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**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

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

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**DOUG McLINKO,**
***Petitioner/Appellee,***

**v.**

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, *et al.*,**
***Respondents/Appellants.***

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**TIMOTHY BONNER, *et al.*,**
***Petitioners/Appellees,***

**v.**

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

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

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# REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

Upon reading the Commonwealth Court's majority opinion and the three briefs of Appellees/Petitioners ("Petitioners"), one thing *is* clear, palpable, and plain: But for *Chase*'s decision invalidating voting in out-of-state military camps during the Civil War, and *Lancaster City*'s uncritical application of *Chase* a century ago, Petitioners would not have a wisp of a case. The text, structure, and legislative history of the current Pennsylvania Constitution stand squarely against them. So too does the overwhelming weight of case law interpreting the same language in other states' constitutions. Under well-settled principles of constitutional adjudication, Petitioners' challenge collapses.

It is therefore unsurprising that Petitioners' entire argument is based on *Chase*. Rather than attempting to carry their burden of showing that the current Pennsylvania Constitution clearly, palpably, and plainly prohibits the General Assembly from providing for mail-in voting, Petitioners start with *Chase*'s construction of the 1838 Constitution. They then argue that, notwithstanding the material changes in constitutional language between the time of *Chase* and *Lancaster City* and today, those cases should control this Court's evaluation of Act 77.

But *Chase* and *Lancaster City* do not support Petitioners' position. *Lancaster City* reflexively followed *Chase*'s interpretation of the 1838

Constitution, without accounting for a fundamental change to a key provision on which *Chase* had relied—a change that expressly gave the General Assembly broad power to prescribe the permissible methods of voting. And *Lancaster City* itself relied on a provision that was later repealed in 1967. Petitioners are thus left to argue that a *different* constitutional provision, which *requires* the General Assembly to permit certain classes of persons to vote absentee, somehow clearly, palpably, and plainly *prohibits* the General Assembly from allowing others to vote by mail. Further, even taken on its own terms, *Chase*'s construction of the "offer to vote" language in what is now Article VII, § 1 of the Pennsylvania Constitution—which is the indispensable basis of Petitioners' entire argument—is indefensible. Tellingly, that interpretation has been rejected by the great majority of courts that have taken up the question since.

Put simply, *Chase* and *Lancaster City* are readily distinguishable from the case—and the Constitution—currently before this Court, and this Court has every reason to distinguish them. Alternatively, they should be overruled. They were wrongly decided, have engendered no reliance interests, and have not stood the test of time. They should not be allowed to strip the General Assembly of the ability to help all Pennsylvanians access the fundamental right to vote.

Petitioners' other arguments are also without merit. The *Bonner* and *County Republican Committee* Petitioners' federal claims, which are derivative of their

state constitutional challenge, fail as a matter of law. And Petitioners' attempts to resist the plain language of Section 13 of Act 77 are unavailing: The Commonwealth Court lacked jurisdiction over Petitioners' facial constitutional challenge, and that challenge was time-barred. For all of these reasons, the decision below should be vacated, and Petitioners' claims should be dismissed with prejudice.

## II. PETITIONERS IGNORE FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

Petitioners' interpretive approach goes awry from the start. Petitioners not only disregard the standards governing their constitutional challenge to Act 77; they affirmatively misstate the controlling rules. Petitioner McLinko cites *Marbury v. Madison* for the proposition that "[t]he powers of the Legislature are defined and limited" by the Constitution. McLinko Br. 24 (quoting *Marbury*, 5 U.S. (1 Cranch) 137, 176 (1803)). But the U.S. Congress stands in a very different relationship to the U.S. Constitution than the General Assembly does to the Pennsylvania Constitution. "[A] reviewing court must narrowly construe a [Pennsylvania] constitutional provision which places limitations on the power of the legislature, as, unlike the federal Constitution, the powers not expressly withheld from the General Assembly inhere in it." *Stilp v. Commonwealth*, 974 A.2d 491, 494-95 (Pa. 2009); *accord Sharpless v. Mayor of Phila.*, 21 Pa. 147, 161 (1853) (opinion of Black, C.J.) (recognizing the "vast field of power, granted to the

legislature by the general words of the [Pennsylvania] constitution, and not reserved, prohibited, or given away to others"; "[o]f this field the General Assembly is entitled to the full and uncontrolled possession").

In other words, "[t]he General Assembly possess[es] all legislative power except such as is [constitutionally] prohibited by *express* words or *necessary* implication." *Lewis & Nelson's Appeal*, 67 Pa. 153, 166 (1870) (emphasis added). 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.

The "thou shalt not" must be unmistakable. Hence the rule that a duly enacted statute "will not be invalidated unless it clearly, palpably, and plainly violates the Constitution, [with] any doubts … to be resolved in favor of a finding of constitutionality." *Id*. at 495. Put differently, Petitioners have the "very heavy burden," *id.*, of demonstrating "a *direct* collision between [Act 77] and [the provisions] of the federal or state constitution." *Erie & Ne. R.R. Co. v. Casey*, 26 Pa. 287, 301 (1856).

These first principles end Petitioners' case. Petitioners fail to show that their construction of the current Pennsylvania Constitution is even a reasonable one, let alone that it is the *only* reasonable interpretation, such that the Constitution "clearly, palpably, and plainly" prohibits voters from returning their ballots by mail.

## III. PETITIONERS IGNORE THE TEXT AND STRUCTURE OF THE PENNSYLVANIA CONSTITUTION

It is impossible to read Article VII, § 1 as "clearly, palpably, and plainly" prohibiting the General Assembly from authorizing voters to return their ballots by mail, let alone to reconcile that interpretation with Article VII, § 4's express grant of legislative power.

*First*, Petitioners' exclusive focus on the three words "offer to vote" improperly ignores the rest of the provision in which those words appear (as well as other constitutional provisions bearing on the question at hand). The "offer to vote" language on which they rely does not appear in a provision addressing *methods* of voting, but rather appears in a description of a durational-residency[1] requirement addressed to *who* may vote. *See* Pa. Const. art. VII, § 1. Petitioners ignore the rule that "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). They continue to insist—contrary to fundamental tenets of construction—that the Pennsylvania Constitution *does*, in fact, "hide [an] elephant[] in [a] mousehole[]." Initial Brief of Appellants ("Initial Br.") 42 (quoting *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001)). And they continue to maintain that those "who drafted [Article VII, § 1], stopped short in the

[1] Petitioners do not dispute that a voter can "reside" in an election district even while physically absent from the district. *See* Initial Br. 40-41.

midst of defining the qualifications of an elector and injected an idea of an entirely different character," notwithstanding that "no one familiar with the rudiments of English would undertake to define qualifications and place or manner of voting, by the use of the language employed in [§ 1]." *Goodell v. Judith Basin Cnty.*, 224 P. 1110, 1114 (Mont. 1924). Even without a standard requiring limitations on legislative power to be clear, palpable, and plain, Petitioners' tortured reading would have to be rejected.

*Second*, Petitioners' interpretation of even those three words ("offer to vote") is untenably cramped. As the North Carolina Supreme Court has observed, "[a]n offer to vote may be made in writing, and that is what the absent voter does when he selects his ballots and attaches his signature to the form and mails the sealed envelope to proper official[s]." *Jenkins v. State Bd. of Elections*, 104 S.E. 346, 349 (N.C. 1920). Indeed, as Respondents previously pointed out, the evidence of original understanding in this case shows that, *even in 1838*, "offer to vote" was not understood to require voters to be physically present in their election district when casting their ballot.[2] Initial Br. 46-50; *see infra* Section IV.

[2] Petitioner McLinko asks the Court to set all of this evidence aside based on a single definition of the word "offer" appearing in Webster's New Universal Unabridged Dictionary. McLinko Br. 11. But as even Petitioner McLinko appears to concede, that definition—whereby "offer" means "to present for acceptance or rejection" or "proffer"—does not preclude offering to vote by mail. *See id.* Under Act 77, an elector proffers his or her vote by mail, for acceptance or rejection by county of boards according to the rules set forth in the Election Code. Other dictionaries confirm that an "offer to vote" can be made by mail. The first edition of Black's Law Dictionary defines "offer" as "[a] proposal to do a thing" or "an attempt." Black's Law

*Third*, Petitioners' interpretation of Article VII, § 1 renders other sections of the Constitution incoherent. For example, Article VII, § 14 would be rendered inoperative. The absentee voting rights guaranteed by § 14 can be exercised only by "qualified electors," *i.e.*, those who satisfy the requirements of § 1. If Petitioners are right that § 1 mandates voting in person at polling places, then no one can vote absentee under § 14. *See* Initial Br. 44-45.

