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NOTICE TO PLEAD

Petitioners: You are hereby notified to file a written response to the enclosed Preliminary Objections within thirty (30) days from service hereof, or a judgment may be entered against you.

/s/ Robert A. Wiygul
Robert A. Wiygul
Attorney for Respondents

Counsel for Respondents

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' PRELIMINARY OBJECTIONS TO THE PETITION FOR REVIEW

TABLE OF CONTENTS

Respondents, Acting Secretary of the Commonwealth Leigh M. Chapman and the Department of State of the Commonwealth of Pennsylvania, hereby present Preliminary Objections to the Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief (the "Petition" or "Pet.") filed by Petitioners.

I. INTRODUCTION

By any reasonable measure, Act 77 of 2019 has been an outstanding legislative success. The most comprehensive reform and modernization of Pennsylvania election law in decades, Act 77 established a no-excuse mail-in method of voting, making the franchise more accessible for millions of Pennsylvanians and permitting them to vote safely from their homes during the COVID-19 pandemic. At the same time, and among many other reforms, Act 77 provided funding allowing counties to deploy electronic voting machines with voter-verifiable paper records and enhanced security; eliminated straight-ticket voting; and gave voters more time before an election in which to register to vote.

Petitioners are fourteen current members of the Pennsylvania House of Representatives. Eleven of them were not only legislators at the time Act 77 passed; they voted in favor of the legislation. Yet they now seek to invalidate it. This is not their first attempt to do so. In August 2021, nearly two years after Act 77 was signed into law, Petitioners filed a lawsuit contending that Act 77's

allowance of mail-in voting violated the Pennsylvania Constitution. On August 2, 2022, the Pennsylvania Supreme Court squarely rejected that argument, holding that there is "no restriction in our Constitution on the General Assembly's ability to create universal mail-in voting." *McLinko v. Department of State*, No. 14 MAP 2022, --- A.3d ----, 2022 WL 3039295 (Pa. 2022).

Shortly before the Supreme Court issued its decision, Petitioners mounted their second, latest attack on mail-in voting. This time, rather than alleging any infirmity in mail-in voting itself, Petitioners have seized on a Third Circuit ruling seeking to *protect* voters from disenfranchisement. In that case, *Migliori v. Lehigh County Board of Elections*, 36 F.4th 153 (3d Cir. 2022), the Court of Appeals held that the federal Civil Rights Act of 1964 prohibited the Lehigh County Board of Elections from refusing to count absentee and mail-in ballots timely returned by qualified voters based on the sole fact that the voters had omitted a handwritten date from the ballot-return envelope on which the voter's declaration is printed. As the court explained, that handwritten date is immaterial to determining whether the voter is a qualified elector—and thus, under federal law, a voter cannot be disenfranchised for failing to write a date.

Petitioners contend that this decision led to a perverse and paradoxical result: In their view, the Third Circuit's ruling protecting the right to vote operated to invalidate the entirety of Act 77 and deprive all Pennsylvania voters of the

ability to cast a no-excuse mail-in ballot. In support of this conclusion, Petitioners rely exclusively on the "nonseverability provision" in Section 11 of Act 77. According to Petitioners, because the Third Circuit purportedly "invalidated" a provision of Act 77, the nonseverability provision inexorably compels this Court to invalidate the entire Act.

For reasons both procedural and substantive, Petitioners' claim must be dismissed. First, they lack standing. They do not plead any facts showing a cognizable injury, but simply assert a generalized interest in adherence to the law. Second, Petitioners' claim is barred by the doctrine of laches. Based on Petitioners' own theory of nonseverability, they should have brought their claim in November 2020, when the Pennsylvania Supreme Court affirmed rulings holding that absentee and mail-in ballots lacking a handwritten date on the ballot-return envelope should be counted. *See In re Canvass Absentee & Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020).

Third, for multiple reasons, Petitioners' claim fails on the merits as a matter of law. It is built on a mistaken premise: far from "invalidating" any portion of Act 77, *Migliori*'s ruling is fully consistent with the statutory scheme. Putting that aside, Petitioners misconstrue the nonseverability provision on which they rely. Even if the *Migliori* decision invalidated a provision of Act 77—which it did not—Petitioners' arguments would be contrary to the text of the nonseverability

provision as well as precedent from the Pennsylvania Supreme Court. Finally, if the nonseverability provision were interpreted as Petitioners urge, it would be unconstitutional and unenforceable.

II. BACKGROUND

A. Act 77 of 2019 Is Signed into Law with Bipartisan Support

1. In 2019, the Pennsylvania General Assembly enacted Act 77 of 2019. Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. 2019-77 (S.B. 421) (West) ("Act 77" or "the Act").

2. "Act 77 effected major amendments to the Pennsylvania Election Code," including "establishing state-wide, universal mail-in voting." *McLinko*, 2022 WL 3039295, at *1 (citing 25 P.S. §§ 3150.11-3150.17).

3. But that is "only a fraction of the scope of the Act." *Id.* "For instance, Act 77 eliminated the option for straight-ticket voting; moved the voter registration deadline from thirty to fifteen days before an election; allocated funding to provide for upgraded voting systems; and reorganized the pay structure for poll workers, along with other administrative changes." *Id.* (footnote omitted).

4. Further, "Act 77 was an enormously popular piece of legislation on both sides of the aisle." *Id.* "In the state Senate, Act 77 passed 35-14, with Republicans voting 27-0 in favor along with eight Democrats. In the state House of

Representatives, it passed 138-61, with 105 Republicans and thirty-three Democrats voting in favor of it." *Id.* (citation omitted).

5. "As put by Bryan Cutler, Pennsylvania's House Majority Leader at the time[:]"

> [Act 77] was not written to benefit one party or the other, or any one candidate or single election. It was developed over a multi-year period, with input from people of different backgrounds and regions of Pennsylvania. It serves to preserve the integrity of every election and lift the voice of every voter in the Commonwealth.

Id.

6. Section 8 codifies one of Act 77's many changes to the Election Code, setting out the provisions concerning mail-in voting.

7. First, Section 8's provision concerning "Qualified mail-in electors" states that, as a "[g]eneral rule … [a]ny qualified elector who is not eligible to be a qualified absentee elector under Article XIII … shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article." *See* Act 77, § 8 *see also* 25 P.S. § 3150.11.

8. Act 77, Section 8's provision concerning "Voting by mail-in electors" identifies procedures for voting by mail-in ballot:

> (a) General rule.—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.

See Act 77, § 8 (codified at 25 P.S. § 3150.16(a)).

9. Thus, the "Voting by mail-in electors" provision contains many instructions about mail-in voting procedures, one of which states that voters should fill out, date, and sign the declaration on the ballot-return envelopes.

10. Separately, Section 6 of Act 77 contain revisions to the Election Code concerning absentee voting.

11. For example, Section 6 of Act 77 contains the Act's "Voting by Absentee Electors" provision, added language regarding the manner for voting by absentee ballot:

> (a) Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the 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 Absentee 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.

See Act 77, § 6 (codified at 25 P.S. § 3146.6(a)).

