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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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

DOUG McLINKO,
Petitioner/Appellee,

v.

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

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

v.

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

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

RESPONDENTS/APPELLANTS' EMERGENCY APPLICATION TO REINSTATE AUTOMATIC SUPERSEDEAS PURSUANT TO RULE 1736

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND AND PROCEDURAL HISTORY 4

A. Pennsylvania Enacts Mail-In Voting With Overwhelming Bipartisan Support. 4

B. Two Years After Mail-In Voting Was Enacted, Petitioners File Their Long-Delayed Lawsuits. 5

C. In a Closely Divided 3-2 Decision, the Commonwealth Court Incorrectly Holds That It Is Constrained, Under Two Century-Old Decisions, to Invalidate Mail-in Voting. 6

III. ARGUMENT 7

A. The Commonwealth Court Erred in Terminating the Automatic Supersedeas Because, as the Court's Opinion Effectively Acknowledged, Petitioners Did Not Establish the Necessary Elements. 7

B. Reinstating the Supersedeas Is Necessary to Protect the Public Interest; Without it, There Will Be Confusion Undermining Orderly Election Administration and Threatening Disenfranchisement. 11

C. Petitioners Failed to Make the Requisite Strong Showing That They Will Prevail on the Merits. 14

1. Article VII, § 1 Addresses Who May Vote, Not How They May Vote 17

2. The Two Century-Old Cases on Which the Commonwealth Court Relied Were Decided Under Materially Different Constitutional Provisions. 20

3. High-Court Decisions in Other Jurisdictions Underscore That the Commonwealth Court Misinterpreted Article VII, § 1 23

D. Petitioners Failed to Show Irreparable Harm. 26

IV. CONCLUSION 29

TABLE OF CITATIONS

Page(s)

Cases

In re Case of Fry,
71 Pa. 302 (1872).....19

Chase v. Miller,
41 Pa. 403 (1862).....*passim*

City of Philadelphia v. Commonwealth,
838 A.2d 566 (Pa. 2003).....1

In re Contested Election of Fifth Ward of Lancaster City,
126 A. 199 (1924).....*passim*

Corman v. Acting Secretary of Pennsylvania Department of Health,
266 A.3d 452 (Pa. 2021).....27

Costa v. Cortes,
143 A.3d 430 (Pa. Commw. Ct. 2016).....13

Department of Environmental Resources v. Jubelirer,
614 A.2d 199 (Pa. 1989).....8, 10, 11, 27

Dunn v. Blumstein,
405 U.S. 330 (1972).....18

Germantown Cab Co. v. Philadelphia Parking Authority,
15 A.3d 44 (Pa. 2011) (per curiam).....8, 10

Goodell v. Judith Basin County,
224 P. 1110 (Mont. 1924).....26

Jenkins v. State Board of Elections,
104 S.E. 346 (N.C. 1920).....24, 25

League of Women Voters v. Commonwealth,
178 A.3d 737 (Pa. 2018).....26

Lemons v. Noller,
63 P.2d 177 (Kan. 1936) 17, 24

In re Lesker,
105 A.2d 376 (Pa. 1954) 19

Mathews v. Paynter,
752 F. App'x 740 (11th Cir. 2018) 22

Merrill v. Milligan,
142 S. Ct. 879 (2022) 14

Moore v. Pullem,
142 S.E. 415 (Va. 1928) 25

Pennsylvania Public Utility Commission v. Process Gas Consumers Group,
467 A.2d 805 (Pa. 1983) 15

Pennsylvania Public Utility Commission v. Israel,
52 A.2d 317 (Pa. 1947) 26, 27

Purcell v. Gonzalez,
549 U.S. 1 (2006) 14

Rickert v. Latimore Township,
960 A.2d 912 (Pa. Commw. Ct. 2008) 8

SEIU Healthcare Pennsylvania v. Commonwealth,
104 A.3d 495 (Pa. 2014) 26, 27

In re Stack,
184 A.3d 591 (Pa. Commw. Ct. 2018) 19

Straughan v. Meyers,
187 S.W. 1159 (Mo. 1916) 25

Constitutional Provisions

PA. CONST. art. V, § 10 10

PA. CONST. art VII, § 1 ..... *passim*

PA. CONST. art VII, § 4 20

PA. CONST. art. VII, § 14 ..... *passim*

PA. CONST. of 1838, art. VIII, § 1 20

PA. CONST. of 1838, art. VIII, § 4 20

PA. CONST. of 1838, art. VIII, § 6 21

U.S. CONST. amend. XXVI 18

Statutes

25 P.S. § 2602(z.3) 23

25 P.S. § 2814 19

25 P.S. § 3050(a) 23

25 P.S. § 3146.1(b) 23

25 P.S. § 3150.12(g)(1) 12

25 P.S. § 3150.12a 13

25 Pa.C.S. § 1301 18

25 Pa.C.S. § 1302 19

1967 Pa. Laws 1048 21

Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. 2019-77 (S.B. 421) 4

Other Authorities

Board of Elections: No excuse mail-in ballot applications will continue to be accepted in Erie County, YourErie.com (Feb. 1, 2022), https://www.yourerie.com/news/breaking-news/board-of-elections-no-excuse-mail-in-ballot-applications-will-continue-to-be-accepted-in-erie-county/ 12

Department of State, https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Pages/SpecialElections.asp 13

McLinko Goes after Yaw, Legislature on Steven Bannon Show, MORNING TIMES (Jan. 2, 2021), available at https://www.morning-times.com/news/article_2cd4d3ff-64d1-5c54-9d75-af4d334c798a.html 5

Pa. R. App. P. 1736 .....*passim*

PJ D'Annunzio, *Pa. Court Gives State Justices 1 Week to Weigh Mail-In Voting*, LAW360, Feb. 17, 2022, https://www.law360.com/articles/1466163?e_id=ee2a4309-5371-46ca-a336-8834fa47736c&utm_source=engagement-alerts&utm_medium=email&utm_campaign=similar_articles 3

Respondents-Appellants, the Pennsylvania Department of State (the "Department") and the Acting Secretary of the Commonwealth (collectively, "Respondents"), respectfully submit this Application to Reinstate Automatic Supersedeas Pursuant to Rule 1736 (the "Application to Reinstate").

I. INTRODUCTION

This case epitomizes why the automatic supersedeas under Pennsylvania Rule of Appellate Procedure 1736(b) exists. Since Act 77 was signed into law on October 31, 2019, millions of Pennsylvania voters have utilized no-excuse mail-in voting in primary and general elections during the 2020 and 2021 election cycles. On January 28, 2022, in a closely divided 3-2 decision, the Commonwealth Court held that it was bound, by two century-old cases decided under previous versions of the Pennsylvania Constitution, to declare Act 77 invalid. But it is undisputed that the ultimate authority to determine the merits of Petitioners' claims—and the constitutionality of mail-in voting—belongs exclusively to this Court. The automatic supersedeas was designed for exactly these circumstances: it avoids "disturbing the status quo and risking circumstances of ongoing flux," thereby affording the Commonwealth time to adjust, should the trial court's judgment be affirmed. *See City of Philadelphia v. Commonwealth*, 838 A.2d 566, 594 (Pa. 2003).

Accordingly, when Petitioners filed their application seeking to lift the supersedeas, the Commonwealth Court should have immediately denied it. Indeed, the Commonwealth Court recognized that Petitioners had failed to carry their burden, and the court even acknowledged the significant prejudice that lifting the stay would likely cause. To that end, the court described at length the potential for "adverse impact upon the public interest" and "agree[d] that the *status quo ante* should be preserved while the Pennsylvania Supreme Court considers the merits of the *McLinko* and *Bonner* decisions, which are listed for argument on March 8, 2022." (Memorandum Opinion at 8-10, *McLinko v. Commonwealth*, No. 244 MD 2021 (Pa. Commw. Ct. Feb. 16, 2022 (attached as Exhibit A).)

That should have been the end of the matter. Instead, even though the Commonwealth Court agreed that Petitioners had not made the required showing, the court ***granted*** the motion to vacate the supersedeas effective March 15, 2022. (Ex. A, Memo. Op. at 10-11). The court did not find that lifting the stay at that juncture would avoid harm to the public interest. Of course, the opposite is true—lifting the stay (*i.e.*, eliminating mail-in voting) even *closer* to election day would, if anything, only exacerbate voter confusion and the danger of disenfranchisement. Rather than adjudicating Petitioners' application to lift the automatic stay under the well-defined standard established by this Court, the Commonwealth Court treated Petitioners' application as an opportunity to impose a deadline by which this Court,

a superior tribunal, should decide Respondents' appeal from the Commonwealth Court's decision.[1] As the Commonwealth Court explained, its unilaterally imposed "timeline gives the Supreme Court seven days to issue its decision, with a formal opinion likely to follow thereafter." (*Id.* at 11.)

Respondents respectfully submit that the Commonwealth Court's decision not only fundamentally misapprehends the nature, purpose, and scope of a trial court's authority to lift the automatic stay; it is institutionally improper and turns the judicial hierarchy on its head. Rule 1736(b) embodies the considered presumption that decisions by trial courts (here, the Commonwealth Court) should, as a matter of course, be stayed pending the disposition of appeals taken by the Commonwealth. The authority to lift the automatic stay exists to address those exceptional circumstances in which a stay is not needed to prevent harm to any of the parties or the public interest; ***and*** the petitioners are very likely to prevail on appeal; ***and*** the petitioners would suffer irreparable harm if the stay is not immediately lifted. If ***any single one*** of those circumstances does not exist, then neither does the trial court's authority to lift the stay. Certainly, that narrowly

[1] The legal press immediately recognized that this was the meaning and effect of the Commonwealth Court's ruling. *See* PJ D'Annunzio, *Pa. Court Gives State Justices 1 Week to Weigh Mail-In Voting*, LAW360, Feb. 17, 2022, https://www.law360.com/articles/1466163?e_id=ee2a4309-5371-46ca-a336-8834fa47736c&utm_source=engagement-alerts&utm_medium=email&utm_campaign=similar_articles.

circumscribed authority does not empower a trial court to dictate to this Court the timeline for deciding an appeal from the trial court's ruling.

Put simply, the Commonwealth Court erred in terminating the automatic supersedeas despite Petitioners' failing to meet their high burden. First, the Commonwealth Court explicitly acknowledged that the public would be harmed by termination of the supersedeas, but granted the Application to Vacate anyway. Second, the Commonwealth Court's decision fails to recognize that it is Respondents—not Petitioners—who are likely to succeed on the merits of their appeal. Indeed, the court assumed the correctness of its constitutional analysis despite the dissent of two of its five members. Third and finally, Petitioners failed to show that they would suffer irreparable harm from the automatic stay. For these reasons, the Court should immediately and unconditionally reinstate the automatic supersedeas.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Pennsylvania Enacts Mail-In Voting With Overwhelming Bipartisan Support.

In 2019, with the support of a bipartisan supermajority of both legislative chambers, the Pennsylvania General Assembly enacted Act 77 of 2019, which made several important updates and improvements to Pennsylvania's Election Code, including by providing for no-excuse mail-in voting. Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. 2019-77 (S.B. 421) (West) ("Act 77").

Act 77 was signed into law and became effective on October 31, 2019, applying to all elections held on or after April 28, 2020. Between Act 77's enactment and the commencement of this litigation, millions of Pennsylvanians cast more than 4.7 million mail-in ballots during the 2020 and 2021 election cycles,[2] the Commonwealth and Pennsylvania's counties invested enormous resources in implementation of the new voting procedures, and Pennsylvania voters came to rely on mail-in voting.

B. Two Years After Mail-In Voting Was Enacted, Petitioners File Their Long-Delayed Lawsuits.

Petitioner Doug McLinko filed his Petition for Review on July 26, 2021, nearly 15 months after the first election permitting mail-in voting. McLinko has been a member of the Bradford County Board of Elections since at least 2011.[3] He is a long-standing critic of Pennsylvania's mail-in voting procedures and Act 77.[4]

The *Bonner* Petitioners filed their Petition for Review one-and-a-half months later, on August 31, 2021. The *Bonner* Petitioners are fourteen current members of

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[2] *See* https://www.electionreturns.pa.gov/ReportCenter/Reports (permitting generation of reports for each election since 2020, which list the total number of mail-in ballots).

[3] *See* https://bradfordcountypa.org/department/elections/ (using "Results" icon, permitting generation of reports for 2011, 2015, and 2019 elections).

[4] *See McLinko Goes after Yaw, Legislature on Steven Bannon Show*, MORNING TIMES (Jan. 2, 2021), available at https://www.morning-times.com/news/article_2cd4d3ff-64d1-5c54-9d75-af4d334c798a.html (last accessed Jan. 24, 2022) ("We expect that anybody that voted for Act 77 — which started the Keystone steal, because without this state doing what they did the rest of the country couldn't have followed suit and stole it — they should step down.").

the Pennsylvania House of Representatives. Eleven of them were not only legislators at the time Act 77 was passed; they voted *to enact* the very mail-in voting procedures they now claim are facially unconstitutional. (*See Bonner* Pet. for Review, ¶¶ 4, 6-11, 13-16.) The remaining *Bonner* Petitioners were either in office when Act 77 was passed or were active candidates no later than January 2020. (*See id.* ¶¶ 5, 12.)

C. In a Closely Divided 3-2 Decision, the Commonwealth Court Incorrectly Holds That It Is Constrained, Under Two Century-Old Decisions, to Invalidate Mail-in Voting.

On January 28, 2022, the Commonwealth Court issued Opinions and Orders declaring Act 77 "unconstitutional and void *ab initio*." (*See*, *e.g.*, Order, *Bonner v. Degraffenreid*, No. 293 MD 2021 (Pa. Commw. Ct. Jan. 28, 2022).) First, the court rejected Respondents' arguments that Petitioners lacked standing and that their claims were untimely. *See McLinko v. Dep't of State*, Nos. 244 and 293 MD 2021, 2022 WL 257659, at *18-25 (Pa. Commw. Ct. Jan. 28, 2022). Second, in a 3-2 decision, the Commonwealth Court erroneously held that, under *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election of Fifth Ward of Lancaster City*, 126 A. 199 (1924), the court was constrained to find that Act 77 violates Article VII, Section 1 of the Pennsylvania Constitution. *See McLinko*, 2022 WL 257659, at *13-18. Judges Wojcik and Ceisler dissented, pointing out that mail-in voting is expressly permitted by a different provision of the Pennsylvania Constitution that

did not exist when *Chase* was decided: "[A]rticle VII, section 4 [of the Pennsylvania Constitution] by its plain language specifically empowers the General Assembly to provide for this new method of casting a no-excuse mail-in ballot, and [Petitioners]' claims regarding the constitutionality of Act 77 are without merit." *McLinko*, 2022 WL 257659, at *30 (Wojcik, J., dissenting).

Respondents filed a Notice of Appeal and Jurisdictional Statement within hours of receiving the Commonwealth Court's Orders, effecting an automatic supersedeas under Rule 1736(b). After Petitioners filed their Application to Terminate (Eliminate) Automatic Stay in the Commonwealth Court on January 31, 2022 (the "Application to Vacate," attached as Exhibit B), this Court issued expedited briefing deadlines and scheduled oral argument in this appeal for March 8, 2022. On February 16, 2022, the Commonwealth Court terminated the automatic supersedeas effective March 15, 2022, necessitating this emergency Application.

III. ARGUMENT

A. The Commonwealth Court Erred in Terminating the Automatic Supersedeas Because, as the Court's Opinion Effectively Acknowledged, Petitioners Did Not Establish the Necessary Elements.

Under Rule 1736, "the taking of an appeal by [the Commonwealth or any officer thereof, acting in his official capacity] shall operate as a *supersedeas* in favor of such party, which *supersedeas* shall continue through any proceedings in

the United States Supreme Court." Pa. R. App. P. 1736(b); *see also* Pa. R. App. P. 1736(a).

When a party seeks to vacate an automatic supersedeas, the movant bears the burden. *See Rickert v. Latimore Twp.*, 960 A.2d 912, 924 (Pa. Commw. Ct. 2008).[5] That is because when the Commonwealth takes an appeal, it is entitled to an automatic supersedeas under Rule 1736(b) ***as of right***.[6]

Accordingly, to carry its burden:

> The petitioner ***must*** make a substantive case on the merits, demonstrating the stay [of the automatic supersedeas] will prevent petitioner from suffering irreparable injury, and establishing other parties will not be harmed and the grant of the stay is not against the public interest. Those standards were articulated in a series of decisions handed down by this Court.

Dept. of Environmental Res. v. Jubelirer, 614 A.2d 199, 203 (Pa. 1989) (emphasis added); *accord Rickert*, 960 A.2d at 923 ("the petitioner ***must*** establish: 1) that he is likely to prevail on the merits; 2) that without the requested relief he will suffer irreparable injury; ***and*** 3) that the removal of the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest" (emphasis added)).

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[5] This Court cited approvingly to *Rickert* in *Germantown Cab Co. v. Philadelphia Parking Authority*, 15 A.3d 44 (Pa. 2011) (per curiam).

[6] *See* Note, Pa. R. App. P. 1736(b) (stating that the automatic supersedeas under Rule 1736(b) "is self-executing, and a party entitled to its benefits is not required to bring the exemption to the attention of the court under Rule 1732 (application for stay or injunction pending appeal)").

The Commonwealth Court concluded that Petitioners had not carried their burden, and thus the court erred by nonetheless granting the Application to Vacate. The Commonwealth Court identified numerous ways in which vacating the supersedeas would have an "adverse impact upon the public interest." (Ex. A, Memo. Op. at 8.)

- "The statutory deadline for counties to send mail-in ballot applications to electors on the permanent mailing list was Monday, February 7, 2022, and the counties have sent applications to over 1.3 million electors." (*Id.* at 8);

- "Immediate implementation of this Court's decision will require county boards of election to notify voters of a change in voting requirements, so that voters will know the options available for the 2022 primary election. If the Supreme Court reverses this Court's decision, then the county boards of election will have to notify the public of the reversal of their prior notice. This will create confusion and uncertainty, which is not in the public interest." (*Id.* at 9); and

- "Similarly, the cost to taxpayers of notifying electors of a change, twice, is also relevant to the public interest analysis. As stated above, approximately 1.3 million mail-in ballot applications have been sent to Pennsylvania electors for the primary election. The cost of postage, printing, and employee time to revoke these applications is not in the record but cannot be trivial. That expenditure would prove unnecessary, and moreover, would have to be incurred yet again in order to reverse the first notice required by the Supreme Court's decision on appeal." (*Id.* at 9-10 (citation omitted).)

In light of these risks, the Commonwealth Court correctly concluded that "[a]n orderly election is in the public interest. Lifting the automatic supersedeas now, while cross-appeals are pending in the Pennsylvania Supreme Court, will not advance an orderly election process." (*Id.* at 9 (citation omitted).) Thus, because Petitioners "fail[ed] to meet the standards" for vacating the supersedeas, the

Commonwealth Court was required to deny relief. *Jubelirer*, 614 A.2d at 203-04; *accord Germantown Cab*, 15 A.3d at 44.

Failing to adhere to this requirement, the Commonwealth Court vacated the automatic stay. In doing so, that court effectively (1) nullified the "public interest" element established in *Jubelirer* and (2) set a precedent pursuant to which a lower court may set a deadline for this Court's resolution of an appeal. That is because, in every single case involving an automatic supersedeas, the Commonwealth Court could prospectively vacate the supersedeas, effective on some future date, for the purported purpose of "postponing" the harm to the public interest, while at the same time dictating to this Court the deadline for it to render a decision. Such a regime would be contrary to this Court's binding precedent, to say nothing of the Pennsylvania Constitution, which states that "[t]he Supreme Court," not the Commonwealth Court, "shall exercise general supervisory and administrative authority over all the courts." PA. CONST. art. V, § 10.

In sum, an application to lift the automatic supersedeas should be granted only in those rare circumstances in which it is necessary and appropriate to give effect to a trial court decision against the Commonwealth notwithstanding the pendency of an appeal. The Commonwealth Court correctly recognized that this was not such a case—but then purported to tell this Court when it should issue its decision. Having concluded that the stay should not be lifted before the appeal was

argued and submitted to this Court, the Commonwealth Court should simply have denied Petitioners' application. It is this Court's prerogative to determine when it should issue its rulings, and when those rulings should take effect.

B. Reinstating the Supersedeas Is Necessary to Protect the Public Interest; Without it, There Will Be Confusion Undermining Orderly Election Administration and Threatening Disenfranchisement.

Respondents do not rule out the possibility of a case in which deferring the effective date on which the automatic supersedeas is lifted could avoid harm to the public interest, potentially allowing a petitioner to satisfy the requisite elements of the *Jubelirer* test. *See* 614 A.2d at 203. But this is plainly not such a case. Here, the harm caused by lifting the stay only increases as election day draws closer. Indeed, the Commonwealth Court acknowledged as much, expressly noting that, even if this Court were to affirm the Commonwealth Court's decision, it might nonetheless hold that mail-in voting should remain in place for the 2022 primary election. (*See* Exhibit A at 8 (noting that "the effect of the declaratory relief [awarded by the Commonwealth Court] could be deferred beyond the primary election if affirmed by the Supreme Court").) Yet, inexplicably, despite acknowledging this Court's prerogative to defer the effect of a hypothetical ruling affirming the Commonwealth Court's opinion—and making clear why this Court would have good reason for such deferment—the Commonwealth Court ordered

that the automatic stay should be lifted only seven days after this Court hears oral argument. That order is untenable.

