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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVID H. ZIMMERMAN
and KATHY L. RAPP,
Petitioners,

v.

AL SCHMIDT, in his official capacity as Secretary
of the Commonwealth of Pennsylvania, et al.,

Respondents.

No. 33 MD 2024

**BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS OF
RESPONDENTS AL SCHMIDT AND DEPARTMENT OF STATE**

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Pursuant to Pennsylvania Rule of Appellate Procedure 1516(b) and Pennsylvania Rule of Civil Procedure 1028(a), Respondents Al Schmidt, in his official capacity as Secretary of the Commonwealth, and the Department of State of the Commonwealth of Pennsylvania (the Commonwealth Respondents) submit this brief in support of their Preliminary Objections to the Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief (Pet.) filed by Petitioners David H. Zimmerman and Kathy L. Rapp.

I. PRELIMINARY STATEMENT

The Pennsylvania Election Code, as enacted by the General Assembly, requires Pennsylvania voters to return absentee and mail-in ballots to their respective county board of elections, which then reviews the ballots and tallies the votes. Countless individuals have been elected to state and federal office thanks in part to votes cast by absentee and mail-in ballots canvassed by county boards of elections.

Petitioners seek to destroy this commonsense, efficient process by asking the Court to order absentee ballots only be returned to and canvassed in election districts (i.e., polling places)—of which there are 9,159 in Pennsylvania. This legally frivolous petition, filed more than fifty years after the Pennsylvania Supreme Court squarely rejected the same legal arguments presented here, would

create absurd and oppressive consequences for voters and county boards of elections alike.

Petitioners have no standing to bring their claims and their claims have no merit. The Court should sustain these preliminary objections and dismiss the Petition with prejudice.

II. BACKGROUND¹

A. Voting in Pennsylvania.

The Election Code is Pennsylvania's primary codification of statutory election law. *See generally* 25 P.S. §§ 2601-3591; Act of June 3, 1937, P.L. 1333, No. 320 (as amended). Consistent with the Pennsylvania Constitution, the Election Code divides Pennsylvania into geographic subunits, known as election districts or precincts, for the purpose of voting. Pa. Const. art. VII § 9; 25 P.S. § 2701 ("Each borough and township, not divided into wards, and each ward of every city, borough and township now existing or hereafter created, shall constitute a separate election district, unless divided into two or more election districts or formed into one election district, as hereinafter provided."). There are 9,159 election districts in Pennsylvania. Pet. Ex. A.

¹ Commonwealth Respondents accept as true Petitioners' well-pleaded factual allegations for purposes of these preliminary objections only.

Every election district has one polling place. 25 P.S. § 2602(g) (“The words ‘election district’ shall mean a district, division or precinct, established in accordance with the provisions of this act, within which all qualified electors vote at one polling place.”). On Election Day, voters vote in person at the polling place in their election district. 25 P.S. § 3045. Polling places are usually “schoolhouses, municipal buildings or rooms, or other public buildings” used temporarily for voting. 25 P.S. § 2727(a). Polling places are run by election officials, who are not county board of elections employees; instead, election officials are elected by voters. 25 P.S. § 2671.

In addition to in-person voting, the Election Code provides ways for voters to participate in the electoral process by mail. Historically, certain voters who are in military service, overseas, or unable to vote in person due to illness, religious observation, or obligation have been accorded the ability to vote by absentee ballot. 25 P.S. §§ 3146.1-3146.9; *see also* 25 Pa. C.S. ch. 35 (codifying the Uniform Military and Overseas Voters Act). With the enactment of Act 77, any person eligible to vote in Pennsylvania can vote by a mail-in ballot. 25 P.S. §§ 3150.11-3150.17; Act of Oct. 31, 2019, P.L. 552, No. 77 (enacting no-excuse mail-in voting).

The General Assembly has chosen to treat absentee and mail-in ballots identically in many ways.

