[J-18A-2022, J-18B-2022, J-18C-2022, J-18D-2022 and J-18E-2022]
[MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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. 14 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 244 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022
TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK, Appellees v. LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, Appellants	:	No. 15 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 293 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022

DOUG MCLINKO	:	No. 17 MAP 2022
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	:	Appeal from the Order of the
v.	:	Commonwealth Court at No. 244
	:	MD 2021 dated January 28, 2022.
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; AND LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA	:	ARGUED: March 8, 2022
	:	
CROSS APPEAL OF: YORK COUNTY REPUBLICAN COMMITTEE, WASHINGTON COUNTY REPUBLICAN COMMITTEE, BUTLER COUNTY REPUBLICAN COMMITTEE	:	
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TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK	:	No. 18 MAP 2022
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	:	Appeal from the Order of the
	:	Commonwealth Court at No. 293
	:	MD 2021 dated January 28, 2022.
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	:	ARGUED: March 8, 2022
	:	
v.	:	
	:	
LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE	:	
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CROSS APPEAL OF: YORK COUNTY REPUBLICAN COMMITTEE, WASHINGTON COUNTY REPUBLICAN COMMITTEE, BUTLER COUNTY REPUBLICAN COMMITTEE	:	

TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK, Cross Appellants v. LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, Appellees	:	No. 19 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 293 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022

DISSENTING OPINION

JUSTICE MUNDY **DECIDED: August 2, 2022**

As I would affirm the order of the Commonwealth Court, I respectfully dissent. Notably, neither the majority nor the concurrence provides a convincing account of how our state Charter permits universal, no-excuse mail-in ballots, particularly in light of its specific authorization for absentee ballots for four defined groups of voters. The majority opinion in particular takes an approach that, if not ahistorical, is at best historically selective. Its most glaring omission is its failure to come to grips with the fact that the Pennsylvania Constitution's election-related provisions have been amended on numerous occasions in the 160 years since this Court first explained that by default it requires in-person voting, and in none of those instances have the people of this

Commonwealth sought to eliminate, alter, or clarify the textual basis for that ruling as it appears in our organic law. The majority also emphasizes the popularity of the legislation under review and the care with which it was debated, going so far as to recite the margin by which it was passed in each House of the General Assembly and the party affiliation of the legislators. *See* Majority Op. at 4-5. None of these observations has any relevance to the issue before this Court. Legislation inconsistent with our state Charter cannot gain validity through popular sentiment or careful drafting. The Constitution stands as a bulwark against contrary sentiment and the passions of the moment, and it can only be altered in the careful manner that it prescribes. *See* PA. CONST. art. XI, § 1.

To find authorization for universal no-excuse, mail-in balloting, the majority relies almost exclusively on Section 4 of Article VII. That provision indicates elections "shall be by ballot or by such other method as may be prescribed by law" so long as ballot secrecy is maintained. PA. CONST. art. VII, § 4. But that language does not speak to the issue before this Court, as there is no dispute that mail-in voting under Act 77 is "by ballot." The ballot is mailed in, rather than completed in person at the polling place, but it is still a ballot. *See* 25 P.S. §§3150.11(a) (giving qualified mail-in electors the right to "vote by an official mail-in ballot"), 3150.12(a) (relating to applications for mail-in ballots); Concurring Op. at 19 ("Mail-in ballots are ballots."); *In re Canvassing Observation*, 241 A.3d 339, 341 (Pa. 2020) (resolving a dispute relating to the canvassing of "mail-in and absentee ballots"). Given the meaning of the word "other," Section 4's reference to "other method[s]" plainly pertains to non-ballot methods – most notably when the provision was added to the Constitution in 1901, voting machines. *See In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924); *accord McLinko v. Dep't of State*, 270 A.3d 1243, 1257 (Pa. Cmwlth. 2022) (quoting Robert E. Woodside, PENNSYLVANIA CONSTITUTIONAL LAW 465 (1985)); *cf. People ex rel. Deister v. Wintermute*, 86 N.E. 818,

819 (N.Y. 1909) (stating that the same phrase – "such other method as may be prescribed by law" – which was added to the New York Constitution in 1895, was included "solely to enable the substitution of voting machines, if found practicable"). It is true, as the majority emphasizes, that this language is broad enough to encompass other methods besides voting machines, including methods not yet invented. My point here is that those other methods cannot include mail-in ballots because, as noted, they must be "other" than ballots. *Accord McLinko*, 270 A.3d at 1263 (observing that no-excuse mail-in voting "uses a paper ballot, and not some 'other method'"). As a consequence, Section 4's reference to "other methods" cannot accurately be understood the way the majority interprets it, as authorizing mail-in ballots. To the contrary, Section 4, standing alone, is neutral on the question of whether the ballots used in an election must be completed at the polling place, or whether they may instead be completed elsewhere and delivered by mail.

