

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

Docket Nos. 14 MAP 2022 & 15 MAP 2022 (Consolidated)
Nos. 17, 18 & 19 MAP 2022 (Cross Appeals)

DOUG McLINKO,

Appellee,

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF STATE, *et al.*,**

Appellants.

TIMOTHY BONNER, *et al.*,

Appellees,

v.

**VERONICA DEGRAFFENFREID, in her official capacity as Acting
Secretary of the Commonwealth of Pennsylvania, *et al.*,**

Appellants.

**BRIEF OF AMICUS CURIAE PENNSYLVANIA AFL-CIO IN SUPPORT
OF APPEAL OF APPELLANTS**

Appeal from the Order of the Commonwealth Court at No. 244 & 293 MD 2021 dated January 28, 2022.

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I. STATEMENT OF INTEREST

Pursuant to Pennsylvania Rule of Appellate Procedure 531, Your Amicus Curiae, the Pennsylvania AFL-CIO, submits this brief in support of Petitioners;¹ Your Amicus Curiae is a Federation of Labor Organizations operating throughout Pennsylvania, that is well recognized as the Central Address of Organized Labor in the Commonwealth, whose affiliated Local Unions, District Councils, Regional Councils, Central Labor Councils and Area Labor Federations represent in excess of 750,000 public and private sector working men and women engaged in the virtually all of the extraordinary range of occupations, vocations and professions present in our diverse economy and who reside in virtually every community in the Commonwealth who, together with their families, comprise an exceptionally significant portion of voting age Pennsylvania citizens. Those voting age citizens include individuals who (1) are elderly, infirm, mobility challenged, or partially disabled, (2) who have family, employment, organizational and avocational obligations and interests that do not always coincide with a precise 13 hour period on a statutorily designated Spring or November day (3) are regionally matriculated college and/or university students, (4) do not operate a motor vehicle or have easy access to public transit systems, (5) or lack the reasonable physical, practical and/or

¹ No person or entity other than these Amici Curiae or their counsel has paid for the preparation of this brief or authored the brief, in whole or in part.

economic means of always safely and securely exercising their sacred franchise in person despite being validly registered Pennsylvania electors and voters. Therefore, Your Amicus Curiae has a direct and substantial interest in Petitioner's challenge to the decision of our Commonwealth Court partially striking the General Assembly's enactment of Act 77 at issue in the instant matter, and it files this brief in support of the Petitioners' Petition for Review.

Additionally, members of organizations affiliated with the Pennsylvania AFL-CIO are employed by various Pennsylvania counties, assigned to work duties on behalf of various County Boards of Election and are assigned tasks associated with and are called upon to implement and/or administer election operations and activities on and associated with primary and general elections throughout the Commonwealth's sixty-seven (67) counties. Among the goals of the Pennsylvania AFL-CIO is the protection, assurance, and advancement of the cause of social and economic justice for the residents and citizens of our Commonwealth at the workplace, in civic affairs, in their Pennsylvania communities, in political participation and, significantly, in the unfettered and easily accessible exercise of their franchise right in their capacity as Pennsylvania citizens and voters.

Like Petitioner, the Commonwealth, Your Amicus Curiae is interested in protecting the interests of eligible voters across the Commonwealth of Pennsylvania and in upholding the requirements of our Commonwealth's Constitution. Further, it

has an interest in ensuring that otherwise eligible voters are not illegitimately disenfranchised or restricted in their ballot access by incorrect application of Constitutional interpretation to properly adopted statutory provisions. Your Amicus Curiae believes this Honorable Court will benefit from this brief because it provides an overview of the present and historic state Constitutional issues and development involved in the review and interpretation of Act 77, and explains the significant, and irreversible effects this improper striking of selective sections of this law will have on voting and citizen access to voting rights in this year's upcoming primary and general elections and beyond.

II. STATEMENT OF THE CASE

A. Act 77 of 2019

On October 31, 2019, Governor Tom Wolf signed Act 77 into law—a bipartisan statute that represents the most significant expansion in how Pennsylvanians exercise the franchise since the passage of the Election Code in 1937.² Under this amendment to the Election Code, all qualified Pennsylvania voters may request and cast their ballots by mail. 25 P.S. § 3150.11. To do so, voters must request in a designated number of days before an election, either online or via mail, a mail-in or absentee ballot to cast the mail-in ballot. 25 P.S. § 3150.12a(a). The deadline for

² Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591 (“Election Code”). Act 77 was added by the Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”), 25 P.S. §§3150.11-3150.17.

returning those ballots to the county board of elections office is 8 p.m. on Election Day. 25 P.S. § 3150.16.

