IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 14 MAP 2022
No. 17 MAP 2022 (Cross Appeal)

DOUG MCLINKO,

Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, and LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania,

Appellants.

No. 15 MAP 2022
Nos. 18 & 19 MAP 2022 (Cross Appeals)

TIMOTHY BONNER et al.,

Appellees,

v.

LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE et al.,

Appellants.

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

BRIEF OF APPELLANTS-INTERVENORS THE DEMOCRATIC NATIONAL COMMITTEE AND THE PENNSYLVANIA DEMOCRATIC PARTY

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INTRODUCTION

Pennsylvania Act 77 makes it easier for Pennsylvanians to exercise their fundamental right to vote, by permitting all Pennsylvanians to cast their ballots by mail. The General Assembly unquestionably had the power to improve representative democracy in the Commonwealth by enacting that law.

As this Court has repeatedly recognized, all "powers not expressly withheld from the General Assembly inhere in it." *Stilp v. Commonwealth*, 974 A.2d 491, 494-495, 601 Pa. 429, 435 (2009); *accord William Penn School District v. Pennsylvania Department of Education*, 170 A.3d 414, 440 n.38, 642 Pa. 246, 278 n.38 (2017). In other words, if the Pennsylvania Constitution does not say "'thou shalt not,' … then the statute is the law simply because it is the will of the people." *Stilp*, 974 A.2d at 497. Accordingly, a statute will not be declared unconstitutional "unless it clearly, palpably, and plainly violates the Constitution," *Zauflik v. Pennsbury School District*, 104 A.3d 1096, 1103, 629 Pa. 1, 13 (2014), and "[n]othing will [void a statute] but a *direct* collision between its provisions and those of the federal or state constitution," *Erie & North-East Railroad Co. v. Casey*, 26 Pa. 287, 301 (1856). Given these established principles, a "party who wishes [a court] to pronounce a law unconstitutional[] takes upon himself the burden of proving, beyond all doubt, that it is so." *Id.* at 300-301.

That rule applies with particular force in this challenge to Act 77, given that the Pennsylvania Constitution explicitly grants the General Assembly broad

authority to determine the "method of elections," Pa. Const. art. VII, §4. The constitution, that is, "specifically empowers the General Assembly to provide for [the] means by which an elector may cast a ballot through legislation such as Act 77." McLinko Dissent 4.

Although the Commonwealth Court reached a different conclusion by a 3-2 vote, it did not identify anything in the text of the Pennsylvania Constitution that creates a "direct collision" with Act 77, let alone one that establishes the Act's invalidity beyond "all doubt," *Erie*, 26 Pa. at 301. The court relied on two constitutional provisions—Article VII, sections 1 and 14—but neither provides any support for the court's holding that Act 77 exceeds the legislature's broad power over elections. Section 1 governs *who* is eligible to vote rather than *how* ballots must be cast. And section 14 sets a constitutional *floor* regarding who must be allowed to vote absentee rather than a *ceiling* that prevents the legislature from extending that right to others.

The Commonwealth Court also concluded that two of this Court's decisions (one from 1862 and the other from 1924) control this case. But neither decision applied the current Pennsylvania Constitution, which has changed materially since those decisions. Nor did either case involve a method of voting that remotely resembles the vote-by-mail process Act 77 authorizes. Those cases

therefore do not control. If this Court concludes otherwise, they should be overruled.[1]

OPINIONS BELOW

This appeal concerns the January 28, 2022, orders of the Commonwealth Court attached as Exhibits A & B. The Commonwealth Court's accompanying opinions and dissents are attached as Exhibits C & D.

JURISDICTION

These consolidated cases were commenced in the Commonwealth Court pursuant to 41 Pennsylvania Consolidated Statutes §761(a)(1). This Court accordingly has jurisdiction under 42 Pennsylvania Consolidated Statutes §723(a).

ORDERS IN QUESTION

The text of the Commonwealth Court orders at issue is:

***McLinko* Order**

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

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[1] This brief addresses only Act 77's constitutionality. Intervenor-appellants adopt respondents' arguments regarding the timeliness of appellees' lawsuits.

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

Bonner Order

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

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

STANDARD OF REVIEW

This Court's review of the Commonwealth Court's interpretation of the Pennsylvania Constitution is "de novo and the scope is plenary." *Commonwealth v. Talley*, 265 A.3d 485, 513 (Pa. 2021).

QUESTIONS ADDRESSED IN THIS BRIEF

1. Is Act 77 constitutional? The Commonwealth Court determined that it is not.

2. If Act 77 would be deemed unconstitutional under this Court's decisions in *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 281 Pa. 131 (1924), should those cases be overruled? The Commonwealth Court did not resolve this issue because it recognized that only this Court can overrule those cases.

STATEMENT

A. Relevant Constitutional History

The Commonwealth Court's invalidation of Act 77 rested significantly on the 1838 Pennsylvania Constitution, the version that this Court addressed in both *Chase* and *Lancaster City*. McLinko Op. 11-12, 14, 21, 25, 31-32. The article in that constitution governing elections contained just three provisions. The first restricted the right to vote to "white freem[e]n [who] resided … in the election district where [they would] offer[] to vote." Pa. Const. art. III, §1 (1838). The second permitted this subset of Pennsylvanians to cast their votes only "by ballot." *Id*. §2. And the third exempted voters from arrest while voting. *Id*. §3.

Under the 1838 constitution, moreover, Pennsylvania had no state-wide voter-registration system in place; "white freem[e]n" simply appeared at the polls to assert their eligibility to vote. As *Chase* recognized, much of the Commonwealth's election law and practice was oriented towards withholding suffrage "altogether from about four-fifths of the population, … however competent in respect of prudence and patriotism[] many of them may be to vote." 41 Pa. at 426. Modern-day mail voting did not exist, and early attempts to allow

absentee voting for soldiers drew *Chase*'s skepticism because there was no way to determine who had voted absentee, whether those who had were qualified to do so, or whether their votes were properly counted and preserved. In particular, the Court explained that the system it struck down "permits the ballot-box … to be opened anywhere, within or without our state, with no other guards than such as commanding officers" and permits "soldiers to vote where the evidence of their qualifications is not at hand." *Id.* at 424.

After *Chase*, the constitution was repeatedly amended to provide the General Assembly considerable flexibility regarding how ballots are cast. For example, a 1901 amendment authorized the General Assembly to provide for "method[s]" of voting "other" than "by ballot." 1901 Pa. Laws 882. That same year, the constitution was also amended to acknowledge the General Assembly's power to pass "uniform" "laws regulating the registration of electors." 1901 Pa. Laws 881-882. And in 1928, an amendment granted the legislature the power to "permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote." 1927 Pa. Laws 1050. As described further below, since 1937, the legislature has used its authority to establish a comprehensive voter-registration system that now serves as the backbone of the Pennsylvania Election Code. Section 701 of Act 1333 of 1937 *as amended at* 25 P.S. §§1301, 2811; Act of June 3, 1937 Pub. L. 1333, §701 *et seq*.

Likewise relevant to this case are various constitutional amendments giving the General Assembly the power to authorize voters to cast a ballot without

being physically at the polls. In 1864, an amendment permitted individuals in "military service" to cast an absentee ballot "under such regulations as are, or shall be, prescribed by law." 1864 Pa. Laws 1054. In 1949, an amendment gave the General Assembly the authority to extend that right to injured war veterans. *See* 1949 Pa. Laws 2138. And in 1957, the absentee-ballot provision was extended further still, providing that "[t]he Legislature may, by general law, provide a manner in which" two groups could vote absentee: (1) voters who would be "unavoidably absent" from their election districts on election day for occupational reasons, and (2) voters who were "unable" to go to the polls in person "because of illness or physical disability." 1957 Pa. Laws 1019-1020. Finally, in 1967, the Pennsylvania Constitution was amended to change the provision that authorized the General Assembly to *permit* absentee voting for those groups ("The Legislature may …") into a requirement that it do so ("The Legislature shall …"). *See* 1967 Pa. Laws 1048, 1050. With the advent of a voter-registration system, the General Assembly—with the people's blessing—repeatedly reaffirmed through these amendments that it no longer considered in-person appearance at the polls necessary to confirm voter identity and qualifications.

Reflecting these myriad changes since *Chase*, today's constitution provides that all elections "shall be by ballot or by such other method as may be prescribed by law," Pa. Const. art. VII, §4, and mandates that the legislature

"shall, by general law, provide a manner in which" various categories of Pennsylvanians may vote without appearing in person at the polls, *id*. §14.

B. Act 77

1. Act 77—which was approved by a bipartisan supermajority of the General Assembly—allows Pennsylvanians to "vote by mail for any reason or no reason whatsoever." R. 476a; *accord* R. 274a. In particular, the Act provides that a "qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article." 25 P.S.. §3150.11(a). The term "qualified mail-in elector" has the same meaning as "qualified elector," *id.* §3150.11(b), which 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).

Act 77 also made other "changes to the Pennsylvania Election Code," R. 476a, including (1) allowing voters to cast a mail ballot up to 50 days before an election; (2) allowing voters to be placed on a permanent mail-in ballot list, so that each year they need only submit one request for mail or absentee ballots for all elections in that year; (3) adding fifteen days for voter registration; (4) extending the deadline for submitting mail and absentee ballots until 8:00 pm on election day; and (5) eliminating straight-party-ticket voting. *See* Press Release, *Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting*

(Oct. 31, 2019);[2] Lai, *Pa.'s Election System is on the Verge of the Largest Changes in Decades—in Time for the 2020 Election*, Phila. Inquirer (Oct. 23, 2019).[3]

To vote by mail under Act 77, a person must be registered to vote in Pennsylvania. Pa. Dep't of State, *Ballot Request Application*.[4] Registration is managed through the Statewide Uniform Registry of Electors ("SURE"), "a single, uniform integrated computer system" that "[c]ontain[s] a database of all registered electors in this Commonwealth" and is designed to "[e]nsure the integrity and accuracy of all registration records." 25 P.S.. §1222(c)(1), (2). Under this system, registration applications are reviewed to ensure each applicant is a qualified elector. *Id.* §1328(a)(2). Any applicant's qualifications "may be challenged by a commissioner, registrar or clerk or by a qualified elector of the municipality." *Id.* §1329(a). If an applicant is approved, the voter is "assign[ed] … a unique identification number in the SURE system" and mailed a "voter's identification card" with that number. *Id.* §1328(c)(1).

