Received 2/15/2022 3:53:24 PM Supreme Court Middle District

Filed 2/15/2022 3:53:00 PM Supreme Court Middle District
14 MAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Nos. 14, 15, 17, 18, and 19 MAP 2022

DOUG McLINKO,
Petitioner/Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, *et al.*,
Respondents/Appellants.

TIMOTHY BONNER, *et al.*,
Petitioners/Appellees,

v.

LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, *et al.*,
Respondents/Appellants.

On Appeal from the January 28, 2022, Orders of the Commonwealth Court, Nos. 244 MD 2021 and 293 MD 2021

INITIAL BRIEF OF APPELLANTS

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
Robert A. Wiygul (I.D. No. 310760)
John Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200

OFFICE OF ATTORNEY GENERAL
J. Bart DeLone (I.D. No. 42540)
Chief, Appellate Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-3226

(additional counsel on signature pages)

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

I. STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over these consolidated appeals pursuant to 42 Pa.C.S. § 723(a).

II. ORDERS IN QUESTION

This appeal is taken from the following Orders:

ORDER

AND NOW, this 28th day of January, 2022, it is ORDERED that the application for summary relief filed by Petitioner Doug McLinko in the above-captioned matter is GRANTED. The application for summary relief filed by Respondent Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, is DENIED.

Additionally, the preliminary objections filed by Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and the Commonwealth of Pennsylvania, Department of State, and the preliminary objections filed by the Democratic National Committee and the Pennsylvania Democratic Party are DISMISSED as moot.

(R.1906a-R.1907a.)

ORDER

AND NOW, this 28th day of January, 2022, it is ORDERED that the application for summary relief filed by Petitioners Timothy R. Bonner and 13 other members of the Pennsylvania House of Representatives in the above-captioned matter is GRANTED, in part. Act 77 is declared unconstitutional and void *ab initio*. Petitioners' request for injunctive relief, nominal damages and reasonable costs and expenses, including attorneys' fees, is DENIED.

The application for summary relief filed by Respondents Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and the Department of State is DENIED.

(R.1908a-R1909a.)

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Each of the issues raised by Respondents/Appellants, the Pennsylvania Department of State and the Acting Secretary of the Commonwealth, presents a question of law. Accordingly, this Court's standard of review is *de novo*, and its scope of review is plenary. *In re Administrative Order No. 1-MD-2003*, 936 A.2d 1, 5-6 (Pa. 2007) (determining whether court had subject-matter jurisdiction); *Dubose v. Quinlan*, 173 A.3d 634, 643 (Pa. 2017) (interpreting statutory time bar); *In re F.C. III*, 2 A.3d 1201, 1213 n.8 (Pa. 2010) (resolving facial constitutional challenge to statute).

IV. STATEMENT OF QUESTIONS INVOLVED

1. Did the Commonwealth Court err in exercising jurisdiction over Petitioners' claims when Section 13(2) of Act 77 of 2019 vests this Court with exclusive jurisdiction to adjudicate constitutional challenges to the statute?

Answer Below: No.
Suggested Answer: Yes.

2. Did the Commonwealth Court err in holding that Petitioners' claims are not time-barred under Section 13(3) of Act 77, which provides that any constitutional challenge to the statute "must be commenced within 180 days of [October 31, 2019]"?

Answer Below: No.
Suggested Answer: Yes.

3. Did the Commonwealth Court err in holding that Act 77 was unconstitutional under *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924), notwithstanding that each of those cases was decided under an earlier version of the Pennsylvania Constitution containing provisions materially different from those in the current Constitution?

Answer Below: No.
Suggested Answer: Yes.

4. Assuming *arguendo* that the Commonwealth Court was bound by *Chase* and *Lancaster City*, should this Court overrule those cases because they were wrongly decided—and improperly prevent the General Assembly from providing for methods of voting that afford all qualified voters an equal opportunity, to the greatest degree possible, to participate in the electoral process?

Answer Below: No.
Suggested Answer: Yes.

V. STATEMENT OF THE CASE

A. Summary of the Case

This case involves a facial constitutional challenge to a statute. Petitioners seek to invalidate certain provisions of Act 77 of 2019, which gave all qualified Pennsylvania voters the option of voting by mail.

This is no ordinary set of Petitioners. Most of them are Pennsylvania lawmakers who *voted for* Act 77. They now ask the courts to strike down what they enacted, asserting that they violated the Pennsylvania Constitution. Petitioners have also disregarded their own rules regarding when a facial constitutional challenge to Act 77 may be brought. The statute they supported expressly requires all such challenges to be brought within 180 days of Act 77's enactment. Yet Petitioners waited almost *two years*—while three elections using mail-in voting transpired—before filing suit.

The substance of Petitioners' claims is no less extraordinary. Petitioners do not contend that mail-in voting violates any individual constitutional right. To the contrary, Act 77 indisputably furthers the central purpose of the Constitution's Free and Equal Elections Clause—namely, to afford all Pennsylvania voters an equal opportunity, to the greatest degree possible, to access the franchise. Rather, Petitioners argue that three words in the Pennsylvania Constitution, tucked into the third subsection of a clause defining *who* may vote, deprives the General Assembly

of the power to prescribe a safe and secure voting method that has long been used in dozens of other states. Petitioners are undeterred by the fact that a separate section of the Constitution *expressly* gives the General Assembly nearly plenary power to prescribe voting methods.

Petitioners' argument relies not on the text, structure, or history of the relevant constitutional provisions, but on two century-old decisions under earlier—and materially different—versions of the Pennsylvania Constitution: *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924). As numerous other courts and commentators have recognized, the opinions in those cases cannot be reconciled with settled principles of constitutional interpretation; in any event, *Chase* and *Lancaster City* are readily distinguishable from the constitutional question currently before this Court.

Erroneously believing itself bound by these two cases, a 3-2 majority of the Commonwealth Court declared Act 77 unconstitutional. The court held that the Pennsylvania Constitution prevents the General Assembly from making voting more accessible for all Pennsylvanians. In fact, the Commonwealth Court should never have reached the merits of Petitioners' constitutional claim. Now that the issue is before this Court, however, it should conclusively distinguish *Chase* and *Lancaster City* or, if necessary, overrule them.

B. Statement of Facts

1. Pennsylvania's Act 77

In 2019, with the support of a bipartisan supermajority of both legislative chambers, the Pennsylvania General Assembly enacted Act 77 of 2019, which made several important updates and improvements to Pennsylvania's Election Code. Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. 2019-77 (S.B. 421) (West) ("Act 77"). Act 77 included provisions that, for the first time, offered the option of mail-in voting to Pennsylvania electors who did not qualify for absentee voting. *See* 25 P.S. §§ 3150.11–3150.17. This change, which allowed Pennsylvanians to use a method of voting already adopted in the majority of other states,[1] was a significant development that made it easier for all Pennsylvanians to exercise their fundamental right to vote. Act 77's other provisions included the elimination of straight-ticket voting, revisions to registration and ballot deadlines, modernization of various administrative requirements, and funding for counties to replace outdated voting systems.

Reflecting the complex negotiations and policy tradeoffs that were involved in persuading a Republican-controlled legislature and a Democratic Governor to

[1] National Conference of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, *Table 1: States with No-Excuse Absentee Voting* (Jan. 3, 2022), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx (26 states (including Pennsylvania) and Washington D.C. allow any voter to "request and cast an absentee/mail ballot, no excuse or reason necessary," and 8 additional states conduct their elections entirely by mail).

support the legislation, the General Assembly included a nonseverability provision stating that invalidation of certain sections of the Act, including the mail-in ballot provisions (an important Democratic legislative priority) and the straight-ticket voting provisions (a similarly important Republican priority), would void almost all of the Act. *See* Act 77 § 11. The General Assembly also understood that implementing such a significant overhaul of Pennsylvania's voting laws would be a lengthy, complex, and resource-intensive endeavor. It therefore sought to ensure that any challenges to the constitutionality of Act 77's major provisions, including mail-in voting, would be resolved before Act 77 was implemented. To that end, Section 13(2) of Act 77 gave the Pennsylvania Supreme Court "exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality" of those provisions. *See* Act 77 § 13(2). And Section 13(3) provided that any such challenges must be brought within 180 days of the statute's effective date. *See* Act 77 § 13(3).

Act 77 was signed into law and became effective on October 31, 2019. *See* Act 77 § 15(3). The statutory 180-day period for challenges to the law expired on April 28, 2020. Neither Petitioners nor anyone else challenged the constitutionality of Act 77's authorization of mail-in voting before that date.

2. Pennsylvania Voters Eagerly Embrace Mail-In Voting, and Act 77's Mail-In Voting Provisions Withstand a Constitutional Challenge Based on Arguments Identical to Those Asserted Here

By any practical measure, Act 77's mail-in voting provisions were a spectacular success. Within months of the statute's enactment, the COVID-19 pandemic swept into the Commonwealth. Because of voters' and election workers' concerns about the safety of in-person voting in a pandemic, voters immediately began voting by mail-in or absentee ballot in numbers far exceeding what was expected before the pandemic took hold. (R.127a-R.128a ¶ 6.) Pennsylvanians cast more than 4.7 million mail-in ballots during the 2020 and 2021 election cycles.[2] More than 1.3 million Pennsylvanians also have opted to vote by mail in future elections by requesting to be placed on a "permanent mail-in ballot list file," as provided by 25 P.S. § 3150.12(g)(1). (R.133a ¶ 25.) (*See* Appendix A at 7-8 (finding "no factual question that substantial resources have been expended by the Commonwealth and by county boards of elections to implement mail-in voting and that approximately 1,380,342 electors have been placed on the [permanent] mail-in ballot list file").)

[2] *See* https://www.electionreturns.pa.gov/ReportCenter/Reports (permitting generation of election reports listing the total number of mail-in ballots). Of the approximately 6.9 million Pennsylvanians who voted in the 2020 general election, approximately 2.7 million cast a mail-in or absentee ballot. (R.128a ¶ 10.)

On November 21, 2020, on the eve of certification of the 2020 presidential election, a different group of petitioners filed a lawsuit that challenged Act 77 on grounds identical to those asserted here. In *Kelly v. Commonwealth*, the petitioners alleged—as Petitioners do here—that the mail-in balloting provisions of Act 77 violate Article VII, § 1 of the Pennsylvania Constitution, which provides:

> Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections ….
>
> …
>
> 3. He or she shall have resided 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; *see* 240 A.3d 1255, 1256 (Pa. 2020), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021). Like the Petitioners here, the *Kelly* petitioners sought a declaratory judgment that the mail-in voting provisions of Act 77 run afoul of the phrase "offer to vote." *See id.* They argued that this phrase—which appears in a clause modifying a durational residency requirement in a provision delimiting *who* may vote—should be interpreted as prohibiting the General Assembly from authorizing any electoral *method* other than "in person" voting, notwithstanding that a separate provision of the Pennsylvania Constitution expressly gives the General Assembly nearly plenary power to prescribe the permissible "methods" of voting, *see* PA. CONST. art VII, § 4. In support of their argument, the *Kelly* petitioners relied on two cases that are almost a century or

more old: *Chase v. Miller*, 41 Pa. 403 (1862), a Civil War-era case decided under the Pennsylvania Constitution of 1838; and *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924), decided under the Constitution of 1874.

Exercising extraordinary jurisdiction, this Court dismissed the *Kelly* petition with prejudice. *Kelly*, 240 at 1257. The Court held that the *Kelly* petition "violates the doctrine of laches given [the *Kelly* petitioners'] complete failure to act with due diligence in commencing their facial constitutional challenge, which was ascertainable upon Act 77's enactment." *Id.* at 1256.

C. Procedural History

1. The *McLinko* and *Bonner* Petitions

On July 26, 2021, Doug McLinko, a long-time member of the Bradford County Board of Elections charged with administering Act 77 and other election laws,[3] filed a petition for review along with an application for summary relief in the Commonwealth Court's original jurisdiction. Like the *Kelly* petitioners, McLinko relied upon *Chase* and *Lancaster City* to argue that the mail-in voting provisions of Act 77 violated the "offer to vote" provision of Article VII, § 1 of the Pennsylvania Constitution. (R.63a-R.67a.) Neither McLinko's Petition, nor any other paper he has filed in this case, explains why he waited nearly two years after

[3] McLinko was last reelected to the Bradford County Board of Commissioners in 2019 and has been in office since at least 2012. *See* https://bradfordcountypa.org/department/elections/ (using "Results" icon, permitting generation of reports for 2011, 2015, and 2019 elections).

Act 77 was passed—during which time three elections took place and over 4 million mail-in ballots were cast[4]—to file his suit.

On August 31, 2021, fourteen sitting members of the Pennsylvania House of Representatives (the *"Bonner* Petitioners")—eleven of whom voted *in favor* of Act 77 (R.262a-265a ¶¶ 3-16)—filed a separate petition challenging Act 77, followed by an application for summary relief. The *Bonner* Petitioners relied on the same arguments and "offer to vote" language as McLinko. (*See* R.275a-R.281a.) They also asserted federal constitutional claims that are wholly derivative of their claim under the Pennsylvania Constitution: they alleged that *because* Act 77 purportedly violates the Pennsylvania Constitution, it also violates the U.S. Constitution. (*See id.*, R281a-R283a.) Like McLinko, the *Bonner* Petitioners have offered no explanation for their delay in bringing suit.[5]

[4] *See supra* note 1.

[5] Ten of the *Bonner* Petitioners, in their capacity as members of the General Assembly, filed an amicus brief in support of the *Kelly* petitioners' unsuccessful application asking the Supreme Court of the United States to reverse this Court's decision and to enjoin Pennsylvania from certifying the results of the November 2020 general election. *See* Brief for Members of the Pennsylvania General Assembly, as *Amicus Curiae* in Support of Applicants/Petitioners, *Kelly v. Pennsylvania*, No. 20A98 (U.S. filed Dec. 7, 2020), available at https://www.supremecourt.gov/DocketPDF/20/20A98/162797/20201207110117475_20A98%20General%20Assembly%20amicus.pdf.

2. The Commonwealth Court Consolidates *McLinko* and *Bonner*, Grants Intervention Applications by Both Democratic and Republican Entities, and Hears Argument on the Parties' Cross-Applications for Summary Relief

Respondents filed cross-applications for summary relief and preliminary objections in both the *McLinko* and *Bonner* actions. (R.134a-R.256a; R.418a-R.469a; R.507a-R.641a; R.731a-R.775a; R.895a-R.979a; R.1876a-R.1899a.) Their filings maintained that Petitioners' claims were flawed on a number of procedural grounds: (1) Petitioners failed to plead a basis for standing; (2) their claims, like those of the *Kelly* Petitioners, were barred by the doctrine of laches; and (3) their suits were untimely because they were brought outside the statutory time limit set forth in Section 13(3) of Act 77. Moreover, Respondents argued, Petitioners' constitutional arguments were meritless. Nothing in the Pennsylvania Constitution prohibited the General Assembly from adopting modern, secure voting methods making it easier for all Pennsylvanians to exercise the fundamental right to vote. To the contrary, the Constitution expressly authorizes the legislature to "prescribe[]" the permissible "method[s]" of voting. PA. CONST. art. VII, § 4.

The Commonwealth Court initially heard oral argument on September 22, 2021, limited to the cross-applications for summary relief in the *McLinko* action. Following the argument, the court deferred ruling on the parties' claims and defenses, consolidated the *McLinko* and *Bonner* cases, and ordered expedited briefing on cross-dispositive motions. (R.470a-R.471a.)

On October 26, 2021, the Commonwealth Court granted applications to intervene filed by the Republican Committees of Bulter, York, and Washington Counties (which intervened on the side of Petitioners) and the Democratic National Committee and Pennsylvania Democratic Party (which intervened on the side of Respondents). (*See* R.1532a-R.1534a.) On November 17, 2021, after receiving additional briefing, an *en banc* panel of the Commonwealth Court heard oral argument from all parties and Intervenors on the cross-applications for summary relief and preliminary objections in both consolidated actions.[6]

3. The Commonwealth Court Rejects Respondents' Procedural Arguments and, in a Closely Divided 3-2 Decision, Holds That It Is Constrained, Under Two Century-Old Decisions, to Invalidate Mail-in Voting

On January 28, 2022, the Commonwealth Court issued Orders and Opinions disposing of all claims in the *McLinko* and *Bonner* cases. First, the court rejected Respondents' standing and laches arguments. As to standing, the court held that all Petitioners had a substantial, direct, and immediate interest in the outcome of the litigation; alternatively, they met the requirements for taxpayer

[6] Following the initial oral argument, Petitioner McLinko filed an Amended Petition for Review on September 29, 2021. (R.472a-R.504a) The Amended Petition was identical to McLinko's initial Petition, other than the addition of certain allegations attempting to support McLinko's standing. (R.482a-R.485a.) Respondents filed Preliminary Objections to the Amended Petition on October 8, 2021. (R.731a-R.775a; *see also* R.895a-R.979a.) Pursuant to the Commonwealth Court's Orders, neither McLinko nor Respondents filed a renewed application for summary relief; the court directed that, "[f]or purposes of argument on the cross-applications for summary relief filed in *McLinko*, the parties should assume the facts pled in McLinko's amended petition for review." (R.1532a-R.1534a.)

standing. (Appendix A at 35-40; Appendix B at 3-8.) As to laches, the Commonwealth Court recognized that this Court had rejected an identical constitutional challenge to Act 77 in *Kelly*. But the Commonwealth Court held that *Kelly* was not "on all fours" with this case because the *Kelly* petitioners sought to invalidate mail-in ballots that had already been cast, whereas Petitioners here seek only prospective relief. (Appendix A at 41-42 & n.32.)[7] The Commonwealth Court also noted that *Kelly* was a *per curiam* order and therefore not precedential. (Appendix A at 41 n.32.) Finally, although the court acknowledged Respondents' undisputed evidence showing profound prejudice—measured in millions of dollars of public resources and prospective voter confusion and disenfranchisement—flowing from Petitioners' unjustified delay in filing suit, the Commonwealth Court read this Court's precedent as foreclosing any laches defense to constitutional claims for prospective declaratory relief.[8] (*Id.* at 42-44.)

[7] *But see Kelly*, 240 A.3d at 1262 (Saylor, C.J., dissenting in part precisely *because* the majority had dismissed not only claims seeking to invalidate previously cast ballots, but also claims for prospective declaratory relief).

[8] Respondents do not press in this appeal the arguments they raised below regarding Petitioners' lack of standing or laches. Although Respondents maintain that none of Petitioners adequately pled standing, Respondents concede that an electoral candidate *could* have standing to challenge the statute. In addition, Respondents believe it is not in the public interest for the issues raised by Petitioners to be left open for future litigation. *See Estate of Wilner*, 127 A.3d 1286 (Pa. 2014) (standing in Pennsylvania is nonjurisdictional and therefore waivable). Similarly, given that the application of laches is a fact- and petitioner-specific question "to be determined case by case," *Kelly*, 240 A.3d 1255, 1257 (Wecht, J., concurring), Respondents withdraw that defense.

The Commonwealth Court also held that Petitioners' claims were not time-barred under Section 13(3) of Act 77, which states that "[a]n action under [Section 13(2)]," *i.e.*, "a challenge to … the constitutionality of [mail-in voting]," "must be commenced within 180 days of [October 31, 2019]." Act 77, § 13(2), (3). According to the Commonwealth Court, Section 13(3) did not set a time limit on when constitutional challenges could be brought. Instead, the court read Section 13(2) (Act 77 grants "[t]he Pennsylvania Supreme Court … exclusive jurisdiction to hear a challenge to … the constitutionality of [mail-in voting]") and 13(3) together as a single provision, namely, a time-limited grant of exclusive jurisdiction to the Supreme Court. Because Petitioners' claims had been filed long after Section 13(3)'s 180-day period had expired, the Commonwealth Court concluded it had jurisdiction to determine Petitioners' constitutional challenge. (Appendix A at 45-46.) The court further opined that time limitations on constitutional challenges to statutes are categorically impermissible. (*Id.* at 45, 47-48.)

Reaching the merits of the constitutional claims, a three-judge majority of the en banc panel (Senior Judge Leavitt and Judges McCullough and Fizzano Cannon) held "that Act 77 violates Article VII, Section 1 of the Pennsylvania Constitution." (Appendix A at 49.) The majority did not base this conclusion on its own analysis of the text or structure of the current Constitution. The majority

also did not examine how the language on which it relied was understood at the time it was added to the Constitution. Instead, the majority held that it was "bound" by two century-old cases, *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election of Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924), decided under previous versions of the Pennsylvania Constitution. (Appendix A at 49.)

Notably, the majority recognized that "[n]o-excuse mail-in voting makes the exercise of the franchise more convenient," and that millions of Pennsylvanians had successfully used mail-in voting in four elections since Act 77 was enacted. (Appendix A at 49.) But the majority concluded that the court's hands were tied: *Chase* and *Lancaster City* required holding that the current Pennsylvania Constitution prohibits the General Assembly from allowing every Pennsylvanian to vote by mail. The court further noted that it could not consider any argument that *Chase* and *Lancaster City* be overruled;[9] such an argument "can be raised only to the Pennsylvania Supreme Court." (Appendix A at 26 n.23.)[10]

---

[9] The majority opinion states that "[t]he Democratic Intevenors" argued "that *Chase* and *Lancaster City*" should, if necessary, "be overruled." (Appendix A at 26 n.23.) In fact, Respondents made the same argument. (*See* R.200a (maintaining that *Chase* and *Lancaster City* "should not be followed" because, among other reasons, "they were wrong at the time they were decided … and, if anything, are even more erroneous under current jurisprudence governing constitutional challenges to duly enacted statutes").)

[10] Having held Act 77 invalid under the Pennsylvania Constitution, the Commonwealth Court granted Petitioner McLinko's application for summary relief in full, denied Respondents' cross-application, and dismissed Respondents' preliminary objections as moot. (R.1906a-R.1907a.) With respect to the *Bonner* case, the Commonwealth Court observed that its holding

Writing in dissent, Judge Wojcik, joined by Judge Ceisler, vigorously disagreed that no-excuse mail-in voting violated Article VII of the Pennsylvania Constitution. In the dissent's view, the majority had not paid sufficient heed to the fundamental rule that a statute is not to be "deemed unconstitutional unless it clearly, palpably, and plainly violates the Constitution." (Appendix C at 5.) Petitioners had failed to carry their heavy burden because, *inter alia*, "article VII, section 4 [of the Constitution] by its plain language specifically empowers the General Assembly to provide for … casting a no-excuse mail-in ballot." *Id.* at 10. *Chase* and *Lancaster City* did not control the constitutionality of Act 77, Judge Wojcik opined, and the majority erred in treating those decisions as binding. (Appendix C at 4-9.)

