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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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DOUG MCLINKO,

PETITIONER,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; AND VERONICA DEGRAFFENREID, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA,

RESPONDENTS.

REPLY BRIEF IN SUPPORT OF APPLICATION FOR SUMMARY RELIEF IN THE FORM OF A DECLARATORY JUDGMENT AND IN OPPOSITION TO RESPONDENTS' CROSS-APPLICATION FOR SUMMARY RELIEF

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INTRODUCTION

Petitioner's argument is straightforward: the mailed ballot provisions of Act 77 violate Article VII, § 1 of the Pennsylvania Constitution. The text of Pennsylvania's Constitution and binding precedent confirm that the challenged provisions are unconstitutional.

None of Respondents' defenses insulate Act 77 from judicial review. Respondents' effort to immunize Act 77 from constitutional scrutiny would enshrine an unconstitutional voting process in Pennsylvania law and, if successful, prohibit future courts from declaring laws with latent constitutional defects unconstitutional. This Court should find that Petitioner has standing to bring his claim, that laches and Pennsylvania law do not preclude him from doing so, and that Act 77 violates the clear terms of the Pennsylvania Constitution under binding precedent of the Pennsylvania Supreme Court.

ARGUMENT

I. MCLINKO HAS STANDING TO CHALLENGE ACT 77.

To maintain standing a party must have "a substantial, direct and immediate interest in the outcome of the litigation." *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013) "A substantial interest in the outcome of litigation is one that surpasses the common interest of all citizens in procuring obedience to the law." *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497, 506 (Pa. Commw. Ct. 2019). "A direct interest requires a causal connection between the asserted violation and the harm complained of." *Id.* "An interest is immediate when the causal connection is not remote or speculative." *Id.*

This Court has recognized that elected officials, like McLinko, satisfy these standards when they are called upon to make quasi-judicial judgments on a statute they perceive as unconstitutional. *Robinson Twp. v. Com.*, 52 A.3d 463 (Pa. Commw. Ct. 2012), aff'd in part, rev'd in part sub nom., *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901 (Pa. 2013). As Respondents concede, Board of Election officials, like McLinko, are not mere clerks and exercise a host of judicial, quasi-judicial, and

executive functions, including, issuing rules and regulations under the election code, investigating claims of fraud, irregularities, and violations of the election code, issuing subpoenas, determining the sufficiency of nomination petitions, ordering recounts or recanvassing of votes, and certifying election results. 25 P.S. §§ 2642, 2644, 3151, 3154, and 3158. That McLinko is but one member of a board exercising these functions does not change his station for standing purposes. *Robinson Twp.*, 52 A.3d at 475.

Still, even if McLinko does not satisfy the traditional factors for standing (he does), standing is appropriate under *Application of Biester,* 487 Pa. 438, 409 A.2d 848 (1979). As a member of a County Board of Elections, there is no better individual situated to assert claims regarding the constitutionality of Act 77.

Therefore, McLinko has standing.

A. As a member of the Board of Elections, McLinko has a Substantial, Particularized Interest in the Constitutionality of Act 77.

Respondents contend that McLinko lacks a substantial, particularized interest to challenge Act 77's constitutionality because "public officials cannot demonstrate a substantial interest by asserting their duties

are unlawful." Resp. Br., 11-19. While a party's status as a public official does not, *ipso facto*, confer standing, the law does not categorically preclude standing for public officials in exercising their official duties as Respondents suggest.

In *Robinson Twp.*, this Court held that local officials have standing to challenge the constitutionality of a statute when those officials are called upon to exercise their authority based on a statute they believe is unconstitutional. In that case, this Court ruled that two councilmembers had standing to challenge the constitutionality of a statute they were charged with administering. *Id.* at 475. The councilmembers argued they had standing because they could be subjected to personal liability and would be required to vote on the passage of zoning amendments, which the councilmembers believed were unconstitutional, under the challenged law. *Id.* The court held that officials have a significant interest where there is some "discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *Id.* The court explicitly held "as local elected officials acting in their official capacities for their individual municipalities and being required

to vote for zoning amendments they believe are unconstitutional, [they] have standing to bring the action." *Id.* at 476.

