[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 v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; AND LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA CROSS APPEAL OF: YORK COUNTY REPUBLICAN COMMITTEE, WASHINGTON COUNTY REPUBLICAN COMMITTEE, BUTLER COUNTY REPUBLICAN COMMITTEE	:	No. 17 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 v. LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE CROSS APPEAL OF: YORK COUNTY REPUBLICAN COMMITTEE, WASHINGTON COUNTY REPUBLICAN COMMITTEE, BUTLER COUNTY REPUBLICAN COMMITTEE	:	No. 18 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 293 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, 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 BROBSON **DECIDED: August 2, 2022**

I join the dissenting opinion of Justice Mundy in full.

Succinctly stated, the majority overrules 160 years of this Court's precedent to save a law that is not yet 3 years old. It does so not to right some egregiously wrong decision or to vindicate a fundamental constitutional right. This is not, as Justice Mundy observes, a *Brown v. Board of Education*[1] moment. Honoring our precedent and striking Act 77[2] as unconstitutional would not extinguish the right of people to vote in this

[1] Dissenting Op. at 11-12 (Mundy, J., dissenting).

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

Commonwealth; rather, it would merely return us to where we were before the 2020 primary election.

Since this Court decided *Chase*[3] and reaffirmed *Chase*'s holding in *City of Lancaster*,[4] it has never been seriously debated that the phrase "offer to vote," as it has appeared in our Pennsylvania Constitution since 1838, embraces the historical preference in our Commonwealth for in-person voting at a polling place, whether "by ballot or by such other method as may be prescribed by law."[5] The phrase "offer to vote" as interpreted by *Chase* survived two constitutional conventions (1873 and 1968). Moreover, our current Pennsylvania Constitution—"the 1968 Constitution"—has been amended on several occasions. Yet, the phrase "offer to vote" remains. Under time-honored principles of statutory construction, this means that the delegates to our constitutional conventions and our citizens have accepted that precedent.[6]

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[3] *Chase v. Miller*, 41 Pa. 403 (1862).

[4] *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924).

[5] As Justice Mundy notes at pages 4 and 5 of her dissenting opinion, properly construed, Article VII, Section 4 of the Pennsylvania Constitution (added by Joint Resolution No. 2, 1901, P.L. 882), on which the majority relies, authorizes methods of election "other" than by ballot. Act 77 does not authorize a method of election other than by ballot; rather, Act 77 authorizes a voter to execute a ballot and transmit that ballot by mail to a county election office in lieu of casting and submitting a ballot in person. Because Act 77 does not provide for a method of election "other" than by ballot, it does not follow that the General Assembly was authorized to enact Act 77 under its Article VII, Section 4 authority.

[6] *See* Dissenting Op. at 15-16 (Mundy, J., dissenting). Indeed, as Justice Mundy observes, both the General Assembly and Pennsylvania's voters have acted in reliance on this precedent, amending the Pennsylvania Constitution on several occasions to create *exceptions* for those who, through no fault of their own, are unable to vote at their polling places. *See* Pa. Const. art. VII, § 14.

Today, this Court upends the tradition and historic preference in this Commonwealth for in-person voting without the requisite "special justification"[7] and important reasons necessary to set aside long-standing precedent. Mere disagreement with that precedent is not enough.[8] Respectfully, I do not believe that the majority has mounted a persuasive case that *Chase* and *City of Lancaster* have proven unworkable or are badly reasoned. Instead, the majority has set forth a case as to why it merely disagrees with this Court's precedent.

Finally, I wish to highlight an argument raised by Appellants-Intervenors the Democrat National Committee and the Pennsylvania Democratic Party (collectively, DNC) relating to the nonseverability provision in Act 77.[9] In his dissenting opinion below, Judge Wojcik, citing the nonseverability provision, warned that "if the no-excuse mail-in provisions of Act 77 are found to be unconstitutional, all of Act 77's provisions are void."[10] Building on Judge Wojcik's observation, the DNC argues here that affirmance of the Commonwealth Court's decision below would lead to "serious confusion" that "will be compounded by Act 77's non-severability provision, which requires that nearly the entire Act—which includes a multitude of changes to the Pennsylvania election code—fall if

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[7] *See Commonwealth v. Alexander*, 243 A.3d 177, 212 (Pa. 2020) (Dougherty, J., dissenting) (criticizing majority for overruling precedent without special justification).

[8] *Commonwealth v. Reid*, 235 A.3d 1124, 1126 (Pa. 2020). *Stare decisis* commands that we only overrule precedent involving constitutional interpretation if that precedent has "proven to be unworkable or badly reasoned." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 759 (Pa. 2012).

[9] *See* Section 11 of Act 77 ("Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.").

[10] *McLinko v. Dep't of State*, 270 A.3d 1243, 1277-78 (Pa. Cmwlth. 2022) (Wojcik, J., dissenting in part).

universal mail voting is deemed unconstitutional."[11] In other words, the DNC advances the nonseverability provision as a reason why this Court should reject the constitutional challenge to Act 77's mail-in ballot provisions and reverse the Commonwealth Court's order, because doing otherwise would trigger the nonseverability provision and render the entirety of Act 77 invalid.[12]

The majority opinion does not specifically address this argument, and thus it does not appear to have informed the majority's merits decision. Nonetheless, how the nonseverability provision operates in the event of a judicial decision impacting the application of the provisions within its scope is an interesting question. Given the majority's disposition here, however, that question now must wait for another day.

Justice Mundy joins this dissenting opinion.

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[11] DNC Br. at 45.

[12] *See also* Bonner Petitioners' Br. at 11, 39 (arguing that entirety of Act 77 should be struck down because of nonseverability provision).