The *Bonner* Petitioners' response to this point is not only a *non-sequitur*, but is also simply wrong. They contend that § 14's requirement that the Legislature provide a "time and place" at which certain electors can vote absentee somehow shows that "offer to vote," as used in § 1, requires voting at polling places. Bonner Br. 53-54. Of course, this in no way addresses the contradiction between § 14's restriction of absentee voting rights to "qualified voters" and Petitioners' position that voting in person at a polling place is a § 1 voter qualifications. Moreover, Petitioners' argument is unfounded even on its own terms. It is hardly surprising that, having required the General Assembly to allow certain groups of electors to vote absentee, the Constitution would require that the legislature prescribe the essentials of how such absentee voting would be effectuated. The existence of that

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Dictionary (1st ed. 1891), http://nfpcar.org/Archive/Blacks_Law/Black's%20Law%20Dictionary.pdf. As *Jenkins* recognizes, one can propose or attempt to vote by any number of methods, including by returning one's ballot through the mail. 104 S.E. at 349.

requirement does nothing to support Petitioners' interpolation of a restriction on voting methods into the voter-qualification provisions of § 1.[3]

*Fourth* and finally, it is impossible to reconcile Petitioners' contorted reading of § 1 with the Constitution's plain and clear grant of authority to the Legislature to determine methods of voting in Article VII, § 4. The Constitution's "method" provision expressly gives the General Assembly the power to prescribe the permissible "method[s]" of voting—the *only* constitutionally imposed limitation is that secrecy must be preserved.[4] PA. CONST. art. VII, § 4. Section 4 manifestly does not include the proviso "so long as electors vote only in person at

[3] Similarly misplaced is Petitioners' reliance on the fact that § 14 grants absentee voting rights to, among others, those "unable to attend at their proper polling places because of illness or physical disability." That phrase simply defines the scope of the constitutional right at issue: if a voter is able to vote in person at his or her designated polling place, she is not constitutionally entitled to vote absentee. The existence of that condition in no way establishes that the phrase "offer to vote" in § 1 imposes an in-person voting requirement or that the Constitution prohibits the General Assembly from *permitting* other persons to vote by mail.

[4] In a footnote, the *Bonner* Petitioners suggest that mail-in voting is incompatible with secrecy. Bonner Br. 43 n.7. But it is clear—and none of the Petitions for Review in this case dispute—that Act 77's mail-in voting procedures comply with the "secrecy" requirement of Article VII, § 4. *See* 25 Pa. Stat. § 3150.16 ("mail-in elector" must mark the ballot "in secret" and "securely seal" it in the secrecy envelope); 25 Pa. Stat. § 3146.8(g)(4)(ii) (mail-in ballot returned with any identifying marks is void); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 377 & n.30, 380 (Pa. 2020) (relating requirement of secrecy envelope to secrecy requirement in Article VII, § 4); *see also W. Hanover v. Pa. Labor Relations Bd.*, 646 A.2d 625, 629 (Pa. Commw. Ct. 1994) (concluding that secrecy requirements in 25 P.S. §§ 3146.6, 3146.8 satisfy statutory requirement of voting secrecy); *NLRB v. Groendyke Transp., Inc.*, 372 F.2d 137, 142 (10th Cir. 1967) ("ballot by mail is [] accepted … throughout the country as not incompatible with the democratic process of secret balloting"); *Peterson v. City of San Diego*, 666 P.2d 975 (Cal. 1983) ("conclud[ing] that [California's constitutional] secrecy provision does not preclude voting by mail").

polling places within their respective election districts," or even "subject to restrictions set forth elsewhere in this Article."

It is not difficult to imagine how the Constitution *could* have incorporated a clear, palpable, and plain prohibition on anything other than voting in person at polling places in a voter's election district of residence. Such a prohibition would be found in a provision addressing the "method" of voting, and it would specify that in-person voting is required. But the Pennsylvania Constitution contains nothing remotely approaching such a provision. Indeed, two of the Petitioners here have proposed a constitutional amendment illustrating what a clear, plain, and palpable prohibition on mail-in voting would look like—and demonstrating that the current version of Article VII, § 4 is its antithesis.[5]

## IV. PETITIONERS IGNORE THE LEGISLATIVE HISTORY AND COMMON UNDERSTANDING OF THE "OFFER TO VOTE" PROVISION AT THE TIME OF ITS ADOPTION

Conspicuously, Petitioners completely ignore the legislative history of the "offer to vote" provision, as well as the evidence of how it was understood at the

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[5] The proposed amendment would revise Article VII, § 4 of the Constitution as follows (deleted language is bracketed and struck out and added language is bolded):

> ~~[All]~~ **Except as permitted by absentee ballot under section 14 of this article, all** elections by the citizens shall be by ballot ~~[or by such other method as may be prescribed by law:]~~ **cast in person by electors at their polling place, including early in-person voting, as prescribed by law:** Provided, That secrecy in voting be preserved.

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time of its adoption in 1838. *See* Initial Br. 46-50; *see League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) (if the text of a constitutional provision is ambiguous, courts should examine, among other things, "the contemporaneous legislative history"). This evidence confirms that the election-district residency requirement in Article VII, § 1 is not a limitation on voting methods. It shows that the "offer to vote" language serves an essential purpose—but not the one Petitioners and the Commonwealth Court ascribe to it. Consistent with the purpose of residency requirements generally, the third sub-provision of Article VII, § 1 (originally introduced as part of Article III, § 1 of the 1838 Constitution) defines *who* may vote in a given election district's elections: only residents of that district. *See, e.g.*, 9 John Agg, PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG ON THE SECOND DAY OF MAY 1837, at 309 (1838) ("Those who resided in a particular district, were the persons who ought alone to be entitled to vote in that district, because they were the persons to be affected by the election in that district.").

Petitioners do not dispute that, under the 1790 Constitution, the General Assembly could—and did—permit electors to vote other than in person at polling places in their election district. It is uncontroverted that nothing in the Convention debates of 1837-38 suggests that the new election-district residency requirement

took that power away. To the contrary, *immediately* after the 1838 Constitution was adopted, the General Assembly re-enacted a statute allowing soldiers to vote outside their election districts. *See* Initial Br. 46-50.

Only one of the Petitioners, McLinko, even attempts to respond to this evidence. Rather than address the evidence itself, Petitioner McLinko argues that it should be ignored because Justice Woodward, "who wrote the *Chase* opinion[,] was a participant in the [1837-38] constitutional convention." McLinko Br. 14. According to McLinko, Justice Woodward's 1862 opinion must be accepted as the ultimate, unimpeachable authority on "what was intended by the phrase 'offer to vote'" and "the meaning of the 1838 Constitution." *Id.* at 9, 14.

This argument from authority is flawed in several basic respects. *First*, Petitioner McLinko does not explain why this Court should defer to an opinion written 25 years *after* the constitutional convention took place, when this Court can consult the *actual* legislative history of the provision at issue. *Second*, as previously pointed out, Justice Woodward's interpretation of "offer to vote" in *Chase* was not grounded in any interpretation of that legislative history or evidence of contemporaneous understanding. To the contrary, Justice Woodward summarily dismissed powerful evidence that, at the time of its adoption, the election-residency requirement was *not* understood as a limitation on voting methods. *See Chase*, 41 Pa. at 417 (asserting that the General Assembly of 1839 was "careless" in

reenacting a statute allowing soldiers to vote other than in person at polling places in their election districts). Justice Woodward's interpretation of "offer to vote" was conjured out of thin air. *See* Initial Br. 64-65.

*Third*, even if one is inclined to accept an argument from authority over an argument from evidence, Petitioner McLinko has selected the wrong standard-bearer. Justice Woodward played only a small role in the convention debate over the election-district residency requirement at issue, stating that he preferred an election-district residency requirement to a requirement that eligible voters be taxpayers. This remark reflects that Woodward, too, understood the residency requirement not as a restriction on voting methods, but rather as an effort to limit voting eligibility to those holding a "sufficient" stake in the communities in which they vote. *See* 9 Agg, *supra*, at 296-97.[6]

Petitioner McLinko notably fails to mention the most prominent role Justice Woodward played at the convention—namely, as a vigorous advocate for denying black Pennsylvanians the right to vote. Championing the provision by which the 1838 Constitution would limit suffrage to "white freemen," Woodward exhorted the convention to "rescue our institutions from meditated debasement, by

[6] Woodward ultimately voted against the residency requirement. *Id.* at 320.

declaring, what has always been understood, that voters must be white men."[7] 10 Agg, *supra*, at 22. Indeed, Woodward argued that Pennsylvania's "covenant engagement, and obligations to the surrounding states, forbid us to license negro votes," reasoning that the southern states would not "have confederated with a state who was to make their fugitive slaves voters." *Id.* at 22.[8]

As shown below, Justice Woodward's anti-democratic convictions cannot be divorced from his opinion in *Chase*. *See infra* Section VI. And they furnish yet another reason, if one were needed, to reject Petitioner McLinko's appeal to the authority of a single justice. Constitutional interpretation must be based on *evidence* of constitutional meaning, including the text, structure, and legislative history of the provisions at issue. Arguments from authority, which treat individual judges as oracles, are illegitimate. As shown above, they are especially inappropriate here.

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[7] *Compare Chase*, 41 Pa. at 426 (celebrating that the 1838 Constitution "withholds [suffrage] altogether from about four-fifths of the population," and noting approvingly that "all our successive constitutions have grown more and more astute on this subject").

[8] These sentiments did not diminish over time. In November 1860, just after Abraham Lincoln's election as President, Woodward wrote a letter declaring that "slavery was intended as a special blessing to the people of the United States" and blaming the "antislavery" movement for all manner of evils, from "conjugal infidelities & prostitution" to "stuffing ballot boxes." Letter from George W. Woodward to Jeremiah S. Black (Nov. 18, 1860), *reprinted in* Jonathan W. White, *A Pennsylvania Judge Views the Rebellion: The Civil War Letters of George Washington Woodward*, 129 Pa. Mag. Hist. & Biography 195, 205, 206 (2005). Woodward opined that, if the southern states should secede, the north should "let them go in peace," adding: "I wish Pennsylvania could go with them…. We are the wrong doers." *Id.* at 207.

## V. PETITIONERS IGNORE THE PERSUASIVE DECISIONS OF NUMEROUS OTHER SUPREME COURTS INTERPRETING MATERIALLY IDENTICAL CONSTITUTIONAL LANGUAGE

The 1837-38 convention and 1839 General Assembly were not the only institutions that rejected Petitioners' interpretation of "offer to vote." Supreme courts in many other states have issued thorough and persuasive opinions reaching the same conclusion. *See* Initial Br. 51-53 (collecting cases); *accord, e.g.*, *Bullington v. Grabow*, 298 P. 1059, 1059 (Colo. 1931) (rejecting the argument "that a voter must be personally present when 'he offers to vote'"); *see also Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (endorsing "related case-law from other states" as a resource for interpreting the Pennsylvania Constitution); *League of Women Voters*, 178 A.3d at 803 ("we may consider … extra-jurisdictional case law from states that have identical or similar provisions, which may be helpful and persuasive").

