

IN THE SUPREME COURT OF PENNSYLVANIA

No. 68 MAP 2024

Black Political Empowerment Project, *et. al.*,

Petitioners/Appellees,

v.

Al Schmidt, in his official capacity as Secretary of the Commonwealth,
Philadelphia County Board of Elections, and Allegheny County Board of
Elections,

Respondents,

Republican National Committee and Republican Party of Pennsylvania,

Intervenors/Appellants.

**BRIEF OF RESPONDENTS ALLEGHENY AND PHILADELPHIA
COUNTY BOARDS OF ELECTIONS**

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INTRODUCTION

The Allegheny and Philadelphia County Boards of Elections (collectively, “Respondent Counties”) are committed to protecting the fundamental right to vote through the fair and orderly administration of elections in their respective counties. Respondent Counties have taken no position on the merits of Petitioners’ constitutional claims. Respondent Counties submit this brief to highlight the lack of any meaningful purpose served by the dating requirement, the disparate impact enforcement of that requirement has had on elderly and disadvantaged voters, and the administrative burdens associated with enforcing it.

Respondent Counties’ commitment to fair and orderly election administration also compels them to respond in opposition to the Republican Intervenors’ invitation to this Court to invalidate all of Act 77. This attack on Act 77—including its introduction of universal mail voting for all qualified voters in Pennsylvania—is as wrong as it is extreme. Declining to enforce the meaningless dating requirement does not trigger the nonseverability provision of Act 77. And even if it did, that would not justify invalidating the entirety of Act 77. A contrary conclusion will have staggering and profound implications for the electoral process in Pennsylvania, needlessly disenfranchise thousands of Pennsylvania voters, and sow electoral chaos shortly before the 2024 General Election.

ARGUMENT

I. Respondent Counties Need to Expend Considerable Time, Labor, and Resources to Enforce a Meaningless Dating Requirement.

No governmental entity in this case, including Respondent Counties, believes that the requirement to handwrite a date offers any benefit to the administration of elections.¹ The handwritten date is not used to determine a voter's qualification or the timeliness of the ballot, nor is it relied upon to prevent or detect fraud. After the ballot template is certified by the Pennsylvania Department of State, Mem. Op. 31, county boards of elections print and mail absentee and mail ballots to qualified voters who have successfully applied to receive such a ballot. When Respondent Counties receive an absentee or mail ballot, the ballot envelope is stamped with the date and time of receipt to confirm its timeliness. *Id.* at 77. Only ballots stamped before 8:00 p.m. on Election Day may be counted. *Id.* at 21.² If an absentee or mail ballot is

¹ While Respondent Counties usually would not be compelled to respond to misrepresentations in an amicus brief from an individual member of a single county board, the expedited nature of this case demands a correction that this Court would otherwise make on its own. The assertion that Respondent Counties helped Petitioners navigate this case through the Commonwealth Court is utterly baseless, as Respondent Counties have not taken a position on the merits of Petitioners' constitutional claims. If amicus is worried about the lack of governmental entities defending the date requirement in this litigation, he should look no further than his own board of elections, which chose not to intervene in this suit.

² This does not include military overseas ballots, which may be counted as timely if submitted for delivery no later than 11:59 p.m. the day before the election and received by a County Board of Elections by 5:00 p.m. on the seventh day following an election. *See* 25 P.S. §§ 3509(2), 3511(a).

timely received by a county board of elections, it could only have been marked and dated between the time it was sent to a qualified voter and 8:00 p.m. on Election Day. *Id.*

The dating requirement is a meaningless paperwork-related technicality, and it has been challenging and costly for Respondent Counties to enforce it. *Cf.* Brief of *Amicus Curiae* County Officials at 15-19. To process the large volume of absentee and mail ballots received each election,³ Respondent Counties rely on automated sorting machines to recognize when ballot envelopes are returned without handwritten signatures or without the internal secrecy envelope that is required by the Pennsylvania Election Code. *Mem. Op.* at 38 (citing Respondent Counties' Commonwealth Ct. Statement of Position at 4-5). These machines, however, cannot be configured to determine whether the date on the ballot's outer return envelope is "correct." *Id.* at 38. As a result, Respondent Counties must devote additional time and labor to manually inspect, identify, and set aside ballots that do not comply with the dating requirement. *Id.* at 38-39.

