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244 MD 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG MCLINKO, Petitioner, v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; and VERONICA DEGRAFFENREID, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents.	:	NO. 244 MD 2021
TIMOTHY R. BONNER, ET. AL., Petitioners, v. VERONICA DEGRAFFENREID, ET. AL. Respondents.	:	NO. 293 MD 2021

ORDER

AND NOW, this _____ day of October, 2021, upon consideration of the Petitioner McLinko's Application for Leave to File an Amended Response to Respondents' Preliminary Objections to Amended Petition for Review, it is hereby **ORDERED** that the Application is **GRANTED** and Petitioner McLinko is granted leave to file the amended response in

opposition to the preliminary objections to the amended petition for review that is attached to this application as Exhibit A.

BY THE COURT:

_____

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG MCLINKO, Petitioner, v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; and VERONICA DEGRAFFENREID, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, Respondents.	:	NO. 244 MD 2021
TIMOTHY R. BONNER, ET. AL., Petitioners, v. VERONICA DEGRAFFENREID, ET. AL. Respondents.	:	NO. 293 MD 2021

APPLICATION FOR LEAVE TO FILE TO AMENDED RESPONSE

On October 22, 2021, petitioner, Doug McLinko, filed his response in opposition to the preliminary objections to the amended petition for review. After that document was filed, it was discovered that the headings in the table of contents did not properly match with the section headings in the document as originally drafted, which is believed to have been was caused by the creation of the table of contents using Microsoft

Word. McLinko has corrected this formatting issue and respectfully requests leave from this Court to file an amended response that contains the correct section headings and subheadings. A copy of the proposed amended response is attached at Exhibit A.

Respectfully submitted,

Date: October 29, 2021

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOCKET Nos. 244 M.D. 2021; 293 M.D. 2021

DOUG MCLINKO,

PETITIONER,

v.

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

RESPONDENTS.

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

PETITIONERS,

v.

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

RESPONDENTS.

PETITIONER'S AMENDED RESPONSE IN OPPOSITION TO RESPONDENTS' PRELIMINARY OBJECTIONS TO AMENDED PETITION FOR REVIEW

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INTRODUCTION

If the arguments that Respondents present in their Preliminary Objections to the Amended Petition for Review sound familiar, they are. Respondents recycle the same arguments they presented in their Cross-Application for Summary Relief, the same arguments they presented in their Reply to Petitioners' Opposition to Respondents' Application for Summary Relief, and the same arguments that Respondents spent over 30 minutes trying to convince an *en banc* panel of this Court to accept. But their arguments are no more availing the fourth time than the first. Therefore, rather than regurgitate his arguments, Petitioner McLinko incorporates the arguments from his opening brief, reply brief, and argument, expounding only were necessary. He supplements his prior arguments with responses to the Respondents' amended objections and with additional reasons why Act 77 is unconstitutional.

Additionally, McLinko's substantive arguments are even stronger given the procedural posture of the case. Respondents filed preliminary objections to Petitioner's amended petition. That means that the Court must accept as true all factual averments in the petition and grant McLinko all reasonable inferences deducible therefrom. *Marin v. Sec'y of*

Com., 41 A.3d 913, 915, n. 2 (Pa. Commw. Ct. 2012), aff'd, 620 Pa. 56, 66 A.3d 250 (2013)(citing *Warminster Fiberglass Co. v. Upper Southampton Township*, 939 A.2d 441 (Pa. Commw. Ct. 2007)). This Court furthermore should sustain those objections only when it is clear and free from doubt that the law will not permit recovery. *Id.*

Respondents' laches and statute of limitations arguments are particularly dubious because they are raised through preliminary objections. "A statute of limitations defense is properly raised in new matter and not in preliminary objections." *Sayers v. Heritage Valley Med. Grp., Inc.*, 2021 PA Super 42, 247 A.3d 1155, 1159 (2021). Likewise, the defense of laches is an affirmative defense that is not properly raised in preliminary objections but must be raised in a responsive pleading as new matter." *Banfield v. Cortes*, 922 A.2d 36, 45–46 (Pa. Commw. Ct. 2007).

Accordingly, the Court should overrule Respondents' preliminary objections.

