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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG McLINKO, Petitioner, v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, et al., Respondents.	**CASES CONSOLIDATED** No. 244 MD 2021

TIMOTHY BONNER, et al., Petitioners, v. VERONICA DEGRAFFENREID, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, et al., Respondents.	No. 293 MD 2021

RESPONDENTS' REPLY TO PETITIONER McLINKO'S RESPONSE IN OPPOSITION TO RESPONDENTS' PRELIMINARY OBJECTIONS TO AMENDED PETITION FOR REVIEW

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Respondents, the Department of State of the Commonwealth of Pennsylvania and Acting Secretary of the Commonwealth Veronica Degraffenreid, submit this reply to Petitioner McLinko's Response in Opposition to Respondents' Preliminary Objections to Petitioner's Amended Petition for Review ("Opposition" or "Pet'r Opp"). Although many of Petitioner's arguments have been adequately addressed in Respondents' previous filings, Petitioner's Opposition contains several new, erroneous assertions that call out for correction.

I. PETITIONER'S NEW ARGUMENT THAT ACT 77 VIOLATES THE SECRECY PROVISION OF ARTICLE VII, § 4 OF THE PENNSYLVANIA CONSTITUTION IS PROCEDURALLY IMPROPER AND SUBSTANTIVELY WITHOUT MERIT

In his brief in opposition to Respondents' Preliminary Objections, Petitioner offers not only "responses to the Respondents' [preliminary] objections," but also "additional reasons why Act 77 is unconstitutional." Pet'r Opp. 1. In particular, Petitioner argues, for the first time, that mail-in and absentee ballots necessarily fail to comply with the requirement, set forth in Article VII, § 4 of the Pennsylvania Constitution, that "secrecy in voting be preserved." *See* Pet'r Opp. 18–20. This new argument is both procedurally improper and wrong on the merits.

A. Petitioner Cannot Use a Brief in Opposition to Preliminary Objections to Allege a Constitutional Violation Not Pled in the Amended Petition

As an initial matter, insofar as he is now alleging that Act 77's mail-in voting procedures violates the secrecy requirement of Article VII, § 4, Petitioner is improperly attempting to assert a new and different constitutional argument without amending his pleading. Neither version of Petitioner's pleading even mentions Article VII, § 4, let alone alleges—or pleads any factual predicate for a claim—that Act 77 violates that constitutional provision's secrecy requirement. Nor does Petitioner's Application for Summary Relief assert any such theory. For good reason, a petitioner cannot short-circuit the pleading rules by raising a new claim in a brief responding to preliminary objections. *See Newcomer v. Civil Serv. Comm'n of Fairchance Borough*, 515 A.2d 108 (Pa. Commw. Ct. 1986) (plaintiff could not press new constitutional theory because he had failed to seek leave to include it in an amended complaint). In the absence of a further pleading amendment, this new theory cannot serve as a basis for relief.

B. Neither Act 77's Provision for Mail-in Voting, Nor the Election Code's Preexisting Provision for Absentee Voting, Violates the Secrecy Requirement of Article VII, § 4

Putting aside its procedural defect, Petitioner's new argument is substantively without merit. The provisions governing mail-in voting under Act 77 contain express requirements that voters complete their mail-in ballot in secret. 25

Pa. Stat. § 3150.16(a) ("mail-in elector" must mark the ballot "in secret" and "securely seal" it in the secrecy envelope). A mail-in ballot returned with any identifying marks is void. 25 Pa. Stat. § 3146.8(g)(4)(ii). Petitioner does not allege any facts suggesting these statutory protections are ineffective.

Moreover, this Court already has identified materially indistinguishable provisions as adequately preserving the constitutional secrecy requirement. In *West Hanover Township v. Pennsylvania Labor Relations Board*, 646 A.2d 625 (Pa. Commw. Ct. 1994), a township challenged a representation election that had been conducted "solely by balloting through the U.S. mail." *Id.* at 626. The township contended that the election procedure violated statutory provisions requiring that such elections "shall be conducted by secret ballot" and governed by "'rules and regulations …' to 'guarantee the secrecy of the ballot.'" *Id.* Notably, and directly contrary to Petitioner's position, this Court did *not* hold that mail-in voting was inherently incapable of satisfying the legal requirement of ballot secrecy. Rather, it held that the specific election at issue violated the statute because, notwithstanding the explicit requirement of "rules and regulations" to "guarantee the secrecy of the ballot," there was a "total absence of any [regulation] to require secrecy with respect to the casting of mail ballots." *Id.* at 629 (emphasis omitted).