D. Statement of Orders Under Review

The Orders under review are the Commonwealth Court's Orders dated January 28, 2022, declaring Act 77 void *ab initio* under the Pennsylvania Constitution and denying Respondents' applications for summary relief.

---

under the Pennsylvania Constitution obviated the need to "address [the *Bonner*] Petitioners' claims under the United States Constitution." (Appendix B at 3 n.5, 8 n.12.) The court denied the *Bonner* Petitioners' request for injunctive relief, nominal damages, attorneys' fees and costs. (*Id.* at 3 (injunctive relief was unnecessary given award of declaratory relief); *id.* at 8 n.12.) Finally, the court denied Respondents' cross-application for summary relief. (R.1908a-R.1909a.)

VI. SUMMARY OF ARGUMENT

The Commonwealth Court lacked jurisdiction to adjudicate Petitioners' constitutitional challenge to Act 77's mail-in voting provisions. Putting aside that threshold defect, the court erred in holding Petitioners' claims to be timely and further erred in determining that the Pennsylvania Constitution prohibited the General Assembly's bipartisan election reforms.

First, Act 77 unambiguously states that "[t]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or render a declaratory judgment concerning the constitutionality of," *inter alia*, the statute's mail-in voting provisions. To avoid the plain meaning of this jurisdictional limitation, the Commonwealth Court relied on a distinct sub-section, which requires that "[a]n action [challenging the constitutionality of mail-in voting] must be commenced within 180 days of [October 31, 2019,] the effective date of this section." By their clear terms, the two sub-sections (1) grant this Court exclusive jurisdiction over constitutional challenges to mail-in voting and (2) require any constitutional challenges to be brought by April 28, 2020. But the Commonwealth Court conflated the two sub-sections into a single provision: a grant of exclusive jurisdiction that expired after only 180 days. That interpretation contravenes the text, structure, and purpose (as confirmed by legislative history) of the statute. The Commonwealth Court acted without jurisdiction.

Second, due to the same misreading, the Commonwealth Court failed to recognize that Petitioners' claims—which were filed well over a year after April 28, 2020—were time-barred. The court also held, erroneously, that any time limitation on facial constitutional challenges to a statute would itself be unconstitutional. But that is not the law. The court's holding relies on decisions involving entirely different arguments and circumstances; those decisions have no bearing on this case. The General Assembly had good reasons for requiring any facial constitutional challenges to Act 77 to be brought within 180 days of its enactment, and Petitioners here could easily have filed their actions within this period. Having failed to do so, their claims must be dismissed.

Finally, Petitioners' constitutional claims fail on the merits. To carry their heavy burden, Petitioners must show that the Pennsylvania Constitution "clearly, palpably, and plainly" prohibits the General Assembly from authorizing mail-in voting. But Petitioners do not come close to clearing this bar. There is nothing in the text or structure of the current Constitution that prohibits the General Assembly from providing for the return of ballots by mail, let alone does so clearly, palpably, and plainly. The statute challenged here is not alleged to infringe any individual rights or violate the separation of powers between the branches of government.

To the contrary, Act 77 indisputably makes the fundamental right to vote more accessible to all Pennsylvanians. Petitioners' argument relies on a tortured

reading of the Pennsylvania Constitution that would give the Legislature authority to prescribe methods of voting in one section, while sneaking an in-person voting requirement into a different section that does not deal with methods of voting at all. The only basis for Petitioners' contention is two century-old cases. But as two Commonwealth Court judges recognized, those cases are inapplicable because they dealt with long-since-replaced versions of the Constitution; moreover, they were wrongly decided at the time, as confirmed by high-court decisions interpreting near-identical provisions in the constitutions of other states. This Court should put an end, once and for all, to the theory that an obscure phrase in the Pennsylvania Constitution somehow forbids the General Assembly from adopting reforms already in place in most other states—and from making modern, secure, and accessible methods of voting available to all Pennsylvania voters.

VII. ARGUMENT

A. Petitioners Cannot Maintain Their Claims Under Act 77's Statutory Structure for Judicial Review

The General Assembly created a clear structure for judicial review of Act 77. That structure precluded the Commonwealth Court from exercising jurisdiction over Petitioners' facial constitutional challenge, and it imposed a constitutionally permissible time limit—which Petitioners grossly exceeded—for bringing such a challenge.

1. Section 13(2) of Act 77 Vests This Court With Exclusive Jurisdiction Over Petitioners' Facial Constitutional Challenge to Mail-in Voting; Section 13(3) Separately Required Facial Constitutional Challenges to Be Brought by April 28, 2020

Under the plain language of Section 13 of Act 77, the Commonwealth Court did not have jurisdiction to decide Petitioners' claims.

Section 13 provides in pertinent part:

> (1) This section applies to … the following provisions of the act: … (xxi) Article XIII-D [and other provisions of Act 77 authorizing no-excuse mail-in voting].
>
> (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 of the effective date of this section [*i.e.*, by April 28, 2020].

Act 77, § 13 (emphasis added). Section 13 indisputably applies here. Petitioners have asserted facial constitutional challenges to provisions of Act 77 listed in

Section 13(1). (*See* R.485a (seeking a declaration that "Article XIII-D [of Act 77] violates the Pennsylvania Constitution"); R.278a-R.279a, R.284a (same).) Section 13(2) grants the Pennsylvania Supreme Court exclusive jurisdiction to adjudicate facial constitutional challenges to these provisions. Petitioners, however, brought their challenges in the Commonwealth Court. Because this Court had and has exclusive jurisdiction over Petitioners' claims, the Commonwealth Court's Orders are void for lack of subject-matter jurisdiction.[11]

The Commonwealth Court determined that "Act 77 gave the Pennsylvania Supreme Court exclusive jurisdiction to hear challenges to the enumerated provisions of Act 77 for [only] the first 180 days after enactment. Thereafter, such constitutional challenges reverted to this Court in accordance with the Judicial Code." (Appendix A at 46.) But that conclusion cannot be reconciled with the plain language of Section 13, which is "[t]he best indication of legislative intent." *Crown Castle NG E. LLC v. Pa. Pub. Util. Commn.*, 234 A.3d 665, 674 (Pa. 2020); *accord* 1 Pa.C.S. § 1921. The clear text of Section 13(2) and Section 13(3), as well as the overall structure of Section 13, establishes that Section 13(3) imposes a time

[11] Respondents did not challenge the Commonwealth Court's jurisdiction in the proceedings below. Nonetheless, it is axiomatic that "[j]urisdiction of subject matter can never attach nor be acquired by consent or waiver of the parties." *McGinley v. Scott*, 164 A.2d 424, 428 (Pa. 1960).

limitation on when facial constitutional challenges to Act 77 may be brought, and does not alter Section 13(2)'s grant of exclusive jurisdiction to this Court.

As its plain text makes clear, Section 13(2) does not include any language limiting or modifying the length of this Court's exclusive jurisdiction over constitutional challenges to Act 77. Section 13(3), by contrast, does contain durational language, but Section 13(3) is expressly not addressed to subject-matter jurisdiction. Instead, Section 13(3) states that an "*action* under paragraph (2) must be *commenced* within 180 days" of October 31, 2019. Act 77, § 13(3) (emphasis added).

The phrases "action under paragraph (2)" and "must be commenced" each demonstrate that Section 13(3) operates as an independent time bar on lawsuits rather than limiting the length of this Court's exclusive jurisdiction. *Id.* An "action" means a lawsuit; it does not refer to (or otherwise limit) the concept of jurisdiction. *See Bayview Loan Servicing, LLC v. Lindsay*, 185 A.3d 307, 313 (Pa. 2018) ("action" means "a judicial proceeding … in which the plaintiff seeks some form of relief"). The only "action" identified in Section 13(2) is a "challenge to … the constitutionality of" Act 77. Act 77, § 13(2). Thus, an "action under paragraph (2)" is a lawsuit asserting constitutional challenges to Act 77. *Id.* § 13(3).

Moreover, the phrase "must be commenced" "mirrors traditional statute of limitation language." *Dubose v. Quinlan*, 173 A.3d 634, 647 (Pa. 2017); *see*

McCreesh v. City of Philadelphia, 888 A.2d 664, 671 (Pa. 2005) ("our legislature has enacted statutes of limitations that require *actions* to be '*commenced*' within certain time-frames depending on the nature of the underlying claims" (emphasis added)). Put simply, the phrase "must be commenced" cannot reasonably be read as referring to exclusive jurisdiction. Actions and lawsuits are commenced; jurisdiction is exercised.

Section 13's division into subsections further confirms that Section 13(3) is not a time limit on the grant of exclusive jurisdiction in Section 13(2). If the General Assembly had intended to give this Court exclusive jurisdiction for only 180 days (with jurisdiction over constitutional challenges reverting to the Commonwealth Court on day 181), it would have drafted Section 13(2) to say: "For 180 days following the effective date of this statute, [t]he 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)." Act 77, § 13(2) (underlined text added). It did not do so, and nothing in Section 13 indicates that it meant to do so. By dividing Sections 13(2) and 13(3) into separate "subsection[s]," the legislature made clear that the provisions were "distinct and separate." *See Commonwealth v. DeBellis*, 165 A.2d 77, 78 (Pa. 1960).

2. Petitioners' Facial Constitutional Challenge Is Foreclosed by Section 13(3)'s Statutory Time Bar

As discussed above, Section 13(3) of Act 77 requires that certain constitutional challenges to the Pennsylvania Election Code, including challenges to Act 77's mail-in voting provisions, "must be commenced within 180 days" of October 31, 2019. Section 13(3), Act 77. Indeed, irrespective of whether Section 13(3) limits the duration of this Court's exclusive jurisdiction, it is indisputably *also* a time limit on when claims can be brought, because it "require[s] actions to be 'commenced' within [a] certain time-frame[]." *McCreesh*, 888 A.2d at 671.

The Petitions raise facial constitutional challenges to provisions identified in Section 13(1), and thus are paradigmatic examples of actions that were required to be filed by April 28, 2020. That date had long since come and gone when Petitioner McLinko sued on July 26, 2021, and the *Bonner* Petitioners sued on August 31, 2021. Therefore, their claims must be dismissed as untimely.

3. Legislative History Confirms that Section 13 Contains an Exclusive Jurisdiction Provision *and* a Distinct Time Limitation on When Facial Constitutional Claims Can Be Brought

The legislative history of Act 77, the mischief to be remedied, and the occasion and necessity of Act 77 all confirm that the Commonwealth Court misconstrued Section 13. *See* 1 Pa.C.S. § 1921(c)(1), (3), (6), (7).

The legislative history of Act 77 confirms that Section 13(2) is a standalone exclusive-jurisdiction provision and that Section 13(3) is a separate time bar on the assertion of claims. During the General Assembly's consideration of Act 77, a member stated her "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." Government Committee Chair Everett agreed: "[T]he section that you mentioned … gives the Supreme Court of Pennsylvania jurisdiction." *See* 2019 Pa. Legislative Journal—House 1740 (Oct. 29, 2019).

Later in the same exchange, Committee Chair Everett confirmed that Section 13(3) is a time bar that was designed to avoid exactly the sort of harm created by Petitioners' claims here, *i.e.*, prejudicial delay: "[T]here is also a provision that the desire is … that suits be brought within 180 days so that we can settle everything before [Act 77] would take effect." *Id.* In other words, Section 13(3) was included in Act 77 to ensure that the legislature's grand bipartisan statute would either stand

or fall as a whole, and that if it were to fall, it would fall *before being used in an election*. *See id.* The General Assembly was no doubt aware that overturning an election statute after the public had come to rely on it would be disruptive, costly, and potentially disenfranchising. (*See* R.128a-133a ¶¶ 9-26.) It clearly wanted to discourage precisely the gamesmanship that has occurred in this case, that is, politicians waiting to see the political results of Act 77's various reforms—in particular, the net effect of permitting no-excuse mail-in voting while eliminating straight-ticket voting—before deciding whether to challenge the statute.

There appears to be no reason—certainly the Commonwealth Court did not identify one—why the General Assembly would want this Court to determine facial constitutional challenges brought in the first 180 days of Act 77, but then pass the jurisdictional baton to the Commonwealth Court to make the same types of constitutional decisions later. Such a scheme would directly undermine the manifest purpose of Sections 13(2) and (3)—to ensure that any constitutional challenge to Act 77 was finally resolved as quickly as possible. Indeed, such a rule would not just fail to prevent dilatory filings; it might cause them, inviting litigants to forum shop by waiting to file until the jurisdictional changeover date. That would be an absurd result.

4. The General Assembly Has the Power to Set Deadlines for Challenges to Act 77, Including Actions Bringing Facial Constitutional Claims

As the U.S. Supreme Court has observed, a "constitutional claim can become time-barred just as any other claim can. Nothing in the Constitution requires otherwise." *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983) (collecting cases). Indeed, courts across the country have held that time limitations like the one in Act 77 are constitutional and consistent with due process. *See*, *e.g.*, *Dugdale v. U.S. Cust. & Border Protec.*, 88 F. Supp. 3d 1, 8 (D.D.C. 2015) (upholding federal law requiring constitutional challenges to certain statutory provisions, regulations, or procedures to be filed within 60 days of implementation); *Greene v. Rhode Island*, 398 F.3d 45, 53-55 (1st Cir. 2005) (rejecting due process challenge to 180-day time limitation for bringing constitutional challenges to federal statute); *Native Am. Mohegans v. United States*, 184 F. Supp. 2d 198, 202 (D. Conn. 2002) (holding that statutory 180-day time limitation for bringing constitutional challenges to statute "does not violate due process because plaintiffs' constitutional challenges could have been brought within 180 days of" statute's enactment).

The Commonwealth Court wrongly concluded that "this precedent is irrelevant," stating that none of the cases "stand for the proposition that a legislature can prevent judicial review of a statute, whose constitutionality is

challenged, with a statute of limitations of any duration." (Appendix A at 45.) As an initial matter, statutory time bars—including the one in Section 13(3) of Act 77—do not *prevent* judicial review of a statute; they *limit* the period within which a plaintiff can bring a claim. "Statutes of limitations [embody] that principle of the common law which is expressed in the maxim *vigilantibus non dormientibus subveniunt leges*," *i.e.*, the laws serve those who are vigilant, not those who are sleeping. *Forster v. Cumberland Val. R. Co.*, 23 Pa. 371, 371 (1854). And the cases identified above undeniably stand for the proposition that a legislature *can* limit the time for facial challenges of a statute's constitutionality. For example, in *Greene*, the First Circuit Court of Appeals applied a statute of limitations that stated: "[A]ny action to contest the constitutionality of this subchapter shall be barred unless the complaint is filed within one hundred eighty days of September 30, 1978." 398 F.3d at 47 (quoting 25 U.S.C. § 1711). The court held that "Section 1711 bars the constitutional claims put forth by the [plaintiffs] in this suit." *Id.* at 53. Section 13(3) of Act 77 likewise bars Petitioners' constitutional claims here.

To the extent the application of Section 13(3) presents any constitutional concern, it is with respect to as-applied challenges to Act 77's constitutionality based on events that take place after the 180-day period ends. A holding that such challenges can be time-barred before they are ripe could raise due process

concerns. *Turner v. People of State of New York*, 168 U.S. 90, 94 (1897) (statutory time bars must "provide[] a reasonable time, taking into consideration the nature of the case, … for bringing an action … before the bar takes effect"); 51 Am. Jur. 2d *Limitations of Actions* § 33 (2022). If and when such claims arise, a court could plausibly determine that Section 13(3) cannot apply to these challenges. But that is not this case; the challenge in this case is facial, not as-applied, and Petitioners could have brought it on the date the statute was enacted. *Kelly*, 240 A.3d at 1256 ("Petitioners' … facial constitutional challenge … was ascertainable upon Act 77's enactment."); *see Phila. Ent'mt & Dev. Partners & City of Phila.*, 937 A.2d 385, 392 n.7 (Pa. 2007) ("facial challenges are … ripe upon mere enactment of the ordinance"). Accordingly, the time bar raises no due process concerns in this case.

5. The Political Question Doctrine and "Void *Ab Initio*" Case Law Have No Bearing on Whether to Enforce Section 13(3) of Act 77

In refusing to apply Section 13(3), the Commonwealth Court improperly relied on the political question doctrine and this Court's decision in *Glen-Gery Corp. v. Zoning Hearing Board of Dover Township*, 907 A.2d 1033 (Pa. 2006), neither of which applies here. First, the Commonwealth Court cited two decisions by this Court, which rejected the argument that certain constitutional claims were nonjusticiable under the political question doctrine, for the proposition that "[t]he General Assembly cannot insulate Act 77 from judicial review." (Appendix A at

47 (citing *William Penn Sch. Dist. v. Pa. Dept. of Educ.*, 170 A.3d 414 (Pa. 2017), and *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013)). But unlike the political question doctrine, Section 13 of Act 77 is not a judicially created justiciability doctrine immunizing from review questions "entrusted exclusively and finally to the political branches of government for 'self-monitoring.'" *Robinson Township*, 83 A.3d at 928; *accord William Penn*, 170 A.3d at 438 (same). Instead, Section 13 merely ensures that untimely claims do not cause widespread prejudice and disenfranchisement or reward political gamesmanship.

Second, relying on *Glen-Gery*, the Commonwealth Court incorrectly concluded that if mail-in voting is unconstitutional, then all of Act 77, including Section 13(3), is void *ab initio*. *Glen-Gery* is not on point. That case held that "a claim alleging a *procedural* defect affecting *notice or due process rights* in the enactment of an ordinance may be brought notwithstanding" the claimant's failure to comply with a statutory time limitation. 907 A.2d at 1035 (emphasis added). That conclusion makes perfect sense: Basic principles of due process require that, before a limitations period can bar a challenge to a law, the claimant must be given constitutionally adequate notice of the law's enactment.

But there is no allegation that Act 77 suffers from any such procedural defect. *Cf. Glen-Gery*, 907 A.2d at 1044. Nor could there be. Indeed, many of the *Bonner* Petitioners *voted to enact Act 77*, and Petitioner McLinko has been

personally involved in administering the law since it was enacted. Instead, Petitioners' facial challenge constitutes a substantive attack on only the mail-in voting provisions of Act 77—one portion of a multi-faceted statutory overhaul that revised numerous provisions in the Election Code. Petitioners challenged neither the enactment of Act 77 as a whole nor the many other changes made by Act 77.[12] *Glen-Gery*'s holding simply has no application in a case like this.

There is no dispute that Petitioners could have brought their claims in accordance with Section 13(3)'s time limitation. They failed to do so. Accordingly, their claims are barred.

6. This Court's Non-Precedential Order in *Delisle* Does Not Dictate a Different Interpretation of Section 13

The Commonwealth Court relied on a *per curiam* order in *Delisle v. Boockvar*, 234 A.3d 410 (Pa. 2020), to support both its jurisdiction and its conclusion that Section 13 contains no time limitation on facial constitutional challenges. That reliance was misplaced. In *Delisle*, this Court transferred a challenge to Act 77 to the Commonwealth Court because "[t]he Petition for Review was filed outside of the 180-day time period from the date of enactment of Act []77 during which this Court had exclusive jurisdiction to decide specified

[12] Significantly, although Act 77 contains a non-severability provision connecting the fate of certain specified provisions, Section 13 is *not* one of those nonseverable provisions. *See* Act 77, § 11. That is because the entire purpose of Section 13(3) is to foreclose untimely challenges to the constitutionality of various substantive provisions of the statute.

constitutional challenges to" Act 77. *Id.* at 410-11. *Delisle* does not control this case for at least two reasons.

First, *Delisle* involved an as-applied challenge to Act 77. The *Delisle* petitioners did not assert that Act 77 was facially unconstitutional (as Petitioners claim here). Instead, the *Delisle* petitioners argued that, because of the pandemic and mail delays, Act 77's deadline for submission of mail-in ballots would have the effect of violating Pennsylvania's Free and Equal Elections Clause and Equal Protections Guarantees on an as-applied basis. Petition for Review ¶¶ 65-101, *Delisle v. Boockvar*, No. 95 MM 2020 (Pa. May 25, 2020). The distinction between facial and as-applied challenges is significant, as the former would be ascertainable immediately upon Act 77's enactment (and could easily be brought before the 180-day time bar ran), while the latter could conceivably arise after 180 days.

Second, because *Delisle* is a *per curiam* order, its "legal significance … is limited to setting out the law of the case. This Court has made it clear that *per curiam* orders have no *stare decisis* effect." *Commonwealth v. Thompson*, 985 A.2d 928, 937 (Pa. 2009) (collecting cases). And, in fact, another, more recent *per curiam* order from this Court characterized Section 13(3) as a time bar on constitutional challenges brought after 180 days of Act 77's effective date. *See Kelly*, 240 A.3d at 1257 n.4 (Section 13(3) "provid[es] for a 180-day period in

which constitutional challenges may be commenced"). For all of these reasons, Respondents respectfully submit that *Delisle* provides no basis for refusing to apply the unambiguous language of Section 13, which divested the Commonwealth Court of jurisdiction over Petitioners' claims and—separately and in any event—barred those claims as untimely.[13]

B. The Commonwealth Court Erred in Concluding That Act 77's Mail-In Voting Provisions Violate the Pennsylvania Constitution

Quite apart from the statutory time bar, Petitioners failed to carry their heavy burden of demonstrating that Act 77's mail-in voting provisions are unconstitutional.

1. Mail-in Voting, Which Furthers the Goals of the Free and Equal Elections Clause, Is Constitutional

In challenging an act of the General Assembly under the Pennsylvania Constitution, Petitioners assume an extraordinarily heavy burden. All "powers not expressly withheld from the [Pennsylvania] General Assembly inhere in it." *Stilp v. Commonwealth*, 974 A.2d 491, 494–95 (Pa. 2009). As this Court has warned: "The Constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument, we become ourselves the aggressors,

[13] Because the Commonwealth Court lacked subject-matter jurisdiction over Petitioners' claims, the Court should vacate the decisions below. This Court, however, indisputably has jurisdiction over Petitioners' claims. Accordingly, Respondents respectfully request that the Court proceed to determine whether Petitioners' claims were timely under Section 13(3) of Act 77 and whether the Pennsylvania Constitution prohibits mail-in voting.

and violate both the letter and spirit of the organic law as grossly as the legislature ever could." *Id.* at 495 (internal quotation marks omitted).