For example, the Election Code requires voters to return completed absentee and mail-in ballots to their county boards of elections. 25 P.S. § 3146.6(a) (for absentee ballots: “Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.”); 25 P.S. § 3150.16 (for mail-in ballots: “Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.”). Voters must return mail-in ballots and most absentee ballots to their county board of elections by 8:00 p.m. on Election Day, 25 P.S. §§ 3146.6(a), 3146.8(g)(1)(ii), 3150.16(a), though absentee ballots cast by certain military and overseas voters can be returned to the county board of elections by 5:00 p.m. on the seventh day after Election Day, 25 P.S. § 3146.8(g), 25 Pa. C.S. § 3511.

The Election Code also requires county boards of elections to pre-canvass and canvass absentee and mail-in ballots using the same statutory process. 25 P.S. § 3146.8(a) (“An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).”). During the pre-canvass, the county board of elections inspects and opens absentee and mail-in ballot return envelopes, removes the absentee or mail-in ballot, and tallies the votes, but does not report the results. 25

P.S. §§ 2602(q.1), 3146.8(g)(1), (1.1). During the canvass, the county board of elections inspects and opens absentee and mail-in ballot return envelopes, removes the absentee or mail-in ballot, tallies the votes, and reports the results. 25 P.S. §§ 3602(a.1), 3146.8(g)(1), (2).

B. History of absentee voting in Pennsylvania.

The Pennsylvania Constitution has provided for some form of absentee voting since 1864. *McLinko v. Dep't of State*, 279 A.3d 539, 561 (Pa. 2022). Pennsylvania originally limited absentee voting to persons in active military service. Pa. Const. art. III § 4 (1838) (added in 1864); Pa. Const. art. VIII § 6 (1874).² In 1949, Pennsylvania amended the 1874 Constitution to add a section extending absentee voting to hospitalized and bedridden veterans. Pa. Const. art. VIII § 18 (1874) (added in 1949, P.L. 2138, Joint. Res. 3).³ In 1957, Pennsylvania again amended the 1874 Constitution to add a section extending absentee voting to individuals unavoidably absent from the county. Pa. Const. art. VIII § 19 (1874)

² “Whenever any of the qualified electors of this Commonwealth shall be in actual military service, under a requisition from the President of the United States or by the authority of this Commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual place of election.” Pa. Const. art. VIII § 6 (1874).

³ “The General Assembly may, by general law, provide a manner in which, and the time and place at which, qualified war veteran voters, who may, on the occurrence of any election, be unavoidably absent from the State or county of their residence because of their being bedridden or hospitalized due to illness or physical disability contracted or suffered in connection with, or as a direct result of, their military service, may vote and for the return and canvass of their votes in the election district in which they respectively reside.” Pa. Const. art. VIII § 18 (1874) (added in 1949, P.L. 2138, Joint. Res. 3).

(added in 1957, P.L. 1019, Joint Res. 1).⁴ Relevant here, Section 18 and Section 19 both ended with the same phrase: “and for the return and canvass of their votes in the election district in which they respectively reside.”

After each constitutional amendment, the General Assembly updated the Election Code to implement the new constitutional sections. Each time, the General Assembly required absentee voters to return absentee ballots to their county board of elections and then required county boards of elections to canvass the absentee ballots. Act of Mar. 6, 1951, P.L. 3, § 11, No. 1 (adding to the Election Code provisions for absentee voting by voters in actual military service and for bedridden or hospitalized veterans); Act of Jan. 8, 1960, P.L. 2135, § 2, No. 789 (adding to the Election Code a provision for absentee voting by voters unavoidably absent from the county); Act of Aug. 13, 1963, P.L. 707, § 24, No. 379 (amending the Election Code to create a single absentee ballot procedure for voters in actual military service, for bedridden or hospitalized veterans, and for voters unavoidably absent from the county).

