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68 MAP 2020

IN THE SUPREME COURT OF PENNSYLVANIA

THE HONORABLE MIKE KELLY, SEAN PARNELL, THOMAS A. FRANK, NANCY KIERZEK, DEREK MAGEE, ROBIN SAUTER, MICHAEL KINCAID, and WANDA LOGAN,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GENERAL ASSEMBLY, HONORABLE THOMAS W. WOLF, and KATHY BOOCKVAR,

Respondents.

Docket No. 68 MAP 2020

RESPONSE TO APPLICATION FOR THE COURT TO EXERCISE EXTRAORDINARY JURISDICTION

Filed on behalf of Petitioners, The Honorable Mike Kelly, Sean Parnell, Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter, Michael Kincaid, and Wanda Logan

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INTRODUCTION

Act 77 (Act of October 31, 2019, P.L. 552, No. 77 ("Act 77")), the most expansive and fundamental change to the Pennsylvania election code to date, is unconstitutional. Under Act 77's no excuse mail-in ballot scheme, any and all qualified electors are eligible to vote by mail, with no justification required. Beginning with the Military Absentee Ballot Act of 1839, this Court has consistently rejected attempts to expand mail-in voting by statute – uniformly holding that a constitutional amendment is required to expand mail-in voting. Act 77 is the Commonwealth's latest attempt to override the protective limitations on absentee voting proscribed by Pennsylvania's Constitution, as interpreted by this Court over the last one hundred and eighty-one years. This Court should not deviate from the clear and predictable standard that it has established.

This Court's decisions regarding Article VII of the Pennsylvania Constitution make clear that there are two, and only two, constitutionally permissible mechanisms by which an elector may cast a ballot : 1) offering your ballot *in propria persona* at the polling place on election day; and 2) exceptions to the first method limited to those persons qualifying under the absentee voting provision in Article VII, § 14 of the Pennsylvania Constitution.

As with prior attempts to illegally expand mail-in voting by statute, which have been struck down by this Court going as far back as the Military Absentee Ballot Act of 1839, Act 77 is another illegal attempt to override the limitations on absentee voting without first following the necessary procedure to amend the Pennsylvania Constitution. Respondents have at least begun the steps necessary to certify the results of the November 3, 2020, General Elections ("the General Elections"), which was undertaken pursuant to an unconstitutional, universal, no-excuse mail-in voting scheme. Absent intervention by this Court, Respondents will complete the process of certifying the results of an election conducted in a manner which this Court has repeatedly rejected.

The Commonwealth Court wisely began to intervene with preliminary injunctive relief in order to prevent irreparable injury from the resulting wrongs of an election conducted pursuant to an unconstitutional and invalid mail-in voting scheme. This Court or the Commonwealth Court should make that relief permanent and strike down Act 77 as unconstitutional. Petitioners do not oppose the application of the Commonwealth of Pennsylvania, Governor Thomas W. Wolf, and Secretary of the Commonwealth Kathy Boockvar ("the Executive-Respondents") for this Court to exercise extraordinary jurisdiction, should the Court find it

appropriate. Regardless of the procedural posture, for the reasons stated herein, Petitioners urge this Court to either grant the relief Petitioners requested, or such other or further relief as this Court may deem proper, or allow the Commonwealth Court to do so.

PROCEDURAL HISTORY

The procedural history set forth in Petitioners' Response to Jurisdictional Statement in incorporated by reference as if fully set forth herein.

MATERIAL FACTS

I. Background

In 2019, the Pennsylvania legislature desired to implement no-excuse mail-in voting and initiated the process of proposing an amendment to the Pennsylvania Constitution to allow for no excuse mail-in voting. Petition ¶ 28. Pursuant to the Pennsylvania Constitution, Article XI, §1, an amendment to the Constitution must be approved by a majority of the members of both the Senate and House of Representatives in two separate legislative sessions, then submitted as a ballot question to be voted on by the electors. If, after approval by two legislative sessions, a majority of the electors then vote to approve the proposed constitutional amendment, only then will the amendment take effect.

The proposed constitutional amendment initiated by the legislature have been approved by a majority vote of both the House and Senate in two consecutive legislative sessions, nor has either been submitted to the qualified electors as a ballot question and approved by a majority vote of the citizens. Petition ¶ 32. The legislature proceeded to implement Act 77 anyway, in direct contravention of the Pennsylvania Constitution. Petition ¶ 33.

II. The In-Progress Efforts to Amend the Pennsylvania Constitution to Allow No Excuse Absentee Voting

In 2019, the Pennsylvania General Assembly began the process for amending Article VII, § 14 of the Pennsylvania Constitution in order to drastically expand absentee voting – permitting all voters to do so without an excuse. Senate Bill 411, 2019 (later incorporated into Senate Bill 413). Petition ¶ 36. The legislative history of the proposed amendment recognizes that "Pennsylvania's current Constitution restricts voters wanting to vote by absentee ballot to [specific] situations…" Senator Mike Folmer, et al., Senate Co-Sponsorship Memoranda (Jan. 29, 2019, 10:46 AM), https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=28056. Petition ¶ 37. The amendment proposes to "eliminate these limitations, empowering voters to request and

submit absentee ballots for any reason – allowing them to vote early and by mail." *Id*.

Introduced on March 19, 2019, S.B. 413 as originally filed was a joint resolution proposing an amendment to the Pennsylvania Constitution related to judicial retention elections and contained nothing related to the constitution's absentee voting provision. Petition ¶ 38. The Senate passed the bill on October 22, 2019 and it was sent to the House where it was referred to the House Committee on State Government a few days later. Petition ¶ 39. On April 6, 2020, S.B. 413 was reported as amended from committee. Petition ¶ 40. S.B. 413's caption was changed from the introduced version which read: "A Joint Resolution proposing separate and distinct amendments to the Constitution of the Commonwealth of Pennsylvania, further providing for tenure of justices, judges and justices of the peace," to "A Joint Resolution proposing separate and distinct amendments to the Constitution of the Commonwealth of Pennsylvania, further providing for tenure of justices, judges and justices of the peace; and **further providing for absentee voting.**" (emphasis added). Petition ¶ 41.

In its amended form with the added provisions seeking to amend the Pennsylvania Constitution's absentee voting restrictions, S.B. 413 was

passed by a majority of both Houses and filed with the Office of the Secretary of the Commonwealth on April 29, 2020. Petition ¶ 42. S.B. 413 will need to be passed by a majority vote in both the Senate and House of Representatives in the next legislative session and then appear on the November 2021 general election ballot to be approved by a majority of the electors in order to be ratified and properly approved pursuant to the established procedures set forth in the Pennsylvania Constitution. If properly approved and ratified by a majority of voters in 2021, S.B. 413 will amend Article VII, § 14 in part as follows:

> (a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors ~~who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee,~~ may vote, and for the return and canvass of their votes in the election district in which they respectively reside. **A law under this subsection may not require a qualified elector to physically appear at a designated polling place on the day of the election.**

Petition ¶ 44.

The General Assembly later went on to establish a "Select Committee on Election Integrity" to "investigate, review and make recommendations

concerning the regulation and conduct of the 2020 general election." Pa. H. Res. No. 1032, Printer's No. 4432, Session of 2020 (Sep. 28, 2020), https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=H&billTyp=R&billNbr=1032&pn=4432. Petition ¶ 45. The resolution establishing the committee noted that the "Commonwealth has traditionally only allowed absentee voting by individuals with a statutorily defined excuse to do so, such as a physical disability or absence from their municipality on election day." *Id*. It further notes that "[b]efore the enactment of Act 77 of 2019, for an individual to vote absentee in this Commonwealth, the individual must have provided a permissible reason to do so…." *Id*. It is expressly acknowledged that Act 77 of 2019, "created a new category of mail-in voting … [whereby] mail-in voters do not have to provide a customary reason to vote by mail and are able to return their ballots several days later than had traditionally been allowed." *Id*.

Article XI, § 1 of the Constitution of Pennsylvania requires amendments to be passed by majority vote in both the House and Senate in two separate legislative sessions and submitted as a ballot question during the general election to be voted on by the qualified voters. Pa. Const. Art. XI, § 1. Only if a majority of the qualified voters vote to approve

the proposed constitutional amendment is the proposed constitutional amendment ratified and legally effective. *See* Pa. Const., Art. XI, §1.

The Pennsylvania Constitution also expressly provides for emergency amendments. *See* Pa. Const., Art. XI, § 1; *see also* Act 12, Act of Mar. 27, 2020, § 1, P.L. No. 41, No. 12, at § 16. The Legislature neglected this lawful mechanism entirely and instead attempted to bypass amending the Pennsylvania Constitution by fundamentally overhauling Commonwealth's voting system through the enactment of a general law.

III. Act 77 of 2019

On October 31, 2019, Governor Wolf signed Act 77 of 2019 into law, which implemented sweeping reforms to the elections process in Pennsylvania. Petition ¶ 54. Among other changes, Act 77 "create[ed] a new option to vote by mail without providing an excuse"; allowed voters to request and submit mail-in or absentee ballots up to 50 days before an election; and established a semi-permanent mail-in and absentee ballot voter list. *See, e.g.*, Press Release, Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting, Governor Tom Wolf (Oct. 31, 2019). Petition ¶ 55. In passing Act 77 without first amending the Pennsylvania Constitution, Respondents disenfranchised the entire Pennsylvania electorate, who were entitled to a constitutionally mandated

vote on whether to make this sweeping change to widespread no excuse mail-in voting before it was implemented.

IV. The November 3, 2020 General Elections

Voting at the Pennsylvania General Elections was held on November 3, 2020. Petition ¶ 61. The General Elections were administered by Pennsylvania election officials pursuant to Act 77, which included allowing for universal, no-excuse mail-in ballots to be filled out, collected and counted, in violation of the Pennsylvania Constitution. Petition ¶ 62. The process of certifying the returns and results of the General Elections is currently underway. Petition ¶ 63.

