

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko,

Petitioner,

v.

Commonwealth of Pennsylvania,
Department of State, and Veronica
Degraffenreid, in her official capacity
as Acting Secretary of the
Commonwealth of Pennsylvania,
Respondents.

Timothy R. Bonner, P. Michael Jones,
David H. Zimmerman, Barry J.
Jozwiak, Kathy L. Rapp, David
Maloney, Barbara Gleim, Robert
Brooks, Aaron Bernstine, Timothy F.
Twardzik, Dawn W. Keefer, Dan
Moul, Francis X. Ryan, and Donald
“Bud” Cook,

Petitioners,

v.

Veronica Degraffenreid, in her official
capacity as Acting Secretary of the
Commonwealth of Pennsylvania, and
Commonwealth of Pennsylvania,
Department of State,
Respondents.

CASES CONSOLIDATED

No. 24 M.D. 2021

No. 293 M.D. 2021

**PETITIONERS’ APPLICATION
FOR SUMMARY RELIEF**

Filed on behalf of Petitioners,
Timothy R. Bonner, P. Michael Jones,
David H. Zimmerman, Barry J.
Jozwiak, Kathy L. Rapp, David
Maloney, Barbara Gleim, Robert
Brooks, Aaron Bernstine, Timothy F.
Twardzik, Dawn W. Keefer, Dan
Moul, Francis X. Ryan, and Donald
“Bud” Cook

Counsel of Record for Petitioners:

Gregory H. Teufel
Pa. Id. No. 73062
OGC Law, LLC
1575 McFarland Road, Suite 201
Pittsburgh, PA 15216
412-253-4622
412-253-4623 (facsimile)
gteufel@ogclaw.net

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INTRODUCTION

This application for summary relief seeks declaratory and injunctive relief from the unlawful implementation of no-excuse mail-in balloting under Act 77 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”); 25 Pa.Stat. §§ 3146.6(c), 3150.16(c)), the most expansive and fundamental change to the in-person voting requirements existing under every version of the Pennsylvania Constitution since the Commonwealth first ratified its Constitution in 1776. Act 77 violates the Constitution of the Commonwealth of Pennsylvania because it permits all electors to vote by mail, without qualifying for the Commonwealth’s constitutionally-prescribed exemption. Act 77 further violates the U.S. Constitution, which only grants authority to regulate elections in accordance with a state’s delegation of the lawmaking power, and the no-excuse absentee voting provisions of Act 77 required prior approval by referendum of the people.

STATEMENT OF UNDISPUTED FACTS

Petitioners Timothy R. Bonner (hereinafter “Bonner”), P. Michael Jones (hereinafter “Jones”), David H. Zimmerman (hereinafter “Zimmerman”), Barry J. Jozwiak (hereinafter “Jozwiak”), Kathy L. Rapp (hereinafter “Rapp”), David Maloney (hereinafter “Maloney”), Barbara Gleim (hereinafter “Gleim”), Robert Brooks (hereinafter “Brooks”), Aaron J. Bernstine (hereinafter “Bernstine”),

Timothy F. Twardzik (hereinafter “Twardzik”), Dawn W. Keefer (hereinafter “Keefer”), Dan Moul (hereinafter “Moul”), Francis X. Ryan (hereinafter “Ryan”), and Donald “Bud” Cook (hereinafter “Cook”) are Pennsylvania citizens who are qualified registered electors residing in Pennsylvania and are elected members of the Pennsylvania House of Representatives (“the House”). Verified Pet. ¶¶ 3-16. Bonner was elected to the House on March 17, 2020, and took office on April 6, 2020, after Act 77 was passed by the House. *Id.* ¶ 3. Twardzik was elected to the House in the fall of 2020, and took office on January 5, 2021, after Act 77 was passed by the House. *Id.* ¶ 12. Zimmerman voted against Act 77 when it was passed by the House. *Id.* ¶ 5. Jones, Jozwiak, Rapp, Maloney, Gleim, Brooks, Bernstine Keefer, Moul, Ryan and Cook voted in favor of Act 77 when it was passed by the House. *Id.* ¶¶ 4, 6-11, 13-16. Each of the Petitioners are past and likely future candidates for office and registered Pennsylvania voters. *Id.* ¶ 17.

I. Historical constitutional amendments to expand absentee voting.

In order to qualify to vote, Article VII of the Pennsylvania Constitution provides two exclusive ways an elector may cast a ballot in an election: 1) offering the ballot *in propria persona* (in person) at the polling place on election day, as provided in Article VII, § 1; and 2) exceptions to the first method limited to those persons qualifying under Article VII § 14. Over time, exceptions to in-person voting have been added to the Pennsylvania Constitution only through valid

constitutional amendments, which includes specific exceptions for military personnel, disabled veterans, religious observations, out of town work duties, and county employees who cannot vote due to election day duties.

Article XI, § 1 of the Pennsylvania Constitution establishes the mandatory procedural requirements that must be strictly followed to amend the Constitution. Pursuant to Article XI, § 1, a proposed constitutional amendment must be approved by a majority vote of the members of both the Pennsylvania House of Representatives and Senate in two consecutive legislative sessions, then the proposed amendment must be published for three months ahead of the next general election in two newspapers in each county, and finally it must be submitted to the qualified electors as a ballot question in the next general election and approved by a majority of those voting on the amendment. Therefore, the qualified electors, the people of Pennsylvania have the right to vote on any amendment to the Pennsylvania Constitution, and the final say on whether any such amendment is permitted.