McLinko's standing is indistinguishable from the councilmembers in *Robinson Twp*. McLinko is acting in his official capacity for his individual county and will be required to deliberate and cast a vote on every official action taken by the Board, including implementing and administering Act 77, an act that Petitioner believes is unconstitutional. McLinko will be required to determine the validity of ballots and certify that the results of an election are true and correct when he believes that certain ballots were cast in an unconstitutional manner. There is no distinction between councilmembers potentially voting on zoning amendments pursuant to an unconstitutional statute and McLinko certifying the results of an election based on a statute he believes is unconstitutional. If anything, McLinko's standing is actually stronger than the councilmembers in *Robinson Twp.* because he will be required to vote on rules, regulations, and the acceptance of ballots pursuant to a statute he in good faith believes is unconstitutional.

This discernible interest is sufficient to establish standing.

1. McLinko's Duties Are Not Purely Ministerial.

Respondents' attempt to further diminish McLinko's standing by characterizing the duties of the Board of Elections as "purely ministerial." Resp., Br. 17. But this is not the law. Pennsylvania has long recognized that Boards of Elections perform more than purely ministerial functions. *Boord v. Maurer*, 22 A.2d 902, 904 (Pa.1941) ("The Election Code makes the County Board of Election more than a mere ministerial body. It clothes them with quasi-judicial functions."); *Appeal of McCracken*, 88 A.2d 787, 788 (Pa.1952) ("Canvassing and computing necessarily embrace acts of discretion."); *Donald Trump v. Philadelphia Cty. Bd. of Elections*, 241 A.3d 120 (Pa. Commw. Ct. 2020).

Respondents reliance on *In re Admin.* No. 1-MD-2003, 936 A.2d 1 (Pa. 2007), is misplaced because the duties of a court clerk are vastly different than those of a member of the County Board of Elections. That case addressed the standing of a clerk of the court to challenge an administrative order regarding the filing of records. There the Supreme Court defined purely ministerial offices as those that lack any quasi-judicial duties and exercise no discretion to interpret rules and statutes. *Id.* at 9.

Notwithstanding binding precedent holding that Boards of Election are not purely ministerial bodies, *Appeal of McCracken*, 88 A.2d at 788, the express powers and duties conferred on the Board of Elections under the Election Code make clear that they are not purely ministerial bodies. Among other thing, County Boards:

- Issue rules and regulations they deem necessary for the administration of elections (25 P.S. § 2642(f));
- Ensure that elections are "honestly, efficiently, and uniformly conducted;" (25 P.S. § 2642(g));
- Investigate election fraud (25 P.S. § 2642(i));
- Determine the sufficiency of nominating petitions (25 P.S. § 2642(j)); and
- Conduct investigations, issue subpoenas, summon witnesses, and compel production of documents. (25 P.S. § 2644 (a)).

McLinko is not simply following orders or pushing papers like the clerk in *In re Admin. Order No. 1-MD-2003*. McLinko is not just some "humanized adding machine." *Appeal of McCracken*, 88 A.2d 787 (Pa. 1952). Rather, McLinko is exercising discretion and making legal determinations as to the actual validity of mail ballots during canvassing, an

expressly quasi-judicial duty directly implicated by Act 77. *Id.* at 788. For this reason Respondents' citation to *Stroyer v. Thomas*, 81 A.2d 435, 427 (Pa. 1951) is of no relevance, for that decision observed merely that some functions of a Board of Elections are ministerial—but the determination of the validity of ballots is not such an act.

In sum, the discretion afforded to McLinko due to the quasi-judicial nature of his duties under Act 77, and his need to make such decisions constitutionally, provide him with sufficient interest to have standing to seek this Court's declaration of law.

2. McLinko Has Standing Even Though He Brings this Action Alone.

Respondents also suggest that McLinko lacks standing to bring this action on his own because the Board of Elections is a multi-member body that can act only by majority decision, but this argument also fails. Resp. Br., 19-21. A party's position on a multi-member quasi-judicial body does not his standing. For example, plaintiffs in *Robinson Township* were individual councilmembers who sued on behalf of their respective municipalities. *Robinson Twp.*, 52 A.3d at 475. The court recognized the

individual interest of each official and did not arbitrarily mandate that they could only sue with the consent of all councilmembers.