Accordingly, "[i]t is foundational that all legislation duly enacted by the General Assembly enjoys a strong presumption of validity." *Commonwealth v. Bullock*, 913 A.2d 207, 211 (Pa. 2006). The burden to overcome this presumption is "very heavy." *Stilp*, 974 A.2d at 495. "[A] statute will not be declared unconstitutional unless it *clearly*, *palpably*, and *plainly* violates the Constitution.'" *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 393 (Pa. 2005) (emphasis in original). Consequently, "[a]ll doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster." *Id*.

If anything, that deference to the legislature applies with even greater force here. Petitioners do not claim Act 77 invades any constitutional right or violates the separation of powers among the coordinate branches of government. Instead, Petitioners ask this Court to abridge the legislature's exercise of its core powers to enact policy in the public interest—here, the power to enact procedures making exercise of the franchise more convenient and accessible for all Pennsylvania voters. *See Commonwealth v. Torsilieri*, 232 A.3d 567, 596 (Pa. 2020) ("[W]hile courts are empowered to enforce constitutional rights, they should remain mindful that 'the wisdom of public policy is one for the legislature ….'"). In fact, far from

violating any constitutional right, Act 77 directly underwrites one of the core guarantees of the Constitution's Free and Equal Elections Clause: By ensuring that voters who live far from their polling places or have difficulty taking time off work on election day—or who are at high risk from COVID-19—are afforded equal access to the franchise, Act 77's mail-in voting procedures ensure that "all aspects of the electoral process, to the greatest degree possible, [are] kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802, 804 (Pa. 2018) (construing PA. CONST. art. I, § 5). In sum, it is difficult to imagine a legislative act entitled to more judicial deference than the one at issue here.

2. Petitioners' Interpretation Contravenes the Text, Structure, and History of the Pennsylvania Constitution

In analyzing a provision of the Pennsylvania Constitution, this Court examines "at least the following four factors: 1) text of the constitutional provision; 2) history of the provision including Pennsylvania case-law; 3) related case-law from other states; and 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991); *accord Robinson Twp.*, 83 A.3d at 944.

This Court's "ultimate touchstone is the actual language of the constitution itself." *Yocum v. Commonwealth, Pa. Gaming Control Bd.*, 161 A.3d 228, 239 (Pa. 2017) (internal quotation marks omitted). The court seeks the "ordinary, natural interpretation the ratifying voter would give" to those provisions, and avoids reading them "in a strained or technical manner." *Zemprelli v. Daniels*, 436 A.2d 1165, 1170 (Pa. 1981) (internal quotation marks omitted). "If the words of a constitutional provision are not explicit, [this Court] may [look] to … the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history." *League of Women Voters*, 178 A.3d at 802.

Petitioners' challenge to Act 77's mail-in voting provisions rests on two provisions of the Pennsylvania Constitution. Article VII, § 1, entitled "Qualifications of electors," prescribes the age, citizenship, and residency requirements that a person must satisfy to be deemed eligible to register and vote in Pennsylvania elections. Article VII, § 14, entitled "Absentee voting," *requires* that "[t]he Legislature … provide a manner in which qualified voters who may, on the occurrence of any election, be absent from the municipality of their residence [for certain specifically defined reasons]," or "unable to attend a polling place" for reasons of illness, disability, or religious observance, may vote. As shown below,

Petitioners' attack on Act 77 is belied by the plain language of these provisions, their history, and the structure of Article VII as a whole.

(a) Article VII, § 1 Addresses *Who* May Vote, Not *How* They May Vote

(i) The Text and Structure of Article VII, § 1—and of Other Constitutional Provisions—Confirm That § 1 Is a "Qualifications" Clause, Not a "Methods" Clause

As its title indicates, Section 1 of Article VII addresses only the criteria for voting eligibility in Pennsylvania. It provides, in its entirety:

> Qualifications of electors.
>
> 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, 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.

PA. CONST. art. VII, § 1 (underlining added).

Based on its plain language, structure, and title, the meaning of this provision is clear. It limits the right to vote in Pennsylvania elections to citizens of a certain age who have been a U.S. citizen for at least a month. It also prescribes residency requirements—namely, the prospective voter must have resided in Pennsylvania at least 90 days immediately preceding the election and have resided in the specific election district in which she seeks to vote for at least 60 days. Article VII, § 1 also provides for cases in which a person was qualified to vote in an election district but then moves her residence to a different Pennsylvania election district within 60 days of an election. That person is not eligible to vote in her new district's electoral contests (because she does not satisfy the 60-day residency requirement), so § 1 allows her to vote in her old district's contests.

As the authority interpreting "residence" makes clear, the qualifications set forth in § 1 do *not* include any requirement of physical presence at the time of the election; a person may maintain a "residence" in a given state and election district even while she is physically absent from them. The constitutional concept of residence is synonymous with the concept of domicile; it refers to the elector's "permanent or true home," the place to which, when she engages in temporary departures, she "intends to return." *In re Case of Fry*, 71 Pa. 302, 309–10 (1872);

accord In re Stack, 184 A.3d 591, 597 (Pa. Commw. Ct. 2018) (citing *In re Lesker*, 105 A.2d 376, 380 (Pa. 1954)). This definition is consistent with the meaning of the term "residence" as it is used in the Election Code. *See* 25 P.S. § 2814.

Indeed, the other provision on which Petitioners rely (Article VII, § 14) confirms that physical absence, without an intention to establish a new permanent abode, does not defeat residence. That provision mandates that the Legislature establish a means for certain "qualified electors" who are "absent from the municipality of their residence" on election day to vote in their election district's electoral contests, and to provide "for the return and canvass of their votes *in the election district in which they respectively reside*." PA. CONST. art. VII, § 14(a) (emphasis added).

Thus, nothing in the text or structure of Article VII, § 1 imposes restrictions on the *method* by which voters may vote. Rather, that constitutional provision is addressed to the subject matter identified in its title: it establishes the age, citizenship, and durational-residency "qualifications" to vote. Put differently, the provision addresses *who* may vote in a given election, not *how* they may vote.

(ii) The Phrase "Offer to Vote" Does Not Sneak a Restriction on Voting Methods into a Provision Expressly Addressed Solely to Who May Vote

Petitioners, however, purport to divine an implicit restriction on how people may vote from the third qualification enumerated in § 1—namely, the requirement

that a prospective voter "shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election." PA. CONST. art. VII, § 1. According to Petitioners, the modifying clause "where he or she shall offer to vote" (which describes only the election district in which the voter must *reside*) should actually be understood as an across-the-board, unyielding constitutional nullification of the Legislature's power to allow any qualified electors to vote other than in person.

Petitioners' interpretation is precisely the sort of "strained" construction of constitutional text that Pennsylvania courts are required to avoid. *Zemprelli*, 436 A.2d at 1170. As the late Justice Antonin Scalia remarked, those who make our law do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001). If the framers of the Pennsylvania Constitution had intended to limit the voting methods that the Legislature could establish, they could easily have done so—and presumably would have done so in a constitutional provision addressed to *how* people vote, rather than by indirect implication from use of the word "offer" in the third subsection of a separate provision addressed only to *who* may vote.

In fact, the Pennsylvania Constitution actually *does* contain a separate provision expressly addressing the "method" of voting. Article VII, § 4, which is entitled "Methods of elections; secrecy in voting," states that "[a]ll 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). There can thus be no doubt about where the Pennsylvania Constitution speaks to these issues or what it says about them. The plain words of the constitutional provision specifically addressed to voting methods *expressly give the Legislature plenary power over such methods*, subject only to the requirement that any method authorized by the Legislature preserve the secrecy of the vote.[14] The existence of this separate provision precludes Petitioners' interpretation of Article VII, § 1. *See Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1126 (Pa. 2014) ("the Constitution [should be read as] an integrated whole").

Declining to read Article VII, § 4 as written, or as part of a cohesive constitutional plan to govern voting, the Commonwealth Court determined that "such other method as may be prescribed by law" (a) refers only to voting machines used at polling places and (b) incorporates a restriction on voting methods purportedly buried in § 1's enumeration of voter qualifications. (*See* Appendix A at 29-30.) Neither conclusion is tenable, particularly under the rules of construction requiring all interpretive doubts to be resolved in favor of

[14] In the case of Act 77's mail-in voting procedures, the secrecy requirement is met through the use of "secrecy envelopes" in which voters must insert their completed ballots. *See* 25 P.S. § 3150.16(a); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 353, 378–80 (Pa. 2020) (discussing PA. CONST. art. VII, § 4).

upholding Act 77. Article VII, § 4 is unambiguously broad. If its framers had intended to limit the General Assembly's authority over methods to "voting machines," or to "in-person" voting methods, they could easily have done so. They did not. *See Solebury Twp. v. Dept. of Envt'l Prot.*, 928 A.2d 990, 1005 (Pa. 2007) (broad language should be given broad construction, particularly where public policy favored such a construction); *accord United States v. IBM Corp.*, 517 U.S. 843, 861 (1996) (rejecting construction of constitutional provision that "cannot be squared with the broad language of the Clause").

Further, it is well settled that the term "prescribed by law" refers to statutory law. *See Commonwealth v. Carcia*, 517 A.2d 956, 957-58 (Pa. 1986) (construing constitutional phrase "imposed by law" to refer to legislative enactments); *D.C. v. Georgetown & T. Ry. Co.*, 41 F.2d 424, 426 (D.C. Cir. 1930) ("'Prescribed by law,' when used in Constitutions, generally means prescribed by statutes."). Had the framers intended § 4 to bear the meaning suggested by the Commonwealth Court, the provision would have been written differently, *e.g.*: "such other method as may be prescribed by law, *subject to the limitations [purportedly] set forth elsewhere in this Article*."

Article VII, § 14—the other provision on which Petitioners rely—further undermines their interpretation of § 1. According to Petitioners' reading of § 1, a person cannot be a qualified elector unless she votes in person in her election

district. But that interpretation cannot be reconciled with the plain language of § 14, which provides that certain "qualified electors" must be given "a manner" of voting from outside their election district when they are "absent from the municipality of their residence" on Election Day. PA. CONST. art. VII, § 14. If Petitioners' reading of § 1 were correct, § 14 would be oxymoronic because a person voting other than in person in her election district could, ipso facto, *never* be a "qualified voter." In contrast, if the language of § 1 is given its natural meaning, § 14 makes perfect sense: The Legislature must provide certain categories of "qualified voters"—that is, voters who satisfy the age, citizenship, and durational-residency requirements of § 1—with "a manner" of voting absentee. PA. CONST. art. VII, § 14. *See Commonwealth ex rel. Paulinski v. Isaac*, 397 A.2d 760, 766 (Pa. 1979) (when deciding between two interpretations of a constitutional provision, courts should adopt the interpretation that avoids contradictions and difficulties in implementation).

The latter interpretation of § 1 gives meaning to all its terms. Each absentee voter under § 14 must "have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election," just as he or she must "have resided in the State ninety (90) days immediately preceding the election." PA. CONST. art. VII, § 1. In other words, that absentee voter cannot "offer to vote" in an election district other than the one in which her residence is

located. For example, an elector residing in Philadelphia cannot vote for the commissioners of Allegheny County, just as an elector residing in one election district cannot vote in the judge-of-elections race of another election district. Indeed, the language of Section 14 expressly recognizes and complies with this requirement. *See* PA. CONST. art. VII, § 14 (providing that the Legislature must provide "for the return and canvass of [absentee electors'] votes *in the election district in which they respectively reside*" (emphasis added).) *See In re Canvass of Absentee Ballots of 1967 Gen. Election*, 245 A.2d 258, 264 (Pa. 1968) (recognizing that the clear purpose of this constitutional language is to ensure "the counting of each [absentee] vote … in such a manner that the computation appears on the return *in the district where it belongs*" (emphasis added)).

(iii) The History of the "Offer to Vote" Provision, as Well as Evidence of How It Was Commonly Understood at the Time of Its Adoption, Confirms That the Provision Does Not Limit Voting Methods

The history of the "offer to vote" language, which first appeared in the 1838 Pennsylvania Constitution, supports the same conclusion. Before 1838, the Constitution imposed no limitation on the physical location where an elector could complete his ballot, leaving that issue to the General Assembly. *Chase*, 41 Pa. at 417. Exercising that authority in 1813, the General Assembly permitted Pennsylvanians in military service to vote "at such place as may be appointed by

the[ir] commanding officer," so long as they were more than two miles from their usual polling place at the time of the election. Act of Mar. 29, 1813, ch. 152, 2012-2013 Pa. Laws 213.

The 1838 Constitution left unchanged two of the three sections in Article III of the 1790 Constitution—notably including the section addressing voting methods. *Compare* PA. CONST. of 1790, art. III, §§ 2-3, *with* PA. CONST. of 1838, art. III, §§ 2-3. But the 1838 Constitution amended the list of voter qualifications in Section 1. Voters now had to establish residency not only in Pennsylvania, but also in a particular election district: To "enjoy the rights of an elector," a citizen had to "hav[e] resided in the State one year, and in the election district where he offers to vote, ten days immediately preceding [the] election." PA. CONST. of 1838, art. III, § 1.

The introduction of this election-district residency requirement reflected the growing use of registry laws, "the main object of which was to identify the legal voter, before the election came on," and to restrict him to voting "in his appropriate ward or township." *Chase*, 41 Pa. at 418. Tying voters to particular election districts had obvious benefits: It helped prevent electors from fraudulently casting multiple ballots in a single election—one in each of several different election districts—and ensured that votes in electoral contests for local offices would be cast only by residents of the relevant locality. *See id.*; *In re Fry*, 71 Pa. at 306-07

("Thus an actual fixed residence and home, as the means of identifying the elector, and securing the public against frauds, was the evident purpose of the district residence.").

The debates of the Pennsylvania Constitutional Convention of 1837-38 confirm that the purpose of the new election-district residency requirement was *not* to mandate a particular method of voting, or to preclude any particular method of voting, but rather to limit each elector to voting in a particular election district's electoral contests. The delegate who proposed the residency requirement, Emanuel Reigart, explained that the committee of the whole had already decided that a qualified elector must have been assessed a tax at least ten days before the election. 9 John Agg, PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG, ON THE SECOND DAY OF MAY 1837, at 296 (1838). In Reigart's view, "[a] man must have been a resident in the district ten days before he could vote, so that a sufficient time would be allowed for him to be assessed." *Id.* When he explained the need for this new requirement, Reigart conspicuously said nothing about voting methods.

A Washington County delegate, Walter Craig, also addressed the purpose of the amendment. Craig worried that, without the district residency requirement, an elector, though resident in one district, would be "entitled … to vote at elections in

any other place"; he would be permitted to "vote in any district, ward, or borough where he may choose," regardless of his connection to it. *Id.* at 300. "The object of the amendment is to prevent this amalgamation, so to speak, of electors from different parts of the state; it is to keep within their own proper districts." *Id.*

Delegate James Biddle put the point of the amendment plainly: "Those who resided in a particular district, were the persons who ought alone to be entitled to vote in that district, because they were the persons to be affected by the election in that district." *Id.* at 309. Biddle also noted that the amendment would have the salutary effect of preventing a particular kind of election fraud, in which "one voter giv[es] in a vote at perhaps [multiple] wards in the [same] city … on the same day." *Id.* Preventing such fraud appeared to be a chief object of the residency requirement's proponents. Near the end of the debate, another delegate warned that the amendment was needed to prevent the sort of "notorious" frauds that reportedly afflicted Baltimore, where "two men … had gone round to every ward except one, and deposited their votes." *Id.* at 318. "They had no particular place of residence, and therefore, could say they lived in all those wards." *Id.*

Absolutely *nowhere* do the Convention debates suggest that the residency requirement would invalidate the Act of March 29, 1813—which had been in effect for nearly 25 years—or otherwise restrict the General Assembly's authority to prescribe *how* residents of an election district could vote in that district's

contests. Indeed, in offering the residency amendment, Delegate Reigert emphasized that it "could do no possible harm to any human being," Agg, *supra*, at 296—an unthinkable statement if the amendment stripped the right to vote from soldiers stationed outside their election district.

The General Assembly that followed had the same opinion as the Convention delegates: the 1838 Constitution did not limit electors to voting in person at polling places in their election district. Less than seven months after the adoption of the new Constitution was announced in the General Assembly on December 11, 1838, *see* Agg, *supra*, at 260-62, the General Assembly enacted an election law that, like the Act of March 29, 1813, permitted soldiers located outside of their election district of residence to vote via a kind of absentee ballot. Act of July 2, 1839, No. 192, § 43, 1838-39 Pa. Laws 519, 528; *see Chase*, 41 Pa. at 416-17. The statute required military officers, whom the Act made judges of elections, to "transmit *through the nearest post office*, a return [of the votes cast by the soldiers], together with the tickets, tally lists and lists of voters, to the prothonotary of the county in which such electors would have voted, if not in military service." Act of July 2, 1839, § 47 (emphasis added).

(iv) High-Court Decisions in Other Jurisdictions Underscore That the Commonwealth Court Misinterpreted Article VII, § 1

This understanding of the language in the Pennsylvania Constitution was not confined to those who wrote it, or those who ratified it, or those in the General Assembly who operationalized it. It was also (and remains) widespread in other states that adopted the same "offer to vote" language in their constitutions while imposing residency requirements on electors. As supreme courts in those states have recognized, this language does not prohibit civilian absentee or mail-in voting statutes like Act 77. "[A]lthough our Constitution prescribes the qualifications of electors[,] it does not prescribe the manner or form of holding elections, [and] it [is] within its constitutional power for the Legislature to provide that an offer to vote in the township or ward in which the elector resides, c[an] be made [by electors physically located outside of their township or ward at the time of the election]." *Lemons v. Noller*, 63 P.2d 177, 185 (Kan. 1936). Indeed, "[a]n offer to vote may be made in writing, and that is what the absent voter does when he selects his ballots and attaches his signature to the form and mails the sealed envelope to proper official[s]." *Jenkins v. State Bd. of Elections*, 104 S.E. 346, 349 (N.C. 1920). As the Missouri Supreme Court explained in construing a voter-qualifications provision analogous to Article VII, § 1 of the Pennsylvania Constitution: "It is clear that this section does not undertake to prescribe the

manner in which a choice shall be expressed, or a vote cast, or the ballots prepared, deposited, or counted, but merely the qualifications of the voters. It is true, under this provision, a person can vote only in the place of his residence, but this constitutes no inhibition against any particular method the Legislature may provide to enable him to so vote." *Straughan v. Meyers*, 187 S.W. 1159, 1162 (Mo. 1916).

As these cases recognize, the construction of "offer to vote" proffered by Petitioners here—and accepted by the Commonwealth Court—requires a tortured reading of the constitutional text:

> To suppose that the draftsmen of the Constitution paused in the writing of these elaborate provisions relating to these different subjects [*i.e.*, voting qualifications, registration and prerequisites] and interrupted the sequence of thought to digress and to interpolate the requirement that the voter must be personally present to tender his ballot on the day of election, and that in this unusual way and by this equivocal language they intended to inhibit the General Assembly from passing [an absentee voting] statute, … ignores fundamental rules of construction. The method of voting is elsewhere [in the constitution at issue] specifically and unequivocally committed to the legislative discretion.

Moore v. Pullem, 142 S.E. 415, 421-22 (Va. 1928) (refusing to construe the phrase "the precinct in which he offers to vote" as imposing a requirement of in-person voting). As the Montana Supreme Court put the point:

> In order … to hold that the clause 'at which he offers to vote' was intended to fix the place or describe the manner of voting, we must assume that the learned men who drafted [the qualifications provision], stopped short in the midst of defining the qualifications of an elector and injected an idea of an entirely different character; but no one familiar with the rudiments of English would undertake to

> define qualifications and place or manner of voting, by the use of the language employed in [the voter-qualifications provision].

Goodell v. Judith Basin Cnty., 224 P. 1110, 1114 (Mont. 1924).

* * *

It is unsurprising that so many people, in so many settings, have understood "offer to vote" language this way. On Petitioners' contrary view, a relative clause modifying a durational-residency requirement in a provision delimiting *who* may vote, *see* PA. CONST. art. VII, § 1, should be construed as an oblique prohibition on voting *methods* for all electors in Pennsylvania—notwithstanding that a separate constitutional provision expressly gives the General Assembly nearly unrestricted authority to prescribe the "method[s]" of voting, PA. CONST. art. VII, § 4. This contravenes basic rules of grammar and syntax, and it cannot be reconciled with the Constitution's text, structure, or history. At an absolute minimum, Petitioners' argument turns the fundamental principles of constitutional interpretation discussed above—which require courts to sustain legislative enactments unless they "*clearly*, *palpably*, and *plainly*" violate the Constitution—directly on their head. *See Pennsylvanians Against Gambling*, 877 A.2d at 393.

(b) Act 77 Does Not Render Article VII, § 14 Superfluous

Petitioners contend that there would have been no reason for § 14 if Article VII, § 1 did not require in-person voting at polling places. (*See* R.279a (contending that Act 77 "makes [Article VII, § 14] moot").) According to

Petitioners, § 14's prescription of "specific circumstances" in which the Legislature is required to allow absentee voting must be read as affirmatively *prohibiting* voters who do not fall into the prescribed categories from voting by mail. (R.277a.) But Petitioners' argument is at odds with the Constitution's plain language. Article VII, § 14 does not *permit* the Legislature to provide a method for certain voters to cast their ballot other than in person; it *requires* the Legislature to do so. *See* PA. CONST. art. VII, § 14 ("The Legislature *shall* … provide a manner in which [certain specific groups of absentee electors] may vote …." (emphasis added)). That the Legislature is constitutionally *required* to allow certain groups of electors to vote other than in person does not suggest—let alone carry the "necessary implication," *see Appeal of Lewis*, 67 Pa. 153, 165 (1870)—that the Legislature is *prohibited* from allowing others to do so.