⁴ “The Legislature may, 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 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 (1874) (added in 1957, P.L. 1019, Joint Res. 1).

In 1967, Pennsylvania amended the Constitution to combine the three absentee voting sections into a single section: Article VII, § 14. Pa. Const. art. VII § 14 (1874) (added in 1967, P.L. 1048, Joint Res. 3).⁵ This combined section retained the phrase “and for the return and canvass of their votes in the election district in which they respectively reside.” *Id.* After Pennsylvania adopted a new constitution in 1968, it subsequently amended Article VII, § 14 twice more: once to permit absentee voting by individuals observing a religious holiday or performing election day duties, Joint Res. 1 of 1985, P.L. 555, and once to permit absentee voting based on absence from the municipality instead of the state or county, Joint Res. 3 of 1997, P.L. 636.

The current language of Article VII, § 14 is:

(a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for

⁵ “The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the State or county of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.” Pa. Const. art. VII § 14 (1874) (added in 1967, P.L. 1048, Joint Res. 3).

the return and canvass of their votes in the election district in which they respectively reside.

(b) For purposes of this section, “municipality” means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.

Pa. Const. art. VII § 14 (1968).

Although the General Assembly has revised the Election Code sections on absentee ballots over the years, the relevant language today mirrors the language of the Election Code adopted by the General Assembly in 1951, 1960, and 1963: absentee and (now) mail-in voters return their ballots to their county board of elections and the county board of elections canvasses those ballots. 25 P.S. §§ 3146.6(a), 3150.16(a), 3146.8(a).⁶

C. The Petition for Review.

On January 30, 2024, Petitioners filed their Petition for Review against the Commonwealth Respondents and the boards of elections for each of Pennsylvania’s 67 counties (the County Respondents). Petitioners served the Commonwealth Respondents on February 29, 2024. Petitioners claim that the phrase “and for the return and canvass of their votes in the election district in

⁶ While the General Assembly amended the Election Code in 1968 to require absentee ballots to be returned to county boards of elections but canvassed by election districts, Act of Dec. 11, 1968, P.L. 1183, No. 375, the General Assembly in 2019 reinstated the canvassing of absentee ballots by county boards of elections, together with the newly created mail-in ballots, Act of Oct. 31, 2019, P.L. 552, §§ 6-7, No. 77.

which they respectively reside” in Article VII, § 14 requires absentee voters to return completed absentee ballots to their election district to be canvassed.⁷

Petitioner David H. Zimmerman represents Pennsylvania’s 99th Legislative District in the Pennsylvania House of Representatives and was most recently reelected in 2022. Pet. ¶¶ 5-6. The 99th District consists of parts of Lancaster County and Berks County, which contain 241 and 202 election districts, respectively. *Id.*⁸; Pet. Ex. A. Petitioner Kathy L. Rapp represents Pennsylvania’s 65th Legislative District in the Pennsylvania House of Representatives and was most recently reelected in 2022. Pet. ¶¶ 9-10. The 65th Legislative District consists of Warren County, Forest County, and parts of Crawford County, which contain 33, 9, and 61 election districts, respectively. *Id.*; Pet. Ex. A. Both Petitioners allege that they intend to run for reelection in 2024. Pet. ¶¶ 6, 10.

The Petition alleges that the Commonwealth Respondents have published information on their website, in guidance, and in a designated agent form directing

⁷ It is not clear whether Petitioners are challenging only the *canvass* of absentee ballots by county boards of elections or also the *return* of absentee ballots to the county boards of elections. For example, although Petitioners discuss the return of absentee ballots throughout their Petition, they seek an injunction prohibiting county boards of elections only from “canvassing absentee ballots at the county boards of elections or anywhere other than in the election districts in which the absentee voters respectively reside.” Pet. Prayer for Relief ¶ B. Out of an abundance of caution, Commonwealth Respondents assume that Petitioners are challenging both the return of absentee ballots to county boards of elections and the subsequent canvass.

