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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDDLE DISTRICT

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

DOUG McLINKO,

Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, *et al.*,

Appellants.

TIMOTHY R. BONNER, *et al.*,

Appellees,

v.

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

Appellants

On Appeal from the January 18, 2022, Orders of the Commonwealth Court, Nos. 244 MD 2021 and 293 MD 2021

APPELLEES JOINT ANSWER TO APPELLANTS' EMERGENCY APPLICATION TO REINSTATE THE AUTOMATIC SUPERSEDEAS

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I. SUMMARY OF ARGUMENT

The Commonwealth Court declared Act 77 unconstitutional and *void ab initio*. *See McLinko v. Dept. of State*, -- A.3d --, 2022 WL 257659 (Pa. Commw. Ct. 2022); Act of October 31, 2019, P.L. 552, No. 77 (Act 77). The Commonwealth Court's opinion was based on two controlling precedents of this Court, the plain language of the Pennsylvania Constitution, the harmonious structure of constitutional provisions under Article VII, and the well-documented historical context of each provision. The Commonwealth Court's opinion convincingly held Act 77 to be unconstitutional.

The Acting Secretary of the Commonwealth, joined by the Democratic National Committee (DNC) and other state appellants, immediately noticed an appeal of the Commonwealth Court's decision and invoked an automatic *supersedeas* stay pursuant to PA. R.A.P Rule 1736(b). Then, the Secretary went on to encourage citizens to continue relying upon Act 77's provisions even though the law had been declared

unconstitutional. [1] Such resistance to court decisions has been condemned in many historical contexts.

Appellees promptly filed a joint motion in the Commonwealth Court to terminate the automatic stay on the basis that the Secretary should not continue to mislead citizens and jeopardize their franchise under such a unconstitutional statute. The Commonwealth Court granted the motion after finding Appellees met their burden of establishing that (1) Appellees are likely to prevail on the merits; (2) without the requested relief, Appellees will suffer irreparable injury; and (3) removal of the automatic *supersedeas* will not substantially harm other interested parties or adversely affect the public interest. *See McLinko*.

However, instead of terminating the automatic stay immediately, the Commonwealth Court took a measured approach and decided to

[1] This encouragement was only exacerbated by the Department of State's memo discussed *infra* II.C.i., which further encouraged voters to ignore the Commonwealth Court's ruling and to "[g]o ahead and request [their] mail-in ballot for the May primary election." *See* Department of State's January 28, 2022, "Statement on Commonwealth Court Ruling on Mail-In Ballots." Furthermore, mere hours before briefs in this case were due, the Department of State issued *another* statement to voters via email, exhorting voters to vote by mail and to disregard the Commonwealth Court's ruling: "You might have seen recent news that Pennsylvania's Commonwealth Court declared "no-excuse mail voting," referred to as "mail-in" voting, is unconstitutional. **The Court's ruling has been appealed and has no immediate effect on mail-in voting.**" Department of State's February 24, 2022, Email, "Be on the lookout for your annual mail ballot application."

delay terminating the automatic stay until March 15, one week after this Court has had a chance to rule in this case to avoid any voter confusion. Order, slip op. at 11. The Commonwealth Court did so after "recognizing the magnitude of the public interest in holding a primary election in 2022 that is not affected by any doubt as to the constitutionality of the forms of voting permitted[,]" openly requesting a timely answer from this Court on the constitutionality of Act 77 for voters' sake. *Id.*

While the Commonwealth Court's decision to maintain the stay through the pendency of this appeal satisfies the intent of PA. R.A.P Rule 1736(b), Appellants nonetheless appealed the Commonwealth Court's order by filing an emergency application to reinstate the automatic stay so that they can continue to push citizens to rely on Act 77's mail voting procedures – not just while they attempt to convince this Court to overturn the Commonwealth Court's opinion, but for the indefinite period of time between March 8, 2022 (when this Court hears oral arguments) and when it issues its opinion. This conduct is contemptuous.

