

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

Nos. 1 EAP 2025, 2 EAP 2025 (consolidated)

BRIAN T. BAXTER and SUSAN T. KINNIRY,

v.

**PHILADELPHIA BOARD OF ELECTIONS, REPUBLICAN NATIONAL
COMMITTEE, and REPUBLICAN PARTY OF PENNSYLVANIA,**

**APPEAL OF: REPUBLICAN NATIONAL COMMITTEE, and
REPUBLICAN PARTY OF PENNSYLVANIA.**

**BRIEF OF *AMICI CURIAE* SPEAKER OF THE PENNSYLVANIA HOUSE
OF REPRESENTATIVES JOANNA E. MCCLINTON, DEMOCRATIC
LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES
MATTHEW BRADFORD AND DEMOCRATIC LEADER OF THE
PENNSYLVANIA SENATE JAY COSTA IN SUPPORT OF APPELLEES**

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INTEREST OF AMICI CURIAE¹

Speaker of the Pennsylvania House of Representatives Joanna E. McClinton, Majority Leader of the Pennsylvania House of Representatives Matthew Bradford, and Democratic Leader of the Pennsylvania Senate Jay Costa (collectively, “*Amici Curiae*”), hereby file this *amici curiae* brief pursuant to Pa. R.A.P. 531(b)(1)(i) in support of Appellees.

As leaders in the General Assembly, *Amici Curiae* have a unique and direct interest in ensuring that its legislative intent is clear so that the laws are properly construed. Though multiple prior legal challenges attempting to circumvent the legislative process by walking back the General Assembly’s passage of historical election reforms in the Act of October 31, 2019, P.L. 522, No. 77 (“Act 77”) have failed, once again the result of this appeal threatens to effectively repeal the legislation. It does so by making an absurd claim about the legislative intent of an inapplicable nonseverability provision and the application of a single word that – not so mysteriously – was never even mentioned during the many legislative debates on Act 77. What is worse, Appellants in this case would have all future two-year legislatures forever held hostage to this ruling and any time its elected

¹ No other person or entity other than the *Amici Curiae* or counsel paid, in whole or in part, for the preparation of this *Amici Curiae* brief or authored, in whole or in part, this *Amici Curiae* brief. See Pa. R.A.P. 531(b)(2).

representatives attempt to enact amendments to the Election Code. Of course, this was not the intent of the General Assembly.

Amici join in full support of the arguments of the Appellees, but do not repeat these arguments in this brief. Rather, *Amici* respectfully submit this brief to clear up any confusion regarding the legislative intent behind the passage of Act 77 and the effect this litigation will have on the present and future legislatures.

INTRODUCTION

Act 77 is not – and never has been – about restricting access to voting. The purpose was always to increase access to the ballot and cast votes by qualified electors. See Stephen E. Friedman, *Mail-in Voting and the Pennsylvania Constitution*, 60 Duq. L. Rev. 1, 10 (2022) (“The whole purpose of Act 77 was to expand access and make voting easier.”). It provided Pennsylvanians with the option to vote by mail for any reason; permitted voters to deliver their absentee and mail ballots early and in-person; it extended the deadline for voter registration; and it even provided a mechanism for new voting equipment.

But somehow Appellants would have this Court believe that passage of Act 77 relied on a component – indeed, a *single* word – in all of Act 77 that could one day trigger an obsolete nonseverability provision inserted into the technical sections of the bill to completely wipe out an expansive act of the legislature at any given time in the future. No matter how many elections have passed since enactment. No more mail-in ballots. No more early, in-person delivery of one’s ballot. And, as Appellants’ argument goes, not even a guarantee to free and equal elections for the people in the Pennsylvania Constitution could save it. See Pa. Const. art. I, § 5.

As this Court has established, an election is free and equal under article I § 5, when, *inter alia*, “every voter has the same right as any other voter; **when each voter under the law has the right to cast his ballot and have it honestly counted**; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914) (emphasis added). Additionally, this right to vote is fundamental so any attempt to severely regulate it must be subject to strict scrutiny. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372-74 (Pa. 2020).