12. Like the "Voting by mail-in electors" provision, the "Voting by Absentee Electors" provision also contains several instructions, including for filling out, dating, and signing the declaration on the ballot-return envelopes.

13. Notably, the language in Sections 6 and 8 concerning voters "fill[ing] out, dat[ing] and sign[ing] the declaration printed on" ballot-return envelopes was not newly added to the Election Code by Act 77; § 3146.6(a) has long included identical language for absentee ballots, and courts have been construing that language for more than fifty years.

14. Section 7 of Act 77 codifies, at 25 P.S. § 3146.8, the rules governing "Canvassing of Official Absentee Ballots and Mail-in Ballots." *See* Act 77, § 7 (codified at 25 P.S. § 3146.8).

15. Section 7 requires that:

> An absentee ballot cast by any absentee elector as defined in [the Election Code] or a mail-in ballot cast by a mail-in elector shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is

> received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

Id. (codified at § 3146.8(g)).

16. Section 7 then lists several conditions absentee and mail-in ballots must meet to be canvassed, but does not state that their ballot-return envelopes must bear a date written by the voter to be canvassed. *See id.*

17. As noted above, beyond making additions to the Election Code regarding mail-in and absentee voting, Act 77 also struck pre-existing provisions of the Election Code, including those permitting straight-ticket voting. *See* Act 77, §§ 3, 3.2.

18. Section 11 of Act 77 (the "nonseverability provision") states that "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." Act 77, § 11.

B. In *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, the Supreme Court of Pennsylvania Holds that Ballots in the November 2020 Election Should Not Be Disqualified on the Grounds That the Voter Failed to Write a Date on the Ballot-Return Envelope

19. In the wake of the November 2020 General Election, multiple county boards of elections received challenges to their decision to count certain absentee

and mail-in ballots that were timely received, and for which the voters who submitted them had signed the declaration on the ballot-return envelope, but for which "the voters … failed to handwrite their name, street address or the date (or some combination of the three) on the ballot-return outer envelope." *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020) (Opinion Announcing the Judgment of the Court (OAJC)) ("*In re Canvass*"), *cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451, 209 L. Ed. 2d 172 (2021).

20. In a November 23, 2020, judgment issued just five days after the Court exercised extraordinary jurisdiction over the matter, the Supreme Court of Pennsylvania affirmed the decision of the Philadelphia Court of Common Pleas and reinstated the decision of the Allegheny County Court of Common Pleas (which had been reversed by the Commonwealth Court), ordering that the county boards of elections should count ballots that failed "to include a handwritten name, address or date in the voter declaration on the back of the outer envelope." *Id.* at 1079.

C. In *Migliori v. Lehigh County Board of Elections*, a Group of Lehigh County Voter Plaintiffs Files a Claim, Pursuant to the Materiality Provision of the Federal Civil Rights Act, Challenging an Order Disqualifying Their Votes

21. On January 31, 2022, a group of voters who had voted absentee or by mail-in ballot (the "*Migliori* Plaintiffs") sued the Lehigh County Board of

Elections (the "LCBE") in the Eastern District of Pennsylvania. *Migliori*, 36 F.4th at 158.

22. The *Migliori* plaintiffs were qualified voters who had timely returned an absentee or mail-in ballot for the 2021 municipal election without hand-writing a date on the return-envelope declaration. *See id.* While the LCBE initially decided to canvass and count each ballots, the Commonwealth Court later issued a non-precedential decision that the LCBE must disqualify each ballot. *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989 (Pa. Commw. Ct.) (unreported opinion), *appeal denied*, 271 A.3d 1285 (Pa. 2022).

23. The *Migliori* Plaintiffs then sued the LCBE, arguing that disqualifying ballots on such grounds "violated their rights under the Materiality Provision of the Civil Rights Act," 52 U.S.C. § 10101(a)(2)(B). 36 F.4th at 158. Pursuant to that provision, "[n]o person acting under color of law shall … deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." § 10101(a)(2)(B).

24. Specifically, the plaintiffs challenged the materiality of requiring a hand-written date on the envelope. *Migliori*, 36 F.4th at 155.

25. After the district court granted summary judgment in favor of the

LCBE, the Third Circuit Court of Appeals reversed, holding that the declaration-dating language in 25 P.S. §§ 3146.6(a) and 3150.16(a) is not material under the Civil Rights Act. *Migliori*, 36 F.4th at 164.

D. Two Months After the Court of Appeals' Decision in *Migliori*, a Separate Group of Citizens Who Were Not Parties in *Migliori* Initiates this Lawsuit

26. On July 20, 2022—more than a year-and-a-half after the Supreme Court's decision in *In re Canvass*—a group of fifteen individuals ("Petitioners") filed this lawsuit seeking a declaratory judgment that, because *Migliori* held that disenfranchising qualified absentee and mail-in electors solely because they omitted handwritten dates from their ballot-return envelopes would violate the Civil Rights Act, and that the LCBE was thus required to count those electors' ballots in the May 2022 primary election, Act 77's nonseverability provision requires invalidating all of Act 77. *See id.* ¶¶ 6-8, 28-29.

27. None of the fifteen Petitioners in this action was a party to *Migliori*. Each Petitioner is a member of the Pennsylvania House of Representatives. The Petitioners purport to be suing "in their capacities as past and likely future candidates for office and as private citizens and registered Pennsylvania voters." Pet. ¶ 23 (footnote omitted).

III. PRELIMINARY OBJECTIONS TO PETITION FOR REVIEW

A. First Preliminary Objection: Petitioners Lack Standing to Challenge the Validity of Act 77 (Pa. R. Civ. P. 1028(A)(3), (5))

28. "In Pennsylvania, a party to litigation must establish as a threshold matter that he or she has standing to bring an action." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (citing cases).

29. To satisfy the standing requirement, a litigant must be "aggrieved," *i.e.*, he or she must have a "substantial, direct, and immediate interest in the matter." *Id.*

30. "To have a substantial interest, concern in the outcome of the challenge must surpass 'the common interest of all citizens in procuring obedience to the law.'" *Id.* (quoting *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003)). Thus, "there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975).

31. To satisfy the criterion of directness, a litigant must "demonstrat[e] that the matter caused harm to the party's interest." *Id.* (internal quotation marks omitted).

32. "Finally, the concern is immediate if that causal connection is not remote or speculative." *Id.* (internal quotation marks omitted).

33. The Petition here fails to plead standing for at least two independent reasons.[1]

1. As a Threshold Matter, the Petition Fails to Allege Any Facts Showing that Petitioners Are Aggrieved

34. Petitioners have not pleaded any facts establishing they have standing.

35. "Pennsylvania is a fact-pleading state." *Briggs v. Sw. Energy Prod. Co.*, 224 A.3d 334, 351 (Pa. 2020). Accordingly, to plead standing, "a party must plead facts which establish a direct, immediate and substantial injury." *Open PA Schools v. Dep't of Educ.*, No. 504 M.D. 2020, 2021 WL 129666, at *6 (Pa. Commw. Ct. Jan. 14, 2021) (en banc) (citing *Pa. Chiropractic Fed'n v. Foster*, 583 A.2d 844, 851 (Pa. Commw. Ct. 1990)).

