Received 2/25/2022 3:26:05 PM Supreme Court Middle District

Filed 2/25/2022 3:26:00 PM Supreme Court Middle District
14 MAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDDLE DISTRICT

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

DOUG McLINKO,
Appellee,
v.

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

TIMOTHY R. BONNER, *et al.*,
Appellees,
v.

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

On Appeal from the January 18, 2022, Orders of the Commonwealth Court, Nos. 244 MD 2021 and 293 MD 2021

BRIEF OF APPELLEE DOUG MCLINKO

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SUMMARY OF ARGUMENT

This Court should affirm the Commonwealth Court. As established by this Court, the law of the Commonwealth for the past 160 year is that the language of Article VII, § 1 of the Pennsylvania Constitution requires in-person voting. *In re: Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 126 A. 199, 201 (1924); *Chase v. Miller*, 41 Pa. 403, 419 (1862). Article VII, § 14 carves out a limited exception to this in-person voting requirement for certain classes of absentee voters, but this Court has never questioned the basic requirement that Pennsylvania voters must "offer to vote" by appearing *in person* at the polling place, unless specifically exempted by § 14. Act 77 of 2019, which permits all qualified voters to vote by mail, violates that constitutional requirement. Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. 2019-77 (S.B. 421) (West) ("Act 77").

Legislators initially recognized that Act 77 was inconsistent with the Constitution, as authoritatively interpreted by this Court. Those concerns were brushed aside, however, and the result was a mail-in-voting process identical to what this Court has already said – twice – is unconstitutional.

This case is not about whether no-excuse absentee voting is good policy. Rather, this case is about whether the General Assembly is bound by constitutional limits and by this Court's long-established precedents, or whether, instead, the General Assembly may ignore the Constitution's limits on its power when those limits prove inconvenient.

The Commonwealth Court correctly held that the mail-in-voting provisions of Act 77 are fundamentally incompatible with the plain language, structure, purposes, and historical development of Article VII of the Pennsylvania Constitution. This Court held the same in *Chase* and *Lancaster City*, and it should hold the same now. *Stare decisis* counsels strongly in favor of following the law that those cases established – law that has formed the background against which the people of Pennsylvania have adopted several constitutional amendments. Those amendments have expanded absentee voting for specific groups of voters, but the people have never amended the constitutional language that requires most voters to "offer to vote" in person.

Indeed, as *Lancaster City* recognized, by amending the Constitution to exempt certain classes of voters from having to vote in person, the people implied that the in-person requirement would persist for voters

who were not included in those specific exemptions. Neither do any of the other provisions of Article VII call into question the holdings of *Chase* and *Lancaster City*. Article VII, § 4 permits the General Assembly to determine that votes should be marked by use of a "ballot or other method" but that power is restricted to laws dealing with the medium used for recording voters' preferences; it does not give the General Assembly *carte blanche* to create any and all rules for elections, particularly since such an interpretation would amount to an implied repeal of the in-person-voting requirement of § 1.

Further, the Appellants' jurisdictional arguments are unavailing.[1] As the Commonwealth Court unanimously held, in line with this Court's *per curiam* holding in *Delisle v. Boockvar*, -- Pa ---, 234 A.3d 410 (Pa. 2020), § 13(3) of Act 77 is best read as a jurisdictional statement, not a statute of limitations. The contrary interpretation advanced by Appellants is inconsistent with the void-*ab-initio* doctrine and would permit

[1] Appellants are no longer challenging Appellees' standing nor asserting laches. *See* Appellants Commonwealth of Pennsylvania and Secretary of State ("Sect.") Br., 15 n.8 ("Respondents do not press in this appeal the arguments they raised below regarding Petitioners' lack of standing or laches."). Standing is waivable and Appellants can withdraw their assertion of laches at this stage. Therefore, the issues standing, or laches are before this Court at this time. In the alternative, the Commonwealth Court ruled correctly on each of these points and should be affirmed for the reasons set forth in its opinion.

the General Assembly to insulate patently unconstitutional statutes from judicial review.

Accordingly, the decision of the Commonwealth Court should be affirmed.

ARGUMENT

I. ACT 77 VIOLATES ARTICLE VII, § 1 OF THE CONSTITUTION, WHICH REQUIRES VOTES TO BE CAST IN PERSON

Article VII, § 1 of the Pennsylvania Constitution – as interpreted by this Court in *Chase* and *Lancaster City* – requires in-person voting. Exceptions are permitted under Article VII, § 14 only "where the elector's absence is for reasons of occupation, physical incapacity, religious observance, or Election Day duties." *McLinko v. Dept. of State*, -- A.3d --, 2022 WL 257659, at *18 (Pa. Commw. Ct. 2022).

Under Act 77, 25 P.S. § 3150.11 *et seq.*, however, any "qualified mail-in elector" – that is, all qualified voters – may vote by mail "without having to demonstrate a valid reason for absence from their polling place on Election Day." *McLinko* at *2. As the Commonwealth Court demonstrated in its comprehensive analysis, Act 77 cannot be squared with Article VII, § 1, and is, therefore, unconstitutional. The Commonwealth Court's judgment should be affirmed.

A. AS THIS COURT HELD IN *CHASE* AND *LANCASTER CITY*, ARTICLE VII, § 1 REQUIRES IN-PERSON VOTING.

Article VII, § 1 of the Pennsylvania Constitution provides:

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

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

The key phrase is "offer to vote."[2] That phrase first appeared in Article III, § 1 of the Constitution of 1838. *See* PA. CONST. art. III, § 1 (1838). Since its enactment, "offer to vote" has been consistently interpreted by this Court to require in-person voting. Because Act 77 violates this requirement, it is unconstitutional.

1. This Court's Holding in *Chase* Establishes "Offer to Vote" requires In-Person Voting.

Shortly after "offer to vote" was adopted by the 1838 Constitution, this Court decided *Chase v. Miller*, 41 Pa. 403 (1862). In *Chase*, this Court interpreted the phrase, and held 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. **The ballot cannot be sent by mail or express**. . . .

[2] Appellants dismiss "offer to vote" as "an obscure phrase in the Pennsylvania Constitution." Appellants Sect. Br., 21. The actual words of the Constitution matter, whether or not a litigant chooses to characterize them as "obscure." In any event, the *Chase* Court – one much closer to the enactment of the constitutional provision than we are – did not consider the phrase to be "obscure" at all. Rather, the Court thought the provision "undoubtedly" meant – when the words were construed "according to their plain and literal import" – that voting had to be done in person. *Chase*, 41 Pa. at 419. Far from an "obscure" provision, it had a meaning that was "natural and obvious[.]" *Id.* at 428. This meaning may be one that Appellants do not like, but to which this Court has been faithful ever since.

Id. at 419 (emphasis added). The constitutional voting qualifications have since been amended four times – in 1901, 1933, 1959, and 1967.[3] But "offer to vote" has remained in the Pennsylvania Constitution – unchanged – from 1838 until today (a period of more than 180 years).