Indeed, even the possibility that the automatic supersedeas could terminate prior to this Court's decision injects uncertainty into election administration efforts that are already underway, upsetting the status quo that has been in effect since April 2020 (when mail-in voting took effect). According to Jonathan Marks, the Deputy Secretary for Elections and Commissions for the Department of State, as of August 26, 2021, there were 1,380,342 voters on the permanent mail-in ballot list file established by 25 P.S. § 3150.12(g)(1); all voters on this list automatically receive a mail-in ballot application at the beginning of each year. (*See* Affidavit of Jonathan Marks ¶¶ 24-25, attached as Exhibit C.) "An elector who has requested to be placed on this permanent list … has every reason to expect that she need take no further affirmative steps to be able to vote; the Election Code assures her that elections officials will send her the appropriate materials at the appropriate time." (*Id.* ¶ 24.) The statutory deadline for counties to send mail-in ballot applications to Pennsylvanians on the permanent mail-in voting list was February 7, 2022. *See* 25 P.S. § 3150.12(g)(1). Accordingly, counties have already sent applications to over 1.3 million voters.[7]

[7] *See*, *e.g.*, *Board of Elections: No excuse mail-in ballot applications will continue to be accepted in Erie County*, YourErie.com (Feb. 1, 2022),

The risk of confusion—and the urgency of the need to reinstate the automatic supersedeas—is particularly acute in light of two upcoming special elections that Allegheny and Luzerne counties will conduct on April 5, 2022. *See* Special Elections, Pennsylvania Department of State, https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Pages/SpecialElections.aspx. The counties were able to begin processing mail-in ballot applications for these elections on February 14, 2022. *See* 25 P.S. § 3150.12a. Unless this Court reinstates the automatic stay immediately, there is a significant risk of confusion about the permissible means of voting—particularly in these imminent special elections—with potential "disenfranchising effects." (Ex. C, Marks Aff. ¶ 23.)

This case starkly illustrates the principle that, when courts must weigh the public interest in election law cases, "the voters deserve certainty and finality." *See Costa v. Cortes*, 143 A.3d 430, 442 (Pa. Commw. Ct. 2016) (denying injunction of election law because it "would not be in the public interest as it would only foment further uncertainty among the public"). As the United States Supreme Court has stated (and reaffirmed several times in recent years):

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https://www.yourerie.com/news/breaking-news/board-of-elections-no-excuse-mail-in-ballot-applications-will-continue-to-be-accepted-in-erie-county/ ("With litigation pending, the Board of Elections says it is still mandated by law to send the 41,000 mail-in voters of Erie County an annual renewal application. Those applications were mailed Friday, Jan. 28.").

> Faced with an application to enjoin operation of [voting procedures] just weeks before an election, [courts] [are] required to weigh, in addition to the harms attendant upon issuance or non-issuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.

Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006); *accord Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (agreeing with stay of district court order because of proximity to election: "Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges. The … order would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion."). To prevent confusion, the Court should make clear that the automatic supersedeas will remain in place until this Court adjudicates Respondents' appeal.

C. Petitioners Failed to Make the Requisite Strong Showing That They Will Prevail on the Merits.

This Court need go no further to resolve Respondents' present Application: Because lifting the automatic supersedeas would harm the public interest—as the Commonwealth Court correctly found—the supersedeas should be reinstated. But Petitioners also failed to satisfy other prerequisites for lifting the automatic stay.

To obtain a termination of the automatic supersedeas, Petitioners were required to "make[] a *strong* showing that [they are] likely to prevail on the merits." *Pa. Public Utility Comm'n v. Process Gas Consumers Grp.*, 467 A.2d 805, 808 (Pa. 1983) (emphasis added). Petitioners did not meet that bar. In essence, they simply reiterated the Commonwealth Court's majority opinion, which held that *Chase* and *Lancaster City* compel the conclusion that mail-in voting is impermissible. But Petitioners failed to acknowledge that (1) that position won only three votes from the *en banc* panel, with the other two judges finding that *Chase* and *Lancaster City* are distinguishable because they interpreted prior iterations of the Pennsylvania Constitution that have since been fundamentally altered; and (2) Respondents advanced an alternative argument that only this Court can decide—namely, that *Chase* and *Lancaster City* were wrongly decided and should be overruled. Seemingly recognizing as much, the Commonwealth Court made its own arguments about why Petitioners were likely to succeed on the merits. In other words, where Petitioners' Application to Vacate was insufficient, the Commonwealth Court attempted to pick up the mantle on Petitioners' behalf.

The Commonwealth Court's merits arguments are no more successful than those of Petitioners. Although Respondents will not belabor the strength of their case—set forth fully in their Appellants' Brief, *see* Initial Brief of Appellants (Feb. 15, 2022), which Respondents incorporate fully by reference—Respondents are

likely to succeed because, among other reasons: (1) the Commonwealth Court lacked jurisdiction to decide Petitioners' facial constitutional challenge to Act 77, (2) Petitioners' facial constitutional challenge is foreclosed by the statutory time bar in Section 13(3) of Act 77, (3) Petitioners' interpretation of Act 77 contravenes the text, structure, and history of the Pennsylvania Constitution, (4) the Commonwealth Court's reliance on *Chase* and *Lancaster City*, which are from earlier constitutional epochs, was misplaced, and (5) regardless, *Chase* and *Lancaster City* were wrongly decided and are irreconcilable with settled principles of constitutional interpretation.

In its decision vacating the automatic supersedeas, the Commonwealth Court did not grapple with most of those arguments. Instead, it made three points: (1) it asserted, incorrectly, that "each incremental expansion of the right to vote by absentee ballot" prior to Act 77 was "preceded by a specific amendment to Article VII, Section 14 of the Pennsylvania Constitution" (Ex. A, Memo Op. at 6); (2) it attempted to distinguish one of the many decisions from other states that disagrees with *Chase* and *Lancaster City*'s interpretation of the phrase "offer to vote" as used in the Pennsylvania Constitution (*see* Ex. A, Memo. Op. at 5-6); and (3) it asserted, in largely conclusory fashion, that this Court is unlikely to overrule *Chase* and *Lancaster City* (*id.* at 6-7). As shown below, the plain text of the pertinent constitutional provisions show that they do not prohibit mail-in voting. Moreover,

during the entire period that the current Constitution, adopted in 1968, has been in effect, Pennsylvania law has permitted absentee voting by persons beyond the scope of those protected by Article VII, Section 14. And, despite the Commonwealth Court's narrow focus on one case, *Lemons v. Noller*, 63 P.2d 177, 185 (Kan. 1936), numerous state supreme courts interpreting constitutional language nearly identical to the pertinent portion of Article VII, § 1 of the Pennsylvania Constitution show that *Chase* and *Lancaster City*, besides being inapposite, were wrongly decided.

1. Article VII, § 1 Addresses Who May Vote, Not How They May Vote

As its title indicates, Section 1 of Article VII of the Constitution addresses only the criteria for voting eligibility in Pennsylvania. It provides, in its entirety:

> Qualifications of electors.
>
> Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State ninety (90) days immediately preceding the election.
>
> 3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal, he or she may, if a resident of

> Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

PA. CONST. art. VII, § 1 (underlining added).[8]

Based on its plain language, structure, and title, the meaning of this provision is clear. It limits the right to vote in Pennsylvania elections to citizens of a certain age who have been a U.S. citizen for at least a month. It also prescribes residency requirements—namely, the prospective voter must have resided in Pennsylvania at least 90 days immediately preceding the election and have resided in the specific election district in which she seeks to vote for at least 60 days. Article VII, § 1 also provides for cases in which a person was qualified to vote in an election district but then moves her residence to a different Pennsylvania election district within 60 days of an election. That person is not eligible to vote in her new district's electoral contests (because she does not satisfy the 60-day residency requirement), so § 1 allows her to vote in her old district's contests.

[8] Although not relevant to this case, certain of these requirements have been preempted or otherwise invalidated under federal law. *See* U.S. Const. amend. XXVI (voting rights of U.S. citizens "eighteen years of age or older" "shall not be … abridged … by any State on account of age"); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating Tennessee law conditioning eligibility to vote on a durational-residency requirement exceeding 30 days); *see also* 25 Pa.C.S. § 1301 (providing in pertinent part that, to be eligible to register to vote, an individual must be "at least 18 years of age on the day of the next election, … a citizen of the United States for at least one month prior to the next election and [a resident of] this Commonwealth and the election district where the individual offers to vote for at least 30 days prior to the next ensuing election").

The qualifications set forth in § 1 do *not* include any requirement of physical presence at the time of the election; a person may maintain a "residence" in a given state and election district even while she is physically absent from them. The constitutional concept of residence is synonymous with the concept of domicile; it refers to the elector's "permanent or true home," the place to which, when she engages in temporary departures, she "intends to return." *In re Case of Fry*, 71 Pa. 302, 309–10 (1872); *accord In re Stack*, 184 A.3d 591, 597 (Pa. Commw. Ct. 2018) (citing *In re Lesker*, 105 A.2d 376, 380 (Pa. 1954)). This definition is consistent with the meaning of the term "residence" as it is used in the Election Code. *See* 25 P.S. § 2814; *see also* 25 Pa.C.S. § 1302.

Indeed, the other provision on which Petitioners rely (Article VII, § 14) confirms that physical absence, without an intention to establish a new permanent abode, does not defeat residence. That provision mandates that the Legislature establish a means for certain "qualified electors" who are "absent from the municipality of their residence" on election day to vote in their election district's electoral contests, and to provide "for the return and canvass of their votes *in the election district in which they respectively reside*." PA. CONST. art. VII, § 14(a) (emphasis added).

Thus, nothing in the text or structure of Article VII, § 1 imposes restrictions on the *method* by which voters may vote. Rather, that constitutional provision is

addressed to the subject matter identified in its title: it establishes the age, citizenship, and durational-residency "qualifications" to vote. Put differently, the provision addresses *who* may vote in a given election, not *how* they may vote.

2. The Two Century-Old Cases on Which the Commonwealth Court Relied Were Decided Under Materially Different Constitutional Provisions.

The two cases on which the Commonwealth Court relied, *Chase* and *Lancaster City*, are inapposite, as set forth in Judge Wojcik's dissent.

Chase's interpretation relied on the combination of two provisions of the 1838 Pennsylvania Constitution, which (1) limited the right to vote to "white freem[e]n" citizens "having resided in the state one year, and in the election district where [they] offer[] to vote ten days immediately preceding such election, and within two years paid a state or county tax," *Chase*, 41 Pa. at 418 (quoting PA. CONST. of 1838, art. VIII, § 1), and (2) required all elections to be "by ballot," *id.* (discussing PA. CONST. of 1838, art. VIII, § 4). Significantly, however, the second provision was later replaced by the provision set forth in Article VII, § 4 of the current Constitution, which expressly grants the General Assembly plenary power to "prescribe[] the "method[s]" of voting, subject only to the requirement that "secrecy in voting be preserved." PA. CONST. art VII, § 4. That change alone is sufficient to distinguish *Chase*'s interpretation of the Constitution of 1838.

Lancaster City is likewise off-point. There, the Court concluded that whatever the *method* by which the ballot was returned to county officials, the *place* of the elector's "'offer to vote' must still be in the district where the elector resides." 126 A. at 201. In this regard, the Court found it significant that the then-existing Constitution "made [it] so that absent voting in the case of soldiers is permissible." *Id.*; *see* PA. CONST. of 1874, art. VIII, § 6. The Constitution has since been amended several times: although it first *permitted* the Legislature to provide absentee voting rights for certain groups, it now *requires* the Legislature to provide absentee voting rights for certain groups. *See* PA. CONST. art. VII, § 14 (amended 1967) ("[t]he Legislature *shall*, by general law, provide a manner in which" various categories of voters can vote by absentee ballot (emphasis added)). At the same time that change was made in 1967, the provision on which the *Lancaster City* Court relied was repealed in its entirety. *See* 1967 Pa. Laws 1048.

The 1967 amendments are an obvious basis on which to distinguish *Lancaster City*—and, in particular, *Lancaster City*'s reliance on the interpretive canon of *expressio unius* for the proposition that, because the then-operative constitution permitted only certain types of mail-in voting, it necessarily prohibited all others. *See* 126 A. at 201. True, where a provision says the legislature "may" do something in certain circumstances, it is natural to infer that the legislature may not do that thing in other circumstances. But where a provision says the legislature

"shall" do something in certain circumstances, it is unnatural to infer that it may never otherwise do that thing. Especially where the constitutional text otherwise reflects broad legislative discretion, the sensible inference is that the legislature "shall" meet certain obligations and is otherwise free to enact policy as it deems fit. *See Mathews v. Paynter*, 752 F. App'x 740, 744 (11th Cir. 2018) (distinguishing "shall" from "may" and noting that the former term does not impliedly limit government authority).

Legislative history supports this interpretation of the 1967 amendments' effects. As the majority leader of the House explained, the intention behind those amendments to the elections article of the Constitution was "to make our constitution less restrictive and permit the legislature to adopt … statutory acts." Pennsylvania Legislative Journal, Session of 1967, Vol. 1, No. 1, at 54 (Jan. 3, 1967) (statement of Representative Donaldson).

Overlooking the importance of these amendments, the Commonwealth Court incorrectly asserted that "*Chase* and *Lancaster City* have informed the conduct of elections in Pennsylvania for over 100 years. Each incremental expansion of the opportunity to vote by absentee ballot has been preceded by a specific amendment to Article VII, Section 14 of the Pennsylvania Constitution." (Ex. A. Memo. Op. at 6 (citation omitted).) This assertion is simply untrue. Around the same time the 1967 amendments were passed, the General Assembly expanded the scope of

voters allowed to vote absentee well beyond the boundaries of the specific groups identified in the Constitution. *See, e.g.*, 25 P.S. § 3146.1(b) (military spouses) (enacted 1963); 25 P.S. § 2602(z.3) (electors on vacations) (enacted 1968).[9] That history is entirely consistent with the General Assembly's own power to enact the scheme set forth in Act 77. In other words, even if the absentee ballot provision interpreted by *Lancaster City* could be construed as a *ceiling* on absentee voting rights, the current version of Article VII, § 14 is, by its plain terms, merely a *floor*.

3. High-Court Decisions in Other Jurisdictions Underscore That the Commonwealth Court Misinterpreted Article VII, § 1

Chase's interpretation of the "offer to vote" language in the Pennsylvania Constitution is not only at odds with the understanding of those who wrote that provision, those who ratified it,[10] and those in the General Assembly who operationalized it. It is also at odds with high-court decisions from other states that adopted the same "offer to vote" language in their constitutions, while similarly imposing residency requirements on electors. As the supreme courts in those states have recognized, the "offer to vote" language does not prescribe any limitation on the *method* of voting, and it certainly does not prohibit civilian absentee or mail-in

[9] Acceptance of the Commonwealth Court's position would, at least impliedly, invalidate these decades-old provisions, in addition to Act 77 (to say nothing of provisional balloting, *see* 25 P.S. § 3050(a)).

[10] *See* Initial Brief of Appellants at 46-50.

voting statutes like Act 77. In *Lemons*, which the Commonwealth Court dismissively (and wrongly) described as "meandering discourse at best" (Ex. A, Memo Op. at 6), the Kansas Supreme Court clearly stated "although our Constitution prescribes the ***qualifications*** of electors[,] it does not prescribe the ***manner or form*** of holding elections, [and] it [is] within its constitutional power for the Legislature to provide that an offer to vote in the township or ward in which the elector resides, c[an] be made [by electors physically located outside of their township or ward at the time of the election]." *Lemons*, 63 P.2d at 185 (emphasis added). And *Lemons* is just one of a litany of cases with similar holdings.

As the North Carolina Supreme Court held: "[a]n offer to vote may be made in writing, and that is what the absent voter does when he selects his ballots and attaches his signature to the form and mails the sealed envelope to proper official[s]." *Jenkins v. State Bd. of Elections*, 104 S.E. 346, 349 (N.C. 1920).

> [*Chase*] differs very materially from the [case] under consideration. The substance of that decision, as we read it, was that under the Constitution of Pennsylvania the right of a soldier to vote is confined to and must be exercised in the election district where he resided when he entered the military service, and that the Legislature could not authorize a military commander to form an election district and hold an election therein.
>
> The election laws which attempted to confer the right of suffrage upon federal soldiers absent on military service … are wholly unlike in principle, as well as in detail, the North Carolina Absent Voters Act.

Id. And as the Missouri Supreme Court explained in construing a voter-qualifications provision analogous to Article VII, § 1 of the Pennsylvania Constitution: "It is clear that this section does not undertake to prescribe the manner in which a choice shall be expressed, or a vote cast, or the ballots prepared, deposited, or counted, but merely the qualifications of the voters. It is true, under this provision, a person can vote only in the place of his residence, but this constitutes no inhibition against any particular method the Legislature may provide to enable him to so vote." *Straughan v. Meyers*, 187 S.W. 1159, 1162 (Mo. 1916).

These cases all recognize that the construction of "offer to vote" proffered by Petitioners here—and accepted by the Commonwealth Court—requires a tortured reading of the constitutional text:

> To suppose that the draftsmen of the Constitution paused in the writing of these elaborate provisions relating to these different subjects [*i.e.*, voting qualifications, registration and prerequisites] and interrupted the sequence of thought to digress and to interpolate the requirement that the voter must be personally present to tender his ballot on the day of election, and that in this unusual way and by this equivocal language they intended to inhibit the General Assembly from passing [an absentee voting] statute, … ignores fundamental rules of construction. The method of voting is elsewhere [in the constitution at issue] specifically and unequivocally committed to the legislative discretion.

Moore v. Pullem, 142 S.E. 415, 421-22 (Va. 1928) (refusing to construe the phrase "the precinct in which he offers to vote" as imposing a requirement of in-person voting). As the Montana Supreme Court put the point:

> In order … to hold that the clause "at which he offers to vote" was intended to fix the place or describe the manner of voting, we must assume that the learned men who drafted [the qualifications provision], stopped short in the midst of defining the qualifications of an elector and injected an idea of an entirely different character; but no one familiar with the rudiments of English would undertake to define qualifications and place or manner of voting, by the use of the language employed in [the voter-qualifications provision].

Goodell v. Judith Basin Cnty., 224 P. 1110, 1114 (Mont. 1924).

Although Respondents brought each of the cases above to the Commonwealth Court's attention, the Court failed to acknowledge the breadth and persuasiveness of the precedent construing "offer to vote" as fully consistent with mail-in voting regimes like the one set forth in Act 77. Those cases only underscore that, to the extent this Court concludes that it cannot distinguish *Chase* and *Lancaster City*, it should not hesitate to overrule them.

D. Petitioners Failed to Show Irreparable Harm.

The Commonwealth Court was also wrong to conclude that permitting mail-in voting pending this Court's decision is *per se* irreparable harm sufficient to vacate the supersedeas. (Ex. A, Memo. Op. at 7 (citing *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 504 (Pa. 2014) and *Pa. Public Utility Comm'n v. Israel*, 52 A.2d 317, 321 (Pa. 1947).) First, reliance on these cases puts the cart before the horse because "matters concerning the proper interpretation and application of our Commonwealth's organic charter are at the end of the day for this Court—and only this Court." *League of Women Voters v. Commonwealth*, 178

A.3d 737, 822 (Pa. 2018). Further, these cases are plainly inapplicable in this context. It cannot possibly be the case that any order determining that the Commonwealth has violated the law is sufficient, *ipso facto*, to establish irreparable harm overcoming the automatic supersedeas. If that were the law, the irreparable harm requirement would always be met in cases against the Commonwealth, turning Rule 1736(b) on its head.[11]

Petitioners' other cited authority in their Application to Vacate is equally unavailing. Relying on the Commonwealth Court's decision to lift the automatic stay in *Corman v. Acting Secretary of the Pennsylvania Department of Health*, *see* Order dated November 16, 2021, No. 294 M.D. 2021 (Pa. Commw. Ct.), Petitioners asserted that "the irreparable harm involved in this matter is self-evident." (Ex. B, App. to Vacate ¶ 25.) But this Court *reinstated* the automatic supersedeas in *Corman*, effectively reversing the Commonwealth Court's decision. *Corman v. Acting Sec'y of Pa. Dept. of Health*, 266 A.3d 452, 466-67 (Pa. 2021). Astonishingly, Petitioners did not acknowledge this Court's ruling.

In fact, this case is a far worse candidate for vacating the automatic supersedeas than was *Corman*. In *Corman*, the challenged masking rule imposed

[11] *SEIU Healthcare Pennsylvania* and *Israel* are also clearly inapposite because they involved requests for preliminary injunctions. As the Supreme Court stated in *Jubelirer*, the Court "must not blur the distinction between the standard required for the entry of a preliminary injunction . . . and the requirements necessary for the entry of a stay [of the automatic supersedeas]." 614 A.2d at 203 (internal citations omitted).

some limitation on individual conduct, and the Commonwealth Court identified an alternative basis for the Commonwealth to preserve the status quo pending appeal (emergency rulemaking). Here, by contrast, Petitioners and the Commonwealth Court have effectively *taken away* statutory voting rights, and no such alternative means for preserving the status quo exists. Moreover, no Petitioner has demonstrated harm—let alone irreparable harm—from leaving in place the automatic stay. Mail-in voting does not allow anyone to vote who would otherwise be ineligible to vote; it simply makes voting more accessible, on equal terms, to *all* Pennsylvanians. Nor has any candidate Petitioner demonstrated that mail-in voting would place him or her at any competitive disadvantage (particularly in a primary election among members of the same political party).

Finally, Petitioners' complaints of harm ring hollow in light of their own conduct. As noted above, Petitioners did not bring their claims until approximately one-and-a-half years after the first election using mail-in voting. Petitioner McLinko is on the Bradford County Board of Elections and thus administered mail-in voting, multiple times, long before he brought suit. And the *Bonner* Petitioners are legislators, the vast majority of whom *voted to enact Act 77*. To the extent they now claim (without evidence) to be harmed by the statute, they have no one to blame but themselves. Having had ample opportunity to bring their claims

before mail-in voting was fully implemented, Petitioners cannot in good faith claim irreparable harm by the continued use of mail-in voting now.

IV. CONCLUSION

The Commonwealth Court correctly recognized that Petitioners had failed to satisfy at least one of the essential prerequisites for lifting the automatic stay. In fact, they failed to establish any of them. For the foregoing reasons, the Court should grant Respondents' Application, and the automatic supersedeas should be reinstated pending disposition of Respondents' appeal.