Once the county board of elections approves a voter's request for a mail-in ballot, it sends the voter a ballot in an envelope marked "Official Election Ballot" (hereinafter "interior envelope"), and a second larger envelope containing "the form of declaration of the elector, and the address of the elector's county board of elections and the local election district of the elector" (hereinafter "exterior envelope"). 25 P.S. §§ 3150.14, 3150.16. The voter must make his or her selections on the ballot, enclose the ballot in the interior envelope, and then place that envelope in the larger exterior envelope for mailing. 25 P.S. § 3150.16(a). "The elector shall then fill out, date and sign the declaration printed on [the exterior] envelope." *Id.*

To return the mail-in ballot, the voter may either mail it or deliver it "in person to the county board of election[s]." *Id.* The Election Code permits county boards of elections to open multiple other offices (hereinafter "satellite offices") other than the one generally used for this purpose—so that voters may deliver their ballots in person to the satellite offices. 25 P.S. § 2645(b). The Election Code also permits county boards of elections to receive mail-in ballots at ballot boxes (hereinafter "drop boxes") at places other than the county board of elections office, "as ha[ve] been designated by the board." 25 P.S. § 3151.

B. Legal Challenges to Act 77

Initially, there was no constitutional challenge to the mail-in provisions of Act 77. Both the Primary and General Elections in 2020 were conducted under the new mail-in procedures with success, albeit with delays in counting ballots due to the high volume of mail-in ballots and the short time provided to conduct a pre-canvass of those votes. *Kelly v. Commonwealth*, 240 A.3d 1255, 1256-57 (Pa. 2020). In the end, approximately 2.9 million of the 6.9 million total votes cast by Pennsylvanians in the 2020 General Election were mail-in ballots.³ Those ballots included hundreds of thousands of union members and their families represented by Your Amicus.

Not until the county boards of election were poised to certify the nearly 7 million ballots from the 2020 General Election did any litigant come forth challenging the constitutionality of the mail-in voting procedures of Act 77 –even though Act 77 had been enacted over a year earlier and Pennsylvania conducted two elections based on its provisions. *Kelly*, 240 A.3d at 1256-57. Nevertheless, on November 21, 2020, eight Republican officeholders or candidates (“Kelly Petitioners”) filed a petition for review with the Commonwealth Court seeking a declaration that the mail-in voting provisions of Act 77 are void *ab initio* under the Pennsylvania Constitution and requesting a preliminary injunction to prevent the

³ In the case below, the Commonwealth Appellants submitted into the record an affidavit of Jonathan Marks, which averred these numbers.

certification of Pennsylvania ballots from the November 2020 Presidential election. *Id.* at 1256. In response, the Commonwealth respondents filed an application with this Court requesting that it exercise jurisdiction over the matter as permitted under 42 Pa.C.S. § 726. *Id.* at 1255.

In a per curium order, this Court (1) granted the Commonwealth respondents' emergency application, (2) vacated the Commonwealth Court's preliminary injunction, and (3) dismissed the Kelly Petitioners' petition for review. *Id.* at 1256-57. This Court reasoned that the doctrine of laches prohibited such relief and, in fact, would cause tremendous harm as it would result in the disenfranchisement of millions of Pennsylvanians. *Id.* at 1256. While this Court's order ended the constitutional challenge raised by the Kelly Petitioners,⁴ on July 26, 2021, Doug McLinko, a member of the Bradford County Board of Elections ("Appellee McLinko"), filed a similar petition for review, along with an application for summary relief, challenging the constitutionality of Act 77. *McLinko, v. Commonwealth*, 2022 Pa. Commw. LEXIS 12, at *1-2 (Pa. Cmwlth. January 28, 2022). Shortly thereafter, on August 31, 2021, Appellant Timothy Bonner and thirteen (13) other sitting members of the Pennsylvania House of Representatives

⁴ The Kelly Petitioners filed a writ of *certiorari* with the U.S. Supreme Court of this Court's order, which our nation's highest court denied on February 21, 2021.

(“Bonner Appellees”), including eleven (11) who had voted in favor of Act 77, filed their own petition for review raising the same constitutional challenge. *Id.* at *2.