³ In the 2020 General Election, for example, Philadelphia County received more than 380,000 absentee and mail ballots before the Election Day deadline, and Allegheny County received more than 350,000 absentee and mail ballots. *See* Pennsylvania Department of State, Report on the 2020 General Election, *available at* <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/reports/2020-General-Election-Report.pdf> (May 14, 2021).

This labor-intensive and time-consuming manual review is compounded by the lack of guidance as to what constitutes an “incorrect” date. To be clear, since this Court’s decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), Respondent Counties have followed the mandate and invalidated ballots based on the non-substantive requirement in the Pennsylvania Election Code that voters handwrite a correct date on the outer return envelope of an absentee or mail ballot. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). But this Court left it to county boards to “evaluate the ballots that they receive in future elections . . . for compliance” with the dating requirement. Mem. Op. at 65-66 (citing *Ball*, 289 A.3d at 23). And as the Commonwealth Court observed, the Secretary “has thrice changed his guidance following *Ball*,” twice in the last year alone. *Id.* at 61, 81. This unnecessary administrative burden does not contribute to the integrity or efficiency of the election process in Allegheny or Philadelphia County. The only effect of the of the non-substantive date requirement is to reject timely ballots of otherwise qualified voters.

II. The Dating Requirement Disproportionately Affects Elderly Pennsylvania Voters.

Respondent Counties’ experience establishes that the dating requirement disproportionately affects elderly Pennsylvania voters, and resulted in the rejection of more than 10,000 Pennsylvania ballots in the 2022 General Election alone. Mem. Op. at 12, 38. For example, when the Philadelphia County Board of Elections analyzed its own data for the 2022 General Election, it found: (i) 60.9% of undated

ballots and 64.1% of misdated ballots were submitted by voters who were 60-years old or older, (ii) 37.5% of undated ballots and 40.9% of misdated ballots were submitted by voters who were 70 years old or older; (iii) 14.1% of undated ballots and 13.9% of misdated ballots were submitted by voters who were 80 years old or older; and (iv) 57 undated ballots and 15 misdated ballots were submitted by voters who were 90 years old or older.⁴ “The percentages all are significantly higher than the percentage of Philadelphia’s registered voters that these age groups represent.”⁵ While Respondent Counties have not taken a position on the merits of Petitioners’ constitutional claims, their experience demonstrates that enforcement of the dating requirement results in the practical disenfranchisement of thousands of elderly, qualified Pennsylvania voters who rely on mail voting to participate in elections.

III. Declining to Enforce the Dating Requirement Would Not Trigger Act 77’s Nonseverability Provision or Invalidate Act 77.

If this Court were to affirm that enforcement of the date requirement is unconstitutional, it need not also strike all of Act 77, including universal mail voting in Pennsylvania. (Republican Intervenors Br. at 55.) Republican Intervenors’ contrary argument misses the mark for two reasons: The Commonwealth Court’s

⁴ Transcript from November 18, 2022 Meeting of the Philadelphia County Board of Elections at 4-6, available at https://vote.phila.gov/media/111822_Meeting_Transcript.pdf.

⁵ *Id.*

order did not trigger Act 77's severability provision. And even if it did, the severability provision is not enforceable in the sweeping, reckless manner urged by the Republican Intervenors.

At the outset, affirming the Commonwealth Court's conclusion that enforcing of the dating requirement violates the Pennsylvania Constitution would not trigger Act 77's nonseverability provision. That provision (*i.e.*, Section 11 of Act 77) states: "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." As the Commonwealth Court observed, its decision did not "invalidate" the date requirement, as voters are still required to date their declaration. Mem. Op. at 89-90; *see also* *Murphy v. NCAA*, 584 U.S. 453, 487-89 (2018) (Thomas, J. concurring) ("Invalidating a statute is not a 'remedy,' like an injunction, a declaration, or damages."). In other words, the decision below was directed at preventing county boards from rejecting ballots based on the date requirement, rather than altering the obligations of the voters themselves.