Respectfully submitted,

Dated: February 24, 2022

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I 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 non-confidential information and documents.

Dated: February 24, 2022

/s/ Robert A. Wiygul
Robert A. Wiygul

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents	:	
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, Petitioners	:	
v.	:	No. 293 M.D. 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: February 16, 2022

Before the Court is the "Appellees' Joint Application to Terminate (Eliminate) Automatic Stay in Both Appeals" (Joint Application) filed by Petitioners Doug McLinko, 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 F. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook, and Intervenors the Butler County Republican Committee, the York County Republican Committee, and the Washington County Republican Committee (collectively, Petitioners). The Joint Application seeks to vacate the automatic stay[1] of this Court's orders of January 28, 2022, declaring that the Act of October 31, 2019, P.L. 552, No. 77 (Act 77),[2] which established a system of no-excuse mail-in voting, violates Article VII, Section 1 of the Pennsylvania Constitution. PA. CONST. art. VII, §1.[3] *See McLinko v. Commonwealth*, __ A.3d __

[1] The automatic stay was occasioned by the appeal of Veronica Degraffenreid, the Acting Secretary of the Department of State, and the Commonwealth of Pennsylvania, Department of State (collectively, Acting Secretary). On January 8, 2022, Leigh M. Chapman was appointed Secretary of the Commonwealth, succeeding Veronica Degraffenreid. *See* https://www.governor.pa.gov/newsroom/gov-wolf-names-leigh-m-chapman-new-acting-secretary-of-the-commonwealth/ (last visited February 16, 2022).

[2] Act 77 amended the Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, *as amended,* 25 P.S. §§2600-3591.

[3] It states:

> *Every citizen* twenty-one years of age, possessing the following qualifications, *shall be entitled to vote* at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State ninety (90) days immediately preceding the election.
>
> 3. *He or she shall have resided in the election district where he or she shall offer to vote* at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

PA. CONST. art. VII, §1 (emphasis added).

(Pa. Cmwlth., No. 244 M.D. 2021, filed January 28, 2022), and *Bonner v. Degraffenreid*, __ A.3d __ (Pa. Cmwlth., No. 293 M.D. 2021, filed January 28, 2022). Article VII, Section 1 was adopted in 1838 and definitively construed in 1862 by the Pennsylvania Supreme Court to mean that electors must appear in person, at "their proper polling place[]," and on Election Day in order to vote. *McLinko*, __ A.3d at __, slip op. at 25. The ability to vote at another time and place, *i.e.*, by absentee ballot, requires specific constitutional authorization. *Id.* at __, slip op. at 32. This Court held that, consistent with Pennsylvania Supreme Court precedent, a constitutional amendment is a necessary prerequisite to the legislature's establishment of a no-excuse mail-in voting system such as that set forth in Act 77. *McLinko*, __ A.3d at __, slip op. at 35.[4]

The Acting Secretary appealed the Court's January 28, 2022, decisions to the Pennsylvania Supreme Court that same day, thereby triggering an automatic stay ancillary to the appeal. *See* PA. R.A.P. 1702 (stay ancillary to appeal) *and* 1736(b) (a self-executing automatic supersedeas attaches upon the taking of an appeal and continues through the pendency of the appeal process).[5] On January 31, 2022, Petitioners filed the Joint Application seeking a termination of the automatic

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[4] The Court rejected the Acting Secretary's contention that Article VII, Section 4 of the Pennsylvania Constitution, PA. CONST. art VII, §4, authorized Act 77. *McLinko*, __ A.3d at __, slip op. at 31-32.

This 1901 constitutional provision pre-dated the Supreme Court decision that any deviation from the requirement of in-person voting at an elector's polling place on Election Day required express authorization in the Constitution. *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924) (*Lancaster City*). The Supreme Court further explained that the language in Section 4 for "such other method as may be prescribed by law[,]" PA. CONST. art. VII, §4, was adopted to allow the use of voting machines. *Lancaster City*, 126 A. at 201. It goes without saying that voting machines can only be employed at a polling place.

[5] Because this case was filed in this Court's original jurisdiction, this Court retains jurisdiction over stay applications during an appeal. *See* PA. R.A.P. 1701(b)(1).

stay. On February 1, 2022, the Court directed the Acting Secretary to file any answer to the Joint Application by noon on Friday, February 4, 2022. The Acting Secretary filed an answer opposing Petitioners' Joint Application.[6]

> To prevail on a petition to vacate an automatic supersedeas,
>
> the petitioner must establish: (1) that he is likely to prevail on the merits; (2) that without the requested relief he will suffer irreparable injury; and (3) that the removal of the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest.

Rickert v. Latimore Township, 960 A.2d 912, 923 (Pa. Cmwlth. 2008) (quoting *Solano v. Pennsylvania Board of Probation and Parole*, 884 A.2d 943, 944 (Pa. Cmwlth. 2005)).

The Court agrees with Petitioners that they are likely to prevail on the merits and rejects the Acting Secretary's arguments to the contrary.

The Acting Secretary intimates that the *McLinko* and *Bonner* decisions are not likely to stand because each was a "closely divided 3-2 decision" of an *en banc* panel. Answer to Joint Application at 2, 6. The fact that the Court's decision was not unanimous does not, in any way, predict the outcome of the Supreme Court's review. For example, the Pennsylvania Supreme Court affirmed the decision of a divided five-member *en banc* panel in *League of Women Voters of Pennsylvania v. Boockvar* (Pa. Cmwlth., No. 578 M.D. 2019, filed January 7, 2021), *affirmed*, 265 A.3d 207 (Pa. 2021) (upholding this Court's decision that Victim's Right Amendment violated the procedure for amending the Pennsylvania Constitution).[7]

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[6] Intervenors the Democratic National Committee and the Pennsylvania Democratic Party did not submit an answer to the Joint Application; however, they concur with the Acting Secretary's opposition to the Joint Application. Democratic Intervenors' Letter, 2/4/2022, at 1.

[7] In *League of Women Voters*, Judge Ceisler filed an opinion in support of the order announcing the judgment of the Court, which Judge Wojcik joined. Judge McCullough filed an opinion in

Likewise, the Supreme Court declined review of a split *en banc* decision of this Court in *Penjuke v. Pennsylvania Board of Probation and Parole*, 203 A.3d 401 (Pa. Cmwlth. 2019), *appeal denied*, 228 A.3d 254 (Pa. 2020).[8] Each review by the Supreme Court turns on the merits of this Court's decision without regard to whether that decision was unanimous or the result of a split vote.

The Acting Secretary believes that the Pennsylvania Supreme Court will overrule *Chase v. Miller*, 41 Pa. 403 (1862), and *Lancaster City*, 126 A. 199. It is true that the Supreme Court has the power to overrule *Chase* and *Lancaster City*, but the Acting Secretary has not identified the error in either decision. The place requirement for exercise of the voting franchise was added to the Pennsylvania Constitution in 1838, and its operative language, *i.e.*, "offer to vote," has not changed since then. PA. CONST. art. VII, §1. The Supreme Court established in 1862 that the entitlement to vote created in Article VII, Section 1, compelled the qualified elector "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 the law to receive it." *Chase*, 41 Pa. at 419. The Acting Secretary argues, in conclusory fashion, that *Chase* and *Lancaster City* are "outliers" and directs the Court to *Lemons v. Noller*, 63 P.2d 177 (Kan. 1936). Answer to Joint Application at 15. In *Lemons*, the Kansas Supreme Court concluded that an elector can waive his right to cast a ballot in secrecy by choosing to vote by absentee ballot and, thus, refused to issue a writ of mandamus to change the outcome of an election.

Lemons does not support the Acting Secretary's claim that *Chase* and *Lancaster City* are "outliers." *Lemons* concerned whether an absentee voting

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support of the Court's order. Judge Leavitt filed an opinion in opposition to the Court's order, which Judge Fizzano Cannon joined.

[8] The decision in *Penjuke* was 4-3, with one judge concurring in the result only.

provision in the Kansas constitution allowing those in military service to vote by absentee ballot implicitly denied other electors the right to vote by absentee ballot. *Lemons*, 63 P.2d at 181. The merits of *Chase* and *Lancaster City* will not be evaluated by comparison to *Lemons*, which offers a meandering discourse at best. In any case, *Chase* and *Lancaster City* are consistent with decisions by other state courts and their understanding of their constitutions. *See* John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and The Secret Ballot*: *Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 498 (2003) (noting that Pennsylvania and other states were required to amend their constitutions before enacting an absentee voting system because of the state constitutional requirement of in-person voting). *See also McLinko*, ___ A.3d at ___, slip. op. at 30, n.26 (explaining that the New York legislature put no-excuse mail-in voting to the voters as a constitutional amendment because of the constitutional limits on availability of absentee voting).

Chase and *Lancaster City* have informed the conduct of elections in Pennsylvania for over 100 years. *McLinko*, __ A.3d at __, slip op. at 28-29. Each incremental expansion of the opportunity to vote by absentee ballot has been preceded by a specific amendment to Article VII, Section 14 of the Pennsylvania Constitution. PA. CONST. art. VII, §14(a).[9] *McLinko*, __ A.3d at __, slip op. at 32. Except the most recent one.

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[9] It states:

> (a) 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 municipality 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 or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

As the Pennsylvania Supreme Court recently stated, "[t]o reverse a decision, we demand a special justification, over and above the belief that the precedent was wrongly decided." *Commonwealth v. Alexander*, 243 A.3d 177, 196 (2020) (quoting *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020)). In deciding whether to overrule its prior decision, the Supreme Court considers several factors, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Alexander*, 243 A.3d at 196 (quoting *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2177-78 (2019)). The age of the decision is another factor. *Alexander*, 243 A.3d at 196. The holdings of *Chase* and *Lancaster City* meet all these factors. More importantly, each decision is firmly grounded in the text of the Pennsylvania Constitution.[10]

The Court also agrees with Petitioners that the use of an unconstitutional voting system constitutes, in itself, irreparable harm. *See generally SEIU Healthcare Pennsylvania v. Commonwealth*, 104 A.3d 495, 508 (Pa. 2014) (violation of a statutory mandate establishes irreparable injury). Indeed, it has long been established that the continuation of "unlawful conduct constitutes irreparable injury." *Pennsylvania Public Utility Commission v. Israel*, 52 A.2d 317, 321 (Pa. 1947).

Harm to other persons interested in this matter is difficult to evaluate. Should the automatic supersedeas be vacated, electors will be unable to avail themselves of no-excuse mail-in voting, but they will still be able to vote in person

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PA. CONST. art. VII, §14(a).

[10] The textual support for the Supreme Court's ruling in *Chase*, 41 Pa. 403, has strengthened over time. The verb has changed from the declarative form "offers to vote," PA. CONST. art. III, §(1838), to the imperative form "shall offer to vote." PA. CONST. art III, §1 (adopted in 1874). *See McLinko*, ___ A.3d at ___, slip. op. at 13, n.15.

at their polling places on Election Day. If electors meet even one of the express enumerated exceptions to the in-person voting requirement in Article VII, Section 14(a) of the Constitution, they may vote by absentee mail-in ballot. The enumerated exceptions apply to electors who are absent from their municipality on Election Day "because their duties, occupation or business" require them to be elsewhere or who are in residence in their election district but cannot attend their proper polling place "because of illness or physical disability[.]" PA. CONST. art. VII, §14(a). Election duties or observance of a religious holiday also provide a basis for absentee, mail-in voting. *Id.* It may be inconvenient for an elector to return to the pre-Act 77 election system, but it is difficult to discern any "harm" in having electors vote at their assigned polling place, as they have done since 1838.

This leaves the adverse impact upon the public interest with regard to the primary election scheduled for May 17, 2022. The statutory deadline for counties to send mail-in ballot applications to electors on the permanent mailing list was Monday, February 7, 2022, and the counties have sent applications to over 1.3 million electors. Answer to Joint Application at 9-10. The Acting Secretary argues that this Court should forbear from altering the *status quo* while the Supreme Court considers the constitutionality of Act 77. Notably, this is also a year in which both the congressional and state legislative districts must be configured because of the 2020 census results. Petitioners seek prospective relief, which suggests that the effect of the declaratory judgment could be deferred beyond the primary election if affirmed by the Supreme Court.[11]

[11] *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (judgment deferred 60 days to permit implementation of fallback provisions in statute); *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294, 299-300 (1955) (courts of equity may consider "complexities arising from the transition to a system of public education freed of racial discrimination" after the declaration that

An orderly election is in the public interest. *Costa v. Cortes*, 143 A.3d 430, 441 (Pa. Cmwlth. 2016) (observing the need for "an orderly and lawful election process"). Lifting the automatic supersedeas now, while cross-appeals[12] are pending in the Pennsylvania Supreme Court, will not advance an orderly election process. Immediate implementation of this Court's decision will require county boards of election to notify voters of a change in voting requirements, so that voters will know the options available for the 2022 primary election. If the Supreme Court reverses this Court's decision, then the county boards of election will have to notify the public of the reversal of their prior notice. This will create confusion and uncertainty, which is not in the public interest. *Accord id.* at 442 (observing that ordering the removal of a ballot question from the primary ballot "would not be in the public interest as it would only foment further uncertainty among the public as to whether they should vote on [the ballot question] and whether, if they do, their votes will be counted").

Similarly, the cost to taxpayers of notifying electors of a change, twice, is also relevant to the public interest analysis. *Accord id.* at 436 (noting the possible waste of $1 million in costs to taxpayers for advertising a ballot question, if that question were later removed from the ballot). As stated above, approximately 1.3 million mail-in ballot applications have been sent to Pennsylvania electors for the

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racial discrimination in public education is unconstitutional). *McLinko* and *Bonner* concern not just the Secretary of the Commonwealth but all the county boards of election.

[12] Subsequently, on February 4, 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 F. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook filed a notice of cross-appeal of this Court's January 28, 2020, decision in *Bonner* in the Supreme Court, which has been docketed at No. 19 MAP 2022. Then, on February 7, 2022, Intervenors the Butler County Republican Committee, the York County Republican Committee, and the Washington County Republican Committee also filed a notice of cross-appeal of this Court's decision in *Bonner* in the Supreme Court.

primary election. The cost of postage, printing, and employee time to revoke these applications is not in the record but cannot be trivial. That expenditure would prove unnecessary, and moreover, would have to be incurred yet again in order to reverse the first notice required by the Supreme Court's decision on appeal.

Nevertheless, there is also an important competing public interest in safeguarding the public from unconstitutional legislation. As this Court observed in *Costa*, "the public interest is best served by adhering to the text of the Pennsylvania Constitution . . . ."[13] *Id.* at 442; *see also id.* ("[a] critical role of this Court is to save the public from unlawful or unconstitutional decisions by the other two branches of government . . . ."). However, this competing interest must be balanced with those stated above and viewed in light of the exigency arising from the short time remaining before the primary election. Recognizing this exigency, the Supreme Court has scheduled expedited argument on the cross-appeals of this Court's decisions for March 8, 2022. As such, there remains sufficient time for the Supreme Court to consider and decide the parties' appeals in advance of the primary election.

Given the particular challenges of this election year, the Court agrees that the *status quo ante* should be preserved while the Pennsylvania Supreme Court considers the merits of the *McLinko* and *Bonner* decisions, which are listed for argument on March 8, 2022. For this reason, the Court will delay vacating the supersedeas until March 15, 2022. This will allow the county boards of election to defer sending any notices until the Supreme Court has decided the appeal in this matter. If the declaratory judgment is affirmed, the county boards of elections can

[13] In *Costa*, 430 A.3d at 436-37, this Court acknowledged the undesirable financial consequences of moving the proposed constitutional amendment from the April 2016 ballot to the November 2016 ballot, but ultimately concluded it could not consider the cost, where doing so would impinge upon the legislature's authority to enact resolutions on placement of a constitutional question on the primary ballot. *Id.* at 436. Here, no such impingement on legislative authority is involved.

promptly inform the electorate that one must qualify for an absentee ballot to vote by mail. The deadline for receipt of absentee mail-in ballot applications by local election boards is May 10, 2022,[14] and this deadline can be met by electors needing an absentee ballot. All other electors can appear at their "proper polling places" and vote in person. PA. CONST. art VII, §14(a). If the Supreme Court reverses this Court's orders and holds that no-excuse mail-in voting is constitutional, all of the forms of voting currently in place would continue in due course.

This timeline gives the Supreme Court seven days to issue its decision, with a formal opinion likely to follow thereafter.[15] Deferring the vacating of the supersedeas to March 15, 2022, does not disturb the Supreme Court's schedule and avoids the risk of unnecessary public confusion or cost, while recognizing the magnitude of the public interest in holding a primary election in 2022 that is not affected by any doubt as to the constitutionality of the forms of voting permitted.

For these reasons, the Court will grant Petitioners' Joint Application, but it will deny Petitioners' request to immediately vacate the automatic stay.

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

[14] https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx (last visited February 16, 2022).

[15] In election cases, a gap between the Supreme Court's order and its opinion is not uncommon. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (opinion filed on February 7, 2018, on an order filed January 22, 2018); *In re Cohen for Office of Philadelphia City Council-at-Large*, 225 A.3d 1083 (Pa. 2020) (opinion filed February 19, 2020, on an order entered on October 3, 2019).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents	:	
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, Petitioners	:	
v.	:	No. 293 M.D. 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

O R D E R

AND NOW, this 16th day of February, 2022, it is ORDERED that Petitioners-Appellees' Joint Application to Terminate (Eliminate) Automatic Stay is hereby GRANTED effective March 15, 2022.

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

Order Exit
02/16/2022

EXHIBIT B

Received 1/31/2022 12:34:55 PM Commonwealth Court of Pennsylvania

Filed 1/31/2022 12:34:00 PM Commonwealth Court of Pennsylvania
244 MD 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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, *et al.*,

Appellants,

TIMOTHY BONNER, *et al.*,

Appellees,

v.

CHAPMAN, *et al.*,

Appellants,

and

BUTLER COUNTY REPUBLICAN COMMITTEE; YORK COUNTY REPUBLICAN COMMITTEE; and **WASHINGTON COUNTY REPUBLICAN COMMITEE.**

Nos.: 244 M.D. 2021
293 M.D. 2021 (Consolidated)

APPELLEES' JOINT APPLICATION TO TERMINATE (ELIMINATE) AUTOMATIC STAY

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APPELLEES' JOINT APPLICATION TO TERMINATE (ELIMINATE) AUTOMATIC STAY IN BOTH APPEALS

Petitioner-Appellee, Doug McLinko, Petitioner-Appellees Timothy Bonner, *et al.*, and Intervenor-Appellees, Butler County Republican Committee, *et al.*, hereinafter collectively referred to as, "Appellees", by and through their undersigned counsel, file the within Application to Terminate (Eliminate) Automatic Stay, stating in support thereof as follows:

Introduction

1. On January 28, 2022, the Court issued two Memorandum Opinions and Orders granting Petitioner-Appellees' and Intervenor-

Appellees' Applications for Summary Relief and Entry of Judgment at dockets 244 M.D. 2021 and 293 M.D. 2021, respectively.[1]

2. The Court's Order stated that, "Act 77 is declared unconstitutional and void ab initio." *See* Ex. B, at Pg. 10.

3. The Court held that, "the legislature may not excuse qualified electors from exercising the franchise at their 'proper polling places' unless there is first 'an amendment to the Constitution . . . permitting this to be done.'" *See* Ex. A, at Pg. 34-35.

4. On January 28, 2022, mere hours after the issuance of this Court's Memorandum Opinions and Orders, Respondent-Appellants appealed to the Pennsylvania Supreme Court at docket numbers 14 MAP 2022 ("McLinko Appeal") and 15 MAP 2022 ("Bonner Appeal").

5. On January 28, 2022, immediately after the filing of Appellants' Notice of Appeal, the Department of State issued its,

[1] A true and correct copy of the Commonwealth Court's January 28, 2022, Memorandum Opinion and Order entered in Docket 244 M.D. 2021 ("McLinko Opinion") is attached hereto as "Exhibit A." A true and correct copy of the Commonwealth Court's January 28, 2022, Memorandum Opinion and Order entered in Docket 293 M.D. 2021 ("Bonner Opinion") is attached hereto as "Exhibit B." The Court's Memorandum Opinions and Orders are incorporated by reference as if set forth at length herein.

"Statement on Commonwealth Court Ruling on Mail-In Ballots," which document provides,

> [t]he Department of State has a simple message today for Pennsylvania voters: **Today's ruling on the use of mail-in ballots has no immediate effect on mail-in voting. Go ahead and request your mail-in ballot for the May primary election**.
>
> Voters who are on the annual mail ballot list might recently have received in the mail, or will soon receive, the annual application from their county. They should complete and return the application to affirm that they want their county to send them a mail ballot for all 2022 elections.
>
> Additionally, the Department is notifying all county election boards that they should proceed with all primary election preparations as they were before today's Commonwealth Court ruling. There should be no change in their procedures.

A true and correct copy of the Department of State's January 28, 2022, "Statement on Commonwealth Court Ruling on Mail-In Ballots," is attached hereto as "Exhibit C." (emphasis in original).

6. As a result of the Appellants' appeals, this Court's Orders are stayed based upon the automatic *supersedeas* found in the Pennsylvania Rules of Appellate Procedure.

7. Accordingly, Appellees collectively move this Court to immediately eliminate and terminate the stay, or automatic *supersedeas*, in both cases, pursuant to Pennsylvania Rules of Appellate Procedure 1736 and 1732.

Legal Standard

8. Rule 1736(b), entitled, "***Supersedeas* automatic**," states:

> [u]nless otherwise ordered pursuant to this chapter the taking of an appeal by any party specified in Subdivision (a) of this rule shall operate as a *supersedeas* in favor of such party, which *supersedeas* shall continue through any proceedings in the United States Supreme Court.
>
> Note: This rule is self-executing, and a party entitled to its benefits is not required to bring the exemption to the attention of the court under Rule 1732 (application for stay or injunction pending appeal). ***However, the appellee may apply under Rule 1732 for elimination or other modification of the automatic supersedeas…***

Pa. R.A.P. 1736(b) (emphasis added).