⁸ Contrary to Petitioners’ allegation, the 99th District also encompasses parts of Berks County. *See* <https://www.vote.pa.gov/Pages/Pennsylvania-Redistricting-House-of-Representative.aspx>.

voters to return completed absentee ballots to their county board of elections. Pet. ¶¶ 48-53. The Petition further alleges that the County Respondents receive and canvass absentee ballots. Pet. ¶¶ 56-58.

Petitioners bring two counts against the Commonwealth and County Respondents. Count I is styled as a facial constitutional challenge to 25 P.S. §§ 3146.6(a) and 3156.8(a) for violating Article VII, § 14 of the Pennsylvania Constitution. Pet. ¶¶ 62-65. Count II is styled as an as-applied constitutional challenge to the Commonwealth Respondents' guidance and websites and to the "policy and practice" of the County Respondents for violating Article VII, § 14 of the Pennsylvania Constitution. Pet. ¶¶ 66-72. Although styled as an as-applied challenge, Petitioners do not appear to challenge either the Commonwealth Respondents' guidance and websites or the "policy and practice" of the County Respondents as applied to Petitioners.

Petitioners seek declaratory and injunctive relief, including a declaration that 25 P.S. §§ 3146.6(a) and 3146.8(a) are unconstitutional, and an injunction prohibiting county boards of elections from canvassing absentee ballots. Pet. Prayer for Relief ¶¶ A-C.

III. PRELIMINARY OBJECTIONS

A respondent may assert preliminary objections based upon "legal insufficiency of [the] pleading (demurrer)." Pa. R.C.P. 1028(a)(4). In adjudicating

preliminary objections for legal insufficiency, the Court “must accept as true all well-pleaded material allegations in the petition for review, as well as all inferences reasonably deducible therefrom.” *Cogen, Sklar & Levick v. Commonwealth*, 814 A.2d 825, 827 (Pa. Cmwlth. 2003). But the Court “does not consider conclusions of law, argumentative allegations, or expressions of opinion.” *Id.* Preliminary objections in the nature of demurrer should be sustained where it is clear “the law will not permit recovery.” *Id.* If there are no contested factual averments, the Court may consider Petitioners’ standing under Rule 1028(a)(4). *Petty v. Hosp. Serv. Ass’n of Ne. Pennsylvania*, 967 A.2d 439, 444 (Pa. Cmwlth. 2009).

A. Petitioners lack standing to bring their claims.

Petitioners claim standing based on their prospective candidacies for state office in the 99th and 65th Legislative Districts. But Petitioners cannot identify any adverse effect from having absentee ballots canvassed by the 67 county boards of elections instead of in each of the 9,159 election districts. Because Petitioners are not aggrieved, they lack standing and the Court should dismiss the Petition for Review.⁹

⁹ At minimum, Petitioners lack standing against the 62 counties that are not a part of the 99th and 65th Legislative Districts.

Standing is a threshold matter that ensures courts resolve “real and concrete issues.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (citing *Stilp v. Commonwealth*, 940 A.2d 1227, 1233 (Pa. 2007)). Accordingly, a party seeking to “initiate the court’s dispute resolution machinery” must demonstrate he or she is aggrieved. *Id.* (citing *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 280-81 (Pa. 1975) (plurality)). To determine whether a party is aggrieved, “courts consider whether the litigant has a substantial, direct, and immediate interest in the matter.” *Id.* An interest is substantial if it “surpass[es] ‘the common interest of all citizens in procuring obedience to the law.’” *Id.* (quoting *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003)). The party must identify “some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” *William Penn Parking Garage, Inc.*, 346 A.2d at 282. An interest is direct if the challenged law causes “harm to the party’s interest.” *Markham*, 136 A.3d at 298 (quoting *In re Hickson*, 821 A.2d at 1243). An interest is immediate if the “causal connection is not remote or speculative.” *Id.* (quoting *In re Hickson*, 821 A.2d at 1243).