Appellees file this joint answer and ask this Court to affirm the Commonwealth Court's decision to terminate the automatic *supersedeas* stay on March 15.[2]

II. ARGUMENT

A. Petitioners-Appellees Satisfied Their Burden to Prevail on Their Application to Vacate Automatic *Supersedeas*.

It is well established that to prevail on a motion to vacate an automatic *supersedeas*, the movant must establish that: (1) movant is likely to prevail on the merits; (2) without the requested relief movant will suffer irreparable injury; and (3) removal of the automatic *supersedeas* will not substantially harm other interested parties or adversely affect the public interest. *Solano v. Pennsylvania Bd. of Probation and Parole*, 884 A.2d 943, 944 (Pa. Commw. 2005); *citing Elizabeth Forward Sch. Dist. v. Pennsylvania Labor Relations Bd.*, 613 A.2d 68 (Pa. Commw. 1992); *Pennsylvania Pub. Util. Comm'n. v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). Appellees The Commonwealth Court's Order Vacating Automatic Supersedeas found that Appellees satisfied these three

[2] Although this Court's Order (dated February 2, 2022) set these consolidated cases on an expedited briefing schedule with oral arguments to take place on March 8, 2022, the Acting Secretary continues to implement Act 77 under cover of the automatic *supersedeas*.

requisite elements to prevail on a motion to vacate *supersedeas*. Appellees ask this court to affirm for the following reasons.

B. Appellees Are Likely to Prevail on the Merits.

The Court should acknowledge Appellees' likelihood of prevailing because they come to this Court having prevailed in the Commonwealth Court, with a notably clear opinion from that court. *See McLinko v. Dept. of State*, -- A.3d --, 2022 WL 257659 (Pa. Commw. Ct. 2022). Additionally, the Commonwealth Court affirmed Appellees' likelihood of success on the merits in its order granting the termination of the automatic stay. Order, slip op. at 4.

i. Appellees are Likely to Prevail on the Merits Because Article VII, § 14 is the Sole Exception to the In-Person Voting Requirement, Rendering Act 77 Invalid.

As set forth in that opinion, Appellees are likely to prevail on the merits of their challenge to Act 77 because, for 150 years, the Pennsylvania Constitution has been interpreted to require voters to "offer to vote" in person in the election district where the elector resides. *See* PA. CONST. art. VII, § 1; *In re Contested Election of Fifth Ward of Lancaster City*, 126 A. 199, 201, 281 Pa. 131, 134 (1924); *Chase v. Miller*, 41 Pa. 403, 419

(1862) ("[t]o '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."). Subsequently, the Commonwealth Court's order granting Appellees' motion to terminate the automatic stay recognized that Appellees established their burden of showing they are likely to prevail on the merits. Order, slip op. at 4.

Act 77 is unconstitutional, and Appellees are likely to prevail on the merits.

ii. Appellees are Likely to Prevail on the Merits Because *Stare Decisis* Supports the Commonwealth Court's Decision to Strike Down Act 77.

This declaration by the Commonwealth Court that Act 77 is unconstitutional is not a novel decision. It continues this Court's interpretations of the Constitution for nearly 160 years. Those interpretations have been widely acknowledged, including by the legislature in recent years when it has attempted to amend the

Constitution prior to reversing course in enacting Act 77.[3] Thus, under over 160 years of this Court's precedents, Act 77 should not continue to be implemented.

As the Commonwealth Court's Opinion made clear, "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." *McLinko* at *15. The Commonwealth Court expressed the importance of these vital precedents and what they mean for the history of art. VII, sec. 14 of the Pennsylvania Constitution:

> *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…Moreover, the rulings in *Chase* and *Lancaster City* have been followed over the years in numerous election cases…In sum, the viability of *Chase* and *Lancaster City* has never flagged.

Id. (internal citations omitted).

Furthermore, in granting Petitioners' motion to terminate automatic stay, the Commonwealth Court found that "the Acting Secretary has not identified the error in either decision." Order, slip op. at 5. As

[3] *See* S.B. 411 (2019).

this Court recently held, "[t]o reverse a decision, we demand a special justification, over and above the belief that the precedent was wrongly decided." *Commonwealth v. Alexander*, 243 A.3d 177, 196 (2020) (quoting *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020)). No such special justification exists here.