The Commonwealth Court's holding that the dating requirement does not need to be invalidated or stricken from Act 77 to grant Petitioners relief is consistent with its prior holding in *Bonner v. Chapman*, 298 A.3d 153 (Pa. Commw. Ct. 2023). In *Bonner*, as here, the issue was whether declining to enforce the dating requirement triggered Act 77's nonseverability provision. 298 A.3d. at 168-69. The

Commonwealth Court determined that Act 77's nonseverability provision was not triggered because a decision not to enforce the dating requirement did not "str[ike] the Dating Provisions from the Election Code," nor did it imply "that electors cannot or should not handwrite a date on the declaration in accordance with those provisions." *Id.* at 168. Here, too, Act 77's nonseverability provision is "not triggered" because "the Dating Provisions" will "remain part of the Election Code and continue to instruct electors to date the declaration on the return mailing envelope, which, as history has shown, a majority of electors will do." *Id.*

Additionally, even if this Court were to conclude that the nonseverability provision were triggered, such a conclusion would not justify invalidating Act 77 in its entirety. Pennsylvania statutes are presumptively severable, and this Court has ample discretion to exercise its independent judgment with respect to how to interpret and apply Act 77's nonseverability provision. *See Stilp v. Com.*, 905 A.2d 918, 970-75, 980 (Pa. 2006). In *Stilp*, this Court confronted a "boilerplate" nonseverability clause worded almost identically to the one found in Act 77⁶ but still

⁶ The provision in *Stilp* provided as follows, "The provisions 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." 905 A.2d at 970 (quoting Act 44, § 6). Whereas the provision in this case provides, "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.

held that the statute was severable unless: (1) “the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining provisions without the void one”; or (2) “the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” *Id.* at 970-74, 980-81 (quoting 1 Pa. C.S. § 1925).

As the *Stilp* Court explained, where a nonseverability clause “sets forth no standard for measuring nonseverability, but instead, simply purports to dictate to the courts how they must decide severability”—as is the case here—such provisions are not treated as “inexorable commands.” *Id.* at 972-73 (quoting *Saulsbury v. Bethlehem Steel Co.*, 196 A.2d 664, 667 (Pa. 1964)). Additionally, a nonseverability provision improperly “intrude[s] upon the independence of the Judiciary and impair[s] the judicial function” where, as here, it “serve[s] an in terrorem function,” or operates to “guard against judicial review altogether by making the price of invalidation too great.” *Id.* at 979-80 (quoting Fred Kameny, *Are Inseverability Clauses Unconstitutional?*, 68 ALB. L. REV. 997, 1001 (2005)).

As in *Stilp*, it would impair the judicial function if this Court were to strike down all of Act 77 simply because the enforcement of an irrelevant, minor provision were held to violate the constitution. To interpret Act 77’s boilerplate

nonseverability provision in this sweeping manner raises separation-of-powers concerns because it sets “no standard for measuring non-severability, but instead simply purports to dictate to the courts how they must decide severability.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 397 n.4 (Pa. 2020) (Donohue, J., concurring and dissenting) (quoting *Stilp*, 905 A.2d at 973). Likewise, to strike all of Act 77—an enormously popular piece of legislation that broadened access to Pennsylvania elections—makes the price of invalidating minor provisions (like the dating requirement) too great.

This Court itself recognized that even the mail voting provisions of Act 77 “are only a fraction of the scope of the Act.” *McLinko v. Dep’t of State*, 279 A.3d 539, 543 (Pa. 2022). Act 77 also “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.* All these provisions would be invalidated under the Republican Intervenors’ nonseverability argument. For this reason, to treat Act 77’s nonseverability provision as an “inexorable command” would be to improperly “employ[] [it] as a sword against the Judiciary or the Executive, rather than as a shield to ensure preservation of a legislative scheme or compromise.” *Stilp*, 905 A.2d at 978. These types of boilerplate, standard-less nonseverability provisions are what led the Pennsylvania

Supreme Court in *Stilp* to admonish that it “has never deemed nonseverability clauses to be controlling in all circumstances.” *Id.* at 980.