1949 marked the first of several modern attempts to amend the Pennsylvania Constitution to expand the exceptions for which absentee voting would be allowed. The legislature went through the formal procedure for amending the Pennsylvania Constitution, as explicitly provided therein, to allow bedridden or hospitalized war veterans the ability to vote absentee. Pa. Const. Art. VIII, § 18 (1949).

In 1957, Pennsylvania went through the formal amendment process to amend the Pennsylvania Constitution to allow civilian absentee voting in instances where un-avoidable absence or physical disability prevented them from voting in person. In 1967, following a constitutional convention, the Pennsylvania Constitution was reorganized and Article VII, § 19 was renumbered to Article VII, § 14.

In 1985, Pennsylvania went through the formal amendment process to amend the Pennsylvania Constitution to add religious observances to the list of permissible reasons for requesting an absentee ballot. See Pa. H. Leg. J. No. 88, 167th General Assembly, Session of 1983, at 1711 (Oct. 26, 1983) (considering HB 846, PN 1963, entitled “An Act amending the ‘Pennsylvania Election Code,’ ... further providing for absentee ballots for religious holidays and for the delivery and mailing of ballots.”); see also Id. (statement of Mr. Itkin) (“[T]his amendment is offered to alleviate a possible problem with respect to the legislation. The bill would originally amend the Election Code to [expand absentee balloting] Because it appears that the Constitution talks about who may receive an absentee ballot, we felt it might be better in changing the bill from a statute to a proposed amendment to the Pennsylvania Constitution.”).

In 1997, Pennsylvania went through the formal amendment process to amend the Pennsylvania Constitution to expand the ability to vote by absentee

ballot to qualified voters who were outside of their municipality of residence on election day, where previously absentee voting had been limited to those outside of their county of residence. See Pa. H. Leg. J. No. 31, 180th General Assembly, Session of 1996 (May 13, 1996) (“people who do not work outside the municipality [or county] or people who are ill and who it is a great difficulty for them to vote but it is not impossible for them to vote, ... they cannot vote under [the 1997 amendment].” *Id.* at 841 (statement of Mr. Cohen).

II. The Pennsylvania General Assembly began the process for amending the Pennsylvania Constitution to allow for no-excuse absentee voting.

Although Article VII, § 4 of the Pennsylvania Constitution generally provides that “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,” the Pennsylvania General Assembly recognized that such general legislative power did not extend to amending or eliminating the constitutional prerequisites for absentee voting, as more specifically set forth in Article VII, § 14. Therefore, on March 19, 2019, the Pennsylvania General Assembly introduced a joint resolution to amend Article VII, § 14 of the Pennsylvania Constitution to permit no-excuse absentee voting. See Senate Bill 411, 2019 (later incorporated into Senate Bill 413).

The legislative history set forth in the Co-Sponsorship Memorandum of the proposed constitutional amendment (such memoranda accompany all proposed

legislation) recognized that “Pennsylvania’s current Constitution restricts voters wanting to vote by absentee ballot to [specific] situations...” The amendment proposes to “eliminate these limitations, empowering voters to request and submit absentee ballots for any reason – allowing them to vote early and by mail.” Sen. Mike Folmer & Sen. Judith Schwank, Senate Co-Sponsorship Memoranda to S.B. 411 (Jan. 29, 2019, 10:46 AM), <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=28056>. The constitutional amendment proposed to “eliminate these limitations, empowering voters to request and submit absentee ballots for any reason—allowing them to vote early and by mail.” Id.

S.B. 413, amending Article VII, § 14 of the Pennsylvania Constitution, was passed by both chambers and filed with the Office of the Secretary of the Commonwealth on April 29, 2020. If S.B. 413 passed both chambers again in the next legislative session, it would have appeared on a future ballot for approval by a majority of Pennsylvania electors to be properly ratified, but the Commonwealth failed to follow the requisite procedure to amend the Pennsylvania Constitution. Had it been properly approved and ratified by a majority of electors in 2021, S.B. 413 would have amended Article VII, § 14 to allow any voter, for any reason, to vote by absentee ballot as follows:

- (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 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. **A law under this subsection may not require a qualified elector to physically appear at a designated polling place on the day of the election.**~~

~~(b) For purposes of this section, "municipality" means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.~~

Instead, the General Assembly later went on to establish a “Select Committee on Election Integrity” to “investigate, review and make recommendations concerning the regulation and conduct of the 2020 general election.” Pa. H. Res. No. 1032, Printer’s No. 4432, Session of 2020 (Sep. 28, 2020),

<https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=H&billTyp=R&billNbr=1032&pn=4432>

The resolution establishing the committee noted that the “Commonwealth has traditionally only allowed absentee voting by individuals with a statutorily defined excuse to do so, such as a physical disability or absence from their municipality on election day.” *Id.* (emphasis added). It further noted that “[b]efore the enactment of