I also cannot support a reading of Article VII where everything that is not expressly prohibited is presumed to be permissible, and thereby treat all contrary authority from this Court as either *dicta* or insufficiently reasoned. Perhaps it is possible in some instances to say that an election-related constitutional provision which states the Legislature "shall" do something leaves open the possibility that it "may" do other things not mentioned, as the concurrence suggests by reference to a fanciful dog-sitting example. *See* Concurring Op. at 22. But that example is devoid of context, *i.e.*, information concerning the assumptions, the prior communications, and the prior course of conduct of the parties involved. More important, it does not align with the historical understanding of the Constitution's absentee-voting provisions, and it cannot be taken literally, as to do so would mean the Legislature, for example, has the authority to permit ten-year-old Nebraska residents to vote in Pennsylvania elections because it states Pennsylvania residents who are over 21 years old (now 18 years old by virtue of the United States

Constitution) "shall be entitled to vote," PA. CONST. art. VII, § 1, but it does not expressly prohibit younger persons or non-residents from voting.

To understand why "shall" in this context and others within Article VII often carries an implication of exclusivity, it is important to recognize the unique role voting plays in a viable democracy, and that individuals will sometimes seek to corrupt the electoral process for political ends. *See, e.g.*, *Marks v. Stinson*, 19 F.3d 873, 877 (3d Cir. 1994). It goes without saying that, without election integrity, democracy is no more than a façade, and a cynical one at that. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (recognizing the need for "substantial regulation of elections" to ensure electoral fairness and honesty). The very word democracy assumes both the availability of the franchise and its integrity, neither concept being more or less important than the other. As the Supreme Court has observed, the right to vote "is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992); *see also Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."). Public confidence in the electoral system and trust in the outcome of every election are crucial to a functioning democracy. *See generally* CONFERENCE REPORT – THE CARTER-BAKER COMMISSION: 16 YEARS LATER, at 25 (Rice University's Baker Institute for Public Policy 2021) (indicating that "confidence in our election system, and always working to make it better, is the underpinning of our democracy").

On one side of the ledger, the right of suffrage in the United States has been fleshed out over our history through successive iterations of expansion, as a matter of both constitutional and statutory law, to include men and women of all races and socioeconomic statuses, and in all walks of life. Provisions such as the Fifteenth

Amendment, the Nineteenth Amendment, the Civil Rights Act of 1957, and the Voting Rights Act of 1965, stand out as milestones in that expansion. *See, e.g.*, U.S. CONST. amend. XV, § 1 (1870) ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id*. amend. XIX (1920) ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."). These are all welcome developments. But on the other side of the ledger, it is self-evident that the *integrity* of electoral actions becomes more difficult to verify when they are undertaken at a distance and outside of public scrutiny: not only is fraud more difficult to detect, but the voter lacks contemporaneous assistance from election officials and so there is a greater chance for honest mistakes. *See Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (observing honest voting mistakes and voting fraud can both be facilitated by absentee voting).[1] Thus, the concept of mail-in ballots was virtually unknown during the early years of this Republic.

It is against this backdrop that our Court undertook over a century and a half ago to expound the meaning of the constitutional requirement that an elector must "offer to vote" in his district. Recognizing that its purpose was "to exclude disqualified pretenders and fraudulent voters of all sorts," *Chase v. Miller*, 41 Pa. 403, 418 (1862), the Court explained:

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[1] See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot & the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 484-85 (2003) ("As casting ballots away from the polling place becomes more widespread, the possibilities for fraud and coercion expand[.]"); Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, NEW YORK TIMES, Oct. 6, 2012 (noting the trend toward voting by mail enhances the potential for fraud – for example through the practice of "granny farming" (tricking or coercing senior citizens) or through the buying and selling of votes – and will likely result in more uncounted votes), *reprinted in* Brief for Appellees at Exh. B.

> Construing the words according to their plain and literal import (and we must presume that the people of Pennsylvania construed them so when they adopted the amendment), they mean, undoubtedly, that the citizen, possessing the other requisite qualifications, is . . . to offer his ballot in that district. . . . *To "offer to vote" by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. The ballot cannot be sent by mail or express*, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil. We cannot be persuaded that the constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. The constitution meant, rather, that the voter, *in propria persona*, should offer his vote in an appropriate election district, in order that his neighbors might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.
>
> The amendment so understood, introduced not only a new test of the right of suffrage, to wit, a district residence, but a rule of voting also. Place became an element of suffrage for a two-fold purpose. Without the district residence no man shall vote, but having had the district residence, the right it confers is to vote in that district. Such is the voice of the constitution. The test and the rule are equally obligatory. We have no power to dispense with either. Whoever would claim the franchise which the constitution grants, must exercise it in the manner the constitution prescribes.