Under these standards, the Commonwealth Court found that incorrectly dating or failing to date the outer envelope, when accompanied with a timestamped date indicating timely receipt, of an absentee or mail-in ballot is a “minor irregularity” and cannot justify disenfranchising voters. *See Baxter v. Phila. Bd. of Elections*, Nos. 1305 & 1309 C.D. 2024, 2024 WL 4614689, at *17 (Pa.Cmwlth. 2024) (unpublished disposition). Furthermore, the Court found that the date provision serves no compelling state interest and could not satisfy strict scrutiny. *Id.* Because the date requirement on the outer envelope of an absentee or mail-in ballot is inconsequential and does not show whether a voter is eligible, when a ballot is received, or whether there was fraud, this Court should uphold the

Commonwealth Courts decision and protect Pennsylvanians' fundamental right to vote.

Additionally, affirming the Commonwealth Court's ruling on an unconstitutional application of the dating requirement here will not render it "invalid" under the inapplicable nonseverability section of Act 77. *See id.* at *18 (Pa.Cmwlt. 2024) (unpublished disposition). Appellants' attempt to alchemize the court's ruling on the unconstitutional application of a single word to one set of circumstances into a complete invalidation of the entirety of Act 77's comprehensive election scheme would lead to an absurd result. Act 77's legislative history and subsequent amendments to the act also support the General Assembly's intent to limit application of the nonseverability provision and avoid impermissibly binding future legislatures. The General Assembly did not intend to circumscribe the legislative powers of its successors in perpetuity by tying passage of comprehensive election reform to an expired nonseverability provision that could simply be triggered at any time by the interpretation of single word.

The current two-year General Assembly is the proper branch to repeal Act 77 or mail-in ballots should it choose to do so. A court's interpretation of the word "date" six years, several elections and multiple amendments later cannot trigger the expired nonseverability provision to do so here.

ARGUMENT

I. The Commonwealth Court correctly held that disenfranchising voters for errors related to the inconsequential date on the outer envelope of an absentee or mail-in ballot violates the Free and Equal Elections Clause of the Pennsylvania Constitution.

It is long-established that the courts have the power to review the constitutionality of statutes as a check and balance to the legislative and executive branches of government. *Marbury v. Madison*, 5 U.S. 137 (1803) (In *Com. v. Edmunds*, 526 Pa. 374 (Pa. 1991), this Court extended the power of the State courts to interpret the Pennsylvania Constitution independently from the decisions of the United States Supreme Court's interpretation of similar federal constitutional provisions). The argument by Appellants and Republican legislative *amici curiae* in support of Appellants that the court performing its vital role of reviewing the constitutionality of statutory provisions is somehow "radical" is absurd. Pennsylvanian's right to vote is fundamental and the backbone of our democracy. *See Reynolds v. Sims*, 84 S.Ct. 1362, 1381 (U.S. 1964) ("Undoubtedly, the right to suffrage is a fundamental matter in a free and democratic society."). Therefore, all provisions of the Election Code must satisfy strict scrutiny to ensure that the fundamental right to vote is protected. *Pa. Democratic Party*, 238 A.3d at 372-74.

The Pennsylvania Constitution through the Free and Equal Elections Clause mandates: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

As detailed by the Commonwealth Court below, the Elections Clause has a dual purpose (1) to provide an equal opportunity for voters to cast a ballot; and (2) to protect the right of each voter to “**cast [a] ballot and have it honestly counted**” *Winston*, 91 A. at 523 (emphasis added); *See Baxter*, Nos. 1305 & 1309 C.D. 2024, 2024 WL 4614689, at *10 (citing *Pa. Democratic Party*, 238 A.3d at 356; *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965)).

At issue in this case are the dating provisions for the declaration on the outer envelope for absentee and mail-in ballots. The Election Code provides for electors to “fill out, date and sign the declaration” on the outer envelopes containing their completed absentee and mail-in ballots. 25 Pa. Stat. §§ 3146.6(a), 3150.16(a).

