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.

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.

CASES CONSOLIDATED
No. 244 M.D. 2021
No. 293 M.D. 2021

PETITIONERS' BRIEF IN RESPONSE TO RESPONDENTS' APPLICATION FOR SUMMARY RELIEF AND PRELIMINARY OBJECTIONS

Filed on behalf of Petitioners, 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

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INTRODUCTION

The Respondents' Application for Summary Relief should be denied and Respondents' Preliminary Objections should be overruled because (1) Act 77 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 ("Act 77"); 25 Pa.Stat. §§ 3146.6(c), 3150.16(c)) violates the Constitution of the Commonwealth of Pennsylvania by permitting all electors to vote by mail, without qualifying for any of the Commonwealth's constitutionally-prescribed exemptions and (2) Act 77 further violates the U.S. Constitution, which only grants state legislatures authority to regulate elections in accordance with the relevant state constitution. This case is not about whether no excuse mail-in voting is a good idea or about whether no excuse mail-in balloting should be legally permissible in Pennsylvania. Those issues are for the General Assembly and the Pennsylvania voters to decide in accordance with the proper process of passing a constitutional amendment, should they decide to proceed with one.

This Court found a likelihood of success on the merits of this constitutional challenge in a similar case (the *Kelly* case) in November 2020 when petitioners therein sought to preliminarily enjoin the certification of the 2020 general election results. This Court stated that there appeared to be "a viable claim that the mail-in ballot procedures set forth in Act 77 contravene Pennsylvania Constitution Article

VII, Section 14." Unfortunately, the Pennsylvania Supreme Court declined to consider the merits of the constitutional issues and dismissed that case in a *per curiam* Order on the grounds of laches. But there is no basis for a laches defense in the present case before this Court because Petitioners seek no retrospective relief. Neither is there a statutory time bar to this constitutional challenge. All of the Petitioners meet the legal requirements for standing. The relief sought by Petitioners will rectify the Act 77's violations of the Pennsylvania and U.S. Constitutions going forward and will restore to the people of Pennsylvania the right to vote on any amendment seeking to expand the absentee voting provisions of the Pennsylvania Constitution.

Petitioners incorporate by reference their Application for Summary Relief, as well as Petitioner McLinko's Response in Opposition to Respondents' Preliminary Objections to Amended Petition for Review ("McLinko Response"), to the extent applicable, to avoid duplicative briefing as much as possible. No party has identified any factual issues that would preclude summary disposition of this case and there appear to be no material facts in dispute.

ARGUMENT

I. There is no statutory time bar to Petitioners' constitutional challenge.

There is no statutory time bar to Petitioners' constitutional challenge. Respondents argue that Section 13 of Act 77 functions as a statute of limitations on constitutional challenges to Act 77. It does not. Section 13 is an exclusive jurisdiction provision, granting exclusive original jurisdiction to the Supreme Court of Pennsylvania for certain claims for a period of 180 days from the effective date of Act 77 (October 31, 2019). Section 13 expired and no longer operative. As a result, this Court has original jurisdiction over this action pursuant to 42 Pa.Cons.Stat. § 761(a)(1) ("Against the Commonwealth government, including any officer thereof, acting in his official capacity").

Section 13 of Act 77 does not state that challenges to Act 77's mail-in voting provisions "must be commenced within 180 days" of the effective date of Act 77. Rather, Section 13 of Act 77 provides that "[a]n action under paragraph (2)" must be commenced within 180 days of the effective date of this section (and the effective date was October 31, 2019). Paragraph (2) of Section 13 of Act 77, in turn, provides as follows:

> The 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). The Supreme Court may take action it deems appropriate, consistent with the Supreme Court retaining jurisdiction over the matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief.

While this Court found applicable the exclusive jurisdiction provision of Act 77 to a challenge to Sections 1306 and 1306-D of the Election Code in *Crossey v. Boockvar*, Pa. Commw. No. 266 MD 2020, this Court also noted in its Recommended Findings of Fact and Conclusions of Law that such transfer was because "the Supreme Court had exclusive jurisdiction if a challenge was brought within 180 days of Act 77's effective date." *Id.*, Recommended Findings of Fact and Conclusions of Law (Filed Sept. 04, 2020). This Court bifurcated the matter and retained jurisdiction over the preliminary injunction only. *Id*.; *see also* discussion of *Delisle v. Boockvar*, 95 MM 2020 (Pa. 2020) at McLinko Response, pp. 11-12.

Thus, while Act 77 did initially confer exclusive jurisdiction on the Supreme Court to address constitutional challenges to certain provisions therein, that exclusive jurisdiction terminated 180 days after Act 77 was passed, on April 28, 2020. Paragraph (3) of Section 13 of Act 77 (which contains the 180-day limit) specifically applies only to paragraph (2).

The suggestion that a petitioner would ever be precluded from challenging the constitutionality of a statute because of a provision included in legislation would be an interpretation that is both "absurd," 1 Pa. C.S. § 1922(1), and violative of "the Constitution of the United States [and] this Commonwealth". *Id*. § 1922(3). As noted in *William Penn School District v. Pa. Dep't of Ed.*, 170 A.2d 412, 418 (Pa. 2017):

> It is settled beyond peradventure that constitutional promises must be kept. Since *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803), it has been well-established that the separation of powers in our tripartite system of government typically depends upon judicial review to check acts or omissions by the other branches in derogation of constitutional requirements. That same separation sometimes demands that courts leave matters exclusively to the political branches. Nonetheless, "**[t]he idea that any legislature ... can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions**." *Smyth v. Ames*, 169 U.S. 466, 527, 18 S.Ct. 418, 42 L.Ed. 819 (1898).

(emphasis added); *see also Robinson Twp., Wash. Cty. v. Commonwealth*, 83 A.3d 901, 927 (Pa. 2013) ("[I]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts."). While, consistent with and pursuant to the Pennsylvania Constitution, the General Assembly can set the jurisdiction of the courts, it has no authority to limit the window of time in which the constitutionality of a law can be challenged. Moreover, where a statute was *void ab initio* because it was

unconstitutional, provisions within that statute are not operable to put time limitations on actions challenging it.

None of the cases cited by Respondents address the issue of whether a legislature can put a statute of limitations within a statute that functions to time bar facial constitutional challenges to the statute itself. The few cases cited by Respondents that even involved provisions within statutes themselves purporting to limit the time within which the very same law could be constitutionally challenged were all federal cases that put time limits on constitutional challenges to federal laws that waived sovereign immunity. Federal courts are courts of limited jurisdiction, meaning they can only hear cases authorized by the United States Constitution or federal statutes. Waivers of sovereign immunity are voluntary, not mandatory. Analyzing statutes of limitations on the jurisdiction of federal courts to hear constitutional challenges to federal statutes waiving sovereign immunity presents a different issue than the validity of a time limit on challenging a change to Pennsylvania election laws in conflict with its Constitution. To enforce such a statute of limitations would effectively allow amendment of the Pennsylvania Constitution by a new means not prescribed therein: by legislation and the mere passage of time.

Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 275-277 (1983) involved whether the 12-year statute of limitations for bringing actions

under the Quiet Title Act of 1972 applied to actions brought under that Act by states. The Quiet Title Act of 1972 functioned as a waiver of sovereign immunity by the United States, allowing actions to adjudicate title disputes involving real property in which the United States claims an interest. *Id*. In the course of the decision, the United States Supreme Court noted that "A constitutional claim can become time-barred just as any other claim can." *Id.* at 292 (citing *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) (applying a statute of limitations to a bar a 42 U.S.C. § 1983 claim contesting the denial of a waiver of a state licensing exam requirement for chiropractors) and *Soriano v. United States*, 352 U.S. 270 (1957) (applying a statute of limitations to bar a claim for compensation for property taken by the Philippine guerrilla forces during World War II)). Those cases involved statutes of limitations barring compensation for constitutional violations, in which types of cases laches and other time bars are relevant. Petitioners do not cite any cases supporting a statutory or equitable (laches) time bar to future and ongoing facial constitutional violations. Nor do they cite any cases stating that a legislature can put a time limit within a statute limiting the time within which facial constitutional challenges to the statute itself can be brought.

The statute that the *Block* court contemplated waived immunity for a certain period of time, and once that waiver expired, it deprived the court of jurisdiction to hear claims premised on that waiver. The *Block* decision did not bar a

constitutional claim at all, much less bar one on the basis of a statute of limitations. Rather, the decision merely barred a quiet title action, which bar did not apply to any constitutional claims as to an unconstitutional taking of the property at issue. *Id*. at 291-292.

Turner v. People of State of New York, 168 U.S. 90, 92 (1897) involved the constitutionality of a statute of limitations requiring challenges to sale of lands for non-payment of taxes to be brought within two years. *Dugdale v. U.S. Cust. and Border Protec.*, 88 F. Supp. 3d 1, 8 (D.D.C. 2015) involved enforcing a 60-day jurisdictional time limit for actions by aliens challenging the constitutionality of an expedited removal statute, not a statute of limitations on such actions. *Greene v. Rhode Island*, 398 F.3d 45, 53–55 (1st Cir. 2005) involved enforcing a 180-day jurisdictional time limit on actions challenging the constitutionality of the Rhode Island Indian Claims Settlement Act ("Settlement Act"). Neither *Dugdale* nor *Green* addressed the validity of such jurisdictional time limits as a general matter, but rather simply applied the limitations periods without questioning their validity. *Cacioppo v. Eagle Cnty. Sch. Dist. Re- 50J*, 92 P.3d 453, 457 (Colo. 2004) involved the constitutionality of a statute of limitations requiring petitions to contest ballot titles to be brought within five days after the setting of the ballot title. *Native Am. Mohegans v. United States*, 184 F. Supp. 2d 198, 217-218 (D. Conn. 2002) involved the same Settlement Act as *Greene* and analyzed the

reasonableness of 180 days from a due process perspective, but did not consider as a general matter the validity of a legislature's limit of the time within which to bring a substantive constitutional challenge to a law by way of a provision within the law itself.

Moreover, the 180-day limit in this case is unreasonable because of the difficulty of establishing the harm necessary to support standing within that time period. The 180-day period expired before any election was even completed utilizing the no excuse mail-in ballot provisions of Act 77.

Section 13 of Act 77 would also be invalidated by future amendments to the Pennsylvania Election Code, such as occurred with Act 12 of 2020. *See* Act of Mar. 27, 2020, Section 1, P.L. No. 41, No. 12 (hereinafter "Act 12"). Act 12, *inter alia*, amended Section 1302, which is noted in Act 77 as being subject to the 180-day exclusive jurisdiction period. Respondents' reading of Section 13 of Act 77 would limit any judicial review of the constitutionality of changes made to Act 77 by Act 12 to a period of 1 month (*i.e.*, from March 27, 2020 to April 28, 2020) and would effectively preclude judicial review of any future amendment to those provisions because such review would not be within the 180-day initial window ending on April 28, 2020. To limit constitutional challenges in such a manner would be an "absurd," "unreasonable," and unconstitutional reading of the statute. 1 Pa.Cons.Stat. § 1922(1), (3).

II. Respondents cannot meet their burden of establishing a laches defense.

Respondents cannot meet their burden of establishing a laches defense. "[L]aches may bar a challenge to a statute based upon procedural deficiencies in its enactment." *Stilp v. Hafer*, 718 A.2d 290, 294 (Pa. 1998). However, in *Stilp*, the Pennsylvania Supreme Court found that "Appellees concede[d] that laches may not bar a constitutional challenge to the substance of a statute. . ." *Id*. Indeed, the holding in *Stilp* is in direct contravention to the Respondents' argument, holding that while the principle of laches may apply when a constitutional challenge is on procedural grounds, it does not apply with respect to the substance of a statute. *Id*. (citing *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988) (Stating that "laches and prejudice can never be permitted to amend the Constitution.")); *see also Wilson v. School Distr. of Philadelphia*, 195 A. 90, 99 (Pa. 1937) ("We have not been able to discover any case which holds that laches will bar an attack upon the constitutionality of a statute as to its future operation . . . . To so hold would establish a dangerous precedent, the evil effect of which might reach far beyond present expectations.").

Petitioner's constitutional claim is purely substantive, and therefore cannot be defeated by laches. Unlike *Stilp* where the plaintiffs argued that a bill was not referred to the appropriate committee, and not considered for the requisite number of days, *Stilp*, 718 A.2d at fn. 1, here Petitioner argues that the substance of Act 77

directly contravenes the Pennsylvania Constitution. *See* Petition ¶¶ 11-40. Petitioner makes no challenge to the procedural mechanisms through which Act 77 was passed – *e.g.*, bicameralism and presentment – but rather, what is substantively contained within the legislative vehicle that became Act 77. The General Assembly attempted to unconstitutionally expand absentee voting through Act 77. Such a patent and substantive violation of the Constitution cannot be insulated from review by the mere passage of time. *See Wilson*, 195 A. at 99. Violating the constitutional limits on absentee voting is not a mere procedural issue, but rather one of substance.

Even if laches can apply to bar retrospective relief in a case involving a substantive constitutional challenge, laches can only bar relief where "the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another." *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). The two elements of laches are "(1) a delay arising from Appellants' failure to exercise due diligence and (2) prejudice to the Appellees resulting from the delay." *Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998) (citing *Sprague*, 550 A.2d at 187-88).

