Received 3/2/2022 10:20:48 PM Supreme Court Middle District

Filed 3/2/2022 10:20:00 PM Supreme Court Middle District
14 MAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 14 MAP 2022

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

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

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

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INTRODUCTION

Despite submitting over 150 pages of briefing, appellees never engage with two foundational principles governing constitutional challenges to legislation enacted by the General Assembly—principles that require reversal of the decision below.

First, the Pennsylvania Constitution "must be considered as an integrated whole." *Zauflik v. Pennsbury School District*, 629 Pa. 1, 53, 104 A.3d 1096, 1126 (2014). Appellants' position does so; appellees' does not. Instead, appellees cling to one phrase in Article VII, section 1 ("offer to vote"), failing to account for the fact that the whole of Article VII is materially different than it was at the time of *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 126 A. 199 (1924). Indeed, *Chase*'s construction of "offer to vote" in the 1838 constitution cannot be reconciled with the *current* constitution, which expressly authorizes "other method[s]" of voting than by in-person ballot. *Chase* and *Lancaster City* clearly were not based on the current constitution, and thus are either inapplicable or should be overruled.

Second, because "the powers not expressly withheld from the General Assembly inhere in it," statutes enjoy "a strong presumption of constitutionality," *Stilp v. Commonwealth*, 601 Pa. 429, 436, 974 A.2d 491, 494-495 (2009), so appellees have a "high burden" to show beyond "any doubt" that Act 77 "clearly, palpably, and plainly violates the Constitution," *Zauflik*, 629 Pa. at 13-14, 104 A.3d at 1103; *see also Harrisburg School District v. Zogby*, 574 Pa. 121, 135,

828 A.2d 1079, 1087 (2003). Only Bonner even *acknowledges* this burden, yet he offers no argument it is met here. Appellees instead imply limitations on the legislature's broad authority through an atextual construction of Article VII, sections 1 and 14. But an implied limitation is not "express," *Stilp*, 601 Pa. at 435, 974 A.2d at 495, and does not give rise to a "clear, palpable, and plain" constitutional violation, *Zauflik*, 629 Pa. at 14, 104 A.3d at 1103.

Nor are these the only points appellees fail to address. For example, appellees nowhere acknowledge that Pennsylvania's modern election system is far more integrated and secure than what existed in the nineteenth and early twentieth centuries. They likewise say nothing about the fact that, in enacting Act 77, a bipartisan supermajority of 138 House members and 35 Senate members concluded that the Pennsylvania Constitution empowered the legislature to adopt mail-in voting by statute. This overwhelming support by "a co-equal branch of government" deserves "the judiciary's respect." *Commonwealth v. Stern*, 549 Pa. 505, 512, 701 A.2d 568, 571 (1997); *see also Stilp v. Commonwealth*, 588 Pa. 539, 574, 905 A.2d 918, 938 (2006) ("there exists a judicial presumption that our sister branches take seriously their constitutional oaths"). Finally, appellees never mention this Court's extensive review of Act 77 during the 2020 election, including *In re November 3, 2020 General Election*, ___ Pa. ___, 240 A.3d 591 (2020), which reviewed with specificity the various changes to the Election Code, and in *Pennsylvania Democratic Party v. Boockvar*, ___ Pa. ___, 238 A.3d 345, 379 (2020), which treated mail-in voting as subject to the requirement in Article

VII, section 4 that "secrecy be maintained"—a ruling that would make no sense if, as appellees insist, mail voting is not a permissible "method of voting" under section 4.

Appellees' silence on so many key points speaks volumes. And as explained below, the arguments they do offer provide no sound basis to affirm.

ARGUMENT

I. ARTICLE VII, SECTION 1 GOVERNS WHO MAY VOTE, NOT HOW

A. Text

As appellant-intervenors the Democratic National Committee and the Pennsylvania Democratic Party ("DNC") explained in their opening brief (at 19), nothing in the section 1 phrase on which the Commonwealth Court relied—"offer to vote"—suggests an in-person voting requirement. That is true whether the phrase is viewed in isolation or (as it should be) in the context of section 1 (and indeed Article VII) as a whole.

McLinko contends (Br.11), however, that "'offer' … connote[s] in-person behavior." Yet in the same breath, he concedes that "offer[s]" are routinely transmitted "through the mail." *Id.* And as the Commonwealth's opening brief notes (at 51-53), numerous other state supreme courts have declined to interpret the same "offer to vote" phrase in their states' constitutions as requiring in-person voting. McLinko thus pivots from section 1's text, arguing (Br.11) that "offer to vote" is synonymous with "present [a vote] for acceptance." This Court has consistently declined to "substitute for words used in the constitution" with "other

words having a different meaning." *Commonwealth v. Truesdale*, 449 Pa. 325, 332, 296 A.2d 829, 833 (1972). The same approach is warranted here.