36. "If a petition contains only 'general averments' or allegations that 'lack the necessary factual depth to support a conclusion that the [petitioner] is an aggrieved party,' standing will not be found." *Id.* (quoting *Pa. State Lodge, Fraternal Ord. of Police v. Dep't of Conservation & Nat. Res.*, 909 A.2d 413, 417 (Pa. Commw. Ct. 2006)).

[1] In *McLinko v. Department of State*, 270 A.3d 1278 (Pa. Commw. Ct.) (en banc), *aff'd in part and rev'd in part*, --- A.3d ----, 2022 WL 3039295 (Pa. 2022), this Court held that Petitioners had standing to assert their constitutional challenge to Act 77's establishment of no-excuse mail-in voting. The Pennsylvania Supreme Court, however, subsequently reversed this Court's decision except insofar as it held that this Court had jurisdiction to review Petitioners' challenge and that the challenge was not time-barred by Section 13 of the Act. *See* 2022 WL 3039295, at *17-19, 34. The Supreme Court did not address whether Petitioners had standing, as that issue was not raised by Appellants/Respondents in the appeal. For the reasons stated herein, Respondents respectfully submit that Petitioners have failed to plead facts establishing their standing to assert the claim they press in this action.

37. "Moreover, the harm asserted must be actual; an allegation of only a potential harm does not give rise to standing to bring a lawsuit." *Id.*

38. The Petition contains ***no*** factual allegations of direct, immediate and substantial injury to the *Bonner* Petitioners. The ***only*** allegation in the Petition that even gestures at Petitioners' interest in this litigation states: "Representatives brings this suit in their capacities as past and likely future candidates for office and as private citizens and registered Pennsylvania voters." Pet. ¶ 23.

39. The Petition does not state how the *Bonner* Petitioners are aggrieved based on their status as "past and likely future candidates for office" or as "registered voters."

40. At most, the Petition suggests that Petitioners' alleged harm is that Respondents continue "to implement the provisions of the Pennsylvania Election Code that were enacted pursuant to Act 77," notwithstanding Petitioners' contention that those provisions are now invalid by virtue of Act 77's nonseverability provision. Pet. ¶ 29. This, of course, is the sort of quintessentially "abstract interest of all citizens in having others comply with the law" that is insufficient to open the courthouse doors to a litigant. *Wm. Penn Parking Garage*, 346 A.2d at 282.

41. The Petition does not contain any allegation of direct, immediate and substantial injury resulting from continued enforcement of Act 77.

42. As a result, the Court must dismiss the Petition for Petitioners' failure to plead facts establishing they have standing.

2. Petitioners' Status—as Registered Electors and Past and Potential Future Candidates—Does Not Confer Standing to Enforce Act 77's Nonseverability Clause

43. Petitioners do not have standing in their capacities as voters or potential candidates.

(a) Petitioners Do Not Have Standing in Their Capacity as Voters

44. Pennsylvania case law—decided by both this Court and the Pennsylvania Supreme Court—confirms that litigants, including voters, lack standing to challenge laws that apply generally, where the litigants cannot assert any substantial, particularized injury. *See Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970); *In re Gen. Election 2014*, No. 2047 CD 2014, 2015 WL 5333364 (Pa. Commw. Ct. Mar. 11, 2015); *see also Szoko v. Twp. of Wilkins*, 974 A.2d 1216, 1220 (Pa. Commw. Ct. 2009) (a plaintiff must have "an interest that surpasses the common interest of all citizens in seeking obedience to the law").

45. In *Kauffman*, certain voters brought a declaratory judgment action challenging the validity of amendments to the Election Code that "permit[t]ed electors and their spouses who are on vacation to vote by absentee ballot." *Gen. Election 2014*, 2015 WL 5333364, at *3 (describing *Kauffman*).

46. The *Kauffman* plaintiffs alleged that the statute had expanded the scope of absentee voting beyond what the Pennsylvania Constitution allowed. *Kauffman*, 271 A.2d at 238. The Supreme Court ruled that the *Kauffman* plaintiffs did not "have a justiciable interest or standing" necessary to maintain the action. *Id.* As the Supreme Court emphasized, "it is hornbook law that a person whose interest is common to that of the public generally, in contradistinction to an interest peculiar to himself, lacks standing to attack the validity of a legislative enactment." *Id.* at 239. The Supreme Court thus held that *Kauffman* was precisely such a case; among other fatal flaws, "the interest which [the plaintiffs] claim[ed] [was] nowise peculiar to them but rather [was] an interest common to that of all other qualified electors." *Id.* at 240.

47. Petitioners' generalized theory of standing as voters, which would apply equally to every voter in the Commonwealth of Pennsylvania, is identical to theory that the Supreme Court already rejected in *Kaufman*. *See id.*

(b) Petitioners Do Not Have Standing in Their Capacity as Past or Potential Future Candidates

48. Petitioners' bare allegation that they are past and potential future candidates likewise cannot confer standing.

49. Petitioners nowhere explain how Act 77 injures them "as past and likely future candidates for office." Pet. ¶ 23.

50. That failure is fatal to the Petition because there is nothing about one's status as a candidate that talismanically confers standing to challenge any election-related rule; a candidate-petitioner, like any other petitioner, must allege facts showing a substantial, particularized interest in the specific claims alleged. *See, e.g.*, *In re Pickney*, 524 A.2d 1074 (Pa. Commw. Ct. 1987) (holding that incumbent candidate lacked standing to challenge nominating petition of candidate belonging to a different political party); *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013) (although plaintiff candidate "might have been able to establish standing [to challenge an Federal Election Commission decision] if he had shown that the FEC's determination injured his ability to fight the next election," he had not adequately alleged such facts); *cf. Biener v. Calio*, 361 F.3d 206, 210–11 (3d Cir. 2004) (candidate had sufficiently pled standing to challenge filing fee for party primary election by alleging that payment of the fee in protest had "depleted two-thirds of his campaign funds").

51. Because Petitioners plead no facts whatsoever demonstrating that they have a "substantial, direct, and immediate interest in the matter," *Markham*, 136 A.3d at 140, the Petition must be dismissed. *See Open PA Schools*, 2021 WL

129666, at *6; *Warren v. State Ethics Comm'n*, No. 234 M.D. 2018, 2019 WL 114061, at *2 (Pa. Commw. Ct. Jan. 7, 2019).

52. Further, any injury to Plaintiffs' potential future candidacy, in addition to being unidentified, is speculative.

53. "A speculative or remote possibility of harm is insufficient to support standing." *Tishok v. Dep't of Educ.*, 133 A.3d 118, 124 (Pa. Commw. Ct. 2016) (citing *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 659-61 (Pa. 2005); *accord Young v. Wetzel*, 260 A.3d 281, 288 (Pa. Commw. Ct.), *publication ordered* (July 8, 2021), *appeal denied*, 267 A.3d 479 (Pa. 2021) (plaintiff lacked standing because he was "unable to establish a 'real and concrete' controversy or that any potential, future harm is neither remote nor speculative").