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ARGUMENT

I. THE COURT MUST ACCEPT ALL FACTS PLEAD IN THE AMENDED PETITION AS TRUE AND SUSTAIN THE OBJECTIONS ONLY IF THE LAW IS CLEAR THAT NO RECOVERY IS PERMITTED.

Absent from the Respondents' brief is the standard of review used to determine preliminary objections. It is well-settled that "in ruling on preliminary objections in the nature of a demurrer, the Court must accept as true all well-pleaded facts and all reasonable inferences deducible therefrom; however, we need not accept conclusions of law. *Marin v. Sec'y of Com., 41 A.3d 913, 915*, n. 2 (Pa. Commw. Ct. 2012), aff'd, 620 Pa. 56, 66 A.3d 250 (2013)(citing *Warminster Fiberglass Co., Inc. v. Upper Southampton Township*, 939 A.2d 441 (Pa.Cmwlth.2007). "A demurrer will be sustained only where it is clear and free from doubt that the law will not permit recovery under the alleged facts." *Id.* Although well settled and well known, this standard of review cannot be overlooked, especially given the procedural posture of this case, where the Court has already received extensive briefing from Respondents on their arguments and has already heard oral arguments. Indeed, given the higher deferential standard afforded to McLinko, it is unclear why respondents feel that

their previous arguments are better suited to be raised through preliminary objections.

The standard of review particularly impacts Respondents' standing argument. It means every fact McLinko pleads regarding traditional standing is accepted as true and, unless the law is clear and free from doubt (it is not) that he lacks traditional standing, the objections should be overruled. It also means each of McLinko's averments regarding taxpayer standing are accepted as true and can only be defeated if the law is equally clear and free from doubt.

II. MCLINKO HAS STANDING TO CHALLENGE ACT 77.

Respondents' evolving argument concerning McLinko's standing is worth recognizing:

- Respondents initially argued that McLinko lacked standing because his duties were "purely ministerial." Resp't Br. (8/26/21), 16.
- After McLinko refuted that argument by showing his inherently discretionary duties, Respondents pivoted to claiming McLinko lacked standing because he was only one member of an administrative body. Resp't Reply Br. (9/15/21), 5.

- Now, Respondents seem to concede McLinko, as a member of the County Board of Elections, has discretion in administering the Election Code—an argument it staunchly rejected at first—but now argues that in discharging his duties under Act 77, McLinko's conduct is purely ministerial. Resp't Br. in Supp. of Prel. Obj. (10/18/21), 17.

The Court should not be swayed by this sleight of hand shell game Respondents are playing. McLinko's responsibility to determine the lawfulness of absentee ballots cast pursuant to Act 77 is not a passive, ministerial responsibility that would foreclose his standing to obtain judicial review of the constitutionality of the statute.

As a local election official, McLinko must determine the lawfulness of absentee ballots, exercising discretion to judge which are to be counted and which are to be rejected. McLinko must exercise discretional duties of judging the validity of ballots cast under Act 77, an act McLinko believes is unconstitutional. Furthermore, McLinko's decisions to count certain ballots, including Act 77 ballots, necessarily impact McLinko's responsibility to certify or withhold certification of accurate election results. McLinko's role concerning these functions—determining the

lawfulness of each ballot cast and certifying a final result of all lawful votes—is not that of a ministerial robot. McClinko necessarily applies discretion in performing these and other related responsibilities, discretion that provides him with standing to challenge Act 77's constitutionality.

McClinko has shown how his standing is indistinguishable from the councilmembers in *Robinson Twp. v. Com.*, 52 A.3d 463 (Pa. Commw. Ct. 2012); *see* Pet'r Br. in Supp. at 9-12. Like the councilmembers in *Robinson Township*, McLinko has standing to obtain judicial review and a declaratory judgment as to the lawfulness of the ballots he is called upon to judge and the election results he certifies. In any event, McLinko's standing is stronger than the councilmembers in *Robinson Twp.* because he will be required to exercise discretionary duties to vote on rules, regulations, and the acceptance of ballots pursuant to a statute he in good faith believes is unconstitutional. As an elected official called upon to make quasi-judicial judgments under the Election Code, McLinko has standing.

