IN THE SUPREME COURT OF PENNSYLVANIA

No. 63 MAP 2024

DAVID H. ZIMMERMAN and KATHY L. RAPP,

Appellants,

v.

AL SCHMIDT, in his official capacity as Acting Secretary of the Commonwealth of Pennsylvania, the COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, *et al.*,

Appellees.

BRIEF FOR APPELLANTS

Appeal from the August 23, 2024 Order of the Commonwealth Court of Pennsylvania Dismissing Appellants' Petition for Review at No. 33 MD 2024

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STATEMENT OF JURISDICTION

On January 30, 2024, Appellants ("Petitioners" below), proceeding under 42 Pa.Cons.Stat. § 761(a)(1), filed a Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief ("PFR") in the original jurisdiction of the Commonwealth Court. On August 23, 2024, the Commonwealth Court entered an order that disposed of all claims and parties: (1) granting the application for summary relief filed by Appellees Al Schmidt, the Secretary of the Commonwealth, the Commonwealth of Pennsylvania, Department of State, and all 67 County Boards of Elections ("Respondents" below), (2) denying the application for summary relief filed by Appellants, (3) dismissing the PFR with prejudice, and (4) dismissing the preliminary objections of Appellees as moot. In this direct appeal, this Court has exclusive jurisdiction over the matter pursuant to 42 Pa.Cons.Stat. § 723(a). See 42 Pa.Cons.Stat. § 723(a) ("The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter which was originally commenced in the Commonwealth Court . . . .").

ORDER IN QUESTION

Appellants seek reversal of the order entered by the Commonwealth Court in this matter on August 23, 2024, which states:

O R D E R

NOW, August 23, 2024, the Application for Summary Relief filed by Al Schmidt, in his official capacity as Secretary of the Commonwealth of Pennsylvania

and the Commonwealth of Pennsylvania, Department of State, and the Application for Summary Relief filed by Adams County Board of Elections, both of which are joined in by various other County Boards of Elections (collectively, Respondents), are **GRANTED**, the Application for Summary Relief filed by David H. Zimmerman and Kathy L. Rapp (Petitioners) is **DENIED**, the Petition for Review filed by Petitioners is **DISMISSED WITH PREJUDICE**, and the Preliminary Objections of Respondents are **DISMISSED** as moot.

_____

RENÉE COHN JUBELIRER, President Judge

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

"An application for summary relief may be granted if a party's right to judgment is clear and no material issues of fact are in dispute." Hosp. & Health System Ass'n of Pa. v. Commonwealth, 77 A.3d 587, 602 (Pa. 2013); see Pa.R.A.P. 1532(b) ("At any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear.").

"[A] statute is presumed to be constitutional and will only be invalidated as unconstitutional if it clearly, palpably, and plainly violates constitutional rights." Commonwealth v. Ludwig, 874 A.2d 623, 628 (Pa. 2005) (internal citations and quotation marks omitted). As the constitutionality of a statute presents a pure question of law, this Court's standard of review is *de novo* and its scope of review is plenary. Commonwealth v. Omar, 981 A.2d 179, 185 (Pa. 2009).

STATEMENT OF QUESTIONS PRESENTED

I. Whether the Commonwealth Court erred in failing to grant Appellants summary relief because the plain and unambiguous language of Article VII, Section 14 requires absentee votes to be returned and canvassed in the local election districts in which the absentee voters respectively reside, while 25 Pa. Stat. § 3146.6(a), 25 Pa. Stat. § 3146.8(a), and the Guidance issued by Appellee Department of State, as applied by Appellee County Boards of Election, mandate that absentee ballots must be returned and canvassed at the office of the county board of elections, and not the local election districts.

Suggested answer: *Yes.*

II. Whether this Court should overrule In re Absentee Ballots Case (No.1), 245 A.2d 258 (Pa. 1969) ("Absentee Ballots No. 1"), and/or reject the legal reasoning of Absentee Ballots No.1 and In re Absentee Ballots Case (No.2), 245 A.2d 265 (Pa. 1969) ("Absentee Ballots No. 2") (plurality).[1]

Suggested answer: *Yes.*

[1]In Absentee Ballots No. 2, there were six participating Justices in the case; three Justices concurred in the result of the opinion but did not join the analysis (Jones, J., O'Brien, J., Roberts, J., concurring in the result only), whereas two Justices joined the opinion of the author (Eagan, J. and Bell, C.J., joining Musmanno, J.,), and one Justice (Cohen, J.) took no part. Consequently, the case was decided on a three-to-three basis, and Absentee Ballots No. 2 did not garner a majority of the justices to agree on the legal rationale. Therefore, Absentee Ballots No. 2 is a non-binding plurality decision that has no precedential effect. See Gallagher v. Geico Indem. Co., 201 A.3d 131, 135 n.5 (Pa. 2019) ("[A] plurality opinion . . . does not constitute binding precedent.").

STATEMENT OF THE CASE

A. Form of Action and Procedural History

Appellants David H. Zimmerman and Kathy L. Rapp ("Petitioners" below) are currently serving as elected representatives of the Pennsylvania House of Representatives and intend to seek reelection in 2024. They commenced this action, seeking declaratory and injunctive relief to restore the supremacy of the mandate in Article VII, Section 14 of the Pennsylvania Constitution, which plainly requires that absentee votes be delivered to and canvassed in the election districts (precincts) in which the absentee voters respectively reside.[2]

On January 30, 2024, Appellants filed the PFR in the original jurisdiction of the Commonwealth Court, contending that 25 Pa.Stat. § 3146.6(a), 25 Pa.Stat. § 3146.8(a), and the 2024 "Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures," ("Guidance") Section 4.1, issued by Appellee Respondent Department of State, contravene Article VII, Section 14.[3] Subsequently, Appellees

[2]"The Legislature shall, by general law, provide a manner in which, and the time and place at which, [qualified absentee electors] may vote, and for the return and canvass of their votes in the election district in which they respectively reside." Pa. Const. Art. VII, § 14(a) (emphasis added).

[3]Even if 25 Pa.Stat. § 3146.6(a) and 25 Pa.Stat. § 3146.8(a) and/or the Guidance could be construed in a constitutional manner that does not require absentee ballots to be canvassed at the county board of elections offices, and Appellee County Boards of Election could, consistent with those statutes and Guidance, canvass absentee ballots in the election districts in which the absentee voters reside, Appellee County Boards of Election have instituted practices and policies whereby they return and canvass absentee ballots centrally at the county board of elections offices. Accordingly, in the alternative to a declaration that the statutes and Guidance are unconstitutional on their face, Appellants are alternatively requesting summary declaratory relief that 25 Pa.Stat. § 3146.6(a), 25 Pa.Stat. § 3146.8(a) and the Guidance are unconstitutional as applied.

filed preliminary objections and briefs in support, Appellants filed an omnibus brief in response, and Appellees filed reply briefs.

Following a status conference on June 10, 2024, the Commonwealth Court entered a per curiam order reflecting the parties' agreement that there were no issues of fact, the most expeditious way to resolve this matter was on cross-applications for summary relief, and Appellees' preliminary objections would be considered simultaneously with any cross-applications for summary relief. In this order, the Commonwealth Court directed the parties to file applications for summary relief no later than June 24, 2024.

Beginning on June 21, 2024, Appellees Department of State, the Secretary of State, and the Adams County Boards of Election filed applications for summary relief and briefs in support, which were joined by various other Appellees. On June 24, 2024, Appellants filed their own application for summary relief and brief in support.

On July 11, 2024, the Commonwealth Court entered a per curiam order directing the prothonotary to submit the case for disposition on the briefs and without oral argument to a special en banc panel.

By order and accompanying unpublished memorandum opinion dated August 23, 2024, the Commonwealth Court denied Appellants' application for summary relief, granted the cross-applications for summary relief filed by Appellees,

dismissed the PFR with prejudice, and dismissed Appellees' preliminary objections as moot. A copy of the Commonwealth Court's August 23, 2024 Order and Opinion is attached hereto as Appendix A.

B. Prior Determinations

There are no prior determinations of any court or other government unit in this case.

C. Names of the Judges Whose Determinations are Being Reviewed

The Honorable Renee Cohn Jubelirer, the Honorable Patricia A. McCullough, the Honorable Michael Wojcik, the Honorable Ellen Ceisler, and the Honorable Mathew S. Wolf, convened as a five-judge panel, presiding.

D. Statement of Facts

Originally, the Pennsylvania Constitution required all qualified electors to cast their votes in-person and submit their ballots at the local election district and their ballots were also canvassed at their local election district. This method and manner of voting and canvassing was the only way a qualified elector could cast a ballot and have that ballot tabulated in accordance with the Constitution. On two occasions, the Pennsylvania Supreme Court held that absentee voting statutes, without authorization from an express constitutional amendment permitting a manner of voting different from in-person voting, were unconstitutional. See Chase v. Miller, 41 Pa. 403 (Pa. 1862) (holding that the Military Absentee Act of 1839 was

unconstitutional because a constitutional amendment was required to o authorize a method and manner of voting different from in-person voting); In re Contested Election of Fifth Ward of Lancaster City, 126 A. 199 (Pa. 1924) (same; with respect to the 1923 Absentee Voting Act); see also McLinko v. Commonwealth, 279 A.3d 539, 564 (Pa. 2022) (holding that, due to the addition of Article VII, Section 4, the Pennsylvania Constitution permitted mail-in voting).

The Pennsylvania Constitution was eventually amended to allow voters to cast ballots via absentee voting, namely with respect to members of the military. See McLinko, 279 A.3d at 581-82 and n.51. From 1949 until 1967, the pertinent language of the constitutional provision relating to absentee ballots, which then included the term "may," stated as follows:

> The General Assembly may, by general law, provide a manner in which, and the time and place at which, [qualified absentee electors] may vote and for the return and canvass of their votes in the election district in which they respectively reside.

See 1949 Pa. Laws 2138 (former Pa. Const. art. VIII, § 18); 1957 Pa. Laws 1019 ("Former Article VIII, Section 19") (emphasis added).

From 1937 to 1967, the Election Code contained two provisions that directed "military ballots" to be returned to and canvassed by county board of election

("Former Election Code Provisions), presumably at the office of the county board of election.[4]

On May 16, 1967, the electorate amended what was then Article VIII, Section 19, into Article VIII, Section 14—now Article VII, Section 14—and replaced the word "may" with the word "shall":

> The Legislature shall, by general law, provide a manner in which, and the time and place at which, [qualified absentee electors] may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

[4]The 1951 version of what eventually became 25 Pa.Stat. § 3146.6(a), in relevant part, stated as follows:

> [A]t any time after receiving an official military ballot . . . the elector shall [complete the military ballot] . . . and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 Pa.Stat. § 3146.8(a), formerly the Act of March 6, 1951, 1951 Pa. Laws 3. The 1951 version of what eventually became 25 Pa.Stat. § 3146.8(a), in relevant part, provided as follows:

> The county boards of election, upon receipt of official military ballots. . . shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections.

25 Pa.Stat. § 3146.8(a), formerly the Act of March 6, 1951, 1951 Pa. Laws 3. For purposes of this case, there is no notable difference between "military ballots" and "absentee ballots" because military ballots were the original form, method, and mean by which to conduct absentee voting. See McLinko, 279 A.3d at 581 ("Our Charter was amended in 1864 in response to Chase to allow qualified electors in active military service to exercise their right of suffrage in a manner prescribed by law as if they were present in their usual place of election [and] established that a qualified voter in active military service had the ability to cast a vote from outside of his designated election district. . . . . Subsequent amendments to the absentee voting provision of the Constitution made accommodations for qualified voters unable to vote in their district due to their 'unavoidable' absence because of their duties, occupation or business or because of illness or physical disability, see PA. CONST. art. VIII, § 19 (1874) (amended in 1957).") (some internal citations omitted)).

Pa. Const. Art. VII, § 14(a) (emphasis added).

Absentee Ballots No.2 is a case where this Court addressed the November 8, 1966 general election and concluded that the Former Election Code Provisions did not violate Former Article VIII, Section 19, which contained the term "may." In Absentee Ballots No. 1, this Court addressed the November 7, 1967 general election and concluded that the Former Election Code Provisions did not violate Article VII, Section 14, which contained—and continues to contain—the term "shall." This Court decided both Absentee Ballots No. 2 and Absentee Ballots No. 1 on September 4, 1968.

Approximately three months later, in December 1968, the General Assembly, in an apparent response to the new version of Article VII, Section 14, and its usage of the word "shall," enacted legislation providing that local district boards of election receive and canvass absentee ballots in the election districts (not the office of the county boards of election) before returning the absentee ballots to the county board of elections for final computation. See Act of Dec. 11, 1968, P.L. 1183, No. 375 (the "1968 Election Code"), repealed and replaced by the Act of October 31, 2019, P.L. 552 ("Act 77").[5]

[5]For example, the General Assembly added the following sections to the Former Election Code, directing that the local district board canvass absentee ballots before returning the absentee ballots to the county board of elections:

Pursuant to the 1968 Election Code, from December 1968 to 2019, a period of over 50 years, the local district boards of election received absentee ballots (albeit from the county boards of election after the electors initially returned the ballots to county board) and canvassed those absentee ballots in the local election districts.[6] It

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> Section 1302.2(c). In addition, the local district boards of election shall, upon canvassing the official absentee ballots under section 1308, examine the voting check list of the election of the election district of said elector's residence and satisfy itself of the election district of said elector's residence and satisfy itself that such elector did not cast any other ballot other than the one properly issued to him under his absentee ballot. In all cases where the examination of the local district board of elections discloses that an elector did vote a ballot other than the one properly issued to him under the absentee ballot application, the local district board of elections shall thereupon cancel said absentee ballot and said elector shall be subject to the penalties as hereinafter set forth.
>
> * * *
>
> Section 1308(e). [T]he local election board shall then further examine the declaration on each envelope not so set aside and shall compare the information thereon with that contained in the [absentee voters' lists and file]. If the local election board is satisfied that the declaration is sufficient ... the local election board shall announce the name of the elector and shall give any watcher present an opportunity to challenge [the absentee vote]. Upon challenge of any absentee elector ... the local election board shall mark "challenged" on the envelope ... and the same shall be set aside for the return to the county board unopened pending decision by the county board and shall not be counted. All absentee ballots not challenged . . . shall be counted and included with the general return of paper ballots or voting machines. ... Thereupon, the local election board shall open the envelope of every unchallenged absentee election .... If any of these envelopes shall contain any extraneous marks or identifying symbols other than the words "Official Absentee Ballot," the envelopes and the ballots contained therein shall be set aside and declared void. The local election board shall then break the seals of such envelopes, remove the ballots and record the votes in the same manner as district election officers are required to record votes. With respect to challenged ballots, they shall be returned to the county board with the returns of the local election district where they shall be placed unopened in secure, safe and sealed container in the custody of the county board until ... a formal hearing of all such challenges ....

