

NO. 22-\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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TIMOTHY R. BONNER, *et al.*,

*Petitioners,*

v.

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

*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF PENNSYLVANIA**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Does Pennsylvania's Act 77 no-excuse mail-in voting law violate Article I § 4 of the United States Constitution by allowing mail-in voting from anywhere in the world?

## **PARTIES TO THE PROCEEDING**

Petitioners are Timothy R. Bonner; P. Michael Jones; David H. Zimmerman; Barry J. Jozwiak; Kathy L. Rapp; David Maloney; Barbara Gleim; Robert Brooks; Aaron Bernstine; Timothy F. Twardzik; Dawn F. Keefer; Dan Moul; Francis X. Ryan; and Donald “Bud” Cook.

Respondents are Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania; Commonwealth of Pennsylvania, Department of State; the Democratic National Committee; the Pennsylvania Democratic Party; Butler County Republican Committee; York County Republican Committee; and Washington County Republican Committee.

The Democratic National Committee and the Pennsylvania Democratic Party were Intervenor-Respondents below. The Butler County Republican Committee, York County Republican Committee, and Washington County Republican Committee were Intervenor-Petitioners below.

## RELATED PROCEEDINGS

### *Pennsylvania Commonwealth Court*

*Bonner, et al. v. Degraffenreid, et al.*, 293 MD 2021 – order entered January 28, 2022; opinion in support filed January 28, 2022.

*McLinko, D. v. Dept. of State, et al.*, 244 MD 2021 – order entered January 28, 2022; opinion in support filed January 28, 2022.

### *Pennsylvania Supreme Court*

*Bonner, et al. v. Dept. of State, et al.*, 15 MAP 2022 – order entered August 2, 2022; opinion in support filed August 2, 2022.

*Bonner, et al. v. Dept. of State, et al.*, 18 MAP 2022 – order entered August 2, 2022; opinion in support filed August 2, 2022.

*Bonner, et al Cross Aplts v. Dept. of State, et al*, 19 MAP 2022 – order entered August 2, 2022; opinion in support filed August 2, 2022.

*McLinko, D. v. Dept. of State, et al.*, 14 MAP 2022 – order entered August 2, 2022; opinion in support filed August 2, 2022.

*McLinko, D. v. Dept. of State, et al.*, 17 MAP 2022 – order entered August 2, 2022; opinion in support filed August 2, 2022.

## TABLE OF CONTENTS

QUESTION PRESENTED .....	i
PARTIES TO THE PROCEEDINGS .....	ii
TABLE OF APPENDICES .....	v
TABLE OF AUTHORITES.....	vi
PETITION FOR A WRIT OF CERTIORARI .....	1
OPINIONS BELOW .....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE.....	9
I.    PETITIONERS CHALLENGED THE CONSTITUTIONALITY OF ACT 77 UNDER, <i>INTER ALIA</i> , ARTICLE I, § 4 AND THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, PURSUANT TO 42 U.S.C. § 1983 .....	9
II.   THE COMMONWEALTH COURT OF PENNSYLVANIA AND THE SUPREME COURT OF PENNSYLVANIA REFUSED TO ADDRESS PETITIONER’S FEDERAL LAW CLAIM THAT ACT 77’S VIOLATED ARTICLE 4, § 1 OF THE U.S. CONSTITUTION GOVERNING STATE REGULATION OF FEDERAL ELECTIONS .....	13
REASONS TO GRANT THE PETITION.....	17
CONCLUSION.....	25

**TABLE OF APPENDICES**

APPENDIX A — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, AUGUST 2, 2022.....	1a
APPENDIX B — OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA, DATED JANUARY 28, 2022 .....	160a
APPENDIX C — OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA, DATED JANUARY 28, 2022 .....	172a

## TABLE OF AUTHORITES

### Cases

<i>Bourland v. Hildreth</i> , 26 Cal. 161 (Cal. 1864).....	21
<i>Heinly v. Cmwltth</i> , 621 A.2d 1212 (Pa. Cmwltth. 1993).....	15
<i>McLinko v. Commonwealth</i> , 279 A.3d 539 (Pa. 2022) .....	24
<i>McPherson v. Blacker</i> , 146 U.S. 1 (1892) .....	18
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	11
<i>Yee v. Escondido</i> , 503 U.S. 519 (1992) .....	15

### Statutes

28 U.S.C. § 1331.....	2
25 Pa.Stat. § 3146.6 (a).....	3
25 Pa.Stat. § 3150.16 (a).....	3-4
42 U.S.C. § 1983.....	4-5, 9, 12
Ariz. Rev. Stat. § 16-541.A .....	5, 24
Ariz. Rev. Stat. § 16-548.A .....	5, 24
D.C. Mun. Regs. tit. 3, § 720.3.....	5, 24
D.C. Mun. Regs. tit. 3, § 720.12.....	6, 24

Ga. Code Ann. § 21-2-380 .....	6, 24
Ga. Code Ann. § 21-2-385 (a).....	6, 24
Idaho Code § 34-1001.....	7, 24
Idaho Code § 34-1005.....	7, 24
ME. Rev. Stat. tit. 21-A §751 .....	7, 24
ME. Rev. Stat. tit. 21-A §754-A .....	7-8, 24
Mont. Code § 13-13-201 .....	8, 24
VA. Code §24.2-700 .....	8,24
VA. Code §24.2-707.B.....	8, 24

### **Other Authorities**

James Madison, <i>The Journal of the Constitutional Convention 1787</i> .....	19-21
---	-------

### **Constitutional Provisions**

U.S. Const. art. I, § 2 .....	9-10
U.S. Const. art. I, § 4 .....	passim
U.S. Const. amend. XIV, § 1.....	2, 9, 11
U.S. Const. art. II, § 1.....	9-10, 22
U.S. Const. amend. XVII .....	10

**Legislation**

Act 77, Laws of the General Assembly of the  
Commonwealth of Pennsylvania, Act of October  
31, 2019, P.L. 552, No. 77 .....*passim*

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Timothy R. Bonner; P. Michael Jones; David H. Zimmerman; Barry J. Jozwiak; Kathy L. Rapp; David Maloney; Barbara Gleim; Robert Brooks; Aaron Bernstine; Timothy F. Twardzik; Dawn F. Keefer; Dan Moul; Francis X. Ryan; and Donald “Bud” Cook respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

## OPINIONS BELOW

The opinion of the Commonwealth Court supporting its order granting declaratory relief to Petitioners Bonner, *et al.* and denying injunctive relief, nominal damages and reasonable costs and expenses, including attorneys’ fees (along with the concurring/dissenting opinion of the Judges Wojcik and Ceisler) is available at Pet.App. 160a-171a; reported at *McLinko v. Commonwealth*, 270 A.3d 1278 (Pa.Comm.w. 2022). The opinion of the Commonwealth Court supporting its order of the Commonwealth Court granting declaratory relief to McLinko (along with the concurring/dissenting opinion of the Judges Wojcik and Ceisler) is available at Pet.App. 172a-247a; reported at *McLinko v. Commonwealth*, 270 A.3d 1243 (Pa.Comm.w. 2022). The opinion of the Supreme Court of Pennsylvania supporting its order reversing the Commonwealth Court’s declaratory relief (along with the concurring opinion of Justice Wecht dissenting opinions of Justices Brobson and Mundy) is available at Pet.App. 1a-159a; reported at *McLinko v. Commonwealth*, 279 A.3d 539 (Pa. 2022).

## **JURISDICTION**

This Court has jurisdiction pursuant to 28. U.S.C. §1331. The petition is timely filed within 90 days of the judgment entered below. The Pennsylvania Supreme Court entered its judgment on August 2, 2022.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Elections Clause of the U.S. Constitution provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. Const. art. I, § 4, cl. 1.

The Fourteenth Amendment to the U.S. Constitution provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

U.S. Const. amend. XIV, § 1.

Act 77, Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77, the legislation subject to challenge in this case, which amended the Pennsylvania Election

Code, *inter alia*, at 25 Pa.Stat. § 3146.6(a) (Voting by absentee electors) and 25 Pa.Stat. § 3150.16(a) (Voting by mail-in electors). 25 Pa.Stat. § 3146.6(a) provides in pertinent part:

... at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 Pa.Stat. § 3150.16(a) provides in pertinent part:

At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in

secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

42 U.S.C. § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any

action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Ariz. Rev. Stat. § 16-541.A provides, in pertinent part: "Any election called pursuant to the laws of this state shall provide for early voting, . . . . Any qualified elector may vote by early ballot."

Ariz. Rev. Stat. § 16-548.A provides in pertinent part:

The early voter shall . . . deposit the voted ballot in the envelope provided for that purpose, which shall be . . . delivered or mailed to the county recorder or other officer in charge of elections of the political subdivision in which the elector is registered . . . .

D.C. Mun. Regs. tit. 3, § 720.3 provides in pertinent part:

Any duly registered voter may request an absentee ballot for any of the following:

- (a) Any single election;
- (b) All elections in a calendar year; or
- (c) All future elections that the voter may be eligible to vote (permanent request).

D.C. Mun. Regs. tit. 3, § 720.12 provides in pertinent part: “An absentee ballot may be returned to the Board by: (a) Mail ....”

Ga. Code Ann. § 21-2-380 provides in pertinent part:

- (a) As used in this article, the term “absentee elector” means an elector of this state or a municipality thereof who casts a ballot in a primary, election, or runoff other than in person at the polls on the day of such primary, election, or runoff.
- (b) An elector who votes by absentee ballot shall not be required to provide a reason in order to cast an absentee ballot in any primary, election, or runoff.

Ga. Code Ann. § 21-2-385(a) provides in pertinent part:

At any time after receiving an official absentee ballot, but before the day of the primary or election, ... the elector shall vote his or her absentee ballot, then fold the ballot and enclose and securely seal the same in the envelope on which is printed “Official Absentee Ballot.” \*\*\* Such envelope shall then be securely sealed and the elector shall then personally mail or personally deliver same to the board of registrars or absentee ballot clerk ....”

Idaho Code § 34-1001 provides in pertinent part:

“Any registered elector of the state of Idaho may vote at any election by absentee ballot as herein provided.”

Idaho Code § 34-1005 provides in pertinent part: “The return envelope shall be mailed or delivered to the officer who issued the same ....”

ME. Rev. Stat. tit. 21-A, § 751 provides in pertinent part:

Absentee ballots may be cast at any election by any voter who requests an absentee ballot as provided under this subchapter. The voter need not specify a reason to receive an absentee ballot.

ME. Rev. Stat. tit. 21-A, § 754-A provides in pertinent part:

When a voter or an immediate family member of a voter obtains a ballot from the clerk in person or by mail and returns that ballot to the clerk in person or by mail and receives no assistance in marking the ballot, the following procedures apply. \* \* \*

D. The voter or an immediate family member of the voter shall return the sealed envelope containing the voted ballot to the clerk of the municipality where the voter resides by mail, by personal

delivery or by depositing it into a secured drop box accessible by only the municipal clerk.

Mont. Code § 13-13-201 provides in pertinent part:

(1) A legally registered elector or provisionally registered elector is entitled to vote by absentee ballot as provided for in this part.

(2) The elector may vote absentee by: \* \*

(e) returning the signature envelope with all appropriate enclosures by regular mail, postage paid ....

VA. Code § 24.2-700 provides “Any registered voter may vote by absentee ballot in accordance with the provisions of this chapter in any election in which he is qualified to vote.”

VA. Code § 24.2-707.B provides “A mailed absentee ballot shall be returned (i) by mail to the office of the general registrar ...”

## STATEMENT OF THE CASE

The facts in this case are not in dispute. On October 31, 2019, Governor Wolf signed Act 77 into law, implementing sweeping reforms to the Pennsylvania Election Code. Among other changes, Act 77 created a new option to vote by mail from anywhere without providing an excuse for not voting in person.

### **I. Petitioners Challenged the Constitutionality of Act 77 Under, *inter alia*, Article I, § 4 and the Fourteenth Amendment of the U.S. Constitution, pursuant to 42 U.S.C. § 1983.**

On July 26, 2021, Doug McLinko, a member of the Bradford County Board of Elections, filed a petition for review in the Commonwealth Court of Pennsylvania, challenging the constitutionality of Act 77 under the Pennsylvania Constitution only. On August 31, 2021, Petitioners Bonner, *et al.* also filed a petition for review in the Commonwealth Court, wherein they raised the same state constitutional issues raised by McLinko, and also raised federal claims, arguing that the no-excuse mail-in voting system implemented by Act 77 violated the provisions of the U.S. Constitution governing state regulation of federal elections and due process and equal protection guarantees. The Commonwealth Court consolidated the two cases.

Specifically, Petitioners alleged in Count II of their Petition for Review that the U.S. Constitution delegates the authority to make laws for federal elections to the states' legislative power (citing U.S. Const. art. I, §§ 2 and 4, U.S. Const. Art. II, §1, and U.S. Const.

amend. XVII), and that a state is restricted to exercising this federal authority in accordance with the provisions of its Constitution delegating the legislative power:

## COUNT II

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80. The U.S. Constitution delegates the authority to make laws for federal elections to the states' legislative power. See U.S. Const. Art. I, § 2; U.S. Const. Art. I § 4; U.S. Const. Art. II, § 1; U.S. Const. Amend. XVII.

81. A state is restricted to exercising this federal authority in accordance with the provisions of its Constitution delegating the legislative power. \*\*\*

82. In the case of a law enacted by a state legislature applicable to the election of U.S. Senators, U.S. Representatives, and the selection of Presidential and Vice-Presidential electors, the legislature is not acting solely under the authority given to it by the people of the state, but by virtue of a direct grant of authority made under Article I, § 2; Article 1, § 4; Art. II, § 1; and the 17<sup>th</sup> Amendment of the United States Constitution.

Inasmuch as the legislative changes enabling no-excuse mail-in voting required a Pennsylvania constitutional amendment but no such amendment was voted upon or enacted, Petitioners' Petition alleged

that Act 77 violated the US Constitution's delegation to states of the lawmaking power for federal elections under Article 1, § 4.

Petitioners alleged separately in Count III of their Petition that enactment of Act 77 deprived Petitioners of their due process and equal protection rights in violation of the Fourteenth Amendment to the U.S. Constitution. Specifically, Petitioners alleged that allowing mail-in ballots to be counted that exceed the limitations for permitted absentee voting under the Pennsylvania Constitution can deny the right to vote "by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," in violation of the 14<sup>th</sup> Amendment Due Process and Equal Protection guarantees:

### COUNT III

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88. Allowing mail-in ballots to be counted which exceed the limitations for permitted absentee voting under the Pennsylvania Constitution can deny the right to vote "by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," in violation of 14th Amendment Due Process and Equal Protection guarantees. See Reynolds v. Sims, 377 U.S. 533, 555 (1964); U.S. Const. Amend. XIV.

Count III of the Petition further alleged that the Acting Secretary of the Commonwealth, acting under color of state law, has continued to implement the unlawful provisions of the Pennsylvania Election Code that permit no-excuse-mail-in voting in violation of 42 U.S.C. § 1983, which prohibits any person acting under color of state law to subject or cause to be subjected any other person “to the deprivation of any right, privileges, or immunities secured by the Constitution and laws”:

89. Acting Secretary Degraffenreid, in her role as Secretary of the Commonwealth and acting under color of state law, has continued to implement the unlawful provisions of the Pennsylvania Election code that permit no-excuse mail-in voting.

90. These practices have had the impact of disenfranchising Petitioners and other registered Pennsylvania voters in previous elections and such policies will continue to disenfranchise voters unless relief is granted to Plaintiffs [*sic* Petitioners].

Accordingly, in their prayer for relief, Petitioners sought the following relief:

WHEREFORE, Petitioners respectfully request that this Honorable Court enter relief as follows:

A. DECLARATORY JUDGMENT: a declaratory judgment declaring unconstitutional the Act 77 provisions, as amended by Act 12, that enable voting by mail without excuse;

B. PROHIBITORY INJUNCTION: an order, declaration, and/or injunction that prohibits Defendants from distributing, collecting, and counting no-excuse mail-in ballots in future state and federal elections and

C. FURTHER RELIEF: awarding Petitioners' nominal damages; reasonable costs and expenses of this action, including attorneys' fees and costs; and providing such other and further legal and equitable relief as this Court deems just and proper.

## **II. The Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania Refused to Address Petitioner's Federal Law Claim That Act 77's Violated Article 4, § 1 of the U.S. Constitution Governing State Regulation of Federal Elections.**

The parties filed applications for summary relief and the Commonwealth Court granted declaratory relief to Petitioners on their claim that Act 77 was unconstitutional under the Pennsylvania Constitution. Pet.App. 170a. The Commonwealth Court's Opinion relating to the Bonner Petitioners stated that the Bonner Petitioners' federal claims under Counts II and III of the Petition were not addressed:

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.

*Id.*, n.12.

The Commonwealth Court denied the Respondents' application for summary relief and did not dismiss Petitioners' federal claims under Counts II and III. Pet.App. 170a. The Commonwealth Court did not offer any explanation why the grant of declaratory relief to Petitioners on their state constitutional challenge to Act 77 obviated the requirement to address Petitioners' federal claims set forth in Counts II and III of the Petitioners' Petition. In short, without dismissing Petitioners' federal claims, the Commonwealth Court simply opted not to decide Petitioners' federal claims in favor of one party or the other, though it did specifically deny Petitioners' request for injunctive relief, nominal damages and reasonable costs and expenses, including attorneys' fees. Pet.App *Id.*, n.12.

Respondents appealed and the Bonner Petitioners cross appealed. In Petitioners Brief of Appellees/Cross-Appellants, Petitioners explained two ways that Act 77 exceeded the U.S. Constitution's delegation of authority to the states' legislative bodies to make laws for federal elections. The first way was derivative of Petitioners' state law claims: "A state is restricted to exercising this federal delegation of authority in accordance with the provisions of its Constitution delegating the legislative power." (citations

omitted). The second way was independent of Petitioners' state law claims:

Article 1 [*sic* I], § 4 of the U.S. Constitution requires that "The Times, **Places** and Manner of holding Elections for Senators and Representatives, **shall** be prescribed in each State by the Legislature thereof ..." (emphasis added). The no-excuse mail-in voting provisions of Act 77 allow any registered voter to vote from anywhere in the world, failing to prescribe any required place at all for voting in federal elections to occur. Thus, even if Act 77 did not violate the Pennsylvania Constitution, it would independently violate Article 1 [*sic* I], § 4 of the U.S. Constitution because of its failure to prescribe places for all of the votes cast in federal elections.

The second way that Act 77 exceeded the U.S. Constitution's delegation of authority to the states' legislative bodies to make laws for federal elections was not outlined in Petitioners' Petition, but it was not required to be spelled out there in detail to be properly raised and preserved. As a "fact pleading" jurisdiction, Pennsylvania "courts are presumed to know the law, and plaintiffs need only plead facts constituting the cause of action, and the courts will take judicial notice of the statute involved." *Heinly v. Cmwlth.*, 621 A.2d 1212, 1215 n.5 (Pa.Cmwlth. 1993). Plaintiffs need only plead the facts and not the "legal theory or theories underlying the complaint." *Id.*; see also *Yee v.*

*Escondido*, 503 U.S. 519, 534 (1992) (“Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.”).

Petitioners further explained in their Brief of Appellees/Cross-Appellants as follows:

Acting Secretaries Degraffenreid and Chapman, in their official capacities and acting under color of state law have implemented and continue to implement the unlawful provisions of the Pennsylvania Election Code that permit no-excuse mail-in voting in Pennsylvania state and federal elections from anywhere in the world. These practices have had the impact of disenfranchising the Bonner Petitioners and other registered Pennsylvania voters in previous elections and such policies will continue to disenfranchise voters unless relief is granted.

The Supreme Court of Pennsylvania found that Act 77’s no-excuse mail-in voting provisions were constitutional under the Pennsylvania Constitution. Pet.App. 95a. This finding, in the Pennsylvania Supreme Court’s view, obviated the requirement to address Petitioners’ federal claims:

Our conclusion in this regard defeats Bonner’s federal claims, as the viability of those claims requires a finding that the universal mail in provisions of Act 77

are unconstitutional under the Pennsylvania Constitution ... As there is no constitutional infirmity in Act 77's universal mail in voting provisions, there is no foundation for Bonner's claims.

Pet.App. 96a, n.53.

The Pennsylvania Supreme Court's conclusion regarding Petitioners' federal claims quoted above appeared in the last foot note on the last page of the Court's 76-page opinion. The court offered no explanation how its conclusion that Act 77 was constitutional under the Pennsylvania Constitution operated to "defeat" Petitioners' independent federal claim that Act 77 violated Article I, § 4 of the U.S. Constitution.

## **REASONS TO GRANT THE PETITION**

Petitioners request that this Court grant a writ of certiorari to resolve whether Pennsylvania's Act 77 no-excuse mail-in voting law violates Article I § 4 of the United States Constitution by allowing mail-in voting from anywhere in the world. This Court should grant this petition because:

1. In this case, the Pennsylvania Supreme Court has decided, or rather refused to decide, a properly raised important question of federal law that has not been, but should be, settled by this Court. In so doing, the lower courts have refused to remedy a significant violation of the United States Constitution.

2. The question presented by this Petition is vitally important with respect to future elections.

Pennsylvania is one of a large and growing number of states, including many of the “battleground” states, that have begun allowing widespread no-excuse mail-in voting in recent years, breaking from the past where mail-in voting was limited to a relatively small number of hardship situations where voters were not able to vote in person on election day. If this Court were to deny this petition, similar challenges to similar laws in other states are likely to arise.

3. This case is the best vehicle for this Court to address this issue and to do so now would be an ideal time because it is well in advance of the 2024 elections, which allows ample time for the issue to be addressed on a non-emergency basis. The issue has been properly raised and preserved and if the Court waits for it to come up again, it would likely be at a far less ideal time.

Article I § 4 of the United States Constitution mandates, by its plain and mandatory language, requires that:

The Times, **Places** and Manner of holding Elections for Senators and Representatives, **shall** be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

U.S. Const. art. I, § 4, cl. 1 (emphasis added).

As this Court explained in *McPherson v. Blacker*, 146 U. S. 1, 47-48 (1892):

The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight.

There is some discussion of what became Article I, § 4 in James Madison's *The Journal of the Constitutional Convention 1787* ("Jour. Con."). A prior version of what became Article I, § 4, which was originally Article 6, Section 1, provided as follows:

The times, and places, and manner of holding the elections of the members of each House, shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States.

Jour. Con. 451. Discussion of that prior version proceeded in relevant part as follows:

Article 6, Sect. 1, was then taken up. Mr. MADISON and Mr. GOUVERNEUR MORRIS moved to strike out, "each House," and to insert, "the House of Representatives," the right of the Legislatures to regulate the times and places,

&c., in the election of Senators, being involved in the right of appointing them; which was disagreed to. A division of the question being called for, it was taken on the first part down to, "but their provisions concerning," &c.

The first part was agreed to *nem. con.*

Mr. PINCKNEY and Mr. RUTLEDGE moved to strike out the remaining part, viz., "but their provisions concerning them may at any time be altered by the Legislature of the United States." The States, they contended, could and must be relied on in such cases.

Mr. GORHAM. It would be as improper to take this power from the National Legislature, as to restrain the British Parliament from regulating the circumstances of elections, leaving this business to the counties themselves.

Mr. MADISON. The necessity of a General Government supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience or prejudices. The policy of referring the appointment of the House of Representatives to the people, and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode. This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrolled right of

regulating the times, places, and manner, of holding elections . These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot, or *viva voce*; should assemble at this place or that place; should be divided into districts, or all meet at one place; should all vote for all the Representatives, or all in a district vote for a number allotted to the district, — these and many other points would depend on the Legislatures, and might materially affect the appointments.

Jour. Con. 491-492.

Both the plain meaning and original intent of “Places ... of holding elections for Senators and Representatives,” as used in Article I, § 4 and as indicated by the above-quoted discussion from the Constitutional Convention, is that the states shall specify places for voters to actually “assemble” and cast their votes for Senators and Representatives. “Places ... of holding Elections for Senators and Representatives” does not merely refer to the places where votes are counted, but rather to where votes are cast. *See also Bourland v. Hildreth*, 26 Cal. 161, 216–17 (Cal. 1864) (Sawyer, J., concurring):

In the election of all civil officers, however, in every State in the Union, the personal presence of the elector was required at the [polling] place ... whether

the vote was by ballot or by the voice, and these elections were always held within the district for which the officers were elected. The very idea of an election embraced the idea of a place appointed within the district for the meeting of the voters ... and the presence of the elector in person to offer or claim his vote, to deposit his ballot, or announce his choice by the living voice. Men had no other conception of the process of voting, or of offering to vote, or of claiming their votes. \* \* \* The mode of voting established by the Constitution is by ballot, and there can be no possible difference of opinion as to what, in the minds of the people who adopted the Constitution, constituted the process of voting by ballot.

(emphasis added).

The context of federal elections provides one of the few areas in which the United States Constitution expressly requires action by the states, namely that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, **shall** be prescribed in each State by the Legislature thereof.” Art. I, § 4, cl. 1. This duty parallels the duty under Article II that “Each State **shall** appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.” Art. II, § 1, cl. 2.

The mandatory “shall” language in Article I, § 4 with regard to prescribing places for holding elections has no significance if states are instead free to allow voters to vote in federal elections literally everywhere and anywhere. Everywhere is not a prescribed place. It is a total failure to prescribe places for holding elections to prescribe an unlimited number of places for voting.

If unlimited mail-in voting were permitted in federal elections despite Article I, § 4, then states would be permitted to conduct federal elections entirely by mail (as could theoretically occur in Pennsylvania if all voters opted to vote by mail), or, for that matter, entirely by internet voting, and there would be no real functional purpose to prescribing places for holding elections. The only place involved in such federal elections would be the place where votes are tabulated. However, elections are not merely the tabulation of votes but also the casting of votes, such that the failure to prescribe places where voting must occur is a failure to prescribe the places for holding elections.

Requiring states to prescribe places for holding federal elections makes sense and serves important policy functions, in that if elections are held only at a finite number of polling places, then it is possible to observe the conduct of elections to help ensure that no vote buying, coercion, fraud, or undue influence is occurring and that vote secrecy is being preserved. In short, requiring states to prescribe places for holding federal elections helps ensure that federal elections are free and fair and enables greater confidence in the freedom and fairness of federal elections. In her

dissent from the Pennsylvania Supreme Court’s majority opinion below upholding the constitutionality of Act 77, Justice Mundy observed that

...it is self-evident that the *integrity* of electoral actions becomes more difficult to verify when they are undertaken at a distance and outside of public scrutiny: not only is fraud more difficult to detect, but the voter lacks contemporaneous assistance from election officials and so there is a greater chance for honest mistakes.

*McLinko v. Commonwealth*, 279 A.3d. 539 (Pa. 2022) (Mundy, J. dissenting), Pet.App. 131a.

This issue is not limited to Pennsylvania. Most states and Washington, D.C. permit any qualified registered voter to vote by mail from anywhere. *See, e.g.*, Ariz. Rev. Stat. §§ 16-541.A, 16-548.A; D.C. Mun. Regs. tit. 3, §§ 720.3, 720.12; Ga. Code Ann. §§ 21-2-380, 21-2-385(a); Idaho Code §§ 34-1001, 34-1005; ME. Rev. Stat. tit. 21-A, §§ 751, 754-A; Mont. Code §§ 13-13-201(1), 13-13-201(2)(e); VA. Code §§ 24.2-700, 24.2-707.

Granting certiorari will allow this Court to remedy the now widespread and growing disregard of the mandatory requirement of Article I, § 4 that states prescribe places for holding federal elections.

**CONCLUSION**

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

October 31, 2022

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## **APPENDIX**

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**APPENDIX A — OPINION OF THE SUPREME  
COURT OF PENNSYLVANIA, AUGUST 2, 2022**

IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT

No. 14 MAP 2022, No. 15 MAP 2022, No. 17 MAP 2022,  
No. 18 MAP 2022, No. 19 MAP 2022

DOUG MCLINKO,

*Appellee,*

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF STATE; AND LEIGH M.  
CHAPMAN, IN HER OFFICIAL CAPACITY AS  
ACTING SECRETARY OF THE COMMONWEALTH  
OF PENNSYLVANIA,

*Appellants.*

TIMOTHY R. BONNER, P. MICHAEL JONES,  
DAVID H. ZIMMERMAN, BARRY J. JOZWIAK,  
KATHY L. RAPP, DAVID MALONEY, BARBARA  
GLEIM, ROBERT BROOKS, AARON J.  
BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W.  
KEEFER, DAN MOUL, FRANCIS X. RYAN, AND  
DONALD “BUD” COOK,

*Appellees,*

v.