Id. at 419 (emphasis added).

This interpretation is entirely reasonable. In Pennsylvania the concept of a defined place for voting has always had special prominence. The Constitution of 1776 contained a "Plan or Frame of Government" which prescribed that the Commonwealth would be governed by an assembly of freemen as well as a president and a twelve-man counsel holding executive power, *see* PA. CONST. §§ 1, 3 (1776), to be elected at the same "time and place" for electing representatives in the assembly. PA. CONST. § 19 (1776). Likewise, sheriffs and coroners were to be elected "at the same time and place appointed for the election of representatives." PA. CONST. § 31 (1776). This dual focus on both time and place was carried through into the 1790 and 1838 Constitutions, which specified that

the governor, state senators, and other officials such as sheriffs and coroners, were to be elected at the "same place" as state representatives. *See, e.g.*, PA. CONST. art. I, § V (1790); PA CONST. art II, § II (1838). The specification of a place of election was more than a formality, as one of Appellants' amici helpfully expounds:

> At the time of *Chase*, elections in Pennsylvania, as in most states, were community events. As one historian explains, "One did not simply 'vote,' in the nineteenth century; in the parlance of the times, one 'attended' or 'went to the election.'" John F. Reynolds, *Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920* 34 (1988). At the 1837 Pennsylvania Constitutional Convention, delegates were concerned with facilitating "the attendance" of voters, and spoke of large numbers of voters "assembled together" at elections. 2 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania 24-25 (1837). The continuing communal quality of nineteenth-century elections is reflected in a speech at the convention by a delegate named George Woodard, who later joined this Court and wrote the *Chase* opinion. He explained he would hesitate to change the traditional day for elections – "a day on which the people had been accustomed from the days of the revolution, to meet and consult, and decide who should rule over them." *Id*. at 27.

Brief for Amicus Molly Mahon, *et al*., at 13-14. Although amicus recognizes times have changed, *see id*. at 14 (expressing that the above description "no longer resonates"), the constitutional language has not changed, and amicus's explanation lends credence to the *Chase* Court's understanding of what "offer to vote" meant at the time that provision was drafted and adopted by the citizens of Pennsylvania.

The majority recognizes as much, *see* Majority Op. at 62-63 (acknowledging that in the early nineteenth century it was important for a voter to appear in person so his qualifications could be verified by others within his district), but relies on advances in voter registration schemes to suggest this need no longer exists. *See id*. Even assuming the need for in-person verification is diminished or no longer exists, the originally intended meaning still applies unless and until the text has been repealed, amended, or clarified,

which it has not. "[I]n interpreting a constitutional provision, we view it as an expression of the popular will of the voters who adopted it, and, thus, construe its language in the manner in which it was understood *by those voters*." *Washington v. Dep't of Pub. Welfare*, 188 A.3d 1135, 1149 (Pa. 2018) (citing *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006)) (emphasis added). If the phrase "offer to vote" were inserted into the Constitution for the first time today, we might interpret it differently. But it was inserted in 1838 and should be construed according to what it meant at that time. *See Yocum v. Pa. Gaming Control Bd.*, 161 A.3d 228, 239 (Pa. 2017) (indicating that constitutional language must be interpreted "as the average person would have understood it when it was adopted"); *accord* A. Scalia & B. Garner, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012) (observing "words mean what they conveyed to reasonable people at the time they were written"). *Chase* was decided close in time to when the provision was first included in the Constitution, and the authoring Justice participated in the constitutional convention that adopted it. The relevant constitutional text remains unchanged, and the explanation in *Chase* is so clear, that the majority must resort to demoting it through disparaging language by referring to it as an "incidental interpretation" resulting in *dicta*, Majority Op. at 52, and criticizing a later decision which employed the established principle of *stare decisis* as having "slavishly" adhered to precedent. *Id*. at 65.

I cannot agree with the majority's suggestion that the above passage from *Chase* is either incidental or *dicta*. The Court concluded that "offer to vote" means the voter must show up in person to vote, and that conclusion logically decided the issue before the Court: whether the legislation permitting absentee voting by military personnel was constitutional. If that provision was also unconstitutional for a separate reason, that it authorized voting in an invalid election district, those two bases constituted alternative holdings and neither should be relegated to the status of *dicta*. *See Commonwealth v.*