9. Rule 1732 (a), entitled, "**Application to trial court**," states:

> [a]pplication for a stay of an order of a trial court pending appeal, or for approval of or modification of the terms of any *supersedeas*, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal, or for relief in the nature of peremptory mandamus, must ordinarily be made in the first instance to the trial court, except where a prior order under this chapter has been entered in the matter by the appellate court or a judge thereof.

Pa. R.A.P. 1732(a).

10. In the present matter, Appellees commenced their respective actions by Petitions for Review pursuant to this Court's original jurisdiction. *See* 42 Pa. C.S. § 761(a)(1).[2]

11. Accordingly, the "trial court" in this matter, as referenced by Rule 1732(a), is the Commonwealth Court. *See e.g., Dept. of Envtl. Resources v. Jubelirer*, 614 A.2d 199, 202 (Pa. 1989) (the "Rules of Appellate Procedure make clear that an appellee wishing to vacate, eliminate[,] or modify an automatic *supersedeas* must make application for a stay of that automatic *supersedeas* first to the lower court.").

12. "The requirements for a stay emerged from [the Pennsylvania Supreme] Court's adoption of holdings in several Commonwealth Court cases as impacted by the federal cases of *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C.Cir.1958), modified by *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C.Cir.1977)." *Dept. of Envtl. Resources v. Jubelirer*, 614 A.2d 199, 202–03 (Pa. 1989).

13. Appellees "must make a substantive case on the merits, demonstrating the stay will prevent petitioner from suffering irreparable

[2] Filed at 244 M.D. 2021 ("McLinko Docket"); and 293 M.D. 2021 ("Bonner Docket").

injury, and establishing other parties will not be harmed and the grant of the stay is not against the public interest," and "[t]hose standards were articulated in a series of decisions handed down by this Court." *Dept. of Envtl. Resources v. Jubelirer*, 614 A.2d 199, 203 (Pa. 1989); *citing Chartiers v. William H. Martin, Inc.*, 542 A.2d 985 (Pa. 1988); *Ernest Renda Contracting Co. v. Commonwealth*, 532 A.2d 413 (Pa. 1987); *Pennsylvania PUC v. Process Gas*, 467 A.2d 805 (Pa. 1983).

14. "[W]hen an appellee seeks to vacate an automatic *supersedeas*, the appellee bears the burden, which is not merely to demonstrate that the appellant has failed to meet the *Process Gas* standards to obtain a *supersedeas* in the first instance," and "it is inappropriate to argue that the appellant may not be injured if the automatic *supersedeas* is vacated." *Elizabeth Forward Sch. Dist. v. Pennsylvania Lab. Rel. Bd.*, 613 A.2d 68, 70 (Pa. Commw. 1992).

15. Rather, "Appellee must convince the court that appellee will be irreparably harmed if the automatic *supersedeas* is not vacated." *Id.*

16. "It is well-established that in order to prevail on a motion to vacate an automatic *supersedeas*, the petitioner must establish: 1) that he is likely to prevail on the merits; 2) that without the requested relief

he will suffer irreparable injury; and 3) that the removal of the automatic *supersedeas* will not substantially harm other interested parties or adversely affect the public interest." *Solano v. Pennsylvania Bd. of Probation and Parole*, 884 A.2d 943, 944 (Pa. Commw. 2005); *citing Elizabeth Forward Sch. Dist. v. Pennsylvania Labor Relations Bd.*, 613 A.2d 68 (Pa. Commw. 1992); *Pennsylvania Pub. Util. Comm'n. v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983).

17. Appellees meet the three requisite elements to prevail on a motion to vacate *supersedeas* for the following reasons.

Argument

1) APPELLEES ARE LIKELY TO PREVAIL ON THE MERITS.

18. Appellees are likely to prevail on the merits of their challenge to Act 77 as the Constitution of the Commonwealth of Pennsylvania clearly provides for the entitlement of an elector to "offer to vote" in the election district where the elector has resided 60 days immediately preceding the election. *See* Pa. Const. art. VII, § 1; *See also Chase v. Miller*, 41 Pa. 403, 419 (1862) ("[t]o '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 domicile.").

19. The sole exception to the Pennsylvania Constitution's requirement to "offer to vote" is set forth in Article VII, Section 14, which provides,

> (a) 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 municipality 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* or who will *not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties*, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.
>
> (b) For purposes of this section, "municipality" means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.

Pa. Const. art. VII, §14. (emphasis added).

20. As set forth by this Court in the McLinko Opinion,

> [t]he 1901 amendment authorizing "such other method" of voting at the polling place did not repeal the in-person voting requirement in Section 1, which created the "entitlement" to vote as well as the prerequisites therefor. [footnote omitted]. Our Constitution allows the requirement of in-person voting

> to be waived where the elector's absence is for reasons of occupation, physical incapacity, religious observance, or Election Day duties. Pa. Const. art. VII, §14(a). Because that list of reasons does not include no-excuse absentee voting, it is excluded. *Page v. Allen*, 58 Pa. 388, 347 (1868); *Lancaster City*, 126 A. at 201. An amendment to our Constitution that ends the requirement of in-person voting is the necessary prerequisite to the legislature's establishment of a no-excuse mail-in voting system.

See Ex. A, at Pg. 35.

21. Accordingly, "a constitutional amendment must be presented to the people and adopted into our fundamental law before legislation authorizing no-excuse mail-in voting can 'be placed upon our statute books.'" *See* Ex. A, at Pg. 49; *citing In re Contested Election of Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924).

22. As recognized by this Court in its January 28, 2022 Memorandum Opinions and Orders, Act 77 is clearly and plainly unconstitutional and thus is void *ab initio*, and Appellees will likely prevail on such an issue again on appeal.

2) APPELLEES WILL SUFFER IRREPARABLE INJURY WITHOUT THE REQUESTED RELIEF.

23. As Act 77 violates the Pennsylvania Constitution's requirement to "offer to vote" as set forth in Article VII, Section 1, and is thus *void ab initio*, continued use of mail-in ballots in Pennsylvania's

elections will result in an election for our Commonwealth's Governor, representatives in Congress, and United States Senator being held in an unconstitutional manner and with the potential for a staggering number of votes being rendered void.

24. Appellant, despite this Court's ruling that Act 77 is unconstitutional, has already made clear that no-excuse mail-in voting under the act will still be available for Pennsylvania's primary election currently scheduled for May 17, 2022, and is continuing to encourage its use by electors in the Commonwealth. *See* Ex. C ("[g]o ahead and request your mail-in ballot for the May primary election.").

25. Moreover, the unconstitutionality of Act 77 creates *per se* irreparable harm. *See SEIU Healthcare Pennsylvania v. Com.*, 104 A.3d 495, 504 (Pa. 2014) ("the Executive Branch's violation of both a state statute and the Pennsylvania Constitution results in *per se* irreparable harm that cannot be compensated adequately by damages."); *see also Corman v. Acting Secretary of the Pennsylvania Department of Health*, Memorandum Opinion dated November 16, 2021, 294 M.D. 2021 (Not Reported) ("[s]econd, the irreparable harm involved in this matter is self-evident. The November 10, 2021 Opinion declared

the Masking Order void ab initio based on a failure to comply with the requirements of Pennsylvania rulemaking requirements. 'In Pennsylvania, the violation of an express statutory provision per se constitutes irreparable harm[.]'") (internal citations omitted).

26. Accordingly, due to Appellant's continued advocacy for the use of no-excuse mail-in ballots provided for under Act 77 in the months leading up to Pennsylvania's 2022 Primary Election and the *per se* irreparable harm stemming from the unconstitutionality of Act 77, Appellees will continue to face irreparable harm should the *supersedeas* be left in place.

27. Beyond the existence of a *per se* irreparable harm, Appellees will face particular and individualized irreparable harms if a stay the automatic *supersedeas* is not removed.

28. Without the removal of *supersedeas*, Appellee Doug McLinko will continue to be caught in the same legal quagmire that gave rise to this action. Because Act 77 has been ruled unconstitutional but is not currently stayed, Mr. McLinko faces the same dilemma of whether to exercise administerial and quasi-judicial duties under Act 77 concerning the processing of ballots cast by unqualified mail voters or to adhere to

the limitations the Pennsylvania Constitution for another election unless *supersedeas* is removed.

29. Appellees Bonner, *et al.*, will face irreparable harm as candidates in the 2022 election unless *supersedeas* is removed. The continued use of mail-in ballots in Pennsylvania's elections will result in an election for these candidates being held in an unconstitutional manner and with the potential for a staggering number of votes cast in favor of these candidates being rendered void. Furthermore, the Department of State's "Statement on Commonwealth Court Ruling on Mail-In Ballots" wrongly encourages voters who may intend to vote for these candidates to vote according to the provisions set forth in Act 77, which may lead to these votes being discarded.

30. Appellees Butler County Republican Committee, *et al.*, also face irreparable harm if *supersedeas* is not removed because Appellees will need to advise voters on how they are to cast their ballots leading up to the next election. Removal of *supersedeas* is necessary to ensure Appellees properly advise voters and so that voters' ballots are not ultimately rendered void. Additionally, the Department of State's "Statement on Commonwealth Court Ruling on Mail-In Ballots" thwarts

appellees' abilities to properly and confidently advise voters on how to vote, for the Commonwealth encourages voters to cast their ballots by mail in accordance with an unconstitutional law.

31. Therefore, Appellees will each suffer collective and individual irreparable harm if the removal of the automatic supersedeas is not granted.

3) THE REMOVAL OF THE AUTOMATIC SUPERSEDEAS WILL NOT SUBSTANTIALLY HARM OTHER INTERESTED PARTIES OR ADVERSELY AFFECT THE PUBLIC INTEREST.

32. As set forth *supra*., the removal of the automatic *supersedeas* will not affect other interested parties or the public interest because Act 77 violates the Pennsylvania Constitution's requirement to "offer to vote" as set forth in Article VII, Section 1, and was thus an illegal statute void *ab initio*.

33. The general public will not be negatively affected by the removal of the automatic *supersedeas* as removal of the automatic *supersedeas* will simply mean that electors in Pennsylvania must physically present themselves to the polling place on election day (as they did for over 100 years before Act 77), unless meeting one of the expressly enumerated qualifications for absentee voting under Article VII, Section

14 of the Pennsylvania Constitution, just as they have done prior to Act 77's enactment.

34. Moreover, Appellants' public statement concerning Act 77 and its validity, together with Act 77's unconstitutionality, creates a likelihood that many electors will attempt to cast no-excuse mail-in ballots in the upcoming 2022 Primary Election and subsequently have such votes rendered void.

35. The elimination of the automatic *supersedeas* in the present matter will clarify any confusion regarding the use of no-excuse mail-in ballots in the upcoming 2022 Primary Election, currently scheduled for May 17, 2022.

36. Here, Appellees can establish: "1) that [th]ey [are] likely to prevail on the merits; 2) that without the requested relief [th]ey will suffer irreparable injury; and 3) that the removal of the automatic *supersedeas* will not substantially harm other interested parties or adversely affect the public interest." *Solano v. Pennsylvania Bd. of Probation and Parole*, 884 A.2d 943, 944 (Pa. Commw. 2005).

WHEREFORE, Appellees respectfully request that this Court immediately eliminate and terminate the automatic *supersedeas* pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I 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 non-confidential information and documents.

/s/ Walter S. Zimolong, Esquire
Walter S. Zimolong, Esq.

CERTIFICATE OF SERVICE

I certify that this filing was served via PACFile upon all counsel of record this 31st day of January 2022.

/s/ Walter S. Zimolong, Esquire
Walter S. Zimolong, Esq.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents	:	
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, Petitioners	:	
v.	:	No. 293 M.D. 2021 Argued: November 17, 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

EXHIBIT A

OPINION
BY JUDGE LEAVITT[1] FILED: January 28, 2022

Doug McLinko (McLinko) has filed an amended petition for review seeking a declaration that Article XIII-D of the Pennsylvania Election Code,[2] added by Act 77, violates the Pennsylvania Constitution and is, therefore, void. Act 77 established that any qualified elector may vote by mail, but McLinko argues that the Pennsylvania Constitution requires a qualified elector to present her ballot in person at a designated polling place on Election Day, except where she meets one of the constitutional exceptions for absentee voting. *See* PA. CONST. art. VII, §§1, 14. No-excuse mail-in voting cannot be reconciled, McLinko argues, with the Pennsylvania Constitution.

Respondents are the Pennsylvania Department of State and the Acting Secretary of the Commonwealth, Veronica Degraffenreid (collectively, Acting Secretary). She contends that Act 77's system of no-excuse mail-in voting conforms to the Pennsylvania Constitution, which allows elections "by ballot or by *such other method* as may be prescribed by law" so long as "secrecy in voting be preserved." PA. CONST. art. VII, §4 (emphasis added). Nevertheless, the Acting Secretary explains that the Court need not reach the merits of McLinko's challenge to Act 77 because his action was untimely filed and McLinko lacks standing to challenge the constitutionality of Act 77.

[1] This matter was assigned to the panel before January 3, 2022, when President Judge Emerita Leavitt became a senior judge on the Court. Because the vote of the commissioned judges was evenly divided on the analysis in Part III of this opinion, the opinion is filed "as circulated" pursuant to Section 256(b) of the Court's Internal Operating Procedures, 210 Pa. Code §69.256(b).

[2] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§3150.11-3150.17. Article XIII-D was added by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

On August 31, 2021, Timothy R. Bonner and 13 other members of the Pennsylvania House of Representatives (collectively, Bonner) filed a petition for review also seeking a declaration that Act 77 is unconstitutional under Article VII of the Pennsylvania Constitution. Bonner additionally asserts that the enactment of Act 77 violates the United States Constitution. *See Bonner v. Degraffenreid* (Pa. Cmwlth., No. 293 M.D. 2021, filed January 28, 2022). On September 24, 2021, the Court consolidated the McLinko and Bonner petitions, which raise the same question under the Pennsylvania Constitution.[3]

Thereafter, the Democratic National Committee and the Pennsylvania Democratic Party (collectively, Democratic Intervenors), and the Butler County Republican Committee, the York County Republican Committee, and the Washington County Republican Committee (collectively, Republican Intervenors) sought intervention in the consolidated matter. The Court granted them intervention.

Before this Court are the cross-applications for summary relief filed by McLinko and the Acting Secretary. McLinko seeks a declaratory judgment that Act 77 violates the requirement that an elector must "offer to vote" in the "election district" where he or she resides unless the elector has grounds to cast an absentee ballot. PA. CONST. art. VII, §§1, 14. The Acting Secretary seeks an order dismissing McLinko's amended petition with prejudice on procedural grounds or, in the alternative, because it lacks substantive merit.

For the reasons set forth herein, the Court rejects the Acting Secretary's procedural objections to McLinko's amended petition, and it holds that Act 77 violates Article VII, Section 1 of the Pennsylvania Constitution. This holding,

[3] The cases have been consolidated because they raise identical issues under the Pennsylvania Constitution. A separate opinion is filed in each case to address the differences in the petitioners' standing and their requested relief.

EXHIBIT A

consistent with binding precedent of the Pennsylvania Supreme Court, explains how a system of no-excuse mail-in voting may be constitutionally implemented in the Commonwealth and expresses no view on whether such a system should, or should not, be implemented as a matter of public policy.

We grant McLinko's application for summary relief and deny the Acting Secretary's application for summary relief.

I. Background

Act 77, *inter alia*, created the opportunity for all Pennsylvania electors to vote by mail without having to demonstrate a valid reason for absence from their polling place on Election Day, *i.e.*, a reason provided in the Pennsylvania Constitution. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 352 (Pa. 2020). Section 1301-D(a) of the Election Code provides that "[a] qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under [Article XIII-D]." 25 P.S. §3150.11(a).[4] A "qualified mail-in elector" or "qualified elector" is any person who meets the qualifications for voting in the Pennsylvania Constitution, "or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election." Section 102(t), (z.6) of the Election Code, 25 P.S. §2602(t), (z.6). Section 1306-D of the Election Code directs that the elector must mark the ballot, "enclose and securely seal [the ballot] in the envelope on which is printed . . . 'Official Election Ballot[,]' place that envelope in a second envelope, "fill out, date, and sign the declaration on [the outside of the] envelope" and put the envelope in the mail. 25 P.S. §3150.16(a).[5]

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[4] Added by Act 77, *as amended* by the Act of March 27, 2020, P.L. 41, No. 12.

[5] Added by Act 77, *as amended* by the Act of March 27, 2020, P.L. 41, No. 12.

EXHIBIT A

Act 77 directed that during the first 180 days after its effective date, any constitutional challenge to Act 77 had to be filed with the Pennsylvania Supreme Court. *See* Section 13(2) of Act 77. On July 26, 2021, McLinko filed a petition for review in this Court challenging the constitutionality of Act 77 after the 180-day period for filing such an action in the Supreme Court had elapsed on April 28, 2020.

McLinko asserts that as a member of the Bradford County Board of Elections, he is responsible for the conduct of elections within that county, including voter registration, voting on election day and the computation of votes. Amended Petition ¶¶3,5. McLinko must certify the results of all primary and general elections in the county to the Secretary of the Commonwealth. *Id*. McLinko believes that no-excuse mail-in voting is illegal and that ballots cast in that manner should not be counted. He asserts that under the Pennsylvania Constitution, a qualified elector must establish residency 60 days before an election in "the election district *where he or she shall offer to vote*." Amended Petition ¶12 (quoting PA. CONST. art. VII, §1) (emphasis added). McLinko explains that the Pennsylvania Supreme Court has definitively construed the term "offer to vote" to mean that the elector must "physically present a ballot at a polling place." Amended Petition ¶¶13-14 (citation omitted). Stated otherwise, Article VII, Section 1 requires electors to vote in person at their designated polling place on Election Day.

McLinko acknowledges that there are exceptions to this requirement. Article VII, Section 14(a) of the Pennsylvania Constitution[6] allows absentee voting, and McLinko asserts that this provision authorizes the only exceptions. Amended Petition ¶15. Specifically, a qualified elector may vote by absentee ballot where he is (1) absent from his residence on Election Day because of business or occupation,

[6] The complete text of Article VII, Section 14 is set forth, *infra*, in part III.C of this opinion.

(2) unable to "attend" his proper polling place because of illness, disability, or observance of a religious holiday or (3) "cannot vote" because of his Election Day duties. Amended Petition ¶16. McLinko believes that only where qualified electors meet one of the exceptions enumerated in Article VII, Section 14(a) may they vote by mail.

McLinko observes that in 2019, Senate Bill 411, Printer's No. 1012, proposed a Joint Resolution to amend Article VII, Section 14 of the Pennsylvania Constitution to end the requirement that qualified electors must physically appear at a designated polling place on Election Day. However, Senate Bill 411 did not pass,[7] and the Constitution was not amended as proposed. McLinko believes that if he certifies no-excuse mail-in ballots, then he will be acting unlawfully because it is his duty "to certify, count, and canvas" votes in a manner "consistent with the Pennsylvania Constitution." Amended Petition ¶48.

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[7] Senate Bill 411 was considered twice in June 2019 and then re-referred to the Appropriations Committee. *See Pennsylvania Legislative Journal-Senate*, June 18, 2019, 627, 655 and June 19, 2019, 659, 672. The legislative history for Senate Bill 411 explains that "Pennsylvania's current Constitution restricts voters wanting to vote by absentee ballot to [enumerated] situations. . . ." Senator Mike Folmer, Senate Co-Sponsoring Memoranda (January 29, 2019, 10:46 A.M.) https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=28056 (last visited January 27, 2022). Senate Bill 411 proposed a constitutional amendment to "eliminate these limitations, empowering voters to request and submit absentee ballots for any reason – allowing them to vote early and by mail." *Id.*

Senate Bill 411 was incorporated into Senate Bill 413, Printer's No. 1653. It proposed, by Joint Resolution, a constitutional amendment to provide that the physical appearance of a qualified elector at a designated polling place "on the day of the election" may not be required. *Id.* Senate Bill 413, Printer's No. 1653 passed; was signed in the Senate and the House on April 28, 2020; and was filed in the Office of the Secretary of the Commonwealth on April 29, 2020. *See Pennsylvania Legislative Journal-Senate*, April 28, 2020, 289, 307; *Pennsylvania Legislative Journal-House*, April 28, 2020, 491, 518; Act of April 29, 2020, Pamphlet Laws Resolution No. 2. No further action was taken.

EXHIBIT A

II. Standards for Summary Relief

Pennsylvania Rule of Appellate Procedure 1532(b) allows the Court to enter judgment at any time after the filing of a petition for review where the applicant's right to relief is clear. PA. R.A.P. 1532(b).[8] Summary relief is reserved for disputes that are legal rather than factual, *Rivera v. Pennsylvania State Police*, 255 A.3d 677, 681 (Pa. Cmwlth. 2021), and we resolve "all doubts as to the existence of disputed material fact against the moving party." *Id*. (quoting *Marcellus Shale Coalition v. Department of Environmental Protection*, 216 A.3d 448, 458 (Pa. Cmwlth. 2019)). An application for summary relief is appropriate where a party lodges a facial challenge to the constitutionality of a statute. *Philadelphia Fraternal Order of Correctional Officers v. Rendell*, 701 A.2d 600, 617 n.24 (Pa. Cmwlth. 1997) (citing *Magazine Publishers v. Department of Revenue*, 618 A.2d 1056, 1058 n.3 (Pa. Cmwlth. 1992)).

Here, McLinko's petition for review raises a single constitutional question that is appropriate for disposition in an application for summary relief. The Acting Secretary challenges McLinko's petition for review on grounds of laches and standing. These legal issues involve facts, but there is no dispute on the relevant facts. There is no question that McLinko is a member of the Bradford County Board of Elections and a taxpayer. There is no factual question that substantial resources have been expended by the Commonwealth and by county boards of elections to

[8] It states: "At any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear." PA. R.A.P. 1532(b).