When a registered voter applies for a mail ballot under Act 77, his or her county board of elections uses SURE to "determine the qualifications of the

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[2] https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting.

[3] https://www.inquirer.com/politics/pennsylvania/pa-election-reform-deal-20191023.html.

[4] https://www.pavoterservices.pa.gov/OnlineAbsenteeApplication/#/OnlineAbsenteeBegin (visited Feb. 15, 2022).

applicant by verifying the proof of identification and comparing the information provided on the application with the information contained on the applicant's permanent registration card." 25 P.S. §3150.12b(a). Ballots are sent only after applicants are verified through this process. *Id.* §3150.15. The system then records each vote cast in an election, including the method by which it was cast. *Id*. §1222(c)(20). Each mail-ballot request, approval, and return is stored as a public record. *Id.* §3150.17. As with registration, the approval of any mail-ballot application can be challenged on the ground that the applicant is not a qualified elector. *Id.* §3150.12b(a)(3).

2. In March 2020, the General Assembly "authorized … the mail-in voting procedures established by Act 77" to be used during "the June 2, 2020 primary election, and for all subsequent elections." *In re November 3, 2020 General Election*, 240 A.3d 591, 595-596, ___ Pa. ___ (2020). Accordingly, the June 2020 primary elections, November 2020 general elections, May 2021 primary elections, and November 2021 municipal elections were all conducted under Act 77.

Because of the COVID-19 pandemic, "a significant percentage of Pennsylvania voters cast a mail-in or absentee ballot during the 2020 election[s]"—"far exceed[ing] what Pennsylvania elections administrators had planned for prior to the pandemic." R. 127a. For example, of the approximately 6.9 million Pennsylvanians who voted in the November 2020 elections, roughly 2.7 million used mail ballots. *See* Pa. Dep't of State, *Official Returns* (Nov. 3,

2020);[5] *see also* R. 128a. In total, "more than 4.7 million [mail] ballots have been cast by Pennsylvania voters" so far due to Act 77. Pa. Dep't of State, *Statement on Commonwealth Court Ruling on Mail-In Ballots* (Jan. 28, 2022).[6]

This Court has already decided several cases involving Act 77. For example, the Court has held that the statute does not "authorize or require county election boards to reject absentee or mail-in ballots during the canvassing process based on an analysis of a voter's signature." *In re November 3, 2020 General Election*, 240 A.3d at 595. It also addressed whether the Act required that "naked ballots"—those cast without the outside envelope—be counted. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 378-379, ___ Pa. ___ (2020), *cert. denied sub nom. Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732 (2021); *see also id.* at 352-353 (addressing other "discrete issues" related to Act 77).

As of now, Act 77 will govern the primary elections set for May 17, 2022 (just over two months after this Court will hear oral argument in this appeal). And the over "1.38 million Pennsylvania electors [who] have requested to be placed on [the] permanent mail-in ballot list," pursuant to Act 77, McLinko Op. 42, "might recently have received in the mail, or will soon receive, the annual

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[5] https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G&IsActive=0/.

[6] https://www.dos.pa.gov/about-us/Documents/statements/2022-01-28-MailBallot-Statemnt.pdf.

application" by which they can request mail ballots for "all 2022 elections." Dep't of State, *Statement*, *supra* n.6. Any voters who have already returned those applications will likely expect they need take no further action to receive their ballot for the upcoming elections.

C. These Lawsuits

Mr. McLinko, who has been an election official in Bradford County for a decade, filed a petition for review challenging Act 77 in the Commonwealth Court in July 2021. He sought a declaration that the entire statute—and hence the broad swath of the Pennsylvania Election Code that it enacted—is unconstitutional.

The *Bonner* petitioners are fourteen Republican members of the Pennsylvania House of Representatives, eleven of whom voted in favor of Act 77. R. 262a-265a. The remaining three either voted against Act 77 or were not in the House when the law was enacted. The *Bonner* petition, which raises the same basic challenge to Act 77, was filed in August 2021.

D. Decisions Below

The Commonwealth Court consolidated the *McLinko* and *Bonner* petitions, R. 470a-471a, and granted two sets of organizations leave to intervene: (1) the Democratic National Committee and Pennsylvania Democratic Party, and (2) the Butler County Republican Committee, the York County Republican Committee, and the Washington County Republican Committee, McLinko Op. 3.

After receiving expedited briefing and hearing oral argument, the court ruled by a 3-2 vote that petitioners were entitled to summary relief because Act 77's universal vote-by-mail provisions violate the Pennsylvania Constitution. McLinko Op. 3; *see* Bonner Op. 3 ("incorporat[ing] by reference" the *McLinko* constitutional ruling). The court stated that it was bound by *Chase* and *Lancaster City*, which in the court's view "held the phrase 'offer to vote' [in Article VII, section 1] requires the physical presence of the elector." McLinko Op. 26.

More specifically, the Commonwealth Court interpreted *Chase* and *Lancaster City* to mean "[t]here must be a constitutionally provided exception" in order for an elector to vote without physically appearing at the polls. McLinko Op. 26. The court concluded that Article VII, section 4—which authorizes the General Assembly to provide for election "by ballot *or by such other method as may be prescribed by law*" (emphasis added)—did not create such an exception, for three reasons. First, *Lancaster City* did not treat section 4 (which existed when the case was decided) as such an exception. *Id.* at 26-27. Second, the phrase "other method" in section 4 refers (according to the Commonwealth Court) only to "an alternative to a paper ballot for use at the polling place," such as a voting machine. *Id.* at 30-31. Third, reading section 4 to permit universal vote-by-mail would (again according to the Commonwealth Court) render unnecessary Article VII, section 14, which provides that the General Assembly "shall" permit certain groups of voters to cast absentee ballots. *Id.* at 32.

The Commonwealth Court recognized that the constitution's election provisions were amended in 1928 and 1967, but it concluded that the changes were either irrelevant or too "minor" to distinguish *Chase* and *Lancaster*. McLinko Op. 19 & n.19, 33-34. For example, the court placed no weight on the fact that Article VII was amended to give the General Assembly the express power to require the use of voting machines, reasoning that the new language merely allowed the General Assembly to require their use in some locales but not others. *Id.* at 19 & n.19. The court similarly discounted the fact that section 14 had been amended from *permitting* the General Assembly to establish absentee voting for certain groups (with language using the word "may") to *requiring* the General Assembly to establish absentee voting for those groups (with language using the word "shall"). *Id.* at 33-34. The only authority the court cited in deeming this textual change insufficient was a treatise that predated the change by 60 years. *Id.* at 34. Finally, the Commonwealth Court did not address the fact that Pennsylvania's process for confirming the identity and qualification of voters has changed dramatically since *Chase* and *Lancaster City*.

In response to appellants' argument that, to the extent *Chase* and *Lancaster City* were deemed controlling here, they should be overruled, the Commonwealth Court observed that only this Court can overturn its decisions. McLinko Op. 26 n.23.

Judge Wojcik, joined by Judge Ceisler, dissented from the invalidation of Act 77. Judge Wojcik explained that Article VII, section 4 "specifically

empowers the General Assembly to provide for another means [besides in-person voting] by which an elector may cast a ballot." McLinko Dissent 4. Indeed, Judge Wojcik reasoned, it would make little sense to read section 4's use of "other methods" as limited to voting machines (as the Commonwealth Court read it), given that Article VII, section 6 was amended long after section 4 was put in place—and four years after *Lancaster City*—specifically to give the General Assembly the authority to use "voting machines" at polling places. *Id.* at 7-9. Judge Wojcik also highlighted Act 77's non-severability provision, which meant that the court's ruling would invalidate nearly "all of Act 77's provisions." *Id.* at 9-10.[7]

SUMMARY OF ARGUMENT

Act 77 is constitutional. The Pennsylvania Constitution gives the General Assembly broad power over elections, including the specific authority to determine the "method" of elections, Pa. Const. art. VII, §4. The Commonwealth Court erred in concluding that *Chase* and *Lancaster City* required it to strike down the statute.

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[7] Because "the vote of the commissioned judges was evenly divided" on Act 77's constitutionality, the opinion was "filed 'as circulated' pursuant to Section 256(b) of the [Commonwealth] Court's Internal Operating Procedures." McLinko Op. 2 n.1. An "as circulated" opinion reflects that a vacancy or recusal among the commissioned judges left the vote of the other participating commissioned judges tied, meaning the opinion is not to be reported. 210 Pa. Code §69.254.

I. The Commonwealth Court relied primarily on Article VII, section 1's requirement that a voter "shall have resided in the election district where he or she shall offer to vote." But that language establishes the residency requirement a person must satisfy to vote in a given district. It does not address the *method* by which an eligible voter may cast a ballot. Put simply, one can "offer to vote" by mail as well as in person.

This plain-text reading of section 1 is confirmed by other provisions in Article VII. For example, section 4 expressly grants the General Assembly broad authority to prescribe *how* voting may be conducted. And section 14 establishes that some voters *must* be permitted to cast a ballot without appearing in person. The Commonwealth Court concluded that section 14 establishes an *exclusive* list of Pennsylvanians who can vote by mail and that the General Assembly's section 4 authority to enact another "method" of voting therefore does not encompass mail-in ballots. But section 14 is a floor, i.e., it guarantees certain categories of Pennsylvanians the right to vote absentee, while leaving to the legislature the choice whether to permit others to do so. And nothing in section 4 limits the "method" that the General Assembly can implement to those that require voting in person.

History further undermines the court's ruling, as the revisions to the Pennsylvania Constitution over the years confirm that sections 4 and 14—not section 1—govern the General Assembly's authority to provide for universal mail voting.

