Received 2/4/2022 11:51:43 AM Commonwealth Court of Pennsylvania

Filed 2/4/2022 11:51:00 AM Commonwealth Court of Pennsylvania
244 MD 2021 and additional consolidated case(s)

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

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

RESPONDENTS' ANSWER IN OPPOSITION TO PETITIONERS' JOINT APPLICATION TO TERMINATE AUTOMATIC STAY

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Respondents, the Pennsylvania Department of State (the "Department") and the Acting Secretary of the Commonwealth, submit this Answer in Opposition to Petitioners' Joint Application to Terminate (Eliminate) Automatic Stay in Both Appeals (the "Application" or "App.").

I. INTRODUCTION

This case epitomizes why the automatic supersedeas under Pennsylvania Rule of Appellate Procedure 1736(b) exists. Since Act 77 was signed into law on October 31, 2019, millions of Pennsylvania voters have utilized no-excuse mail-in voting in primary and general elections held in both the 2020 and 2021 election cycles. Many of those same voters undoubtedly intend to vote by mail in the upcoming May 2022 primary election, including the more than 1 million voters who have registered to automatically receive mail-in ballots in all future elections. On January 28, 2022, in a closely divided 3-2 decision, this Court held that it was bound, by two century-old cases, to declare Act 77 invalid. But it is undisputed that the ultimate authority to determine the merits of Petitioners' claims—and the constitutionality of mail-in voting—belongs exclusively to the Supreme Court of Pennsylvania. Recognizing the urgency and importance of the issue now before it, the Supreme Court immediately scheduled expedited briefing and oral argument on Respondents' appeal, indicating that the Court is likely to issue its decision well before the primary election. The automatic supersedeas was designed for exactly

these circumstances: it ensures that, pending the Supreme Court's final determination, the status quo that has prevailed for over two years will remain in place, permitting orderly election administration and avoiding confusion.

Disregarding all of that, Petitioners ask this Court to disrupt the impending May 2022 primary election—and sow widespread uncertainty among voters and election administrators—by invalidating mail-in voting *immediately*, notwithstanding that the Supreme Court will soon exercise *de novo* review of the legal questions decided by this Court. Granting Petitioners' Application would needlessly risk a scenario in which mail-in voting would be valid one day, invalid the next, and valid again after the Supreme Court issues its decision.[1] That would vitiate the purpose of Rule 1736(b): preserving the status quo and avoiding unnecessary flux. *See City of Philadelphia v. Commonwealth*, 838 A.2d 566, 594 (Pa. 2003).

Remarkably—and tellingly—Petitioners' Application seeks support from this Court's decision lifting the automatic stay in *Corman v. Acting Secretary of the Pennsylvania Department of Health*, 294 M.D. 2021 (Pa. Commw. Ct. Nov. 16, 2021) (single judge opinion) (attached as Exhibit A). (*See* App. at 10.) But Petitioners fail to mention that the Supreme Court *disagreed* with this Court's

[1] As discussed below, voters on the permanent mail-in voting list across the Commonwealth have already begun receiving mail-in ballot applications, and the last day for applications to be sent to such voters is February 7, 2022. *See infra* pp. 9-10 & note 6.

ruling and immediately reinstated the supersedeas. *See* Order, *Corman v. Acting Secretary of the Pennsylvania Department of Health*, 83 MAP 2021 (Pa. Nov. 30, 2021) (per curiam) (attached as Exhibit B); *see also Corman v. Acting Sec'y of Pa. Dept. of Health*, No. 83 MAP 2021, 2021 WL 6071796, at *11 (Pa. Dec. 10, 2021) (describing Supreme Court's grant of "emergency application to reinstate the supersedeas pending further consideration following argument").

Petitioners' reliance on *Corman* betrays the error of their arguments. It is not sufficient for Petitioners merely to point out that this Court ruled in their favor and declared Act 77 invalid. As Rule 1736(b) and the case law make clear, that argument fundamentally misconceives the nature and operation of the automatic stay. Instead, as shown below, Petitioners have the burden of establishing three separate prerequisites for vacating the automatic supersedeas. Their Application satisfies none of them. First, Petitioners' request is contrary to the public interest; it would harm voters and undermine election administration. Second, Petitioners fail to make the required strong showing that they are likely to succeed on the merits. And third, Petitioners cannot establish that they will suffer irreparable harm as a result of maintaining the supersedeas pending the Supreme Court's decision.

In sum, Rule 1736(b) embodies the considered presumption that decisions by this Court should, as a matter of course, be stayed pending the disposition of appeals taken by the Commonwealth. Petitioners' Application does not come close

to making the showing needed to overcome that strong presumption. This Court should preserve the status quo and leave the automatic supersedeas in place.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Pennsylvania Enacts Mail-In Voting With Overwhelming Bipartisan Support.

In 2019, with the support of a bipartisan supermajority of both legislative chambers, the Pennsylvania General Assembly enacted Act 77 of 2019, which made several important updates and improvements to Pennsylvania's Election Code, including by providing for no-excuse mail-in voting. Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. 2019-77 (S.B. 421) (West) ("Act 77"). Act 77 was signed into law and became effective on October 31, 2019, applying to all elections held on or after April 28, 2020. Between Act 77's enactment and the commencement of this litigation, millions of Pennsylvanians cast more than 4.7 million mail-in ballots during the 2020 and 2021 election cycles,[2] the Commonwealth and Pennsylvania's counties invested enormous resources in implementation of the new voting procedures, and Pennsylvania voters came to rely on mail-in voting.

[2] *See* https://www.electionreturns.pa.gov/ReportCenter/Reports (permitting generation of reports for each election since 2020, which list the total number of mail-in ballots).

B. Two Years After Mail-In Voting Was Enacted, Petitioners File Their Long-Delayed Lawsuits.

Petitioner Doug McLinko filed his Petition for Review on July 26, 2021, nearly 15 months after the first election permitting mail-in voting. McLinko has been a member of the Bradford County Board of Elections since at least 2011.[3] He is a long-standing critic of Pennsylvania's mail-in voting procedures and Act 77.[4]

The *Bonner* Petitioners filed their Petition for Review one and a half months later, on August 31, 2021. The *Bonner* Petitioners are fourteen current members of the Pennsylvania House of Representatives. Eleven of them were not only legislators at the time Act 77 was passed; they voted *to enact* the very mail-in voting procedures they now claim are facially unconstitutional. (*See Bonner* Pet. for Review, ¶¶ 4, 6-11, 13-16.) The remaining *Bonner* Petitioners were either in office when Act 77 was passed or were active candidates no later than January 2020. (*See id.* ¶¶ 5, 12.)

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[3] *See* https://bradfordcountypa.org/department/elections/ (using "Results" icon, permitting generation of reports for 2011, 2015, and 2019 elections).