Act 77 of 2019, for an individual to vote absentee in this Commonwealth, the individual must have provided a permissible reason to do so....” *Id.* It is expressly acknowledged that Act 77 of 2019, “created a new category of mail-in voting ... [whereby] mail-in voters do not have to provide a customary reason to vote by mail and are able to return their ballots several days later than had traditionally been allowed.” *Id.*

Neither Act 77 nor the contemporaneous proposed constitutional amendment initiated by the legislature were approved by a majority vote of both the House and Senate in two consecutive legislative sessions, nor were either submitted to the qualified electors of Pennsylvania as a ballot question and approved by a majority vote of the citizens, to give the final consent to amend Article VII, § 14 of the Pennsylvania Constitution. The Commonwealth proceeded to implement Act 77 anyway, without amending the Pennsylvania Constitution. Put differently, the Commonwealth first recognized the constitutional constraints and the need to amend the Pennsylvania Constitution in order to enact no-excuse mail-in voting, sought to amend the Pennsylvania Constitution to lawfully allow for the legislation, and subsequently abandoned its efforts to comply with the Pennsylvania Constitution.

III. Act 77, as Amended by Act 12, became the legislative vehicle for implementing no-excuse mail-in voting.

On October 31, 2019, Governor Wolf signed Act 77 into law, implementing sweeping reforms to the Pennsylvania Election Code. Among other changes, Act 77 “create[ed] a new option to vote by mail without providing an excuse,” allowed voters to request and submit mail-in or absentee ballots up to 50 days before an election; and established a semi-permanent mail-in and absentee ballot voter list. Press Release, Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting, Governor Tom Wolf (Oct. 31, 2019).

In March 2020, Pennsylvania further updated its Election Code, including certain changes to mail-in voting provisions implemented by Act 77, when it enacted “Act 12 of 2020,” which among other changes amended the definition of a “qualified mail-in elector” to include all qualified voters, except for “person[s] specifically prohibited from being a qualified absentee elector under section 1301.” *See* Act 12, § 1(z.6).

IV. No-Excuse Mail-In Ballots were used extensively in the 2020 and 2021 Elections.

The 2020 primary and general elections and 2021 primary election were conducted with extensive use of Act 77’s no-excuse mail-in voting system. Leading up to the 2020 elections, the Secretary of the Commonwealth issued guidance documents on a number of topics related to Election Day procedures,

including interpretations of provisions amended by Act 77. Among other directives, the Pennsylvania Department of State issued guidelines for accepting mail-in ballots received after election day. See, e.g., Pa. Dep't State, Pennsylvania Guidance for Mail-in and Absentee Ballots Received from the United States Postal Service after 8:00 p.m. on Tuesday, November 3, 2020 (Oct. 28, 2020, Version 1.0), Pet.App. 345a-347a. Pa. Dep't State, Statewide Return and Recount Directive and Procedures (Nov. 1, 2020).

ARGUMENT

I. LEGAL STANDARD

In challenging the constitutionality of Act 77 under Pennsylvania state law, Petitioners bear the burden of establishing that Act 77 "clearly, palpably and plainly" violates the Constitution. *Pennsylvanians Against Gambling Expansion Fund ("PAGE") v. Commw.*, 877 A.2d 383, 393 (Pa. 2005) (citing *Pa. Sch. Bds. Ass'n v. Commw. Ass'n of Sch. Adm'rs*, 805 A.2d 476, 479 (Pa. 2002)).

A violation under the Due Process Clause of the Fourteenth Amendment will be found upon a plaintiff showing "(1) that the state deprived him of a protected interest in ... liberty... and (2) that the deprivation occurred without due process of law." *Burns v. Pa. Dep't of Correction*, 544 F.3d 279, 285 (3rd Cir. 2008) (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *Reynolds v. Wagner*, 128 F.3d 166, 179 (3d Cir.1997)).

The Fourteenth Amendment further prohibits a state, by arbitrary and disparate treatment, from diluting the weight of the vote of its citizens. The court “must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Pursuant to Pa. R.A.P. 1532(b), this Court can grant summary relief "if the right of the applicant thereto is clear." Because the contents of Act 77 and the relevant legislative history are a matter of public record, there is no need for discovery, and this case presents a pure question of law. Petitioners' right to relief is clear, and summary adjudication is appropriate.

II. The no-excuse mail-in voting provisions of Act 77 violate the Pennsylvania and U.S. Constitutions because they seek to eliminate the qualification of in-person voting in the Pennsylvania Constitution through *ultra vires* legislation without the required Pennsylvania constitutional amendment.

The no-excuse mail-in voting provisions of Act 77 violate the Pennsylvania and U.S. Constitutions because they seek to eliminate the qualification of in-person voting in the Pennsylvania Constitution through *ultra vires* legislation without the

required Pennsylvania constitutional amendment approved via referendum by the people. No legislative enactment may contravene the requirements of the Pennsylvania Constitution. Under Supreme Court of Pennsylvania precedent, voting in person at the election is a qualification for voting under the Pennsylvania Constitution. *See* Pa. Const. art. VII, § 1; *Chase v. Miller*, 41 Pa. 403, 418-19 (1862); *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 134-35, 126 A. 199 (1924) (hereinafter *Lancaster City*).