SCOPE AND STANDARD OF REVIEW

The Executive-Respondents Application for the Court to Exercise Extraordinary Jurisdiction ("the Application") seeks to have this Court reverse the November 25 Order of the Commonwealth Court and sustain the Preliminary Objections of the Respondents. The standard of review of the grant or denial of a preliminary injunction is whether the trial court abused its discretion or committed an error of law. *See Buffalo Twp. V. Jones*, 813 A.2d 659 n. 4 (Pa. 2002). In considering preliminary objections, this Court must consider as true all well-pleaded material facts set forth in the petitioner's petition and all reasonable inferences that may be drawn

from those facts. *Mulholland v. Pittsburgh National Bank*, 174 A.2d 861, 863 (Pa. 1961). Preliminary objections should be sustained only in cases clear and free from doubt that the facts pleaded are legally insufficient to establish a right to relief. *Werner v. Zazyczny*, 681 A.2d 1331 (Pa. 1996).

COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Should the Court assume immediate jurisdiction over this action pursuant to its Extraordinary Jurisdiction?

Suggested answer: Petitioners do not oppose this.

2. Are Petitioners entitled to injunctive relief?

Suggested answer: Yes.

3. Should the relief requested in the Petition be granted?

Suggested answer: Yes.

ARGUMENT

I. The Executive-Respondents' Preliminary Objection 1 should be overruled because Petitioners have standing.

Preliminary Objection 1 should be overruled because Petitioners have standing. In general, to have standing, a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens that is substantial, direct and immediate. *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). In this case, each Petitioner has such an interest in the controversy.

Petitioner Sean Parnell is an adult individual who is a registered qualified elector residing in Allegheny County, and a candidate for U.S. Representative for the 17th Congressional District of Pennsylvania, which includes all of Beaver County, and parts of Butler and Allegheny counties. Mr. Parnell constitutes both a "candidate" and a "qualified elector" as those terms are defined in Election Code § 102(a) and (t), 25 Pa.Stat. § 2602(a) & (t). Mr. Parnell brings this suit in his capacity as a candidate for federal office and a private citizen. Petition ¶ 3. It was not alleged in the Petition, but could easily be alleged in an amended Petition[1] or be found through judicial notice based on public election results that, if Respondents are permitted to certify the results of the November 3, 2020 General Elections including mail-in ballots that do not meet the Pennsylvania Constitutional requirements, then Mr. Parnell's opponent will be certified as the winner of his congressional race, but if only the constitutionally permitted ballots are included in the certification, the Mr. Parnell would have the most votes of any candidate in his congressional race.

[1] It is not clear how to go about amending a Petition for Review in this unusual procedural context. Petitioners hereby request leave to amend their Petition for Review to add the additional allegations described in this Section I of the Argument, and also request leave to join the presidential electors as parties to this action, to the extent they have been selected and they are now necessary parties in order to enjoin Respondents' unconstitutional actions from completion.

Petitioner Wanda Logan is a registered qualified elector residing Philadelphia County, Pennsylvania and a candidate for the Pennsylvania House of Representatives for the 190th district. Ms. Logan constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code § 102(a) and (t), 25 Pa.Stat. § 2602(a) & (t). Ms. Logan brings this suit in her capacity as a candidate for state office and a private citizen. Petition ¶ 4. It was not alleged in the Petition, but could easily be alleged in an amended Petition or be found through judicial notice based on public election results that, if Respondents are permitted to certify the results of the November 3, 2020 General Elections including mail-in ballots that do not meet the Pennsylvania Constitutional requirements, then Ms. Logan’s opponent will be certified as the winner of her Pennsylvania House race, but if only the constitutionally permitted ballots are included in the certification, the Ms. Logan would have the most votes of any candidate in her race.

Petitioner the Honorable Mike Kelly (hereinafter “Representative Kelly”) is a qualified registered elector residing in Butler County and the United States Representative for the 16th Congressional District of Pennsylvania. Representative Kelly was recently re-elected to represent the 16th Congressional District, which includes all of Erie, Crawford,

Mercer, and Lawrence counties, as well as part of Butler County. Representative Kelly constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code § 102(a) and (t), 25 Pa.Stat. § 2602(a) & (t). Representative Kelly brings this suit in his capacity as a candidate for federal office and a private citizen. Petition ¶ 2. It was not alleged in the Petition, but could easily be alleged in an amended Petition that, if Respondents are permitted to certify the results of the November 3, 2020 General Elections including mail-in ballots that do not meet the Pennsylvania Constitutional requirements, then one or more candidates for whom Representative Kelly voted would lose their races, but if only the constitutionally permitted ballots are included in the certification, then more of the candidates for whom Representative Kelly voted would have the most votes of any candidate in their races.

Petitioners Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter and Michael Kincaid are all registered qualified electors residing in Erie, Mercer, and Allegheny Counties, Pennsylvania. All of them are “qualified electors” as that term is defined in Election Code § 102(t), 25 Pa.Stat. § 2602(t). All of them bring this suit in their capacities as a private citizens. Petition ¶ 5-9. It was not alleged in the Petition, but could easily be alleged in an amended Petition that, if Respondents are permitted to certify

the results of the November 3, 2020 General Elections including mail-in ballots that do not meet the Pennsylvania Constitutional requirements, then candidates for whom they voted would lose their races, but if only the constitutionally permitted ballots are included in the certification, then more of the candidates for whom they voted would have the most votes of any candidate in their races.

Accordingly, all of the Petitioners have substantial, direct and immediate interests in whether Respondents are permitted to certify the results of the November 3, 2020 General Elections including mail-in ballots that do not meet the Pennsylvania Constitutional requirements and those interests are distinguishable from the interests shared by other citizens. Therefore, Petitioners meet the normal standing criteria.

Moreover, although to have standing a party must ordinarily have an interest in the controversy that is distinguishable from the interest shared by other citizens that is substantial, direct and immediate, there are certain cases that warrant the grant of standing even where the interest at issue "arguably is not substantial, direct and immediate." *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988) (citing, *inter alia*, *Application of Biester*, 409 A.2d 848, 852 (Pa. 1979)). "[A]lthough many reasons have been advanced for granting standing to taxpayers, the fundamental reason for granting

standing is simply that otherwise a large body of governmental activity would be unchallenged in the courts." *Biester*, 409 A.2d at 852 (citation omitted).

The *Biester* Court elaborated on the benefit of granting standing under such circumstances, holding that:

> The ultimate basis for granting standing to taxpayers must be sought outside the normal language of the courts. Taxpayers' litigation seems designed to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.... Such litigation allows the courts, within the framework of traditional notions of 'standing,' to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts.

Biester, 487 Pa. at 443 n.5 (citation omitted); *see also Consumer Party of Pennsylvania v. Commonwealth*, 507 A.2d 323, 328 (Pa. 1986) (same). Other factors to be considered include that issues are likely to escape judicial review when those directly and immediately affected are actually beneficially as opposed to adversely affected; the appropriateness of judicial relief; the availability of redress through other channels; and the existence of other persons better situated to assert claims, for example. *Sprague*, 550 A.2d at 187 (citations omitted).

In *Sprague*, the petitioner challenged placing one seat on the Supreme Court and one on the Superior Court on the general election

ballot. *Id*. at 186. An election to fill Supreme Court and Superior Court offices may not be placed on the ballot during a general election because the Pennsylvania Constitution mandated that all judicial officers were to be elected at the municipal election next proceeding the commencement of their respective terms. *Id*. at 186. Under those circumstances, the Court specifically held that if standing were not granted, "the election would otherwise go unchallenged," that "[j]udicial relief is appropriate because the determination of the constitutionality of the election is a function of the courts," and that "redress through other channels is unavailable." *Id*. (citing *Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165 (1981); and *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 58 A.2d 464 (1948)).

Here, as in *Sprague*, if standing were not granted, the November 3, 2020, General Election would otherwise go unchallenged; redress through other channels is unavailable because those directly and immediately affected are actually beneficially as opposed to adversely affected; and the only persons better situated to assert the claims at issue are possibly the Respondents, who did not choose to institute legal action. Determination of the constitutionality of the election remains a function of the courts and granting standing would add judicial scrutiny of the statutory and

constitutional validity of the acts of public officials to the controls over public officials inherent in the elective process.

The case of *In re Gen. Election 2014 Kauffman*, 111 A.3d 785 (Pa. Commw. Ct. 2015) is distinct from the case at bar. In that case, the Commonwealth Court quashed an appeal of objectors who challenged an order granting an emergency application for absentee ballots because the objectors were not parties in the proceedings before the trial court and, thus, did not have standing. *Id*. The objectors claimed they had standing because they were registered voters in the relevant area and they had an interest in seeing that the Election Code was obeyed and that absentee ballots were prevented from affecting the outcome of the election. *Id*. at 792. The election at issue had not yet occurred and it was speculative for the objectors to suggest that five absentee ballots might affect the outcome of the election. *Id*. at 793. Quoting *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970), the Commonwealth Court highlighted "assumption" in the following:

> Basic in appellants' position is the *assumption* 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 basis upon which to afford appellants a standing to maintain this action.

In re Gen. Election 2014 Kauffman, 111 A.3d. at 793.

Unlike in that case, here Petitioners have already been affected by the allowance of mail-in ballots that do not meet the Pennsylvania Constitutional requirements or will be if those ballots are included in the certified results. The harms they allege are not based on speculation or assumption. Accordingly, this Court should determine that the Petitioners have standing to maintain this action and overrule Preliminary Objection 1.

II. The Executive-Respondents' Preliminary Objection 2 should be overruled because statutes cannot limit the time within which their constitutionality can be challenged.

The Executive-Respondents' Preliminary Objection 2 should be overruled because statutes cannot limit the time within which their constitutionality can be challenged. The suggestion that Petitioners would ever be precluded from challenging the constitutionality of a statute because of a provision included in that statute would be an interpretation that is both "absurd," 1 Pa.Cons.Stat. § 1922(1), and violative of "the Constitution of the United States [and] this Commonwealth". *Id*. § 1922(3). As noted in *William Penn School District v. Pa. Dep't of Ed.*, 170 A.2d 412, 418 (Pa. 2017):

> It is settled beyond peradventure that constitutional promises must be kept. Since *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (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**." *Smyth v. Ames*, 169 U.S. 466, 527, 18 S.Ct. 418, 42 L.Ed. 819 (1898).