Likewise, Pennsylvania recognizes legislative standing of individual members of the General Assembly, notwithstanding that they are members of a multi-member body which can only act through majority vote. *Fumo v. City of Philadelphia*, 601 Pa. 322, 972 A.2d 487 (2009).

Thus, Petitioner has standing to bring this action for declaratory relief as to the constitutionality of Act 77.

B. McLinko has taxpayer standing.

While McLinko satisfies the traditional requirements for standing, he also satisfies the requirements for general taxpayer standing. Pennsylvania recognizes general taxpayer standing to challenge the constitutionality of a law because "otherwise a large body of governmental activity would be unchallenged in the courts." *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). In *Sprague,* the Supreme Court held the grant of taxpayer standing is particularly appropriate in election related matters "because the determination of the constitutionality of the election is a function of the courts, (citations omitted) and redress through other channels is unavailable." *Id.*

Our courts apply several factors to determine whether to grant taxpayer standing: that the government action would otherwise go unchallenged, the appropriateness of judicial relief, the availability of redress through other channels, and the existence of better persons situated to assert the claim. *Id.*; *Pittsburg Palisades Park, LLC v. Com.*, 888 A.2d 655, 662 (Pa. 2005). Each of these factors is at play here. First and foremost, there is no person better situated to challenge the constitutionality of Act 77 than McLinko, who is an elected official charged with administering rules and regulations, investigating claims of fraud, and certifying election results. Second, judicial relief is appropriate because of the importance of the integrity of our election process. Third, McLinko lacks redress through other channels and the judiciary is the branch of government that ultimately decides the constitutionality of statutes. Finally, if McLinko does not challenge the Act, it would likely go unchallenged before the election.

Like the plaintiff in *Sprague*, McLinko satisfies all of the elements of taxpayer standing. So, even if McLinko did not satisfy traditional standing requirements, he maintains taxpayer standing.

II. LACHES DOES NOT BAR PETITIONER'S CLAIM

A. *KELLY* IS NOT BINDING PRECEDENT.

Respondents urge this Court to adopt the Supreme Court's rationale in *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020). However, as Respondents conceded – albeit in a footnote – *Kelly* is a per curiam opinion, which is not precedential and is not binding authority. *Cagey v. Commonwealth*, 645 Pa. 268, 284, 179 A.3d 458, 467 (2018) ("we have unequivocally explained on multiple occasions that the legal significance of per curiam decisions is limited to setting out the law of the case and that such decisions are not precedential, even when they cite to binding authority.")

The other problem with *Kelly* is that it never addressed the merits of the constitutionality of Act 77. The case was dismissed based exclusively on the doctrine of laches. *Kelly*, 240 A.3d at 1257. As Justice Saylor noted in his concurring and dissenting statement, the fundamental

constitutional questions raised by petitioners in that case, which are the same as those before this Court, remained unresolved. *Id.* at 1262.

Contrary to Respondents' claim, *Kelly* is a wholly different case. *Kelly* was decided immediately after one of the most contentious elections in American history, when the Supreme Court of Pennsylvania exercised its extraordinary jurisdiction to resolve an issue before Pennsylvania's electoral vote certification. The Petitioners in *Kelly* included losing candidates in the 2020 election and the relief they sought was a retrospective court injunction "to invalidate the ballots of the millions of Pennsylvania voters who utilized the mail-in voting procedures established by Act 77" and, moreover, they "advocated the extraordinary proposition that the court disenfranchise all 6.9 million Pennsylvanians who voted in the General Election and instead 'direct[ ] the General Assembly to choose Pennsylvania's electors.'" *Kelly*, 240 A.3d at 1256. Courts routinely reject post-election challenges by sore losers who slept on their rights, lost, and then entreated a court to overturn the will of the voters. *See, e.g.*, *King v. Whitmer*, 505 F.Supp.3d 720, 731 (E.D. Mich. 2020); *Perry v. Judd*, 840 F.Supp.2d 945, 955 (E.D. Va. 2012). And in many of those decisions courts

include an implicit or explicit admonition that the legal challenge to an election rule should have been brought *before* the election.