II. The Commonwealth Court wrongly concluded that *Chase* and *Lancaster City* required it to invalidate Act 77. Those cases not only interpreted prior versions of the constitution, but also addressed absentee-voting methods wholly unlike today's mail voting. Neither case establishes "beyond all doubt" that Act 77 stands in "direct collision" with the *current* constitution, *Erie*, 26 Pa. at 301.

III. If *Chase* and *Lancaster City* do control, they should be overruled because they cannot be squared with the current constitution. *Stare decisis* does not require adhering to decisions that do not withstand modern scrutiny, conflict with modern-day realities (such as a secure vote-by-mail system), do not serve the interests of justice, and have engendered no legitimate reliance interests.

ARGUMENT

Statutes enacted by the General Assembly enjoy a strong presumption of constitutionality, and Act 77 falls well within the constitution's express conferral on the General Assembly of broad power to determine the "method" of elections. Pa. Const. art. VII, §4. The grounds the Commonwealth Court offered for its contrary conclusion lack merit.

I. THE COMMONWEALTH COURT'S READING OF ARTICLE VII, SECTION 1 IS CONTRARY TO THE CONSTITUTION'S TEXT, STRUCTURE, AND HISTORY

The Commonwealth Court concluded that the Pennsylvania Constitution forbids mail ballots unless cast by Pennsylvanians whom the constitution

specifically entitles to vote absentee. McLinko Op. 35. That conclusion rested almost exclusively on the language italicized below in Article VII:

> §1. Qualifications of electors.
>
> Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State 90 days immediately preceding the election.
>
> 3. He or she shall have resided in the election district where he or she *shall offer to vote* at least 60 days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within 60 days preceding the election.

The court interpreted the phrase "shall offer to vote" to require in-person voting. McLinko Op. 26. That interpretation cannot be reconciled with the Pennsylvania Constitution's text, structure, or history—which collectively make clear that section 1 does not speak to the *method* of voting but simply establishes that electors are qualified to vote only in the elections of the jurisdiction where they reside.

A. Section 1's Text Shows That It Governs *Who* Is Eligible To Vote, Not *How* Votes Are Cast

This Court has long instructed that the Pennsylvania Constitution should be given its "natural and ordinary meaning." *Scarnati v. Wolf*, 173 A.3d 1110, 1118, 643 Pa. 474, 489 (2017). It has similarly instructed that legal texts

generally should be interpreted in a manner consistent with their "natural and most obvious import … without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation." *Commonwealth v. Johnson*, 22 A. 703, 144 Pa. 377 (1891) (per curiam). Finally, it has instructed that courts "do not read words in isolation, but with reference to the context in which they appear." *Commonwealth v. Smith*, 186 A.3d 397, 402, 646 Pa. 588, 597 (2018); *accord A.S. v. Pennsylvania State Police*, 143 A.3d 896, 906, 636 Pa. 403, 419-420 (2016). Applying those principles here leaves no doubt that the Commonwealth Court's reading of section 1's "shall offer to vote" language is erroneous.

To begin with, even considered in isolation, the phrase "shall offer to vote" does not mean voters must cast their ballot in person. A mail-in voter "offer[s] to vote" in her district just as an in-person voter does. The only difference is that the former's vote is delivered to local election officials by mail and the latter's by ballot box or voting machine.

Moreover, "shall offer to vote" must—like any legal text—be read together with the rest of the sentence in which it appears. *See A.S.*, 143 A.3d at 906, 636 Pa. at 420. Doing so shows that "shall offer to vote" means Pennsylvanians may vote in a particular district only if they "have resided" there for the specified length of time. This rule sensibly ensures that Pennsylvanians vote only for issues that will directly affect them and for candidates who will directly represent them. The Commonwealth Court's reading, by contrast, assumes that the constitution's

drafters inserted a subtle but sweeping limit on the General Assembly's election powers in a sentence that otherwise pertains solely to voter residency.[8]

Finally, the rest of section 1 confirms the natural meaning of the "shall offer to vote" language. Section 1 is entitled "Qualifications of electors," and the "offer to vote" language appears alongside other basic "qualifications" to exercise the franchise, like age and citizenship. The section (including the "offer to vote" language) is thus directed at determining *who* is permitted to vote in specific elections—not *how*. Nothing in the section purports to require or prohibit the method in which qualified electors cast their vote. The Commonwealth Court identified no textual reason for interpreting the provision otherwise.

B. The Structure Of Article VII Also Forecloses The Commonwealth Court's Reading

Although the clarity of section 1's text in isolation suffices to reject the Commonwealth Court's reading, this Court has explained that the Pennsylvania Constitution must be considered "as an integrated whole," *Zauflik*, 104 A.3d at 1126. Doing so makes clear that the Commonwealth Court's reading is further foreclosed by the overall structure of Article VII—specifically sections 4 and 14.

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[8] Pennsylvania's Election Code provides further proof that the Commonwealth Court's reading diverges from the plain-text meaning of "offer to vote," as several provisions were clearly enacted under the assumption that a voter need not be physically present in the district to cast a valid ballot. For example, the code permits the counting of a provisional ballot cast by an individual who was "eligible in the county in which the ballot was cast but not at the election district where the ballot was cast." 25 P.S. §3050(a.4)(7)(i).

1. Section 4

The topic of *how* Pennsylvanians must cast their votes is governed explicitly by section 4. Entitled "Method of elections," that section states that "[a]ll elections by the citizens shall be by ballot *or by such other method as may be prescribed by law*; Provided, That secrecy in voting be preserved" (emphasis added). In other words, far from proscribing universal mail balloting, the constitution (in section 4) explicitly grants the General Assembly broad authority to determine how votes are cast—provided only that "secrecy in voting be preserved." The mail-in voting Act 77 authorizes is an "other method" of voting "prescribed by law."

Section 4 thus confirms the error of the Commonwealth Court's reading of "shall offer to vote." As the U.S. Supreme Court has said, legal drafters "do[] not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—[they] do[] not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001). Yet that is exactly how the Commonwealth Court read the constitution, as conferring broad legislative authority over a particular subject (voting methods) in one provision of the document and then burying a sweeping and indirect limit on that authority amidst a list of qualifications for voting in another section. The infirmity of that reading is reinforced by the fact that the shift from a mandate that elections occur "by ballot" to "by ballot or by such other method" was the

subject of a stand-alone amendment in 1901 and thus was clearly an intentional change. *See supra* p.6.

The Commonwealth Court's response to the foregoing was that section 4's "other method" language refers only to "an alternative to a paper ballot for use at the polling place," i.e., voting machines, and therefore does not encompass mail-in voting. McLinko Op. 30. But there is no basis for giving such a limited meaning to the broad "other method" language, particularly when the drafters included a different express limitation (namely, that no "other method" could fail to preserve secret balloting). Certainly "voting machine only" is not what the phrase "other method" meant when it was adopted in 1901. Contemporary dictionaries instead defined "method" broadly, as "the mode or rule of accomplishing an end," *American Dictionary of the English Language* (Peter Fenelon Collier & Son 1902); *see also Chambers Twentieth Century Dictionary* (1901) (same), or the "[m]ode of procedure, way or order of doing," *Century Dictionary* (1901). These early 20th century definitions confirm that the authority granted to the General Assembly to determine the "method" of voting was expansive.[9]

[9] Indeed, this Court has already suggested that mail-in ballots *are* a "method" of voting within the meaning of section 4, i.e., that "other method" does not mean just "voting machine." In *Pennsylvania Democratic Party v. Boockvar*, the Court explained (at the urging of the Pennsylvania Republican Party) that absentee and mail-in ballots implicate the "secrecy in voting protected expressly by Article VII, Section 4" of the constitution. *Pennsylvania Democratic Party*, 238 A.3d at 379.

As Judge Wojcik's dissent noted, moreover (at 7-8), another provision of article VII—section 6—expressly provides for the use of voting machines, stating that "the General Assembly shall by general law … permit the use of voting machines… or other mechanical devices." The Commonwealth Court's reading would render this language superfluous, in violation of the basic principle that "specific language in our constitution cannot be readily dismissed as superfluous," *Kroger Co. v. O'Hara Township*, 392 A.2d 266, 274, 481 Pa. 101, 117 (1978). The court disagreed, stating that section 6 does *not* actually authorize voting machines. McLinko Op. 19 n.19. But that ignores the court's previous recognition that through section 6, "the Pennsylvania Constitution reserves the power to provide, by general law, the use and choice of voting machines to the General Assembly," *In re Agenda Initiative to Place on the Agenda of a Regular Meeting of County Council*, 206 A.3d 617, 624 (Pa. Commw. Ct. 2019).

The Commonwealth Court also stated that its restrictive reading of "other method" is supported by *Lancaster City* and several non-binding authorities (only one of which is even a decision of a Pennsylvania court). McLinko Op. 18-20. To begin with, however, *Lancaster City*'s mention of voting machines addressed not the reason the drafters adopted the "other method" language of section 4, but rather the reason they added the "secrecy" requirement. Indeed, although the Commonwealth Court asserted that *Lancaster City* "agreed that *Section 4* was 'likely added in view of the suggestion of the use of voting machines,'" McLinko Op. 19 (emphasis added), what *Lancaster City* actually said was that "this

provision *as to secrecy* was likely added in view of the suggestion of the use of voting machines," 126 A. at 201, 281 Pa. at 137-138 (emphasis added). The other sources the Commonwealth Court cited likewise provide little if any support (and in any event are not binding). To take just one example, the Common Pleas decision simply explained that "[t]here is not, and constitutionally may not be, any right to vote 'viva voce,'" *In re General Election of November 4, 1975*, 71 Pa. D. & C. 2d 83, 91 (Ct. Com. Pl. 1975). That of course is not the issue here. And more generally, there is simply nothing in section 4's broad language that is limited to voting machines. Hence, even if the other authorities the Commonwealth Court cited did support its atextual "machine-voting" gloss on that language—which, again, impermissibly reads out the separate constitutional provision expressly addressing machine voting—it would not be appropriate to follow them.