The Commonwealth Court consolidated the cases of Appellees McLinko and Bonner, Appellee McLinko filed an amended petition for review, and the Commonwealth Appellees filed preliminary objections. *Id.* The Bonner Appellants and Commonwealth Appellees filed cross-applications for summary relief, and the latter also filed preliminary objections. *Id.*

On January 28, 2022, a bare majority of three of five members of the Commonwealth Court issued two orders (1) denying Commonwealth Appellants’ application for summary relief; (2) dismissing as moot Commonwealth Appellants’ preliminary objections; (3) granting Appellees’ applications for summary relief; and (4) declaring Act 77 unconstitutional and void *ab initio*. *Id.* at *62; *McLinko v. Commonwealth*, 2022 Pa. Commw. LEXIS 11, * 9 (Pa. Cmwlth. Jan. 28, 2022). In its written opinions, authored by Judge Hannah Leavitt, the majority reasoned that two prior decisions of this Court interpreting earlier versions of the Pennsylvania Constitution governed the matter-- *Chase v. Miller*, 41 Pa. 403 (1862) (hereinafter “*Chase*”) and *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924) (hereinafter “*Lancaster City*”). *McLinko, v. Commonwealth*, 2022 Pa. Commw. LEXIS 12, at *11-*16. Relying upon these two cases, the majority of the Commonwealth Court argued that the phrase, “offer to vote,” found in the voter

qualification sections of the 1838, 1874, and 1968 Constitutions, mandated in-person voting for all Pennsylvanians except those who met one of the enumerated categories in the Constitution's absentee provision for voting via absentee ballot. *Id.* at *31-*44.

C. Voting Rights under the Pennsylvania Constitution

In considering the constitutionality of Act 77, it is vital to understand Pennsylvania's long and distinguished history of being among the first States to create meaningful popular sovereignty, whereby the people select their elected officials. KEN GORMLEY ET AL., *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES*, (2004); Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776-1791*, 67 *TEMP. L. REV.* 575, 588-592; Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 *TEMP. L. REV.* 541, 548-561 (1989). Among the primary means by which the 1776 Constitution achieved this goal was to extend the franchise to non-propertied freeman regardless of race who had paid appropriate State or local taxes. GORMLEY, *supra*, at 216; Herrington, *supra*, at 580; ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 329 (2000). In its current iteration and consistent with the Thirteenth and Nineteenth Amendments, Article VII, Section 1 of the Pennsylvania Constitution extends the right to vote to

all men and women of twenty-one (21) years of age, regardless of race, property, or the payment of taxes. PA. CONST. art. VII, § 1; *see also* US. CONST. amend. XV; U.S. CONST. amend. XIX.⁵

Pennsylvania also achieved greater participatory democracy through a provision that has existed in some form since the 1776 Constitution and is currently found in Article I, Section 5 (hereinafter “the Free and Equal Elections Clause”). GORMLEY, *supra*, at 216-17 (citing PA. CONST. of 1776, Ch. I, § VII; PA. CONST. of 1790, Art. IX, § V). The current version of this provision states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5.

This Court has recognized that the Free and Equal Elections Clause protects the fundamental right to vote. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018) (holding that the 2010 reapportionment of Pennsylvania’s congressional districts violated the Free and Equal Elections Clause); *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (declaring “this Court has acknowledged that the right to vote is fundamental and ‘pervasive of other basic civil and political rights’”) (citing and quoting *Bergdall v.*

⁵ Although as written the 1968 Constitution states that a Pennsylvanian must attain the age of twenty-one (21) to vote, that was effectively amended with the adoption of the Twenty-Sixth Amendment to the United States Constitution. *See* U.S. CONST. amend. XXVI.

Kane, 731 A.2d 1261 (Pa. 1999)). Recognizing the grave importance of the right to vote in a constitutional democracy, this Court has declared that there is a “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *In re Cioppa*, 626 A.2d 146, 148 (Pa. 1993); *see also In re Wieskerger Appeal*, 290 A.2d 108, 109 (Pa. 1972) (“Our goal must be to enfranchise and not to disenfranchise.”).

In the most powerful articulation of the constitutional significance and importance of the Free and Equal Elections Clause, this Court announced:

[Our] analysis of the Free and Equal Elections Clause — its plain language, its history, the occasion for the provision and the circumstances in which it was adopted, the case law interpreting this clause, and consideration of the consequences of our interpretation — leads us to conclude the Clause should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so.

League of Women Voters, 178 A.3d at 814. Ultimately, the Free and Equal Elections Clause guarantees the fundamental right to vote and Act 77 represents the latest and most expansive statutory articulation of that right.