McLinko also adequately pleads a claim that satisfies taxpayer standing. *Sprague v. Casey*, 550 A.2d 184 (Pa. 1998); Pet'r Br. in Supp.

at 9-10. Pennsylvania recognizes general taxpayer standing to challenge the constitutionality of a law because "otherwise a large body of governmental activity would be unchallenged in the courts." *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). Determining whether a taxpayer has standing requires the Court to weigh five factors: (a) the governmental action would otherwise go unchallenged; (b) those directly and immediately affected by the complained of matter are beneficially affected and not inclined to challenge the action; (c) judicial relief is appropriate; (d) redress through other channels is unavailable; and (e) no other persons are better situated to assert the claim. *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 662 (2005). McLinko has plead each of these factors and those averments are taken are true. Am. Pet.,¶¶ 50-55.

Accepting all the facts plead in the petition as true, McLinko has both traditional and taxpayer standing. Therefore, the Court should overrule Respondents' objections.

III. ACT 77 IS NOT INSULATED FROM JUDICIAL REVIEW UNDER ANY TIMELINESS PRINCIPLE.

A. RESPONDENTS' LACHES DEFENSE IS IMPROPERLY RAISED THROUGH PRELIMINARY OBJECTIONS AND MCLINKO'S REQUEST FOR PROSPECTIVE RELIEF TO GUIDE FUTURE ELECTIONS IS TIMELY.

Respondents claim that the Court should grant their preliminary objections based on the equitable defense of laches. Prel. Obj., ¶¶ 15-23, 61-80. However, "the defense of laches is an affirmative defense that is not properly raised in preliminary objections but must be raised in a responsive pleading as new matter." *Banfield v. Cortes*, 922 A.2d 36, 45–46 (Pa. Commw. Ct. 2007)(overruling preliminary objections of the Commonwealth of Pennsylvania based on laches raised in response to a petition to compel the Secretary of the Commonwealth to decertify certain electronic voting machines.) The Court should therefore deny Respondents' preliminary objections on that basis alone[1].

[1] McLinko recognizes that the technical method of challenging Respondents' improper preliminary objections based on laches and the statute of limitations would be to raise preliminary objections to preliminary objections. *Farinacci v. Beaver Cty. Indus. Dev. Auth.*, 511 A.2d 757, 759 (Pa. 1986). However, given the expedited nature of this case, McLinko responds substantively rather than embroil the case in a matter of procedure.

Although Respondents improperly raise the defense of laches, in all events it does not apply. *See* Pet'r Br. in Supp. at 11-13. While it is true that elections have occurred since the passage of Act 77, McLinko has not sat on his rights for **this** election and **future** elections. McLinko has not brought a lawsuit asking for any election to be overturned. Rather, he is asking for prospective relief as to the constitutionality of Act 77. McLinko filed his petition concerning the November 2021 election in July 2021 and has filed an amended petition concerning all future elections. There are an indefinite number of elections in the future for which McLinko is timely challenging Act 77; therefore, laches does not apply to the case at hand.

The Court is called upon to resolve the dilemma McClinko will face in all future elections until the constitutionality of Act 77 is decided. Therefore, even if McLinko delayed bringing this cause of action (he has not), he has not delayed challenging Act 77 well in advance of future elections.

B. Respondents' Attempt to Assert the 180-Day Time Limit as a Statute of Limitations is Improper as a Preliminary Objection.

Respondents next argue that McLinko's petition is barred by a 180-day statute of limitations period contained in Act. 77. That defense is also improperly raised. Setting aside that there is no statute of limitation in Act 77, even if there were, the statute of limitations defense is improperly raised. *Koken by Taylor v. Balaban & Balaban*, 720 A.2d 823, 826 (Pa. Commw. Ct. 1998)(striking statute of limitations defense raised in preliminary objections to complaint brought by the Insurance Commissioner); *Miller v. Klink*, 871 A.2d 331, 333 (Pa. Commw. Ct. 2005)("The defense of statute of limitations is to be raised as an affirmative defense by filing new matter and not as a preliminary objection.").