2. Section 14

Section 14, entitled "Absentee voting," further demonstrates that in-person voting is not constitutionally required. Paragraph (a) provides that:

> 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.

The Commonwealth Court's decision places sections 1 and 14 in irreconcilable conflict, in contravention of this Court's instruction that "'because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible,'" *Jubelirer v. Rendell*, 953 A.2d 514, 528, 598 Pa. 16, 39 (2008) (quoting *Cavanaugh v. Davis*, 440 A.2d 1380, 1382, 497 Pa. 351, 354 (1982)). Specifically, section 14 mandates that "qualified electors" in Pennsylvania "shall" be permitted to vote absentee. But under the Commonwealth Court's reading of section 1, a Pennsylvanian is a qualified elector only if he or she votes in person. Under this reading, section 14 would be a nullity because a person could become a "qualified elector" (and thus entitled to vote absentee) only by first voting in person.

The Commonwealth Court asserted, however, that section 14 *supports* its interpretation of section 1 because the former shows that when the constitution's drafters intended to create an exception to the (supposed) in-person voting requirement, they knew how to do so. McLinko Op. 33. But section 14 is not an exception; it is a freestanding mandate. And it does not follow that because section 14 provides that the General Assembly "shall" (i.e., must) allow certain categories of Pennsylvanians to vote absentee, the General Assembly is forbidden from authorizing universal mail voting pursuant to the broad grant of authority in section 4. Indeed, that the Pennsylvania Constitution directs the legislature to extend absentee voting to a certain subset of voters in no way places a broader limit on the legislative power to determine the method of election for all other

voters. *See Christensen v. Harris County*, 529 U.S. 576, 583 (2000) (similarly concluding that language in a federal statute providing that employees "shall" be permitted to use compensatory time off in a certain manner "is more properly read as a minimal guarantee" than "as setting forth the exclusive method by which compensatory time can be used"); *see also New York Legal Assistance Group v. BIA*, 987 F.3d 207, 217-218 & n.19 (2d Cir. 2021) (where a court was given broad statutory authority to craft equitable relief, a subsequent clause that *gave* the court authority to demand specific documents did not *limit* the court's ability to demand other kinds of documents as well); *Animal Legal Defense Fund v. United States Department of Agriculture*, 935 F.3d 858, 871 (9th Cir. 2019) (similar). As this Court has explained in a related context, "[i]n the cases specified[,] the constitution is mandatory. … In the cases not enumerated, but of the same kind, it is discretionary." *Commonwealth ex rel. McCormick v. Reeder*, 33 A. 67, 70, 171 Pa. 505, 518 (1895).

Finally, the Commonwealth Court stated that if section 14 were "exclusively a floor" and thus did not preclude laws like Act 77, then the 1985 proposal of a constitutional amendment adding other categories of voters to section 14 (i.e., giving those voters the right to vote absentee) would have been "unnecessary." McLinko Op. 33. That is wrong. The proposal would have ensured that a future legislature could not deny those additional categories of Pennsylvanians the right to vote absentee without going through the constitutional-amendment process. The Commonwealth Court's reading also

conflicts with the General Assembly's consistent practice of expanding by statute the categories of Pennsylvanians entitled to vote absentee since 1967. *See infra* p.29.

C. History Confirms That Article VII, Section 1 Does Not Require Voting To Be In Person

A constitutional provision's history is relevant in determining its meaning. *Commonwealth v. Edmunds*, 586 A.2d 887, 896, 526 Pa. 374, 392 (1991). Here, the revisions made to the Pennsylvania Constitution over the years provide yet more evidence that sections 4 and 14 of Article VII—not section 1—control whether the General Assembly can authorize mail-in voting.

The 1838 constitution originally mandated that elections be conducted "by ballot," Pa. Const. art. III, §1 (1838), and it limited the right to vote to "white freem[e]n [who] resided … in the election district where [they] offer[] to vote, ten days immediately pr[ece]ding such election," *id.* There was then no state-wide voter registration; voters simply appeared at the polls to assert their eligibility to cast a ballot, and eligibility was determined by local officials. *See* Brookings Institution, *Registration of Voters in the United States* at 79. A 1901 amendment then revised the "by ballot" requirement to give the General Assembly power to "prescribe" "the "method[s]" of voting, (as discussed) allowing voting "other" than "by ballot." 1901 Pa. Laws 882. The amendment also empowered the legislature to enact a comprehensive and effective voter-registration system. 1901 Pa. Laws 881-882. Both changes reflect the drafters'

and public's aim of expanding the General Assembly's authority to modernize the Commonwealth's voting system. And the revisions' placement demonstrates the difference between sections 1 and 4: The change affecting who could vote—permitting the General Assembly to impose a voter registration system—was placed in section 1. Pa. Const. art. VIII, §1 (1901). By contrast, the change affecting how votes are to be cast and counted—permitting voting by methods "other" than "by ballot"—was placed in section 4. *Id.* §4.

Next, Article VII was amended in 1928 to give the General Assembly the separate power to "permit the use of voting machines, or other mechanical devices for registering and or recording and computing the vote." *See* McLinko Dissent 8 (quoting Pa. Const. art. VII, §6). In Judge Wojcik's words, if section 4 "was limited to the use of voting machines, … there was absolutely no need" for the 1928 amendment. *Id.* at 8-9.[10]

Later constitutional amendments (in 1949 and 1957) then provided that the General Assembly "may" provide a manner by which certain categories of voters can vote absentee. *See* 1949 Pa. Laws 2138 (disabled veteran voters); 1957 Pa. Laws 1019 (occupation- or duty-based absence, and illness or disability). And in

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[10] The 1928 amendment is also notable because Pennsylvania, as of at least 1927, did not have a "permanent registration system[]" in place that would have allayed the fraud concerns discussed in *Chase* and echoed in *Lancaster City*. Harris, Brookings Institution, *Registration of Voters in the United States* 19 (1929); *see also id.* at 232 (noting that "one of the prime purposes of registration is to identify the voter when he votes, and thereby avoid voting frauds through impersonation and repeating"); *supra* p.6.

1967, the constitution was further amended to replace that permissive language ("may") with a mandate that the General Assembly "shall" permit such voters to vote absentee. Pa. H.B. 442 (1967); Pa. Const. art. VII, §14. This move from permissive to mandatory language made clear that the categories of voters listed as eligible under section 14 for absentee voting are not exclusive (i.e., a ceiling), but rather constitute those as to whom the General Assembly cannot *deny* the right to vote absentee (i.e., a floor).

Indeed, the General Assembly has repeatedly given effect to the significance of this wording change, by expanding *by statute* the right to vote absentee. Shortly after the 1967 amendment, for example, the General Assembly gave that right to voters with "leaves of absence for teaching or education, vacations [and] sabbatical leaves," as well as spouses who accompany an elector on his or her leave or vacation. 25 P.S. §2602(z.3); *see also id.* §3146.1(k) (expanding absentee voting to ill and physically disabled Pennsylvanians); *id.* §3146.1(m) (same for county employees with election-day duties). Moreover, the debates surrounding the shift from "may" to "shall" underscore that the change was intended to set a constitutional floor. For example, one state representative opposed the change because he "object[ed] to" the fact that the constitution, if amended, "would compel this legislature to act" to provide absentee voting for certain classes of voters. 1966 Pa. Leg. J. 518-House (July 20, 1966) (Stmt. of Rep. Pancoast on H.B. 398). The House Majority Whip responded: "[A]lthough I do not foresee any legislative body ever usurping the

right of the people to cast an absentee ballot, nevertheless I see no invasion of legislative prerogatives to *insure this basic constitutional proposal being incorporated* in a document as basic to democratic society as our constitution." *Id.* (Stmt. of Rep. Fineman on H.B. 398 (emphasis added)).

The Commonwealth Court's response to these points was that even though this Court has recognized that "'[m]ay' is generally understood to be directory [i.e., permissive], and 'shall' is generally understood to be mandatory," *McLinko* Op. 33, a treatise once "observed"—over a century ago—that sometimes "shall" actually is not mandatory, *id.* (citing White, *Commentaries on the Constitution of Pennsylvania*, at 23-24 (1907)). But the examples in the treatise have nothing to do with methods of casting ballots, and even it recognized that a constitutional provision using mandatory language usually *is* mandatory. *See* White, *Commentaries*, at 24-25. More importantly, this Court has repeatedly recognized that words cannot simply be drained of meaning, and hence that "'[s]hall' means 'must.'" *Commonwealth v. Barker*, 70 A.3d 849, 856 (Pa. Super. Ct. 2013) (citing *Cranberry Park Associates ex rel. Viola v. Cranberry Township Zoning Hearing Board*, 751 A.2d 165, 167, 561 Pa. 456, 460 (2000)). The Commonwealth Court has done likewise, explaining that "[*b*]*y definition*, the word 'shall' is mandatory; in ordinary usage, the word 'shall' means 'must' and is inconsistent with a concept of discretion." *Commonwealth v. Spontarelli*, 791 A.2d 1254, 1260 (Pa. Commw. Ct. 2002) (emphasis added). The Commonwealth

Court's effort here to avoid the plain meaning of section 14 is further evidence that its position is untenable.

* * *

The decision below is inconsistent with the text, structure, and history of Article VII of the Pennsylvania Constitution. The Commonwealth Court offered no textual defense of its interpretation of section 1's "offer to vote" language, eliding clear evidence that that section governs *who* is eligible to vote, not *how*. It provided no compelling justification for severely restricting section 4's broad grant of authority to the General Assembly to determine the "method" of voting. And its analysis of section 14 ignored clear indications that that provision creates a floor, not a ceiling, on who may vote without having to appear in person. Even if the court's reading were *plausible*, moreover, that would not justify holding Act 77 unconstitutional, because only a "direct collision" with the constitution—one that is "beyond all doubt"—is sufficient to do so, *Erie*, 26 Pa. at 301. Nothing in the court's opinion remotely shows the existence of such a clear and direct conflict.