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection for Petitioners' lack of standing and enter an order dismissing the Petition.

B. Second Preliminary Objection: Petitioners' Challenge Is Barred by the Doctrine of Laches (Pa. R. Civ. P. 1028(A)(4))

54. Even if Petitioners had standing, their claim would be barred by laches. Petitioners could have brought an identical challenge to Act 77 pursuant to its nonseverability provision a year-and-a-half earlier, after the Supreme Court's November 2020 decision in *In re Canvass* permitting counting absentee and mail-

in ballots that did not include a handwritten date on the ballot-return envelope. *See* 241 A.3d at 1079.

55. "'[L]aches is an equitable doctrine that bars relief when a complaining party is guilty of [1] want of due diligence in failing to promptly institute an action [2] to the prejudice of another.'" *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020) (per curiam) (quoting *Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998)).

56. "It is settled that laches may be raised and determined by preliminary objection if laches clearly appears in the complaint." *Holiday Lounge, Inc. v. Shaler Enterprises Corp.*, 272 A.2d 175, 177 (Pa. 1971); *accord In re Marushak's Est.*, 413 A.2d 649, 651 (Pa. 1980) ("[T]he defense of laches may be raised by preliminary objections.").

57. Petitioners undeniably failed to exercise reasonable diligence in initiating this action. *See id.* at 1256-57; *see also Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Commw. Ct. 2004) (applying laches to challenge to ballot referendum because it was initiated "thirteen months following the election").

58. In *Kelly*, the petitioners filed their suit challenging the constitutionality of Act 77 on November 21, 2020—*387 days and two elections*—after the Governor signed Act 77 into law.

59. Here, Petitioners filed suit on July 20, 2022—*604 days and three elections*—after the Supreme Court's decision in *In re Canvass*, which held that

undated ballots should be counted, the same predicate that Petitioners assert requires invalidating Act 77 as a result of *Migliori*. *Compare In re Canvass*, 241 A.3d at 1063, 1073-1079 *with* Pet. ¶¶ 6-8, 28.

60. "The [due diligence] test is not what the plaintiff knows, 'but what he might have known by the use of the means of information within his reach with the vigilance the law requires of him.'" *In re Mershon's Est.*, 73 A.2d 686, 687 (Pa. 1950) (citation omitted). As elected legislators, Petitioners, like the candidate-petitioners in *Kelly*, are in the election business.

61. Moreover, Petitioners have been litigating challenges to Act 77 since August 31, 2021, when they filed a separate petition for review in this Court arguing that Act 77 was invalid on constitutional grounds. *See Bonner, et al v. Degraffenreid, et al.*, No. 293 MD 2021 (Pa. Commw. Ct.) ("*Bonner I*").

62. Indeed, in their petition for review in *Bonner I*, Petitioners specifically cited Act 77's nonseverability provision in support of their argument that if mail-in voting under Section 8 of Act 77 is invalid, all of Act 77 "must be struck down in its entirety." *See* Pet. for Review ¶¶ 76-78, *Bonner I*, No. 293 MD 2021 (Pa. Commw. Ct. Aug. 31, 2021).

63. If the Court grants the requested relief, Petitioners' undue delay will cause substantial prejudice throughout the Commonwealth.

64. "Prejudice can be found where a change in the condition or relation of

the parties occurs during the time the complaining party failed to act." *Koter*, 844 A.2d at 34.

65. To mitigate any prejudice, Petitioners could have brought suit any time since *In re Canvass* was decided. They did not do so.

66. Overturning Act 77 now would require reeducating millions of voters and risks disenfranchising untold numbers of Pennsylvanians.

67. Although voiding Act 77 would change the permissible means of voting for all Pennsylvanians, millions who voted by mail-in ballot in the past five elections would have to be alerted that they are no longer permitted to vote using a method on which they have repeatedly relied; many of these voters intend to use the same method in all future elections.

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection and enter an order dismissing the Petition as barred by the doctrine of laches.

C. Third Preliminary Objection: Demurrer – Petitioners' Claim Fails on the Merits Because the Third Circuit's *Migliori* Decision Did Not Invalidate Any Part of Act 77, and Even If It Had, the Invalidation of Immaterial Language Would Not Require Invalidation of the Entire Act

68. Petitioners' claim also fails on the merits.

69. Their argument rests entirely on the so-called "nonseverability provision" in Section 11 of Act 77. According to Petitioners, because "the Migliori

decision 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 [sic],"[2] Petition ¶ 5, all of "the remaining provisions and applications of Act 77 and all amendments thereto, such as Act No. 12 of 2020, are now void pursuant to [Section 11's] nonseverability provision and Act 77 must be struck down in its entirety," *id.* ¶ 28. Every step of this analysis is flawed. First, Petitioners' premise is wrong: *Migliori* did not "invalidate" any portion of Act 77. Second, even if it had, the nonseverability provision would not dictate invalidation of the entirety of Act 77, let alone Act 77 and Act 12. It would be absurd to conclude that the legislature intended the availability of mail-in voting, the elimination of straight-ticket voting, and all of the other provisions in Act 77 to hinge on a hand-written date that *serves no identifiable purpose*. Third, if Section 11 of Act 77 were construed as Petitioners urge, it would itself be invalid and unenforceable.

1. The *Migliori* Decision Did Not "Invalidate" Any Portion of Act 77

70. Contrary to Petitioners' assertion, *Migliori* did not "invalidate" any provision of Act 77.

71. Instead, the Third Circuit considered whether disqualifying ballots casts by voters who did not handwrite a date on their mail-in or absentee ballot-

[2] The hand-written date pertains to the outer ballot-return envelope, not the secrecy envelope.

return envelope would violate the Materiality Provision of the Civil Rights Act. That Provision "prohibits any 'person acting under color of law from denying the right of any individual to vote in any election because of an error or omissions … if such error or omission is not material in determining whether such voter is qualified … vote in such election.'" *Migliori*, 36 F.4th at 155 (quoting 52 U.S.C. § 10101(a)(2)(B)).

72. There was (and is) no question that the Election Code states that absentee and mail-in voters "shall fill out, date and sign the declaration" printed on the ballot-return envelope enclosing the ballot. 25 P.S. §§ 3146.6(a), 3150.16(a).

73. The Third Circuit did not "invalidate" or "strike down" any of those terms, nor did it hold that the specific voters at issue in *Migliori* were exempt from the dating requirement. Following *Migliori*, the language that voters "shall . . . date" the declaration is unaffected.

74. Rather, the issue decided in *Migliori* concerned how the LCBE was permitted to respond to a voter's "error or omission" of neglecting to handwrite a date on the ballot-return envelope. *Migliori*, 36 F.4th at 155. The Third Circuit held that, because "th[e] omission" by the voters at issue "of the date on their outside envelopes is immaterial to determining their qualifications," the Materiality Provision prohibited the LCBE from "denying Voters their right to vote based on [that] omission." *Id.* at 164; *see also id.* at 162 (explaining that the question before

the court was "whether the LCBE's refusal to count Voters' ballots for omitting the date violates [the Materiality Provision]").