To be a “qualified elector,” and therefore generally entitled to vote, the Pennsylvania Constitution requires the following:

1. 18 years of age.
2. A Citizen of the United States for at least one month.
3. Residence in Pennsylvania for the 90 days immediately preceding the election.
4. Residence in the “election district where he or she ***shall offer to vote*** at least 60 days immediately preceding the election”

Pa. Const. Art. VII, § 1 (emphasis added).

To “offer to vote” by ballot is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it, not to send a ballot by mail. Interpreting the same portions of Article VII, §§ 1 and 5 that exist today, the Pennsylvania Supreme Court explained as follows:

To ‘offer to vote’ by ballot is to present one’s self, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it.

The ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicile. ***We cannot be persuaded that the Constitution ever contemplated any such mode of voting***, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. ***The Constitution meant, rather, that the voter, in propria persona, should offer his vote in an appropriate election district***, in order that his neighbors might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.

Lancaster City, 126 A. 199, 200 (Pa. 1924) (quoting *Chase v. Miller*, 41 Pa. at 418-19) (emphasis added).

Article VII, § 14 of the Pennsylvania Constitution provides the only exemptions to the *in propria persona* voting requirements of the Pennsylvania Constitution, for four specific circumstances:

(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 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.

(b) For purposes of this section, "municipality" means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.

Pa. Const. Art. VII, § 14. The Pennsylvania Constitution does not provide a mechanism for the Legislature to allow for absentee voting in situations other than

those enumerated in Article VII § 14. *See Lancaster City*, 281 Pa. at 136-37, 126 A.2d. at 201. The legislative power “can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed.” *Lancaster City*, 281 Pa. at 137 (citation omitted).

Act 77 unconstitutionally expands the scope of absentee voting permitted by the Pennsylvania Constitution to all voters. 25 Pa.Stat. § 3150.11 states:

Qualified mail-in electors.

(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) [25 Pa.Stat. § 2602(t)].

Absentee voting is defined in 25 Pa.Stat. § 3146.1, which outlines a variety of categories of eligibility that are each consistent with Article VII, § 14 of the Pennsylvania Constitution.

Act 77, as amended, defines a “qualified mail-in elector” as “a qualified elector.” 25 Pa. Stat. § 2602(z.6). A “qualified elector” is “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.” *Id.* § 2602(t). In short, Act 77 qualifies all electors as mail-in electors.

In enacting Act 77, the Legislature created a fictitious distinction between the pre-existing “absentee” voting and the newly created “Mail-In Voting.” In reality, there is no distinction except that Mail-In Voting is simply absentee voting without any of the conditions precedent that the Pennsylvania Constitution clearly requires in order for someone to be permitted to cast a ballot without being physically present at the polls on election day. In other words, absentee voting (by any name, such as “mail-in” voting) is only constitutionally authorized under the four limited circumstances specifically delineated under Article VII, § 14, whereas Act 77 opens absentee voting (renamed “mail-in” voting) to any and all otherwise qualified voters in the Commonwealth who do not meet the constitutional requirements for absentee voting, without excuse or limitation, and simply relabels the voting mechanism as “mail-in” voting as opposed to “absentee” voting.

Taking an inartful twist such as simply relabeling “absentee” voting as “mail-in” voting simply yields a distinction without a legal difference and violates Article VII, § 14 of the Pennsylvania Constitution, as Act 77 effectively repeals Article VII, § 14 and/or makes it moot. The Legislature further attempted to do indirectly what it could not otherwise do without a constitutional amendment, namely disguise the obvious redundancy between mail-in voting and absentee voting by refusing to add “mail-in” voting to 25 P.S. Article XIII (which governs “Voting By Qualified Absentee Elector”) and instead created a new Article (25

P.S. Article XIII-D, “Voting By Qualified Mail-In Electors”). By doing this, it appears the Legislature intended to obscure that the two are the same, except that absentee voters are required to satisfy additional conditions mandated by the Pennsylvania Constitution whereas Mail-In Voters are not.

The legislative goal is clear: vastly expand absentee voting and remove all conditions precedent and requirements to make it a no-excuse voting mechanism, while obscuring the fact that such voting method would violate the Pennsylvania Constitution and which otherwise could only be properly enacted through a constitutional amendment to Article VII, § 14. However, renaming a vast, unconstitutional expansion of absentee voting as “Mail-In Voting” cannot, and does not, make the conduct valid or effective as a matter of law.

The authority vested in the Legislature to pass general laws concerning the way voters can vote by absentee ballot is explicitly (and inherently) limited only to the four enumerated circumstances in Article VII, § 14 where absentee voting is authorized. Therefore, any attempt to expand the definition of an absentee voter conflicts with and exceeds the authority established by the Pennsylvania Constitution and, therefore, a constitutional amendment is required for such an expansion to be legitimate.

As with many states, the Pennsylvania General Assembly shares aspects of its legislative power with the people, who since the first Pennsylvania Constitution

in 1776 have protected the power to amend the state constitution. This power has taken shape in different forms since the first Constitutional Convention, but the impetus for its need has remained constant. The 1776 Pennsylvania Constitution provided for an independent body called the “Council of Censors” – which was neither legislative, judicial, nor executive – made up of two persons in each city and county of Pennsylvania, whose duty, in part, was:

[T]o enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled to by the constitution

Pa Const. Sec. 47 (1776), https://avalon.law.yale.edu/18th_century/pa08.asp.