Act of Dec. 11, 1968, P.L. 1183, No. 375, repealed by Act 77 (emphasis added).

[6] Former Section 1308(a) of the 1968 Election Code stated:

is undisputed that, during this timeframe, there is no evidence or reason to believe that there were any practical, financial, or administrative problems with the return and canvassing of absentee ballots at the local election districts.

The local district boards of elections continued to canvass absentee ballots in the local election district until the General Assembly enacted Act 77 of 2019, which authorized no-excuse, mail-in voting and deleted all of the provisions of the 1968 Election Code related to the canvassing of absentee ballots. See Exhibit A, attached below to Appellants' Omnibus Brief in Opposition to Appellees' Preliminary Objections ("PO Brief"). Two new provisions introduced with Act 77, 25 Pa.Stat. § 3146.6(a) and 25 Pa.Stat. § 3146.8(a), similar to the Former Election Code Provisions, collectively required the county boards of election to receive and canvass both absentee and mail-in ballots at the office of the county boards of election—not in the local election districts. See 25 Pa.Stat. §§ 3146.6(a), 3146.8(a).

> The county boards of election, upon receipt of all official absentee ballots in such envelopes, shall safely keep the same in sealed or locked containers until they distribute same to the appropriate local election districts in a manner prescribed by the Secretary of the Commonwealth. Except as provided in section 1302.1(a.2), the county board of elections shall then distribute the absentee ballots, unopened, to the absentee voter's respective election district concurrently with the distribution of the other election supplies. Absentee ballots shall be canvassed immediately and continuously without interruption until completed after the close of the polls on the day of the election in each election district.

Former Section 1308(a) of the 1968 Election Code, 25 P.S. § 3146.8(a) (repealed by Act 77) (emphasis added).

In its 2024 "Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures," ("Guidance") Section 4.1, Appellee Department of State instructed Appellee County Boards of Elections that "voters must return their own completed absentee or mail-in ballot by 8:00 pm on Election Day to the county board of elections or other county-designated drop-off location." See Exhibit C to the PFR. At Section 5.2 of that Guidance, Appelee Department of State instructed the Appellee County Boards of Elections that "the county board of elections" should conduct the pre-canvass and canvass procedures. Id. Apparently following the Guidance of Appelee Department of State, Appellee County Boards of Election have instituted practices and policies whereby the county boards of election receive and canvass absentee ballots at the office of the county boards of election. See Exhibit E to the PFR.

E. Commonwealth Court's Decision

In their application for summary relief, Appellants argued that the plain and unambiguous language of Article VII, Section 14 requires absentee votes to be returned and canvassed in the local election districts in which the absentee voters respectively reside, Absentee Ballots No. 2 was a non-binding plurality decision, and, alternatively, that the reasoning of Absentee Ballots No. 2 should be rejected, and, if necessary, Absentee Ballots No. 1 should be overruled.

On August 23, 2024, the Commonwealth Court, sitting *en banc* in a five-member panel, with one Judge issuing a concurring opinion,[7] entered an order and accompanying opinion that dismissed the PFR with prejudice. See Appendix A. Writing for the majority, President Judge Cohn Jubelirer first addressed the "threshold matter" of standing. Appendix A at p. 11. Applying its decision in Bonner v. Chapman, 298 A.3d 153 (Pa. Cmwlth. 2023) (en banc), the Commonwealth Court unanimously concluded that Appellants possessed standing to pursue this matter, reasoning as follows:

> Here, we likewise conclude, as we did in Bonner, that it is "not sufficiently clear and free from doubt" that Petitioners do not have standing in this matter considering their status as past and current candidates with a quickly approaching election. 298 A.3d at 162. Petitioners are concerned with "integrity and legitimacy of the electoral franchise" and assert that Respondents promote the practice of or engage in a practice "whereby absentee votes are sent to, received by, and canvassed at" the County Boards, which could potentially include votes for them, in contravention of article VII, section 14. (Petition ¶¶ 8, 12, 39, 47-60.) Petitioners' status confers an interest in this matter that is distinguishable "from the citizenry at large." Bonner, 298 A.3d at 163. Accordingly, we will not dismiss the Petition on this basis.

Appendix A at pp. 12-13.[8]

[7]The Honorable Patricia A. McCullough. On August 26, 2024, Judge McCullough filed an amending order making minor language modifications to her concurring and dissenting opinion ("CDO") and designating her opinion as a concurring opinion rather than a CDO.

[8]Consistent with precedent from this Court and to further buttress its conclusion on the standing issue, the Commonwealth Court explained that "it is better to issue election-related decisions, where possible, before they confer a political benefit." Appendix A at p. 13, n.13. See Albence v. Higgin, 295 A.3d 1065, 1087-1088 (Del. 2022) ("It seems nearly self-evident that a candidate who runs the risk of defeat because of the casting of ballots that are the product of an extra-

Turning to the merits, the Commonwealth Court majority reviewed this Court's decision in Absentee Ballots No. 1, which Appellees argued was controlling authority in this matter, and readily acknowledged that, based on the text of the opinion, "[i]t is unclear whether the Supreme Court was speaking to [Former] article VIII, section 19, or the newly amended article VII, section 14." Appendix A at 17 n.15.[9] The majority recounted that from 1968 to 2019, the 1968 Election Code required that county boards of election deliver completed absentee ballots to the local election districts so the officials of the local election districts could open and then canvass the ballots, and that this practice remained in effect, for over 50 years, until Act 77 was enacted. Appendix A at p. 18-19. Nonetheless, the majority noted that, in terms of the language in the final clause, and despite the change in language to the prefatory clause from "may" to "shall," "both [Former] article VIII, section 19, and article VII, section 14, provided 'for the return and canvass of their votes in the election district in which they respectively reside.'" Appendix A at 17 n.15

constitutional statute has standing to challenge that statute."). In reaching this conclusion, the Commonwealth Court effectively credited the Appellants' arguments in their Omnibus PO Brief at pp. 14-22 and Brief in Support of Application for Summary Relief at pp. 31-33.

[9] Accord Appendix A at p. 20 ("We acknowledge there is a question . . . as to whether the Supreme Court analyzed [the Former Election Code Provisions] under former article VIII, section 19, which it quotes, or article VII, section 14, which it acknowledges.").

(quoting the final clause in Former Article VIII, Section 19, and current Article VII, Section 14).[10]

Forgoing a plain language analysis of the Article VII, Section 14 (especially the term "shall"), the majority then emphasized the concerns expressed by Appellees and this Court in Absentee Ballots No. 1 and Absentee Ballots No. 2, pertaining to the perceived "logistical difficulties" and "logistical nightmares" that would transpire if absentee ballots were delivered to and canvassed at the local election district. Appendix A at p. 17, 20-21. The majority also noted the negative effect that could occur if an individual's right to vote were retroactively nullified because an absentee ballot was canvassed at the county level instead of the district level. Id. at 17. On these grounds, the majority determined that in Absentee Ballots No. 1 and Absentee Ballots No. 2, the Supreme Court "held that the process of returning and canvassing absentee ballots at the county level *served the intent of the language found in the constitutional provisions*—for the return and canvass of [electors'] votes," not ballots, "in the election district in which they respectively reside.'" Appendix A at 20 (quoting the last clause in Former Article VII, Section 19 and Article VII, Section 14) (underlined emphasis in original; italicized emphasis

[10] In any event, the majority confirmed that "Petitioners are correct that former article VIII, section 19 was amended to change 'may' to 'shall,' which is in the current provision, Pa. Const. art. VII, § 14(a), and that after [Absentee No. 1] was decided, [the Former Election Code provision] was amended to provide for the canvassing of absentee ballots at the voting districts, 25 P.S. § 3146.8(a) (1968). Petitioners are also correct that Act 77 of 2019 changed the procedure to the canvassing of absentee ballots at the county level, 25 P.S. § 3146.8(a)." Appendix A at p. 19.

added). Ultimately, the Commonwealth Court majority concluded that Absentee Ballots No. 1 was binding precedent. Appendix A at 21-22.

In a concurring opinion, Judge McCullough noted that the case presented "a legislative quagmire" and recommended that Absentee Ballots No. 1 and Absentee Ballots No. 2 "could be distinguished as 'old law.'" Appendix A (McCullough, J., concurring at p. 1). Judge McCullough emphasized that three months after the Supreme Court decided Absentee Ballots No. 1 and Absentee Ballots No. 2, the Legislature passed the 1968 Election Code, which provided for the return and canvassing of absentee ballots at and in the local election district, and that this remained the law of this Commonwealth for over 50 years. In Judge McCullough's view, the Supreme Court in Absentee Ballots No. 1 and Absentee Ballots No. 2 merely held that the Former Election Code Provisions "made practical sense and [] therefore comported with the constitutional intent that votes be canvassed by the counties and returned to the election districts." Id. at p. 4 (emphasis in original). Because the Supreme Court never considered Article VII, Section 14 in light of the 1968 Election Code, Judge McCullough suggested that "[t]his is a critical matter [that] deserves a fresh look," while acknowledging that "it remains within the purview of the Supreme Court to assess its precedent." Id. at 6.

F. Brief Statement of the Order Under Review

Appellants seek review of the August 23, 2024 order and accompanying memorandum opinion of the Commonwealth Court that granted Appellees' application for summary relief, denied Appellants' application for summary relief, dismissed the PFR with prejudice, and dismissed the Appellees' preliminary objections as moot.

SUMMARY OF THE ARGUMENT

For approximately 50 years, the 1968 Election Code complied with the constitutional mandate in Article VII, Section 14, but the Legislature suddenly disregarded it with the passage of Act 77 in 2019. Contrary to the plain and unambiguous language of Article VII, Section 14, 25 Pa.Stat. § 3146.6, 25 Pa.Stat. § 3146.8, the Guidance, and/or the practice and policy of the 67 Counties in Pennsylvania now dictate that absentee votes must be delivered to and canvassed on a county-wide basis at the offices of the relevant county boards of elections. When Article VII, Section 14 is correctly interpreted in accordance with the applicable cannons of construction, its plain and unambiguous language compels the conclusion that absentee votes must be returned and canvassed in the election districts in which the absentee voters respectively reside.

To the extent In re Absentee Ballots Case (No.1), holds otherwise, and assuming it is binding authority, this Court should overturn that decision. On

multiple levels, Absentee Ballots No. 1 was wrongly decided. This Court in Absentee Ballots No. 1 completely disregarded the plain language of Article VII, Section 14, and instead relied upon its own policy-based judgments to effectively substitute its subjective beliefs for the plain language itself. This Court also distorted other cannons of constitutional interpretation by erroneously imposing an unprecedented burden of proof and interjecting the doctrine of laches into the case without acknowledging that the doctrine would not bar a claim for prospective relief, and by presupposing, without any supporting evidentiary basis of record, that reading Article VII, Section 14 as requiring the return and canvass of votes in the election districts in which the voters reside would yield an absurd result. If Absentee Ballots No. 1 were overruled, the result would not upset any settled expectation or reliance interests. To the contrary, the result would elevate Article VII, Section 14 to its unambiguous meaning and original intent and properly effectuate the will of the electorate.

ARGUMENT FOR APPELLANT

I. The Commonwealth Court erred in failing to grant Appellants summary relief because the plain and unambiguous language of Article VII, Section 14 requires absentee votes to be returned and canvassed in the local election districts in which the absentee voters respectively reside, while 25 Pa. Stat. § 3146.6(a), 25 Pa. Stat. § 3146.8(a), and the Guidance issued by Appellee Department of State, as applied by Appellee County Boards of Election, mandate that absentee ballots must be returned and canvassed at the office of the county board of elections, and not the local election district.

Appellants are entitled to summary relief because the plain language of Article VII, Section 14 requires that absentee votes be returned and canvassed in the election districts in which the absentee voters respectively reside. "As an interpretive matter, the polestar of constitutional analysis undertaken by the Court must be the plain language of the constitutional provisions at issue." In re Bruno, 101 A.3d 635, 689 (Pa. 2014). Because the "ultimate touchstone is the actual language of the Constitution itself," Stilp v. Commonwealth, 905 A.2d 918, 939 (Pa. 2006), "[e]very word employed in the constitution is to be expounded in its plain, obvious and commonsense meaning," Commonwealth v. Gaige, 94 Pa. 193 (1880). See Rogers v. Tucker, 279 A.2d 9, 13 (Pa. 1971) ("Where in the Constitution the words are plain . . . they must be given their common or popular meaning, for in that sense, the voters are assumed to have understood them when they adopted the constitution.") (internal citations and alterations omitted). "[W]hen the language of a constitutional provision is clear upon its face, and when standing alone it is fairly susceptible of but one

construction, that construction must be given it." Jubelirer v. Pa. Dep't of State, 859 A.2d 874, 876 (Pa. Cmwlth. 2004) (internal citations and quotation marks omitted).