[4] *See McLinko Goes after Yaw, Legislature on Steven Bannon Show*, MORNING TIMES (Jan. 2, 2021), available at https://web.archive.org/web/20210103173836/http://www.morningtimes.com/news/article_2cd4d3ff-64d1-5c54-9d75-af4d334c798a.html (last accessed Oct. 15, 2021) ("We expect that anybody that voted for Act 77 — which started the Keystone steal, because without this state doing what they did the rest of the country couldn't have followed suit and stole it — they should step down.").

C. In a Closely Divided 3-2 Decision, an *En Banc* Panel of This Court Holds That It Is Constrained, Under Two Century-Old Decisions, to Invalidate Mail-in Voting.

On January 28, 2022, the Court issued opinions and orders granting Petitioner McLinko's and the *Bonner* Petitioners' respective applications for summary relief on their claims under the Pennsylvania Constitution and declaring Act 77 "unconstitutional and void *ab initio*." (*See*, *e.g.*, Order, *Bonner v. DeGraffenreid*, No. 293 MD 2021 (Pa. Commw. Ct. Jan. 28, 2022).) First, the Court rejected Respondents' procedural arguments that Petitioners lacked standing or were procedurally barred from bringing their claims. *See McLinko*, 2022 WL 257659, at *18-25. Second, in a 3-2 decision, the Court held that, under *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election of Fifth Ward of Lancaster City*, 281 Pa. 131, 126 A. 199 (1924), the Court was constrained to find that Act 77 violates Article VII, Section 1 of the Pennsylvania Constitution. *See McLinko*, 2022 WL 257659, at *13-18. Judges Wojcik and Ceisler dissented, reasoning that mail-in voting is permitted by a different provision of the Pennsylvania Constitution that did not exist when *Chase* was decided: "[A]rticle VII, section 4 [of the Pennsylvania Constitution] by its plain language specifically empowers the General Assembly to provide for this new method of casting a no-excuse mail-in ballot, and Petitioners' claims regarding the constitutionality of Act 77 are without merit." *McLinko*, 2022 WL 257659, at *30 (Wojcik, J., dissenting).

Respondents filed a Notice of Appeal and Jurisdictional Statement within hours of receiving the Court's opinions and orders, to prevent confusion among voters and to ensure that the status quo prevailing since October 2019 remains in place while the Department and county boards of election prepare to administer the May 2022 primary election. Respondents' Notice of Appeal triggered the automatic supersedeas under Rule 1736(b), staying this Court's Orders declaring Act 77 unconstitutional.

After Petitioners filed their Application to terminate the supersedeas, the Supreme Court issued expedited briefing deadlines and scheduled oral argument for March 8, 2022.

III. ARGUMENT

A. Petitioners Fail to Establish Any of the Elements Necessary to Vacate the Automatic Supersedeas.

Under Rule 1736, "the taking of an appeal by [the Commonwealth or any officer thereof, acting in his official capacity] shall operate as a supersedeas in favor of such party, which *supersedeas* shall continue through any proceedings in the United States Supreme Court." Pa. R. App. P. 1736(b); *see also* Pa. R. App. P. 1736(a). The purpose of the automatic supersedeas is to avoid "disturbing the status quo and risking circumstances of ongoing flux," thereby affording the Commonwealth time to adjust, should the trial court's judgment be affirmed. *See City of Philadelphia*, 838 A.2d at 594.

"[W]hen an appellee seeks to vacate an automatic supersedeas, the appellee bears the burden[.]" *Elizabeth Forward Sch. Dist. v. Pennsylvania Lab. Rel. Bd.*, 613 A.2d 68, 70 (Pa. Commw. Ct. 1992) (single judge opinion, Kelley, J.). Importantly, "the litigant must make a showing that is the obverse of what is required under *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983), where a litigant seeks to stay an order being appealed." *Rickert v. Latimore Twp.*, 960 A.2d 912, 923 (Pa. Commw. Ct. 2008). "What is more, the appellee's burden is not merely to demonstrate that the appellant has failed to meet the *Process Gas* standards to obtain a supersedeas in the first instance." *Id.* That is because when the Commonwealth takes an appeal, it is entitled to an automatic supersedeas under Rule 1736(b) *as of right*.[5]

Accordingly, this Court has explained:

> It is well-established that in order to prevail on a motion to vacate an automatic supersedeas, the petitioner must establish: 1) that he is likely to prevail on the merits; 2) that without the requested relief he will suffer irreparable injury; *and* 3) that the removal of the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest.

Rickert, 960 A.2d at 923 (quoting *Solano v. Pennsylvania Bd. of Probation and Parole*, 884 A.2d 943, 944 (Pa. Commw. Ct. 2005)) (emphasis added).

[5] *See* Note, Pa. R. App. P. 1736(b) (stating that automatic supersedeas under Rule 1736(b) "is self-executing, and a party entitled to its benefits is not required to bring the exemption to the attention of the court under Rule 1732 (application for stay or injunction pending appeal).").

Petitioners fail to establish any of these elements here.

1. Vacating the Supersedeas Is Contrary to the Public Interest Because It Will Create Unnecessary Confusion and Undermine Orderly Election Administration.

Terminating the automatic supersedeas will immediately upset the status quo that has been in effect since April 2020 and affect the rights of millions of voters, despite the fact that the Supreme Court may uphold Act 77 and permit mail-in voting. Of the approximately 6.9 million Pennsylvanians who voted in the November 2020 election, approximately 2.7 million cast a mail-in or absentee ballot. (Affidavit of Jonathan Marks ¶ 10, attached as Exhibit C.) As of August 26, 2021, there were 1,380,342 voters on the permanent mail-in ballot list file established by 25 P.S. § 3150.12(g)(1); all voters on this list automatically receive a mail-in ballot application at the beginning of each year. (*See* Exhibit C, Marks Aff. ¶¶ 24-25.) As described by Jonathan Marks, the Deputy Secretary for Elections and Commissions for the Department of State, "[a]n elector who has requested to be placed on this permanent list … has every reason to expect that she need take no further affirmative steps to be able to vote; the Election Code assures her that elections officials will send her the appropriate materials at the appropriate time." (*Id.* ¶ 24.) The statutory deadline for counties to send mail-in ballot applications to Pennsylvanians on the permanent mail-in voting list is *this coming Monday*, February 7, 2022. *See* 25 P.S. § 3150.12(g)(1). The majority of the

counties have already sent applications to voters, over 1.3 million in total.[6]

If Act 77's mail-in voting procedures are now eliminated, the Department and county boards of election will immediately have to begin investing millions of dollars and countless staff-hours to educate voters before the upcoming May 2022 primary election—particularly those voters who have already received mail-in ballot applications. (*See* Exhibit C, Marks Aff. ¶ 22.) Even then, many voters will likely be confused about the permissible means of voting, with "disenfranchising effects." (*Id.* ¶ 23.)[7]

