

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BLACK POLITICAL EMPOWERMENT
PROJECT, POWER INTERFAITH,
MAKE THE ROAD PENNSYLVANIA,
ONEPA ACTIVISTS UNITED, NEW
PA PROJECT EDUCATION FUND,
CASA SAN JOSÉ, PITTSBURGH
UNITED, LEAGUE OF WOMEN
VOTERS OF PENNSYLVANIA, and
COMMON CAUSE PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as
secretary of the commonwealth,
PHILADELPHIA COUNTY BOARD OF
ELECTIONS, and ALLEGHENY
COUNTY BOARD OF ELECTIONS,

Respondents.

Civil Action No. 283 MD 2024
Original Jurisdiction

**RESPONDENTS ALLEGHENY AND PHILADELPHIA COUNTY BOARDS
OF ELECTIONS' SUPPLEMENTAL STATEMENT OF POSITION
REGARDING APPLICATIONS FOR SUMMARY RELIEF**

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INTRODUCTION

The Allegheny and Philadelphia County Boards of Elections (collectively, “Responding Counties”) have not applied for summary relief and take no position on the merits of Petitioners’ constitutional claims. Responding Counties have filed a statement of position, however, highlighting the lack of any meaningful purpose served by the dating requirement, the disparate impact enforcement of that requirement has had on elderly voters, the administrative burdens associated with enforcing it, and their commitment to safeguarding the elective franchise by ensuring that all qualified voters can cast their ballots. That commitment compels Responding Counties to respond in opposition to the Republican Intervenors’ argument that “declaring the date requirement unconstitutional would strike Act 77 and universal mail voting in Pennsylvania.” (Republican Intervenors Br. at 55-58.)

This attack on Act 77—including its introduction of universal no-excuse mail voting for all qualified voters in the Commonwealth (*see* 25 P.S. § 3150.11)—is as wrong as it is extreme. Declining to enforce the meaningless dating requirement would not even trigger the nonseverability provision of Act 77, much less justify overturning the entirety of Act 77. *See Bonner v. Chapman*, 298 A.3d 153, 168-69 (Pa. Commw. 2023). And adopting the Republican Intervenors’ contrary argument would have staggering and profound implications for the electoral process in Pennsylvania, needlessly disenfranchising thousands of Pennsylvania voters and

sowing electoral chaos shortly before the 2024 General Election. This Court should accordingly reject the Republican Intervenors’ extraordinary invitation to strike all of Act 77 in the event Petitioners prevail on the merits of their constitutional claims.

ARGUMENT

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

The Republican Intervenors are wrong to argue that “if the Court grants the relief requested by Petitioners and holds that application of the date requirement is unconstitutional, then by its own terms, Act 77 in its entirety . . . must be stricken as well.” (Republican Intervenors Br. at 58.) This argument misses the mark for several reasons.

At the outset, the relief Petitioners seek does 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.” Petitioners, as Responding Counties understand, do not aim to “invalidate” the date requirement. They instead argue that it would be unconstitutional to *interpret* and *enforce* the date requirement in a manner that sets aside otherwise timely mail ballots from qualified voters. (*See* Petition ¶¶ 84, 91, 92.a, 92.b, 92.c); *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.”).

This Court’s holding in *Bonner v. Chapman* confirms that the dating requirement does not need to be invalidated or stricken from Act 77 to grant Petitioners relief. 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. This 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, if Petitioners prevail, 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.* Accordingly, *Bonner*’s holding alone refutes the Republican Intervenors’ argument.

In any event, even if the Court were to conclude that the nonseverability provision were triggered, such a conclusion would not justify striking 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. *Stilp v. Com.*, 905 A.2d 918,

970-75, 980 (Pa. 2006). In *Stilp*, the Pennsylvania Supreme Court confronted a “boilerplate” nonseverability clause worded almost identically to the one found in Act 77¹ but still 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 “intrude[s] upon the independence of the Judiciary and impair[s] the

¹ 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.

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*, these considerations weigh against applying Act 77’s nonseverability provision in the sweeping manner urged by the Republican Intervenors. Act 77’s boilerplate nonseverability provision similarly 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).² Act 77’s nonseverability provision also impairs the judicial function because 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. As the Pennsylvania Supreme Court has recognized,

² While Republican Intervenors may argue that the more specific list of nonseverable statutory sections makes Act 77’s nonseverability clause less “boilerplate” than the one in *Stilp*, this argument would be misplaced. *Stilp* was clear that the issue was not that the nonseverability clause in question covered the entire statute, but that it provided no standard. *See Democratic Party v. Boockvar*, 238 A.3d 345, 397 n.4 (Pa. 2020) (Donohue, J. concurring in part and dissenting in part). Moreover, the Pennsylvania Supreme Court has declined to enforce a nonseverability clause that applied only to specific statutory provisions. *See Pa. Federation of Teachers v. Sch. Dist.*, 484 A.2d 751, 754 (Pa. 1984).

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 of 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.

As in *Stilp*, this Court should apply the presumption of severability and the standard for rebutting the presumption found in 1 Pa.C.S. § 1925, which requires severance only “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, as explained in Responding Counties' initial statement of position. 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.³ *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-in and absentee ballots surely can be enforced without the dating

³ 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).

requirement, irrespective of whether the Act as a whole was, in the words of the Republican Intervenors, “a politically difficult compromise.” (Republican Intervenors Br. at 57.) Indeed, the overwhelming majority of Act 77 has nothing to do with the dating provision.⁴ 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 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

⁴ *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).

nonseverability provision.⁵ 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 that 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 Act 77 as a whole must be invalidated due to the nonseverability provision—and it should *not* reach that 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 Act 77 as a whole.

⁵ 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.

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

The Republican Intervenors ignore the staggering consequences of their extreme nonseverability argument. To be sure, 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-in voting to exercise their constitutional right to vote. The sudden elimination of this time-tested and proven method of voting 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. Responding 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.

At least 5.5 million Pennsylvanians have voted in each of the last five presidential elections dating back to 2004.⁶ As of April 23, 2024, nearly one million voters had already applied for mail-in ballots in the 2024 General Election⁷ and are therefore already relying on their access to mail-in ballots to exercise their right to vote in the upcoming election. And Responding Counties are preparing to send mail-in ballots to qualified applicants in the fall—a significant task that would be disrupted if this Court were to declare Act 77 invalid. 25 P.S. § 3150.12a(b). Repealing 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

⁶ 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 July 8, 2024).

⁷ Commonwealth of Pennsylvania, Elections Data - Daily Mail Ballot Report, <https://www.pavoterservices.pa.gov/2024%20Primary%20Daily%20Mail%20Ballot%20Report.xlsx> (last accessed July 8, 2024).

invitation to create mass election confusion and chaos shortly before a major presidential election.

CONCLUSION

For these reasons, if this Court rules in Petitioners' favor on its constitutional claims, it should reject Republican Intervenors' request to strike Act 77 in its entirety.

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CERTIFICATE OF COMPLIANCE

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

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