II. *CHASE* AND *LANCASTER CITY* DO NOT GOVERN THIS CASE

The Commonwealth Court also erred in concluding that *Chase* and *Lancaster City* control this case. Neither decision addressed the central issue here: whether the *current* Pennsylvania Constitution—ratified in 1968, decades after *Chase* and *Lancaster City*—"'clearly, palpably, and plainly'" prohibits the

legislature from enacting universal vote-by-mail laws, *Zauflik*, 104 A.3d at 1103, 629 Pa. at 13.

A. *Chase* Is Inapposite

Chase was decided in 1862, when Abraham Lincoln was president, the Civil War was raging, and slavery was permitted if not blessed by the U.S. Constitution. At the time, the Pennsylvania Constitution, as discussed, required all elections to occur "by ballot." Pa. Const. art. III, §2 (1838). *Chase* concluded that to "'offer to vote' by ballot" meant "to make manual delivery of the ballot" to the elector's polling place. 41 Pa. at 419. This Court accordingly determined that the constitution did not authorize absentee voting.

Whatever the merits of that reading, it cannot control here because the mandate that voting occur only "by ballot" no longer appears in the constitution. As explained, Article VII, section 4 now gives the legislature the power to prescribe other methods of voting, providing that "[a]ll elections by the citizens shall be by ballot *or by such other method as may be prescribed by law*," Pa. Const. art. VII, §4 (emphasis added). Nor, as discussed in Part I, is there any basis to hold that section 1's "offer to vote" language precludes the General Assembly from authorizing universal voting by mail.

Chase also rested on the view that the framers of the 1838 constitution did not "contemplate[]" any form of voting except in-person. 41 Pa. at 419. Again, whatever the merits of that view at the time, it is unquestionably not true today. As recounted above, section 14 expressly requires the General Assembly to

"provide a manner in which … qualified electors who may … be absent [on election day] … or … unable to [vote] at their proper polling places … may vote" absentee. Pa. Const. art. VII, §14.

Finally, the type of "mail" or "absentee" voting discussed in *Chase* is starkly different from the vote-by-mail regime Act 77 adopted. *Chase* addressed a system under which voters could (1) cast ballots at an unknown place, (2) under unknown circumstances, (3) in an election process administered by individuals whose identity was unknown (and indeed who might not have been Pennsylvanians), and (4) where there was no opportunity to challenge or confirm voter eligibility. *See* 41 Pa. 403, 424. Under that system, "the ballot-box" could "be opened anywhere, … with no other guards than such as commanding officers … may choose to throw around it." *Id.* Such a regime, *Chase* observed, "invites soldiers to vote where the evidence of their qualifications is not at hand; and where our civil police cannot attend to protect the legal voter." *Id.* It was, in the words of the Court, "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." *Id.* *This* specific system—not all mail voting—was what the Court deemed incompatible with a safe and secure election, such that the constitution had to be read to require universal in-person voting.

Today's voting system is entirely different. As discussed in the statement (pp.19-20), there is a reticulated process by which individuals both register to vote and then apply to vote by mail. That system ensures that only qualified

individuals can register to vote, and it allows accurate verification of the identity and qualifications of those who apply to vote by mail, with secrecy preserved, *see Pennsylvania Democratic Party*, 238 A.3d at 379.

In short, *Chase*'s holding rested to a significant degree both on constitutional text and a voting system that are obsolete, and on the claimed absence of constitutional language that has since been added. Those changes—which the Commonwealth Court failed to address—mean that holding does not control here.

B. *Lancaster City* Is Inapposite

Lancaster City likewise does not support the invalidation of Act 77. To begin with, *Lancaster City* largely just adhered to *Chase*, even though section 4 had been modified since *Chase* to allow votes to be cast not only by ballot but also "by such other method as may be prescribed by law," Pa. Const. art. VII, §4. *Lancaster City* quoted this text in passing, but it neither engaged with the "other method" language nor addressed the fact that *Chase* had relied on the text as it existed at the time, i.e., the "by ballot" language standing alone. Instead, the Court focused on Article VII, section 1, the constitutional provision governing "the qualifications of voters." *Lancaster City*, 126 A. at 201, 281 Pa. at 136. But even that section had changed in a significant way: It newly allowed the General Assembly to employ a voter-registration system to replace the in-person appearance method of ensuring voters' identity and qualifications that *Chase* had deemed essential to election security. 41 Pa. 403, 424.

Lancaster City also did not discuss the fact that a key part of *Chase*'s reasoning—that the drafters never contemplated any form of voting except in-person—was no longer valid given the addition of what is now section 14. *See supra* pp.32-33. That omission is critical because, as the U.S. Supreme Court has explained, a prior decision is generally not binding on a particular point if that point "was not then fully argued," including if the prior decision did not "canvas" potential counterarguments. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013). This Court has similarly recognized that a prior decision's failure to address an argument makes it inappropriate to treat that decision as controlling in a new context. *See Cinram Manufacturing, Inc. v. W.C.A.B. (Hill*), 975 A.2d 577, 581, 601 Pa. 524, 531 (2009).

The Commonwealth Court contended that *Lancaster City did* consider the addition of sections and 4 and 14, deeming them to have no import. McLinko Op. 26-27. As a review of *Lancaster City*'s cursory analysis reveals, that is incorrect. As to section 4, *Lancaster City* quoted the new text, *see* 126 A. at 201, 281 Pa. at 136, but did not acknowledge that the text marked a key change to language that was central to *Chase*'s reasoning. And *Lancaster City* certainly did not hold, as the Commonwealth Court suggested (McLinko Op. 27), that the "by other method" language served solely to permit use of voting machines. The discussion of voting machines in *Lancaster City* pertained only to the constitution's secrecy requirement. *See supra* pp.23-24.

As for section 14, the language *Lancaster City* relied on was subsequently amended in a way that bears directly on this Court's analysis. Specifically, *Lancaster City* cited Article VIII, section 6, of the 1984 constitution, which provided that "qualified electors … in actual military service… may exercise the right of suffrage … under such regulation as are or shall be prescribed by law." The Court reasoned that for the General Assembly to allow soldiers to vote absentee necessarily indicated an intent to prohibit the legislature from allowing any other classes of voters to do so. *See* 126 A. at 201, 281 Pa. at 136-137. But that language has meaningfully changed in the intervening years; the constitution was amended to add additional categories of persons that the General Assembly could permit to vote absentee. *See* Pa. Const. art. VIII, §18 (1949) ("The General Assembly may, by general law, provide a manner in which, and the time and place at which [certain absent voters] *may* vote and for the return and canvass of their votes in the election district in which they respectively reside." (emphasis added)). And it was amended again in 1967 to *require* the General Assembly to allow these particular classes of voters to do so. *See* 1967 Pa. Laws 1048 ("The Legislature *shall*, by general law, provide a manner in which" various categories of voters can vote by absentee ballot (emphasis added)). Those changes—which Lancaster City had no opportunity to assess—show that the current constitution's drafters sought to expand the General Assembly's authority to provide for absentee voting. *See supra* pp.25-26.

In short, *Lancaster City* at most "stands for the proposition that the General Assembly may not by statute extend the scope of a method of voting already specifically provided for in article VII, section 14 of the Constitution." McLinko Dissent 28. It "in no way limits the authority conferred upon the General Assembly by article VII, section 4 to provide … the no-excuse mail-in ballot provisions of Act 77." *Id.* It therefore provides no basis to invalidate Act. 77.

III. IF *CHASE* AND *LANCASTER CITY* CONTROL HERE, THEN THEY SHOULD BE OVERRULED

If this Court concludes that *Chase* and *Lancaster City* control here even though they interpreted materially different versions of the Pennsylvania Constitution, then it should overrule both decisions. The notion that Article VII, section 1 requires ballots to be cast in person is—for the reasons given in Part I—refuted by the text, structure, and history of the Pennsylvania Constitution.

To be sure, this Court ordinarily adheres to its past decisions, to ensure "evenhanded, predictable, and consistent development of legal principles, [to] foster[] reliance on judicial decisions, and [to] contribute[] to the actual and perceived integrity of the judicial process." *Stilp v. Commonwealth*, 905 A.2d 918, 954 n.31, 588 Pa. 539, 599 n.31 (2006). But "[w]hile … *stare decisis* is important, it does not demand unseeing allegiance to things past." *Commonwealth v. Doughty*, 126 A.3d 951, 955, 633 Pa. 539, 546 (2015). In particular, this Court has explained that retaining an incorrect decision is "revolting if the grounds upon which it was laid down have vanished long since,

and the rule simply persists from blind imitation of the past." *Id.* Put another way, "[*s*]*tare decisis* is not an iron mold into which every utterance by a Court, regardless of circumstances, parties, economic barometer and sociological climate, must be poured." *Flagiello v. Pennsylvania Hospital*, 208 A.2d 193, 205, 417 Pa. 486, 511 (1965).

Whether a prior decision should be overruled depends on "a number of factors." *Commonwealth v. Alexander*, 243 A.3d 177, 196 (Pa. 2020). For example, *stare decisis* "is at its weakest" in cases that involve constitutional interpretation, because constitutional rulings "can be altered only by constitutional amendment or by overruling … prior decisions." *Id.* at 197. Other factors include the "quality of [the prior decision's] reasoning," *id.* at 196; whether the prior decision "is out of accord with modern conditions of life," *Ayala v. Philadelphia Board of Public Education*, 305 A.2d 877, 887-888, 453 Pa. 584, 605 (1973) (subsequent history omitted); and whether, when "tested by experience, [it] has been found to be inconsistent with the sense of justice or with the social welfare," *Griffith v. United Air Lines, Inc*., 203 A.2d 796, 806, 416 Pa. 1, 23 (1964). Finally, this Court has considered whether overruling a prior decision would upset legitimate reliance interests. *See Alexander*, 243 A.3d at 196 (citing *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2177-2178 (2019)).

Each of these factors counsels in favor of overruling *Chase* and *Lancaster City* if this Court deems them controlling here.