C. The 180-Day Time Period is a Jurisdictional Provision Not a Statute of Limitations Against Constitutional Challenges.

Even if Respondents' statute of limitation defense were not improperly raised (it is), the argument fails because there is no statute of limitation in Act 77. Rather, there is only an exclusive jurisdiction provision. The genesis for Respondents' claim that McLinko's claim is time barred is Section 13 of Act 77. Act of Oct. 31, 2019, P.L. 552, No. 77, § 13. Section

13(2) of Act 77 provides that "[t]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1)" of Section 13." *Id.* Section 13(3) of Act 77 then provides that "[a]n action under paragraph (2) must be commenced within 180 days of the effective date of this section." Thus, Act 77 is an exclusive jurisdiction provision granting the Pennsylvania Supreme Court exclusive jurisdiction to hear challenges to Act 77 **for the first 180 days.** After that 180-day period, jurisdiction reverts to traditional jurisdiction and devolves to this Court. 42 Pa. Cons. Stat. § 761(a)(l). Indeed, Respondents have not challenged this Court's subject matter jurisdiction.

Last year, in *Delisle v. Bookvar*, 95 MM 2020 (Pa. 2020), the Supreme Court clarified that Section 13 is an exclusive jurisdiction provision—not a statute of limitations. That case also involved a constitutional challenged to Act 77. The petition for review was filed in the Supreme Court. The Supreme Court dismissed the action and transferred the matter to this Court holding "[t]he petition for Review was filed outside of the 180-day time period from the date of enactment of Act No. 2019-77 during which this Court had exclusive jurisdiction to decide

specified challenges to Act No. 2019-77 … the case is immediately transferred to the Commonwealth Court." In his concurring statement, Justice Wecht expounded further stating, "[t]he statute that conferred exclusive original jurisdiction upon this Court to hear constitutional challenges revoked that jurisdiction at the expiration of 180 days, and there is no question that Petitioners herein filed their petition outside that time limit."

Moreover, were this Court to follow the Commonwealth's argument, then no party would ever be able to challenge unconstitutional measures after 180 days of adoption. It would mean that those who were not yet 18 and therefore unable to vote at the time of adoption would be foreclosed from challenging Act 77. The same would be true for those who recently moved to Pennsylvania, or those who were incapacitated until now, or those who were not yet candidates or public officials. In sum, the Commonwealth's attempt to insulate Act 77 from any future judicial review violates constitutional norms. For these reasons the preliminary objections based on timeliness must be overruled.

IV. ACT 77 IS UNCONSTITUTIONAL

A. THE ADOPTION OF THE 1968 CONSTITUTION DOES NOT SUPPORT RESPONDENTS' ARGUMENTS.

The Commonwealth argues (Resp't Br., 53-57), as it did at oral argument, that the adoption of the 1968 Constitution somehow changed the long-standing judicial interpretations of *Chase* and *Lancaster City* and the legislative understandings of Art. VII, Sections 1, 4 and 14. But the history of Art. VII belies the Commonwealth's arguments.

Pennsylvania adopted significant amendments to the 1874 Constitution to form the 1968 Constitution.[2] But significantly, *not one* of the amendments adopted by the 1967-1968 Constitutional Convention changed the elections provisions of the prior Constitution.[3] That means the constitutional provisions at issue here—Sections 1, 4 and 14—were not affected by the adoption of the 1968 Constitutional.[4] Respondents rest their argument on the 1968 Constitution being so significantly

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[2] *See Constitutional Provisions Adopted by the Convention*, the Pennsylvania Constitutional Convention 1967-68, *available at*: https://www.paconstitution.org/wp-content/uploads/2019/09/Constitutional_Prop.pdf.

[3] The Constitutional Convention of 1967-68, responsible for the 1968 Constitution put forth amendments in only four areas: (1) Legislative Apportionment; (2) Taxation and State Finance; (3) Local Government; and (4) Judicial Administration, Organization, Selection and Tenure. *See Constitutional Provisions Adopted by the Convention* at 3.

[4] *See* Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71 Rutgers U. L. Rev. 287, 300-305 (2018).

different from the prior Constitution of 1874 that *Chase* and *Lancaster City* can no longer be relied upon as valid precedents to decide the case at hand, but the election provisions they say were radically changed were not affected by the adoption of the new Constitution.