In 2019, the General Assembly amended the Election Code by enacting sweeping changes in Act 77 including eliminating straight-party voting and providing qualified electors the option of mail-in voting. Act of October 31, 2019, P.L. 522, No. 77. In reviewing the added provisions for mail-in voting in Act 77 to the existing provisions in the Election Code for absentee voting, it is clear the legislative drafters repurposed the absentee ballot provisions for mail-in ballots

including the declaration provision to “fill out, date and sign” the outer envelope. The same date provision was initially added in 1963 with the statutory update providing requirements for absentee ballots. Act of Aug. 13, 1963, P.L. 707, No. 379, sec. 22, § 1306. At the time the dating provision was added for absentee ballots, there was also a requirement that “[a] board of election shall examine the declaration and if the same bears a date later than the date of such primary or election, the envelope shall be set aside unopened.” *Id.* § 1308(c). That provision was amended again in 1968 to have the date of receipt by the board of election determine the timeliness of an absentee ballot. Act of Dec. 11, 1968, P.L. 1183, No. 375, sec. 8, § 1308(a). In the 1968 amendments to the Election Code, the General Assembly also removed the requirement of boards of election to examine the declaration date on the outer envelope. *Id.* (repeal of § 1308(c)). Five decades later, when adopting the amendments to the Election Code that would ultimately become Act 77, the decision was made to use the date of receipt requirement for both absentee and mail-in ballots thereby making the dating provisions for the declaration on the outer envelope inconsequential. Act of October 31, 2019, P.L. 522, No. 77, § 1308(g). The date on the outer envelope does not establish voter eligibility, timely ballot receipt, or fraud.

Because the dating provision serves no legitimate purpose let alone a compelling state interest, the Commonwealth Court was correct to hold that not

counting absentee and mail-in ballots because of errors to that inconsequential declaration date contained on the outer envelope violates the Free and Equal Elections Clause set forth in article I, section 5 of the Pennsylvania Constitution. The regulation of the right to vote cannot and should not be used to disenfranchise voters. This Court should affirm the Commonwealth Court and protect Pennsylvanian's fundamental right to vote.

II. It is absurd to void the entirety of Act 77 after six years and countless elections based on the claim that the Commonwealth Court's interpretation of the word "date" triggers the 2019 legislation's nonseverability provision.

The true motive of this appeal is clear: Reverse engineer the 2019 enactment of mail-in voting using a judicial challenge to circumvent the proper avenue through the General Assembly.

Nothing in the Commonwealth Court's ruling invalidates the dating requirement for the elector's declaration. *See Baxter*, Nos. 1305 & 1309 C.D. 2024, 2024 WL 4614689, at *18 . Appellants' attempt to alchemize the court's ruling on the unconstitutional application of a single carryover word to one set of voters in one election into a complete invalidation of the entirety of Act 77's comprehensive election reform would lead to an absurd result. All the more because Act 77's legislative history and subsequent amendments to the act support

both the limited application of Act 77's nonseverability provision and the General Assembly's acknowledgment that it cannot bind future legislatures.

If Appellants wish to altogether repeal Act 77 or mail-in ballots, the current two-year General Assembly is the proper branch to do so at this point. Simply put, the word "date" and an expired nonseverability provision cannot be the magic pill to do so.

A. Neither granting relief in this case nor affirming the Commonwealth Court's ruling invalidates the dating provision of the Election Code.

Following its passage, the nonseverability provision in section 11 of Act 77 would have voided the act if certain enumerated sections were held "invalid" by a court: "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. Sections 6 and 8 of Act 77 carry the dating component for absentee and mail-in ballot electors, respectively. *Id.* §§ 6 (25 P.S. § 3146.6(a) and 8 (25 P.S. § 3150.16(a)). The Commonwealth Court's ruling does not hold the dating requirement in sections 6 and 8 "invalid."

First, in the Commonwealth Court's own words, neither the relief sought in this case nor its ruling triggers the nonseverability provision:

[W]e are not asked in these appeals to declare the dating provisions unconstitutional or otherwise strike them from

Act 77 Rather, we find that the other provisions of Act 77, which enacted a comprehensive scheme of no-excuse mail-in voting that has since been upheld in full as a constitutional exercise of our General Assembly’s legislative authority to create universal mail-in voting will not be affected by our ultimate conclusion regarding the unconstitutional **application** of the dating provisions to the 69 voters **in the Special Election**.