First, the reasoning in *Chase* and *Lancaster City* is unpersuasive in light of legal and societal developments over the past century. *Chase* rested almost entirely on the Court's assumptions about the constitutional drafters' purposes and on its own policy concerns about the lax form of absentee voting at issue there. In particular, *Chase* reasoned that "[t]he ballot cannot be sent by mail" because "we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage." 41 Pa. at 419. That reasoning is far from compelling today, when modern methods of mail voting and voter registration are safe and secure, *see supra* p.42. Likewise, although the Court purported to be "[c]onstruing the [constitution's] words according to their plain and literal import," *Chase*, 41 Pa. at 419, it read a phrase establishing a residency requirement to instead implicitly limit the General Assembly's inherent authority to determine the place and method of voting. The Court did so because it determined that interpretation would further the constitution's aim of circumscribing the vote to the "portion of the citizens who come up to the prescribed standards of qualification,"—i.e., "white freeman … [who] paid a state or county tax"—which the Court recognized to exclude "altogether … about four-fifths of the population." *Id.* at 418, 424, 426. It is perhaps an understatement that the Commonwealth's approach to election law today, which gives effect to

the constitutional guarantee of "free and equal" elections, Pa. Const. art. I, §5, would be entirely foreign to the *Chase* Court.[11]

As for *Lancaster City*, the Court's opinion merely adhered to *Chase* without meaningfully considering the plain meaning of "offer to vote" as it appeared in the then-current constitution, much less the ways in which the General Assembly and voters had revised the very language upon which *Chase* had relied. *See supra* pp.34-35; *Lancaster City*, 126 A. at 201, 291 Pa. at 136. Much of the Court's opinion consists of quotes from *Chase*, without analysis of that decision's continued force.

Second, *Chase* and *Lancaster City* conflict with later decisions of this Court, which is relevant because "[*s*]*tare decisis* cannot possibly be controlling when … the decision['s] … underpinnings [have been] eroded by subsequent decisions," *United States v. Gaudin*, 515 U.S. 506, 521 (1995); *see Alexander*, 243 A.3d at 196 (relying on the U.S. Supreme Court's application of *stare decisis* principles). In particular, this Court has made clear since *Chase* and *Lancaster*

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[11] *Compare Chase*, 41 Pa. at 427 ("Now the labour of the constitution has not been to restrict suffrage in any spirit of distrust of popular intelligence, but it has been to define it so exactly that it might be preserved from abuse and perversion" that would occur were suffrage extended to the four-fifths of the population who were not "white freemen"), *with Pennsylvania Democratic Party*, 238 A.3d at 356 (Pennsylvania Constitution "'mandates clearly and unambiguously, and in the broadest possible terms, that all elections conducted in this Commonwealth must be 'free and equal.' Stated another way, this clause was 'specifically intended to equalize the power of voters in our Commonwealth's election process'" (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804, 645 Pa. 1, 100 (2018))).

City that the General Assembly's authority is limited only if the constitution does so "expressly," *Stilp*, 974 A.2d at 494-495, 601 Pa. at 435. But both *Chase* and *Lancaster City* (if applied as the Commonwealth Court read them) interpreted "offer to vote" to limit the General Assembly's power to enact universal mail voting even though that language includes no such express limitation.

Third, factual developments have rendered *Chase* and *Lancaster City* "out of accord with modern conditions of life." *Ayala*, 305 A.2d at 887-888, 453 Pa. at 605; *see also* Gormley, *State Constitutional Law*, in *The Pennsylvania Constitution* 19, 24 (2d ed. 2020) ("Many areas of law which lawyers and judges take for granted today … are relatively modern inventions of jurisprudence that owe their origins to societal changes wrought in the twentieth century."). *Chase* was based on the Court's view that voting in person was necessary to prevent fraud because it allowed others at the polls to ensure a voter was who he said he was. *See* 41 Pa. at 419. That view is undeniably invalid today. The need for neighborly verification was obviated at the latest by the enactment of the 1937 Election Code, which requires voter registration, *see* Act of June 3, 1937, Pub. L. 1333, art. VII, §701, meaning that voters must provide proof of their identity before they even arrive at the polls. The Commonwealth also relies today on SURE's "database of all registered electors in this Commonwealth." 25 P.S. §1222(c)(1), (2). To register, voters submit their personal information—including name, address, party affiliation (if any), part of their Social Security number, and driver's license or state ID number—to the Department of State, and

that information is maintained in the SURE database. *See* Pa. Dep't of State, *Online Voter Registration*.[12] Voters also submit their signatures, which can be matched with the signatures on the outside of mail-in and absentee ballots before they are tabulated as an additional means of establishing identity. *See id.*; *In re November 3, 2020 General Election*, 240 A.3d at 596-597. Today's system is thus nothing like the one *Chase* and *Lancaster City* confronted. And more generally, after years of experience with voting by mail, both in Pennsylvania and around the country, it is clear that fraud in mail voting is exceedingly rare. *See, e.g.*, Barreto et al., *Vote By Mail: Debunking The Myth of Voter Fraud in Mail Ballots*, UCLA Latino Policy & Politics Initiative (Apr. 14, 2020);[13] Kamarck & Stenglein, *Low Rates of Fraud in Vote-By-Mail States Show the Benefits Outweigh the Risks*, Brookings Inst. (June 2, 2020);[14] Durkee, *'No Evidence' of Election Fraud in Battleground States, Statistical Analysis Finds As Trump Continues False Claims*, Forbes (Feb. 19, 2021).[15]

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[12] https://www.pavoterservices.pa.gov/Pages/VoterRegistrationApplication.aspx (visited Feb. 15, 2022).

[13] https://latino.ucla.edu/wp-content/uploads/2020/04/LPPI-VRP-Voter-Fraud-res.pdf.

[14] https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks.

[15] https://www.forbes.com/sites/alisondurkee/2021/02/19/no-evidence-of-election-fraud-in-battleground-states-statistical-analysis-finds-as-trump-continues-false-claims/?sh=4840f41c3315.

The Commonwealth Court nonetheless asserted that "[m]ail-in ballots present particular challenges with respect to 'safeguards of honest suffrage.'" McLinko Op. 12 n.12. Its only support for this statement was a decades-old case involving "massive absentee ballot fraud, deception, intimidation, harassment and forgery" of ballots, *Marks v. Stinson*, 19 F.3d 873, 887 (3d Cir. 1994). As the Third Circuit recently explained, the unique facts of that case "were a far cry from" a normal election, and do not establish that mail-in voting is inherently more susceptible to fraud than other forms of voting. *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 F. App'x 377, 388-389 (3d Cir. 2020).

Fourth, *Chase* and *Lancaster City* "no longer adequately serve the interests of justice," *Tincher v. Omega Flex, Inc*., 104 A.3d 328, 352, 628 Pa. 296, 336 (2014). Although *Chase* professed a desire to protect the state's electoral system—which as noted limited the franchise to "white freeman"—imposing an atextual bar on mail voting today would *weaken* that system, disenfranchising voters and ultimately making elected officials less responsive to the public. Pennsylvania has time and again moved to expand access to the ballot box, both through legislative enactments and constitutional amendments. *See supra* pp.5-6. Act 77 embodied one step on that path, and it has worked: The introduction of no-excuse mail voting led to the highest voter turnout in Commonwealth history, *see* Pa. Sec'y of State, Press Release, *Pennsylvania Announces Record*

Turnout For Nov. 3 Election (Nov. 17, 2020).[16] That is likely because the law made it easier for Pennsylvanians to vote and therefore allowed many voters to participate who (whether because of concern about COVID-19 or otherwise) could not or would not do so. Reversing that progress because of decisions 100 and 150 years old is the type of "injustice or injury" that "should not be continued" in the name of *stare decisis*, *Olin Mathieson Chemical Corp. v. White Cross Stores*, 199 A.2d 266, 268, 414 Pa. 95, 100 (1964).

Finally, *Chase* and *Lancaster City* have not engendered legitimate reliance interests. As an initial matter, while courts consider reliance interests in applying *stare decisis*, such interests are most acute in cases that "serve as a guide to lawful behavior," *Knick*, 139 S. Ct. at 2179, and less weighty in cases concerning matters of government structure and procedure. Moreover, to the extent appellees assert an interest in preventing mail voting because they believe that outcome would aid them politically, a desire to prevail in future elections is not the type of reliance courts consider in this context. *See South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080, 2097 (2018) (giving no weight to a party's desire to retain a competitive advantage in the future).

The true reliance interests here support overruling *Chase* and *Lancaster City*, if necessary. *See Alexander*, 243 A.3d at 200 (considering countervailing reliance interests). The General Assembly, political parties, and candidates have

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16 https://www.media.pa.gov/pages/state-details.aspx?newsid=434.

taken significant steps since the adoption of the current constitution in 1968 to expand the ability to vote by mail and, especially following the enactment of Act 77, to educate voters about mail-in voting. *See supra* pp.10-11. Millions of Pennsylvanians have voted by mail, and over a million have already applied to receive a mail-in ballot in upcoming elections. Those voters surely expect that they will not need to take further action in order to receive ballots this year. Put plainly, state officials, parties, candidates, and voters have all arranged their affairs with the expectation that mail-in voting will be available, as it has been for the past three elections in this Commonwealth. If Act 77 is invalidated, those efforts will have been wasted, voters may well be disenfranchised, and, at minimum, significant additional resources will have to be spent to minimize the serious confusion likely to ensue.

That confusion will be compounded by Act 77's non-severability provision, which requires that nearly the entire Act—which includes a multitude of changes to the Pennsylvania election code—fall if universal mail voting is deemed unconstitutional. *See supra* p.15. Striking down Act 77 would, for example, leave voters who receive a mail-in ballot with a host of questions, such as whether they can still vote on that ballot and return it in person, and (if so) the deadline for doing so. Such a decision would likewise call into question provisional ballots, *see supra* n.8, out-of-district polling places, and any number of election-related practices that Pennsylvanians have long taken for granted.