Markman, 916 A.2d 586, 606 (Pa. 2007) (noting if two equally valid but separate grounds support the holding, neither "may be relegated to the inferior status of obiter dictum") (quoting *Commonwealth v. Swing*, 186 A.2d 24, 26 (Pa. 1962)). Moreover, that the constitutional provision also included the phrase, "entitled to vote" instead of "entitled to offer to vote," as the majority emphasizes, *see* Majority Op. at 51, 60, is of little consequence. Similar to the present Article VII, Section 1, the provision under review established both the constitutional entitlement and the constitutional prerequisites for voting, and the Majority's insistence that the Constitution was somehow required to use "offer to" with every new instance of the word "vote" is unreasonable. *See id*. at 60-62. As *Chase* recognized, to "offer to vote" meant to show up in person to vote. That the Constitution used the equivalent of "show up in person" in one instance where it mentioned "vote" does not mean it had to repeat that entire phrase everywhere it used the word "vote," particularly where it was referring to an entitlement to vote or to the qualifications needed for voting. Even where it again referenced the act of voting, it did not need to re-establish that the action took place in person, having established it already. In this regard, the majority overlooks that words are not read "in isolation, but with reference to the context in which they appear." *Commonwealth v. Smith*, 186 A.3d 397, 402 (Pa. 2018).[2]

[2] The majority also claims it would be an "absurd result" to read the Constitution in its present form as requiring electors who still reside in their voting district on election day, by default, to vote in person, while permitting electors who have recently moved away to vote remotely. Majority Op. at 62. But this result, whether absurd or not, is imaginary: it rests on the majority's reading of "'vote' unencumbered by 'offer to'" as permitting remote voting. *Id*. As explained, such a reading is unreasonable. And it is entirely logical to give electors who have moved away so recently as to preclude re-registering in a timely manner the option to vote in their old district, so long as they are willing to travel to do so. Contrary to the majority's implication, moreover, this innovation, *i.e.*, the 60-day window for recently-moved electors, did not exist at the time of the *Chase* decision.

It may be that this Court, if writing on a clean slate, would assign a different meaning to the constitutional phrase, "offer to vote." But we are not writing on a clean slate, we are writing on a slate marked by over a century of constitutional changes and judicial interpretation. Even if our modern sensibilities would have led us to decide *Chase* a different way, it was not so egregiously wrong as to present an exception to the doctrine of *stare decisis*, nor has it lost its precedential weight through the passage of time notwithstanding that a majority of this Court disapproves of the outcome. *See generally In re Burtt's Estate*, 44 A.2d 670, 677 (Pa. 1945) ("A statutory construction, once made and followed, should never be altered upon the changed views of new personnel of the court.").

Nor is this one of those rare moments in constitutional history when a reviewing court is called upon to correct precedent which is deeply repugnant to civic life and to the organic law itself. *See, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (discarding the "separate but equal" doctrine under the Fourteenth Amendment and overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (abrogating *Korematsu v. United States*, 323 U.S. 214 (1944), and affirming that the forcible relocation of United States citizens to concentration camps on the basis of race lies outside the scope of the President's authority). The people of Pennsylvania have been voting in person since the earliest days of this Commonwealth notwithstanding that William Penn established our first post office in 1683, and the Second Continental Congress established the predecessor to the United States Postal Service in 1775. Now, all these years later, the majority suggests it has greater clarity than all who went before about the meaning of the constitutional phrase, "offer to vote" – greater clarity even than the Justices of this Court who lived through the era when it was incorporated into our charter and gave meaning to the language.

With the *Chase* decision in the books, the people of Pennsylvania amended the Constitution in 1864 to allow for absentee voting by soldiers. Notably, the people did not see fit to alter, delete, or clarify the phrase, "offer to vote"; instead, they added a section specifically giving soldiers the right to cast absentee ballots, a provision carried forward and retained in the Constitution of 1874:

> Whenever any of the qualified electors of this Commonwealth shall be in actual military service, under a requisition from the President of the United States or by the authority of this Commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual place of election.

PA. CONST. art. VIII, § 6 (1874).

Our Court discussed this amendment in *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924), a decision in which *Chase*'s status as binding precedent was cemented. In *Lancaster City*, this Court addressed whether persons other than soldiers could constitutionally be permitted to vote absentee. The Court recognized, as a general precept, that the Constitution requires an elector to tender his or her vote in person, as set forth in *Chase*, and that this rule was consistent with the view taken in "many other states during the Civil War period, where like constitutional requirements existed." *Id*. at 200 (citing *Twitchell v. Blodgett*, 13 Mich. 127 (1865); *Bourland v. Hildreth*, 26 Cal. 161 (1864); *Day v. Jones*, 31 Cal. 261 (1866); *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)); *cf. Morrison v. Springer*, 15 Iowa 304, 313 (1863) (construing a state constitutional provision that did not include the "offer to vote" terminology and expressly distinguishing *Chase* on that basis). The Court also recognized that subsequent rulings in other states had reached the same conclusion. *See id*. (citing *In re Opinion of Justices*,

113 A. 293 (N.H. 1921); *Clark v. Nash*, 234 S. W. 1 (Ky. App. 1921)). In terms of the amendment for military absentee voting, the Court explained:

> Certain alterations are made so that absent voting in the case of soldiers is permissible. *This is in itself significant of the fact that this privilege was to be extended to such only*.