These consequences are profound and will affect Pennsylvanians' fundamental right to vote. The Court should therefore forbear from altering the mail-in voting status quo while the Supreme Court finally resolves the constitutionality of Act 77. Because the Supreme Court may well reverse this Court's Orders, if this Court instead vacates the automatic supersedeas now, it unnecessarily risks creating inconsistency and confusion about how to validly cast

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[6] *See*, *e.g.*, *Board of Elections: No excuse mail-in ballot applications will continue to be accepted in Erie County*, YourErie.com (Feb. 1, 2022), https://www.yourerie.com/news/breaking-news/board-of-elections-no-excuse-mail-in-ballot-applications-will-continue-to-be-accepted-in-erie-county/ ("With litigation pending, the Board of Elections says it is still mandated by law to send the 41,000 mail-in voters of Erie County an annual renewal application. Those applications were mailed Friday, Jan. 28.").

[7] Notably, Allegheny and Luzerne counties will conduct standalone special elections on April 5, 2022. *See* Special Elections, Pennsylvania Department of State, https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Pages/SpecialElections.aspx. Given the proximity of that election, an order precluding mail-in voting now, followed by a Supreme Court decision upholding Act 77, would be especially likely to create confusion leading to voter disenfranchisement.

a ballot in the primary election. This case starkly illustrates the principle that, when courts must weigh the public interest in election law cases, "the voters deserve certainty and finality." *See Costa v. Cortes*, 143 A.3d 430, 442 (Pa. Commw. Ct. 2016) (denying injunction of election law because it "would not be in the public interest as it would only foment further uncertainty among the public").

In light of the above, Petitioners' argument—that "elimination of the automatic supersedeas in the present matter will clarify any confusion regarding the use of no-excuse mail-in ballots in the upcoming 2022 Primary Election[,]" (App. ¶ 35)—is wrong as a matter of law and common sense. Petitioners overlook that the "use of no-excuse mail-in ballots in the upcoming 2022 Primary Election" is not finally settled, because the Supreme Court will have the ultimate say about the constitutionality of Act 77. Thus, to avoid unnecessary flux and ensure certainty and finality, the Court should not alter the status quo pending the Supreme Court's decision. To do so would *create* (rather than reduce) confusion.

B. Petitioners Cannot Make the Requisite Strong Showing That They Will Prevail on the Merits.

To establish likelihood of success, the petitioner must "make[] a *strong* showing that he is likely to prevail on the merits." *Pa. Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805, 808 (Pa. 1983) (emphasis added). Petitioners have not met that bar. In essence, Petitioners simply reiterate this Court's majority opinion, which held that *Chase* and *Lancaster City* compel the

conclusion that mail-in voting is impermissible. But Petitioners fail to acknowledge that (1) that position won only three votes from the *en banc* panel, with the other two judges finding that *Chase* and *Lancaster City* are distinguishable, and (2) Respondents advanced an alternative argument that only the Supreme Court can decide—namely, that *Chase* and *Lancaster City* were wrongly decided and should be overruled. Having neglected even to address these important considerations, Petitioners do not come close to a strong showing of likely success on appeal.

1. Petitioners' Limited Arguments on the Merits of Their Claims Do Not Make A Strong Showing That They Are Likely to Succeed Before the Supreme Court.

Petitioners' mere recitation of their previous arguments and reliance on this Court's decision below (*see* App. at ¶¶ 18-22) do not make the strong showing that they will succeed on appeal. Every petitioner seeking to vacate an automatic supersedeas has necessarily prevailed in the decision on appeal. If a petitioner could carry its burden by merely pointing to the fact that the lower court had ruled in its favor, the "strong showing of likelihood of success" requirement would be a nullity.

Petitioners' argument is especially inadequate considering that the Court's conclusion regarding the constitutionality of Act 77 divided the *en banc* panel 3-2. *See McLinko*, 2022 WL 257659, at *30 (Wojcik, J., dissenting). The Application

addresses neither Judge Wojcik's dissenting opinion nor his conclusion that Article VII, Section 4 of the Pennsylvania Constitution permits mail-in voting. *See id*. In fact, although Petitioners attached the Court's Majority Opinions and Orders to the Application, Petitioners tellingly omitted Judge Wojcik's dissenting opinion.

Petitioners' legal arguments give the dissent the same short shrift. Petitioners do not mention Article VII, Section 4 at all. The Commonwealth Court's divide on the meaning of the Constitution, however, is proof that reasonable minds clearly can and do differ about the correct interpretation of the relevant constitutional provisions, as well as the applicability of *Chase* and *Lancaster City*. *Cf. Cochran v. GAF Corp.*, 666 A.2d 245, 253 (Pa. 1995) (where en banc panel of Superior Court split 6-3 on an issue, the "history of this case strongly indicate[d] that there are material facts in dispute such that reasonable minds *could* differ") (emphasis in original).

Further, Petitioners' Application also ignores the Supreme Court's standard of review. This Court's conclusion about the merits of Petitioners' claims will receive no deference from the Supreme Court. Rather, "[t]he constitutional issues before [the Supreme] Court raise questions of law for which [its] standard of review is *de novo* and [its] scope of review is plenary." *Commonwealth v. Torsilieri*, 232 A.3d 567, 575 (Pa. 2020). Moreover, when the Supreme Court conducts its *de novo* review, it will "proceed to [its] task by presuming [the]

constitutionality" of Act 77 "because there exists a judicial presumption that our sister branches take seriously their constitutional oaths.… Indeed, a legislative enactment will not be deemed unconstitutional unless it clearly, palpably, and plainly violates the Constitution." *McLinko*, 2022 WL 257659, at *30 (Wojcik, J., dissenting) (quoting *Stilp v. Commonwealth*, 905 A.2d 918, 938-39 (Pa. 2006)). Other than stating that a majority of the Commonwealth Court, by a one-vote margin, agreed with their position, Petitioners offer nothing to show that they will overcome the presumption that Act 77 is constitutional.

2. Petitioners Fail to Address Respondents' Argument That the Supreme Court Should Overrule the Cases on Which this Court Relied.