Here, by contrast, McLinko is not a candidate for office, and does not seek to disenfranchise a single Pennsylvania voter. He presents a straightforward legal argument for a prospective declaration of law to guide his conduct in future elections. He has neither slept on his rights, nor prejudiced any particular person, and certainly no one who cast a ballot in reliance on Act 77. Analogizing this case to *Kelly* is inappropriate.

B. THE DOCTRINE OF LACHES DOES NOT APPLY NOTWITHSTANDING THE INAPPLICABILITY OF *KELLY*.

Laches is an equitable defense that bars relief when a party's dereliction indicates a lack of due diligence in failing to institute an action, and such failure results in prejudice to another because that person changed her position in reliance on the delay. *Commonwealth ex rel. Baldwin v. Richard*, 561 Pa. 489, 751 A.2d 647 (2000). But the government cannot use laches to amend the Pennsylvania Constitution or bar a challenge to an unconstitutional statute. *Sprague*, 550 A.2d at 188. Indeed, laches does not bar an attack on the constitutionality of a statute

as to its future operation, especially where the legislation involves a fundamental right like the right to vote. *Id.* Again, the Supreme Court's decision in *Sprague* is instructive.

There the Supreme Court found that a taxpayer's over six-month delay in bringing an action did not prevent the court from hearing constitutional claims under the doctrine of laches even though the government had begun implementing the law. *Id.* The Court held that "laches and prejudice can never be permitted to amend the Constitution." *Id.* And it cited to *Wilson et ux. v. Philadelphia School District, et al.*, 328 Pa. 225, 195 A. 90 (1937), where the Pennsylvania Supreme Court found:

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

Id. at 188-89. Respondents have not cited a single case besides *Kelly*, a post-election challenge completely different from this case, where the Pennsylvania Supreme Court invoked laches to thwart a constitutional challenge to a Pennsylvania statute.

Respondents' argument that McLinko's challenge almost two years after the law was enacted constitutes an unreasonable delay misses the mark. "The application of the equitable doctrine of laches does not depend upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under the circumstances of the particular case, the complaining party is guilty of want of due diligence in failing to institute his action." *Wilson v. King of Prussia Enterprises, Inc.*, 221 A.2d 123, 126 (1966). And even if Petitioner's short delay was unreasonable, which it is not, no delay can justify permitting a patently unconstitutional law to remain on the books for all time.

Respondents contend that they have been prejudiced by McLinko's alleged delay in bringing this case because they and others have "spent millions of dollars and many, many hours implementing Act 77 and educating elections workers and voters about universal mail-in voting." Resp. Br., 26. But "the sort of prejudice required to raise the defense of laches is some changed condition of the parties which occurs during the period of, and in reliance on, the delay." *Sprague*, 550 A.2d at 188. Like the respondents in *Sprague,* Respondents here "began preparing and spending time and money" on mail ballots and educating voters "as soon

as they knew there would be an election." *Id.* Respondents "did not act solely in reliance on petitioner's lack of action" and thus cannot claim prejudice necessary to invoke laches. *Id.*

Moreover, the determination that a statute is unconstitutional should not hinge on whether the outcome will be neat and tidy or whether the government has invested time and money based on the mistaken belief that a statute is viable. If that were true, then segregated schools would still exist. Or, as a more recent example, the eviction moratorium ordered by the Center for Disease Control would avoid judicial review.

Respondents argue that *Koter v. Cosgrove*, 844 A.2d 29 (Pa. Commw. Ct. 2004) supports a finding of prejudice and that "overturning Act 77 now would require reeducating millions of voters and risks disenfranchising untold numbers of Pennsylvanians." Resp. Br., 26-27. But *Koter* did not involve a constitutional challenge to an election law and is not binding on this Court. And there is no evidence here that Respondents relied upon McLinko's alleged failure to bring his claim in expending funds for mail ballots or voter education. Further, there is zero evidence that the elimination of an unconstitutional means of voting will somehow disenfranchise anyone or jeopardize ballots previously cast in reliance on

Act 77. To the contrary, McLinko filed his claim before the election and asked this Court for expedited relief to avoid that potential.