Here, Petitioners claim standing based solely on allegations that they intend to seek reelection to represent the 99th and 65th Legislative Districts in the Pennsylvania House of Representatives and that in prior elections, their opponents

received votes cast by absentee ballot. (Pet. ¶¶ 6-7, 10-11, 13). These scant allegations do not satisfy the legal requirements of standing.

First, completely absent from the Petition are any allegations that Petitioners or their candidacies are *harmed in any way* by voters’ returning absentee ballots to the five county boards of elections in the 99th and 65th Legislative Districts, or by the five boards’ canvassing those ballots. Standing requires “some discernable *adverse* effect” caused by the challenged matter that exceeds the abstract interest of the citizenry. *William Penn Parking Garage*, 346 A.2d at 282 (emphasis added).

Here, Petitioners do not allege that the results would change if absentee ballots were counted in election districts instead of by the county boards of elections. Nor do Petitioners allege that the location of absentee ballot canvassing will in any way affect the outcome of their potential future elections. Indeed, Petitioners themselves likely were elected thanks in part to votes cast by absentee ballots canvassed by the county boards of elections in their respective Legislative Districts.

Second, Petitioners cannot draw standing from *Bonner v. Chapman*, 298 A.3d 153 (Pa. Cmwlth. 2023). *Cf.* Pet. ¶ 13. In *Bonner*, this Court found standing based on allegations that candidates “and their campaigns[will] suffer harm because they will have to adapt, and expend funds, to account for the continued

application of Act 77.” *Bonner*, 298 A.3d at 163. Even then, however, the Court noted that standing was a “close question.” *Id.* at 162.

Here, however, Petitioners do not allege they or their campaigns will have to *do anything*, much less expend any additional resources, if absentee ballots continue to be canvassed by the five county boards of elections in their respective districts. To the contrary, if the Court were to grant Petitioners their requested relief, their campaigns would have to expend *more* time and resources. The Election Code permits candidates or their representatives to observe the canvass of absentee and mail-in ballots. 25 P.S. § 3146.8(g)(1.1), (2). Currently, Petitioners need to send representatives to only five locations: the board of elections offices for Berks, Lancaster, Warren, Forest, and Crawford Counties. Were Petitioners to succeed, they would have to send representatives to the several dozen election districts across the 99th and 65th Legislative Districts.

Finally, Petitioners invoke in passing their alleged concern for the “integrity and legitimacy of the electoral franchise.” Pet. ¶¶ 8, 12. This concern falls squarely within “the common interest of all citizens in procuring obedience to the law” and does not confer standing. *Bonner*, 298 A.3d at 162 (quoting *Markham*, 136 A.3d at 140).

At bottom, Petitioners identify no adverse interest or harm caused by the *location* where absentee ballots are returned and canvassed. Because Petitioners’

lack of standing is clear as a matter of law, the Court should sustain the preliminary objection and dismiss the Petition with prejudice. *See Bonner*, 298 A.3d at 162.

B. Petitioners' claims are foreclosed by Supreme Court precedent.

Even if the Court finds that Petitioners have standing, their claims fail as a matter of law. Petitioners allege that two provisions of the Election Code requiring county boards of elections to receive and canvass absentee ballots—25 P.S. §§ 3146.6(a) and 3146.8(a)—violate Article VII, § 14 of the Pennsylvania Constitution. They demand that the Court prohibit county boards of elections from receiving and canvassing absentee ballots. But binding Supreme Court precedent forecloses this argument and requires the Court to dismiss the Petition for Review.