Those provisions of the 1874 Constitution that were not amended by the Constitutional Convention of 1967-68 continued to carry the same meaning after 1968. *See Stander v. Kelley*, 250 A.2d 474, 481 (Pa. 1969)("The function of the Constitutional Convention was to propose and [r]ecommend to the electorate of Pennsylvania changes and alterations in the existing State Constitution."). Otherwise, Article VII, Section 4, which was not amended by the 1968 Constitution or at any other time in its history, would be wholly irrelevant after the new Constitution was adopted. This is obviously not the case. The unchanged provisions from the prior Constitution were simply carried into the 1968 Constitution.

All this is to say that the Court in *Lancaster City* relied upon practically identical constitutional provisions to those existing after the adoption of the 1968 Constitution to determine the Legislature had exceeded its authority when it expanded who could vote by absentee ballot without going through the constitutional amendment process. Much to

Respondents' dismay, Sections 1 and 4 were virtually the same in 1924 when the Court in *Lancaster City* relied upon them as they are today. The 1968 Constitution did nothing to undermine *Lancaster City* as valid precedent and Act 77 therefore is unconstitutional.

B. Section 4 Does Not Authorize the Legislature to Ignore the In-Person Voting Requirement of Section 1 or to Expand Absentee Voting Categories Beyond Those Prescribed in Section 14.

The history of Article VII, Section 4 shows why the Respondents' argument fails. Section 4 reads:

> "All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, [t]hat secrecy in voting be preserved."

Respondents argue in their brief that Article VII, Section 4 "expressly give[s] the Legislature plenary power over [the methods of voting.]" Resp't Br. at 45. But Article VII, Section 4 does not grant the Legislature unfettered discretion to dictate the means and methods of voting. That argument ignores three vital facts about Section 4:

(1) Section 4 was adopted long before the Court's decision in *Lancaster City*, which held the Legislature did not have authority to legislate absentee voting methods;

(2) Section 14 was adopted decades after Section 4 and the *Lancaster City* holding – proving that the Legislature lacked plenary authority to enact absentee voting; and

(3) Section 4 applies solely to in-person voting methods because voting by absentee ballot was not considered "secret" and does not guarantee secrecy in voting.

Each of these points is discussed in turn.

1. SECTION 4 WAS ADOPTED LONG BEFORE *LANCASTER CITY* AND SECTION 14'S ADOPTION

Article VII, Section 4, was added to the Pennsylvania Constitution in 1901. Although the Article under which it belongs has been renumbered, the text of Section 4 is identical to the original text in 1901. Section 4 predates the Supreme Court's decision in *Lancaster City* by 23 years. In *Lancaster City*, the Supreme Court held the General Assembly lacked constitutional power to prescribe the means of absentee voting. Unfortunately for Respondents, the Court refused to find that the General Assembly had this authority under Article VII, Section 4. The Court held, despite the existence of Section 4, that the Pennsylvania Constitution

requires in-person voting and any other form of voting can only be permitted by constitutional amendment.

2. Section 14's Enactment Proves that Section 4 Did Not Extend Legislative Authority to Expand Absentee Voting, but Rather Addressed Secret Ballots for In-Person Methods of Voting.

Respondents fail to explain why Section 14—adopted 55 years after Section 4—was necessary if Section 4 already authorized the General Assembly to enact and expand who could vote by mail since 1901. Section 14 was adopted by constitutional amendment in 1957,[5] and—under the Respondents' interpretation of Section 4—in vain. Section 14 was adopted for an obvious reason: the General Assembly's authority under Section 4 was limited only to enacting in-person methods of voting by secret ballot. Otherwise, there existed no justification for adopting Section 14 to give the General Assembly authority it already had.

In sum, Section 4 means today what it has meant at each inflection point in constitutional history—in 1901 (adoption); in 1924 (*Lancaster City*); in 1957 (adoption of Section 14); in 1967 (change from "may" to "shall"); 1968 (carried forward without change); in 1970 (dissent in

[5] Joint Resolution 1, 1957 Pa. Laws 1019.