As they did with the legislative history of the 1838 Constitution, and with the evidence of how it was understood at the adoption, Petitioners ignore these cases. None of the Petitioners engages with a single one of these decisions, let alone disputes the cogency of their reasoning. The best Petitioners can do is to point to other cases, which held that in-person voting at polling places was constitutionally required. *See* Bonner Br. 43-46; McLinko Br. 10. But the parties' opposing groupings of cases do not stand on an equal footing.

The *Bonner* Petitioners invoke the extra-jurisdictional cases cited in *Lancaster City*. *See* 126 A. at 200. But many of those cases[9] were "advisory opinions" of New England states with "vastly different" constitutions "drafted with reference to the peculiar New England system of elections at town meetings." *Goodell*, 224 P. at 1112; *accord Jenkins*, 104 S.E. at 349 (such cases "plainly have no bearing" on the interpretation of "offer to vote"); *Moore v. Pullem*, 142 S.E. 415, 420 (Va. 1928). Another case, *Clark v. Nash*, 234 S.W. 1 (Ky. 1921), likewise involved entirely different constitutional language—language which, unlike the election-district residency requirement in Article VII, § 1 of the Pennsylvania Constitution, *did* clearly, palpably, and plainly require in-person voting at polling places. *See id.* at 2 (applying "unambiguous provision" stating that "[a]ll elections … shall be by secret official ballot, furnished by public authority to the voters *at the polls*, and marked by each voter in private *at the polls*, and *then and there* deposited" (emphasis added)).

The remaining cases cited by *Lancaster City* (and invoked by Petitioners here) were, like *Chase*, Civil War-era decisions involving statutes allowing for voting in battlefront military camps. *See Twitchell v. Blodgett*, 13 Mich. 127 (1865); *Bourland v. Hildreth*, 26 Cal. 161 (1864); *Day v. Jones*, 31 Cal. 261 (1866)

[9] *See Opinion of the Judges*, 30 Conn. 591 (1862); *Opinion of the Judges*, 37 Vt. 665 (1864); *Opinion of the Justices*, 44 N.H. 633 (1863); *In re Opinion of Justices*, 113 A. 293 (1921).

(applying *Bourland*). As later decisions recognized, that distinction is highly material. Those Civil War statutes, like the one construed in *Chase*, "authorized soldiers to cast their ballots of the state, in elections to be held by officials who may or may not have been citizens of the state, and without the safeguards of registration or challenge." *Jenkins*, 104 S.E. at 350. By contrast, the cases cited by Respondents construed an election method far more similar to that set forth in Act 77, one that included "due registration of the voter,"[10] proof of the voter's identity,[11] "and the sending of his ballot himself in a sealed envelope direct to the [election authorities presiding] where he is entitled to vote, to be opened by them at a given hour."[12] *Jenkins*, 104 S.E. at 350. In addition, the decision in *Twitchell* drew a vigorous dissent, which, Respondents respectfully submit, has the better of the argument. *See Twitchell*, 13 Mich. at 177 (Mitchell, C.J., dissenting) ("If the person offering to vote be qualified by age, citizenship, and residence, the legislature may determine how and where he may cast his ballot, and in what manner it shall be received and disposed of, and how canvassed.").

The *Bonner* Petitioners do identify one state supreme court that, after the Civil War, interpreted "offer to vote" language as requiring in-person voting at

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[10] *See* 25 Pa.C.S. § 1101 *et seq*.

[11] *See* 25 P.S. § 3150.12b(a); *see also* 25 P.S. § 2602(z.5).

[12] *See* 25 P.S. 3146.8(a), (g)(1.1), (2), (3), (4)(ii), 3150.16(a).

polling places in a voter's election district. *See* Bonner Br. 45-46 (citing *Chase v. Lujan*, 149 P.2d 1003 (N.M. 1944)). But the New Mexico decision is a conspicuous outlier. The case split the New Mexico Supreme Court 3-2 and, once again, the dissenting opinion was the far more persuasive one. The majority opinion opted to follow "what some three courts had said in these early cases of the Civil War period," where "the Civil War had, in a great measure, upset normal conduct in all matters of life if it had not somewhat influenced the soundness of judicial opinion." *Lujan*, 149 P.2d at 1016 (Mabry, J., dissenting). But even the majority conceded that the great "weight" of then-existing authority was against its holding. *Id.* at 1007. Indeed, as the dissent explained, it has been "the [almost] unanimous interpretation of the courts which have passed upon the question *since* 1865" that the phrase "offer to vote" "relates in no way to the manner or method of voting and does no more than fix the period of residence in the home precinct of the person proposing to vote." *Id.* at 1013, 1016.[13]

[13] As the dissent cogently explained:

> The term "in which he offers to vote," as used in the Constitution, implies no more than to say, "where he proposes to vote," "where he resides at the time of voting," or, "in his home precinct." The phrase has no relation to either qualification or manner of voting; it simply designates the period of residence required of the voter in his home precinct. It is to say, simply, that he cannot vote in any other precinct in the county … than the particular one wherein he has resided for 30 days prior to the time he asks to be permitted to, offers, or proposes, to vote.

*Id.* at 1019.

As the dissent pointed out, "had it not been for the[] two or three cases of the Civil War period where such voting was denied" based on a strained and untenable construction of "offer to vote"—*Chase* foremost among them—"the question [of the phrase's meaning] might never thereafter have been raised in any of the courts." *Id.* at 1013. The conclusions of these early opinions are perhaps unsurprising as a response to the exigencies of that time, when "the courts … could not entirely escape the dreadful impact from the turmoil into which the country was thrown by th[at] fratricidal struggle." *Id.* at 1016. But as a construction of voter-qualification provisions requiring residency in the district or precinct in which the elector "offers to vote," these opinions are error. Among other issues, they do not faithfully apply the burden of proof applicable to constitutional challenges to duly enacted statutes; they "do[] not look to see whether, under any reasonable construction of the constitutional language, [the court] can uphold the power of the legislature, but, rather, the view is taken that if it might be said that the Constitution would prohibit, the legislation must fail." *Id.* at 1020. As the *Lujan* dissent rightly explained, "[t]hat is not [the proper] conception of the rule to be employed." *Id.*; *accord Stilp*, 974 A.2d at 497.

The issue presented in this case is neither novel nor unique to Pennsylvania. An extensive body of extra-jurisdictional precedent confirms that Petitioners

misconstrue Article VII, § 1—the lynchpin of their argument—and that Act 77 is constitutional.

## VI. *CHASE* IS INAPPOSITE AND ITS REASONING IS ERRONEOUS

Like the Commonwealth Court's holding, Petitioners' entire argument is built on the 1862 decision in *Chase*. But as Respondents have already shown, the holding in that decision is readily distinguishable, and its interpretation of the Constitution is indefensible. *See* Initial Br. 57-68. Respondents will not reiterate that analysis because Petitioners have barely addressed it. But a few points bear emphasis.

*First*, *Chase* is easily distinguishable because it relied not only on the election-district residency requirement in then-Article III, § 1, but also on § 2, which required that all elections be by ballot. The latter provision has been fundamentally altered in the interim and now provides that an election may be "by ballot" or by any other voting "method" prescribed by the legislature, so long as it preserves secrecy. PA. CONST. art. VII, § 4.

Petitioners insist that this express delegation of authority to the legislature is irrelevant because (1) Article VII, § 4 was purportedly intended only to allow for the possibility of voting machines at polling places; and (2) mail-in voting under Act 77 is done by ballot. But Petitioners' first argument ignores the constitutional text of the provision, as well as the rule that any prohibitions on legislative

authority must be clear, palpable, and plain. The language of Article VII, § 4 is clear and broad—and qualified only by one condition, namely, that any voting method adopted by the legislature maintain secrecy.

Petitioners' second argument ignores that the change from Article III, § 2 of the 1838 Constitution to Article VII, § 4 of the 1968 Constitution had the effect of expressly empowering the legislature to prescribe the method of voting. Had Article VII, § 4 existed in the 1838 Constitution, it would have been impossible for *Chase* to conclude that the legislature lacked the power to prescribe alternatives to in-person voting. *See, e.g.*, *Moore*, 142 S.E. at 421 (noting that materially identical "offer to vote" language, appearing in a voter-qualifications provision, could not be construed as requiring in-person voting, particularly where "[t]he method of voting is elsewhere … specifically and unequivocally committed to the legislative discretion").

*Second*, *Chase*'s construction of "offer to vote" as precluding electors from returning their ballot by mail was unnecessary to the Court's holding. The scheme at issue in *Chase* involved in-person elections held in military camps, "with no other guards than such as commanding officers, who may not themselves be voters, nor subject to our jurisdiction, may choose to throw around it; and it invites soldiers to vote where the evidence of their qualifications is not at hand; and where [Pennsylvania] civil police cannot attent to protect the legal voter, to repel the

rioter, and to guard the ballots after they have been cast." 41 Pa. at 424. *Chase* concluded this wholesale delegation of civil election authority to the military was unconstitutional. *See id.* at 422 (because "the constitution … recognised [election districts] as among the *civil* institutions of the state, to be created and controlled exclusively by the civil, as contradistinguished from the military power of the state," "the civil [power] cannot commit [the formation of election districts] to the military"). This conclusion was, of course, a fully sufficient ground for invalidating the statute then at issue. The Court had no need to determine whether the election-district residency requirement prescribed a univocal *method* of voting. *See Jenkins*, 104 S.E. at 349 (reading *Chase* as holding "that the Legislature could not authorize a military commander to form an election district and hold an election therein"); Note, *Review of Absentee Voters Legislation in Pennsylvania*, 73 U. Pa. L. Rev. 176, 177 (1925) (concluding that *Chase*'s invalidation of the act at issue was "sound" because the statute "was a delegation of the legislative power to a military officer," which was "clearly unconstitutional," but that the Court unnecessarily "went further … in construing the clause that the elector must reside at least ten days in the district 'where he offers to vote'").