D. History of Absentee Voting in Pennsylvania

Just as Pennsylvania led the nation in providing a broader franchise through its 1776 Constitution than the other original thirteen States of our Union,

Pennsylvania was the first state to permit absentee voting. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges to Election Reform*, 36 U. MICH. J.L. REFORM 483, 497 (2003). During the War of 1812, the General Assembly enacted a statute, the Military Absentee Act of 1813,⁶ which authorized Pennsylvanians serving in the military away from home to vote through an absentee ballot. *Id.* At the time, the 1790 Constitution was the operative state constitution, and it contained no express provision authorizing absentee voting. *See* Pa. Const. of 1790. After the adoption of the 1838 Pennsylvania Constitution, the General Assembly enacted the Military Absentee Act of 1839--a similar version of the statute enacted in 1813. Fortier & Ornstein, at 497.

However, in *Chase v. Miller*, 41 Pa. 403 (1862), the Pennsylvania Supreme Court, during the Civil War, heard and decided a constitutional challenge to the Military Absentee Act of 1839. *Chase*, 41 Pa. at 416-18. The case concerned an 1861 district attorney's race in Luzerne County between Ezar B. Chase ("Chase"), a Democrat and former Speaker of the Pennsylvania House of Representatives, and Jerome G. Miller, the Republican candidate. *Id.* at 414. While Chase led the race after the counting of in-person votes on Election Day, he had less votes after receipt and counting of absentee ballots cast by military personnel. Chase filed a lawsuit,

⁶ Act of Mar. 29, 1813, ch. 171, 1813 Pa. Laws 213-14.

alleging that the Military Absentee Act of 1839 violated the 1838 Pennsylvania Constitution. *Id.*

In a decision authored by Chief Justice George Woodward, this Court held that the statute violated the 1838 Constitution, specifically Article III, Section 1. *Id.* at 423-24. That provision limited the franchise to white freemen who, prior to the election, resided in the Commonwealth for one year, and paid appropriate State and county taxes assessed ten days prior to the election. PA. CONST. of 1838, art. III, § 1. Additionally, a person who was a qualified voter and left the Commonwealth, returned, and resided in the State for six months prior to the election and paid the appropriate taxes was permitted to vote. *Id.* Finally, white freemen ages twenty-one (21) to twenty-two (22) who met the residency requirements were permitted to vote without the need to pay State or county taxes. *Id.*

From this enumeration of the qualifications for the franchise, the Court concluded that the phrase “offers to vote” somehow imposes an in-person voting requirement on Pennsylvania’s eligible voters. *Chase*, 41 Pa. at 419. With no support from debates from the constitutional convention leading to the 1838 Constitution or any prior caselaw, Chief Justice Woodward surmised:

To “offer to vote” by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. The ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified into the

county where the voter has his domicil. We cannot be persuaded that the constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all 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 it if it were doubtful.

Chase, 41 Pa. at 419. Thus, absentee voting for military personnel was abolished by Court decree.

The loss of absentee voting for Pennsylvania's soldiers, however, was short-lived. Two years later, Pennsylvania adopted an amendment to its state constitution, which went into effect in August 1864, prior to the next General Election. Fortier & Ornstein, at 497. The amendment became Article III, Section 4 of the 1838 Pennsylvania Constitution. *Id.* (citing PA. CONST. of 1838, art. III, § 4 (amended (1864))). Subsequently, the General Assembly enacted a new absentee ballot statute for Pennsylvania soldiers fighting in the war. Fortier & Ornstein, at 498. When the 1874 Pennsylvania Constitution was adopted, it included the absentee ballot provision from the 1838 Constitution and renumbered it Article VIII, Section 6. *See* PA. CONST. of 1874, art. VIII, § 6.

In 1923, the General Assembly enacted an absentee ballot statute, the 1923 Absentee Voting Act, which expanded absentee voting beyond just military personnel to include those who "by reason of his duties, business or occupation is

unavoidably absent from the county in which he is an elector, but within the confines of the United States....” Act of May 22, 1923, P.L. 309.

At the time of its enactment, the 1874 Constitution as amended, defined the qualifications to vote as (1) male; (2) twenty-one years of age; (3) a citizen of the United States for at least a month; (4) a resident of the Commonwealth for a year and a resident of the election district “where he shall offer to vote” for at least two months; and (5) payment of any State or county taxes within the last two years “which shall have been assessed in the last two months and paid in the last one month before the election. PA. CONST. of 1874, art. VIII, § 1 (amended 1901). Additionally, the military absentee voting provision remained in the state constitution at Article VIII, Section 6. PA. CONST. of 1874, art. VIII, § 6.