2a

*Appendix A*

LEIGH M. CHAPMAN, IN HER OFFICIAL  
CAPACITY AS ACTING SECRETARY OF THE  
COMMONWEALTH OF PENNSYLVANIA, AND  
COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF STATE,

*Appellants.*

DOUG MCLINKO,

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF STATE; AND LEIGH M.  
CHAPMAN, IN HER OFFICIAL CAPACITY AS  
ACTING SECRETARY OF THE COMMONWEALTH  
OF PENNSYLVANIA; CROSS APPEAL OF:  
YORK COUNTY REPUBLICAN COMMITTEE,  
WASHINGTON COUNTY REPUBLICAN  
COMMITTEE, BUTLER COUNTY REPUBLICAN  
COMMITTEE; TIMOTHY R. BONNER, P.  
MICHAEL JONES, DAVID H. ZIMMERMAN,  
BARRY J. JOZWIAK, KATHY L. RAPP, DAVID  
MALONEY, BARBARA GLEIM, ROBERT BROOKS,  
AARON J. BERNSTINE, TIMOTHY F. TWARDZIK,  
DAWN W. KEEFER, DAN MOUL, FRANCIS X.  
RYAN, AND DONALD “BUD” COOK,

v.

LEIGH M. CHAPMAN, IN HER OFFICIAL  
CAPACITY AS ACTING SECRETARY OF THE

*Appendix A*

COMMONWEALTH OF PENNSYLVANIA, AND  
COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF STATE; CROSS APPEAL OF:  
YORK COUNTY REPUBLICAN COMMITTEE,  
WASHINGTON COUNTY REPUBLICAN  
COMMITTEE, BUTLER COUNTY REPUBLICAN  
COMMITTEE; TIMOTHY R. BONNER, P.  
MICHAEL JONES, DAVID H. ZIMMERMAN,  
BARRY J. JOZWIAK, KATHY L. RAPP, DAVID  
MALONEY, BARBARA GLEIM, ROBERT BROOKS,  
AARON J. BERNSTINE, TIMOTHY F. TWARDZIK,  
DAWN W. KEEFER, DAN MOUL, FRANCIS X.  
RYAN, AND DONALD “BUD” COOK,

*Cross Appellants,*

v.

LEIGH M. CHAPMAN, IN HER OFFICIAL  
CAPACITY AS ACTING SECRETARY OF THE  
COMMONWEALTH OF PENNSYLVANIA, AND  
COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF STATE,

*Appellees.*

March 8, 2022, Argued  
August 2, 2022, Decided

Appeal from the Order of the Commonwealth Court at  
No. 244 MD 2021 dated January 28, 2022.

*Appendix A*

Appeal from the Order of the Commonwealth Court at  
No. 293 MD 2021 dated January 28, 2022.

Appeal from the Order of the Commonwealth Court at  
No. 244 MD 2021 dated January 28, 2022.

Appeal from the Order of the Commonwealth Court at  
No. 293 MD 2021 dated January 28, 2022.

Appeal from the Order of the Commonwealth Court at  
No. 293 MD 2021 dated January 28, 2022.

BAER, C.J., TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ. Chief Justice Baer and Justices Todd and Dougherty join the opinion. Justice Wecht joins the opinion, except for its determination that Act 77 prescribed an “other method” of voting, pursuant to Article VII, Section 4 of our Constitution. Justice Wecht files a concurring opinion. Justice Mundy files a dissenting opinion in which Justice Brobson joins. Justice Brobson files a dissenting opinion in which Justice Mundy joins.

JUSTICE DONOHUE

This is a case that is steeped in the history of this Commonwealth and the development of its Constitution. More than one hundred years ago, this Court recognized that our Constitution mandates that elections be free and equal, but that the “[t]he power to regulate elections is a legislative one, [which] has been exercised by the General Assembly since the foundation of the government.” *Winston v. Moore*, 244 Pa. 447, 91 A. 520, 522-23 (Pa.

*Appendix A*

1914). Before the Court now is a question of whether the General Assembly overstepped the bounds of this power and violated our Constitution when it enacted legislation that allows for universal mail-in voting. For the reasons that follow, we find no constitutional violation, and so we reverse the order of the Commonwealth Court.

**A. Background**

The legislation at issue in this case is the Act of October 31, 2019, P.L. 552, No. 77, commonly referred to as “Act 77.” Act 77 effected major amendments to the Pennsylvania Election Code.<sup>1</sup> Although its provisions establishing state-wide, universal mail-in voting are the subject of this appeal, *see* 25 P.S. §§ 3150.11-3150.17, these are only a fraction of the scope of the Act. For instance, Act 77 eliminated the option for straight-ticket voting;<sup>2</sup> moved the voter registration deadline from thirty to fifteen days before an election; allocated funding to provide for upgraded voting systems; and reorganized the pay structure for poll workers, along with other administrative changes. Act 77 was an enormously popular piece of legislation on both sides of the aisle. In the state Senate, Act 77 passed 35-14, with Republicans voting 27-0 in favor along with

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1. Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 3150.11-3150.17.

2. This was the subject of intense legislative debate, with Democratic state legislators in favor of preserving the straight-ticket option and Republican state legislators seeking its elimination. *See, e.g.*, House Legislative Journal, Session of 2019, No. 63, at 1706-11 (Oct. 28, 2019).

*Appendix A*

eight Democrats. Charlie Wolfson, *Trump Politicized Mail-In Voting in 2020, But it Came to PA with Strong Republican Support*, PUBLICSOURCE (Dec. 10, 2020), <https://www.publicsource.org/trump-politicized-mail-in-voting-in-2020-pa-republicans-supported-it-originally/>. In the state House of Representatives, it passed 138-61, with 105 Republicans and thirty-three Democrats voting in favor of it. *Id.* As put by Bryan Cutler, Pennsylvania's House Majority Leader at the time,

[Act 77] was not written to benefit one party or the other, or any one candidate or single election. It was developed over a multi-year period, with input from people of different backgrounds and regions of Pennsylvania. It serves to preserve the integrity of every election and lift the voice of every voter in the Commonwealth.

House Republican Caucus, *Historic Election Reform*, <http://www.pahousegop.com/electionreform> (last visited, July 11, 2022) (quoting Bryan Cutler, then-House Majority Leader). Act 77 was the result of years of careful consideration and debate that began in 2017 with a series of hearings, ultimately spanning twenty-seven months, on the reform and modernization of elections in Pennsylvania. Stephen E. Friedman, *Mail-In Voting and the Pennsylvania Constitution*, 60 DUQ. L. REV. 1, 6 (2022). With a bi-partisan majority of the General Assembly voting in favor of Act 77, Governor Wolf signed it into law on October 31, 2019. See Press Release, *Governor Wolf Signs Historic Election Reform Bill Including New Mail-In Voting* (Oct. 31, 2019).

*Appendix A*

With specific regard to the universal mail-in provisions, Act 77 for the first time allowed all qualified voters to cast their vote by mail. Prior to Act 77's enactment, a voter was required to establish that he or she fit the criteria of an absentee voter to be able to cast a ballot by mail. As we discuss at greater length in this opinion, absentee voting has a long history in the Commonwealth, dating to 1864. At the time of its inception, only otherwise qualified voters who were not present in their election districts on Election Day because of active military duty were allowed to cast an absentee ballot. Both the categories of qualified voters who are permitted to cast absentee ballots and the methods for casting absentee ballots have changed over the intervening century and a half. However, since 1963, a qualified voter has been able to receive and return an absentee ballot through the mail.<sup>3</sup> Act 77's universal mail-in provisions extended the ability to receive and return a ballot through the mail to the electorate without the excuse of absenteeism. *See* 25 P.S. §§ 3150.11-3150.17.

Act 77 became effective immediately upon its October 31, 2019 enactment, allowing the Department of State and local election boards alike to notify the electorate about universal mail-in voting, which would be available for the April 2020 Primary Election.<sup>4</sup> Within months after the passage of Act 77, the COVID-19 pandemic began its spread across the world. *See* Derrick Bryson

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3. As discussed *infra*, the return process involves the use of dual envelopes and a voter declaration.

4. Mail-in voting was not available for the November 5, 2019 General Election, which occurred only days after Act 77's enactment.

*Appendix A*

Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES, <https://www.nytimes.com/article/coronavirus-timeline.html> (last visited July 11, 2022). In March 2020, the first cases were detected within this Commonwealth. By April 1, 2020, all Pennsylvania schools were closed, and residents were required to stay at home by order of the Governor. *See A Year of COVID-19 In Pennsylvania*, WHTM, <https://www.abc27.com/timeline-of-a-year-of-covid-19-in-pennsylvania>. Among other responses to this unparalleled public health crisis, the General Assembly passed a bill delaying the upcoming Primary Election from April 28 to June 2. *See id.* Nonetheless, because of the prescient passage of Act 77 in late 2019, the stage in this Commonwealth was set to allow the electorate to exercise the right of suffrage without leaving their homes, should they so choose. And an overwhelming number of Pennsylvanians so chose. In the June 2, 2020 Primary Election, 1,459,555 mail-in ballots were cast, which represented 51% of all votes cast in that election. PA. DEP'T OF STATE, *Pennsylvania 2020 Primary Election Report*, at 6, 9, 10 (Aug. 1, 2020). In the November 3, 2020 General Election, 2,648,149 mail-in ballots were cast, representing 38% of the total votes. PA. DEP'T OF STATE, *Report on the 2020 General Election*, at 12, 20 (May, 14, 2021).<sup>5</sup> A “clear

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5. In the 2021 Primary Election, approximately 26% of the voting electorate cast mail-in ballots, *see* PA. DEP'T OF STATE, Reporting Center, Reports, 2021 Municipal Primary, Justice of the Supreme Court, Statewide, <https://www.electionreturns.pa.gov/ReportCenter/Reports> (last visited July 11, 2022), and in the 2021 General Election, approximately 27% voted by mail-in ballot. *See* PA. DEP'T OF STATE, Report Center, Reports, 2021 Municipal Election, Justice of the Supreme Court, Statewide,

*Appendix A*

partisan split when it came to the method of voting” was soon evident; Joseph R. Biden defeated Donald J. Trump by more than three-to-one among mail-in ballots, while Trump beat Biden by two-to-one among the votes cast in person on Election Day. *Pennsylvania Elections — Summary Results*, PA. DEP’T OF STATE, <https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G> (last visited July 11, 2022). The election was officially called in President Biden’s favor on November 24, 2020. *See* Press Release, *Department of State Certifies Presidential Election Results* (Nov. 24, 2020).

On November 21, 2020, eight petitioners — including a Republican congressman and Republican candidates for the United States House of Representatives and the Pennsylvania House of Representatives — filed a petition for review in the Commonwealth Court seeking to halt the certification of the 2020 General Election. The petition for review set forth a facial challenge to the portions of Act 77 that established universal mail-in voting. In particular, the petitioners argued that the state Constitution requires voters to cast their votes in person on Election Day, except for the voters whom the Constitution excuses from this requirement because of their absentee status. The petitioners sought a declaration that Act 77’s contrary provisions were unconstitutional and void ab initio, as well as an order enjoining the certification of the results of the November 3, 2020 General Election. *See Kelly v.*

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<https://www.electionreturns.pa.gov/ReportCenter/Reports> (last visited July 11, 2022).

*Appendix A*

*Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449, 209 L. Ed. 2d 171 (2021). The Commonwealth Court granted preliminary relief, enjoining the Commonwealth from certifying the results of the General Election.

In response to a request by the named respondents (the Commonwealth of Pennsylvania, Governor Wolf and Secretary Boockvar), this Court exercised extraordinary jurisdiction over the matter. We found a “complete failure to act with due diligence in commencing [the] facial constitutional challenge, which was ascertainable upon Act 77’s enactment[,]” as the petitioners waited until the ballots from the General Election were in the process of being tallied, and the results were becoming apparent, to raise their claim. *Id.* at 1256-57. Thus, the Court found the claim barred by the doctrine of laches. In a concurring opinion, Justice Wecht laid bare the petitioners’ want of due diligence, detailing precisely how the claim was ascertainable and could have been raised and fully adjudicated before the June 2020 primary — the first election to occur following Act 77’s enactment, and therefore the first election upon which the electorate relied on its universal mail-in voting — but they inexplicably waited until after the 2020 General Election. *See id.* at 1258. Having found the petitioners equitably barred from the adjudication of their claims, this Court dismissed their petition with prejudice and vacated the Commonwealth Court’s order enjoining the certification of the results of the 2020 General Election. *Id.* at 1256. The petitioners sought further review via a writ of certiorari to the United States Supreme Court. In February 2021, their petition

*Appendix A*

was denied. *Kelly v. Pennsylvania*, 141 S. Ct. 1449, 209 L. Ed. 2d 171 (2021).

**B. Procedural History**

The issue raised in *Kelly* laid dormant for only a brief time. On July 26, 2021, Appellee Doug McLinko, a member of the Bradford County Board of Elections, filed a petition for review and application for summary relief in the Commonwealth Court raising the same claims that had been advanced in *Kelly*. McLinko argued that the Pennsylvania Constitution requires a qualified elector to establish residency sixty days before an election in “the election district where he or she shall offer to vote[;]” PA. CONST. art. VII, § 1, and that this Court has definitively construed the term “offer to vote” to mean that the elector must “physically present a ballot at a polling place[;]” in other words, that electors must vote in person at their designated polling place on Election Day. While McLinko acknowledged that Article VII, Section 14(a) of the Pennsylvania Constitution provides an exception to this in-person requirement, he argued that Section 14 provides only narrow exceptions for those who fit its classifications of “absentee.”<sup>6</sup> In short, McLinko argued that only electors that meet one of the Section 14(a) exceptions may vote by mail; and therefore, it would be unlawful for him to

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6. Section 14(a) provides that a qualified elector may vote by absentee ballot where he is (1) absent from his residence on Election Day because of business or occupation, (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. PA. CONST. art. VII, § 14(a).

*Appendix A*

certify the universal mail-in ballots. He asked that the Commonwealth Court declare Act 77 unconstitutional and therefore void.

Approximately one month later, Pennsylvania State Representative Timothy R. Bonner and thirteen additional Republican members of the Pennsylvania House of Representatives (collectively “Bonner”)<sup>7</sup> filed a petition for review and application for summary relief in the Commonwealth Court, wherein they raised the same Article VII challenges to Act 77’s universal mail-in voting provisions as raised by McLinko. Bonner also raised federal claims, arguing that Act 77 violated the United States Constitution and the Civil Rights Act. *See* Petition for Review, 8/31/2021, ¶¶ 79-90.

The respondents, the Pennsylvania Department of State and the Acting Secretary of the Commonwealth (collectively “Secretary”)<sup>8</sup> filed responses and cross-

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7. Joining Bonner are Representatives Timothy F. Twardzik, David H. Zimmerman, P. Michael Jones, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald Cook. Of these fourteen Appellees, eleven voted in favor of Act 77 (Representatives Jones, Jozwiak, Rapp, Maloney, Gleim, Brooks, Bernstine, Keefer, Moul, Ryan and Cook). Representative Zimmerman voted against Act 77. Representatives Bonner and Twardzik assumed office after the passage of Act 77.

8. At the time these proceedings commenced, the Department of State was led by Acting Secretary Veronica Degraffenreid. In January 2022, Leigh M. Chapman was appointed Acting Secretary of State, and so she has been substituted for former Acting Secretary Degraffenreid.

*Appendix A*

motions for summary relief, in which the Secretary argued that the Appellees' petitions should be dismissed because they were untimely and barred by the doctrine of laches<sup>9</sup> and Section 13 of Act 77, which the Secretary interpreted as vesting exclusive jurisdiction in this Court to hear constitutional challenges to Act 77 and providing that all such challenges were required to be raised within 180 days of the date of Act 77's enactment.

The Commonwealth Court consolidated the petitions for consideration, following which the York County Republican Committee, Washington County Republican Committee, Butler County Republican Committee ("Republican Intervenors") intervened as petitioners, and the Democratic National Committee and the Pennsylvania Democratic Party ("Democratic Intervenors") intervened as respondents.<sup>10</sup>

**C. The Commonwealth Court's Decision**

On January 28, 2022, the Commonwealth Court denied the Secretary's procedural challenges and held that Act 77 violates Article VII, Section 1 of the Pennsylvania Constitution. *See McLinko v. Dep't of State*, 270 A.3d 1243

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9. On this point, the Secretary relied upon *Kelly*, in which, as discussed above, a constitutional challenge to Act 77 was dismissed on the basis of laches.

10. The arguments raised by the intervening parties substantially mirror those raised by the principal parties in both the Commonwealth Court and this Court. To avoid redundancy, we discuss the intervenor's arguments only to the extent they diverge from those of the Appellees and the Secretary.

*Appendix A*

(Pa. Commw. 2022) (hereinafter “*McLinko*”); *McLinko v. Dep’t of State*, 270 A.3d 1278 (Pa. Commw. 2022) (hereinafter, “*Bonner*”). Addressing the substantive constitutional challenge first, the Commonwealth Court considered the three sections of Article VII that it found were implicated in this controversy. To begin, the court considered Article VII, Section 1 of the Pennsylvania Constitution, which states the following:

**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, 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.

*Appendix A*

PA. CONST. art. VII, § 1. The Commonwealth Court recognized that in *Chase v. Miller*, 41 Pa. 403, 419, Brightly's El. Cas. 214, 19 Legal Int. 44, 10 Pitts. Leg. J. 49 (1862), this Court interpreted the phrase "offer to vote" to mean to appear in person and deliver the ballot to election officials. *McLinko*, 270 A.3d at 1252 (quoting *Chase*, 41 Pa. at 419). At issue in *Chase* was the Military Absentee Act of 1839, which permitted absentee voting by electors in active military service. Because of the limitation imposed by "offer to vote," the *Chase* Court determined that the Military Absentee Act impermissibly absolved a group of voters (those in active military service) of a constitutionally required qualification, and therefore that the Act was unconstitutional. The Commonwealth Court observed that this definition was subsequently relied upon in *In re Contested Election of Fifth Ward of Lancaster City*, 281 Pa. 131, 126 A. 199 (Pa. 1924), wherein this Court considered the constitutionality of the 1923 Absentee Voting Act, which expanded the opportunity for absentee voting to include civilians. The *Lancaster City* 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 active military service. *McLinko*, 270 A.3d at 1253 (quoting *Lancaster City*, 126 A. at 200). Because the Constitution did not extend the absentee vote to electors other than those in active military service, the Court found that the 1923 Absentee Voting Act violated the Constitution. The Commonwealth Court seized on this Court's explanation in *Lancaster City* that the General Assembly may confer voting rights "only upon those designated by the

*Appendix A*

fundamental law, and subject to the limitations therein fixed[,]” and that no matter how admirable the purpose of the 1923 Absentee Voting Act, “an amendment to the Constitution must be adopted permitting this to be done.” *Id.* (quoting *Lancaster City*, 126 A. at 201).

The court then turned its attention to Article VII, Section 4, which provides as follows:

**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.

The Commonwealth Court traced the development of this provision, beginning with the Constitution of 1776, to establish that through the passage of time, language was added to the initial spartan requirement that a vote be cast by ballot to provide that a vote so cast be done in secrecy. *See McLinko*, 270 A.3d at 1254-57. It characterized the 1901 amendment, which added the phrase “or by such other method as may be prescribed by law; [p]rovided[] that secrecy in voting be preserved” as the measure that “embedded” the requirement for secrecy in our Constitution. *Id.* at 1256. With regard to the phrase “such other method as prescribed by law,” the Commonwealth Court opined that it was “likely” included to permit the use of voting machines. *Id.* (citing *Lancaster City*, 126 A. at 201; *People ex rel. Deister v. Wintermute*, 194 N.Y. 99,

*Appendix A*

86 N.E. 818, 819 (N.Y. 1909)).

Finally, the court considered Article, VII Section 14:

**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 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. The court explained that the first amendment to our Constitution permitting absentee voting occurred in 1864, in response to the *Chase* decision, when the electorate amended the Constitution to permit

*Appendix A*

absentee voting by active-duty soldiers. Following this inaugural amendment, the court observed, amendments occurred in 1949, 1957, 1967 and 1985 to expand the class of “qualified electors” who were unable to vote in person. *See McLinko*, 270 A.3d at 1258-60.

From these three provisions, the Commonwealth Court synthesized the following. First, the phrase “offer to vote” requires the physical presence of the elector, as a “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.<sup>11</sup> Further, that this “in-person” requirement applies unless an elector falls into an explicit exception thereto, and finally, that an amendment to the Constitution is required before legislation may “be placed on our statute books” to allow qualified electors to be absent from their polling place on Election Day and vote by mail. *McLinko*, 270 A.3d at 1260 (quoting *Lancaster City*, 126 A. at 201).

The Commonwealth Court found no merit to the Secretary’s argument that Section 4 gives the General Assembly broad authority to enact legislation providing for different methods of voting. The court reasoned that the authority imparted by Section 4 is restricted by the General Assembly’s ability to enact legislation only within the bounds of the Pennsylvania Constitution; thus, it concluded that Section 4 could not be read, as suggested

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11. The court found the holdings in *Chase* and *Lancaster City* to be clear, direct and binding, and that they leave no room for “modern” adjustment by interpretation. *McLinko*, 270 A.3d at 1261.

*Appendix A*

by the Secretary, to authorize a system of universal mail-in voting that would permit voting to occur from any location. The court reiterated its understanding that “such other method” in Section 4 refers merely to an alternative to a paper ballot for use at a polling place. *Id.* at 1262. In addition, the court explained that Section 4 and Section 14 speak to wholly different concerns, with Section 4 ensuring elections would be conducted free of coercion and fraud, and Section 14 addressing the concern that some electors who are physically unable to “attend at their proper polling places” should not be denied their right to vote. Thus, the court concluded that Act 77 contravenes Article VII, Sections 1 and 14 of the Pennsylvania Constitution because, in effect, the General Assembly created a new class of voter that could be exempt from the Section 1 qualifications without constitutional authority. *Id.* at 1262-64.

The court then turned to the procedural objections to the petitions for review on the basis that they were untimely. The Commonwealth Court rejected the argument that laches should bar the petitions, distinguishing *Kelly* on the basis that here the Appellees filed their petitions in the summer 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. *McLinko*, 270 A.3d at 1269; *Bonner*, 270 A.3d 1278. The Commonwealth Court thus found no such risk in the present cases, given that Appellees sought prospective relief.<sup>12</sup>

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12. We include this background for purposes of completeness, although the Secretary does not pursue a challenge to the Commonwealth Court’s ruling regarding laches before this Court.

*Appendix A*

The court next addressed the Secretary's argument that the petitions should have been dismissed because pursuant to Section 13 of Act 77, the legislature required that challenges to the mail-in voting provisions be brought within 180 days of its enactment. The Commonwealth Court initially questioned the notion that the General Assembly could prevent judicial review of a statute whose constitutionality is challenged, opining that an unconstitutional statute is void ab initio. The court also found that Section 13 of Act 77 does not establish a statute of limitations for instituting a constitutional challenge to Act 77, but rather gave this Court exclusive jurisdiction to hear challenges to the enumerated provisions of Act 77 for the first 180 days after enactment, after which jurisdiction to hear such constitutional challenges reverted to the Commonwealth Court in accordance with the Judicial Code, 42 Pa. C.S. § 761(a)(1). *McLinko*, 270 A.3d at 1271-72. Having rejected the procedural challenges, the court granted summary relief to the Appellees by declaring that Act 77 violates Article VII, Section 1 of the Pennsylvania Constitution, PA. CONST. art. VII, § 1. In light of the summary relief granted, the Commonwealth Court declined to address Bonner's federal claims. *Bonner*, 270 A.3d at 1283 n.12.

The Honorable Michael H. Wojcik, joined by the Honorable Ellen Ceisler, disagreed with the finding of unconstitutionality.<sup>13</sup> The dissent found that Section 4,

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13. Judge Wojcik filed a concurring and dissenting opinion, as he agreed with the majority regarding the Secretary's procedural challenges. *See McLinko*, 270 A.3d at 1273. For the sake of simplicity, we refer to his position as the dissent.

*Appendix A*

by its plain language, empowered the General Assembly to provide for the method of universal mail-in voting. In the dissent's view, *Lancaster City* “merely stands for the proposition that the General Assembly may not by statute extend the scope of a method of voting already specifically provided for in [A]rticle VII, [S]ection 14 of the Constitution[,]” but the holding “in no way limits the authority conferred upon the General Assembly by [A]rticle VII, [S]ection 4 to provide for a new and different method of voting such as the universal mail-in ballot provisions of Act 77.” *McLinko*, 270 A.3d at 1276 (Wojcik, J., concurring and dissenting). The dissent further challenged the majority's reading of the language in Section 4 that elections shall be by ballot “or such other method as may be prescribed by law” as referring only to the use of voting machines. Such a reading, in the dissent's view, reduced Section 4 to surplusage because an amendment was made to Article VII, Section 6 specifically to permit the use of voting machines.<sup>14</sup> To the dissent, the

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14. Article VII, Section 6 provides the following:

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 elections or primaries, in any county, city, borough, incorporated town or township of the Commonwealth, at the option of the

*Appendix A*

only way to construe Sections 1, 4, and 14 together while giving effect to all provisions is to read Article 4's "such other method as may be prescribed by law" language as empowering the General Assembly to "provide a distinct method of casting a ballot for those electors who are present in their municipality" during an election. *Id.* at 1278. The dissent also observed that Section 11 of Act 77 contains a "poison pill" provision, such that the finding of unconstitutionality as to the mail-in voting provisions renders all of Act 77's provisions void. *Id.* (citing 25 P.S. § 2602, Note ("Section 11 of [Act 77] provides that 'Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are non-severable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.'")). Parties on both sides appealed.

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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 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.

*Appendix A***D. Arguments of the Parties**

The Secretary challenges the Commonwealth Court’s finding that the universal mail-in voting provisions of Act 77 are unconstitutional and urges this Court to distinguish or overrule the *Chase* and *Lancaster City* decisions. *See* Secretary’s Brief at 4; Democratic Intervenors’ Brief at 4-5. The Secretary also contests the determination that Appellees’ claims were not foreclosed as untimely pursuant to Section 13 of Act 77. In their cross appeal, the Bonner Appellees and the Republican Intervenors argue that the Commonwealth Court erred by failing to award relief for the claims it raised under federal law. *See* Bonner’s Brief at 2; Republican Intervenor’s Brief at 2.<sup>15</sup>

The Secretary reiterates her challenge to the Commonwealth Court’s jurisdiction to hear the issues raised by the Appellees. As she did before the Commonwealth Court, the Secretary points to Sections 13(2) and (3) of Act 77 to argue that this Court possesses exclusive jurisdiction over constitutional challenges to the universal mail-in voting provisions of Act 77, and that all

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15. On behalf of the Secretary, amicus briefs were filed by the Pennsylvania House and Senate Democratic Caucuses, the Philadelphia County Board of Election, and the Pennsylvania American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”). Additionally, a number of individuals and Disability Rights Pennsylvania filed amicus briefs on behalf of the Secretary. On behalf of the Appellees, amicus briefs were filed by American First Policy Institute, Landmark Legal Foundation, Citizens United, and Honest Elections Project. In large part, the amici on both sides reiterate the arguments made by the parties.

*Appendix A*

such challenges were required to be raised within 180 days of Act 77's enactment. *See* Secretary's Brief at 24-26. She supports her position with comments made by members of the General Assembly during Act 77's inception indicating the intent behind Section 13 was to ensure that certain challenges would be brought within 180 days of enactment so that all such issues would be settled before Act 77 would become effective. *Id.* at 27-28. It would be absurd, she argues, for the General Assembly to vest this Court with jurisdiction to hear these challenges initially, but to then "pass the jurisdictional baton" to the Commonwealth Court following the passage of time. *Id.* at 28. The Secretary recognizes that in *Delisle v. Boockvar*, 234 A.3d 410 (Pa. 2020) (per curiam), this Court transferred a constitutional challenge to Act 77 to the Commonwealth Court for disposition because it was filed more than 180 days after the date of Act 77's enactment. She argues that *Delisle* is not binding because the challenge there was an as-applied, not a facial, constitutional challenge.<sup>16</sup> This distinction is critical, she contends, because the various bases that could give rise to an as-applied challenge cannot be pre-determined, but the bases for a facial challenge are ascertainable upon the enactment of the legislation. As such, it is reasonable for the General Assembly to set a period during which all readily ascertainable facial

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16. A facial challenge to the constitutionality of a statute is a claim alleging that a statute suffers an "ineluctable constitutional deficiency." *Clifton v. Allegheny Cnty.*, 600 Pa. 662, 969 A.2d 1197, 1229 (Pa. 2009). An as-applied challenge to the constitutionality of a statute is one asserting that the statute, even though it may generally operate constitutionally, is unconstitutional in a challenger's particular circumstances. *See id.* at 1224.

*Appendix A*

constitutional challenges may be brought; in this case, 180 days from the date of enactment. *Id.* at 33-34. Further, the Secretary emphasizes that the per curiam order issued in *Delisle* lacks the force of precedent, and in that manner, suggests that the Court is free to disregard it entirely. *Id.* at 34 (citing *Commonwealth v. Thompson*, 604 Pa. 198, 985 A.2d 928, 937 (Pa. 2007)).