Appellants contend that Appellees are not likely to succeed on the merits because this Court misinterpreted Article VII, § 1 in deciding *Chase* and *Lancaster City*. Appellants do so by citing *other states'* constitutions and how their courts interpreted their own state constitutions. *See* Appellants' Emergency Application at 23-26. Appellants argue that the Commonwealth Court "failed to acknowledge the breadth and persuasiveness of the precedent construing offer to vote as fully consistent with mail-in voting regimes like the one set forth in Act 77." *Id.* at 26 (internal quotations omitted). The parties, however, are currently before the Pennsylvania Supreme Court interpreting Pennsylvania's unique Constitution, and the precedent relied upon by Appellants is not applicable to interpreting Pennsylvania's Constitution. *Chase* and *Lancaster City* were rightly decided, and all Pennsylvania courts have followed these precedents ever since.

In granting Appellees' motion to vacate the automatic stay, the Commonwealth Court recognized that *Chase* and *Lancaster City* "have informed the conduct of elections in Pennsylvania for over 100 years" and are "firmly grounded in the text of the Pennsylvania Constitution." Order, slip op. at 6-7. These longstanding cases assure Appellees' likelihood of success on the merits.

c. Judge Wojcik's Dissenting Opinion Provides no Basis for Appellants' Arguments that Appellees are Unlikely to Prevail on the Merits.

The Commonwealth Court held clearly that Appellees proved the likelihood of their success on the merits. *See* Order, slip op. at 4-7. Appellants, however, attempt to undermine the strength of the Commonwealth Court's opinion by citing Judge Wojcik's dissenting opinion and emphasizing that the decision came from a "closely divided" 3-2 court. Appellants' Emergency Application at 6-7. However, these arguments carry no weight.

In his dissenting opinion, Judge Wojcik, joined by Judge Ceisler, attempted to argue that Act 77 is constitutional because Article VII, § 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." *McLinko* at *27 (Wojcik, J., dissenting); *see* PA. CONST. art. VII, § 4. In rejecting this assertion, a majority of the *en banc* Commonwealth Court explained:

> This 1901 constitutional provision pre-dated the Supreme Court decision that any deviation from the requirement of in-person voting at an elector's polling place on Election Day required express authorization in the Constitution. *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924) (*Lancaster City*). The Supreme Court further explained that the language in Section 4 for "such other method as may be prescribed by law[,]" PA. CONST. art. VII, § 4, was adopted to allow the use of voting machines. *Lancaster City*, 126 A. at 201. It goes without saying that voting machines can only be employed at a polling place.

Order, slip op. at 3, fn. 4. This Court in *Lancaster City* did not read § 4 to confer power onto the Legislature to expand absentee voting without a constitutional amendment. Section 4 does not mean something wholly different than what this Court said it did in *Lancaster City*, and therefore Judge Wojcik's dissenting opinion does not show Appellees are unlikely to succeed on the merits.

Furthermore, Appellants' attempt to cast doubt upon the decision of a *majority* of the *en banc* Commonwealth Court by pointing out that the court was closely divided fails. As the Commonwealth Court held in its order granting Appellees' motion to vacate the automatic stay, "[t]he

fact that the court's decision was not unanimous does not, in any way, predict the outcome of the Supreme Court's review." Order, slip op. at 4. Notably, recent "closely divided" opinions from the Commonwealth Court have been upheld by this Court. *See, e.g.*, *League of Women Voters of Pennsylvania v. Boockvar* (Pa. Commw. Ct., No. 578 M.D. 2019, filed January 7, 2021), *affirmed*, 265 A.3d 207 (Pa. 2021) (upholding this Court's decision that Victim's Right Amendment violated the procedure for amending the Pennsylvania Constitution); *Penjuke v. Pennsylvania Board of Probation and Parole*, 203 A.3d 401 (Pa. Commw. Ct. 2019), *appeal denied*, 228 A.3d 254 (Pa. 2020). Whether the Commonwealth Court's opinion was unanimous or closely divided has no bearing on its success before this Court. *See* Order, slip op. at 5.

As recognized by the Commonwealth Court in its Opinion, Act 77 is clearly unconstitutional. Because the Commonwealth Court "did not clearly err" in concluding Plaintiffs made a strong showing that they are likely to succeed on the merits, this Court should affirm. *Com., Bd. of Fin. and Revenue v. Rosetta Oil, Inc.,* 635 A.2d 139, 141 (Pa. 1993). The binding authority of this Court's longstanding and controlling precedent

remains wholly intact; therefore, it is difficult to imagine a clearer case where Appellees would be more likely to prevail on the merits.