At issue in *Chase* was the constitutionality of the Military Absentee Act of 1839, Act of July 2, 1839, P.L. 770, which purported to permit Civil War soldiers to vote by mail from military stations outside of Pennsylvania. Despite the obvious public-policy reasons to accommodate the interests of soldiers who were risking their lives to save the Union,[4] this Court held that absentee voting could not be reconciled with provisions in the Pennsylvania Constitution requiring electors to "offer to vote" in their election districts. *Chase*, 41 Pa. at 418.

Specifically, this Court ruled 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***

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[3] *See* Joint Resolution No. 1, 1909, P.L. 881; Joint Resolution No. 5, 1933, P.L. 1559; Joint Resolution No. 3, 1959, P.L. 2160; and Joint Resolution No. 5, 1967, P.L. 1048.

[4] *See Chase*, 41 Pa. at 427-28 ("A good deal has been said about the hardship of depriving so meritorious a class of voters as our volunteer soldiers of the right of voting. As a court of justice we cannot feel the force of any such consideration. Our 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.").

> ***to receive it. The ballot cannot be sent by mail or express,*** nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil. We cannot be persuaded that the constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. The constitution meant, rather, that the voter, *in propria persona*, should offer his vote in an appropriate election district, in order that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.

Id. (emphasis added). This Court was clear in *Chase*: "offer to vote" meant – and means – voting in person, not by mail. *Id.*

2. Historical Understanding of "Offer to Vote" Affirms it Requires In-Person Voting.

As *amici* in support of the Appellants concede, the Justice who wrote *Chase* knew what was intended by the phrase "offer to vote"; he was a Delegate to the Convention that produced the 1838 Constitution, in which the phrase first appeared. At the Convention, the future Mr. Justice (and later Mr. Chief Justice) George Washington Woodward spoke about election day as "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." Brief of *Amici Curiae* Molly Mahon, Pam Auer, Marisa Niwa, Matthew Jennings, Cindy Jennings, Disability Rights Pennsylvania, Leah Marx, and Hassan Bennett, 14 (quoting 2

Proceedings and Debates of the Constitutional Convention of the Commonwealth of Pennsylvania 27 (1837)). That understanding of election day as a single day for the citizens to gather to make important decisions is fully reflected in both the constitutional requirement that voters "offer to vote" in their respective election districts and in *Chase* and *Lancaster City*. It is wholly incompatible, however, with the universal mail-in-voting process created by Act 77.

In reaching the conclusion that "offer to vote" meant appearing at the polling place in person, the *Chase* Court was hardly alone. "Offering" to vote was commonly understood at the time the same way that *Chase* understood it: to require in-person voting. *See*, *e.g.*, *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865); *Blourland v. Hildreth*, 26 Cal. 161 (1864); *In re Opinion of Justices*, 30 Conn. 591 (1862).[5]

[5] Even *amici* in support of Appellants concede that voting in person was the established process when "offer to vote" was written into the Constitution. Amici admit that "allowing individuals to cast ballots outside the community affected by their voting choices was a radical departure" and that "[a]t 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." Brief of *Amici Curiae* Molly Mahon, Pam Auer, Marisa Niwa, Matthew Jennings, Cindy Jennings, Disability Rights Pennsylvania, Leah Marx, and Hassan Bennett at 14 (quoting 2 *Proceedings and Debates of the Constitutional Convention of the Commonwealth of Pennsylvania* 24-25 (1837)). *Amici* seek to dismiss the in-person-voting requirement as a quirk of a bygone era, but the Constitution has a mechanism for replacing provisions believed to be out of date: the amendment process of Article XI. The people of Pennsylvania made use of precisely this constitutional-

And although "offer to vote" may sound archaic, the word "offer" continues even today to connote in-person behavior. The first definition of "offer" in Webster's New Universal Unabridged Dictionary (the definition most clearly applicable to "offer to vote"), for example, says that the term means "to present for acceptance or rejection; proffer." Webster's New Universal Unabridged Dictionary 1344 (2003). While one might imagine someone sending a contractual "offer" through the mail, it would be far less common for someone to "present [a vote] for acceptance" without being, well, *present*.

The Court must also afford the text the original meaning that existed when the constitutional provision was originally adopted and as originally understood by the voters who ratified the provision. *Washington v. Dept. of Pub. Welfare*, 647 Pa. 220, 242, 188 A.3d 1135, 1149 (2018) ("[I]n interpreting a constitutional provision, we view it as an expression of the popular will of the voters who adopted it, and, thus, construe its language in the manner in which it was **understood by those voters**.")

amendment process in response to *Chase*. They amended the Constitution not to do away with the in-person voting requirement, but to create a specific exception for voters who were absent due to active military service. PA. CONST. art. VIII, § 6 (1864).

(emphasis added); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) ("words mean what they conveyed at to reasonable people at the time they were written."). Regardless of how we might interpret "offer to vote" if the phrase were inserted into the Constitution today, *Chase*, decided in 1862, was in a much better position than we are to ascertain the meaning of "offer to vote" at the time it was adopted and understood by the voters in 1838. Certainly, Appellants have presented nothing to indicate that they know the meaning of the 1838 Constitution better than did Justice Woodward and the *Chase* Court.

3. In *Lancaster City*, this Court Affirmed *Chase's* Holding that "Offer to Vote" Requires In-Person Voting.

This Court confronted the same issue roughly sixty years later, in *In re: Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 126 A. 199 (1924) ("*Lancaster City*"). *Lancaster City*, which was decided nearly 100 years closer than we are to the ratification of the 1838 Constitution, confirmed *Chase*'s interpretation and even went so far as to compliment *Chase*'s analysis. 201 Pa. at 136, 126 A. at 201. *Lancaster City* involved the 1923 Absentee Voting Act, Act of May 22, 1923, P.L. 309, which provided 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 complete an absentee ballot prior to Election Day. *McLinko* , at *6 (quoting § 1 of the 1923 Absentee Voting Act). At the time, the Pennsylvania Constitution permitted absentee voting only by members of the military. PA. CONST. art. VIII, § 6 (1874).

This Court reaffirmed *Chase* and held, once again, that the phrase "offer to vote" meant in-person voting. *Lancaster City*, 281 Pa. at 136, 126 A. at 201 ("It will be noticed that the 'offer to vote' 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*, supra."). This Court accordingly struck down the relevant provisions of the 1923 Absentee Act, concluding that the in-person-voting requirement applied to all voters except those specifically exempted by the Constitution:

> The [Constitution] has determined those who, absent from the district, may vote other than by personal presentation of the ballot, but those so permitted [*i.e.*, those serving in the military] 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.

Lancaster City, 281 Pa. at 137, 126 A. at 201.

Appellants appear to argue that because (some) Pennsylvanians like the convenience of mail-in voting, Act 77 should be upheld – and the original understanding of the Constitution should be replaced with a version more in keeping with (Appellants') modern sensibilities. But it is axiomatic that "constitutional language must be interpreted as the average person would have understood it **when it was adopted**." *Yocum v. Commonwealth Gaming Control Bd.*, 639 Pa. 521, 539, 161 A.3d 228, 239 (Pa. 2017) (emphasis added).