(emphasis added); *see also Robinson Twp., Wash. Cty. v. Commonwealth*, 83 A.3d 901, 927 (Pa. 2013) ("[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."). While consistent with and pursuant to the Pennsylvania Constitution the Legislature can set the jurisdiction of the court, it has no authority to limit the window of time in which the constitutionality of a law can be challenged.

Section 13 of Act 77 would also be invalidated by future amendments to the Pennsylvania Election Code, such as occurred with Act 12 of 2020. *See* Act of Mar. 27, 2020, § 1, P.L. No. 41, No. 12 (hereinafter "Act 12"). Act 12, *inter alia*, amended § 1302, which is noted in Act 77 as being subject to the 180-day exclusive jurisdiction period. Respondent's reading of § 13 of Act 77 would limit any judicial review of the constitutionality of changes made to Act 77 by Act 12 to a period of 1 month (*i.e.*, from March 27, 2020 to April 28, 2020). Taking Respondents' argument to the extreme, if the provisions noted in § 13 of Act 77 were to be amended again at some

time in the future, Respondents' interpretation of the 180-day window would effectively preclude judicial review of any amendment to those provisions because such review would not be within the 180-day initial window ending on April 28, 2020. To deny voters and candidates a forum for addressing violations to their constitutional rights would be an "absurd" and "unreasonable" reading of the statute, as well as an unconstitutional reading. 1 Pa.Cons.Stat. § 1922(1), (3). Accordingly, the Executive Petitioners' Preliminary Objection 2 should be overruled.

III. The Executive Petitioners' Preliminary Objection 3 should be overruled because this Court has jurisdiction.

The Executive Petitioners' Preliminary Objection 3 should be overruled because the Commonwealth Court had jurisdiction. This is not an action to resolve an election dispute. This is an action to challenge the constitutionality of Act 77 and to enjoin unconstitutional actions taken pursuant thereto. The Executive-Respondents attempt to characterize this as an action to resolve an election dispute recognized under the Election Code, to then assert that any such actions must be grounded in statutory provisions for the resolution of election disputes.

There are no provisions in the election dispute statutes for addressing unconstitutional election codes or laws. The Election Code provides no relevant procedure applicable to this type of action and does not preclude

this Court's jurisdiction to hear constitutional challenges to laws and to provide equitable relief. *See William Penn School District v. Pa. Dep't of Ed.*, 170 A.2d 412, 418 (Pa. 2017) ("The 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." *Smyth v. Ames*, 169 U.S. 466, 527, 18 S.Ct. 418, 42 L.Ed. 819 (1898)). Accordingly, this Court should overrule the Executive-Respondents' Preliminary Objection 3.

IV. Preliminary Objection 4 should be overruled because the Executive-Respondents cannot meet their burden of establishing a laches defense.

Preliminary Objection 4 should be overruled because the Executive-Respondents cannot meet their burden of establishing a laches defense. Inconsistently, the Executive-Respondents simultaneously claim that Petitioners were not particularly harmed, such that they lacked standing, but also that they should have brought this action sooner, before the general election occurred and, consequently, before the harms to Petitioners from the unconstitutional mail-in voting became a reality. Had Petitioners brought an action sooner, the Executive-Respondents would have no doubt instead contended that the harms the Petitioners claim are

merely speculative. For the same reason that the objectors did not have standing in *In re Gen. Election 2014 Kauffman,* 111 A.3d 785 (Pa. Commw. Ct. 2015), Petitioners also lacked standing to assert their claims until after they were harmed by the general election and the vote totals were announced. Petitioners brought an action within mere days of being harmed by an unconstitutional election as soon as they reasonably could have hired counsel and identify the constitutional issues after they gained standing to bring their claims. The Executive-Respondents' standing argument negates their argument that Petitioners sat on their rights for a year.

Although "laches may bar a challenge to a statute based upon procedural deficiencies in its enactment." *Stilp v. Hafer*, 718 A.2d 290, 294 (Pa. 1998), in *Stilp*, this Court found that "Appellees concede[d] that laches may not bar a constitutional challenge to the substance of a statute. . ." *Id*. Indeed, the holding in *Stilp* stands in the face of the Executive Respondent's argument, holding that while the principle of laches may apply when a constitutional challenge is on procedural grounds, it does not apply with respect to the substance of a statute. *Id*. (citing *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988) (Stating that "laches and prejudice

can never be permitted to amend the Constitution.")); *see also Wilson v. School Distr. of Philadelphia*, 195 A. 90 (Pa. 1937).

Petitioners constitutional claim is purely substantive, and therefore cannot be defeated by laches. Unlike *Stilp* where the plaintiffs argued that a bill was not referred to the appropriate committee, and that the bill was not considered for the requisite number of days, *Stilp*, 718 A.2d at fn. 1, here Petitioners argue that the substance of Act 77 directly contravenes the Pennsylvania Constitution. *See* Petition ¶¶ 65-87. Petitioners make no challenge to the procedural mechanisms through which Act 77 was passed – *e.g.*, bicameralism and presentment – but rather, what is substantively contained within the legislative vehicle that became Act 77. The Pennsylvania General Assembly attempted to unconstitutionally expanded absentee voting through Act 77, despite limitations to such expansion. Act 77 itself is not a constitutional amendment, which would be the type of procedural laches challenge raised by the Executive-Respondents (and would fail in any case). Such a patent and substantive violation of the Constitution cannot be barred by the mere passage of time – "To so hold would establish a dangerous precedent, the evil effect of which might reach far beyond present expectations." *Wilson*, 195 A. at 99. Amending the

constitution to expand a protected and fundamental right is not a mere procedural step, but rather one of substance.

The Executive-Respondents admitted that laches would not apply to prospective relief pursued by petitioner. *See* Application, Exhibit A, p. 19, fn 4. Even assuming *arguendo* that laches can apply to retrospective relief of a substantive constitutional challenge, the Executive-Respondents' Preliminary Objection 4 should still be overruled. Laches can only bar relief where "the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another." *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). The two elements of laches are "(1) a delay arising from Appellants' failure to exercise due diligence and (2) prejudice to the Appellees resulting from the delay." *Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998) (citing *Sprague*, 550 A.2d at 187-88)

Sprague is on point. In *Sprague*, the petitioner, an attorney, brought suit challenging the placing on a ballot of two judges. *Id*. Respondents raised an objection based on laches because petitioner waited 6.5 months from constructive notice that the judges would be on the ballot to bring suit. In evaluating the facts that petitioner and respondents could have known through exercise of "due diligence," the court found that while petitioner was an attorney, and was therefore charged with the knowledge of the

constitution, the respondents (the Governor, Secretary, and other Commonwealth officials) were also lawyers and similarly failed to apply for timely relief. *Id*. at 188. This Court, in denying the laches defense, reasoned that "[t]o find that petitioner was not duly diligent in pursuing his claim would require this Court to ignore the fact that respondents failed to ascertain the same facts and legal consequences and failed to diligently pursue any possible action." *Id*. To be clear, a citizen with an actionable claim cannot just wait to file a grievance it is aware of. However, courts will generally "hold that there is a heavy burden on the [respondent] to show that there was a deliberate bypass of pre-election judicial relief." *Toney v. White*, 488 F.2d 310, 315 (5th Cir. 1973). The Executive-Respondents have not met that burden here, and instead pretend that the burden is on Petitioners to disprove laches.

There is not the slightest evidence or reason to believe that Petitioners deliberately bypassed pre-election relief in the instant action, and the Executive-Respondents have not pointed to any. Unlike in *Sprague*, Petitioners here are not lawyers, they did not actually, nor could they have known with reasonable diligence the arguments presented before this Court in the instant action. With respect to the candidate-Petitioners, none have participated in state legislature, and none have

responsibilities with respect Pennsylvania Election Code or its constitutionality.

Conversely, as in *Sprague*, Respondent Boockvar is an attorney, and should be charged with knowledge of the Constitution, and particular knowledge of the Election Code. In *Sprague*, the taxpayer's more than six month delay in bringing an action challenging the election did not constitute laches thereby preventing the Commonwealth Court from hearing the constitutional claims. 550 A.2d at 188. Additionally, Respondent Pennsylvania General Assembly appears to have had knowledge of the constitutional issues involved and began the process of amending the constitution to allow no excuse mail-in ballots, which process appears to be still ongoing. Petition ¶¶ 28-30.[2]

In short, the Executive-Respondents want this Court to charge Petitioners, who had no specialized knowledge, with failure to institute an action more promptly, while Respondents possessed extremely specialized knowledge, and failed to take any corrective actions. Petitioners did not

[2] If that process proceeds and the amendment is placed on the ballot, and Act 77 is not declared unconstitutional, then Pennsylvania voters could someday cast no excuse ballots by mail to decide whether to allow no excuse voting by mail. In the meantime, all Pennsylvania voters were disenfranchised of their right to vote on such an amendment prior to institution of widespread no excuse voting by mail.

hedge their bets, they simply brought an action within mere days of being harmed by an unconstitutional election, as soon as they reasonably could have hired counsel and identify the constitutional issues after they gained standing to bring their claims. It could not have in any way served the Petitioner's interests in this matter to delay action for even one day. To suggest they did so deliberately is ridiculous and unsupported.

In light of Respondents' collective failures in enacting and enforcing Act 77, they should have acted; that they did not do so puts the weight of any necessary curative disenfranchisement squarely on their shoulders. Laches is a shield to protect respondents from gamesmanship, it is not a sword to use against harmed individuals to insulate Respondents' unconstitutional actions.