75. Further, as discussed in the following section, the language in the Election Code that dictates which mailed ballots a county is supposed to canvass and count, and the only provision of the Election Code that the decision in *Migliori* might have conceivably altered, was *not* enacted pursuant to Act 77. *See* Section 7 of Act 77 (making no substantive changes to Section 1308(g)(3) and (4)).

2. The Result in *Migliori* Is Consistent with Pennsylvania Law

(a) The Election Code's Text and Structure Clearly Dictate That Absentee and Mail-In Ballots May Not Be Disqualified Merely Because a Voter Neglected to Write a Date on the Ballot-Return Envelope's Declaration

76. Pennsylvania statutory law is fully consistent with the *Migliori* court's decision.

77. Section 1308 of the Election Code, 25 P.S. § 3146.8, entitled "Canvassing of official absentee ballots and mail-in ballots," specifies the statutory criteria that must be satisfied for an absentee or mail-in ballot to be canvassed. Mail-in and absentee ballots that satisfy these § 3146.8 criteria "*shall be counted*

and included with the returns of the applicable election district." *Id.* § 3146.8(g)(4) (emphasis added).

78. One such criterion is that the "declaration is sufficient":

> When the county board meets to pre-canvass of canvass absentee ballots and mail-in ballots …, the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [on the grounds that the voter died before Election Day] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voter File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act *and is satisfied that the declaration is sufficient* and the information contained in the [aforementioned file(s)] verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

Id. § 3146.8(g)(3) (emphasis added).

79. The referenced declaration is the one printed on the back of a ballot's return envelope, which contains a statement that the voter is qualified and has not already voted. 25 P.S. §§ 3146.4, 3150.14. It is the same declaration that the Election Code states voters "shall fill out, date and sign." 25 P.S. §§ 3146.6(a), 3150.16(a).

80. These statutory provisions must be read *in pari materia* to determine if a county board may refuse to canvass—and ultimately disqualify—a timely received absentee or mail-in ballot enclosed in a ballot-return envelope without a

handwritten date. 1 Pa.C.S. § 1932; *see also Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 374-80 (Pa. 2020), *cert. denied sub nom. Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732 (2021).

81. By providing that the declaration need only be "sufficient" for an absentee or mail-in ballot to be canvassed, the Election Code indicates that it does not require perfect compliance with § 3146.6(a) or § 3150.16(a).[3] The ordinary meaning of "sufficient" going back centuries is "[o]f a quantity, extent, or scope adequate a certain purpose or object." *Sufficient*, Oxford English Dictionary (2d ed.) (dating this use of "sufficient" to 1380). Had the General Assembly intended for county boards to canvass only ballots for which the voter both signed and dated the declaration on the ballot-return envelope, it would have used different language, such as requiring that the "declaration fully complies with § 3146.6(a) and § 3150.16(a)" or that "the declaration is complete in all respects."

82. The purpose of the declaration is for the voter to swear that they are qualified to vote and have not already voted. 25 P.S. § 3146.4; 25 P.S. § 3150.14. As the Election Code elsewhere indicates, the voter's signature on a declaration by itself constitutes the voter's attestation of their qualifications and is the voter's

[3] Because in all cases the language of the declaration will be the same, and supplied by the board of elections on a form prescribed by the Secretary, 25 P.S. §§ 3146.4, 3150.14, the only information that could potentially be reviewed for "sufficiency" is that which the voter is asked to provide, which is limited to a signature and date, 25 P.S. §§ 3146.6(a), 3150.16(a).

confirmation that they have not already voted. 25 P.S. § 3553 (creating criminal penalties for anyone who falsely *signs* the declaration). A handwritten date on the declaration is likewise "irrelevant to a board of elections'" duty, under 25 P.S. § 3146.8(g)(3), to perform a "comparison of the declaration to the applicable voter list." *In re Canvass*, 241 A.3d at 1076-77 (OAJC).

83. Because a signature alone fulfills the declaration's purpose, a signed but undated declaration is "sufficient." *Id.* at 1077 ("a board can reasonably determine that a voter's declaration is sufficient even without the date of signature").

84. Determining the consequences of omitting a date solely by reference to the "shall … date" language in 25 P.S. §§ 3146.6(a), 3150.16(a) would violate directives of the Statutory Construction Act beyond the requirement to read statutes in *pari materia*.

85. First, if "shall … date" alone dictates the consequences of non-compliance, other provisions of the Election Code would have no effect. *Contra* 1 Pa.C.S. § 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."). To take one example, the instruction that counties assess a declaration's sufficiency would be gratuitous. As another example, the Election Code states in 25 P.S. § 3146.6(a), entitled "Voting by absentee elector" that "the elector shall, in secret, proceed to make the ballot" "at any time after receiving an

official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election." 25 P.S. § 3146.6(a); *accord id.* § 3150.16. Later, in 25 P.S. § 3146.8, which governs which absentee and mail-in ballots counties must canvass, the Election Code states that such a ballot "shall be canvassed in accordance with this subsection if [it] is received … [by] the county board of elections no later than eight o'clock P.M. on the day of the primary or election." *Id.* The text of the canvassing section has no effect if the section describing the process for voting absentee or by mail dictates the consequences of returning a ballot after 8:00 p.m. on Election Day.

86. Other fundamental principles of statutory interpretation lead to the same result. If, contrary to the General Assembly's approval of "sufficient" declarations, it had meant for a voter's failure to date their declaration to result in disqualification of the ballot, the General Assembly would have said so explicitly, as it has done in other parts of the Election Code. *See, e.g.*, 25 P.S. § 3146.8(g)(1)(ii) (expressly limiting the set of absentee and mail-in ballots that may be canvassed to those "received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election"); *id.* § 3146.8(g)(4)(ii) (if a voter returns an absentee or mail-in ballot with identifying markings on the secrecy envelope, "the envelopes and the ballots contained therein

shall be set aside and declared void"); *id.* § 3146.8(d) (absentee and mail-in ballots cast by voters who died before Election Day "shall be rejected").

87. In stark contrast, nothing in the Election Code provides—as the aforementioned examples each do with unmistakable clarity—that mail-in and absentee ballots without a handwritten date on the ballot-return envelope must be excluded and may not be counted. This difference in treatment, along with Act 77's instruction that declarations need only be "sufficient," *see* § 3146.8(g)(3), itself strongly supports the conclusion that the Election Code does not allow—and certainly does not require—disqualification of ballots based only on an undated declaration. *See Fletcher v. Pa. Prop. & Cas. Ins. Guaranty Ass'n*, 985 A.2d 678, 684 (Pa. 2009) ("[W]here the legislature includes specific language in one section of the statute and excludes it from another, the language should not be implied where excluded…. [W]here a section of a statute contains a given provision; the omission of such a provision from a similar provision is significant to show a different legislative intent."); *Thompson v. Thompson*, 223 A.2d 1272, 1277 (Pa. 2020) ("as a matter of statutory interpretation, 'although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say'"); *see also In re Nov. 3, 2022 Gen. Election*, 240 A.3d 591, 608 (Pa. 2020) (refusing to construe certain provisions as authorizing election officials to engage in signature-comparison analysis, in part because "the General Assembly

has been explicit whenever it has desired to require election officials to undertake an inquiry into the authenticity of a voter's signature"). Because courts should not impose requirements that go beyond the General Assembly's statutory schemes, *Sadler v. Workers' Comp. Appeal Bd.*, 244 A.3d 1208, 1214 (Pa. 2021), courts should not add remedial language that the General Assembly did not include itself.