*Third*, as previously noted, *Chase* provides no rationale for its construction of "offer to vote." Its conclusion is a pure *ipse dixit*. In the words of one commentator, "[i]t is indeed difficult to see how the clause 'where he offers to

vote' involves the implied requirement of personal appearance. Perhaps Woodward, *J.*, also felt the difficulty, for he offered no reasons for his holding; nor does Sadler, *J.*, in following him [in *Lancaster City*], suggest any." Note, *supra*, at 177. Further, these *ipse dixits* are demonstrably at odds with the evidence. Puzzlingly, *Chase* claimed that the Pennsylvania Constitution had never "contemplated" absentee or mail-in voting, 41 Pa. at 419—despite the fact that the Court had just acknowledged that the 1790 Constitution had permitted those very same voting methods, *id.* at 417. As already shown, the *Chase* Court also failed to consider that its interpretation was directly at odds with (1) the evidence from the Convention debates about the purpose of the election-district residency requirement; and (2) the General Assembly's enactment, immediately following the adoption of the 1838 Constitution, of a statute providing for precisely the voting methods the *Chase* Court held proscribed.

*Fourth*, *Chase*'s interpretation of the "offer to vote" language is not only inapposite and erroneous; it was animated by anti-democratic convictions antithetical to the modern Constitution. *See* Initial Br. 64. Although the *Bonner* Petitioners attempt to resist this conclusion, *see* Bonner Br. 54, it is written on the face of the *Chase* opinion itself. *See* 41 Pa. at 426-27. *Chase*'s vote-restricting interpretation of the Constitution was expressly informed by the trajectory of Pennsylvania constitutional law to that point: It had increasingly narrowed the

portion of the population allowed to vote, from William "Penn's frame of government" in 1682 to "the Constitution of 1776." *Id.*

As *Chase* notes, the 1838 Constitution restricted the franchise even further—most notoriously by allowing only "white freemen" to vote.[14] *See* PA. CONST. of 1838, art. III, § 1. *Chase* commends this trajectory as "astute." 41 Pa. at 426; *see also id.* (approvingly noting that the 1838 Constitution "withholds [suffrage] altogether from about four-fifths of the population). It then uses this trendline to craft a rule of construction that is the diametric opposite of the rule requiring all doubts about constitutional interpretation to be resolved in favor of the General Assembly's statutes. Instead of attempting to identify a reasonable construction of the Constitution that would *uphold* statutes facilitating access to the franchise, *Chase* strains to adopt a construction *restricting* suffrage. That is not only at odds with well-settled principles of constitutional interpretation; it is anathema to the democratic spirit of the current Constitution, as ratified by the people and construed by this Court. *See, e.g.*, *League of Women Voters*, 178 A.3d at 804 (construing Free and Equal Elections Clause); House Legislative Journal, Session of 1966 Vol. 1, No. 1, at 518 (July 12, 1966) (statement of Representative

[14] As noted above, Justice Woodward played a prominent role in securing this change. *See supra* Section IV.

Fineman) (the change from "may" to "shall" in Article VII, § 14 reflected the conviction that "[t]he right to vote is among the most precious rights we have").

## VII. *LANCASTER CITY*, WHICH UNCRITICALLY FOLLOWED *CHASE*, IS INAPPOSITE AND WAS WRONGLY DECIDED

Faced with the post-*Chase* introduction of what is now Article VII, § 4, Petitioners are forced to rely on the holding in *Lancaster City*, which invalidated an absentee voting statute (and did not address methods of voting within a voter's election district). According to Petitioners (and the Commonwealth Court majority), *Lancaster City* proves that the introduction of Article VII, § 4 in no way undermined *Chase*'s requirement of in-person voting at polling places. But while *Lancaster City* acknowledged the existence of Article VII, § 4, it made no attempt whatsoever to square that provision with *Chase*'s interpretation.[15] In sum, *Lancaster City*, like *Chase*, provided no explanation of how "the clause 'where he offers to vote' involves the implied requirement of personal appearance." Note, *supra*, at 177.

In any event, *Lancaster City*'s invalidation of the absentee voting statute before it was expressly based on the Court's interpretation of a separate provision in the 1874 Constitution, which the Court construed as "permit[ting]" only certain

[15] Petitioners contend that *Lancaster City* held that the "other method as prescribed by law" language in what is now Article VII, § 4 referred only to voting machines, but that is not what the opinion says. To the contrary, *Lancaster City* speculates only that the "provision *as to secrecy* was *likely* added *in view of* the suggestion of the use of voting machines." 126 A. at 201 (emphasis added).

specific identified groups of persons to vote absentee. *Lancaster City*, 126 A. 199 at 201. The Court applied the canon of *expressio unius*, holding that the naming of these specific classes should be construed as a prohibition on absentee voting by anyone else. *Id.*

As Respondents previously explained, *Lancaster City* is distinguishable for two related reasons. *First*, between 1924 and the ratification of the 1968 Constitution, the language of the Constitution's absentee-voting provision went through several changes. In particular, in 1967, the provision on which *Lancaster City* relied was repealed, and a separate absentee-voting provision was revised to change from "may" to "shall."

Petitioners insist that the change in language from "may" to "shall" is irrelevant, and that the provision now set forth in Article VII, § 14 remained a ceiling on absentee-voting rights.[16] Petitioners admit, however, that this position depends on the (fundamentally flawed) premise that Article VII, § 1 requires in-

[16] The *Bonner* Petitioners contend that "[a]n affirmative 'shall' cannot give the legislature more discretion than 'may.'" Bonner Br. 48. But that argument ignores that *Lancaster City*'s holding rested on its drawing of a *negative implication* from the absentee-voting provision in the Constitution of 1874. Under that reasoning, an express grant of permission in one area may plausibly (depending on other factors) be interpreted to imply a lack of permission in other areas. But the imposition of a requirement in one area implies, at most, the absence of a requirement in other areas; it does not imply a lack of permission. That was exactly the Court of Appeals' holding in *Mathews v. Paynter*, 752 F. App'x 740, 744 (11th Cir. 2018).

person voting.[17] *See* McLinko Br. 33-34; Bonner Br. 48. Petitioners also err in suggesting that the change from "may" to "shall"[18] is not *conclusive* of constitutional meaning. This argument puts the shoe on the wrong foot. Throughout this case, it is *Petitioners* who bear the burden of showing that the *current* Constitution prohibits mail-in voting beyond all doubt. Accordingly, it does not avail Petitioners to argue that the meaning of the "may" to "shall" change is ambiguous. Any such ambiguity is fatal to their claim.

*Second*, and coincident with that change, the General Assembly authorized absentee voting by classes of persons beyond those enumerated in the Constitution.

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[17] The flaw in this premise points out why Petitioner McLinko's parking ordinance analogy is invalid. *See* McLinko Br. 30.

[18] Certain amici argue that the interpretive canon of *expressio unius* can apply to provisions containing "shall" as well as provisions containing "may." Brief of *Amici Curiae* Citizens United, Citizens United Foundation, and the Presidential Coalition, LLC in Support of All Appellees at 29-31. This is true but irrelevant. None of the cases cited by amici involve a construction comparable to that presented by Article VII, § 14. For example, in *Lawless v. Jubelirer*, 789 A.2d 820 (Pa. Commw. Ct. 2002), the court construed a provision stating that the President *pro tempore* of the Senate's "seat as Senator shall become vacant whenever he shall become Governor and shall be filled by election as any other vacancy in the Senate." *Id.* at 829. The court understandably concluded that the provision "compels the President *pro tempore* to resign his senatorial seat **only** if he becomes **Governor**." *Id.* But that conclusion, when applied to Article VII, § 14 of the Pennsylvania Constitution, does not support Petitioners' position. The fact that § 14 *requires* the General Assembly to allow only certain persons to vote absentee does, indeed, imply that the General Assembly is not *required* to allow other persons to vote absentee. But it does not imply that the General Assembly is *prohibited* from doing so.

Further, none of the cases cited by amici involve a situation in which the provision at issue had been amended for the *sole purpose* of changing "may" to "shall," let alone a situation in which there is legislative history indicating that the change reflected the conviction that "[t]he right to vote is among the most precious rights we have." *See* House Legislative Journal, Session of 1966 Vol. 1, No. 1, at 518 (July 12, 1966) (statement of Representative Fineman).

*See* Initial Br. 60-63. Petitioners have little to say about the fact that, since the 1967 amendment was passed, the General Assembly has expanded the type of voters allowed to vote absentee far beyond the specific groups identified in the Constitution. In particular, since 1968, anyone on "vacation[]" may vote absentee, *see* 25 P.S. § 2602(z.3)—even though Article VII, § 14, in pertinent part, requires the General Assembly to allow absentee voting only by electors who are "absent from the municipality of their residence[] because their duties, occupation or business require them to be elsewhere," PA. CONST. art. VII, § 14. Of course, to be away on "vacation" is exactly the opposite of being away because of one's "duties, occupations, or business."[19] The enactment and longstanding existence of this statutory provision are powerful evidence of the General Assembly's contemporaneous and correct understanding of the 1967 amendment to Article VII, § 14.

