitioners should already know this. Last year, they instituted a separate attack on Act 77, seeking to invalidate the creation of no-excuse mail-in voting on constitutional grounds. That lawsuit was filed at almost the exact same time of year as Petitioners’ current lawsuit. This Court recognized that, even with expedited briefing and argument, it was simply not possible to adjudicate the claim

¹ As directed by the Court’s August 1, 2022 Order, at this time Respondents are only submitting this Answer to Petitioners’ Application. Respondents will submit a brief in response to the Application in accordance with the Court’s forthcoming briefing schedule.

before the November 2021 election. That conclusion applies no less forcefully here.

Respondents answer the paragraphs of Petitioners' Application as follows:²

1. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. In addition, to the extent the allegations of this paragraph characterize Petitioners' filings, those filings are in writing and speak for themselves, and any characterization thereof is denied. By way of further response, Respondents specifically deny that Petitioners are entitled to any of the relief they request.

2. Denied. The allegations of this paragraph regarding the effect of 25 Pa. Stat. § 3150.12a(a) set forth conclusions of law to which no response is required.

Respondents specifically deny that expedited briefing is necessary or appropriate here. The sole basis for Petitioners' request to proceed in an expedited fashion is their desire to have their claim finally adjudicated—and Act 77 invalidated—in advance of the November 8, 2022, general election. But that request is already effectively moot; Petitioners filed this lawsuit far too late for any

² Petitioners' Application is not divided into numbered paragraphs. To assist the Court in its review of Respondents' Answer to the Application, Petitioners attach as Exhibit A a copy of the Application, to which Respondents have added numbers in red at the beginning of each paragraph. Each numbered paragraph of Respondents' Answer to the Application corresponds to a numbered paragraph in Exhibit A.

court to order that the November 8, 2022, election be conducted under whatever legal regime would obtain if the entirety of Act 77 were invalidated. The abolition of no-excuse mail-in voting alone (which would be only one consequence of the order Petitioners seek) would cause mass confusion, disruption, and disenfranchisement in November. Indeed, hundreds of thousands of voters have already applied for mail-in ballots and had those applications approved. Affidavit of Jonathan Marks ¶ 29 (attached as Exhibit B hereto). Respectfully, even if Petitioners had not inexcusably delayed in asserting their claim, *see* Preliminary Objection No. 2 of Respondents' Preliminary Objections to the Petition for Review (explaining that Petitioners' claim is barred by the doctrine of laches), this Court cannot, consistent with fundamental principles of equity, adjudicate Petitioners' claim prior to the November 2022 general election. *See Kuznik v. Westmoreland Cnty. Bd. of Com'rs*, 902 A.2d 476, 489 (Pa. 2006) (injunctive relief is unavailable where greater injury would result from granting the injunction than from denying it).

This is not the first time this Court has confronted a petitioner who instituted a challenge to Act 77 in late July and then demanded that the Court abandon its normal procedures and rearrange its calendar so that it might enjoin the statute's operation before November. In a consolidated action entitled *McLinko, et al. v. Degraffenreid, et al.*, No. 244 M.D. 2021 (Pa. Commw. Ct. 2021), two sets of

petitioners—including Petitioners here—challenged the validity of Act 77 on constitutional grounds. The *McLinko* lawsuit was commenced by Doug McLinko on July 26, 2021, approximately 14 weeks before the November 2021 general election. *See* Pet. for Review, *McLinko et al. v. Degraffenreid, et al.*, No. 244 M.D. 2021 (Pa. Commw. Ct. July 26, 2021). After granting McLinko’s Application for Expedited Briefing and holding an expedited oral argument, *see* Order, No. 244 M.D. 2021 (Pa. Commw. Ct. July 27, 2021), this Court concluded that “prospective relief, as requested by petitioners, is not available for the November 2021 election because it is already underway as set forth in the Jonathan Marks’ Affidavit, 08/26/2021.” Order, No. 244 M.D. 2021 (Pa. Commw. Ct. Sept. 24, 2021).