There can be little question about how "the average person would have understood [Article VII, § 1] when it was adopted." *Chase* was decided in the same generation when the provision was adopted, and the Justice who wrote the *Chase* opinion was a participant in the constitutional convention that proposed it. With the advantage of such a close vantage point (160 years closer than we are), *Chase* concluded that "undoubtedly" "the natural and obvious reading" of "offer to vote" was that voting must be done in person. 41 Pa. at 419, 428.

As summarized by the Commonwealth Court:

> The Pennsylvania Supreme Court [in *Lancaster City*] 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.

McLinko, at *7.

The phrase "offer to vote" means today what it meant in 1838, 1862, 1901, 1924, 1933, 1959, and 1967: a requirement to vote in person. That requirement should remain in place unless and until the people decide to change it through the appropriate procedure: by adopting a constitutional amendment.

B. STARE DECISIS COMPELS FIDELITY TO CHASE AND LANCASTER CITY.

Chase and *Lancaster City* are settled law. Even if there were doubts about the correctness of the *Chase* and *Lancaster City* holdings, they should be followed because of *stare decisis*. *Commonwealth v. Alexander*, 243 A.3d 177, 212 (Pa. 2020) (Dougherty, J. dissenting) ("[A]n argument that we got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled precedent."). The in-

person-voting requirement recognized in *Chase* and reaffirmed in *Lancaster City* is workable, easily applied, and easily understood. *Cf. Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 855 (1992) ("Although *Roe* [*v. Wade*, 410 U.S. 113 (1973)] has engendered opposition, it has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which a state law is unenforceable.") (citation omitted).

As the Commonwealth Court concluded, "*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*." *McLinko* at *18. *See also id.* at *15 ("[T]here is nothing fusty about the holdings in *Chase* and *Lancaster City*. They are clear, direct, leave no room for 'modern' adjustment."). Moreover, *Chase* and *Lancaster City* have been relied on by generations of Pennsylvanians; they have formed the baseline against which the people have adopted multiple constitutional amendments specifying only four groups of people entitled to exceptions from the otherwise-applicable requirement of in-person voting.

Appellants ask this Court to overrule *Chase* and *Lancaster City* and replace their holdings with a "modern" interpretation of the Constitution.

See, e.g., Appellants Sect. Br., 63-64 (claiming *Chase* and *Lancaster City* "are even more clearly erroneous under modern jurisprudence governing constitutional challenges to duly enacted statutes."). But mere disagreement with a precedent is not enough to justify overruling it. If courts followed only those precedents with which they agreed, *stare decisis* would be a nullity. *Alexander*, 243 A.3d at 195-96 (courts should follow "even questionable decisions because stare decisis 'promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'") (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). *See also id.* at 213-14 (Dougherty, J., dissenting) (citing *Knick v. Township of Scott*, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting) ("[T]he entire idea of stare decisis is that judges do not get to reverse a decision just because they never liked it in the first instance. Once again, they need a reason other than the idea that the precedent was wrongly decided.").

Despite Appellants' suggestion that modern, expansive conceptions of voting rights should induce this Court to discard 160 years of prece-

dent,[6] *Chase* and *Lancaster City* both explicitly considered analogous arguments to the ones offered today by Appellants – and still found the in-person-voting requirement of Article VII, § 1 to be the "obvious" interpretation of the constitutional language. *Chase,* 41 Pa. at 428. *Chase* noted the "hardship" that its holding would mean for soldiers who would be unable to participate in the election. *Id.* at 427. But the Court steadfastly insisted that constitutional interpretation not be affected by sympathy: "As a court of justice we cannot feel the force of any such consideration." *Id.* at 427-28. Likewise, *Lancaster City* acknowledged the "laudable . . .

[6] Although Appellants make reference to the Free and Equal Elections Clause, PA. CONST. art. I, § 5, they do not argue that an in-person voting requirement is unconstitutional. Any such argument would be frivolous, insofar as the Clause has been a part of the Pennsylvania Constitution since 1790 and co-existed with the in-person-voting requirement of *Chase* from 1862 until the passage of Act 77 in 2019. Obviously, in the days before the secret ballot, voting was a "public act," *Doe v. Reed*, 561 U.S. 186, 227 (2010) (Scalia, J., concurring in the judgment), and it would have been inconceivable that the Clause protected a right to vote without appearing at the place where votes were tallied. Accordingly, Appellants' argument that Act 77 should be welcomed because it expands opportunities to vote is merely a request for this Court to put aside the law and reach a decision solely on the basis of policy.

Furthermore, even if policy is a relevant matter for this Court to consider, Appellants' argument begs the question. They appear to assume that this Court should pursue a policy of expanding voting rights, but the Commonwealth has never pursued that law to the exclusion of other goals – as demonstrated by the limits on voter qualifications in Article VII, § 1. Rather, the question is whether the Constitution permits voting rights to be exercised *in this way*, *i.e.*, by mail when the voters have no excuse for not appearing at the polling place. There is no objective basis for finding a policy promoting the unlimited use of absentee voting; indeed, more than 150 years of history before the passage of Act 77 point in precisely the opposite direction.

purpose" of the act extending absentee voting, but the Court again held that such an extension was unconstitutional, and could be permitted only if "an amendment to the Constitution [were] adopted permitting this to be done." 281 Pa. at 138, 126 A. at 201.[7]

Appellants also argue that *Chase* and *Lancaster City* conflict with recent decisions of this Court. Appellants Democratic National Committee and Pennsylvania Democratic Party ("DNC") Br., 40-41. They do not. The Court has never revisited nor even questioned *Lancaster City* because every time absentee-voting eligibility was expanded, the Constitution was amended – exactly as *Lancaster City* insisted.

The best argument that Appellants can muster to demonstrate the special circumstances necessary to justify overruling *Chase* and *Lancaster City* is that those decisions are simply old. Modern times are always going to be in tension with decisions made in a different era. But this

[7] Indeed, *Chase* and *Lancaster City* invalidated votes that had been cast in reliance on the unconstitutional absentee-voting laws, and, in so ruling, awarded victory to the candidates who had been opposed by a majority of the absentee voters. Still, the sympathetic position of the absentee voters in those cases did not cause this Court to waver from its responsibility to enforce the Constitution's requirement that, absent an exception in the constitutional text, voting be in person.

In the present case, Appellees are requesting merely prospective relief. Appellants note that they have already sunk costs into complying with Act 77, and that, if Act 77 were struck down, they would presumably need to devote more resources to notifying voters to vote in person in future elections. Those complaints pale in comparison to the concerns that the Court found insufficient in *Chase* and *Lancaster City*.

Court does not overturn decisions merely because they run afoul of perceived modern sensibilities. Indeed, the vintage of *Chase* and *Lancaster City* is a factor counselling *against* overturning them. *Alexander*, 243 A.3d at 196-197 ("The age of the challenged decision is also a relevant factor."). Regarding that factor, "[t]he strength of the case for adhering to such decisions *grows* in proportion to their 'antiquity.'" *Id.* (citing *Gamble v. United States*, 139 S. Ct. 1960 (2019) (emphasis added).

The people have had 160 years to adopt a constitutional amendment to overturn *Chase*. But despite all the constitutional amendments that the people have adopted concerning absentee voting – in 1864, 1949, 1957, 1967, 1985, and 1997 – no amendment has done what Appellants are asking this Court to do. This Court should not impose an amendment on the people that they have declined to adopt for themselves.