The Council’s authority was significant. To accomplish its lofty mission, the Council could subpoena persons and papers, order impeachments, publicly censure, and recommend to the legislature laws that should be repealed for violating the Pennsylvania Constitution. Importantly, the Council also held the exclusive authority to amend the state constitution by calling a convention when it found articles to be defective, or when needed for the “preservation of the rights and happiness of the people.” Pa Const. Sec. 47 (1776), https://avalon.law.yale.edu/18th_century/pa08.asp. Any amendment, however, was required to be presented to the people at least six months prior to the date of the amending convention.

What culmination of government atrocities arose such that Pennsylvania required this unique, independent constitutional steward is described by James Madison in Federalist No. 48's description of Pennsylvania's Council of Censors:

[T]he truth of most of which both sides in the council subscribed, it appears that the constitution had been flagrantly violated by the legislature in a variety of important instances.

A great number of laws had been passed violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution against improper acts of the legislature.

The constitutional trial by jury had been violated; and powers assumed which had not been delegated by the constitution.

Executive powers had been usurped.

The salaries of the judges, which the constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department, frequently drawn within legislative cognizance and determination.

* * *

The conclusion which I am warranted in drawing from these observations is, that a mere demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

Federalist No. 48 (James Madison).

While the Council of Censors is no longer a part of Pennsylvania's structure, the multiple iterations of Pennsylvania's Constitution since 1776 through the current constitution have retained a strictly interpreted right of the people to approve any changes to the constitution via referendum.

In effect, Act 77 attempts by legislation to amend the Commonwealth's constitutional in-person voting requirements which date back prior to its first constitution in 1776. Elections in Pennsylvania, and in many other states, have always occurred at a time and at a place. In Pennsylvania this has been the case for longer than the Commonwealth itself has existed. Since at least the Charter of 1683, Pennsylvania has required its electors to vote for elected officials - including members of the Provincial Council, the Governor, sheriffs, and coroners - by ballot and at a "time and place" within an elector's county. The Frame of the Government of the Province of Pennsylvania and, Territories thereunto annexed, in America (Feb. 2, 1683), https://avalon.law.yale.edu/17th_century/pa05.asp.

The 1776 Pennsylvania Constitution outlined a "time **and place** for electing representatives in general assembly," the 12 members of the supreme executive council, the governor, sheriffs, and coroners. The 1789 Pennsylvania Constitution identified that there would be times and places for electing the same officers in the 1776 Constitution, and also added that "Senators shall be chosen... at the same time, in the same manner, and **at the same places**, where [the citizens] shall vote for Representatives. Pa. Const., Art. I, Sec. V (1790), <https://www.paconstitution.org/texts-of-the-constitution/1790-2/>. The 1838 Pennsylvania Constitution retained the language requiring voting at a "place" of election, and further added a qualification that citizens must reside in the district

where they will offer their vote for at least the 10 days immediately preceding the election. Pa. Const. Art. III, Sec. I (1838). And from the 1874 Pennsylvania Constitution through the current 1968 Pennsylvania Constitution, including every amended version in between, the Pennsylvania Constitution has retained the “place” of election language relating to the election of officials and the requirement for citizens to reside in the district pertaining to the place where they will offer their vote.¹

The first significant legal challenge to *ultra vires* legislation seeking to modify Pennsylvania’s in-person voting requirement arose after Pennsylvania amended its constitution in 1838 to require voters to “reside in the election district where he offers to vote, ten days immediately preceding such election.” John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 497 (2003). (citing Pa. Const. art. III, § 1 (1838)). This created a conflict with the Military Absentee Act as reenacted in 1839, which allowed for absentee voting, and the newly amended Pennsylvania Constitution, which no longer did. *Id.* Analyzing the constitutionality of the Military Absentee Act of 1839 under the Pennsylvania

¹ Although Petitioners do not challenge it in this case, it is important for the Court to note that the Absentee voting provision of the Pennsylvania Constitution, Pa. Const. Art. VII, § 14, also **requires** the legislature to identify the “time and place”, along with the manner, where absentee voting can take place.

Constitution, the Supreme Court of Pennsylvania held that the Act was unconstitutional because the purpose of the 1838 constitutional amendment was to require in-person voting in the election district where a voter resided at least 10 days before the election. *Chase v. Miller*, 41 Pa. at 418-19. From 1864 to 1949, only qualified electors engaged in actual military service were permitted to vote by absentee ballot under the Pennsylvania Constitution. See Josiah Henry Benton, *Voting in the Field: A Forgotten Chapter of the Civil War*, at 199 (1915); Pa. Const. art. VIII, § 6 (1864).

In 1924, *Lancaster City* struck down as unconstitutional the Act of May 22, 1923 (P.L. 309; Pa. St. Supp. 1924, §9775a1, *et seq.*), which provided civilians the right to vote by absentee ballot. *Lancaster City* reaffirmed *Chase v. Miller*'s analysis of the Pennsylvania Constitution's in-person voting requirements.