If this Court adopts Respondents' position, then no party will ever be able to challenge plainly unconstitutional measures that were adopted but not challenged until a later date. For example, poll taxes and literacy tests for voting were widely accepted and administered for decades but later challenged and rightly struck down. *See, e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (striking poll tax in place for decades). Further, Petitioner did not unreasonably delay in bringing his claim, and the time that elapsed since the law's enactment has not prejudiced Respondents.

III. THE STATUTE DOES NOT PRECLUDE MCLINKO'S CONSTITUTIONAL CHALLENGE

Respondents contend that the Pennsylvania legislature has insulated certain provisions of Act 77 from all constitutional challenges brought after April 28, 2020, and thus Petitioner's claim is statutorily time-barred. Resp. Br., 28-31. Respondents misread Act 77. Still, the alleged limitations period in Act 77 does not shield it from judicial review.

"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 Corp. v. Zoning Hearing Bd. of Dover Twp.*, 589 Pa. 135, 143, 907 A.2d 1033, 1037 (2006).

A. THE 180-DAY TIME PERIOD IS A JURISDICTIONAL PROVISION NOT A STATUTE OF LIMITATIONS.

The genesis for Respondents' claim that McLinko's claim is time barred is Section 13 of Act 77. Act of Oct. 31, 2019, P.L. 552, No. 77, § 13. Section 13(2) of Act 77 provides that "[t]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1)" of Section 13." *Id.* Section 13(3) of Act 77 then provides that "[a]n action under paragraph (2) must be commenced within 180 days of the effective date of this section." Thus, Act 77 is an exclusive jurisdiction provision granting the Pennsylvania Supreme Court exclusive jurisdiction to hear challenges to Act 77 **for the first 180 days.** After that 180 day period, jurisdiction reverts to traditional jurisdiction and devolves to this Court. 42 Pa. Cons. Stat. § 761(a)(l). Indeed, Respondents have not challenged this Court's subject matter jurisdiction.

Thus, while Act 77 did initially confer exclusive jurisdiction on the Supreme Court to address constitutional challenges to certain provisions therein, that exclusive jurisdiction terminated 180 days after Act 77 was passed, on April 28, 2020.

The time limit in paragraph 3 of Section 13 only circumscribes constitutional challenges to provisions named in paragraph 2 of Section 13 directly to the Pennsylvania Supreme Court for the stated time limit. After that period, constitutional challenges may be brought to Act 77 through the normal process in Pennsylvania state courts. Respondents' reading of Section 13 is plainly inconsistent with the text of that section and provides a result that is "absurd" and "unreasonable," 1 Pa. C.S. § 1922(1) – namely, that no Pennsylvania court would now be able to review constitutional challenges to certain portions of Pennsylvania's elections laws. This result is not consistent with Pennsylvania law, which does not permit the legislature to insulate its legislation from constitutional review by the judiciary. *William Penn School District v. Pa. Dep't of Ed.*, 170 A.2d 412, 418 (Pa. 2017).

B. IN ALL EVENTS, A 180-DAY LIMITATIONS PERIOD IS VOID.

Even if Respondents' reading of Section 13 of Act 77 were correct (it is not), that reading of Section 13 of Act 77 would violate the Pennsylvania Constitution rendering it void. "The idea that any legislature . . . can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions." *William Penn School District*, 170 A.2d at 418 (quoting *Smyth v. Ames*, 169 U.S. 466, 527, 18 S.Ct. 418, 42 L.Ed. 819 (1898)). Under the Pennsylvania Constitution, the Pennsylvania legislature cannot completely shield its legislation from scrutiny by the Commonwealth's judiciary. "It is settled beyond peradventure that constitutional promises must be kept," and "the separation of powers in our tripartite system of government typically depends upon judicial review to check acts or omissions by the other branches in derogation of constitutional requirements." *Id.*; *Robinson Twp., Wash. Cty. v. Commonwealth*, 83 A.3d 901, 927 (Pa. 2013) ("[I]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts.").