Indeed, "when the language is plain and unambiguous, it cannot be ignored in favor of what the courts or the advocates of a new plan or a new policy or a new agency zealously or blindly believe is within its spirit." Evans v. West Norriton Twp. Municipal Authority, 87 A.2d 474, 479 (Pa. 1952) (internal citation and quotation marks omitted). "The courts are not at liberty to disregard the plain meaning of words of a Constitution in order to search for some other conjectured intent." O'Connor v. Armstrong, 149 A. 655, 657 (Pa. 1930). To be sure, the courts "have no right to disregard or (unintentionally) erode or distort any provision of the Constitution, especially where, as here, its plain and simple language make its meaning unmistakably clear." Commonwealth v. Russo, 131 A.2d 83, 88 (Pa. 1957); accord, e.g., In re Roca, 173 A.3d 1176, 1186 (Pa. 2017). See Commonwealth ex rel. Mac Callum v. Acke, 308 Pa. 29, 162 A. 159, 160 (Pa. 1932) ("Where the Constitution has expressed its purpose in clear and explicit language, a court cannot delimit the meaning of the words used by reference to a supposed intent which might be evoked from it…."); accord, e.g., Robinson Twp. v. Commonwealth, 83 A.3d 901, 945-946 (Pa. 2013).

The one and only time a court may look behind or beyond the plain language of the Constitution is in the rare event that the language at issue is ambiguous or

conflicts with other language within the Constitution. "Language is 'ambiguous' when it conveys two or more reasonable meanings; or when it is otherwise vague, uncertain or indefinite." Barasch v. Public Utility Commission, 532 A.2d 325, 662 (Pa. 1987). Only in such circumstances, a court may consider the electorate's intent by resorting to factors such as the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history.[11]

"In ascertaining the meaning of a word in accordance with its common and approved usage, this Court has found it helpful to consult dictionaries." McLinko, 279 A.3d at 577; see Commonwealth v. Gamby, 283 A.3d 298, 307 (Pa. 2022) ("To discern the [] meaning of words and phrases, our Court has on numerous occasions engaged in an examination of dictionary definitions."). Here, the plain and unambiguous language of Article VII, Section 14 unconditionally dictates that the General Assembly "shall" enact legislation that accomplishes both of two separate

[11]See PEDF v. Commonwealth, 161 A.3d 911, 929-30 (Pa. 2017) ("As with our interpretation of statutes, if the language of a constitutional provision is unclear, we may be informed by 'the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history.'"); Robinson Twp., 83 A.3d at 945-946 ("If, in the process of undertaking explication of a provision of the Pennsylvania Constitution, any ambiguity, conflict, or inconsistency becomes apparent in the plain language of the provision, [the courts] follow rules of interpretation similar to those generally applicable when construing statutes. . . . If the words of a constitutional provision are not explicit, we may resort to considerations other than the plain language to discern intent, including, in this context, the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history.") (internal citations omitted).

objectives: (1) provide a manner for absentee voting for the enumerated individuals, and (2) provide a manner for absentee votes to be returned and canvassed in the election district in which the absentee voter resides. See Oberneder v. Link Computer Corp., 696 A.2d 148, 150 (Pa. 1997) ("By definition, 'shall' is mandatory."). The final clause in Article VII, Section 14 requires that all absentee ballots must be submitted to ("returned") and reviewed/counted ("canvassed") in the local polling place or precinct ("election district") in which the absentee voters reside. See MIRRIAM-WEBSTER ONLINE DICTIONARY (defining "return" to mean "to bring, send, or put back to a former or proper place"); id. (defining "canvass" as the process "to examine (votes) officially for authenticity"); see also 25 Pa.Stat. § 2602(a.1) ("The word 'canvass' shall mean the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots."). Pursuant to Article VII, Section 14, every absentee vote must be returned to and canvassed "in the election district in which [the absentee voters] respectively reside." Pa. Const. Art. VII, § 14(a) (emphasis added). See MIRRIAM-WEBSTER DICTIONARY (defining "in," when used as a preposition, "as a function word to indicate inclusion, location, or position within limits").

According to its clear meaning, Article VII, Section 14 mandates that absentee ballots must be returned to the local election district (in one way or the other, even

if not originally received by the local elections district)[12] and reviewed/canvassed (but not necessarily adjudicated in all their legal aspects)[13] in the election districts in which the absentee voters respectively reside. This natural and plain language reading is reinforced by the electorate's obvious intent in amending the constitutional proviso to replace the term "may" with the word "shall," thereby affirmatively requiring the Legislature to pass legislation providing for the return and review/canvass of absentee ballots in the local election district. See McLinko, 279 A.3d at 581 n.51 (noting that "[i]n 1968, the directory 'may' became the

[12]Appellants are not arguing that electors must return or mail absentee ballots directly to the local election district. Indeed, under the 1968 Election Code, electors mailed absentee ballots to the county boards of election, who then forwarded them to the local election districts in an unopened form, for over 50 years, and without any known issue or incident. Appellants concede that indirect delivery of absentee ballots to the local election districts through the county boards of elections complies with Article VII, Section 14, because the word "return" does not necessarily imply directly returning votes to the election districts, so long as they are returned there ultimately. In contrast, canvassing the votes in the county boards of elections and merely attributing the votes to their appropriate election districts does not in any sense of the word constitute "canvassing" votes in the election districts. Canvassing clearly occurs where the counting occurs.

Below, the majority, as their first-line defense of Absentee Ballots No. 2 and Absentee Ballots No. 1, adopted Respondents' straw man argument, and argued as to the impracticality of returning ballots directly to the precincts, distorting the nature of Appellants' contentions and the factual reality that, for over 50 years, the local polling places received and canvassed absentee ballots under the 1968 Election Code. Indeed, in attempting to uphold Absentee Ballots No. 2 and Absentee Ballots No. 1, the Commonwealth Court majority relied predominately on what it believed would result in a catastrophic failure of the voting machinery if absentee ballots were directly delivered to and canvassed at the local election districts, with all of their focus on difficulties in delivering absentee ballots directly to the precincts.

[13]Appellants do not suggest that when canvassing absentee votes, the local election districts must convene hearings or act as a quasi-judicial adjudicative body, deciding and disposing of all legal issues that could potentially arise with respect to the legal validity of an absentee ballot. Indeed, pursuant to the 1968 Election Code, in circumstances where the absentee ballot was challenged, the local election board simply marked the absentee ballot as challenged and submitted it to the county election board for further canvassing, review, and/or resolution.

mandatory 'shall' that continues to appear in Section 14" and suggesting that courts must not "ignore the mandatory connotation usually attributed to the word 'shall'").

While "may" is directory and permissive, "shall" is mandatory and obligatory. See Lorino v. Workers' Comp. Appeal Bd., 266 A.3d 487, 493 (Pa. 2021) ("The term 'shall' establishes a mandatory duty, whereas the term 'may' connotates an act that is permissive, but not mandated or required."). With regard to legislative discretion in implementing a constitutional directive, the legislature is completely free to (but need not) exercise power that is granted to it by the permissive "may." See 10 P.L.E. CONSTITUTIONAL LAW § 28 (2023) ("[W]hen a constitutional provision contemplates the enactment of implementing legislation, the provision should, absent clear language to the contrary, be interpreted as establishing general guidelines for the forthcoming legislation, rather than mandatory directives as to its content."). However, when the constitution grants legislative power with the mandatory "shall," the legislature has no discretion and must exercise that power by completing all the objectives that are enumerated within that grant of power. See 10 P.L.E. CONSTITUTIONAL LAW § 28 (2023) ("The word 'shall' in a provision of the Constitution is mandatory, not directory . . . The Legislature is bound and concluded by the mandatory provisions of the Constitution, and is under an obligation to perform the duties and discharge the functions imposed upon it by the Constitution in accordance with its mandate."); see also McLinko, 279 A.3d at 594

(Wecht, J., concurring) (noting that "the Constitution was amended several times to permit—but not to require— the General Assembly to provide a means of absentee voting," and appreciating the legal significance when the people of Pennsylvania "amended the operative verb in Section 14 from the permissive 'may' to the obligatory 'shall,'" because the change in language vested the General Assembly with an affirmative duty to implement absentee voting in a manner consistent with the term "shall").

Former Article VIII, Section 19, which contained the permissive term "may," granted the Legislature the power but not the duty to enact legislation providing a manner for absentee voting for certain enumerated individuals. Former Article VIII, Section 19, did not require that, if the Legislature exercised that power, the Legislature must also provide a manner for each absentee vote to be returned and reviewed/canvassed in the election district in which the absentee voter resided. In other words, because of the permissive word "may" in Former Article VIII, Section 19, the second "and" in the language of the third clause was rendered several or permissive (one or two or both). See Weinberg v. Waystar, Inc., 294 A.3d 1039, 1045-46 (Del. 2023) (stating that "'and' may be used in the joint or several sense," and explaining that "[t]he several 'and' denotes A and B, jointly or severally").

On the other hand, Article VII, Section 14, as a result of the change from "may" to "shall," not only granted the Legislature with power to enact legislation,

but also imposed the duty to enact legislation (1) providing a manner for absentee voting for certain enumerated individuals and, further, (2) providing a manner for each absentee vote to be returned and canvassed in the election district in which the absentee voter resided. Stated differently, the "shall" in Article VII, Section made the second "and" in the language of the third clause joint and mandatory (*i.e.*, both one and two). See Weinberg, 294 A.3d at 1046 (explaining that "[t]he joint 'and' denotes A and B, jointly but not severally).

In discussing the several and joint meanings of the word "and" in the context where it is preceded by "may" or "shall" language, the Delaware Supreme Court persuasively explained as follows:

> [A]lthough some scholars maintain that "the meaning of and is usually several," it is, at least, commonplace. This is especially true in permissive sentences and aligns with our understanding of common, ordinary usage. For example, if the litigants went to a breakfast meeting and the host said, "You may have a yogurt, a muffin, and a bagel," the litigants would understand that they may take any of the food items, all of the food items, or none of the food items. In the same situation, albeit with a more demanding host, if the litigants were told, "You must take a yogurt, a muffin, and a bagel," they would understand that they must take all three food items.

Weinberg, 294 A.3d at 1058. See also Mason v. Range Res.-Appalachia LLC, 120 F. Supp. 3d 425, 445 (W.D. Pa. 2015) (court persuasively explained that authorities agree that "and" has a several sense as well as a joint sense and that, when the word "and" is used in a permissive sentence, it is most likely to be used in its several sense).

Under a plain language analysis, while the "may" in Former Article VIII, Section 19 did not require the Legislature to enact legislation providing "for the return and canvass of [absentee] votes in the election district in which [the voters] respectively reside," the "shall" in Article VII, Section 14 absolutely requires the Legislature to enact legislation providing "for the return and canvass of [absentee] votes in the election district in which [the voters] respectively reside." When the electorate changed the word "may" to "shall" in the current Article VII, Section 14, the electorate altered the "and" that preceded "for the return and canvass" from its former (and more typical) several or permissive sense ("may") that was located in Former Article VIII, Section 19. The term "shall" in Article VII, Section 14 changed the context of that "and" in Former Article VIII, Section 19, such that the same "and" in Article VII, Section 14 now has a joint or mandatory meaning with respect to requiring the Legislature to provide for both: (1) a manner, time, and place for absentee voting and (2) the return and review/canvass of absentee ballots in the election district in which the absentee voters resided—and not just the first without the second, or neither the first nor the second, at the sole discretion of the Legislature, as was the case with Former Article VIII, Section 19.[14]

[14]Below, Respondent Allegheny, Bucks, Chester, Delaware, Montogomery, and Philadelphia Counties contended that former Article VIII, Section 19, containing the "may" word, "was not offering a menu of breakfast options; it was authorizing the legislature to provide for an absentee-voting regime (or not) and then specifying the features that any such regime must have." (Br. Support of Prel. Obj. at 15, n.6). However, this reading erroneously presupposes that the act of

Because there is no ambiguity surrounding the shift from "may" to "shall" in 1967, Article VII, Section 14 must be applied in light and consideration of—and in accordance with— that "shall." See In re Canvass of Absentee Ballots of November 4, 2003 General Election, 843 A.2d 1223, 1231-32 (Pa. 2004) ("Although some contexts may leave the precise meaning of the word 'shall' in doubt . . . this Court has repeatedly recognized the unambiguous meaning of the word in most contexts."); see also In re 2020 Canvass, 241 A.3d at 1079, 1087 (Wecht, J., concurring and dissenting) ("[The date] requirement is stated in unambiguously mandatory terms, and nothing in the Election Code suggests that the legislature intended that courts should construe its mandatory language as directory. . . . That reasonable arguments may be mounted for and against a mandatory reading only illustrates precisely why we have no business doing so."); id. at 1090 (Dougherty,

casting an absentee vote is the same as the act of returning and canvassing that vote. Because former Article VIII, Section 19 did not require the Legislature to create a manner and mode for qualified absentee electors to cast a vote at all, former Article VIII, Section 19 could not require the Legislature to devise a mechanism where the absentee votes were returned and canvassed "in the election district in which [the absentee voters] respectively reside." In other words, under former Article VIII, Section 19, the Legislature could enact a law authorizing the return and canvass of absentee votes in the central board of elections offices because the verb "provide" has two separate objects: that is, the first clause ("a manner in which, and the time and pace at which [absentee voters] may vote") functions independently of the second clause ("for the return and canvass of their votes in the election district in which they respectively reside"), and the first can be accomplished without necessarily accomplishing the second. Nonetheless, if the Legislature would only accomplish the second command, it most likely would have to satisfy the first command; however, this inverse relationship does not alter the fact that the Legislature could, under Former Article VIII, Section 19, simply effectuate the first grant of constitutional power and completely decline to exercise the second grant of constitutional power.

J., joined by Saylor, C.J., and Mundy, J., concurring and dissenting) ("[T]he meaning of the terms 'date' and 'sign' ... are self evident, they are not subject to interpretation, and the statutory language expressly requires that the elector provide them. . . . In my opinion, there is an unquestionable purpose behind requiring electors to date and sign the declaration.").

