

I agree with the Majority’s scholarly opinion with respect to the issues of Petitioners’ standing, and the procedural objections to the amended petitions for review. However, I disagree with the Majority’s conclusion that Sections 1 and 8 of the Act of October 31, 2019, P.L. 552, No. 77 (Act 77) violate article VII, section 1 and section 14 of the Pennsylvania Constitution¹ by adding “a qualified mail-in

¹ Pa. Const. art. VII, §1. Article VII, section 1 states:

Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.

1. He or she shall have been a citizen of the United States at least one month.

2. He or she shall have resided in the State ninety (90) days immediately preceding the election.

3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

In turn, article VII, section 14(a) provides, in relevant part:

(a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any

(Footnote continued on next page...)

elector” as a class of elector who is eligible to vote as defined in Section 102(z.5)(3) and (z.6) of the Pennsylvania Election Code (Election Code),² and by adding Section 1301-D of Article XIII-D to the Election Code³ permitting any qualified elector, who is not eligible to be a qualified absentee elector, to vote by an official no-excuse

election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

Pa. Const. art. VII, §14(a).

² Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §2602(z.5)(3), (z.6). Section 102(z.5)(3) of the Election Code provides that “[t]he words ‘proof of identification’ shall mean: . . . For a qualified absentee elector under Section 1301 or a qualified mail-in elector under section 1301-D.” In turn, Section 102(z.6) states: “The words “qualified mail-in elector” shall mean a qualified elector.”

³ 25 P.S. §3150.11. Section 1301-D, added by Act 77, provides:

(a) General rule.--A qualified mail-in elector 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.

(b) Construction.--The term “qualified mail-in elector” shall not be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition in section 102(t).

In turn, Section 102(t) of the Election Code states:

The words “qualified elector” shall mean any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election.

25 P.S. §2602(t).

mail-in ballot in any primary, general, or municipal election held in this Commonwealth.

To the contrary, article VII, section 4 of the Pennsylvania Constitution specifically empowers the General Assembly to provide for another means by which an elector may cast a ballot through legislation such as Act 77. Specifically, article VII, section 4 states: “All elections by the citizens shall be by ballot *or by such other method as may be prescribed by law*: Provided, That secrecy in voting be preserved.” Pa. Const. art. VII, §4 (emphasis added). Thus, the General Assembly is constitutionally empowered to enact Act 77 to provide for qualified and registered electors present in their municipality of residence on an election day to vote by no-excuse mail-in ballot. Specifically, I disagree with the Majority’s faulty premise that the no-excuse mail-in ballot method of voting is merely a subspecies of voting by absentee ballot as provided in article VII, section 14, and that article VII, section 1 and article VII, section 14 have primacy over the provisions of article VII, section 4.

In reviewing the constitutionality of Act 77, it is important to remember:

When faced with any constitutional challenge to legislation, we proceed to our task by presuming constitutionality in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths. *See* [Section 1922(3) of the Statutory Construction Act of 1972,] 1 Pa. C.S. §1922(3) (“In ascertaining the intention of the General Assembly in the enactment of a statute the . . . presumption [is] [t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.”); *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, [877 A.2d 383, 393 (Pa. 2005)] (hereinafter, “PAGE”). Indeed, a

legislative enactment will not be deemed unconstitutional unless it clearly, palpably, and plainly violates the Constitution. *PAGE*, 877 A.2d at 393. “Any doubts are to be resolved in favor of a finding of constitutionality.” *Payne v. Dep[artment] of Corrections*, [871 A.2d 795, 800 (Pa. 2005)]. Accordingly, a party challenging the constitutionality of a statute bears a very heavy burden of persuasion. *See Commonwealth v. Barud*, [681 A.2d 162, 165 (Pa. 1996)].

Stilp v. Commonwealth, 905 A.2d 918, 938-39 (Pa. 2006). Additionally, “‘because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible.’ Thus, where two provisions of our Constitution relate to the same subject matter, they are to be read in *pari materia*, and the meaning of a particular word cannot be understood outside the context of the section in which it is used.” *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (citation omitted).