Sprague is on point. In *Sprague*, the petitioner, an attorney, brought suit challenging the placement of two judges on a ballot. *Id*. Respondents raised an objection based on laches because petitioner waited 6.5 months from constructive

notice that the judges would be on the ballot to bring suit. In evaluating the facts that petitioner and respondents could have known through exercise of "due diligence," the court found that while petitioner was an attorney and was therefore charged with the knowledge of the constitution, the respondents (the Governor, Secretary, and other Commonwealth officials) were also lawyers and similarly failed to apply for timely relief. *Id*. at 188. The Pennsylvania Supreme Court, in denying the laches defense, reasoned that "[t]o find that petitioner was not duly diligent in pursuing his claim would require this Court to ignore the fact that respondents failed to ascertain the same facts and legal consequences and failed to diligently pursue any possible action." *Id*. Courts will generally "hold that there is a heavy burden on the [respondent] to show that there was a deliberate bypass of pre-election judicial relief." *Toney v. White*, 488 F.2d 310, 315 (5th Cir. 1973). The Respondents have not met that burden here. Instead, they pretend that the burden is on Petitioners to disprove laches.

In *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 134-35, 126 A. 199 (1924) (hereinafter *Lancaster City*) and *Chase v. Miller*, 41 Pa. 403, 418-19 (1862), laches did not bar the Pennsylvania Supreme Court from voiding all unlawful mail-in ballots cast at the elections at issue. The legislation at issue in *Chase* was enacted **23 years** prior to its decision, 41 Pa. at 407 ("Act of 2d July 1839, § 155") and in *Lancaster City* the legislation was enacted **one year and**

two months prior to its decision, 281 Pa. at 133 (Act May 22, 1923 (P. L. 309; Pa. St. Supp. 1924, § 9775a1, et seq.)). In both cases, the constitutionality of the legislation at issue was successfully challenged after the election had occurred.

In 2018, the Pennsylvania Supreme Court heard a challenge to the state's congressional district plan brought 6 years and multiple elections after the 2011 congressional redistricting map legislation was enacted. *See League of Women Voters v. Commonwealth*, 645 Pa. 341, 179 A.3d 1080 (Pa. 2018). On November 23, 2020, well after the election had already taken place, the Pennsylvania Supreme Court also decided another Act 77 case regarding whether Act 77 required county boards of elections to disqualify absentee ballots (including no-excuse absentee ballots) based on the lack of a signature on the outer secrecy envelope. *See In re Canvass of Absentee and Mail-In Ballots*, 241 A.3d 1058 (Pa. 2020).

Although the Petitioners could be charged with knowledge of the Constitution, just like the petitioner was in *Sprague*, Petitioners are not guilty of want of due diligence in the instant action because Petitioners are only seeking prospective relief, as to future elections. Conversely, as in *Sprague*, Respondent Degraffenreid is an attorney, and should be charged with knowledge of the Constitution, and particular knowledge of the Election Code. In *Sprague*, the taxpayer's more than six-month delay in bringing an action challenging the

election did not constitute laches thereby preventing the Commonwealth Court from hearing the constitutional claims. 550 A.2d at 188. Additionally, the Commonwealth appears to have had knowledge of the constitutional issues involved and began then abandoned the process of amending the Constitution to allow no excuse mail-in ballots. Petition ¶¶ 38-40.

In short, the Respondents want this Court to charge Petitioners with failure to institute an action more promptly, while Respondents possess extremely specialized knowledge, and failed to take any corrective actions (such as by bringing a declaratory judgment action). Accordingly, the Commonwealth's and the Respondents' collective failures place the weight of any prejudice squarely on their shoulders. Laches is a shield to protect respondents from gamesmanship, it is not a sword to use against harmed individuals to insulate Respondents' unconstitutional actions.

The claims in this case are distinct from those in *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020) (*per curiam*). The relief that Petitioners who are members of the Pennsylvania House of Representatives ("the House Petitioners") seek here has been specifically tailored to avoid retrospective relief. In contrast, in *Kelly* the petitioners sought relief that would "invalidate the ballots of the millions of Pennsylvania voters who utilized the mail-in voting procedures established by Act 77." *Id*. at 1256. Here, Petitioners seek only prospective relief. In *Kelly*, in

support of applying laches to dismiss the claim, the Pennsylvania Supreme Court noted and entirely relied upon prejudice in the form of "the disenfranchisement of millions of Pennsylvania voters," *id*., but no such prejudice would ensue from granting the relief that the Petitioners seek here. On the contrary, the only disenfranchisement of millions of voters at issue in this case is the disenfranchisement of millions of Pennsylvania voters who were supposed to have the opportunity to vote on a constitutional amendment prior to the implementation of no excuse mail-in balloting in Pennsylvania.

Although the petitioners in *Kelly* also sought prospective relief, the brief Pennsylvania Supreme Court *per curiam* opinion made no mention of it and focused exclusively on retrospective relief when dismissing the case on the grounds of laches. *Id*.[1] Moreover, the Pennsylvania Supreme Court has made it clear that *per curiam* orders have no *stare decisis* effect. *Commonwealth v. Dickson*, 918 A.2d 95, 108 n. 14 (Pa. 2007). Respondents acknowledge this at fn. 7 of Respondents' Memorandum in Support of Respondents' Application for Summary Relief Regarding the Bonner Petition ("Respondents' Mem."). Nevertheless, they attempt to treat *Kelly* as if it were binding precedent.

[1] Only Chief Justice Saylor's partial dissent made any mention of the prospective relief requested.

Respondents point to no prior case where a *per curiam* opinion was relied upon in such a manner.

Respondents similarly point to no precedent for using expenses incurred in implementing an unconstitutional law as support for a laches defense in an action challenging the law's constitutionality.[2] Allowing such a basis for a laches defense would insulate virtually any unconstitutional law from challenge, as governments frequently incur costs in implementing laws. Where there is strong evidence that the government knew a statute was unconstitutional, no weight should be given in equity to such costs.

Koter v. Cosgrove, 844 A.2d 29, 34 (Pa.Commw.Ct. 2004), cited by Respondents, had nothing to do with costs and made no mention of costs incurred in implementing an unconstitutional law. *Koter* involved a procedural challenge (failure to properly post notices of a referendum) and not a substantive constitutional challenge to a law. *Koter* involved an election contest, and election contests have their own unique interests because:

> The continuing and efficient operation of government is dependent upon the prompt resolution of election contests. Our system depends upon the timely certification of a winner. The operation of each of three branches of government would be threatened in the absence of clear time limitations for the challenging of an election.

[2] Likewise, the Intervenor Respondents fail to cite any precedent for using private party expenses incurred in reliance upon an unconstitutional law as a basis for a laches defense against challenging the law's constitutionality.

Koter, 844 A.2d at 33.

Fulton v. Fulton, 106 A.3d 127, 135 (Pa. Super. Ct. 2014), also cited by Respondents, is also inapplicable. While the *Fulton* decision at least referenced costs in relation to laches, it involved a private action to set aside conveyances from an estate, not a challenge to a statute or governmental action of any kind.