The decision on appeal relied primarily on two very old Pennsylvania Supreme Court cases: *Chase* and *Lancaster City*. *See McLinko*, 2022 WL 257659, at *14-18. Respondents argued that these cases were distinguishable, but they *also* argued, in the alternative, that *Chase* and *Lancaster City* were wrongly decided and should be overruled.[8] Of course, only the Supreme Court may decide whether to overrule *Chase* and *Lancaster City* – meaning that this Court could not and did not reach this question. Indeed, as this Court acknowledged after concluding it was

[8] *See*, *e.g.*, Respondents' Memo. in Opp. to Petitioner McLinko's App. for Summary Relief and in Support of Respondents' Cross-App. for Summary Relief at 49-52; Intervenors-Respondents' Br. in Support of Respondents' App. for Summary Relief and in Opp. to Petitioners' Apps. for Summary Relief at 26-28.

bound by *Chase* and *Lancaster City*, whether to overrule those cases "is an argument that can be raised *only* to the Pennsylvania Supreme Court." *Id.* at *14 n.23 (emphasis added). Petitioners' Application does not discuss this argument at all.

Petitioners' failure to explain why *Chase* and *Lancaster City* should not be overruled is fatal to the Application. As Respondents demonstrated to this Court, those cases are clear outliers in how they interpreted the constitutional "offer to vote" language at issue; numerous courts have recognized that materially identical provisions "do[] not prescribe the manner or form of holding elections, [and] it [i]s within its constitutional power for the Legislature to provide that an offer to vote in the township or ward in which the elector resides, could be made [by electors physically located outside of their township or ward at the time of the election]." *Lemons v. Noller*, 63 P.2d 177, 185 (Kan. 1936).[9] Petitioners say nothing about this key question, which the Supreme Court will consider and decide in both the first and last instance. *Cf. League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018) (citing *Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002)) ("matters concerning the proper interpretation and application of our commonwealth's organic charter are at the end of the day for [the Supreme]

[9] *Accord Moore v. Pullem*, 142 S.E. 415, 421 (Va. 1928); *Goodell v. Judith Basin Cnty.*, 224 P. 1110, 1114 (Mont. 1924); *Jenkins v. State Bd. of Elections*, 104 S.E. 346, 349 (N.C. 1920); *Straughan v. Meyers*, 187 S.W. 1159, 1162 (Mo. 1916).

Court—and only [the Supreme] Court"). Undeniably, Petitioners' silence is not a strong showing that the Supreme Court will disagree with Respondents.

C. Any Harm to Petitioners Is Not Irreparable and Does Not Result from the Supersedeas.

Petitioners also cannot establish that, without immediately invalidating mail-in voting, they will suffer irreparable injury. Petitioners allege they will be harmed by (1) having to administer mail-in voting in the upcoming election, (2) having mail-in votes either counted or discarded in the upcoming election, and (3) having to advise voters about legal methods of voting. (App. ¶¶ 28-30.) Petitioners also allege that if mail-in voting is unconstitutional, the automatic supersedeas *per se* creates irreparable harm. (*Id.* ¶¶ 25-26.) None of Petitioners' purported harms justify disturbing the status quo.

1. It Is Unlikely that Petitioners Will Be Harmed in Any Way.

Even if one accepts all of Petitioners' claims at face value, Petitioners' alleged harms will only occur if (1) the Supreme Court ultimately rules in favor of Petitioners *and* (2) mail-in voting is nonetheless used in the May 2022 primary election. But given the schedule set by the Supreme Court, this case will almost certainly be finally resolved before the upcoming primary election, and perhaps even before the first day on which applications for mail-in ballots may be received,

which is March 28, 2022.[10] *See* 25 P.S. § 3150.12a(a). Particularly given this schedule, the harm conjured by Petitioners is illusory.

2. *Kelly v. Commonwealth* Clearly Shows That There Is No Risk That Valid Mail-in Ballots Will Be Voided.

In addition, Supreme Court case law makes clear that, even if the Supreme Court were to conclude that Act 77 is unconstitutional after the May primary election, there would be no risk that votes already cast would be retroactively invalidated. *See Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021). If the Supreme Court does not finally resolve Act 77's constitutionality until after the election (unlikely as that is), mail-in votes would not be cast aside and thus no prejudice would result from maintaining the status quo.[11]

[10] According to the Court's schedule, briefing will be completed by March 2, 2022, no requests for extensions are permitted, and oral argument is set for March 8, 2022.

[11] To the extent Petitioners who are candidates imply that allowing mail-in voting in the upcoming primary election would put them at a competitive disadvantage, they provide no evidence whatsoever in support of that proposition. Moreover, because the May election is a primary, the political parties are not competing against one another, and any suggestion that mail-in voting benefits one party more than the other is therefore irrelevant.

3. Maintaining the Status Quo Does Not Cause *Per Se* Irreparable Harm.

Petitioners are also wrong to argue that "the unconstitutionality of Act 77 creates *per se* irreparable harm." (App. 25 (citing *SEIU Healthcare Pennsylvania v. Com.*, 104 A.3d 495, 504 (Pa. 2014) ("[T]he Executive Branch's violation of both a state statute and the Pennsylvania Constitution results in *per se* irreparable harm that cannot be compensated adequately by damages.").) *SEIU Healthcare Pennsylvania* is plainly inapplicable in this context. It cannot possibly be the case that any order determining that the Commonwealth has violated the law is sufficient, *ipso facto*, to establish irreparable harm overcoming the automatic supersedeas. If that were the law, the irreparable harm requirement would always be met in cases against the Commonwealth, turning Rule 1736(b) on its head.[12]

Petitioners' other cited authority is equally unavailing. Relying on *Corman v. Acting Secretary of the Pennsylvania Department of Health*, Petitioners assert that "the irreparable harm involved in this matter is self-evident." (App. 25.) As noted above, however, the Supreme Court reinstated the automatic supersedeas in *Corman*, effectively reversing this Court's decision. *See* 2021 WL 6071796, at *11. Astonishingly, Petitioners do not acknowledge the Supreme Court's ruling.

[12] *SEIU Healthcare Pennsylvania* also involved a request for preliminary injunctions. As the Supreme Court stated in *Jubelirer*, the Court "must not blur the distinction between the standard required for the entry of a preliminary injunction . . . and the requirements necessary for the entry of a stay [of the automatic supersedeas]." 614 A.2d at 203 (internal citations omitted).

In fact, this case is a far worse candidate for vacating the automatic supersedeas than was *Corman*. In *Corman*, the challenged masking rule imposed some limitation on individual conduct, and this Court identified an alternative basis for the Commonwealth to preserve the status quo pending appeal (emergency rulemaking). Here, by contrast, Petitioners seek to *take away* statutory voting rights, and no such alternative basis for preserving the status quo exists. If this Court vacates the supersedeas and invalidates mail-in voting immediately, the genie will be out of the bottle. The Department and county boards of election will be precluded from taking the advance steps necessary to administer mail-in voting during the upcoming primary election, and they will have no choice but to begin immediately informing the public that mail-in voting is no longer an option—despite the significant possibility that, after the Supreme Court resolves Respondents' appeal, mail-in voting will endure.