These principles are based on the *void ab initio* doctrine. *Glen-Gery Corp.*, 907 A.2d at 1037. Under this doctrine, "a statute held unconstitutional is considered void in its entirety and inoperative as if it had no existence from the time of its enactment." *Id.* The doctrine is grounded in judicial review itself, *Marbury v. Madison*, 5 U.S. 137 (1803), where Chief Justice Marshall held "a law repugnant to the constitution is void." *Id.* If a statute is held void in its entirety, then any provisions purporting to shield it from judicial review are as well and they are inoperative.

Finally, Respondents' citations to a number of federal court decisions do not countermand the principles set forth above. The decisions cited do not interpret the Pennsylvania Constitution or legislative attempts to set time limits on constitutional challenges to legislative enactments.

IV. ACT 77 VIOLATES THE PENNSYLVANIA CONSTITUTION

A. THE ORIGINAL AND PLAIN MEANING OF THE PHRASE "TO OFFER TO VOTE" MEANS TO VOTE IN PERSON BY MANUALLY DELIVERING THE BALLOT AS REQUIRED BY LAW.

When interpreting the text of the Pennsylvania Constitution, the Court should afford the terms their plain and ordinary meanings.

Phantom Fireworks Showrooms, LLC v. Wolf, 198 A.3d 1205, 1220–21 (Pa. Commw. Ct. 2018) (quoting *Scarnati v. Wolf*, 643 Pa. 474, 173 A.3d 1110, 1118 (2017) ("[W]e do not consider such language in a 'technical or strained manner, but are to interpret its words in their popular, natural and ordinary meaning.") The Court must also afford the text the original meaning that existed when the constitutional provision was originally adopted. *Id.* (quoting *Washington v. Dept. of Pub. Welfare*, 188 A.3 1135, 1149 (Pa. 2018) ("[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.")); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012)("words mean what they conveyed at to reasonable people at the time they were written.")

The phrase "offer to vote" has appeared in every Pennsylvania Constitution since 1838. In *Chase v. Miller*, 41 Pa. 403 (1862), the Pennsylvania Supreme Court held the phrase meant "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." *Id.* at 419. The Supreme Court reached the same conclusion regarding the

meaning of the phrase "offer to vote" sixty-two years later in *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 137, 126 A. 199, 201 (1924). In that case, the Supreme Court was interpreting the phrase as it appeared in the Constitution of 1874. The phrase "offer to vote" has carried over to our current Constitution of 1968. In 1968, the phrase "offer to vote" meant the same as it did in 1862 and 1924 – to vote in person at the prescribed polling place. If Pennsylvanians were polled in 1968 as to the meaning of the phrase "offer to vote," it is unlikely anyone would have believed it meant to vote by mail or by some other means.

1. *CHASE* AND *LANCASTER CITY* ARE BINDING PRECEDENT.

Chase and *In re Contested Election in Fifth Ward of Lancaster City* are binding precedent which constrain this Court. *Zauflik v. Pennsbury Sch. Dist.*, 72 A.3d 773, 783 (Pa. Commw. Ct. 2013), aff'd, 629 Pa. 1, 104 A.3d 1096 (2014) ("[A]s an intermediate appellate court, we are bound by the opinions of the Supreme Court.") Those cases remain the law of the Commonwealth and those cases hold that the term "offer to vote," as it appears in the Pennsylvania Constitution, means to vote in person.

Unless and until the Pennsylvania Supreme Court overrules those cases, those cases are the precedent this Court should follow.

Even if they were wrongly decided (they were not), "this Court is powerless to rule that decisions of [the Supreme Court] are wrongly decided and should be overturned." *Id.* (citing *Griffin v. Southeastern Pennsylvania Transportation Authority*, 757 A.2d 448, 451 (Pa. Cmwlth. 2000)). Simply put, the Pennsylvania Supreme Court has twice ruled what the phrase means. It means to vote in person and not by other means. That holding binds this Court.

2. IN PERSON VOTING IS CONSISTENT WITH THE ORIGINAL AND PLAIN MEANING OF OFFER TO VOTE.

The original meaning of the phrase "offer to vote" is also consistent with its plain and ordinary meaning. Respondents argue that the phrase merely defines the residency requirement for a qualified voter and dictates for whom a voter may vote. Resp. Br., 34-36. They argue that the phrase just qualifies that a voter must reside in his or her election district to vote for at least 60 days before he or she may cast a ballot "in her new district's electoral contests." *Id.* at 35.