In 1924, this Court considered a constitutional challenge to the 1923 Absentee Ballot Statute in *Lancaster City*, a case concerning ballots cast in a select councilman election of the Fifth Ward in the City of Lancaster. *Id.* at 200. The initial returns demonstrated that the Democratic candidate received eight more votes than the Republican candidate. *Id.* When the absentee ballot votes were counted, the Republican candidate received the most votes, winning the election. *Id.* A legal challenge ensued, in which the lower court found the absentee ballots were cast in violation of Article VII, Section 1 of the 1874 Constitution. *Id.* at 200-201.

On appeal, this Court affirmed the lower court decision. *Id.* at 201. Relying upon the decision in *Chase*, this Court found that the phrase “offer to vote” in Article VIII, Section 1 of the 1874 Constitution requires eligible electors to vote in person on Election Day, unless they fall within the provisions of Article VIII, Section 6, allowing military personnel to vote absentee if not present at the time of the election. *Id.* This Court concluded that the absentee ballot provision constitutes the only exception to in-person voting.

Subsequently, Pennsylvania adopted several amendments to the 1874 Constitution greatly expanding the breadth of absentee voting. In 1949, the Constitution was amended to permit the General Assembly to allow disabled veterans to absentee when they are “unavoidably absent from the State or county of their residence because of their being bedridden or hospitalized due to illness or physical disability” arising from their military service. PA. CONST. of 1874, art. VIII, § 18 (amended 1949). In 1953, Pennsylvania amended this provision, but it still allowed the General Assembly to enact an absentee ballot provision for disabled veterans. PA. CONST. of 1874, art. VIII, §18 (amended 1953). Four years later, Pennsylvania amended the 1874 Constitution to permit “qualified voters” to vote by absentee ballot on Election Day because “their duties, occupation or business” require them to be elsewhere” or due to “illness or physical disability...” PA. CONST. of 1874, art. VIII, § 19 (amended 1957).

On May 16, 1967, Pennsylvania amended the 1874 Constitution again, this time adopting a general absentee voting provision. PA. CONST. of 1874, art VIII, § 19 (amended 1967). Unlike other absentee ballot provisions, this amendment *mandated* that the General Assembly “shall” enact a statute to provide for absentee voting for “qualified electors” who were unable to vote on Election Day because (1) “their duties, occupation or business require them to be elsewhere,” (2) they are unable to attend the election due to “illness or disability”; (3) “observance of a religious holiday”; or (4) “election day duties, in the case of a county employee.” PA. CONST. of 1874, art. VIII, § 19 (amended 1967).⁷ This version was adopted as part of the 1968 Constitution, and renumbered as Article VII, Section 14. *See* PA. CONST. of 1968, art. VII, § 14 (1968).

In 1985, Pennsylvania amended Article VII, Section 14 to expand absentee voting. PA. CONST. art. VII, § 14 (amended 1985). While the 1968 version permitted qualified electors to vote absentee when they were “absent from the State or county of their residence” due to their “duties, occupation, or business,” PA. CONST. art. VII, §14 (1968), the 1985 version narrowed the geographical scope of any absence to “the municipality of their residence.” PA. CONST., art. VII, § 14 (amended 1985). One no longer needed to be outside the county of his or her residence, but simply

⁷ Due to this new general absentee provision, Pennsylvania also repealed the military absentee ballot provision in the Constitution.

out of his or her municipality. In 1997, Pennsylvania adopted the final amendment to the absentee voting provision by providing a definition of the meaning of municipality: “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. of 1968, art. VII, § 14 (amended 1997).

By its terms, the Constitution requires the General Assembly to provide for absentee voting for those who are absent from the municipality where they reside as well as others who are present in their municipality but due to disability, illness, or observance of a religious holiday are not able to vote at their polling place. *Id.* It does not expressly bar the General Assembly from providing alternative methods of voting. *Id.* In fact, the current Constitution includes a provision that “[a]ll elections by the citizens shall be by ballot *or such other method as may be prescribed by law.* Provided, [t]hat secrecy in voting is preserved.” PA. CONST. of 1968, art. VII, § 4 (emphasis added).

III. ARGUMENT

A. The Commonwealth Court Failed to Exercise Proper Statutory and Constitutional Review Over Appellees’ Petition Which Concerns the Fundamental Right to Vote.