4. Petitioners' Own Delay Cannot Justify a Sudden and Calamitous Change in the Status Quo.

Finally, Petitioners' complaints of harm ring hollow in light of their own conduct. As noted above, Petitioners did not bring their claims until approximately one-and-one-half years after the first election using mail-in voting. Petitioner McLinko is on the Bradford County Board of Elections and thus administered mail-in voting long before he brought suit. And the *Bonner* Petitioners are elected officials, the vast majority of whom *voted to enact Act 77*. To the extent they now

claim (without evidence) to be harmed by the statute, they have no one to blame but themselves. Having had ample opportunity to bring their claims before mail-in voting was fully implemented, Petitioners cannot in good faith claim irreparable harm by the continued use of mail-in voting now.

Petitioners' years-long delay in bringing suit fundamentally undermines their claim of harm. Simply put, the harms asserted by Petitioners pale in comparison to the enormous prejudice that vacating the automatic supersedeas would have on the voting rights of millions of Pennsylvania citizens.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the Application, and the automatic supersedeas should remain in effect pending disposition of Respondents' appeal.

Dated: February 4, 2022

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: February 4, 2022

/s/ Robert A. Wiygul
Robert A. Wiygul

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacob Doyle Corman, III, individually and as a parent of two minor school children; Jesse Wills Topper, individually and as a parent of two minor school children; Calvary Academy; Hillcrest Christian Academy; James Reich and Michelle Reich, individually and as parents of three minor school children; Adam McClure and Chelsea McClure, individually and as parents of one minor special needs school child; Victoria T. Baptiste, individually and as a parent of two special needs school children; Jennifer D. Baldacci, individually and as a parent of one school child; Klint Neiman and Amanda Palmer, individually and as parents of two minor school children; Penncrest School District; Chestnut Ridge School District and West York Area School District, Petitioners	:	
v.	:	
Acting Secretary of the Pennsylvania Department of Health, Respondent	:	No. 294 M.D. 2021

BEFORE: HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FIZZANO CANNON FILED: November 16, 2021

Before the Court is the "Application to Terminate (Eliminate) Automatic Stay" (Application) filed by Jacob Doyle Corman, III, Jesse Wills Topper, Calvary Academy, Hillcrest Christian Academy, James and Michelle Reich, Adam and Chelsea McClure, Victoria T. Baptiste, Jennifer D. Baldacci, Klint Neiman and Amanda Palmer, Penncrest School District, Chestnut Ridge School District, and West York Area School District (collectively, Petitioners) seeking to vacate the automatic stay occasioned by the appeal of Alison M. Beam, the Acting Secretary of Health (Acting Secretary), of this Court's November 10, 2021 Opinion (November 10, 2021 Opinion) that declared the Acting Secretary's August 31, 2021 "Order of the Acting Secretary of the Pennsylvania Department of Health Directing Face Coverings in School Entities" (Masking Order) void *ab initio*. For the reasons that follow, we grant the Application.

Preliminarily, as stated in the Court's November 10, 2021 opinion, this Court expresses herein "no opinion regarding the science or efficacy of mask-wearing or the politics underlying the considerable controversy the subject continues to engender." November 10, 2021 Opinion at 3 (citing *Wolf v. Scarnati*, 233 A.3d 679, 684 (Pa. 2020)). The November 10, 2021 Opinion decided the narrow legal question of whether the Acting Secretary acted properly in issuing the Masking Order in the absence of either legislative oversight or a declaration of disaster emergency by the Governor. *See generally* November 10, 2021 Opinion. This Court concluded the Masking Order was void *ab initio* because it was a regulation not duly

promulgated in accordance with the Commonwealth Documents Law[1] and the Regulatory Review Act.[2] *See* November 10, 2021 Opinion at 30-31 & Order.

The Acting Secretary appealed the November 10, 2021 Order to the Supreme Court of Pennsylvania on the afternoon of November 10, 2021, thereby triggering an automatic stay ancillary to appeal. *See* Notice of Appeal dated November 10, 2021; *see also* Pa. R.A.P. 1702; Pa. R.A.P. 1736(b) & Note (noting

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[1] Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §§ 1102-1602, and 45 Pa.C.S. §§ 501-907, which, collectively, are known as the "Commonwealth Documents Law." As this Court explained in the November 10, 2021 Opinion:

> In general, the purpose of the Commonwealth Documents Law is to promote public participation in the promulgation of a regulation. To that end, an agency must invite, accept, review and consider written comments from the public regarding the proposed regulation; it may hold public hearings if appropriate. Section 202 of the Commonwealth Documents Law, 45 P.S. § 1202. After an agency obtains the Attorney General's approval of the form and legality of the proposed regulation, the agency must deposit the text of the regulation with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin.* Section 205, 207 of the Commonwealth Documents Law, 45 P.S. §§ 1205, 1207.

November 10, 2021 Opinion at 13 (citing *Germantown Cab Co. v. Phila. Parking Auth.*, 993 A.2d 933, 937-38 (Pa. Cmwlth. 2010), *aff'd*, 36 A.3d 105 (Pa. 2012)) (internal brackets omitted).

[2] Act of June 25, 1982, P.L. 633, *as amended*, 71 P.S. §§ 745.1-745.15. As we further noted in the November 10, 2021 Opinion:

> In promulgating regulations, the Regulatory Review Act requires that Commonwealth agencies submit proposed regulations to the Independent Regulatory Review Commission (IRRC) for public comment, recommendation from the IRRC, and, ultimately, the IRRC's approval or denial of a final-form regulation. Section 5 of the Regulatory Review Act, 71 P.S. § 745.5.

November 10, 2021 Opinion at 14 n.18 (quoting *Naylor v. Dep't of Pub. Welfare*, 54 A.3d 429, 434 (Pa. Cmwlth. 2012), *aff'd*, 76 A.3d 536 (Pa. 2013)) (internal quotation marks and brackets omitted).

that self-executing automatic supersedeas attaches upon the taking of an appeal and continues through the pendency of the appeal process). On November 11, 2021, Petitioners filed the Application seeking the termination of the automatic stay. The Court directed the Acting Secretary to answer the Application, if at all, by Monday, November 15, 2021, and the Acting Secretary complied. *See* November 12, 2021 Order; *see also* Response to Petitioners' Application to Terminate the Automatic Supersedeas, filed November 15, 2021 (Answer).

As this Court has explained:

> It is well-established that in order to prevail on a motion to vacate an automatic supersedeas, the petitioner must establish: 1) that he is likely to prevail on the merits; 2) that without the requested relief he will suffer irreparable injury; and 3) that the removal of the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest.

Solano v. Pa. Bd. of Prob. & Parole, 884 A.2d 943, 944 (Pa. Cmwlth. 2005) (citing *Elizabeth Forward Sch. Dist. v. Pa. Labor Relations Bd.*, 613 A.2d 68 (Pa. Cmwlth. 1992)); *see also Pa. Pub. Util. Comm'm. v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983).[3] These criteria weigh in favor of Petitioners.