Overruling *Chase* and *Lancaster City*, if necessary, is warranted to avoid this substantial disruption to myriad facets of the Commonwealth's election system.

CONCLUSION

This Court should reverse the decision of the Commonwealth Court and award summary disposition in appellants' favor.

February 15, 2022

Respectfully submitted,

By: */s/ Seth P. Waxman*

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CERTIFICATE OF WORD COUNT

This brief contains 11,231 words, as counted by Microsoft Word's word-count tool.

/s/ Clifford B. Levine

CERTIFICATE OF SERVICE

On February 15, 2022, I caused the foregoing to be electronically filed and to be served via the Court's ECF system on counsel of record for each party listed on the docket.

/s/ Clifford B. Levine

EXHIBITS
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EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents	:	
Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook, Petitioners	:	
v.	:	No. 293 M.D. 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

O R D E R

AND NOW, this 28th day of January, 2022, it is ORDERED that the application for summary relief filed by Petitioner Doug McLinko in the above-

captioned matter is GRANTED. The application for summary relief filed by Respondent Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, is DENIED.

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

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

EXHIBIT B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents	:	
Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook, Petitioners	:	
v.	:	No. 293 M.D. 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

O R D E R

AND NOW, this 28th day of January, 2022, it is ORDERED that the application for summary relief filed by Petitioners Timothy R. Bonner and 13 other

members of the Pennsylvania House of Representatives in the above-captioned matter is GRANTED, in part. Act 77 is declared unconstitutional and void *ab initio*. Petitioners' request for injunctive relief, nominal damages and reasonable costs and expenses, including attorneys' fees, is DENIED.

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

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

EXHIBIT C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents	:	
Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook, Petitioners	:	
v.	:	No. 293 M.D. 2021 Argued: November 17, 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Background

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

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

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

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

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

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

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

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

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

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

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

II. Standards for Summary Relief

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

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

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

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

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

III. Article VII of the Pennsylvania Constitution

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

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

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

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

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

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

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

A. Article VII, Section 1

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

> **Qualifications of Electors**
>
> Every citizen 21 years of age, possessing the following qualifications, *shall be entitled to vote* at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State 90 days immediately preceding the election.
>
> 3. *He or she shall have resided in the election district where he or she shall offer to vote at least 60 days immediately preceding the election,*

> except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within 60 days preceding the election.

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

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

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

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

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

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

> To "offer to vote" by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. *The ballot cannot be sent by mail or express*, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil. *We cannot be persuaded that the constitution ever contemplated any such mode of voting,* and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. The constitution meant, rather, that the voter, *in propria persona*, should offer his vote in an appropriate election district, in order that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.

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

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

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

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

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

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

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

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

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

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

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

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

> Every male citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections, *subject however to such laws requiring and regulating the registration of electors as the General Assembly may enact[.]*

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

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

> However laudable the purpose of the [1923 Absentee Voting Act], it cannot be sustained. *If it is deemed necessary that such legislation be placed upon our statute books, then an amendment to the Constitution must be adopted permitting this to be done.*

Id. (emphasis added).

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

B. Article VII, Section 4

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

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

Method of Elections; Secrecy in Voting

> All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> All elections by the citizens shall be by ballot or *by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.*

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

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

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

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

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

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

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

The text, in full, reads as follows:

> **Election and Registration Laws**
>
> Section 6. *All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State*, except that laws regulating and requiring the registration of electors may be enacted to apply to cities only, provided that such laws be uniform for cities of the same class, *and except further, that the General Assembly shall, by general law, permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote, at all election or primaries*, in any county, city, borough, incorporated town or township of the Commonwealth, at the option of the electors of such county, city, borough, incorporated town or township, *without being obliged to require the use of such voting machines or mechanical devices in any other county, city, borough, incorporated town or township*, under such regulations with reference thereto as the General Assembly, may from time to time prescribe. The General Assembly may, from time to time, prescribe the number and

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

C. Article VII, Section 14

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

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

> duties of election officers in any political subdivision of the Commonwealth in which voting machines or other mechanical devices authorized by this section may be used.

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

> *religious holiday or who cannot vote because of election day duties*, in the case of a county employee, *may vote*, and for the return and canvass of their votes in the election district in which they respectively reside.
>
> (b) For purposes of this section, "municipality" means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.

PA. CONST. art. VII, §14 (emphasis added). Absentee voting has a long history.

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

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

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

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

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

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

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

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

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

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

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

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

> *The Legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who may,* on the occurrence of any election, *be unavoidably absent from the State or county of their residence* because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, *are unable to attend at their proper polling places because of illness or physical disability*, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

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

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

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[22] It stated:

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

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

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

> The Legislature *shall*, by general law, provide a manner in which, and the time and place at which, *qualified electors* who may, on the occurrence of any election, be absent from the State or county of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, *are unable to attend at their proper polling places* because of illness or physical disability, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. art. VII, §14 (1967) (emphasis added). Third, the Joint Resolution renumbered the provision that a qualified elector must "offer to vote" in the election district where he resides, from Article VIII to Article VII, where it remains. PA. CONST. art. VII, §1.

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

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

> *polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee,* may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

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

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

D. Analysis

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

Our Supreme Court has specifically held that the phrase "offer to vote" requires the physical presence of the elector, whose "ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicile." *Chase*, 41 Pa. at 419. There is no air in this construction of "offer to vote." There must be a constitutionally provided exception before the "offer to vote" requirement can be waived. Our Supreme Court has further directed that before legislation "be placed on our statute books" to allow qualified electors absent from their polling place on Election Day to vote by mail, "an amendment to the Constitution must be adopted permitting this to be done." *Lancaster City*, 126 A. at 201. This is our "fundamental law." *Id*.

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

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

when *Lancaster City* was decided. In fact, the Supreme Court quoted the entire text of what is now Article VII, Section 4 in its opinion and explained that "this provision as to secrecy was likely added in view of the suggestion of the use of voting machines, yet the direction that privacy be maintained is now part of our fundamental law." *Lancaster City*, 126 A. at 201. The Acting Secretary does not believe there is a "place requirement" in Article VII, Section 1 and, thus, she does not consider Article VII, Section 14 to be an exception to the in-person voting requirement. For the reasons that follow, we reject the Acting Secretary's construction of Article VII, Sections 4 and 14.

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

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

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

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

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

Election Instructions, 2 Pa. D. 299, 300 (1888), the court stated that "the offer to vote is an act wholly distinct from a qualification. Judge Woodward says: '*To offer to vote* by ballot is to present oneself with proper qualifications at the time and place appointed, and to make manual delivery of the ballot to the officers appointed to receive it.' *See Chase v. Miller*, 41 Pa. 419." (Emphasis in original.) In sum, the viability of *Chase* and *Lancaster City* has never flagged.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> because his duties, occupation or business required him to be absent; [or] (b) unable to attend the polling place because of illness or physical disability. The statutory law provides in detail the process of obtaining the counting of absentee ballots.
>
> An amendment to this section will be submitted to the electorate in November, 1985. It would add subsequently to "physical disability" the following: or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee.

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

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

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

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

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

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

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

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

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

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

A. Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Timeliness of McLinko's Petition for Review

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

1. Doctrine of Laches

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Section 13 of Act 77 Time Bar

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

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

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

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

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

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

> (2) *The Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1)* [including Article XIII-D of the Election Code that provides for mail-in voting]. The Supreme Court may take action it deems appropriate, consistent with the Supreme Court retaining jurisdiction over the matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief.

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

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

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

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

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

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[36] It states, in relevant part:

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

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

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

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

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

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

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

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

V. Conclusion

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

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

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

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

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

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

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

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

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

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 244 M.D. 2021
	:	
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania,	:	
	:	
Respondents	:	

Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 293 M.D. 2021
	:	Argued: November 17, 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State,	:	
	:	
Respondents	:	

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

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

I agree with the Majority's scholarly opinion with respect to the issues of Petitioners' standing, and the procedural objections to the amended petitions for review. However, I disagree with the Majority's conclusion that Sections 1 and 8 of the Act of October 31, 2019, P.L. 552, No. 77 (Act 77) violate article VII, section 1 and section 14 of the Pennsylvania Constitution[1] by adding "a qualified mail-in

[1] Pa. Const. art. VII, §1. Article VII, section 1 states:

> Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State ninety (90) days immediately preceding the election.
>
> 3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

In turn, article VII, section 14(a) provides, in relevant part:

> (a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any

(Footnote continued on next page…)

elector" as a class of elector who is eligible to vote as defined in Section 102(z.5)(3) and (z.6) of the Pennsylvania Election Code (Election Code),[2] and by adding Section 1301-D of Article XIII-D to the Election Code[3] permitting any qualified elector, who is not eligible to be a qualified absentee elector, to vote by an official no-excuse

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> election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

Pa. Const. art. VII, §14(a).

[2] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §2602(z.5)(3), (z.6). Section 102(z.5)(3) of the Election Code provides that "[t]he words 'proof of identification' shall mean: . . . For a qualified absentee elector under Section 1301 or a qualified mail-in elector under section 1301-D." In turn, Section 102(z.6) states: "The words "qualified mail-in elector" shall mean a qualified elector."

[3] 25 P.S. §3150.11. Section 1301-D, added by Act 77, provides:

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

In turn, Section 102(t) of the Election Code states:

> The words "qualified elector" shall mean any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election.

25 P.S. §2602(t).

mail-in ballot in any primary, general, or municipal election held in this Commonwealth.

To the contrary, article VII, section 4 of the Pennsylvania Constitution specifically empowers the General Assembly to provide for another means by which an elector may cast a ballot through legislation such as Act 77. Specifically, article VII, section 4 states: "All elections by the citizens shall be by ballot ***or by such other method as may be prescribed by law***: Provided, That secrecy in voting be preserved." Pa. Const. art. VII, §4 (emphasis added). Thus, the General Assembly is constitutionally empowered to enact Act 77 to provide for qualified and registered electors present in their municipality of residence on an election day to vote by no-excuse mail-in ballot. Specifically, I disagree with the Majority's faulty premise that the no-excuse mail-in ballot method of voting is merely a subspecies of voting by absentee ballot as provided in article VII, section 14, and that article VII, section 1 and article VII, section 14 have primacy over the provisions of article VII, section 4.