There is a critical factor for our courts to consider when interpreting a statute such as Act 77 or any constitutional provision that concerns or impacts

the fundamental right to vote: “[T]he longstanding and overriding policy in this Commonwealth [is] to protect the elective franchise.” *In re Cioppa*, 626 A.2d at 148 (citations omitted). Thus, this Court commands that such constitutional or statutory provisions involving the right to vote be “liberally construed.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004) (“[A]ll things being equal, the law will be construed liberally in favor of the right to vote but, at the same time, we cannot ignore the clear mandates of the Election Code.”) (citing *In re Nomination Petition of Gallagher*, 359 A.2d 791, 792 (Pa. 1976)); *Shamback v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (“[A]lthough election laws must be strictly construed to prevent fraud, they ‘ordinarily will be construed liberally in favor of the right to vote.’”) (citing *Appeal of James*, 105 A.2d 64 (Pa. 1954)); *In re Cioppa*, 625 A.2d at 148 (“[O]ur Election Code should be liberally construed so as not to deprive a candidate of the right to run for office or the voters their right to elect a candidate of their choice.”)

Thus, when considering the constitutionality of a statute, such as Act 77, this Court stated:

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*, [877 A.2d 383, 393, (Pa. 2005) (hereinafter “PAGE”).

Stilp v. Commonwealth, 905 A.2d 918, 938-39 (Pa. 2006). Furthermore, “in interpreting provisions of the Pennsylvania Constitution, [a court’s] ultimate touchstone is the actual language of the constitution itself.” *Yocum v. Commonwealth, Pa. Gaming Control Bd.*, 161 A.3d 228, 239 (Pa. 2017). Thus, “a legislative enactment will not be deemed unconstitutional unless it *clearly, palpably, and plainly violates the Constitution*. PAGE, 877 A.2d at 393 (emphasis added). “All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.” *Working Families Party, v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019). Courts considering a facial challenge to a statute may only declare that statute unconstitutional “where there are no other circumstances under which the statute would be valid,” and “the law is unconstitutional in all of its applications.” *Germantown Cab. Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019).

Additionally, other rules of constitutional interpretation apply: “[B]ecause the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible.” *Cavanaugh v. Davis*, 440 A.2d 1380, 1382 (Pa.

1982). “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 work cannot be understood outside the context of the section in which it is used.” *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (citations omitted). In fact, as noted in the seminal treatise on state constitutional law, some courts often examine the textual changes to constitutional provisions over time to interpret meaning: “State courts often refer to the evolution of the state constitutional text over time, concluding that meaning or change of meaning may be derived from [the historical] layering of state constitutional text.” ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS*, 338 (2000) (citing multiple state supreme court cases, including *Husebye v. Jaeger*, 534 N.W.2d 811, 814-15 (N.D. 1995) (“We assume that the people’s decision to change the language of the constitutional provision was intended to also change the meaning.”))

In this case, the majority of the Commonwealth Court ignored these rules of constitutional interpretation. Instead, the Commonwealth Court assumed that the text of the Constitution supported its holding that the phrase “offer to vote,” contained in the qualifications to vote provision of the Pennsylvania Constitution, mandated “in-person voting.” The court compounded its error by concluding that the absentee voting provision requiring the General Assembly to enact a statute to ensure

certain listed groups of individuals may vote absentee precluded the General Assembly from authorizing other methods of voting. In doing so, the majority improperly relied upon *Chase* and *Lancaster County*, which were decided in prior centuries and were interpreting constitutions that were distinguishable both textually and historically. Finally, by arriving at the incorrect conclusion that our Constitution mandates in-person voting for all Pennsylvanians who do not fall within one of the categories outlined in the absentee ballot provision, the Commonwealth Court ignored Article I, Section 5 of the Constitution ensuring protection of the franchise, and, in derogation of that provision, undermined the franchise of millions of Pennsylvania voters who have voted and intend to vote via no-excuse mail-in voting.

1. The text of Article VII, Sections 1 and 14 do not support the Commonwealth Court’s holding.

Despite the Commonwealth Court’s conclusion that “offer to vote” in the voting qualifications provision requires in-person voting, neither that phrase nor any other provision in the Constitution includes any language that expressly makes that a requirement. Nor does an absentee ballot provision requiring the General Assembly to provide for absentee voting for Pennsylvanians in certain enumerated categories bar the General Assembly from authorizing other methods of voting, such as no-excuse mail-in voting.