The phrase "offer to vote" does not simply restrict for whom a qualified voter may cast a ballot – it requires the ballot be cast in a voter's proper election district. For example, Respondents explain that a Philadelphia voter cannot vote for the commissioners of Allegheny County. *Id.* at 39. This is true, but a Philadelphia voter cannot also go to a polling place in Allegheny County – or any county for that matter - and cast a ballot for a Philadelphia election contest. More particularly, a voter could also not cast a regular ballot for his or her electoral contest at an incorrect polling place. So, a Philadelphia voter could not cast a regular ballot in a Philadelphia election on election day by walking into any polling place. The voter must cast a regular ballot at the polling place where his or her name appears in the records.

Respondents also make much of the fact that the restriction on in-person voting appears in a section laying out the qualifications of voters. Resp. Br., 36-40. But McLinko has explained how the words "offer to vote" in context require in-person voting outside of certain very limited circumstances. And contrary to Respondents' arguments, Article VII, § 4 of the Pennsylvania Constitution only strengthens his argument, as the legislature may prescribe certain methods for elections only if those methods

comply with the Pennsylvania Constitution, including the in-person voting requirement in Article VII, § 1.

B. ARTICLE VII, § 1 ESTABLISHES THE QUALIFICATIONS TO VOTE AND METHOD OF VOTING.

Article VII, § 1, not only prescribes the qualifications of voters but also the right conferred on the voter once qualified: to vote in person at his or her proper polling place. As *Chase* explained, residency requirements first appeared in the Constitution of 1838 and did two things. *Chase*, 41 Pa. at 419. First, they added an additional voter qualification. Without residency a person could not vote. *Id.* Second, they added a right. Once residency was established, it granted a specific right – to vote in the district of residency. *Id.* In other words, once a voter meets the qualifications set forth in Article VII, § 1, he gets to vote in person at his proper polling place. He does not get the right to vote in any manner the General Assembly deems appropriate.

C. THE INCLUSION OF CERTAIN CLASSES OF VOTERS ELIGIBLE TO VOTE ABSENTEE EXCLUDES OTHER CLASSES.

Article VII, § 14, further clarifies the plain and ordinary meaning of the phrase "offer to vote." Respondents claim that section 14 sets a floor for those qualified to vote by absentee ballot, not a ceiling. Respondents'

Mem. at 42. To accept that argument, the Court must ignore binding precedent. *In re Contested Election in Fifth Ward of Lancaster City* rejects this argument and holds that the absentee voting provisions of the Pennsylvania Constitution are a ceiling, not a floor, and restricts those eligible to vote by absentee ballot. *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. at 201 ("The old principle that the expression of an intent to include one class excludes another has full application here.") Indeed, that case dealt with the General Assembly's attempt to enlarge the class of voters eligible to vote by absentee. The controlling law in this case is that only that class of voters in Article VII, § 14 may vote by absentee. If that is true, then Act 77 does render Article VII, § 14 superfluous and is thus unconstitutional.

CONCLUSION

The volume of Respondents' defenses belies their quality. Each one fails for the reasons discussed above. No piece of legislation should be insulated from constitutional scrutiny, for "[w]hen the constitution clearly sets forth the manner in which something shall be done, that procedure must be followed to the exclusion of all others, including a procedure which the legislature may prefer." *School Districts of Deer Lakes*

and Allegheny v. Kane, 463 Pa. 554, 564, 345 A.2d 658, 663 (1975). While Respondents may prefer Act 77, it violates the Pennsylvania Constitution and must be declared unconstitutional. Petitioner respectfully requests that this Court grant his Application for Summary Relief and deny Respondents' Application.

Respectfully submitted,

Date: September 8, 2021

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CERTIFICATE OF COMPLIANCE

I, Walter S. Zimolong, counsel for petitioner, certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than nonconfidential information and documents.

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CERTIFICATE OF SERVICE

I, Walter S. Zimolong, counsel for petitioner, hereby certify that on the date indicated below, I caused to be served a true and correct copy of the foregoing document to the following:

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