Baxter, Nos. 1305 & 1309 C.D. 2024, 2024 WL 4614689, at *18.

Appellees are not asking for an invalidation of the dating requirement in sections 3146.6(a) or 3150.16(a) or for this Court to enjoin counties from requiring the elector to date the declaration on the outer envelope. Instead, they are requesting that timely received absentee and mail-in ballots are not rejected or disenfranchised when there is a meaningless error with the date consistent with the Free and Equal Elections Clause, Pa. Const. art. I, § 5. Brief of Appellees at 53-54, *Baxter*, Nos. 1305 & 1309 C.D. 2024, 2024 WL 4614689, at *1 (“[T]he Court need not invalidate or excise “shall...date” from sections 3146.6 to grant the relief sought. . . . Appellees do not seek an order barring voters from being directed to date mail ballot declaration forms, or barring continued inclusion of a date field next to the signature line.”). Nowhere in the request for relief was an invalidation of any provision of Act 77.

Second, the holding of the court below that the application of the dating provision to a set of electors in one election is unconstitutional does not render the provision “invalid” as that term is commonly understood. When a term is not

defined by statute, the “words and phrases shall be construed according to rules of grammar and according to their common and approved usage.” *Honey v. Lycoming Cnty. Offices of Voter Servs.*, 312 A.3d 942, 951 (Pa.Cmwlt. 2024), *appeal granted*, 327 A.3d 611 (Pa. 2024) (determining the meaning of the undefined term “voting machine” in the Pennsylvania Election Code by using 2024 dictionaries) (internal citations omitted). To ascertain the common and approved meaning, a court may use dictionary definitions. *Id.* (internal citations omitted).

Black’s Law Dictionary defines “invalid” as “[n]ot legally binding.” *Invalid*, *Black’s Law Dictionary* (11th ed. 2019); *Cf. Kidwell Grp., LLC v. ASI Preferred Ins. Corp.*, 351 So.3d 1176, 1179 (Fla. Dist. Ct. App. 2022) (distinguishing the meanings of “invalid” and “unenforceable”). Compare this to the definition of “unenforceable,” which means “valid but incapable of being enforced.” *Kidwell Grp., LLC*, 351 So.3d at 1179 (citing *Unenforceable*, *Black’s Law Dictionary* (11th ed. 2019) (“The definition of “unenforceable” suggests a subtle difference from the term “invalid.”)). Consistent with the term’s common and approved usage, a court decision holding a statutory provision “invalid” means it is no longer legally binding, but holding the provision is “unenforceable” does not render it nonbinding. It merely indicates the provision cannot be enforced in that particular set of circumstances. Likewise, here a ruling that the dating component is unenforceable as applied to rejecting timely received, otherwise valid absentee and

mail-in ballots in a particular election, while still enforceable in other circumstances, does not make it “invalid.” Thus, the nonseverability provision in Act 77 is not triggered.

Third, the Commonwealth Court has repeatedly recognized that Appellees’ requested relief does not trigger Act 77’s nonseverability provision. In *Bonner v. Chapman*, as Appellants do here, petitioners sought a declaration from the Commonwealth Court that invalidation of the dating provision voided the entirety of Act 77 under the theory that, as Appellants argue here, prior court decisions held that counties could not reject timely received absentee and mail-in ballots for lack of a date on the declaration within the context of federal and state law. *Bonner v. Chapman*, 298 A.3d 153, 157-158 (Pa.Cmwlt. 2023) (citing *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), *pet. for cert. granted, judgment vacated by Ritter v. Migliori*, 142 S.Ct. 1824 (U.S. 2022) and *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, *1 (Pa.Cmwlt. 2022) (Cohn Jubelirer, J., single judge op.)). As this Court should do, the court in *Bonner* rejected the petitioners’ nonseverability claim because those prior court decisions merely *interpreted* the dating provision as applied to the circumstances in each case and not invalidate it:

These interpretations did not invalidate the Dating Provisions, as neither opinion struck the Dating Provisions from the Election Code or held that electors cannot or should not handwrite a date on the declaration in

accordance with those provisions. Even under these interpretations, the Dating Provisions 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. The Dating Provisions were not declared invalid or stricken from the statutory scheme Petitioners have not cited authority, and our research has found none, in which a nonseverability clause is triggered by a judicial interpretation of a statutory provision that did not declare the provision invalid, and, following the interpretation, the provision remained a part of the statute.