This is no minor textual point. An earlier version of the Pennsylvania Constitution said "may" instead of "shall." *See* 1957 Pa. Laws 1019. This change from "may" to "shall"—given no weight by the Commonwealth Court below—was significant because it underscored that Article VII, § 14 sets a floor for when absentee voting must be allowed; it does not establish a ceiling defining when it is forbidden. *See, e.g.*, *Mathews v. Paynter*, 752 F. App'x 740, 744 (11th Cir. 2018) (distinguishing "shall" from "may" and noting that the former term does not impliedly limit government authority); *see also Zimmerman v. O'Bannon*, 442

A.2d 674, 677 (Pa. 1982) (refusing "to ignore the mandatory connotation usually attributed to the word 'shall'"); *Haughey v. Dillon*, 108 A.2d 69, 72 (Pa. 1954) ("A change of language in subsequent statutes on the same matter indicates a change of legislative intent."). Thus, the Pennsylvania Constitution provides that the General Assembly *must* allow voters in the enumerated categories to cast absentee ballots, but may also go further—by exercising its broad powers to "prescribe[]" the permissible "method[s]" of voting, PA. CONST. art. VII, § 4—and allow other categories of voters to vote by mail.[15]

This interpretation is supported not only by constitutional text and structure, but also by decades of history, during which time the Election Code has continuously allowed categories of voters not named in Article VII, § 14 to vote absentee. *See, e.g.*, 25 P.S. § 3146.1(b) (military spouses) (enacted 1963); 25 P.S. § 2602(z.3) (electors on vacations) (enacted 1968).[16] Soon after the current Constitution was ratified in 1968, this Court rejected a challenge to some of these expansions when they were still young, albeit on standing grounds. *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970). So far as Respondents are aware, no other challenges to these enactments were ever brought. Thus, for virtually the entire

[15] Contrary to Petitioners' unsupported assertion, this interpretation does not render § 14 superfluous, but rather gives it an essential purpose: It provides constitutional rights to certain groups of voters, which the General Assembly must respect and may not take away.

[16] Acceptance of Petitioners' argument would, at least impliedly, invalidate these decades-old provisions as well as Act 77.

life of the current Constitution, the Election Code has provided for absentee voting beyond the scope of the requirements in Article VII, § 14. This fact reinforces what the plain language of the constitutional provision dictates: § 14 requires the General Assembly to facilitate voting for certain groups; it does not prohibit the General Assembly from aiding others.[17]

3. The Commonwealth Court's Reliance on Two Cases from Earlier Constitutional Epochs Was Misplaced

Rather than meaningfully grapple with the interpretive issues set forth above, the Commonwealth Court relied almost exclusively on two cases decided under earlier versions of the Pennsylvania Constitution. *See Chase v. Miller*, 41 Pa. 403 (1862); *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924). Not only is the analysis in these cases flawed, but material provisions of the Constitution have changed in the interim. As discussed above, under the current Constitution, the Election Code has long allowed categories of

[17] The Commonwealth Court noted that the Pennsylvania General Assembly began, but did not complete, the process of amending the Pennsylvania Constitution in S.B. 413 of 2019. But this fact is of no relevance to the proper interpretation of Article VII. On its face, the proposed amendment would not merely have clarified that the General Assembly *may* allow mail-in voting. That amendment would have *prohibited* the General Assembly from requiring *any* voter to vote in person at a polling place. *See* S.B. 413 (amendment would have provided that statutes prescribing the "manner" of voting "may not require a qualified elector to physically appear at a designated polling place on the day of the election"). Put differently, Respondents' interpretation of the Pennsylvania Constitution in no way renders the content of the proposed constitutional amendment superfluous. The same is true, of course, of the post-1968 amendments to Article VII, § 14, on which Petitioners and the Commonwealth Court also rely. Contrary to the Commonwealth Court's suggestion (*see* Appendix A at 32), none of those amendments was superfluous because each of them *required* the General Assembly to allow absentee voting for the classes of persons at issue, giving those persons constitutional rights.

voters not named in Article VII, § 14, to vote by mail. In short, the cases cited by Petitioners are inapposite. They readily can—and should—be distinguished.

(a) The Cases on Which Commonwealth Court Relied, Which Were Decided Under Different Constitutions Containing Different Language, Are Inapposite

The *Chase* Court did not consider a voting method remotely similar to the secure, confidential mail-in ballot procedures established by Act 77. *Chase* invalidated a statute on the basis that the Legislature had improperly authorized Civil War military commanders to form battlefront election districts and polling stations at out-of-state military camps and to hold elections therein, bereft of any of the key features that protect elections administered by civil authorities:

> [The statute at issue] permits the ballot-box, according to the court below, to be opened anywhere, within or without our state, with no other guards than such as commanding officers, who may not themselves be voters, subject to our jurisdiction, may choose to throw around it; and it invites soldiers to vote where the evidence of their qualifications is not at hand; and where our civil police cannot attend to protect the legal voter, to repel the rioter, and to guard the ballots after they have been cast.

Chase, 41 Pa. at 424. Indeed, the *Chase* Court believed that this extraterritorial polling-place location and election-district administration scheme not only "open[ed] a wide door for most odious frauds," but that such frauds had actually been committed: "[P]olitical speculators … prowl[] about the military camps watching for opportunities to destroy true ballots and substitute false ones, to forge

and falsify returns, and to cheat citizen and soldier alike out of the fair and equal election provided for by law." *Id.* at 425.

Unsurprisingly, when it considered the meaning of materially identical "offer to vote" language in its own state constitution the Supreme Court of North Carolina found *Chase* inapposite:

> [*Chase*] differs very materially from the [case] under consideration. The substance of that decision, as we read it, was that under the Constitution of Pennsylvania the right of a soldier to vote is confined to and must be exercised in the election district where he resided when he entered the military service, and that the Legislature could not authorize a military commander to form an election district and hold an election therein.
>
> The election laws which attempted to confer the right of suffrage upon federal soldiers absent on military service … are wholly unlike in principle, as well as in detail, the North Carolina Absent Voters Act.

Jenkins, 104 S.E. at 349 (rejecting a constitutional challenge to a civilian absentee voting statute because an "offer to vote … may be made in writing, and that is what the absent voter does when he selects his ballots and attaches his signature to the form, and mails the sealed envelope to proper official[s]").

Petitioners ignore the above-discussed analysis in *Chase* and instead rely heavily on a cherry-picked, context-free discussion of the "offer to vote" language in Article III, § 1 of the 1838 Constitution—and *Chase*'s suggestion that the 1838 Constitution "undoubtedly" required each voter "to make manual delivery of the ballot to [elections] officers" at their respective polling places. *Chase*, 41 Pa. at

419. But the *Chase* Court expressly acknowledged that its conclusion was based on the "offer to vote" language in what was then Article III, § 1 *in combination with* the language of Article III, § 2. *See Chase*, 41 Pa. at 419. Article III, § 2 was subsequently amended and became Article VII, § 4 of the 1968 Constitution. At the time of *Chase*, however, not only did this provision *not* give the General Assembly near-plenary authority over the "method" of voting; it did not give the General Assembly any discretion whatsoever. *See* PA. CONST. of 1838, art. III, § 2 (requiring that all popular elections be "by ballot"); PA. CONST. of 1968, art. VII, § 4 (requiring that all popular election be "by ballot or by such other method as may be prescribed by law").

That change alone is sufficient to distinguish *Chase*'s interpretation of the Constitution of 1838—and, in particular, its statement that, under the earlier charter, "[t]he ballot c[ould] not be sent by mail or express," *Chase*, 41 Pa. at 419. *See Moore*, 142 S.E. at 422 (refusing to construe the phrase "the precinct in which he offers to vote," which appeared in the voter-qualifications provision of the Virginia Constitution, as imposing a requirement of in-person voting, particularly because "[t]he method of voting is elsewhere specifically and unequivocally committed to the legislative discretion").

Nor does *Lancaster City*, decided in 1924, control Petitioners' challenge under the current Constitution dating from 1968. At issue in *Lancaster City* was a

statute allowing the return of ballots by voters who, "by reason of [their] duties, business or occupation," are "absent from [their] lawfully designated election district[s]" on election day. 126 A. at 200. The *Lancaster City* Court acknowledged the new constitutional provision expressly granting the Legislature authority to determine the "method" of voting (which had been added in 1901, *see* 1901 Pa. Laws 882), but the Court appeared to conclude that, whatever the *method* by which the ballot was returned to county officials, the *place* of the elector's "'offer to vote' must still be in the district where the elector resides." 126 A. at 201. The Court found it significant that the then-existing Constitution "made [it] so that absent voting in the case of soldiers is permissible." *Id.*; *see* PA. CONST. of 1874, art. VIII, § 6. The Court believed this provision implicated "[t]he old principle that the expression of an intent to include one class," *i.e.*, military electors, "excludes another," *i.e.*, non-military electors. 126 A. at 201. Because the challenged statute allowed non-military electors to vote from outside their election districts, the Court invalidated it. *Id.*

As discussed above, however, the constitutional provisions addressing absentee voting have not remained static in the century that has elapsed since *Lancaster City*. In 1949, an amendment was adopted providing that "[t]he General Assembly *may*, by general law, provide a manner in which" disabled war veterans could vote by absentee ballot. 1949 Pa. Laws 2138 (emphasis added). Similar

amendments in 1953 and 1957 provided that the General Assembly "may" allow certain other categories of absentee voters. 1953 Pa. Laws 1496; 1957 Pa. Laws 1019. In 1967, however, the soldier absentee ballot provision relied on by *Lancaster City*, which had been adopted in 1864, was repealed altogether. *See* 1967 Pa. Laws 1048. At the same time, still another amendment (carried over into the 1968 Constitution) provided that "[t]he Legislature *shall*, by general law, provide a manner in which" various categories of voters can vote by absentee ballot. 1967 Pa. Laws 1048 (emphasis added); *see* PA. CONST. art. VII, § 14.

The legislative history of the 1967 amendment confirms what the plain text indicates: the General Assembly changed "may" to "shall" precisely because it intended to convert what was formerly a limited grant of legislative discretion into a constitutional right that the legislature could not take away. The bill proposing the amendment was entitled, "A Joint Resolution proposing that article eight, section nineteen of the Constitution [*i.e.*, what was then the absentee voting provision] be amended *by making it mandatory rather than permissive* for the General Assembly to provide for absentee voting." House Legislative Journal, Session of 1966, Vol, 1, No, 1, at 518 (July 12, 1996) (discussing House Bill 398) (emphasis added).[18] What drove this change was the General Assembly's

[18] The substance of House Bill 398, which addressed only the absentee voting provision in what was then Article VIII of the 1874 Constitution, was later incorporated into a proposed constitutional amendment—which was passed by the General Assembly and then ratified—that

conviction—diametrically opposed to the anti-democratic sentiments expressed in *Chase*, *see infra* Section VII.B.3.b—that "[t]he right to vote is among the most precious rights we have." House Legislative Journal, Session of 1966, Vol, 1, No, 1, at 518 (July 12, 1996) (statement of Representative Fineman).

The 1967 amendment is a decisive basis on which to distinguish *Lancaster City*—and, in particular, *Lancaster City*'s reliance on the interpretive canon of *expressio unius.* Where a provision says the legislature "may" do something in certain circumstances, it is natural to infer that the legislature may not do that thing in other circumstances. But where a provision says the legislature "must" do something in certain circumstances, it is unnatural to infer that it may never otherwise do that thing. Especially where the constitutional text otherwise reflects broad legislative discretion, the sensible inference is that the legislature "must" meet certain obligations and is otherwise free to enact policy as it deems fit. *See, e.g.*, *Mathews*, 752 F. App'x at 744.

Legislative history supports this interpretation of the 1967 amendment's effect. As the majority leader of the House explained, the intention behind the amendments to the elections article of the Constitution was "to make our constitution less restrictive and permit the legislature to adopt … statutory acts."

---

also addressed other provisions in Article VIII. *See* Senate Legislative Journal, Session of 1966, Vol. 1, No. 1, at 303-304 (amending House Bill 422).

Pennsylvania Legislative Journal, Session of 1967, Vol. 1, No. 1, at 54 (Jan. 3, 1967) (statement of Representative Donaldson). It is unsurprising, then, that around the same time the 1967 amendment was passed, the General Assembly expanded the scope of voters allowed to vote absentee well beyond the boundaries of the specific groups identified in the Constitution. *See, e.g.*, 25 P.S. § 2602(z.3) (electors on vacations, or sabbatical leaves). That history is entirely consistent with the General Assembly's constitutional power to enact the mail-in voting provisions in Act 77.

These facts readily distinguish *Lancaster City*. At a minimum, given these changes, Petitioners cannot show that Article VII, § 14 "clearly, palpably, and plainly" sets a ceiling on absentee—let alone mail-in—voting.

(b) Regardless, *Chase* and *Lancaster City* Were Wrongly Decided and Are Irreconcilable With Settled Principles of Constitutional Interpretation

Even if *Chase* and *Lancaster City* were on all fours with this case (and they are not), they should not be followed: they were wrong at the time they were decided—as compellingly shown by numerous decisions in other jurisdictions, *see supra* pages 51-53—and are even more clearly erroneous under modern

jurisprudence governing constitutional challenges to duly enacted statutes. *See Stilp*, 905 A.2d at 938-39 (setting forth applicable standards).

The *Lancaster City* Court appeared to view itself as largely bound by *Chase*. The root of the problem, then, lies in that deeply problematic 1862 opinion.

First, the *Chase* opinion was expressly informed by the anti-democratic sentiments of its era. Indeed, the 1838 Constitution was the first in Pennsylvania history—and, thankfully, also the last—to restrict voting to "white" men. *Chase*, 41 Pa. at 418 (construing PA. CONST. of 1838, art. III, § 1). The *Chase* opinion not only noted this reactionary trajectory; *Chase* appeared to celebrate it. *See, e.g.*, *id.* at 426 ("[The Pennsylvania Constitution of 1838] withholds [suffrage] altogether from four-fifths of the population, however much property they may have to be taxed, or however competent in respect of prudence and patriotism, many of them may be to vote. And here let it be remarked, that all our successive constitutions have grown more and more astute on this subject."). These anti-democratic convictions are wholly alien to the current Constitution, including its election provisions, as interpreted by this Court. *See, e.g.*, *League of Women Voters*, 178 A.3d at 804 (construing Free and Equal Elections Clause).

Second, as explained more fully above, *see supra* pages 46-50, 58-59, *Chase*'s interpretation of the durational-residency requirement in Article III, § 1 is utterly unmoored from the text, structure, and history of the 1838 Constitution. In

fact, *Chase* is downright dismissive of evidence concerning how the phrase "offer to vote" was actually understood at the time of ratification. *See* 41 Pa. at 417 (describing the General Assembly as "careless" in re-enacting a law inconsistent with the *Chase* Court's interpretation of the 1838 Constitution). Where a contemporary reader would expect to find actual analysis of the text, structure, and original public understanding of Article III, § 1, *Chase* rushes instead to prioritize the Court's own policy views regarding how elections ought to be administered—and asserts that the Constitution must "undoubtedly" reflect the same beliefs. *Id.* at 419. The Court even opines that a voter's "neighbours" should be allowed to "challenge" his vote at the time it is cast, *see id.*—a suggestion utterly ungrounded in anything the 1838 Constitution actually said, but fully supported by the *Chase* Court's anti-democratic view of the right to vote. This mode of "interpretation" is irreconcilable with well-settled, inveterate principles of constitutional jurisprudence. *See Yocum*, 161 A.3d at 239 (the constitutional text is the "touchstone" of interpretation). It is unsurprising, then, that in interpreting the same "offer to vote" phrase in other state constitutions, multiple courts have squarely—and persuasively—rejected *Chase*'s construction. *See supra* pages 51-53; *see also* Note, *Review of Absentee Voters Legislation in Pennsylvania*, 73 U. PA. L. REV. 176 (1925) (cataloguing the numerous flaws in the *Chase* and *Lancaster City* decisions); Stephen E. Friedman, *Mail-In Voting and the*

Pennsylvania Constitution, 60 DUQ. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4029825.

Accordingly, if this Court concludes it cannot distinguish *Chase* and *Lancaster City*, it should not hesitate to overrule them. It is well settled that "th[is] Court's general faithfulness to precedent is not sufficient justification to buttress judicial decisions proven wrong in principle …. [T]he doctrine of stare decisis is not a vehicle for perpetuating error, but a legal concept which responds to the demands of justice …." *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 352 (Pa. 2014). These precepts apply with greater force when "the desired break with the past involves an interpretation of a constitutional section." *Tarantino v. Allentown State Hosp.*, 351 A.2d 247, 249 (Pa. 1976) (opinion in favor of reversal with respect to decision of equally divided court) (citing Cardozo, *The Nature of the Judicial Process* 149-52 (1921)). Indeed, this Court has declared that "stare decisis has no real place in constitutional law when," as here, "the validity of another statute [*i.e.*, a statute different than the one invalidated under the earlier constitutional decision] is under consideration." *Commonwealth ex rel. Margiotti v. Lawrence*, 193 A. 46, 48 (Pa. 1937). Even in cases where this Court's "predecessors" invalidated a "similar statute," "if, after having fully considered the matter, [this Court is] nevertheless impelled to the conclusion that the later enactment is constitutional, [the Court] cannot decide otherwise, unless [it is] to

forget [its] duty to support the Constitution as the supreme law." *Heisler v. Thomas Colliery Co.*, 118 A. 394, 395 (Pa.), *aff'd*, 260 U.S. 245 (1922).

As this Court has explained, a contrary rule would shackle the Commonwealth to erroneous decisions reflecting the view of a majority of the seven justices sitting at the time the initial case was decided:

> As a function of our system of government, this Court has the final word on matters of constitutional dimension in Pennsylvania. Our charter … is not easily amended and any errant interpretation is not freely subject to correction by any co-equal branch of our government, other than this Court. For this reason, we are not constrained to closely and blindly re-affirm constitutional interpretations of prior decisions which have proven to be unworkable or badly reasoned.

Holt, 38 A.3d at 759 n.38 (internal citations omitted); *accord Agostini v. Felton*, 521 U.S. 203, 235 (1997) (explaining that the case for adhering to precedent "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decision").

Here, not only do *Chase* and *Lancaster City* rest on untenable interpretations of the Constitution, but there are no reliance interests weighing in favor of continued adherence. *See Am. Trucking Ass'ns v. McNulty*, 596 A.2d 784, 788-90 (Pa. 1991) (noting the role of reliance interests in the doctrine of *stare decisis*); *Tarantino*, 351 A.2d at 249 (same). To the contrary, as noted above, the Pennsylvania Election Code has, virtually from the inception of the current Pennsylvania Constitution, allowed a broader scope of voting by mail than

Petitioners' constitutional interpretation would permit. *See supra* pges 55-56. Even more significantly, millions of Pennsylvania citizens have now relied on the availability of mail-in voting in four elections. Put simply, the applicable reliance interests in this case weigh decisively in favor of sustaining Act 77's mail-in voting procedures, not eliminating them.

Further, the precedents on which Petitioners rely do not rest on the need to defend any purported constitutional rights against the government. To the contrary, as shown above, the mail-in voting provisions of Act 77 directly further the purpose of the Pennsylvania Constitution's Free and Equal Elections Clause. *See supra* pages 35-37. Put differently, the arena at issue—namely, the General Assembly's power to regulate election procedures, drawing on current technological, logistical, and administrative capabilities, so as to *facilitate* voters' exercise of the franchise—is one in which the deference owed to the policy judgments of the legislature should be at its zenith. *See Torsilieri*, 232 A.3d at 596 ("the wisdom of a public policy is one for the legislature"). Correlatively, when considering past judicial decisions abridging this legislative power, the force of stare decisis is at its nadir.

C. The *Bonner* Petitioners' Federal Constitutional Claims Are Wholly Derivative of Their Fatally Flawed State Constitutional Claim—and Fail for Other Reasons as Well

The *Bonner* Petitioners have cross-appealed from the Commonwealth Court's decision not to address their federal constitutional claims. These claims cannot salvage their Petition. Each of the federal claims is predicated on the assertion that Act 77's mail-in voting procedures violate the Pennsylvania Constitution. Count II of the *Bonner* Petition alleges that "[w]hen a state legislature violates its state constitution[] … in furtherance of its … authority to regulate federal elections and appoint [presidential] electors," the state legislature also "violates the U.S. Constitution's delegation to the states of the lawmaking power for federal elections." (R.282a (alleging violation of U.S. CONST. art. I, §§ 2, 4, art. II, § 1, amend. XVII).) Count III alleges that "[a]llowing mail-in ballots to be counted which," in Petitioners' view, "exceed the limitations for permitted absentee voting under the Pennsylvania Constitution," effects vote dilution violating the "14th Amendment Due Process and Equal Protection Guarantees." (R.283a.) Because each of these federal-law claims rests on the premise that Act 77 violates the Pennsylvania Constitution, the analysis above disposes of the federal claims as well.

In fact, the federal claims fail irrespective of the merits of the state-law claim. Contrary to the *Bonner* Petitioners' unsupported assertion, the U.S.

Constitution's "delegat[ion of] authority to make laws for federal elections to the states' legislative power" (R.281a.) does not convert every alleged violation of state election law into a federal constitutional claim. *See King v. Whitmer*, 505 F. Supp. 3d 720, 737 (E.D. Mich. 2020) (finding "no case … supporting such an expansive approach"). Nor can the *Bonner* Petitioners bootstrap their state-law claim into a claim for violation of the U.S. Constitution's Fourteenth Amendment. *See Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 391 (W.D. Pa. 2020) ("A violation of state law does not state a claim under § 1983 …." (quoting *Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) (citing *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)))); *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d at 336, 354–55 (3d Cir. 2020) (rejecting similar vote-dilution claim and citing same line of precedent), *vacated on mootness grounds sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711–12 (D. Ariz. 2020) (same). Accordingly, even if the *Bonner* Petitioners' claims under the Pennsylvania Constitution had merit (and they do not), their federal claims would fail as a matter of law.

VIII. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court vacate the Orders below for lack of jurisdiction and dismiss the petitions for review with prejudice.