Finally, Respondents reliance on *In re Contest of Election for Off. of City Treas. from Seventh Legis. Dist. (Wilkes-Barre City) of Luzerne County*, 162 A.2d 363, 365-66 (Pa. 1960) for the premise that voters should not be disenfranchised because of "errors or wrongful acts of election officers" is misplaced in this context. *In re Contest*, stands for the proposition that disenfranchisement of voters is not necessary because "[s]ociety's weapon against election frauds is the power to arrest those that violate the Code." *Id*. That however is not the case, where the code itself is

illegally and unconstitutionally promulgated. Where, as is the case here, the illegality is of an unconstitutional nature, intervention is necessary. *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994) (If the district court finds a constitutional violation, it will have authority to order a special election, whether or not it is able to determine what the results would have been in the absence of that violation.). Accordingly, this Court should determine that the Respondents have not met their burden in establishing a laches defense and overrule Preliminary Objection 4.

V. The Executive-Respondents' Preliminary Objection 5 should be overruled because the Petition states a valid claim.

The Executive-Respondents' Preliminary Objection 5 should be overruled because the Petition states a valid claim.

A. The Pennsylvania Constitution requires voting to take place in person, subject only to specified absentee voting exceptions.

Article I, § 4 and Article II, § 1 of the U.S. Constitution grant plenary authority to state legislatures to enact laws that govern the conduct of elections. Yet, while the "legislature may enact laws governing the conduct of elections[,]... 'no legislative enactment may contravene the requirements of the Pennsylvania or United States Constitutions.'" *Kauffman v. Osser*, 271 A.2d 236, 240 (Pa. 1970) (Cohen, J. dissenting) (citing *Winston v. Moore*, 91 A. 520 (1914), and quoting *Shankey v. Staisey*, 257 A.2d 897,

898, cert denied 396 U.S. 1038 (1970)); *see also, e.g.*, *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (noting that state Legislatures are constrained by restrictions imposed by state constitutions on their exercise of the lawmaking power, even when enacting election laws pursuant to U.S. Constitutional authority).

Article VII, § 1 of the Pennsylvania Constitution outlines the authorities under which the Pennsylvania legislature enacts election laws. This Court, in evaluating absentee voting legislation, first looks at the Pennsylvania Constitution's requirements on qualifying to be an elector in Pennsylvania. "For the orderly exercise of the right resulting from these qualifications … the Legislature must prescribe necessary regulations …. But this duty and right inherently imply that such regulations are to be subordinate to the right …. As a corollary of this, no constitutional qualification of an elector can in the least be **abridged, added to, or altered** by legislation or the pretence of legislation." *In re Lancaster City*, 126 A. at 201 (emphases added).

The current Pennsylvania Constitution sets out the following qualifications for voting: (1) 18 years of age or older; (2) citizen of the United States for at least one month; (3) has residence in Pennsylvania for the 90 days immediately preceding the election; and (4) has residence in

the "election district where he or she ***shall offer to vote*** at least 60 days immediately preceding the election …." Pa. Const. Art. VII, § 1 (emphasis added). As held by this Court in *Chase*, 41 Pa. at 418-19, and *Lancaster City*, 126 A. at 200:

> To "offer to vote" by ballot is to present one's self, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. The ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil.

The Pennsylvania Constitution has not been amended to change or eliminate this qualification since *Chase.* Therefore*,* in-person voting remains a requirement under law, unless otherwise exempt by the Pennsylvania Constitution.

Article VII, § 14(a) provides the only such exceptions to the *in propria persona* voting requirement of the Pennsylvania Constitution, in four specific circumstances. It states:

> (a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day

> duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

Pa. Const. Art. VII, § 14(a). Outside of those four situations, this Court's precedents do not provide a mechanism for the Legislature to allow for expansion of absentee voting.

B. Act 77 is illegal and void ab initio because it attempts to expand the exceptions to *in propria persona* voting requirements beyond what the Pennsylvania Constitution currently allows.

"The Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed." *Lancaster City*, 281 Pa. at 137 (citing *McCafferty v. Guyer*, 59 Pa. 109). Act 77 unconstitutionally expands the scope of absentee voting permitted by the Pennsylvania Constitution to all voters.

Act 77, as amended, defines a "qualified mail-in elector" as "a qualified elector." 25 Pa.Stat. § 2602(z.6). A "qualified elector" is "any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election." *Id.* § 2602(t). In short, Act 77 qualifies all electors as mail in electors.

Moreover, newly-created 25 Pa.Stat. § 3150.11 states:

> Qualified mail-in electors.
>
> (a) General rule.-- A qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article.
>
> (b) Construction.-- The term "qualified mail-in elector" shall not be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition in section 102(t).

Separately, absentee voting is defined in 25 Pa.Stat. § 3146.1, which outlines a variety of categories of eligibility that are each consistent with Article VII, § 14 of the Pennsylvania Constitution. *See also* 25 Pa.Stat. § 2602(w) (defining 14 types of qualified absentee electors).

Act 77 purported to create a distinction between the existent "absentee voting" and "mail-in voting". Taking an inartful twist such as simply renaming the mechanism yields a distinction without a difference. The General Assembly subverted the limitations in Article VII, § 14 by creating a fictitious distinction between the pre-existing "absentee voting" and the newly created "mail-in voting." There is no distinction except that mail-in voting is simply absentee voting without any of the inconvenient conditions precedent that the Pennsylvania Constitution requires in order

for someone to be permitted to cast a ballot without being physically present at the polls on election day.[3]

This Court in *Chase v. Miller* struck down unconstitutional military absentee voting during the Civil War. Pennsylvania was one of the first states to allow for absentee voting, originating with the Military Absentee Act of 1813, which allowed “members of the state militia and those in the service of the United States to vote as long as the company the soldier was serving was more than two miles from his polling place on election day.” John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 497 (2003). At the time the Military Absentee Act was passed, the Pennsylvania Constitution imposed no restrictions with regard to absentee voting. However, in 1838, Pennsylvania amended its constitution to require voters to “reside in the election district where he offers to vote, ten days immediately preceding such election.” *Id.* (citing Pa. Const. of 1838, Art. III, § 1 (1838)). This created a conflict with the Military Absentee Act as re-

3. In an attempt to create the distinction between absentee and mail-in, the legislature defined "qualified mail-in elector" is a “qualified elector who is not a qualified absentee elector.” Again, the definitional distinction is non-yielding because there is no longer any functional purpose to applying for an absentee ballot.

enacted in 1839, which allowed for absentee voting, and the newly amended Pennsylvania Constitution, which no longer did. *Id.*

In the 1861 election, Pennsylvania soldiers voted under the Military Absentee Act 1839, and legal challenges came soon after. In 1862, this Court decided *Chase v. Miller*, 41 Pa. 403. The Court analyzed the Military Absentee Act of 1839 and its conflict with new (as of 1838) Pennsylvania Constitution. This Court held that the act was unconstitutional because the purpose of the 1838 amendment to the Pennsylvania Constitution was to require in-person voting in the election district where a voter resided at least 10 days before the election. *Id.* at 418-19.

> The second section of [the 1838 amendment] requires all popular elections to be by ballot. 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.
> * * *

> [Regarding the 1839 act,] [i]t is scarcely possible to conceive of any provision and practice that could, at so many points, offend the cherished policy of Pennsylvania in respect to suffrage. Our Constitution and laws treat the elective franchise as a sacred trust…. All of which the [1839 act] reverses and disregards, and opens a wide door for most odious frauds, some of which have come under our judicial cognizance.

Id. at 419-25 (emphasis added in bold). This Court also noted that the Pennsylvania legislature carelessly avoided discussing the constitutionality of the 1839 act before its passage; although, it noted that "instances of even more careless legislation are not uncommon." *Id.* at 417.

Following this Court's invalidation of the 1839 Military Absentee Voting Act, the legislature proposed amendment to the Pennsylvania Constitution in 1864 to include for this first time a provision allowing for absentee voting by active military personnel. *See* Josiah Henry Benton, Voting in the Field: A Forgotten Chapter of the Civil War, at 199 (1915). The legislature passed the amendment in two successive sessions, in 1863, and again on April 23, 1864, and the amendment was approved by the citizens of Pennsylvania in August 1864. Prior to the August approval of the amendment, on April 1, 1864, the Legislature was attempting to pass a soldier's voting bill that would have implemented absentee voting laws in accordance with what the constitutional provision would have allowed if

passed. The legislature sought the Attorney General's opinion on the constitutionality of passing this legislation before the constitutional amendment was approved by the voters. The Attorney General opined that it "would not be constitutional to pass a law before the Constitution was amended so as to allow it." *Id.* at 200.

From 1864 to 1949, only qualified electors engaged in actual military service were permitted to vote by absentee ballot under the Pennsylvania Constitution. Pa. Const. Art. VIII, § 6 (1864). However, this limitation did not prevent the legislature from, again, attempting to pass unconstitutional legislation to expand absentee voting. In 1924, this Court decided *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, striking down as unconstitutional Act May 22, 1923 (P.L. 309; Pa. St. Supp. 1924, §9775a1, *et seq*.), an act providing civilians the right to vote by absentee ballot. Quoting *Chase v. Miller*, 41 Pa. at 419, this Court reaffirmed the law that "'[t]o offer to vote' by ballot, is to present one's self with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed 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." *Lancaster City*, 126 A. 200. This principle was affirmed

between 1864 and 1924 in many other states with similar constitutional provisions, both with regard to absentee voting by regular citizens as well as by soldiers away from home. *Id.* (citing *Twitchell v. Blodgett*, 13 Mich. 127; *Bourland v. Hildreth*, 26 Cal. 161; *Day v. Jones*, 31 Cal. 261; *Opinion of the Judges*, 30 Conn. 591; *Opinion of the Judges*, 37 Vt. 665; *Opinion of the Justices*, 44 N.H. 633; *In re Opinion of Justices* [N.H.] 113 Atl. 293; *Clark v. Nash*, 192 Ky. 594, 234 S.W. 1, 19 A.L.R. 304). The Court held the civilian absentee ballot act unconstitutional because the Pennsylvania Constitution still required electors to "offer to vote" in the district where they reside, and that those eligible to "vote other than by personal presentation of the ballot" were specifically named in the Constitution (i.e., active military). *Id.* at 136-37. The Court relied on two primary legal principles in its ruling:

> [1] 'In construing particular clauses of the Constitution it is but reasonable to assume that in inserting such provisions the convention representing the people had before it similar provisions in earlier Constitutions, not only in our own state but in other states which it used as a guide, and in adding to, or subtracting from, the language of such other Constitutions the change was made deliberately and was not merely accidental.' *Com v. Snyder*, 261 Pa. 57, 63, 104 Atl. 494, 495.
> * * *
> [2] The old principle that the expression of an intent to include one class excludes another has full

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

Id. The Court went further to note:

> 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.