Id. at 201 (emphasis added).

The *Lancaster City* Court emphasized that constitutional changes are judicially presumed to have been accomplished carefully and with full awareness of the range of alternatives, by reference to provisions from earlier constitutions and to other states' constitutions, which are "used as a guide." *Id*. (quoting *Commonwealth ex rel. Lafean v. Snyder*, 104 A. 494, 495 (Pa. 1918)). With that background, the Court noted that the constitutional amendment finally agreed upon is assumed to be "deliberate[]" and "not merely accidental." *Id*. (quoting *Snyder*, 104 A. at 495). The result is that, where absentee voting is permitted by the Constitution, the statutory construction principle denominated *expressio unius est exclusio alterius* has special force:

> The Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed. The latter has determined those who, absent from the district, may vote other than by personal presentation of the ballot, but those so permitted are specifically named in section 6 of article 8 [*i.e.*, the amendment which allowed soldiers to vote absentee]. *The old principle that the expression of an intent to include one class excludes another has full application here*.

Id. (emphasis added). Thus, as can be seen, *Lancaster City*'s adherence to the ruling concerning the meaning of "offer to vote" as expressed in *Chase* was neither "slavish" nor poorly reasoned. The Court applied the established precept of *stare decisis* together with accepted rules of statutory construction, and it noted that the meaning ascribed was in concert with rulings from other jurisdictions around the time *Chase* was decided and in the post-*Chase* timeframe.

Twenty-five years after *Lancaster City*, the people of this Commonwealth expanded the privilege of absentee voting to war veterans whose injuries made them unavoidably absent from their county of residence on election day. This time, instead of directly granting a right to such persons, the Constitution was amended to authorize the General Assembly to "provide a manner" for such voting, *see* PA. CONST. art. VIII, § 18 (1949), *quoted in McLinko*, 270 A.3d at 1258 n.22, and this provision was modified eight years later to include electors who could not vote in person due to illness or physical disability, *see* PA. CONST. art. VIII, § 18 (1957). Two years after that, Section 1 of Article VIII (which defined the right and qualifications of electors) was changed to permit residents to vote in their old election district if they had moved less than 60 days before the election. *See* PA. CONST. art. VIII, § 1 (1959).

Thereafter, at the 1967 Constitutional Convention, even more changes were made to the way the Pennsylvania Constitution regulates voting and elections. The relevant provisions were moved to Article VII. Section 1 of that article was changed so that the residency requirement was shortened from one year to 90 days, but notably, the "offer to vote" language was left unchanged. Absentee voting was placed in Section 14, and the military voting provisions – those relating both to active service and to war injuries – were replaced with more general language allowing for absences required by one's "occupation" or occasioned by "illness or physical disability." Additionally, the rights of those entitled to vote absentee were made more secure by affirmatively requiring the General Assembly to enact appropriate legislation instead of only permitting it to do so:

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

> and canvass of their votes in the election district in which they respectively reside.

PA CONST. art. VII, §14 (1967). A 1985 amendment kept Section 14 essentially the same but extended the right of absentee voting even further to persons who could not attend a polling place due to a religious observance, as well as to county employees who would be unable to vote that day due to election-day duties. *See* PA CONST. art. VII, §14 (1985), *quoted in McLinko*, 270 A.3d at 1259-60. The final change occurred in 1997 when "State or county" was replaced with "municipality," which made it even easier to qualify as an absentee voter. *See* PA. CONST. art. VII, § 14(b) (1997) (defining "municipality" as a city, borough, incorporated town, township, or any similar general purpose unit of government which may be created by the General Assembly).

As mentioned above, in making all of these changes – including changes to the language of Section 1 on four separate occasions (1901, 1933, 1959, and 1967) – the people of Pennsylvania chose not to eliminate or clarify the "offer to vote" terminology appearing in that provision, notwithstanding that it had been interpreted since 1862 to set forth a baseline requirement that, absent some specific constitutional provision to the contrary, voting had to be undertaken in person. It is an established interpretive precept that when this Court has construed statutory language, subsequent reenactments on the same topic are presumed to intend the construction judicially reached unless the language is changed. That precept is reflected in the Statutory Construction Act, *see* 1 Pa.C.S. § 1922(4), and in numerous decisions of this Court. We recently stated:

> We . . . may presume 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. *Commensurately, when the legislature declines to amend a statute in contravention of this Court's prior interpretation of the statute, we may presume that our prior interpretation was and remains consistent with legislative intent*.