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[3] It is Petitioners' burden to establish the conditions required under *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983), for vacatur of the automatic supersedeas. *See Rickert v. Latimore Twp.*, 960 A.2d 912, 923 (Pa. Cmwlth. 2008). However, we reject the Acting Secretary's suggestion that the *Process Gas* factors do not apply to an application to lift an automatic supersedeas. This Court has expressly stated that "to set aside the automatic supersedeas, the litigant must make a showing that is the obverse of what is required under . . . *Process Gas* . . . where a litigant seeks to stay an order being appealed." *Rickert*, 960 A.2d at 923.

Department of Environmental Resources v. Jubelirer, 614 A.2d 199 (Pa. 1989), on which the Acting Secretary relies, is not to the contrary. Our Supreme Court in that case applied the same

Regarding the first criterion, the Court finds that Petitioners are likely to prevail on the merits. In the November 10, 2021 Opinion, this Court, sitting *en banc*, determined the Masking Order to be void *ab initio* because the Acting Secretary did not comply with the requirements of the Commonwealth Documents Law and the Regulatory Review Act in issuing the Masking Order. *See* November 10, 2021 Opinion at 30-31. It is beyond dispute that (1) the Governor did not issue a new declaration of disaster emergency following the termination of the Disaster Proclamation by the General Assembly's June 10, 2021 Concurrent Resolution, and (2) the Acting Secretary did not comply with the formal requirements of the Commonwealth Documents Law and the Regulatory Review Act for promulgating a regulation. *See id.* at 29-30. Further, the Masking Order represents a rule or regulation subject to the formal requirements for regulatory rulemaking and the Acting Secretary was not authorized by statute or regulation to promulgate the Masking Order without complying with the formal requirements of the Commonwealth Documents Law and the Regulatory Review Act.[4] *See id.* at 18-30. Therefore, Petitioners are likely to prevail on the merits on appeal. *See id.* at 30-31.

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test applied here, *i.e.*, to support vacatur of an automatic supersedeas, "petitioner must make a substantive case on the merits, demonstrating the stay will prevent petitioner from suffering irreparable injury, and establishing other parties will not be harmed and the grant of the stay is not against the public interest." *Id.* at 203.

[4] The Acting Secretary insists authority for the Masking Order can be found by reading various statutes and regulations *in pari materia*. It is true that statutes *in pari materia* must be construed together, if possible. *See* Section 1932 of the Statutory Construction Act, 1 Pa.C.S. § 1932 (requiring that statutes *in pari materia* be construed together as one statute, when possible). However, the principle of *in pari materia* does not allow the Department of Health to add language to the applicable statute to streamline the process of carrying out its duty to protect the people of the Commonwealth. This Court may not insert terms into a statute that are not present. *See Mohamed v. Dep't of Transp., Bureau of Motor Vehicles*, 40 A.3d 1186, 1194-95 (Pa. 2012) ("[W]here the language of a statute is clear and unambiguous, a court may not add matters the

Second, the irreparable harm involved in this matter is self-evident. The November 10, 2021 Opinion declared the Masking Order void *ab initio* based on a failure to comply with the requirements of Pennsylvania rulemaking requirements. *See* November 10, 2021 Opinion at 30-31. "In Pennsylvania, the violation of an express statutory provision *per se* constitutes irreparable harm[.]" *Council 13, Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO by Keller v. Casey*, 595 A.2d 670, 674 (Pa. Cmwlth. 1991) (Commonwealth's failure to comply with clear statutory requirements constituted irreparable harm); *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 498 (Pa. 2014) (violation by Executive Branch of statute and constitution constitutes irreparable harm). As the Pennsylvania Supreme Court has explained,

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legislature saw fit not to include under the guise of construction . . . . Any legislative oversight is for the General Assembly to fill, not the courts.").

In the same vein, the exercise of reading statutory provisions *in pari materia* does not allow the Department of Health to omit express text that the Acting Secretary views as troublesome or otherwise inconvenient. For example, in asserting that the Department of Health had authority to issue the Mask Order, the Acting Secretary ignored the language in the Disease prevention and Control Law of 1955 (Disease Control Law), Act of April 23, 1956, P.L. (1955) 1510, *as amended*, Section 5 of which states, in relevant part: "Upon the receipt by . . . the Department of Health . . . of a report of a disease which is subject to isolation, quarantine, or any other control measure, . . . the Department of Health shall carry out the appropriate control measures in such manner and in such place as is *provided by rule or regulation*." 35 P.S. § 521.5 (emphasis added); *see* November 10, 2021 Opinion at 22-23. Further, the Acting Secretary ignores the limitations in existing Department of Health regulations, which authorize measures for the "*isolation* of a person . . . *with a communicable disease* . . . and any other disease control measure . . . appropriate for the *surveillance* of disease . . . ." 28 Pa. Code § 27.60(a) (emphasis added); *see* November 10, 2021 Opinion at 25-27.

Therefore, to the extent the statutes and regulations cited by the Masking Order as authority for the mask mandate contained therein are to be read *in pari materia*, they cannot be read as though the limitations within the text of the purported authorities, as discussed *supra*, do not exist. *See* 1 Pa.C.S. § 1921 ("Every statute shall be construed, if possible, to give effect to all its provisions.").

> [t]he argument that a violation of law can be a benefit to the public is without merit. When 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.

Pa. Pub. Util. Comm'n v. Israel, 52 A.2d 317, 321 (Pa. 1947). Allowing an order to remain in force indefinitely during the pendency of an appeal, where that order was issued without proper authority or adherence to statutory requirements, was declared to be void by this Court, and affects the lives and behavior of all those entering School Entities[5], would constitute an irreparable harm to the citizenry of the Commonwealth. *See* November 10, 2021 Opinion at 30-31.

Third, vacating the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest. The Acting Secretary is concerned that the public health will be harmed if the November 10, 2021 Order is not stayed pending appeal. *See* Answer at 4-11. However, as noted in this Court's November 10, 2021 Opinion, the Regulatory Review Act provides a mechanism for emergency rulemaking, even in the absence of a declared disaster emergency. *See* November 20, 2021 Opinion at 15 n.20. The Acting Secretary, on behalf of the

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[5] The Masking Order defines a "School Entity" as any of the following:

> (1) A public PreK-12 school.
> (2) A brick and mortar or cyber charter school.
> (3) A private or parochial school.
> (4) A career and technical center (CTC).
> (5) An Intermediate unit (IU).
> (6) A PA Pre-K Counts program, Head Start Program, Preschool Early Intervention program, or Family Center.
> (7) A private academic nursery school and locally-funded prekindergarten activities.
> (8) A childcare provider licensed by the Department of Human Services of the Commonwealth.