Recognizing that Article VII, Section 14 requires that absentee votes be returned and canvassed in the local election district does not result in an "absurd" situation where the amendment cannot be executed or implemented in practical reality. In fact, pursuant to the 1968 Election Code, which was passed on the heels of Article VII, Section 14, absentee ballots were received and reviewed/canvassed at the local election district, without any notable incident, for over 50 years.

The majority opinion from the Commonwealth Court (just like this Court in Absentee Ballots No. 2 and Absentee Ballots No. 1) failed to review and analyze the plain language of Article VII, Section 14 and, instead, focused on the provision's general "intent" and the unfounded concern that "logistical nightmares" would occur if absentee ballots were returned to and canvassed at the local election district. Although a straightforward analysis of the plain and unambiguous language should suffice to resolve this case, Absentee Ballots No. 1 could be deemed to be binding

and controlling authority on this Court.[15] Although the Commonwealth Court cannot be faulted for viewing Absentee Ballots No. 1 as binding precedent, Appellants are nonetheless entitled to summary relief because 25 Pa.Stat. § 3146.6(a), 25 Pa.Stat. § 3146.8(a), and the Guidance are unconstitutional on their face and/or as applied by Respondent County Boards of Election.

II. This Court should overrule Absentee Ballots No. 1 and/or reject the legal reasoning of Absentee Ballots No. 1 and Absentee Ballots No. 2 .

Absentee Ballots No. 2 is a non-binding plurality opinion and its "legal reasoning" duplicates and is completely dependent on the rationale in Absentee Ballots No. 1. The decision in Absentee Ballots No. 1 is baseless and without foundation in the law, contradicts the plain and clear language of Article VII, Section 14, and stands as an anomaly in distorting various constitutional cannons of interpretation throughout its opinion. Applying bedrock rules of constitutional interpretation and precedent regarding stare decisis, this Court should overrule Absentee Ballots No. 1 as wrongly decided.

"[I]t is the duty of the courts to invalidate legislative action repugnant to the constitution." Zemprelli v. Daniels, 256, 436 A.2d 1165, 1169 (Pa. 1981). "While

[15]The Commonwealth Court majority raises legitimate questions and issues regarding whether Absentee No. 1 or Absentee No. 2, actually addressed Article VII, Section 14 (with the term "shall)." See Appendix A at 17 n.15 and 20, Without question, this Court could interpret its own precedent and disregard or distinguish Absentee Ballots No. 1 on this basis. For reasons discussed below, this Court could also distinguish Absentee Ballots No. 1 on legal or factual grounds. Nonetheless, Appellants proceed on the assumption that Absentee Ballots No. 1 is controlling authority in this matter.

the doctrine of stare decisis is important, it does not demand unseeing allegiance to things past," Commonwealth v. Doughty, 126 A.3d 951, 955 (Pa. 2015), and "the Court's general faithfulness to precedent is not sufficient justification to buttress judicial decisions proven wrong in principle." Tincher v. Omega Flex, Inc., 104 A.3d 328, 352 (Pa. 2014); see Olin Mathieson Chem. Corp. v. White Cross Stores, Inc., No. 6, 199 A.2d 266, 268 (Pa. 1964) ("[T]he courts should not perpetrate error solely for the reason that a previous decision although erroneous, has been rendered on a given question."); Stilp v. Commonwealth, 905 A.2d 918, 967 (Pa. 2006) ("While stare decisis serves invaluable and salutary principles, it is not an inexorable command to be followed blindly when such adherence leads to perpetuating error."). "Surely, the orderly development of the law must be responsive to new conditions and to the persuasion of superior reasoning." Estate of Grossman, 406 A.2d 726, 731 (Pa. 1979). "Although this Court adheres to the principle of stare decisis, it will not be bound by a decision that in itself is clearly contrary to the body of the law." Lewis v. Workers' Comp. Appeal Bd. (Giles & Ransome, Inc.), 919 A.2d 922, 928 (Pa. 2007). Notably, this "is a constitutional case, and stare decisis is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." Commonwealth v. Alexander, 243 A. 3d 177, 197 (Pa. 2020) (internal citation omitted); Allegheny

Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 850 (Pa. 2024) ("Stare decisis is at its weakest in the context of constitutional interpretation.").

"Furthermore, in circumstances where prior decisional law has obscured the manifest intent of a constitutional provision as expressed in its plain language, engagement and adjustment of precedent as a prudential matter is fairly implicated and salutary." Robinson Twp. v. Commonwealth, 83 A.3d 901, 946 (Pa. 2013). "When precedent is examined in the light of modern reality and it is evident that the reason for the precedent no longer exists, the abandonment of the precedent is not a destruction of stare decisis but rather a fulfillment of its proper function." Ayala v. Philadelphia Board of Public Education, 305 A.2d 877, 886-87 (Pa. 1973) (internal citation omitted).

> It has been said that it is sometimes more important that an issue "be settled than that it be settled right." But when it comes to the interpretation of the Constitution—the "great charter of our liberties," which was meant "to endure through a long lapse of ages,"—we place a high value on having the matter "settled right."

Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 264 (2022) (internal citations omitted). Significantly, this Court will overrule a decision when the quality of its reasoning is "patently flawed," the decision "has not been approvingly cited or applied by [the Supreme Court]," and reliance interest are not at stake. See Allegheny Reprod. Health Ctr., 309 A.3d at 883-89 (discussing applying stare decisis factors when deciding to overrule precedent).

Absentee Ballots No. 1 is patently flawed. In Absentee Ballots No. 1, this Court considered the situation where the absentee votes were pivotal in the outcome of the race for three seats on the board of commissioners for Lackawanna County in the November 7, 1967 general election, and the petitioners sought to nullify all of the absentee votes after the ballots were cast and canvassed. The petitioners in Absentee Ballots No. 1 challenged the Former Election Code Provisions under what had very recently become Article VII, Section 14 of the Pennsylvania Constitution, contending that Article VII, Section 14 required that absentee ballots be received and canvassed at the local election district. Ultimately, in a perplexing and ambiguous opinion, this Court concluded that the absentee ballots could be tabulated on a county-wide basis, rather than in the local election districts.

In Absentee Ballots No. 1, this Court discussed four factors in reaching its holding. First, in Absentee Ballots No. 1, this Court focused on the fact that, from 1937 to 1967 (30 years), the Former Election Code Provisions provided that absentee ballots were to be canvassed by the county board of elections and that, during that time period, no one challenged the practice as unconstitutional. This Court viewed the lack of a constitutional challenge to the statute as evidence "that the lawmakers of the state are satisfied it conforms to the Constitution," and given the numerous times the General Assembly has revised the Election Code, "if the county canvassing of absentee ballots were as a flagrant a violation of the Constitution as appellants

contend, the Legislature would have noted this, and made the demanding correction." 245 A.2d at 261. For this reason, this Court framed the issue as one of determining whether the asserted constitutional violation was "monumentally wrong." Id. However, in engaging in this analysis, the Pennsylvania Supreme Court failed to consider that, for that entire prior 30 year time period, Article VIII, Section 19 contained the permissive "may" language, and the newly adopted Article VII, Section 14, changed "may" to "shall." This Court did not analyze the several and joint meanings of the word "and" in the context where it is preceded by "may" or "shall" language. Strangely, this Court gave no consideration to the change from "may" to "shall" in its analysis despite recognizing the important difference between "may" and "shall" constitutional language in the plurality opinion in Absentee Ballots No. 2.[16]

[16]This Court in Absentee Ballots No. 2 stated:

> The provision of the Constitution under discussion provides that "The Legislature may by general law provide a manner . . . for the return and canvass of their votes in the election district in which they respectively reside." In interpreting language of this character, the illustrious Chief Justice Gibson of this Court said: "A constitution is not to receive a technical construction, like a common-law instrument or a statute. It is to be interpreted so as to carry out the great principles of government, not to defeat them; and to that end [constitutional] commands as to the time or manner of performing an act are to be considered as merely directory whenever it is not said that the act shall be performed at the time, or in the manner prescribed, and no other." Com. v. Clark, 7 W. & S. 127.

Absentee Ballots No. 2, 245 A.2d at 267 (emphasis added; emphasis in original omitted).

In addition, it is one thing for a court to set forth the correct standard of review as requiring a "a party challenging a statute must meet the high burden of demonstrating that the statute clearly, palpably, and plainly violates the Constitution." In re J.B., 107 A.3d 1, 14 (Pa. 2014). It is a completely different thing altogether for a court to elevate that already high standard, based on a statute's perceived longevity, and demand that the challenging party, in addition to demonstrating a clear and plain violation of the Constitution, to show that the violation, in and of itself, was of such a magnitude that it could be said to have resulted in a "monumental wrong."

Later in the opinion, the Pennsylvania Supreme Court suggested that the petitioners could not meet their burden of proof because the petitioners did not claim that the absentee ballots "were illegally marked, cast or counted," or "that they were the victims of fraud, or even mistake." The Pennsylvania Supreme Court characterized the petitioners as seeking to invalidate numerous absentee votes "because, in effect, the counters of the votes sat in a brick and stone courthouse instead of a garage, schoolhouse, or empty building as they counted ballots." Id. at 262. According to this Court, this state of affairs did not result in a "monumental wrong."

Second, after setting forth and then applying an incorrect standard to review constitutional challenges to statutes, this Court in Absentee Ballots No. 1 proceeded

to place overwhelming significance on "the paramount rights of the voters," noting that the petitioners, if successful, "would nullify the votes of 5,506 civilians," and this would amount to "mass disfranchisement," necessitating a showing of "grave constitutional infirmities." Id. at 262. This Court continued that, in the context of the case, "[t]he disfranchisement of 5,506 citizens for following a procedure laid down by the election authorities would be unconscionable." Id. Similarly, in Kelly v. Commonwealth, 240 A. 3d 1255, 1257 (Pa. 2020), this Court dismissed a petition for review because of petitioners "failure to institute promptly a facial challenge to the mail-in voting statutory scheme" and relief would have resulted "in the disenfranchisement of millions of Pennsylvania voters"); see also id. at 1257-28 (Wecht, J., concurring) ("In the context of a challenge to the results of an election, [] due consideration must [] be accorded to the rights of those voters who cast ballots in good faith reliance upon the laws passed by their elected representatives.") (citing Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 243 (6th Cir. 2011) ("To disenfranchise citizens whose only error was relying on [state] instructions ... [is] fundamentally unfair."). By contrast, Petitioners here are not attempting to invalidate even a single vote and seek only prospective relief. Standing alone, this fact should be sufficient to distinguish Absentee Ballots No. 1 and relegate the remainder of its to discussion to the status of mere *dicta*.

Third, without any apparent support from an evidentiary record, this Court stated:

> As we study the objective realities of county-wide canvassing of votes, we are led inevitably to the conclusion that the framers of the controverted constitutional amendment never intended that the actual counting of the absentee ballots was to 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. This Court noted that "Lackawanna County has 243 election districts," and "the reasoning of the [petitioners] would require . . . the distribution of absentee ballots to some 243 election districts [and] special arrangements for the opening, challenging, counting, and tabulating of these ballots in each of these 243 separate places." Id. According to this Court, "[t]his in itself would create chaotic and highly disruptive situations," and "[t]o require hearings in 243 separate places when the job can more effectively be done in one, could only lead to absurd consequences." Id.

Without first applying a plain language analysis of Article VII, Section 14, it was improper for this Court in Absentee Ballots No. 1 to proceed directly to what has been referred to as the "absurdity cannon" of constitutional interpretation, which provides that "[t]he Constitution . . . should not be construed so as to lead to impracticable and unreasonable results or absurd consequences." 10 P.L.E. CONSTITUTIONAL LAW § 21 (2023). This precept of constitutional interpretation can only be employed when the language at issue is ambiguous. The language of Article VII, Section 14 at issue here is clear and unambiguous.

In any event, the prediction of this Court in Absentee Ballots No. 1 did not age well, because within the same year the Legislature did what this Court thought was too absurd to do and required by statute that absentee ballots be canvassed in the local election districts. That requirement failed to yield the absurd consequences that this Court predicted and remained in effect for more than 50 years thereafter.

Fourth, last and least, this Court attempted to construe Article VII, Section 14 and concluded "that what the Constitution aims at is the counting of each vote not by the local elections district but in such a manner that the computation appears on the return in the district where it belongs." Id. at 264 (emphasis added). This Court determined that Article VII, Section 14 was constitutional because "[t]he county board of elections tallied the absentee votes and applied the tallies to the districts in which the absentee voters respectively resided." Id.

However, this Court did not engage in any meaningful textual analysis of the actual language of Article VII, Section 14 and, instead, focused on the general and abstract "spirit," "intent," or "aim" of the provision. That was a fundamental misapplication of the rules of constitutional construction because courts cannot ignore the plain language in search of some broader, speculative, and perceived intent of what the electorate meant when it was not plainly stated in the words at issue.