Just as relief was unavailable for the November 2021 election in *McLinko*, it is unavailable here for the November 2022 election. As set forth in the attached Affidavit of Jonathan Marks, overturning Act 77 now would be enormously prejudicial, particularly for the hundreds of thousands of voters who are on the permanent mail-in ballot list file established by Act 77 and have already had their application to vote by mail in November approved. *See* Exhibit B, Marks Aff., ¶¶ 28-29.

The confusion and disenfranchisement from invalidating Act 77 prior to the November 2022 election would be even greater than what would have resulted

from granting the request for an expedited ruling in *McLinko*. The Pennsylvania Supreme Court has just upheld Act 77 and rejected Petitioners' and *McLinko*'s constitutional challenge. *McLinko v. Department of State*, --- A.3d ----, 2022 WL 3039295 (Pa. Aug. 2, 2022). That decision has, of course, been widely publicized by local, state, and national media, leading voters to believe that their statutory right to vote by mail is secure. Particularly in this context, the confusion and disenfranchisement resulting from a subsequent order *nullifying* Act 77 before the November 2022 election would be difficult to overstate.

In sum, the Court should deny Petitioners' request for expedited briefing because no relief is available to Petitioners for the November 2022 election.

3. Admitted in part denied in part. Respondents admit that Petitioners are registered electors residing in Pennsylvania, are elected members of the Pennsylvania House of Representatives, and were past candidates for office. Respondents lack knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in this paragraph, which are therefore denied.

4. Admitted in part and denied in part. Respondents admit that Act 77 is a valid Pennsylvania law that they are obligated to enforce and implement and that Respondents have complied with this obligation. The remaining allegations in this paragraph characterize Respondents' filings in other litigation. Respondents'

filings are in writing and speak for themselves, and any characterization thereof is denied.

5. The allegations in this paragraph characterize the Department of State's Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes. The Department's Guidance is in writing and speaks for itself, and any characterization thereof is denied.

6. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. In addition, to the extent the allegations of this paragraph characterize the Supreme Court of Pennsylvania's decision in *Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006), that decision is in writing and speaks for itself, and any characterization thereof is denied. By way of further response, Respondents specifically deny that the decision of the United States Court of Appeals for the Third Circuit in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), held any provision of Act 77 invalid or void.

7. The allegations in this paragraph set forth conclusions of law to which no response is required. In addition, to the extent the allegations of this paragraph purport to characterize certain portions of Act 77, that legislation is in writing and speaks for itself, and any characterization thereof is denied.

8. Denied. To the extent the allegations in this paragraph set forth conclusions of law, no response is required. To the extent the allegations of this

paragraph purport to characterize *Migliori*, including the court’s recitation of the facts and history of the case, that decision is in writing and speaks for itself, and any characterization thereof is denied.

9. Denied. To the extent the allegations in this paragraph set forth conclusions of law, no response is required. To the extent the allegations of this paragraph characterize the Third Circuit’s decision in *Migliori*, the preceding decision of the U.S. District Court for the Eastern District of Pennsylvania in that same case, or this Court’s decision in *Ritter v. Lehigh County Board of Elections*, 272 A.3d 989 (Pa. Commw. Ct. 2022) (unreported opinion), those decisions are in writing and speak for themselves, and any characterization thereof is denied.

10. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. In addition, to the extent the allegations of this paragraph characterize *Migliori*, that decision is in writing and speaks for itself, and any characterization thereof is denied. By way of further response, Respondents specifically deny that *Migliori* held any provision of Act 77 invalid or void, or that the decision “trigger[ed]” the nonseverability provision of Section 11 of Act 77.

11. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. In addition, to the extent the allegations of this paragraph characterize this Court’s decisions in *Ritter* and *In re Election in Region*

4 for Downingtown School Board Precinct Uwchlan 1 Petition of Carpenter, 272 A.3d 993 (Pa. Commw. Ct. 2022) (“*In re Election Region 4*”) (unreported opinion), or any of the opinions issued in *In re Canvass Absentee & Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020), those decisions and opinions are in writing and speak for themselves, and any characterization thereof is denied. By way of further answer, Respondents specifically deny that the Pennsylvania Election Code requires or permits election officials to exclude mail-in ballots that are timely returned by qualified voters simply because the voters neglected to write a date on the ballots’ outer envelope.

12. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. In addition, to the extent that the allegations of this paragraph purport to characterize this Court’s decision in *In re Election in Region 4*, that decision is in writing and speaks for itself, and any characterization thereof is denied. By way of further answer, Respondents specifically deny that the Pennsylvania Election Code requires or permits election officials to exclude mail-in ballots that are timely returned by qualified voters simply because the voters neglected to write a date on the ballots’ outer envelope.

13. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. In addition, to the extent the allegations of this paragraph characterize *Migliori*, that decision is in writing and speaks for itself,

and any characterization thereof is denied. By way of further answer, Respondents specifically deny that *Migliori* held any portion of Act 77 invalid or void.

Respondents also specifically deny that *Migliori* would have the effect of requiring the invalidation of the entirety of Act 77, even assuming *arguendo* that *Migliori* invalidated a provision of that Act. In addition, Respondents specifically deny that there is any basis for invalidating Act 12 of 2020, which was enacted subsequent to Act 77 of 2019 and has no nonseverability provision. Indeed, the fact that the provisions of Act 77 containing the declaration-dating requirement at issue in *Migliori* were subsequently amended by Act 12—which does not contain any nonseverability provision—further supports the conclusion that Petitioners’ arguments regarding the construction and effect of Act 77’s nonseverability provision should be rejected.

14. Admitted in part and denied in part. It is admitted only that Petitioners seek the relief set forth in this paragraph. It is denied that Petitioners are entitled to any relief whatsoever.

WHEREFORE, Respondents respectfully requests that this Honorable Court deny Petitioners’ application for summary relief and enter judgment in favor of Respondents and against Petitioners.

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: August 8, 2022

By: /s/ Robert A. Wiygul

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: August 8, 2022

/s/ Robert A. Wiygul
Robert A. Wiygul

EXHIBIT A

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,

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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
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Other Authorities

GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES, https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf	3
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Israel E. Friedman, Comment, Inseverability Clauses in Statutes, 64 U. Chi. L.
Rev. 903 (1997)4

INTRODUCTION

1. 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.

2. 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

3. 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.

4. 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.

5. 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

6. 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.

7. 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.

8. 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

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.

9. 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.

10. 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.

11. 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.Commw.Ct. 2022) and In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1 Petition of Carpenter, 272 A.3d 993 (Pa.Commw.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.Commw.Unpub.LEXIS 1, *7-*25.

12. 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. Unpub. LEXIS 15, *8.¹

13. 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.

¹ 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

14. 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,



Gregory H. Teufel
Robert Cowburn
Attorney for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.

Leigh M. Chapman, in her official
capacity as Acting Secretary of the
Commonwealth of Pennsylvania, and
Commonwealth of Pennsylvania,
Department of State,

Respondents.

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.

J.

CERTIFICATE OF WORD COUNT

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

A handwritten signature in blue ink, reading "G. H. Teufel". The signature is written in a cursive style with a large initial "G" and "H".

Date: July 20, 2022

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 blue ink, reading "G. H. Teufel". The signature is written in a cursive style with a large initial "G" and "H".

Gregory H. Teufel, Esq.

EXHIBIT B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TIMOTHY BONNER, et al.,

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

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No. 364 MD 2022

AFFIDAVIT OF JONATHAN MARKS

I, Jonathan Marks, declare and affirm under the penalties of 18 Pa.C.S.

§ 4904 that:

1. I am the Deputy Secretary for Elections and Commissions for the Department of State (the “Department”) of the Commonwealth of Pennsylvania, a position I have held since February 2019. Prior to being appointed as Deputy Secretary, I served as Commissioner for the Department’s Bureau of Commissions, Elections and Legislation. I submit this Affidavit in opposition to Petitioner’s Application for Summary Relief and in support of Respondents’ Cross-Application for Summary Relief.

2. In my current and former positions, I have been responsible, together with the Secretary of the Commonwealth and other officials, for helping to lead the

Department's efforts to ensure that Pennsylvania's elections are free, fair, secure, and accessible to all eligible voters. In that capacity, I have worked closely with county executives, elections directors, and personnel in the Commonwealth's 67 counties.