Respectfully submitted,

Dated: February 15, 2022

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

By: /s/ *Robert A. Wiygul*
Robert A. Wiygul (I.D. No. 310760)
John Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

PENNSYLVANIA GOVERNOR'S OFFICE OF GENERAL COUNSEL
Kenneth L. Joel (I.D. No. 72370)
333 Market Street, 17th Floor
Harrisburg, PA 17101
(717) 787-9348

OFFICE OF ATTORNEY GENERAL

J. Bart DeLone (I.D. No. 42540)
Chief, Appellate Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-3226

PENNSYLVANIA DEPARTMENT OF STATE
Kathleen M. Kotula (I.D. No. 86321)
306 North Office Bldg.
401 North Street
Harrisburg, PA 17120-0500
(717) 783-1657

TUCKER LAW GROUP, LLC

Joe H. Tucker, Jr. (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
Jessica A. Rickabaugh (I.D. No. 200189)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

KAPLAN HECKER & FINK LLP

Joshua Matz (D.C. Bar No. 1045064)
(pro hac vice application pending)
1050 K Street NW | Suite 1040
Washington, D.C. 20001
(929) 294-2537

STATES UNITED DEMOCRACY CENTER

Norman L. Eisen (D.C. Bar No. 435051)
(pro hac vice application pending)
Christine P. Sun (CA Bar No. 218701)
(pro hac vice application pending)
1101 17th Street NW
Washington, DC 20036
(202) 656-8178
(615) 574-9108

Counsel for Respondents/Appellants Pennsylvania Department of State and Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I, Robert A. Wiygul, hereby certify that this Initial Brief of Appellants was prepared in word-processing program Microsoft Word 2016 (for Windows), and I further certify that, as counted by Microsoft Word 2016, this Initial Brief of Appellants contains 16,445 words, excluding the parts of the brief exempted by Pa. R.A.P. 2135(b).

Dated: February 15, 2022

/s/ *Robert A. Wiygul*
Robert A. Wiygul

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

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.

Dated: February 15, 2022

/s/ *Robert A. Wiygul*
Robert A. Wiygul

APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
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 J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook, Petitioners	:	
v.	:	No. 293 M.D. 2021 Argued: November 17, 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

OPINION
BY JUDGE LEAVITT[1] FILED: January 28, 2022

Doug McLinko (McLinko) has filed an amended petition for review seeking a declaration that Article XIII-D of the Pennsylvania Election Code,[2] added by Act 77, violates the Pennsylvania Constitution and is, therefore, void. Act 77 established that any qualified elector may vote by mail, but McLinko argues that the Pennsylvania Constitution requires a qualified elector to present her ballot in person at a designated polling place on Election Day, except where she meets one of the constitutional exceptions for absentee voting. *See* PA. CONST. art. VII, §§1, 14. No-excuse mail-in voting cannot be reconciled, McLinko argues, with the Pennsylvania Constitution.

Respondents are the Pennsylvania Department of State and the Acting Secretary of the Commonwealth, Veronica Degraffenreid (collectively, Acting Secretary). She contends that Act 77's system of no-excuse mail-in voting conforms to the Pennsylvania Constitution, which allows elections "by ballot or by *such other method* as may be prescribed by law" so long as "secrecy in voting be preserved." PA. CONST. art. VII, §4 (emphasis added). Nevertheless, the Acting Secretary explains that the Court need not reach the merits of McLinko's challenge to Act 77 because his action was untimely filed and McLinko lacks standing to challenge the constitutionality of Act 77.

[1] This matter was assigned to the panel before January 3, 2022, when President Judge Emerita Leavitt became a senior judge on the Court. Because the vote of the commissioned judges was evenly divided on the analysis in Part III of this opinion, the opinion is filed "as circulated" pursuant to Section 256(b) of the Court's Internal Operating Procedures, 210 Pa. Code §69.256(b).

[2] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§3150.11-3150.17. Article XIII-D was added by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

On August 31, 2021, Timothy R. Bonner and 13 other members of the Pennsylvania House of Representatives (collectively, Bonner) filed a petition for review also seeking a declaration that Act 77 is unconstitutional under Article VII of the Pennsylvania Constitution. Bonner additionally asserts that the enactment of Act 77 violates the United States Constitution. *See Bonner v. Degraffenreid* (Pa. Cmwlth., No. 293 M.D. 2021, filed January 28, 2022). On September 24, 2021, the Court consolidated the McLinko and Bonner petitions, which raise the same question under the Pennsylvania Constitution.[3]

Thereafter, the Democratic National Committee and the Pennsylvania Democratic Party (collectively, Democratic Intervenors), and the Butler County Republican Committee, the York County Republican Committee, and the Washington County Republican Committee (collectively, Republican Intervenors) sought intervention in the consolidated matter. The Court granted them intervention.

Before this Court are the cross-applications for summary relief filed by McLinko and the Acting Secretary. McLinko seeks a declaratory judgment that Act 77 violates the requirement that an elector must "offer to vote" in the "election district" where he or she resides unless the elector has grounds to cast an absentee ballot. PA. CONST. art. VII, §§1, 14. The Acting Secretary seeks an order dismissing McLinko's amended petition with prejudice on procedural grounds or, in the alternative, because it lacks substantive merit.

For the reasons set forth herein, the Court rejects the Acting Secretary's procedural objections to McLinko's amended petition, and it holds that Act 77 violates Article VII, Section 1 of the Pennsylvania Constitution. This holding,

[3] The cases have been consolidated because they raise identical issues under the Pennsylvania Constitution. A separate opinion is filed in each case to address the differences in the petitioners' standing and their requested relief.

consistent with binding precedent of the Pennsylvania Supreme Court, explains how a system of no-excuse mail-in voting may be constitutionally implemented in the Commonwealth and expresses no view on whether such a system should, or should not, be implemented as a matter of public policy.

We grant McLinko's application for summary relief and deny the Acting Secretary's application for summary relief.

I. Background

Act 77, *inter alia*, created the opportunity for all Pennsylvania electors to vote by mail without having to demonstrate a valid reason for absence from their polling place on Election Day, *i.e.*, a reason provided in the Pennsylvania Constitution. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 352 (Pa. 2020). Section 1301-D(a) of the Election Code provides that "[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 [Article XIII-D]." 25 P.S. §3150.11(a).[4] A "qualified mail-in elector" or "qualified elector" is any person who meets the qualifications for voting in the Pennsylvania Constitution, "or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election." Section 102(t), (z.6) of the Election Code, 25 P.S. §2602(t), (z.6). Section 1306-D of the Election Code directs that the elector must mark the ballot, "enclose and securely seal [the ballot] in the envelope on which is printed . . . 'Official Election Ballot[,]' place that envelope in a second envelope, "fill out, date, and sign the declaration on [the outside of the] envelope" and put the envelope in the mail. 25 P.S. §3150.16(a).[5]

---

[4] Added by Act 77, *as amended* by the Act of March 27, 2020, P.L. 41, No. 12.

[5] Added by Act 77, *as amended* by the Act of March 27, 2020, P.L. 41, No. 12.

Act 77 directed that during the first 180 days after its effective date, any constitutional challenge to Act 77 had to be filed with the Pennsylvania Supreme Court. *See* Section 13(2) of Act 77. On July 26, 2021, McLinko filed a petition for review in this Court challenging the constitutionality of Act 77 after the 180-day period for filing such an action in the Supreme Court had elapsed on April 28, 2020.

McLinko asserts that as a member of the Bradford County Board of Elections, he is responsible for the conduct of elections within that county, including voter registration, voting on election day and the computation of votes. Amended Petition ¶¶3,5. McLinko must certify the results of all primary and general elections in the county to the Secretary of the Commonwealth. *Id*. McLinko believes that no-excuse mail-in voting is illegal and that ballots cast in that manner should not be counted. He asserts that under the Pennsylvania Constitution, a qualified elector must establish residency 60 days before an election in "the election district *where he or she shall offer to vote*." Amended Petition ¶12 (quoting PA. CONST. art. VII, §1) (emphasis added). McLinko explains that the Pennsylvania Supreme Court has definitively construed the term "offer to vote" to mean that the elector must "physically present a ballot at a polling place." Amended Petition ¶¶13-14 (citation omitted). Stated otherwise, Article VII, Section 1 requires electors to vote in person at their designated polling place on Election Day.

McLinko acknowledges that there are exceptions to this requirement. Article VII, Section 14(a) of the Pennsylvania Constitution[6] allows absentee voting, and McLinko asserts that this provision authorizes the only exceptions. Amended Petition ¶15. Specifically, a qualified elector may vote by absentee ballot where he is (1) absent from his residence on Election Day because of business or occupation,

[6] The complete text of Article VII, Section 14 is set forth, *infra*, in part III.C of this opinion.

(2) unable to "attend" his proper polling place because of illness, disability, or observance of a religious holiday or (3) "cannot vote" because of his Election Day duties. Amended Petition ¶16. McLinko believes that only where qualified electors meet one of the exceptions enumerated in Article VII, Section 14(a) may they vote by mail.

McLinko observes that in 2019, Senate Bill 411, Printer's No. 1012, proposed a Joint Resolution to amend Article VII, Section 14 of the Pennsylvania Constitution to end the requirement that qualified electors must physically appear at a designated polling place on Election Day. However, Senate Bill 411 did not pass,[7] and the Constitution was not amended as proposed. McLinko believes that if he certifies no-excuse mail-in ballots, then he will be acting unlawfully because it is his duty "to certify, count, and canvas" votes in a manner "consistent with the Pennsylvania Constitution." Amended Petition ¶48.

---

[7] Senate Bill 411 was considered twice in June 2019 and then re-referred to the Appropriations Committee. *See Pennsylvania Legislative Journal-Senate*, June 18, 2019, 627, 655 and June 19, 2019, 659, 672. The legislative history for Senate Bill 411 explains that "Pennsylvania's current Constitution restricts voters wanting to vote by absentee ballot to [enumerated] situations. . . ." Senator Mike Folmer, Senate Co-Sponsoring Memoranda (January 29, 2019, 10:46 A.M.) https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=28056 (last visited January 27, 2022). Senate Bill 411 proposed a constitutional amendment to "eliminate these limitations, empowering voters to request and submit absentee ballots for any reason – allowing them to vote early and by mail." *Id.*

Senate Bill 411 was incorporated into Senate Bill 413, Printer's No. 1653. It proposed, by Joint Resolution, a constitutional amendment to provide that the physical appearance of a qualified elector at a designated polling place "on the day of the election" may not be required. *Id.* Senate Bill 413, Printer's No. 1653 passed; was signed in the Senate and the House on April 28, 2020; and was filed in the Office of the Secretary of the Commonwealth on April 29, 2020. *See Pennsylvania Legislative Journal-Senate*, April 28, 2020, 289, 307; *Pennsylvania Legislative Journal-House*, April 28, 2020, 491, 518; Act of April 29, 2020, Pamphlet Laws Resolution No. 2. No further action was taken.

II. Standards for Summary Relief

Pennsylvania Rule of Appellate Procedure 1532(b) allows the Court to enter judgment at any time after the filing of a petition for review where the applicant's right to relief is clear. PA. R.A.P. 1532(b).[8] Summary relief is reserved for disputes that are legal rather than factual, *Rivera v. Pennsylvania State Police*, 255 A.3d 677, 681 (Pa. Cmwlth. 2021), and we resolve "all doubts as to the existence of disputed material fact against the moving party." *Id*. (quoting *Marcellus Shale Coalition v. Department of Environmental Protection*, 216 A.3d 448, 458 (Pa. Cmwlth. 2019)). An application for summary relief is appropriate where a party lodges a facial challenge to the constitutionality of a statute. *Philadelphia Fraternal Order of Correctional Officers v. Rendell*, 701 A.2d 600, 617 n.24 (Pa. Cmwlth. 1997) (citing *Magazine Publishers v. Department of Revenue*, 618 A.2d 1056, 1058 n.3 (Pa. Cmwlth. 1992)).

Here, McLinko's petition for review raises a single constitutional question that is appropriate for disposition in an application for summary relief. The Acting Secretary challenges McLinko's petition for review on grounds of laches and standing. These legal issues involve facts, but there is no dispute on the relevant facts. There is no question that McLinko is a member of the Bradford County Board of Elections and a taxpayer. There is no factual question that substantial resources have been expended by the Commonwealth and by county boards of elections to

[8] It states: "At any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear." PA. R.A.P. 1532(b).

implement mail-in voting and that approximately 1,380,342 electors have been placed on the mail-in ballot list file.[9]

In short, the parties' respective applications for summary relief involve only legal disputes and, thus, are ready for our disposition.

III. Article VII of the Pennsylvania Constitution

The central question presented in this matter is whether Act 77 conforms to Article VII of the Pennsylvania Constitution, which article governs elections. In resolving this question, we recognize that "'acts passed by the General Assembly are strongly presumed to be constitutional' and that we will not declare a statute unconstitutional 'unless it clearly, palpably, and plainly violates the Constitution. If there is any doubt that a challenger has failed to reach this high burden, then that doubt must be resolved in favor of finding the statute constitutional.'" *Zauflik v. Pennsbury School District*, 104 A.3d 1096, 1103 (Pa. 2014) (quoting *Pennsylvania State Association of Jury Commissioners v. Commonwealth*, 64 A.3d 611, 618 (Pa. 2013)). In construing the Pennsylvania Constitution, "[e]very word employed in the constitution is to be expounded in its plain, obvious and commonsense meaning." *Commonwealth v. Gaige*, 94 Pa. 193 (1880). Our Supreme Court has also instructed that

> all the provisions [of the Constitution] relating to a particular subject . . . are to be grouped together, when considering such

[9] The Acting Secretary submitted the affidavit of Jonathan Marks, Deputy Secretary of State for Elections and Commissions. In his affidavit, Marks attests that following the passage of Act 77, Pennsylvania election officials invested significant resources to educate voters about the new mail-in voting procedures and to create systems for the efficient issuance of mail-in ballots and their canvassing. Marks' Affidavit ¶11. County boards of elections invested substantial resources to purchase equipment and to train additional election workers needed to process mail-in ballots. *Id.* ¶¶13-15. Marks also attests that approximately 1,380,342 qualified electors were on Pennsylvania's permanent mail-in ballot list as of the date of his affidavit, August 26, 2021. *Id.* ¶25.

> subject, and so read that they may blend or stand in harmony, if that can be done without violence to the language.

Guldin v. Schuylkill Co., 149 Pa. 210 (1892); *see also Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008).

The three provisions of Article VII relevant hereto are Sections 1, 4, and 14. McLinko argues that Section 1 requires in-person voting, except where expressly permitted under Section 14. He argues that Section 4 applies to the conduct of elections at the polling place. The Acting Secretary responds that Section 4 authorized the legislature to establish a system of no-excuse absentee mail-in voting. Further, she believes that Section 14 sets forth the minimum requirements for absentee voting, but the minimum can be expanded by the legislature using its authority under Section 4.

We begin with a review of each relevant provision of Article VII.

A. Article VII, Section 1

Article VII, Section 1 of the Pennsylvania Constitution states as follows:

> **Qualifications of Electors**
>
> Every citizen 21 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 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 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 60 days preceding the election.

PA. CONST. art. VII, §1 (emphasis added). Section 1 entitles the elector to "offer to vote" in the election district where "he or she shall have resided" 60 days before "the election." *Id*.

The Supreme Court has specifically construed the phrase "offer to vote." *Chase v. Miller*, 41 Pa. 403 (1862), involved a district attorney's race between Ezra B. Chase and Jerome G. Miller. Based on the ballots cast in person on Election Day, Chase led Miller 5811 to 5646. Thereafter, 420 votes were received from Pennsylvania soldiers fighting in the Civil War who had cast their ballots by mail under authority of the Military Absentee Act of 1839.[10] Chase challenged the military votes which, if counted, made Miller the next district attorney by a vote of 6066 to 5869. Chase asserted that the Military Absentee Act of 1839 violated the constitutional requirement that ballots be presented in person.

The Military Absentee Act of 1839 provided that on Election Day a Pennsylvania citizen "in any actual military service in any detachment of the militia or corps of volunteers under a requisition from the president of the United States" was authorized to vote "*at such place as may be appointed by the commanding officer*[.]" *Chase*, 41 Pa. at 416 (emphasis added) (summarizing the Military Absentee Act of 1839). The "great question" before the court was whether this statute could be "reconciled with the 1st section of article 3d of the amended

[10] Act of July 2, 1839, P.L. 770. It effectively reenacted an earlier statute, the Military Absentee Act of 1813, Act of March 29, 1813, 6 Smith's Laws.

constitution,"[11] the predecessor to the current Article VII, Section 1. *Chase*, 41 Pa. at 418. The Supreme Court ruled it could not, and held that the Military Absentee Act of 1839 was unconstitutional, thereby invalidating all 420 absentee military votes. *Chase*, 41 Pa. at 428-29.

The Supreme Court explained that the 1838 constitutional amendment sought to "identify the legal voter, before the election came on, and *to compel him to offer his vote in the appropriate* ward or township, and thereby to exclude disqualified pretenders and fraudulent voters of all sorts." *Chase*, 41 Pa. at 418 (emphasis added). Given that background, the Court construed the operative language of Article III, Section 1 as follows:

> 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. *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 domicil. *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 neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.

---

[11] Article III, Section 1 stated as follows:

> In elections by the citizens, every white freeman of the age of twenty-one years, having resided in this State one year, and *in the election-district where he offers to vote* ten days immediately preceding such election, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector.

PA. CONST. art. III, §1 (1838) (emphasis added).

Chase, 41 Pa. at 419 (emphasis added).[12] In short, the 1838 constitutional amendment required the properly qualified elector to "present oneself . . . at the time and place appointed" to make "manual delivery of the ballot." *Id.* Following the Supreme Court's decision in *Chase*, the Pennsylvania Constitution was amended in 1864 to permit electors in military service to vote by absentee ballot. PA. CONST. art. III, §4 (1864).[13]

In re Contested Election of Fifth Ward of Lancaster City, 126 A. 199 (Pa. 1924) (*Lancaster City*), considered another Pennsylvania statute, the Act of May 22, 1923, P.L. 309 (1923 Absentee Voting Act), which expanded the opportunity for absentee voting from those in military service to include civilians. The 1923 Absentee Voting Act stated that a "qualified voter . . . who by reason of his duties, business, or occupation [may be] unavoidably absent from his lawfully designated election district, and outside of the county of which he is an elector, but within the confines of the United States" could request an absentee ballot and complete it in the presence of an election official before Election Day. Section 1 of the 1923 Absentee Voting Act. However, in 1923, the Pennsylvania Constitution limited absentee voting to those electors absent by reason of active military service. *See* PA. CONST. art. VIII, §6 (1874).[14]

---

[12] Mail-in ballots present particular challenges with respect to "safeguards of honest suffrage." *Chase*, 41 Pa. at 419. *See Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (injunction granted under Voting Rights Act, *see now* 52 U.S.C. §§10301-10702, setting aside election of Pennsylvania State Senator for fraudulent use of absentee ballots).

[13] The text of Article III, Section 4 of the 1864 Constitution is set forth, *infra*, in part III.C of this opinion.

[14] The text of Article VIII, Section 6 of the 1874 Pennsylvania Constitution was identical to the text of Article III, Section 4 of the Constitution adopted in 1864 to permit those in active military service to vote by mail. The only change in 1874 was to renumber the provision from Section 4 to Section 6.

In *Lancaster City*, eight votes separated the candidates for councilman at the conclusion of Election Day. After the absentee ballots were counted, the Republican candidate pulled ahead by nine votes. The Democratic candidate challenged the results of the election, arguing that the 1923 Absentee Voting Act was unconstitutional and that the absentee ballots should be excluded. The Supreme Court agreed, concluding that the election should be determined solely on the basis of ballots cast in person on Election Day, as required by Article VIII, Section 1 of the Constitution. PA. CONST. art. VIII, §1 (1901).[15]

---

[15] Article VIII, Section 1 of the 1874 Constitution stated as follows:

> Every male citizen twenty-one years of age, possessing the following qualifications, *shall be entitled to vote* at all elections:
>
> *First.* - He shall have been a citizen of the United States at least one month.
>
> *Second.* - He shall have resided in the State one year, (or if, having previously been a qualified elector or native born citizen of the State, he shall have removed therefrom and returned, then six months), immediately preceding the election.
>
> *Third. - He shall have resided in the election district where he shall offer to vote* at least two months immediately preceding the election.
>
> *Fourth.* - If twenty-two years of age or upwards, he shall have paid within two years a State or county tax, which shall have been assessed at least two months and paid at least one month before the election.

PA. CONST. art. VIII, §1 (1874) (emphasis added). The 1901 amendment changed the first paragraph to read as follows:

> Every male 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[.]*

PA. CONST. art. VIII, §1 (1901) (emphasis added); Joint Resolution No. 1, 1901, P.L. 881. Additionally, the 1901 amendment switched from the use of words to identify the separate paragraphs to the use of Arabic numerals. In 1933, Article VIII, Section 1 was amended to add the pronoun "she" where appropriate and to eliminate the requirement that the qualified elector be current on tax obligations. PA. CONST. art. VIII, §1 (1933); Joint Resolution No. 5, 1933, P.L.

In declaring the 1923 Absentee Voting Act unconstitutional, the Supreme Court held that the General Assembly could address voting procedures only in a manner consistent with the "wording of our Constitution," which at that time limited absentee voting to those engaged in military service. *Lancaster City*, 126 A. at 200. The Court held that "[t]he Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed." *Id.* at 201. The Court concluded as follows:

> However laudable the purpose of the [1923 Absentee Voting Act], 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. (emphasis added).

The Pennsylvania Supreme Court invalidated the Military Absentee Act of 1839 and the 1923 Absentee Voting Act because each enactment violated the requirement that a qualified elector must "offer to vote" in person at a polling place in his election district on Election Day. PA. CONST. art. III, §1 (1838), PA. CONST. art. VIII, §1 (1901). The Court established that legislation, no matter how laudable its purpose, that relaxes the in-person voting requirement must be preceded by an amendment to the Constitution "permitting this to be done." *Lancaster City*, 126 A. at 201. Based on this analysis and holding, the Supreme Court set aside the votes cast under the invalidated statutes, thereby changing the outcome of two elections.

B. Article VII, Section 4

The second relevant provision of Article VII is Section 4, and it states as follows:

1559. The 1959 amendment expanded paragraph 3 to read as it does today. PA. CONST. art. VIII, §1; Joint Resolution No. 3, 1959, P.L. 2160. The 1967 amendment renumbered the provision to its current Article VII, Section 1. PA. CONST. art. VII, §1; Joint Resolution No. 5, 1967, P.L. 1048.

Method of Elections; Secrecy in Voting

> 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. This provision was the result of an amendment proposed by Joint Resolution No. 2, 1901, P.L. 882. Although Article VII, Section 4 has been amended and renumbered over the years, the requirement that elections "shall be by ballot" has been in the Pennsylvania Constitution since 1776.