PPL Elec. Utils. Corp. v. City of Lancaster, 214 A.3d 639, 647-48 (Pa. 2019) (cleaned up) (emphasis added); *accord Fonner v. Shandon, Inc.*, 724 A.2d 903, 906 (Pa. 1999) ("The failure of the General Assembly to change the law which has been interpreted by the courts creates a presumption that the interpretation was in accordance with the legislative intent; otherwise the General Assembly would have changed the law in a subsequent amendment."). This rule is based on straightforward logic, and although the Constitution is more difficult to change than legislative enactments, its rationale plainly applies to a constitutional provision such as Article VII, Section 1, where, as here, the electorate has revisited and amended that provision but has opted to retain the previously-interpreted language with no revisions.

The history of absentee voting in Pennsylvania as briefly sketched above confirms that the electorate has always understood that any expansion of the franchise on an absentee basis can only be accomplished through an amendment to the Constitution. In this latter regard, this Court has explained that in the absentee-voting arena, the "principle that the expression of an intent to include one class excludes another has full application[.]" *Lancaster City*, 126 A. at 201. The majority points to no constitutional amendment that negates that principle as a general policy or specifically alters the "offer to vote" language as it has been understood for 160 years and retained through multiple constitutional amendments, including amendments to the very provision containing the phrase. Instead, the majority overrules 160 years of precedent by finding authorization for Act 77's universal no-excuse mail-in balloting in a constitutional provision that only applies to voting methods *other than by ballot*. *See* PA. CONST. art. VII, §4. That provision has been in the Constitution since 1901. If its intended meaning was as the majority says, it is difficult to see why the people of Pennsylvania would have needed to make constitutional changes in 1949 and 1957 specifically authorizing the Legislature to provide

for absentee voting by additional named classes of individuals, instead of simply overturning *Lancaster City* by constitutional amendment and clarifying that Section 4 contains such authorization. The New Mexico court has cogently observed:

> The constitution makers were not unfamiliar with the controversial question as to absentee voting. They were familiar with the common law understanding that an offer to vote contemplated a personal appearance of the voter in connection with such offer. They knew of the mandatory requirement for voting in that manner which had been in force in New Mexico for approximately sixty years. They were familiar with the meaning which attended the phrase "offers to vote" in several separate sections of the territorial laws and employed the phrase in the face of such knowledge in this provision of our constitution without in any way qualifying that meaning. These considerations impress us that if it had been the desire of the convention to authorize absentee voting, it would have been an easy and simple manner to choose language making clear the intention to do so.

Chase v. Lujan, 149 P.2d 1003, 1010-11 (N.M. 1944). The above can properly be said of Pennsylvania's "constitution makers" in 1874 and 1967.

The majority also fails to explain what action it believes was signified by the phrase, "offer to vote," when it was placed in the Constitution. As used here, "offer" is a verb, and the phrase contemplates that *some* action will be taken in the election district. The majority sidesteps this difficulty by suggesting the phrase is descriptive of the election district residency qualification. *See* Majority Op. at 53 n.38, 61, 62, 64. I agree it is descriptive, but the description arises by reference to an action to be taken in the election district. When placed into the 1838 Constitution, the word "offer" signified more than merely having a subjective intent, as the majority presently suggests. *See id*. at 61 n.43. Oddly, the majority relies for this understanding on a case which it acknowledges *materially misquoted* the Constitution due to an apparent "clerical error" thirty years after the fact. *Id*. at 53 n.38. In my view, a sounder approach would be to consult contemporaneous historical sources. The dictionaries extant at that time – most notably

Noah Webster's and Samuel Johnson's – confirm that in the early nineteenth century a mere intention was not encompassed within the meaning of the verb "to offer." These dictionaries variously define offer, first, as a transitive verb meaning to present (something), to bring to or before (as in worship), to bid, or to propose. As an intransitive verb – and notably consistent with *Chase* – to "offer" meant to be present, to be at hand, or to present oneself. *See* WEBSTER'S DICTIONARY OF 1828, available at https://webstersdictionary1828.com/Dictionary/offer (last viewed August 2, 2022) (giving as an example "Th' occasion offers and the youth complies"); Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE 227 (6th ed. 1785), available at https://archive.org/details/dictionaryofengl02johnuoft/page/n227/mode/2up (last viewed August 2, 2022) (giving largely the same definitions and the same example).[3]

This solves the "mystery" of why the *Chase* Court would have understood "offer to vote" as meaning to appear in person to vote. Majority Op. at 61 n.43. It also undermines the majority's suggestion that such usage amounted to an "oddity" in that era. *Id*. While the phrase may sound odd to modern ears, that only reinforces the concept, evident from the *Chase* decision, that it had a particularized meaning when it was drafted, and consequently, that *Chase* did not err in providing an explanation consistent with that meaning. To my mind, what is more difficult to comprehend is how the majority can interpret being present, being at hand, and presenting oneself as not needing to be physically present, that is, not needing to do the very thing the verb actually means. *See id*. Even if in some strained, abstract sense, being present, being at hand, and presenting oneself could potentially include not being physically present (although I cannot see how),

[3] Insofar as the majority implies that "to be present" is not included in the intransitive definition, *see id*. ("The actual definition reads: '[t]o present itself; to be at hand.'"), this follows from the majority's failure to consult the Samuel Johnson dictionary referenced above, which contains that definition.