Petitioners do not dispute that 25 P.S. § 2602(z.3), as well as the statute allowing military spouses to vote absentee, *see* 25 P.S. § 3146.1(b), contravenes their interpretation of the Pennsylvania Constitution. *See* McLinko Br. 29 n.9; Bonner Br. 47. (In fact, Petitioners' interpretation would sweep even further,

[19] Indeed, prior to Act 77's enactment, the practical effect of 25 P.S. § 2602(z.3) was that almost anyone who would be out of town on election day was eligible to return a ballot by mail, while voters who remained at home in their own election districts were compelled to vote in person at polling places.

cutting down voters' ability to cast a provisional ballot if they mistakenly go to the wrong polling place. *See* 25 P.S. § 3050(a.4)(7)(i).)

For more than half a century, countless Pennsylvanians have relied on these statutory provisions to cast their vote by mail. Petitioner now argue, 54 years after 25 P.S. § 2602(z.3) was enacted, that all of those votes were unconstitutional. According to Petitioners, if Pennsylvanians are out of town on election day for any reason other than business or work necessity, if they are married to a military service member stationed in another state, or if they inadvertently go to the wrong polling place, they may forfeit the fundamental right to vote. Respondents respectfully submit that the Court should reject that contention and distinguish or overrule *Lancaster City*.

## VIII. PETITIONERS' RELIANCE ON POST-1967 CONSTITUTIONAL AMENDMENTS AND A PROPOSED 2019 CONSTITUTIONAL AMENDMENT IS MISPLACED

Like the Commonwealth Court, Petitioners make much of certain amendments to Article VII, § 14 after 1967, each of which expanded the scope of persons within the provision. *See* McLinko Br. 23-24; Bonner Br. 50-52. According to Petitioners, "[i]f Respondents' arguments were correct, … those prior absentee balloting amendments … were pointless surplusage." Bonner Br. 52. Not so. By expanding the scope of persons for whom the General Assembly "shall" provide absentee-voting rights, each of those amendments raised the

"floor" established by Article VII, § 14; it increased the number of people who enjoyed *constitutional* absentee-voting rights that the General Assembly may not take away.

In a similar vein, Petitioners try to make hay out of the fact that the Pennsylvania General Assembly began, but did not complete, the process of amending the Pennsylvania Constitution in S.B. 413 of 2019. For many reasons, their reliance on this proposed amendment is puzzling. *First*, on its face, the proposed amendment would not merely have clarified that the General Assembly *may* allow mail-in voting. That amendment also would have *prohibited* the General Assembly from requiring *any* voter to vote in person at a polling place. *See* Butler Cnty. Comm. Br. 33 (quoting SB 411 (2019)) (amendment would have provided that statutes prescribing the "manner" of voting "may not require a qualified elector to physically appear at a designated polling place on the day of the election"). Once again, contrary to Petitioners' assertion, Respondents' interpretation of the Pennsylvania Constitution in no way renders the content of the proposed constitutional amendment superfluous.

*Second*, Petitioners erroneously rely on the statements of individual legislators regarding the need for the proposed amendment. Those statements obviously do not bind the courts, which have the ultimate authority to construe the Constitution. Indeed, the "touchstone" of constitutional interpretation is the

constitutional text itself. It is that text that determines whether the General Assembly has the authority to enact a certain law. Although the legislative history of constitutional provisions is an interpretive aid when that text is ambiguous, Petitioners do not invoke that legislative history. Instead, they seek to rely on the statements of individual legislators in 2019 to shed light on the meaning of a Constitution ratified fifty years earlier (containing provisions, like the election-residency requirement in Article VII, § 1, that were ratified much earlier than that).

Indeed, if the events surrounding the proposed amendment have any relevance to the present proceeding, it is to show that the General Assembly did *not* believe that Act 77 violated the Constitution of 1968. After all, both houses of the Republican-controlled General Assembly enacted Act 77 with supermajorities of nearly 70% (a percentage that included 11 of the Petitioners themselves), and the bill was signed into law by the Democratic Governor. *See Clifton v. Allegheny Cnty.*, 969 A.2d 1197, 1211 (Pa. 2009) (noting "the presumption that, when enacting any statute, the Legislature does not intend to violate the Constitutions of the United States or of this Commonwealth"). Accordingly, to the extent the General Assembly's interpretation of the Constitution has a role to play here, it necessarily militates in favor of sustaining the legislative enactment.

## IX. THIS COURT SHOULD DEFINITIVELY DISTINGUISH OR OVERRULE *CHASE* AND *LANCASTER CITY*

As the briefing in this appeal has shown, the root of the dispute is the 1862 decision in *Chase*—in particular, its unsupported declaration that, in adding an election-district residency requirement to the list of voter qualifications, the 1838 Constitution required that all electors vote in person at polling places in their respective election districts. That conclusion is at odds with the text, structure, legislative history, and contemporaneous understanding of the 1838 Constitution. It is also at odds with the overwhelming weight of the case law interpreting constitutional "offer to vote" language. The *Chase* Court appears to have taken the first step, nationwide, in construing that language. Unfortunately, it was a misstep that set the Commonwealth on the wrong path. *See* Note, *supra*, at 181 ("Where [Pennsylvania] attempted to lead, she has been prevented from keeping pace with her sister states."). The error was compounded when, in 1924, *Lancaster City* reflexively followed its Civil War forbearer—notwithstanding material differences in both the relevant constitutional language and the statutory scheme under review. *See id.* at 179 (observing that, although *Lancaster City* "could have reconsidered the problem, especially since the statute of 1923 differed in principle and detail from that of 1839, … the court deemed *Chase* … to be binding authority").

As Respondents have shown, *Chase* and *Lancaster City* can both readily be distinguished from the case at bar based on changes to the pertinent constitutional

provisions and differences in the nature of the voting methods at issue. But if this Court concludes otherwise, it should overrule them. *See* Initial Br. 64-68. Petitioners' arguments to the contrary are unpersuasive.

There is no dispute that "stare decisis 'is at its weakest when [this Court] interpret[s] the Constitution.'" *Commonwealth v. Alexander*, 243 A.3d 177, 198 (Pa. 2020). Nonetheless, Petitioners contend that *Chase* and *Lancaster City* were rigorously reasoned. But that is manifestly not the case. Indeed, as shown, neither case advances any reasoning in support of the conclusion that the "offer to vote" language in Article VII, § 1 required in-person voting at polling places. Note, *supra*, at 179 & n.19 ("In the Pennsylvania cases no attempt to give reasons is made …."). And the conclusion contravenes the text and structure of the Constitution, as well as the legislative history and common understanding of the provision at issue. *See supra* Sections III-V. Indeed, from the vantage point of the present, this Court can see that *Chase* and *Lancaster City* have become outliers; their interpretation of "offer to vote" is opposed by the great weight of the case law, which, unlike *Chase* and *Lancaster City*, is persuasively reasoned. *See supra* Sections III, V; Initial Br. 51-53.

The consequence of perpetuating *Chase*'s error would be profound. It would strip the legislature of authority that rightly belongs to it—and do so, not in the name of protecting individual rights, but rather to the prejudice of all

Pennsylvanian voters. As this Court has explained, if courts "extend" the "list of the things the legislature may not do" beyond what the Constitution actually proscribes, they "become [themselves] the aggressors and violate both the letter and spirit of the organic law as grossly as the legislature ever could." *Stilp*, 974 A.2d at 495. Further, as discussed above, *Chase* reflects a profoundly anti-democratic sentiment completely foreign to the current Constitution and this Court's contemporary jurisprudence. *See supra* Section VI. Put simply, there is ample "justification" for overruling *Chase* and *Lancaster City*, beyond the fact that they were wrongly decided. *See Alexander*, 243 A.3d at 196.

Petitioners suggest that the age of *Chase* and *Lancaster* militate against their overruling. But age is a weighty factor only where the passage of time has established "multiple precedents to overcome." *Id.* at 197. That is not the case here. *Chase*'s interpretation was affirmed (at most) once, without any reasoning, in *Lancaster City*, and has not been reconsidered by any precedent in the intervening 98 years.[20] Indeed, this is a case in which the passage of time—and the

[20] Petitioners and the Commonwealth Court cited only two other decisions purportedly relying on *Chase*'s or *Lancaster City*'s limitations on absentee voting. *See In re Franchise of Hospitalized Veterans*, 77 Pa. D. & C. 237, 240 (1952); *In re Election Instructions*, 2 Pa. D 299, 300 (1888). Notably, both cases are trial court decisions, and neither was decided under the current Constitution adopted in 1968. Further, neither case is on point. *Election Instructions* did not decide any question regarding the permissibility of mail-in or absentee judges. Instead, it held that townships could lawfully locate their polling places in boroughs outside the township. *See* 2 Pa. D. at 300 (explaining that *Chase* was inapposite and did not speak to the question before the court). As for *Hospitalized Veterans*, it did not examine a statute that was allegedly unconstitutional under the rule of *Chase* or *Lancaster City*. Rather, *Hospitalized Veterans* held

number of dissenting decisions that have been issued in the interim—only underscores why the precedent at issue should be overruled. *See supra* Sections III, V; Initial Br. 51-53; *see also Mayle v. Pa. Dept. of Highways*, 388 A.2d 709, 720 (Pa. 1978) ("Stare decisis should not be invoked when 'there is no better reason for it than that it was laid down in the time of Henry IV. It is … revolting if the grounds upon which it was laid down have vanished long since, and the rule persists from blind imitation of the past."). Petitioners' argument also overlooks that, for the entire life of the 1968 Constitution, the Election Code has provided for methods of voting *beyond* what *Chase* and *Lancaster City* held permissible. *See supra* Section VII.