Kauffman); in 1985 (expanding Section 14 to include those who cannot attend a polling place due to religious holiday and those who cannot vote because of election day duties); and in 1997 (amendments Section 14 to include those away from municipality on election day)—namely that the Legislature's power to enact methods of voting has been limited to in-person methods of voting where secrecy can be maintained. Based on this history, Respondents' argument falls apart. There is no reality where Section 4 grants the Legislature legislative authority to abrogate in-person voting or expand the classifications of qualified absentee voters. Constitutional amendment is the only valid path.

3. THE HISTORY OF VOTING BY SECRET BALLOT SHOWS THAT SECTION 4 CONCERNS IN-PERSON VOTING METHODS, EXCLUDING ABSENTEE BALLOTS.

Historical context further illuminates that Section 4 is limited in scope. Prior to Section 4's adoption in 1901, there was no right to vote by secret ballot under the Pennsylvania Constitution, and no right has ever existed under the federal constitution.[6] States, including Pennsylvania,

[6] *See e.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186, 277 (2010) (J. Scalia, *concurring*) ("I am aware of no contention that the Australian system [secret ballot] was required by the First Amendment (or the state counterparts). That would have been utterly implausible, since the inhabitants of the Colonies, the States, and the United States had found public voting entirely compatible with 'the freedom of speech' for several centuries.").

required voters to cast their votes through a myriad of public methods.[7] New York and Massachusetts began a movement in 1888, and almost 90 percent of the States had followed suit by 1896 in a nationwide effort to combat voter coercion and vote-buying.[8] Section 4 was enacted at the end of this progressive era in 1901, and with it, Pennsylvania joined a movement of states that adopted the traditional secret ballot for in-person voting.

Mail voting, on the other hand, has never been a means of voting by secret ballot.[9] Therefore, Section 14 is not implicated by Section 4's secrecy requirement.[10] This is because absentee voting takes place in an environment that is far from secret—there is no private voting booth, no

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[7] *See id. at 276-77* ("Initially, many States did not regulate the form of the paper ballot.... Taking advantage of this, political parties began printing ballots with their candidates' names on them. They used brightly colored paper and other distinctive markings so that the ballots could be recognized from a distance, making the votes public.").

[8] *Burson v. Freeman,* 504 U.S. 191, 203–05 (1992); *see also*, John C. Fortier and Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, University of Michigan, Journal of Law Reform, Vol. 36, 483 (2003), *available at*: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1415&context=mjlr.

[9] *See id.* at 506 ("[A] number of state constitutions included provisions that explicitly provided for a 'secret ballot.' The secrecy provisions in state constitutions and laws made it hard to justify a system of absentee ballots where a voter did not have the protection of the curtain in the polling place to keep secret his voting selections."); *see also, id.* at 488 ("[T]he secrecy of the Australian ballot included…essential protections[,]" one of which is that secret ballots "were only by election officials at the polling place[.]").

[10] *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924) (noting how absentee ballot voting potentially conflicted with Article VIII, Section 4—now Article VII, Section 4—secret ballot requirement, and suggesting a constitutional amendment was necessary to distinguish an absentee ballot method from Section 4's secrecy requirement).

protections from outside influence, no supervision of officials, etc. Respondents claim, albeit in a footnote (at 45 n. 14), that the secrecy envelope of the absentee ballot is a qualifying feature that makes an absentee ballot a method of secret voting under Section 4 that the Legislature is authorized to prescribe.

This argument falls short. Absentee voting still jeopardizes the secrecy of a voter's ballot because it is cast away from the voter's polling place where measures are in place to protect each voter from undue influence in the voting process. The secrecy envelope and other protections surrounding absentee ballots are imperfect measures to guarantee voting in secret and thus do not qualify absentee voting under the methods of voting mentioned in Section 4 that the Legislature has power to enact.

In sum, Section 4 does not abrogate the in-person voting requirement of Section 1, as interpreted by *Lancaster City*, or render Section 14 superfluous. Ultimately, Section 4 provides no support for the constitutionality of Act 77 and Respondents' argument fails.

C. Section 14's History Shows it Did Not Change the Well-Established Meaning of Section 1 that Voters Are Required to Vote In Person, it Merely Provided Explicit Exceptions to Section 1.

If the General Assembly in fact has the authority to expand absentee voting classes without passing a constitutional amendment like the Respondents assert (Resp't Br. at 38), it is hard to see why Section 14 and its many amendments were ever adopted. But for the Legislature's lack of power under the Constitution to expand absentee voting classes, Section 14 would not exist. The history of Section 14 support's Mr. McLinko's argument here and is helpful to understand why Respondents' position is wrong.