Id. at 138.

Because the Legislature failed to strictly comply with the requirements of Article XI, the efforts to amend the Constitution to improperly authorize universal mail-in voting are fatally defective and inherently unconstitutional, having no lawful basis or effect. *See, e.g., Kremer v. Grant*, 529 Pa. 602, 613, 606 A.2d 433, 439 (1992) ("[T]he failure to accomplish what is prescribed by Article XI infects the amendment process with an incurable defect"); *Sprague v. Cortes*, 636 Pa. 542, 568, 145 A.3d 1136, 1153 (2016) (holding that matters concerning revisions of the Pennsylvania Constitution require "the most rigid care" and demand "[n]othing short of literal compliance with the specific measures set forth in Article XI.") (*quoting Commonwealth ex rel. Schnader v. Beamish*, 64 A. 615, 616-17 (Pa. 1932)). "However laudable the purpose of the 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." *Lancaster City*, 281 Pa. at 137-38.

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

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

qualifications and requirements for voting in an election. Respondents' actions in passing Act 77 without first amending the Constitution directly contravene biding precedent and it is respectfully submitted that this Court should invalidate the Act.

D. Post-World-War-II and the modern absentee voting provision in the Pennsylvania Constitution.

In 1949, the Pennsylvania Constitution was amended to also allow bedridden or hospitalized war veterans the ability to vote absentee. Pa. Const. Art. 8, § 18 (1949). In 1957, the legislature began the process of amending the constitution to allow civilian absentee voting in instances where unavoidable absence or physical disability prevented them from voting in person. *See Absentee Ballots Case*, 423 Pa. 504, 508, 224 A.2d 197, 199-200 (1966). Because of the restrictions and safeguards under Article XI, the 1957 amendment to the constitution did not go into effect until 1960. *Id.* The constitutional amendment effectively expanded eligibility for absentee voting to include only two categories of qualified electors: (1) those who on election day would be absent from their municipality of residence because of their duties, occupation, or business; and (2) those who are unable to attend their proper polling place because of illness or physical disability. Pa. Const. Art. 7, § 19 (1957).

Issues arose immediately with the canvassing and computation of ballots under the newly expanded absentee voting system, and any challenges to absentee ballots that were rejected by the board of elections resulted in the challenged ballots being placed with ballots that were not challenged to be counted, making it impossible to correct if it was later determined that the decision to reject the challenge was incorrect. *See Absentee Ballots Case*, 423 Pa. 504, 509, 224 A.2d 197, 200. In response, "the legislature added further amendments by the Act of August 13, 1963, P.L. 707, 25 Pa.Stat. § 3146.1 et seq. (Supp. 1965)" to require the board of elections to mark any ballot that was disputed as "challenged," hold a hearing on the objections, and the decision was opened up to review by the court of common pleas in the county involved. *Id.* Until all challenges were resolved, the board of elections was required to desist from canvassing and computing all challenged ballots to avoid the possible mixing of valid and invalid ballots. *Id.* In 1967 following the Constitutional Convention, the Pennsylvania Constitution was reorganized and Article VII, § 19 was renumbered to Article VII, § 14.

On November 5, 1985, the citizens of Pennsylvania approved another amendment to Article VII, § 14 of the Pennsylvania Constitution, which added religious observances to the list of permissible reasons for

requesting an absentee ballot (the "1985 Amendment"). The 1985 Amendment began as HB 846, PN 1963, which would have amended the Pennsylvania Election Code to provide absentee ballots for religious holidays and for the delivery and mailing of ballots. *See* Pa. H. Leg. J. No. 88, 167th General Assembly, Session of 1983, at 1711 (Oct. 26, 1983) (considering HB 846, PN 1963, entitled "An Act amending the 'Pennsylvania Election Code,' …further providing for absentee ballots for religious holidays and for the delivery and mailing of ballots."). However, the legislative history recognized that because the Pennsylvania Constitution specifically delineates who may receive an absentee ballot, a constitutional amendment was necessary to implement these changes. HB 846, PN 1963 was thus changed from a statute to a proposed amendment to the Pennsylvania Constitution. *Id.* (statement of Mr. Itkin) ("[T]his amendment is offered to alleviate a possible problem with respect to the legislation. The bill would originally amend the Election Code to [expand absentee balloting] …. Because it appears that the Constitution talks about who may receive an absentee ballot, we felt it might be better in changing the bill from a statute to a proposed amendment to the Pennsylvania Constitution.").

On November 4, 1997, the citizens of Pennsylvania approved another amendment to Article VII, § 14 of the Pennsylvania Constitution, which expanded the ability to vote by absentee ballot to qualified voters that were outside of their *municipality of residence* on election day; where previously absentee voting had been limited to those outside of their *county of residence* (the "1997 Amendment"). *See* Pa. H. Leg. J. No. 31, 180th General Assembly, Session of 1996 (May 13, 1996) The legislative history of the 1997 Amendments recognized the long-known concept that there existed only two forms of voting: (1) in-person, and (2) absentee voting and that the 1997 Amendment would not change the status quo; namely that "people who do not work outside the municipality [or county] or people who are ill and who it is a great difficulty for them to vote but it is not impossible for them to vote, so they do not fit in the current loophole for people who are too ill to vote but for them it is a great difficulty to vote, they cannot vote under [the 1997 Amendment]." *Id.* at 841 (statement of Mr. Cohen).

E. The Executive-Respondents' attempts to distinguish or undermine this Court's precedents are unavailing.

The Executive-Respondents' attempts to distinguish or undermine this Court's precedents are unavailing. The Executive-Respondents refer to this Court's precedents interpreting provisions of the Pennsylvania Constitution, which remain unchanged since those cases were decided, as

"outdated" and "not reflected in other current, constitutional voting practices provided by the Election Code." *See* Application, Exhibit A, pp. 22-23. Respondents argue that absentee balloting is more acceptable and less prone to fraud in modern times than it was in the past. They claim that this Court's precedents "based their holdings on a fear of absentee voting that no longer exists, and is not reflected in other current, constitutional voting practices provided for by the Election Code." *See Id*.

On the contrary, concerns regarding absentee voting persist to this day. For example, in a New York Times article entitled "Error and Fraud at Issue as Absentee Voting Rises," Oct. 6, 2012, the author noted that, in the absentee system, "fraud and coercion have been documented to be real and legitimate concerns" because fraud is easier via mail. *See* Exhibit A attached hereto (also noting issues with "granny farming," issues with buying and selling mail-in votes, and other serious issues with mail-in votes).

The Executive-Respondents' argument that *Chase* and *Lancaster City* are "outdated" and "inapplicable" is unintelligible and stand in the face of the foundational principles of *stare decisis*. *See* Application, Exhibit A, p 22. As a preliminary matter, the Executive-Respondents correctly state that the holdings in *Chase* and *Lancaster City* interpret the language "offer to

vote" to require in person voting. Because the language "offer to vote" conspicuously remains in the Pennsylvania Constitution, the Executive-Respondents resign to arguing that the very meaning of that language, as interpreted by this Court, has somehow changed. In support of such an argument, they cite to vague historical context, and a shift in modern realities. *See* Application, Exhibit A, pp. 23-24.

The Executive-Respondents completely ignore the doctrine of *stare decisis,* well settled in this Court's precedents, especially in the context of election law. This Court has held that "for purposes of stability and predictability that are essential to the rule of law ... the forceful inclination of courts should favor adherence to the general rule of abiding by that which has been settled." *Shambach v. Bickhart*, 845 A. 2d 793, 807 (Pa. 2004) (J. Saylor concurring). Certainty and stability in the law is crucial, and unless blindly following stare decisis perpetuates error, precedent must be followed. *See Stilp v. Com*., 905 A. 2d 918, 967 (Pa. 2006). Holdings, "once made and followed, should never be altered upon the changed views of new personnel of the court." *In re Burtt's Estate*, 44 A.2d 670, 677 (Pa. 1945) (cited by *In re Paulmier*, 937 A. 2d 364 (Pa. 2007)). "Stare decisis simply declares that, for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially

the same, even though the parties may be different." *Heisler v. Thomas Colliery Co.*, 118 A. 394, 395 (Pa. 1922).

The material facts of this case are not only substantially similar, but they are also identical - the terms "offer to vote" remains identical in today's Pennsylvania Constitution to the Pennsylvania Constitution back in the times of *Chase* and *Lancaster City*. For the sake of consistency of law, the meaning must remain the same. This Court should consistently find that the term requires voting to be in person, absent some contravening language. Article 7, § 14 provides that contravening language, and does so specifically because of the limitation set by § 1. The Executive-Respondents cite no special justification that would justify injecting instability into settled law. Departure from the stringent principles of *stare decisis* requires special justification, and the Executive-Respondents have not identified a single one. *See Arizona v. Rumsey*, 467 U. S. 203, 212 (1984) ("Any departure from the doctrine of *stare decisis* demands special justification …").

Indeed, *Chase* and *Lancaster City* have been consistently upheld without any indication of perpetuating legal error. The idea that a change in times is reason to reinterpret language is risible, precisely because *stare decisis*, as a principle, was established to provide predictability and stability

through time. The Executive-Respondents fail to cite a single case for their historically relative definitional approach. The Executive-Respondents provide "little basis here for invoking the rare exception to *stare decisis* to disturb a long-settled matter." *See Shambach*, 845 A. 2d at 807.