Regardless, swapping "present" for "offer" in section 1 would not yield appellees' preferred meaning, because McLinko provides no reason why the verb "present" necessarily implies the physical appearance of a voter. To "present" can simply mean "to give or bestow formally," *Merriam-Webster Dictionary Online*.[1] For example, when this Court stated that "the legislature presented a bill to the Governor," *Scarnati v. Wolf*, 643 Pa. 474, 495, 173 A.3d 1110, 1122 (2017), it surely did not mean that the entire legislature personally appeared before the governor, only that the actual bill was put before him. Likewise, voters may "present"—or, more pertinently, "offer"—their votes without appearing in person.

McLinko's reading of "offer" also cannot be squared with how that word is used elsewhere in Article VII. For example, section 7 provides that anyone who "offer[s] to give" a bribe to an elector forfeits the right to vote in the tainted election. Appellees' reading would limit that constitutional protection of the integrity of elections to only those bribes that are "offered" in person. This Court has never so narrowed the reach of that provision, and the reasons against doing so are obvious.

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[1] *See* https://www.merriam-webster.com/dictionary/present#:~:text=transitive%20verb,of%20superior%20rank%20or%20status (visited Mar. 2, 2022).

In any event, as the DNC explained (Br.19), "offer to vote" must be read in context. And section 1 does not state simply that Pennsylvanians must "offer to vote" in order to be qualified electors. It provides that a voter "shall have resided in the election district where he or she shall offer to vote." The pivotal sentence thus pertains to voter residency—as one would expect in a section titled "Qualifications of electors"—not to how ballots must be cast. By instead interpreting "offer to vote" as a sweeping limitation on the General Assembly's authority over *how* voting occurs (rather than by *whom*), appellees adopt a "subtle and forced construction[]" that the plain text simply cannot bear, *Greene County v. Center Township*, 305 Pa. 79, 107, 157 A. 777, 786 (1931).

Bonner responds (Br.34 & n.6) that section 1 addresses not "only who may vote" but also "how they may vote," because (he says) "every definition of the qualifications of voters refers to what a person has done as well as to what he or she is." That is wrong. For example, "be[ing] a citizen of the United States," Pa. Const. art. VII, §1, is not necessarily (or even typically) something a person "has done." Moreover, Bonner's only cited authority is an 1867 Missouri Supreme Court decision, *Blair v. Ridgely*, 41 Mo. 63, 163 (1867). But *Blair* had nothing to do with the issues here. And when the Missouri Supreme Court *did* consider the section of the Missouri Constitution equivalent to Pennsylvania's Article VII, section 1, it deemed it "clear" that that section, which likewise uses the phrase "offer to vote," "does not … prescribe the manner in which a choice shall be

expressed, or a vote cast, … but merely the qualifications of the voters," *Straughan v. Meyers*, 187 S.W. 1159, 1162 (Mo. 1916).[2]

Finally, Bonner contends (Br.34) that section 1 "clearly addresses not only who may vote but also where a voter may vote." That is true but it does not help appellees. As the DNC explained (Br.19), there is no reason (textual or otherwise) why a voter cannot "offer to vote" in her district by requesting a ballot from her local election official or by delivering the completed ballot to local election officials by mail. Appellees offer no direct response to that point.

B. *Chase* And *Lancaster City* Do Not Control

As the DNC explained (Br.31-37), *Chase* and *Lancaster City* do not control here because they interpreted materially different versions of the Pennsylvania Constitution. Appellees' responses lack merit.

First, appellees suggest (*e.g.*, McLinko Br.12) that the age of *Chase* and *Lancaster City* is a virtue because they were closer in time to the ratification of the 1838 constitution. But this case concerns the proper interpretation of the *current* constitution, which was ratified in 1968—decades after *Lancaster City* and a century after *Chase*. The current constitution is materially different from the versions *Chase* and *Lancaster City* construed. *See* DNC Br.31-37. And as a review of *Chase* reveals, a foremost concern of the Court there was the implementation of then-recently adopted limits on *who* could vote (i.e., only

[2] It bears mention that what Bonner cites from *Blair* is the summary of one party's position in the case, not the court's decision.

white, land-owning males)—limits that have long been stricken from the Pennsylvania Constitution. *Chase* thus did not interpret the phrase "offer to vote" in a vacuum; rather, it interpreted that phrase with an eye toward enforcing the Commonwealth's then-narrow suffrage requirements and in the context of a constitution that contemplated neither voter-registration nor legislative flexibility as to the method of voting.

The Committees' related argument (Br.25)—that "none of the various amendments to Article VII, Section 1 has removed ['offer to vote'] or provided additional context so as to render [*Chase* and *Lancaster City*] inapplicable"—is demonstrably false. An amendment to section 1 *has* provided such additional context: the amendment providing for voter-registration laws to replace the in-person-appearance method that *Chase* deemed essential to election security. *See* DNC Br.6, 27-28 (discussing 1901 Pa. Laws 881-882). Moreover, this argument fails to account for constitutional changes *outside* section 1, including the addition of both section 4, which expressly gives the legislature the power to authorize voting by methods other than in-person ballot and section 6, which makes clear that section 4's reach goes beyond voting machines. *See id.* at 21-24; *infra* p.11.