Petitioners also insinuate that *Chase* and *Lancaster City* have somehow engendered reliance interests, asserting, in conclusory fashion, that "overturning *Chase* … and *Lancaster City*" would "inject[] instability into settled law." Bonner Br. 42. Unsurprisingly, however, Petitioners cannot identify any specific reliance interest here. They seem to suggest that the General Assembly "relied" on not having the power to permit mail-in or absentee voting when it went to the trouble of initiating the constitutional amendment process in the past. But even assuming *arguendo* that Petitioners are correct about the General Assembly's thinking, they

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that the plaintiffs at bar were not entitled to vote under the absentee-voter *statute* in effect at the time. 77 Pa. D. & C. at 238-39.

have not identified a cognizable reliance interest weighing against overruling. If *Chase* was wrong to declare that the General Assembly could not authorize voting methods other than in-person voting at polling places (and it was), the fact that the General Assembly has labored under that mistaken opinion is no reason to perpetuate the error. Rather, the Court should reaffirm the Legislature's continuing constitutional role of enacting public policy to improve the lives and welfare of all Pennsylvanians.

Indeed, it is clear that the relevant reliance interests in this case are held by (1) voters who have relied on the existence of Act 77 and the availability of no-excuse mail-in voting—including, in particular, the approximately 1.4 million Pennsylvanians who are on Act 77's permanent mail-in voter list (R.132a-R.133a); (2) voters who, since 1968, have relied on the ability to vote absentee while on vacation, *see* 25 P.S. § 2602(z.3), or while accompanying their military spouse, *see* 25 P.S. § 3146.1(b), and (3) election administrators and government entities who have spent millions of dollars on implementing Act 77, on the understanding that mail-in voting would be available for the indefinite future (R.126a-131a).

Finally, Petitioner McLinko argues against overruling *Chase* and *Lancaster City* based on a theory of legislative acquiescence. The reasoning seems to be that, because Article VII, § 1's "offer to vote" language has not been amended in response to the *Chase* decision, that decision should be deemed to have been

implicitly ratified or acquiesced to. *See* McLinko Br. 34-37. But the authorities cited by McLinko are inapposite for at least two fundamental reasons. First, each addresses *statutory* rather than constitutional construction. *See id.* That distinction is fundamental when it comes to principles of stare decisis. It is well settled that "stare decisis has 'special force' in matters of statutory, as opposed to constitutional, construction, because in the statutory arena the legislative body is free to correct any errant interpretation of its intentions, whereas, on matters of constitutional dimension, the tripartite design of government calls for the courts to have the final word." *Hunt v. Pa. State Police*, 983 A.2d 627, 638 (Pa. 2009) (quoting *Shambach v. Bickhart*, 845 A.2d 793, 807 (Pa. 2004) (Saylor, J., concurring)). By contrast, "stare decisis has no real place in constitutional law when the validity of another statute"—here, Act 77—"is under consideration." *Commonwealth ex rel. Margiotti v. Lawrence*, 193 A. 46, 48 (Pa. 1937) (quoting *Heisler v. Thomas Colliery Co.*, 118 A. 394, 395 (Pa. 1922)); *see Alexander*, 243 A.3d at 197; *see also Balentine v. Chester Water Auth.*, 191 A.3d 799, 810 (Pa. 2018) ("If, after thorough examination and deep thought, a prior judicial decision seems wrong in principle or manifestly out of accord with modern conditions of life, it should not be followed as a controlled precedent, where departure therefrom

can be made without unduly affecting contract rights or other interests calling for consideration.").

McLinko's argument might have some force if the people of Pennsylvania had *rejected* a proposed amendment to overturn *Chase*, or had amended the Constitution to *restrict* the Legislature's power to prescribe voting methods. But McLinko relies exclusively on constitutional amendments that have expressed *dissatisfaction* with *Chase*'s restriction on voting methods by expanding the right to vote by mail. That the people of Pennsylvania have consistently *approved* these voting-rights-expanding amendments cannot reasonably be viewed as ratification of *Chase*. Put differently, the fact that the General Assembly and people of Pennsylvania have duly labored under the shackles of *Chase* is no reason to keep those shackles in place, should the Court find that they were erroneously imposed (as it should).

*Second*, McLinko's argument takes no account of the fact that, since adoption of the current Constitution in 1968, the Election Code has provided absentee voting rights to a broad swath of electors outside the scope of Article VII, § 14 of the Constitution. *See supra* Section VII. No constitutional amendment has been adopted to prevent that practice. Respondents respectfully submit that that

fact is more justly viewed as acquiescence than any fact to which Petitioners can point.

## X. THE *BONNER* AND *COUNTY REPUBLICAN COMMITTEE* PETITIONERS' FEDERAL CONSTITUTIONAL CLAIMS FAIL AS A MATTER OF LAW

Respondents have already explained why the federal claims in the *Bonner* and *County Republican Committee* Petitioners, which attempt to turn their challenges under the Pennsylvania Constitution into federal constitutional claims, fail as a matter of law—and, indeed, fail irrespective of the merits of the state-law claim. *See* Initial Br. 69-70. "A violation of state law does not state a claim under § 1983 …." *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 391 (W.D. Pa. 2020) (quoting *Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) (citing *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)))). The *Bonner* and *County Republican Committee* Petitioners do not address any of the directly-on-point authorities cited by Respondents. *See generally* Bonner Br. 14-19. As set forth below, the *Bonner* and *County Republican Committee* Petitioners' arguments do not hold water.[21]

[21] Contrary to the *Bonner* Petitioners' argument, *see* Bonner Br. 13-14, the Commonwealth Court's Order clearly and finally resolved all their requests for relief, granting the declaratory judgment sought by Appellees and denying the other requested forms of relief. In pertinent part, the Order states: "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." (R.1908a-R1909a.) The Commonwealth Court made clear that it denied injunctive relief because it "[w]as unnecessary" given that court's declaration that Act 77 was invalid. Initial Br., Appendix B at 3. The Commonwealth Court's decision to

### A. The *Bonner* and *County Republican Committee* Petitioners' Elections Clause Claim Is Meritless

Petitioners fail to identify any authority supporting the proposition that the Elections Clause—or any of the other federal constitutional provisions they invoke—converts an alleged violation of a state constitution into a federal claim. To be sure, numerous cases stand for the proposition that a state legislature is constrained by "the provisions of its Constitution," even when enacting election laws pursuant to state authority conferred by the Elections Clause. Bonner Br. 16-17 (citing *Smiley v. Holm*, 285 U.S. 355, 369 (1932); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015)); Butler Cnty. Comm. Br. 35-37 (discussing *Smiley*, 285 U.S. at 365-73).[22] But none of these cases, including *Smiley*, stands for the proposition

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invalidate Act 77 under the Pennsylvania Constitution obviated the need to reach the federal constitutional claims. As the Commonwealth Court said: "Given our grant of declaratory relief to Petitioners [based on the Pennsylvania Constitution], we need not address the federal claims." *Id.* at 8, n.12.

There is nothing unusual—or non-final—about the Commonwealth Court's ruling. If a court grants relief under one of a plaintiff's theories, the court has no need to adjudicate the others. Under the *Bonner* Petitioners' erroneous conception of a "final order," courts would be required to determine the validity of every legal theory presented in a case—including all constitutional claims—irrespective of whether the case can be resolved on a narrower legal basis. But Courts routinely decline to reach federal-law claims when the case can be resolved based on state-law theories. *See, e.g.*, *Commonwealth v. Greiner*, 388 A.2d 698, 700 (Pa. 1978) ("Because we conclude that the Juvenile Act of 1972 and case law provide an adequate basis for our decision today, we need not reach the question of the federal due process requirements in this area.").

[22] The remaining case the *Bonner* Petitioners cite, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000), also provides no support for Petitioners' position. That case raised—but did not resolve—the question whether there may be certain situations in which the Elections Clause (Article II, § 1, cl. 2) of the U.S. Constitution imposes limits on a state

that any election procedure that violates state law is, necessarily, also a violation of the U.S. Constitution actionable under 42 U.S.C. § 1983. Such a rule would have sweeping implications, federalizing a wide swath of state-law issues. (For example, it would effectively create a federal private right of action to enforce violations of the Free and Equal Elections Clause of the Pennsylvania Constitution, which has a "broad and wide sweep." *League of Women Voters*, 178 A.3d at 809.) Moreover, there is no reason why, by its logic, such a rule would be limited to alleged violations of a state's constitution. If, as the *Bonner* and *County Republican Committee* Petitioners argue, alleged violations of state laws applicable to federal elections are actionable federal constitutional claims, then any state official could be sued under § 1983 for allegedly violating virtually any state-law statute or administrative regulation touching elections. That is not the law, and the *Bonner* and *County Republican Committee* Petitioners cite no case holding otherwise.