Appellees respond that the Commonwealth Court's interpretation of Section 13 was correct. Noting that its decision on this front was unanimous, McLinko asserts that a 180-day limitation to bring constitutional challenges would itself be unconstitutional, and that the *Delisle* order established that the 180-day period was merely a "window of exclusive jurisdiction." McLinko's Brief at 46-47. Bonner agrees that *Delisle* is instructive and posits that it reveals this Court's understanding that Section 13(3) is nothing but a limitation on this Court's exclusive jurisdiction. Bonner's Brief at 21-22 (quoting *Delisle*, 234 A.3d at 411 (Wecht, J., concurring)). He argues that it is "absurd" to suggest that the General Assembly could preclude challenges to the constitutionality of a statute, as such a measure would violate the separation of powers by limiting the judiciary's ability to conduct judicial review. *Id.* at 20, 24-25.

The Secretary further challenges the Commonwealth's Court's finding that the universal mail-in voting provisions of Act 77 violated Article VII, Section 1. She emphasizes that Section 1's exclusive purpose is to establish the qualifications for an elector, and she identifies four discrete qualifications therein: the elector must have (1) obtained

*Appendix A*

twenty-one years of age; (2) been a United States citizen for at least one month prior to the election; (3) resided in the Commonwealth for ninety days prior to the election; and (4) resided in the election district in which the elector seeks to vote for sixty days prior to the election. Secretary's Brief at 40. She draws our attention to both the repeated use of the elector's residence (both within the Commonwealth and within a particular election district) as a benchmark qualification within these criteria and the omission of an explicit requirement for physical presence at the time of the election. *Id.* In her view, the language of Section 1 in no way establishes voting in propria persona as a qualification.

The Secretary advances multiple arguments against the conclusion that "offer to vote" references a method of voting. First, she directs our attention to Section 4, the very existence of which the Secretary contends precludes the Commonwealth Court's (and Appellees') interpretation of Section 1. *Id.* at 43. The exceedingly broad language of Section 4, according to the Secretary, vitiates the Commonwealth Court's supposition that the "methods" mentioned therein was referring only to the use of voting machines. *Id.* at 43-44. The Secretary finds further support for her position in Section 14, which provides that the General Assembly must provide "qualified electors" a manner by which to vote when not present in their election districts. *Id.* at 45. She argues that the Commonwealth Court's conclusion that in-person voting is itself a qualification that must be met to be deemed a "qualified voter" is in irreconcilable conflict with this language. *Id.*

*Appendix A*

Taking a closer look at the phrase itself, the Secretary points out that “offer to vote” made its initial appearance in the 1838 Constitution as part of a revision that created the first residency requirement dictating where an elector could cast his ballot. The Secretary points to historical records establishing that the purpose of the residency requirement was to promote election integrity and reduce election fraud, and that it was not contemplated as a measure that would impact the General Assembly’s authority to establish methods of voting. *Id.* at 49-50. The Secretary reports that other jurisdictions that adopted the same “offer to vote” language into their constitutions when creating residency requirements have determined that this verbiage does not preclude the enactment of legislation that permits mail-in voting. North Carolina provides a succinct example in its explanation that “an 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 officials.” *Id.* at 51 (quoting *Jenkins v. State Bd. Of Elections*, 180 N.C. 169, 104 S.E. 346, 349 (N.C. 1920)). Virginia and Montana also rejected the interpretation adopted by the Commonwealth Court, opining instead that it is contrary to the fundamental rules of construction and the very “rudiments of English” to presume that where there are separate provisions for qualifications and methods, the drafters intermixed those considerations. *Id.* at 52 (quoting *Moore v. Pullem*, 150 Va. 174, 142 S.E. 415, 421-22 (Va. 1928); *Goodell v. Judith Basin Cnty.*, 70 Mont. 222, 224 P. 1110, 1114 (Mont. 1924)). The Secretary rebuffs the notion, urged by Appellees in the court below, that if Section 1 does not contain an “in-person” voting

*Appendix A*

requirement, there was no need for the enactment of Section 14 because Section 14 does not merely permit the General Assembly to devise a method of absentee voting for certain voters, but it requires it to do so. *Id.* at 54. The Secretary argues that a directive requiring the General Assembly to make absentee voting available to certain voters in no way prohibits it from extending a similar method of voting to others. The Secretary stresses that the Constitution previously provided that the General Assembly “may” devise absentee voting, but that it was changed to “shall” in 1967, “underscore[ing] that [Section] 14 sets a floor for when absentee voting must be allowed; it does not establish a ceiling defining when it is forbidden.” *Id.* Thus, rather than rendering Section 14 superfluous, the Secretary argues that her interpretation gives Section 14 an essential purpose by providing for the exercise of a constitutional right by particular categories of voters which the General Assembly “must respect and may not take away.” *Id.* at 55 n.15.

Finally, the Secretary challenges the Commonwealth Court’s reliance on the *Chase* and *Lancaster City* opinions. Concerning *Chase*, the Secretary emphasizes the vast difference between the “secure, confidential” mail-in ballot procedures established by Act 77 and the out-of-state, battlefield election districts that were permitted by that statute under review in *Chase*. *Id.* at 57-58. She argues that the Commonwealth Court failed to consider *Chase* in context, choosing instead to isolate its discussion regarding “offer to vote” as used in the 1838 Constitution (which lacked a provision giving the General Assembly discretion to prescribe methods of voting and which does not resemble the Constitution under which Act 77 was

*Appendix A*

devised), and consider the phrase in a vacuum. *Id.* at 58-59. Because the Commonwealth Court failed to appreciate the material differences between the Constitution as it exists today and the Constitution as it existed at the time of *Chase*, the Secretary maintains that no value can be placed on *Chase*'s pronouncement regarding "offer to vote."

The Secretary finds related fault in the *Lancaster City* decision. Although *Lancaster City* was decided under the 1924 Constitution, which included a provision giving the General Assembly broad authority to authorize methods of voting, the Secretary argues that to the extent the *Lancaster City* Court considered this provision at all, it incorrectly interpreted it to mean that the General Assembly could only prescribe different methods for the return of ballots from election districts to county officials, while the "offer to vote" must still take place in the election district. *Id.* at 60 (citing *Lancaster City*, 126 A. at 201). Once again, the Secretary points to the changes in the Constitution that followed *Lancaster City*, particularly the 1967 constitutional amendment that required the General Assembly to expand the class of electors who could place absentee votes (the change in Section 14 from "may" to "shall") to support her argument. *Id.* at 61-63. She argues that this amendment, the purpose of which was to make voting more accessible, occurred at the same time the General Assembly expanded the scope of voters permitted to vote by absentee ballot beyond the categories provided for in Section 14. The Secretary paints these actions as "entirely consistent with the General Assembly's constitutional power to enact the mail-in voting provisions of Act 77." *Id.* at 63.

*Appendix A*

If this Court were to conclude that *Chase* and *Lancaster City* are on point, the Secretary urges the Court to overrule both decisions. *Chase*, she argues, cannot withstand scrutiny today, as it was “expressly informed by the anti-democratic sentiments of its era” that restricted voting to white men; a restriction that the *Chase* Court embraced and celebrated. *Id.* at 64. Additionally, she contends that *Chase*’s consideration of “offer to vote” and the residency requirements is unsupported by any analysis of the text, structure or history of the 1838 Constitution.<sup>17</sup> The Secretary faults

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17. Article III of the 1838 Constitution provided as follows:

Election franchise.

Section I. In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the State one year, and in the election district where he offers to vote, ten days immediately proceeding 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. But a citizen of the United States who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district, and paid taxes, as aforesaid, shall be entitled to vote after residing in the State six months: Provided, That white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year and in the election district ten days, as aforesaid, shall be entitled to vote, although they shall not have paid taxes.

*Appendix A*

the *Chase* Court for failing to engage in such analysis in favor of “prioritiz[ing] the Court’s own policy views regarding how elections ought to be administered” and then summarily asserting that the Constitution reflects the same beliefs. *Id.* at 65.<sup>18</sup> *Lancaster City* extended *Chase*’s infirmities by adopting its pronouncements. For these reasons, the Secretary calls upon the Court to invoke our sparingly used prerogative to overrule these cases and deny them the force and effect of stare decisis. *Id.* She reminds us of this Court’s explanation that our “faithfulness to precedent is not sufficient justification to buttress ... decisions proven wrong on principle” and that “stare decisis is not a vehicle for perpetuating error, but a legal concept which responds to the demands of justice[.]” *Id.* at 66 (quoting *Tincher v. Omega Flex, Inc.*, 628 Pa. 296, 104 A.3d 328, 352 (Pa. 2014)).

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Elections.

Section II. All elections shall be by ballot, except those by persons in their representative capacities, who shall vote viva voce.

Electors privilege.

Section III. Electors shall, in all cases except treason, felony, and breach or surety of the peace, be privileged from arrest during their attendance on elections, and in going and returning from them.

PA. CONST. art. III (1838).

18. Again, the Secretary draws our attention to jurisdictions that have rejected the *Chase* interpretation of “offer to vote” as support for her position that its interpretation is flawed. *See* Secretary’s Brief at 65.

*Appendix A*

The Appellees find no fault in the Commonwealth Court’s interpretation of “offer to vote,” or its reliance on the *Chase* and *Lancaster City* decisions. Concerning Section 1, Bonner argues that its qualifications speak not only to who may vote, but also where a voter may vote, and for that reason, “offer to vote” has always been understood as meaning “to present oneself in propria persona.” Bonner’s Brief at 34. Act 77’s universal mail-in voting conflicts with these constitutional requirements by allowing a voter to mail a ballot from anywhere to a county board of election, nullifying both requirements that the vote be made in person and in a particularly designated election district.<sup>19</sup> *Id.* It is Bonner’s position that the only exceptions to the requirement that a vote be cast in person are found in Section 14’s absentee voting provision. He emphasizes that even in the absentee context, Section 14 requires the General Assembly to provide both a time and place for absentee votes to be cast. *Id.* at 36 (quoting PA. CONST. art VII, § 14). Bonner argues that because Act 77’s mail-in provisions lack designated times and places for the casting of a ballot, they unconstitutionally expand the scope of absentee voting. *Id.*

Bonner’s argument for the proposition that the “offer to vote” must be made in person absent an exception named in the Constitution is built on *Chase* and *Lancaster City*.<sup>20</sup> He emphasizes that in *Lancaster City*, which

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19. As discussed *infra*, the laws governing absentee voting permit this very procedure.

20. Appellees bolster their argument with discussion of the 1944 New Mexico case of *Chase v. Lujan*, 1944-NMSC-027, 48 N.M. 261, 149 P.2d 1003 (N.M. 1944), as an example of another

*Appendix A*

“reaffirmed” *Chase*, the Court struck down a statute that purported to extend absentee voting to certain civilians when the only constitutional allowance for absentee voting belonged to those in active military service. Bonner identifies two underlying principles for this holding: the presumption that constitutional amendment allowing for absentee voting was made deliberately and that

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jurisdiction that relied on *Chase*’s interpretation of “offer to vote” in its constitution. See Bonner’s Brief at 43. 45 n.8. At issue in *Lujan* was the interpretation of “offer to vote” as the heart of a challenge to a statute that permitted absentee voting for those voters engaged in active United States military or naval service. Rejecting the challenge, the New Mexico Supreme Court pointed to two prior decisions that interpreted “offer to vote” as requiring in-person voting, *Thompson v. Scheier*, 1936- NMSC 026, 40 N.M. 199, 57 P.2d 293 (N.M. 1936), and *Baca v. Ortiz*, 1936- NMSC 054, 40 N.M. 435, 61 P.2d 320 (N.M. 1936). Appellees are correct that the *Lujan* court detailed how, in *Thompson*, the New Mexico Supreme Court validated its interpretation with citation to two cases from “sister states” that had reached the same conclusion, including *Chase*. See *Lujan*, 149 P.2d at 1006-7. However, the *Lujan* Court referenced *Chase* and the other state’s interpretations as collateral support to its own analysis, which focused heavily on New Mexico’s jurisprudential history. The *Lujan* Court considered that at the time New Mexico adopted its constitution, a long-standing territorial law explicitly required the presence of the voter at the polls; it provided, “All votes shall be by ballot, each voter being required to deliver his own vote in person.” *Lujan*, 149 P.2d at 1004 (quoting L. 1851, p. 196, Code 1915, § 1999). It further recognized multiple other territorial statutes in effect at the time of the constitution’s adoption that used the phrase “offer to vote.” *Id.* at 1004-05. It is impossible not to conclude that the law requiring the in-person delivery of a ballot and the statutes already in existence that used “offer to vote” were the bases for the *Lujan* Court’s interpretation.

*Appendix A*

designating a particular class of electors (those on active military duty) excludes all others. *Id.* at 38-39. He urges this Court to follow *Chase* and *Lancaster City* and to apply their holdings in this case, as it involves substantially similar facts and constitutional provisions. *Id.* at 40. He contends that the text of Sections 1 and 4 have remained the same in all relevant ways since the time of *Lancaster City*, so there is no basis upon which to depart from it at this juncture. *Id.* at 42-43. Bonner rejects the notion that because the General Assembly changed the language of Section 14 from “may” to “shall,” Section 14 provides a floor for when absentee voting must be permitted. Where the Secretary found significance in the use of “shall” in Section 14, Bonner points to the language of Section 1, which provides that limitations are subject to “laws requiring and regulating the registration of electors as the General Assembly may enact,” and argues that “an affirmative ‘shall’ cannot give the legislation more discretion than ‘may.’” *Id.* at 48 (quoting PA. CONST. art VII, § 1). He also cautions that the Secretary’s “floor/ceiling” argument would lead to the conclusion that the amendments to Section 14 that occurred during the twentieth century to expand the categories of absentee voters were unnecessary because the General Assembly could have simply allowed mail-in voting “for any reason, or for no reason at all.” *Id.* at 49. In essence, Bonner argues that the use of constitutional amendment to expand exceptions to in-person voting in the past proves that all such expansions must be accomplished by constitutional amendment. See *id.* at 50-53.<sup>21</sup>

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21. See also McLinko’s Brief at 23 (“If [the Secretary’s] interpretation of Article VII is correct, [expansion of absentee voting by constitutional amendment] was a colossal waste of time:

*Appendix A*

Like Bonner, McLinko argues for adherence to *Chase* and *Lancaster City*. He cautions that this Court should not cast aside this “settled law[,] [e]ven if there were doubts about the correctness of their holdings[.]” McLinko’s Brief at 15. He contends that the in-person voting requirement first recognized in *Chase* and later endorsed in *Lancaster City* should stand because it is easily understood, easily applied and workable. McLinko argues that the Secretary’s request to overrule these cases simply in favor of a “‘modern’ interpretation of the Constitution” is not a sufficient basis upon which to do so. *Id.* at 16-17. This is particularly so, McLinko argues, because the *Chase* and *Lancaster City* Courts rejected arguments analogous to those advanced by the Secretary presently, as they refused to be swayed by sympathy for the disenfranchised soldiers in favor of hewing to the polestar of dispassionate constitutional interpretation. *Id.* at 18. He cautions that precedent should not be overturned simply because it would satisfy desired policy objectives. *Id.* at 24-25.

McLinko also mirrors Bonner’s argument that the only exceptions to Section 1’s in-person voting requirement are found in Section 14, and that the change in that section from “may” to “shall” did not transform Section 14 into a “floor” for absentee voting, thereby freeing the General Assembly’s hands to enact Act 77. *See id.* at 26-35. Rather, McLinko contends that the more reasonable interpretation is to presume that amending Section 14 while leaving Section 1 in place demonstrates the intent to not upset

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[t]he General Assembly possessed the power to expand absentee voting all along.”).

*Appendix A*

the settled interpretation of Section 1. *Id.* at 34-36. In his view, Section 4 does not grant the General Assembly “unlimited authority to prescribe election procedures[;]” rather, McLinko argues that the phrase “by ballot or such other method ... concerns the **medium** by which voters may indicate their selections.” *Id.* at 38 (emphasis in original). Like Bonner, he argues that a contrary reading would obviate the need for Section 14. *See id.* at 38-40, 45 (“[Section] 4 is limited to allowing voters to indicate their preference through media other than paper ballots.”). He further faults the Secretary’s proposed interpretation as inserting language into Section 14 that is not there; specifically, language allowing the General Assembly to “further provide for absentee voting by such other voters as the Legislature shall determine.” *Id.* at 41

Finally, McLinko argues that the reference in Article VII, Section 6 to voting machines does not support the Secretary’s argument. The purpose of Section 6, he posits, is to establish uniform election and voter registration laws and to provide narrow exceptions to the required uniformity. The “natural and plain meaning” thereof, as far as our inquiry here is concerned, is that the General Assembly must permit the use of different voting equipment in different parts of the Commonwealth, notwithstanding its general requirement for uniformity of election laws. *Id.* at 44. Thus, McLinko argues, Section 4 and 6 have separate purposes (methods of voting and uniformity of election laws, respectively), and so no conflict exists.

*Appendix A***E. The Historical Development of the Implicated Constitutional Provisions**

Article VII, Sections 1 (“Qualifications of electors”), 4 (“Methods of elections; secrecy in voting”), and 14 (“Absentee voting”) of our Constitution are central players in this contest. The genesis of these provisions and their evolution over time is pertinent to our resolution.

**1. Qualifications of Electors & Method of Elections**

Provisions governing voter qualifications and methods of voting, found today in Sections 1 and 4, have been a part of the fabric of Pennsylvania elections since colonial times. When Pennsylvania was established as a colony, the Royal Charter of 1681 conferred upon William Penn and his successors the power to enact laws “by and with the advice, assent, and approbation of the freemen of the province, or the greater part of them, or of their delegates or deputies.” Charles R. Buckalew, *AN EXAMINATION OF THE CONSTITUTION OF PENNSYLVANIA*, 191 (1883) (quoting Charter of 1681, § 4). In accordance with this grant of power, the Charter of 1682, §§ 1, 2, 14, 16, 23, authorized the election of members of the Executive Council and Representatives by “freemen” of the province of Pennsylvania. Buckalew, *supra*, at 191. Those qualified to vote in elections and to run for office at that time, or “freemen,” were defined as follows:

That every inhabitant in the said province that is or shall be a purchaser of one hundred acres of land or upwards, his heirs and assigns, and

*Appendix A*

every person who shall have paid his passage and taken up one hundred acres of land at one penny an acre, and have cultivated ten acres thereof, and every person that hath been a servant or bondsman and is free by his service, that shall have taken up his fifty acres of land and cultivated twenty acres thereof, and every inhabitant, artifices, or other resident in the said province that pays scot and lot to the government, shall be deemed and accounted a freeman of the said province; and every such person shall and may be capable of electing or being elected representatives of the people in Provincial Council or General Assembly in the said province.

*Id.* (quoting Charter of 1682, § 2). In a separate provision, the Charter of 1682 provided that “all elections of members, or representatives of the people ... shall be resolved and determined by the ballot.”<sup>22</sup> Charter of 1682, § 20.

In 1696, Governor William Markham set forth further eligibility requirements for “freemen” to be able to vote in elections:

And, to the end it may be known who those are, in this province and territories, who ought

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22. While the early Pennsylvania charters required the use of some form of paper ballot, there has been some suggestion that at that time “paper ballots were not generally used, beans and viva voce voting being used instead.” Joseph P. Harris, *ELECTION ADMINISTRATION IN THE UNITED STATES*, 16 (1934). However, by “1706 a statute was adopted in Pennsylvania which rigidly required the use of paper ballots.” *Id.*

*Appendix A*

to have right of, or to be deemed freemen to choose, or be chosen, to serve in Council and Assembly, as aforesaid, Be it enacted by the authority aforesaid, That no inhabitant of this province or territories, shall have right of electing, or being elected as aforesaid, unless they be free denizens of this government, and are of the age of twenty-one years, or upwards, and have fifty acres of land, ten acres whereof being seated and cleared, or be otherwise worth fifty pounds, lawful money of this government, clear estate, and have been resident within this government for the space of two years next before such election.

Buckalew, *supra*, at 191-92 (quoting Frame of Government of the Province of Pennsylvania of 1696). Five years later, the General Assembly approved the Charter of Privileges of 1701, which “continued to be the fundamental law of the province until the Declaration of Independence and substitution therefor of the Constitution of 1776.” *Id.* at 192. Through the 1701 Charter it was provided that

no inhabitants of the province shall have right of election or being elected unless he or they be native-born subjects of Great Britain, or be naturalized in England or in this province, and unless such person or persons be of the age of twenty-one years or upwards, and be a freeholder or freeholders in this province, have fifty acres of land, or more, well settled, and twelve acres thereof cleared and improved, or be otherwise worth forty pounds lawful money

*Appendix A*

of the province, clear estate, and have been resident therein for the space of two years before such election.

*Id.* at 192-93.<sup>23</sup> Thus, throughout colonial times, Pennsylvania's governing charters meticulously detailed the qualifications necessary to be eligible to vote, disconnected from any requirements concerning the method or manner of voting.

Following the colonies' declaration of their independence from Great Britain, Pennsylvania adopted its first Constitution, the Constitution of 1776, which provided therein:

Every freeman of the full age of twenty-one years, having resided in this state for the space of one whole year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector: Provided always, That sons of freeholders of the age of twenty-one years shall be entitled to vote, although they have not paid taxes.

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23. The Charter of Privileges of 1701 did not contain this language; but rather stated "[t]hat the qualifications of electors and elected ... shall be and remain as by a law of this government, made at New Castle, in the year 1700, entitled 'An Act to ascertain the number of members of Assembly and to regulate elections.'" Buckalew, *supra*, at 192 (quoting Charter of Privileges of 1701). Buckalew's historical analysis led him to conclude that the Charter was referencing the language cited above. *Id.* at 192-93.

*Appendix A*

PA. CONST. ch. II, § 6 (1776). In a separate provision, the 1776 Constitution provided that “[a]ll elections ... shall be by ballot, free and voluntary[.]” *Id.* ch. II, § 32. With the adoption of the 1790 Pennsylvania Constitution,<sup>24</sup> the drafters for the first time created a standalone article governing elections. Article III of the 1790 Constitution was untitled and contained three provisions. *See* PA. CONST. art. III, §§ 1-3 (1790). The first set forth the qualifications of eligible voters as follows:

In elections by the citizens, every freeman of the age of twenty-one years, having resided in the state two years next before the election, and within that time paid a state or county tax, which shall have been assessed at least six months before the election, shall enjoy the rights of an elector: Provided, that the sons of persons qualified as aforesaid, between the ages of twenty-one and twenty-two years, shall be entitled to vote, although they shall not have paid taxes.

PA. CONST. art. III, § 1 (1790). The second provision, once again separate from the qualifications of voters, required that “[a]ll elections shall be by ballot, except those by persons in their representative capacities, who shall vote viva voce.” *Id.* § 2. The third exempted voters from arrest while voting. *Id.* § 3.

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24. Constitutional Conventions resulted in the Constitutions of 1790, 1838, 1874, and 1968.

*Appendix A*

The next amendments occurred following the Constitutional Convention of 1837 (giving rise to what is commonly referred to as the Constitution of 1838), and it was here that the phrase “offer to vote” made its first appearance. The phrase was suggested by Emmanuel Reigart, a delegate from Lancaster County, during the Convention. Reigart proposed amending the language of Article III, Section 1 of the 1790 Constitution by inserting the phrase, “and shall have resided in the district in which he shall offer to vote, at least ten days immediately preceding such election” after the words “before the elections.” 9 John Agg, PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG, ON THE SECOND DAY OF MAY 1837, 296 (1838). This proposal marked the first election district residency requirement, as all previous iterations of Pennsylvania’s governing charter only required that a qualified elector reside in the state or, prior thereto, the colony. *See* Charter of 1682, § 2; Frame of Government of the Province of Pennsylvania of 1696; Charter of Privileges of 1701; PA. CONST. ch. II, § 6 (1776); PA. CONST. art. III, § 1 (1790). As a result, until the amendment that arose from the 1837 Constitutional Convention, there was no restriction limiting where in the Commonwealth an elector could vote. Records from the Constitutional Convention reveal that one purpose underlying the proposed election district residency requirement was the belief that “[t]hose who resided in a particular district[] were the persons who ought alone to be entitled to vote in that district, because they were the persons to be affected by the election in that district.” 9 Agg, at 309 (quoting Delegate James

*Appendix A*

Biddle). Delegate Reigart viewed his proposed language as “sett[ing] the difficulty as to residence.” *Id.* at 296.

As a result of Delegate Reigart’s proposal, Article III, Section 1 of the 1838 Constitution was amended to provide the following with respect to voter qualifications:

In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the State one year, and in the election district where he offers to vote, ten days immediately proceeding 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. But a citizen of the United States who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district, and paid taxes, as aforesaid, shall be entitled to vote after residing in the State six months: Provided, That white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year and in the election district ten days, as aforesaid, shall be entitled to vote, although they shall not have paid taxes.

PA. CONST. art III, § 1 (1838). The title of this section was “Election franchise.” *Id.* Thus, the recorded history establishes that the sole reason for the inclusion of the phrase “offer to vote” was to capture the election district

*Appendix A*

residency requirement. Article III, Section 2 remained unchanged, providing that “[a]ll elections shall be by ballot” except for those voting in representative capacities. PA. CONST. art III, § 2 (1838). Consistent with colonial charters and Commonwealth constitutional history, nothing in the recorded procedures of the constitutional convention resulting in the 1838 Constitution suggests the intent to intermingle qualifications of voters with the method of voting.

In 1874, Article III was renumbered to Article VIII, and the number of its provisions expanded exponentially. *See* PA. CONST. art. VIII, §§ 1-17 (1874). The three provisions (establishing voter qualifications, providing that voting be done by ballot, and prohibiting the arrest of electors while voting) that had sufficed since 1790 to govern elections grew to include, *inter alia*, provisions establishing that those in actual military service may vote absentee in the manner “as are or shall be prescribed by law[;]”<sup>25</sup> that election laws are to be uniform but that no elector shall be deprived of the privilege of voting for failing to register;<sup>26</sup> and that political subdivisions shall be formed or divided into election districts.<sup>27</sup> Each provision within the new Article VIII was titled, with the sections regarding qualifications and voting methods being labeled respectively, “Qualifications of voters,” and “Elections by ballot.” PA. CONST. art VIII, §§ 1, 4 (1874). The article

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25. PA. CONST. art. VIII, § 6 (1874).

26. PA. CONST. art. VIII, § 7 (1874).

27. PA. CONST. art. VIII, § 11 (1874).

*Appendix A*

housing these provisions was given the title “Of Suffrage and Elections.” PA. CONST. art VIII (1874).

Further amendments were made in 1901, three of which are particularly significant for our present purposes. The first modified then-Article VIII, Section 4 from stating that elections “shall be by ballot” to providing that “[a]ll 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 (1874) (amended in 1901) (emphasis added). By its terms, this amendment of Section 4 gave the General Assembly the authority to devise methods of voting, subject to secrecy requirements. The second and third relevant amendments, found in Sections 1 and 7, subjected qualified electors to registration laws and required that laws regulating the registration of electors must be uniform. PA. CONST. art. VIII, §§ 1, 7 (1874) (amended in 1901). In fact, however, a proliferation of registration laws predated the constitutional amendment requiring such laws. The Registry Act of 1869 set forth requirements for voter registration, allowing electors to prove their qualifications prior to Election Day, thereby having their information entered onto a voter registration list. *See* Act of April 17, 1869, No. 38, P.L. 49. While this requirement was not a part of the Constitution at that time, this Court in *Patterson v. Barlow*, 60 Pa. 54 (1869), found the Registry Act of 1869 to be constitutional. In so doing, the *Patterson* Court reasoned that registration laws that allowed electors to demonstrate that they were qualified prior to Election Day were fully within the legislature’s powers “to prescribe the evidence of the identity and

*Appendix A*

the qualifications of the voters.” *Id.* at 83. “The essential purpose of a registration law is that the qualifications of electors may be determined at some period in advance of the election, and that a list of such electors may be made, which shall be binding upon the election officers upon election day.” Thomas Raeburn White, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA, 356 (1907).

## 2. Absentee Voting

Constitutionally permitted absentee voting in Pennsylvania dates to 1864.<sup>28</sup> This first iteration of absentee voting, which was available only to active-duty military voters who were absent from their election districts, *see* Act of August 25, 1864, No. 871, P.L. 990, involved an intricate procedure. A captain’s or officer’s quarters would be designated as the voting location, where

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28. The constitutional amendment provided as follows:

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

PA. CONST. art. III, § 4 (1838) (amended in 1864) (emphasis added). As the bolded language demonstrates, and as will be discussed further in this Opinion, this amendment remedied what the *Chase* Court identified as the fatal defect in the statute under its review by ensuring that the General Assembly, not military commanders, established all regulations related to the military absentee vote.

*Appendix A*

the soldier would appear before the judge of election. At that location, the election judge would examine the soldier's qualifications to vote within the district for which he sought to vote. If satisfied, the soldier would fill out his "ticket" and return it to the judge of election before Election Day, who would deposit it into the ballot box. With the vote thus cast, the election judge would record the voter's information, including his election district, in the corresponding poll book. Once the poll closed, the election judge and his clerks would open the ballot box and tally the votes by hand. The election judges would then mail each poll book and the "tickets" recorded to each election district.

There was an exception for soldiers whose duties made it impossible for them to appear at their designated military poll on the designated day. These soldiers could, before Election Day, seal their completed ballot in an envelope and provide a written statement containing their names and election districts, and designating a fellow qualified voter within their election district to cast their ballot. On Election Day, this designated representative would bring the envelope and written grant of authority to cast the absentee ballot to the election district's polling location, where an election official would open the envelope in view of the election board and the representative would swear an oath that he had not tampered with the ballot.