EXHIBIT A

implement mail-in voting and that approximately 1,380,342 electors have been placed on the mail-in ballot list file.[9]

In short, the parties' respective applications for summary relief involve only legal disputes and, thus, are ready for our disposition.

III. Article VII of the Pennsylvania Constitution

The central question presented in this matter is whether Act 77 conforms to Article VII of the Pennsylvania Constitution, which article governs elections. In resolving this question, we recognize that "'acts passed by the General Assembly are strongly presumed to be constitutional' and that we will not declare a statute unconstitutional 'unless it clearly, palpably, and plainly violates the Constitution. If there is any doubt that a challenger has failed to reach this high burden, then that doubt must be resolved in favor of finding the statute constitutional.'" *Zauflik v. Pennsbury School District*, 104 A.3d 1096, 1103 (Pa. 2014) (quoting *Pennsylvania State Association of Jury Commissioners v. Commonwealth*, 64 A.3d 611, 618 (Pa. 2013)). In construing the Pennsylvania Constitution, "[e]very word employed in the constitution is to be expounded in its plain, obvious and commonsense meaning." *Commonwealth v. Gaige*, 94 Pa. 193 (1880). Our Supreme Court has also instructed that

> all the provisions [of the Constitution] relating to a particular subject . . . are to be grouped together, when considering such

[9] The Acting Secretary submitted the affidavit of Jonathan Marks, Deputy Secretary of State for Elections and Commissions. In his affidavit, Marks attests that following the passage of Act 77, Pennsylvania election officials invested significant resources to educate voters about the new mail-in voting procedures and to create systems for the efficient issuance of mail-in ballots and their canvassing. Marks' Affidavit ¶11. County boards of elections invested substantial resources to purchase equipment and to train additional election workers needed to process mail-in ballots. *Id.* ¶¶13-15. Marks also attests that approximately 1,380,342 qualified electors were on Pennsylvania's permanent mail-in ballot list as of the date of his affidavit, August 26, 2021. *Id.* ¶25.

> subject, and so read that they may blend or stand in harmony, if that can be done without violence to the language.

Guldin v. Schuylkill Co., 149 Pa. 210 (1892); *see also Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008).

The three provisions of Article VII relevant hereto are Sections 1, 4, and 14. McLinko argues that Section 1 requires in-person voting, except where expressly permitted under Section 14. He argues that Section 4 applies to the conduct of elections at the polling place. The Acting Secretary responds that Section 4 authorized the legislature to establish a system of no-excuse absentee mail-in voting. Further, she believes that Section 14 sets forth the minimum requirements for absentee voting, but the minimum can be expanded by the legislature using its authority under Section 4.

We begin with a review of each relevant provision of Article VII.

A. Article VII, Section 1

Article VII, Section 1 of the Pennsylvania Constitution states as follows:

> **Qualifications of Electors**
>
> Every citizen 21 years of age, possessing the following qualifications, *shall be entitled to vote* at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State 90 days immediately preceding the election.
>
> 3. *He or she shall have resided in the election district where he or she shall offer to vote at least 60 days immediately preceding the election,*

EXHIBIT A

> except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within 60 days preceding the election.

PA. CONST. art. VII, §1 (emphasis added). Section 1 entitles the elector to "offer to vote" in the election district where "he or she shall have resided" 60 days before "the election." *Id*.

The Supreme Court has specifically construed the phrase "offer to vote." *Chase v. Miller*, 41 Pa. 403 (1862), involved a district attorney's race between Ezra B. Chase and Jerome G. Miller. Based on the ballots cast in person on Election Day, Chase led Miller 5811 to 5646. Thereafter, 420 votes were received from Pennsylvania soldiers fighting in the Civil War who had cast their ballots by mail under authority of the Military Absentee Act of 1839.[10] Chase challenged the military votes which, if counted, made Miller the next district attorney by a vote of 6066 to 5869. Chase asserted that the Military Absentee Act of 1839 violated the constitutional requirement that ballots be presented in person.

The Military Absentee Act of 1839 provided that on Election Day a Pennsylvania citizen "in any actual military service in any detachment of the militia or corps of volunteers under a requisition from the president of the United States" was authorized to vote "*at such place as may be appointed by the commanding officer*[.]" *Chase*, 41 Pa. at 416 (emphasis added) (summarizing the Military Absentee Act of 1839). The "great question" before the court was whether this statute could be "reconciled with the 1st section of article 3d of the amended

[10] Act of July 2, 1839, P.L. 770. It effectively reenacted an earlier statute, the Military Absentee Act of 1813, Act of March 29, 1813, 6 Smith's Laws.

constitution,"[11] the predecessor to the current Article VII, Section 1. *Chase*, 41 Pa. at 418. The Supreme Court ruled it could not, and held that the Military Absentee Act of 1839 was unconstitutional, thereby invalidating all 420 absentee military votes. *Chase*, 41 Pa. at 428-29.

The Supreme Court explained that the 1838 constitutional amendment sought to "identify the legal voter, before the election came on, and *to compel him to offer his vote in the appropriate* ward or township, and thereby to exclude disqualified pretenders and fraudulent voters of all sorts." *Chase*, 41 Pa. at 418 (emphasis added). Given that background, the Court construed the operative language of Article III, Section 1 as follows:

> 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 neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.

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[11] Article III, Section 1 stated as follows:

> In elections by the citizens, every white freeman of the age of twenty-one years, having resided in this State one year, and *in the election-district where he offers to vote* ten days immediately preceding such election, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector.

PA. CONST. art. III, §1 (1838) (emphasis added).

Chase, 41 Pa. at 419 (emphasis added).[12] In short, the 1838 constitutional amendment required the properly qualified elector to "present oneself . . . at the time and place appointed" to make "manual delivery of the ballot." *Id.* Following the Supreme Court's decision in *Chase*, the Pennsylvania Constitution was amended in 1864 to permit electors in military service to vote by absentee ballot. PA. CONST. art. III, §4 (1864).[13]

In re Contested Election of Fifth Ward of Lancaster City, 126 A. 199 (Pa. 1924) (*Lancaster City*), considered another Pennsylvania statute, the Act of May 22, 1923, P.L. 309 (1923 Absentee Voting Act), which expanded the opportunity for absentee voting from those in military service to include civilians. The 1923 Absentee Voting Act stated that a "qualified voter . . . who by reason of his duties, business, or occupation [may be] unavoidably absent from his lawfully designated election district, and outside of the county of which he is an elector, but within the confines of the United States" could request an absentee ballot and complete it in the presence of an election official before Election Day. Section 1 of the 1923 Absentee Voting Act. However, in 1923, the Pennsylvania Constitution limited absentee voting to those electors absent by reason of active military service. *See* PA. CONST. art. VIII, §6 (1874).[14]

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[12] Mail-in ballots present particular challenges with respect to "safeguards of honest suffrage." *Chase*, 41 Pa. at 419. *See Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (injunction granted under Voting Rights Act, *see now* 52 U.S.C. §§10301-10702, setting aside election of Pennsylvania State Senator for fraudulent use of absentee ballots).

[13] The text of Article III, Section 4 of the 1864 Constitution is set forth, *infra*, in part III.C of this opinion.

[14] The text of Article VIII, Section 6 of the 1874 Pennsylvania Constitution was identical to the text of Article III, Section 4 of the Constitution adopted in 1864 to permit those in active military service to vote by mail. The only change in 1874 was to renumber the provision from Section 4 to Section 6.

EXHIBIT A

In *Lancaster City*, eight votes separated the candidates for councilman at the conclusion of Election Day. After the absentee ballots were counted, the Republican candidate pulled ahead by nine votes. The Democratic candidate challenged the results of the election, arguing that the 1923 Absentee Voting Act was unconstitutional and that the absentee ballots should be excluded. The Supreme Court agreed, concluding that the election should be determined solely on the basis of ballots cast in person on Election Day, as required by Article VIII, Section 1 of the Constitution. PA. CONST. art. VIII, §1 (1901).[15]

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[15] Article VIII, Section 1 of the 1874 Constitution stated as follows:

> Every male citizen twenty-one years of age, possessing the following qualifications, *shall be entitled to vote* at all elections:
>
> *First.* - He shall have been a citizen of the United States at least one month.
>
> *Second.* - He shall have resided in the State one year, (or if, having previously been a qualified elector or native born citizen of the State, he shall have removed therefrom and returned, then six months), immediately preceding the election.
>
> *Third. - He shall have resided in the election district where he shall offer to vote* at least two months immediately preceding the election.
>
> *Fourth.* - If twenty-two years of age or upwards, he shall have paid within two years a State or county tax, which shall have been assessed at least two months and paid at least one month before the election.

PA. CONST. art. VIII, §1 (1874) (emphasis added). The 1901 amendment changed the first paragraph to read as follows:

> Every male citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections, *subject however to such laws requiring and regulating the registration of electors as the General Assembly may enact[.]*

PA. CONST. art. VIII, §1 (1901) (emphasis added); Joint Resolution No. 1, 1901, P.L. 881. Additionally, the 1901 amendment switched from the use of words to identify the separate paragraphs to the use of Arabic numerals. In 1933, Article VIII, Section 1 was amended to add the pronoun "she" where appropriate and to eliminate the requirement that the qualified elector be current on tax obligations. PA. CONST. art. VIII, §1 (1933); Joint Resolution No. 5, 1933, P.L.

In declaring the 1923 Absentee Voting Act unconstitutional, the Supreme Court held that the General Assembly could address voting procedures only in a manner consistent with the "wording of our Constitution," which at that time limited absentee voting to those engaged in military service. *Lancaster City*, 126 A. at 200. The Court held that "[t]he Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed." *Id.* at 201. The Court concluded as follows:

> However laudable the purpose of the [1923 Absentee Voting Act], it cannot be sustained. *If it is deemed necessary that such legislation be placed upon our statute books, then an amendment to the Constitution must be adopted permitting this to be done.*

Id. (emphasis added).

The Pennsylvania Supreme Court invalidated the Military Absentee Act of 1839 and the 1923 Absentee Voting Act because each enactment violated the requirement that a qualified elector must "offer to vote" in person at a polling place in his election district on Election Day. PA. CONST. art. III, §1 (1838), PA. CONST. art. VIII, §1 (1901). The Court established that legislation, no matter how laudable its purpose, that relaxes the in-person voting requirement must be preceded by an amendment to the Constitution "permitting this to be done." *Lancaster City*, 126 A. at 201. Based on this analysis and holding, the Supreme Court set aside the votes cast under the invalidated statutes, thereby changing the outcome of two elections.

B. Article VII, Section 4

The second relevant provision of Article VII is Section 4, and it states as follows:

1559. The 1959 amendment expanded paragraph 3 to read as it does today. PA. CONST. art. VIII, §1; Joint Resolution No. 3, 1959, P.L. 2160. The 1967 amendment renumbered the provision to its current Article VII, Section 1. PA. CONST. art. VII, §1; Joint Resolution No. 5, 1967, P.L. 1048.

Method of Elections; Secrecy in Voting

> All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.

PA. CONST. art. VII, §4. This provision was the result of an amendment proposed by Joint Resolution No. 2, 1901, P.L. 882. Although Article VII, Section 4 has been amended and renumbered over the years, the requirement that elections "shall be by ballot" has been in the Pennsylvania Constitution since 1776.

In the colonial period, elections were conducted by *viva voce* or by the showing of hands, as was the practice in most of Europe. *Burson v. Freeman*, 504 U.S. 191, 200 (1992) (plurality opinion). "That voting scheme was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some." *Id*. Because of the opportunities for bribery and intimidation in the *viva voce* system, the colonies began using written ballots. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 489 (2003) (FORTIER & ORNSTEIN). In Pennsylvania, the 1776 Constitution provided:

> All elections, whether by the people or in general assembly, *shall be by ballot*, free and voluntary: And any elector, who shall receive any gift or reward for his vote, in meat, drink, monies, or otherwise, shall forfeit his right to elect for that time, and suffer such other penalties as future laws shall direct. And any person who shall directly or indirectly give, promise, or bestow any such rewards to be elected, shall be thereby rendered incapable to serve for the ensuing year.

PA. CONST., §32 (1776) (emphasis added). Then, in 1790, the Pennsylvania Constitution was amended to provide that "[a]ll elections shall be by ballot, except

those by persons in their representative capacities, who shall vote *viva voce*." PA. CONST. art. III, §2 (1790).[16]

To vote in Pennsylvania, as in other states, electors wrote the name of their chosen candidates on a piece of paper and brought it to an official location. FORTIER & ORNSTEIN at 489. "These pre-made ballots often took the form of 'party tickets' – printed slates of candidate selections, often distinctive in appearance, that political parties distributed to their supporters and pressed upon others around the polls." *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1882 (2018); *see also Commonwealth v. Coryell*, 9 Pa. D. 632, 635 (1900) (political parties printed the ballots used by electors). The polling place contained a "voting window" through which the voter would hand his ballot to an election official in a separate room with the ballot box. *Minnesota Voters Alliance*, 138 S. Ct. at 1882. "As a result of this arrangement, 'the actual act of voting was usually performed in the open,' frequently within view of interested onlookers." *Id*. (quotation omitted). As voters went to the polls, "[c]rowds would gather to heckle and harass voters who appeared to be supporting the other side." *Id*. at 1882-83.

In 1874, the Pennsylvania Constitution was amended to bind election officials to a duty of non-disclosure of an elector's choice. The amendment provided as follows:

> *All elections by the citizens shall be by ballot.* Every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the elector who presents the ballot. Any elector may write his name upon his ticket or cause the same to be written thereon and attested by a citizen of the district. *The*

[16] In 1838, Pennsylvania amended its Constitution, but Article III, Section 2 remained unchanged. *See* PA. CONST. art. III, §2 (1838).

> *election officers shall be sworn or affirmed not to disclose how any elector shall have voted unless required to do so as witnesses in a judicial proceeding*.

PA. CONST. art. VIII, §4 (1874) (emphasis added). The election official's non-disclosure duty introduced an early form of election secrecy to the system. *De Walt v. Commissioners*, 1 Pa. D. 199, 201 (1892) (citations omitted).

The late nineteenth century saw further election reforms with the adoption of the so-called "Australian ballot," which consisted of a "standard ballot and private voting booth." FORTIER & ORNSTEIN at 486. The Australian ballot system provided "greater freedom and secrecy in voting by providing an official ballot, a marking in a secret compartment, and a deposit of the ballot in the ballot-box without exhibition." *Case of Loucks*, 3 Pa. D. 127, 132 (1893). The Australian ballot prevented "chicanery endemic to the party ballot system, including protecting the privacy of the ballot, and preventing political parties from distributing ballots that looked like the slate of another party but actually listed the candidates of the distributing party." *Working Families Party v. Commonwealth*, 209 A.3d 270, 293 n.11 (Pa. 2019) (Wecht, J., concurring, in part). Between 1888 and 1892, 38 states adopted the Australian ballot. FORTIER & ORNSTEIN at 486.

In 1891, the "so-called Australian ballot system was first introduced in Pennsylvania," with the enactment of the Ballot Reform Act.[17] *Super v. Strauss*, 17 Pa. D. 333, 336 (1908). Commonly referred to as "The Baker Ballot Law," *Case of Loucks*, 3 Pa. D. at 130, the 1891 statute required the exclusive use of "uniform official ballots" as well as the "legal nomination of the candidates" and "voting in a room where electioneering and solicitation of votes is forbidden." *De Walt v. Bartley*, 24 A. 185, 186-87 (Pa. 1892). The Baker Ballot Law specified that the voter

[17] Act of June 19, 1891, P.L. 349.

EXHIBIT A

must "retire to one of the voting shelves or compartments, and shall prepare his ballot by marking in the appropriate margin[.]" *Id*. at 188. The ballot used two methods for designating a choice: placing a cross on the ticket to the right of the candidate's name or placing a cross to the right of the party designation. The Baker Ballot Law "insure[d] a secret ballot, and therefore fulfill[ed], better than the system which it supplant[ed], the provisions of the constitution governing the subject of voting[.]" *De Walt*, 1 Pa. D. at 201. Before 1891, "no vote could be kept a secret[.]" *In re Twentieth Ward Election*, 3 Pa. D. 120, 121 (1894).

In 1901, the requirement that a ballot be produced by the government and cast in secret became embedded into the Pennsylvania Constitution with the adoption of Article VIII, Section 4. It stated:

> All elections by the citizens shall be by ballot or *by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.*

PA. CONST. art. VIII, §4 (1901) (emphasis added); Joint Resolution No. 2, 1901, P.L. 882. The amendment added the language italicized above and deleted the sentences in the 1874 version that had required election officials to number the ballots, obtain the electors' signatures on their ballots, and swear not to disclose how any elector voted. *Cf*. PA. CONST. art. VIII, §4 (1874). The 1901 amendment guaranteed the secrecy of the ballot, both in its casting and in counting. "[T]he cornerstone of honest elections is secrecy in voting. A citizen in secret is a free man; otherwise, he is subject to pressure and, perhaps, control." *In re Second Legislative District Election*, 4 Pa. D. & C. 2d 93, 95 (1956).

The New York Court of Appeals has construed the single phrase "by such other method as may be prescribed by law," which appeared in New York's

Constitution, as in Pennsylvania's 1901 Constitution.[18] The Court of Appeals held that the language "or by such other method as may be prescribed by law" was "not to create any greater safeguards for the secrecy of the ballot than had hitherto prevailed, but solely to enable the substitution of voting machines, if found practicable[.]" *Wintermute*, 86 N.E. at 819. Our Supreme Court later agreed that Section 4 was "likely added in view of the suggestion of the use of voting machines" but further noted that "the direction that privacy be maintained is now part of our fundamental law." *Lancaster City*, 126 A. at 201.[19]

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[18] The New York Constitution states, in relevant part, as follows:

> All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.

N.Y. CONST. art. II, §7. As the Court of Appeals explained, the phrase "or by such other method as may be prescribed by law, provided that secrecy in voting be preserved," was added by an 1895 amendment. *People ex rel. Deister v. Wintermute*, 86 N.E. 818, 819 (N.Y. 1909).

[19] The dissent notes that Article VII, Section 6 allows the General Assembly to "permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote . . . ," PA. CONST. art. VII, §6, suggesting that this is the provision that authorizes voting machines. We disagree.

The text, in full, reads as follows:

> **Election and Registration Laws**
>
> Section 6. *All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State*, except that laws regulating and requiring the registration of electors may be enacted to apply to cities only, provided that such laws be uniform for cities of the same class, *and except further, that the General Assembly shall, by general law, permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote, at all election or primaries*, in any county, city, borough, incorporated town or township of the Commonwealth, at the option of the electors of such county, city, borough, incorporated town or township, *without being obliged to require the use of such voting machines or mechanical devices in any other county, city, borough, incorporated town or township*, under such regulations with reference thereto as the General Assembly, may from time to time prescribe. The General Assembly may, from time to time, prescribe the number and

EXHIBIT A

Regarding voting methods, one Pennsylvania court has stated that "*[t]he only method of permitted voting, other than ballot, is by voting machine*." *In re General Election of November 4, 1975*, 71 Pa. D. & C. 2d 83, 91 (1975) (emphasis added) (electors not able to vote by sworn testimony where a voting machine failed to record their vote because to do so would abridge the constitutional requirement for a secret ballot). Treatise authority also explains that the phrase "such other method" was added to Section 4 of Article VII in order to authorize the use of "mechanical devices" in lieu of a paper ballot at the polling place. Robert E. Woodside, Pennsylvania Constitutional Law, at 465 (1985) (WOODSIDE).

C. Article VII, Section 14

The third relevant provision in Article VII of the Pennsylvania Constitution is Section 14, which states as follows:

> **Absentee Voting**
>
> (a) 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 municipality 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* or who will not attend a polling place because of the *observance of a*

> duties of election officers in any political subdivision of the Commonwealth in which voting machines or other mechanical devices authorized by this section may be used.

PA. CONST. art. VII, §6 (emphasis added). When this provision was adopted in 1928, voting machines were already in use. *See Lancaster City*, 121 A. at 201. Section 6 requires uniformity in election law, as stated in the first sentence. But it allows exceptions. The first exception authorizes the imposition of stricter voter registration requirements in "cities." The second exception, added in 1928, clarifies that uniformity does not require that voting machines be used in every polling place in the Commonwealth, if allowed in one county, city, borough, town or township.

> *religious holiday or who cannot vote because of election day duties*, in the case of a county employee, *may vote*, and for the return and canvass of their votes in the election district in which they respectively reside.
>
> (b) For purposes of this section, "municipality" means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.

PA. CONST. art. VII, §14 (emphasis added). Absentee voting has a long history.

It began with the Military Absentee Act of 1813, which authorized "the citizen soldier who should be in actual service within the state on the day of the general election, an opportunity to vote, if his engagements detained him at the prescribed distance from his domicil." *Chase*, 41 Pa. at 417 (summarizing the 1813 statute). When enacted, the 1790 Pennsylvania Constitution did not require an elector to vote at a certain place. *Id*. However, in 1838, the Pennsylvania Constitution was amended to impose a place requirement, *i.e.*, "in the election-district where [an elector] offers to vote[.]" PA. CONST. art. III, §1 (1838).[20]

Despite this 1838 amendment to the Constitution, the legislature enacted the Military Absentee Act of 1839 in "substantially" the same form as its 1813 predecessor. *Chase*, 41 Pa. at 417. Because the Military Absentee Act of 1839 did not comply with the requirement in the 1838 Constitution that an elector vote in his election district, the Supreme Court struck it down as unconstitutional.

In response to *Chase*, the electorate amended the Constitution in 1864 to provide for soldier voting. It stated:

> 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

[20] *See supra* note 11 for the text of Article III, Section 1 of the 1838 Pennsylvania Constitution.

> 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 places of election.*

PA. CONST. art. III, §4 (1864) (emphasis added). This provision was continued verbatim in the 1874 Constitution but was renumbered as Article VIII, Section 6. Pennsylvania and many other states recognized that absentee voting by the military conflicted with the "constitutional provisions for in person voting, and undertook to amend their state constitutions in order to pass appropriate legislation." FORTIER & ORNSTEIN at 498.