Crucially for present purposes, in illustrating for the parties the type of regulations that *would* have satisfied the statutory requirement, this Court pointed approvingly to *Election Code provisions governing absentee voting*, which "specifically provide[]" that "the elector shall … mark the ballot" "in secret" and then securely seal it in the provided secrecy envelope; and require that secrecy envelopes bearing identifying marks be declared void. *Id.* at 629 (citing 25 Pa. Stat. §§ 3146.6, 3146.8). The provisions governing the secrecy of mail-in voting are either identical to the absentee-voting provisions approved by this Court in *West Hanover*, *see, e.g.*, 25 Pa. Stat. § 3146.8(g)(4)(ii), or materially identical, *compare* 25 Pa. Stat. § 3146.6(a), *with* 25 Pa. Stat. § 3150.16(a). *A fortiori*, then, these same regulations satisfy the secrecy requirement of Article VII, § 4.

Also noteworthy is the Pennsylvania Supreme Court's recent decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). In that case, the Court identified Act 77's secrecy requirement as a mandatory component of mail-in voting and held that "the mail-in elector's failure to comply with such requisite by enclosing the ballot in the [statutorily prescribed] secrecy envelope renders the ballot invalid." *Id.* at 380; *see id.* at 377 & n.30 (quoting PA. CONST. art. VII, § 4). As this decision indicates, the Election Code (including Act 77) does not violate the Constitution's secrecy requirement; it enforces that requirement.

These decisions are not outliers. As early as 1967, a federal Court of Appeals observed that "ballot by mail is [] accepted … throughout the country as not incompatible with the democratic process of secret balloting. No case is cited, and we have found none, wherein the use of the mails has been condemned or challenged as an unacceptable method of conducting an election by secret ballot." *NLRB v. Groendyke Transp., Inc.*, 372 F.2d 137, 142 (10th Cir. 1967) (citing cases).

Courts have reached the same conclusion where the secrecy requirement has a constitutional rather than statutory source. For example, in *Peterson v. City of San Diego*, 666 P.2d 975 (Cal. 1983), the California Supreme Court squarely rejected an argument essentially identical to Petitioner's. In that case, the plaintiff challenged the validity of an election that was conducted *exclusively* by mail ballots, one in which all registered city voters were mailed a ballot without having to apply for it (in contrast to Pennsylvania elections, in which mail-in voting is optional and mail-in ballots are provided only to voters who specifically apply for them). *Id.* at 975. The plaintiff contended that this mail-in voting method violated the California Constitution's requirement that "[v]oting shall be secret." *Id.* (quoting CAL. CONST. art. II, § 7). The court, however, noted that California (like Pennsylvania) had "statutory procedures … designed to carefully protect the absent voter in his right to a secret ballot." *Id.* at 978 (internal quotation marks omitted).

Observing that "[t]he right to vote is … fundamental," and that "[r]educing or eliminating the burdens and inconvenience of voting and thereby increasing voter participation is not only a proper subject of legislation but also fundamental to the maintenance of our representative government," the court had no trouble "conclud[ing] that the [constitutional] secrecy provision does not preclude voting by mail." *Id.* at 977, 978. Other courts have reached the same conclusion. *See, e.g.*, *Sawyer v. Chapman*, 729 P.2d 1220, 1223–24 (Kan. 1986) (following *Peterson* and rejecting argument that the Kansas Mail Ballot Election Act violated the Kansas Constitution's guarantee of "secrecy in voting").