In 1951, this procedure was radically altered and permitted absentee voters to return ballots by mail.<sup>29</sup> By

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29. Although the General Assembly had previously attempted to create a mail-in voting procedure in 1923 to include non-military

*Appendix A*

this time, absentee voting was an option available to active military and disabled or injured veterans. The absentee voter applied to the Secretary of the Commonwealth for an absentee ballot. This application could be made by mail at any time preceding Election Day, but the ballot was required to be completed prior to Election Day. Once the voter received the ballot, he would appear before any person authorized to administer oaths under state, federal, or military law in order to complete the ballot. The voter first would display the ballot to this person to establish that it was unmarked. The voter would then fill out the ballot in the presence of this official, but in such a way that the official could not see the voter's selections. The voter then folded the absentee ballot and placed it in an envelope marked "Official Military Ballot" before sealing it in a second envelope. The second envelope bore an affidavit on the outside, which the voter and the oath-administrator executed. The voter then mailed their ballot to their county board of elections. If voters were in active military service but present in their election districts on Election Day, they would follow this procedure but had the option to deliver the completed ballot, in its sealed envelopes, to the district's judge of elections.

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civilians absent from their districts on Election Day due to their duties, business or occupations, *see* Act of May 22, 1923, No. 201, P.L. 313, this Court invalidated that system in *Lancaster City*, which will be addressed in further detail later in this Opinion. It was in 1951 that the General Assembly first created a mail-in voting procedure for those absentee voters expressly enumerated in the Constitution. *See* Act of March 6, 1951, No. 1, P.L. 11-12, 16-17.

*Appendix A*

In 1963, when the absentee vote had been expanded to include people who would be absent from their election districts because of their “duty, business, or occupation,” or unable to appear at their polling location because of physical disability or illness, this procedure was again refined. *See* Act of April 29, 1963, No. 379, P.L. 738. Absentee voters would still apply for their ballots prior to Election Day, but the General Assembly eliminated the requirement to appear before an oath taker to complete the ballot. In its place, the General Assembly provided that the voter complete the ballot in secret before sealing it in an envelope marked “Official Absentee Ballot.” This envelope was then placed in a second envelope that had a declaration on the front with the voter’s information. The absentee voter could return the envelope through the mail or in person at the county board of election. This method of absentee voting has remained in place since that time.

As noted above, prior to 1963, absentee voting was available to those engaged in active military service, disabled veterans, those who would be absent from their election districts because of their “duties, business or occupation,” and “illness or physical disability.” PA. CONST. art. VIII, § 18 (1874) (amended in 1949); PA. CONST. art. VIII, § 19 (1874) (amended in 1957).<sup>30</sup> In 1963, the General

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30. The constitutional provision addressing absentee voting has been amended several times. In 1967, there were three such amendments. First, the constitutional amendments authorizing active military members and injured military veterans to vote absentee were both repealed. Second, the article governing elections had been renumbered from Article VIII to Article VII, moving the absentee voting provision to its current place in Article

*Appendix A*

Assembly expanded these categories to include the spouses of those in military service by legislative enactment. Act of August 13, 1963, P.L. 707, § 20, effective Jan. 1, 1964; *see also* 25 P.S. § 3146.1(b). In 1968, the General Assembly further expanded the use of voting by mail by extending it to those vacationing on Election Day and their spouses, as well as the spouses of the persons absent because of their duties, business or occupation.<sup>31</sup> Act of December 11, 1968, P.L. 1183, No. 375, §§ 1 to 3; 25 P.S. § 2602(z.3).

**F. Analysis****1. Timeliness of the Constitutional Challenge**

The Secretary's assertion that Section 13 is a statutory time bar that precludes this challenge to the constitutionality of Act 77 presents a matter of statutory interpretation, over which our standard of review is *de novo* and our scope of review is plenary. *O'Donnell v. Allegheny Cnty. North Tax Collection Comm.*, 266

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VII, Section 14. Third, the provision was amended to change the operative verb from “may” to “shall,” requiring the legislature to provide a method of voting for those enumerated categories of absentee voters. Article VII, Section 14 was then further amended to extend absentee voting to those who could not vote in person due to a religious holiday or Election Day duties. PA. CONST. art. VII, § 14 (1968) (amended in 1985). Lastly, in 1997, Section 14 was amended to change “State or county” to “municipality” and added subsection (b) defining “municipality.” PA. CONST. art. VII, § 14 (1968) (amended in 1997).

31. The Appellees do not challenge these legislative enactments as unconstitutional.

*Appendix A*

A.3d 2, 16 (Pa. 2021). “The paramount goal of statutory interpretation is to give effect to the intentions of the General Assembly.” *Commonwealth by Shapiro v. Golden Gate Nat’l Senior Care LLC*, 648 Pa. 604, 194 A.3d 1010, 1027 (Pa. 2018) (citing 1 Pa.C.S. § 1921(a)). Regarding any duly enacted legislation, we presume that the General Assembly does not intend to violate the Pennsylvania Constitution, nor intend an absurd or unreasonable result. 1 Pa.C.S. § 1922(3); *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 943 (Pa. 2013).

Section 13 provides as follows:

(1) This section applies to the amendment or addition of the following provisions of the act:

(i) Section 102.

(ii) Section 1003(a).

(iii) Section 1007(b).

(iv) Section 1107.

(v) Section 1110.

(vi) Section 1107-A.

(vii) Section 1109-A.

(viii) Section 1112-A(a).

*Appendix A*

(ix) Section 1216(d).

(x) Section 1222(a) and (b).

(xi) Section 1223.

(xii) Section 1231.

(xiii) Section 1232.

(xiv) Section 1233.

(xv) Section 1302.

(xvi) Section 1302.1.

(xvii) Section 1302.2.

(xviii) Section 1305.

(xix) Section 1306.

(xx) Section 1308.

(xxi) Article XIII—D.

(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). The Supreme Court may take action it deems appropriate, consistent with

*Appendix A*

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.

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

Act of October 31, 2019, P.L. 552, No. 77, § 13.

As the parties' competing interpretations establish, there is arguable ambiguity in Section 13. Yet, reading Section 13 in a manner that would result in the insulation of the sections of Act 77 listed in Section 13(1) from judicial review following the expiration of the 180-day period set forth in Section 13(3) contravenes the rules of statutory construction, as such an interpretation leads to the conclusion that the provision is unconstitutional; a result that is to be avoided. *See* 1 Pa.C.S. § 1922(3); *Working Fams. Party v. Commonwealth*, 653 Pa. 41, 209 A.3d 270, 279 (Pa. 2019) (“[S]tatutes are to be construed whenever possible to uphold their constitutionality.”). Precluding review in this manner would violate the separation of powers, as “[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.” *Robinson Twp.*, 83 A.3d at 927 (internal quotations omitted); *see also William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 642 Pa. 236, 170 A.3d 414, 418 (Pa. 2017) (finding that the legislature cannot “conclusively determine for the people and for the courts that what it enacts in the form of law

*Appendix A*

... is consistent with the fundamental law”). If Section 13 were intended to foreclose judicial review, the General Assembly would be barring this Court from considering constitutional challenges to legislation pursuant to its King’s Bench or extraordinary jurisdiction powers. *See* 42 Pa.C.S. § 726. The General Assembly has no constitutional authority to bar this Court from exercising its jurisdiction in such circumstances. Construing this section in the manner proposed by the Secretary would render Section 13 unconstitutional.

Moreover, this question was implicitly decided in *Kelly*, as that facial challenge was brought outside of the timeframe specified in Section 13(3). Our decision was based on the doctrine of laches and not a statutory bar to our jurisdiction. A lack of jurisdiction would have prohibited this Court’s consideration of the matter, and as such, would have required the sua sponte application of the bar and dismissal. *See Bisher v. Lehigh Valley Health Network, Inc.*, 265 A.3d 383, 399 (Pa. 2021) (explaining that subject matter jurisdiction may be raised at any time, even by a court sua sponte if necessary); *Burger v. Sch. Bd. of McGuffey Sch. Dist.*, 592 Pa. 194, 923 A.2d 1155, 1161 (Pa. 2007) (“A jurisdictional challenge is typically a threshold question, with review of the substantive issues following a jurisdictional question only if the court is found to possess jurisdiction.”).

The Secretary’s argument that Section 13 applies only to facial challenges, as opposed to as-applied constitutional challenges, is not supported by the language of that provision. *See* Secretary’s Brief at 22-

*Appendix A*

31. Facial and as-applied constitutional challenges are distinct animals, and their differences often mean that they are subject to different standards and principles. See *Lehman v. Pa. State Police*, 576 Pa. 365, 839 A.2d 265, 275 (Pa. 2003) (distinguishing between as-applied and facial constitutional challenges when applying exhaustion of administrative remedies doctrine); *Kepple v. Fairman Drilling Co.*, 532 Pa. 304, 615 A.2d 1298, 1303 & n.3 (Pa. 1992) (distinguishing between facial and as-applied constitutional challenges for purposes of providing notification to Attorney General pursuant to Pa.R.A.P. 521(a)); *Commonwealth v. Noel*, 579 Pa. 546, 857 A.2d 1283, 1288 (Pa. 2004) (Saylor, J., concurring) (discussing difference between as-applied and facial void-for-vagueness claims under First Amendment of U.S. Constitution). However, here, we need not look any further than the plain language of the statute, which offers no distinction between facial and as-applied constitutional challenges. It merely states that this Court had jurisdiction to “hear **a challenge** to or to render a declaratory judgment concerning the constitutionality of a provision” enumerated therein. Act of October 31, 2019, P.L. 552, No. 77, § 13(2) (emphasis added). We may not disregard the plain language of the statute, and we may not read language into it that was not included by the General Assembly.

As intimated by the *Delisle* per curiam order and our consideration of *Kelly*, we find that a holistic reading of Section 13 compels the conclusion that Section 13(3) is not a time bar, but rather, that it — in conjunction with Section 13(2) – vested exclusive original jurisdiction

*Appendix A*

in this Court to hear challenges to the provisions enumerated in subsection (1) for the first 180 days after enactment, and that thereafter, original jurisdiction over all such challenges reverted to the Commonwealth Court, pursuant to 42 Pa.C.S. § 761(a)(1). *See Delisle v. Boockvar*, 234 A.3d 410, 411 (Pa. 2020) (per curiam). Under this construction, the Appellees timely filed their petitions in the Commonwealth Court’s original jurisdiction, and following the Secretary’s appeal, the action is properly within this Court’s jurisdiction pursuant to 42 Pa.C.S. § 723(a).

**2. Constitutionality of Act 77’s Universal Mail-In Voting Provisions**

The substantive question before this Court is whether the Commonwealth Court erred in concluding that Act 77’s universal mail-in voting provisions are unconstitutional. Acts passed by the General Assembly enjoy a strong presumption of constitutionality, and a challenging party bears a very heavy burden of persuasion. *Stilp v. Commonwealth, Gen. Assembly*, 601 Pa. 429, 974 A.2d 491, 495 (Pa. 2009). A statute must violate an express or clearly implied prohibition in the Constitution before it will be held unconstitutional. *Russ v. Commonwealth*, 210 Pa. 544, 60 A. 169, 172 (Pa. 1905); *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 164, 10 Legal Int. 143 (1853) (explaining that legislation is void “only when it violates the constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation on our minds.”). If any doubt arises, it is resolved in favor of the constitutionality of the legislation. *Russ*, 60 A.at 172.

*Appendix A*

The overarching basis for this constitutional challenge is the *Chase* Court’s interpretation of the term “offer to vote,” which it interpreted to mean that a vote must be cast in person. *Chase*, 41 Pa. at 419 (“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[.]”). The phrase has appeared in all iterations of the elections article of our Charter since 1838 including its current version. We must determine whether the current version of Article VII mandates the imposition of the *Chase* Court’s definition of “offer to vote.”

**a. The *Chase* and *Lancaster City* Decisions**

*Chase*, decided in 1862, involved a contested election for the district attorney of Luzerne County. After counting what the return judges deemed to be “legal votes,” the election was called for Chase. Thereafter, twenty electors filed a complaint alleging not only that a large number of votes within the county were fraudulent, but also that the return judges wrongfully excluded votes that were cast by qualified voters fighting in the Civil War, as permitted by Section 43 of the Military Absentee Act of 1839 (“Section 43”).<sup>32</sup> This provision provided:

Whenever any of the citizens of this Commonwealth, qualified as hereinbefore provided, shall be in any actual military

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32. Act of July 2, 1839, P.L. 770. The 1839 act was “virtually a reprint” of the Military Absentee Act of 1813, Act of March 29, 1813, 6 Smith’s Laws. *Chase*, 41 Pa. at 416.

*Appendix A*

service in any detachment of the militia or corps of volunteers under a requisition from the President of the United States, or by the authority of this Commonwealth, on the day of the general election, such citizens may exercise the right of suffrage at such place as may be appointed by the commanding officer of the troop or company to which they shall respectively belong, as fully as if they were present at the usual place of election: Provided, That no member of any such troop or company shall be permitted to vote at the place so appointed, if at the time of such election he shall be within ten miles of the place at which he would be entitled to vote if not in the service aforesaid.

*Chase*, 41 Pa. at 416 (quoting Act of July 2, 1839, No. 192, P.L. 528, § 43 ). The excluded “army vote,” as the opinion refers to it, was outcome determinative because while the votes cast within the county placed Chase ahead of Miller, after the 420 votes received from active-duty soldiers were counted, Miller finished ahead of Chase by 139 votes. *Id.* at 415. Beyond its grievance that the “army vote” was excluded, the complaint contained no details about these military ballots, such as the names of the military voters or the locations in which the votes were cast. *Id.* at 414.

Chase asserted that the election officials would be wrong to count the ballots cast pursuant to Section 43. *Id.* at 414. Before the lower court, the parties stipulated to the following facts to serve as the basis for the court’s decision:

*Appendix A*

Admitted that of the votes polled within the county of Luzerne, Ezra B. Chase received 5811 votes, and that Jerome G. Miller received 5646, and that the said number of votes by each received be counted by the court as legal votes. That of the votes polled by the volunteers in the army, Ezra B. Chase received 58 votes, Jerome G. Miller received 362 votes. But the legality of the votes polled by the volunteers in the army not being admitted, the question as to the legal effect thereof is submitted as a matter of law for the court. If the court should be of opinion that the army vote is constitutional and legal, the same to be allowed by the court, and added to the vote cast in the county for the party or parties in whose favour they may be, and then the court to decree in favour of the party having the greatest number of votes. If no part of the army vote is received, the decree to be in favour of Mr. Chase, the army vote being taken as above stated, the objections to it being all waived, except as to its constitutionality.

*Id.* at 414-15. The lower court determined, on these facts alone, that the army vote was legal and all such ballots should be counted. *Id.* at 415.<sup>33</sup>

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33. On review, the *Chase* Court refused to rule based on the stipulated facts. Rather, the Court noted that these facts, even when read in conjunction with the allegations in the complaint, were insufficient to support the lower court's determination because they failed to establish who the "army vote" electors were; whether they were residents of Luzerne County serving in military detachments; where they voted; and whether the voting locations

*Appendix A*

The Court addressed the genesis of Section 43, explaining that it was “virtually a reprint” of the Act of March 29, 1813, which permitted electors in active military service who were two miles from their customary voting location to vote elsewhere. The Court opined that in neither Section 43 nor its predecessor did the General Assembly intend to authorize voting beyond the Commonwealth’s borders, but rather, that it “probably meant” to allow only the elector who is in active military service within the state an opportunity to vote. This absentee voting within the Commonwealth was permissible under the Constitution of 1790 (which was in effect at the time of the 1813 Act) because the Constitution of 1790 contained no election district residency requirement. *Id.* at 417. The Court observed that the Military Absentee Act was drafted during this time period but languished for five years. The Military Absentee Act was ultimately passed after the changes to the Constitution in 1838, but without consideration of the effect of the amendments made thereto. *Id.* The Court then took up the question that the General Assembly failed to consider: whether the provision of the Military Absentee Act that authorized military commanders to appoint “places” at which qualified voters in acting military service may exercise their right to vote could be reconciled with Article III, Section 1 of the Constitution of 1838. *Id.* at 418.

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were within ten miles of their customary voting location. *Id.* at 415-16. The Court concluded that even when reading the complaint and the stipulated facts together, “we cannot learn in what state the votes were cast[.]” and that the “reasonable presumption” was that votes were cast “partly within and partly without” the Commonwealth. *Id.* at 416.

*Appendix A*

The Court's exhaustive discussion of Article III of the 1838 Constitution focused on the requirement that voting occur within an election district. *See id.* at 418-20. At the time of *Chase*, Article III, Section 1 provided the following:

In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the 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. But a citizen of the United States who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district, and paid taxes, as aforesaid, **shall be entitled to vote** after residing in the State six months: Provided, That white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year and in the election district ten days, as aforesaid, **shall be entitled to vote**, although they shall not have paid taxes.

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

The Court emphasized that this provision differed from its forebearer in three ways: “The word ‘white’ was introduced before ‘freemen,’ excluding thereby negro suffrage, which had prevailed to a slight extent. The

*Appendix A*

state residence was reduced from two years to one, and the words requiring a residence in the election district where he offers to vote, were added.” *Chase*, 41 Pa. at 418. The sole purpose of the amendment, according to the *Chase* Court, was to prevent fraud in voting, *see id.* at 419,<sup>34</sup> and the balance of the Court’s efforts are thereafter directed at explaining how the election district residency requirement served that end. The Court addressed the “offer to vote” language in conjunction with then-Article III, Section 2:<sup>35</sup>

[T]he citizen, possessing the other requisite qualification, is to have a ten days’ residence in an election district, and is to offer his ballot in that district. The second section of this article requires all popular elections to be by ballot. 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.

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34. The record reflects an additional reason was to require electors to exercise the franchise where the vote would make a difference to their lives. *See supra* pp. 34-35.

35. At the time *Chase* was decided, Article III, Section 2 provided as follows:

All elections shall be by ballot, except those by persons in their representative capacities, who shall vote viva voce.

PA. CONST. art. III, § 2 (1838).

*Appendix A*

*Id.* Personal appearance was critical, the Court reasoned, because it provided the mechanism by which to validate a voter's qualifications:

The ballot cannot be sent by mail or express,<sup>36</sup> 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,

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36. During the Civil War, Americans had come to depend on the postal service to hear news from those fighting on the frontlines, *see* UNITED STATES POSTAL SERVICE, *The United States Postal Service: An American History*, at 28 (2020), <https://about.usps.com/publications/pub100.pdf> (“USPS”). Although many soldiers were at war in their own backyards, they naturally could not return to their homes while the fighting ensued. Mail became a “treasured link between camps and battlefields and ‘back home.’” *Id.* at 18. While the Pennsylvania legislature had made a method of absentee voting available to soldiers since 1813, it was during the Civil War era that challenges to absentee voting had become more prevalent throughout the country, as other states had begun enacting their own absentee voting laws so that soldiers were not disenfranchised by serving in the military. *See Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001) (“Absentee voting began during the Civil War as a means of providing soldiers the ability to vote.”). Thus, a moderately reliable postal service was a recent phenomenon during the Civil War, when *Chase* was decided. However, even at that time, the mail was not reaching significant portions of the population, as the postal service would not begin free rural mail delivery for another thirty years after *Chase*. USPS, *supra* at 7, 31.

*Appendix A*

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.

*Id.* This underlying rationale echoes throughout the opinion. *See id.* at 424 (rejecting Section 43 because, inter alia, “it invites soldiers to vote where the evidence of their qualifications is not at hand”); *id.* at 427 (explaining “to secure purity of election, [the Constitution] would have its voters in the place where they are best known on election day”). The authoring Justice’s interpretation of “offer to vote” and the conclusions drawn from it failed to take into account that Article III, Section 1 twice used the phrase “entitled to vote” and not “entitled to offer to vote” when referring to the exceptions to the residency qualifications.

Although it expounded on the meaning of “offer to vote,” the clear target of the Court’s attention in *Chase* was that the Military Absentee Act permitted voting in locations other than in duly created legislative election districts.<sup>37</sup> This is evident upon consideration of the

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37. One of the faults the *Chase* Court found with Section 43 was that it purported to authorize military commanders to establish de facto election districts. The Court explained that as the Constitution assigned the creation of election districts to the legislature, the designation of election districts is a matter of civil administration, which cannot be delegated to the military. *Chase*, 41 Pa. at 422. To do so would “confound the first principles” of our government found in the Constitution, which sharply divide the civil and military powers and command that “the military shall, in all cases and at all times, be in strict subordination to the civil

*Appendix A*

opinion as a whole, which focuses on the amendment of Article III, Section I requiring that an elector vote in his election district. Its ultimate conclusion regarding Section 1 makes this point:

The meaning of the constitutional clause under consideration may, therefore, on the whole, be stated thus--every white freeman, twenty-one years of age, having “resided” according to the primary meaning of that word, or according to legislative definition of it, in any “election district” created by or under the authority of the legislature, for ten days preceding the election, shall be permitted to offer his ballot in that district.

*Id.* at 421. Having settled the requirements of Section 1, the Court invalidated Section 43 of the Military Absentee Act on the basis that it impermissibly authorized voting in locations other than an elector’s designated election district. *See id.* at 421-22.

It is evident that the binding *Chase* holding is concerned with constitutional residency requirements, not constitutional parameters on the method of casting a vote. Nothing in the language of Section 43 implicated the method by which a vote would be cast. Further, its interpretation of “offer to vote” was unnecessary to the

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power[.]” *Id.* Because a military commander cannot create an election district, and the Constitution required voting to occur in an voter’s election district, none of the votes cast pursuant to Section 43 were valid. *Id.*

*Appendix A*

dispositive holding of the case that voting can only take place in a voter's election district created by or under the authority of the legislature. The *Chase* Court's incidental interpretation of "offer to vote" is dicta. See *Castellani v. Scranton Times, L.P.*, 633 Pa. 230, 124 A.3d 1229, 1243 (Pa. 2015) (explaining that dicta is an opinion by the Court on an issue that is not essential to the decision).

Thus, the *Chase* Court's interpretation of "offer to vote," standing alone, has no precedential value. However, sixty-two years later and addressing a fundamentally different Constitution, this Court decided *Lancaster City*, and squarely relied on *Chase* in doing so. In 1923, the General Assembly passed the Absentee Voting Act, which extended the absentee vote to non-military civilians who were absent from their election districts on election day due to their "duties, business, or occupation." The *Lancaster City* Court recognized that "[w]hether such legislation can be sustained ... depends on the wording of our Constitution, in the interpretation of which we are aided by consideration of what has been decided previous to its adoption." *Lancaster City*, 126 A. at 200. The Court turned to *Chase*'s interpretation of Article III, Section 1 of the 1838 Constitution and its resulting rejection of the Military Absentee Act as unconstitutional. It reasoned that "the adverse determination then made is controlling now, unless there has been some change in the fundamental law which makes necessary a different conclusion." *Id.*

Within this framework, the Court began with *Chase*'s interpretation of "offer to vote" before considering the "change[s] in the fundamental law" since that time. It

*Appendix A*

started with the 1864 constitutional amendment, made in response to the *Chase* decision, that allowed military absentee voting. It acknowledged that this Court reaffirmed the right of the General Assembly to regulate the “places, mode and manner, and whatever else may be required, to insure [the] full and free exercise” of the right to vote shortly thereafter in connection with a challenge to the Registry Act of 1869. *Id.* (discussing *Page v. Allen*, 58 Pa. 338, 347 (1868)). However, the Court also took note that in *Page*, the Court explained that this ability to regulate the exercise of the right to vote is distinct from the enjoyment of the right, upon which the General Assembly is powerless to regulate. In other words,

no constitutional qualification of an elector can in the least be abridged, added to, or altered, by legislation or the pretence of legislation. Any such action would necessarily be absolutely void and of no effect. We hold, therefore, what indeed was not expressly denied, that no regulation can be valid which would have the effect to increase the district, or state residence, prior to the time of an offer to exercise the right of an elector, or which would impose other or additional taxation or assessments, than those provided in the constitution.

*Appendix A*

*Id.* at 201 (quoting *Page*, 58 Pa. at 347).<sup>38</sup> This analysis of the constitutionality of the Registry Act involved a provision that added ten days to the residency requirement to qualify to vote and, as such, blatantly violated Section 1.

Turning to the relevant amendments that occurred in 1901,<sup>39</sup> the *Lancaster City* Court stated that the Article

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38. Ironically, the *Page* Court when quoting Article I, Section III of the 1838 Constitution misquoted the residency requirement contained therein as providing that an individual is only qualified to be an elector “where he **intends to vote**[.]” rather than where he “offers to vote[.]” *Page*, 58 Pa. at 346 (emphasis added). While this was apparently a clerical error, it reflects the logical meaning of the description of the election district residency requirement, i.e., it merely describes the appropriate election district where the elector intends to exercise his right to vote.

39. As discussed above, in 1901, Section 1 and Section 7 were amended 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:

1. He shall have been a citizen of the United States at least one month.
2. He shall have resided in the State one year (or, 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.
3. He shall have resided in the election district where

*Appendix A*

VIII, Section 1 provision addressing the qualification of voters was “practically the same” as its predecessor. *Id.* It acknowledged the establishment of registration requirements and also recognized that Section 4 was amended to provide that all elections “shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.” *Id.* (quoting PA. CONST. art. VIII, § 4 (1874) (amended in 1901)). Yet, the Court prioritized the “offer to vote” language contained in Section 1’s establishment of residency requirements, allowing it to guide its interpretation without consideration as to how the registration requirement or the amendment of Section 4 impacted the reasoning underlying *Chase*’s rationale that relied, in part, on the requirement in Section 2 of the 1838 Constitution that elections shall be by ballot. The Court emphasized that the Constitution retained the language that had been interpreted as requiring a voter

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he shall offer to vote at least two months immediately preceding the election.

4. If twenty-two years of age and 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.

\* \* \* \*

All laws regulating the holding of elections by the citizens or for the registration of electors shall be uniform throughout the State, but 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.

PA. CONST. art. VIII, §§ 1, 7 (1874) (amended in 1901).

*Appendix A*

to “offer to vote” within a designated election district and that the only exception allowed in the Charter is for the military absentee vote. *Chase’s* interpretation of “offer to vote” and the fact that the military absentee vote had since been singled out in Section 6 was determinative of the Court’s ultimate conclusion:

The Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed. *McCafferty v. Guyer*, 59 Pa. 109, Brightly’s El. Cas. 44. The latter has determined those who, absent from the district, may vote other than by personal presentation of the ballot, but those so permitted are specifically named in section 6 of article 8. The old principle that the expression of an intent to include one class excludes another has full application here.

*Id.*

Despite the constitutional amendments requiring pre-verification of qualifications pursuant to registration laws, and granting broad authority to the General Assembly to determine the method of voting, the *Lancaster City* Court found that because Section 1 retained the “offer to vote” language, the Constitution continued to require voting in propria persona. Although it acknowledged that the amendment of Section 4 provided that elections shall be by ballot “or such other method as may be prescribed by law[,]” the Court discussed Section 4 only to acknowledge that an argument could be made that the legislation under

*Appendix A*

review violated Section 4's secrecy requirement, but it dismissed this concern, reasoning that because of its disposition, it need not address it. *Id.* The Court ventured that the secrecy requirement was "likely added in view of the suggestion of the use of voting machines[.]" *Id.* Thus, when the Court did contemplate Section 4, it was only with regard to the newly added secrecy requirement, not the grant of authority to the General Assembly to devise methods of voting. In so doing, the Court failed to consider the entirety of this constitutional provision. *See Commonwealth v. Russo*, 388 Pa. 462, 131 A.2d 83, 88 (Pa. 1957) ("We have no right to disregard ... or distort any provision of the Constitution."). Similarly, although it mentioned its existence, the Court did not consider the Registry Act of 1869, which was enacted after *Chase* and allowed voters' qualifications to be established prior to the election. Nor did it address the amended Section 1, which subjected the qualification to vote to compliance with registration laws which were constitutionally required to be uniform pursuant to Section 7.

The *Lancaster City* Court, faced with a newly amended Constitution, failed to grapple with any of the fundamental changes therein.<sup>40</sup> First, it failed to consider what effect

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40. The Constitutional provision addressing absentee voting, now and at the time of *Lancaster City*, makes clear by its very terms that one is a qualified elector without regard to how a vote is cast. Present-day Section 14 begins by stating that "[t]he Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors" who are absent from the municipality of their residence on Election Day, for certain enumerated reasons, "may vote." PA. CONST. art. VII, § 14(a). The

*Appendix A*

the uniform registration laws and the constitutionally required compliance with those laws had on the practice of demonstrating one's qualifications in person. The underlying rationale for the *Chase* Court's interpretation of "offer to vote" as a requirement to vote in person was "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." *Chase*, 41 Pa. at 419. If "offer to vote" in fact had the independent meaning to vote in person for the reasons stated in *Chase*, then the amendment of Section 1 requiring compliance with registration laws eliminated any reliance on that interpretation. Second, to the extent the *Chase* Court drew on the requirement that elections were required to be by ballot and the custom that ballots be cast in person, *Lancaster City* failed to account for the amendment that authorized the legislatures to prescribe other methods by which elections could take place.