Bonner, 298 A.3d at 168–69 (internal citations omitted).

The court in *Bonner* further distinguished Pennsylvania Supreme Court judicial interpretations that invalidate and *strike* language from a statute from those that merely interpret statutes as applied to specific circumstances. *See id.* (citing *Protz v. Workers' Compensation Appeal Board (Derry Area Sch. District)*, 161 A.3d 827, 838, 840-41 (Pa. 2017) (This Court invalidated as unconstitutional a former section and striking related provisions of the Workers' Compensation Act, which allowed employers to require claimants to undergo impairment rating evaluations using the most recent edition of the American Medical Association guidelines); *Robinson Township, Washington County v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (plurality) (This Court invalidated as unconstitutional multiple sections of Act 13 of 2012, explicitly striking them along with related provisions of the Act)). So too here.

Just as the petitioners in *Bonner*, Appellants here claim that the Commonwealth Court’s ruling regarding the application of the dating provision to a set of electors in one election does not result in the invalidation of any provision of Act 77. This ruling falls outside the meaning of “invalid” in the nonseverability provision. And the Appellees never even asked for an invalidation of the dating provision. Nothing here, but the apparent whims of Appellants, triggers the nonseverability clause.

B. Even if the Commonwealth Court did invalidate the dating provision – despite its own words on the matter – it is absurd to conclude that the General Assembly intended to bind all future legislatures in perpetuity by a tying a comprehensive election reform bill to an expired nonseverability provision that could be simply triggered by the interpretation of one carryover word.

The Appellants have failed to bring forward just one exchange between the legislators during Act 77 debates on the dating requirement, let alone debates tying it to the nonseverability provision. Legislators never contemplated that the most comprehensive election reform compromise in modern Pennsylvania history could be voided based on minor disputes such as the interpretation of the dating requirement. *See, e.g., McLinko v. Dep’t of State*, 279 A.3d 539, 543 (Pa. 2022) (“Act 77 was the result of years of careful consideration and debate that began in 2017 with a series of hearings, ultimately spanning twenty-seven months, on the reform and modernization of elections in Pennsylvania.”) (citing Stephen E.

Friedman, *Mail-In Voting and the Pennsylvania Constitution*, 60 DUQ. L. REV. 1, 6 (2022)).

This understanding is consistent with the 180-day challenge provision in section 13 of Act 77, the subsequent amendments to Act 77 since 2019 and the longstanding principle that no two-year General Assembly may bind future legislatures. Any other result would be unreasonable if not absurd, contrary to the presumption that the legislature does not intend an unreasonable or absurd result in matters of statutory construction. 1 Pa.C.S § 1922(1) (“In ascertaining the intention of the General Assembly in the enactment of a statute”, a court presume “[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.”).

- i. The dating requirement was merely a carryover word from the absentee ballot provisions of the Election Code and not a major compromise of Act 77 triggering nonseverability.**

As this Court recognized in *McLinko v. Department of State*, even the addition of the mail-in ballot option was “only a fraction of the scope of the Act.” *McLinko*, 279 A.3d at 543. Among many other things, Act 77 also eliminated straight-party ticket voting, provided more time for voters to register before an election, allocated funding for upgraded voting systems, changed requirements for poll workers and changed the deadline for challenges to elector qualifications. *See id.* These changes were largely bipartisan and discussed ad nauseam during both

committee meetings and floor debates. But for all of this post-enactment tumult over the dating component, not once in debate did legislators mention the supposed crucial importance of dating the declaration or even imply that they intended to tie it to the nonseverability claim as the Appellants would have this Court infer.