Lancaster City, 281 Pa. at 135. The Supreme Court of Pennsylvania held the Act of May 22, 1923 unconstitutional because the Pennsylvania Constitution still required electors to "offer to vote" in the district where they reside, and that those eligible to "vote other than by personal presentation of the ballot" were specifically named in the Constitution (*i.e.*, active military). *Id.* at 136-37. The court relied on two primary legal principles in its ruling:

[1] '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.’ *Com v. Snyder*, 261 Pa. 57, 63, 104 Atl. 494, 495.

* * *

[2] The old principle that the expression of an intent to include one class excludes another has full application here.... ‘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 ballot at some place other than the election district in which they reside [is] unconstitutional.’

Id. The court went further to note that “[h]owever 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.” *Id.* at 138. This principle was affirmed between 1864 and 1924 in many other states with similar constitutional provisions, both with regard to absentee voting by regular citizens as well as by soldiers away from home. *Id.* (citations omitted).

Section 11 of Act 77 contains a non-severability clause, which requires that the entire act be rendered void if certain provisions of Act 77 are held invalid. *See* Act of October 31, 2019, P.L. 552, No. 77, at § 11 (“Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are non-severable. 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.”). Several of the provisions noted in the non-severability clause of Act 77 include changes to the Election Code relating to no-

excuse mail-in voting, including § 8, which contains most of the provisions for the new mail-in voting system. *Id.* at § 8. Because § 8 and other sections of Act 77 containing provisions for the mail-in ballot system are invalid, Act 77 must be struck down in its entirety.

III. Article VII, §§ 1 and 4 of the Pennsylvania Constitution have not materially changed since the Pennsylvania Supreme Court struck down legislation unconstitutionally expanding mail-in voting in *Lancaster City*.

Article VII, §§ 1 and 4 of the Pennsylvania Constitution (previously numbered as Article VIII, §§ 1 and 4) remain materially the same today as they were when the Pennsylvania Supreme Court in *Lancaster City* struck down “Act May 22, 1923” (P. L. 309; Pa. St. Supp. 1924, § 9775a1, *et seq.*) and invalidated the illegal mail-in ballots cast thereunder. The current language of Article VII, § 4 remains identical to the language the Pennsylvania Supreme Court interpreted in *Lancaster City*. Article VII, § 1 has been altered in three ways since the 1924 case: (1) the voting age requirement was changed to 18, from 21; (2) the state residency requirement was lowered from 1 year, to 90 days; and (3) Clause 3 of Article VII, § 7 was amended to allow a Pennsylvania resident who moves to another County within 60 days of an election to vote in their previous county of residence. These changes to Article VII, § 1 are not relevant to the Court’s reasoning in *Lancaster City*. Pennsylvania Constitution’s remains, for all relevant purposes, unchanged since 1924 with regard to the qualifications and requirements for voting in

elections. The Commonwealth's actions in passing Act 77 without first amending the Constitution directly contravene binding precedent and it is respectfully submitted that this Court should invalidate the Act.

In 1949, the Pennsylvania Constitution was amended to also allow bedridden or hospitalized war veterans the ability to vote absentee. Pa. Const. Art. VIII, § 18 (1949). In 1957, the legislature began the process of amending the constitution to allow civilian absentee voting in instances where unavoidable absence or physical disability prevented them from voting in person. *See Absentee Ballots Case*, 423 Pa. 504, 508, 224 A.2d 197, 199-200 (1966). Because of the restrictions and safeguards under Article XI, the 1957 amendment to the constitution did not go into effect until 1960. *Id.* The constitutional amendment effectively expanded eligibility for absentee voting to include only two categories of qualified electors: (1) those who on election day would be absent from their municipality of residence because of their duties, occupation, or business; and (2) those who are unable to attend their proper polling place because of illness or physical disability. Pa. Const. Art. VII, § 19 (1957).

Issues arose immediately with the canvassing and computation of ballots under the newly expanded absentee voting system, and any challenges to absentee ballots that were rejected by the board of elections resulted in the challenged ballots being placed with ballots that were not challenged to be counted, making it

impossible to correct if it was later determined that the decision to reject the challenge was incorrect. *See Absentee Ballots Case*, 423 Pa. 504, 509, 224 A.2d 197, 200 (Pa. 1966). In response, “the legislature added further amendments by the Act of August 13, 1963, P.L. 707, 25 Pa.Stat. § 3146.1 *et seq.* (Supp. 1965)” to require the board of elections to mark any ballot that was disputed as “challenged,” hold a hearing on the objections, and the decision was opened up to review by the court of common pleas in the county involved. *Id.* Until all challenges were resolved, the board of elections was required to desist from canvassing and computing all challenged ballots to avoid the possible mixing of valid and invalid ballots. *Id.* In 1967 following the Constitutional Convention, the Pennsylvania Constitution was reorganized and Article VII, § 19 was renumbered to Article VII, § 14.