In the case at bar, the Commonwealth knew the law was unconstitutional. Verified Pet., ¶¶ 38-40. It should not be permitted to hide behind spending taxpayer money in unreasonable reliance on an unconstitutional law as a means of preventing a constitutional challenge. Moreover, if the Commonwealth wants to make use of past costs incurred in implementing no excuse mail-in voting, it could still implement no excuse mail-in voting through a proper constitutional amendment, if the Pennsylvania voters approve. The money spent educating voters about no excuse mail-in voters will not have been a total waste if a constitutional amendment is put on the ballot, as voters can now make a more informed choice about whether to amend the Pennsylvania Constitution to allow no excuse mail-in balloting. Granting the relief sought by Petitioners would not disenfranchise anyone, as Respondents inexplicably suggest at Respondents' Mem., p. 25. No relief is sought as to any past election.

Inconsistently, Respondents simultaneously claim that the House Petitioners were not particularly harmed, such that they lacked standing, but also that they

should have brought this action sooner, before any elections occurred and the harms to the House Petitioners from the unconstitutional mail-in voting became a retrospective reality. Had the House Petitioners brought an action sooner, Respondents would have contended that the harms that the House Petitioners claim are too speculative to support standing. For the same reason that standing was lacking in *In re Gen. Election 2014*, No. 2047 CD 2014, 2015 WL 5333364 (Pa.Commw.Ct. Mar. 11, 2015) and *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970), the House Petitioners also lacked standing to assert their claims at least until after millions voted utilizing the no excuse mail-in provisions of Act 77 and the vote totals were announced.

Act 77 cannot be insulated from challenge as to its constitutionality at all times, due to a lack of standing prior to its utilization in elections and due to laches after its utilization in elections. There has to be or have been some way at some time for some litigant to obtain review of the merits of issues of this case by the courts. All avenues cannot possibly be at all times blocked by procedural walls, yet if Respondents' arguments are correct, all avenues always were and will be blocked.

III. Petitioners claims under the U.S. Constitution are timely.

Petitioners claims under the U.S. Constitution are timely. The analysis for determining whether and what state statute of limitations *could potentially* apply in

the context of federal constitutional rights being enforced through a § 1983 claim in state court must consider uniformity in federal law across the nation. *Wilson v. Garcia*, 471 U.S. 261, 269-271 (1985) ("Even when principles of state law are borrowed to assist in the enforcement of this federal remedy, the state rule is adopted as 'a federal rule responsive to the need whenever a federal right is impaired.' *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229, 240, 90 S.Ct. 400, 406, 24 L.Ed.2d 386 (1969).").

There is no specific statute of limitations governing § 1983 claims – "a void which is commonplace in federal statutory law." *Wilson*, 471 U.S. at 266 (quoting *Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980)). In cases where Congress has not established a time limitation for a federal cause of action, the "settled practice" is to use a state law time limitation as federal law "***if it is not inconsistent with federal law or policy to do so***." *Id.*at 266-267 ("In 42 U.S.C. § 1988, Congress has implicitly endorsed this approach with respect to claims enforceable under the Reconstruction Civil Rights Acts.").

Under 42 U.S.C. § 1988, courts are directed to follow a three-step process in determining the rules of decision applicable to federal civil rights claims:

> First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' [42 U.S.C. § 1988.] If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and

> statutes' of the forum state. *Ibid.* A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.' *Ibid." Burnett v. Grattan,* 468 U.S. 42, 47–48, 104 S.Ct. 2924, 2928, 82 L.Ed.2d 36 (1984).

Wilson, 471 U.S. at 267. When looking at the appropriate state law to apply under this process, the Court adopts the most analogous, generally applicable rules for a given *cause of action*. The U.S. Supreme Court, and on remand the Third Circuit, has already had the occasion to determine the statute of limitations for §1983 claims involving Pennsylvania law:

> "[A]ll § 1983 claims should be characterized for statute of limitations purposes as actions to recover damages for injuries to the person." *Springfield Township School District v. Knoll,* [471] U.S. at [289], 105 S.Ct. at 2065. ***The Supreme Court thus adopted a bright-line approach to the problem of determining what statute of limitations should be applied in § 1983 actions***. In *Wilson v. Garcia,* the Court held that even though constitutional claims alleged under § 1983 encompass numerous and diverse topics and subtopics, the state statute of limitations governing tort actions for the recovery of damages for personal injuries provides the appropriate limitation period. 471 U.S. at ——, 105 S.Ct. at 1948. The Court believed that Congress in 1871 would have characterized § 1983 as conferring a general remedy for injuries to personal rights. Id. at ——, 105 S.Ct. at 1948. The Court expressly rejected the possibility that states' residuary statutes of limitations be applied in § 1983 actions: "The relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many States." Id. at ——, 105 S.Ct. at 1948.
>
> Pennsylvania has a two-year limitations period for actions to recover damages for personal injuries. 42 Pa.Cons.Stat. § 5524 (Purdon Supp.1984). The statute provides in relevant part:

> The following actions and proceedings must be commenced within two years:
>
> (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.
>
> *Id.*

Knoll v. Springfield Tp. School Dist., 763 F.2d 584 (3rd Cir. 1985) (emphasis added); *accord* 42 Pa.Cons.Stat. § 5524.

Accordingly, a two-year statute of limitations applies to this case beginning from the date the constitutional injury was recognized. The earliest date on which the constitutional injury was recognizable was upon the passage of Act 77 on October 31, 2019. The House Petitioners filed their claims less than two years later (in August 2021). Accordingly, the House Petitioners have timely filed their claims under the U.S. Constitution. Holding otherwise would break the national uniformity with similar facial constitutional challenges brought in other states and federal districts involving elections and voting rights protected by the U.S. Constitution.

IV. The House Petitioners have standing to challenge the constitutionality of Act 77.

The House Petitioners have standing to challenge the constitutionality of Act 77. In general, to have standing, a party must have an interest in the controversy

that is distinguishable from the interest shared by other citizens that is substantial, direct and immediate. *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). In this case, all of the House Petitioners have substantial, direct and immediate interests in whether Respondents are permitted to continue to allow mail-in ballots that do not meet the Pennsylvania Constitutional requirements and those interests are distinguishable from the interests shared by all other citizens, because the House Petitioners are past and likely future candidates for office and are registered Pennsylvania voters. Verified Pet. ¶ 17.

As registered voters, the House Petitioners had a right to vote on a constitutional amendment prior to the implementation of no excuse mail-in voting in Pennsylvania. Moreover, they suffer from vote dilution in every election in which improper mail-in ballots are counted, that is, ballots from people who are not qualified electors under Pa. Const. art. VII, § 1 because they did not "offer to vote" by making manual delivery of the ballot to the officers appointed by law to receive it or otherwise meet the requirements of Pa. Const. art. VII, § 14. In addition, as candidates, the House Petitioners likewise suffer from having their election impacted by improper mail-in ballots and having to adapt their campaigns to an unconstitutional law.