Act 77's Amendments to the Pennsylvania Election Code

3. On October 31, 2019, Governor Wolf signed into law Act 77 of 2019, which amended Pennsylvania's Election Code in several respects.

4. Among other reforms, Act 77 provided that electors who were not eligible for absentee ballots would be permitted to vote with mail-in ballots. Before Act 77 was passed, voters who did not qualify for absentee ballots were required to vote in person at their polling places on election day.

5. As a result of Act 77, the Department and Pennsylvania's county boards of elections (the "counties") anticipated that counties would have to deal with a large increase in the number of ballots they would receive by mail.

6. Those expectations, however, had not accounted for the effects of the COVID-19 pandemic, which took hold in Pennsylvania in March 2020. Due to voters' concerns that voting in person at polling places on election day might expose them to the virus—and given the absence of any vaccine, which was not generally available to the public until 2021—a significant percentage of Pennsylvania voters cast a mail-in or absentee ballot during the 2020 election

cycle. These numbers far exceeded what Pennsylvania elections administrators had planned for prior to the pandemic.

7. The first statewide election following the enactment of Act 77 was the 2020 primary election, which was held on June 2, 2020. In that election, the majority of voters—nearly 1.5 million people—cast a mail-in or absentee ballot, while approximately 1.3 million Pennsylvanians voted in person on June 2.

8. One consequence of the massive use of mail-in voting was that certain counties fell behind in the processing of mail-in ballot applications and the issuance of mail-in ballots.

Following the 2020 Primary Election, the Department and Counties Expended Substantial Resources for the Purpose of Implementing Act 77’s Mail-In Voting Procedures

9. Based on historical experience, Pennsylvania election administrators anticipated that a significantly greater number of Pennsylvanians would vote in the 2020 general election than had voted in the 2020 primary election. In addition, due in large part to the ongoing COVID-19 pandemic, election administrators expected that a large percentage of these voters would vote by mail—many more than the number of mail-in voters in the primary election.

10. These expectations were borne out. Of the approximately 6.9 million Pennsylvanians who voted in the 2020 general election, nearly 2.7 million cast a mail-in or absentee ballot.

11. In anticipation of these high numbers, and based on their experience in the 2020 primary election, Pennsylvania election administrators invested significant resources to educate voters about the mail-in voting procedures made available by Act 77; to avoid the delays in application processing and mail-in ballot issuance that had affected certain counties during the primary election; and to minimize the time it would take to process and tabulate millions of returned mail-in ballots.

12. Recognizing that many voters who vote in general elections, particularly in presidential years, do not vote in primary elections and are less familiar with the electoral system than primary voters, the Department, as well as certain counties, continued their extensive public relations efforts to educate voters about the availability of mail-in voting, and to encourage voters to apply early for mail-in ballots, thereby easing the administrative burden on elections officials. The Department alone spent approximately \$13.7 million on these communications between the 2020 primary and general election.

13. Certain counties that fell behind in the issuance of mail-in and absentee ballot applications and ballots during the primary election also invested additional resources in the general election, including purchasing equipment to streamline their fulfillment of ballot requests.

14. Counties also had to invest substantial resources into training additional election workers to process mail-in ballot applications.

15. In the lead-up to the 2020 general election, a particular concern of election administrators was the time it would take to process the large volume of mail-in ballot submissions and tabulate votes.

16. Pursuant to the requirements of the Election Code, each mail-in ballot was returned in two nested envelopes. After determining the sufficiency of the declaration printed on the outside envelopes, county election administrators had to open each of those envelopes in turn, and the ballot then needed to be reviewed and tabulated.

17. Per the Election Code, this canvassing of mail-in ballots did not take place at individual election districts staffed by local polling-place officials (as had previously been the case with the canvassing of absentee ballots); instead, pursuant to the provisions of Act 77, all mail-in and absentee ballots returned in a given county were canvassed by the county board of elections at a central location.