Pennsylvania adopted excuse-based absentee voting for electors other than military servicemen for the first time by constitutional amendment in 1957, affording those who were unavoidably absent because of occupational duties or illness the ability to vote by absentee ballot.[11] If the General Assembly had power to authorize means and methods of absentee voting under either Section 4 or its plenary power, a constitutional amendment giving the General Assembly this power under Section 14 would have been unnecessary. Nevertheless, abiding by the Court's 1924 decision in *Lancaster City*, the Legislature tried for *22 years*

[11] *See* Joint Resolution 1, 1957 Pa. Laws 1019.

to get a constitutional amendment passed that would allow absentee voting for additional electors.

The legislative record is telling. During the amendment's final consideration on the Senate floor, Senator Ruth said:

> [I]n 1935 I introduced the first constitutional amendment on absentee voting. I introduced it in every Session up until the time when someone else picked it up. It looks as though we are now getting it after twenty-two years of work.[12]

The same was said on the floor of the House by Representative Ragot:

> For many sessions in the past similar absentee voting bills were presented by Members of the house. . . . [A]ll can claim some pioneering credit if it finally passes. . . . Many states extend this privilege to their citizens, and Pennsylvania should not be the exception.[13]

It was obvious to these legislators that *Lancaster City* continued to mean what it does today—that absentee voting classes can only be expanded by constitutional amendment. For that reason, they labored for over two decades to pass the 1957 amendment to expand absentee voting rights to certain qualified electors and not others.

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[12] Senate Legislative Journal, Vol. 35, No. 43 at 1531 (May 2, 1957) (emphasis added), *available at*: https://www.legis.state.pa.us/WU01/LI/SJ/1957/0/Sj19570502.pdf.

[13] House Legislative Journal at 204 (Jan. 29, 1957), *available at*: https://www.legis.state.pa.us/WU01/LI/HJ/1957/0/19570129.pdf.

The Legislature continued to amend the Constitution after 1957, showing again that it lacked the power to do so by legislative act. In 1967 the legislature, by constitutional amendment, removed the requirement that a qualified absentee voter be "unavoidably" absent and changed "may" to "shall" concerning the Legislature's duty to provide a means of voting absentee to the enumerated classes of qualified voters.[14] The General Assembly needed a constitutional command because whatever discretion it may have had under the Constitution was limited to absentee voting.

Then, in 1985, Section 14 of the Constitution was amended to expand absentee further to include to voters with religious excuses and to voters assuming election day duties.[15] Notably, the 1985 amendment began as legislation that would have expanded the right to vote absentee to these classes of voters, but the General Assembly realized that this could not be accomplished by statute but only through constitutional amendment.[16] In 1997, Section 4 was amended again to accommodate voters

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[14] Joint Resolution 5, 1967 Pa. Laws 1048.

[15] Joint Resolution 1, 1985 Pa. Laws 555.

[16] The legislative record shows that Representative Itkin introduced an amendment to the bill that would "change the form of the bill to a proposed amendment to the Pennsylvania Constitution" because the legislature could not "do [it] statutorily by amending the Election Code." House

away from their municipality.[17] Even when the General Assembly considered S.B. 411 in 2019, a constitutional amendment similar to Act 77, they understood a constitutional amendment was required.[18]

Before Act 77, each time the General Assembly wished to expand the class of those eligible to vote by absentee, it properly understood that it could only be done by amending the Pennsylvania Constitution. Respondents argue that statutes permitting military spouses and vacationers to vote by mail were passed by the General Assembly without amending Section 14. Resp't Br., 50-51. While the Pennsylvania Supreme Court suggests such statutes are unconstitutional,[19] the constitutionality of those particular statutes is not before the Court—Act 77 is.

Legislative Journal, No. 88 at 1713 (Oct. 26, 1983), *available at*: https://www.legis.state.pa.us/WU01/LI/HJ/1983/0/19831026.pdf.