Respondents' claim that Pennsylvania case law confirms that voters lack standing to challenge Act 77, citing *In re Gen. Election 2014*, No. 2047 CD 2014,

2015 WL 5333364 (Pa.Commw.Ct. Mar. 11, 2015). However, that case involved an appeal of an order granting an emergency application for an absentee ballot to a single voter, because the voter had not submitted a notarized affidavit with the application, and there was a grand total of five absentee ballots at issue. *Id*. at *1.[3] The voters who attempted to appeal were not even parties in the proceeding below, which was the first and foremost reason that this Court found that they lacked standing to appeal. *Id*. at *3. This Court also found that the voters additionally lacked standing because they were not "aggrieved" by the order at issue because their allegation that five absentee ballots in any way affected the outcome of the General Election was unsupported. *Id*. at *4.

In so holding, this Court discussed *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970), and Respondents' attempt to rely on that decision as well to assert that voters never have standing to challenge the constitutionality of election laws. Quoting *Kauffman v. Osser*, 271 A.2d 239-240, this Court highlighted "assumption" in the following:

> Basic in appellants' position is the *assumption* that those who obtain absentee ballots, by virtue of statutory provisions which they deem invalid, will vote for candidates at the November election other than those for whom the appellants will vote and thus will cause a dilution of appellants' votes. This assumption, unsupported factually, is

[3] It appears that a virtually identical decision regarding one of the other five absentee ballots at issue (*In Re: General Election 2014 Muriel Kauffman*) was reported at 111 A.3d 785 on the exact same date, and had a different docket number of 2043 C.D. 2014.

> unwarranted and cannot afford a sound basis upon which to afford appellants a standing to maintain this action.

See In re Gen. Election 2014, 2015 WL 5333364 at *4. It was not that vote dilution could never support standing, but rather the speculative nature of the claim that dilution would occur that defeated standing.

In the case at bar, the likelihood of vote dilution impacting the outcome of elections is not remote or speculative as it was in cases where only small numbers of votes are at issue. As noted by Intervenor Respondents' Brief in Support of Preliminary Objections and Application for Summary Relief ("Intervenor Respondents Brief") at p. 4, of the approximately 6.9 million Pennsylvanians who voted in the November 2020 general election, roughly 2.7 million used mail ballots. *See* Pa. Dep't of State, Official Returns (Nov. 3, 2020) https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G&IsActive=0/. The enormous number of ballots cast as no excuse mail-in ballots in the elections since Act 77 took effect take it out of the realm of speculation. To the contrary, voter dilution will very likely continue to occur if Act 77 is not declared unconstitutional.

Moreover, although to have standing a party must ordinarily have an interest in the controversy that is distinguishable from the interest shared by all other citizens that is substantial, direct and immediate, there are certain cases that warrant the grant of standing even where the interest at issue "arguably is not

substantial, direct and immediate." *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988) (citing, *inter alia*, *Application of Biester*, 409 A.2d 848, 852 (Pa. 1979)). "[A]lthough many reasons have been advanced for granting standing to taxpayers, the fundamental reason for granting standing is simply that otherwise a large body of governmental activity would be unchallenged in the courts." *Biester*, 409 A.2d at 852 (citation omitted).

The *Biester* Court elaborated on the benefit of granting standing under such circumstances, holding that:

> The ultimate basis for granting standing to taxpayers must be sought outside the normal language of the courts. Taxpayers' litigation seems designed to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.... Such litigation allows the courts, within the framework of traditional notions of 'standing,' to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts.

Biester, 487 Pa. at 443 n.5 (citation omitted); *see also Consumer Party of Pennsylvania v. Commonwealth*, 507 A.2d 323, 328 (Pa. 1986) (same). Other factors to be considered include: that issues are likely to escape judicial review when those directly and immediately affected are actually beneficially as opposed to adversely affected; the appropriateness of judicial relief; the availability of redress through other channels; and the existence of other persons better situated to assert claims, for example. *Sprague*, 550 A.2d at 187 (citations omitted).

In *Sprague*, the petitioner challenged placing one seat on the Supreme Court and one on the Superior Court on the general election ballot. *Id*. at 186. An election to fill Supreme Court and Superior Court offices may not be placed on the ballot during a general election because the Pennsylvania Constitution mandated that all judicial officers were to be elected at the municipal election next proceeding the commencement of their respective terms. *Id*. at 186. Under those circumstances, the Pennsylvania Supreme Court specifically held that if standing were not granted, "the election would otherwise go unchallenged," that "[j]udicial relief is appropriate because the determination of the constitutionality of the election is a function of the courts," and that "redress through other channels is unavailable." *Id*. (citing *Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165 (1981); and *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 58 A.2d 464 (1948)).

Here, as in *Sprague*, if standing were not granted, Act 77 would otherwise go unchallenged; redress through other channels is unavailable because those directly and immediately affected are actually beneficially as opposed to adversely affected; and the only persons better situated to assert the claims at issue are possibly the Respondents, who did not choose to institute legal action. Determination of the constitutionality of election laws remains a function of the courts and granting standing would add judicial scrutiny of the statutory and constitutional validity of the acts of public officials involved in the elective

process. Accordingly, this Court should determine that all of the Petitioners have standing to maintain this action.

V. Article VII, §§ 1 and 4 of the Pennsylvania Constitution have not materially changed since the Pennsylvania Supreme Court struck down legislation unconstitutionally expanding mail-in voting in *Lancaster City*.

As explained in the House Petitioners' Application for Summary Relief, Article VII, §§ 1 and 4 of the Pennsylvania Constitution (previously numbered as Article VIII, §§ 1 and 4) remain materially the same today as they were when the Pennsylvania Supreme Court in *Lancaster City* struck down "Act May 22, 1923" (P. L. 309; Pa. St. Supp. 1924, § 9775a1, *et seq*.) and invalidated the illegal mail-in ballots cast thereunder. The Respondents' attempts to distinguish or undermine binding precedents are unavailing. The Respondents refer to the Pennsylvania Supreme Court's precedents interpreting provisions of the Pennsylvania Constitution, which remain unchanged since those cases were decided, as "Irreconcilable With Modern Principles of Constitutional Interpretation." *See* Respondents' Mem., p. 48. The Respondents' arguments stand in the face of the foundational principles of *stare decisis*. The holdings in *Chase* and *Lancaster City* interpret the language "offer to vote" to require in person voting. Because the language "offer to vote" conspicuously remains in the Pennsylvania Constitution, the Respondents are resigned to arguing that the very meaning of that language should change.

The Respondents completely ignore the doctrine of *stare decisis* and cite no special justification that would justify injecting instability into settled law, much less allow this Court to ignore binding precedent. Departure from the stringent principles of *stare decisis* requires special justification, and the Respondents have not identified any. *See Arizona v. Rumsey*, 467 U. S. 203, 212 (1984) ("Any departure from the doctrine of *stare decisis* demands special justification …"). The Respondents provide "little basis here for invoking the rare exception to *stare decisis* to disturb a long-settled matter." *See Shambach*, 845 A. 2d 793, 807 (Pa. 2004) (J. Saylor concurring).