To obtain a declaratory judgment or a permanent injunction, Petitioners must establish a clear right to relief. *Bonner*, 298 A.3d at 161 (declaratory judgments); *Buffalo Twp. v. Jones*, 813 A.2d 659, 663 (Pa. 2002) (permanent injunctions). The Election Code, like any enactment by the General Assembly, enjoys “a strong presumption of constitutionality, and a challenging party bears a very heavy burden of persuasion.” *McLinko*, 279 A.3d at 565 (citing *Stilp v. Commonwealth, Gen. Assembly*, 974 A.2d 491, 495 (Pa. 2009)). The statute must clearly, palpably, and plainly “violate an express or clearly implied prohibition in the Constitution before it will be held unconstitutional.” *Id.* (citing *Russ v. Commonwealth*, 60 A.

169, 172 (Pa. 1905); *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 164 (Pa. 1853)). Any doubt is “resolved in favor of the constitutionality of the legislation.” *Id.*

Petitioners cannot show that 25 P.S. §§ 3146.6(a) and 3146.8(a) clearly, palpably, and plainly violate Article VII, § 14 because the Supreme Court has already squarely addressed and rejected Petitioners’ legal theory. *In re Canvass of Absentee Ballots of 1967 Gen. Election*, 245 A.2d 258, 259 (Pa. 1968) (“*In re 1967 Gen. Election*”); *In re 223 Absentee Ballot Appeals*, 245 A.2d 265, 266 (Pa. 1968). Curiously, Petitioners fail to cite or address *In re 1967 Gen. Election* or *In re 223 Absentee* in their Petition.

In these companion cases, candidates challenged 25 P.S. § 3146.8, which—as it does now—required county boards of elections to canvass absentee ballots. The candidates claimed that the county boards of elections “had no constitutional authority to canvass” absentee votes because the Constitution, through the language “for the return and canvass of their votes in the election district in which they respectively reside,” required absentee ballots to be canvassed in each election district. *In re 1967 Gen. Election*, 245 A.2d at 260; accord *In re 223 Absentee*, 245 A.2d at 265-66.

The Supreme Court rejected the candidates’ argument in both cases, calling it “a stultification of reason and justice, as well as a jettisoning of common sense.”

In re 1967 Gen. Election, 245 A.2d at 262. The Court concluded that “the framers of the controverted constitutional amendment never intended that the actual counting of the absentee ballots . . . be performed in the local districts as against the more-convenient, expeditious, business-like operation of having them tabulated on a county-wide basis.” *Id.* at 263. Instead, “what the Constitution aims at is the counting of each vote not By [*sic*] the local elections district but in such a manner that the computation appears on the return In [*sic*] the district where it belongs.” *Id.* at 264.

In other words, the Constitution requires simply that absentee votes be added to the tallies of “the districts in which the absentee voters respectively resided.” *Id.* This requirement is obvious given that many federal, state, and local officeholders only represent certain geographic constituencies. Voters select these officeholders based upon where the voter resides, which is correlated to the voter’s election district. For instance, because Lancaster County covers several Pennsylvania Legislative Districts, an absentee voter’s vote for Pennsylvania House Representative must be attributed to that voter’s election district.

The Supreme Court was motivated in part by the practical impossibility of the candidates’ argument. The Court noted that a “district election board sits on election day and, after the polls close, the members thereof immediately proceed to tabulate the results shown on the voting machines, or the written ballots. When this

has been accomplished, the job of the district election board is done. Its operation is at an end.” *In re 223 Absentee*, 245 A.2d at 266; *see also* 25 P.S. § 2676. “The County Board, on the other hand, is a permanent body functioning continuously throughout its tenure of office.” *In re 223 Absentee*, 245 A.2d at 266. Even if the election districts did tally the absentee votes, the county board of elections would still have final approval during the computation; the candidates’ argument would only inject an unnecessary extra step into the process. *Id.* at 268.