Although *stare decisis* applies less strongly in constitutional cases than in statutory ones, that doctrine is based on the difficulty of amending the Constitution. *See Alexander*, 243 A.3d at 197. Here, the people have demonstrated – six times, including five times since *Lancaster City* – that they are quite capable of amending the Constitution's provisions respecting absentee voting, but they have not adopted an amendment to

overturn *Chase* and *Lancaster City*. Far from it, the people have incorporated *Chase* and *Lancaster City* into an intricate set of constitutional provisions that, together and individually, preserve the general rule established by *Chase* and *Lancaster City*, but which create specified exceptions to that general rule. This Court should not upset the careful balance set by the people. *See Etter v. McAfee*, 78 A. 275, 276 (Pa. 1910) (observing that constitutional provisions reflect the will of the people and the people "having exercised that right we are bound by what they themselves did.").

Our absentee ballot rules found in Article VII, § 14, were born from *Lancaster City*. Until 1957, absentee voting was limited to qualified voters in active military service and disabled veterans whose war injuries rendered them 'unavoidably absent' from their residence." *McLinko*, at *12. *Lancaster City* had told the people that if they thought it wise to expand absentee voting, they should pass a constitutional amendment allowing them to do so. And so, in 1957, Pennsylvania voters ratified a constitutional amendment that expanded absentee voting to all qualified electors unable to vote in person by reason of illness or disability. *Id.*; *see* Joint Resolution No.1, 1957, P.L. 1019. The amendment 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).

This amendment gave the General Assembly the constitutional authority that *Lancaster City* made clear it did not already have – to expand the categories of voters excused from voting in person at their proper polling place. The categories of voters eligible to vote absentee was further expanded by constitutional amendment in 1985 to include those unable to vote in person because of a religious holiday or election day duties. PA. CONST. art VII, § 14 (1985); Joint Resolution No. 3, 1984, P.L. 1307, and Joint Resolution No. 1, 1985, P.L. 555. Then, in 1997, the Constitution was amended again to confer absentee voting rights on those who could not go in person to vote in their home municipalities but who were present in their counties. PA. CONST. at VII, § 14 (1997); Joint Resolution No. 2, 1996, P.L. 1546, and Joint Resolution No. 3, 1997, P.L. 636.

Before Act 77, each expansion of absentee voting was accomplished by constitutional amendment – exactly as *Lancaster City* said should be done. If Appellants' interpretation of Article VII is correct, this effort was a colossal waste of time: The General Assembly possessed the power to expand absentee voting all along.[8]

As the Commonwealth Court rightly concluded, *stare decisis* counsels that *Chase* and *Lancaster City* be followed: They "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." *McLinko*, at *18. As the Commonwealth Court explained:

> *Lancaster City* is binding precedent that has informed election law in Pennsylvania for nearly 100 years. It has provided the impetus for the adoption of multiple amendments to the Pennsylvania Constitution that were each considered the necessary first step to any expansion of absentee voting. See, e.g., Joint Resolution No. 3, 1997, P.L. 636. Moreover, the rulings in Chase and Lancaster City have been followed over the years in numerous election cases. For example, in *In re Franchise of Hospitalized Veterans*, 77 Pa. D. & C. 237, 240 (1952),

[8] Recall that, before 1967, the Constitution gave the General Assembly merely the *option* of making absentee voting available for people in the enumerated categories. PA. CONST. art VII, § 14 (1985); Joint Resolution No. 3, 1984, P.L. 1307, and Joint Resolution No. 1, 1985, P.L. 555 ("The Legislature may, by general law, provide . . . ."). If § 1 or, after 1901, § 4 gave the General Assembly the authority that Appellants claim they did, the 1949 and 1957 amendments accomplished nothing. The rule against surplusage therefore cuts strongly against Appellants' reading; those amendments should be interpreted consistent with their plain meaning – as granting authority to the General Assembly that it would not have possessed without the amendments.

> 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. at 419." (Emphasis in original.) In sum, the viability of *Chase* and *Lancaster City* has never flagged.

McLinko at *15.

Appellants believe that universal mail-in voting is good public policy, but *Chase* and *Lancaster City* should not be upended merely because they stand in the way of Appellants' desired policy objectives. Indeed, restraining the government is the entire point of a written Constitution, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?"); *see also INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a

given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."). Confidence in the courts depends on courts' fidelity to the law and to precedent. *See, e.g.*, *Casey*, 505 U.S. at 864-69. Abandoning *Chase* and *Lancaster City* – particularly given the Appellants' overtly policy-based arguments for doing so – would undermine public confidence in the judiciary as a non-political institution. Indeed, "any time a court overrules a precedent in the absence of a special justification for doing so, it runs the risk of signifying that later-elected judges are merely interested in seizing opportunities to throw out cases they believe were wrongly decided by earlier-elected judges." *Alexander*, 243 A.3d at 214 (Dougherty, J., dissenting).

Ultimately, *stare decisis* compels this Court to affirm the Commonwealth Court and to declare Act 77 unconstitutional.

C. ARTICLE VII, § 14 PROVIDES A LIMITED EXCEPTION TO § 1'S IN-PERSON VOTING REQUIREMENT

Article VII, § 14(a) of the Pennsylvania Constitution 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 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.

Section 14 thus identifies four specific categories of people who are exempt from the general in-person voting requirement: (1) people whose duties, occupation, or business require them to be elsewhere on election day; (2) people who are unable to vote in person due to illness or physical disability; (3) people who are unable to vote in person due to observance of a religious holiday; and (4) people who are unable to vote in person due to election-day duties. As the Commonwealth Court correctly concluded, "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)." *McLinko* at *17. Section 14's use of phrases such as "be absent from the municipality of their residence," "are unable to attend at their

proper polling places," "will not attend," and "cannot vote" demonstrates that § 14 presumes in-person voting to be the rule, subject to the four specific exceptions created by § 14 itself. *See McLinko* at *17 ("It is striking how many times Article VII, Section 14, and its antecedents, refer to 'proper polling places.'"). This understanding is consistent with § 1, and satisfies the "fundamental principle in statutory construction . . . that we must read statutory sections harmoniously." *Trust Under Agreement of Taylor*, 640 Pa. 629, 645, 164 A.3d 1147 (Pa. 2017). Section 14 is the sole exception to Section 1's in-person voting requirement; therefore, Act 77 is unconstitutional.

1. The History of Article VII, § 14 Proves that it Serves as the Exclusive Exception to In-Person Voting Requirement.

The historical context of § 14's adoption further confirms that the people intended it as an exception to the general rule of in-person voting. In response to the Court's holding in *Chase*, the people of Pennsylvania amended the Constitution in 1864 to allow absentee voting by persons in actual military service. PA. CONST. art. III, § 4 (1864). The people did not give the General Assembly the power to employ mail-in voting *ad libitum*, nor did the people amend the "offer to vote" language that this

Court had interpreted to require in-person voting. Rather, the people created a limited exception to the in-person voting requirement but left the general requirement in place.