C. Appellees Will Suffer Irreparable Injury Without the Requested Relief.

Appellees will suffer collective and individualized harm if the Court does not affirm the Commonwealth Court's decision to vacate automatic *supersedeas*. The Commonwealth Court lifted the stay after finding Appellees satisfied this factor because "the use of an unconstitutional voting system constitutes, in itself, irreparable harm." Order, slip op. at 7. For this and other reasons, this Court should find the same.

i. *Per Se* Irreparable Injury Will Occur Without the Requested Relief.

Act 77 violates the Pennsylvania Constitution's requirement to "offer to vote" as set forth in Article VII, Section 1, and is thus void *ab initio*. Therefore, the continued use of no-excuse absentee ballots in Pennsylvania's elections without the required constitutional amendment will result in *per se* irreparable harm. The election for the Commonwealth's Governor, representatives in Congress, and United States Senator would be held in an unconstitutional manner with the potential for a staggering number of votes rendered void. The Commonwealth Court agreed with

Appellees, finding that "the use of an unconstitutional voting system constitutes, in itself, irreparable harm." Order, slip op. at 7.

Appellants have only exacerbated this harm. Despite the Commonwealth Court's ruling that Act 77 is unconstitutional, the automatic *supersedeas* gave Appellants an excuse to issue a memo to convince voters to wholly disregard the ruling and continue applying for no-excuse mail-in voting for Pennsylvania's primary election currently scheduled for May 17, 2022. The Department of State's "Statement on Commonwealth Court Ruling on Mail-In Ballots" (Statement) asserted:

> The Department of State has a simple message today for Pennsylvania voters: **Today's ruling on the use of mail-in ballots has no immediate effect on mail-in voting. Go ahead and request your mail-in ballot for the May primary election.** . . .
>
> Additionally, the Department is notifying all county election boards that they should proceed with all primary election preparations as they were before today's Commonwealth Court ruling. There should be no change in their procedures.

Department of State's January 28, 2022, "Statement on Commonwealth Court Ruling on Mail-In Ballots."[4]

[4] As Appellees made note of above and below, this communication encouraging voters to utilize an unconstitutional mail voting process is not unique. The Department of State has issued several communications encouraging voters to ignore the Commonwealth Court declaring Act 77 unconstitutional. *See e.g.*, Department of State's February 24, 2022, Email, "Be on the lookout for your annual mail ballot application."

The Commonwealth Court recognized how the unconstitutionality of Act 77 creates *per se* irreparable harm if voters rely on an invalid method of voting. Order, slip op. at 7; *see also SEIU Healthcare Pennsylvania v. Com.*, 104 A.3d 495, 504, 628 Pa. 573, 587 (2014) ("the Executive Branch's violation of both a state statute and the Pennsylvania Constitution results in per se irreparable harm that cannot be compensated adequately by damages."). According to this Court's standards, allowing Act 77 to remain in force indefinitely would constitute an irreparable harm to the citizenry of the Commonwealth. *See* Order, slip op. at 11.

Accordingly, Appellees, and indeed all citizens of Pennsylvania, will continue to face irreparable harm should the *supersedeas* be left in place after the March 15 date set by the Commonwealth Court.

ii. Irreparable Injury Will Occur to The Judiciary and Constitution Without the Requested Relief.

Affirming the Commonwealth Court's order terminating the *supersedeas* stay respects judicial authority and the Constitution. The dignity of both the judiciary and the Constitution are undermined when state officials exhibit such brazen disregard for the Commonwealth Court's Order and continue to implement unconstitutional law.

Rather than give deference to the Commonwealth Court's opinion striking down Act 77, the Department of State Appellants chose instead to encourage voters to ignore the ruling and to vote by mail without an excuse even though the law prescribing such was declared unconstitutional. The message to voters is simple: decisions from the courts of this Commonwealth and the limits prescribed by the state Constitution have no power and deserve no heed. Not only are state executive officials clearly bound by Commonwealth Court rulings and the limits of the Constitution, but Appellants took an oath to uphold the Pennsylvania Constitution. Yet they refuse to acknowledge Act 77's unconstitutionality under the Pennsylvania Constitution.