The Supreme Court also relied on a New Jersey decision reaching the same conclusion about the same constitutional language. *In re 1967 Gen. Election*, 245 A.2d at 264 (discussing *Miller v. Town of Monclair*, 108 A. 131, 133-34 (N.J. Sup. Ct. 1919), *aff’d sub nom. Brown v. Borough of Dunellen*, 108 A. 925 (1919), and *aff’d*, 108 A. 926 (1919)). New Jersey’s constitution likewise permitted active military servicemembers to vote by absentee ballots and included language identical to the relevant Pennsylvania Constitution language here: “for the return and canvass of their votes in the election districts in which they respectively reside.” *Miller*, 108 A. at 134. The plaintiffs had argued that the New Jersey Soldier Voting Act was unconstitutional because it required absentee ballots to be returned to and counted by the county boards of elections instead of the election districts. *Id.* at 133. The New Jersey court had “no particular difficulty” rejecting this argument, holding instead that what “the Constitution aims at is the counting

of each vote so that it appear[s] on the return in the district where it belongs; the method of securing this result is left to the Legislature, which, in the present case, has said that the county board shall open and count the votes.” *Id.* at 134. Because there was “no question that such votes as were received and counted appeared on the returns of the proper districts,” the New Jersey court upheld the Soldier Voting Act as constitutional.

Here, *In re 1967 Gen. Election* and *In re 223 Absentee* are directly on point and squarely reject Petitioners’ claims. The relevant statutory and constitutional language is functionally identical. So too are the practical effects, including the “chaotic and highly disruptive” situation that would occur if the 67 county boards of elections had to divert absentee ballots to approximately 9,159 temporary polling places for canvassing by election officials.

As in 1968, Petitioners do not challenge *how* absentee ballots will be counted but *where* they will be counted. *See In re 1967 Gen. Election*, 245 A.2d at 262. Then, as now, Petitioners do not allege that the results will change if absentee ballots are canvassed in election districts. *See id.*; *In re 223 Absentee*, 245 A.2d at 268. The Court should reject their attempt to force “absurd consequences” on voters and county boards of elections. *In re 1967 Gen. Election*, 245 A.2d at 264.

Should the Court have any doubt, the constitutional language, relevant history, and practical consequences provide ample support for the constitutionality

of 25 P.S. §§ 3146.6(a) and 3146.8(a). *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 802-15 (Pa. 2018) (interpreting the Pennsylvania Constitution by examining language, history, Pennsylvania case law, and other considerations).

First, Article VII, § 14 uses the word “vote,” not the word “ballot.”

Requiring county boards of elections to canvass absentee *ballots* while attributing the *votes* to the absentee voter’s election district is entirely consistent with the constitutional language.

Second, the General Assembly has never interpreted Article VII, § 14 or its predecessors to require absentee ballots to be returned and canvassed in election districts. To the contrary, after the Constitution was amended in 1949 and 1957, the General Assembly updated the Election Code and required county boards of elections to receive and canvass absentee ballots. Act of Mar. 6, 1951, P.L. 3, § 11, No. 1; Act of Jan. 8, 1960, P.L. 2135, § 2, No. 789; Act of Aug. 13, 1963, P.L. 707, § 24, No. 379.

The General Assembly has also required certain absentee ballots cast by military and overseas voters to be returned to and canvassed by their county board of elections without any constitutional challenge. Since 2006, certain military and overseas voters have returned absentee ballots to their county board of elections by 5 p.m. on the seventh day following the election. *See* Act of May 11, 2006, P.L.

178, § 12, No. 45 (codified as amended at 25 P.S. § 3146.8(g)(1)(i)). Likewise, since 2012, the Pennsylvania Uniform Military and Overseas Voters Act has permitted certain uniformed and overseas voters to return absentee ballots to their county board of elections by 5 p.m. on the seventh day following the election. Act of Oct. 24, 2012, P.L. 1490, No. 189 (codified at 25 Pa. C.S. ch. 35). Were Petitioners correct, these statutory provisions would also be unconstitutional. Yet neither Petitioners nor any other party has ever questioned their constitutionality. “Where a statute has been in force for many years without any question as to its constitutionality being raised and engagements have been entered into on the strength of its validity, the court will not undertake the drastic measure of wiping it off the statute books unless it is convinced beyond all peradventure of doubt that it violates a provision of the fundamental law.” *In re 1967 Gen. Election*, 245 A.2d at 260-61 (internal quotation marks omitted).