Indeed, numerous jurisdictions with constitutional voting-secrecy requirements conduct their elections by sending *every* voter a mail-in ballot by default. *See, e.g.*, CAL. CONST. art. II, § 7 ("Voting shall be secret."); Cal. Elec. Code § 3000.5; COLO. CONST. art. VII, § 8 ("secrecy in voting [must be] preserved"); Colo. Rev. Stat. § 1-7.5-104; HAW. CONST. art. II, § 4 ("Secrecy of voting shall be preserved[.]"); Haw. Rev. Stat. § 11-101; UTAH CONST. art. IV, § 8 ("secrecy in voting [must be] preserved"); Utah Code Ann. § 20A-3a-202; WASH. CONST. art. VI, § 6 ("The legislature shall provide for such method of voting as will secure to each elector absolute secrecy in preparing and depositing his ballot."); Wash. Rev. Code § 29A.40.010.

Petitioner cites almost no authority in support of his position. He relies primarily on an article by two members of an ideological think tank—neither of whom appears to have a law degree—who are opposed to the expansion of mail-in voting. *See* Pet'r Opp. 19 n.9 (citing John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 483 (2003)); *see also* Fortier & Ornstein, *supra*, at 515 (opining that "the experience of entering a private, curtained voting booth reaffirms [voters'] commitment to individual liberty and the right to choose their leaders," whereas mail-in voting, according to the author's view, "cheapens the experience"). These authors' policy preferences are, of course, irrelevant to the proper construction and application of Article VII, § 4 of the Pennsylvania Constitution.[1]

[1] Petitioner also cites dicta in *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924), which noted that it might "be argued that the [specific] scheme of procedure fixed by the act of 1923" at issue in that case "would end in the disclosure of the voter's intention" in a hypothetical scenario in which "but one [absentee] vote [was] returned for a single district." *Id.* This dicta does not avail Petitioner. Notably, the 1923 statute required that election officials "announce the name of the voter of [each] absent[ee] voter's ballot" as it was canvassed, "and give any person present the opportunity to challenge the same." Act of May 22, 1923, No. 201, § 12, 1923 Pa. Laws 309, 313. By contrast, under the current Election Code, no such announcement is made, and "the legislature [has] eliminated time-of-canvassing challenges *entirely*." *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 610 (Pa. 2020) (emphasis in original). Moreover, with Act 77's introduction of no-excuse mail-in voting, the number of vote-by-mail ballots is orders of magnitude greater than the number of absentee ballots allowed under the 1923 statute; accordingly, the hypothetical scenario posited by *Lancaster City*—namely, that a board of elections would receive only one mail-in ballot—is highly unlikely. Finally, the only-one-vote possibility contemplated in *Lancaster City* is by no means unique to mail-in voting; it could also occur with other forms of voting (*e.g.*, provisional ballots or voting machines).

In sum, Petitioner's belated constitutional argument fails on the merits.

II. PETITIONER'S ARGUMENT BASED ON THE 1957 AMENDMENT TO THE PENNSYLVANIA CONSTITUTION IS ILLOGICAL AND MISAPPREHENDS THE ISSUES CONTROLLING THIS CASE

As Respondents previously pointed out, Petitioner's other constitutional arguments rely exclusively on two century-old decisions under *earlier* Constitutions (decisions which, it should be noted, nowhere purport to apply the "clearly, palpably, and plainly" standard that controls modern constitutional adjudication). But as Respondents have observed, those decisions are distinguishable and non-binding because the constitutional language on which they relied has changed in the interim. *Chase v. Miller*, 41 Pa. 403 (1862), expressly relied on the *combination* of what was then Article III, § 1 *and* Article III, § 2—*before* the latter provision was amended to give the legislature near-plenary authority to "prescribe" the "[m]ethod of elections." *See Chase*, 41 Pa. at 419 (construing together PA. CONST. of 1838, art. III, §§ 1, 2); *see also* PA. CONST. art. VII, § 4 (amended version of what had been Article III, § 2 of the 1838 Constitution). The *Lancaster City* holding rested on a *different* constitutional provision that *also* changed prior to Act 77's enactment. Specifically, *Lancaster City* relied on a provision permitting absentee voting by soldiers. Based on its construction of this provision, the Court applied the interpretive canon of *expressio unius*—"[t]he old principle that the expression of an intent to include one class

excludes another"—and concluded that, by negative implication, the provision necessarily prohibited non-soldiers from voting absentee. *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924). But in 1967, this provision was repealed; at the same time, a separate constitutional provision, which had been adopted in 1957 and provided that the legislature "may" permit certain categories of civilians to vote absentee, was amended to give these classes of persons the *right* to vote absentee—a right the legislature could not take away. *See* 1967 Pa. Laws 1048. As previously explained, the changes effected by the 1967 amendment distinguish *Lancaster City* and render its *expressio unius* logic inoperative.[2]