88. In addition, assigning "shall … date" dispositive weight would lead to absurd results. *Contra* 1 Pa.C.S. § 1922(1). One would be that applying the same strict interpretation elsewhere in the Election Code would disenfranchise voters for exceedingly trivial reasons. For example, the Election Code directs that voters who vote in person by ballot "shall retire to one of the voter compartments, and draw the curtain or shut the screen door." 25 P.S. § 3055(a). Those same voters are told that they "shall fold [their] ballot … in the same way it was folded when received" before returning it. *Id.* § 3055(d). The General Assembly could not have meant to use shall in each case to indicate that voters who do not satisfactorily draw their curtain or who do not fold their ballot properly before returning it must have their ballot excluded.

89. Another perverse result would be that, because the date itself serves no purpose relevant to voting, *see infra* Section III.D.1(b), voters are disenfranchised for failing to write inconsequential information. The absurdity of such a result is underscored by the Election Code's silence about *what* date a voter

is expected to write. At the very least, it could mean the date the declaration is signed or the date the ballot was completed. In practice, counties treat the requirement to mean *any* date. *See Migliori*, 36 F.4th at 163-64. It is absurd to believe that the General Assembly intended to disenfranchise voters that fail to write a date on their envelope declaration but was completely unconcerned about what date they write.

90. Finally, reading "shall . . . date" to determine whether ballots without a handwritten date on the ballot-return envelope should be counted is inconsistent with the structure of the Election Code. The Election Code has articles that govern absentee and mail-in voting have several sections that describe the process by which a voter can avail herself of absentee or mail-in voting options. *See* 25 P.S. §§ 3146.1-3146.7; 25 P.S. §§ 3150.11-3150.16. Separately, the Election Code directs county boards how to review, canvass, and count absentee and mail-in ballots. 25 P.S. § 3146.8. *See, e.g.*, 25 P.S. § 3146.8(g)(1)(ii) (to be canvassed, mail-in ballot must be "received in the office of the county board of elections no later than eight o'clock"); *id.* § 3146.8(g)(4)(ii) (if a ballot is returned in an inside "secrecy envelope" that "contain[s] any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void"); *see also id.* § 3146.8(h) (prescribing the disposition of "absentee

ballots or mail-in ballots for which proof of identification has not been received or could not be verified"). Across the board, the answers to what absentee or mail-in ballots are canvassed and counted are in section 3146.8. *See, e.g.*, 25 P.S. §§ 3146.8(d), (g)(3), (4)(ii). They are not in section 3146.6 or 3150.16.

(b) The Interpretive Result Is the Same Even If the Election Code Is Deemed Ambiguous

91. Even if the requirements for deeming a declaration "sufficient" were ambiguous, the Election Code would still have to be construed to require—and certainly to permit—the counting of ballots notwithstanding a voter's failure to date the declaration.

92. When interpreting an ambiguous statute, Pennsylvania courts determine the General Assembly's intent by considering, among other facts, the "occasion and necessity for the statute," the "mischief to be remedied," "the object to be attained," and the "consequences of a particular interpretation." 1 Pa. C.S. § 1921(c)(1), (3), (4), (6). It is well settled that "the Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect the candidate of their choice." *Pa. Democratic Party*, 238 A.3d at 356. "[T]he power to disallow a ballot for minor irregularities should be sparingly exercised" and voters should not be "disenfranchised except for compelling reasons." *In re Gen. Election, Nov. 3, 1964*, 224 A.2d 197, 203 (Pa. 1966).

93. Particularly given these principles of statutory construction, the Election Code's provisions must be read to preclude disqualifying the ballots of voters who merely omitted a date from their ballot's return envelope. As recognized by this Court in *McCormick for U.S. Senate v. Chapman*, by the opinion announcing the judgment of the Pennsylvania Supreme Court in *In re*

Canvass, and by the Third Circuit in *Migliori*, a voter-supplied date is not necessary for any purpose, does not remedy any mischief, and does not advance any other objective. *In re Canvass*, 241 A.3d 1058, 1077 (OAJC) (explaining why a handwritten date is "unnecessary and, indeed, superfluous"); *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *12-13 (Pa. Commw. Ct. June 2, 2022) (explaining why a handwritten date does not serve any weighty interest); *Migliori*, 36 F.4th at 164 ("Ignoring ballots because the outer envelope was undated, even though the ballot was indisputably received before the deadline for voting, serves no purpose other than disenfranchising otherwise qualified voters."). To interpret the Election Code as requiring the exclusion of ballots without a handwritten date is to disenfranchise voters for failing to provide county boards with irrelevant information.

94. Other canons of construction dictate the same conclusion. When construing an ambiguous statute, courts presume that the General Assembly "does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa.C.S. § 1922(2), (3). Under the Free and Equal Election Clause of the Pennsylvania Constitution, Pa. Const. art. I, § 5, the General Assembly's "regulation of the right to exercise the franchise [may] not deny the franchise itself, or make it so difficult as to amount to a denial." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). "[T]hat body is prohibited by this clause from

interfering with the exercise of those rights, even if the interference occurs by inadvertence." *League of Women Voters v. Commonwealth*, 178 A.3d 787, 812 (Pa. 2018). Imposing the drastic consequence of disenfranchisement for omitting an immaterial date presents an acute risk, at a minimum, of violating the Free and Equal Elections Clause. *See id.* at 804 (explaining the Clause reflects "the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth").

95. Finally, exclusion of such ballots would also interpret language of the Election Code that pre-dates Act 77 to conflict with federal law—as determined by the Third Circuit in *Migliori*—and thus "violate the Supremacy Clause of the United States Constitution." *Shapp v. Sloan*, 391 A.2d 595, 606 (Pa. 1978). This further militates against Petitioners' interpretation. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 647 (1990) (construing ambiguous state statute to avoid preemption problem); *State v. Mooney*, 98 P.3d 420, 425 (Utah 2004) ("We … avoid interpreting an ambiguous state statute in a way that would render the statute invalid under an explicitly preemptive federal law."). For these reasons, too, Petitioners' construction of the Election Code must be rejected.