Finally, Petitioners’ requested relief would be highly chaotic, burdensome, and disruptive for voters and county boards of elections, with zero countervailing benefit. The many harmful consequences have been well documented by other preliminary objections filed by County Respondents, which the Commonwealth Respondents join.

For example, county boards of elections would continue to receive and canvass mail-in ballots, which are not covered by Article VII, § 14. *See McLinko*,

279 A.3d at 581. The law treats absentee and mail-in ballots identically in many ways, including by requiring voters to return both absentee and mail-in ballots to county boards of elections. 25 P.S. §§ 3146.6(a) (absentee ballots), 3150.16 (mail-in ballots). Yet if Petitioners had their way, absentee ballots would now have to be returned to polling places, which are only open on Election Day. Because voters can return completed absentee ballots during the several weeks before Election Day, county boards of elections would have to expend oppressive sums of money to open and staff polling places that could receive and securely store absentee ballots. 25 P.S. §§ 3146.5 (absentee ballots mailed 50 days before the election), 3146.6(a) (completed absentee ballots returned any time before 8 p.m. on Election Day). Because the Election Code requires public buildings, such as schools or municipal buildings, to be used wherever possible, 25 P.S. § 2727, opening thousands polling places for weeks would raise serious security and custody concerns.

Similarly, county boards of elections would continue to pre-canvass and canvass mail-in ballots but would have to provide substantial training and expensive scanning equipment to election officials at each polling place to pre-canvass and canvass absentee ballots. For counties that accept funds under the newly established Election Integrity Grant Program,¹⁰ each polling place would

¹⁰ The grant program was created by Act of July 11, 2022, P.L. 1577, No. 88.

have to begin pre-canvassing at 7 a.m. on Election Day, begin canvassing at 8 p.m. on Election Day, and “continue without interruption until each ballot has been canvassed.” 25 P.S. § 3260.2-A(j)(1), (2). Doing so would require election officials to take time away from their many other obligations overseeing free and fair in-person voting. *E.g.*, 25 P.S. §§ 3048-50. Moreover, these election officials would have to continuously inspect and open absentee ballot return envelopes, remove the absentee ballot, and scan in the ballots to tally the results—only to return the absentee ballots back to the county board of elections for computation and certification. 25 P.S. § 3154(f).

These absurd consequences—as obvious to the Supreme Court in 1968 as they are now—give the lie to Petitioners’ claim that their interpretation “safeguards against obvious due process concerns, ensuring that ballots of similarly situated people are received, processed, and counted in an identical manner.” Pet. ¶ 39. These consequences also give the lie to Petitioners’ claim that they brought this suit to “ensure the integrity and legitimacy of the electoral franchise.” Pet. ¶¶ 8, 12.

In short, in the 75 years since the words “and for the return and canvass of their votes in the election district in which they respectively reside” were added to the Pennsylvania Constitution, no one—not the Pennsylvania Supreme Court, not the General Assembly, and not another state with similar language—has concluded that the Constitution requires absentee ballots to be returned to and canvassed in

election districts. Petitioners provide no reason for the Court to conclude otherwise.

Because it is clear as a matter of law that Petitioners cannot recover, the Court should sustain these preliminary objections and dismiss the Petition with prejudice. *See Bonner*, 298 A.3d at 161.

IV. CONCLUSION

Because Petitioners lack standing and their claims are clearly foreclosed by binding Supreme Court precedent, the Court should sustain these preliminary objections and dismiss the Petition for Review with prejudice.

Respectfully submitted,

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Date: April 12, 2024

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Date: April 12, 2024

/s/ Aimee D. Thomson

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