The *Bonner* Petitioners also raise a second, entirely new, Elections Clause argument for the first time on appeal. According to the *Bonner* Petitioners,

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constitution's power to "circumscribe the legislative power." *Bush*, 531 U.S. at 77; *see also* 78 (vacating and remanding the Florida Supreme Court's decision ordering a manual recount with respect to the 2000 presidential election because it was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2," and "unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5"). *Bush* does nothing to support Petitioners' theory that if a legislature violates its own state constitution, then it has automatically also violated the federal constitution.

because the Elections Clause "requires that 'The Times, **Places** and Manner of holding Elections for Senators and Representatives, **shall** be prescribed in each State by the Legislature thereof[,]'" mail-in voting unconstitutionally "allow[s] any registered voter to vote from anywhere in the world, failing to prescribe any required place at all for voting in federal elections to occur." Bonner Br. 17 (emphasis in original). This new argument is waived. *See Cash Am. Net of Nevada, LLC v. Com., Dept. of Banking*, 8 A.3d 282, 298 (Pa. 2010). But it is also absurd: if it were right, it would mean that the Elections Clause prohibits states from authorizing (through their constitutions or otherwise) mail-in voting *or absentee voting*. According to the *Bonner* Petitioners' logic, neither form of voting "prescribe[s] any required place at all for voting in federal elections to occur." Bonner Br. 17. That would invalidate voting laws that have long been in place in the vast majority, if not all, of the 50 states and the District of Columbia. The Court should reject the *Bonner* Petitioners' radical, unfounded view of the Elections Clause.

### B. The *Bonner* and *County Republican Committee* Petitioners' Fourteenth Amendment Claim Is Meritless

Petitioners also fail to marshal any relevant authority in support of their claim under the Fourteenth Amendment to the U.S. Constitution. The Third Circuit Court of Appeals has already rejected a virtually identical theory of vote dilution. *See Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 354-55 (3d Cir.

2020) (rejecting similar vote-dilution claim and citing cases), *vacated on mootness grounds sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *accord Wood v. Raffensperger*, 981 F.3d 1307, 1314-15 (11th Cir. 2020); *King v. Whitmer*, 505 F. Supp. 3d 720, 735-36 (E.D. Mich. 2020). And the *Bonner* and *County Republican Committee* Petitioners' reliance on *Reynolds v. Sims*, 377 U.S. 533 (1964), is misplaced. *Reynolds* was a malapportionment case and bears no resemblance to the type of so-called "vote dilution" Petitioners allege in this case. The *Bonner* and *County Republican Committee* Petitioners allege neither malapportionment nor fraud. Contrary to the *Bonner* Petitioners' conclusory assertion, a mail-in voting method equally available to all qualified voters does not "disenfranchise" anyone. *See* Bonner Br. 19. At bottom, the *Bonner* and *County Republican Committee* Petitioners fail to state any federal constitutional claim.

## XI. Petitioners Brought Their Constitutional Challenge to Act 77 in the Wrong Court

### A. Act 77 Grants Exclusive Jurisdiction to This Court and Separately Bars Constitutional Claims Brought After 180 Days

In assessing whether the Commonwealth Court had jurisdiction to hear Petitioners' state law claims and whether those claims were time-barred, what is most telling is what Petitioners' three briefs do not discuss: Act 77's plain language, structure, and legislative history. A statute's plain language is "[t]he best indication of legislative intent." *Crown Castle NG E. LLC v. Pa. Pub. Util.*

*Commn.*, 234 A.3d 665, 674 (Pa. 2020); *accord* 1 Pa.C.S. § 1921. And where that language is not conclusive, the Court looks to legislative history. *See* 1 Pa.C.S. § 1921; *Holland v. Marcy*, 883 A.2d 449, 458, 459 (Pa. 2005).

As Respondents previously showed, *see* Initial Br. 22-28, the plain language and structure of Section 13 of Act 77 make two things clear. First, under Section 13(2), the "Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of" Act 77, without any limitation on the duration of that exclusive jurisdiction. Act 77, § 13(2). Second—and separately—under Section 13(3), "actions" raising constitutional challenges to Act 77 "must be commenced within 180 days of" October 31, 2019. Act 77, § 13(3). The legislative history confirms that the statute means what it says. As House Government Committee Chair Everett explained to the General Assembly, Section 13(2) "gives the Supreme Court of Pennsylvania jurisdiction" over challenges to Act 77, *see* 2019 Pa. Legislative Journal—House 1740 (Oct. 29, 2019); and Section 13(3) requires "that suits be brought within 180 days so that we can settle everything before [Act 77] would take effect," *id*.[23]

[23] Petitioners cannot avoid the statutory time bar by invoking the canon of constitutional avoidance. *See* McLinko Br. 50-51. Because the plain text of Section 13(3) can reasonably be interpreted in only one way—as imposing a time bar on constitutional challenges to Act 77—that canon has no place here. *See Clark v. Martinez*, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a *means of choosing between them*." (emphasis in original)).

### B. Petitioners' Reliance on *Delisle v. Boockvar* Is Misplaced

Apparently recognizing that Section 13's text and legislative history stand against them, Petitioners attempt to support their interpretation by over-reading this Court's 81-word *per curiam* order in *Delisle v. Boockvar*, 234 A.3d 410 (Pa. 2020), which addressed an as-applied (not facial) challenge. Building the house of cards higher, Petitioners then assert that the Court should grant their distorted reading of *Delisle* "*stare decisis* effect." McLinko Br. 48. None of Petitioners' arguments withstands scrutiny.

According to Petitioner McLinko, the Court's *per curiam* order in *Delisle* "implicitly held" that "Act 77 establishes a 180-day window of exclusive jurisdiction for this Court to hear challenges to Act 77. After that 180-day period, the usual jurisdictional rules apply, and the Commonwealth Court has jurisdiction over constitutional challenges under 42 Pa. Cons. Stat. § 761(a)(l)." McLinko Br. 47-48 (citation omitted). But *Delisle* is a summary order that does not set forth any opinion on behalf of the Court. Even more significantly, as Appellants previously pointed out, *Delisle* involved an *as-applied* constitutional challenge rather than a facial one. There are good reasons to treat as-applied and facial constitutional challenges differently for purposes of determining the applicability and enforceability of Section 13. Not only would applying Section 13(3)'s time bar to as-applied challenges raise procedural due process concerns, but, as Justice Wecht

explained, such challenges often depend on "fact-intensive constitutional theories requiring a great deal of speculation that generally lie outside this Court's purview." *Delisle*, 234 A.3d at 411 (Wecht, J., concurring). Facial challenges like the one presented here, by contrast, present pure issues of law squarely within the province of this Court, the only tribunal that can conclusively resolve them. That is exactly why the General Assembly vested this Court with exclusive jurisdiction to decide the type of challenge Petitioners raise here. Act 77, § 13(2).

Putting aside the fundamental distinction between as-applied and facial constitutional challenges, *Delisle* has no precedential weight. Without citing any apposite authority, Petitioners ask the Court to grant the decision "*stare decisis* effect." McLinko Br. 48. But "[t]his Court has made it clear that *per curiam* orders have no *stare decisis* effect." *Commonwealth v. Thompson*, 985 A.2d 928, 937 (Pa. 2009) (collecting cases). "The rationale for declining to deem *per curiam* decisions precedential is both simple and compelling. Such orders do not set out the facts and procedure of the case nor do they afford the bench and bar the benefit of the Court's rationale." *Id.* at 937-38. Each of those reasons for treating *per curiam* orders as non-binding applies fully here: the *Delisle per curiam* order does not set out the case background and does not identify the basis for the Court's reading of Section 13 of Act 77. *See* 234 A.3d at 410-11.

### C. This Court Should Exercise Jurisdiction over Petitioners' Claims

Because Section 13(2) grants this Court exclusive jurisdiction over Petitioners' constitutional challenges to Act 77, the Commonwealth Court lacked jurisdiction. Its decision should therefore be vacated. *See In re Pet. for Enf't of Subpoenas issued by Hrg. Examr. in a Proc. before Bd. of Med.*, 214 A.3d 660, 662 (Pa. 2019). But Respondents agree with Petitioner McLinko that "[i]n such a circumstance, the Court could treat the appeal as if the case has been transferred to this Court under 42 Pa. C.S. § 5103[.] Just as if transferred, the appeal in this case is subject to this Court's *de novo* review for questions of law." McLinko Br. 52-53; *see also* Initial Br. 35 fn.13. Exercising jurisdiction, the Court should dismiss Petitioners' claims.

## XII. ACT 77'S 180-DAY TIME BAR PRECLUDES PETITIONERS' CLAIMS

### A. Legislatures Have the Power to Impose Reasonable Time Limitations on Facial Constitutional Challenges to Statutes

Unable to avoid the plain meaning of Section 13(3), Petitioners insist the time bar is unenforceable on constitutional grounds. They again fail to acknowledge that a statute like Section 13(3) "will not be declared unconstitutional unless it *clearly*, *palpably*, and *plainly* violates the Constitution," *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 393 (Pa. 2005) (emphasis in original), and that "[a]ll doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster." *Id*. Nor do

Petitioners meaningfully engage with the overwhelming body of case law establishing that a "constitutional claim can become time-barred just as any other claim can. Nothing in the Constitution requires otherwise." *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983) (collecting cases).[24] For instance, in *Greene v. Rhode Island*, 398 F.3d 45 (1st Cir. 2005), the First Circuit Court of Appeals rejected a due process challenge to a 180-day time limitation for bringing constitutional challenges to federal statute. *Id.* at 53-55. Just like the time bar in Section 13(3) of Act 77, the at-issue provision in *Greene* was included within the statute it affected, the Rhode Island Indian Claims Settlement Act. *Id.* at 47. In applying that statute's 180-day time bar, the *Greene* court explicitly rejected the argument that the plaintiff "received inadequate notice of the Settlement Act's extinguishment of its claims, in violation of the Due Process Clause of the Fifth

[24] The *Bonner* Petitioners attempt to distinguish the many cases cited by Respondents on the basis that they "were all federal cases that put time limits on constitutional challenges to federal laws that waived sovereign immunity." *Bonner* Br. 25-26. Although *Block* did involve a waiver of sovereign immunity, that has no bearing on the U.S. Supreme Court's broader statement about the enforceability of time limitations on constitutional claims. Moreover, the relevant holdings in the remainder of the cases cited by Respondents have nothing to do with waivers of sovereign immunity. *See Greene v. Rhode Island*, 398 F.3d 45 (1st Cir. 2005) (denying constitutional challenge to 180-day time limitation on constitutional claims included in Rhode Island Indian Claims Settlement Act); *Native Am. Mohegans v. United States*, 184 F. Supp. 2d 198, 217-18 (D. Conn. 2002) (same for Mohegan Nation of Connecticut Land Claims Settlement Act); *Dugdale v. U.S. Cust. And Border Protec.*, 88 F. Supp. 3d 1, 8 (D.D.C. 2015) (denying challenge to 60-day limit on constitutional challenges to expedited removal statute).