In the colonial period, elections were conducted by *viva voce* or by the showing of hands, as was the practice in most of Europe. *Burson v. Freeman*, 504 U.S. 191, 200 (1992) (plurality opinion). "That voting scheme was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some." *Id*. Because of the opportunities for bribery and intimidation in the *viva voce* system, the colonies began using written ballots. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 489 (2003) (FORTIER & ORNSTEIN). In Pennsylvania, the 1776 Constitution provided:

> All elections, whether by the people or in general assembly, *shall be by ballot*, free and voluntary: And any elector, who shall receive any gift or reward for his vote, in meat, drink, monies, or otherwise, shall forfeit his right to elect for that time, and suffer such other penalties as future laws shall direct. And any person who shall directly or indirectly give, promise, or bestow any such rewards to be elected, shall be thereby rendered incapable to serve for the ensuing year.

PA. CONST., §32 (1776) (emphasis added). Then, in 1790, the Pennsylvania Constitution was amended to provide that "[a]ll elections shall be by ballot, except

those by persons in their representative capacities, who shall vote *viva voce*." PA. CONST. art. III, §2 (1790).[16]

To vote in Pennsylvania, as in other states, electors wrote the name of their chosen candidates on a piece of paper and brought it to an official location. FORTIER & ORNSTEIN at 489. "These pre-made ballots often took the form of 'party tickets' – printed slates of candidate selections, often distinctive in appearance, that political parties distributed to their supporters and pressed upon others around the polls." *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1882 (2018); *see also Commonwealth v. Coryell*, 9 Pa. D. 632, 635 (1900) (political parties printed the ballots used by electors). The polling place contained a "voting window" through which the voter would hand his ballot to an election official in a separate room with the ballot box. *Minnesota Voters Alliance*, 138 S. Ct. at 1882. "As a result of this arrangement, 'the actual act of voting was usually performed in the open,' frequently within view of interested onlookers." *Id*. (quotation omitted). As voters went to the polls, "[c]rowds would gather to heckle and harass voters who appeared to be supporting the other side." *Id*. at 1882-83.

In 1874, the Pennsylvania Constitution was amended to bind election officials to a duty of non-disclosure of an elector's choice. The amendment provided as follows:

> *All elections by the citizens shall be by ballot.* Every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the elector who presents the ballot. Any elector may write his name upon his ticket or cause the same to be written thereon and attested by a citizen of the district. *The*

[16] In 1838, Pennsylvania amended its Constitution, but Article III, Section 2 remained unchanged. *See* PA. CONST. art. III, §2 (1838).

> *election officers shall be sworn or affirmed not to disclose how any elector shall have voted unless required to do so as witnesses in a judicial proceeding*.

PA. CONST. art. VIII, §4 (1874) (emphasis added). The election official's non-disclosure duty introduced an early form of election secrecy to the system. *De Walt v. Commissioners*, 1 Pa. D. 199, 201 (1892) (citations omitted).

The late nineteenth century saw further election reforms with the adoption of the so-called "Australian ballot," which consisted of a "standard ballot and private voting booth." FORTIER & ORNSTEIN at 486. The Australian ballot system provided "greater freedom and secrecy in voting by providing an official ballot, a marking in a secret compartment, and a deposit of the ballot in the ballot-box without exhibition." *Case of Loucks*, 3 Pa. D. 127, 132 (1893). The Australian ballot prevented "chicanery endemic to the party ballot system, including protecting the privacy of the ballot, and preventing political parties from distributing ballots that looked like the slate of another party but actually listed the candidates of the distributing party." *Working Families Party v. Commonwealth*, 209 A.3d 270, 293 n.11 (Pa. 2019) (Wecht, J., concurring, in part). Between 1888 and 1892, 38 states adopted the Australian ballot. FORTIER & ORNSTEIN at 486.

In 1891, the "so-called Australian ballot system was first introduced in Pennsylvania," with the enactment of the Ballot Reform Act.[17] *Super v. Strauss*, 17 Pa. D. 333, 336 (1908). Commonly referred to as "The Baker Ballot Law," *Case of Loucks*, 3 Pa. D. at 130, the 1891 statute required the exclusive use of "uniform official ballots" as well as the "legal nomination of the candidates" and "voting in a room where electioneering and solicitation of votes is forbidden." *De Walt v. Bartley*, 24 A. 185, 186-87 (Pa. 1892). The Baker Ballot Law specified that the voter

[17] Act of June 19, 1891, P.L. 349.

must "retire to one of the voting shelves or compartments, and shall prepare his ballot by marking in the appropriate margin[.]" *Id*. at 188. The ballot used two methods for designating a choice: placing a cross on the ticket to the right of the candidate's name or placing a cross to the right of the party designation. The Baker Ballot Law "insure[d] a secret ballot, and therefore fulfill[ed], better than the system which it supplant[ed], the provisions of the constitution governing the subject of voting[.]" *De Walt*, 1 Pa. D. at 201. Before 1891, "no vote could be kept a secret[.]" *In re Twentieth Ward Election*, 3 Pa. D. 120, 121 (1894).

In 1901, the requirement that a ballot be produced by the government and cast in secret became embedded into the Pennsylvania Constitution with the adoption of Article VIII, Section 4. It stated:

> 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. VIII, §4 (1901) (emphasis added); Joint Resolution No. 2, 1901, P.L. 882. The amendment added the language italicized above and deleted the sentences in the 1874 version that had required election officials to number the ballots, obtain the electors' signatures on their ballots, and swear not to disclose how any elector voted. *Cf*. PA. CONST. art. VIII, §4 (1874). The 1901 amendment guaranteed the secrecy of the ballot, both in its casting and in counting. "[T]he cornerstone of honest elections is secrecy in voting. A citizen in secret is a free man; otherwise, he is subject to pressure and, perhaps, control." *In re Second Legislative District Election*, 4 Pa. D. & C. 2d 93, 95 (1956).

The New York Court of Appeals has construed the single phrase "by such other method as may be prescribed by law," which appeared in New York's

Constitution, as in Pennsylvania's 1901 Constitution.[18] The Court of Appeals held that the language "or by such other method as may be prescribed by law" was "not to create any greater safeguards for the secrecy of the ballot than had hitherto prevailed, but solely to enable the substitution of voting machines, if found practicable[.]" *Wintermute*, 86 N.E. at 819. Our Supreme Court later agreed that Section 4 was "likely added in view of the suggestion of the use of voting machines" but further noted that "the direction that privacy be maintained is now part of our fundamental law." *Lancaster City*, 126 A. at 201.[19]

---

[18] The New York Constitution states, in relevant part, as follows:

> All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.

N.Y. CONST. art. II, §7. As the Court of Appeals explained, the phrase "or by such other method as may be prescribed by law, provided that secrecy in voting be preserved," was added by an 1895 amendment. *People ex rel. Deister v. Wintermute*, 86 N.E. 818, 819 (N.Y. 1909).

[19] The dissent notes that Article VII, Section 6 allows the General Assembly to "permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote . . . ," PA. CONST. art. VII, §6, suggesting that this is the provision that authorizes voting machines. We disagree.

The text, in full, reads as follows:

> **Election and Registration Laws**
>
> Section 6. *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 election 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

Regarding voting methods, one Pennsylvania court has stated that "*[t]he only method of permitted voting, other than ballot, is by voting machine*." *In re General Election of November 4, 1975*, 71 Pa. D. & C. 2d 83, 91 (1975) (emphasis added) (electors not able to vote by sworn testimony where a voting machine failed to record their vote because to do so would abridge the constitutional requirement for a secret ballot). Treatise authority also explains that the phrase "such other method" was added to Section 4 of Article VII in order to authorize the use of "mechanical devices" in lieu of a paper ballot at the polling place. Robert E. Woodside, Pennsylvania Constitutional Law, at 465 (1985) (WOODSIDE).

C. Article VII, Section 14

The third relevant provision in Article VII of the Pennsylvania Constitution is Section 14, which states as follows:

> **Absentee Voting**
>
> (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*

> 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). When this provision was adopted in 1928, voting machines were already in use. *See Lancaster City*, 121 A. at 201. Section 6 requires uniformity in election law, as stated in the first sentence. But it allows exceptions. The first exception authorizes the imposition of stricter voter registration requirements in "cities." The second exception, added in 1928, clarifies that uniformity does not require that voting machines be used in every polling place in the Commonwealth, if allowed in one county, city, borough, town or township.

> *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 (emphasis added). Absentee voting has a long history.

It began with the Military Absentee Act of 1813, which authorized "the citizen soldier who should be in actual service within the state on the day of the general election, an opportunity to vote, if his engagements detained him at the prescribed distance from his domicil." *Chase*, 41 Pa. at 417 (summarizing the 1813 statute). When enacted, the 1790 Pennsylvania Constitution did not require an elector to vote at a certain place. *Id*. However, in 1838, the Pennsylvania Constitution was amended to impose a place requirement, *i.e.*, "in the election-district where [an elector] offers to vote[.]" PA. CONST. art. III, §1 (1838).[20]

Despite this 1838 amendment to the Constitution, the legislature enacted the Military Absentee Act of 1839 in "substantially" the same form as its 1813 predecessor. *Chase*, 41 Pa. at 417. Because the Military Absentee Act of 1839 did not comply with the requirement in the 1838 Constitution that an elector vote in his election district, the Supreme Court struck it down as unconstitutional.

In response to *Chase*, the electorate amended the Constitution in 1864 to provide for soldier voting. It stated:

> Whenever any of the qualified electors of this Commonwealth shall be in actual military service, under a requisition from the President of the United States or by the authority of this

[20] *See supra* note 11 for the text of Article III, Section 1 of the 1838 Pennsylvania Constitution.

> Commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully *as if they were present at their usual places of election.*

PA. CONST. art. III, §4 (1864) (emphasis added). This provision was continued verbatim in the 1874 Constitution but was renumbered as Article VIII, Section 6. Pennsylvania and many other states recognized that absentee voting by the military conflicted with the "constitutional provisions for in person voting, and undertook to amend their state constitutions in order to pass appropriate legislation." FORTIER & ORNSTEIN at 498.

As noted, the 1923 Absentee Voting Act expanded absentee voting to those electors "unavoidably" absent from their designated election district by reason of "duties, business or occupation," which would include military service.[21] *Lancaster City*, 126 A. at 200. In striking down this law, the Supreme Court held that the 1874 Constitution limited the "privilege" of absentee voting to persons who "are in actual military service." *Id*. at 201. *See also* PA. CONST. art. VIII, §6 (1874).

---

[21] The 1923 Absentee Voting Act stated, in relevant part, as follows:

> Be it enacted . . . That any *duly qualified voter of this Commonwealth, who by reason of his duties, business, or occupation is unavoidably absent from his lawfully designated election district* and outside of the county in which he is an elector, but within the confines of the United States, on the day of holding any general, municipal, or primary election, may vote by appearing before an officer, either within or without the Commonwealth authorized to administer oaths, and marking his ballot under the scrutiny of such official as herein prescribed. Such voter may vote only for such officers and upon such questions as he would be entitled to vote for or on had he presented himself in the district in which he has his legal residence, and in the matter hereinafter provided.

Section 1 of the Act of May 22, 1923, P.L. 309 (emphasis added). The statute further provided that after the voter cast his or her vote, and secured the ballot and envelopes as provided in the statute, the "voter shall send [the ballot] by registered mail to the prothonotary or county commissioners in sufficient time to reach its destination on or before the day such election is held." *See* Amended Petition, Ex. A.

In 1949, Section 18 was added to Article VIII of the Pennsylvania Constitution to expand the opportunity for absentee voting to war veterans whose war injuries rendered them "unavoidably absent" from their residence. PA. CONST. art. VIII, §18.[22] Thereafter, in 1957, Section 19 was added to Article VIII to expand absentee voting to all qualified electors unable to vote in person by reason of illness or disability. Section 19 stated:

> *The Legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who may,* on the occurrence of any election, *be unavoidably absent from the State or county 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*, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. art. VIII, §19 (1957) (emphasis added); Joint Resolution No.1, 1957, P.L. 1019. For the first time, electors could vote by absentee ballot if "unable to attend at their proper polling place because of illness or physical disability," even though present in the county of their residence. *Id*.

In 1967, the Pennsylvania Constitution was amended in three ways relevant to absentee voting. *See* Joint Resolution No. 5, 1967, P.L. 1048. First, it

---

[22] It stated:

> The General Assembly may, by general law, provide a manner in which, and the time and place at which, *qualified war veteran voters*, who may, on the occurrence of any election, *be unavoidably absent* from the State or county of their residence *because of their being bedridden or hospitalized due to illness or physical disability contracted or suffered in connection with, or as a direct result of, their military service*, may vote and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. art. VIII, §18 (1949) (emphasis added).

repealed Article III, Section 6 of the 1874 Constitution and Article VIII, Section 18, which authorized those in military service and those with war injuries to vote by absentee ballot. These provisions were rendered redundant by Section 19, which extended absentee voting to any citizen whose absence was required by "occupation" or by an "illness or physical disability." Second, the Joint Resolution renumbered Article VIII, Section 19 to the current Article VII, Section 14, and it was revised to change the operative verb from "may" to "shall" as follows:

> 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 State or county 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, 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 (1967) (emphasis added). Third, the Joint Resolution renumbered the provision that a qualified elector must "offer to vote" in the election district where he resides, from Article VIII to Article VII, where it remains. PA. CONST. art. VII, §1.

In 1985, Article VII, Section 14 was amended to extend absentee voting to persons who could not vote in person due to a religious holiday or Election Day duties. As amended, Article VII, Section 14 stated as follows:

> 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 State or county 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.

PA. CONST. art. VII, §14 (1985) (emphasis added); Joint Resolution No. 3, 1984, P.L. 1307, and Joint Resolution No. 1, 1985, P.L. 555. Finally, in 1997, Article VII, Section 14 was amended to change "State or county" to "municipality" and to add subsection (b), which defines "municipality." PA. CONST. art. VII, §14; Joint Resolution No. 2, 1996, P.L. 1546, and Joint Resolution No. 3, 1997, P.L. 636.

Beginning in 1864, the Pennsylvania Constitution has provided an exception to the requirement that electors "attend at their proper polling places" on Election Day to exercise the franchise. The current version states that the legislature must provide a way for "qualified electors who may, *on the occurrence of any election,*" be absent from their residence or from their polling place to vote if their absence is for one of the enumerated reasons, *i.e.*, their duties, occupation or business; an illness or physical disability; the observance of a religious holiday; or Election Day duties. PA. CONST. art. VII, §14(a).

D. Analysis

Since 1838, the Pennsylvania Constitution has required a qualified elector to appear at a polling place in the election district where he resides and on Election Day. This requirement was adopted "thereby to exclude disqualified pretenders and fraudulent voters of all sorts." *Chase*, 41 Pa. at 418. In 1864, an exception to the place requirement was introduced to the Constitution with the introduction of "absentee voting." Its very name, "absentee," relates back to the Section 1 requirement that electors vote in person at a polling place.

Our Supreme Court has specifically held that the phrase "offer to vote" requires the physical presence of the elector, whose "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." *Chase*, 41 Pa. at 419. There is no air in this construction of "offer to vote." There must be a constitutionally provided exception before the "offer to vote" requirement can be waived. Our Supreme Court has further directed that before legislation "be placed on our statute books" to allow qualified electors absent from their polling place on Election Day to vote by mail, "an amendment to the Constitution must be adopted permitting this to be done." *Lancaster City*, 126 A. at 201. This is our "fundamental law." *Id*.

In dismissing this construction of Article VII of our Constitution, the Acting Secretary places all emphasis on Article VII, Section 4, which states that elections shall be "by ballot or by such other method as may be prescribed by law." PA. CONST. art. VII, §4. The General Assembly, she argues, has nearly unbounded discretion to enact legislation except where specifically prohibited. Because there is no express prohibition in our Constitution against legislation establishing a new system of mail-in voting, it must be allowed. This logic was rejected in *Chase*, 41 Pa. at 409. The Acting Secretary does not grapple with the holdings in *Chase* and *Lancaster City*, which she considers hoary jurisprudence and not in line with the "modern" way constitutions are construed.[23] Acting Secretary Brief at 44. She is undeterred by the inconvenient truth that the provision authorizing "such other method as may be prescribed by law" was part of the Pennsylvania Constitution

[23] The Democratic Intervenors suggest that *Chase* and *Lancaster City* be overruled. Democratic Intervenors' Brief at 26. This is an argument that can be raised only to the Pennsylvania Supreme Court.

when *Lancaster City* was decided. In fact, the Supreme Court quoted the entire text of what is now Article VII, Section 4 in its opinion and explained that "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." *Lancaster City*, 126 A. at 201. The Acting Secretary does not believe there is a "place requirement" in Article VII, Section 1 and, thus, she does not consider Article VII, Section 14 to be an exception to the in-person voting requirement. For the reasons that follow, we reject the Acting Secretary's construction of Article VII, Sections 4 and 14.

First, the General Assembly must enact legislation within the bounds of the Pennsylvania Constitution.[24] The Constitution establishes the "fundamental law" against which the actions of all three branches of the Commonwealth government, including the work of the General Assembly, will be measured. *Lancaster City*, 126 A. at 201. The Constitution's fundamental law enables the General Assembly to legislate, and it restricts the exercise of the legislative prerogative in numerous ways, both substantively and procedurally. *See, e.g.*, PA. CONST. art. III, §§1 ("[N]o bill shall be so altered or amended, on its passage through

[24] The Acting Secretary notes that the Pennsylvania Supreme Court has stated that "[w]hat the people have not said in the organic law their representatives shall not do, they may do. . . . The Constitution allows to the Legislature every power which it does not positively prohibit." *William Penn School District v. Pennsylvania Department of Education*, 170 A.3d 414, 440 n.38 (Pa. 2017) (citations omitted). Congress is bound by the list of enumerated powers set forth in the United States Constitution; the General Assembly is not so bound. Nevertheless, this footnote goes on to state that the General Assembly must "stay[] within constitutional bounds" when it legislates. *Id*. "Constitutional bounds" occur in different ways. For example, Article VII, Section 1 sets a voting age of 21 years, but this age has been preempted by federal law. The bounds may also be found in the "fundamental law" of the Pennsylvania Constitution. The question here is whether the legislature's enactment of no-excuse mail-in voting has stayed within the bounds of Article VII of the Pennsylvania Constitution.

either House, as to change its original purpose."), 3 ("No bill shall be passed containing more than one subject[.]"), 4 ("Every bill shall be considered on three different days in each House.").

Second, there is nothing fusty about the holdings in *Chase* and *Lancaster City*. They are clear, direct, leave no room for "modern" adjustment and are binding. The Democratic Intervenors argue that because the Supreme Court did not provide a sufficiently penetrating analysis of Article VII, Section 4, *Lancaster City* has no precedential effect. We reject this legerdemain. The Supreme Court quoted the text of Section 4 in full and then stated that its purpose was to allow voting machines and to maintain secrecy in voting as "part of our fundamental law." *Lancaster City*, 126 A. at 201. More to the point, the Supreme Court quoted and addressed the same three provisions of the Constitution we review here, and concluded, decisively, that they prohibited the enactment of legislation to permit qualified electors absent from their polling place on Election Day to vote, except for reasons enumerated in the Pennsylvania Constitution. *Id.*

Lancaster City is binding precedent that has informed election law in Pennsylvania for nearly 100 years. It has provided the impetus for the adoption of multiple amendments to the Pennsylvania Constitution that were each considered the necessary first step to any expansion of absentee voting. *See, e.g.*, Joint Resolution No. 3, 1997, P.L. 636. Moreover, the rulings in *Chase* and *Lancaster City* have been followed over the years in numerous election cases. For example, in *In re Franchise of Hospitalized Veterans*, 77 Pa. D. & C. 237, 240 (1952), the court quoted *Lancaster City* for the proposition that "article VIII of the Constitution of 1874, with its amendments, sets up the requirements of a citizen to obtain the right to vote," which include express limits on absentee voting. Similarly, in *In re*

Election Instructions, 2 Pa. D. 299, 300 (1888), the court stated that "the offer to vote is an act wholly distinct from a qualification. Judge Woodward says: '*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 to receive it.' *See Chase v. Miller*, 41 Pa. 419." (Emphasis in original.) In sum, the viability of *Chase* and *Lancaster City* has never flagged.

Third, Article VII, Section 4 cannot be read, as suggested by the Acting Secretary, to authorize a system of no-excuse mail-in voting to be conducted from any location. To begin, "such other method" is limited to one that is "prescribed by law." PA. CONST. art. VII, §4. This prescription includes the "fundamental law" that voting must be in person except where there is a specific constitutional exception. PA. CONST. art. VII, §§1, 14. We reject the suggestion that "the law" in Section 4 refers only to the legislature's work product and not to the Pennsylvania Constitution. Further, the Supreme Court could have, but did not, state that "such other method" included voting by mail, a system in existence and used for military absentee voting at the time *Lancaster City* was decided.[25] Instead, the Supreme

[25] The first Pennsylvania statute on military voting provided that a soldier "who may attend, vote, or offer to vote" in the field was subject to the provisions of the "election laws . . . , so far as practicable." Section 27 of the Act of August 25, 1864, P.L. 990 (Soldiers' Voting Act of 1864). After voting in a polling place in the field, the soldier deposited his ballot into a sealed envelope with a statement attested by a "commissioned officer" that the soldier will "not offer to vote at any poll, which may be opened on said election day," and is not a deserter and that provided the location where "he is now stationed." *Id.* at Section 33. The ballot was then mailed to an identified elector, who delivered the soldier's ballot envelope to an election officer in the soldier's "proper district on the day of the election." *Id.* at Section 34.

The Soldiers' Voting Act of 1864 used the terms "attend" and "offer to vote" to describe in-person voting at the military polling place. The 1864 act sought to replicate in-person voting so far as practicable, recognizing that in-person voting at the elector's polling place is the polestar.

Court stated that "such other method" authorized the use of mechanical devices at the polling place. *Lancaster City*, 126 A. at 201.