Fundamentally, appellees fail to contend with the changes to Pennsylvania's voting system in the decades since *Chase* and *Lancaster City*. In particular, they do not address either the fact that those cases' reasoning turned on the need for voters to verify their identity and qualifications in person, or the

fact that Pennsylvania has since adopted a comprehensive, secure, and effective voter-registration system that displaced in-person recognition by neighbors. *See* DNC Br.33-35. Put simply, neither *Chase* nor *Lancaster City* addressed anything like the voting system in place in Pennsylvania today.

II. ARTICLE VII, SECTION 4 GRANTS THE GENERAL ASSEMBLY BROAD AUTHORITY TO DETERMINE HOW VOTES ARE CAST

Act 77 fits comfortably within section 4's broad grant of power to the legislature to determine the "method" of voting. Indeed, this Court has long recognized that "[i]f any limitations are to be implied" on an explicit grant of authority such as section 4, such limitations "must arise from clear necessity, as absolute, as peremptory, and as unavoidable as the constitutional mandate itself." *Appeal of Carlisle & Mechanicsburg Street Railway Co.*, 245 Pa. 561, 565-566, 91 A. 959, 960 (1914). Appellees' five basic arguments for why this high standard is met here are unpersuasive.

First, McLinko contends (Br.38) that section 4's "plain text" refers to the "medium" Pennsylvanians can use to vote (i.e., paper ballot versus voting machine), rather than how they vote. But section 4 does not use "medium" and McLinko cites no decision or dictionary suggesting that the language it does use ("method") should be read so narrowly. To the contrary, as the DNC explained

(Br.22), contemporary dictionaries defined "method" broadly. McLinko has no answer.[3]

Second, appellees argue that appellants' reading of section 4 would render superfluous the amendments to section 14 that added classes of Pennsylvanians eligible to vote absentee. McLinko Br.38-39, 42-43; Bonner Br.52-53. That is certainly wrong as to the current constitution, where each such amendment ensures that the General Assembly cannot *revoke* the right of those groups to cast absentee ballots without going through the constitutional-amendment process. *See infra* p.13.

In any event, the legislature frequently inserts language to make clear that certain actions are permitted even though the actions were not forbidden in the first place. Indeed, there are "many examples of Congress legislating in that hyper-vigilant way, to remove any doubt as to things that are not particularly doubtful in the first instance." *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1074 (2018).

Third, McLinko invokes (Br.39-40) the "specific controls the general" canon, arguing that because section 14 provides one alternative to casting an in-person ballot, it precludes the General Assembly from enacting others under

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[3] Again citing no authority, McLinko suggests (Br.38) that appellants' reading of section 4 would permit the General Assembly to "alter the years in which elections should be held for various offices." *Accord id.* at 40 n.10. Section 4, however, makes clear that "other method" means only an alternative to an in-person ballot. The *timing* of an election is distinct from whether votes are cast in person or by mail.

section 4. But McLinko's own authority establishes that the canon applies "only when [two] provisions … are irreconcilable." *In re Borough of Downingtown*, 639 Pa. 673, 716-717, 161 A.3d 844, 871 (2017). And as the DNC explained (Br.25-26), sections 4 and 14 do not conflict because the Pennsylvania Constitution's mandate that the legislature extend absentee voting to *certain* voters places no limit on the legislative power to determine the method of voting for others. *Accord* McLinko Dissent 7, *quoted in* DNC Br.37. Once again, appellees have no response.[4]

Fourth, appellees argue that *Lancaster City* interpreted section 4 narrowly. McLinko Br.43; Bonner Br.42-43; Committees Br.27. As the DNC explained (Br.35), however, *Lancaster City* merely quoted section 4 without grappling with the fact that it had been amended to modify language that was central to *Chase*'s reasoning. Bonner relatedly argues (Br.42-43) that Act 77 was enacted *only* under the "by ballot" language of section 4—i.e., the language that was specifically interpreted in *Chase* to require in-person voting, 41 Pa. at 419. But Bonner cites no authority for this point. And logically, if *Chase* (and *Lancaster City*) remain good law, Act 77 must have been enacted under the "other method" language.

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[4] McLinko relatedly argues (Br.40) that if section 14 is a floor on who can vote by mail, section 1 could likewise be read to give the General Assembly authority to limit Pennsylvanians' right to vote. But section 1 already provides that the right to vote is subject "to such laws requiring and regulating the registration of electors as the General Assembly may enact."

Fifth, McLinko contends (Br.43-45) that Article VII, section 6's explicit reference to voting machines does not refute the Commonwealth Court's conclusion that the "other method" language of section 4 implicitly refers only to voting machines. To the contrary, section 6's mention of voting machines shows that if Pennsylvanians meant to limit the reference to "other methods" in section 4 to voting machines, they knew how to do so expressly. This "use of 'explicit language' in [section 6] 'cautions against inferring' the same limitation in" section 4. *State Farm Fire & Casualty Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 442-443 (2016); *see also Matter of Employees of Student Services, Inc.*, 495 Pa. 42, 52-53, 432 A.2d 189, 195 (1981) (refusing to infer an implicit limitation that was made explicit elsewhere because "each word … is to be given meaning").