The irreparable harm therefore is apparent. Regardless of what the courts of this Commonwealth decide or what the Constitution says, Appellants would have voters and election officials disregard the law and the courts and proceed how they desire. The authority of the courts of this Commonwealth and the dignity of the state Constitution is irreparably harmed by this lack of regard for the rulings of the Commonwealth Court and the limits of the state Constitution concerning who may vote by mail.

iii. Appellees Will Suffer Individualized and Particular Irreparable Harm Without the Requested Relief.

Beyond the existence of these irreparable harms, Appellees will face particular and individualized irreparable harms if a stay the automatic *supersedeas* is not removed.

Without the removal of *supersedeas*, Appellee Doug McLinko will continue to be caught in the same legal quagmire that gave rise to this action. Because Act 77 has been ruled unconstitutional but is not currently stayed, Mr. McLinko faces the same dilemma of whether to exercise administerial and quasi-judicial duties under Act 77 concerning the processing of ballots cast by unqualified mail voters or to adhere to the limitations the Pennsylvania Constitution for another election unless *supersedeas* is removed.

The Bonner Appellees will face irreparable harm as candidates in the 2022 election unless *supersedeas* is removed. The continued use of mail-in ballots in Pennsylvania's elections will result in an election for these candidates being held in an unconstitutional manner and with the potential for a staggering number of votes cast in favor of these candidates being rendered void. Furthermore, the Secretary's Statement wrongly encourages voters who may intend to vote for these candidates

to vote according to the provisions set forth in the unconstitutional Act 77, which may lead to these votes being discarded.

The local political party Appellees also face irreparable harm if *supersedeas* is not removed because Appellees will need to advise voters on how they are to cast their ballots leading up to the next election. Removal of *supersedeas* is necessary to ensure Appellees properly advise voters and so that voters' ballots are not ultimately rendered void. Additionally, the Department of State's Statement thwarts Appellees' abilities to properly and confidently advise voters on how to vote, for the Commonwealth encourages voters to cast their ballots by mail in accordance with an unconstitutional law.

Appellees will each suffer collective and individual irreparable harm if the removal of the automatic *supersedeas* is not lifted on March 15. Therefore, this Court should deny Appellants' Emergency Application.

D. The Removal of the Automatic *Supersedeas* Will Not Substantially Harm Other Interested Parties or Adversely Affect the Public Interest.

While the Commonwealth Court admitted that the "harm to other persons interested in this matter is difficult to evaluate[,]" it nonetheless

held in granting Appellee's motion to terminate the automatic *supersedeas* that the harm in maintaining the stay after this Court has had time to issue its decision outweighs the harm caused by leaving the stay in place after March 15. Order, slip op. at 7. Act 77 violates the Pennsylvania Constitution's requirement to "offer to vote" as set forth in Article VII, §1, and is thus an illegal statute void *ab initio*; therefore, this Court should find the Commonwealth Court did not err in its analysis that removing the automatic stay on March 15 caters to the public interest.

i. The Commonwealth Court Recognized the Harm of Lifting the Stay *Before* this Court had the Chance to Rule on the Merits and Intentionally Delayed when the Stay Would be Lifted.

The Commonwealth Court gave due weight to the harm that could result in lifting the stay before this Court could issue an opinion on the merits. However, to avoid these specific harms from occurring, the Commonwealth Court pushed back the date on which the stay would be lifted to March 15. This Court should find that lifting the stay on March 15 does not substantially harm other interested parties and is in the public interest.

As Appellants rightly point out, the Commonwealth Court conceded, for specific reasons, that lifting the automatic *supersedeas* before the Supreme Court had a chance to rule on the merits would not be in the public interest. In furthering their argument, however, Appellants assert that the Commonwealth Court "explicitly acknowledged that the public would be harmed by termination of the automatic supersedeas, but granted the Application to Vacate anyway." Appellants' Emergency Application at 4. This assertion leaves out one important fact. None of these reasons overcame the "magnitude of the public interest in holding a primary election in 2022 that is not affected by any doubt as to the constitutionality of the forms of voting permitted." Order, slip op. at 11. In choosing to lift the automatic stay on March 15, the Commonwealth Court found a greater harm would occur to the electorate if the automatic stay was left in place *after* this Court had the opportunity to rule on the merits. *See* Order, slip op. at 10.