Despite the *Lancaster City* Court's acknowledgment that it was required to review the challenged legislation "in light of the controlling constitutional provisions[.]" *Lancaster City*, 126 A. at 200, it failed to do so and instead rested its decision on an interpretation made in a case decided more than half a century before, under a prior version of the Constitution that had been amended multiple times since, and for a proposition that was unquestionably dicta. The interpretation of Section 1 underlying *Lancaster City*, which elevated dicta from *Chase*, is palpably incomplete.

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absentee voting provision at the time of *Lancaster City* was found in Article VIII, Section 6, and it provided for absentee voting "[w]hensoever any of the qualified electors of this Commonwealth shall be in actual military service[.]" PA. CONST. art. VIII, § 6 (1874).

*Appendix A*

The question thus arises as to whether we are bound to the interpretation of “offer to vote” designed by *Chase* and perpetuated in *Lancaster City* when, by any rules of constitutional construction recognized at the time of those decisions or now, the interpretation is patently flawed. The answer is that we are not. See *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 642 Pa. 236, 170 A.3d 414, 457 (Pa. 2017) (“When presented with a case that hinges upon our interpretation and application of prior case law, the validity of that case law always is subject to consideration, and we follow the exercise of our interpretive function wherever it leads.”); *Commonwealth v. Doughty*, 633 Pa. 539, 126 A.3d 951, 955 (Pa. 2015) (“While the doctrine of *stare decisis* is important, it does not demand unseeing allegiance to things past.”) (“It is ... revolting if the grounds upon which [a rule of law] was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”) (quoting O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897)); *Tincher v. Omega Flex, Inc.*, 628 Pa. 296, 104 A.3d 328, 352 (Pa. 2014) (“[W]e have long recognized that the doctrine of *stare decisis* is not a vehicle for perpetuating error, but a legal concept which responds to the demands of justice, and thus, permits the orderly growth processes of the law to flourish.”) (internal citations omitted); *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc., No. 6*, 414 Pa. 95, 199 A.2d 266, 268 (Pa. 1964) (“[T]he courts should not perpetrate error solely for the reason that a previous decision although erroneous, has been rendered on a given question.”).

*Appendix A*

Compared to the federal Constitution, our Pennsylvania Charter has been amended on a frequent basis<sup>41</sup> to reflect, inter alia, changes in the Commonwealth itself. Changes to our Charter’s provisions regarding elections are reflective of the symbiotic relationship between advancements and changes in the Commonwealth’s society and recognizing them by way of Constitutional amendment. We have an obligation to give amendments to our Charter meaning.

**b. Article VII, Section 1**

The meaning ascribed by the *Chase* and *Lancaster City* Courts to the phrase “offer to vote” cannot be reconciled with the text of Article VII, Section 1, which at the time of the passage of Act 77 provided:

Section 1, Qualification of Electors, provides:

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41. Since the Twentieth Century, more than 150 substantive amendments were made to our Constitution. See Duquesne University School of Law, *Texts of the Constitution*, <https://www.paconstitution.org/texts-of-the-constitution/> (last visited July 11, 2022); Pa. General Assembly, *Legislation Enacted, Joint Resolutions (Amendments to the Constitution) passed*, [https://www.legis.state.pa.us/cfdocs/legis/CL/Public/cl\\_view\\_action1.cfm?sess\\_yr=&sess\\_ind=0&cl\\_typ=JR&cl\\_nbr=](https://www.legis.state.pa.us/cfdocs/legis/CL/Public/cl_view_action1.cfm?sess_yr=&sess_ind=0&cl_typ=JR&cl_nbr=) (last visited July 11, 2022); *Ballotpedia*, *List of Pennsylvania Ballot Measures*, [https://ballotpedia.org/List\\_of\\_Pennsylvania\\_ballot\\_measures](https://ballotpedia.org/List_of_Pennsylvania_ballot_measures) (last visited July 11, 2022). In contrast, the federal Constitution has been amended only twenty-seven times. See U.S. CONST. amends. I-XXVII.

*Appendix A***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, 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)

The word “vote” is used four times in Section 1. Section 1 refers to an elector being “entitled to vote” and “qualified to vote,” and once provides that an elector “may ... vote.” The two most pertinent instances of the use of “vote” for our analysis appear in the third subsection, which is the same subsection in which “offer to vote” appears. While

*Appendix A*

the elector “shall have resided in the election district where he or she shall offer to vote” at least sixty days immediately preceding the election, this same subsection creates a sixty-day lookback period for electors who move their residence within the bounds of the Commonwealth. Such electors who are qualified “to vote” in an election district sixty days prior to relocating their residence may “vote” in the election district from which they moved. It is relevant that neither of these instances within the third subsection repeat the use of “offer to vote,” just as it is relevant to our interpretation that the first paragraph of Section 1 states that citizens with the proper qualifications shall be entitled “to vote,” not entitled “to offer to vote.”

We must reconcile, in the context of Article VII, Section 1 of our current Charter, this repeated use of the word “vote” with the singular use of the phrase “offer to vote,” which is found in the paragraph requiring votes to be cast in particular election districts. And the location of this phrase is key. Section 1 sets forth the qualifications that a citizen must establish in order to be “entitled to vote.” To be “entitled to vote,” the citizen must be at least twenty-one years old<sup>42</sup> and must possess the “following qualifications,” which are enumerated in three subsections. The first subsection requires United States citizenship, and the second subsection requires Pennsylvania residency. The third subsection requires election district residency as a qualification to cast a vote in a particular election district. It is in service of defining

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42. In 1971, the twenty-sixth amendment to the United States Constitution lowered the voting age to eighteen.

*Appendix A*

this election district residency requirement that we find the lone use of “offer to vote.” The phrase “where he or she shall offer to vote” is a descriptive clause<sup>43</sup> that modifies

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43. In dissent, Justice Mundy, without any reference to the extensive recorded history of the Constitutional Convention that first introduced this amendment, *see supra* pp. 34-35; Concurring Op. at 10-14 (Wecht, J.), opines that the phrase “offer to vote” contemplates that some in-person action must be taken in the election district. Dissenting Op. at 17-18 (Mundy, J.). Although we disagree that anything other than residency in the district is required, it remains a mystery as to how the dissent (or the *Chase* Court) transforms “offer” into “appear in person.” *Id.*

It may be that the Court in *Page* got the meaning right when it inadvertently translated “offer to vote” to “intends to vote” when quoting the election district residency requirement. *See supra* note 38. Contrary to the dissent’s assertion that we suggest “offer” signifies a subjective intent, we do not. Our reference to the *Page* Court’s inadvertent translation of “offer to vote” to “intends to vote” does not inform our analysis, but merely highlights the oddity of the drafters’ use of the phrase “offer to vote” in the section of the elections article establishing voter qualifications.

The nineteenth century dictionary definitions, to which the dissent refers, do not support the proposition that “appear in person” flows from “offer to vote.” *See* Concurring Op. at 15 & nn. 13, 14 (Wecht, J.). Acting as a transitive verb, the word “offer” was defined as “to bring to or before; ... to present for acceptance or rejection,” “to present in words; to proffer; to make a proposal to,” “to bid,” “to present to the view or to the mind[.]” *Offer*, WEBSTER’S DICTIONARY OF 1828. None of these definitions impute the necessity of a personal appearance. Likewise, the word “offer” serving as an intransitive verb, as the dissent suggests the *Chase* Court understood the term, is also defined in several ways, which, again, do not require physical presence. *Offer*, WEBSTER’S DICTIONARY OF 1828; *see also* Dissenting Op. at 18-19 (Mundy, J.).

*Appendix A*

the object of the prepositional phrase “in the election district.” It does no more than identify the district in which the elector is eligible to vote, which is the interpretation supported by the recorded history. Given the clear intent of Section 1 to set forth the qualification to vote, this is the most natural reading of the third subsection of Section 1. *See League of Women Voters*, 178 A.3d at 802. There is no indication in Section 1 as a whole or in its third subsection that it establishes the manner in which a vote must be cast.

There is no rule of construction that allows us to add the words “offer to” in three different places (including the overarching opening paragraph) where the anomalous terminology “offer to vote” can be explained based on clear historical records as the descriptive syntax that was chosen to define an election district residency qualification. Moreover, any interpretation of Section 1 requires a uniform interpretation of “vote” because a contrary conclusion is not sustainable. If, as Appellees contend, “offer to vote” possesses a particular meaning, then we can neither ignore its omission or read it into the instances in Section 1 that use “vote” unencumbered by “offer to.” Thus, an elector who relocates within the Commonwealth within the sixty-day window prescribed

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For example, “offer” was defined as “to declare a willingness” and “[t]o make an attempt.” *Offer*, WEBSTER’S DICTIONARY OF 1828. Like its transitive verb counterpart, nothing in these definitions suggest the requirement of a personal presence. The dissent asserts that “offer” was defined as “to be present, to be at hand, to present oneself,” *see* Dissenting Op. at 19. The actual definition reads: “[t]o present itself; to be at hand.” *Offer*, WEBSTER’S DICTIONARY OF 1828. Suffice it to say, one need not be present to present.

*Appendix A*

in the third subsection is not required to vote in person (as it does not say “offer to vote”) while an elector who has consistently resided in the election district must appear in person to vote in that district. This is an absurd result. Our clear rule of constitutional interpretation mandates that we reject such a reading. 1 Pa.C.S. § 1922.

Moreover, the rationale for the *Chase* Court’s imposition of an in-person voting requirement was the need for other voters in a voting district to verify the bona fides of an individual appearing to cast a ballot. *See Chase*, 41 Pa. at 419 (“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.”). The Constitution it was interpreting was drafted at a time when there were no voter registration laws and, arguably, the only way to verify an individual’s qualifications to vote in an election district was to allow his neighbors to identify him as qualified. This lack of verifiable qualifications to vote ended with the passage of registration laws. Critically, in 1901, the elections article of the Constitution was amended to subject an otherwise qualified elector to “such laws requiring and regulating the registration of electors as the General Assembly may enact.” PA. CONST. art. VIII, § 1 (1874) (amended in 1901). The registration compliance requirement also appears in the current Article VII, Section 1.

Since the enactment of the Election Code in 1937, voters are required to prove their identities and

*Appendix A*

qualifications prior to casting a vote. Act of June 3, 1937, P.L. 1333, art. VII, § 701. The Commonwealth relies on the Statewide Uniform Registry of Electors (“SURE”), which is “a single, uniform integrated computer system” that “[c]ontain[s] a database of all registered electors in this Commonwealth.” 25 Pa.C.S. § 1222(c)(1)-(2). In order to register, voters submit to the Department of State their personal information, including their name, address, party affiliation, part of their Social Security number, and driver’s license or state ID number. *See* PA. DEP’T OF STATE, *Online Voter Registration Application*, <https://www.pavoterservices.pa.gov/Pages/VoterRegistrationApplication.aspx> (last visited July 11, 2022). These voters’ signatures are also submitted, and, as an additional way to verify identity, these signatures are available to be matched with those on the outside of universal mail-in (and absentee ballots) before being tabulated. *See id.*; *see also In re November 3, 2020 General Election*, 240 A.3d 591, 596-97 (Pa. 2020). Consequently, the rationale supporting the *Chase* Court’s questionable interpretation of offer to vote ceased to exist in 1901.<sup>44</sup>

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44. The Commonwealth Court expressed its view that “[m]ail-in ballots present particular challenges with respect to ‘safeguards of honest suffrage.’” *McLinko*, 270 A.3d at 1252 n.12. Its only support for this statement was a decades-old case, *Marks v. Stinson*, 19 F.3d 873, 887 (3d Cir. 1994). As the Third Circuit recently explained, the unique facts of that case “were a far cry from” a normal election and do not establish that mail-in voting is inherently more susceptible to fraud than other forms of voting. *Donald J. Trump for President, Inc. v. Sec’y of Pa.*, 830 F. App’x 377, 388-89 (3d Cir. 2020).

*Appendix A*

While the *Lancaster City* Court did not reconcile the basis of the *Chase* Court’s interpretation of “offer to vote” with the amended Constitution before it in 1924, it is our obligation to do so in interpreting our current Constitution.

We therefore conclude that neither *Chase* nor *Lancaster City* support the conclusion that “offer to vote” creates in-person ballot-casting as a voter qualification in Article VII, Section 1 of the Pennsylvania Constitution in effect when Act 77 was enacted. Rather, the phrase “offer to vote” is a descriptive term, used to define the election district residency requirement found in Article VII, Section 1(3).<sup>45</sup>

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Justice Mundy likewise cites to *Marks* without the critical qualification provided in *Donald J. Trump for President, Inc.* Dissenting Op. at 6 (Mundy, J.). Despite disclaiming policy considerations, *see id.* at 22, the Dissent further asserts that “it is self-evident that the **integrity** of elector actions becomes more difficult to verify when they are undertaken at a distance and outside of public scrutiny.” *Id.* at 7 (emphasis in original). Presumably the Dissent is referring to universal mail-in voting, although her citations are to articles concerning the potential or possibility for fraud or error in absentee voting. *Id.* at 7 n.1. We are unaware of **any** evidence to call into question the integrity of any elections in this Commonwealth since the enactment of Act 77, including those in 2021, in which appellate court jurists at all levels were elected and subsequently seated.

45. The dissenting Justices complain that our decision here violates a historical reliance on the *Chase* Court’s interpretation of “offer to vote” as requiring in-person voting, subject only to exceptions created by way of constitutional amendment. *See* Dissenting Op. at 16 (Mundy, J.); Dissenting Op. at 4 n.6

*Appendix A***c. Article VII, Section 4**

Having established that Section 1 does not require electors to submit their ballots in person at their polling location, it remains that submitting a ballot in person is a method by which electors may vote. The *Lancaster City* Court had the first opportunity to interpret the language and scope of what is now Article VII, Section 4, which addresses the “method” of voting. However, it failed to

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(Brobson, J.). It is certainly not true that our General Assembly has historically relied on the *Chase* Court’s in-person voting requirement or *Lancaster City*’s adoption of it. In 1963, the legislature provided that all aspects of absentee voting could be done by mail. *See* Act of April 29, 1963, No. 379, P.L. 738. In that same year, our General Assembly passed legislation allowing spouses of those in military service to vote by mail. *See* Act of August 13, 1963, P.L. 707, § 20, effective Jan. 1, 1964; *see also* 25 P.S. § 3146.1(b). Then, again by legislative enactment in 1968 (the same year the Constitution was amended to revamp Article VII, Section 14), additional categories of voters were permitted to vote by mail. Specifically, persons absent from their election district because of their “duties, occupation or business.” This was broadly defined to include vacations, sabbatical leaves or leaves of absence for teaching or education. It also included an elector’s spouse who accompanies the elector during absences associated with their “duties, occupation or business.” 25 P.S. § 2602(z.3).

Although the legislature referred to the extended category of voters as absentee voters, the effect of the legislation was to extend mail-in voting to categories of electors not designated in Section 14. Justice Mundy’s suggestion that it was always understood that the expansion of mail-in voting can only be accomplished by an amendment to the Constitution is belied by this record. *See* Dissenting Op. at 16 (Mundy, J.).

*Appendix A*

do so because of its slavish adherence to *Chase*'s dicta. This was a critical omission because *Chase* referenced the requirement in the 1838 Constitution that elections shall be by ballot in formulating its conclusion that voters must appear in person to cast a vote. *Chase*, 41 Pa. at 419. As a result of the *Lancaster City Court*'s incomplete analysis, Section 4's meaning was left unresolved. Accordingly, we undertake an examination of this constitutional provision and its relevance to the current question. Section 4, unchanged since 1901, provides:

Method of Elections; Secrecy in Voting.

Section 4.

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. It is plain that Section 4 endows the General Assembly with the authority to enact methods of voting subject only to the requirement of secrecy. There is scant legislative history related to the amendment of this provision, but comments made by Governor William Stone to the Senate regarding this proposed amendment suggest that the purpose of the amendment was "the substitution of voting machines for [the] present system of balloting." *Journal of the Pennsylvania Senate*, Session of 1901, Vol. 2, at 1543 (statement of Governor William Stone). This statement reveals that at the time, voting by ballot and by machine were viewed as alternative methods of casting

*Appendix A*

a vote. Viewed in this context, the conclusion follows that “method” as used in Section 4 refers to the way a vote is cast. This conclusion is further supported by the meaning of the term “method” as it was understood at the time of Section 4’s amendment, as well as today.

When interpreting constitutional language, we are mindful that the language of the Constitution controls and that it must be interpreted “in its popular sense, as understood by the people when they voted on its adoption.” *Pa. Env’t Def. Found. v. Commonwealth*, 640 Pa. 55, 161 A.3d 911, 929 (Pa. 2017). In ascertaining the meaning of a word in accordance with its common and approved usage, this Court has found it helpful to consult dictionaries. *Greenwood Gaming & Entertainment, Inc. v. Commonwealth*, 263 A.3d 611, 620 (Pa. 2021) (citing *Bruno v. Erie Ins. Co.*, 630 Pa. 79, 106 A.3d 48, 75 (Pa. 2014)). Around the time that the section addressing methods of election was first amended, “method” had been defined as “[a] general or established way or order of doing or proceeding in anything, or the means or manner by which such way is presented or inculcated[.]” *Method*, Standard Dictionary of the English Language, Vol. II (M to Z), 1117 (1895). Our modern definition of “method” has diverged little, and provides, as relevant here, “a procedure or process for attaining an object: such as ... a way, technique, or process of or for doing something.” *Method*, MERRIAM-WEBSTER ONLINE DICTIONARY (last visited July 11, 2022); *see also Method*, BLACK’S LAW DICTIONARY, 1187 (11th ed. 2019) (defining “method” as “[a] mode of organizing, operating, or performing something, esp. to achieve a goal <method of election>”).

*Appendix A*

Based on the use of such broad language, the General Assembly is authorized, pursuant to Section 4, to prescribe any process by which electors may vote. The amendment did not limit the relevant methods of casting a vote to ballot or voting machine, as were relevant at the time of its passage, but instead provided that the General Assembly could enact laws establishing “other methods” for elections by citizens, subject only to the requirement that the method preserve secrecy in voting. Maintaining the secrecy of an elector’s vote is supported by a fairly straightforward rationale, namely, that “[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, 45 Luz. Legal Reg. Rep. 33 (C.C.P. Luzerne 1956). Such secrecy has historically served as a bastion to the integrity of the election franchise.<sup>46</sup> However, the requirement that secrecy must

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46. Initially, the Constitution of 1874 provided an early method for maintaining secrecy in voting in Section 4:

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 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). Pursuant to the 1874 provision, it was required that the election officers were

*Appendix A*

be preserved cannot alone inform the legislature as to what methods it may prescribe, only that those methods must maintain this secrecy. This was, and continues to be, the sole restriction found in Section 4.

The lack of restriction other than the maintenance of secrecy has overarching significance. The only restrictions on the power of our General Assembly to enact legislation are found within the Constitution, and any such restrictions must be explicit. *See Stilp*, 974 A.2d at 494-95 (explaining that courts must narrowly construe constitutional provisions that place limitations on the General Assembly’s power because “unlike the federal Constitution, the powers not expressly withheld from the General Assembly inhere in it”). It is well established that “[t]he test of legislative power is constitutional restriction. What the people have not said in the organic law their representatives shall not do, they may do.” *Russ*, 60 A.

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not to disclose voters’ selections, whereas the legislature was not constitutionally mandated to establish voting methods which inherently maintained secrecy. Throughout the remainder of the nineteenth century, there were other election reforms that sought to preserve secrecy in the actual voting methods, most notably the Ballot Reform Act of 1891. Act of June 19, 1891, No. 289, P.L. 358. Through this legislation, counties were required to provide a “sufficient number of voting shelves or compartments at or in which voters may conveniently mark their ballots, so that in marking thereof they may be screened from the observation of others.” *Id.* Moreover, the Ballot Reform Act further prohibited anyone from “electioneer[ing] or solicit[ing] votes for any party or candidate[.]” *Id.* With the 1901 amendment, maintaining secrecy in the voting method itself was enshrined in the Constitution. *See* PA. CONST. art. VIII, § 4 (1874) (amended in 1901).

*Appendix A*

at 172. The courts are bound to respect the breadth of power given to our legislative branch, and we reject any challenge to a law that is not based on a prohibition in the Constitution. *Russ* illustrates this point, as the Court refused to invalidate a law for any reason less than a showing of constitutional prohibition, even in the face of a charge of corruption and the abuse of legislative power:

‘Nothing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void.’ *Pennsylvania Railroad Company v. Riblet*, 66 Pa. 164, 28 Legal Int. 292, 5 Am. Rep. 360, 18 Pitts. Leg. J. 295. ‘To justify a court in pronouncing an act of the Legislature unconstitutional and void, either in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. To doubt is to be resolved in favor of the constitutionality of the act. This rule of construction is so well settled by authority that it is entirely unnecessary to cite the cases.’

*Id.* at 172-73.

Like the Court in *Russ*, we are scrupulously mindful that it is not the place of this Court to opine as to the wisdom or purpose underlying the law. To be a restraint on the General Assembly’s law-making authority, it must be explicitly set forth or necessarily implied in the

*Appendix A*

Constitution. There is no restriction — other than the maintenance of secrecy — in Section 4 on the methods of election the General Assembly may establish. The reading adopted by the Commonwealth Court that “such other method” refers only to “the use of mechanical devices at the polling place[,]” *McLinko*, 270 A.3d at 1262, is unsupported by the language of Section 4. The Commonwealth Court’s supposition contravenes the maxim that when interpreting constitutional provisions, a court may not disregard the plain language of a statute in favor of “a supposed intent.” *League of Women Voters*, 178 A.3d at 802. Nor can a court impose a restraint on legislative authority that is not contained in the Constitution. Moreover, the Commonwealth Court minimized the constitutional amendment specifically permitting the use of voting machines that was enacted in 1928. *See* PA. CONST. art. VIII, § 7 (1874) (amended in 1928). Its construction that “such other methods” only refers to voting machines renders Section 4 as surplusage given the express constitutional recognition of voting by machine which now appears as Article VII, Section 6.

The determination of alternative procedures for conducting an election was vested in the legislature by Article VII, Section 4. It can be inferred from the Commonwealth Court’s thorough historical background discussion<sup>47</sup> that when the *Chase* Court discussed the

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47. *See McLinko*, 270 A.3d at 1254-56. Although it provides thorough explication of the history of the use of ballots as a method of voting, we take some exception to the Commonwealth Court’s notion that Pennsylvania voters during the entirety of the colonial era voted viva voce. *See id.* at 1254. While some colonies

*Appendix A*

requirement that elections be “by ballot” in conjunction with its conclusion that voters must appear in person, it may have drawn from the method by which elections were then conducted, where a written ballot or ticket was completed by a voter who would then personally present it at a polling place.

Assuming that this was the established method of voting, the amendment to Section 4 clearly authorizes alternative methods. And although the recorded history of the amendment reflects that the drafters envisioned the legislative allowance of voting machines, the legislature’s authority was conspicuously not limited to that one other method.

Act 77 prescribed another method for elections. By application, universal mail-in voters pre-qualify to cast a ballot in their election district and request mail-in ballots, *see* 25 P.S. § 3150.12, and return the completed slip to their respective county board of elections for canvassing, *see* 25 P.S. §§ 3150.16, 3146.8. Nothing in Article VII, Section 4 dictates how an elector must deliver their vote for canvassing and nothing in Article VII, Section 1 requires a qualified elector to deliver a vote in person, i.e., to manually deliver the ballot to a designated official. The Constitution does not restrain the legislature from designing a method of voting in which votes can be

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practiced viva voce voting, many others, including Pennsylvania, used ballots. David Clark, *Law Reform as a Legal Transplant: The South Australian Ballot in Australia and in America*, FLINDERS J. OF L. REFORM, Vol. 11, Issue 2, at 312 (2009).

*Appendix A*

delivered by mail by qualified electors for canvassing.<sup>48</sup> It is beyond dispute that “[f]or the orderly exercise of the right [to vote] resulting from these qualifications, it is admitted that the legislature must prescribe necessary regulations, as to the places, mode and manner, and whatever else may be required, to insure its full exercise.” *Robinson Twp.*, 83 A.3d at 944 n.31 (quoting *Page*, 58 Pa. at 347). Thus, pursuant to Section 4, the legislature has the authority to provide that votes can be cast by mail by all qualified electors. The only restraint on the legislature’s design of a method of voting is that it must maintain the secrecy of the vote.<sup>49</sup> Act 77 ensures such secrecy in the

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48. In contrast to the postal system as it existed when *Chase* was decided, *see supra* note 36, our postal service has become increasingly more sophisticated. By the 1960s, the advent of Zoning Improvement Plan (“ZIP”) Codes and letter sorting machines enabled more efficient and effective organization of mail, increasing productivity and reliability. USPS, *supra*, at 54-59. This automation in postal sorting and delivery continued to advance throughout the decades, particularly with the development of computer technology. *Id.* at 68-74.

49. The Election Code provides for secrecy in universal mail-in voting by requiring the use of both an inner envelope marked only as “Official Election Ballot,” and a larger envelope. *See* 25 P.S. § 3150.14. Once a universal mail-in voter receives an official mail-in ballot, they are required to mark the ballot in secret and seal it in the envelope marked “Official Election Ballot,” and then they must secure the secrecy envelope inside the larger envelope. *Id.* § 3150.16. If there is any identifying information on any of the envelopes, it is required that the envelopes and ballots must be set aside and declared void. *Id.* § 3146.8. This process is virtually identical to the process absentee voters have used since 1963. *See* Act of August 13, 1963, No. 379, P.L. 738.

*Appendix A*

same manner as it did with the design of the procedure for absentee voting by mail which has been a part of our election methodology since 1963.

Appellees argue that Act 77 impermissibly eliminates the requirement that electors must cast their ballots in person in preordained locations. *See* Bonner’s Brief at 43. Likewise, the underpinning of the Commonwealth Court’s reasons for invalidating universal mail-in voting was that “it ignores the in-person place requirement that was made part of our fundamental law in 1838.” *McLinko*, 270 A.3d at 1263. We have rejected that interpretation in the context of the Constitution in effect at the time Act 77 was enacted. Rather, the controlling principles are that Section 4 broadly authorizes the legislature to prescribe alternative methods of voting and the Constitution does not otherwise prohibit the General Assembly from enacting universal mail-in voting. Thus, the General Assembly possesses the power to do so. *See Stilp*, 974 A.2d at 499 (“Consistent with our guiding principles of Pennsylvania Constitutional analysis, the General Assembly has the ability to act, absent some prohibition.”).

**d. Article VII, Section 14**

Appellees argue that an interpretation of Section 4 that permits the enactment of universal mail-in voting renders Section 14 mere surplusage, as there would be no need for a separate constitutional provision establishing absentee voting for certain categories of voters if the General Assembly could effectuate the same through legislation. This is incorrect. Section 14 establishes the

*Appendix A*

categories of qualified electors that are entitled to avail themselves of absentee voting and guarantees those categories of voters a method of casting an absentee vote.

Section 14 provides, in relevant part, the following:

**§ 14. 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 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(a) (1968 as amended).

The history of the inclusion in our Constitution of a provision for qualified electors to vote if they are absent from their election district on Election Day is relevant to our analysis. Our Charter was amended in 1864 in response to *Chase* to allow qualified electors in active

*Appendix A*

military service to exercise their right of suffrage in a manner prescribed by law as if they were present in their usual place of election. PA. CONST. art. III, § 4 (1838) (amended in 1864). The amendment addressed the *Chase* court’s concern that the legislature, not military authority, is required to set the parameters for exercising the right to vote. More directly, it established that a qualified voter in active military service had the ability to cast a vote from outside of his designated election district.

Subsequent amendments to the absentee voting provision of the Constitution made accommodations for qualified voters unable to vote in their district due to their “unavoidable” absence because of their duties, occupation or business or because of illness or physical disability, *see* PA. CONST. art. VIII, § 19 (1874) (amended in 1957), and later, eliminated the “unavoidable” nature of the absence for work-related absence and added the additional classification of absentee voters that appears in our current Constitution.

While it is accurate that Act 77’s provision of universal mail-in voting provides a way for designated absentee voters to cast their vote without resorting to the absentee voting provisions of the Election Code,<sup>50</sup> this current ability to do so does not render Section 14 of Article VII surplusage. As discussed, nothing in Article VII prohibits the legislature from eliminating the ability of qualified voters to cast their votes by mail, just as nothing in the Constitution required it to do so. By recently enacting

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50. *See* 25 P.S. §§ 2602(z.6), 3150.11, 3150.12.

*Appendix A*

Act 77, the legislature made a policy decision, based on the authority afforded it by our Charter, to afford all qualified voters the convenience of casting their votes by mail. However, acts of the legislature are not guaranteed to be permanent.

Article VII, Section 14 guarantees<sup>51</sup> that regardless of the legislature’s exercise of its authority to determine

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51. The guaranty to be free from legislatively imposed, in-person voting requirements to the classes of voters enumerated in Section 14 was established by the Constitution of 1968. The predecessor section provided as follows:

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 of 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 (1874) (amended in 1957).