The Respondents' interpretation of the relevant constitutional provisions, if correct, would have obviated the need for many Pennsylvania Constitutional amendments. Yet, Respondents point to the Pennsylvania Supreme Court's propensity to allow some latitude in the prescriptive language in some of these amendments as evidence that the language is entirely permissive. For example, the Respondents cite to the fact that spouses of military members were allowed to vote absentee when the amendment only allowed for military members. *See* Respondents' Mem., p. 43. Put simply, the Respondents argue that because some legislation does not adhere to the strictest interpretation of Article VII, § 14, the Pennsylvania General Assembly has free reign to interpret § 14 out of existence, as Act 77 does. This argument strains credulity; Act 77 classifies virtually everyone

as an absentee voter, and is not a mere interpretation of some enumerated exception. The Respondents essentially urge this Court to interpret Article VII, § 14 of the Pennsylvania Constitution out of existence.

The Respondents cite no interpretive principle for their argument that the change of the word from "may" in distinct earlier absentee provisions in the Pennsylvania Constitution to "shall" in Article VII, § 14 indicates that "Article VII, § 14 sets a floor for absentee voting; it does not establish a ceiling." Respondents' Mem., p. 40. Article VII, § 1 clearly states that the limitations are "subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact," providing discretion to the General Assembly to enact laws as they see fit. No similar discretionary language is present in Article VII, § 14. An affirmative "shall" cannot give the legislature more discretion than "may."

The earlier Pennsylvania constitutional provisions addressing absentee voting that provided what types of absentee voting the General Assembly "may" allow in 1949, 1953, and 1957 (as cited by Respondents' Mem. at p. 47) served no purpose and had no operative effect if Respondents' constitutional analysis is correct. According to Respondents, even without those amendments, the Pennsylvania Constitution already permitted the General Assembly to allow no

excuse mail-in balloting. Respondents' approach would treat those prior absentee balloting amendments as surplusage.

The Intervenor Respondents note that Pa. Const. art VII, § 14 only applies to "qualified electors," and argue that, if Pa. Const. art VII, § 1 required a Pennsylvanian to vote in person to be a "qualified elector," that would render Section 14 a nullity because qualified electors by definition would only retain that status if they vote in person. *See* Intervenor Respondents' Brief, p. 18. But consistent with the understanding that to "offer to vote" by ballot, as the phrase is used in Pa. Const. art VII, § 1, means to present one's self, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it, Pa. Const. art VII, § 14 requires the Legislature to provide not just a manner and time, but also a "place" "outside the municipality of their residence" where "qualified electors" meeting the criteria of that section "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 requires the Legislature to specify other places where voters may vote, outside the normal polling places where voters would normally "offer to vote" under Pa. Const. art VII, § 1, because certain voters for specified reasons may be absent from the municipality of their residence on election day. Pa. Const. art VII, § 14 would not need to authorize or require the Legislature to specify other places to vote if Pa.

Const. art VII, § 1 did not require voters to otherwise "offer to vote" at the normal places appointed.

The Intervenor Respondents argue that "The [*Chase*] court's conclusion—to which the Lancaster City court deferred—thus turned on concerns that are not relevant today, in an era of widespread mail voting where evidence of mail-voting fraud is exceedingly rare. See Intervenor Respondents' Brief, p. 25. The Intervenor Respondents' attempt to undermine the Pennsylvania Supreme Court's precedents are unavailing. Concerns regarding absentee voting persist to this day. For example, in a New York Times article entitled "Error and Fraud at Issue as Absentee Voting Rises," Oct. 6, 2012, the author noted that, in the absentee system, "fraud and coercion have been documented to be real and legitimate concerns" because fraud is easier via mail. *See* Exhibit A hereto (also noting issues with "granny farming," issues with buying and selling mail-in votes, and other serious issues with mail-in votes).

Respondents devote not a single sentence to explaining why, if it was completely unnecessary, the Pennsylvania General Assembly began the process of amending the Pennsylvania Constitution Article VII, § 14 of the Pennsylvania Constitution to permit no-excuse absentee voting. *See* Senate Bill 411, 2019 (later incorporated into Senate Bill 413). The way to change the Pennsylvania

Constitution is through amendment, not reinterpretation contradictory to the original intent and meaning of its terms.

VI. There are no circumstances under which the unconstitutional provisions of Act 77 would be valid.

There are no circumstances under which the unconstitutional provisions of Act 77 would be valid. Respondents argue that a statute is facially unconstitutional only where there is no circumstance under which the statute would be valid, and because a substantial number of "mail-in" ballots cast under Act 77 are returned by voters in person, Act 77 is not unconstitutional in all of its applications. *See* Respondents' Mem., pp. 52-53. But the requirement that facial challenges show that a statute is unconstitutional in all of its applications is not a requirement that every single provision of a statute must be unconstitutional. Act 77 requires that "all" mail-in ballots not challenged for certain reasons not relevant here "shall" be counted. Act 77, Section 1308(g)(4); 25 Pa.Stat. § 3146.8(g). The offending portions of Act 77 do not allow for the refusal to count mail-in ballots not delivered in person to the county board of election. Instead, the offending portions of Act 77 require that votes be counted from people who do not meet the constitutional requirements for qualifications of electors nor meet any of the constitutionally prescribed exceptions to the *in propria persona* voting requirements. There are no circumstances under which it would be valid to require such votes to be counted.

Respondents further argue voters mailing their votes from home, "even under *Lancaster City's* holding," "undeniably 'offer to vote' 'in the[ir] election district' in accordance with a 'method … prescribed by law.' Pa. Const. art. VII, §§ 1, 4." *See* Respondents' Mem., p. 52. But such an argument flatly contradicts the binding and very clear holding in *Lancaster City* that "To 'offer to vote' by ballot is to present one's self, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. The ballot ***cannot be sent by mail or express*** …" *Lancaster City*, 126 A. at 200 (quoting *Chase*, 41 Pa. at 418-19) (emphasis added). Under the Pennsylvania Constitution, as interpreted by *Lancaster City*, it is not constitutional to count a ballot sent by mail, even if it is sent from the voter's home within that voter's election district, unless the voter meets one of the requirements of Pa. Const. art. VII, § 14.

Moreover, if Respondents' arguments were correct, then the same facial challenge brought within the first 180 days after Act 77 was signed into law on October 31, 2019 (in other words, before April 28, 2020) would also need to have been dismissed. The net effect of all of the Respondents' arguments is that no one ever had and no one will ever have the ability to challenge the unconstitutional provisions of Act 77. Challenge the unconstitutional provisions of Act 77 before any election, and in addition to being too speculative for standing, such a challenge

is also too speculative for a facial constitutional challenge, because Act 77 may not be applied in an unconstitutional manner. Challenge the unconstitutional provisions of Act 77 after an election to challenge how Act 77 was actually applied, and you are too late, barred by laches and by the asserted statutory time limit. The Respondents are asking the courts to effectively insulate Act 77 from any constitutional review whatsoever at all times by all litigants.