The Commonwealth Court indeed gave some weight to three points that weigh against Appellees satisfying their burden that removing the automatic stay would be in the public interest and would not harm inter-

ested persons; however, it found none to be sufficient. First, the Commonwealth Court recognized the upcoming primary election scheduled for May 17, 2022, and how lifting the stay before March 15 could cause voter confusion. Order, slip op. at 8. Nevertheless, the Commonwealth Court understood that because Appellees seek only prospective relief, this Court could delay the effect of its opinion concerning the constitutionality of Act 77 until after the primary election.[5] *Id.* at 8. Second, the Commonwealth Court considered how lifting the stay before March 15 would go against the public interest of conducting an orderly election. *Id.* at 9. However, in intentionally lifting the stay on March 15, the Commonwealth Court recognized how a swift ruling from this Court will eliminate such harm from occurring. *Id.* at 11. Lastly, the Commonwealth Court considered how officials having to notify electors of the change not

[5] Appellants assert that "the harm caused by lifting the stay only increases as election day draws closer." Appellants' Emergency Application at 11. Appellants are right in that the harm increases as election day draws closer, but this harm is due to the automatic stay being *left in place*. This is the exact harm the Commonwealth Court attempted to avoid by requiring the stay be lifted on March 15, for it recognized how voters would be harmed by utilizing an unconstitutional voting process. *See* Order, slip op. at 11. The public interest is not served by allowing this unconstitutional law to stay in place *after* this Court has time to make a decision on the merits. By lifting the stay on March 15, the Commonwealth Court provided relief to this harm by allowing voters to know whether or not Act 77 can be used long before the primary election takes place, whether or not this Court issues a timely decision before then.

just once, but twice, would be costly to taxpayers and would run against the public interest.[6] *Id.* at 9. The March 15 lift of the stay would prevent such harm from occurring by preventing election officials from having to notify voters of the law more than once. *See id.* The Commonwealth Court correctly found none of these elements against the public interest was sufficient.

Most importantly, the Commonwealth Court recognized how the public would be harmed by *not* terminating the automatic *supersedeas*. On balance, the Court found there to be a "magnitude of the public interest in holding a primary election in 2022 that is not affected by any doubt

[6] The Commonwealth is in a poor position to complain about the costs it would face in complying with the Constitution – not only because saving money is an insufficient reason to excuse unconstitutional behavior, but also because the Commonwealth has continued to encourage people to vote by mail even after the Commonwealth Court struck down Act 77. In an e-mail sent to voters the night before briefs in this case were due, the Department of State told Pennsylvanians to "be on the lookout" for an application for "safe, easy and convenient" mail-in voting. Department of State's February 24, 2022, Email, "Be on the lookout for your annual mail ballot application." The Department then explicitly instructed voters *not to pay any attention* to the Commonwealth Court's ruling. In bold and multi-colored text, the Department announced that "**The [Commonwealth] Court's ruling has been appealed and has no immediate effect on mail-in voting.**" *See id.*

In sending that message, the Department has unilaterally increased the difficulty and expense of communicating to voters that no-excuse mail-in voting violates the Constitution. It is in the position of the proverbial child who kills his parents and pleads for mercy because he is an orphan. But undermining this reality of this harm even more, the e-mail also indicates that the Commonwealth can easily and quickly reach mail-in voters and could presumably notify them to vote in person if this Court were to affirm the Commonwealth Court.

as to the constitutionality of the forms of voting permitted[]" and granted Appellees' application to terminate the automatic stay on March 15. *Id.* at 11. "[S]afeguarding the public from unconstitutional legislation[]" was the Commonwealth Court's highest motivation for advancing the public interest through the March 15 termination. *See id.* at 10. The Commonwealth Court found it to be in the public interest for the voters to have a final answer on Act 77's constitutionality by March 15, a date that likewise gives this Court an opportunity to rule on the merits. *Id.* at 10. This balance wisely serves the public interest by limiting confusion while ensuring the public can hold a primary election that is "not affected by any doubt as to the constitutionality of the forms of voting permitted." *Id.* at 11. For these reasons, this Court should find Appellees satisfied this factor.

ii. Harm will not Occur Because even if the Stay is Terminated on March 15, Qualified Voters Under Article VII, § 14 can Still Vote by Mail.