Moreover, the Supreme Court’s opinion in *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924) (*Lancaster City*), does not compel a different conclusion. In *Lancaster City*, the electors of the Fifth Ward in the City of Lancaster voted for a select councilman. The returns of the local board of elections showed that the Democratic and coalition candidate had received 869 of the votes, while the Republican candidate received 861. When the additional votes by absentee ballot, provided for by statute,⁴ were counted, the Democratic candidate received an additional 3 votes, while the Republican candidate received an additional 20 votes thereby apparently winning the election. The statute expanding the scope of the constitutional provision permitting absentee voting was subsequently challenged as unconstitutional. In affirming a lower court’s determination that the

⁴ Act of May 22, 1923, P.L. 309. At that time, the constitutional provision permitting an elector to vote by absentee ballot, the former article VIII, section 6, was limited to electors who were outside their district of residence due to military service. *See In re Contested Election*, 126 A. at 200.

statute was, in fact, an unconstitutional statutory extension of the constitutional absentee voting provision, the Supreme Court stated:

It will be noticed that the ‘offer to vote’ [in the present article VII, section 1] must still be in the district where the elector resides, the effect of which requirement is so ably discussed by Justice Woodward in *Chase v. Miller*, [41 Pa. 403 (1862)]. Certain alterations are made so that absent voting in the case of soldiers is permissible. This is in itself significant of the fact that this privilege was to be extended to such only.

‘In construing particular clauses of the Constitution, it is but reasonable to assume that in inserting such provisions the convention representing the people had before it similar provisions in earlier Constitutions, not only in our own state but in other states which it used as a guide, and, in adding to, or subtracting from, the language of such other Constitutions the change was made deliberately and was not merely accidental.’ *Commonwealth v. Snyder*, [104 A. 494, 495 (Pa. 1918)].

The Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed. *McCafferty v. Guyer*, 59 Pa. 109 [(1868)]. The latter has determined those who, absent from the district, may vote other than by personal presentation of the ballot, but those so permitted are specifically named in [the former] section 6 of article 8. The old principle that the expression of an intent to include one class excludes another has full application here. White, in his work on the Constitution[,] succinctly sums up the proposition controlling this case when he says:

‘The residence required by the Constitution must be within the election district where the elector attempts to vote; hence a law giving to voters the right to cast their ballots at some place other than the election district in which they reside [is] unconstitutional.’

[Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 360 (1907).]

Other objections to the validity of the act now under consideration have been raised, but any detailed discussion is unnecessary. It may well be argued that the scheme of procedure fixed by the act of 1923, for the receipt, recording, and counting of the votes of those absent, who mail their respective ballots, would end in the disclosure of the voter's intention prohibited by the amendment [in the present article VII, section 4] of the Constitution, undoubtedly the result if but one vote so returned for a single district. Though this provision as to secrecy was likely added in view of the suggestion of the use of voting machines, yet the direction that privacy be maintained is now part of our fundamental law.

However laudable the purpose of the act of 1923, it cannot be sustained. If it is deemed necessary that such legislation be placed upon our statute books, then an amendment to the Constitution must be adopted permitting this to be done. For the reasons stated, the only assignment of error is overruled.

Lancaster City, 126 A. at 201.

Thus, *Lancaster City* merely stands for the proposition that the General Assembly may not by statute extend the scope of a method of voting already specifically provided for in article VII, section 14 of the Constitution. The Supreme Court's holding in that case in no way limits the authority conferred upon the General Assembly by article VII, section 4 to provide for a new and different method of voting such as the no-excuse mail-in ballot provisions of Act 77.