III. ARTICLE VII, SECTION 14 CONFIRMS THAT IN-PERSON VOTING IS NOT CONSTITUTIONALLY REQUIRED

A. Bonner's Arguments

The DNC's leading argument regarding section 14 (Br.25) was that "[t]he Commonwealth Court's decision places sections 1 and 14 in irreconcilable conflict," rendering the latter "a nullity because a person could become a 'qualified elector' (and thus entitled to vote absentee) only by first voting in person." Appellees' only response (Bonner Br.53-54) rests on a naked rewriting of section 14.

Specifically, Bonner claims (Br.53) that "§ 14 requires the Legislature to provide … a 'place' '*outside the municipality of their residence*' where 'qualified electors' meeting the criteria of that section 'may vote'" (emphasis added). That is important, he asserts, because "§ 14 would not need to … require the Legislature to specify other places to vote if … § 1 did not require voters to otherwise 'offer to vote' at the normal places appointed." *Id.* at 53-54. As a threshold matter, however, this atextual argument would invalidate the longstanding practice, which predated Act 77 by decades, of allowing absentee voters to request and cast their ballots in person at their local clerk's office.

More importantly, the phrase "outside the municipality of their residence" is nowhere in section 14. The section instead provides that people "*absent* from the municipality of their residence" on election day are constitutionally entitled to vote absentee (emphasis added). It imposes no limit on the "place" that the legislature must provide for absentee voting. That fully defeats Bonner's argument.[5]

Bonner also makes several abbreviated arguments regarding the 1967 change in section 14 from "may" to "shall," i.e., the change from *allowing* the

[5] Bonner's argument would fail even if section 14's mandate that the legislature specify the "place" for absentee voting *did* supersede section 1's supposed requirement for in-person voting. Section 14 states that "[t]he legislature shall … provide a … place at which[] *qualified electors* … may vote" (emphasis added). Even under Bonner's rewriting of section 14, then, section 1 would render section 14 a nullity, because there would never be a "qualified elector" who could vote absentee. *See* DNC Br.24.

legislature to provide for absentee voting by the enumerated groups to *requiring* that it do so. First, he contends (Br.48) that appellants "cite no interpretive principle for their argument" that the change shows that section 14 sets a constitutional floor on absentee voting rather than a ceiling. To the contrary, the DNC cited (Br.26) not only precedent from this Court and others, but also the most fundamental canon of all: Language should be given its "plain meaning" (*id.* at 30-31). Second, Bonner asserts (Br.48) that whereas Article VII, section 1 expressly gives the General Assembly power to make "laws" that modify that section's scope, section 14 has no such carve-out. But appellants do not urge any carve-out from section 14's mandate that certain groups be allowed to vote absentee; appellants argue that section 14 nowhere limits the legislature's power to extend mail voting to others whom the section does not mention. And third, Bonner says (Br.48) that "[a]mending Article VII, §14 from permissive to mandatory would certainly be a strange way of attempting to change the meaning of 'offer to vote' in Article VII, § 1." That too misstates appellants' argument; appellants argue not that section 14 "change[d]" section 1, but that *Chase* and *Lancaster City* were not interpreting the current constitution, with the host of changes to Article VII that have been adopted in the intervening 100 years.

Bonner next contends (Br.49-50) that under appellants' position, several amendments to the pre-1968 version of the Pennsylvania Constitution, each of which provided that the legislature could (i.e., "may") allow a specified category of Pennsylvanian to vote absentee, "served no purpose" because section 4 already

conferred that authority. As discussed, a belt-and-suspenders approach would be entirely unremarkable and would provide no support for the Commonwealth Court's decision. *See supra* p.9. More fundamentally, the question in this appeal is not the meaning or effect of provisions of any prior constitution but the proper interpretation of the current constitution. Appellants' position—unlike appellees', *see supra* pp.11-12 & n.5—does not render any provision of the current constitution superfluous.[6]

Finally, Bonner cites (Br.51) the view expressed in 1983 by one member of the legislature that the right to vote by mail could be expanded only by constitutional amendment. As the U.S. Supreme Court has repeatedly explained, however, "statements by individual legislators rank among the least illuminating forms of legislative history." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1661 (2017). Far more significant than what a single legislator said is what the legislature as a whole has done—which is to expand *by statute* the right to vote by mail, DNC Br.29; *see also supra* p.2.