Instead of adopting the Republican Intervenor’s argument to invalidate all of Act 77, this Court should apply the presumption of severability that it applied in *Stilp*, which requires severance “in those circumstances where a statute can stand alone absent the invalid provisions.” 905 A.2d at 970. This “specific, cogent standard” “emphasizes the logical and essential relationship of the void and valid provision” and makes clear that the remainder of Act 77 is severable from the dating requirement. *See id.*

That conclusion follows from the undisputed fact that the dating requirement serves no purpose in the administration of elections by the Allegheny and Philadelphia County Boards of Elections. The handwritten date is not used by either County Board to determine a voter’s qualification or the timeliness of the ballot, or to prevent or detect fraud. Mem. Op. at 76-79. Since the dating requirement serves no purpose, any suggestion that the statutory scheme cannot function without it—or that Act 77 would not have been enacted without it—falls flat. The legislative history of Act 77 does not even mention the dating requirement, much less suggest that it was “so essentially and inseparably connected with” the rest of Act 77 that the

General Assembly might not have enacted Act 77 without it.⁷ *See* 1 Pa.C.S. § 1925. Nor is there any reason to believe that without the dating requirement, Act 77 would be incomplete or incapable of being executed in accordance with the intent of the General Assembly. The numerous provisions of Act 77 that are unrelated to dating the outer envelopes of mail and absentee ballots surely can be enforced without the dating requirement, irrespective of whether the Act as a whole was, in the words of the Republican Intervenors, “a politically difficult compromise.” (Republican Intervenor Br. at 56.) Indeed, essentially all of Act 77 has nothing to do with the dating provision.⁸ And there is no reason to believe that the General Assembly intended that “invalidation” of any word, phrase, or sub-clause of the Act would trigger invalidation of Act 77, which “effected major amendments to the Pennsylvania Election Code” and “was an enormously popular piece of legislation on both sides of the aisle.” *McLinko*, 279 A.3d at 543. In these circumstances, it is

⁷ Act 77’s legislative history shows that several components of Act 77 were considered essential parts of the legislative compromise. *See, e.g.*, S. LEGIS. J. NO. 46, 203rd. SESS. at 1000-02 (Pa. 2019) (discussing how eliminating straight-ticket voting and the adequacy of election funding were key Republican concerns). The dating provision, by contrast, appears to have been a holdover from a previous version of the Election Code that was not discussed during Act 77’s passage. *See* H. LEGIS. J. NO. 64, 203rd SESS. at 1740 (Pa. 2019); *see also* 25 P.S. § 3146.6(a)(1) (effective prior to Act 77).

⁸ *See, e.g.*, Act 77, § 6 (eliminating straight-ticket voting); *id.* § 4 (adding 15 days to register to vote); *id.* § 3 (changing requirements for nominating petitions, requiring that sample ballots be published online, and restricting when the boundaries of election districts can be changed).

simply illogical to infer that the General Assembly intended to invalidate the entirety of Act 77—including its elimination of straight-ticket voting, introduction of universal mail ballots, and numerous other reforms to modernize Pennsylvania’s elections—based on the invalidation of “shall ... date” language that serves no purpose other than disenfranchising otherwise qualified voters. *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”).

That conclusion is further reinforced by the fact that the Pennsylvania Legislature has amended Act 77 several times without including a similar nonseverability provision.⁹ If the General Assembly intended that Act 77’s nonseverability provision would be applied in the face of those subsequent amendments, it would have included nonseverability clauses in those later enactments. Plus, accepting the Republican Intervenors’ nonseverability argument would, in effect, force this Court to parse each amendment to ascertain which parts of the Election Code would remain in effect after applying the nonseverability provision—a result plainly not contemplated by the General Assembly when it enacted Act 77. And even if this Court were to agree that all of Act 77 must be invalidated due to the nonseverability provision—and it should not reach that

⁹ *See, e.g.*, Act of Mar. 27, 2020, P.L. 41, No. 12, sec. 11, § 1306, 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422); *id.*, sec. 14, § 1306-D.

conclusion—the subsequent amendments would likely leave the remaining statutory scheme entirely incoherent. Subsequent amendments to the Election Code thus confirm that the General Assembly did not intend for all of Act 77 to be stricken over the enforceability of dating requirement. In sum, if the dating requirement is declared unconstitutional, this Court can and should conclude that Act 77’s nonseverability provision is either inapplicable or unenforceable. In either event, this Court should not invalidate all of Act 77.