The Supreme Court's "suggested" limitation of article VII, section 4 in *Lancaster City* to the use of voting machines, and the Majority's assertion of the same herein, is undermined by the subsequent amendment of the present article VII, section 6 of our Constitution in 1928. As amended, article VII, section 6 now reads:

All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State, except that laws regulating and requiring the registration of electors may be enacted to apply to cities only, provided that such laws be uniform for cities of the same class, and except further, that ***the General Assembly shall, by general law, permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote, at all elections or primaries, in any county, city, borough, incorporated town or township of the Commonwealth, at the option of the electors of such county, city, borough, incorporated town or township***, without being obliged to require the use of such voting machines or mechanical devices in any other county, city, borough, incorporated town or township, under such regulations with reference thereto as the General Assembly may from time to time prescribe. The General Assembly may, from time to time, prescribe the number and duties of election officers in any political subdivision of the Commonwealth in which voting machines or other mechanical devices authorized by this section may be used.

Pa. Const. art. VII, §6 (emphasis added).⁵

Thus, if the provisions of article VII, section 4 are limited to the use of voting machines, as the Majority suggests, there was absolutely no need to amend article VII, section 6 to provide for the use of such machines at the option of local

⁵ As this Court has explained:

Because the Pennsylvania Constitution reserves the power to provide, by general law, the use and choice of voting machines to the General Assembly, and the General Assembly has enacted [Section 302 of] the Election Code[, 25 P.S. §2642,] which delegates said power to the County's Board of Elections (Elections Board), the Election Code is the final authority on voting machines in this Commonwealth. Thus, the Elections Board has the exclusive control over election equipment.

See also In re Agenda Initiative to Place on the Agenda of a Regular Meeting of County Council, 206 A.3d 617, 624 (Pa. Cmwlth. 2019).

municipalities. Moreover, the Majority's limited construction of article VII, section 4 renders the phrase "or by such other method as may be prescribed by law" meaningless and mere surplusage in light of the amendment to article VII, section 6 to specifically include the use of voting machines as a new and different method of casting a ballot. Thus, contrary to the Supreme Court's observation in *Lancaster City*, and the Majority's conclusion herein, article VII, section 4 may not be construed in such a limited manner to give effect to all of its provisions.

Rather, sections 1, 4, and 14 of article VII must all be read together and given the same prominence and effectiveness. When construed in such a manner, the plain language of article VII, section 4 specifically empowers the General Assembly to provide a distinct method of casting a ballot for electors who are present in their municipality on a primary, general, or municipal election day by permitting the use of no-excuse mail-in ballots. This method is distinct from an elector's appearance at his or her district of residence to cast a ballot as provided in article VII, section 1, either by paper ballot or by the use of a machine pursuant to article VII, section 6, or the use of an absentee ballot by an elector who is absent from his or her municipality on the day of a primary, general, or municipal election as provided in article VII, section 14.

Finally, although not addressed by the Majority, Petitioners note that Section 11 of Act 77 contains a "poison pill" that would invalidate all of Act 77's provisions if this Court determines that any of its provisions are invalid. *See* Section 102 of the Election Code Note, 25 P.S. §2602 Note ("Section 11 of [Act 77] provides 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.”) (emphasis added). As the Supreme Court has observed:

[A]s a general matter, nonseverability provisions are constitutionally proper. There may be reasons why the provisions of a particular statute essentially inter-relate, but in ways which are not apparent from a consideration of the bare language of the statute as governed by the settled severance standard set forth in Section 1925 of the Statutory Construction Act[, 1 Pa. C.S. §1925]. In such an instance, the General Assembly may determine that it is necessary to make clear that a taint in any part of the statute ruins the whole.

Stilp, 905 A.2d at 978. Thus, if the no-excuse mail-in provisions of Act 77 are found to be unconstitutional, all of Act 77’s provisions are void.

Nevertheless, as outlined above, article VII, section 4 by its plain language specifically empowers the General Assembly to provide for this new method of casting a no-excuse mail-in ballot, and Petitioners’ claims regarding the constitutionality of Act 77 are without merit. Accordingly, unlike the Majority, I would grant Respondents’ Application for Summary Relief with respect to the substantive claims of Act 77’s constitutionality, and dismiss Petitioners’ petitions for review with prejudice.



MICHAEL H. WOJCIK, Judge

Judge Ceisler joins in this Concurring/Dissenting Opinion.