B. McLinko's Arguments

McLinko's arguments regarding section 14 largely repeat the Commonwealth Court's reasoning, which is flawed for the reasons explained in DNC's opening brief (at 24-27). For example, McLinko reiterates (Br.26) the

[6] Bonner includes in his superfluity argument (Br.50-52) two amendments adopted *after* the 1967 change from "may" to "shall." Those are manifestly not superfluous under appellants' position. *See supra* p.9.

court's claim that "Section 14 can only be understood as an exception to the [in-person-voting] rule established in … Section 1." But as the DNC explained (Br.25), section 14 is not an exception. When Pennsylvanians want their constitution to create an exception, they do so explicitly. Almost a dozen times, in fact, the constitution states that a provision applies "[n]otwithstanding" one or more other provisions. *E.g.*, Pa. Const. art. III, §31; *id.* art. V, §10(c). That no similar language appears in section 14 confirms it is not an exception but rather a freestanding requirement that the legislature provide for absentee voting by the enumerated groups.

McLinko likewise echoes the Commonwealth Court in asserting (Br.26-27) that "Section 14's use of phrases such as … 'are unable to attend at their proper polling places,' … and 'cannot vote' demonstrates that § 14 presumes in-person voting to be the rule." *Accord id.* at 31 ("Section 14 clearly references a general requirement to vote in-person[.]"). That does not follow. Those phrases simply describe the circumstances in which a constitutionally guaranteed right to vote absentee exists—and it is entirely natural that those circumstances are described with reference to in-person voting, because those who enjoy the constitutional right to vote absentee are people who cannot vote in person. At most, section 14's phrases show not that in-person voting is "the rule," *id.* at 27, but that at the time those phrases were adopted, in-person voting was the norm, i.e., the most common method of voting. That does nothing to show that universal mail voting is constitutionally proscribed.

McLinko next makes (Br.27-28) a historical argument. Specifically, he says that after *Chase*, the constitution was amended not to allow universal mail voting but to allow such voting only by those in active military service. And "[t]hereafter," McLinko adds (Br.28-29), "*every time* the people desired to add categories of citizens permitted to vote absentee, they did so by amending the Pennsylvania Constitution" (emphasis added). McLinko's recap, however, conspicuously skips the 1901 amendments that authorized the legislature to permit voting either by ballot or by "other method[s]." 1901 Pa. Laws 882. Those amendments, as discussed herein and in the DNC's opening brief, *did* "give the General Assembly the power to [allow] mail-in voting" for everyone, McLinko Br.27.

Moreover, it is simply not true that "every time" absentee voting was expanded after 1874, it was done by constitutional amendment, McLinko Br.28. Indeed, McLinko admits in a footnote that his unqualified assertion is incorrect, acknowledging the enactment of statutes "giving the right to vote by mail to" several groups, *id.* at 29 n.9. Those statutes further belie any notion that history supports the decision below.

McLinko's footnoted attempt to wave away the statutes expanding the right to vote by mail is unavailing. He asserts (Br.30 n.9) that those statutes are not "before the court," that their constitutionality has not been definitively resolved, and that they "present[] a more complicated legal question than does Act 77." *Accord* Bonner Br.47-48. None of that addresses the key point: The legislature

acted in a way consistent with appellants' reading of the 1967 amendment to section 14 (i.e., the amendment changing "may" to "shall"), treating it as creating a constitutional floor on who must be permitted to vote absentee rather than a ceiling on who may be permitted to do so.

McLinko claims (Br.32) that there are "four problems" with that reading. None actually exists.

McLinko first argues (Br.32-33) that appellants' reading "is contrary to the plain meaning" of section 14, because "'shall' means only that the General Assembly [had] … to provide for absentee voting for § 14's four listed categories of voters." Appellants agree with that description—but it is wholly contrary to the Commonwealth Court's claim (which no appellee defends) that sometimes "shall" does *not* mean "shall," *see* McLinko Op.33; DNC Br.30-31. In any event, McLinko mischaracterizes (Br.33) appellants' argument as being that section 14 "abrogate[d] the in-person-voting requirement." The DNC argues instead (Br.25) that section 14 is one of many indications that the Commonwealth Court's decision is wrong, because that decision places sections 1 and 14 in irreconcilable conflict. To *that* key argument, McLinko offers no response.

McLinko's second and third arguments—that it is *appellants'* position that puts sections and 1 and 14 in conflict and that it would make little sense for Pennsylvanians to alter section 1's meaning by adding section 14 (Br.33-34)—both rest on the flawed premise that "[u]nder Appellants' interpretation, § 14 would create a broad legislative authority to permit mail-in voting," *id.* at 34;

accord id. at 41-42 ("Appellants ask the Court to read into § 14 language that is not there[.]"); *id.* at 30 (wrongly claiming that appellants advocate "repeal[] by implication" of section 1). The DNC does not argue that section 14 is the source of the legislature's power to enact Act 77; it most certainly is not. That power is instead granted explicitly by section 4, and in any event is part of the legislature's general legislative power, which is plenary save as restricted by a constitutional provision. *See* DNC Br.1.