3. Even If *Migliori* Had "Invalidated" a Portion of the Election Code, the Invalidation of an Immaterial Instruction Would Not Dictate Invalidation of the Entirety of Act 77

96. In addition to misconstruing the Election Code, Petitioners misapprehend the effect of the nonseverability provision in Section 11 of Act 77. In other words, even assuming *arguendo* that *Migliori* did, in fact, "invalidate" the "shall … date" instruction as applied to the 257 ballots at issue in that case, the Third Circuit's holding that ballots lacking any material defect should be counted would not have the perverse and paradoxical effect of facially invalidating the entirety of Act 77. This is true for at least two reasons: (1) contrary to Petitioners' assertion, Section 11 of Act 77 does not dictate that result, and (2) if it did, that Section would itself be invalid and unenforceable.

(a) Petitioners Misinterpret and Misapply Act 77's "Nonseverability Provision"

97. "[T]he principle of severability, and the standard by which severability is measured, has it roots in the common law." *Stilp v. Commonwealth*, 905 A.2d 918, 970 (Pa. 2006). That standard is "now embodied" in 1 Pa.C.S. § 1925, which mandates severance "in those circumstances where a statute can stand alone absent the invalid provision." *Id.* Our Supreme Court has described this as "a specific, cogent standard, one which both emphasizes the logical and essential relationship of the void and valid provision, and also recognizes the

essential role of the Judiciary in undertaking the required analysis." *Stilp*, 905 A.2d at 970.

98. Thus, the Supreme Court has observed that "the courts have not treated legislative declarations that a statute is severable, or nonseverable, as 'inexorable commands,' but rather have viewed such statements as providing a rule of construction." *Id. at* 972 (quoting, *inter alia*, *Louk v. Cormier*, 622 S.E.2d 788, 803 (W. Va. 2005) ("[A] non-severability provision contained in a legislative enactment is construed as merely a presumption that the Legislature intended the entire enactment to be invalid if one of the statutes in the legislation is found unconstitutional. When a non-severability provision is appended to a legislative enactment and this Court invalidates a statute contained in the enactment, we will apply severability principles of statutory construction to determine whether the non-severability provision will be given full force and effect.")).

99. In *Stilp*, the Pennsylvania Supreme Court confronted a "boilerplate" nonseverability provision, *id.* at 973, similar to the construction Petitioners give to Act 11 of Section 77. Notwithstanding this provision, *Stilp* severed the prevision of the legislation at issue that "plainly and palpably violated … the Pennsylvania Constitution" from "the otherwise-constitutionally valid remainder of [the legislation]." *Id.* at 980-81. As *Stilp* observed, the Pennsylvania Supreme Court

"has never deemed nonseverability clauses to be controlling in all circumstances." *Id.* at 980.

100. Indeed, as *Stilp* noted, in *Pennsylvania Federation of Teachers v. School District of Philadelphia*, 484 A.2d 751 (Pa. 1984), which examined the constitutionality of legislation increasing the contribution rate for employees who were members of a public retirement system, the Supreme Court also severed a statute that contained a nonseverability provision. The provision at issue there was significantly more specific than the one in *Stilp*; the *Pennsylvania Federation* provision "render[ed] sections 2, 3 and 4 of the [challenged] Act void '[i]n the event a court of competent jurisdiction rules finally that the salary deductions mandated in these sections are legally or constitutionally impermissible.'" *Id.* at 754. The *Pennsylvania Federation* Court held that the deductions mandated in section 2 of the Act were, in fact, constitutionally impermissible. *See id.* at 753. Yet the Court nonetheless severed the Act, finding that a strict application of nonseverability provision's terms would not be sensible in light of the nature of the Court's specific constitutional holding. *Id.* at 754; *see also Stilp*, 905 A.2d at 972 (describing *Pennsylvania Federation*).

101. Here, there is no question that the remainder of Act 77 can stand—and fully fulfill its purpose—without an immaterial handwritten date (assuming counterfactually that *Migliori* invalidated a statutory requirement). Indeed, that is

tautologically true: *the handwritten-date language in 25 P.S. § 3146.6(a) and § 3150.16(a) is immaterial.*

102. In Petitioners' view, however, Section 11 of Act 77 means that *Migliori* did not actually *protect* voting accessibility by ensuring that an immaterial dating requirement did not disenfranchise absentee or mail-in voters. To the contrary, according to Petitioners' interpretation and application of Act 77's nonseverability provision, the *Migliori* decision actually dealt a devastating blow to voting accessibility by effectively invalidating a method of mail-in voting relied upon by millions of Pennsylvanians (particularly during the COVID-19 pandemic[4])—and, in addition, undid the elimination of straight-ticket voting, reduced the time in which citizens can register to vote, and nullified "years of careful [legislative] consideration and debate … on the reform and modernization of elections in Pennsylvania." *McLinko*, 2022 WL 3039295, at *1. Petitioners are wrong.

103. As an initial matter, the nonseverability provision invoked by Petitioners is facially incoherent. The provision comprises two sentences. The first states that particular *Sections* of Act 77—namely, "Sections 1, 2, 3, 3.2, 4, 5, 5.1,

[4] "[B]ecause of the prescient passage of Act 77 in late 2019, the stage in this Commonwealth was set to allow the electorate to exercise the right of suffrage without leaving their homes, should they so choose. And an overwhelming number of Pennsylvanians so chose." *McLinko*, 2022 WL 3039295, at *1.

6, 7, 8, 9 and 12"—"are nonseverable." Act of Oct. 31, 2019, P.L. 552, No. 77, § 11. The second sentence then states, contradictorily, that "[i]f *any* provision of [Act 77] or its application to any person or circumstance is held invalid, the remaining provisions or applications of th[e entire] act are void." *Id.* (emphasis added).

104. At a minimum, Section 11 can reasonably be construed as being triggered, on its own terms, only if one of the enumerated "Sections" is invalidated, and not, as Petitioners argue, whenever any single sub-clause or word is invalidated. Such a construction appears consistent with the legislative history illuminating the political compromises underlying the enactment. *See, e.g.*, *McLinko*, 2022 WL 3039295, at *1 & n.2 (noting that many Republican legislators were motivated to vote for Act 77 because it "eliminated the option for straight-ticket voting"). On this view, if the Pennsylvania Supreme Court had agreed with the *McLinko* Petitioners and held no-excuse mail-in voting unconstitutional, that decision would have triggered the nonseverability provision because it would have eviscerated, *inter alia*, the entirety of Section 8 of Act 77, which added a new article to the Election Code entitled "Voting by Qualified Mail-In Electors." Act of Oct. 31, 2019, P.L. 552, No. 77, § 11. By contrast, the invalidation of a single word—"date"—in a single sentence in a single sub-sub section of Act 77, a word immaterial to the purpose of the statutory scheme, could not plausibly constitute

invalidation of any "Section" of Act 77 enumerated in the nonseverability provision, and thus would not trigger that provision.

105. Indeed, if the General Assembly had wanted to make clear that the nonseverability clause should be construed as Petitioners now urge, it could easily have done so. Model language was readily available to it. *See, e.g.*, Utah Code § 76-7-317 (severability clause triggered "if any one or more provision, section, subsection, sentence, clause, phrase or word of this part or the application thereof to any person or circumstance is found to be unconstitutional"). That it did not use such language is a further basis for rejecting Petitioners' argument.