As a minor task in the General Assembly’s drafting Act 77, the dating requirement was merely a carryover from an identical provision in the existing absentee voting article of the Pennsylvania Election Code. *Compare* Act 77, § 6 (The bracketed language striking “fill out, date and sign the declaration” for absentee ballots in former 25 P.S. § 3146.6(a) is reenacted in the same section), *with* Act 77, § 8 (The identical language, “fill out, date and sign,” is carried over to the mail-in ballot section in 25 P.S. § 3150.16(a)). There is nothing more to it. In fact, much of the language of the mail-in ballot article in Act 77 was merely copied from the absentee ballot article of the Election Code. *Compare* 25 P.S. §§ 3146.1-3146.9 (Article XIII of the Election Code governing “Voting by Qualified Absentee Electors”), *with* Act 77, § 8 (adding Article XIII-D of the Election Code creating “Voting by Qualified Mail-In Electors”). Legislators confirmed this multiple times throughout consideration of Act 77.²

² That language was merely carried over from the absentee ballot provisions was reiterated at least three times during the House State Government Committee voting meeting at which the bulk of Act 77 was first amended into Senate Bill 421, S.B. 421, Printer’s No. 1292, 203d Gen. Assemb., Reg. Sess. (Pa. 2019). Video Recording: *State Government Call of the Chair (part 2)*, Pa. H. State Government Comm. Voting Meeting – Consideration of Amendment to S.B. 421,

The date requirement was merely one word of one subsection copied from the absentee ballot provisions in the Election Code and final passage did not hinge on it.

ii. Legislative history reveals only that the nonseverability section was intended to apply if a court strikes the validity of one of its major components and that the nonseverability section expired 180 days following enactment of Act 77.

At bottom, the legislative history of Act 77 reveals only two certainties about the General Assembly’s intent on nonseverability. *One*, the nonseverability section applies only if a court strikes the binding legal authority, or renders “invalid,” the entirety of one of Act 77’s components or sections containing a major compromise therein, including section 8’s mail-in ballot provisions. And *two*, the nonseverability section expired 180 days following enactment of Act 77.

Both the Senate prime sponsor of Act 77, Senator Lisa Boscola, and then-Senate Republican Majority Leader, Senator Jacob Corman, agreed that Act 77

Oct. 22, 2019, at: <https://www.pahousegop.com/Video/State-Government/Page-15> (Remarks discussing the “carryover” of language in the absentee ballot provisions to the mail-in ballot provisions begin at 17:50 and 39:50); *See also id.* (Representative Jared Solomon remarks that “the mail-in and absentee provisions are *mirroring one another . . .*” at 44:40 in video).

Legislators again recognized the mirroring of absentee and mail-in ballot provisions on final passage. *See, e.g.* 2019 Pa. Legislative Journal—House 1738 (Oct. 29, 2019) (State Representative Garth Everett summarizing the Senate Bill 421, Printer’s No. 1330, for final passage in the House: “It establishes mail-in voting; the timeliness for making application and voting mail-in ballots and canvassing are *the same as absentee.*”); *see also, e.g.*, 2019 Pa. Legislative Journal—Senate 1000 (Oct. 29, 2019) (State Senator Sharif Street referring to the mail-in ballot provisions as “no-fault *absentee* balloting.”) and 1002 (State Senator Katie Muth referring to the mail-in ballot provisions as “no-excuse *absentee.*”).

was a difficult bipartisan compromise amid a divided state government at the time. 2019 Pa. Legislative Journal—Senate 1000, 1002 (Oct. 29, 2019). Several *whole* sections or compromises in the bill were debated in the Senate remarks, including mail-in voting, removing straight-party ticket voting, moving the voter registration deadline and moving the deadline for the receipt of absentee ballots, but no Senator mentioned the nonseverability provision. And, again, no Senator referenced the dating requirement. Not once. *See id.* at 999-1002. It was merely one carryover word meant to be read within the context of the larger mail-in ballot article to be considered. *See supra* note 1. Passage of Act 77 hinged on the survival of these *whole* components or compromises in Act 77 like mail-in voting in section 8 of the bill, not minor subsections or pieces of these major compromises like the dating requirement therein. *Cf. Gibbons v. New Castle Area Sch. Dist.*, 543 A.2d 1087, 1090 (Pa. 1988) (This Court refused to read one sub-part out of context of its whole section to effectuate the intent of the General Assembly, declaring, “There is . . . a purposeful distinction between a *sub* section and an independent section of a statute . . .”).