In arriving at its conclusion, this Court in Absentee Ballots No. 1 did not give due and proper consideration to the terms "return and canvass," such as by examining any dictionary or statutory definitions of those terms as explained previously in this brief. See Commonwealth v. McCoy, 962 A.2d 1160, 1168 (Pa. 2009) ("We are not permitted to ignore the language of a statute, nor may we deem any language to be superfluous."). Simply ascribing vote totals to a precinct is different from "returning and canvassing" those votes in that precinct. If the county election office is the place where absentee ballots are returned and gathered after the final pre-canvass meeting, examined officially for authenticity, and counted—where the votes reflected thereon are computed and tallied—then the county election office is where the absentee votes are "returned and canvassed."[17]

Moreover, to support its interpretation, this Court in Absentee Ballots No. 1 relied exclusively on the New Jersey Supreme Court's decision in Miller v. Montclair, 108 A. 131 (N.J. 1919). However, in Miller, the court was predominately

[17]Contrary to Respondents' arguments below, which were accepted by the Commonwealth Court, see Appendix A at p. 20, there is no meaningful distinction to be made in this context between "votes" and "ballots" where, as here, those terms are preceded and modified by the verbs "return and canvass." See Mirriam-Webster Online Dictionary (defining "return" to mean "to bring, send, or put back to a former or proper place"); id. (defining "canvass" as the process "to examine (votes) officially for authenticity"); see also 25 Pa.Stat. § 2602(a.1) ("The word 'canvass' shall mean the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots."). Clearly the current practice is to return and canvass votes in the county election boards and not in the election districts in which the voters reside. Neither absentee ballots nor the votes cast upon them are being in any sense of the words "returned and canvassed" in the election districts in which the voters reside.

concerned with the issue of which governmental body, local versus county, should canvass the absentee votes after they were submitted to the secretary of state, and not the place in which the votes were to be reviewed/canvassed. While in *dicta* the court stated that the general "aim" was to have votes counted so the votes "appear on the return in the district where it belongs," the court highlighted that, based on the pertinent constitutional language, the legislature possessed discretion to pick and choose which governmental entity should "open and count the votes." Id. at 134.[18] When read in its proper context, this is the full extent of the holding of and proposition for which Miller stands, and it lends no support to the analysis in Absentee Ballots No. 1. Indeed, even the Miller court determined that "if the constitution means that actual counting should be done in the election district, the county board may attend there for that purpose," but, given the leeway that the constitution afforded the legislature, the court fell short of holding that the constitution definitively imposed such a requirement. Here, by contrast, Article VII, Section 14 imposes such a requirement.

In its 55-year history, Absentee Ballots No. 1 has not been cited approvingly by the courts but, instead, has only been cited for secondary or collateral principles of law. Aside from Absentee Ballots No. 2 (plurality), Absentee Ballots No. 1 has

[18]In this respect the New Jersey Constitution operated in an identical fashion to former Section VIII, Section 19 and its embodiment of the term "may."

never been applied, relied upon, or reaffirmed by a court. Throughout its history, Absentee Ballots No. 1 has not generated a body of constitutional jurisprudence or support through subsequent legislative activity (indeed, the 1968 Election Code appears to have repudiated Absentee Ballots No. 1). Finally, if Absentee Ballots No. 1 were overruled, the result would not upset the expectation or reliance interests of the electors or the Respondent County Boards of Election. Instead, the electors would simply continue to cast absentee ballots as they have in the past, and Respondent County Boards of Election would merely forward absentee ballots to the local election districts for canvassing, in future elections, just as it previously did for over 50 years when the 1968 Election Code was effective. Therefore, stare decisis should not stand as an obstacle to overturning Absentee Ballots No. 1. See Allegheny Reprod. Health Ctr., 309 A.3d at 883-89 (discussing applying stare decisis factors when deciding to overrule precedent). Accordingly, this Court should overrule Absentee Ballots No. 1 and/or reject the rationale of Absentee Ballots No. 1 and Absentee Ballots No. 2 and declare that 25 Pa.Stat. § 3146.6(a), 25 Pa.Stat. § 3146.8(a) ("the Statutes"), and the Guidance, as applied by Respondent County Boards of Elections, violate Article VII, Section 14 of the Pennsylvania Constitution. Given the expeditious nature of these election law proceedings, this Court should enter an order granting summary relief in favor of Appellants and: (1) enjoin the Appellees from enforcing the Statutes and/or

Guidance or any other statutes or guidance in a manner that would cause Appellee County Boards of Election to canvass absentee ballots in a place other than the local election districts where the absentee voters respectively reside, and (2) enjoin the Appellee County Boards of Election 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.

CONCLUSION

For the above-stated reasons, this Court should reverse the order of the Commonwealth Court, declare that the Statutes and the Guidance, as applied by Respondent County Boards of Elections, violate Article VII, Section 14 of the Pennsylvania Constitution, and grant Appellants summary injunctive relief.

Dated: September 3, 2024

Respectfully submitted,

/s/ Gregory H. Teufel
Gregory H. Teufel
Adam G. Locke
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 127(a) of the Pennsylvania Rules of Appellate Procedure, I 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.

Filed: September 3, 2024

/s/ Gregory H. Teufel
Gregory H. Teufel

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Brief contains 11,459, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

Filed: September 3, 2024

/s/ Gregory H. Teufel
Gregory H. Teufel

APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David H. Zimmerman and Kathy L. Rapp, Petitioners	:	
v.	:	No. 33 M.D. 2024 Submitted: August 1, 2024
Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth of Pennsylvania, the Commonwealth of Pennsylvania, Department of State, Adams County Board of Elections, Allegheny County Board of Elections, Armstrong County Board of Elections, Beaver County Board of Elections, Bedford County Board of Elections, Berks County Board of Elections, Blair County Board of Elections, Bradford County Board of Elections, Bucks County Board of Elections, Butler County Board of Elections, Cambria County Board of Elections, Cameron County Board of Elections, Carbon County Board of Elections, Centre County Board of Elections, Chester County Board of Elections, Clarion County Board of Elections, Clearfield County Board of Elections, Clinton County Board of Elections, Columbia County Board of Elections, Crawford County Board of Elections, Cumberland County Board of Elections, Dauphin County Board of Elections, Delaware County Board of Elections, Elk County Board of Elections, Erie County Board of Elections, Fayette County Board of Elections, Forest County Board of Elections, Franklin County Board of Elections, Fulton County Board of Elections, Greene County Board of	:	

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Elections, Huntingdon County Board :
of Elections, Indiana County Board of :
Elections, Jefferson County Board of :
Elections, Juniata County Board of :
Elections, Lycoming County Board of :
Elections, Lackawanna County Board :
of Elections, Lancaster County Board :
of Elections, Lawrence County Board :
of Elections, Lebanon County Board :
of Elections, Lehigh County Board of :
Elections, Luzerne County Board of :
Elections, McKean County Board of :
Elections, Mercer County Board of :
Elections, Mifflin County Board of :
Elections, Monroe County Board of :
Elections, Montgomery County Board :
of Elections, Montour County Board :
of Elections, Northampton County :
Board of Elections, Northumberland :
County Board of Elections, Perry :
County Board of Elections, Philadelphia :
County Board of Elections, Pike County :
Board of Elections, Potter County :
Board of Elections, Schuylkill County :
Board of Elections, Snyder County :
Board of Elections, Somerset County :
Board of Elections, Sullivan County :
Board of Elections, Susquehanna :
County Board of Elections, Tioga :
County Board of Elections, Union :
County Board of Elections, Venango :
County Board of Elections, Warren :
County Board of Elections, :
Washington County Board of :
Elections, Wayne County Board of :
Elections, Westmoreland County Board :
of Elections, Wyoming County Board :
of Elections, and York County Board :
of Elections, :
Respondents :

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BEFORE: **HONORABLE RENÉE COHN JUBELIRER,** President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE MATTHEW S. WOLF, Judge[1]

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE COHN JUBELIRER **FILED: August 23, 2024**

David H. Zimmerman, member of the Pennsylvania House of Representatives for the 99th District, and Kathy L. Rapp, member of the Pennsylvania House of Representatives for the 64th District (together, Petitioners), filed a Petition for Review (Petition) in this Court's original jurisdiction seeking declaratory and injunctive relief against Al Schmidt, the Secretary of the Commonwealth (Secretary),[2] the Commonwealth of Pennsylvania, Department of State (Department), and all 67 county boards of elections (County Boards) (collectively, Respondents). Petitioners also filed an application for summary relief, seeking a declaration that certain provisions of the Pennsylvania Election Code (Election Code),[3] namely, Section 1306(a), 25 P.S. § 3146.6(a),[4] and Section 1308(a), 25 P.S.

[1] This election law matter is being considered by a special panel pursuant to Section 112(b) of this Court's Internal Operating Procedures, 210 Pa. Code § 69.112(b) ("The President Judge may designate Judges to serve on a special court en banc or panel to hear election law matters, appellate or original jurisdiction, on an expedited basis.").

[2] Petitioners named the Secretary as the "Acting" Secretary; however, the Secretary officially became so on June 29, 2023.

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

[4] Section 1306(a) of the Election Code, added by Section 11 of the Act of March 6, 1951, P.L. 3, provides, relevantly:

(Footnote continued on next page…)

§ 3146.8(a),[5] the relevant guidance provided by the Secretary, and the policies and practices of the County Boards violate article VII, section 14(a) of the Pennsylvania Constitution, PA. CONST. art. VII, § 14(a).[6] Specifically, Petitioners argue that

---

> Except as provided in paragraphs (2) and (3), at any time after receiving **an official absentee ballot**, . . . the elector shall . . . mark the ballot . . . and then fold the ballot, enclose and securely seal the same in the envelope . . . . This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and **the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election**.

25 P.S. § 3146.6(a) (emphasis added).

[5] Section 1308(a) of the Election Code, added by Section 11 of the Act of March 6, 1951, P.L. 3, provides:

> **The county boards of election, upon receipt of official absentee ballots** in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, [Sections 1301-D-1307-D, added by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), 25 P.S. §§ 3150.11-3150.17,] **shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections**. 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).

25 P.S. § 3146.8(a) (emphasis added).

[6] Article VII, section 14(a) provides:

> The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business 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

(Footnote continued on next page…)

article VII, section 14(a) provides that the delivery and canvassing of absentee ballots must be done in the district where the elector resides, but pursuant to the statutory provisions and the Secretary's guidance, the County Boards are receiving and canvassing absentee ballots on a county-wide basis. Respondents have filed various preliminary objections (POs) and cross-applications for summary relief seeking dismissal of the Petition asserting Petitioners lack standing, the claims are barred by the doctrine of laches, and this Court is bound by nearly half-a-century-old Supreme Court precedent addressing the exact issue raised by Petitioners, which found no constitutional violation. Because we agree that the Court is bound by the Supreme Court precedent, we grant Respondents' applications for summary relief, deny Petitioners' application for summary relief, dismiss the Petition with prejudice, and dismiss the POs as moot.

I. FILINGS AND ARGUMENTS

Petitioners filed their Petition on January 30, 2024, to which Respondents filed various answers or POs. Following a status conference on June 10, 2024, the Court issued an Order reflecting the parties' agreement that there were no issues of fact, the most expeditious way to resolve this matter was on cross-applications for summary relief, and the POs would be considered simultaneously with any cross-applications for summary relief. (June 10, 2024 Order.) Due to the voluminous number of parties and filings, this opinion combines the relevant arguments and summarizes the parties' filings as many of the arguments raised therein overlap.

> a county employee, may vote, and **for the return and canvass of their votes in the election district in which they respectively reside**.

PA. CONST. art. VII, § 14(a) (emphasis added).

A. Petitioners' Petition and Application for Summary Relief

1. The Petition

Petitioners are incumbent members of the Pennsylvania House of Representatives, were reelected in 2022, and are running for reelection in 2024. They are seeking an order from this Court directing that "absentee votes be delivered to and canvassed at the" elector's **local precinct** or polling location, and **not** at the county board level, in accordance with article VII, section 14(a), "[t]o ensure the integrity and legitimacy of the electoral franchise, including [Petitioners'] next reelection[.]" (Petition ¶¶ 8, 12.) Petitioners each allege that the county boards of elections in their respective districts reported receiving absentee ballots but that neither Petitioner received any absentee votes in their favor. (*Id*. ¶¶ 7, 11.) Petitioners assert that they have standing to pursue this action under *Bonner v. Chapman*, 298 A.3d 153, 162-63 (Pa. Cmwlth. 2023), (Petition ¶ 13), and that this Court has "the inherent power to enjoin the enforcement of unconstitutional statutes, . . . policies[,] and procedures," (*id*. ¶ 20). Petitioners allege that "[a]rticle VII, [s]ection 14 unambiguously dictates that all absentee ballots must be submitted to ('returned') and counted at ('canvassed') the local polling place or precinct ('election district')." (*Id*. ¶ 27.) Notwithstanding this requirement, Petitioners explain that "the Election Code appears to have been amended" to add Sections 1306 and 1308, and contend these provisions are in direct contradiction to article VII, section 14, by providing for the delivery to and canvassing of absentee ballots by the county boards rather than local precincts. (*Id*. ¶¶ 40-46.)

Taking the above allegations into consideration, Petitioners contend in Count I that Sections 1306 and 1308 "contravene and are inherently incompatible with [a]rticle VII, [s]ection 14," and request that we "enter judgment in their favor

and grant Petitioners relief[.]" (*Id*. ¶ 65, Wherefore Clause.) In Count II, Petitioners assert that the Secretary and Department have issued guidance and/or directed the public to send absentee ballots to the electors' county boards and not to their local polling place in contravention of article VII, section 14." (*Id*. ¶¶ 67-72.) As relief, Petitioners seek a declaratory judgment decreeing that Sections 1306 and 1308 are facially unconstitutional and that the "[o]fficial [g]uidance and/or the [p]olicy and [p]ractice described above are [] unconstitutional[.]" (*Id*., Prayer for Relief.) Further, Petitioners request an injunction prohibiting Respondents from enforcing Sections 1306 and 1308, issuing and enforcing guidance to that effect, and canvassing absentee ballots at the county boards or anywhere that is not at the district level.