In 1968, the directory “may” became the mandatory “shall” that continues to appear in Section 14. *See Lorino v. Workers’ Comp. Appeal Bd.*, 266 A.3d 487, 493 (Pa. 2021) (“The term ‘shall’ establishes a mandatory duty, whereas the term ‘may’ connotes an act that is permissive, but not mandated or required.”); *see also Zimmerman v. O’Bannon*, 497 Pa. 551, 442 A.2d 674, 677 (Pa. 1982) (refusing “to ignore the mandatory connotation usually attributed to the word ‘shall’”).

*Appendix A*

the way that votes may be cast, those classes of absentee voters designated within it will be guaranteed the ability to participate in the electoral process. Whether or not Act 77's universal mail-in provisions survive future legislatures, Article 14 guarantees the constitutionally designated qualified voters a way to exercise their franchise regardless of their location on Election Day.

**G. Conclusion**

Section 13 of Act 77 is not a bar to our consideration of the universal mail-in voting provisions of the Act. The Commonwealth Court's declaration that the universal mail-in voting provisions of Act 77 were unconstitutional was premised on its conclusion that it was bound by the definition of "offer to vote" in Article VII, Section 1 of our Constitution as construed in the *Chase* and *Lancaster City* decisions. For the reasons we have explained, the pronouncements in those cases do not control our interpretation of the Constitution in effect when Act 77 became law. Based upon our analysis of Article VII, Section 1 of our Constitution, we conclude that the phrase "offer to vote" does not establish in-person voting as an elector qualification or otherwise mandate in-person voting. We reiterate that our General Assembly is endowed with great legislative power, subject only to express restrictions in the Constitution. We find no restriction in our Constitution on the General Assembly's ability to create universal mail-in voting.<sup>52</sup> The order of the

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52. It bears repeating that Act 77's universal mail-in voting extends a method of voting to the entire electorate that our General Assembly has made available to voters it legislatively deemed to be absentee voters in 1963 and 1968. *See supra* pp. 40-41.

*Appendix A*

Commonwealth Court is affirmed as to the reviewability of the challenged statutory provisions. Otherwise, the decision is reversed.<sup>53</sup>

Chief Justice Baer and Justices Todd and Dougherty join the opinion.

Justice Wecht joins the opinion, except for its determination that Act 77 prescribed an “other method” of voting, pursuant to Article VII, Section 4 of our Constitution.

Justice Wecht files a concurring opinion.

Justice Mundy files a dissenting opinion in which Justice Brobson joins.

Justice Brobson files a dissenting opinion in which Justice Mundy joins.

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53. Our conclusion in this regard defeats Bonner’s federal claims, as the viability of those claims requires a finding that the universal mail in provisions of Act 77 are unconstitutional under the Pennsylvania Constitution. *See* Bonner’s Brief at 15-16 (explaining that his claims that Act 77 violate federal law and the U.S. Constitution as based on the premise that the General Assembly violated the Pennsylvania Constitution when it enacted it). As we have found no constitutional infirmity in Act 77’s universal mail in voting provisions, there is no foundation for Bonner’s claims.

*Appendix A***CONCURRING OPINION****JUSTICE WECHT****DECIDED: August 2, 2022**

I join the learned Majority in full, except for its determination that Act 77 prescribed an “other method” of voting, pursuant to Article VII, Section 4 of our Constitution.

As this Court enters its fourth century of service to the Commonwealth, this appeal illustrates the simple truth that a great deal of our function as expositors of the Constitution of Pennsylvania boils down to how we treat our earlier decisions. This case raises fundamental questions about legislative power, with particular focus on the exercise of the elective franchise. Article VII, Section 1 of our organic charter sets forth the qualifications of Pennsylvania’s electors. It provides, *inter alia*, that an elector “shall have resided in the election district where he or she shall offer to vote at least 60 days immediately preceding the election.” PA. CONST. art. VII, § 1. In 1862, the Court confronted a challenge to an act of the General Assembly providing for absentee voting by certain electors then engaged in military service too far away from their established election districts to vote in person. Invalidating that law, the Court declared that “[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.” *Chase v. Miller*, 41 Pa. 403, 419 (1862). And so it has been the general rule in Pennsylvania that voters cast their ballots in person. *See id.*

*Appendix A*

The Commonwealth Court discerned “nothing fusty” about that precedent. *McLinko v. Dep’t of State*, 270 A.3d 1243, 1261 (Pa. Cmwlth. 2022). Following *Chase* to the letter, the lower court concluded that the General Assembly exceeded its power when it provided for universal, no-excuse mail-in voting via Act 77 of 2019.<sup>1</sup> *Id.* at 1273. Conversely, the Majority today dismisses the *Chase* Court’s construction of “offer to vote” as non-binding *dicta*, both “incidental” and “unnecessary” to that holding. *See* Maj. Op. at 52. Finding that Article VII, Section 1 places no such limitation upon the General Assembly’s plenary authority to extend remote voting to the electorate as a whole by statute, the Court upholds Act 77 as a valid exercise of legislative power. *Id.* at 74.

While I join the learned Majority in full with respect to its analysis of Section 13 of Act 77, *see id.* at 41-45, and similarly find no constitutional impediment to the General Assembly legislating universal mail-in voting, I write separately to underscore *Chase*’s infirmities relative to both its constitutional era and ours. *Obiter dictum* cannot compel an outcome in later disputes, but it may nonetheless retain some degree of persuasive value.<sup>2</sup> While I do not necessarily disagree with the assertion that

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1. Act of Oct. 31, 2019, P.L. 552, No. 77.

2. “A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).” *Obiter dictum*, BLACK’S LAW DICTIONARY 1240 (10th ed. 2014). *See also Humphrey’s Executor v. United States*, 295 U.S. 602, 627 (1935) (describing *dicta* as expressions “which may be followed if sufficiently persuasive[,] but which are not controlling”).

*Appendix A*

*Chase*’s treatment of “offer to vote” constitutes *dicta*,<sup>3</sup> its role in today’s constitutional analysis merits further close examination here.

The Constitution “must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” *Ieropoli v. AC&S Corp.*, 842 A.2d 919, 925 (Pa. 2004). What existed as Article III, Section 1 at the time of *Chase*, see PA. CONST. (1838) art. III, § 1, and now occupies Article VII, Section 1, has survived two significant moments of constitutional revision. We therefore must consider the possibility that, when the people engaged in broad-spectrum revisions that culminated in the Constitutions of 1874 and 1968, they deliberately re-ratified this “offer to vote” provision as *Chase* understood it. In other words, even if the in-person requirement *Chase* gleaned from the Constitution was inessential to its ruling, what began as commentary with dubious legal effect might have *become* law when the citizenry preserved the same terminology that *Chase* had so described.

The value of consistency in constitutional interpretation militates in favor of preserving and faithfully applying this Court’s past interpretations of our Constitution. See *Stilp v. Commonwealth*, 905 A.2d 918, 967 (Pa. 2006) (“The doctrine of *stare decisis* maintains that for purposes of certainty and stability in the law, a conclusion reached

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3. See Maj. Op. at 51 (“[T]he clear target of the Court’s attention in *Chase* was that the Military Absentee Act permitted voting in locations other than in duly created legislative election districts.”). I discuss the elements of *Chase* that retain precedential merit in greater detail *infra*, at 16-18.

*Appendix A*

in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different.”) (cleaned up). Still, though, our respect for precedent can go only so far, especially in the constitutional arena, where we have held that blind adherence thereto is no excuse “for perpetuating error.” *See id.* at 967 (quoting *Mayle v. Pa. Dep’t of Highways*, 388 A.2d 709, 720 (Pa. 1978) (“[T]he doctrine of *stare decisis* is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish.”)). Whatever deference is owed, reviewing courts must always bow to the “force of better reasoning,” *see Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 408 (1932) (Brandeis, J., dissenting), and our “ultimate touchstone” is the text of the Constitution itself. *Firing v. Kephart*, 353 A.2d 833, 835-36 (Pa. 1976). So, while I am cautious not to hastily discount the persuasive value of *dicta*, I nonetheless reject the path of unquestioning adherence to *Chase*. *See McLinko*, 270 A.3d at 1273. The provisions that govern the franchise and its exercise have changed dramatically since 1862.<sup>4</sup> It would therefore disserve the

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4. Compare PA. CONST. (1838) art. III, § 2 (“All elections shall be by ballot, except those by persons in their representative capacities, who shall vote *viva voce*.”), with PA. CONST., art. VII, § 4 (“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.”). Beyond this clear expansion of legislative authority over the manner of holding elections, Article VII now also includes Section 14, which establishes a right to absentee voting for several enumerated populations. *See* PA. CONST. art. VII, § 14. I discuss the function of Section 14 in more detail *infra*, at 20-24.

*Appendix A*

foregoing principles to kick the proverbial tires of *Chase* and award it some perfunctory approval based upon a colorable theory of acquiescence. The contest between a requirement that may have been sewn into the fabric of the Constitution by the function of time or consistent legislative action and the document’s plain language is no contest at all.

Upon closer examination, Justice Woodward’s treatment of “offer to vote” represents precisely the sort of *ipse dixit* that exceeds this Court’s constitutional prerogative. Judicial review is not an exercise in consulting oracles whose proclamations hold water by virtue of some inherent authority. Rather, it represents the deliberative and analytical work of courts effectuating the will of the people, from whom all power flows, *see* PA. CONST. art. I, § 2,<sup>5</sup> as they have expressed it in writing. The *Chase* Court’s construction of “offer to vote” finds no basis in the text or structure of Article VII. It neither aligns with the meaning of those words—presently or at the time of their inclusion in our Constitution—nor does it reflect the apparent intent of the democratic body that adopted them. In my view, these deficiencies preclude us from following *Chase* today.

The 1862 Court’s analysis suffers mightily from the outset. The Court began by observing that the General Assembly had drafted the Military Absentee Act of 1839—which was “virtually a reprint of” the Military Absentee

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5. “All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. . . .”

*Appendix A*

Act of 1813—five years before its enactment. *Chase*, 41 Pa. at 416. From the bare fact that “the legislature passed [the 1839 Act] pretty much in the words submitted,” the Court deduced that the General Assembly failed to recognize “the changes which . . . had taken place in our fundamental law” over the interim—*i.e.*, the revision of the Constitution of 1790. *Id.* at 417. “We are not to wonder at this,” Justice Woodward relates, “for instances of even more careless legislation are not uncommon.” *Id.* To wit, since the Legislature “did not hesitate to retain the substance of the Act of 1813[,]” the *Chase* Court theorized that it irresponsibly overlooked the ratification of the 1838 Constitution and the introduction of “offer to vote” between 1834 and 1839. *Id.*

But this Court presumes neither carelessness nor ignorance from our General Assembly. Rather, the Legislature’s acts “enjoy a strong presumption of validity, and will only be declared void if they violate the Constitution clearly, palpably, and plainly.” *Commonwealth v. Bullock*, 913 A.2d 207, 211 (Pa. 2006) (cleaned up); *see Sharpless v. Mayor of Phila.*, 21 Pa. 147, 164 (1853) (opinion of Black, C.J.) (“[W]e can declare an Act of Assembly void, only when it violates the constitution *clearly, palpably, plainly*; and in such manner as to leave *no doubt* or hesitation on our minds.”) (emphasis in original). To succeed in challenging a statute’s constitutionality is to bear a “very heavy burden,” and we must resolve any doubt in favor of the constitutionality of legislative action. *Bullock*, 913 A.2d at 212 (quoting *Payne v. Commonwealth, Dep’t of Corr.*, 871 A.2d 795, 800 (Pa. 2005)). By presuming unscrupulous action from a coequal branch of our Commonwealth’s government, the *Chase* Court began its analysis on the

*Appendix A*

wrong foot, in derogation of the separation of powers.

The parade of infirmities does not end there, though. As both the Majority and the Acting Secretary observe, the constitutional provision in which “offer to vote” appeared in 1838 concerned the *qualifications* of voters; the *method* of voting was prescribed elsewhere in Article III. See Maj. Op. at 30-35; Acting Secretary Br. at 39-46. Recognizing that drafters do not ordinarily “hide elephants in mouseholes,” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001), this distinction alone led several peer courts interpreting virtually identical “offer to vote” provisions to expressly reject *Chase*’s logic.<sup>6</sup> That

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6. See, e.g., *Moore v. Pullem*, 142 S.E. 415, 421-22 (Va. 1928) (“To suppose that the draftsmen of the Constitution paused in the writing of these elaborate provisions relating to these different subjects 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 such a statute, appears to us to ignore fundamental rules of construction. The method of voting is elsewhere . . . specifically and unequivocally committed to the legislative discretion.”); *Goodell v. Judith Basin Cty.*, 224 P. 1110, 1114 (Mont. 1924) (“In order . . . to hold that the clause ‘at which he offers to vote’ was intended to . . . describe the manner of voting, we must assume that the learned men who drafted [that provision] stopped short in the very 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 . . . manner of voting, by the use of the language employed in [the voter qualifications provision].”); *Jenkins v. State Bd. of Elections of N.C.*, 104 S.E. 346, 349 (N.C. 1920) (“[T]he context of article 6 [of the North Carolina Constitution] indicates that the

*Appendix A*


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personal presence of the voter is not required in order to cast his ballot. An 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 [the] proper official. The section requires only that he must make that offer in the precinct where he has resided . . . .”); *Straughan v. Meyers*, 187 S.W. 1159, 1162 (Mo. 1916) (“It is clear that this section does not undertake to prescribe the manner in which a choice shall be expressed, or a vote cast, . . . but merely the qualifications on the voters. It is true, under this provision, a person can only vote 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.”); accord *Lemons v. Noller*, 63 P.2d 177, 185 (Kan. 1936); *Bullington v. Grabow*, 298 P. 1059, 1059-60 (Colo. 1931). Other jurisdictions have rejected similar efforts to conflate voting methods with voter qualifications. See *Jones v. Smith*, 264 S.W. 950, 950-51 (Ark. 1924) (holding that voter qualifications provision of state constitution attaching the phrase “where he may propose to vote” to various residency requirements did not preclude absentee voting); *Morrison v. Springer*, 15 Iowa 304, 345-47 (1863) (same, where voter qualifications provision required sixty days’ residency in “the county in which he claims his vote”).

Eliding these precedents, Bonner relies heavily upon three decisions from the Supreme Court of New Mexico that credited *Chase’s* conclusion that “offer to vote” required manual delivery of one’s ballot. See Bonner’s Br. at 43-47 & n.8 (citing *Chase v. Lujan*, 149 P.2d 1003 (N.M. 1944); *Baca v. Ortiz*, 61 P.2d 320 (N.M. 1936); *Thompson v. Scheier*, 57 P.2d 293 (N.M. 1936). While those cases *did* invoke our 1862 decision and those of the divided high courts of California and Michigan, see *Bourland v. Hildreth*, 26 Cal. 161 (1864); *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865) (*seriatim*), the Majority aptly observes that what drove the New Mexico Supreme Court’s decision was a long-standing statutory command, dating to the State’s territorial days, that, “All votes shall be by ballot, each voter being required to deliver

*Appendix A*

its reading assumed the interpolation of a substantive constitutional requirement in a section that concerns an entirely distinct subject may not, by itself, prove fatal to *Chase*. It does, however, serve to fan the flames of skepticism.

Justice Woodward, himself a delegate to the 1837 constitutional convention, might also have grounded his analysis in the intent and aims of the men who chose to introduce “offer to vote” into the constitutional text. But he did not, and with good reason: any examination of that project would have yielded results that undermined his conclusion. Pages and pages of convention proceedings reveal a body preoccupied with the switch from at-large voting to precinct voting, with no mention whatsoever of any in-person voting requirement.

The most substantial discussion of the proposed Article III, Section 1 took place on Wednesday, January 17, 1838. In its initial draft, the provision did not use the phrase “offer to vote,” nor did it require residence in a particular “election district.”<sup>7</sup> In this respect, the draft

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his own vote in person.” See Maj. Op. at 27 n.20 (quoting L. 1851, p. 196, Code 1915, § 1999); see *Thompson*, 57 P.2d at 295-96, 301; see also *Lujan*, 149 P.2d at 1004-06 (identifying several other territorial-era election statutes containing “offer to” language, still in force when New Mexico attained statehood, requiring in-person participation for various purposes, including registering to vote). But the *Chase* Court had no such Pennsylvania legacy upon which to rely. Thus, New Mexico’s experience provides little support for Bonner’s contention.

7. When debate began on January 17, the provision read as follows:

*Appendix A*

language largely tracked that of the 1790 Constitution.<sup>8</sup> Delegate Emanuel C. Reigart of Lancaster County then proposed inserting the words “and shall have resided in the district in which he shall offer to vote, at least ten days immediately preceding such election.”<sup>9</sup> PROCEEDINGS, at 296. Ten days, according to Reigart, was a “sufficient time . . . for [an elector] to be assessed. A residence was

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SECTION 1. In elections by the citizens, every freeman of the age of twenty-one years, having resided in the state one year, and, if he had previously been a qualified elector of this state, six months, 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. Provided that freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in this state one year before the election, shall be entitled to vote, although they shall not have paid taxes.

9 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG, MAY 2, 1837, 296 (Packer, Barrett, & Parke, pubs., 1839) (“PROCEEDINGS”).

8. *See* PA. CONST. (1790) art. III, § 1:

In elections by the citizens, every freeman of the age of twenty-one years, having resided in the State two years next before the elections, and within that time paid a State or county tax, which shall have been assessed at least six months before the election, shall enjoy the rights of an elector: Provided, That the sons of persons qualified as aforesaid, between the age of twenty-one and twenty-two years, shall be entitled to vote, although they shall not have paid taxes.

*Appendix A*

obtained by the payment of a tax.” *Id.* Another delegate, believing “that a residence of ten days was too long, as an absolute qualification,” indicated his willingness to support “five, or seven days,” *id.* at 303; yet another proposed “fifteen days,” *id.* at 314. And after Reigart apparently acquiesced to a shorter timeframe, a third delegate proposed reverting to the original suggestion of ten days. *See id.* Other delegates fretted about which taxes might empower an individual to vote within a given election district. Proposals to include school taxes, poor taxes, and municipal corporation taxes failed by a vote of fifty-five to fifty-four. *Id.* at 313.<sup>9</sup> The convention eventually settled on state and county taxes, leaving that part of the provision unchanged from the 1790 Constitution. *Id.* at 316.

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9. *See also* 3 PROCEEDINGS, at 92-95. Regarding a proposal that “free male citizens, qualified by age and residence . . . who shall, within two years next before the election, have paid any public tax required by law should also be entitled to vote in the district in which they reside,” one delegate stated his motivations plainly:

His object in introducing [the amendment] was to give the right of suffrage to every citizen who had paid a State, county, road, school, or poor tax. It had happened that a man had gone and presented his vote, with a receipt of his having paid the poor tax—when he was told by the election officer that he had not paid his county tax, and consequently he could not vote. Now, the object of [the] amendment was to extend the elective franchise, to the greatest possible limits. He would not be in favor of any tax, were it not for ascertaining a man’s residence.

*Id.* at 92.

*Appendix A*

The great thrust of the debate, though, concerned whether the Constitution should include a residency requirement at all. Delegate John Cummin of Juniata County, among others, noted that

many mechanics and laborers were in the habit of removing from place to place. They might, for instance, live in this township today, and tomorrow, go a mile or a mile and a half off. So that, although a man might be a citizen of the state, and in the habit of voting, yet, if this amendment should be adopted, he might probably be deprived of . . . the sacred and invaluable right of suffrage.

*Id.* at 297.<sup>10</sup> Delegate William Hiester acknowledged the “great difference of opinion as to what constituted

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10. Numerous other delegates expressed precisely the same concern. *See, e.g., id.* at 298 (“It was well known that a great many hands were employed, and that they had continually to remove from one county to another, and from township to township. A citizen of one county might remove over to another, and this amendment would deprive him of the right of voting.”); *id.* at 304-05 (“[T]he mechanical and laboring classes of society . . . frequent[ly] change [ ] residence[s] in order to suit their occupation. . . . If a man moves into a district the night before the election—if his removal be for the purpose of pursuing the regular business by which he lives—I say that, unless it can be shown that there was fraud, there is no reason why, by a constitutional enactment, we should deprive him of the right to vote. I repudiate the doctrine altogether.”). Others attempted to quell those fears, asserting that “[t]here were very few voters . . . who did not reside in their respective districts, for at least ten days before the election.” *Id.* at 301.

*Appendix A*

a residence. In some places, sleeping a night; in others, a day's residence, or having some washing done, was a sufficient evidence of his right to vote. There was great vagueness and uncertainty, connected with the matter." *Id.* at 298. One delegate wondered whether "a man residing in the city of Philadelphia [whose] house [is] destroyed by a fire," forcing him to move just beyond the city lines to the county of Philadelphia in the days before an election, would "be deprived of the right of suffrage?" *Id.* at 307.

Interspersed in these discussions are several intimations of the amendment's fundamental purpose. Delegate Walter Craig opined that, if Reigart's proposal were not adopted,

it will be seen that no residence will be required, to entitle a man to vote in any district, ward, or borough, where he may choose to exercise this privilege; that is to say, if an individual shall have resided in one part of the state for a given space of time, and shall have paid a state or county tax, he will be entitled, in the absence of such an amendment . . . to vote at elections in any other place. The object of the amendment is to prevent this amalgamation, so to speak, of electors from different parts of the state; *it is to keep [electors] within their own proper districts.*

*Id.* at 300 (emphasis added). Delegate James Biddle put it succinctly: "Those who resided in a particular district, were the persons who ought alone to be entitled to vote in

*Appendix A*

that district, because they were the persons to be affected by the election in that district.” *Id.* at 309.

A lengthy speech by Delegate James Dunlop carried the day. Dunlop began by calling attention to the fact that the General Assembly had enacted a local (or “district”) residency requirement by statute in 1799,<sup>11</sup> though he quickly acknowledged that “it might be a question of some doubt, whether an act of assembly could enlarge or restrict the qualifications of electors” beyond those contemplated by the Constitution. *Id.* at 317-18. Although Dunlop believed “this [local residency] requirement . . . long had been held to be the law of the land,” he conceded that “considerable doubt” remained as to “whether a man was bound to reside in the district in which he voted.” *Id.* at 318. Intimating that “judges and inspectors of elections” might “infringe the present law” on that basis, he opined that “the experience of half a century had shown the necessity of requiring a residence of the voter,” such that “a provision ought to be inserted” into the founding charter to quash any lingering questions about the act’s propriety. *Id.*

Raising the specter of “import[ed] voters from different parts of the country,” Dunlop then related a story about two individuals in Baltimore who “had no particular place of residence” and, taking advantage of an omission in the law that required “no particular time” to establish residency for purposes of voting, allegedly “had voted together in every ward but one.” *Id.* at 318-19. “Could

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11. See Act of Feb. 15, 1799, 3 Smith’s Laws 340.

*Appendix A*

there be any doubt that under the operation of such a law, many unfair practises [*sic*] were obtained?” *Id.* at 318. Undoubtedly, Philadelphia was no stranger to the practice of such “great frauds.” *Id.* “In the city of Pittsburg[h],” he added, “men had been apprehended, charged with having voted where they had no right to vote.” *Id.* at 318. With these fears in mind, he concluded:

[I]f a man could change his residence three or four times a day, there could be no evidence to prove that he was entitled to a vote, but when a man was compelled to reside a certain time in one district, before being permitted to vote, then we fixed the *indicia* of his residence.

*Id.* at 319 (emphasis in original). The convention then adopted the amendment by a vote of sixty-four to sixty. *Id.* at 320.

Had the *Chase* Court searched for the impetus behind the convention’s adoption of the “offer to vote” language, it would have found overwhelming evidence that the delegates were principally concerned with the change from at-large to precinct voting and carefully considered whether the imposition of a local residency requirement to establish one’s *qualifications* as an elector could be sustained other than by constitutional amendment. The delegates wrestled with *where* an individual should be allowed to vote, with an eye toward the Commonwealth’s ongoing westward expansion and the political rights of transient populations. They quibbled over the duration of the residency requirement and what sorts of taxes

*Appendix A*

would suffice. But I have found no evidence that delegates concerned themselves with *how* electors should vote.<sup>12</sup>

Even without support from the structure of then-Article III or the intentions that animated its drafting, an interpretation of “offer to vote” that incorporates an

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12. The *Chase* Court conceivably might have found a modicum of support for its view in the comments of a lone delegate. James Biddle opined that the Reigart amendment would “make it more difficult for persons disposed to give fraudulent votes, to accomplish their ends.” 9 PROCEEDINGS, at 309. An individual who had resided in a district for ten days, he said, “will be known by some person, and frauds cannot be perpetrated as they now are, one voter giving in a vote at perhaps one or two wards in the city, in Southwark and the Northern Liberties on the same day.” *Id.* By requiring voters to establish “fixed residences,” Biddle suggested “it will be in the power of some one at the polls, to point out where another resides, and if he votes in an improper place, he may be punished for his fraud and crime.” *Id.* While this discrete deterrence justification coheres with the Court’s eventual analysis, *see Chase*, 41 Pa. at 419 (“[T]he 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.”), it stands alone in the historical record. Moreover, it reinforces the notion that the principal evil that concerned delegates was the circumstance in which electors fraudulently attempted to vote *in more than one election district*, not the particular form of their votes. In any event, the Election Code long has imposed various fraud-control measures—above and beyond anything envisioned by nineteenth-century voter-fraud prognosticators—to ensure that an elector is qualified to vote in a particular election district, that only a qualified elector may obtain an absentee (or, now, mail-in) ballot, and that no elector is able to cast more than one ballot, no matter the method he or she chooses to vote.

*Appendix A*

in-person requirement might still have prevailed today if it found traction in the plain meaning of those words. But here, too, *Chase*'s reading fails. Nothing about the verb "offer," as presently used or as employed in the nineteenth-century, mandates physical presence. Dictionaries of that era defined "to offer" as "to exhibit anything so as that it may be taken or received"; "to attempt; to commence; to propose";<sup>13</sup> or even "to declare a willingness."<sup>14</sup> Not one of these meanings supports Justice Woodward's narrower reading. McLinko concedes that "one might imagine someone sending a contractual 'offer' through the mail"—indeed, the average Pennsylvanian in 1838 or 1862 certainly would have been familiar with offers to buy, sell, contract, appear, prove, etc., by way of a letter, *see, e.g., Slaymaker v. Irwin*, 4 Whart. 369 (Pa. 1839) (adjudicating breach of contract executed by mail)—but nonetheless maintains that offering to vote by mail would be "far less common." McLinko's Br. at 11. In doing so, he devastates his own argument. Faced with two uses of a given word or phrase in the Constitution, both of which would have been understood by the ratifying voter, the Court cannot simply cast one aside as illegitimate on mere conjecture.<sup>15</sup>

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13. SAMUEL JOHNSON & JOHN WALKER, A DICTIONARY OF THE ENGLISH LANGUAGE 503 (1828 ed.); *cf.* 9 PROCEEDINGS, at 315 ("[H]e must prove that he has lived in some particular district for the last fifteen days prior to the election, at which he *purposes* [*sic*] to vote.") (emphasis added).

14. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 689 (1828).

15. To do so, in fact, would contradict our mandate to resolve all doubts about constitutionality in favor of the Legislature. *Cf.*

*Appendix A*

It is for these reasons that the Court is justified in discarding *Chase*'s construction of "offer to vote." The text, structure, intent, and original public meaning of that constitutional provision all run counter to its ultimate conclusion. Without any discernible resort to conventional tools of constitutional interpretation, the Court's opinion turned instead on policy considerations, not entirely convincing in their own right, that fall outside the purview of the judicial branch. The General Assembly, the Court alleged, had "open[ed] a wide door for [the] most odious frauds," enabling "political speculators, who prowled about the military camps watching for opportunities to destroy true ballots and substitute false ones, to forge and falsify returns, and to cheat citizen and soldier alike out of the fair and equal election provided for by law." *Chase*, 41 Pa. at 425; *id.* ("And this is the great vice of [the Act]—that it creates the occasion and furnishes the opportunity for such abominable practices."). These considerations do not belong in the courts, but in the halls of the General Assembly, and their prominence in the *Chase* Court's analysis engenders still more suspicion as to the legitimacy and soundness of its interpretation of "offer to vote."

While the foregoing considerations establish why *Chase*'s reading of then-Article III (now-Article VII), Section 1 should be abrogated (to the extent they constitute binding precedent at all), other elements of that decision survive today's review. As the Majority recognizes, a great deal of the *Chase* Court's reasoning

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*Payne*, 871 A.2d at 800.

*Appendix A*

concerned the deputization of military commanders—who, in many cases, may not even have been Pennsylvanians—to create *ad hoc* election districts which may have fallen outside the Commonwealth’s borders. Setting aside whether the General Assembly “could form a district *beyond* our territorial jurisdiction for the convenience of our own citizens,” *id.* at 420 (emphasis in original), Justice Woodward, speaking for himself, granted that the General Assembly could “make a military camp in Pennsylvania an election district and declare that military sojourn and service therein for ten days should be equivalent to a constitutional residence for the purposes of election.” *Id.* at 421.<sup>16</sup> But that is not what the Military Absentee Act of 1839 did. Rather, the Act delegated to “the commanding officer of the troop or company to which [the electors] belong” the authority to “appoint” “such place” at which the electors “may exercise the right of suffrage.” *Id.* (quoting Section 43 of the Act).