In making his third point (i.e., that the constitutional drafters would not have amended section 1 by enacting section 14), McLinko discusses at length (Br.34-37) two "re-enactment canons." Neither helps him. The first iteration (Br.35) provides that "when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language." That has no relevance here because section 14 uses none of the same key "language" as section 1. The second iteration (Br.36) provides that when a statute is re-enacted without any change to a provision that courts have interpreted, the legislature is presumed to adopt that interpretation. But McLinko cites no case applying the re-enactment canon in the constitutional context. That is understandable, for as noted, the constitution "must be considered as an integrated whole," *Zauflik*, 629 Pa. at 53, 104 A.3d at 1126. When a constitutional article is substantially rewritten, courts must necessarily reconcile the new material with the old, so as to interpret the entire article coherently.

Fourth, McLinko repeats (Br.37) the Commonwealth Court's claim that if section 14 were merely a floor, a 1985 constitutional amendment expanding the constitutional right to vote absentee would have been unnecessary. The DNC has already explained (Br.26) why that claim fails, and McLinko—like Bonner, who invokes the same amendment (Br.50-51)—does not even acknowledge that explanation.

C. The Committees' Arguments

The Republican Committees offer two additional arguments regarding section 14.

First, they contend (Br.31-33) that Act 77 renders section 14 "entirely meaningless," by allowing all qualified electors—rather than just those covered by section 14—to vote by mail. That is wrong. Section 14 does something Act 77 does not: preventing the legislature from *denying* those covered by section 14 the right to vote absentee. Put another way, if section 14 did not exist, the General Assembly could pass a statute repealing Act 77 and affirmatively providing that all votes in Pennsylvania must be cast in person. Because section 14 (and not Act 77) precludes such legislative action, it is not superfluous.

The same point answers the Committees' related argument (Br.32-33) that because section 14 guarantees certain groups the right to vote by mail, the *expressio unius* canon means that other Pennsylvanians lack that right. *See also* McLinko Br.29-31 (invoking the same canon). In reality, the canon shows that other Pennsylvanians lack the *constitutional* right to vote by mail that section 14

confers, i.e., a right that cannot be taken away by statute. The DNC explained this (Br.26-27) in answering similarly flawed reasoning by the Commonwealth Court (echoed here by McLinko (Br.42-43)). The Committees offer no response.

Second, the Committees note (Br.6-7) that the legislature initially considered adopting universal mail balloting by constitutional amendment rather than statute. The Committees assert (Br.7) that this reflects "the General Assembly's apparent recognition that the implementation of no-excuse mail-in voting in Pennsylvania must be effectuated through constitutional amendment." In fact, it shows the opposite, that the legislature, acting with overwhelming majorities, concluded that a constitutional amendment was *not* required (a conclusion the Bonner appellees appear to have revisited only in the wake of the 2020 election). This judgment is entitled to substantial deference by this Court. *See supra* p.2.

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

Appellees offer no sound basis to adhere to *Chase* and *Lancaster City* if those decisions are deemed controlling even though each pertained to a materially different version of the constitution.

A. *Chase* and *Lancaster City* Were Poorly Reasoned And Have Engendered No Cognizable Reliance Interests

Appellees recognize (*e.g.*, Committees Br.29-30) that the strength of a decision's reasoning is a key factor in determining whether it should be overruled. Yet they do not meaningfully respond to the flaws the DNC identified in *Chase*'s

and *Lancaster City*'s reasoning. Most notably, appellees never dispute that *Lancaster City* rotely applied *Chase* without considering the expansion of the General Assembly's power in section 4 or the introduction of voter registration. *See* DNC Br.40.[7]

Appellees' primary argument (*e.g.*, McLinko Br.19-20) is instead that this Court should adhere to *Chase* and *Lancaster City* because those decisions are very old. But while a decision's age sometimes counsels in favor of retaining it, that is because longstanding decisions tend to have engendered strong reliance interests, such that overruling them would cause significant disruption. *See, e.g.*, *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). *Chase* and *Lancaster City*, however, have created no relevant reliance interests. DNC Br.44. Appellees cite no evidence, for example, of anyone detrimentally relying on the in-person appearance requirement, nor offer any explanation of how rejecting that requirement would injure anyone in a cognizable way. Allowing all eligible Pennsylvanians to vote either by mail or in person does not deprive other voters of anything.

To be sure, McLinko asserts (Br.16) that Pennsylvanians relied on *Chase* and *Lancaster City* in enacting constitutional amendments regarding absentee voting. But those amendments were not undone (or even undermined) by Act 77;

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[7] Bonner denies (Br.54) that *Chase* reflects the racist sentiments of its time—while ignoring *Chase*'s statement that restricting voting to "white male" taxpayers was "astute," 41 Pa. at 426.

the amendments gave certain Pennsylvanians a *constitutional* right to vote absentee, while Act 77 gives all Pennsylvanians a statutory right to vote absentee. *See supra* p.9. The amendments thus create no reliance interest that matters for purposes of *stare decisis*. *See Montejo v. Louisiana*, 556 U.S. 778, 793 (2009) (rejecting the notion that past actions taken to comply with a prior rule was a reliance interest that justified retaining the rule); *see also* DNC Br.40 (noting that this Court relies on the U.S. Supreme Court's *stare decisis* precedent).