As stated above, the phrase “offers to vote” appears in Article VII, Section 1 (the voters qualification provision) in which our Constitution enumerates the

“qualifications” a voter must possess to cast a ballot. First, a voter must be a United States citizen for at least one month prior to the election. PA CONST. art. VII, § 1. Second, he or she must have resided in the Commonwealth for ninety (90) days prior to the election. *Id.* Third, an elector must “have resided where he or she shall offer to vote at least sixty (60) days prior to voter.” *Id.* Fourth, it permits Pennsylvanians, who move from their election district to another election district within sixty (60) days of the election, to cast a ballot in their old district. *Id.*

While the Commonwealth Court held that “offer to vote” constitutes another requirement to be eligible to vote, it strains credulity to so conclude. The phrase simply helps define the durational residency a voter must possess within his or her election district to be entitled to vote. Suggesting otherwise, as the Commonwealth Court does, ignores the fact that, by its own terms, Article VII, Section 1 allows an elector to vote in his or her old election district, despite being absent from that election district, if he or she has not established residence in his or her new election district for at least sixty (60) days prior to the election. PA CONST. art. VII, § 1. In the end, Article VII, Section 1 simply defines the age, citizenship, and durational-residency requirements for Pennsylvanians. It does not establish a requirement concerning the manner of voting as claimed by the majority below.⁸

⁸ Quite frankly, if the founders of the 1968 Constitution wanted to mandate in-person voting except for limited categories of groups enumerated in the absentee ballot provision, they could have easily done so with language that expressly makes that

Similarly, the Commonwealth Court’s conclusion that Article VII, Section 14 (the absentee ballot provision) bars the General Assembly from enacting legislation to authorize absentee voting for Pennsylvanians outside the categories of groups enumerated in the provision is simply incorrect. Prior to the 1967 amendment that established a general provision for absentee voting, every other iteration of absentee voting in the prior constitutions stated that the General Assembly “may” pass a particular type of absentee ballot provision. But the 1967 amendment, which was later adopted as Article VII, Section 14 of the 1968 Constitution, changed “may” to “shall.” PA CONST. of 1874, art. VIII, § 19 (amended 1967); PA CONST., art. VII, Section 14. Whereas earlier versions of absentee ballot provisions permitted the General Assembly to enact an absentee ballot provision, the current one commands that they do so. That distinction is significant.

To understand the implication of the use of the word “shall” rather than the word “may,” it is necessary to understand that the various State legislatures possess plenary powers to enact legislation for the general welfare of its citizens. WILLIAMS, at 28. State constitutions, including the Pennsylvania Constitution, therefore, often constitute limitations of that plenary power. WILLIAMS, *supra*, at 331 (“[A] key factor distinguishing state constitutions from the federal Constitution is that state

clear. The insertion of “offers to vote” in a durational residency provision does not do so.

documents are basically (not exclusively) documents that limit state legislative power.”) However, when a state constitution authorizes the legislature to exercise its plenary power by enacting a statute authorizing absentee voting, it cannot be said that the constitutional provision limits the power of the legislature to enact other mail-in voting provisions. As stated by the Idaho Supreme Court,

“Our Constitution is a limitation not a grant of power, and the Legislature has plenary powers in all matters, except those prohibited by the Constitution.” ... Because the Constitution is not a grant of power, there is no reason to believe that a Constitutional provision enumerating powers of a branch of government was intended to be an exclusive list.

Idaho v. Press Club, Inc., v. State Legislature, 132 P.3d 397, 399-400 (Idaho 2006)
(citations omitted).

In this case, Article VII, Section 14 of the Pennsylvania Constitution commanded the General Assembly to enact an absentee ballot provision. Effectively, it was requiring the General Assembly to exercise its plenary authority to provide a method of voting for enumerated groups of voters. There is no reason to conclude that by doing so, it silently barred the General Assembly from authorizing other methods of mail-in voting, including no excuse mail-in voting as authorized by Act 77. In fact, Article VII, Section 4 of the current Constitution, which concerns “Method of Elections,” supports such a conclusion. That provision states that “[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law. Provided, [t]hat secrecy in voting be preserved.” PA CONST., art.

VII, § 6. This interpretation is also supported by the fact that the General Assembly has authorized other types of individuals, not enumerated in Article VII, Section 14 to vote via absentee ballot. *See, e.g.*, 5 Pa. Stat. § 3146.1(b) (military spouses); 25 Pa. Stat. § 2602(z.3) (electors on vacations).

For these reasons, the Commonwealth Court erred when it held that Article VII, Sections 1 and 14 constitutionally mandate in-person voting for all Pennsylvanian electors, except those who fall within the groups enumerated in the absentee ballot provision. Nothing in these provisions demonstrates that Act 77 “clearly, palpably, and plainly violates the Constitution.” *PAGE*, 877 A.2d at 393.

2. The Commonwealth Court reliance on *Chase* and *Lancaster City* is misplaced.

In reaching its conclusion that in-person voting is constitutionally required in Pennsylvania, the Commonwealth Court heavily relied upon this Court’s rulings in *Chase* and *Lancaster City*—the first decided 160 years ago and the second almost a century ago. Those cases interpreted prior versions of the state constitution that were significantly different than our current Constitution and arose in a dramatically different historical era.