Masking Order at 3-4; *see* November 10, 2021 Opinion at 8 n.12.

Department of Health, had and has the ability to request certification by the Governor that a regulation is required to meet an emergency. This allows for the immediate adoption of a regulation to meet an emergency, which includes conditions which the Governor finds "may threaten the public health, safety or welfare[.]" 71 P.S. § 745.6(d).[6] The emergency regulation can "take effect on the date of publication," and remain in effect while its review by the Independent Regulatory Review Commission and the House and Senate Committees takes place. *See id.* This Court notes that the next publication date of the Pennsylvania Bulletin is December 4, 2021 with a closing date (subject to change) of November 22, 2021.[7]

Considering the Petitioners' likelihood of success on the merits on appeal, the *per se* harm inherent in allowing an order issued in violation of statutory authority to remain in force, and the lack of substantial harm to other interested parties or the public interest given the existence of expedited, rule-making procedures under the Regulatory Review Act, the Application to lift the automatic

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[6] Although the Regulatory Review Act has been amended numerous times since its enactment in 1982, the mechanism for the emergency certification of agency regulations has remained intact. Under this mechanism, a regulation can be promulgated expeditiously. For example, on March 17, 1986, in the wake of "substantial increase in the number of mid-term cancellations and nonrenewal of commercial property and casualty insurance policies," Governor Dick Thornburgh certified that emergency rulemaking was required to address that "emergency situation." 16 PA. B. 953 (Mar. 22, 1986) (citations omitted). On March 22, 1986, the Insurance Department published its "emergency amendments" to its regulations "to provide commercial property and casualty insurance policyholders within 60 days' advance notice of nonrenewal or midterm cancellation of their coverage and to limit the reasons for which an insurer may cancel commercial property and casualty insurance policies in midterm." 16 PA. B. 951-52 (Mar. 22, 1986). The regulation was deemed approved by the IRRC on April 16, 1986. *See* 16 PA. B. 4167 (Oct. 25, 1986). From the certification of the emergency to the promulgation of the emergency regulation, a total of five days elapsed. In the instant matter, the Acting Secretary did not employ such measures in the implementation of the Masking Order, but still has this mechanism at her disposal.

[7] *See* https://www.pacodeandbulletin.gov/downloads/2021BulletinSchedule.pdf (last visited Nov. 16, 2021).

stay is granted. The automatic stay will be lifted upon the next publication of the Pennsylvania Bulletin on Saturday, December 4, 2021. 71 P.S. § 745.6(d).

s/Christine Fizzano Cannon

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CHRISTINE FIZZANO CANNON, Judge

EXHIBIT B

[J-86-2021]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JACOB DOYLE CORMAN, III, INDIVIDUALLY AND AS A PARENT OF TWO MINOR SCHOOL CHILDREN; JESSE WILLS TOPPER, INDIVIDUALLY AND AS A PARENT OF TWO MINOR SCHOOL CHILDREN; CALVARY ACADEMY; HILLCREST CHRISTIAN ACADEMY; JAMES REICH AND MICHELLE REICH, INDIVIDUALLY AND AS PARENTS OF THREE MINOR SCHOOL CHILDREN; ADAM MCCLURE AND CHELSEA MCCLURE, INDIVIDUALLY AND AS PARENTS OF ONE MINOR SPECIAL NEEDS SCHOOL CHILD; VICTORIA T. BAPTISTE, INDIVIDUALLY AND AS A PARENT OF TWO SPECIAL NEEDS SCHOOL CHILDREN; JENNIFER D. BALDACCI, INDIVIDUALLY AND AS A PARENT OF ONE SCHOOL CHILD; KLINT NEIMAN AND AMANDA PALMER, INDIVIDUALLY AND AS PARENTS OF TWO MINOR SCHOOL CHILDREN; PENNCREST SCHOOL DISTRICT; CHESTNUT RIDGE SCHOOL DISTRICT AND WEST YORK AREA SCHOOL DISTRICT,	:	No. 83 MAP 2021
Appellees	:	
v.	:	
ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH,	:	
Appellant	:	

ORDER

PER CURIAM

AND NOW, this 30th day of November, 2021, the emergency application to reinstate automatic supersedeas is GRANTED in part. The order of the Commonwealth Court at No. 294 M.D. 2021 dated November 16, 2021, granting the Application to Terminate Automatic Stay, and lifting automatic supersedeas effective December 4, 2021, is hereby vacated in light of this Court's order of the same date noting probable jurisdiction, expediting briefing, and scheduling oral argument for December 8, 2021. Supersedeas is reinstated pending further consideration of the Court following oral argument.

Nothing in this Order shall be construed as a position regarding the merits of this appeal.

Justice Mundy notes her dissent.

Justice Saylor did not participate in the consideration or decision of this matter.

EXHIBIT C

Received 8/26/2021 4:32:11 PM Commonwealth Court of Pennsylvania

Filed 8/26/2021 4:32:00 PM Commonwealth Court of Pennsylvania
244 MD 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG McLINKO,
Petitioner,
v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents.

No. 244 MD 2021

AFFIDAVIT OF JONATHAN MARKS

I, Jonathan Marks, declare and affirm under the penalties of 18 Pa.C.S. § 4904 that:

1. I am the Deputy Secretary for Elections and Commissions for the Department of State (the "Department") of the Commonwealth of Pennsylvania, a position I have held since February 2019. Prior to being appointed as Deputy Secretary, I served as Commissioner for the Department's Bureau of Commissions, Elections and Legislation. I submit this Affidavit in opposition to Petitioner's Application for Summary Relief and in support of Respondents' Cross-Application for Summary Relief.

2. In my current and former positions, I have been responsible, together with the Secretary of the Commonwealth and other officials, for helping to lead the Department's efforts to ensure that Pennsylvania's elections are free, fair, secure,

and accessible to all eligible voters. In that capacity, I have worked closely with county executives, elections directors, and personnel in the Commonwealth's 67 counties.

Act 77's Amendments to the Pennsylvania Election Code

3. On October 31, 2019, Governor Wolf signed into law Act 77 of 2019, which amended Pennsylvania's Election Code in several respects.

4. Among other reforms, Act 77 provided that electors who were not eligible for absentee ballots would be permitted to vote with mail-in ballots. Before Act 77 was passed, voters who did not qualify for absentee ballots were required to vote in person at their polling places on election day.

5. As a result of Act 77, the Department and Pennsylvania's county boards of elections (the "counties") anticipated that counties would have to deal with a large increase in the number of ballots they would receive by mail.