Puzzlingly, Petitioner now argues that the very adoption of the 1957 amendment somehow shows that Respondents' argument is untenable. According to Petitioner, "[i]f the General Assembly had power to authorize means and methods of absentee voting under either Section 4 or its plenary power, [the 1957] constitutional amendment giving the General Assembly this power … would have been unnecessary." Pet'r Opp. 21. This argument reflects a fundamental misunderstanding of the issues.

[2] *See, e.g.*, Brief in Support of Respondents' Preliminary Objections to Petitioner McLinko's Amended Petition for Review 48–57 (filed Oct. 15, 2021); Reply in Support of Respondents' Cross-Application for Summary Relief 32–36 (filed Sept. 15, 2021); Respondents' Response to the *Bonner* Petitioners' Application for Summary Relief 12–18 (filed Oct. 14, 2021).

As noted, the addition of what is now Article VII, § 4 distinguishes *Chase*'s holding, which relied on a previous (and very different) version of that constitutional provision. Respondents do not dispute what *Lancaster City* held: namely, that, under the then-existing version of the 1874 Constitution, the legislature lacked the authority to authorize absentee voting by anyone other than military service members. As shown, this holding was based on the Court's use of the *expressio unius* canon of interpretation to draw a negative implication from the then-existing constitutional provision allowing absentee voting by members of the military. In the face of that holding, if the legislature wanted to permit other categories of electors to vote absentee, it obviously had to amend the Constitution. It did so in 1957, but that amendment was worded so as to *permit* the General Assembly to allow absentee voting only for those classes of voters, thus carrying forward (arguably) the same negative implication drawn in *Lancaster City*: A constitutional provision *permitting* only certain groups to vote absentee could be read as a provision *prohibiting* absentee voting by all others. But the 1967 amendment, which was carried over into the current Constitution, changed the permissive "may" to a mandatory "shall," a material change in language incompatible with the *expressio unius* logic of *Lancaster City*. Petitioner's reliance on the 1957 amendment is misplaced.

III. PETITIONER HAS WAIVED ANY OBJECTION TO RESPONDENTS' PRELIMINARY OBJECTIONS BASED ON LACHES AND THE STATUTORY TIME BAR

Finally, this Court should reject Petitioner's complaint about Respondents' preliminary objections based on laches and Act 77's statutory time bar. Petitioner objects that these defenses are not properly interposed as preliminary objections. But as Petitioner appears to acknowledge, this is a highly technical objection that must be raised in accordance with prescribed technical procedures. Specifically, if a petitioner wishes to raise such an objection, he must file preliminary objections to respondents' preliminary objections. If the petitioner instead answers the preliminary objections—as Petitioner here has done—the technical objection is waived, and the Court will proceed to adjudicate the merits of the laches and/or time-bar defenses. *Laskaris v. Hice*, 247 A.3d 87, 89 n.3 (Pa. Commw. Ct. 2021); *Schneller v. Prothonotary of Montgomery Cnty.*, No. 1316 C.D. 2016, 2017 WL 3995911, at *3 (Pa. Commw. Ct. Sept. 12, 2017). Accordingly, Petitioner's objection is waived.[3]

In any event, Petitioner's objection is of no practical import in light of the procedural posture of this case. Respondents have raised the same laches and statute-of-limitations defenses in their pending application for summary relief.

[3] Although Petitioner now asks the Court to excuse his failure to file preliminary objections, he fails to cite any authority supporting that request.

IV. CONCLUSION

Respondents respectfully request that their Preliminary Objections be sustained and that the Amended Petition be dismissed with prejudice.

Respectfully submitted,

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Dated: November 2, 2021

By: */s/ Robert A. Wiygul*

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 12, 2021

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