Amendment." *Id.* at 53. *Greene* is just one of several cases showing that Section 13(3) is neither unconstitutional nor atypical. *See also* Initial Br. 29-31.[25]

### B. Petitioners Conflate Statutory Time Limitations With Provisions and Doctrines Categorically Precluding Judicial Review

Petitioners wrongly argue that Section 13(3) "render[s] the provision unconstitutional because the General Assembly may not insulate its statutes from judicial review." McLinko Br. 48; *see also* Bonner Br. 24; Butler Cnty. Comm. Br. 45-46. But Petitioners' conclusion does not follow from their premise. Act 77 is nothing like the jurisdiction-stripping provision cited by Petitioner McLinko, *see* McLinko Br. 49, nor is it akin to the political question doctrine cited by Petitioner McLinko and the *Bonner* Petitioners,[26] which altogether "insulate[s] from state court review" certain constitutional questions. *Sweeney v. Tucker*, 375 A.2d 698, 710 (Pa. 1977). In those cases, the party opposing review contended that the judiciary could *never* review the constitutionality of a statute. In this case, the legislature simply restricted *when* litigation could be brought—something that is entirely within its power. For 180 days after Act 77's enactment, Petitioners could

[25] This line of cases demonstrates that the County Republican Committee Petitioners' reliance on laches caselaw, *see* Butler Cnty. Comm. Br. 44-46, instead of time-bar caselaw, is misplaced. Respondents rely on Section 13(3) as a time bar; they are no longer pursuing their laches defense.

[26] *See* McLinko Br. 48 (citing *William Penn Sch. Dist. v. Pa. Dep't. of Educ.*, 170 A.3d 414, 438 (Pa. 2017)); Bonner Br. 24 (citing *William Penn*, 170 A.3d at 418, and *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 927 (Pa. 2013)).

have brought their facial constitutional challenges directly to this Court and obtained a definitive ruling, as "facial challenges are … ripe upon mere enactment" of the law. *Phila. Ent'mt. & Dev. Partners v. City of Phila.*, 937 A.2d 385, 393 n.7 (Pa. 2007); *see Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020) (noting that the petitioners there, who had brought the same constitutional challenge to Act 77 more than eight months before the earliest of the consolidated suits filed here, had "complete[ly] fail[ed] to act with due diligence in commencing their facial constitutional challenge, *which was ascertainable upon Act 77's enactment*" (emphasis added)); *id.* at 1258 (Wecht, J., concurring) ("Petitioners could have brought this action at any time between October 31, 2019, when Governor Wolf signed Act 77 into law, and April 28, 2020").[27] Act 77's time bar merely ensured that untimely claims do not cause widespread prejudice and disenfranchisement or reward political gamesmanship; it did not insulate Act 77 from review. *See* Initial Br. 27-28.

[27] The *Bonner* Petitioners' argument that they would have lacked standing if they had "brought an action sooner," Bonner Br. 23, is at odds with Petitioners' arguments below as to why they had standing. (R.1628a-1634a.) Assuming, as the Commonwealth Court held, that Petitioners have standing, then they had standing to challenge Act 77 from the moment it was enacted. *See* Initial Br., Appendix A at 37-40; *id.*, Appendix B at 7-8.

### C. The "Void *ab Initio*" Case Law Petitioners Rely Upon Is Not On Point

As set forth in Respondents' initial brief, *see* Initial Br. 32-33, Petitioners' reliance on *Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Township*, 907 A.2d 1033 (Pa. 2006), is unavailing. *See* McLinko Br. 50; Butler Cnty. Comm. Br. 40-42; Bonner Br. 24-25. Petitioners cite *Glen-Gery* for a proposition far broader than the case stands for. The Court in *Glen-Gery* did *not* hold that "'a statute held unconstitutional is considered void in its entirety and inoperative as if it had no existence from the time of its enactment.'" *Glen-Gery*, 907 A.2d at 1037. *See* McLinko Br. 50 (quoting *Glen-Gery*, 907 A.2d at 1037; Butler Cnty. Comm. Br. 41 (quoting *Glen-Gery*, 907 A.2d at 1037). The language Petitioners quote appears in a background discussion of a historical doctrine that, the *Glen-Gery* opinion points out, Pennsylvania law does not apply across the board. *Id.* at 1037-40.[28]

*Glen-Gery*'s actual holding is much narrower: "A claim alleging a *procedural* defect affecting *notice or due process rights* in the enactment of an ordinance may be brought notwithstanding" a statutory time limitation. 907 A.2d

[28] In a more recent decision, this Court made clear that judicial decisions holding a statute unconstitutional do not invariably result in the statute's being deemed "void *ab initio*." *Dana Holding Corp. v. Workers' Comp. Appeal Bd.*, 232 A.3d 629, 640-49 (Pa. 2020). Indeed, even the *general* rule is merely that "a holding of this Court that a statute is unconstitutional will generally be applied to cases *pending on direct appeal in which the constitutional challenge has been raised and preserved*." *Id.* at 649 (emphasis added). That is quite different than a rule that an unconstitutional statute is "void ab initio," such that *all* of its prior effects are automatically undone, and it is "inoperative as though it had never been passed." *See id.* at 640.

at 1035 (emphasis added). Here, there is no allegation that any Petitioner did not receive adequate notice of Act 77; accordingly, the limited void *ab initio* doctrine discussed in *Glen-Gery* does not apply.

Moreover, even if Pennsylvania law were as Petitioners describes it, Section 13's time bar would stand. Although the Commonwealth Court's Order states—overbroadly—that "Act 77," presumably as a whole, "is declared unconstitutional and void *ab initio*" (R.1908a-R.1909a),[29] the court's opinion addressed only the constitutionality of Act 77's no-excuse mail-in voting provisions, which are just one portion of a sprawling statute. Although the statute provides that many of its other provisions will be "void" if other provisions fall, *see* Act of Oct. 31, 2019, P.L. 552, No. 77, § 11, Section 13 does not appear on this list. In other words, Petitioners cannot avoid Section 13's time bar by asserting a substantive challenge to the constitutionality of a *different* provision in Act 77; the validity of no-excuse mail-in voting has no bearing on the validity of Section 13.

[29] If given effect as written, the Commonwealth Court's declaration "Act 77" was "void *ab initio*" would create very serious difficulties and profound injustice. For one thing, that court's declaration appears to directly contradict this Court's ruling in *Kelly v. Commonwealth*, which held that petitioners "could *not* disenfranchise[] … millions of Pennsylvania voters" by retroactively invalidating votes cast in reliance on Act 77's no-excuse mail-in voting procedures. 240 A.3d at 1257 (emphasis added). Indeed, the Commonwealth Court explicitly distinguished *Kelly* from this case on the grounds that Petitioners here were purportedly seeking only *prospective* relief. Initial Br., Appendix A at 42. But a declaration that Act 77 is void "*ab initio*" is, on its face, a grant of *retroactive* relief. *See Dana Holding*, 232 A.3d at 640 (equating the "void *ab initio* doctrine" with the practice of "accord[ing] full retroactivity to judicial rulings holding statutes to be unconstitutional").

### D. Contrary to the *Bonner* Petitioners' Assertion, Section 13's Time Bar Does Not Apply to Constitutional Challenges to Statutes Enacted After Act 77

The *Bonner* Petitioners argue that the 180-day time limit of Section 13(3) is "absurd" because it would preclude challenges to further amendments of Act 77. Bonner Br. 27-28. But Section 13 does not say that; it applies to challenges to Act 77's "amendment or addition" of various provisions of the Election Code, and not to amendments of those provisions set forth in newer (or older) statutes. Act 77, § 13(1) ("This section applies to the amendment or addition of the following provisions …."). In any event, *this* case does not challenge a post-Act 77 election procedure; it expressly challenges the universal mail-in voting procedures introduced by Act 77. Put differently, even if the 180-day time bar would be unconstitutional as applied to challenges to *later* statutory enactments (assuming *arguendo* that the time bar was written to apply to such enactments, as it is not), it would not be unconstitutional as applied to this case.[30]

[30] Because the *Bonner* Petitioners' federal claims fail as a matter of law, the Court need not consider whether, as asserted by the *Bonner* Petitioners, they were timely under the statute of limitations for actions brought under § 1983. Bonner Br. 29-30.

## XIII. CONCLUSION

For the foregoing reasons, and those set forth in their Initial Brief, Respondents respectfully request that this Court vacate the Orders below and dismiss the petitions for review with prejudice.

Respectfully submitted,

Dated: March 2, 2022


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## CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I, Robert A. Wiygul, hereby certify that this Reply Brief of Appellants was prepared in word-processing program Microsoft Word 2016 (for Windows), and I further certify that, as counted by Microsoft Word 2016, this Reply Brief of Appellants contains 13,610 words, excluding the parts of the brief exempted by Pa.R.A.P. 2135(b), and thus complies with Pa.R.A.P. 2135(a)(2).

Dated: March 2, 2022

/s/ *Robert A. Wiygul*
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**CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127**

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

Dated: March 2, 2022

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