As the Court explained, “the legislature had no power to authorize a military commander to make an election district.” *Id.* at 422.

It is a part of the civil administration—this designating of election districts—and however it may be committed by one of the three coordinate departments of the government to another of those departments, as by the legislature to the judiciary, no civil functions

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16. *See id.* (“I would be extremely loth to think such a law unconstitutional. These observations, however, . . . must not be considered as expressing the opinion of the court, but only my own.”).

*Appendix A*

of either department can be delegated to a military commander. This would be to confound the first principles of the government. If the legislature had said in the most express terms that the commander might declare his camp, wherever it might happen to be, an election district, it could have availed nothing, for the constitution, in referring to the legislature for election districts, recognized them as among the *civil* institutions of the state, to be created and controlled exclusively by the civil, as contradistinguished from the military power of the state. The constitution says “the military shall, in all cases and at all times, be in strict subordination to the civil power,”<sup>17</sup> which is marking a distinction between the two powers with great emphasis. To the civil and not to the military power did the constitution intrust [*sic*] the formation of election districts, and therefore the civil cannot commit it to the military.

If, then, the legislature did not and could not authorize the military commander to form an election district, how could there be any constitutional voting under [Section 43 of the Act]? Without an election district there can be no constitutional voting. [Section 43] provides for no election district, and no military

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17. PA. CONST. (1838) art. IX, § 22 (“No standing army shall, in time of peace, be kept up without the consent of the Legislature; and the military shall, in all cases, and at all times, be in strict subordination to the civil power.”), *since redesignated* PA. CONST. art. I, § 22.

*Appendix A*

commander can be empowered to form one—hence it follows, as an inevitable deduction, that the “place” referred to in that section is inconsistent with the constitutional requisition of an election district, and that whatever votes have been cast in pursuance of that section since the Constitution of 1838 came in, have been cast without authority of law.

*Id.* In this respect, the Court relied not upon conclusory pronouncements untethered from the constitutional text, but longstanding principles of constitutional democratic governance and the separation of powers. The discussion of “offer to vote” being entirely severable from this more substantive and defensible analysis, *Chase* stands as good law insofar as it expounds principles of non-delegation vis-à-vis the military.<sup>18</sup>

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18. To be clear, *Chase* did not question the General Assembly’s authority to delegate the creation of election districts to other *civil* powers, including the courts. The Court noted that, from the adoption of the 1799 law, “we have had innumerable Acts of Assembly creating, dividing, and subdividing election districts, until the legislature grew tired of the subject, and, in 1854, turned it over to the Courts of Quarter Sessions, to fix election districts, ‘so as to suit the convenience of the inhabitants thereof.’” *Chase*, 41 Pa. at 420 (quoting Purd. 1069). Nor, curiously, did Justice Woodward impugn the Legislature’s power to “sanction” election practices that deviated from “the natural and obvious reading of” Article III. *Id.* at 424, 428; *see id.* at 424 (citing, for example, the fact “that voters in the township of [Wilkes-Barre] . . . are accustomed to vote in the borough of [Wilkes-Barre], which is a separate election district, and other similar instances [that] are said to exist in Luzerne County, where votes are actually cast in an election district adjacent to that in which the electors reside”);

*Appendix A*

Without *Chase*'s narrow construction of "offer to vote," McLinko and Bonner must find some other constitutional hook to establish that the General Assembly lacked authority to enact Act 77. But there is none to be found. Article VII, Section 4 requires that "[a]ll 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. The Majority offers a persuasive account of the 1901 addition of "such other method" and the power that it confers upon the Legislature, *see* Maj. Op. at 64-69, but resort to that provision is wholly unnecessary to resolve this case. Mail-in ballots are ballots.<sup>19, 20</sup> And neither McLinko nor

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*id.* ("If this practice have the sanction of an Act of Assembly, it is defensible; if it have not, I know of no principle on which it can be excused except that of *communis error*."). At bottom, the Court's concern was for "legislative control of election districts." *Id.* Because the General Assembly could not dictate the actions of military commanders, its efforts to delegate the creation of *ad hoc* districts to those commanders in their absolute discretion ran afoul of the Constitution.

19. For this reason, I do not join the Majority's analysis in the paragraph that begins on page 71.

20. The Commonwealth Court opined that, "where language has been retained [from one version of the Constitution to the next], this has been done advisedly in order to retain the original meaning." *McLinko*, 270 A.3d at 1263. To refer to the "1968 Constitution" or the "1838 Constitution," it explained, is a misnomer. These are "designations for convenience only," because our founding charter "has been amended, *not replaced and not readopted*, by the proposals of the last four conventions." *Id.* (citing ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 7 (1985) (Commonwealth Court's emphasis)). The Majority appears to credit this view. Maj. Op. at 33 n.24.

*Appendix A*


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Interpreters might ask, though, if the Constitution is to be “interpreted in its popular sense, as understood by the people when they voted on its adoption,” *Ieropoli*, 842 A.2d at 925, to which people and to which adoption do we refer? Following the Commonwealth Court’s logic, it appears, our sole touchstone in determining the meaning of a term like “ballot” would be the 1776 constitution. *See* PA. CONST. (1776) ch. II, § 32 (“All elections . . . shall be by ballot . . .”). We would assume that original meaning to have been intentionally retained in 1790, 1838, 1874, and 1968. But, as the lower court’s own analysis demonstrates, what constitutes a “ballot” has evolved to no small degree. *See McLinko*, 270 A.3d at 1254-56. If the interpretive inquiry were limited to the popular sense of “ballot” in 1776, we might understand it to mean a “printed slate[ ] of candidate selections . . . that political parties distributed to their supporters and pressed upon others at the polls,” to the exclusion of all other forms. *Id.* at 1255 (quoting *Minn. Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1882 (2018)). But the 1968 ratifying voter, accustomed to the Australian ballot—which only made its way into Pennsylvania law in 1891, *id.* (citing *De Walt v. Bartley*, 24 A. 185, 186-87 (Pa. 1892); *Working Families Party v. Commonwealth*, 209 A.3d 270, 293 n.11 (Pa. 2019) (Wecht, J., concurring and dissenting))—might not have viewed such pre-ordained selections as a true “ballot” at all. Taken to its logical extreme, this principle might preclude use of both state-generated paper ballots, as well as certain voting machines that “display an electronic ballot on a screen and allow an individual to vote using a button, dial, or touch screen,” *Banfield v. Cortes*, 110 A.3d 155, 159 (Pa. 2015)—none of which would have been familiar to the eighteenth-century Pennsylvanian.

There can be no doubt that, where language is retained, its extant meaning and prior constructions are relevant to its present interpretation. I decline, however, to spin Judge Woodside’s comment about “designations” (as opposed to “constitutions”) into a broader principle of constitutional theory that would render sacrosanct the understanding of the men who promulgated our 1776 Constitution—which, like the Constitution of 1790, was

*Appendix A*

Bonner contends that existing provisions of the Election Code fail to ensure constitutionally-prescribed secrecy. Accordingly, Act 77 finds no impediment in Article VII, Section 4.

Appellees' remaining arguments, which derive from Article VII, Section 14,<sup>21</sup> are strained and unconvincing.

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never submitted to the people of Pennsylvania for ratification, *see* PA. CONST. (1776) Whereas cl.; *League of Women Voters v. Commonwealth*, 178 A.3d 737, 808 n.68 (Pa. 2018); *see generally* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 232-33, 307, 332-40, 438-46 (1998 ed.)—and would functionally ignore the likely understanding of the millions of Pennsylvanians who ratified our current governing charter in 1968. This Court has never passed upon whether our Commonwealth has had one moment of constitutional self-determination or five. We have, however, referred to the projects of 1790, 1838, 1874, and 1968 as culminating in “new” constitutions. *See Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 744 (Pa. 2012) (“[T]he new Constitution . . . was approved by Pennsylvania voters [in 1968].”); *Appeal of Long*, 87 Pa. 114, 116 (1878) (“since the adoption of the New Constitution of 1874”); *Kittanning Coal Co. v. Commonwealth*, 79 Pa. 100, 105 (1875) (“This power was possessed under the constitution of 1790 . . . and existed when the new constitution was framed and adopted.”). Accordingly, the Commonwealth Court’s commentary on the point should be recognized as nothing more than an expression of one available view among several, the selection of which could be quite consequential.

21. Article VII, Section 14(a) provides:

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

*Appendix A*

They claim that, to permit the legislature to provide for universal mail-in voting by statute (rather than by constitutional amendment) would render that provision mere surplusage. *See* McLinko’s Br. at 21-24; Bonner’s Br. at 52. The Commonwealth Court agreed. *McLinko*, 270 A.3d at 1263. In that court’s view, “Section 14 established the rules of absentee voting as both a floor and a ceiling.” *Id.* at 1264. That is, by exclusively granting this privilege to the populations enumerated therein, the Constitution foreclosed its availability to all others. *See* Bonner’s Br. at 27-31. But, as the Majority explains, this is incorrect. Section 14 “*guarantees* that regardless of the legislature’s exercise of its authority to determine the way that votes may be cast, those classes of absentee voters designated within it” retain an enforceable right “to exercise their franchise regardless of their location on Election Day.” Maj. Op. at 73-74 (footnote omitted; emphasis added).

Appellees’ argument also neglects to address Section 14’s use of “shall,” rather than “may.” Legislative power is not circumscribed by just *any* implication from the constitutional text, but only that which is *necessary* to the document’s coherence. *Bailey v. Waters*, 162 A. 819, 820

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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(a).

*Appendix A*

(Pa. 1932) (“A long line of judicial pronouncements declare that the Legislature may be prohibited by *necessary* implication from doing things which are not expressly prohibited in the Constitution.”); *Commonwealth ex rel. Brown v. Heck*, 95 A. 929, 930 (Pa. 1915) (“If such power does not exist, it is because the Constitution has expressly withheld it or forbidden it by *necessary* implication.”); *Appeal of Lewis*, 67 Pa. 153, 165 (Pa. 1870) (“A prohibition may be implied even in a constitution, but the implication must be very plain and *necessary*. The legislature possess all legislative power except such as is prohibited by express words or *necessary* implication.”) (all emphases added).

To illustrate the problem that this presents for Appellees’ argument, imagine that a dog-owner hires a neighbor to check in on Fido while she is at work. She instructs the neighbor that he “shall” give Fido one cup of kibble in his bowl, fresh water, and a walk around the block. No reasonable interpretation of those requirements *necessarily* prohibits the neighbor from also playing fetch with Fido, or rubbing his belly, or giving him a treat. The neighbor would not need special dispensation to go above the bare minimum, and likely would not face adverse consequences as long as that bare minimum was met. Had the owner wished to set both a floor *and* a ceiling with respect to the neighbor’s activity, she could have used “may” instead of “shall”—in which case a *necessary* implication of her omitting anything about fetch, belly rubs, or treats from the instructions is that they are beyond the neighbor’s purview. See, e.g., *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) (“Under the doctrine of *expressio unius est exclusio alterius*, the

*Appendix A*

inclusion of a specific matter in a statute implies the exclusion of other matters.”) (internal quotation marks omitted).

In an earlier era, Appellees’ claims might have held water. Between 1949 and 1967, the Constitution was amended several times to permit—but not to require—the General Assembly to provide a means of absentee voting for certain “qualified war veteran voters,”<sup>22</sup> and,

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22. Article VIII, Section 18 was added by amendment November 8, 1949. It provided:

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. (1874) art. VIII, § 18 (emphasis added); *see* 1949 Pa. Laws 2138. The circumstances covered by Section 18 were refined on November 3, 1953, but the permissive language was retained:

The General Assembly may, by general law, provide a manner in which, and the time and place at which, qualified war veteran voters may vote, who are unable to attend at their proper polling places because of being bedridden or otherwise physically incapacitated, and may provide for the return and canvass of their votes in the election district in which they respectively reside. Positive proof of being bed-ridden or otherwise

*Appendix A*

later, voters who might 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.”<sup>23</sup> But that state of affairs changed significantly on May 16, 1967, when Section 18 was repealed and Section 19 was altered considerably. Renumbered Article VII, Section 14, the newly ratified provision commanded that:

The Legislature *shall*, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the

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physically incapacitated shall be given by affidavit or by certification of a physician, hospital or other authenticated source.

PA. CONST. (1874) art. VIII, § 18; *see* 1953 Pa. Laws 1496.

23. Article VIII, Section 19, added by amendment November 5, 1957, provided:

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 of 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. (1874) art. VIII, § 19; *see* 1957 Pa. Laws 1019.

*Appendix A*

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. (1874) art. VII, § 14 (emphasis added); *see* 1967 Pa. Laws 1048. In 1985, the class of guaranteed absentee voters covered by Section 14 was expanded to include voters “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.” PA. CONST. art. VII, § 14; *see* 1985 Pa. Laws 555.<sup>24</sup>

The electorate having amended the operative verb in Section 14 from the permissive “may” to the obligatory “shall” in 1967, this provision now functions as a bulwark against the prospect of a temporal majority that might stand to benefit if the populations enumerated therein were excluded from the democratic process. Were that hypothetical antidemocratic majority to repeal the Election Code in its entirety, Section 14 guarantees those discrete classes of electors relief in the form of an absentee ballot. Any member of those enumerated

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24. The most recent amendment to this provision, replacing “State or county” with “municipality” and adding a new subsection containing a definition for the same, was ratified November 4, 1997. *See* 1997 Pa. Laws 636.

*Appendix A*

populations could petition the courts to compel the General Assembly to fulfill its constitutional obligations to them. But the same cannot be said of those entitled to vote by mail without an excuse under Act 77. If the General Assembly were to repeal that statute tomorrow, the ordinary voter would have no constitutional claim to a no-excuse mail-in ballot; absent a constitutional *mandate*, the courts have no authority to compel the Legislature to extend such a forbearance beyond the protected classes of electors expressly identified. Thus, Section 14 and Act 77 accomplish fundamentally different ends, and the Majority's reading renders no part of the Constitution surplusage.

In announcing its decision today, the Court looks past the celebrated bipartisan nature of this law's passage; past the fact that several of the challengers in the instant suit voted for its adoption; past whatever reliance interests may have developed as millions of Pennsylvanians became accustomed to voting by mail these past several years; and even past the startlingly offensive, antidemocratic overtones<sup>25</sup> of the *Chase* Court's rationale. We consider only whether any defensible construction of the text of our Constitution mandates in-person voting. Having afforded *Chase* its proper scrutiny, I conclude that no such construction exists, and that Act 77 must stand.

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25. *See Chase*, 41 Pa. at 426 (“[The Pennsylvania Constitution of 1838] withholds [suffrage] altogether from about four-fifths of the population, however much property they may have to be taxed, or however competent in respect of prudence and patriotism, many of them may be to vote. And here let it be remarked, that all our successive constitutions have grown more and more astute on this subject.”).

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

As I would affirm the order of the Commonwealth Court, I respectfully dissent. Notably, neither the majority nor the concurrence provides a convincing account of how our state Charter permits universal, no-excuse mail-in ballots, particularly in light of its specific authorization for absentee ballots for four defined groups of voters. The majority opinion in particular takes an approach that, if not ahistorical, is at best historically selective. Its most glaring omission is its failure to come to grips with the fact that the Pennsylvania Constitution's election-related provisions have been amended on numerous occasions in the 160 years since this Court first explained that by default it requires in-person voting, and in none of those instances have the people of this Commonwealth sought to eliminate, alter, or clarify the textual basis for that ruling as it appears in our organic law. The majority also emphasizes the popularity of the legislation under review and the care with which it was debated, going so far as to recite the margin by which it was passed in each House of the General Assembly and the party affiliation of the legislators. *See* Majority Op. at 4-5. None of these observations has any relevance to the issue before this Court. Legislation inconsistent with our state Charter cannot gain validity through popular sentiment or careful drafting. The Constitution stands as a bulwark against contrary sentiment and the passions of the moment, and it can only be altered in the careful manner that it prescribes. *See* PA. CONST. art. XI, § 1.

*Appendix A*

To find authorization for universal no-excuse, mail-in balloting, the majority relies almost exclusively on Section 4 of Article VII. That provision indicates elections “shall be by ballot or by such other method as may be prescribed by law” so long as ballot secrecy is maintained. PA. CONST. art. VII, § 4. But that language does not speak to the issue before this Court, as there is no dispute that mail-in voting under Act 77 is “by ballot.” The ballot is mailed in, rather than completed in person at the polling place, but it is still a ballot. *See* 25 P.S. §§3150.11(a) (giving qualified mail-in electors the right to “vote by an official mail-in ballot”), 3150.12(a) (relating to applications for mail-in ballots); Concurring Op. at 19 (“Mail-in ballots are ballots.”); *In re Canvassing Observation*, 241 A.3d 339, 341 (Pa. 2020) (resolving a dispute relating to the canvassing of “mail-in and absentee ballots”). Given the meaning of the word “other,” Section 4’s reference to “other method[s]” plainly pertains to non-ballot methods — most notably when the provision was added to the Constitution in 1901, voting machines. *See In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924); *accord McLinko v. Dep’t of State*, 270 A.3d 1243, 1257 (Pa. Cmwlth. 2022) (quoting Robert E. Woodside, PENNSYLVANIA CONSTITUTIONAL LAW 465 (1985)); *cf. People ex rel. Deister v. Wintermute*, 86 N.E. 818, 819 (N.Y. 1909) (stating that the same phrase — “such other method as may be prescribed by law” — which was added to the New York Constitution in 1895, was included “solely to enable the substitution of voting machines, if found practicable”). It is true, as the majority emphasizes, that this language is broad enough to encompass other methods besides voting machines, including methods not yet invented. My point

*Appendix A*

here is that those other methods cannot include mail-in ballots because, as noted, they must be “other” than ballots. *Accord McLinko*, 270 A.3d at 1263 (observing that no-excuse mail-in voting “uses a paper ballot, and not some ‘other method’”). As a consequence, Section 4’s reference to “other methods” cannot accurately be understood the way the majority interprets it, as authorizing mail-in ballots. To the contrary, Section 4, standing alone, is neutral on the question of whether the ballots used in an election must be completed at the polling place, or whether they may instead be completed elsewhere and delivered by mail.

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

*Appendix A*

years old (now 18 years old by virtue of the United States Constitution) “shall be entitled to vote,” PA. CONST. art. VII, § 1, but it does not expressly prohibit younger persons or non-residents from voting.

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

*Appendix A*

to make it better, is the underpinning of our democracy”).

On one side of the ledger, the right of suffrage in the United States has been fleshed out over our history through successive iterations of expansion, as a matter of both constitutional and statutory law, to include men and women of all races and socioeconomic statuses, and in all walks of life. Provisions such as the Fifteenth Amendment, the Nineteenth Amendment, the Civil Rights Act of 1957, and the Voting Rights Act of 1965, stand out as milestones in that expansion. *See, e.g.*, U.S. CONST. amend. XV, § 1 (1870) (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); *id.* amend. XIX (1920) (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”). These are all welcome developments. But on the other side of the ledger, it is self-evident that the *integrity* of electoral actions becomes more difficult to verify when they are undertaken at a distance and outside of public scrutiny: not only is fraud more difficult to detect, but the voter lacks contemporaneous assistance from election officials and so there is a greater chance for honest mistakes. *See Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (observing honest voting mistakes and voting fraud can both be facilitated by absentee voting).<sup>1</sup>

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1. See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot & the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 484-85 (2003) (“As casting ballots away from the polling place becomes more widespread, the possibilities for fraud and coercion expand[.]”); Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, NEW YORK TIMES, Oct. 6, 2012

*Appendix A*

Thus, the concept of mail-in ballots was virtually unknown during the early years of this Republic.

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

Construing the words according to their plain and literal import (and we must presume that the people of Pennsylvania construed them so when they adopted the amendment), they mean, undoubtedly, that the citizen, possessing the other requisite qualifications, is . . . to offer his ballot in that district. . . . *To “offer to vote” by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. The ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicile. We cannot be persuaded that the constitution*

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(noting the trend toward voting by mail enhances the potential for fraud — for example through the practice of “granny farming” (tricking or coercing senior citizens) or through the buying and selling of votes — and will likely result in more uncounted votes), *reprinted in* Brief for Appellees at Exh. B.

*Appendix A*

ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. The constitution meant, rather, that the voter, *in propria persona*, should offer his vote in an appropriate election district, in order that his neighbors might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.

The amendment so understood, introduced not only a new test of the right of suffrage, to wit, a district residence, but a rule of voting also. Place became an element of suffrage for a two-fold purpose. Without the district residence no man shall vote, but having had the district residence, the right it confers is to vote in that district. Such is the voice of the constitution. The test and the rule are equally obligatory. We have no power to dispense with either. Whoever would claim the franchise which the constitution grants, must exercise it in the manner the constitution prescribes.

*Id.* at 419 (emphasis added).

This interpretation is entirely reasonable. In Pennsylvania the concept of a defined place for voting has always had special prominence. The Constitution of 1776 contained a “Plan or Frame of Government” which prescribed that the Commonwealth would be governed by an assembly of freemen as well as a president and a twelve-

*Appendix A*

man counsel holding executive power, *see* PA. CONST. §§ 1, 3 (1776), to be elected at the same «time and place» for electing representatives in the assembly. PA. CONST. § 19 (1776). Likewise, sheriffs and coroners were to be elected “at the same time and place appointed for the election of representatives.” PA. CONST. § 31 (1776). This dual focus on both time and place was carried through into the 1790 and 1838 Constitutions, which specified that the governor, state senators, and other officials such as sheriffs and coroners, were to be elected at the “same place” as state representatives. *See, e.g.*, PA. CONST. art. I, § V (1790); PA. CONST. art II, § II (1838). The specification of a place of election was more than a formality, as one of Appellants’ amici helpfully expounds:

At the time of *Chase*, elections in Pennsylvania, as in most states, were community events. As one historian explains, “One did not simply ‘vote,’ in the nineteenth century; in the parlance of the times, one ‘attended’ or ‘went to the election.’” John F. Reynolds, *Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920* 34 (1988). At the 1837 Pennsylvania Constitutional Convention, delegates were concerned with facilitating “the attendance” of voters, and spoke of large numbers of voters “assembled together” at elections. 2 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania 24-25 (1837). The continuing communal quality of nineteenth-century elections is reflected in a

*Appendix A*

speech at the convention by a delegate named George Woodard, who later joined this Court and wrote the *Chase* opinion. He explained he would hesitate to change the traditional day for elections — “a day on which the people had been accustomed from the days of the revolution, to meet and consult, and decide who should rule over them.” *Id.* at 27.

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

The majority recognizes as much, *see* Majority Op. at 62-63 (acknowledging that in the early nineteenth century it was important for a voter to appear in person so his qualifications could be verified by others within his district), but relies on advances in voter registration schemes to suggest this need no longer exists. *See id.* Even assuming the need for in-person verification is diminished or no longer exists, the originally intended meaning still applies unless and until the text has been repealed, amended, or clarified, which it has not. “[I]n interpreting a constitutional provision, we view it as an expression of the popular will of the voters who adopted it, and, thus, construe its language in the manner in which it was understood *by those voters.*” *Washington v. Dep’t of*

*Appendix A*

*Pub. Welfare*, 188 A.3d 1135, 1149 (Pa. 2018) (citing *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006)) (emphasis added). If the phrase “offer to vote” were inserted into the Constitution for the first time today, we might interpret it differently. But it was inserted in 1838 and should be construed according to what it meant at that time. *See Yocum v. Pa. Gaming Control Bd.*, 161 A.3d 228, 239 (Pa. 2017) (indicating that constitutional language must be interpreted “as the average person would have understood it when it was adopted”); *accord* A. Scalia & B. Garner, *READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) (observing “words mean what they conveyed to reasonable people at the time they were written”). *Chase* was decided close in time to when the provision was first included in the Constitution, and the authoring Justice participated in the constitutional convention that adopted it. The relevant constitutional text remains unchanged, and the explanation in *Chase* is so clear, that the majority must resort to demoting it through disparaging language by referring to it as an “incidental interpretation” resulting in *dicta*, Majority Op. at 52, and criticizing a later decision which employed the established principle of *stare decisis* as having “slavishly” adhered to precedent. *Id.* at 65.

I cannot agree with the majority’s suggestion that the above passage from *Chase* is either incidental or *dicta*. The Court concluded that “offer to vote” means the voter must show up in person to vote, and that conclusion logically decided the issue before the Court: whether the legislation permitting absentee voting by military personnel was constitutional. If that provision was also

*Appendix A*

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

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2. The majority also claims it would be an “absurd result”

*Appendix A*

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

Nor is this one of those rare moments in constitutional history when a reviewing court is called upon to correct precedent which is deeply repugnant to civic life and to the organic law itself. *See, e.g., Brown v. Board of Educ.*,

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

*Appendix A*

347 U.S. 483 (1954) (discarding the “separate but equal” doctrine under the Fourteenth Amendment and overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (abrogating *Korematsu v. United States*, 323 U.S. 214 (1944), and affirming that the forcible relocation of United States citizens to concentration camps on the basis of race lies outside the scope of the President’s authority). The people of Pennsylvania have been voting in person since the earliest days of this Commonwealth notwithstanding that William Penn established our first post office in 1683, and the Second Continental Congress established the predecessor to the United States Postal Service in 1775. Now, all these years later, the majority suggests it has greater clarity than all who went before about the meaning of the constitutional phrase, “offer to vote” — greater clarity even than the Justices of this Court who lived through the era when it was incorporated into our charter and gave meaning to the language.

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

Whenever any of the qualified electors of this Commonwealth shall be in actual military service, under a requisition from the President of the United States or by the authority of this Commonwealth, such electors may exercise

*Appendix A*

the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual place of election.

PA. CONST. art. VIII, § 6 (1874).

Our Court discussed this amendment in *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924), a decision in which *Chase*'s status as binding precedent was cemented. In *Lancaster City*, this Court addressed whether persons other than soldiers could constitutionally be permitted to vote absentee. The Court recognized, as a general precept, that the Constitution requires an elector to tender his or her vote in person, as set forth in *Chase*, and that this rule was consistent with the view taken in “many other states during the Civil War period, where like constitutional requirements existed.” *Id.* at 200 (citing *Twitchell v. Blodgett*, 13 Mich. 127 (1865); *Bourland v. Hildreth*, 26 Cal. 161 (1864); *Day v. Jones*, 31 Cal. 261 (1866); *Opinion of the Judges*, 30 Conn. 591 (1862); *Opinion of the Judges*, 37 Vt. 665 (1864); *Opinion of the Justices*, 44 N. H. 633 (1863)); *cf. Morrison v. Springer*, 15 Iowa 304, 313 (1863) (construing a state constitutional provision that did not include the “offer to vote” terminology and expressly distinguishing *Chase* on that basis). The Court also recognized that subsequent rulings in other states had reached the same conclusion. *See id.* (citing *In re Opinion of Justices*, 113 A. 293 (N.H. 1921); *Clark v. Nash*, 234 S. W. 1 (Ky. App. 1921)). In terms of the amendment for military absentee voting, the Court explained:

*Appendix A*

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

*Id.* at 201 (emphasis added).

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

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

*Appendix A*

*class excludes another has full application here.*

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

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

*Appendix A*

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

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

PA CONST. art. VII, §14 (1967). A 1985 amendment kept Section 14 essentially the same but extended the right

*Appendix A*

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

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

We . . . may presume that when a court of last resort has construed the language

*Appendix A*

used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language. *Commensurately, when the legislature declines to amend a statute in contravention of this Court's prior interpretation of the statute, we may presume that our prior interpretation was and remains consistent with legislative intent.*

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

The history of absentee voting in Pennsylvania as briefly sketched above confirms that the electorate has always understood that any expansion of the franchise on an absentee basis can only be accomplished through an amendment to the Constitution. In this latter regard, this Court has explained that in the absentee-voting arena, the

*Appendix A*

“principle that the expression of an intent to include one class excludes another has full application[.]” *Lancaster City*, 126 A. at 201. The majority points to no constitutional amendment that negates that principle as a general policy or specifically alters the “offer to vote” language as it has been understood for 160 years and retained through multiple constitutional amendments, including amendments to the very provision containing the phrase. Instead, the majority overrules 160 years of precedent by finding authorization for Act 77’s universal no-excuse mail-in balloting in a constitutional provision that only applies to voting methods *other than by ballot*. See PA. CONST. art. VII, §4. That provision has been in the Constitution since 1901. If its intended meaning was as the majority says, it is difficult to see why the people of Pennsylvania would have needed to make constitutional changes in 1949 and 1957 specifically authorizing the Legislature to provide for absentee voting by additional named classes of individuals, instead of simply overturning *Lancaster City* by constitutional amendment and clarifying that Section 4 contains such authorization. The New Mexico court has cogently observed:

The constitution makers were not unfamiliar with the controversial question as to absentee voting. They were familiar with the common law understanding that an offer to vote contemplated a personal appearance of the voter in connection with such offer. They knew of the mandatory requirement for voting in that manner which had been in force in New Mexico for approximately sixty years. They

*Appendix A*

were familiar with the meaning which attended the phrase “offers to vote” in several separate sections of the territorial laws and employed the phrase in the face of such knowledge in this provision of our constitution without in any way qualifying that meaning. These considerations impress us that if it had been the desire of the convention to authorize absentee voting, it would have been an easy and simple manner to choose language making clear the intention to do so.