And while this implies that the nonseverability provision was essential to Act 77’s passage to give legislators assurances that the most politically difficult *whole* sections or compromises of the bill would not be picked off later by the

courts, that does not magically morph the nonseverability provision into an everlasting vice grip on every *individual word* of Act 77 in perpetuity.

In fact, there is only one exchange on the legislative record on the nonseverability section. In it the legislators discuss nonseverability alongside Section 13, which conferred exclusive jurisdiction to the Supreme Court of Pennsylvania over any constitutional challenge to a list of major components in the bill within 180 days of enactment. Act 77, § 13.³ The legislators' only exchange on nonseverability made it plain that it too was part of the larger agreement to limit any legal uncertainty of the bill's major compromises to within 180 days:

Mrs. DAVIDSON. . . . My second question has to do with the severability clause. It is my understanding that the bill says that the Supreme Court will have exclusive jurisdiction over challenges to *elimination of straight-party voting, absentee voting, and mail-in voting. Then I also understand it also reads that the provisions of the bill will be nonseverable.* So is that to mean that if somebody wants to challenge whether or not they were discriminated against because they did not have a ballot in braille, would they be able to – would that be a suit that they could bring to the Supreme Court under the severability clause?

³ Section 13(1) lists the several provisions of the bill that contain the many compromises in Act 77. Like the nonseverability provision in Section 11 of Act 77, Section 13 was included in the technical sections of the bill, not amended into the Election Code. Act 77, §§ 11, 13. Sections 13(2) and (3) state, in relevant part:

- (2) The Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1). . . .
- (3) An action under paragraph (2) must be commenced within 180 days.

Act 77, § 13.

Mr. EVERETT. . . . *There is a nonseverability clause, and there is also the section that you mentioned that gives the Supreme Court of Pennsylvania jurisdiction, because the intent of this is that this bill works together, that it not be divided up into parts, and there is also a provision . . . that suits be brought within 180 days so that we can settle everything before this would take effect. So those are the provisions that have to do with nonseverability.*

Mrs. DAVIDSON. So in effect, if a suit was brought to the Supreme Court of Pennsylvania and they found it to be unconstitutional, it would eliminate the entire bill because it cannot be severed.

Mr. EVERETT. Yes; that would be just in those sections that have been designated as nonseverable.

2019 Pa. Legislative Journal—House 1740-41 (Oct. 29, 2019) (emphasis added).

To summarize, the General Assembly understood that the nonseverability provision was to “work together” with the 180-day deadline for certain challenges in the bill. This was intended to reassure legislators that a court would not pick off whole sections consisting of the major compromises in Act 77 – mail-in ballots, changes to absentee voting, removal of straight party ticket voting and the like – and those initial challenges to the novel legislation would be resolved in the first 180 days. *See* 1 Pa.C.S. § 1922(2) (In determining legislative intent, it is presumed that “the General Assembly intends the entire statute to be effective and *certain*.”).

If the legislative record were not enough to support the 180-day limit on nonseverability, the General Assembly subsequently amended Act 77 multiple

times without including a nonseverability provision. *See, e.g.*, Act of Mar. 27, 2020, P.L. 41, No. 12. If the General Assembly wished to apply a nonseverability provision to those amendments, it would have included one.⁴

Breathing life back into an expired nonseverability provision of Act 77 would compel this Court to deconstruct each subsequent amendment, determine whether nonseverability applies and cherry-pick which one in the Election Code survives severability. Assuming such a result would even leave a coherent voting scheme, it certainly mocks the very legislative concern the nonseverability provision aimed to resolve in 2019: Forcing a court to pluck from Act 77 certain politically difficult compromises while others survive. *See* 1 Pa.C.S. § 1921(c)(6) (In determining legislative intent, courts may consider the “consequences of a particular interpretation.”); *see also* 1 Pa.C.S. § 1922(2) (In determining legislative intent, it is presumed that “the General Assembly intends the entire statute to be effective and *certain*.”).