As noted, the 1923 Absentee Voting Act expanded absentee voting to those electors "unavoidably" absent from their designated election district by reason of "duties, business or occupation," which would include military service.[21] *Lancaster City*, 126 A. at 200. In striking down this law, the Supreme Court held that the 1874 Constitution limited the "privilege" of absentee voting to persons who "are in actual military service." *Id*. at 201. *See also* PA. CONST. art. VIII, §6 (1874).

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[21] The 1923 Absentee Voting Act stated, in relevant part, as follows:

> Be it enacted . . . That any *duly qualified voter of this Commonwealth, who by reason of his duties, business, or occupation is unavoidably absent from his lawfully designated election district* and outside of the county in which he is an elector, but within the confines of the United States, on the day of holding any general, municipal, or primary election, may vote by appearing before an officer, either within or without the Commonwealth authorized to administer oaths, and marking his ballot under the scrutiny of such official as herein prescribed. Such voter may vote only for such officers and upon such questions as he would be entitled to vote for or on had he presented himself in the district in which he has his legal residence, and in the matter hereinafter provided.

Section 1 of the Act of May 22, 1923, P.L. 309 (emphasis added). The statute further provided that after the voter cast his or her vote, and secured the ballot and envelopes as provided in the statute, the "voter shall send [the ballot] by registered mail to the prothonotary or county commissioners in sufficient time to reach its destination on or before the day such election is held." *See* Amended Petition, Ex. A.

EXHIBIT A

In 1949, Section 18 was added to Article VIII of the Pennsylvania Constitution to expand the opportunity for absentee voting to war veterans whose war injuries rendered them "unavoidably absent" from their residence. PA. CONST. art. VIII, §18.[22] Thereafter, in 1957, Section 19 was added to Article VIII to expand absentee voting to all qualified electors unable to vote in person by reason of illness or disability. Section 19 stated:

> *The Legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who may,* on the occurrence of any election, *be unavoidably 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. VIII, §19 (1957) (emphasis added); Joint Resolution No.1, 1957, P.L. 1019. For the first time, electors could vote by absentee ballot if "unable to attend at their proper polling place because of illness or physical disability," even though present in the county of their residence. *Id*.

In 1967, the Pennsylvania Constitution was amended in three ways relevant to absentee voting. *See* Joint Resolution No. 5, 1967, P.L. 1048. First, it

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[22] It stated:

> The General Assembly may, by general law, provide a manner in which, and the time and place at which, *qualified war veteran voters,* who may, on the occurrence of any election, *be unavoidably absent* from the State or county of their residence *because of their being bedridden or hospitalized due to illness or physical disability contracted or suffered in connection with, or as a direct result of, their military service*, may vote and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. art. VIII, §18 (1949) (emphasis added).

repealed Article III, Section 6 of the 1874 Constitution and Article VIII, Section 18, which authorized those in military service and those with war injuries to vote by absentee ballot. These provisions were rendered redundant by Section 19, which extended absentee voting to any citizen whose absence was required by "occupation" or by an "illness or physical disability." Second, the Joint Resolution renumbered Article VIII, Section 19 to the current Article VII, Section 14, and it was revised to change the operative verb from "may" to "shall" as follows:

> 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) (emphasis added). Third, the Joint Resolution renumbered the provision that a qualified elector must "offer to vote" in the election district where he resides, from Article VIII to Article VII, where it remains. PA. CONST. art. VII, §1.

In 1985, Article VII, Section 14 was amended to extend absentee voting to persons who could not vote in person due to a religious holiday or Election Day duties. As amended, Article VII, Section 14 stated as follows:

> 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 *or who will not attend a*

> *polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee*, 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 (1985) (emphasis added); Joint Resolution No. 3, 1984, P.L. 1307, and Joint Resolution No. 1, 1985, P.L. 555. Finally, in 1997, Article VII, Section 14 was amended to change "State or county" to "municipality" and to add subsection (b), which defines "municipality." PA. CONST. art. VII, §14; Joint Resolution No. 2, 1996, P.L. 1546, and Joint Resolution No. 3, 1997, P.L. 636.

Beginning in 1864, the Pennsylvania Constitution has provided an exception to the requirement that electors "attend at their proper polling places" on Election Day to exercise the franchise. The current version states that the legislature must provide a way for "qualified electors who may, *on the occurrence of any election,*" be absent from their residence or from their polling place to vote if their absence is for one of the enumerated reasons, *i.e.*, their duties, occupation or business; an illness or physical disability; the observance of a religious holiday; or Election Day duties. PA. CONST. art. VII, §14(a).

D. Analysis

Since 1838, the Pennsylvania Constitution has required a qualified elector to appear at a polling place in the election district where he resides and on Election Day. This requirement was adopted "thereby to exclude disqualified pretenders and fraudulent voters of all sorts." *Chase*, 41 Pa. at 418. In 1864, an exception to the place requirement was introduced to the Constitution with the introduction of "absentee voting." Its very name, "absentee," relates back to the Section 1 requirement that electors vote in person at a polling place.

Our Supreme Court has specifically held that the phrase "offer to vote" requires the physical presence of the elector, whose "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 domicile." *Chase*, 41 Pa. at 419. There is no air in this construction of "offer to vote." There must be a constitutionally provided exception before the "offer to vote" requirement can be waived. Our Supreme Court has further directed that before legislation "be placed on our statute books" to allow qualified electors absent from their polling place on Election Day to vote by mail, "an amendment to the Constitution must be adopted permitting this to be done." *Lancaster City*, 126 A. at 201. This is our "fundamental law." *Id*.

In dismissing this construction of Article VII of our Constitution, the Acting Secretary places all emphasis on Article VII, Section 4, which states that elections shall be "by ballot or by such other method as may be prescribed by law." PA. CONST. art. VII, §4. The General Assembly, she argues, has nearly unbounded discretion to enact legislation except where specifically prohibited. Because there is no express prohibition in our Constitution against legislation establishing a new system of mail-in voting, it must be allowed. This logic was rejected in *Chase*, 41 Pa. at 409. The Acting Secretary does not grapple with the holdings in *Chase* and *Lancaster City*, which she considers hoary jurisprudence and not in line with the "modern" way constitutions are construed.[23] Acting Secretary Brief at 44. She is undeterred by the inconvenient truth that the provision authorizing "such other method as may be prescribed by law" was part of the Pennsylvania Constitution

[23] The Democratic Intervenors suggest that *Chase* and *Lancaster City* be overruled. Democratic Intervenors' Brief at 26. This is an argument that can be raised only to the Pennsylvania Supreme Court.

when *Lancaster City* was decided. In fact, the Supreme Court quoted the entire text of what is now Article VII, Section 4 in its opinion and explained that "this provision as to secrecy was likely added in view of the suggestion of the use of voting machines, yet the direction that privacy be maintained is now part of our fundamental law." *Lancaster City*, 126 A. at 201. The Acting Secretary does not believe there is a "place requirement" in Article VII, Section 1 and, thus, she does not consider Article VII, Section 14 to be an exception to the in-person voting requirement. For the reasons that follow, we reject the Acting Secretary's construction of Article VII, Sections 4 and 14.

First, the General Assembly must enact legislation within the bounds of the Pennsylvania Constitution.[24] The Constitution establishes the "fundamental law" against which the actions of all three branches of the Commonwealth government, including the work of the General Assembly, will be measured. *Lancaster City*, 126 A. at 201. The Constitution's fundamental law enables the General Assembly to legislate, and it restricts the exercise of the legislative prerogative in numerous ways, both substantively and procedurally. *See, e.g.*, PA. CONST. art. III, §§1 ("[N]o bill shall be so altered or amended, on its passage through

[24] The Acting Secretary notes that the Pennsylvania Supreme Court has stated that "[w]hat the people have not said in the organic law their representatives shall not do, they may do. . . . The Constitution allows to the Legislature every power which it does not positively prohibit." *William Penn School District v. Pennsylvania Department of Education*, 170 A.3d 414, 440 n.38 (Pa. 2017) (citations omitted). Congress is bound by the list of enumerated powers set forth in the United States Constitution; the General Assembly is not so bound. Nevertheless, this footnote goes on to state that the General Assembly must "stay[] within constitutional bounds" when it legislates. *Id*. "Constitutional bounds" occur in different ways. For example, Article VII, Section 1 sets a voting age of 21 years, but this age has been preempted by federal law. The bounds may also be found in the "fundamental law" of the Pennsylvania Constitution. The question here is whether the legislature's enactment of no-excuse mail-in voting has stayed within the bounds of Article VII of the Pennsylvania Constitution.

either House, as to change its original purpose."), 3 ("No bill shall be passed containing more than one subject[.]"), 4 ("Every bill shall be considered on three different days in each House.").

Second, there is nothing fusty about the holdings in *Chase* and *Lancaster City*. They are clear, direct, leave no room for "modern" adjustment and are binding. The Democratic Intervenors argue that because the Supreme Court did not provide a sufficiently penetrating analysis of Article VII, Section 4, *Lancaster City* has no precedential effect. We reject this legerdemain. The Supreme Court quoted the text of Section 4 in full and then stated that its purpose was to allow voting machines and to maintain secrecy in voting as "part of our fundamental law." *Lancaster City*, 126 A. at 201. More to the point, the Supreme Court quoted and addressed the same three provisions of the Constitution we review here, and concluded, decisively, that they prohibited the enactment of legislation to permit qualified electors absent from their polling place on Election Day to vote, except for reasons enumerated in the Pennsylvania Constitution. *Id.*

Lancaster City is binding precedent that has informed election law in Pennsylvania for nearly 100 years. It has provided the impetus for the adoption of multiple amendments to the Pennsylvania Constitution that were each considered the necessary first step to any expansion of absentee voting. *See, e.g.*, Joint Resolution No. 3, 1997, P.L. 636. Moreover, the rulings in *Chase* and *Lancaster City* have been followed over the years in numerous election cases. For example, in *In re Franchise of Hospitalized Veterans*, 77 Pa. D. & C. 237, 240 (1952), the court quoted *Lancaster City* for the proposition that "article VIII of the Constitution of 1874, with its amendments, sets up the requirements of a citizen to obtain the right to vote," which include express limits on absentee voting. Similarly, in *In re*

Election Instructions, 2 Pa. D. 299, 300 (1888), the court stated that "the offer to vote is an act wholly distinct from a qualification. Judge Woodward says: '*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 to receive it.' *See Chase v. Miller*, 41 Pa. 419." (Emphasis in original.) In sum, the viability of *Chase* and *Lancaster City* has never flagged.

Third, Article VII, Section 4 cannot be read, as suggested by the Acting Secretary, to authorize a system of no-excuse mail-in voting to be conducted from any location. To begin, "such other method" is limited to one that is "prescribed by law." PA. CONST. art. VII, §4. This prescription includes the "fundamental law" that voting must be in person except where there is a specific constitutional exception. PA. CONST. art. VII, §§1, 14. We reject the suggestion that "the law" in Section 4 refers only to the legislature's work product and not to the Pennsylvania Constitution. Further, the Supreme Court could have, but did not, state that "such other method" included voting by mail, a system in existence and used for military absentee voting at the time *Lancaster City* was decided.[25] Instead, the Supreme

[25] The first Pennsylvania statute on military voting provided that a soldier "who may attend, vote, or offer to vote" in the field was subject to the provisions of the "election laws . . . , so far as practicable." Section 27 of the Act of August 25, 1864, P.L. 990 (Soldiers' Voting Act of 1864). After voting in a polling place in the field, the soldier deposited his ballot into a sealed envelope with a statement attested by a "commissioned officer" that the soldier will "not offer to vote at any poll, which may be opened on said election day," and is not a deserter and that provided the location where "he is now stationed." *Id.* at Section 33. The ballot was then mailed to an identified elector, who delivered the soldier's ballot envelope to an election officer in the soldier's "proper district on the day of the election." *Id.* at Section 34.

The Soldiers' Voting Act of 1864 used the terms "attend" and "offer to vote" to describe in-person voting at the military polling place. The 1864 act sought to replicate in-person voting so far as practicable, recognizing that in-person voting at the elector's polling place is the polestar.

Court stated that "such other method" authorized the use of mechanical devices at the polling place. *Lancaster City*, 126 A. at 201.

The better reading of Section 4 is that "such other method" refers to an alternative to a paper ballot for use at the polling place. This is consistent with the ruling in *Wintermute*, 86 N.E. at 819, that construed the addition of "such other method" to the New York Constitution as "solely to enable the substitution of voting machines, if found practicable[.]" Notably, the New York Court of Appeals' holding is contemporaneous with Pennsylvania's 1901 addition of this phrase to the Pennsylvania Constitution.[26] Thereafter, our Supreme Court gave Section 4 this same construction in *Lancaster City*, 126 A. at 201. Other courts have consistently observed that "[t]he only method of permitted voting, other than ballot, is by voting machine." *In re General Election of November 4, 1975*, 71 Pa. D. & C. 2d at 91.

Finally, in his treatise, Judge Woodside has explained that Article VII, Section 4 was intended to allow "the use of voting machines and other mechanical devices." WOODSIDE at 465. He further opined on the meaning of Article VII, Section 4 as follows:

> Although ballots were used exclusively for elections in the *early years* of this century and are still used in a few rural areas, voting machines gradually became the customary method of casting and counting votes. *More modern methods are presently being tested and suggested.* The laws on the methods to be used are likely to be changed from time to time by the General Assembly as *science improves ways which preserve the secrecy but are more*

[26] New York's legislature did not consider "such other method" to authorize its enactment of a no-excuse mail-in voting system. In November of 2021, the citizens of New York rejected a proposal to amend the New York Constitution to authorize "No-Excuse Absentee Ballot Voting." *See* 2021 New York Statewide Ballot Proposal No. 4, *available at*: https:///www.elections.ny.gov/2021Ballotproposals.html (last visited January 27, 2022) (not passed) (proposing an amendment to section 2 of article II of the constitution in relation to authorizing ballot by mail by removing cause for absentee ballot voting).

> *efficient for voting and counting*. The *secrecy* in voting undoubtedly will be protected by the courts just as they have carefully guarded it in the past.

WOODSIDE at 470 (emphasis added). The phrase "such other method" of voting is not limited to mechanical devices known in 1901; it is broad enough in scope to allow devices yet to be invented that "preserve secrecy but are more efficient." *Id*. However, an "other method" authorized in Article VII, Section 4 refers to a type of voting that takes place at the polling place, so long as it preserves secrecy.[27]

To read Section 4 as an authorization for no-excuse mail-in voting is wrong for three reasons. First, no-excuse mail-in voting uses a paper ballot and not some "other method." Second, this reading unhooks Section 4 from the remainder of Article VII as well as its historical underpinnings. It ignores the in-person place requirement that was made part of our fundamental law in 1838. PA. CONST. art. VII, §1. Third, it renders Article VII, Section 14 surplusage. The Acting Secretary's interpretation of "such other method" means that the legislature always had the authority to extend absentee voting to every elector, in any circumstance, and *Lancaster City* was dead wrong in holding that before an expansion to absentee voting could be placed on the "statute books," there must be a constitutional amendment to authorize that expansion.

Finally, we reject the Acting Secretary's premise that the 1968 Constitution ushered in a new age for the conduct of elections in Pennsylvania. As Judge Woodside has observed, what we call the "1968 Constitution" resulted from a process of incorporation of, and amendment to, our first Constitution of 1776.

[27] Voters may tell the world how they voted. However, when they cast their vote they must "retire to one of the voting shelves or compartments" to prepare their ballot. *De Walt*, 24 A. at 188. Assistance is prohibited.

Conventions produced what have been designated as the Constitutions of 1790, 1838, 1874, and 1968, but these yearly "designations are for convenience only as *the* Constitution of Pennsylvania has been amended, *not replaced and not readopted*, by the proposals of the last four conventions." WOODSIDE at 7 (emphasis added). Simply, where language has been retained, this has been done advisedly in order to retain the original meaning.

"Offer to vote" has been part of the Pennsylvania Constitution since 1838 and has been consistently understood, since at least 1862, to require the elector to appear in person, at a "proper polling place" and on Election Day to cast his vote. The ability to vote at another time and place, *i.e.*, absentee voting, requires specific constitutional authorization. Accordingly, the absentee voting authorization has been extended in small steps from those in active military service to those war veterans whose injuries require residency outside their election district and, then, to civilians who may still reside in their election district but are unable to "attend" to the polls on Election Day because of incapacity, illness or disability. The most recent amendment, in 1997, added observance of a religious holiday or Election Day duties. Each painstaking amendment to the absentee voting requirement in Section 14 was unnecessary, according to the Acting Secretary, after 1901 when Section 4 was amended.

The 1968 changes to Article VII were minor. They did not eliminate the constitutional requirement of in-person voting or the need for a constitutional provision to authorize an exception to in-person voting. Judge Woodside, a delegate to the constitutional convention that produced the 1968 Constitution, explains Article VII, Section 14 as follows:

> This provision requires that a voter by absentee ballot be a "qualified elector" and (a) absent from the county of residence

> because his duties, occupation or business required him to be absent; [or] (b) unable to attend the polling place because of illness or physical disability. The statutory law provides in detail the process of obtaining the counting of absentee ballots.
>
> An amendment to this section will be submitted to the electorate in November, 1985. It would add subsequently to "physical disability" the following: or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee.

WOODSIDE at 473-74. Stated otherwise, Section 14 established the rules of absentee voting as both a floor and a ceiling. Were it exclusively a floor, then the 1985 pending constitutional amendment of which Woodside writes was unnecessary.

It is striking how many times Article VII, Section 14, and its antecedents, refer to "proper polling places." PA. CONST. art. VII, §14. The 1864 Constitution used the phrase that soldiers voting *in absentia* would treat their ballots "as if they were present at their usual places of election." PA. CONST. art. III, §4 (1864). Also appearing in the absentee voting provision is the phrase "unavoidably absent from the State or county of their residence." PA. CONST. art. VIII, §19 (1957). Section 14 can only be understood as an exception to the rule established in Article VII, Section 1 that a qualified elector must present herself at her proper polling place to vote on Election Day, unless she must "be absent" on Election Day for the reasons specified in Article VII, Section 14(a). PA. CONST. art. VII, §14(a).

The 1968 change from "may" to "shall" in Article VII, Section 14 does not affect this analysis, as suggested by the Acting Secretary. "May" is generally understood to be directory, and "shall" is generally understood to be mandatory. *In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004) ("The word 'shall' carries an imperative or mandatory

meaning."). However, it has been observed that "there are provisions in nearly every constitution which from the nature of things must be construed to be directory, for example, sections commanding the legislature to pass laws of a particular character, as to redistrict the state into senatorial or representative districts at stated periods." Thomas Raeburn White, Commentaries on the Constitution of Pennsylvania, at 24-25 (1907) (WHITE). Here, the legislature has fulfilled its duty; it has provided a "manner" by which qualified electors unable to attend at their proper polling places for a constitutionally accepted reason "may vote." PA. CONST. art. VII, §14(a)

Section 4 and Section 14 address different concerns. Section 4 incorporated the terms of the Baker Ballot Law into our fundamental law to ensure elections were conducted free of coercion and fraud. Section 14 addresses the concern that some electors physically unable to "attend at their proper polling places" should not be denied the franchise. Section 14 resolves the tension between the constitutional requirement of in-person voting and the need to waive that requirement in appropriate circumstances. FORTIER & ORNSTEIN at 498. Section 4 did not supplant the need for the exceptions in Section 14, as the Acting Secretary suggests.

Chase and *Lancaster City* have not lost their precedential weight over the course of time. They have the "rigor, clarity and consistency" that one expects for the application of *stare decisis*. *William Penn School District*, 170 A.3d at 457. We reject the strained argument of the Acting Secretary and the Democratic Intervenors that in *Lancaster City* the Supreme Court did not give close enough consideration to Article VII, Section 4. It did consider and construe its meaning. Rather, it is the Acting Secretary that gives inadequate attention to our fundamental law that the legislature may not excuse qualified electors from exercising the

franchise at their "proper polling places" unless there is first "an amendment to the Constitution … permitting this to be done." *Lancaster City*, 126 A. at 201.

The 1901 amendment authorizing "such other method" of voting at the polling place did not repeal the in-person voting requirement in Section 1, which created the "entitlement" to vote as well as the prerequisites therefor.[28] Our Constitution allows the requirement of in-person voting to be waived where the elector's absence is for reasons of occupation, physical incapacity, religious observance, or Election Day duties. PA. CONST. art. VII, §14(a). Because that list of reasons does not include no-excuse absentee voting, it is excluded. *Page v. Allen*, 58 Pa. 338, 347 (1868); *Lancaster City*, 126 A. at 201. An amendment to our Constitution that ends the requirement of in-person voting is the necessary prerequisite to the legislature's establishment of a no-excuse mail-in voting system.

IV. Acting Secretary's Procedural Objections to McLinko's Petition for Review

The Acting Secretary argues that the Court need not - and cannot - reach the question of whether Act 77 can be reconciled with Article VII of the Pennsylvania Constitution. She asserts that McLinko's petition for review was untimely filed and, further, McLinko lacks standing to initiate this action, even if his petition had been timely filed. We address each procedural objection.

A. Standing

In her challenge to McLinko's standing to challenge the constitutionality of Act 77, the Acting Secretary asserts that McLinko's duties under the Election Code do not give him a substantial or particularized interest in

[28] The Acting Secretary notes that Section 1 merely qualifies voters as stated in the title. However, "[n]o attention will be paid to the captions of the articles or section. They are inserted only for convenience." WHITE at 13 (citing *Houseman v. Commonwealth ex rel. Tener*, 100 Pa. 222 (1882)). In any case, the Supreme Court has explained that Section 1 both qualifies the elector and "compel[s] him to offer his vote in the appropriate ward or township." *Chase*, 41 Pa. at 418.

the statute's constitutionality. McLinko responds that as a member of the Bradford County Board of Elections he holds an interest that is separate from the interest that every Pennsylvania citizen has in statutes that conform to the Pennsylvania Constitution. Alternatively, he meets the test for taxpayer standing.