The better reading of Section 4 is that "such other method" refers to an alternative to a paper ballot for use at the polling place. This is consistent with the ruling in *Wintermute*, 86 N.E. at 819, that construed the addition of "such other method" to the New York Constitution as "solely to enable the substitution of voting machines, if found practicable[.]" Notably, the New York Court of Appeals' holding is contemporaneous with Pennsylvania's 1901 addition of this phrase to the Pennsylvania Constitution.[26] Thereafter, our Supreme Court gave Section 4 this same construction in *Lancaster City*, 126 A. at 201. Other courts have consistently observed that "[t]he only method of permitted voting, other than ballot, is by voting machine." *In re General Election of November 4, 1975*, 71 Pa. D. & C. 2d at 91.

Finally, in his treatise, Judge Woodside has explained that Article VII, Section 4 was intended to allow "the use of voting machines and other mechanical devices." WOODSIDE at 465. He further opined on the meaning of Article VII, Section 4 as follows:

> Although ballots were used exclusively for elections in the *early years* of this century and are still used in a few rural areas, voting machines gradually became the customary method of casting and counting votes. *More modern methods are presently being tested and suggested.* The laws on the methods to be used are likely to be changed from time to time by the General Assembly as *science improves ways which preserve the secrecy but are more*

[26] New York's legislature did not consider "such other method" to authorize its enactment of a no-excuse mail-in voting system. In November of 2021, the citizens of New York rejected a proposal to amend the New York Constitution to authorize "No-Excuse Absentee Ballot Voting." *See* 2021 New York Statewide Ballot Proposal No. 4, *available at*: https:///www.elections.ny.gov/2021Ballotproposals.html (last visited January 27, 2022) (not passed) (proposing an amendment to section 2 of article II of the constitution in relation to authorizing ballot by mail by removing cause for absentee ballot voting).

> *efficient for voting and counting*. The *secrecy* in voting undoubtedly will be protected by the courts just as they have carefully guarded it in the past.

WOODSIDE at 470 (emphasis added). The phrase "such other method" of voting is not limited to mechanical devices known in 1901; it is broad enough in scope to allow devices yet to be invented that "preserve secrecy but are more efficient." *Id*. However, an "other method" authorized in Article VII, Section 4 refers to a type of voting that takes place at the polling place, so long as it preserves secrecy.[27]

To read Section 4 as an authorization for no-excuse mail-in voting is wrong for three reasons. First, no-excuse mail-in voting uses a paper ballot and not some "other method." Second, this reading unhooks Section 4 from the remainder of Article VII as well as its historical underpinnings. It ignores the in-person place requirement that was made part of our fundamental law in 1838. PA. CONST. art. VII, §1. Third, it renders Article VII, Section 14 surplusage. The Acting Secretary's interpretation of "such other method" means that the legislature always had the authority to extend absentee voting to every elector, in any circumstance, and *Lancaster City* was dead wrong in holding that before an expansion to absentee voting could be placed on the "statute books," there must be a constitutional amendment to authorize that expansion.

Finally, we reject the Acting Secretary's premise that the 1968 Constitution ushered in a new age for the conduct of elections in Pennsylvania. As Judge Woodside has observed, what we call the "1968 Constitution" resulted from a process of incorporation of, and amendment to, our first Constitution of 1776.

---

[27] Voters may tell the world how they voted. However, when they cast their vote they must "retire to one of the voting shelves or compartments" to prepare their ballot. *De Walt*, 24 A. at 188. Assistance is prohibited.

Conventions produced what have been designated as the Constitutions of 1790, 1838, 1874, and 1968, but these yearly "designations are for convenience only as *the* Constitution of Pennsylvania has been amended, *not replaced and not readopted*, by the proposals of the last four conventions." WOODSIDE at 7 (emphasis added). Simply, where language has been retained, this has been done advisedly in order to retain the original meaning.

"Offer to vote" has been part of the Pennsylvania Constitution since 1838 and has been consistently understood, since at least 1862, to require the elector to appear in person, at a "proper polling place" and on Election Day to cast his vote. The ability to vote at another time and place, *i.e.*, absentee voting, requires specific constitutional authorization. Accordingly, the absentee voting authorization has been extended in small steps from those in active military service to those war veterans whose injuries require residency outside their election district and, then, to civilians who may still reside in their election district but are unable to "attend" to the polls on Election Day because of incapacity, illness or disability. The most recent amendment, in 1997, added observance of a religious holiday or Election Day duties. Each painstaking amendment to the absentee voting requirement in Section 14 was unnecessary, according to the Acting Secretary, after 1901 when Section 4 was amended.

The 1968 changes to Article VII were minor. They did not eliminate the constitutional requirement of in-person voting or the need for a constitutional provision to authorize an exception to in-person voting. Judge Woodside, a delegate to the constitutional convention that produced the 1968 Constitution, explains Article VII, Section 14 as follows:

> This provision requires that a voter by absentee ballot be a "qualified elector" and (a) absent from the county of residence

> because his duties, occupation or business required him to be absent; [or] (b) unable to attend the polling place because of illness or physical disability. The statutory law provides in detail the process of obtaining the counting of absentee ballots.
>
> An amendment to this section will be submitted to the electorate in November, 1985. It would add subsequently to "physical disability" the following: 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.

WOODSIDE at 473-74. Stated otherwise, Section 14 established the rules of absentee voting as both a floor and a ceiling. Were it exclusively a floor, then the 1985 pending constitutional amendment of which Woodside writes was unnecessary.

It is striking how many times Article VII, Section 14, and its antecedents, refer to "proper polling places." PA. CONST. art. VII, §14. The 1864 Constitution used the phrase that soldiers voting *in absentia* would treat their ballots "as if they were present at their usual places of election." PA. CONST. art. III, §4 (1864). Also appearing in the absentee voting provision is the phrase "unavoidably absent from the State or county of their residence." PA. CONST. art. VIII, §19 (1957). Section 14 can only be understood as an exception to the rule established in Article VII, Section 1 that a qualified elector must present herself at her proper polling place to vote on Election Day, unless she must "be absent" on Election Day for the reasons specified in Article VII, Section 14(a). PA. CONST. art. VII, §14(a).

The 1968 change from "may" to "shall" in Article VII, Section 14 does not affect this analysis, as suggested by the Acting Secretary. "May" is generally understood to be directory, and "shall" is generally understood to be mandatory. *In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004) ("The word 'shall' carries an imperative or mandatory

meaning."). However, it has been observed that "there are provisions in nearly every constitution which from the nature of things must be construed to be directory, for example, sections commanding the legislature to pass laws of a particular character, as to redistrict the state into senatorial or representative districts at stated periods." Thomas Raeburn White, Commentaries on the Constitution of Pennsylvania, at 24-25 (1907) (WHITE). Here, the legislature has fulfilled its duty; it has provided a "manner" by which qualified electors unable to attend at their proper polling places for a constitutionally accepted reason "may vote." PA. CONST. art. VII, §14(a)

Section 4 and Section 14 address different concerns. Section 4 incorporated the terms of the Baker Ballot Law into our fundamental law to ensure elections were conducted free of coercion and fraud. Section 14 addresses the concern that some electors physically unable to "attend at their proper polling places" should not be denied the franchise. Section 14 resolves the tension between the constitutional requirement of in-person voting and the need to waive that requirement in appropriate circumstances. FORTIER & ORNSTEIN at 498. Section 4 did not supplant the need for the exceptions in Section 14, as the Acting Secretary suggests.

Chase and *Lancaster City* have not lost their precedential weight over the course of time. They have the "rigor, clarity and consistency" that one expects for the application of *stare decisis*. *William Penn School District*, 170 A.3d at 457. We reject the strained argument of the Acting Secretary and the Democratic Intervenors that in *Lancaster City* the Supreme Court did not give close enough consideration to Article VII, Section 4. It did consider and construe its meaning. Rather, it is the Acting Secretary that gives inadequate attention to our fundamental law that the legislature may not excuse qualified electors from exercising the

franchise at their "proper polling places" unless there is first "an amendment to the Constitution … permitting this to be done." *Lancaster City*, 126 A. at 201.

The 1901 amendment authorizing "such other method" of voting at the polling place did not repeal the in-person voting requirement in Section 1, which created the "entitlement" to vote as well as the prerequisites therefor.[28] Our Constitution allows the requirement of in-person voting to be waived where the elector's absence is for reasons of occupation, physical incapacity, religious observance, or Election Day duties. PA. CONST. art. VII, §14(a). Because that list of reasons does not include no-excuse absentee voting, it is excluded. *Page v. Allen*, 58 Pa. 338, 347 (1868); *Lancaster City*, 126 A. at 201. An amendment to our Constitution that ends the requirement of in-person voting is the necessary prerequisite to the legislature's establishment of a no-excuse mail-in voting system.

IV. Acting Secretary's Procedural Objections to McLinko's Petition for Review

The Acting Secretary argues that the Court need not - and cannot - reach the question of whether Act 77 can be reconciled with Article VII of the Pennsylvania Constitution. She asserts that McLinko's petition for review was untimely filed and, further, McLinko lacks standing to initiate this action, even if his petition had been timely filed. We address each procedural objection.

A. Standing

In her challenge to McLinko's standing to challenge the constitutionality of Act 77, the Acting Secretary asserts that McLinko's duties under the Election Code do not give him a substantial or particularized interest in

[28] The Acting Secretary notes that Section 1 merely qualifies voters as stated in the title. However, "[n]o attention will be paid to the captions of the articles or section. They are inserted only for convenience." WHITE at 13 (citing *Houseman v. Commonwealth ex rel. Tener*, 100 Pa. 222 (1882)). In any case, the Supreme Court has explained that Section 1 both qualifies the elector and "compel[s] him to offer his vote in the appropriate ward or township." *Chase*, 41 Pa. at 418.

the statute's constitutionality. McLinko responds that as a member of the Bradford County Board of Elections he holds an interest that is separate from the interest that every Pennsylvania citizen has in statutes that conform to the Pennsylvania Constitution. Alternatively, he meets the test for taxpayer standing.

A party seeking judicial resolution of a controversy must establish a "substantial, direct, and immediate" interest in the outcome of the litigation. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). An interest is "substantial" if the party's interest "surpasses the common interest of all citizens in procuring obedience to the law." *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497, 506 (Pa. Cmwlth. 2019) (quoting *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1215 (Pa. Cmwlth. 2018)). A "direct" interest requires a causal connection between the matter complained of and the party's interest. *Id*. Finally, an "immediate" interest requires a causal connection that is neither remote nor speculative. *Id*. The key is that the party claiming standing must be "negatively impacted in some real and direct fashion." *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005).

McLinko argues that as an elected member of the Bradford County Board of Elections he meets these standards. In that role, he must make a host of judicial, quasi-judicial, and executive judgments, which include "issuing rules and regulations under the [E]lection [C]ode[;] investigating claims of fraud, irregularities, and violations of the [E]lection [C]ode[;] issuing subpoenas[;] determining the sufficiency of nomination petitions[;] ordering recounts or recanvassing of votes[;] and certifying election results." McLinko Reply Brief at 3 (citing Sections 302, 304, 1401, 1404 and 1408 of the Election Code, 25 P.S. §§2642, 2644, 3151, 3154, 3158). McLinko argues that the standing of a public

official to challenge the constitutionality of a statute that the public official must administer and implement was established in *Robinson Township v. Commonwealth*, 52 A.3d 463 (Pa. Cmwlth. 2012), *aff'd in part, rev'd in part sub nom. Robinson Township, Washington County v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

The Acting Secretary responds that McLinko's duty to carry out the Election Code does not encompass challenging the Election Code's constitutionality. Further, because a board of elections is a multi-member body, it can act only through a majority of its members. As such, McLinko does not have standing in his own right.

As McLinko correctly observes, the Election Code requires a board of elections to promulgate regulations, issue subpoenas, conduct hearings on the conduct of primaries and elections and certify election results. Section 304 of the Election Code, 25 P.S. §2644. In *Robinson Township*, 52 A.3d at 476, this Court considered whether one member of a borough council and one member of a board of supervisors had standing to challenge the constitutionality of a statute that restricted their official actions.[29] This Court held that because the petitioners were "local elected officials acting in their official capacities for their individual municipalities and being required to vote for zoning amendments they believe are unconstitutional," they had an interest sufficient to confer standing. *Id.* Likewise, McLinko is required to count ballots and certify election results that he believes are

[29] Brian Coppola, a Supervisor of Robinson Township, and David M. Ball, a Councilman of Peters Township, brought suit against the Commonwealth individually and in their official capacities as elected officials in their respective municipalities. They contended that they would be required to vote on the passage of zoning amendments to comply with Act 13 of 2012, 58 Pa. C.S. §§2301-3504, which amended the Oil and Gas Act to require municipal zoning ordinances to be amended to include oil and gas operations in all zoning districts.

unconstitutional. As in *Robinson Township*, this dilemma confers standing on McLinko as an elected official, and he does not need the participation of his entire board to demonstrate his standing. *Id*. at 475 (standing granted to individual supervisor of Robinson Township and individual councilman of Peters Township). *See also Fumo v. City of Philadelphia*, 972 A.2d 487 (Pa. 2009) (single member of General Assembly, a body that can only act through majority vote, had standing to challenge ordinance as unconstitutional).

Nevertheless, the Acting Secretary directs the Court to *In re Administrative Order No. 1-MD-2003 (Appeal of Honorable James P. Troutman)*, 936 A.2d 1 (Pa. 2007) (*Troutman*). In that case, a clerk of courts challenged the legality of an administrative order issued by the court's president judge directing the clerk to seal certain records in his custody. The Supreme Court acknowledged that the clerk of courts had a constitutional duty to make court records available to the public but observed that these duties were purely ministerial. The clerk of courts' "interest" in the merits of an administrative order of the court was the same as that of any other citizen. *Troutman*, 936 A.2d at 9. Accordingly, the Supreme Court held that the clerk of courts lacked standing.

Troutman is distinguishable. First, as the concurring opinion of Justice Saylor pointed out, there is a "tenuous relationship between [the clerk's] legal obligations and the statute at issue [(Criminal History Record Information Act, 18 Pa. C.S. §§9101-9183)]." *Troutman*, 936 A.2d at 11 (Saylor, J., concurring). Here, by contrast, the relationship between McLinko's legal obligations and the Election Code is direct, not tenuous. Second, *Troutman* concerned an administrative order of the court and not a statutory duty, as here and in *Robinson Township*. Third, our Supreme Court has held that the Election Code makes a county board of elections

"more than a mere ministerial body. It clothes [the board] with quasi-judicial functions," such as the power to "issue subpoenas, summon witnesses, compel production of books, papers, records and other evidence, and fix the time and place for hearing any matters relating to the administration and conduct of primaries and elections." *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952) (citation omitted).

Given McLinko's responsibilities under the Election Code, it is difficult to posit a petitioner with a more substantial or direct interest in the constitutionality of Act 77's amendments to the Election Code.

Even so, this case presents the special circumstances where taxpayer standing may be invoked to challenge the constitutionality of governmental action. The Pennsylvania Supreme Court has established that a grant of taxpayer standing is appropriate where (1) governmental action would otherwise go unchallenged; (2) those directly affected are beneficially affected; (3) judicial relief is appropriate; (4) redress through other channels is not appropriate; and (5) no one else is better positioned to assert the claim. *Application of Biester*, 409 A.2d 848 (Pa. 1979). McLinko meets all five requirements. Because the Acting Secretary has not challenged the constitutionality of Act 77, it may go unchallenged if McLinko is denied standing.

In *Sprague v. Casey*, 550 A.2d 184 (Pa. 1998), a taxpayer challenged the special election to fill one seat on the Supreme Court and one seat on the Superior Court scheduled for the General Election of November 1998.[30] The respondents argued that the taxpayer lacked standing because the governmental action he

[30] Judges are to be elected at municipal elections held in odd-numbered years. Article V, Section 13(b) and Article VII, Section 3 of the Pennsylvania Constitution, PA. CONST. art. V, §13(b) and art. VII, §3. Judicial vacancies are to be filled by election only when they occur more than 10 months before the municipal election. Article V, Section 13(b) of the Pennsylvania Constitution, PA. CONST. art. V, §13(b).

challenged did not substantially or directly impact him. The Supreme Court determined that taxpayer standing under *Biester* was warranted because the "election would otherwise go unchallenged because respondents are directly and beneficially affected" but chose not to initiate legal action. *Id.* at 187. The Court explained that "[j]udicial relief is appropriate because the determination of the constitutionality of the election is a function of the courts . . . and redress through other channels is unavailable." *Id*. (citation omitted).

We reject the challenge of the Acting Secretary and the Democratic Intervenors to McLinko's standing to initiate an action to challenge the constitutionality of Act 77's system of no-excuse mail-in voting.

B. Timeliness of McLinko's Petition for Review

The Acting Secretary next contends that McLinko's petition for review was untimely filed and, thus, should be dismissed. She argues, first, that his petition is barred by the doctrine of laches and, second, by the so-called statute of limitations in Act 77 requiring constitutional challenges to the act to be filed within 180 days of the statute's effective date, or April 28, 2020. McLinko's petition was filed in July of 2021.

1. Doctrine of Laches

Laches is an equitable defense[31] that can result in the dismissal of an action where the plaintiff has been dilatory in seeking relief and the delay has prejudiced the defendant. *Commonwealth ex rel. Baldwin v. Richard*, 751 A.2d 647, 651 (Pa. 2000); *Smires v. O'Shell*, 126 A.3d 383, 393 (Pa. Cmwlth. 2015). A defendant can establish prejudice from the passage of time by offering evidence that

[31] "Because laches is an affirmative defense, the burden of proof is on the defendant or respondent to demonstrate unreasonable delay and prejudice." *Pennsylvania Federation of Dog Clubs v. Commonwealth*, 105 A.3d 51, 58 (Pa. Cmwlth. 2014).

he changed his position with the expectation that the plaintiff has waived his claim. *Baldwin*, 751 A.2d at 651. The question of laches is factual and is determined by examining the circumstances of each case. *Sprague*, 550 A.2d at 188.

The Acting Secretary relies upon *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020).[32] *Kelly* was filed several weeks after the 2020 General Election and challenged the constitutionality of Act 77. There, the petitioners "sought to invalidate the ballots of the millions of Pennsylvania voters who utilized the mail-in voting procedures established by Act 77," believing those votes were illegal. *Kelly*, 240 A.3d at 1256. In addition to seeking the disenfranchisement of "6.9 million Pennsylvanians who voted in the General Election," the petitioners sought to "direct the General Assembly to choose Pennsylvania's electors." *Id*. (footnote omitted).

The Supreme Court dismissed the petition on the basis of laches. It held that the petitioners were dilatory because they waited until days before the county boards of elections were required to certify the election results to the Secretary of the Commonwealth to file their action. Moreover, they did not file their action until the election results were "seemingly apparent." *Id*. at 1256-57. The Supreme Court held that the "disenfranchisement of millions of Pennsylvania voters" established "substantial prejudice." *Id*. at 1257. It further held that to disenfranchise citizens whose only error was relying on the Commonwealth's instructions was fundamentally unfair, and the request to void an election was

[32] *Kelly* is a *per curiam* order. In *Cagey v. Commonwealth*, 179 A.3d 458, 467 (Pa. 2018) (citation omitted), the Supreme Court explained that "'the legal significance of *per curiam* decisions is limited to setting out the law of the case' and that such decisions are not precedential, even when they cite to binding authority." The Acting Secretary concedes that *Kelly* is "technically not binding precedent" but nevertheless argues that it is "on all fours with this case" because it involved an identical constitutional claim and was decided by the very justices who currently sit on the Supreme Court. Acting Secretary Brief at 23 n.10. We disagree that *Kelly* is "on all fours."

declared "a drastic if not staggering remedy" that was quickly dismissed. *Id*. at 1259 (Wecht, J., concurring) (citations omitted).

McLinko filed his petition in July of 2021, between elections, and sought expedited relief "in sufficient advance" of the November 2021 General Election so that electors would not have their votes disqualified. Application for Expedited Briefing and Summary Relief, ¶6.[33] There is no risk of disenfranchisement of one vote, let alone millions, as was the case in *Kelly*. The critical difference between *Kelly* and this case is that McLinko is seeking prospective relief, *i.e.*, a determination as to the constitutionality of Act 77 for future elections.

Nevertheless, the Acting Secretary and Democratic Intervenors assert that the doctrine of laches should apply because McLinko did not file his action until two years after the enactment of Act 77 and three subsequent elections. As a member of a board of elections, McLinko cannot claim a lack of knowledge as justification for not bringing his claims sooner. Invalidating Act 77 after two election cycles would cause "profound prejudice" because of the funding and effort dedicated to the implementation of mail-in voting. Acting Secretary's Brief at 24. More than 1.38 million Pennsylvania electors have requested to be placed on a permanent mail-in ballot list, and the elimination of this list would result in confusion and impose a burden upon state and local governments.

The government's investment of resources to implement a statute is irrelevant to the analysis of the statute's constitutionality. In *Commonwealth ex rel.*

[33] In his application for summary relief, McLinko sought a "speedy declaration" from this Court to allow any person that planned on voting by mail to arrange to vote in person on November 2, 2021, or by absentee ballot if qualified as an absentee voter under the Pennsylvania Constitution. Application for Expedited Briefing and Summary Relief, ¶7. This Court concluded that prospective relief in advance of the November 2021 election was impossible because the election was underway by the time argument was held on the summary relief applications.

Fell v. Gilligan, 46 A. 124, 125 (Pa. 1900), the Supreme Court observed that expenditures of "millions of dollars of school funds" for 25 years under the provisions of a statute were not reasons "for refusing to declare [the statute] void if in contravention of the constitution." Our Supreme Court has further explained that "laches and prejudice can never be permitted to amend the Constitution." *Sprague*, 550 A.2d at 188. In *Wilson v. School District of Philadelphia*, 195 A. 90, 99 (Pa. 1937), our Supreme Court explained, with emphasis added:

> We have not been able to discover any case which holds that laches will bar an attack upon the constitutionality of a statute as to its future operation, *especially where the legislation involves a fundamental question going to the very roots of our representative form of government and concerning one of its highest prerogatives*. To so hold would establish a dangerous precedent, the evil effect of which might reach far beyond present expectations.

The question of Act 77's constitutionality is a question that goes to the "very roots of our representative form of government." *Id.* Constitutional norms outweigh the cost of implementing unconstitutional statutes.

This is not the first challenge to the constitutionality of a statute to be filed years after its enactment. *See, e.g.*, *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (constitutional challenge to state's congressional redistricting legislation brought six years and multiple elections after its 2011 enactment); *Peake v. Commonwealth*, 132 A.3d 506, 521 (Pa. Cmwlth. 2015) (challenge filed in 2015 to constitutionality of 1996 amendment to the Older

Adults Protective Services Act[34] imposing a lifetime ban on persons with a single conviction from employment in the care of older adults).