VII. Act 77 also violates the U.S. Constitution because it exceeds the powers granted to the Pennsylvania General Assembly under Article I, § 2; Article I, § 4; Article II, § 1; and the 17th Amendment of the U.S. Constitution.

Act 77 also violates the U.S. Constitution because it exceeds the powers granted to the Pennsylvania General Assembly under Article I, § 2; Article I, § 4; Article II, § 1; and the 17th Amendment of the U.S. Constitution. Respondents' attempt to recharacterize the House Petitioners' argument as "every violation of state election law, is, therefore, a violation of the federal constitution." Respondents' Mem., p. 22. The latter argument is a straw man of the Respondents' own construction. They do not address the argument that states exceed their U.S. Constitutional delegation of authority in the conduct of federal elections when they violate their own constitutions in their exercise of lawmaking power as to the conduct of federal elections.

Respondents construct yet another straw man in arguing that "A violation of state law does not state a claim under § 1983." *See* Respondents' Mem., p.54

(citing *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 391 (W.D. Pa. 2020) and other cases). The House Petitioners do not premise their Fourteenth Amendment claim upon a mere violation of state law, but rather upon the Commonwealth's violation of the United States Constitution by exceeding the federal constitutional delegation of power granted to the state legislature by violating the Pennsylvania Constitution in the exercise of lawmaking authority in the conduct of federal elections. In *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), cited in the House Petitioners' Petition, an equal protection claim under the Fourteenth Amendment was also premised on vote dilution by a state legislature, in that case due to a constitutionally deficient apportionment plan. *Id*. *Reynolds* did not suggest, as Respondents attempt to do at Respondents' Response in Opposition to the Bonner Petitioners' Application for Summary Relief, p.23, that the only type of vote dilution that could form the basis of an equal protection claim under the Fourteenth Amendment was vote dilution caused by malapportionment, and Respondents point to no language in *Reynolds* to support that it was so limited.

CONCLUSION

For the aforementioned reasons, Petitioners respectfully urge this Court to deny Respondents' Application for Summary Relief and overrule Respondents' Preliminary Objections and enter the attached proposed order.

Respectfully submitted,

Gregory H. Teufel
Attorney for Petitioners

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.

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.

CASES CONSOLIDATED
No. 24 M.D. 2021
No. 293 M.D. 2021
ORIGINAL JURISDICTION

ORDER DENYING SUMMARY RELIEF

AND NOW, this ____ day of _____, 2021, pursuant to Rule 1532(b) of the Pennsylvania Rules of Appellate Procedure and upon consideration of Respondents' Application for Summary Relief and Respondents' Preliminary

Objections, along with Petitioners' responses, it is ORDERED AND DECREED that Respondents' Application for Summary Relief is denied and Respondents' Preliminary Objections are overruled.

IT IS SO ORDERED.

_____

J.

CERTIFICATE OF WORD COUNT

I certify that this brief contains 8,472 words, as determined by the word-count feature of Microsoft Word.

Date: November 1, 2021

Gregory H. Teufel, Esq.

CERTIFICATE OF COMPLIANCE

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.

Date: November 1, 2021

Gregory H. Teufel, Esq.

The New York Times | https://nyti.ms/R2EbfO

Error and Fraud at Issue as Absentee Voting Rises

By Adam Liptak

Oct. 6, 2012

TALLAHASSEE, Fla. — On the morning of the primary here in August, the local elections board met to decide which absentee ballots to count. It was not an easy job.

The board tossed out some ballots because they arrived without the signature required on the outside of the return envelope. It rejected one that said "see inside" where the signature should have been. And it debated what to do with ballots in which the signature on the envelope did not quite match the one in the county's files.

"This 'r' is not like that 'r,' " Judge Augustus D. Aikens Jr. said, suggesting that a ballot should be rejected.

Ion Sancho, the elections supervisor here, disagreed. "This 'k' is like that 'k,' " he replied, and he persuaded his colleagues to count the vote.

Scenes like this will play out in many elections next month, because Florida and other states are swiftly moving from voting at a polling place toward voting by mail. In the last general election in Florida, in 2010, 23 percent of voters cast absentee ballots, up from 15 percent in the midterm election four years before. Nationwide, the use of absentee ballots and other forms of voting by mail has more than tripled since 1980 and now accounts for almost 20 percent of all votes.

Yet votes cast by mail are less likely to be counted, more likely to be compromised and more likely to be contested than those cast in a voting booth, statistics show. Election officials reject almost 2 percent of ballots cast by mail, double the rate for in-person voting.

"The more people you force to vote by mail," Mr. Sancho said, "the more invalid ballots you will generate."

Election experts say the challenges created by mailed ballots could well affect outcomes this fall and beyond. If the contests next month are close enough to be within what election lawyers call the margin of litigation, the grounds on which they will be fought will not be hanging chads but ballots cast away from the voting booth.

In 2008, 18 percent of the votes in the nine states likely to decide this year's presidential election were cast by mail. That number will almost certainly rise this year, and voters in two-thirds of the states have already begun casting absentee ballots. In four Western states, voting by mail is the exclusive or dominant way to cast a ballot.

The trend will probably result in more uncounted votes, and it increases the potential for fraud. While fraud in voting by mail is far less common than innocent errors, it is vastly more prevalent than the in-person voting fraud that has attracted far more attention, election administrators say.

In Florida, absentee-ballot scandals seem to arrive like clockwork around election time. Before this year's primary, for example, a woman in Hialeah was charged with forging an elderly voter's signature, a felony, and possessing 31 completed absentee ballots, 29 more than allowed under a local law.

The flaws of absentee voting raise questions about the most elementary promises of democracy. "The right to have one's vote counted is as important as the act of voting itself," Justice Paul H. Anderson of the Minnesota Supreme Court wrote while considering disputed absentee ballots in the close 2008 Senate election between Al Franken and Norm Coleman.

Voting by mail is now common enough and problematic enough that election experts say there have been multiple elections in which no one can say with confidence which candidate was the deserved winner. The list includes the 2000 presidential election, in which problems with absentee ballots in Florida were a little-noticed footnote to other issues.

In the last presidential election, 35.5 million voters requested absentee ballots, but only 27.9 million absentee votes were counted, according to a study by Charles Stewart III, a political scientist at the Massachusetts Institute of Technology. He calculated that 3.9 million ballots requested by voters never reached them; that another 2.9 million ballots received by voters did not make it back to election officials; and that election officials rejected 800,000 ballots. That suggests an overall failure rate of as much as 21 percent.

Some voters presumably decided not to vote after receiving ballots, but Mr. Stewart said many others most likely tried to vote and were thwarted. "If 20 percent, or even 10 percent, of voters who stood in line on Election Day were turned away," he wrote in the study, published in The Journal of Legislation and Public Policy, "there would be national outrage."

