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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,

TIMOTHY BONNER et al.,

Petitioners,

and

BUTLER COUNTY REPUBLICAN COMMITTEE, et al, Intervenors-Petitioners,

v.

VERONICA DEGRAFFENREID et al.,

Respondents,

and

DEMOCRATIC NATIONAL COMMITTEE, and THE PENNSYLVANIA DEMOCRATIC PARTY,

Intervenors-Respondents.

Nos. 244 MD 2021
293 MD 2021

INTERVENORS-RESPONDENTS' REPLY IN SUPPORT OF RESPONDENTS' APPLICATION FOR SUMMARY RELIEF AND IN OPPOSITION TO PETITIONERS' APPLICATIONS FOR SUMMARY RELIEF

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I. INTRODUCTION

The *Bonner* petitioners and the Party Committee intervenors offer no convincing answers to respondents' application for summary relief and no persuasive arguments to support petitioners' applications. Both briefs argue that laches is inapplicable to constitutional questions. That claim is refuted by the fact that just last year, the Pennsylvania Supreme Court dismissed a substantially identical challenge based on laches. Similarly, both briefs argue that at least one petitioner has standing to maintain this action, but neither brief identifies any concrete factual allegations that show any petitioner's substantial, direct, and immediate interest in this litigation. And although the *Bonner* petitioners continue to stake their challenge to Act 77 on the *Chase* and *Lancaster City* cases, they fail to grapple with the numerous reasons those cases do not control here—and certainly do not meet petitioners' "burden of proving, beyond all doubt" that there is "a direct collision" between Act 77 and the current text of the Pennsylvania constitution. *Erie & North-East R.R. Co. v. Casey*, 26 Pa. 287, 300-301 (1856); *see also Commonwealth v. Smith*, 732 A.2d 1226, 1235 (Pa. Super. Ct. 1999) (citing *Casey*, 26 Pa. at 300).

II. ARGUMENT

A. Laches

The *Bonner* petitioners and Party Committees argue that laches is categorically inapplicable to this case because it is a substantive constitutional challenge. *Bonner* Opp. 10-11; Party Committees Br. 16-17. But that argument is grounded in language from *Sprague v. Casey*, 550 A.2d 184 (Pa. 1988), that the Pennsylvania Supreme Court subsequently labeled "dicta," *Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998). And it is hard to imagine a clearer rejection of that dicta than the fact that, when directly presented with a similar constitutional challenge to Act 77 last year, the Pennsylvania Supreme Court dismissed the suit based on laches. *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020) (per curiam), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021).

The *Bonner* petitioners respond (Opp. 14) that *Kelly* is different because petitioners here seek prospective relief, not to invalidate a past election. But the *Kelly* petitioners likewise sought prospective relief. *See* 240 A.3d at 1256 ("Petitioners sought a declaration that [Act 77's universal vote-by-mail] provisions were unconstitutional[.]"); Bonner Opp. 15 (conceding this). Yet the Pennsylvania Supreme Court dismissed the entire challenge. *See id.* at 1257. The *Bonner* petitioners also note (Opp. 15) that *Kelly* is not binding. But *Kelly* is certainly "persuasive authority," *Commonwealth v. Derrig*, 239 A.3d 59, 2020 WL 3867130,

at *4 n.10 (Pa. Super. Ct. July 9, 2020). And perhaps more importantly, *Kelly*'s laches ruling disproves the *Bonner* petitioners' argument that laches is categorically inapplicable to cases like this.