Moreover, consistent amendments to Article VII demonstrate a necessity to provide specific constitutional authority for each expansion of methods of voting beyond *in propria persona* voting, because of the strict requirement for in person voting. The Executive-Respondents' interpretation of the relevant constitutional provisions, if correct, would have obviated the need for many such prior Pennsylvania Constitutional amendments. Indeed, absent such restriction, amendments allowing for Military voting and absentee voting under Article VII, § 14 would be redundant.

Yet, Executive-Respondents point to the Court's propensity to allow some latitude in the prescriptive language in some of these amendments as evidence that the language is entirely permissive. Specifically, the Executive-Respondents cite to the fact that spouses of military members were allowed to vote when the amendment only allowed for military members, and the legislature interpreting "duties, occupation or business" in Article VII, § 14 as inclusive of "teaching or education, vacations,

sabbatical leaves, and all other absences associated with the elector's duties, occupation or business, and also include an elector's spouse who accompanies the elector." Application, Exhibit A, pp. 24-25 (quoting 25 Pa.Stat. § 2602). Citing these minor variances – well within the interpretive confines of both amendments – the Executive-Respondents assert that "five decades of allowing absentee voting beyond the 'specifically named' categories of Article VII, § 14, suggests it would no longer be appropriate to follow *Lancaster City* by applying the maxim *expressio unius est exclusio alterius*." *Id*. at p. 26.

Put simply, the Executive-Respondents argue that because some legislation does not adhere to the strictest interpretation of Article VII, § 14, the Pennsylvania General Assembly has free reign to interpret § 14 out of existence, as Act 77 does. The issue here, is an Act that classifies virtually everyone as an absentee voter, not a mere justifiable interpretation of some enumerated exception. The Court should resist the invitation to interpret § 14 out of existence.

Moreover, Respondents, reliance on *Kauffman v. Osser,* 271 A.2d 236 (Pa. 1970) is misguided at best. In *Kauffman*, the Plaintiffs brought a challenge to a law that allowed for absentee voting in situations where electors were on vacation on election day. Respondents state that "the

legislature believed these expansions to be constitutional, even contemporaneously with the finalization of the new constitution. And the Supreme Court rejected a challenge to some of these expansions when they were still young, albeit on standing grounds. *Kauffman v. Osser*, 441 Pa. 150 (1970).” First, not only did this Court base its holding in *Kauffman* on lack of standing, but also this Court did not analyze any part of the statute’s constitutionality, not even in a single sentence. No honest reading of the case would render a holding of constitutionality.

The Executive-Respondents’ desperate reliance on *Martin v. Haggerty*, 548 A.2d 371, 374-75 (Pa. Commw. Ct. 1988) and *Ray v. Commonwealth*, 276 A.2d 509 (Pa. 1971) fare no better. The Executive-Respondents draw the following conclusion from these cases: “More recent decisions suggest the legislature has broad powers to decide who may vote by absentee ballot.” First, *Martin* was decided by the Commonwealth Court, applying *Ray*. Therefore, only *Ray* is authoritative here. Second, and regardless, both decisions revolve around the definition of “qualified elector” specifically excluding incarcerated individuals. This Court found that the “Legislature has the power to define ‘qualified electors' in terms of age and residency requirements, so it also has power to except persons ‘confined in a penal institution’ from the class of ‘qualified electors.’” *Ray*,

276 A.2d at 510. The power of the legislature to limit who can register to vote – *i.e.*, a qualified elector – is not the subject of the present litigation. But the Executive-Respondents argue that "if the 1968 Constitution sets a floor for qualified electors in Article VII, § 1, then by the same logic it sets a floor for absentee voters in Article VII, § 14." Application, Exhibit A, p. 27. The incongruity of the comparison is outstanding. Article VII, § 1 clearly states that the limitations are "subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact," providing discretion to the General Assembly to enact laws as they see fit. No similar discretionary language is present in Article VII, § 14. The comparison of different Sections, containing wholly different language is not instructive.

The Executive-Respondents cite no authority or interpretive principle for their argument that the change of the word from "may" in totally distinct earlier absentee provisions to "shall" in Article VII, § 14 "reflects the modern Pennsylvania Constitution's grant of general discretion to set qualifications for absentee voting…" Application, Exhibit A, p. 28. How the Executive-Respondents can glean that an affirmative "shall" creates more discretion on the legislature is beyond comprehension.

Finally, in the three single lines dedicated to the Constitutional amendment that would have prevented this entire litigation if constitutionally passed, the Executive-Respondents argue that "[i]f anything, the General Assembly recognized that, as no challenges had been made to Act 77 within the prescribed time frame, it was likely constitutional and no amendment was necessary." Application, Exhibit A, p. 28. Such conclusion is flawed both in fact and in logic. As to the former, because the legislature did not "abandon the quest" of amending the Constitution, the amendment passed and is slated to be voted on by electors, pursuant to Constitutional mandate, in November of 2021. As to the latter, there is no implication of a lack of constitutionality in the mere lack of a challenge. The way to change the Pennsylvania Constitution is through amendment, not reinterpretation contradictory to the original intent and meaning of its terms. Accordingly, the Executive-Respondents' Preliminary Objection 5 should be overruled.

VI. The standards for granting a preliminary and permanent injunctive relief are met in this case.

The standard for granting a preliminary and permanent injunction are met in this case.

A. Standard for Granting a Preliminary Injunction.

A preliminary injunction's purpose is to preserve the status quo and to prevent imminent and irreparable harm that might occur before the merits of a case can be heard and determined. *Ambrogi v. Reber*, 932 A.2d 969, 976 (Pa. Super. 2007), *Walter v. Stacy*, 837 A.2d 1205, 1209 (Pa. Super. 2003). Pennsylvania Law is well settled regarding the prerequisites that must be established by the movant in order to obtain a Preliminary Injunction. "There are six 'essential prerequisites' that a party must establish prior to obtaining preliminary injunctive relief. The party must show: 1) 'that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages'; 2) 'that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings'; 3) 'that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct'; 4) 'that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits'; 5) 'that the injunction it seeks is reasonably suited to abate the offending activity'; and, 6) 'that a preliminary injunction will not

adversely affect the public interest.' *Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004) (citing, *Summit Towne Centre. Inc, v. Shoe Show of Rocky Mount Inc.,* 828 A.2d 995, 1002 (Pa. 2003)).

B. An Injunction Is Necessary to Prevent Immediate and Irreparable Harm to the Petitioners That Cannot Be Otherwise Adequately Compensated by Damages.

The injunction in this case is necessary to prevent Petitioners from suffering the permanent, irreparable harm of an illegal election conducted pursuant to unconstitutional laws. As an initial matter, this Court has consistently held that, "[w]hen the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury." *Pennsylvania Public Utility Commission v. Israel*, 52 A.2d 317, 321 (Pa. 1947). An illegal action, should it be allowed to continue, is an irreparable harm. *Milk Marketing Board v. United Dairy Farmers Co–op Association*, 299 A.2d 191 (Pa. 1973) (plurality) (affirming issuance of a preliminary injunction and finding irreparable harm because Petitioners violated state statute by selling milk below the minimum prices mandated by state law); *Pennsylvania Public Utility Commission v. Israel*, 52 A.2d 317 (Pa. 1947) (affirming issuance of a preliminary injunction on the basis that Petitioners

violated a state statute requiring taxicabs to have a certificate of public convenience).

The same kind of irreparable harm, as a matter of law, has been found in instances where legislative acts were preempted or not in accordance with a higher authority. *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1180 (Pa. Commw. Ct. 2016). In *Firearm,* the court found that a town ordinance that violated state statutory law constituted irreparable injury. "[R]egardless of the persuasiveness of the Township's argument, [] binding case law mandates that the Ordinance is preempted by § 6120(a) of the UFA and, therefore, the Township's enactment of the same violates the UFA. Thus, issuance of a preliminary injunction is necessary to prevent immediate and irreparable harm, *i.e.*, the continued statutory violation." *Id.* Accordingly, the per se irreparable harm as a matter of law standard should be applied in situations where legislation is in violation of the Pennsylvania Constitution.

Here the General Assembly enacted Act 77 in violation of the Pennsylvania Constitution. Should this Court find that it is at least likely that a violation of the Pennsylvania Constitution occurred, then the inquiry should end there – immediate and irreparable harm should be found as a matter of law. In the alternative, should the Court not find irreparable harm

as a matter of law, irreparable harm should be found because the November 3, 2020, General Election was conducted pursuant to unconstitutional legislation; a failure by the Court to enjoin early certification of those derivatively unconstitutional results (which to this point include mail-in ballots), would strip the Court of the ability to redress the harm suffered by Petitioners and all Pennsylvanians with respect to the presidential election. Once elections are certified and electors are appointed and cast their votes, the Court's ability to undo such certification and provide redressability for the November 3, 2020, presidential General Election becomes impossible.

For presidential and vice-presidential elections, states must choose their electors “at least six days before the time fixed for the meeting of electors” in order to meet the federal “safe harbor” deadline. 3 U.S.C. § 5. For the 2020 General Election, electors must be chosen by December 8, 2020, in order to ensure that they are able to meet and vote at the time prescribed by law – December 14, 2020, at 12:00 PM – and have that vote counted in Congress. Once such votes are cast by the presidential and vice-presidential electors, this Court would lose the ability to provide relief to Petitioners, and Petitioners would have no other forum in which to have their claims redressed.

Although no similar deadline exists with regard to United States House of Representatives election , it is unlikely that the Court would be able to provide relief once the returns of these races have been certified and the Governor has transmitted those returns to the Speaker of the House of Representatives pursuant to 25 Pa.Stat. § 3163. Similarly, with respect to General Assembly elections, there is no certification deadline, however, pursuant to the Pennsylvania Constitution the new General Assembly is seated on December 1st after which, relief would be impracticable. Pa. Const. Art. II, Sec, 2.