EXHIBIT A

happening — and why it matters.

The list of very close elections includes the 2008 Senate race in Minnesota, in which Mr. Franken's victory over Mr. Coleman, the Republican incumbent, helped give Democrats the 60 votes in the Senate needed to pass President Obama's health care bill. Mr. Franken won by 312 votes, while state officials rejected 12,000 absentee ballots. Recent primary elections in New York involving Republican state senators who had voted to allow same-sex marriage also hinged on absentee ballots.

There are, of course, significant advantages to voting by mail. It makes life easier for the harried, the disabled and the elderly. It is cheaper to administer, makes for shorter lines on election days and allows voters more time to think about ballots that list many races. By mailing ballots, those away from home can vote. Its availability may also increase turnout in local elections, though it does not seem to have had much impact on turnout in federal ones.

Still, voting in person is more reliable, particularly since election administrators made improvements to voting equipment after the 2000 presidential election.

There have been other and more controversial changes since then, also in the name of reliability and efficiency. Lawmakers have cut back on early voting in person, cracked down on voter registration drives, imposed identification requirements, made it harder for students to cast ballots and proposed purging voter rolls in a way that critics have said would eliminate people who are eligible to vote.

But almost nothing has been done about the distinctive challenges posed by absentee ballots. To the contrary, Ohio's Republican secretary of state recently sent absentee ballot applications to every registered voter in the state. And Republican lawmakers in Florida recently revised state law to allow ballots to be mailed wherever voters want, rather than typically to only their registered addresses.

"This is the only area in Florida where we've made it easier to cast a ballot," Daniel A. Smith, a political scientist at the University of Florida, said of absentee voting.

He posited a reason that Republican officials in particular have pushed to expand absentee voting. "The conventional wisdom is that Republicans use absentee ballots and Democrats vote early," he said.

Republicans are in fact more likely than Democrats to vote absentee. In the 2008 general election in Florida, 47 percent of absentee voters were Republicans and 36 percent were Democrats.

There is a bipartisan consensus that voting by mail, whatever its impact, is more easily abused than other forms. In a 2005 report signed by President Jimmy Carter and James A. Baker III, who served as secretary of state under the first President George Bush, the Commission on Federal Election Reform concluded, "Absentee ballots remain the largest source of potential voter fraud."

On the most basic level, absentee voting replaces the oversight that exists at polling places with something akin to an honor system.

"Absentee voting is to voting in person," Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit has written, "as a take-home exam is to a proctored one."

Fraud Easier Via Mail

Election administrators have a shorthand name for a central weakness of voting by mail. They call it granny farming.

"The problem," said Murray A. Greenberg, a former county attorney in Miami, "is really with the collection of absentee ballots at the senior citizen centers." In Florida, people affiliated with political campaigns "help people vote absentee," he said. "And help is in quotation marks."

Voters in nursing homes can be subjected to subtle pressure, outright intimidation or fraud. The secrecy of their voting is easily compromised. And their ballots can be intercepted both coming and going.

The problem is not limited to the elderly, of course. Absentee ballots also make it much easier to buy and sell votes. In recent years, courts have invalidated mayoral elections in Illinois and Indiana because of fraudulent absentee ballots.

Voting by mail also played a crucial role in the 2000 presidential election in Florida, when the margin between George W. Bush and Al Gore was razor thin and hundreds of absentee ballots were counted in apparent violation of state law. The flawed ballots, from Americans living abroad, included some without postmarks, some postmarked after the election, some without witness signatures, some mailed from within the United States and some sent by people who voted twice. All would have been disqualified had the state's election laws been strictly enforced.

In the recent primary here, almost 40 percent of ballots were not cast in the voting booth on the day of the election. They were split between early votes cast at polling places, which Mr. Sancho, the Leon County elections supervisor, favors, and absentee ballots, which make him nervous.

"There has been not one case of fraud in early voting," Mr. Sancho said. "The only cases of election fraud have been in absentee ballots."

EXHIBIT A

Efforts to prevent fraud at polling places have an ironic consequence, Justin Levitt, a professor at Loyola Law School, told the Senate Judiciary Committee September last year. They will, he said, “drive more voters into the absentee system, where fraud and coercion have been documented to be real and legitimate concerns.”

“That is,” he said, “a law ostensibly designed to reduce the incidence of fraud is likely to increase the rate at which voters utilize a system known to succumb to fraud more frequently.”

Clarity Brings Better Results

In 2008, Minnesota officials rejected 12,000 absentee ballots, about 4 percent of all such votes, for the myriad reasons that make voting by mail far less reliable than voting in person.

The absentee ballot itself could be blamed for some of the problems. It had to be enclosed in envelopes containing various information and signatures, including one from a witness who had to attest to handling the logistics of seeing that “the voter marked the ballots in that individual’s presence without showing how they were marked.” Such witnesses must themselves be registered voters, with a few exceptions.

Absentee ballots have been rejected in Minnesota and elsewhere for countless reasons. Signatures from older people, sloppy writers or stroke victims may not match those on file. The envelopes and forms may not have been configured in the right sequence. People may have moved, and addresses may not match. Witnesses may not be registered to vote. The mail may be late.

But it is certainly possible to improve the process and reduce the error rate.

Here in Leon County, the rejection rate for absentee ballots is less than 1 percent. The instructions it provides to voters are clear, and the outer envelope is a model of graphic design, with a large signature box at its center.

The envelope requires only standard postage, and Mr. Sancho has made arrangements with the post office to pay for ballots that arrive without stamps.

Still, he would prefer that voters visit a polling place on Election Day or beforehand so that errors and misunderstandings can be corrected and the potential for fraud minimized.

“If you vote by mail, where is that coming from?” he asked. “Is there intimidation going on?”

Last November, Gov. Rick Scott, a Republican, suspended a school board member in Madison County, not far from here, after she was arrested on charges including absentee ballot fraud.

The board member, Abra Hill Johnson, won the school board race “by what appeared to be a disproportionate amount of absentee votes,” the arrest affidavit said. The vote was 675 to 647, but Ms. Johnson had 217 absentee votes to her opponent’s 86. Officials said that 80 absentee ballots had been requested at just nine addresses. Law enforcement agents interviewed 64 of the voters whose ballots were sent; only two recognized the address.

Ms. Johnson has pleaded not guilty.

Election law experts say that pulling off in-person voter fraud on a scale large enough to swing an election, with scores if not hundreds of people committing a felony in public by pretending to be someone else, is hard to imagine, to say nothing of exceptionally risky.

There are much simpler and more effective alternatives to commit fraud on such a scale, said Heather Gerken, a law professor at Yale.

“You could steal some absentee ballots or stuff a ballot box or bribe an election administrator or fiddle with an electronic voting machine,” she said. That explains, she said, “why all the evidence of stolen elections involves absentee ballots and the like.”

EXHIBIT A