On November 5, 1985, the citizens of Pennsylvania approved another amendment to Article VII, § 14 of the Pennsylvania Constitution, which added religious observances to the list of permissible reasons for requesting an absentee ballot (the “1985 Amendment”). The 1985 Amendment began as HB 846, PN 1963, which would have amended the Pennsylvania Election Code to provide absentee ballots for religious holidays and for the delivery and mailing of ballots. *See Pa. H. Leg. J. No. 88*, 167th General Assembly, Session of 1983, at 1711 (Oct. 26, 1983) (considering HB 846, PN 1963, entitled “An Act amending the

‘Pennsylvania Election Code,’ ...further providing for absentee ballots for religious holidays and for the delivery and mailing of ballots.”). However, the legislative history recognized that because the Pennsylvania Constitution specifically delineates who may receive an absentee ballot, a constitutional amendment was necessary to implement these changes. HB 846, PN 1963 was thus changed from a statute to a proposed amendment to the Pennsylvania Constitution. *Id.* (statement of Mr. Itkin) (“[T]his amendment is offered to alleviate a possible problem with respect to the legislation. The bill would originally amend the Election Code to [expand absentee balloting] Because it appears that the Constitution talks about who may receive an absentee ballot, we felt it might be better in changing the bill from a statute to a proposed amendment to the Pennsylvania Constitution.”).

On November 4, 1997, the citizens of Pennsylvania approved another amendment to Article VII, § 14 of the Pennsylvania Constitution, which expanded the ability to vote by absentee ballot to qualified voters who were outside of their *municipality of residence* on election day, where previously absentee voting had been limited to those outside of their *county of residence* (the “1997 Amendment”). *See* Pa. H. Leg. J. No. 31, 180th General Assembly, Session of 1996 (May 13, 1996) The legislative history of the 1997 Amendments recognized the long-known concept that there existed only two forms of voting: (1) in-person, and (2) absentee

voting and that the 1997 Amendment would not change the status quo; namely that “people who do not work outside the municipality [or county] or people who are ill and who it is a great difficulty for them to vote but it is not impossible for them to vote, so they do not fit in the current loophole for people who are too ill to vote but for them it is a great difficulty to vote, they cannot vote under [the 1997 Amendment].” *Id.* at 841 (statement of Mr. Cohen).

The Pennsylvania Constitution has not been amended to allow for other categories of absentee voting since 1997. This is a mandatory requirement to implement the no-excuse mail-in ballot system that Respondents sought with Act 77. *See, e.g., Kremer v. Grant*, 529 Pa. 602, 613, 606 A.2d 433, 439 (1992) (“[T]he failure to accomplish what is pre-scribed by Article XI infects the amendment process with an incurable defect”); *Sprague v. Cortes*, 636 Pa. 542, 568, 145 A.3d 1136, 1153 (2016) (holding that matters concerning revisions of the Pennsylvania Constitution require “the most rigid care” and demand “[n]othing short of literal compliance with the specific measures set forth in Article XI.”) (citation omitted).

The holdings in *Chase v. Miller* and *Lancaster City* interpret the language “offer to vote” to require in person voting. The doctrine of *stare decisis* is well settled, especially in the context of election law. The Pennsylvania Supreme Court has held that “for purposes of stability and predictability that are essential to the rule of law ... the forceful inclination of courts should favor adherence to the

general rule of abiding by that which has been settled." *Shambach v. Bickhart*, 845 A. 2d 793, 807 (Pa. 2004) (J. Saylor concurring). Certainty and stability in the law is crucial, and unless blindly following stare decisis perpetuates error, precedent must be followed. *See Stilp v. Com.*, 905 A. 2d 918, 967 (Pa. 2006). Holdings, "once made and followed, should never be altered upon the changed views of new personnel of the court." *In re Burt's Estate*, 44 A.2d 670, 677 (Pa. 1945) (cited by *In re Paulmier*, 937 A. 2d 364 (Pa. 2007)). "Stare decisis simply declares that, for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." *Heisler v. Thomas Colliery Co.*, 118 A. 394, 395 (Pa. 1922).

The material facts of this case are identical -- the wording "offer to vote" remains identical in today's Pennsylvania Constitution to the Pennsylvania Constitution back in the times of *Chase* and *Lancaster City*. For the sake of consistency of law, the meaning must remain the same. This Court should consistently find that the term requires voting to be in person. Article VII, § 14 provides that contravening language, and does so specifically because of the limitation set by § 1. Departure from the stringent principles of *stare decisis* requires special justification. *See Arizona v. Rumsey*, 467 U. S. 203, 212 (1984) ("Any departure from the doctrine of *stare decisis* demands special justification ..."). There is no special justification that would justify injecting instability into

settled law, much less allow this Court to ignore binding precedent. Indeed, *Chase* and *Lancaster City* have been consistently upheld without any indication of perpetuating legal error. *Stare decisis*, as a principle, was established to provide predictability and stability through time.

Moreover, consistent amendments to Article VII demonstrate a necessity to provide specific constitutional authority for each expansion of methods of voting beyond *in propria persona* voting, because of the strict requirement for in person voting. Absent such restriction, amendments allowing for Military voting and absentee voting under Article VII, § 14 would be redundant.

IV. Act 77 also violates the U.S. Constitution because it exceeds the powers granted to the Pennsylvania General Assembly under Article I, § 2; Article I, § 4; Article II, § 1; and the 17th Amendment of the U.S. Constitution.