2. Petitioners' Application and Arguments

Petitioners assert in their Application for Summary Relief (Petitioners' Application) that they are entitled to their requested relief because Sections 1306 and 1308 are clearly at odds with the plain language of article VII, section 14. Petitioners admit that the Supreme Court's opinion in *In re Canvass of Absentee Ballots of 1967 General Election*, 245 A.2d 258 (Pa. 1968) (*In re Canvass*), is binding on this Court and believe it should be overturned by the Supreme Court. (*See* Petitioners' Brief (Br.) in Support (Supp.) at 20 n.9.) Petitioners also argue that, under a former version of the Election Code, the county boards of elections initially received and processed absentee ballots, which were then distributed to the local election boards for canvassing and inspection. (Petitioners' Omnibus Br. in Opposition (Opp'n) to POs at 8-9.) Petitioners explain that "[o]n April 23, 1968,[] following the 1967 joint resolution passed by the General Assembly, the electorate approved an amended constitutional provision that renumbered and revised then

[a]rticle VIII, [s]ection 19 to [a]rticle VII, [s]ection 14" and "revised former [a]rticle VIII, [s]ection 19, in pertinent part, to remove the permissive and directory word 'may' . . . and replace it with the mandatory and imperative 'shall.'" (*Id*. at 6 (footnote omitted).) Petitioners continue that "[a]pproximately 8 months after the electorate approved the new [a]rticle VII, [s]ection 14, the General Assembly, in an apparent response to the change in language from 'may' to 'shall,' revised the provisions of the Election Code pertaining to absentee ballots" and mandated that the local election boards "receive and canvass absentee ballots." (*Id*. at 7.) Petitioners contend that "the Election Code continued to provide for the return and canvass of absentee ballots at the local polling place, precinct, or election district from 1968 to 2019, for over 50 years." (*Id*. at 10.) Petitioners assert that "[t]here is no evidence or reason to believe, especially at this stage in this litigation, that there were any practical, financial, or administrative problems with returning and canvassing absentee ballots at the local election districts." (*Id*. at 10-11.)

Petitioners also explain that they have standing as they are candidates in an upcoming election, and they run the risk of defeat if an unconstitutional law is upheld. Thus, Petitioners assert, their interests are substantial, direct, and immediate in knowing whether Respondents may continue to enforce an unconstitutional law. Petitioners argue the doctrine of laches is not applicable because they are seeking "prospective relief," and while their requested relief may incur costs and burdens, the constitutional requirements outweigh those concerns. (Petitioners' Omnibus Br. in Opp'n to POs at 37.)

B. Respondents' POs, Application, and Arguments

Various Respondents filed POs and applications for summary relief seeking dismissal of the Petition. The Secretary and Department, as well as a majority of

County Boards, filed POs asserting Petitioners lack standing and demurred to both Counts I and II. Adams County Board of Elections filed the same POs but added that the Petition is barred by the doctrine of laches. The Secretary and Department later filed an application for summary relief, which was joined by numerous County Boards,[7] and Adams County Board of Elections filed a separate application for summary relief, which was also joined by various County Boards[8] (together, Respondents' Applications). Many of these arguments overlap, and, thus, unless otherwise noted, the summarized arguments below relate to all Respondents.[9]

First, Respondents assert that Petitioners lack standing as they have not shown they are aggrieved and thus lack a substantial, immediate, and direct interest in the outcome of this dispute. In particular, Respondents maintain that Petitioners have not asserted any harm due to absentee ballots being delivered and canvassed at the county level, nor have they explained how their interest surpasses that of ordinary citizens.

Second, Respondents argue that Petitioners have failed to state a claim and Respondents are entitled to summary relief because this Court is bound by *In re Canvass* and a companion case, *In re 223 Absentee Ballot Appeals*, 245 A.2d 265 (Pa. 1968) (*In re 223*), which resolved the very question Petitioners present here.

[7] Allegheny, Armstrong, Bedford, Berks, Blair, Bradford, Bucks, Butler, Carbon, Centre, Chester, Clarion, Clearfield, Clinton, Columbia, Crawford, Dauphin, Delaware, Fayette, Franklin, Huntingdon, Indiana, Jefferson, Lackawanna, Lawrence, Lehigh, Luzerne, Monroe, Montgomery, Montour, Northumberland, Philadelphia, Snyder, Somerset, Susquehanna, Tioga, Venango, Warren, Westmoreland, and York County Boards of Elections join in the Secretary and Department's Application for Summary Relief.

[8] Armstrong, Bedford, Bradford, Butler, Clarion, Fayette, Somerset, Susquehanna, Tioga, Warren, and Westmoreland County Boards of Elections join in Adams County Board of Elections' Application for Summary Relief.

[9] It appears that Lancaster County Board of Elections, which is part of Petitioner Zimmerman's 99th District, has not filed an application for summary relief or joined any filed application for summary relief.

Respondents also respond to Petitioners' argument that the return and canvass of absentee ballots has occurred at the district level for over 50 years. The Secretary and Department contend that between 1968 and 2019, county boards of elections "recei[ved]" absentee ballots, secured them, and distributed them to the voters' election districts for canvassing. (Secretary and Department's Br. in Opp'n to Petitioners' (Pet'rs') Application (Appl.) at 20-21 (quoting Section 8 of the Act of December 11, 1968, P.L. 1183, 1198, No. 375).) Therefore, the Secretary and Department contend that Petitioners' requested relief, that we declare Sections 1306 and 1308 unconstitutional, seeks "[f]or the first time [that] more than 9,000 polling places, most of which are in public buildings, . . . receive and store absentee ballots in the weeks ahead of Election Day." (*Id*. at 21.) The Secretary and Department also argue that the 1968 amendments are consistent with *In re Canvass* in that article VII, section 14 "does not **require** absentee voters to return absentee ballots to election districts to be counted," and only requires that "absentee votes are counted 'in such a manner that the computation appears on the return **in** the district where it belongs.'" (*Id*. at 22, 25 (citing *In re Canvass*, 245 A.2d at 264) (emphasis in Secretary and Department's Br. in Opp'n to Pet'rs' Appl.).) Further, the Secretary and Department argue that the former version of article VII, section 14, then renumbered article VIII, section 19, was amended on May 16, 1967, and not April 23, 1968, as Petitioners contend. (Secretary and Department's Br. in Supp. of Appl. at 8.) The Secretary and Department express some confusion, however, as to why the Supreme Court cited article VIII, section 19, in *In re Canvass*, as opposed to article VII, section 14, as that language had already been amended by the time of the election at issue in *In re Canvass* and the Supreme Court's decision therein, but note that the Supreme Court was at least "aware" of the amendment as it acknowledged

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article VII, section 14, in its decision. (*Id*. at 22 n.8.) Adams County Board of Elections also explains that the "core issue" in *In re Canvass* was "the central canvassing of absentee ballots by the county [] board[s] rather than local election boards" and that case "cited to the exact same statute and constitutional provision that Petitioners cite to today." (Adams County Board of Elections' Appl. at 18.)

Respondents further highlight, as the Supreme Court did in *In re Canvass* and *In re 223*, the administrative difficulties that would arise if this Court granted Petitioners their requested relief. For example, the Secretary and Department highlight that "[t]o comply with Petitioners' requested relief, [] [the] County [Boards] would have to expend significant resources to open and staff 9,159 temporary polling places for several weeks to receive and securely store absentee ballots." (Secretary and Department's Br. in Supp. at 30 (citing Petition, Ex. A.).) The Secretary and Department also note that "polling places are usually schools, municipal buildings, or other public buildings, . . . [which] would create serious security and custody concerns, as well as logistical nightmares for functioning public spaces." (*Id*.)

Adams County Board of Elections also highlights these logistical concerns and adds that Petitioners' requested relief would create a system where mail-in ballots "would be canvassed in a central location by the [C]ounty [B]oard[s]," while "absentee ballots, which are not substantively different from mail-in ballots, would be required to be canvassed in the thousands of polling sites," which creates equal protection concerns. (Adams County Board of Elections' Appl. at 14-15.) Adams County further highlights the fact that election districts "do not have designated mailing addresses," and polling locations are often "not government-owned and are not designed to securely accept mail." (*Id*. at 20.) Moreover, Adams County Board

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of Elections asserts it is difficult to find polling places, which would be further complicated should Petitioners' requested relief be granted, because of the length of time they would be needed. (*Id.*) In addition, Adams County Board of Elections points out that these locations would have to be staffed "every day from the time absentee ballots are sent to voters until Election Day at 8 p[.]m[.]," as well as after the election for purposes of counting military ballots, resulting in significant expense to taxpayers. (*Id.* at 21.) Petitioners' requested relief would also have the effect of delaying Election Day returns, as local election boards would have to remain at the polling site after polls close to canvass absentee ballots. (*Id.*)

Last, Adams County Board of Elections, and those that joined that board's filings, asserts that Petitioners' claims are barred by the doctrine of laches as Petitioners have been in office for several years and the practice of which they complain has been statutorily authorized for over 50 years. Further, the County Boards would suffer substantial hardship due to the chaos that would ensue by granting the requested relief, which would require an overhaul to the current system for counting absentee ballots.

II. ANALYSIS

Pennsylvania Rule of Appellate Procedure 1532(b) states that "[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear." Pa.R.A.P. 1532(b). This Court may only grant an application for summary relief where "a party's right to judgment is clear and no material issues of fact are in dispute." *Banfield v. Cortes*, 110 A.3d 155, 165 (Pa. 2015). The right to relief must be "free from doubt." *O'Rourke v. Pa. Dep't of Corr.*, 730 A.2d 1039, 1041 (Pa. Cmwlth. 1999). We likewise view the record "in the light most favorable to the non-

moving party[.]" *Id.* We will review the cross-applications herein with these standards in mind.[10]

A. Standing

Standing is a threshold matter,[11] and "[o]ur inquiry is whether the putative plaintiff has demonstrated that she is 'aggrieved,' by establishing a substantial, direct and immediate interest in the outcome of the litigation." *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs.*, 309 A.3d 808, 832 (Pa. 2024) (citing *Robinson Township, Washington County v. Commonwealth of Pennsylvania*, 83 A.3d 901, 917 (Pa. 2013)).

> A substantial interest in the outcome of litigation is one that surpasses the common interest of all citizens in procuring obedience to the law. *Pa. Fed'n of Dog Clubs v. Commonwealth*, 105 A.3d 51 (Pa. Cmwlth. 2014) . . . . A direct interest requires a causal connection between the asserted violation and the harm complained of. *Id.* An interest is immediate when the causal connection is not remote or speculative. *Id.*

Phantom Fireworks Showrooms, LLC v. Wolf, 198 A.3d 1205, 1215 (Pa. Cmwlth. 2018). With respect to a substantial interest, "there must be some discernible 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. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). Additionally, "[g]enerally speaking, in our Commonwealth, standing is granted more liberally than in federal courts." *Allegheny Reprod. Health Ctr.*, 309 A.3d at 832.

[10] As stated in the June 10, 2024 Order, the POs, which raise substantially the same arguments, will be considered alongside Respondents' Applications.

[11] Standing is an issue that "must be raised at the soonest possible opportunity[.]" *In the Interest of K.N.L.*, 284 A.3d 121, 150 n.22 (Pa. 2022). Respondents have done so by raising this issue in their POs and in their applications.

All parties point to *Bonner* to support their positions on standing. In that case, this Court addressed, among other things, whether the petitioners had standing to enforce the nonseverability provision of Act 77 of 2019 (Act 77)[12] where, they claimed, various court decisions seemed to invalidate certain provisions in Act 77. Many of the petitioners were past and future candidates for office who argued that this status provided them a direct, substantial, and immediate interest in whether the respondents were "permitted to continue to enforce and administer a law . . . that has become void by its own terms, and [that] their interests [were] distinguishable from the interests shared by all other citizens." *Bonner*, 298 A.3d at 162 (internal quotation marks and citation omitted). These petitioners also asserted they had standing because "their elections [would be] impacted by ballots that do not meet the requirements of the applicable law and by having to spend campaign funds to adapt their campaigns to comply with a now-void Act 77." *Id*. The Court "conclude[d] it [wa]s **not sufficiently clear and free from doubt** that [these p]etitioners lack standing so as to grant the [c]ross-[a]pplications and/or sustain the POs on this basis." *Id*. (emphasis added). Further, the Court concluded that it was not clear that the candidate petitioners did not have standing because as a class of candidates for office, these petitioners' interests were distinguishable "from the citizenry at large." *Id*. at 163.

Here, we likewise conclude, as we did in *Bonner*, that it is "not sufficiently clear and free from doubt" that Petitioners do not have standing in this matter considering their status as past and current candidates with a quickly approaching election. 298 A.3d at 162. Petitioners are concerned with "integrity and legitimacy of the electoral franchise" and assert that Respondents promote the practice of or

[12] Among other changes to the Election Code, Act 77 expanded mail-in voting to all registered voters without requiring a reason to vote by mail.

engage in a practice "whereby absentee votes are sent to, received by, and canvassed at" the County Boards, which could potentially include votes for them, in contravention of article VII, section 14. (Petition ¶¶ 8, 12, 39, 47-60.) Petitioners' status confers an interest in this matter that is distinguishable "from the citizenry at large." *Bonner*, 298 A.3d at 163. Accordingly, we will not dismiss the Petition on this basis.[13]

B. Merits

In reviewing whether a statute is constitutional, "we are guided by the principle that 'acts passed by the General Assembly are strongly presumed to be constitutional.'" *Commonwealth v. Neiman*, 84 A.3d 603, 611 (Pa. 2013) (quoting *Pa. State Ass'n of Jury Comm'rs v. Commonwealth*, 64 A.3d 611, 618 (Pa. 2013)). Further, we will declare a statute "unconstitutional only if it is shown to be clearly, palpably, and plainly [violative of] the Constitution." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 384 (Pa. 2020) (quoting *West Mifflin Area Sch. Dist. v. Zahorchak*, 4 A.3d 1042, 1048 (Pa. 2010)) (alterations in *Boockvar*).