106. The reason the General Assembly did not use such language is obvious. It would be profoundly imprudent for a legislature to provide *ex ante*, without knowing what specific cases might be brought in the future, that the invalidation of *any* single word in a statute would invalidate the statute—particularly in the case of legislation as lengthy and multifaceted as Act 77. And it would be plainly absurd to think that a legislature would intend to invalidate the entirety of such legislation based on the invalidation of language *that is immaterial*, *i.e.*, that "serves no purpose other than disenfranchising otherwise qualified voters." *Migliori*, 36 F.4th at 164; *see* 1 Pa.C.S. § 1922(1) (in interpreting

a statute, it should be presumed "[t]hat the General Assembly does not intend a result that is absurd[] … or unreasonable").[5]

107. Finally, Petitioners' argument is directly at odds with Pennsylvania Supreme Court precedent examining Act 77. In *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), the Court invalidated the requirement that an absentee or mail-in ballot must be returned by 8:00 p.m. on Election Day in order to be eligible for canvassing. The Court held that, as applied to the "unprecedented" pandemic circumstances and mail delays surrounding the 2020 general election, the deadline "results in an as-applied infringement of elector's right to vote." *Id.* at 369. The invalidated requirement was introduced in Section 7 of Act 77, *see* 25 P.S. 3146.8(g)(ii), and Respondent the Republican Party of Pennsylvania argued that its as-applied invalidation "would trigger the nonseverability provision of Act 77, which would invalidate the entirety of the Act, including all provisions creating universal mail-in voting." 238 A.3d at 367. Needless to say, the *Boockvar* Court did not apply the nonseverability provision, *see id.* at 386, and Justice Donohue, writing for herself, Chief Justice Saylor and Justice Mundy, explained that decision: "[I]n *Stilp* …, this Court declined to apply

[5] The fact that the provisions of Act 77 containing the declaration-dating requirement at issue in *Migliori* were subsequently amended by Act 12 of 2020—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.

an identically worded non-severability provision, refusing to allow the General Assembly to 'dictate the effect of a judicial finding that a provision in an act is 'invalid.' Here, as in *Stilp*, Act 77's boilerplate non-severability provision 'no standard for measuring non-severability, but instead simply purports to dictate to the courts how they must decide severability.'" *Id.* at 397 n.4 (Donohue, J., concurring and dissenting).

108. *In re Canvass*, decided only two months later, is, if anything, even more on point. There, the Court held that, notwithstanding the declaration-dating instruction in 25 P.S. §§ 3146.6(a), 3150.16(a), mail-in and absentee ballots without dates on the ballot-return envelope cast in the November 2020 election should be counted. 241 A.3d at 1076-78 (OAJC). If Petitioners' construction of 25 P.S. §§ 3146.6(a), 3150.16(a) were correct (as it is not), that holding, no less than the *Migliori* decision, should have resulted in invalidation of all of Act 77. Yet not a single one of the Supreme Court justices, each of whom was obviously well aware of the nonseverability provision at the time *In re Canvass* was decided, even suggested the provision might have that effect. As this case law underscores, Petitioners' position is meritless.

(b) If the Nonseverability Provision Were Construed as Petitioners Urge, It Would Be Unenforceable

109. If Act 77's nonseverability provision were construed in the way Petitioners advocate—notwithstanding the absurd results that would follow—the provision would be constitutionally invalid.

110. The *Stilp* Court held that a similarly worded nonseverability clause violated the constitutional separation of powers. The nonseverability clause in *Stilp* was attached to a law that increased pay for various government officials, including members of the General Assembly and the judiciary. *Stilp*, 905 A.2d at 980. The Court concluded that the nonseverability clause had been included so that "if a court struck down the increase in legislators' expense allowances, the increase in judicial salaries would be sacrificed as well." *Id. Stilp* recognized that a nonseverability clause that "serve[s] an in terrorem function," or operates to "guard against judicial review altogether by making the price of invalidation too great," "intrude[s] upon the independence of the Judiciary and impairs the judicial function." *Id.* at 979-80.

111. In reaching this conclusion, *Stilp* cited favorably, and quoted at length from, a law review article by Fred Kameny, *Are Inseverability Clauses Unconstitutional*? 68 L. Rev. 997 (2005). Kameny warned specifically against "an inseverability clause [that] provide[d] that in case the courts invalidated any part of a wide-ranging, indispensable law (such as a budget bill), the entire law, and

perhaps other previously enacted laws, would cease to exist." *Id.* at 1001. As he explained, "one would expect to find some limit on the legislative power to prescribe the consequences of judicial invalidation: otherwise, there would be nothing to prevent a legislature from shielding any statute from judicial review by making the consequences of invalidation sufficiently dire." *Id.* at 1002.

112. Other legal scholars have perceived the same potential danger in nonseverability clauses. *See, e.g.*, Michael C. Dorf*, Fallback Law*, 107 Colum. L. Rev. 303, 339 (2007) (explaining that although severability clauses could also pose a risk of being unconstitutionally coercive, "it may be even easier [for legislatures] to write a coercive nonseverability clause"). And they have identified a test for distinguishing between constitutional and unconstitutionally coercive nonseverability clauses: to be valid, a nonseverability provision's conditioning of the continuing existence of some provisions on the continuing validity of another must be "germane" to the statutory scheme at issue; if it is not, the clause—or its application in a particular circumstance—would be unconstitutionally coercive. *Id.* at 334-35, 339-42.

113. If construed and applied as Petitioners urge, Act 77's nonseverability provision would plainly fail that test. Under Petitioners' reading, the provision does not serve merely to make clear that certain provisions of Act 77 are functionally interrelated, or even to protect the results of a political compromise.

See Stilp, 905 A.2d at 978 (discussing potentially permissible uses of nonseverability provisions). Rather, on the nonseverability provision operates, on Plaintiffs' reading, as a legislatively planted doomsday device, directing that a court may not invalidate *any* portion of Act 77—even an immaterial one—for any reason, without nullifying the entirety of a comprehensive election modernization statute in which elections officials, millions of Pennsylvania voters, and candidates have developed enormous reliance interests, and in which state and local governments have invested many millions of dollars. Such a clause would epitomize an impermissible nonseverability provision that would have the effect of deterring "judicial review altogether by making the price of invalidation too great." *Stilp*, 905 A.2d at 979.

114. By the same token, it is difficult to conceive of a more perfect example of a "nongermane" nonseverability provision than one that would invalidate the entirety of a statute based on the invalidation *of immaterial language*. In fact, Petitioners' construction of Section 11 of Act 77 would render it worse than nongermane; it would perversely mean that courts could not act to protect and enforce the federal-law voting rights of a small minority of mail-in voters who fail to date their ballots without depriving millions of voters—*including*

those the court was acting to protect—of mail-in voting altogether. Such a clause would be noxiously coercive and patently unconstitutional.

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection for failure to state a claim for relief and enter an order dismissing the Petition.

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Dated: August 8, 2022

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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

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