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

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

*Appendix A*

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

This solves the “mystery” of why the *Chase* Court would have understood “offer to vote” as meaning to appear in person to vote. Majority Op. at 61 n.43. It also undermines the majority’s suggestion that such usage amounted to an “oddity” in that era. *Id.* While the phrase may sound odd to modern ears, that only reinforces the concept, evident from the *Chase* decision,

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

*Appendix A*

that it had a particularized meaning when it was drafted, and consequently, that *Chase* did not err in providing an explanation consistent with that meaning. To my mind, what is more difficult to comprehend is how the majority can interpret being present, being at hand, and presenting oneself as not needing to be physically present, that is, not needing to do the very thing the verb actually means. *See id.* Even if in some strained, abstract sense, being present, being at hand, and presenting oneself could potentially include not being physically present (although I cannot see how), *Chase*'s holding that, in this instance, it means being physically present was not so egregiously wrong as to implicate an exception to the rule of *stare decisis*. Regardless, one may wonder how it would have been possible *for a voter* to be at hand or present himself without being physically present.<sup>4</sup>

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

*Appendix A*

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

For its part, the concurrence recognizes the limitations of Section 4, *see* Concurring Op. at 19 (stating resort to Section 4 is “wholly unnecessary”), but it expresses that a one-word change in Section 14, from “may” to “shall,” so affected the meaning of the remainder of Article VII as a whole that that Article no longer requires in-person voting by default. Thus, in the concurrence’s reading, when Section 14 stated that the General Assembly “may” provide for absentee voting for the defined classes of electors, it was not allowed to provide that same privilege for anyone else; now that it “must” provide for absentee voting for those same electors, it can do so for anyone and

*Appendix A*

everyone.

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

*Appendix A*

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

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

*Appendix A*

amendments, the electorate has struck a balance so as to maintain security while at the same time guaranteeing, to the extent feasible, that everyone has a reasonable opportunity to vote.

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

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

*Appendix A*

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

The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors may vote, and for the

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

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

*Appendix A*

return and canvass of their votes in the election district in which they respectively reside. *A law under this subsection may not require a qualified elector to physically appear at a designated polling place on the day of the election.*

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

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

Justice Brobson joins this dissenting opinion.

*Appendix A*

## DISSENTING OPINION

JUSTICE BROBSON      DECIDED: August 2, 2022

I join the dissenting opinion of Justice Mundy in full.

Succinctly stated, the majority overrules 160 years of this Court’s precedent to save a law that is not yet 3 years old. It does so not to right some egregiously wrong decision or to vindicate a fundamental constitutional right. This is not, as Justice Mundy observes, a *Brown v. Board of Education*<sup>6</sup> moment. Honoring our precedent and striking Act 77<sup>7</sup> as unconstitutional would not extinguish the right of people to vote in this Commonwealth; rather, it would merely return us to where we were before the 2020 primary election.

Since this Court decided *Chase*<sup>8</sup> and reaffirmed *Chase*’s holding in *City of Lancaster*,<sup>9</sup> it has never been seriously debated that the phrase “offer to vote,” as it has appeared in our Pennsylvania Constitution since 1838, embraces the historical preference in our Commonwealth for in-person voting at a polling place, whether “by ballot or by such other method as may be prescribed by law.”<sup>10</sup>

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6. Dissenting Op. at 11-12 (Mundy, J., dissenting).

7. Act of October 31, 2019, P.L. 552, No. 77.

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

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

10. As Justice Mundy notes at pages 4 and 5 of her

*Appendix A*

The phrase “offer to vote” as interpreted by *Chase* survived two constitutional conventions (1873 and 1968). Moreover, our current Pennsylvania Constitution—“the 1968 Constitution”—has been amended on several occasions. Yet, the phrase “offer to vote” remains. Under time-honored principles of statutory construction, this means that the delegates to our constitutional conventions and our citizens have accepted that precedent.<sup>1</sup>

Today, this Court upends the tradition and historic preference in this Commonwealth for in-person voting without the requisite “special justification”<sup>2</sup> and important reasons necessary to set aside long-standing

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

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

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

*Appendix A*

precedent. Mere disagreement with that precedent is not enough.<sup>3</sup> Respectfully, I do not believe that the majority has mounted a persuasive case that *Chase* and *City of Lancaster* have proven unworkable or are badly reasoned. Instead, the majority has set forth a case as to why it merely disagrees with this Court's precedent.

Finally, I wish to highlight an argument raised by Appellants-Intervenors the Democrat National Committee and the Pennsylvania Democratic Party (collectively, DNC) relating to the nonseverability provision in Act 77.<sup>4</sup> In his dissenting opinion below, Judge Wojcik, citing the nonseverability provision, warned that “if the no-excuse mail-in provisions of Act 77 are found to be unconstitutional, all of Act 77’s provisions are void.”<sup>5</sup> Building on Judge Wojcik’s observation, the DNC argues here that affirmance of the Commonwealth Court’s decision below would lead to “serious confusion” that “will be compounded by Act 77’s non-severability provision, which requires that nearly the entire Act—which includes a multitude of changes to the Pennsylvania

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

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

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

*Appendix A*

election code—fall if universal mail voting is deemed unconstitutional.”<sup>6</sup> In other words, the DNC advances the nonseverability provision as a reason why this Court should reject the constitutional challenge to Act 77’s mail-in ballot provisions and reverse the Commonwealth Court’s order, because doing otherwise would trigger the nonseverability provision and render the entirety of Act 77 invalid.<sup>7</sup>

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

Justice Mundy joins this dissenting opinion.

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6. DNC Br. at 45.

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

160a

**APPENDIX B — OPINION OF THE  
COMMONWEALTH COURT OF PENNSYLVANIA,  
DATED JANUARY 28, 2022**

IN THE COMMONWEALTH COURT  
OF PENNSYLVANIA

CASES CONSOLIDATED

No. 244 M.D. 2021, No. 293 M.D. 2021

DOUG MCLINKO,

*Petitioner,*

v.

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

*Respondents,*

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,*

161a

*Appendix B*

v.

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

*Respondents.*

November 17, 2021, Argued; January 28, 2022,  
Decided; January 28, 2022, Filed

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

OPINION BY JUDGE LEAVITT<sup>1</sup>

In this companion opinion to *McLinko v. Commonwealth*, 270 A.3d 1243 (Pa. Cmwlth., No. 244 M.D.

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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).

*Appendix B*

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,<sup>2</sup> 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.<sup>3</sup> 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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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.

*Appendix B*

On the merits, Petitioners' claims under the Pennsylvania Constitution are identical to those raised by *McLinko* in the companion case.<sup>4</sup> 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.<sup>5</sup>

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 \_\_, Pa. Commw. LEXIS, slip op. at 40-48. Accordingly, we hold that Petitioners' petition for review was timely filed.

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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.

*Appendix B*

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*, 635 Pa. 288, 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) (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*, 585 Pa. 196, 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.<sup>6</sup>

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6. Notably, this Court has observed that “any person who is registered to vote in a particular election has a substantial interest

*Appendix B*

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<sup>7</sup> in that party’s primary election. *In re Pasquay*, 525 A.2d at 14. Likewise, a political party has standing to challenge the nomination of a party candidate who has failed to comply with election laws. *In re Barlip*, 59 Pa. Commw. 178, 428 A.2d 1058 (Pa. Cmwlth. 1981).<sup>8</sup> In *In re Shuli*, 105 Pa. Commw. 462, 525 A.2d 6, 9 (Pa. Cmwlth. 1987), this Court concluded that a candidate for district justice had standing to

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in obtaining compliance with the election laws by any candidate for whom that elector may vote in that election.” *In re Williams*, 155 Pa. Commw. 494, 625 A.2d 1279, 1281 (Pa. Cmwlth. 1993) (quoting *In re Pasquay*, 105 Pa. Commw. 532, 525 A.2d 13, 14 (Pa. Cmwlth. 1987)).

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

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,<sup>1</sup> 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.*

*Appendix B*

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*, 109 Pa. Commw. 604, 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").<sup>9</sup> 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., 111 A.3d 817, filed 2015).<sup>10</sup> 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 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

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9. Notably, in *Barbieri v. Shapp*, 476 Pa. 513, 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).

*Appendix B*

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*, 111 A.3d 817, 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. 111 A.3d 817, slip op. at 11 (citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269, 286 (Pa. 1975)). In so holding, we relied upon *Kauffman v. Osser*, 441 Pa. 150, 271 A.2d 236 (Pa. 1970),<sup>11</sup> where our Pennsylvania Supreme Court rejected a challenge to absentee ballots that was premised on a speculative theory of vote dilution:

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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.

*Appendix B*

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 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

*Appendix B*

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*, 487 Pa. 438, 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*, 520 Pa. 38, 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.

170a

*Appendix B*

**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,<sup>12</sup> PA. CONST. art. VII, §1.

/s/\_\_\_\_\_  
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.

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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.

*Appendix B*CONCURRING AND DISSENTING OPINION BY  
JUDGE WOJCIK

I concur in the Majority's disposition of the procedural objections in this matter. I dissent from the Majority's disposition of the substantive claims regarding the constitutionality of the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), for the reasons expressed in my Concurring and Dissenting Opinion in the companion case, *McLinko v. Commonwealth*, 270 A.3d 1243 (Pa. Cmwlth., No. 244 M.D. 2021, filed January 28, 2022). I only add that Petitioners' federal constitutional claims are without merit as they are based on the purported violation of the Pennsylvania Constitution, which claims are meritless for the reasons outlined therein.

Accordingly, unlike the Majority, I would grant Respondents' Application for Summary Relief with respect to the substantive claims of the constitutionality of Act 77, and dismiss Petitioners' petitions for review with prejudice.

/s/ \_\_\_\_\_  
MICHAEL H. WOJCIK, Judge

Judge Ceisler joins in this Concurring/Dissenting Opinion.

**APPENDIX C — OPINION OF THE  
COMMONWEALTH COURT OF PENNSYLVANIA,  
DATED JANUARY 28, 2022**

IN THE COMMONWEALTH COURT  
OF PENNSYLVANIA

CASES CONSOLIDATED  
No. 244 M.D. 2021, No. 293 M.D. 2021

DOUG MCLINKO,

*Petitioner,*

v.

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

*Respondents.*

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,*

173a

*Appendix C*

v.

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

*Respondents.*

November 17, 2021, Argued  
January 28, 2022, Decided  
January 28, 2022, Filed

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.  
OPINION BY JUDGE LEAVITT.<sup>1</sup> Former President  
Judge Brobson, Judge Covey, and former Judge  
Crompton did not participate in the decision in this case.  
CONCURRING AND DISSENTING OPINION BY  
JUDGE WOJCIK.

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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 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).

*Appendix C*

## OPINION BY JUDGE LEAVITT

Doug McLinko (McLinko) has filed an amended petition for review seeking a declaration that Article XIII-D of the Pennsylvania Election Code,<sup>2</sup> 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.

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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).

*Appendix C*

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.<sup>3</sup>

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

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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.

*Appendix C*

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, 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

*Appendix C*

XIII-D].” 25 P.S. §3150.11(a).<sup>4</sup> 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).<sup>5</sup>

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

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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.

*Appendix C*

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<sup>6</sup> 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, (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.

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

*Appendix C*

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,<sup>7</sup> 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

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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.

*Appendix C*

certify, count, and canvas” votes in a manner “consistent with the Pennsylvania Constitution.” Amended Petition ¶48.

## 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).<sup>8</sup> 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*, 151 Pa. Commw. 592, 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

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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).

*Appendix C*

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 implement mail-in voting and that approximately 1,380,342 electors have been placed on the mail-in ballot list file.<sup>9</sup>

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

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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.

*Appendix C*

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*, 629 Pa. 1, 104 A.3d 1096, 1103 (Pa. 2014) (quoting *Pennsylvania State Association of Jury Commissioners v. Commonwealth*, 619 Pa. 369, 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 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, 24 A. 171 (1892); *see also Jubelirer v. Rendell*, 598 Pa. 16, 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

*Appendix C*

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, except that if qualified to vote in an election district prior to removal of*

*Appendix C*

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, Brightly’s El. Cas. 214, 19 Legal Int. 44, 10 Pitts. Leg. J. 49 (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.<sup>10</sup> 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

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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.

*Appendix C*

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 constitution,”<sup>11</sup> 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:

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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).

*Appendix C*

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 domicile. *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.

*Chase*, 41 Pa. at 419 (emphasis added).<sup>12</sup> 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.

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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).

*Appendix C*

CONST. art. III, §4 (1864).<sup>13</sup>

*In re Contested Election of Fifth Ward of Lancaster City*, 281 Pa. 131, 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).<sup>14</sup>

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

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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.

*Appendix C*

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).<sup>15</sup>

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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*

*Appendix C*

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).

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*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. 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.

*Appendix C*

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:

**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.

*Appendix C*

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, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (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).<sup>16</sup>

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

*Appendix C*

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, 201 L. Ed. 2d 201 (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*

*Appendix C*

written thereon and attested by a citizen of the district. *The 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*, 653 Pa. 41, 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

*Appendix C*

the Ballot Reform Act.<sup>17</sup> *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*, 146 Pa. 529, 24 A. 185, 186-87 (Pa. 1892). The Baker Ballot Law specified that the voter 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.*

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

*Appendix C*

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, 45 Luz. Legal Reg. Rep. 33 (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.<sup>18</sup> 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

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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*, 194 N.Y. 99, 86 N.E. 818, 819 (N.Y. 1909).

*Appendix C*

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.<sup>19</sup>

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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*

*Appendix C*

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).

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time prescribe. The General Assembly may, from time to time, prescribe the number and 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.

*Appendix C***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 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.

*Appendix C*

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).<sup>20</sup>

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

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

*Appendix C*

of the United States or by the authority of this Commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully *as if they were present at their usual 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.<sup>21</sup> *Lancaster City*, 126 A. at 200. In

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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,

*Appendix C*

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).

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.<sup>22</sup> Thereafter, in 1957, Section 19

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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.

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*

*Appendix C*

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

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*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).

*Appendix C*

Resolution No. 5, 1967, P.L. 1048. First, it 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.

*Appendix C*

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.

*Appendix C*

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

*Appendix C*

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.<sup>23</sup> 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 when *Lancaster City* was decided. In fact, the Supreme Court quoted the entire text of what is now

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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.

*Appendix C*

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.<sup>24</sup> The Constitution establishes the “fundamental law” against which the actions of all three branches of the Commonwealth government, including the work of the

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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*, 642 Pa. 236, 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.

*Appendix C*

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 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

*Appendix C*

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, 99 Pitts. Leg. J. 341 (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

*Appendix C*

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.<sup>25</sup> Instead, the Supreme 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

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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.

*Appendix C*

1901 addition of this phrase to the Pennsylvania Constitution.<sup>26</sup> 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*

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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).

*Appendix C*

*ways which preserve the secrecy but are more 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.<sup>27</sup>

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.

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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.

*Appendix C*

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. 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

*Appendix C*

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.

*Appendix C*

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*, 577 Pa. 231, 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

*Appendix C*

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.

*Appendix C*

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.<sup>28</sup> 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

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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.

*Appendix C*

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 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*, 635 Pa. 288, 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*

*Appendix C*

*Park, LLC v. Commonwealth*, 585 Pa. 196, 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*, 623 Pa. 564, 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,

*Appendix C*

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.<sup>29</sup> 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 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*, 601 Pa. 322, 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).

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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.

*Appendix C*

Nevertheless, the Acting Secretary directs the Court to *In re Administrative Order No. 1-MD-2003 (Appeal of Honorable James P. Troutman)*, 594 Pa. 346, 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

*Appendix C*

elections.” *Appeal of McCracken*, 370 Pa. 562, 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*, 487 Pa. 438, 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*, 520 Pa. 38, 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.<sup>30</sup> The respondents argued that the taxpayer lacked

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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

*Appendix C*

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” 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.

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occur more than 10 months before the municipal election. Article V, Section 13(b) of the Pennsylvania Constitution, PA. CONST. art. V, §13(b).

*Appendix C***1. Doctrine of Laches**

Laches is an equitable defense<sup>31</sup> 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*, 561 Pa. 489, 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 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).<sup>32</sup> *Kelly* was filed several weeks after the 2020 General Election and

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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).

32. *Kelly* is a *per curiam* order. In *Cagey v. Commonwealth*, 645 Pa. 268, 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.”

*Appendix C*

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 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,

*Appendix C*

¶16.<sup>33</sup> 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

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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.

*Appendix C*

statute's constitutionality. In *Commonwealth ex rel. Fell v. Gilligan*, 195 Pa. 504, 46 A. 124, 125, 10 Luz. Legal Reg. Rep. 117 (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*, 328 Pa. 225, 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*, 645

*Appendix C*

Pa. 1, 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<sup>34</sup> 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, 18 S. Ct. 38, 42 L. Ed. 392 (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, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983) (federal statute with 12-year

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

*Appendix C*

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 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.<sup>35</sup> McLinko

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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

*Appendix C*

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.

(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.

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of limitations is nonwaivable. PA.R.CIV.P. 1030(a); *Devine v. Hutt*, 2004 PA Super 460, 863 A.2d 1160, 1167 (Pa. Super. 2004); *City of Warren v. Workers' Compensation Appeal Board (Haines)*, 156 A.3d 371, 377 (Pa. 2017).

*Appendix C*

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).<sup>36</sup> 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

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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.

*Appendix C*

[p]etitioners 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, 2 L. Ed. 60 . . . (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, 18 S. Ct. 418, 42 L.

*Appendix C*

Ed. 819 (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*, 589 Pa. 135, 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:

*Appendix C*

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

*Appendix C*

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.<sup>37</sup>

s/ 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.

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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.

*Appendix C*CONCURRING AND DISSENTING OPINION BY  
JUDGE WOJCIK

I agree with the Majority's scholarly opinion with respect to the issues of Petitioners' standing, and the procedural objections to the amended petitions for review. However, I disagree with the Majority's conclusion that Sections 1 and 8 of the Act of October 31, 2019, P.L. 552, No. 77 (Act 77) violate article VII, section 1 and section 14 of the Pennsylvania Constitution<sup>1</sup> by adding "a qualified

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1. Pa. Const. art. VII, §1. Article VII, section 1 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.

In turn, article VII, section 14(a) provides, in relevant part:

- (a) The Legislature shall, by general law, provide a manner in which, and the time and place at which,

*Appendix C*

mail-in elector” as a class of elector who is eligible to vote as defined in Section 102(z.5)(3) and (z.6) of the Pennsylvania Election Code (Election Code),<sup>2</sup> and by adding Section 1301-D of Article XIII-D to the Election Code<sup>3</sup> permitting any qualified elector, who is not eligible

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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.

Pa. Const. art. VII, §14(a).

2. Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §2602(z.5) (3), (z.6). Section 102(z.5)(3) of the Election Code provides that “[t]he words ‘proof of identification’ shall mean: . . . For a qualified absentee elector under Section 1301 or a qualified mail-in elector under section 1301-D.” In turn, Section 102(z.6) states: “The words “qualified mail-in elector” shall mean a qualified elector.”

3. 25 P.S. §3150.11. Section 1301-D, added by Act 77, provides:

**(a) General rule.**--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 this article.

**(b) Construction.**--The term “qualified mail-in elector” shall not be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition in section 102(t).

*Appendix C*

to be a qualified absentee elector, to vote by an official no-excuse mail-in ballot in any primary, general, or municipal election held in this Commonwealth.

To the contrary, article VII, section 4 of the Pennsylvania Constitution specifically empowers the General Assembly to provide for another means by which an elector may cast a ballot through legislation such as Act 77. Specifically, article VII, section 4 states: “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 (emphasis added). Thus, the General Assembly is constitutionally empowered to enact Act 77 to provide for qualified and registered electors present in their municipality of residence on an election day to vote by no-excuse mail-in ballot. Specifically, I disagree with the Majority’s faulty premise that the no-excuse mail-in ballot method of voting is merely a subspecies of voting by absentee ballot as provided in article VII, section 14, and that article VII, section 1 and article VII, section 14 have primacy over the provisions of article VII, section 4.

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In turn, Section 102(t) of the Election Code states:

The words “qualified elector” shall mean any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election.

25 P.S. §2602(t).

*Appendix C*

In reviewing the constitutionality of Act 77, it is important to remember:

When faced with any constitutional challenge to legislation, we proceed to our task by presuming constitutionality in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths. *See* [Section 1922(3) of the Statutory Construction Act of 1972,] 1 Pa. C.S. §1922(3) (“In ascertaining the intention of the General Assembly in the enactment of a statute the . . . presumption [is] [t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.”); *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, [583 Pa. 275, 877 A.2d 383, 393 (Pa. 2005)] (hereinafter, “*PAGE*”). Indeed, a legislative enactment will not be deemed unconstitutional unless it clearly, palpably, and plainly violates the Constitution. *PAGE*, 877 A.2d at 393. “Any doubts are to be resolved in favor of a finding of constitutionality.” *Payne v. Dep[artment] of Corrections*, [582 Pa. 375, 871 A.2d 795, 800 (Pa. 2005)]. Accordingly, a party challenging the constitutionality of a statute bears a very heavy burden of persuasion. *See Commonwealth v. Barud*, [545 Pa. 297, 681 A.2d 162, 165 (Pa. 1996)].

*Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 938-39 (Pa. 2006). Additionally, “because the Constitution

*Appendix C*

is an integrated whole, effect must be given to all of its provisions whenever possible.’ Thus, where two provisions of our Constitution relate to the same subject matter, they are to be read in *pari materia*, and the meaning of a particular word cannot be understood outside the context of the section in which it is used.” *Jubelirer v. Rendell*, 598 Pa. 16, 953 A.2d 514, 528 (Pa. 2008) (citation omitted).

Moreover, the Supreme Court’s opinion in *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 126 A. 199 (Pa. 1924) (*Lancaster City*), does not compel a different conclusion. In *Lancaster City*, the electors of the Fifth Ward in the City of Lancaster voted for a select councilman. The returns of the local board of elections showed that the Democratic and coalition candidate had received 869 of the votes, while the Republican candidate received 861. When the additional votes by absentee ballot, provided for by statute,<sup>4</sup> were counted, the Democratic candidate received an additional 3 votes, while the Republican candidate received an additional 20 votes thereby apparently winning the election. The statute expanding the scope of the constitutional provision permitting absentee voting was subsequently challenged as unconstitutional. In affirming a lower court’s determination that the statute was, in fact, an unconstitutional statutory extension of the constitutional absentee voting provision, the Supreme Court stated:

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4. Act of May 22, 1923, P.L. 309. At that time, the constitutional provision permitting an elector to vote by absentee ballot, the former article VIII, section 6, was limited to electors who were outside their district of residence due to military service. See *In re Contested Election*, 126 A. at 200.

*Appendix C*

It will be noticed that the ‘offer to vote’ [in the present article VII, section 1] must still be in the district where the elector resides, the effect of which requirement is so ably discussed by Justice Woodward in *Chase v. Miller*, [41 Pa. 403, Brightly’s El. Cas. 214, 19 Legal Int. 44, 10 Pitts. Leg. J. 49 (1862)]. Certain alterations are made so that absent voting in the case of soldiers is permissible. This is in itself significant of the fact that this privilege was to be extended to such only.

‘In construing particular clauses of the Constitution, it is but reasonable to assume that in inserting such provisions the convention representing the people had before it similar provisions in earlier Constitutions, not only in our own state but in other states which it used as a guide, and, in adding to, or subtracting from, the language of such other Constitutions the change was made deliberately and was not merely accidental.’ *Com[monwealth] v. Snyder*, 261 Pa. 57, [104 A. 494, 495 (Pa. 1918)].

The Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed. *McCafferty v. Guyer*, 59 Pa. 109, Brightly’s El. Cas. 44 [(1868)]. The latter

*Appendix C*

has determined those who, absent from the district, may vote other than by personal presentation of the ballot, but those so permitted are specifically named in [the former] section 6 of article 8. The old principle that the expression of an intent to include one class excludes another has full application here. White, in his work on the Constitution[,], succinctly sums up the proposition controlling this case when he says:

‘The residence required by the Constitution must be within the election district where the elector attempts to vote; hence a law giving to voters the right to cast their ballots at some place other than the election district in which they reside [is] unconstitutional.’

[Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 360 (1907).]

Other objections to the validity of the act now under consideration have been raised, but any detailed discussion is unnecessary. It may well be argued that the scheme of procedure fixed by the act of 1923, for the receipt, recording, and counting of the votes of those absent, who mail their respective ballots, would end in the disclosure of the voter’s intention prohibited

*Appendix C*

by the amendment [in the present article VII, section 4] of the Constitution, undoubtedly the result if but one vote so returned for a single district. Though 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.

However laudable the purpose of the act of 1923, 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. For the reasons stated, the only assignment of error is overruled.

*Lancaster City*, 126 A. at 201.

Thus, *Lancaster City* merely stands for the proposition that the General Assembly may not by statute extend the scope of a method of voting already specifically provided for in article VII, section 14 of the Constitution. The Supreme Court's holding in that case in no way limits the authority conferred upon the General Assembly by article VII, section 4 to provide for a new and different method of voting such as the no-excuse mail-in ballot provisions of Act 77.

The Supreme Court's "suggested" limitation of article VII, section 4 in *Lancaster City* to the use of voting machines, and the Majority's assertion of the same herein,

*Appendix C*

is undermined by the subsequent amendment of the present article VII, section 6 of our Constitution in 1928. As amended, article VII, section 6 now reads:

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 elections 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 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.

*Appendix C*

Pa. Const. art. VII, §6 (emphasis added).<sup>5</sup>

Thus, if the provisions of article VII, section 4 are limited to the use of voting machines, as the Majority suggests, there was absolutely no need to amend article VII, section 6 to provide for the use of such machines at the option of local municipalities. Moreover, the Majority's limited construction of article VII, section 4 renders the phrase "or by such other method as may be prescribed by law" meaningless and mere surplusage in light of the amendment to article VII, section 6 to specifically include the use of voting machines as a new and different method of casting a ballot. Thus, contrary to the Supreme Court's observation in *Lancaster City*, and the Majority's conclusion herein, article VII, section 4 may not be construed in such a limited manner to give effect to all of its provisions.

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5. As this Court has explained:

Because the Pennsylvania Constitution reserves the power to provide, by general law, the use and choice of voting machines to the General Assembly, and the General Assembly has enacted [Section 302 of] the Election Code[, 25 P.S. §2642,] which delegates said power to the County's Board of Elections (Elections Board), the Election Code is the final authority on voting machines in this Commonwealth. Thus, the Elections Board has the exclusive control over election equipment.

*See also In re Agenda Initiative to Place on the Agenda of a Regular Meeting of County Council*, 206 A.3d 617, 624 (Pa. Cmwlth. 2019).

*Appendix C*

Rather, sections 1, 4, and 14 of article VII must all be read together and given the same prominence and effectiveness. When construed in such a manner, the plain language of article VII, section 4 specifically empowers the General Assembly to provide a distinct method of casting a ballot for electors who are present in their municipality on a primary, general, or municipal election day by permitting the use of no-excuse mail-in ballots. This method is distinct from an elector's appearance at his or her district of residence to cast a ballot as provided in article VII, section 1, either by paper ballot or by the use of a machine pursuant to article VII, section 6, or the use of an absentee ballot by an elector who is absent from his or her municipality on the day of a primary, general, or municipal election as provided in article VII, section 14.

Finally, although not addressed by the Majority, Petitioners note that Section 11 of Act 77 contains a "poison pill" that would invalidate all of Act 77's provisions if this Court determines that any of its provisions are invalid. *See* Section 102 of the Election Code Note, 25 P.S. §2602 Note ("Section 11 of [Act 77] provides that 'Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. ***If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.***'") (emphasis added). As the Supreme Court has observed:

[A]s a general matter, nonseverability provisions are constitutionally proper. There may be reasons why the provisions of a particular statute essentially inter-relate, but in ways

*Appendix C*

which are not apparent from a consideration of the bare language of the statute as governed by the settled severance standard set forth in Section 1925 of the Statutory Construction Act[, 1 Pa. C.S. §1925]. In such an instance, the General Assembly may determine that it is necessary to make clear that a taint in any part of the statute ruins the whole.

*Stilp*, 905 A.2d at 978. Thus, if the no-excuse mail-in provisions of Act 77 are found to be unconstitutional, all of Act 77's provisions are void.

Nevertheless, as outlined above, article VII, section 4 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. Accordingly, unlike the Majority, I would grant Respondents' Application for Summary Relief with respect to the substantive claims of Act 77's constitutionality, and dismiss Petitioners' petitions for review with prejudice.

MICHAEL H. WOJCIK,  
Judge

Judge Ceisler joins in this Concurring/Dissenting Opinion.