IV. Invalidating Act 77 Would Disenfranchise Voters and Cause Electoral Chaos.

The Republican Intervenors ignore the staggering consequences of their extreme nonseverability argument. Accepting that argument would have dire consequences for Pennsylvania voters and the County Boards of Elections tasked by law with administering the 2024 General Election. Universal “no-excuse” mail voting has been a resounding success since the General Assembly adopted it in 2019. It has made voting more accessible and less burdensome to hundreds of thousands of voters. It has become a settled part of Pennsylvania’s electoral process, with over one million voters now relying on mail voting to exercise their constitutional right to vote. The sudden elimination of this time-tested and proven method of voting—mere months before the 2024 General Election—would be devastating to those who are unable to vote in person yet are excluded from the narrow categories of those permitted to vote by absentee ballot. Indeed, invalidating Act 77 would, in effect,

“disenfranchise a massive number of Pennsylvanians from the right to vote in the upcoming election.” *Pa. Democratic Party*, 238 A.3d at 397 n.4 (Donohoe, J., concurring in part and dissenting in part).

Eliminating Act 77 would also be confusing to voters and extremely disruptive and chaotic to the electoral process. Act 77 is a comprehensive election modernization statute in which county boards of elections, elections officials, Pennsylvania voters, and candidates for office have developed significant reliance interests. Respondent Counties alone have invested significant time and resources implementing and complying with Act 77, including by ensuring that mail ballots are available to all qualified applicants in Allegheny and Philadelphia Counties and by developing robust processes for handling those ballots in a manner that complies with state and federal law. With the General Election soon approaching, eliminating Act 77 would be profoundly disruptive to those efforts.¹⁰

At least 5.5 million Pennsylvanians have voted in each of the last five presidential elections dating back to 2004.¹¹ As of April 23, 2024, nearly one million

¹⁰ Respondent Philadelphia County will be administering a Special Election on September 17, 2024, to fill recent vacancies in the 195th and 201st Legislative Districts. Delivery of absentee and mail ballots to qualified voters for the Special Election began on August 21, 2024, and the Board of Elections has already begun receiving completed absentee and mail ballots.

¹¹ Commonwealth of Pennsylvania, Voting & Election Statistics, *available at* <https://www.pa.gov/en/agencies/dos/resources/voting-and-elections-resources/voting-and-election-statistics.html> (last accessed September 4, 2024).

voters had already applied for mail ballots in the 2024 General Election¹² and are therefore already relying on their access to mail ballots to exercise their right to vote in the upcoming election. And Respondent Counties are preparing to send mail ballots to qualified applicants in the fall¹³—a significant task that would be disrupted if this Court were to declare Act 77 invalid. 25 P.S. § 3150.12a(b). Invalidating all of Act 77—which includes voting reforms that go well beyond the introduction of universal no-excuse mail voting—would sow chaos and place countless voters at risk of disenfranchisement. This Court should decline the invitation to create mass election confusion and chaos shortly before a major presidential election.

CONCLUSION

For these reasons, if this Court affirms the decision below on the merits of Petitioners’ constitutional claims, it should reject Republican Intervenors’ request to strike all of Act 77.

¹² Commonwealth of Pennsylvania, Elections Data - Daily Mail Ballot Report, <https://www.pavoterservices.pa.gov/2024%20Primary%20Daily%20Mail%20Ballot%20Report.xlsx> (last accessed September 4, 2024).

¹³ Respondent Allegheny County has already approved over 150,000 applications for mail ballots, and Respondent Philadelphia County has already approved over 120,000. The process for ordering, printing, and mailing these ballots is well underway.

Dated: September 4, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this brief contains 3,694 words, not including the supplementary materials as defined by Pa.R.A.P. 2135(b).

Dated: September 4, 2024

/s/ Ilana H. Eisenstein
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/s/ Ilana H. Eisenstein
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I hereby certify that on September 4, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

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