⁴ Even more to the point, the General Assembly did not make the majority of subsequent amendments to Act 77 effective until *after* the close of that 180-day period for challenges to Act 77 on April 28, 2020. The first amendment was Act 12 of 2020, Act of March 27, 2020, P.L. 41, No. 12 (“Act 12”), which amended several provisions of Act 77 including, among many things, requiring counties to meet no earlier than 7AM on Election Day to pre-canvass absentee and mail-in ballots and altering the definition of “qualified mail-in elector” to permit any qualified elector to apply to vote by mail-in ballot even if qualified to vote absentee. Act 12, §§ 1 and 11. Those changes impacting the major compromises in Act 77 were not effective until June 2 or November 2 of 2020. *See* Act 12, § 17(1) and (2). The other provisions of Act 12 that took effect before the 180-day period expired were merely technical corrections, administrative changes or did not otherwise amend Act 77. *See* Act 12, § 17(3) (listing provisions of Act 12 that took effect immediately).

The legislative history of Act 77 reveals that the nonseverability section only applied if a court were to strike the validity of the whole sections or parts containing its major compromises, such as the addition of its mail-in ballot article in Section 8. At any rate, the General Assembly intended that it expire 180 days after Act 77's enactment.

- iii. It is unreasonable if not absurd to conclude that the 2019-2020 General Assembly intended to forever bind all future legislatures by allowing the interpretation of one carryover word – six years later – to trigger nonseverability, resulting in the loss of the entire political compromise and all that came after it.**

This Court has repeatedly heeded Pennsylvania's longstanding principle "that no action taken by [a] governing body" in an exercise of its governmental powers "is binding upon its successor . . . because they may not lawfully circumscribe the legislative powers of their successors." *McCormick v. Hanover Twp.*, 92 A. 195, 196 (Pa. 1914); *see also Commonwealth ex rel. Fortney, for Use of Volunteer Fire Dep't of Coal Twp., Northumberland Cnty. v. Bartol*, 20 A.2d 313, 314 (Pa. 1941) (a legislature "cannot, by ordinance or resolution, make it obligatory upon a future body to pass an ordinance"), and *Fletcher v. Peck*, 6 Cranch 87, 135 (1810) (John Marshall, C.J.) ("[O]ne legislature is competent to repeal any act which a former legislature was competent to pass; and . . . one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted.").

The General Assembly's intent for Act 77 was to use a nonseverability provision to get the major compromises in the act through the legislative process and encourage resolution of any challenges using the nonseverability provision as a tool for 180 days following enactment. Any conclusion that the challenge to one carryover word in a massive electoral reform bill could trigger a nonseverability provision from the original bill – six years, countless elections, multiple subsequent amendments and three successive legislatures later – impermissibly binds all future legislatures from enacting subsequent amendments to the original act with any certainty. And it is still unclear whether or which of the subsequent amendments would be severed along with the original language of Act 77 in the Election Code.

Voiding all of Act 77 despite the legislative intent using the 180-day challenge provision, the subsequent amendments since 2019 and the longstanding principle that no two-year General Assembly may bind future legislatures would certainly be unreasonable if not absurd, contrary to the presumption that the legislature does not intend an unreasonable or absurd result in matters of statutory construction. 1 Pa.C.S § 1922(1) (“In ascertaining the intention of the General Assembly in the enactment of a statute”, a court presume “[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.”).

If Appellants wish to altogether repeal Act 77 or mail-in ballots, the General Assembly is the proper branch to do so at this point. Simply put, the word “date” and an expired nonseverability provision cannot do that.

CONCLUSION

To uphold the constitutional guarantee to free and equal elections and consistent with the legislative intent of Act 77, respectfully, this Court should affirm the decision of the Commonwealth Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains 5,971 words. In making this certification, I have relied upon the word count function of the word-processing system used to prepare this Brief.

I further certify that this Brief 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.

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CERTIFICATE OF SERVICE

I, Shannon A. Sollenberger, hereby certify that I have this day served the foregoing Brief of *Amici Curiae* upon all counsel of record by PACFile eService, which satisfies the requirements of Pa. R.A.P. 121.

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