Chase's holding that, in this instance, it means being physically present was not so egregiously wrong as to implicate an exception to the rule of *stare decisis*. Regardless, one may wonder how it would have been possible *for a voter* to be at hand or present himself without being physically present.[4]

Under Act 77, a person can apply by mail for a mail-in ballot to the Secretary of the Commonwealth or the county board of elections – which, notably, may be situated outside of the voter's election district, *see* 25 P.S. § 3150.12(a) – and then mail the ballot in from anywhere in the world to the county board of elections, *see id*. § 3150.16(a). As the voter will not have taken any action at all in the election district, it follows that he or she cannot have "offered to vote" in that district. The majority's interpretation thus renders the phrase "offer to vote" of no practical effect, which is contrary both to long-established interpretive principles and to our precedent construing the same language. *See Commonwealth v. Russo*, 131 A.2d 83, 88 (Pa. 1957) (stating this Court may not disregard any aspect of the Constitution); *Commonwealth ex rel. Barratt v. McAfee*, 81 A. 85, 89 (Pa. 1911) ("In construing any part of the Constitution, we are not at liberty to disregard other applicable provisions . . .; nor can we ignore the authority of our own prior decisions.").

For its part, the concurrence recognizes the limitations of Section 4, *see* Concurring Op. at 19 (stating resort to Section 4 is "wholly unnecessary"), but it expresses

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[4] The majority suggests this analysis is faulty because the records of the constitutional convention lack a substantive discussion of the meaning of the phrase, "offer to vote." *See id*. But arguments from silence cut both ways, and they form an especially weak foundation for overruling longstanding precedent. In all events, the lack of a substantive discussion may also follow from the phrase's intent being so well understood at the time that there was little need to debate it. *See generally Actus Fund, LLC v. Sauer Energy, Inc.*, 393 F. Supp. 3d 139, 141 (D. Mass. 2019) (observing courts are "chary to accept the absence of legislative history to rule that the legislature meant something other than what it said"); *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018) ("If the legislative text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity").

that a one-word change in Section 14, from "may" to "shall," so affected the meaning of the remainder of Article VII as a whole that that Article no longer requires in-person voting by default. Thus, in the concurrence's reading, when Section 14 stated that the General Assembly "may" provide for absentee voting for the defined classes of electors, it was not allowed to provide that same privilege for anyone else; now that it "must" provide for absentee voting for those same electors, it can do so for anyone and everyone.

It is certainly counterintuitive to suggest a change from "may" to "shall" was intended to give the General Assembly *more* discretion than it previously had and to bring about a tectonic shift whereby absentee voting for all is now constitutionally permitted – all by implication. A more natural understanding of that one-word change is that the framers wished to ensure that the absentee voting privilege as delineated in Section 14 was available to the identified classes of voters, and not leave it up to the General Assembly's discretion. *See* Brief for Commonwealth at 61 (indicating the legislative history of the 1967 amendment confirms that "the General Assembly changed 'may' to 'shall' precisely because it intended to convert what was formerly a limited grant of legislative discretion into a constitutional right that the legislature could not take away"). This is entirely consistent with the way the Constitution ordinarily guarantees civil rights: they are affirmatively protected against contrary legislation, *see, e.g., Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002), or the lack thereof, *see William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414 (Pa. 2017). During the Twentieth Century, via constitutional amendment the right to vote absentee was expanded to an ever wider class of individuals who had valid excuses for not showing up in person to vote. As these changes were put in place, giving the General Assembly discretion to provide or withhold the mechanism naturally began to appear anomalous; and so, that discretion was removed. It does not

follow that, in affirmatively guaranteeing the right, the Constitution *sub silentio* extended its permissive availability to everyone else.

Still, the concurrence notes that, besides changing "may" to "shall," other changes were made to the same provision at the same time. It thus characterizes the provision as having been "altered considerably." Concurring Op. at 24. But those other changes, consistent with the 1949 and 1957 amendments, simply added new groups of electors acknowledged to have a valid excuse for not voting in person. As previously explained, the framers also amended Section 1 but elected to retain the "offer to vote" terminology without amendment. It seems attenuated to argue that, in this context, the change from "may" to "shall" in Section 14 reflects the framers' intent that absentee voting could now be provided to everyone at the General Assembly's discretion.