The military exception was carried forward verbatim and renumbered in 1874. *See* PA. CONST. VIII, § 6 (1874). It was part of the Constitution when this Court decided *Lancaster City*. *See McLinko* at *12. In *Lancaster City*, this Court relied on that provision in confirming *Chase*'s holding:

> It will be noticed that the 'offer to vote' 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, supra. *Certain alterations are made [to the Constitution] 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*. . . . The [Constitution] 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.

281 Pa. at 136-37, 126 A. at 201 (emphasis added).

Thereafter, every time the people desired to add categories of citizens permitted to vote absentee, they did so by amending the Pennsylvania Constitution. In 1949, they amended § 14 to allow absentee voting by injured war veterans. *See McLinko* at *12; PA. CONST. art. VIII, § 18

(1949). They expanded that provision again in 1957 to include anyone unable to vote at his or her polling place due to injury or disability. *See McLinko,* at *12; PA. CONST. art. VIII, § 19 (1957); 1957 Pa. Laws 1019. In 1967, the people amended the Constitution in part by reorganizing the absentee voter provisions and changing § 14's language from "may" to "shall." *McLinko* at *13; PA. CONST. art. VII, § 14 (1967); 1967 Pa. Laws 1048. In 1985, § 14 was amended yet again to allow absentee voting for observance of religious holidays and election-day duties. *McLinko,* at *13; PA. CONST. art. VII, § 14 (1985); 1985 Pa. Laws 555. In 1997, the people of Pennsylvania made one more amendment to § 14, which amendment referenced and defined "municipality." *McLinko* at *13; PA. CONST. art. VIII, § 14 (1997); 1997 Pa. Laws 636.

Each of these constitutional amendments has been specific and limited. The amendments have extended absentee voting to certain voters. They have not discarded the Constitution's requirement that most voters appear in person.[9] The implication – recognized by the venerable *expressio unius* canon – is that the amendments created exceptions to the

[9] Appellants cite legislative acts giving the right to vote by mail to military spouses and voters on sabbatical. Appellants Sect Br., 55-56; 25 P.S. § 3146.1(b); 25 P.S. § 2602(z.3). Neither of those acts is before the court currently – Act 77 is. While both statutes are in conflict with § 1, only one was challenged. The Supreme Court,

general rule requiring in-person voting, but they left the general rule in place. Imagine that a city has an ordinance prohibiting on-street parking. If thereafter the city enacts a new ordinance saying that parking shall be allowed on Sundays, it has left the no-parking rule in place for Mondays through Saturdays. Section 14 is analogous, in that it alters the pre-existing in-person voting requirement, but only as to the portion that is inconsistent with § 14. Appellants, however, would treat the exception in § 14 as undermining the stability and clarity of the preexisting rule, contrary to the canon that "[r]epeals by implication are disfavored – 'very much disfavored.'" SCALIA & GARNER, *supra*, at 327 (quoting JAMES KENT, COMMENTARIES ON AMERICAN LAW *467 n.(y1) (Charles M. Barnes ed., 13th ed. 1884); *Branch v. Smith*, 538 U.S. 254, 273, (2003) (Scalia, J.) ("repeals by implication are not favored.").

over a three-Justice dissent, declined to render a merits decision and instead dismissed the challenge for lack of standing. *See Kauffman v. Osser*, 441 Pa. 150, 158, 271 A.2d 236, 240 (1970) (Cohen, J., dissenting) ("The statute is thus a clear and unconscionable violation of the Pennsylvania Constitution, which the majority condones and I must condemn. Absent a constitutional amendment, such enactment cannot constitutionally stand."). Moreover, the validity of these statutes presents a more complicated legal question than does Act 77 because of the 1985 enactment of the federal Uniformed and Overseas Citizens Voting Act, 42 U.S.C. §§ 1973ff *et seq.*, which requires states to permit military members and their spouses living overseas to vote by mail in federal elections. Nevertheless, the existence of either does not support the constitutionality of Act 77.

Article VII, § 1 has been interpreted since 1862 as requiring in-person voting, and the people have created four specific exceptions to that general rule. Where the exceptions do not apply – and they do not apply here – the general rule does. As this Court consistently has maintained in discerning the meaning of constitutional provisions and statutes, "[t]he omission of language . . . speaks volumes . . . . Under the doctrine of *expressio unius est exclusio alterius*, 'the inclusion of a specific matter in a statute implies the exclusion of other matters.'" *Thompson v. Thompson*, 656 Pa. 732, 223 A.3d 1272, 1277 (2020) (citing *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 571 Pa. 580, 812 A.2d 1218, 1223 (2002)); *Page v. Allen*, 58 Pa. 338, 347 (Pa. 1868) ("[N]o constitutional qualification of an elector can in the least be abridged, added to, or altered, by legislation or the pretence [*sic*] of legislation. Any such action would necessarily be absolutely void and of no effect."). Section 14 clearly references a general requirement to vote in-person ("attend" a "proper polling place") and exempts four – and only four – specific categories of people from that requirement. The inclusion of these specific categories implies the exclusion of others.

Because *Chase* and *Lancaster City* set the background rule requiring in-person voting, the people had no reason to include a provision in § 14 to say even more explicitly that in-person voting would be required unless an exception applied. This Court had already said exactly that in *Lancaster City*. Accordingly, Appellants' request that this Court abandon a century and a half of precedent and overrule *Chase* and *Lancaster City* is particularly dangerous to the rule of law and to the sovereignty of the people. The effectiveness of the amendment process depends on the people being able to understand the effect that proposed amendments would have on the law. And the people should be able to rely on this Court's interpretation of the Constitution when they choose the language of, and vote on, constitutional amendments.

2. The "May" to "Shall" Change in Article VII, § 14 Does Not Give the Legislature the Power to Enact Act 77.

Appellants suggest that the 1967 amendment of § 14, which changed "may" to "shall," fundamentally changed § 14 from a ceiling to a floor of legislative authority. Appellants Sect Br., 54-55; Joint Resolution No. 5, 1967, P.L. 1048. There are four problems with this argument. First, it is contrary to the plain meaning of the provision. The term

"shall" means only that the General Assembly would be obligated to provide for absentee voting for § 14's four listed categories of voters. The amendment did nothing to change the established meaning of § 1 as applied outside of those categories of voters, and there was no indication that the General Assembly intended any more significant change than was apparent from the text itself. *See generally* 1 House Legis. J. at 84 (Jan. 30, 1967) (remarks of Rep. Gallen) (noting that "the only major change" in the amendment was a change in the time of residency "from 6 months to 90 days"). Surely if the General Assembly intended to abrogate the in-person-voting requirement (already more than a century old in 1967), there would have been some indication in the text of the amendment or at least in the history surrounding its adoption. The lack of any such indication naturally leads to the inference that the amendment to § 14 meant what it said, namely, that the General Assembly was obligated to allow those four categories of voters to vote absentee – but meant nothing more. *McLinko,* at *18 ("The 1968 change from "may" to "shall" in Article VII, Section 14 does not affect this analysis.").