For these reasons, we hold that the doctrine of laches does not bar McLinko's challenge to the constitutionality of Act 77.

2. Section 13 of Act 77 Time Bar

Alternatively, the Acting Secretary argues that McLinko's petition must be dismissed because the legislature has required that challenges to the mail-in voting provisions of Act 77 be brought within 180 days of its enactment. *See* Section 13 of Act 77. In support, she offers precedent that she claims authorizes a legislature to set a time bar to the challenge of a statute's constitutionality. *See, e.g.*, *Turner v. People of State of New York*, 168 U.S. 90 (1897) (New York statute with six-month statute of limitations to challenge tax sale of property for nonpayment of taxes held constitutional); *Block v. North Dakota*, *ex rel. Board of University and School Lands*, 461 U.S. 273 (1983) (federal statute with 12-year statute of limitations to file land title action land against United States government held not to violate Tenth Amendment, U.S. CONST., amend. X); *Dugdale v. United States Customs and Border Protection*, 88 F. Supp. 3d 1 (D.D.C. 2015) (federal statute with 60-day statute of limitations to challenge removal order held not to violate due process or the Suspension Clause of Article I of the United States Constitution, U.S. CONST. art. I); *Greene v. Rhode Island*, 398 F.3d 45 (1st Cir. 2005) (federal statute with 180-day statute of limitations for Native Americans to assert land claim held not to violate due process); *Native American Mohegans v. United States*, 184 F. Supp. 2d 198 (D. Conn. 2002) (federal statute providing 180-day statute of limitations for Native Americans to assert land claim held not to violate due process or separation

[34] Act of November 6, 1987, P.L. 381, *as amended*, 35 P.S. §§10225.101-10225.5102.

of powers); *Cacioppo v. Eagle County School District Re-50J*, 92 P.3d 453 (Colo. 2004) (Colorado statute providing a five-day statute of limitations to challenge ballot titles held not to violate Colorado Constitution).

This precedent is irrelevant. Not a single case cited by the Acting Secretary stands for the proposition that a legislature can prevent judicial review of a statute, whose constitutionality is challenged, with a statute of limitations of any duration. This is because, simply, an unconstitutional statute is void *ab initio*.

A statute of limitations is procedural and extinguishes the remedy rather than the cause of action.[35] McLinko seeks clarity on whether Act 77 comports with the Pennsylvania Constitution, and the General Assembly did not impose a time bar for seeking this clarity.

To begin, Section 13 of Act 77 does not establish a statute of limitations for instituting a constitutional challenge to Act 77. It states:

> (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)* [including Article XIII-D of the Election Code that provides for mail-in voting]. The Supreme Court may take action it deems appropriate, consistent with the Supreme Court retaining jurisdiction over the matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief.

[35] A statute of limitations is an affirmative defense that is properly raised in new matter, rather than in preliminary objections, and it cannot be raised in a demurrer, unless the particular statute of limitations is nonwaivable. PA.R.CIV.P. 1030(a); *Devine v. Hutt*, 863 A.2d 1160, 1167 (Pa. Super. 2004); *City of Warren v. Workers' Compensation Appeal Board (Haines)*, 156 A.3d 371, 377 (Pa. 2017).

> (3) An action under paragraph (2) must be commenced within 180 days of the effective date of this section.

Section 13 of Act 77 (emphasis added). This provision addresses subject matter jurisdiction and does not state a statute of limitations.

Act 77 gave the Pennsylvania Supreme Court exclusive jurisdiction to hear challenges to the enumerated provisions of Act 77 for the first 180 days after enactment. Thereafter, such constitutional challenges reverted to this Court in accordance with the Judicial Code. 42 Pa. C.S. §761(a)(1).[36] Notably, the Acting Secretary does not assert this Court lacks subject matter jurisdiction over McLinko's action. The Supreme Court had exclusive jurisdiction to entertain constitutional challenges to certain sections of Act 77 for the first 180 days, or until April 28, 2020, and its exclusive jurisdiction terminated as of that day. Section 13 of Act 77 is not a statute of limitations.

Lest there be any doubt, Section 13 has been treated as a provision on subject matter jurisdiction, not a statutory time bar. In *Delisle v. Boockvar*, 234 A.3d 410 (Pa. 2020), the Supreme Court by *per curiam* order dismissed a petition for review that had been filed after April 28, 2020, and transferred the case to this Court. In a concurrence, Justice Wecht explained that "[t]he statute that conferred exclusive original jurisdiction upon this Court to hear constitutional challenges revoked that jurisdiction at the expiration of 180 days, and there is no question that [p]etitioners

---

[36] It states, in relevant part:

> (a) General rule.--The Commonwealth Court shall have original jurisdiction of all civil actions or proceedings:
>
> > (1) Against the Commonwealth government, including any officer thereof, acting in his official capacity[.]

42 Pa. C.S. §761(a)(1). The exceptions to the general rule in Section 761(a)(1) are not applicable here.

herein filed their petition outside of that time limit." *Id*. at 411 (Wecht, J., concurring). Though *Delisle* was a *per curiam* order, and therefore not binding precedent, this Court has also independently stated that Section 13 is an exclusive jurisdiction provision. *See Crossey v. Boockvar* (Pa. Cmwlth., No. 266 M.D. 2020, filed September 4, 2020), Recommended Findings of Fact and Conclusions of Law at 2 n.3 (stating that the Supreme Court had "exclusive jurisdiction if a challenge was brought within 180 days of Act 77's effective date").

The General Assembly cannot insulate Act 77 from judicial review. As our Supreme Court has stated:

> Since *Marbury v. Madison*, 5 U.S. 137 . . . (1803), it has been well-established that the separation of powers in our tripartite system of government typically depends upon judicial review to check acts or omissions by the other branches in derogation of constitutional requirements. That same separation sometimes demands that courts leave matters exclusively to the political branches. *Nonetheless, "[t]he idea that any legislature . . . can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions*."

William Penn School District, 170 A.3d at 418 (quoting *Smyth v. Ames*, 169 U.S. 466, 527 (1898)) (emphasis added); *Robinson Township*, 83 A.3d at 927 ("[I]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts.") (citation omitted). If the judiciary, upon review, determines that there are defects in the enactment of a statute, procedural or substantive, the court will void that enactment. *See Glen-Gery Corporation v. Zoning Hearing Board of Dover Township*, 907 A.2d 1033 (Pa. 2006) (holding that a statute requiring an ordinance challenge to be

brought within 30 days of the effective date where there were procedural defects in the enactment of the ordinance was unconstitutional and void).

We hold that McLinko's petition seeking prospective relief was timely filed. Section 13 did not establish a 180-day statute of limitations for bringing a constitutional challenge to Act 77. It could not do so without violating separation of powers. *William Penn School District*, 170 A.3d at 418 (legislature cannot "conclusively determine for the people and for the courts that what it enacts in the form of law … is consistent with the fundamental law").

V. Conclusion

In *Chase*, the Supreme Court rejected Mr. Miller's argument that because the Pennsylvania Constitution did not contain a clause that "prohibits the legislature from passing a law authorizing soldiers to vote at their respective camps . . . the power may be exercised." 41 Pa. at 409. This prohibition was expressed in the antecedent to Article VII, Section 1, as our Supreme Court explained:

> The amendment so understood, introduced not only a new test of the right of suffrage, to wit, a district residence, but a rule of voting also. *Place became an element of suffrage* for a two-fold purpose. Without the district residence no man shall vote, but having had the district residence, the right it confers is to vote in *that district*. Such is the voice of the constitution.

Chase, 41 Pa. at 419 (emphasis added). Acknowledging the "hardship of depriving so meritorious a class of voters as our volunteer soldiers of the right of voting," the Supreme Court explained that "[o]ur business is to expound the constitution and laws of the country as we find them written. We have no bounties to grant to soldiers, or anybody else." *Id*. at 427-28. It further explained that while the soldiers "fight for the constitution, they do not expect judges to sap and mine it by judicial constructions." *Id*. at 428. The Court gave a "natural and obvious reading" to the

place element to suffrage set forth in Article VII, Section 1. *Chase*, 41 Pa. at 428. This Court is bound by *Chase* and *Lancaster City*, and we reject the strained construction of Article VII proffered by the Acting Secretary to avoid the clear directive of our Supreme Court.

No-excuse mail-in voting makes the exercise of the franchise more convenient and has been used four times in the history of Pennsylvania. Approximately 1.38 million voters have expressed their interest in voting by mail permanently. If presented to the people, a constitutional amendment to end the Article VII, Section 1 requirement of in-person voting is likely to be adopted. But a constitutional amendment must be presented to the people and adopted into our fundamental law before legislation authorizing no-excuse mail-in voting can "be placed upon our statute books." *Lancaster City*, 126 A. at 201.

For these reasons, we grant summary relief to McLinko and declare that Act 77 violates Article VII, Section 1 of the Pennsylvania Constitution, PA. CONST. art. VII, §1. We deny the Acting Secretary's application for summary relief on the procedural and substantive grounds proffered therein.[37]

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

Former President Judge Brobson, Judge Covey, and former Judge Crompton did not participate in the decision in this case.

[37] As a result of our grant of summary relief to McLinko, the preliminary objections filed by the Acting Secretary and Democratic Intervenors are dismissed as moot.

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
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 J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook, Petitioners	:	
v.	:	No. 293 M.D. 2021 Argued: November 17, 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

OPINION
BY JUDGE LEAVITT[1] FILED: January 28, 2022

In this companion opinion to *McLinko v. Commonwealth*, __ A.3d __ (Pa. Cmwlth., No. 244 M.D. 2021, filed January 28, 2022), Representative Timothy R. Bonner and 13 members of the Pennsylvania House of Representatives (collectively, Petitioners) have filed a petition for review seeking a declaration that Act 77 of 2019,[2] which established that any qualified elector may vote by mail for any reason, violates the Pennsylvania Constitution and is, therefore, void. Petitioners also assert that Act 77 violates the United States Constitution. U.S. CONST. art. I, §§2, 4 and art. II, §1; U.S. CONST. amends. XIV and XVII. Finally, Petitioners seek an injunction prohibiting the distribution, collection, and counting of no-excuse mail-in ballots in future state and federal elections.

Respondents, the Acting Secretary of the Commonwealth, Veronica Degraffenreid, and the Department of State (collectively, Acting Secretary), have filed preliminary objections to Petitioners' challenge to Act 77's system of no-excuse mail-in voting.[3] The Acting Secretary also raises procedural challenges to the petition for review, *i.e.*, it was untimely filed, and Petitioners lack standing to challenge the constitutionality of Act 77. As in *McLinko*, the parties have filed cross-applications for summary relief, which are now before the Court for disposition.

---

[1] This matter was assigned to the panel before January 3, 2022, when President Judge Emerita Leavitt became a senior judge on the Court. Because the vote of the commissioned judges was evenly divided on the constitutional analysis in this opinion, the opinion is filed "as circulated" pursuant to Section 256(b) of the Court's Internal Operating Procedures, 210 Pa. Code §69.256(b).

[2] Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

[3] The Democratic National Committee and the Pennsylvania Democratic Party (collectively, Democratic Intervenors), and the Butler County Republican Committee, the York County Republican Committee, and the Washington County Republican Committee (collectively, Republican Intervenors) sought intervention in these consolidated matters. The Court granted them intervention.

On the merits, Petitioners' claims under the Pennsylvania Constitution are identical to those raised by McLinko in the companion case.[4] The Court thoroughly addressed those claims in the *McLinko* opinion, which we incorporate here by reference. For all the reasons set forth in *McLinko,* we hold that Petitioners are entitled to summary relief on their request for declaratory judgment.[5]

Additionally, Petitioners seek to enjoin the Acting Secretary from enforcing Act 77, which motion for summary relief will be denied as unnecessary. The declaration has the "force and effect of a final judgment or decree." 42 Pa. C.S. §7532.

We turn next to the Acting Secretary's procedural objections. As in *McLinko*, she contends that Petitioners' petition for review was untimely filed because it is barred by the doctrine of laches or, alternatively, because it was filed after the so-called statute of limitations in Section 13 of Act 77. The Court considered, and rejected, these arguments in *McLinko*, and we incorporate that analysis here. *See McLinko*, __ A.3d at __- __, slip op. at 40-48. Accordingly, we hold that Petitioners' petition for review was timely filed.

Finally, we consider the Acting Secretary's challenge to Petitioners' standing. A party seeking judicial resolution of a controversy must establish a "substantial, direct, and immediate interest" in the outcome of the litigation to have standing. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). An interest is "substantial" if the party's interest "surpasses the common interest of all citizens in procuring obedience to the law." *Firearm Owners Against Crime v. City of*

---

[4] The cases have been consolidated because they raise identical issues under the Pennsylvania Constitution. A separate opinion is filed in each case to address the differences in standing and requested relief.

[5] In light of our holding that Act 77 violates the Pennsylvania Constitution, we need not address Petitioners' claims under the United States Constitution.

Harrisburg, 218 A.3d 497, 506 (Pa. Cmwlth. 2019) (quotation omitted). A "direct" interest requires a causal connection between the matter complained of and the party's interest. *Id*. An "immediate" interest requires a causal connection that is neither remote nor speculative. *Id*. The key is that the petitioner must be "negatively impacted in some real and direct fashion." *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005).

Petitioners argue that they meet the above standards either as candidates for office or as registered voters. As registered voters, Petitioners have a right to vote on a constitutional amendment prior to the implementation of no-excuse mail-in voting in Pennsylvania. As past and likely future candidates for office, Petitioners have been or will be impacted by dilution of votes in every election in which improper mail-in ballots are counted. As candidates, Petitioners argue that they will have to adapt their campaign strategies to an unconstitutional law.

The Acting Secretary responds that Petitioners' interest as registered electors does not confer standing.[6] She argues that courts have repeatedly rejected the "vote dilution" theory of injury advanced by Petitioners and, further, Petitioners have not explained how mail-in voting injures them as past and future candidates for office.

This Court has recognized that voting members of a political party have a substantial interest in assuring compliance with the Election Code[7] in that party's primary election. *In re Pasquay*, 525 A.2d at 14. Likewise, a political party has

[6] Notably, this Court has observed that "any person who is registered to vote in a particular election has a substantial interest in obtaining compliance with the election laws by any candidate for whom that elector may vote in that election." *In re Williams*, 625 A.2d 1279, 1281 (Pa. Cmwlth. 1993) (quoting *In re Pasquay*, 525 A.2d 13, 14 (Pa. Cmwlth. 1987)).

[7] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2600-3591.

standing to challenge the nomination of a party candidate who has failed to comply with election laws. *In re Barlip*, 428 A.2d 1058 (Pa. Cmwlth. 1981).[8] In *In re Shuli*, 525 A.2d 6, 9 (Pa. Cmwlth. 1987), this Court concluded that a candidate for district justice had standing to challenge his opponent's nominating petition because his status as a candidate for the same office gave him a substantial interest in the action. *See also In re General Election – 1985*, 531 A.2d 836, 838 (Pa. Cmwlth. 1987) (candidate in general election had standing to challenge judicial deferment and resumption of election because it could have jeopardized the outcome of the election, a possibility sufficient to show "direct and substantial harm").[9] In sum, a candidate has an interest beyond the interest of other citizens and voters in election matters. Because Petitioners have been and will be future candidates, they have a cognizable interest in the constitutionality of Act 77.

Nevertheless, the Acting Secretary directs the Court to *In re General Election 2014* (Pa. Cmwlth., No. 2047 C.D. 2014, filed March 11, 2015).[10] In that case, the manager of a rehabilitation center in the City of Philadelphia filed an emergency application for absentee ballots for five patients who had been admitted to the facility just before the 2014 General Election. The trial court granted the

---

[8] In *In re Barlip*, this Court held that a county Republican Committee had standing to challenge the nomination of a Republican candidate who failed to comply with election laws. We explained that "a political party, by statutory definition,[] is an organization representing qualified electors, [thus] it maintains the same interest as do its members in obtaining compliance with the election laws so as to effect the purpose of those laws in preventing fraudulent or unfair elections." *In re Barlip*, 428 A.2d at 1060. "Moreover, a political party may suffer a direct and practical harm to itself from the violation of the election laws by its candidates, for such noncompliance or fraud will ultimately harm the reputation of party and impair its effectiveness." *Id.*

[9] Notably, in *Barbieri v. Shapp*, 383 A.2d 218, 221 (Pa. 1978), the State Court Administrator had standing to seek a declaration that four judicial offices be filled by an election, as required by statute.

[10] Under Section 414(a) of this Court's Internal Operating Procedures, an unreported opinion may be cited for its persuasive value. 210 Pa. Code §69.414(a).

emergency application over the objections of attorneys for the Republican State Committee and the Republican City Committee. Two registered electors (objectors), who had not participated in the hearing on the emergency application, appealed the trial court's order and raised the same objections as the Republican committees, which were no longer participating. The trial court determined that the objectors lacked standing.

On appeal, the objectors argued that the trial court erred, asserting that as registered electors in the City of Philadelphia, they had "a substantial, immediate and pecuniary interest that the Election Code be obeyed." *In re General Election 2014*, slip op. at 12. The objectors claimed that the disputed absentee ballots affected the outcome of the General Election in which they had voted.

In quashing the objectors' appeal of the trial court's order, this Court held, *inter alia*, that the objectors were not "aggrieved" because they could not establish a "substantial, direct and immediate" interest. *Id.*, slip op. at 11 (citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975)). In so holding, we relied upon *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970),[11] where our Pennsylvania Supreme Court rejected a challenge to absentee ballots that was premised on a speculative theory of vote dilution:

> Basic in appellants' position is the [a]ssumption that those who obtain absentee ballots, by virtue of statutory provisions which they deem invalid, will vote for candidates at the November election other than those for whom the appellants will vote and thus will cause a dilution of appellants' votes. This assumption, unsupported factually, is unwarranted and cannot afford a sound

[11] In *Kauffman*, registered Democratic electors filed a declaratory judgment action against the Philadelphia Board of Elections and its chief clerk to challenge a section of the Election Code that permitted electors and their spouses on vacation to vote by absentee ballot. The objecting electors argued that they would have their votes diluted by the absentee ballots.

> basis upon which to afford appellants a standing to maintain this action.

Kauffman, 271 A.2d at 239-40. We concluded that, as in *Kauffman*, the objectors' interest was common to all qualified electors. Further, the objectors offered no support for their claim that the five absentee ballots they challenged would impact the outcome of the election.

In contrast to *In re General Election 2014*, Petitioners have pleaded an interest as candidates, as well as electors, and this matter extends far beyond five absentee ballots. In the 2020 general election, 2.7 million ballots were cast as mail-in or absentee ballots; more than 1.38 million Pennsylvania electors have requested to be placed on a permanent mail-in ballot list. Affidavit of Jonathan Marks ¶25. Given these numbers, it is obvious that no-excuse mail-in voting impacts a candidate's campaign strategy. We conclude that Petitioners have standing.

Even so, this case presents the special circumstances where taxpayer standing may be invoked to challenge the constitutionality of governmental action. The Pennsylvania Supreme Court has established that a grant of taxpayer standing is appropriate where (1) governmental action would otherwise go unchallenged; (2) those directly affected are beneficially affected; (3) judicial relief is appropriate; (4) redress through other channels is not appropriate; and (5) no one else is better positioned to assert the claim. *Application of Biester*, 409 A.2d 848, 852 (Pa. 1979). Petitioners meet all five requirements. Because the Acting Secretary has not challenged the constitutionality of Act 77, it may go unchallenged if Petitioners are denied standing.

In *Sprague v. Casey*, 550 A.2d 184 (Pa. 1988), a taxpayer challenged the special election to fill one seat on the Supreme Court and one seat on the Superior Court scheduled for the General Election of November 1988. The respondents

argued that the taxpayer lacked standing because the governmental action he challenged did not substantially or directly impact him. The Supreme Court determined that taxpayer standing under *Biester* was warranted because the "election would otherwise go unchallenged because respondents are directly and beneficially affected" and chose not to initiate legal action. *Sprague*, 550 A.2d at 187. The Court explained that "[j]udicial relief is appropriate because the determination of the constitutionality of the election is a function of the courts … and redress through other channels is unavailable." *Id.* (citation omitted).

We reject the challenge of the Acting Secretary and the Democratic Intervenors to Petitioners' standing to initiate an action to challenge the constitutionality of Act 77's system of no-excuse mail-in voting.

Conclusion

For all of the above reasons, we grant Petitioners' application for summary relief, in part, and, in accordance with our analysis in *McLinko*, declare Act 77 to violate Article VII, Section 1 of the Pennsylvania Constitution,[12] PA. CONST. art. VII, §1.

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

Former President Judge Brobson, Judge Covey, and former Judge Crompton did not participate in the decision in this case.

[12] Given our grant of declaratory relief to Petitioners, we need not address the federal claims. Additionally, Petitioners' request for nominal damages, attorneys' fees and costs is denied.

APPENDIX C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 244 M.D. 2021
	:	
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 J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 293 M.D. 2021
	:	Argued: November 17, 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State,	:	
	:	
Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE WOJCIK FILED: January 28, 2022

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 Constitution[1] 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 Code[3] 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.' *Com*[*monwealth*] *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.

APPENDIX D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 244 M.D. 2021
	:	
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 J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 293 M.D. 2021
	:	Argued: November 17, 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State,	:	
	:	
Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE WOJCIK FILED: January 28, 2002

I concur in the Majority's disposition of the procedural objections in this matter. I dissent from the Majority's disposition of the substantive claims regarding the constitutionality of the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), for the reasons expressed in my Concurring and Dissenting Opinion in the companion case, *McLinko v. Commonwealth*, __ A.3d __ (Pa. Cmwlth., No. 244 M.D. 2021, filed January 28, 2022). I only add that Petitioners' federal constitutional claims are without merit as they are based on the purported violation of the Pennsylvania Constitution, which claims are meritless for the reasons outlined therein.

Accordingly, unlike the Majority, I would grant Respondents' Application for Summary Relief with respect to the substantive claims of the constitutionality of Act 77, and dismiss Petitioners' petitions for review with prejudice.

MICHAEL H. WOJCIK, Judge

Judge Ceisler joins in this Concurring/Dissenting Opinion.