[17] Joint Resolution 3, 1997 Pa. Laws 636. Concerning Section 14, Representative Herman said, "There have been many different situations where people have been unable to vote [by absentee ballot]…and *the Constitution has been changed to accommodate them*." House Legislative Journal, No. 31 at 840 (May 31, 1996) (emphasis added), *available at*: https://www.legis.state.pa.us/WU01/LI/HJ/1996/0/19960513.pdf#page=20.

[18] The bill's description read: "Pennsylvania's current Constitution restricts voters wanting to vote by absentee ballot" and therefore the amendment was proposed to "eliminate these limitations, empowering voters to request and submit absentee ballots for any reason." Senator Mike Folmer et. al, Memoranda for S.B. 411 (Jan. 29, 2019), *available at*: https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=28056.

[19] One provision was challenged in 1970, but the Supreme Court declined to render a merits decision and instead dismissed the challenge for lack of standing. *See Kauffman v. Osser*, 271 A.2d 236, 240 (Pa. 1970) (opinion dissenting from dismissal on standing grounds)("The statute is thus a clear and unconscionable violation of the Pennsylvania Constitution, which the majority condones and I must condemn. Absent a constitutional amendment, such enactment cannot constitutionally

D. Respondents Give Undue Weight to the 1967 Amendment to Section 14, Which Changed "may" to "shall".

Respondents argue that the 1967 amendment to Section 14, which changed "may" to "shall" concerning the Legislature's duty to provide a manner for certain classes of electors to vote by absentee, "sets a floor for absentee voting; it does not establish a ceiling." Resp't Br., 49. Therefore, Respondents assert Act 77 is constitutional. However, this argument is unsupported by text and legislative history.

Respondents are correct in their claim that Section 14 once *permitted* the General Assembly to enact a method for voting by mail for the enumerated categories in Section 14 but now *requires* the legislature to do so after the 1967 amendment. Resp't Br., 50. Respondents would be wise to end their argument there. This change simply mandated the General Assembly to afford absentee voting for the prescribed classes of citizens when it previously had the discretion to do so or not to do so. This is the only logical conclusion one can glean from the prescription of specific classes of citizens that follow the word "shall."

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stand."). Moreover, the validity of these involves a more complicated legal question because of the 1985 enactment of the federal Uniformed and Overseas Citizens Voting Act, 42 U.S.C. §§ 1973ff *et seq.*, which requires states to permit military members and their spouses living overseas to vote by mail in federal elections.

If the 1967 amendment changing "may" to "shall" in Section 14 gave the Legislature power it did not previously possess to expand who could vote by absentee ballot, the Legislature was unaware of it. The only remarks about the amendment's substance were made by Representative Gallen upon its final passage in the House:

> Mr. Speaker, a few very brief remarks on the contents of Senate bill No. 6. This proposed constitutional amendment, which passed both Houses in the last session unanimously, would shorten the time a person must reside in the State from one year to 90 days in order to vote, and for a person who has returned to Pennsylvania, it would shorten the time from 6 months to 90 days. This is the *only major change* that this constitutional amendment makes, and it will allow many more of our citizens to be franchised. Thank you, Mr. Speaker. [20]

The Legislature did not note any other major change this amendment made, including one as colossal as Respondents purport occurred. Respondents' entire argument relies on the premise that this change gave the Legislature unfettered power to expand the absentee voting classes. The 1967 amendment itself proves this is not the case and Act 77 is therefore unconstitutional.

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[20] House Legislative Journal, Vol. 1, No. 6, 84 (Jan. 30, 1967) (emphasis added), *available at*: https://www.legis.state.pa.us/WU01/LI/HJ/1967/0/19670130.pdf.

CONCLUSION

While Respondents may prefer Act 77, it violates the Pennsylvania Constitution and must be declared unconstitutional. Petitioner incorporates all prior arguments and respectfully requests that this Court grant his Application for Summary Relief and deny Respondents' Application.

Respectfully submitted,

Date: October 29, 2021

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CERTIFICATE OF COMPLIANCE

I, Walter S. Zimolong, counsel for petitioner, certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than nonconfidential information and documents.

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CERTIFICATE OF SERVICE

I, Walter S. Zimolong, counsel for petitioner, hereby certify that on the date indicated below, I caused to be served a true and correct copy of the foregoing document to the following:

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