A party seeking judicial resolution of a controversy must establish a "substantial, direct, and immediate" interest in the outcome of the litigation. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). An interest is "substantial" if the party's interest "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. Cmwlth. 2019) (quoting *Phantom Fireworks Showrooms, LLC v. Wolf,* 198 A.3d 1205, 1215 (Pa. Cmwlth. 2018)). A "direct" interest requires a causal connection between the matter complained of and the party's interest. *Id*. Finally, an "immediate" interest requires a causal connection that is neither remote nor speculative. *Id*. The key is that the party claiming standing must be "negatively impacted in some real and direct fashion." *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005).

McLinko argues that as an elected member of the Bradford County Board of Elections he meets these standards. In that role, he must make a host of judicial, quasi-judicial, and executive judgments, which include "issuing rules and regulations under the [E]lection [C]ode[;] investigating claims of fraud, irregularities, and violations of the [E]lection [C]ode[;] issuing subpoenas[;] determining the sufficiency of nomination petitions[;] ordering recounts or recanvassing of votes[;] and certifying election results." McLinko Reply Brief at 3 (citing Sections 302, 304, 1401, 1404 and 1408 of the Election Code, 25 P.S. §§2642, 2644, 3151, 3154, 3158). McLinko argues that the standing of a public

official to challenge the constitutionality of a statute that the public official must administer and implement was established in *Robinson Township v. Commonwealth*, 52 A.3d 463 (Pa. Cmwlth. 2012), *aff'd in part, rev'd in part sub nom. Robinson Township, Washington County v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

The Acting Secretary responds that McLinko's duty to carry out the Election Code does not encompass challenging the Election Code's constitutionality. Further, because a board of elections is a multi-member body, it can act only through a majority of its members. As such, McLinko does not have standing in his own right.

As McLinko correctly observes, the Election Code requires a board of elections to promulgate regulations, issue subpoenas, conduct hearings on the conduct of primaries and elections and certify election results. Section 304 of the Election Code, 25 P.S. §2644. In *Robinson Township*, 52 A.3d at 476, this Court considered whether one member of a borough council and one member of a board of supervisors had standing to challenge the constitutionality of a statute that restricted their official actions.[29] This Court held that because the petitioners were "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 had an interest sufficient to confer standing. *Id.* Likewise, McLinko is required to count ballots and certify election results that he believes are

[29] Brian Coppola, a Supervisor of Robinson Township, and David M. Ball, a Councilman of Peters Township, brought suit against the Commonwealth individually and in their official capacities as elected officials in their respective municipalities. They contended that they would be required to vote on the passage of zoning amendments to comply with Act 13 of 2012, 58 Pa. C.S. §§2301-3504, which amended the Oil and Gas Act to require municipal zoning ordinances to be amended to include oil and gas operations in all zoning districts.

unconstitutional. As in *Robinson Township*, this dilemma confers standing on McLinko as an elected official, and he does not need the participation of his entire board to demonstrate his standing. *Id*. at 475 (standing granted to individual supervisor of Robinson Township and individual councilman of Peters Township). *See also Fumo v. City of Philadelphia*, 972 A.2d 487 (Pa. 2009) (single member of General Assembly, a body that can only act through majority vote, had standing to challenge ordinance as unconstitutional).

Nevertheless, the Acting Secretary directs the Court to *In re Administrative Order No. 1-MD-2003 (Appeal of Honorable James P. Troutman)*, 936 A.2d 1 (Pa. 2007) (*Troutman*). In that case, a clerk of courts challenged the legality of an administrative order issued by the court's president judge directing the clerk to seal certain records in his custody. The Supreme Court acknowledged that the clerk of courts had a constitutional duty to make court records available to the public but observed that these duties were purely ministerial. The clerk of courts' "interest" in the merits of an administrative order of the court was the same as that of any other citizen. *Troutman*, 936 A.2d at 9. Accordingly, the Supreme Court held that the clerk of courts lacked standing.

Troutman is distinguishable. First, as the concurring opinion of Justice Saylor pointed out, there is a "tenuous relationship between [the clerk's] legal obligations and the statute at issue [(Criminal History Record Information Act, 18 Pa. C.S. §§9101-9183)]." *Troutman*, 936 A.2d at 11 (Saylor, J., concurring). Here, by contrast, the relationship between McLinko's legal obligations and the Election Code is direct, not tenuous. Second, *Troutman* concerned an administrative order of the court and not a statutory duty, as here and in *Robinson Township*. Third, our Supreme Court has held that the Election Code makes a county board of elections

"more than a mere ministerial body. It clothes [the board] with quasi-judicial functions," such as the power to "issue subpoenas, summon witnesses, compel production of books, papers, records and other evidence, and fix the time and place for hearing any matters relating to the administration and conduct of primaries and elections." *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952) (citation omitted).

Given McLinko's responsibilities under the Election Code, it is difficult to posit a petitioner with a more substantial or direct interest in the constitutionality of Act 77's amendments to the Election Code.

Even so, this case presents the special circumstances where taxpayer standing may be invoked to challenge the constitutionality of governmental action. The Pennsylvania Supreme Court has established that a grant of taxpayer standing is appropriate where (1) governmental action would otherwise go unchallenged; (2) those directly affected are beneficially affected; (3) judicial relief is appropriate; (4) redress through other channels is not appropriate; and (5) no one else is better positioned to assert the claim. *Application of Biester*, 409 A.2d 848 (Pa. 1979). McLinko meets all five requirements. Because the Acting Secretary has not challenged the constitutionality of Act 77, it may go unchallenged if McLinko is denied standing.

In *Sprague v. Casey*, 550 A.2d 184 (Pa. 1998), a taxpayer challenged the special election to fill one seat on the Supreme Court and one seat on the Superior Court scheduled for the General Election of November 1998.[30] The respondents argued that the taxpayer lacked standing because the governmental action he

[30] Judges are to be elected at municipal elections held in odd-numbered years. Article V, Section 13(b) and Article VII, Section 3 of the Pennsylvania Constitution, PA. CONST. art. V, §13(b) and art. VII, §3. Judicial vacancies are to be filled by election only when they occur more than 10 months before the municipal election. Article V, Section 13(b) of the Pennsylvania Constitution, PA. CONST. art. V, §13(b).

challenged did not substantially or directly impact him. The Supreme Court determined that taxpayer standing under *Biester* was warranted because the "election would otherwise go unchallenged because respondents are directly and beneficially affected" but chose not to initiate legal action. *Id.* at 187. The Court explained that "[j]udicial relief is appropriate because the determination of the constitutionality of the election is a function of the courts . . . and redress through other channels is unavailable." *Id*. (citation omitted).

We reject the challenge of the Acting Secretary and the Democratic Intervenors to McLinko's standing to initiate an action to challenge the constitutionality of Act 77's system of no-excuse mail-in voting.

B. Timeliness of McLinko's Petition for Review

The Acting Secretary next contends that McLinko's petition for review was untimely filed and, thus, should be dismissed. She argues, first, that his petition is barred by the doctrine of laches and, second, by the so-called statute of limitations in Act 77 requiring constitutional challenges to the act to be filed within 180 days of the statute's effective date, or April 28, 2020. McLinko's petition was filed in July of 2021.

1. Doctrine of Laches

Laches is an equitable defense[31] that can result in the dismissal of an action where the plaintiff has been dilatory in seeking relief and the delay has prejudiced the defendant. *Commonwealth ex rel. Baldwin v. Richard*, 751 A.2d 647, 651 (Pa. 2000); *Smires v. O'Shell*, 126 A.3d 383, 393 (Pa. Cmwlth. 2015). A defendant can establish prejudice from the passage of time by offering evidence that

[31] "Because laches is an affirmative defense, the burden of proof is on the defendant or respondent to demonstrate unreasonable delay and prejudice." *Pennsylvania Federation of Dog Clubs v. Commonwealth*, 105 A.3d 51, 58 (Pa. Cmwlth. 2014).

he changed his position with the expectation that the plaintiff has waived his claim. *Baldwin*, 751 A.2d at 651. The question of laches is factual and is determined by examining the circumstances of each case. *Sprague*, 550 A.2d at 188.

The Acting Secretary relies upon *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020).[32] *Kelly* was filed several weeks after the 2020 General Election and challenged the constitutionality of Act 77. There, the petitioners "sought to invalidate the ballots of the millions of Pennsylvania voters who utilized the mail-in voting procedures established by Act 77," believing those votes were illegal. *Kelly*, 240 A.3d at 1256. In addition to seeking the disenfranchisement of "6.9 million Pennsylvanians who voted in the General Election," the petitioners sought to "direct the General Assembly to choose Pennsylvania's electors." *Id*. (footnote omitted).

The Supreme Court dismissed the petition on the basis of laches. It held that the petitioners were dilatory because they waited until days before the county boards of elections were required to certify the election results to the Secretary of the Commonwealth to file their action. Moreover, they did not file their action until the election results were "seemingly apparent." *Id*. at 1256-57. The Supreme Court held that the "disenfranchisement of millions of Pennsylvania voters" established "substantial prejudice." *Id*. at 1257. It further held that to disenfranchise citizens whose only error was relying on the Commonwealth's instructions was fundamentally unfair, and the request to void an election was

[32] *Kelly* is a *per curiam* order. In *Cagey v. Commonwealth*, 179 A.3d 458, 467 (Pa. 2018) (citation omitted), the Supreme Court explained 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 Acting Secretary concedes that *Kelly* is "technically not binding precedent" but nevertheless argues that it is "on all fours with this case" because it involved an identical constitutional claim and was decided by the very justices who currently sit on the Supreme Court. Acting Secretary Brief at 23 n.10. We disagree that *Kelly* is "on all fours."

declared "a drastic if not staggering remedy" that was quickly dismissed. *Id*. at 1259 (Wecht, J., concurring) (citations omitted).

McLinko filed his petition in July of 2021, between elections, and sought expedited relief "in sufficient advance" of the November 2021 General Election so that electors would not have their votes disqualified. Application for Expedited Briefing and Summary Relief, ¶6.[33] There is no risk of disenfranchisement of one vote, let alone millions, as was the case in *Kelly*. The critical difference between *Kelly* and this case is that McLinko is seeking prospective relief, *i.e.*, a determination as to the constitutionality of Act 77 for future elections.

Nevertheless, the Acting Secretary and Democratic Intervenors assert that the doctrine of laches should apply because McLinko did not file his action until two years after the enactment of Act 77 and three subsequent elections. As a member of a board of elections, McLinko cannot claim a lack of knowledge as justification for not bringing his claims sooner. Invalidating Act 77 after two election cycles would cause "profound prejudice" because of the funding and effort dedicated to the implementation of mail-in voting. Acting Secretary's Brief at 24. More than 1.38 million Pennsylvania electors have requested to be placed on a permanent mail-in ballot list, and the elimination of this list would result in confusion and impose a burden upon state and local governments.

The government's investment of resources to implement a statute is irrelevant to the analysis of the statute's constitutionality. In *Commonwealth ex rel.*

[33] In his application for summary relief, McLinko sought a "speedy declaration" from this Court to allow any person that planned on voting by mail to arrange to vote in person on November 2, 2021, or by absentee ballot if qualified as an absentee voter under the Pennsylvania Constitution. Application for Expedited Briefing and Summary Relief, ¶7. This Court concluded that prospective relief in advance of the November 2021 election was impossible because the election was underway by the time argument was held on the summary relief applications.

Fell v. Gilligan, 46 A. 124, 125 (Pa. 1900), the Supreme Court observed that expenditures of "millions of dollars of school funds" for 25 years under the provisions of a statute were not reasons "for refusing to declare [the statute] void if in contravention of the constitution." Our Supreme Court has further explained that "laches and prejudice can never be permitted to amend the Constitution." *Sprague*, 550 A.2d at 188. In *Wilson v. School District of Philadelphia*, 195 A. 90, 99 (Pa. 1937), our Supreme Court explained, with emphasis added:

> 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.

The question of Act 77's constitutionality is a question that goes to the "very roots of our representative form of government." *Id.* Constitutional norms outweigh the cost of implementing unconstitutional statutes.

This is not the first challenge to the constitutionality of a statute to be filed years after its enactment. *See, e.g.*, *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (constitutional challenge to state's congressional redistricting legislation brought six years and multiple elections after its 2011 enactment); *Peake v. Commonwealth*, 132 A.3d 506, 521 (Pa. Cmwlth. 2015) (challenge filed in 2015 to constitutionality of 1996 amendment to the Older

Adults Protective Services Act[34] imposing a lifetime ban on persons with a single conviction from employment in the care of older adults).

For these reasons, we hold that the doctrine of laches does not bar McLinko's challenge to the constitutionality of Act 77.

2. Section 13 of Act 77 Time Bar

Alternatively, the Acting Secretary argues that McLinko's petition must be dismissed because the legislature has required that challenges to the mail-in voting provisions of Act 77 be brought within 180 days of its enactment. *See* Section 13 of Act 77. In support, she offers precedent that she claims authorizes a legislature to set a time bar to the challenge of a statute's constitutionality. *See, e.g.*, *Turner v. People of State of New York*, 168 U.S. 90 (1897) (New York statute with six-month statute of limitations to challenge tax sale of property for nonpayment of taxes held constitutional); *Block v. North Dakota*, *ex rel. Board of University and School Lands*, 461 U.S. 273 (1983) (federal statute with 12-year statute of limitations to file land title action land against United States government held not to violate Tenth Amendment, U.S. CONST., amend. X); *Dugdale v. United States Customs and Border Protection*, 88 F. Supp. 3d 1 (D.D.C. 2015) (federal statute with 60-day statute of limitations to challenge removal order held not to violate due process or the Suspension Clause of Article I of the United States Constitution, U.S. CONST. art. I); *Greene v. Rhode Island*, 398 F.3d 45 (1st Cir. 2005) (federal statute with 180-day statute of limitations for Native Americans to assert land claim held not to violate due process); *Native American Mohegans v. United States*, 184 F. Supp. 2d 198 (D. Conn. 2002) (federal statute providing 180-day statute of limitations for Native Americans to assert land claim held not to violate due process or separation

[34] Act of November 6, 1987, P.L. 381, *as amended*, 35 P.S. §§10225.101-10225.5102.

of powers); *Cacioppo v. Eagle County School District Re-50J*, 92 P.3d 453 (Colo. 2004) (Colorado statute providing a five-day statute of limitations to challenge ballot titles held not to violate Colorado Constitution).

This precedent is irrelevant. Not a single case cited by the Acting Secretary stands for the proposition that a legislature can prevent judicial review of a statute, whose constitutionality is challenged, with a statute of limitations of any duration. This is because, simply, an unconstitutional statute is void *ab initio*.

A statute of limitations is procedural and extinguishes the remedy rather than the cause of action.[35] McLinko seeks clarity on whether Act 77 comports with the Pennsylvania Constitution, and the General Assembly did not impose a time bar for seeking this clarity.

To begin, Section 13 of Act 77 does not establish a statute of limitations for instituting a constitutional challenge to Act 77. It states:

> (2) *The 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)* [including Article XIII-D of the Election Code that provides for mail-in voting]. The Supreme Court may take action it deems appropriate, consistent with the Supreme Court retaining jurisdiction over the matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief.

[35] A statute of limitations is an affirmative defense that is properly raised in new matter, rather than in preliminary objections, and it cannot be raised in a demurrer, unless the particular statute of limitations is nonwaivable. PA.R.CIV.P. 1030(a); *Devine v. Hutt*, 863 A.2d 1160, 1167 (Pa. Super. 2004); *City of Warren v. Workers' Compensation Appeal Board (Haines)*, 156 A.3d 371, 377 (Pa. 2017).

> (3) An action under paragraph (2) must be commenced within 180 days of the effective date of this section.

Section 13 of Act 77 (emphasis added). This provision addresses subject matter jurisdiction and does not state a statute of limitations.

Act 77 gave the Pennsylvania Supreme Court exclusive jurisdiction to hear challenges to the enumerated provisions of Act 77 for the first 180 days after enactment. Thereafter, such constitutional challenges reverted to this Court in accordance with the Judicial Code. 42 Pa. C.S. §761(a)(1).[36] Notably, the Acting Secretary does not assert this Court lacks subject matter jurisdiction over McLinko's action. The Supreme Court had exclusive jurisdiction to entertain constitutional challenges to certain sections of Act 77 for the first 180 days, or until April 28, 2020, and its exclusive jurisdiction terminated as of that day. Section 13 of Act 77 is not a statute of limitations.

Lest there be any doubt, Section 13 has been treated as a provision on subject matter jurisdiction, not a statutory time bar. In *Delisle v. Boockvar*, 234 A.3d 410 (Pa. 2020), the Supreme Court by *per curiam* order dismissed a petition for review that had been filed after April 28, 2020, and transferred the case to this Court. In a concurrence, Justice Wecht explained that "[t]he statute that conferred exclusive original jurisdiction upon this Court to hear constitutional challenges revoked that jurisdiction at the expiration of 180 days, and there is no question that [p]etitioners

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[36] It states, in relevant part:

> (a) General rule.--The Commonwealth Court shall have original jurisdiction of all civil actions or proceedings:
>
> > (1) Against the Commonwealth government, including any officer thereof, acting in his official capacity[.]

42 Pa. C.S. §761(a)(1). The exceptions to the general rule in Section 761(a)(1) are not applicable here.

EXHIBIT A

herein filed their petition outside of that time limit." *Id*. at 411 (Wecht, J., concurring). Though *Delisle* was a *per curiam* order, and therefore not binding precedent, this Court has also independently stated that Section 13 is an exclusive jurisdiction provision. *See Crossey v. Boockvar* (Pa. Cmwlth., No. 266 M.D. 2020, filed September 4, 2020), Recommended Findings of Fact and Conclusions of Law at 2 n.3 (stating that the Supreme Court had "exclusive jurisdiction if a challenge was brought within 180 days of Act 77's effective date").

The General Assembly cannot insulate Act 77 from judicial review. As our Supreme Court has stated:

> Since *Marbury v. Madison*, 5 U.S. 137 . . . (1803), it has been well-established that 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. That same separation sometimes demands that courts leave matters exclusively to the political branches. *Nonetheless, "[t]he 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.3d at 418 (quoting *Smyth v. Ames*, 169 U.S. 466, 527 (1898)) (emphasis added); *Robinson Township*, 83 A.3d at 927 ("[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.") (citation omitted). If the judiciary, upon review, determines that there are defects in the enactment of a statute, procedural or substantive, the court will void that enactment. *See Glen-Gery Corporation v. Zoning Hearing Board of Dover Township*, 907 A.2d 1033 (Pa. 2006) (holding that a statute requiring an ordinance challenge to be

brought within 30 days of the effective date where there were procedural defects in the enactment of the ordinance was unconstitutional and void).

We hold that McLinko's petition seeking prospective relief was timely filed. Section 13 did not establish a 180-day statute of limitations for bringing a constitutional challenge to Act 77. It could not do so without violating separation of powers. *William Penn School District*, 170 A.3d at 418 (legislature cannot "conclusively determine for the people and for the courts that what it enacts in the form of law … is consistent with the fundamental law").

V. Conclusion

In *Chase*, the Supreme Court rejected Mr. Miller's argument that because the Pennsylvania Constitution did not contain a clause that "prohibits the legislature from passing a law authorizing soldiers to vote at their respective camps . . . the power may be exercised." 41 Pa. at 409. This prohibition was expressed in the antecedent to Article VII, Section 1, as our Supreme Court explained:

> 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.

Chase, 41 Pa. at 419 (emphasis added). Acknowledging the "hardship of depriving so meritorious a class of voters as our volunteer soldiers of the right of voting," the Supreme Court explained that "[o]ur business is to expound the constitution and laws of the country as we find them written. We have no bounties to grant to soldiers, or anybody else." *Id*. at 427-28. It further explained that while the soldiers "fight for the constitution, they do not expect judges to sap and mine it by judicial constructions." *Id*. at 428. The Court gave a "natural and obvious reading" to the

place element to suffrage set forth in Article VII, Section 1. *Chase*, 41 Pa. at 428. This Court is bound by *Chase* and *Lancaster City*, and we reject the strained construction of Article VII proffered by the Acting Secretary to avoid the clear directive of our Supreme Court.

No-excuse mail-in voting makes the exercise of the franchise more convenient and has been used four times in the history of Pennsylvania. Approximately 1.38 million voters have expressed their interest in voting by mail permanently. If presented to the people, a constitutional amendment to end the Article VII, Section 1 requirement of in-person voting is likely to be adopted. But a constitutional amendment must be presented to the people and adopted into our fundamental law before legislation authorizing no-excuse mail-in voting can "be placed upon our statute books." *Lancaster City*, 126 A. at 201.

For these reasons, we grant summary relief to McLinko and declare that Act 77 violates Article VII, Section 1 of the Pennsylvania Constitution, PA. CONST. art. VII, §1. We deny the Acting Secretary's application for summary relief on the procedural and substantive grounds proffered therein.[37]

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

Former President Judge Brobson, Judge Covey, and former Judge Crompton did not participate in the decision in this case.

[37] As a result of our grant of summary relief to McLinko, the preliminary objections filed by the Acting Secretary and Democratic Intervenors are dismissed as moot.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents	:	
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, Petitioners	:	
v.	:	No. 293 M.D. 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

O R D E R

AND NOW, this 28th day of January, 2022, it is ORDERED that the application for summary relief filed by Petitioner Doug McLinko in the above-

captioned matter is GRANTED. The application for summary relief filed by Respondent Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, is DENIED.

Additionally, the preliminary objections filed by Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and the Commonwealth of Pennsylvania, Department of State, and the preliminary objections filed by the Democratic National Committee and the Pennsylvania Democratic Party are DISMISSED as moot.