Second, Appellants' interpretation of § 14 would bring it into conflict with § 1, contrary to the "fundamental principle" that sections of the

same document should be read harmoniously. Under Appellants' interpretation, § 14 would create a broad legislative authority to permit mail-in voting, which the unamended § 1 had been authoritatively interpreted to forbid. Moreover, Appellants' argument would create such a conflict unnecessarily, because, as noted above, the language of § 14 is more naturally read in harmony with § 1. Inverting usual rules of constitutional and statutory interpretation, Appellants are urging this Court to adopt a strained interpretation of § 14 to create a conflict with § 1 when, in reality, the two provisions are entirely consistent.

Third, and relatedly, Appellants' interpretation implausibly finds that the people implicitly amended Article VII, § 1 when they amended a *different* section of that Article, but when they left § 1 unchanged. Section 1 – and specifically its "offer to vote" language – had been interpreted in *Chase* and *Lancaster City* to require in-person voting. Surely if the people meant to discard the in-person-voting requirement, they would have amended the section that established the requirement.

Contrary to Appellants' argument, it is far more appropriate to presume that, by amending part of Article VII but leaving § 1 in place, the people did *not* want to upset the settled interpretation of § 1. It is well

established in Pennsylvania law "[t]hat when a court of last resort has construed the language 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." 1 Pa. C.S. § 1922(4), Act of May 28, 1937, P.L. 1019; *App. of Borough of Aliquippa*, 405 Pa. 421, 433, 175 A.2d 856, 862 (1961); *Com. v. Sitkin's Junk Co.*, 412 Pa. 132, 137, 194 A.2d 199, 202 (1963); *See also Mullen v. Bd. of Sch. Directors of DuBois Area Sch. Dist.*, 436 Pa. 211, 220, 259 A.2d 877, 882 (1969) (Pomeroy, J., dissenting) ("It is a settled canon of statutory construction that the legislative reenactment of a statutory provision is presumptively a legislative adoption of the judicial interpretation previously given to the language in question.") (citations omitted). This Court also recognized the importance of the reenactment canon in a recent decision:

> The legislature is presumed to know about this body of case law, as it is well-settled that if the legislature in a later statute uses the same language used in a prior statute which has been construed by the courts, there is a presumption that the repeated language is to be interpreted in the same manner as such language had previously interpreted when the court construed the earlier statute.

Pennsylvania State Educ. Assn. v. Cmmw. Dept. of Community and Econ. Dev., 637 Pa. 337, 362, 148 A.3d 142, 157 (Pa. 2016).

As a leading scholar of statutory interpretation has explained, "If Congress or a state legislature reenacts or materially amends the statute, makes no material change in the provision that has been interpreted, and leaves the precedent in place, courts are, properly, more reluctant to reconsider the underlying precedent." WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW 177 (2016). *See also, e.g.*, *Pierce v. Underwood*, 457 U.S. 552 (1988); BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 346 (2016); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322-26 (2012). *Cf, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 582 (1978) (holding that when Congress used the Fair Labor Standards Act as a template to create the Age Discrimination in Employment Act, the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA"). The "rule of law (continuity)" reasons justifying the reenactment/prior-construction canon, ESKRIDGE, *supra*, at 178, apply at least as strongly in constitu-

tional as in statutory interpretation, because overruling this Court's interpretation of Article VII, § 1 would upset the expectations not merely of the people's representatives, but of the people themselves.

The fourth problem with Appellants' interpretation is that it is refuted by the subsequent history, particularly the 1985 amendment, which extended absentee voting for religious observance and election day duties. As the Commonwealth Court correctly reasoned, "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 . . . was unnecessary." *McLinko* at *17.

In sum, § 14 provides four limited exceptions to § 1's requirement that votes be cast in person. The enumeration of a limited number of specific exceptions undercuts Appellants' argument that the General Assembly may provide for absentee voting in circumstances where those exceptions do not apply.

D. ARTICLE VII, § 4 NEITHER EXPANDS NOR SUPERSEDES § 1 OR § 14.

Article VII, § 4 provides: "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.

Contrary to Appellants' argument, § 4 does not grant the General Assembly unlimited authority to prescribe election procedures. Rather, the plain text of § 4 – "by ballot or by such other method," such as voting machines – concerns the *medium* by which voters may indicate their selections. Section 4 no more permits the General Assembly to alter § 1's in-person voting requirement than it permits the General Assembly to alter the years in which elections should be held for various offices. For these reasons, this Court should affirm.

1. The Limited Scope of Article VII, § 4 Precludes Appellants' Argument that it Gave the Legislature Power to Enact Act 77.

When § 4 is read *in pari materia* with § 14, the limited scope of § 4 is even more apparent. Were Appellants' revisionist reading of § 4 adopted, there would be no purpose to § 14. Section 14 is on its face a description of the General Assembly's authority to legislate concerning absentee voting. Section 14 begins "[t]he Legislature shall, by general law, provide a manner in which, and the time and place at which" certain qualified electors can vote absentee. PA. CONST. art. VII, § 14. If § 4 is a general grant of authority to regulate the methods of conducting elections, including authorizing universal use of absentee ballots, then there

would be no point to the grant of specific authority on the same subject in § 14. The original text of § 14 stated that the Legislature "may" confer absentee voting rights on those whose disability or illness would render them incapable of voting in person on election day. *See* Joint Resolution No.1, 1957, P.L. 1019. If Article VII, § 4 already granted the General Assembly that authority, as Appellants argue, then there was no reason for the people to again confer that authority on the General Assembly a second time. The logical reason § 14 originally stated that the Legislature "may" authorize certain people to vote absentee was because the Legislature never had the authority to do it in the first place.

It is a canon of interpretation that specific controls the general (*generalia specialibus non derogant*). *In re Borough of Downingtown*, 639 Pa. 673, 716, 161 A.3d 844, 871 (2017) ("the more specific statute governs the general one.") Accordingly, even if § 4 gave the General Assembly authority to legislate as to more than the medium of recording votes, that authority could not include making exceptions to the in-person-voting requirement because it would have to yield to § 14's more specific manner of addressing the same issue. Whereas one can hardly imagine a more

general term than § 4's "manner,"[10] § 14's language creates the four specific exceptions for voters who cannot come to the polling place because of their absence from the municipality, illness/disability, religious obligations, or election-day duties.

As described above, Appellants seek to attribute significance to the 1967 change in § 14 from "may" to "shall." But there is no exception to the *expressio unius* doctrine for lists of categories preceded by the word "shall." To the contrary, the doctrine applies fully to such texts. *See*, *e.g.*, *Thompson v. Thompson*, -- Pa --, 223 A.3d 1272 (Pa. 2020) (applying *expressio unius* doctrine to limit courts to a specific list of punishments preceded by directive "shall"). If the word "shall" were treated as setting a floor for legislative action while silently implying *carte blanche* authority over all other subjects, then the Legislature could by statute impose additional qualifications upon each citizen's right to vote under § 1. *But see* *Page v. Allen*, 58 Pa. 338, 346-47 (applying *expressio unius* doctrine to § 1's list of voter qualifications, which is preceded by the word "shall").

[10] In context, as noted above, § 4's reference to "by ballot or by such other manner" is not general at all. Appellants, however, would read "manner" as encompassing any number of election regulations, and making it a textbook example of the kind of general law that should be controlled by a more specific one.