18. To ensure that the results of the election would be known within a reasonable time (and sufficiently in advance of post-election day deadlines prescribed by the Election Code), it was necessary for the counties to use scanning machines to scan and tabulate the votes in an automated fashion. Due to the massive volume of mail-in ballots received by certain counties, it was necessary

for those counties to procure additional automated equipment (such as envelopers, which open the envelopes) to process mail-in ballot submissions. A large number of counties also had to expend resources training additional workers to determine whether voters had sufficiently completed the declarations on the outside envelopes enclosing the mail-in and absentee ballots, and to perform various other aspects of the canvassing and vote-tabulation process.

19. Because of the large volume of mail-in ballot submissions expected to be received during the 2020 general election, many counties purchased ballot scanners and/or other automated mail-in ballot-processing machines during the period between the 2020 primary and general election, at a cost of millions of dollars. The Department is aware that \$605,000 was distributed to the counties through the CARES Act. Also, the Department is aware that counties that bought automated equipment to assist in the canvassing of mail-in ballots used county funds and private funds to purchase the equipment.

Following the 2020 General Election, the Department and Counties Continued to Expend Substantial Resources for the Purpose of Implementing Act 77's Mail-In Voting Procedures

20. Despite the challenges posed by COVID-19 and the unexpected volume of mail-in voting, Pennsylvania's election administrators successfully implemented Act 77's mail-in voting procedures during the 2020 election cycle. As discussed above, millions of voters were educated about the availability of mail-in ballots and voted by mail in the 2020 general election.

21. Given the enormous number of voters who took advantage of mail-in voting during the 2020 election cycle, since 2020, many counties have continued to invest time and resources to further improve their ability to process and tabulate mail-in ballots. The Department is aware that many counties have made additional investments in equipment, staff, and office space.

Eliminating Act 77's Mail-In Voting Procedures at This Juncture Would Require Election Officials to Spend Substantial Additional Resources to Educate Voters and Mitigate Disenfranchisement

22. Despite the challenges posed by COVID-19 and the unexpected volume of mail-in voting, Pennsylvania's election administrators successfully implemented Act 77's mail-in voting procedures during the 2020 and 2021 election cycles and in the 2022 primary election. As discussed above, millions of voters were educated about the availability of mail-in ballots and voted by mail in the 2020 general election.

23. In the 2021 election cycle, 1,301,656 mail-in ballots were cast.

24. Likewise, in the May 2022 primary election, 626,521 mail-in ballots were cast.

25. If Act 77's mail-in voting procedures were now eliminated, the Department and counties would have to invest millions of dollars of resources to educate voters regarding the change. In the absence of such expenditures, the elimination of no-excuse mail-in voting would create significant confusion about the permissible means of voting, leading to voter disenfranchisement.

26. Some of the very features of Act 77 that facilitate voting increase the likelihood that the Act's elimination would have disenfranchising effects.

27. For example, Act 77 allowed "[a]ny qualified registered elector [to] request to be placed on a permanent mail-in ballot list file." 25 P.S.

§ 3150.12(g)(1). Once an elector does so, a mail-in ballot application will automatically be mailed to the elector at the beginning of each year, and the elector's return of that application will cause her to be sent a mail-in ballot for each election during that year. *Id.* An elector who has requested to be placed on this permanent list therefore has every reason to expect that she need take no further affirmative steps to be able to vote; the Election Code assures her that elections officials will send her the appropriate materials at the appropriate time.

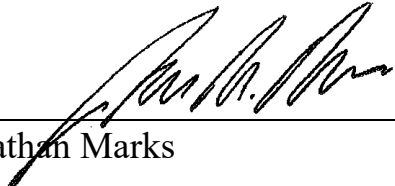
28. As of the date of this Affidavit, approximately 2,015,964

Pennsylvania voters are on the permanent mail-in ballot list file established by Act 77.

29. As of the date of this Affidavit, approximately 442,148 Pennsylvanians have had their application for a mail-in ballot for the upcoming November 8, 2022 election approved.

I declare that the facts set forth in this Affidavit are true and correct. I understand that this Affidavit is made subject to the penalties for unsworn falsification to authorities set forth in 18 Pa.C.S. § 4904.

Executed on August 08, 2022.



Jonathan Marks