Petitioners argue that their right to relief is clear as Sections 1306 and 1308 of the Election Code plainly violate article VII, section 14, while, conversely,

[13] This Court also recognizes that it is better to issue election-related decisions, where possible, before they confer a political benefit. *See* Matthew Queen and Richard L. Hansen, *Ready for the Storm? What Judges Should Know About Election Law*, 108 JUDICATURE 34, 35-36 (2024), available at https://judicature.duke.edu/articles/what-judges-should-know-about-election-law/ (last visited Aug. 21, 2024) ("The worst situation is when a judge is called upon to make outcome-determinative rulings . . . . [I]t is far better, when possible, to rule on the substantive legal issues **before it is clear who would politically benefit from such a ruling**. . . .") (emphasis added). The Supreme Court apparently also recognizes the importance of addressing the merits of election matters before they become determinative as it recently granted a petition for allowance of appeal in *In re: Canvass of Provisional Ballots in the 2024 Primary Election* (Pa., No. 328 MAL 2024, filed July 24, 2024) (per curiam), where the ultimate resolution of the issue in that matter would not affect the outcome of the primary election, but may become outcome determinative in the upcoming 2024 general election.

Respondents argue that their right to relief is clear because this Court is bound by the Supreme Court's decision in *In re Canvass*, which Petitioners concede but argue the Supreme Court should overturn. The relevant constitutional, statutory, and precedential history is as follows. In 1951, Section 1306 was added to the Election Code by Section 11 of the Act of March 6, 1951, P.L. 3, and provided:

> At any time after receiving an **official military ballot**, but on or before the day of the election, the elector, for the purpose of voting, may appear before any person of this or any other state or territory of the United States authorized to administer oaths by Federal, State or military laws. The elector shall first display the ballot to such person as evidence that the same in unmarked, and then shall proceed to mark the ballot with pencil, crayon, indelible pencil or ink, in the presence of such person, but in such manner that the person administering the oath is unable to see how the same is marked, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Military Ballot." This envelope shall then be placed in the second one, on which is printed the affidavit of the elector, the jurat of the person before whom the elector appears, and the address of the elector's county board of election. The elector shall then fill out, subscribe and swear to the affidavit printed on such envelope, and the jurat shall be subscribed and dated by the person before whom the affidavit was taken. Such envelope shall then be securely sealed and **the elector shall send same by mail to said county board of election.**

25 P.S. § 3146.6 (1951) (emphasis added). In 1951, Section 1308(a) was also added to the Election Code by Section 11 of the Act of March 6, 1951, P.L. 3, and provided, relevantly:

> The **county boards of election**, **upon receipt of official military ballots** in such envelopes, shall safely **keep the same until they meet to canvass official military ballots**, which **canvass shall begin immediately** . . . .

25 P.S. § 3146.8(a) (1951) (emphasis added). In 1963, these provisions were amended by Sections 22 and 24 of the Act of August 13, 1963, P.L. 707, respectively, which included a revision to change "military ballot" to "absentee ballot," but provided the same procedure as in 1951 for these ballots to be **delivered to and canvassed** by the **county boards** of elections. *See* 25 P.S. § 3146.6 (1963); 25 P.S. § 3146.8(a) (1963). These were the statutory provisions at issue in *In re Canvass.*

On November 5, 1957, article VIII, section 19, was adopted and provided a provision for "Absentee Voting Due to Illness or Absence," which 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**.

Formerly PA. CONST. art. VIII, § 19 (emphasis added). On May 16, 1967, before *In re Canvass*,[14] article VIII, section 19, was amended and subsequently renumbered

[14] *In re Canvass* was decided on September 4, 1968, and involved the November 7, 1967 General Election. According to the Governor's Proclamations of July 7, 1967, P.L. 1063 and P.L. 1077, the constitutional amendment was approved by the electorate at the May 16, 1967 primary. Petitioners contend that the electorate approved the constitutional amendment on April 23, 1968. (Pet'rs' Omnibus Br. in Opp'n to POs at 6.) For support, they cite the Constitution available on the General Assembly's website. (*Id.* at 6 n.3.) Following the table of contents, the website references seven "Proposals" that were recommended by a Constitutional Convention and approved by the electorate on April 23, 1968. Pa. Gen. Assemb., The Const. of Pa., *available at* https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=0, (last visited Aug. 22, 2024). However, those seven Proposals did not involve elections. *See* Constitutional Proposals Adopted by the Convention at 7, *available at* https://www.paconstitution.org/wp-content/uploads/2019/09/Constitutional_Prop.pdf (last visited Aug. 22, 2024) (setting forth the **(Footnote continued on next page…)**

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as article VII, section 14, retitling the provision as "Absentee Voting" and providing as follows:

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

PA. CONST. art. VII, § 14(a) (emphasis added).

In *In re Canvass*, the Supreme Court addressed whether the 1963 version of Section 1308 "clearly, palpably, [and] plainly" violated article VIII, section 19, of the Pennsylvania Constitution because it provided a process for "the return and canvass of absentee ballots on a county-wide basis" for a general election that took place on November 7, 1967. 245 A.2d at 260. The Supreme Court concluded that the 1963 version of Section 1308 was constitutional because the **procedure** of delivering and counting absentee ballots at the county level, **which are then** "**applied** . . . **to the districts in which the absentee voters respectively resided**[,]"

---

ballot questions addressing the seven Proposals to appear on the ballot at the April 23, 1968 primary). The General Assembly website does identify various constitutional amendments including the May 16, 1967 one. Pa. Gen. Assemb., The Const. of Pa., *available at* https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=0 (last visited Aug. 22, 2024) (stating "[b]y statute, 1 Pa.C.S. § 906, the Constitution, as amended by referenda of May 17, 1966, November 8, 1966, **May 16, 1967**, and April 23, 1968, and as numbered by proclamation of the Governor of July 7, 1967, shall be known and may be cited as the Constitution of 1968") (emphasis added). Notwithstanding that the amendment predated the Constitution of 1968, pursuant to statute, it is to be referred to as the "Constitution of 1968." *See* 1 Pa.C.S. § 906(b).

is **wholly consistent with article VIII**, **section 19**, now article VII, section 14(a). *Id*. at 264 (emphasis added). In other words, "what the Constitution aims at is the **counting of each vote** not **by** the local elections district but **in such a manner that the computation appears on the return in the district where it belongs**." *Id*. (some emphasis added). The Supreme Court explained that the interpretation proffered by the petitioners in *In re Canvass* would create logistical difficulties for "opening, challenging, counting, and tabulating [] these ballots in each" district polling location. *Id*. at 263 (internal quotation marks omitted). The Supreme Court concluded that because "[t]he [c]ounty [b]oard of [e]lections tallied the absentee votes and **applied the tallies to the districts in which the absentee voters respectively resided**," the process was constitutional and the Court was "inevitably [led] to the conclusion that the framers of the controverted constitutional amendment[15] never intended that the actual counting of the absentee ballots was to 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 (emphasis added). In the companion case of *In re 223*,[16] the Supreme Court reiterated its holding from *In re Canvass* and concluded "that no person has been deprived of any properly cast vote because the whole operation of the computation took place at the county level instead of at the district level." *In re 223*, 245 A.2d at 268.

[15] It is unclear whether the Supreme Court was speaking to article VIII, section 19, or the newly amended article VII, section 14. However, both article VIII, section 19, and article VII, section 14, provided "for the return and canvass of their votes in the election district in which they respectively reside." PA. CONST. art. VII, § 14(a); *formerly* PA. CONST. art. VIII, § 19, which was the language at issue in *In re Canvass*.

[16] *In re 223* involved absentee ballots cast in the November 8, 1966 election. 245 A.2d at 265-66.

In 1968, after *In re Canvass* and *In re 223*, and after article VIII, section 19 was amended and renumbered to article VII, section 14, Sections 1306 and 1308 were amended again. *See* Section 8 of the Act of December 11, 1968, P.L. 1183. Section 1306 continued to provide for the delivery of absentee ballots to the county boards of elections. *See* 25 P.S. § 3146.6 (1968). Section 1308, however, was amended to change the procedure for canvassing ballots, and provided, relevantly, that the ballots should be distributed on election day to the election district:

> The **county boards of election**, **upon receipt of official absentee ballots** in such envelopes, shall safely **keep the same in sealed or locked containers** until they **distribute** same **to the appropriate local election districts** in a manner prescribed by the Secretary of the Commonwealth.
>
> The county board of elections shall then **distribute the absentee ballots**, **unopened**, **to the absentee voter's respective election district** concurrently with the distribution of the other election supplies. Absentee ballots shall be **canvassed immediately** and continuously without interruption until completed after the close of the polls on the day of the election in each election district. . . .

25 P.S. § 3146.8(a) (1968) (emphasis added).

In 2019, Act 77 amended Sections 1306 and 1308. Today, Section 1306(a) of the Election Code continues to provide that the absentee ballots be delivered to the county board:

> Except as provided in paragraphs (2) and (3), at any time after receiving an official **absentee ballot**, . . . the elector shall . . . mark the ballot . . . and then fold the ballot, enclose and securely seal the same in the envelope . . . . This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and **the elector shall send same by mail, postage**

> **prepaid, except where franked, or deliver it in person to said county board of election**.

25 P.S. § 3146.6(a) (emphasis added). Section 1308 of the Election Code returned to the pre-1968 procedure of the absentee ballots being canvassed by county boards of elections:

> **The county boards of election**, upon receipt of official **absentee ballots** in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, [Sections 1301-D-1307-D, added by Act 77, 25 P.S. §§ 3150.11-3150.17,] **shall safely keep the ballots in sealed or locked containers** until they are to be **canvassed by the county board of elections**. 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).

25 P.S. § 3146.8(a) (emphasis added).

Petitioners argue that the previous version of article VII, section 14, was amended in new article VIII, section 19, to change "may" to "shall," and, after *In re Canvass*, Section 1308 was also amended to provide for the return and canvassing of absentee ballots at the district level consistent with the newly amended article VII, section 14. This shows, per Petitioners, that the legislature understood that the return and canvassing of ballots should take place at the district level. Petitioners are correct that former article VIII, section 19 was amended to change "may" to "shall," which is in the current provision, PA. CONST. art. VII, § 14(a), and that after *In re Canvass* was decided, Section 1308 was amended to provide for the canvassing of absentee ballots at the voting districts, 25 P.S. § 3146.8(a) (1968). Petitioners are also correct that Act 77 of 2019 changed the procedure to the canvassing of absentee ballots at the county level, 25 P.S. § 3146.8(a). All parties recognize that the statutory

language of today's Section 1308 provides for the same **procedure** as the version of Section 1308 analyzed by the Supreme Court in *In re Canvass* – that the county boards of elections shall canvass absentee ballots – and that the Supreme Court determined that it complies with the Supreme Court's interpretation of the constitutional provision. The Supreme Court explained that Section 1308 provides for "the **counting of each vote** not **by** the local elections district but **in such a manner that the computation appears on the return in the district where it belongs**." *In re Canvass*, 245 A.2d at 264 (some emphasis added). We acknowledge there is a question, as the Secretary and Department recognize, as to whether the Supreme Court analyzed the 1963 version of Section 1308 under former article VIII, section 19, which it quotes, or article VII, section 14, which it acknowledges. Regardless, the Supreme Court held that the process of returning and canvassing absentee ballots at the county level served the intent of the language found in the constitutional provisions – "for the return and canvass of [electors'] **votes**," **not ballots**, "in the election district in which they respectively reside," PA. CONST. art. VII, § 14(a), *formerly* PA. CONST. art. VIII, §19 – and the same procedure is provided in the statutory provision challenged by Petitioners here. Accordingly, we agree with the parties that we are bound by the decision in *In re Canvass*.

To the extent that Petitioners appear to argue that Section 1306 is unconstitutional as it does not provide for the sending and delivering of absentee ballots to the voting districts by the absentee voters, we believe the reasoning of *In re Canvass* would also be applicable and binding on this Court. Just as in 1967, today, as the Respondents contend, district polling locations are usually schools or public and municipal buildings, which are used for election purposes only on election days and cannot receive absentee ballots except on election days. Both *In re Canvass* and

In re 223 recognized the logistical difficulties of delivering absentee ballots to each district polling location in the weeks before the November 1967 election. These logistical difficulties continue to exist today, and as in 1967, Petitioners' requested relief would create logistical "nightmares," such as opening and staffing **over 9,000 temporary polling locations not just on Election Day but before and after Election Day, as well**, needing places to securely store absentee ballots, and needing places to securely mail absentee ballots. (*See* Secretary and Department's Br. in Supp. at 30 (citing Petition, Ex. A.); Adams County Board of Elections' Appl. at 14-15, 20-21.) Not to mention, Petitioners' requested relief would create a different system for mail-in ballots, "which are not substantively different from" absentee ballots. (Adams County Board of Elections' Appl. at 14-15.) Moreover, Petitioners do not seem to refute that Section 1306 has consistently provided that absentee ballots be mailed or delivered to the county boards of elections. (*See* Pet'rs' Omnibus Br. in Opp'n to POs at 5 & 10 n.4 (citing the 1951 version of Section 1306, 25 P.S. § 3146.6(a) (1951), which provided for the mailing of military/absentee ballots to the county boards of elections and remained so throughout the amendments to Section 1308 in 1968[17]).

The same rationales outlined in *In re Canvass* and *In re 223* apply to this case. "It is elementary that unless the United States Supreme Court reverses a decision of [the Pennsylvania Supreme] Court, or [the Pennsylvania Supreme] Court overrules its own prior decision, 'the law emanating from the decision remains law.' *Fiore v. White*, . . . 757 A.2d 842, 847 ([Pa.] 2000)." *Commonwealth v. Reid*, 235 A.3d 1124,

[17] It appears that Petitioners do not cite to the 1951 version of Section 1306, as their quoted material does not match the 1951 version. (*See* Pet'rs' Br. in Supp. at 5 n.3.) Nevertheless, Petitioners' citation and argument shows they acknowledge that military/absentee ballots have been mailed or delivered to the county boards of elections and that process has remained through the amendments as described above.

1159 (Pa. 2020). *In re Canvass* and *In re 223* held, as constitutional, the current procedure whereby absentee ballots are delivered and canvassed at the county level **but the votes therein are then applied to the districts where the absentee voters reside**, based on the Supreme Court's interpretation of the language of article VII, section 14. Given the Supreme Court's interpretation, which we must apply, Petitioners have not met the **high bar** of rebutting the strong presumption that Sections 1306 and 1308 "clearly, palpably, and plainly" violate article VII, section 14. *Boockvar*, 238 A.3d at 384; *Neiman*, 84 A.3d at 611.[18] Accordingly, unless and until the Supreme Court reinterprets Section 1306 and 1308 under article VII, section 14, and concludes otherwise, we are bound by *In re Canvass* and its sound logic.