The failure of an election to choose electors, must be resolved subsequently by the legislature prior to the appointment of electors "in such a manner as the legislature of such State may direct." 3 U.S.C. § 2. Thus, the determination of a failure in the election must be resolved prior to the Secretary exercising her authority to certify the elections, prior to the Governor issuing commissions for the Electors, and prior to the Electors submitting their votes for the Electoral College. Without continuing the temporary injunction, therefore, relief will likely become impossible, and the harm would be rendered irreparable. Finally, should this litigation, and the subsequent appellate process, continue past December 14th – the date

that the Electors cast their votes– the Court would have no power in law or in equity to undue the resulting wrongs.

C. Greater injury would result from allowing certification of election results conducted pursuant to an unconstitutional mail-in voting scheme than from prohibiting it.

The second prerequisite to the issuance of a preliminary injunction is that the party requesting the injunction must show that greater injury would result from refusing an injunction than from granting it and concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. *The York Grp., Inc. v. Yorktowne Caskets, Inc*., 924 A.2d 1234, 1244 (Pa. Super. 2007). This requirement is satisfied here as well.

The injunction requested is temporary and will only prevent the Secretary and Governor from performing certain ministerial actions far in advance of the statutory deadlines set in Federal Law (December 8th for certification of electors, December 14th for casting of electoral votes) or the Pennsylvania Constitution (December 1st for General Assembly to take office). Should the Court ultimately find for the Respondents, the only harm suffered by the Respondents is a slight delay of certification of results, a largely procedural step that benefits Respondents in no way if done early. This Court may take judicial notice that in the 2016 Presidential Election,

the results were certified, and the Certificates of Ascertainment were signed on December 12, 2016. *See* Department of State Certifies Presidential Election Results, available at https://www.media.pa.gov/pages/State-details.aspx?newsid=207 (December 12, 2016). Conversely, if the limited injunction is not maintained, Respondents harm becomes irreparable, and Petitioners, along with all Pennsylvanians, must permanently suffer the fruits of an unconstitutional election and having been disenfranchised of their right to vote on adoption of a constitutional amendment before widespread no excuse mail-in voting was instituted. Juxtaposing the harms, it becomes clear that the lack of injury from a short delay to a procedural mechanism for the sake of preserving any form of redressability for Petitioners is a favorable outcome for all parties involved.

D. Granting the Preliminary Injunction Will Maintain the Status Quo and Prevent Respondents from Inflicting Permanent Damage Through Their Illegal Conduct.

The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made, it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined. *Chipman ex rel. Chipman v. Avon Grove School Dist.*, 841 A.2d 1098, 1101 (Pa. Commw. Ct. 2004.)

(citing *Little Britain Township Appeal*, 651 A.2d 606 (Pa. Commw. Ct. 1994)). “The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful noncontested status which preceded the pending controversy.” *Valley Forge Historical Soc’y v. Washington Memorial Chapel*, 426 A.2d 1123, 1129 (Pa. 1981).

To be clear, the harm suffered by Petitioners is not simply that of being subject to unconstitutional legislation, though that is a cognizable harm under the law. The realized harm is the resulting wrongs of conducting the November 3, 2020, General Election pursuant to unconstitutional legislation. Prior to the November 3, 2020, General Election taking place, there were no results to be certified. As it stands now, it is not clear which steps in the process of certification of an election have and have not been completed, but clearly the electors have not yet voted. Thus, a narrow window exists in which a properly tailored injunction issued by this Court will preserve the status quo as it existed prior to the wrongful conduct at issue. Such an injunction would preserve Petitioners' rights and allow the court adequate time to decide the presented questions of law, while retaining the ability to meaningfully redress the harm. Moreover, as mentioned above, such an injunction would in no way prejudice Respondents. If injunctive relief is not granted, and a final hearing

on the merits is not immediately scheduled, Petitioners will be robbed of their ability to see their harms redressed.

The requested injunctive relief in this matter is appropriate because it will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Consequently, the third prerequisite necessary to the grant of preliminary injunctive relief has been satisfied.

E. Act 77 is a Clear Violation of the Constitution and the Pennsylvania Supreme Court has Previously Struck Down Similar Laws and Set Aside Illegal Mail-in Ballots, Thus Petitioners are Likely to Prevail on the Merits.

The fourth prerequisite to the issuance of a preliminary injunction is that the Petitioners must show that the activity they seek to restrain is actionable, that their right to relief is clear, and that the wrong is manifest, or, in other words, must show that they are likely to prevail on the merits.

To establish a, "clear right to relief," the party seeking an injunction need not prove the merits of the underlying claim, but need only show that substantial legal questions must be resolved to determine the rights of the respective parties. *Walter v. Stacy*, 837 A.2d 1205, 1209 (Pa. Super. 2003) (quoting, *Chmura v. Deegan*, 581 A.2d 592, 593 (Pa. Super. 1990)); *see also*, *Ambrogi v. Reber*, 932 A.2d 969, 976 (Pa. Super. 2007) (citing *Walter*, 837 A.2d at 1209 ("[T]he party seeking an injunction is not required to prove that he will prevail on his theory of liability, but only that there are

substantial legal questions that the trial court must resolve to determine the rights of the parties.")). For the reasons explained in Section V of the Argument above, Petitioners here have a clear right to relief.

F. An Injunction Against Respondents is Reasonably Necessary to Prevent Irreparable Harm.

The fifth prerequisite necessary for granting preliminary injunctive relief is that the moving party must show that the injunction it seeks is reasonably necessary to prevent irreparable harm. Pennsylvania courts sitting in equity have jurisdiction to prevent the continuance of acts prejudicial to the interest of individual rights, including the authority to enjoin the wrongful acts where monetary damages are inadequate. *The York Grp., Inc.,* 924 A.2d, at 1244 (Pa. Super. 2007).

The injunction Petitioners seek is reasonably suited to abate the offending activity. A preliminary injunction at this point would merely prevent the fruits of an unconstitutional election from becoming "final," thereby preserving Petitioners' ability to continue to seek permanent relief from this Court. The remedy requested in the instant motion is narrowly tailored to prevent immediate and irreparable harm to Petitioners that has been caused by an election perpetrated pursuant to an unconstitutional election code.

Petitioners, and the entire Pennsylvania electorate, were subject to an unconstitutional election code leading up to and through the November 3, 2020, General Election. Indeed, Petitioners continue to remain subject to such unconstitutional laws. Act 77 was enacted without regard for the Pennsylvania Constitution, nor for the protections granted therein. A brief delay in the certification of the election results that in no way harms Respondents is reasonably necessary to provide this Court with time to review and make a decision on the merits.

If preliminary injunctive relief is maintained, the Petitioners' remedy will be preserved. The preliminary injunction requested would not last longer than necessary under the circumstance, but only until the rights of the parties could be determined by a full and final hearing on the merits. The grant of the requested preliminary injunctive relief is reasonably suited to abate the offending activity until the matter can be fully adjudicated. For the reasons as set forth herein, the fifth prerequisite necessary for granting preliminary injunctive relief has been satisfied by Petitioners.

VII. The Public Interest Will be Served by Preventing the Premature Certification of Election Results that Includes Illegal Mail-in Ballots.

The sixth and final prerequisite that must be satisfied before a preliminary injunction may be ordered is that the party seeking an injunction

must show that the injunction will not adversely affect the public interest. The Respondents' actions constitute an attempt to deny the electorate the protections afforded to it by the Pennsylvania Constitution. Respondents' actions represent a concerted effort to subvert the Pennsylvania Constitution, especially in light of their tacit acknowledgement that the Constitution required amendment, their attempt to make such amendment, and their abandonment of such efforts.

"Among the factors that a court must weigh in deciding whether or not to grant a preliminary injunction is the effect such a preliminary injunction would have on the public interest." *Philadelphia v. District Council* 33. AFSCME, 528 Pa. 355, 364, 598 A.2d 256, 260 (Pa. 1991). See also, *Allegheny Anesthesiology Associates v. Allegheny General Hosp.*, 826 A.2d 886, 893 (Pa. Super. 2003) (harm to the public is an additional consideration in the issuance or denial of a preliminary injunction).

In the instant matter, any concerns of harm from brief delay are outweighed by the harm of proceeding with all of the certification steps and forever precluding meaningful review by this Court. This Court could reach a final decision on the merits in this case very quickly. The public interest will be served well by granting injunctive relief because there is no greater public interest than that of an electorate exercising its right to a free, fair,

and lawful election. That public interest will not be harmed by a temporary delay in certification while the Court decides the questions of law raised by the instant action. The public interest strongly favors issuance of injunctive relief.

CONCLUSION

For the foregoing reasons, this Court should maintain the preliminary injunctive relief provided by the Commonwealth Court until this Court can make a final decision on the merits, and upon such final decision, make that relief permanent and strike down Act 77 as unconstitutional.

Respectfully submitted,

OGC Law, LLC

/s/Gregory H. Teufel
Gregory H. Teufel, Esq.
Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

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.

Date: November 27, 2020

/s/Gregory H. Teufel
Gregory H. Teufel

CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I certify that the RESPONSE TO APPLICATION FOR THE COURT TO EXERCISE EXTRAORDINARY JURISDICTION is 13,981 words as measured in accordance with Pennsylvania Rule of Appellate Procedure 2135.

Dated: November 27, 2020 /s/Gregory H. Teufel
Gregory H. Teufel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record on November 27, 2020 by this Court's electronic filing system.

/s/Gregory H. Teufel
Gregory H. Teufel

The New York Times | https://nyti.ms/R2EbfO

Error and Fraud at Issue as Absentee Voting Rises

By Adam Liptak

Oct. 6, 2012

TALLAHASSEE, Fla. — On the morning of the primary here in August, the local elections board met to decide which absentee ballots to count. It was not an easy job.