The public will not be negatively affected by the removal of the automatic *supersedeas* because removal will simply mean that electors in Pennsylvania must physically present themselves to the polling place on election day (as they did for nearly 200 years before enactment of Act 77),

unless they meet one of the expressly enumerated qualifications for absentee voting under Article VII, Section 14 of the Pennsylvania Constitution. The Commonwealth Court recognized that while "[i]t may be inconvenient for an elector to return to the pre-Act 77 election system, [] it is difficult to discern any 'harm' in having electors vote at their assigned polling place, as they have done since 1838." Order, slip op. at 8. The Commonwealth's Opinion striking Act 77 did nothing to eliminate the qualified list of absentee voters under Article VII, Section 14; they remain completely valid.

Moreover, Appellants' public statement concerning Act 77 and its validity, together with Act 77's unconstitutionality, creates a likelihood that many electors will attempt to cast no-excuse mail-in ballots in the upcoming 2022 Primary Election and risk having such votes rendered void. The elimination of the automatic *supersedeas* in the present matter on March 15 will clarify any confusion regarding the use of no-excuse

mail-in ballots in the upcoming 2022 Primary Election, currently scheduled for May 17, 2022; is in the public interest; and will not cause substantial harm to any interested party.[7]

As the Commonwealth Court clearly held, leaving Act 77 in effect after this Court has had a chance to issue a ruling weighs heavily against the public interest. Order, slip op. at 11. Voters need to be certain that their method of voting will not result in their ballot being cast in an unconstitutional way. To this point, voters are more confused by Act 77 remaining in place after this Court has heard this case, for they are being told they can and should order mail ballots by Appellants under a law

[7] The May primary election is so far in advance that Appellants' invocation of the *Purcell* Principle is inapplicable. Emergency Application at 14-15. This Court is has more than enough time to affirm the Commonwealth Court without implicating the *Purcell* Principle, which counsels courts to refrain from changing any election rules on the eve of an election to avoid confusing voters and creating election administering issues. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). This principle has been used by courts for over 15 years to block any last-minute changes to election rules. The current time period before the next election is more than three months, a period that is objectively too great to implicate the *Purcell* Doctrine. *See e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (a "few weeks" before the election counseled the Court to refrain from changing the rules); *Democratic Nat'l Comm. v. Wisconsin State Legis.*, 141 S.Ct. 28, 31 (2020), Kavanaugh, J., concurring ("six weeks before" an election); *Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014) (invoking *Purcell* Principle when "election machinery is already in motion"); *North Carolina v. League of Women Voters of North Carolina*, 574 U.S. 927 (2014) (one month before an election); *Husted v. Ohio State Conference of the NAACP*, 573 U.S. 988 (2014) (two months before an election); *Frank v. Walker*, 574 U.S. 929 (2014) (six weeks before an election). Clearly, three months before an election is not enough to invoke the *Purcell* Principle.

that has expressly been held unconstitutional by the Commonwealth Court.

Because there is minimal public interest in enforcing an unconstitutional law, preventing Act 77's implementation after March 15 is in the public interest and does not adversely affect the public interest or substantially harm interested parties.

E. Conclusion

Appellees have established: "1) that [th]ey [are] likely to prevail on the merits; 2) that without the requested relief [th]ey will suffer irreparable injury; and 3) that the removal of the automatic *supersedeas* will not substantially harm other interested parties or adversely affect the public interest." *Solano v. Pennsylvania Bd. of Probation and Parole*, 884 A.2d 943, 944 (Pa. Commw. Ct. 2005). For the reasons stated above, Appellees respectfully request that this Court affirm the Commonwealth Court's order vacating the automatic stay.

Respectfully submitted,

Date: February 25, 2022

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CERTIFICATE OF COMPLIANCE

I, Walter S. Zimolong, counsel for petitioner-appellee, 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 nonconfidential information and documents.

Date: February 25, 22

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