The concurrence justifies this reading by reference to a hypothetical dog-sitting assignment. *See* Concurring Op. at 22. But instructions given to a dog sitter lack all the history and complexity of Article VII of the Pennsylvania Constitution as outlined above. Voting and dog sitting are nothing alike. As noted, the regulation of voting lies at the heart our political system, as without both its availability and integrity, the people of Pennsylvania have democracy in name only. Although absentee voting is less secure than in-person voting, the people have, over the years, decided that that difficulty should be balanced against others which arise for individual electors who, through no fault of their own, cannot attend their polling place on election day without undue hardship. *Accord* Brief for Appellees at 54 (noting convenience and vigilance against fraud are both legitimate concerns in a democratic electoral system). By a series of carefully-crafted constitutional amendments, the electorate has struck a balance so as to maintain security while at the same time guaranteeing, to the extent feasible, that everyone has a reasonable opportunity to vote.

When Article VII is viewed as a whole, within this context and in light of its history and the judicial construction of the phrase, "offer to vote" (which, as discussed, has been retained through many successive amendments), the naming of certain classes of electors who are given the right to vote absentee necessarily implies that those are the only electors who may do so. *Accord Lancaster City*, 106 A. at 201 ("The old principle that the expression of an intent to include one class excludes another has full application here."). It seems a stretch to conclude that the framers of the 1967 Constitution, in *guaranteeing* absentee voting to the identified classes, intended thereby to *cede control* over this delicate balance to the Legislature.[5]

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[5] The legislative history of the bill which resulted in the constitutional change – Senate Bill 6 of 1967, *see* P.L. 1048, May 16, 1967 – contains no indication that such a major expansion was intended. Senate Bill 6 made a few changes to, *inter alia*, Section 1; and the text of Section 14 was altered in a handful of minor ways: "may" was changed to "shall," qualified "voters" was changed to qualified "electors," and the word "unavoidably" was removed from the phrase "unavoidably absent." When the bill was discussed in the House on its third reading, Representative Gallen, the only member to offer remarks, did not mention Section 14 at all, affirmatively stating that the "only major change" was embodied in a revision to Section 1 whereby the state residency period for qualified electors was reduced from one year to 90 days. *See* House Legis. Journal, Session of 1967, Vol. 1, No. 6, at 83-84 (Jan. 30, 1967).

In subsequent legislative sessions during the twentieth century, when the General Assembly wished to expand absentee voting privileges to additional classes of electors, they understood that legislation alone was insufficient, and a constitutional amendment was required. *See* House Legis. Journal, Session of 1983, No. 88, at 1711 (Oct. 26, 1983) (in seeking to expand absentee voting rights to individuals "who will not attend a polling place because of the observance of a religious holiday," discussing and approving the need to change an "Act" to a "Joint Resolution" to amend the constitution because simply amending the Election Code was insufficient to accomplish that goal); House Legis. Journal, Session of 1996, No. 31, at 840-41 (May 13, 1996) (in seeking to expand absentee voting rights to individuals who would be out of town on election day but still within their counties, recognizing that a constitutional amendment was required).

The 1983 and 1996 legislative bodies were much closer in time to the 1967 Constitutional Convention than the one which passed Act 77 in 2019.

If the electorate wishes to effectuate that end, the state Charter, as the majority emphasizes, is not overly difficult to amend. *See* Majority Op. at 58-59 & n.41 (indicating that in the Twentieth Century alone, over 150 substantive amendments were made to our organic law). The people can simply remove the "offer to vote" prerequisite or otherwise specify unambiguously that the Legislature is authorized to pass legislation such as Act 77. In fact, as recently as 2019 the Senate introduced a joint resolution proposing an amendment to do exactly that by changing Article VII, Section 14(a) to state:

> The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors may vote, and for the return and canvass of their votes in the election district in which they respectively reside. *A law under this subsection may not require a qualified elector to physically appear at a designated polling place on the day of the election*.

Senate Bill 413 of 2019 (passed by both Houses April 28, 2020; filed with the Secretary of the Commonwealth April 29, 2020) (emphasis added). That change, though proposed, was not adopted. If the majority were to follow precedent and invalidate Act 77, an amendment like this could easily be adopted assuming no-excuse mail-in voting has widespread popular appeal.

I express no opinion as to whether no-excuse mail-in voting reflects wise public policy. That is not my function as a member of this state's Judiciary. My function is to apply the text of the Pennsylvania Constitution, understood in light of its history and judicial precedent. In so doing, I would hold that that venerable document must be amended before any such policy can validly be enacted. Accordingly, I respectfully dissent.

Justice Brobson joins this dissenting opinion.