2. Other Structures of Provisions in Pennsylvania Constitution Do Not Support Appellants' Interpretation.

Appellants ask the Court to read into § 14 language that is not there and that violates the established meaning of § 1. Appellants would read § 14 as stating, "The Legislature shall, by general law, provide a manner in which [the four specified categories of voters unable to reach the polls] may vote*, and may further provide for absentee voting by such other voters as the Legislature shall determine.*" But the italicized language is not in § 14 – even though the people knew how to express such catch-all authority and did express themselves that way in other constitutional provisions. *Compare*, *e.g.*, PA. CONST. art. VII, § 1 ("The Executive department of this Commonwealth **shall** consist of a Governor, Lieutenant Governor, Attorney General, Auditor General and Superintendent of Public Instruction **and such other officers as the General Assembly may from time to time prescribe**.") (emphasis added); PA. CONST. art. II, § 11 ("Each House **shall** have the power to determine the rules of its proceedings . . . **and shall have all other powers necessary for a legislature of a free State**.") (emphasis added); PA. CONST. art. V, § 1 ("The judicial power of the Commonwealth **shall** be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court,

courts of common pleas, community courts, municipal courts in the City of Philadelphia, **such other courts as may be provided by law** and justices of the peace.") (emphasis added); PA. CONST. art. IX, § 4 ("County officers **shall** consist of commissioners, controllers or auditors, district attorneys, public defenders, treasurers, sheriffs, registers of wills, recorders of deeds, prothonotaries, clerks of courts, **and such others as may from time to time be provided by law**.") (emphasis added). The conspicuous omission of catch-all language from Article VII, § 14 indicates that the General Assembly's authority to provide for absentee voting is limited to the categories of voters listed in § 14.

Moreover, as the Commonwealth Court noted, the reading pressed by Appellants would render unnecessary each of the "painstaking" amendments to § 14 that the people have made since 1901. *McLinko* at *17 ("Each painstaking amendment to the absentee voting requirement in Section 14 was unnecessary, according to the Acting Secretary, after 1901 when Section 4 was amended."). In other words, if Appellants are correct that § 4 gives the General Assembly power to extend mail-in voting to any group of voters it wished, it would have been unnecessary to amend § 14 to say, as the people did in 1985, that the General Assembly

may provide for absentee voting for people who could not go to the polls because of a religious obligation or election-day duties.

Section 4 was in the Constitution when the Court decided *Lancaster City*. Had § 4 given the General Assembly authority to extend absentee voting to whichever voters it desired, that case would have been decided the other way. *Lancaster City* is on all fours with the present case. It involved the same issue and interpreted the same constitutional language that is at issue here. It considered and rejected arguments analogous to those offered by Appellants here. All the Court needs to do to decide the present case is to apply its precedent, which holds unambiguously that the Pennsylvania Constitution requires in-person voting unless a specific exception in the Constitution applies.

3. Article VII, § 6 Does Not Avail Appellants' Argument that § 4 Gives the Legislature Power to Enact Act 77.

Notwithstanding Judge Wojcik's opinion concurring in part and dissenting in part in *McLinko* ("dissent"), Article VII, § 6 is not to the contrary. The dissent reasons that "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." *McLinko,* at

*29 (Wojcik, J., concurring in part and dissenting in part). There was, however, such a need – one apparent from the face of § 6. That section establishes a requirement that election laws be uniform across the Commonwealth: "All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State." *See* PA. CONST. art. VII, § 6. Section 6 goes on to prescribe certain exceptions to this requirement:

> . . . 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 natural and plain meaning of § 6 is that the Legislature shall permit – and local governments may purchase and use – different voting equipment in different parts of the Commonwealth, notwithstanding the general requirement of uniform election laws.

This understanding is entirely consistent with § 4, which was adopted before § 6. Section 4 merely states that the elections shall be by

secret paper ballot or an alternative mechanism prescribed by law for recording voters' choices. It is silent as to whether that method must be the same across the Commonwealth, or whether different methods can be used in different places. Section 6 speaks to this silence by prohibiting disuniformity in election laws as a general matter, but by permitting different municipalities to use different methods of recording votes. Accordingly, § 6 can and should be read in harmony with § 4.

Section 4 is not an all-encompassing grant of authority. The original meaning of the text, as well as the past 120 years of practice, confirm that § 4 is limited to allowing voters to indicate their preferences through media other than paper ballots. Accordingly, § 4 neither expands nor supersedes the authority and restrictions in §§ 1 and 14.

Act 77 is fundamentally incompatible with the text and history of the Pennsylvania Constitution and is therefore void *ab initio*. Act 77 is not the first time the General Assembly has chaffed at its constitutional restraints, and it undoubtedly will not be the last. However, there is a proper way forward if the people of Pennsylvania believe that universal mail-in voting is sound policy: amending the Constitution.

II. THE COMMONWEALTH COURT PROPERLY EXERCISED JURISDICTION OVER APPELLEES' CLAIMS

Appellants argue that the General Assembly insulated Act 77 from all constitutional challenges brought more than 180 days after its effective date. But, as the Commonwealth Court unanimously held, § 13 of Act 77 provides for a 180-day period during which this Court has exclusive jurisdiction to hear challenges, but after that time original jurisdiction reverts to Commonwealth Court, per 42 Pa. C.S. § 761(a)(1). *McLinko*, at *23. If Appellants were correct that Act 77 imposed a 180-day statute of limitations on constitutional challenges, that limit would be unconstitutional. Either way, the Commonwealth Court's unanimous conclusion that it had jurisdiction was correct.

Section 13(2) of Act 77 provides, "[t]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of" portions of Act 77, including the mail-in-voting provisions. *See* Act 77 § 13(2). Section 13(3) of Act 77 then states that "[a]n action under paragraph (2) must be commenced within 180 days of the effective date of this section."

As the Commonwealth Court unanimously held, and as this Court implicitly held (albeit *per curiam*) in *Delisle v. Boockvar*, 234 A.3d 410

(Pa. 2020), Act 77 establishes a 180-day window of exclusive jurisdiction for this Court to hear challenges to Act 77. *McLinko*, at *23. After that 180-day period, the usual jurisdictional rules apply, and the Commonwealth Court has jurisdiction over constitutional challenges under 42 Pa. Cons. Stat. § 761(a)(l). *Delisle*, 234 A.3d at 411 (Wecht, J., concurring) ("I join the Court's decision to transfer the Petition for Review to the Commonwealth Court for disposition. The statute that conferred exclusive original jurisdiction upon this Court to hear constitutional challenges revoked that jurisdiction at the expiration of 180 days. . .").

In *Delisle*, this Court determined that a Petition for Review of Act 77 was outside of the 180-day window for exclusive jurisdiction and, for that reason, *transferred the matter to the Commonwealth Court*. *Delisle*, 234 A.3d at 411 (*per curiam*) ("The case is immediately transferred to the Commonwealth Court."). If § 13 of Act 77 were a statute of limitations, this Court would have dismissed the case, not transferred it. Thus, as the Commonwealth Court unanimously determined, "[t]his provision addresses subject matter jurisdiction and does not state a statute of limitations." *McLinko* at *24.