In addition, there have been no doctrinal developments based on *Chase* and *Lancaster City* that overruling those cases would upset. While McLinko identifies (Br.23-24) two Pennsylvania cases citing *Chase* or *Lancaster City*, courts' citation or application of a prior decision does not create a cognizable reliance interest. Even if it did, the cases McLinko cites did not rely on *Chase*'s and *Lancaster City*'s reading of "offer to vote." For example, *In re Franchise of Hospitalized Veterans*, 77 Pa. D. & C. 237 (Com. Pl. 1952) (per curiam), enforced the scope of a *statute* implementing section 14's soldier-voting provision, *see id.* at 239. And *In re Election Instructions*, 2 Pa. D. 299, 300 (Pa. Com. Pl. 1888), arguably *conflicts* with *Chase*'s "offer-to-vote" holding, as it allowed voters to vote at polling places outside their district.[8]

[8] Bonner also urges this Court (Br.43-46) to retain *Chase* and *Lancaster City* because the New Mexico Supreme Court declined to overrule similar precedent eighty years ago. But the case he cites dealt with different constitutional text and predated modern voting-security measures.

McLinko also argues (Br.16, 20-21) that *Chase* and *Lancaster City* should be retained because Pennsylvanians can always abrogate them by constitutional amendment. But that is always true; if it were enough, this Court would never overrule any decision. In fact, this Court has observed that *stare decisis* is *weakest* where a constitutional amendment would be necessary to abrogate a prior decision. *Commonwealth v. Alexander*, ___ Pa. ___, 243 A.3d 177, 197 (2020).

B. An In-Person Voting Requirement Is Unnecessary And Outdated

Bonner and appellees' amici suggest that *Chase* and *Lancaster City* should be retained because (in their view) mail voting is susceptible to fraud and secrecy problems. *See* Bonner Br.43 n.7, 54-55; America First Br.13-19; Honest Elections Br.11-17; Landmark Legal Br.3-14. But neither Bonner's nor amici's arguments demonstrate that an in-person voting requirement is in "accord with modern conditions of life," *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 605, 305 A.2d 877, 887-888 (1973), or necessary to "serve the interests of justice," *Tincher v. Omega Flex, Inc*., 628 Pa. 296, 336, 104 A.3d 328, 352 (2014).

Bonner's and amici's policy arguments, moreover, are far removed from those that motivated *Chase*, none of which carries any force today under Pennsylvania's comprehensive voter-registration and election-security safeguards. Indeed, Bonner's and amici's purported concerns are grossly overstated. Despite nearly half of voters in the 2020 elections having cast their

votes by mail, *see* U.S. Election Assistance Commission, *Election Administration and Voting Survey 2020*, at 1,[9] appellees and amici can point to only a small number of attempts to commit fraud through mail voting *ever*—each of which was either identified and punished or merely suspected. *See* Honest Elections Br.13-14. This reinforces the point: Voter fraud is not a significant problem, much less one that specifically plagues mail voting.[10]

The authorities that appellees and amici claim show voter fraud to be a significant problem do nothing of the sort. Some of those authorities rest on speculation, while others suggest only that vote-by-mail should be accompanied by the type of voter-registration and signature-match protections that Pennsylvania already has. *See* Bonner Br.54-55 (citing Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. Times (Oct. 6, 2012) (speculating about voter fraud and discussing potential safeguards)); Honest Elections Br.16 (criticizing voting by mail "without appropriate safeguards"); America First Br.12-13 (citing Lucas, *7 Ways the 2005 Carter-Baker Report Could Have Averted Problems with 2020 Election*, The Daily Signal (Nov. 20, 2020) (explaining that mail and absentee voting can be made secure by adopting various

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[9] https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf (visited Mar. 2, 2022).

[10] Indeed, one of the authorities the Landmark Legal amicus brief relies on (at 5) to support its voter-fraud argument expressly states that "[f]raud is rare," *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 56 (2014).

safeguards)). And still other authorities are partisan efforts to propagate a political narrative divorced from facts. *See* Landmark Legal Br.7-10 (citing Committee Report, U.S. House of Representatives Committee on House Administration Republicans, 116th Cong., *Political Weaponization of Ballot Harvesting in California* 2 (May 14, 2020)).[11] Indeed, one amicus argues that whether or not mail voting fraud is real, unfounded fears about it counsel in favor of striking down Act 77. *See* America First Br.3-4, 9-13. In sum, appellees and amici cite nothing to overcome the research-based evidence consistently demonstrating that fraud in mail voting is exceedingly rare. DNC Br.42. Nor do they grapple with the Third Circuit's decision in *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 F. App'x 377 (3d Cir. 2020), which, as the DNC explained (Br.43), undermines the Commonwealth Court's reliance on *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994)—the court's only cited authority for the proposition that mail voting poses a risk of fraud.