While the Commonwealth Court provides a lengthy history of in-person voting in the United States and the ballot, *McLinko*, 2022 Pa. Commw. LEXIS 12, *19-*20, it fails to acknowledge that those decisions were decided when there were less sophisticated means of travel and no voting machines or electronic devices to

cast and record a vote. Therefore, it is no surprise that the 1838 Constitution has several provisions acknowledging the existence of, but not requiring, in-person voting. *See* Pa. Const. of 1838, art. II, § 2 (“The Governor shall be chosen ... by the citizens of the Commonwealth, at the places where they shall respectfully vote for representatives.”); art. III, § 2 (“All elections shall be by ballot, except those by person in their representative capacities, who shall vote viva voce.”); art. III, § 3 (“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.”). Simply mentioning the “place” where one votes, just like including the phrase “offers to vote,” does not turn the then existing practice into a constitutional requirement.

Furthermore, the Commonwealth Court, while citing favorably to the *Chase* Court’s interpretation of the meaning of “offers to vote” fails to acknowledge that that the 1838 Constitution had the greatest restrictions on the franchise in Pennsylvania’s history. Voting was limited to “white freemen” who had “resided in the State one year” and “in the election district ... ten (10) 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.” Pa. Const. of 1838, art. III, § 1. While our current epoch rightly looks unfavorably at such voting restrictions, Chief Justice Woodward, in fact, praised them:

[The 1838 Constitution] withholds [the franchise] altogether from 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.

Chase, 41 Pa. at 418. Considering the expressed disapproval of a broader franchise, the *Chase* decision has limited value in interpreting our current Constitution which offers the most expansive understanding of the franchise in our history.

Similarly, the Commonwealth Court's reliance on *Lancaster City* is also flawed. While "offer to vote" is found in the voter qualification of the 1874 Constitution--the operative constitution when *Lancaster County* was decided--voting in person was still the norm and the only exception was absentee ballots for military personnel. Thus, it is hardly surprising that the 1874 Constitution, as it had been amended by 1923 (the year of the *Lancaster County* decision), contained provisions recognizing a place of voting. See PA CONST. of 1874, art. IV, § 2 ("[The Governor] shall be chosen on the day of the general election, by qualified electors of the Commonwealth, at the places where they shall vote for Representatives."); art. VIII, § 6 (permitting qualified electors to "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"); art. VIII, § 12 ("Townships and wards of cities or boroughs, shall form or be divided into election

districts of compact and contiguous territory, in such manner as the court of quarter sessions of the city or county in which the same are located may direct[.]” But while these provisions acknowledge the practice of voting in-person, none of them mandate it.

Furthermore, as explained by Judge Michael H. Wojcik in his dissent, this Court in *Lancaster City* and the Commonwealth Court majority failed to take proper consideration of Article VII, Section 4, which states that “[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, [t]hat secrecy in voting is preserved.” *McLinko*, 2022 Pa. Commw. LEXIS 12, at *70-*71. Both this Court in *Lancaster City* and the Commonwealth Court suggest Article VII, Section 4 “is limited to the use of voting machines.” *Id.* at *70. But, as Judge Wojcik correctly argues if that is true, “there [was] absolutely no need to amend [in 1928 Article VII, Section 7 of the 1874 Constitution] to provide for the use of such machines at the option of local municipalities.” *Id.* at *71. By doing so, Judge Wojcik rightly concludes this Court’s interpretation of Article VII, Section 4 in *Lancaster City* and adopted by the Commonwealth Court majority render the provision “mere surplusage.”

For all these reasons, the Commonwealth Court wrongly relied upon *Chase* and *Lancaster City*.

3. The Commonwealth Court ignored its obligations to protect the franchise to the detriment of Pennsylvania voters.

As explained in detail above, this Commonwealth has a long history of protecting and expanding the franchise. That history reached its constitutional zenith with the adoption of the Free and Equal Elections Clause: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. PA CONST. art. I, § 5. While this Court announced that this provision must be given the broadest interpretation, *League of Women Voters*, 178 A.3d at 814, the Commonwealth Court failed in that task. Instead, it adopted a narrow definition of “offer to vote,” not required by the language or the other provisions in the Constitution, resulting in a diminishment of the franchise and harming millions of Pennsylvania voters who have relied upon no-excuse mail-in voting.

IV. CONCLUSION

For the reasons set forth above, this Court should reverse the Order of the Commonwealth Court below and declare that Act 77 does not violate the Pennsylvania Constitution.

Respectfully submitted,

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