In reviewing the constitutionality of Act 77, it is important to remember:

> When faced with any constitutional challenge to legislation, we proceed to our task by presuming constitutionality in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths. *See* [Section 1922(3) of the Statutory Construction Act of 1972,] 1 Pa. C.S. §1922(3) ("In ascertaining the intention of the General Assembly in the enactment of a statute the . . . presumption [is] [t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth."); *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, [877 A.2d 383, 393 (Pa. 2005)] (hereinafter, "*PAGE*"). Indeed, a

> legislative enactment will not be deemed unconstitutional unless it clearly, palpably, and plainly violates the Constitution. *PAGE*, 877 A.2d at 393. "Any doubts are to be resolved in favor of a finding of constitutionality." *Payne v. Dep*[*artment*] *of Corrections*, [871 A.2d 795, 800 (Pa. 2005)]. Accordingly, a party challenging the constitutionality of a statute bears a very heavy burden of persuasion. *See Commonwealth v. Barud*, [681 A.2d 162, 165 (Pa. 1996)].

Stilp v. Commonwealth, 905 A.2d 918, 938-39 (Pa. 2006). Additionally, "'because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible.' Thus, where two provisions of our Constitution relate to the same subject matter, they are to be read in *pari materia*, and the meaning of a particular word cannot be understood outside the context of the section in which it is used." *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (citation omitted).

Moreover, the Supreme Court's opinion in *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924) (*Lancaster City*), does not compel a different conclusion. In *Lancaster City*, the electors of the Fifth Ward in the City of Lancaster voted for a select councilman. The returns of the local board of elections showed that the Democratic and coalition candidate had received 869 of the votes, while the Republican candidate received 861. When the additional votes by absentee ballot, provided for by statute,[4] were counted, the Democratic candidate received an additional 3 votes, while the Republican candidate received an additional 20 votes thereby apparently winning the election. The statute expanding the scope of the constitutional provision permitting absentee voting was subsequently challenged as unconstitutional. In affirming a lower court's determination that the

[4] Act of May 22, 1923, P.L. 309. At that time, the constitutional provision permitting an elector to vote by absentee ballot, the former article VIII, section 6, was limited to electors who were outside their district of residence due to military service. *See In re Contested Election*, 126 A. at 200.

statute was, in fact, an unconstitutional statutory extension of the constitutional absentee voting provision, the Supreme Court stated:

> It will be noticed that the 'offer to vote' [in the present article VII, section 1] must still be in the district where the elector resides, the effect of which requirement is so ably discussed by Justice Woodward in *Chase v. Miller*, [41 Pa. 403 (1862)]. Certain alterations are made so that absent voting in the case of soldiers is permissible. This is in itself significant of the fact that this privilege was to be extended to such only.
>
> 'In construing particular clauses of the Constitution, it is but reasonable to assume that in inserting such provisions the convention representing the people had before it similar provisions in earlier Constitutions, not only in our own state but in other states which it used as a guide, and, in adding to, or subtracting from, the language of such other Constitutions the change was made deliberately and was not merely accidental.' *Com*[*monwealth*] *v. Snyder*, [104 A. 494, 495 (Pa. 1918)].
>
> The Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed. *McCafferty v. Guyer*, 59 Pa. 109 [(1868)]. The latter has determined those who, absent from the district, may vote other than by personal presentation of the ballot, but those so permitted are specifically named in [the former] section 6 of article 8. The old principle that the expression of an intent to include one class excludes another has full application here. White, in his work on the Constitution[,] succinctly sums up the proposition controlling this case when he says:
>
> > 'The residence required by the Constitution must be within the election district where the elector attempts to vote; hence a law giving to voters the right to cast their ballots at some place other than the election district in which they reside [is] unconstitutional.'

> [Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 360 (1907).]
>
> Other objections to the validity of the act now under consideration have been raised, but any detailed discussion is unnecessary. It may well be argued that the scheme of procedure fixed by the act of 1923, for the receipt, recording, and counting of the votes of those absent, who mail their respective ballots, would end in the disclosure of the voter's intention prohibited by the amendment [in the present article VII, section 4] of the Constitution, undoubtedly the result if but one vote so returned for a single district. Though this provision as to secrecy was likely added in view of the suggestion of the use of voting machines, yet the direction that privacy be maintained is now part of our fundamental law.
>
> However laudable the purpose of the act of 1923, it cannot be sustained. If it is deemed necessary that such legislation be placed upon our statute books, then an amendment to the Constitution must be adopted permitting this to be done. For the reasons stated, the only assignment of error is overruled.

Lancaster City, 126 A. at 201.

Thus, *Lancaster City* merely stands for the proposition that the General Assembly may not by statute extend the scope of a method of voting already specifically provided for in article VII, section 14 of the Constitution. The Supreme Court's holding in that case in no way limits the authority conferred upon the General Assembly by article VII, section 4 to provide for a new and different method of voting such as the no-excuse mail-in ballot provisions of Act 77.

The Supreme Court's "suggested" limitation of article VII, section 4 in *Lancaster City* to the use of voting machines, and the Majority's assertion of the same herein, is undermined by the subsequent amendment of the present article VII, section 6 of our Constitution in 1928. As amended, article VII, section 6 now reads:

> All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State, except that laws regulating and requiring the registration of electors may be enacted to apply to cities only, provided that such laws be uniform for cities of the same class, and except further, that ***the General Assembly shall, by general law, permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote, at all elections or primaries, in any county, city, borough, incorporated town or township of the Commonwealth, at the option of the electors of such county, city, borough, incorporated town or township***, without being obliged to require the use of such voting machines or mechanical devices in any other county, city, borough, incorporated town or township, under such regulations with reference thereto as the General Assembly may from time to time prescribe. The General Assembly may, from time to time, prescribe the number and duties of election officers in any political subdivision of the Commonwealth in which voting machines or other mechanical devices authorized by this section may be used.

Pa. Const. art. VII, §6 (emphasis added).[5]

Thus, if the provisions of article VII, section 4 are limited to the use of voting machines, as the Majority suggests, there was absolutely no need to amend article VII, section 6 to provide for the use of such machines at the option of local

[5] As this Court has explained:

> Because the Pennsylvania Constitution reserves the power to provide, by general law, the use and choice of voting machines to the General Assembly, and the General Assembly has enacted [Section 302 of] the Election Code[, 25 P.S. §2642,] which delegates said power to the County's Board of Elections (Elections Board), the Election Code is the final authority on voting machines in this Commonwealth. Thus, the Elections Board has the exclusive control over election equipment.

See also In re Agenda Initiative to Place on the Agenda of a Regular Meeting of County Council, 206 A.3d 617, 624 (Pa. Cmwlth. 2019).

municipalities. Moreover, the Majority's limited construction of article VII, section 4 renders the phrase "or by such other method as may be prescribed by law" meaningless and mere surplusage in light of the amendment to article VII, section 6 to specifically include the use of voting machines as a new and different method of casting a ballot. Thus, contrary to the Supreme Court's observation in *Lancaster City*, and the Majority's conclusion herein, article VII, section 4 may not be construed in such a limited manner to give effect to all of its provisions.

Rather, sections 1, 4, and 14 of article VII must all be read together and given the same prominence and effectiveness. When construed in such a manner, the plain language of article VII, section 4 specifically empowers the General Assembly to provide a distinct method of casting a ballot for electors who are present in their municipality on a primary, general, or municipal election day by permitting the use of no-excuse mail-in ballots. This method is distinct from an elector's appearance at his or her district of residence to cast a ballot as provided in article VII, section 1, either by paper ballot or by the use of a machine pursuant to article VII, section 6, or the use of an absentee ballot by an elector who is absent from his or her municipality on the day of a primary, general, or municipal election as provided in article VII, section 14.

Finally, although not addressed by the Majority, Petitioners note that Section 11 of Act 77 contains a "poison pill" that would invalidate all of Act 77's provisions if this Court determines that any of its provisions are invalid. *See* Section 102 of the Election Code Note, 25 P.S. §2602 Note ("Section 11 of [Act 77] provides that 'Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. ***If any provision of this act or its application to any person or circumstance is held***

invalid, the remaining provisions or applications of this act are void.'") (emphasis added). As the Supreme Court has observed:

> [A]s a general matter, nonseverability provisions are constitutionally proper. There may be reasons why the provisions of a particular statute essentially inter-relate, but in ways which are not apparent from a consideration of the bare language of the statute as governed by the settled severance standard set forth in Section 1925 of the Statutory Construction Act[, 1 Pa. C.S. §1925]. In such an instance, the General Assembly may determine that it is necessary to make clear that a taint in any part of the statute ruins the whole.

Stilp, 905 A.2d at 978. Thus, if the no-excuse mail-in provisions of Act 77 are found to be unconstitutional, all of Act 77's provisions are void.

Nevertheless, as outlined above, article VII, section 4 by its plain language specifically empowers the General Assembly to provide for this new method of casting a no-excuse mail-in ballot, and Petitioners' claims regarding the constitutionality of Act 77 are without merit. Accordingly, unlike the Majority, I would grant Respondents' Application for Summary Relief with respect to the substantive claims of Act 77's constitutionality, and dismiss Petitioners' petitions for review with prejudice.

MICHAEL H. WOJCIK, Judge

Judge Ceisler joins in this Concurring/Dissenting Opinion.

EXHIBIT D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents	:	
Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook, Petitioners	:	
v.	:	No. 293 M.D. 2021 Argued: November 17, 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 244 M.D. 2021
	:	
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania,	:	
	:	
Respondents	:	

Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 293 M.D. 2021
	:	Argued: November 17, 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State,	:	
	:	
Respondents	:	

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

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

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

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

MICHAEL H. WOJCIK, Judge

Judge Ceisler joins in this Concurring/Dissenting Opinion.