6. Those expectations, however, had not accounted for the effects of the COVID-19 pandemic, which took hold in Pennsylvania in March 2020. Due to voters' concerns that voting in person at polling places on election day might expose them to the virus—and given the absence of any vaccine, which was not generally available to the public until 2021—a significant percentage of Pennsylvania voters cast a mail-in or absentee ballot during the 2020 election

cycle. These numbers far exceeded what Pennsylvania elections administrators had planned for prior to the pandemic.

7. The first statewide election following the enactment of Act 77 was the 2020 primary election, which was held on June 2, 2020. In that election, the majority of voters—nearly 1.5 million people—cast a mail-in or absentee ballot, while approximately 1.3 million Pennsylvanians voted in person on June 2.

8. One consequence of the massive use of mail-in voting was that certain counties fell behind in the processing of mail-in ballot applications and the issuance of mail-in ballots.

Following the 2020 Primary Election, the Department and Counties Expended Substantial Resources for the Purpose of Implementing Act 77's Mail-In Voting Procedures

9. Based on historical experience, Pennsylvania election administrators anticipated that a significantly greater number of Pennsylvanians would vote in the 2020 general election than had voted in the 2020 primary election. In addition, due in large part to the ongoing COVID-19 pandemic, election administrators expected that a large percentage of these voters would vote by mail—many more than the number of mail-in voters in the primary election.

10. These expectations were borne out. Of the approximately 6.9 million Pennsylvanians who voted in the 2020 general election, approximately 2.7 million cast a mail-in or absentee ballot.

11. In anticipation of these high numbers, and based on their experience in the 2020 primary election, Pennsylvania election administrators invested significant resources to educate voters about the mail-in voting procedures made available by Act 77; to avoid the delays in application processing and mail-in ballot issuance that had affected certain counties during the primary election; and to minimize the time it would take to process and tabulate millions of returned mail-in ballots.

12. Recognizing that many voters who vote in general elections, particularly in presidential years, do not vote in primary elections and are less familiar with the electoral system than primary voters, the Department, as well as certain counties, continued their extensive public relations efforts to educate voters about the availability of mail-in voting, and to encourage voters to apply early for mail-in ballots, thereby easing the administrative burden on elections officials. The Department alone spent approximately $13.7 million on these communications between the 2020 primary and general election.

13. Certain counties that fell behind in the issuance of mail-in and absentee ballot applications and ballots during the primary election also invested additional resources in the general election, including purchasing equipment to streamline their fulfillment of ballot requests.

14. Counties also had to invest substantial resources into training additional election workers to process mail-in ballot applications.

15. In the lead-up to the 2020 general election, a particular concern of election administrators was the time it would take to process the large volume of mail-in ballot submissions and tabulate votes.

16. Pursuant to the requirements of the Election Code, each mail-in ballot was returned in two nested envelopes. After checking the voters' completion of the declaration printed on the outside envelopes, county election administrators had to open each of those envelopes in turn, and the ballot then needed to be reviewed and tabulated.

17. Per the Election Code, this canvassing of mail-in ballots did not take place at individual election districts staffed by local polling-place officials (as had previously been the case with the canvassing of absentee ballots); instead, pursuant to the provisions of Act 77, all mail-in and absentee ballots returned in a given county were canvassed by the county board of elections at a central location.

18. To ensure that the results of the election would be known within a reasonable time (and sufficiently in advance of post-election day deadlines prescribed by the Election Code), it was necessary for the counties to use scanning machines to scan and tabulate the votes in an automated fashion. Due to the massive volume of mail-in ballots received by certain counties, it was necessary

for those counties to procure additional automated equipment (such as envelopers, which open the envelopes) to process mail-in ballot submissions. A large number of counties also had to expend resources training additional workers to determine whether voters had sufficiently completed the declarations on the outside envelopes enclosing the mail-in and absentee ballots, and to perform various other aspects of the canvassing and vote-tabulation process.

19. Because of the large volume of mail-in ballot submissions expected to be received during the 2020 general election, many counties purchased ballot scanners and/or other automated mail-in ballot-processing machines during the period between the 2020 primary and general election, at a cost of millions of dollars. The Department is aware that $605,000 was distributed to the counties through the CARES Act. Also, the Department is aware that counties that bought automated equipment to assist in the canvassing of mail-in ballots used county funds and private funds to purchase the equipment.

20. The expenditures described in Paragraphs 11–19 above were made specifically for the purpose of carrying out the mail-in voting procedures introduced by Act 77. If Act 77's mail-in voting procedures had been invalidated prior to the date of the expenditures described in Paragraphs 11-19 above, these expenditures would not have been made.

Eliminating Act 77's Mail-In Voting Procedures at This Juncture Would Require Election Officials to Spend Substantial Additional Resources to Educate Voters and Mitigate Disenfranchisement

21. Despite the challenges posed by COVID-19 and the unexpected volume of mail-in voting, Pennsylvania's election administrators successfully implemented Act 77's mail-in voting procedures during the 2020 election cycle. As discussed above, millions of voters were educated about the availability of mail-in ballots and voted by mail in the 2020 general election.

22. If Act 77's mail-in voting procedures were now eliminated, the Department and counties would have to invest millions of dollars of resources to educate voters regarding the change. In the absence of such expenditures, the elimination of no-excuse mail-in voting would create significant confusion about the permissible means of voting, leading to voter disenfranchisement.

23. Some of the very features of Act 77 that facilitate voting increase the likelihood that the Act's elimination would have disenfranchising effects.

24. For example, Act 77 allowed "[a]ny qualified registered elector [to] request to be placed on a permanent mail-in ballot list file." 25 P.S. § 3150.12(g)(1). Once an elector does so, a mail-in ballot application will automatically be mailed to the elector at the beginning of each year, and the elector's return of that application will cause her to be sent a mail-in ballot for each election during that year. *Id.* An elector who has requested to be placed on this

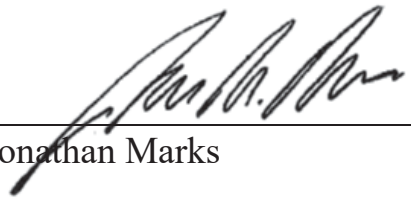
permanent list therefore has every reason to expect that she need take no further affirmative steps to be able to vote; the Election Code assures her that elections officials will send her the appropriate materials at the appropriate time.

25. As of the date of this Affidavit, approximately 1,380,342 Pennsylvania voters were on the permanent mail-in ballot list file established by Act 77.

26. As of the date of this Affidavit, approximately 740,765 Pennsylvanians have had their application for a mail-in ballot for the upcoming November 2, 2021, election approved. Of these ballots that have been approved, 736,534 are those of voters who are on the permanent mail-in list.

I declare that the facts set forth in this Affidavit are true and correct. I understand that this Affidavit is made subject to the penalties for unsworn falsification to authorities set forth in 18 Pa.C.S. § 4904.

Executed on August 26, 2021.



Jonathan Marks