III. CONCLUSION

In sum, Petitioners have standing to bring this matter as their status as present and future candidates confers upon them a substantial, direct, and immediate interest in knowing whether their candidacy may be affected by a purportedly unconstitutional provision. However, as Respondents argue and Petitioners concede, we are bound by the Supreme Court's precedent and ruling outlined in *In re Canvass*. Accordingly, we grant Respondents' Applications, deny Petitioners' Application, dismiss the Petition with prejudice, and dismiss the POs as moot.

RENÉE COHN JUBELIRER, President Judge

[18] Due to our disposition, we need not consider whether the Petition is barred by the doctrine of laches.

APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David H. Zimmerman and Kathy L. Rapp, Petitioners	:	
v.	:	No. 33 M.D. 2024
Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth of Pennsylvania, the Commonwealth of Pennsylvania, Department of State, Adams County Board of Elections, Allegheny County Board of Elections, Armstrong County Board of Elections, Beaver County Board of Elections, Bedford County Board of Elections, Berks County Board of Elections, Blair County Board of Elections, Bradford County Board of Elections, Bucks County Board of Elections, Butler County Board of Elections, Cambria County Board of Elections, Cameron County Board of Elections, Carbon County Board of Elections, Centre County Board of Elections, Chester County Board of Elections, Clarion County Board of Elections, Clearfield County Board of Elections, Clinton County Board of Elections, Columbia County Board of Elections, Crawford County Board of Elections, Cumberland County Board of Elections, Dauphin County Board of Elections, Delaware County Board of Elections, Elk County Board of Elections, Erie County Board of Elections, Fayette County Board of Elections, Forest County Board of Elections, Franklin County Board of Elections, Fulton County Board of Elections, Greene County Board of	:	

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Elections, Huntingdon County Board :
of Elections, Indiana County Board of :
Elections, Jefferson County Board of :
Elections, Juniata County Board of :
Elections, Lycoming County Board of :
Elections, Lackawanna County Board :
of Elections, Lancaster County Board :
of Elections, Lawrence County Board :
of Elections, Lebanon County Board :
of Elections, Lehigh County Board of :
Elections, Luzerne County Board of :
Elections, McKean County Board of :
Elections, Mercer County Board of :
Elections, Mifflin County Board of :
Elections, Monroe County Board of :
Elections, Montgomery County Board :
of Elections, Montour County Board :
of Elections, Northampton County :
Board of Elections, Northumberland :
County Board of Elections, Perry :
County Board of Elections, Philadelphia :
County Board of Elections, Pike County :
Board of Elections, Potter County :
Board of Elections, Schuylkill County :
Board of Elections, Snyder County :
Board of Elections, Somerset County :
Board of Elections, Sullivan County :
Board of Elections, Susquehanna :
County Board of Elections, Tioga :
County Board of Elections, Union :
County Board of Elections, Venango :
County Board of Elections, Warren :
County Board of Elections, :
Washington County Board of :
Elections, Wayne County Board of :
Elections, Westmoreland County Board :
of Elections, Wyoming County Board :
of Elections, and York County Board :
of Elections, :
Respondents :

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O R D E R

NOW, August 23, 2024, the Application for Summary Relief filed by Al Schmidt, in his official capacity as Secretary of the Commonwealth of Pennsylvania and the Commonwealth of Pennsylvania, Department of State, and the Application for Summary Relief filed by Adams County Board of Elections, both of which are joined in by various other County Boards of Elections (collectively, Respondents), are **GRANTED**, the Application for Summary Relief filed by David H. Zimmerman and Kathy L. Rapp (Petitioners) is **DENIED**, the Petition for Review filed by Petitioners is **DISMISSED WITH PREJUDICE**, and the Preliminary Objections of Respondents are **DISMISSED** as moot.

_____

RENÉE COHN JUBELIRER, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David H. Zimmerman and Kathy L. Rapp, Petitioners	:	
v.	:	No. 33 M.D. 2024 Submitted: August 1, 2024
Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth of Pennsylvania, the Commonwealth of Pennsylvania, Department of State, Adams County Board of Elections, Allegheny County Board of Elections, Armstrong County Board of Elections, Beaver County Board of Elections, Bedford County Board of Elections, Berks County Board of Elections, Blair County Board of Elections, Bradford County Board of Elections, Bucks County Board of Elections, Butler County Board of Elections, Cambria County Board of Elections, Cameron County Board of Elections, Carbon County Board of Elections, Centre County Board of Elections, Chester County Board of Elections, Clarion County Board of Elections, Clearfield County Board of Elections, Clinton County Board of Elections, Columbia County Board of Elections, Crawford County Board of Elections, Cumberland County Board of Elections, Dauphin County Board of Elections, Delaware County Board of Elections, Elk County Board of Elections, Erie County Board of Elections, Fayette County Board of Elections, Forest County Board of Elections, Franklin County Board of Elections, Fulton County Board of Elections, Greene County Board of	:	

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Elections, Huntingdon County Board :
of Elections, Indiana County Board of :
Elections, Jefferson County Board of :
Elections, Juniata County Board of :
Elections, Lycoming County Board of :
Elections, Lackawanna County Board :
of Elections, Lancaster County Board :
of Elections, Lawrence County Board :
of Elections, Lebanon County Board :
of Elections, Lehigh County Board of :
Elections, Luzerne County Board of :
Elections, McKean County Board of :
Elections, Mercer County Board of :
Elections, Mifflin County Board of :
Elections, Monroe County Board of :
Elections, Montgomery County Board :
of Elections, Montour County Board :
of Elections, Northampton County :
Board of Elections, Northumberland :
County Board of Elections, Perry :
County Board of Elections, Philadelphia :
County Board of Elections, Pike County :
Board of Elections, Potter County :
Board of Elections, Schuylkill County :
Board of Elections, Snyder County :
Board of Elections, Somerset County :
Board of Elections, Sullivan County :
Board of Elections, Susquehanna :
County Board of Elections, Tioga :
County Board of Elections, Union :
County Board of Elections, Venango :
County Board of Elections, Warren :
County Board of Elections, :
Washington County Board of :
Elections, Wayne County Board of :
Elections, Westmoreland County Board :
of Elections, Wyoming County Board :
of Elections, and York County Board :
of Elections, :
Respondents :

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BEFORE: **HONORABLE RENÉE COHN JUBELIRER,** President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE MATTHEW S. WOLF, Judge

OPINION NOT REPORTED

CONCURRING OPINION
BY JUDGE McCULLOUGH FILED: August 23, 2024

Upon review of what has become a legislative quagmire, I agree with the Majority that the Pennsylvania Supreme Court addressed in *In re Canvass of Absentee Ballots of 1967 General Election*, 245 A.2d 258 (Pa. 1968) (*In re Canvass*), and *In re 223 Absentee Ballot Appeals*, 245 A.2d 265 (Pa. 1968) (*In re 223*), both decided on September 4, 1968, whether language adopted in the Election Code similar to the case at hand violated the Pennsylvania Constitution regarding canvassing and return of ballots by local election districts. I acknowledge that the Supreme Court in those cases held that it did not, and based its decision on whether it was more feasible for election districts to canvass and return ballots as opposed to the county boards. Although the constitutional language has not changed since those cases were filed, for the reasons that follow, I believe *In re Canvass* and *In re 223* could be distinguished as "old law."

A review of the history of the relevant amendments to the Pennsylvania Election Code and the Pennsylvania Constitution reveal a glaring conflict. The Constitution was amended with particular election language in 1957 and 1967, but the Election Code did not adopt that concise language or its purpose until 1968. Rather, the legislative amendments to the Election Code, up until December 11, 1968, and then again in 2019 in Act 77, were in conflict with the constitutional

amendments, which precipitated the litigation in *In re Canvass* and *In re 223*. The following chart outlines the constitutional and Election Code amendments through 1963.

Election Code Statutory Provisions	PA Constitution Provisions
1951- legislature added Section 1306: Military ballots to be **returned and sent** to **county boards of election**.	1957- Art. VIII, Section 19 adopted "Absentee Voting Due To Absence" and provided for r**eturn and canvass** of their **votes in the election district** in which they respectively reside.
1951- legislature added Section 1308(a) providing that **county boards of election** upon receipt of the official military ballots place in the necessary envelopes shall safely keep the same until they meet to **canvass** official military ballots.	1967- Art VIII, Section 19 was amended and renumbered by approval of electors at the May 16, 1967 primary. *See* Fn 14 of Majority. But it still provided that **return and canvass** of votes were to be in **election districts**.

Based on the above chart, one can see the **constitutional amendments** clearly provided that **return and canvass** of votes was to be in the **election districts**. Nonetheless, prior to 1968 and contrary to the constitutional amendments, the noted **legislative amendments** to the Election Code stated that they were to be returned and canvassed by the **county boards**.

Thereafter and notably, on December 11, 1968, **three (3) months after** the Supreme Court handed down its decisions in *In re Canvass* and *In re 223*, the legislature passed the following amendment to the Election Code which was in line with the constitutional provision that the election districts canvass the votes:

> The county boards of election, upon receipt of all official absentee ballots in such envelopes, shall safely keep the same in sealed or locked containers until they **distribute**

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> **same to the appropriate local election districts** in a manner prescribed by the Secretary of the Commonwealth. Except as provided in section 1302.1(a.2), the county board of elections shall then **distribute the absentee ballots, unopened, to the absentee voter's respective election district** concurrently with the distribution of the other election supplies. Absentee ballots shall be canvassed immediately and continuously without interruption until completed after the close of the polls on the day of the election **in each** election district.

Former Section 1308(a) of the Election Code, *formerly* 25 P.S. § 3146.8(a) (repealed by Act 77) (emphasis added).

Important to the matter at hand, this 1968 election code amendment, which appeared to comport with the constitutional language, was not enacted until December 11, 1968, which was 3 months after *In re 223* was filed and 3 months after *In re Canvass* was filed (Sept. 4, 1968). The timeline follows:

> **May 16, 1967**: Constitutional Amendment Art. VIII Section 19 approved by electors;
>
> **September 4, 1968:** *In re Canvass* and *In re 223* filed;
>
> **December 11, 1968**: 1968 Election Code Amendment to Section 1308.

Since the 1968 Election Code Amendment was not passed until December 11, 1968, it is not discussed in either of the *In re Canvass* and *In re 223* cases. If it had been before the Supreme Court, there would have been no issue to consider in those cases as the Election Code and the constitutional provisions would have mirrored each other. Rather, the Election Code section that was challenged in

those cases was the prior Sections 1306 and 1308, which provided that county boards would canvass the votes and ballots. That is why the Court only held in those cases that this particular procedure made practical sense and that it therefore comported with the constitutional **intent** that votes be canvassed by the counties and returned **to** the election districts.

Also important for our consideration in light of this 1968 Election Code Amendment providing that election districts canvass the votes, is the subsequent and inconsistent 2019 amendment via Act 77, where the Election Code language in Sections 1306 and 1308 of the 1968 Amendment was revised to provide that ballots shall be sent to and canvassed by the county boards of elections:

> absentee ballot . . . the elector shall send same by mail . . . or deliver in person to said county board of election . . .

25 P.S. § 3146.6(a).

> county boards of election . . . keep the ballots in sealed or locked containers until . . .canvassed by county board of elections. . .

25 P.S. § 3146.8(a).

While the Majority believes *In re Canvass* and *In re 223* are precedential and binding decisions on this Court concerning the issue before us, I believe the subsequent Code amendments support another look by the Court. Simply put, *In re Canvass* and *In re 223* were decided **PRIOR** to the enactment of the 1968 legislative amendment to the Election Code, which was not enacted until December 11, 1968, as well as Act 77, which amended the 1968 language and was adopted in 2019.

Significantly, when the legislature enacted the 1968 amendment, *In re Canvass* and *In Re 223* had already been decided. The legislature had to make a choice—allow county boards to canvass the ballots or votes, as was permitted by the *In re Canvass* and *In re 223* cases, or adopt the constitutional language which is alleged here again to give election districts the canvassing task. It chose the election districts. It chose to adopt an Election Code amendment that provided **election districts** would canvass the votes, which seemed to mirror the constitutional language for return and canvass of votes in the election districts.

I believe when the legislature passed the 1968 amendment, the constitutional language was particularly evident to it after *In re Canvass* and *In re 223*, where it was brought to the forefront, and it chose instead to pass this 1968 amendment to the Election Code. This 1968 amendment and the subsequent amendments to sections 1306 and 1308 in Act 77 in 2019, were not considered by the Supreme Court in *In re Canvass* and *In re 223* and as such I believe these cases could be rendered "old law."

Whether this precedent is deemed binding or "old law," the 1968 Election Code amendment, passed 3 months after these cases were filed, remained the law for canvassing absentee ballots for over 50 years. Presumably, although not clear from the record, local **election districts were able to** and did canvass those ballots during that **50 year** period. Why the legislature chose to veer off from that language again in Act 77 is unclear. It is clear, however, that it was a major sea change from the 1968 Election Code language.

The question not addressed by the Supreme Court in the *In re Canvass* and *In re 223* cases is whether Sections 1306 and 1308 of the Election Code, as they appear in Act 77, and the prior Election Code amendments, all in light of the 1968

Election Code amendment enacted **after** *In re Canvass* and *In re 223*, violate the constitutional amendments voted on by the people of this Commonwealth. This is a critical matter which I believe deserves a fresh look. For these reasons I concur in the result only. As it remains within the purview of the Supreme Court to assess its precedent, I need not say more.

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PATRICIA A. McCULLOUGH, Judge

APPENDIX A