Non-precedential opinions are justified for cases involving the application of clearly established law to facts. In such circumstances, a court may not wish to give a complete recitation of the facts on which the outcome depends, and therefore reliance on the court's opinion could be misleading. *See Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). That rationale applies to fact-dependent issues, such as laches, but has no applicability to pure questions of law, as in *Delisle*. Issuing non-precedential opinions to resolve purely legal disputes cannot be justified on any other basis than that the court wishes to be free to reconsider its rulings without the constraint of *stare decisis*. That "justification," however, is little different from an invitation to arbitrary judicial decision-making, violating the basic principle that like cases should be treated alike. Accordingly, *per curiam* decisions on pure questions of law should be granted *stare decisis* effect.

Appellants' interpretation of § 13 of Act 77 would render the provision unconstitutional because the General Assembly may not insulate its statutes from judicial review. "The idea that any legislature . . . can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent

with the fundamental law, is in opposition to the theory of our institutions." *William Penn School District v. Pa. Dep't. of Educ.*, 624 Pa. 236, 276, 170 A.3d 414, 438 (2017) (quoting *Smyth v. Ames*, 169 U.S. 466, 527 (1898)). Legislatures may not strip courts of jurisdiction as a way of preventing them from striking down unconstitutional laws. *See United States v. Klein*, 80 U.S. 128, 147 (1872) (striking down a law that deprived the Supreme Court of jurisdiction over certain cases where "its decision, in accordance with settled law, must be adverse to the government").

The General Assembly may not shield its legislation from scrutiny by the Commonwealth's judiciary. "It is settled beyond peradventure that constitutional promises must be kept," and "the separation of powers in our tripartite system of government typically depends upon judicial review to check acts or omissions by the other branches in derogation of constitutional requirements." *William Penn*, 624 Pa. at 243, 85 A.2d at 440; *Robinson Twp., Wash. Cty. v. Commonwealth*, 623 Pa. 564, 606, 83 A.3d 901, 927 (2013) ("[I]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts.").

These conclusions follow from the principle that unconstitutional legislative actions are void *ab initio*. *Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Township*, 589 Pa. 135, 907 A.2d 1033 (2006). Under the void-*ab-initio* doctrine, "a statute held unconstitutional is considered void in its entirety and inoperative as if it had no existence from the time of its enactment." *Id.* at 143 (quoting Erica Frohman Plave, *The Phenomenon of Antique Laws: Can a State Revive Old Abortion Laws in a New Era?*, 58 Geo. Wash. L. Rev. 111 (1990)). The doctrine can be traced to the principles relied upon in *Marbury*, where Chief Justice Marshall held that "a law repugnant to the constitution is void." *Glen-Gery*, 589 Pa. at 143, 907 A.2d at 1037 (quoting Plave, in turn quoting *Marbury*, 5 U.S. at 180). *See also Norton v. Shelby County*, 118 U.S. 425 (1886). If a statute is held void in its entirety, then any provisions purporting to shield it from judicial review are void as well and they are inoperative.

At the very least, the General Assembly's attempt to insulate an unconstitutional statute from constitutional challenge raises a serious constitutional question. And the well-established constitutional-avoidance canon directs courts to adopt any "tenable" interpretation of a stat-

ute, if doing so would avoid the necessity of deciding serious constitutional questions. *Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450, 329 A.2d 812, 827 (1974) ("We reach a constitutional challenge only when we find no tenable interpretation of the statute in question that obviates the necessity of doing so."). *See, e.g.*, 1 Pa. C.S. § 1922; *Webster v. Doe*, 486 U.S. 592, 603 (1988) (interpreting a statute to allow judicial review of constitutional claims because depriving courts of the ability to review such claims would raise a serious constitutional question); *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490, 500 (1979); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *Commonwealth v. Herman*, 639 Pa. 466, 495, 161 A.3d 194, 212 (2017); *MCI WorldCom, Inc. v. Pennsylvania Pub. Util. Commn.*, 577 Pa. 294, 311, 844 A.2d 1239, 1249–50 (2004); SCALIA & GARNER, *supra*, at 247-48 ("[The constitutional-doubt canon] militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality.").

In this case, an alternative interpretation avoiding the constitutional question is not only "tenable"; it is the one that the Commonwealth Court unanimously held to be *correct*, and that this Court implicitly

adopted in *Delisle*. Thus, even if one had doubts about the meaning of § 13, the constitutional-avoidance canon should resolve those doubts in favor of permitting the Commonwealth Court to exercise jurisdiction over this case.

In the alternative, if this Court were to rule (*contra Delisle*) that § 13(2) permanently bars the Commonwealth Court from exercising jurisdiction over constitutional challenges to Act 77, this Court should strike down the 180-day limit on this Court's exclusive jurisdiction and proceed to review the merits. The void-*ab-initio* doctrine requires that some court have jurisdiction to hear constitutional challenges to statutes, and if the General Assembly prohibited the Commonwealth Court from exercising that jurisdiction, then there must be jurisdiction in this Court. In such a circumstance, the Court could treat the appeal as if the case

has been transferred to this Court under 42 Pa. C.S. § 5103,[11] which provides:

> A matter which is within the exclusive jurisdiction of a court or magisterial district judge of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.

Just as if transferred, the appeal in this case is subject to this Court's *de novo* review for questions of law. This Court could look to the Commonwealth Court's decision for its persuasive value and find that Act 77 violates the Constitution.

[11] Title 42 Pa. C.S. § 5103 provides in full:

> "If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or magisterial district judge shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or magisterial district judge of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal."

For the reasons set forth above, the Commonwealth Court properly exercised jurisdiction over McLinko's claims. In any event, this Court should reach the merits of the McLinko's claims and declare Act 77 unconstitutional.

CONCLUSION

More than 150 years of settled constitutional law – established by constitutional text, historical context, and two holdings of this Court – make clear that voting must be performed in person. The four limited exceptions to that requirement were specified by the people in the Constitution itself, and do not apply here. Accordingly, Act 77 is unconstitutional.

Each time the people have wanted to expand the availability of absentee voting, the expansion has been accomplished by constitutional amendment – not by a "modern" interpretation of the Constitution that effectively amends the document without the procedural safeguards provided in Article XI. If Appellants believe that universal mail-in voting is preferable to in-person voting, they are free to attempt to amend the Constitution. But until the Constitution is amended, this Court should continue to do what it has steadfastly done for a century and a half – faithfully apply the Constitution's original meaning, which requires in-person voting.

For the foregoing reasons, the decision of the Commonwealth Court should be affirmed, and Act 77 should be declared unconstitutional.

Respectfully submitted,

Date: February 25, 2022

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I, Walter S. Zimolong, hereby certify that this Initial Brief of Appellants was prepared in word-processing program Microsoft Word 2016 (for Windows), and I further certify that, as counted by Microsoft Word 2016, this Initial Brief of Appellants contains 12,471 words, excluding the parts of the brief exempted by Pa. R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE WITH Pa. R.A.P. 127

I, Walter S. Zimolong, certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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