Finally, McLinko argues (Br.25) that overruling *Chase* and *Lancaster City* would undermine confidence in this Court or make it appear political. That is unfounded. Act 77 was enacted with overwhelming bipartisan support. DNC Br.8, 12. And it adopts a method of voting that can be and is used by voters across the political spectrum, both in Pennsylvania and around the country. *See id.* at 7; *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home*

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[11] https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/CA%20Ballot%20Harvesting%20Report%20FINAL.pdf.

Options, National Conference of State Legislatures (Feb. 17, 2022);[12] Morris, *Who Votes By Mail*, Brennan Center (Apr. 14, 2020).[13] Far from being political, upholding Act 77 would respect the authority of a coordinate branch of government as well as the Court's duty to enforce the plain text of the constitution and leave policy decisions to those duly elected to make them.

V. APPELLEES' FEDERAL CLAIMS ARE BOTH MERITLESS AND LARGELY DERIVATIVE OF THEIR STATE-LAW CLAIMS

Appellees ask this Court to go beyond the Commonwealth Court's ruling by holding that Act 77 violates (1) a grab-bag of provisions in the U.S. Constitution that provide states with certain authority regarding federal elections, and (2) the Fourteenth Amendment's prohibition on vote dilution. *See* Bonner Br.15-19; Committees Br.34-39; *see also* Bonner Op.3 n.5, 8 n.12 (declining to reach Bonner's federal constitutional claims). That request should be rejected.

As a threshold matter, Bonner contends (Br.13-14) that this case was appealed prematurely because the Commonwealth Court did not (he asserts) fully resolve his claims for relief under federal law. But he immediately concedes (Br.14) that this Court could still "choose to exercise jurisdiction over this appeal." In any event, the Commonwealth Court *did* fully resolve the federal claims: It held that the requests for declaratory and injunctive relief were

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[12] https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[13] https://www.brennancenter.org/our-work/analysis-opinion/who-votes-mail.

duplicative of the state-law claims and it "denied" the "request for nominal damages, attorneys' fees and costs." Bonner Op.8 n.12.

That aside, nearly all of appellees' federal claims rise and fall with their state-law claims, because those federal claims are premised on an asserted violation of the Pennsylvania Constitution.

The only federal argument that does *not* depend on appellees' state-law claims is that Act 77 violates the requirement in Article I, section 4 of the U.S. Constitution that state legislatures designate the "Times, Places, and Manner of holding [congressional] Elections," because Act 77 fails to designate a specific "place[]" at which ballots must be cast. But even putting aside that Bonner argues for the first time here (Br.17-18) that this claim is independent of his state-law claims, he identifies no decision, from any court, that has adopted this reading of the U.S. Constitution—a reading that would seem to invalidate mail-in-voting laws in place throughout the country (including Article VII, section 14 of the Pennsylvania Constitution). Nor does Article I, section 4 provide any textual reason to invalidate Act 77. Voters who fill out a mail-in ballot *are* casting their ballot at a designated "place" specified by the legislature: their local elections office. They are simply doing so by mail rather than by ballot box.

Appellees' other federal claims likewise lack merit (although as noted this Court should not reach them) because they rest on the mistaken premise that a violation of a state constitution necessarily violates the U.S. Constitution. The DNC knows of no case adopting this theory. Indeed, the cases appellees cite

largely just interpreted the U.S. Constitution's use of "Legislature." *See, e.g.*, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 804-808 (2015) (addressing whether Article I, section 4 "permit[s] Arizona's use of a commission to adopt congressional districts"). Similarly, *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (per curiam), dealt with the exceptional circumstance of a state supreme court suggesting it could alter election laws after election day if those laws "unreasonabl[y]" restricted the counting of votes—a situation the U.S. Supreme Court feared would lead to the courts substituting their policy judgment for that of the legislature, *see id.* at 77. This case does not involve remotely comparable facts.

Finally, appellees' vote-dilution claim is meritless. Appellees rely on *Reynolds v. Sims*, 377 U.S. 533 (1964), an equal-protection challenge to the apportionment of seats in Alabama's legislature. But as the U.S. Supreme Court later explained, the key in *Reynolds* was that the plaintiff voters there "alleged facts showing disadvantage to themselves as individuals," *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018) (quotation marks omitted). Bonner has made no such allegations, and in any event the authorization of universal mail voting is in no way an equal-protection/vote-dilution violation. Appellees' argument is an "inverted theory of vote dilution," i.e., that the Commonwealth "is *not* imposing a restriction on *someone else's* right to vote" by limiting who can vote by mail. *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 389-390 (W.D. Pa. 2020). That does not state a valid equal-protection claim. *Id.*; *accord*

Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 919-920 (M.D. Pa. 2020) (subsequent history omitted).

CONCLUSION

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

March 2, 2022

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

This brief contains 6,938 words, as counted by Microsoft Word's word-count tool.

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CERTIFICATE OF SERVICE

On March 2, 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