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

Order Exit
01/28/2022

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents	:	
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, Petitioners	:	
v.	:	No. 293 M.D. 2021 Argued: November 17, 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

EXHIBIT B

OPINION
BY JUDGE LEAVITT[1] FILED: January 28, 2022

In this companion opinion to *McLinko v. Commonwealth*, __ A.3d __ (Pa. Cmwlth., No. 244 M.D. 2021, filed January 28, 2022), Representative Timothy R. Bonner and 13 members of the Pennsylvania House of Representatives (collectively, Petitioners) have filed a petition for review seeking a declaration that Act 77 of 2019,[2] which established that any qualified elector may vote by mail for any reason, violates the Pennsylvania Constitution and is, therefore, void. Petitioners also assert that Act 77 violates the United States Constitution. U.S. CONST. art. I, §§2, 4 and art. II, §1; U.S. CONST. amends. XIV and XVII. Finally, Petitioners seek an injunction prohibiting the distribution, collection, and counting of no-excuse mail-in ballots in future state and federal elections.

Respondents, the Acting Secretary of the Commonwealth, Veronica Degraffenreid, and the Department of State (collectively, Acting Secretary), have filed preliminary objections to Petitioners' challenge to Act 77's system of no-excuse mail-in voting.[3] The Acting Secretary also raises procedural challenges to the petition for review, *i.e.*, it was untimely filed, and Petitioners lack standing to challenge the constitutionality of Act 77. As in *McLinko*, the parties have filed cross-applications for summary relief, which are now before the Court for disposition.

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[1] This matter was assigned to the panel before January 3, 2022, when President Judge Emerita Leavitt became a senior judge on the Court. Because the vote of the commissioned judges was evenly divided on the constitutional analysis in this opinion, the opinion is filed "as circulated" pursuant to Section 256(b) of the Court's Internal Operating Procedures, 210 Pa. Code §69.256(b).

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

[3] The Democratic National Committee and the Pennsylvania Democratic Party (collectively, Democratic Intervenors), and the Butler County Republican Committee, the York County Republican Committee, and the Washington County Republican Committee (collectively, Republican Intervenors) sought intervention in these consolidated matters. The Court granted them intervention.

On the merits, Petitioners' claims under the Pennsylvania Constitution are identical to those raised by McLinko in the companion case.[4] The Court thoroughly addressed those claims in the *McLinko* opinion, which we incorporate here by reference. For all the reasons set forth in *McLinko,* we hold that Petitioners are entitled to summary relief on their request for declaratory judgment.[5]

Additionally, Petitioners seek to enjoin the Acting Secretary from enforcing Act 77, which motion for summary relief will be denied as unnecessary. The declaration has the "force and effect of a final judgment or decree." 42 Pa. C.S. §7532.

We turn next to the Acting Secretary's procedural objections. As in *McLinko*, she contends that Petitioners' petition for review was untimely filed because it is barred by the doctrine of laches or, alternatively, because it was filed after the so-called statute of limitations in Section 13 of Act 77. The Court considered, and rejected, these arguments in *McLinko*, and we incorporate that analysis here. *See McLinko*, __ A.3d at __- __, slip op. at 40-48. Accordingly, we hold that Petitioners' petition for review was timely filed.

Finally, we consider the Acting Secretary's challenge to Petitioners' standing. A party seeking judicial resolution of a controversy must establish a "substantial, direct, and immediate interest" in the outcome of the litigation to have standing. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). An interest is "substantial" if the party's interest "surpasses the common interest of all citizens in procuring obedience to the law." *Firearm Owners Against Crime v. City of*

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[4] The cases have been consolidated because they raise identical issues under the Pennsylvania Constitution. A separate opinion is filed in each case to address the differences in standing and requested relief.

[5] In light of our holding that Act 77 violates the Pennsylvania Constitution, we need not address Petitioners' claims under the United States Constitution.

Harrisburg, 218 A.3d 497, 506 (Pa. Cmwlth. 2019) (quotation omitted). A "direct" interest requires a causal connection between the matter complained of and the party's interest. *Id*. An "immediate" interest requires a causal connection that is neither remote nor speculative. *Id*. The key is that the petitioner must be "negatively impacted in some real and direct fashion." *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005).

Petitioners argue that they meet the above standards either as candidates for office or as registered voters. As registered voters, Petitioners have a right to vote on a constitutional amendment prior to the implementation of no-excuse mail-in voting in Pennsylvania. As past and likely future candidates for office, Petitioners have been or will be impacted by dilution of votes in every election in which improper mail-in ballots are counted. As candidates, Petitioners argue that they will have to adapt their campaign strategies to an unconstitutional law.

The Acting Secretary responds that Petitioners' interest as registered electors does not confer standing.[6] She argues that courts have repeatedly rejected the "vote dilution" theory of injury advanced by Petitioners and, further, Petitioners have not explained how mail-in voting injures them as past and future candidates for office.

This Court has recognized that voting members of a political party have a substantial interest in assuring compliance with the Election Code[7] in that party's primary election. *In re Pasquay*, 525 A.2d at 14. Likewise, a political party has

[6] Notably, this Court has observed that "any person who is registered to vote in a particular election has a substantial interest in obtaining compliance with the election laws by any candidate for whom that elector may vote in that election." *In re Williams*, 625 A.2d 1279, 1281 (Pa. Cmwlth. 1993) (quoting *In re Pasquay*, 525 A.2d 13, 14 (Pa. Cmwlth. 1987)).

[7] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2600-3591.

standing to challenge the nomination of a party candidate who has failed to comply with election laws. *In re Barlip*, 428 A.2d 1058 (Pa. Cmwlth. 1981).[8] In *In re Shuli*, 525 A.2d 6, 9 (Pa. Cmwlth. 1987), this Court concluded that a candidate for district justice had standing to challenge his opponent's nominating petition because his status as a candidate for the same office gave him a substantial interest in the action. *See also In re General Election – 1985*, 531 A.2d 836, 838 (Pa. Cmwlth. 1987) (candidate in general election had standing to challenge judicial deferment and resumption of election because it could have jeopardized the outcome of the election, a possibility sufficient to show "direct and substantial harm").[9] In sum, a candidate has an interest beyond the interest of other citizens and voters in election matters. Because Petitioners have been and will be future candidates, they have a cognizable interest in the constitutionality of Act 77.

Nevertheless, the Acting Secretary directs the Court to *In re General Election 2014* (Pa. Cmwlth., No. 2047 C.D. 2014, filed March 11, 2015).[10] In that case, the manager of a rehabilitation center in the City of Philadelphia filed an emergency application for absentee ballots for five patients who had been admitted to the facility just before the 2014 General Election. The trial court granted the

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[8] In *In re Barlip*, this Court held that a county Republican Committee had standing to challenge the nomination of a Republican candidate who failed to comply with election laws. We explained that "a political party, by statutory definition,[] is an organization representing qualified electors, [thus] it maintains the same interest as do its members in obtaining compliance with the election laws so as to effect the purpose of those laws in preventing fraudulent or unfair elections." *In re Barlip*, 428 A.2d at 1060. "Moreover, a political party may suffer a direct and practical harm to itself from the violation of the election laws by its candidates, for such noncompliance or fraud will ultimately harm the reputation of party and impair its effectiveness." *Id.*

[9] Notably, in *Barbieri v. Shapp*, 383 A.2d 218, 221 (Pa. 1978), the State Court Administrator had standing to seek a declaration that four judicial offices be filled by an election, as required by statute.

[10] Under Section 414(a) of this Court's Internal Operating Procedures, an unreported opinion may be cited for its persuasive value. 210 Pa. Code §69.414(a).

emergency application over the objections of attorneys for the Republican State Committee and the Republican City Committee. Two registered electors (objectors), who had not participated in the hearing on the emergency application, appealed the trial court's order and raised the same objections as the Republican committees, which were no longer participating. The trial court determined that the objectors lacked standing.

On appeal, the objectors argued that the trial court erred, asserting that as registered electors in the City of Philadelphia, they had "a substantial, immediate and pecuniary interest that the Election Code be obeyed." *In re General Election 2014*, slip op. at 12. The objectors claimed that the disputed absentee ballots affected the outcome of the General Election in which they had voted.

In quashing the objectors' appeal of the trial court's order, this Court held, *inter alia*, that the objectors were not "aggrieved" because they could not establish a "substantial, direct and immediate" interest. *Id.*, slip op. at 11 (citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975)). In so holding, we relied upon *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970),[11] where our Pennsylvania Supreme Court rejected a challenge to absentee ballots that was premised on a speculative theory of vote dilution:

> Basic in appellants' position is the [a]ssumption that those who obtain absentee ballots, by virtue of statutory provisions which they deem invalid, will vote for candidates at the November election other than those for whom the appellants will vote and thus will cause a dilution of appellants' votes. This assumption, unsupported factually, is unwarranted and cannot afford a sound

[11] In *Kauffman*, registered Democratic electors filed a declaratory judgment action against the Philadelphia Board of Elections and its chief clerk to challenge a section of the Election Code that permitted electors and their spouses on vacation to vote by absentee ballot. The objecting electors argued that they would have their votes diluted by the absentee ballots.

> basis upon which to afford appellants a standing to maintain this action.

Kauffman, 271 A.2d at 239-40. We concluded that, as in *Kauffman*, the objectors' interest was common to all qualified electors. Further, the objectors offered no support for their claim that the five absentee ballots they challenged would impact the outcome of the election.

In contrast to *In re General Election 2014*, Petitioners have pleaded an interest as candidates, as well as electors, and this matter extends far beyond five absentee ballots. In the 2020 general election, 2.7 million ballots were cast as mail-in or absentee ballots; more than 1.38 million Pennsylvania electors have requested to be placed on a permanent mail-in ballot list. Affidavit of Jonathan Marks ¶25. Given these numbers, it is obvious that no-excuse mail-in voting impacts a candidate's campaign strategy. We conclude that Petitioners have standing.

Even so, this case presents the special circumstances where taxpayer standing may be invoked to challenge the constitutionality of governmental action. The Pennsylvania Supreme Court has established that a grant of taxpayer standing is appropriate where (1) governmental action would otherwise go unchallenged; (2) those directly affected are beneficially affected; (3) judicial relief is appropriate; (4) redress through other channels is not appropriate; and (5) no one else is better positioned to assert the claim. *Application of Biester*, 409 A.2d 848, 852 (Pa. 1979). Petitioners meet all five requirements. Because the Acting Secretary has not challenged the constitutionality of Act 77, it may go unchallenged if Petitioners are denied standing.

In *Sprague v. Casey*, 550 A.2d 184 (Pa. 1988), a taxpayer challenged the special election to fill one seat on the Supreme Court and one seat on the Superior Court scheduled for the General Election of November 1988. The respondents

argued that the taxpayer lacked standing because the governmental action he challenged did not substantially or directly impact him. The Supreme Court determined that taxpayer standing under *Biester* was warranted because the "election would otherwise go unchallenged because respondents are directly and beneficially affected" and chose not to initiate legal action. *Sprague*, 550 A.2d at 187. The Court explained that "[j]udicial relief is appropriate because the determination of the constitutionality of the election is a function of the courts … and redress through other channels is unavailable." *Id.* (citation omitted).

We reject the challenge of the Acting Secretary and the Democratic Intervenors to Petitioners' standing to initiate an action to challenge the constitutionality of Act 77's system of no-excuse mail-in voting.

Conclusion

For all of the above reasons, we grant Petitioners' application for summary relief, in part, and, in accordance with our analysis in *McLinko*, declare Act 77 to violate Article VII, Section 1 of the Pennsylvania Constitution,[12] PA. CONST. art. VII, §1.

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

Former President Judge Brobson, Judge Covey, and former Judge Crompton did not participate in the decision in this case.

[12] Given our grant of declaratory relief to Petitioners, we need not address the federal claims. Additionally, Petitioners' request for nominal damages, attorneys' fees and costs is denied.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
Commonwealth of Pennsylvania, Department of State; and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents	:	
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, Petitioners	:	
v.	:	No. 293 M.D. 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

O R D E R

AND NOW, this 28th day of January, 2022, it is ORDERED that the application for summary relief filed by Petitioners Timothy R. Bonner and 13 other

members of the Pennsylvania House of Representatives in the above-captioned matter is GRANTED, in part. Act 77 is declared unconstitutional and void *ab initio*. Petitioners' request for injunctive relief, nominal damages and reasonable costs and expenses, including attorneys' fees, is DENIED.

The application for summary relief filed by Respondents Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and the Department of State is DENIED.

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

Order Exit
01/28/2022

EXHIBIT B

FOR IMMEDIATE RELEASE
January 28, 2022

PA Department of State Statement on Commonwealth Court Ruling on Mail-in Ballots

Harrisburg, PA – The Department of State has a simple message today for Pennsylvania voters: **Today's ruling on the use of mail-in ballots has no immediate effect on mail-in voting. Go ahead and request your mail-in ballot for the May primary election.**

Voters who are on the annual mail ballot list might recently have received in the mail, or will soon receive, the annual application from their county. They should complete and return the application to affirm that they want their county to send them a mail ballot for all 2022 elections.

Additionally, the Department is notifying all county election boards that they should proceed with all primary election preparations as they were before today's Commonwealth Court ruling. There should be no change in their procedures.

Since mail-in ballots were first made available by historic bipartisan legislation, more than 4.7 million of these ballots have been cast by Pennsylvania voters. The Department stands by the use of this secure, convenient and accessible method of voting.

Visit vote.pa.gov for more information on mail-in ballots.

MEDIA CONTACT: Wanda Murren, 717-783-1621

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EXHIBIT C

EXHIBIT C

Received 8/26/2021 4:32:11 PM Commonwealth Court of Pennsylvania

Filed 8/26/2021 4:32:00 PM Commonwealth Court of Pennsylvania
244 MD 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG McLINKO,
Petitioner,
v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents.

No. 244 MD 2021

AFFIDAVIT OF JONATHAN MARKS

I, Jonathan Marks, declare and affirm under the penalties of 18 Pa.C.S. § 4904 that:

1. I am the Deputy Secretary for Elections and Commissions for the Department of State (the "Department") of the Commonwealth of Pennsylvania, a position I have held since February 2019. Prior to being appointed as Deputy Secretary, I served as Commissioner for the Department's Bureau of Commissions, Elections and Legislation. I submit this Affidavit in opposition to Petitioner's Application for Summary Relief and in support of Respondents' Cross-Application for Summary Relief.

2. In my current and former positions, I have been responsible, together with the Secretary of the Commonwealth and other officials, for helping to lead the Department's efforts to ensure that Pennsylvania's elections are free, fair, secure,

and accessible to all eligible voters. In that capacity, I have worked closely with county executives, elections directors, and personnel in the Commonwealth's 67 counties.

Act 77's Amendments to the Pennsylvania Election Code

3. On October 31, 2019, Governor Wolf signed into law Act 77 of 2019, which amended Pennsylvania's Election Code in several respects.

4. Among other reforms, Act 77 provided that electors who were not eligible for absentee ballots would be permitted to vote with mail-in ballots. Before Act 77 was passed, voters who did not qualify for absentee ballots were required to vote in person at their polling places on election day.

5. As a result of Act 77, the Department and Pennsylvania's county boards of elections (the "counties") anticipated that counties would have to deal with a large increase in the number of ballots they would receive by mail.

6. Those expectations, however, had not accounted for the effects of the COVID-19 pandemic, which took hold in Pennsylvania in March 2020. Due to voters' concerns that voting in person at polling places on election day might expose them to the virus—and given the absence of any vaccine, which was not generally available to the public until 2021—a significant percentage of Pennsylvania voters cast a mail-in or absentee ballot during the 2020 election

cycle. These numbers far exceeded what Pennsylvania elections administrators had planned for prior to the pandemic.

7. The first statewide election following the enactment of Act 77 was the 2020 primary election, which was held on June 2, 2020. In that election, the majority of voters—nearly 1.5 million people—cast a mail-in or absentee ballot, while approximately 1.3 million Pennsylvanians voted in person on June 2.

8. One consequence of the massive use of mail-in voting was that certain counties fell behind in the processing of mail-in ballot applications and the issuance of mail-in ballots.

Following the 2020 Primary Election, the Department and Counties Expended Substantial Resources for the Purpose of Implementing Act 77's Mail-In Voting Procedures

9. Based on historical experience, Pennsylvania election administrators anticipated that a significantly greater number of Pennsylvanians would vote in the 2020 general election than had voted in the 2020 primary election. In addition, due in large part to the ongoing COVID-19 pandemic, election administrators expected that a large percentage of these voters would vote by mail—many more than the number of mail-in voters in the primary election.

10. These expectations were borne out. Of the approximately 6.9 million Pennsylvanians who voted in the 2020 general election, approximately 2.7 million cast a mail-in or absentee ballot.

11. In anticipation of these high numbers, and based on their experience in the 2020 primary election, Pennsylvania election administrators invested significant resources to educate voters about the mail-in voting procedures made available by Act 77; to avoid the delays in application processing and mail-in ballot issuance that had affected certain counties during the primary election; and to minimize the time it would take to process and tabulate millions of returned mail-in ballots.

12. Recognizing that many voters who vote in general elections, particularly in presidential years, do not vote in primary elections and are less familiar with the electoral system than primary voters, the Department, as well as certain counties, continued their extensive public relations efforts to educate voters about the availability of mail-in voting, and to encourage voters to apply early for mail-in ballots, thereby easing the administrative burden on elections officials. The Department alone spent approximately $13.7 million on these communications between the 2020 primary and general election.

13. Certain counties that fell behind in the issuance of mail-in and absentee ballot applications and ballots during the primary election also invested additional resources in the general election, including purchasing equipment to streamline their fulfillment of ballot requests.

14. Counties also had to invest substantial resources into training additional election workers to process mail-in ballot applications.

15. In the lead-up to the 2020 general election, a particular concern of election administrators was the time it would take to process the large volume of mail-in ballot submissions and tabulate votes.

16. Pursuant to the requirements of the Election Code, each mail-in ballot was returned in two nested envelopes. After checking the voters' completion of the declaration printed on the outside envelopes, county election administrators had to open each of those envelopes in turn, and the ballot then needed to be reviewed and tabulated.

17. Per the Election Code, this canvassing of mail-in ballots did not take place at individual election districts staffed by local polling-place officials (as had previously been the case with the canvassing of absentee ballots); instead, pursuant to the provisions of Act 77, all mail-in and absentee ballots returned in a given county were canvassed by the county board of elections at a central location.

18. To ensure that the results of the election would be known within a reasonable time (and sufficiently in advance of post-election day deadlines prescribed by the Election Code), it was necessary for the counties to use scanning machines to scan and tabulate the votes in an automated fashion. Due to the massive volume of mail-in ballots received by certain counties, it was necessary

for those counties to procure additional automated equipment (such as envelopers, which open the envelopes) to process mail-in ballot submissions. A large number of counties also had to expend resources training additional workers to determine whether voters had sufficiently completed the declarations on the outside envelopes enclosing the mail-in and absentee ballots, and to perform various other aspects of the canvassing and vote-tabulation process.

19. Because of the large volume of mail-in ballot submissions expected to be received during the 2020 general election, many counties purchased ballot scanners and/or other automated mail-in ballot-processing machines during the period between the 2020 primary and general election, at a cost of millions of dollars. The Department is aware that $605,000 was distributed to the counties through the CARES Act. Also, the Department is aware that counties that bought automated equipment to assist in the canvassing of mail-in ballots used county funds and private funds to purchase the equipment.

20. The expenditures described in Paragraphs 11–19 above were made specifically for the purpose of carrying out the mail-in voting procedures introduced by Act 77. If Act 77's mail-in voting procedures had been invalidated prior to the date of the expenditures described in Paragraphs 11-19 above, these expenditures would not have been made.

Eliminating Act 77's Mail-In Voting Procedures at This Juncture Would Require Election Officials to Spend Substantial Additional Resources to Educate Voters and Mitigate Disenfranchisement

21. Despite the challenges posed by COVID-19 and the unexpected volume of mail-in voting, Pennsylvania's election administrators successfully implemented Act 77's mail-in voting procedures during the 2020 election cycle. As discussed above, millions of voters were educated about the availability of mail-in ballots and voted by mail in the 2020 general election.

22. If Act 77's mail-in voting procedures were now eliminated, the Department and counties would have to invest millions of dollars of resources to educate voters regarding the change. In the absence of such expenditures, the elimination of no-excuse mail-in voting would create significant confusion about the permissible means of voting, leading to voter disenfranchisement.

23. Some of the very features of Act 77 that facilitate voting increase the likelihood that the Act's elimination would have disenfranchising effects.

24. For example, Act 77 allowed "[a]ny qualified registered elector [to] request to be placed on a permanent mail-in ballot list file." 25 P.S. § 3150.12(g)(1). Once an elector does so, a mail-in ballot application will automatically be mailed to the elector at the beginning of each year, and the elector's return of that application will cause her to be sent a mail-in ballot for each election during that year. *Id.* An elector who has requested to be placed on this

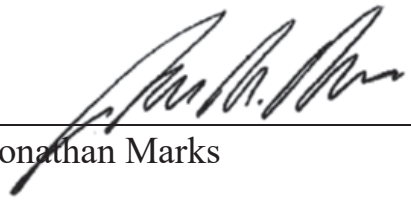
permanent list therefore has every reason to expect that she need take no further affirmative steps to be able to vote; the Election Code assures her that elections officials will send her the appropriate materials at the appropriate time.

25. As of the date of this Affidavit, approximately 1,380,342 Pennsylvania voters were on the permanent mail-in ballot list file established by Act 77.

26. As of the date of this Affidavit, approximately 740,765 Pennsylvanians have had their application for a mail-in ballot for the upcoming November 2, 2021, election approved. Of these ballots that have been approved, 736,534 are those of voters who are on the permanent mail-in list.

I declare that the facts set forth in this Affidavit are true and correct. I understand that this Affidavit is made subject to the penalties for unsworn falsification to authorities set forth in 18 Pa.C.S. § 4904.

Executed on August 26, 2021.



Jonathan Marks