Act 77 also violates the U.S. Constitution because it exceeds the powers granted to the Pennsylvania General Assembly under Article I, § 2; Article I, § 4; Article II, § 1; and the 17th Amendment of the U.S. Constitution. The U.S. Constitution delegates the authority to make laws for federal elections to the states' legislative power. See U.S. Const. Art. I, § 2; U.S. Const. Art. I § 4; U.S. Const. Art. II, § 1; U.S. Const. Amend. XVII. A state is restricted to exercising this federal authority in accordance with the provisions of its Constitution delegating the legislative power. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (“What is forbidden or required to be done by a state is forbidden or required of the

legislative power under the state constitutions as they exist.”); *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (citing *McPherson* and noting that state legislatures are constrained by restrictions imposed by state constitutions on their exercise of the lawmaking power, even when enacting election laws pursuant to U.S. Constitutional authority); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015) (holding that redistricting is a legislative function to be performed in accordance with a state constitution’s prescriptions for lawmaking, which may include referendums).

In the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.

Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000). When a state legislature violates its state constitution, purportedly in furtherance of its plenary authority to regulate federal elections and appoint electors, it also violates the U.S. Constitution.

State constitutions may delegate legislative power to the people, for example through a referendum process, or in part to the Governor through, *e.g.*, the veto power. *See, e.g., Arizona State Legislature*, 576 U.S. 787; *Smiley*, 285 U.S. 355; *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *McPherson*, 146 U.S. 1. Because the legislative changes enabling no-excuse mail voting in

Pennsylvania require a constitutional amendment, and because the Pennsylvania Constitution has delegated to its citizens the right to vote on amendments to the Pennsylvania Constitution, Act 77 violates the U.S. Constitution's delegation to states of the lawmaking power for federal elections.

Title 42 of the U.S. Code, § 1983, prohibits any person acting under color of law to subject or cause to be subjected any other person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The right to vote in lawful elections is a right "of the most fundamental significance" protected by the U.S. Constitution. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Allowing mail-in ballots to be counted which exceed the limitations for permitted absentee voting under the Pennsylvania Constitution can deny the right to vote "by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," in violation of 14th Amendment Due Process and Equal Protection guarantees. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964); U.S. Const. Amend. XIV.

Acting Secretary Degraffenreid, in her role as Secretary of the Commonwealth and acting under color of state law, has continued to implement the unlawful provisions of the Pennsylvania Election code that permit no-excuse mail-in voting. These practices have had the impact of disenfranchising Petitioners

and other registered Pennsylvania voters in previous elections and such policies will continue to disenfranchise voters unless relief is granted to Plaintiffs.

CONCLUSION

For the aforementioned reasons, Petitioners respectfully urge this Court to grant this Application for Summary Relief and enter the attached proposed order or grant such other or further relief as this Court may deem proper.

Respectfully submitted,



Gregory H. Teufel
Attorney for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko,

Petitioner,

v.

Commonwealth of Pennsylvania,
Department of State, and Veronica
Degraffenreid, in her official capacity
as Acting Secretary of the
Commonwealth of Pennsylvania,
Respondents.

CASES CONSOLIDATED

No. 24 M.D. 2021

No. 293 M.D. 2021

ORIGINAL JURISDICTION

Timothy R. Bonner, P. Michael Jones,
David H. Zimmerman, Barry J.
Jozwiak, Kathy L. Rapp, David
Maloney, Barbara Gleim, Robert
Brooks, Aaron Bernstine, Timothy F.
Twardzik, Dawn W. Keefer, Dan
Moul, Francis X. Ryan, and Donald
“Bud” Cook,

Petitioners,

v.

Veronica Degraffenreid, in her official
capacity as Acting Secretary of the
Commonwealth of Pennsylvania, and
Commonwealth of Pennsylvania,
Department of State,
Respondents.

ORDER GRANTING SUMMARY RELIEF

AND NOW, this ____ day of _____, 2021, pursuant to Rule 1532(b)

of the Pennsylvania Rules of Appellate Procedure and upon consideration of

Petitioners' Application for Summary Relief along with Respondents' responses, the Court finds that Petitioners' right to relief is clear.

NOW, THEREFORE, it is ORDERED AND DECREED that:

1. Petitioners' Application for Summary Relief is granted.
2. Act No. 77 of October 31, 2019, P.L. 552, No. 77 (“Act 77”) and all amendments thereto, such as Act No. 12 of 2020 are declared unconstitutional and void;
3. Respondents are enjoined from enforcing any provisions of Act 77 or taking any actions in accordance with Act 77 or any amendments thereto, such as distributing, collecting, and counting no-excuse mail-in ballots in future state and federal elections except to the extent that future amendments to the Pennsylvania Constitution may otherwise permit; and
4. Petitioners are awarded \$1 in nominal damages and their reasonable costs and expenses of this action, including attorneys’ fees and costs and the Court shall issue a separate scheduling order for the submission of affidavits of same and any response.

IT IS SO ORDERED.

J.

CERTIFICATE OF WORD COUNT

I certify that this application/brief contains 7666 words, as determined by the word-count feature of Microsoft Word.

A handwritten signature in blue ink, reading "G. H. Teufel". The signature is written in a cursive style with a large initial "G" and "H".

Date: September 30, 2021

Gregory H. Teufel, Esq.

CERTIFICATE OF COMPLIANCE

I certify that 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.

Date: September 30, 2021

A handwritten signature in blue ink that reads "Gregory H. Teufel". The signature is written in a cursive style with a large initial "G" and "H".

Gregory H. Teufel, Esq.