The board tossed out some ballots because they arrived without the signature required on the outside of the return envelope. It rejected one that said "see inside" where the signature should have been. And it debated what to do with ballots in which the signature on the envelope did not quite match the one in the county's files.

"This 'r' is not like that 'r,' " Judge Augustus D. Aikens Jr. said, suggesting that a ballot should be rejected.

Ion Sancho, the elections supervisor here, disagreed. "This 'k' is like that 'k,' " he replied, and he persuaded his colleagues to count the vote.

Scenes like this will play out in many elections next month, because Florida and other states are swiftly moving from voting at a polling place toward voting by mail. In the last general election in Florida, in 2010, 23 percent of voters cast absentee ballots, up from 15 percent in the midterm election four years before. Nationwide, the use of absentee ballots and other forms of voting by mail has more than tripled since 1980 and now accounts for almost 20 percent of all votes.

Yet votes cast by mail are less likely to be counted, more likely to be compromised and more likely to be contested than those cast in a voting booth, statistics show. Election officials reject almost 2 percent of ballots cast by mail, double the rate for in-person voting.

"The more people you force to vote by mail," Mr. Sancho said, "the more invalid ballots you will generate."

Election experts say the challenges created by mailed ballots could well affect outcomes this fall and beyond. If the contests next month are close enough to be within what election lawyers call the margin of litigation, the grounds on which they will be fought will not be hanging chads but ballots cast away from the voting booth.

In 2008, 18 percent of the votes in the nine states likely to decide this year's presidential election were cast by mail. That number will almost certainly rise this year, and voters in two-thirds of the states have already begun casting absentee ballots. In four Western states, voting by mail is the exclusive or dominant way to cast a ballot.

The trend will probably result in more uncounted votes, and it increases the potential for fraud. While fraud in voting by mail is far less common than innocent errors, it is vastly more prevalent than the in-person voting fraud that has attracted far more attention, election administrators say.

In Florida, absentee-ballot scandals seem to arrive like clockwork around election time. Before this year's primary, for example, a woman in Hialeah was charged with forging an elderly voter's signature, a felony, and possessing 31 completed absentee ballots, 29 more than allowed under a local law.

The flaws of absentee voting raise questions about the most elementary promises of democracy. "The right to have one's vote counted is as important as the act of voting itself," Justice Paul H. Anderson of the Minnesota Supreme Court wrote while considering disputed absentee ballots in the close 2008 Senate election between Al Franken and Norm Coleman.

Voting by mail is now common enough and problematic enough that election experts say there have been multiple elections in which no one can say with confidence which candidate was the deserved winner. The list includes the 2000 presidential election, in which problems with absentee ballots in Florida were a little-noticed footnote to other issues.

In the last presidential election, 35.5 million voters requested absentee ballots, but only 27.9 million absentee votes were counted, according to a study by Charles Stewart III, a political scientist at the Massachusetts Institute of Technology. He calculated that 3.9 million ballots requested by voters never reached them; that another 2.9 million ballots received by voters did not make it back to election officials; and that election officials rejected 800,000 ballots. That suggests an overall failure rate of as much as 21 percent.

Some voters presumably decided not to vote after receiving ballots, but Mr. Stewart said many others most likely tried to vote and were thwarted. "If 20 percent, or even 10 percent, of voters who stood in line on Election Day were turned away," he wrote in the study, published in The Journal of Legislation and Public Policy, "there would be national outrage."

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happening — and why it matters.

The list of very close elections includes the 2008 Senate race in Minnesota, in which Mr. Franken's victory over Mr. Coleman, the Republican incumbent, helped give Democrats the 60 votes in the Senate needed to pass President Obama's health care bill. Mr. Franken won by 312 votes, while state officials rejected 12,000 absentee ballots. Recent primary elections in New York involving Republican state senators who had voted to allow same-sex marriage also hinged on absentee ballots.

There are, of course, significant advantages to voting by mail. It makes life easier for the harried, the disabled and the elderly. It is cheaper to administer, makes for shorter lines on election days and allows voters more time to think about ballots that list many races. By mailing ballots, those away from home can vote. Its availability may also increase turnout in local elections, though it does not seem to have had much impact on turnout in federal ones.

Still, voting in person is more reliable, particularly since election administrators made improvements to voting equipment after the 2000 presidential election.

There have been other and more controversial changes since then, also in the name of reliability and efficiency. Lawmakers have cut back on early voting in person, cracked down on voter registration drives, imposed identification requirements, made it harder for students to cast ballots and proposed purging voter rolls in a way that critics have said would eliminate people who are eligible to vote.

But almost nothing has been done about the distinctive challenges posed by absentee ballots. To the contrary, Ohio's Republican secretary of state recently sent absentee ballot applications to every registered voter in the state. And Republican lawmakers in Florida recently revised state law to allow ballots to be mailed wherever voters want, rather than typically to only their registered addresses.

"This is the only area in Florida where we've made it easier to cast a ballot," Daniel A. Smith, a political scientist at the University of Florida, said of absentee voting.

He posited a reason that Republican officials in particular have pushed to expand absentee voting. "The conventional wisdom is that Republicans use absentee ballots and Democrats vote early," he said.

Republicans are in fact more likely than Democrats to vote absentee. In the 2008 general election in Florida, 47 percent of absentee voters were Republicans and 36 percent were Democrats.

There is a bipartisan consensus that voting by mail, whatever its impact, is more easily abused than other forms. In a 2005 report signed by President Jimmy Carter and James A. Baker III, who served as secretary of state under the first President George Bush, the Commission on Federal Election Reform concluded, "Absentee ballots remain the largest source of potential voter fraud."

On the most basic level, absentee voting replaces the oversight that exists at polling places with something akin to an honor system.

"Absentee voting is to voting in person," Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit has written, "as a take-home exam is to a proctored one."

Fraud Easier Via Mail

Election administrators have a shorthand name for a central weakness of voting by mail. They call it granny farming.

"The problem," said Murray A. Greenberg, a former county attorney in Miami, "is really with the collection of absentee ballots at the senior citizen centers." In Florida, people affiliated with political campaigns "help people vote absentee," he said. "And help is in quotation marks."

Voters in nursing homes can be subjected to subtle pressure, outright intimidation or fraud. The secrecy of their voting is easily compromised. And their ballots can be intercepted both coming and going.

The problem is not limited to the elderly, of course. Absentee ballots also make it much easier to buy and sell votes. In recent years, courts have invalidated mayoral elections in Illinois and Indiana because of fraudulent absentee ballots.

Voting by mail also played a crucial role in the 2000 presidential election in Florida, when the margin between George W. Bush and Al Gore was razor thin and hundreds of absentee ballots were counted in apparent violation of state law. The flawed ballots, from Americans living abroad, included some without postmarks, some postmarked after the election, some without witness signatures, some mailed from within the United States and some sent by people who voted twice. All would have been disqualified had the state's election laws been strictly enforced.

In the recent primary here, almost 40 percent of ballots were not cast in the voting booth on the day of the election. They were split between early votes cast at polling places, which Mr. Sancho, the Leon County elections supervisor, favors, and absentee ballots, which make him nervous.

"There has been not one case of fraud in early voting," Mr. Sancho said. "The only cases of election fraud have been in absentee ballots."

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Efforts to prevent fraud at polling places have an ironic consequence, Justin Levitt, a professor at Loyola Law School, told the Senate Judiciary Committee September last year. They will, he said, “drive more voters into the absentee system, where fraud and coercion have been documented to be real and legitimate concerns.”

“That is,” he said, “a law ostensibly designed to reduce the incidence of fraud is likely to increase the rate at which voters utilize a system known to succumb to fraud more frequently.”

Clarity Brings Better Results

In 2008, Minnesota officials rejected 12,000 absentee ballots, about 4 percent of all such votes, for the myriad reasons that make voting by mail far less reliable than voting in person.

The absentee ballot itself could be blamed for some of the problems. It had to be enclosed in envelopes containing various information and signatures, including one from a witness who had to attest to handling the logistics of seeing that “the voter marked the ballots in that individual’s presence without showing how they were marked.” Such witnesses must themselves be registered voters, with a few exceptions.

Absentee ballots have been rejected in Minnesota and elsewhere for countless reasons. Signatures from older people, sloppy writers or stroke victims may not match those on file. The envelopes and forms may not have been configured in the right sequence. People may have moved, and addresses may not match. Witnesses may not be registered to vote. The mail may be late.

But it is certainly possible to improve the process and reduce the error rate.

Here in Leon County, the rejection rate for absentee ballots is less than 1 percent. The instructions it provides to voters are clear, and the outer envelope is a model of graphic design, with a large signature box at its center.

The envelope requires only standard postage, and Mr. Sancho has made arrangements with the post office to pay for ballots that arrive without stamps.

Still, he would prefer that voters visit a polling place on Election Day or beforehand so that errors and misunderstandings can be corrected and the potential for fraud minimized.

“If you vote by mail, where is that coming from?” he asked. “Is there intimidation going on?”

Last November, Gov. Rick Scott, a Republican, suspended a school board member in Madison County, not far from here, after she was arrested on charges including absentee ballot fraud.

The board member, Abra Hill Johnson, won the school board race “by what appeared to be a disproportionate amount of absentee votes,” the arrest affidavit said. The vote was 675 to 647, but Ms. Johnson had 217 absentee votes to her opponent’s 86. Officials said that 80 absentee ballots had been requested at just nine addresses. Law enforcement agents interviewed 64 of the voters whose ballots were sent; only two recognized the address.

Ms. Johnson has pleaded not guilty.

Election law experts say that pulling off in-person voter fraud on a scale large enough to swing an election, with scores if not hundreds of people committing a felony in public by pretending to be someone else, is hard to imagine, to say nothing of exceptionally risky.

There are much simpler and more effective alternatives to commit fraud on such a scale, said Heather Gerken, a law professor at Yale.

“You could steal some absentee ballots or stuff a ballot box or bribe an election administrator or fiddle with an electronic voting machine,” she said. That explains, she said, “why all the evidence of stolen elections involves absentee ballots and the like.”

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