Finally, the *Bonner* petitioners alternatively argue (Opp. 16 & n.2) that the requirements of laches are not met here because expenditures in reliance on Act 77 cannot establish the requisite prejudice. But they cite no authority for this point, and this Court has held to the contrary, explaining that "[n]o clearer case [of prejudice] could be made" than when an entity "commit[s] itself to financial obligations" in reliance on existing law. *Jones v. Oxford Area School District*, 281 A.2d 188, 190 (Pa. Commw. Ct. 1971). The *Bonner* petitioners also again invoke *Sprague*, arguing (Opp. 11-12) that it held that a similarly situated petitioner had *not* improperly delayed in filing suit. *Sprague*, however, involved only a fraction of the delay here—and whereas most of the delay there was excusable, in that the petitioner did not receive actual notice of the government action at issue until just weeks before he sued, 550 A.2d at 188, here the *Bonner* petitioners had actual notice for the entire two-year period of delay. *Sprague*, moreover, was a lawsuit that "sought to prevent an [action] from occurring rather than" (as here) "challeng[ing] an act that already occurred." *Stilp*, 718 A.2d at 293 (distinguishing *Sprague* on this ground). It provides no help to petitioners. Nor do the remaining Pennsylvania cases the *Bonner* petitioners cite (Opp. 12-13), none of which even mentioned laches.

B. Standing

1. Bonner *Petitioners*

The *Bonner* petitioners first argue (Opp. 22) that they have standing as *voters*, both because they were denied the right to vote on a constitutional amendment with the same substance as Act 77 and because their in-person votes will supposedly be diluted by improper mail ballots. But the former injury would apply to every Pennsylvanian qualified to vote (and thus is not a particularized injury) and the latter claim fails because vote dilution cannot be "assum[ed]"; it must be "[]supported factually." *Kauffman v. Osser*, 271 A.2d 236, 240 (Pa. 1970). The *Bonner* petitioners identify no supporting facts. They point (Opp. 24) to the number of mail ballots cast in 2020, but that number says nothing about *who* received those votes, i.e., whether they favored one party over another. Indeed, because the entire Pennsylvania House of Representatives was up for election in November 2020, long after Act 77's enactment, *all* of the *Bonner* petitioners necessarily were elected when all eligible voters could vote by mail.

The *Bonner* petitioners also contend (Opp. 22) that they have standing as *candidates*, because universal mail balloting has "impacted" their elections. But again, they provide no explanation for *why* permitting all qualified Pennsylvanians to vote by mail will make it more difficult for them to win elections or *how* they will have to change their electoral strategies. Such thin arguments are insufficient to

satisfy the *Bonner* petitioners' burden to "establish as a threshold matter that" they have "standing to bring [this] action." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). Given that most of the *Bonner* petitioners voted *for* Act 77 (and, as noted, were re-elected after the law took effect), it is incumbent on them to articulate the factual basis for whatever injury they contend requires judicial relief. The law demands an explanation of precisely what injury these petitioners believe has befallen them such that they now seek the drastic remedy of enjoining Act 77. Without such a showing, there is no basis to transform a legislative game of "vote yes, but hope no" into constitutional litigation.

Lastly, the *Bonner* petitioners argue (Opp. 26) that they have standing simply because "Act 77 would otherwise go unchallenged." They just ignore, however, the DNC's and PDP's explanation (Br. 12) for why that argument fails: Candidates who allege facts establishing that Act 77 made wining election more difficult for them would have standing.

2. *Party Committees*

The Party Committees first argue (Br. 8-9) that petitioner Doug McLinko has standing because he performs non-ministerial duties related to elections. But they cite no case finding standing under similar circumstances—likely because a mere belief that a law or government action is unconstitutional is insufficient to create standing. *See, e.g.*, *Drake v. Obama*, 664 F.3d 774, 780 (9th Cir. 2011) (rejecting

the argument that an active-duty military member had standing to challenge President Obama's qualifications merely because the member was required "to follow President Obama's orders, despite his [alleged] ineligibility for the presidency"); *see also* DNC/PDP Br. 9-10.

The Party Committees also contend (Br. 13-16) that *they* have standing, primarily under a representational/organizational theory. As they acknowledge, however (Br. 13-14), that theory requires that one of their members face immediate or threatened injury—and the only member they point to (Jeffrey Piccola) has no standing. The Party Committees say he does because he had to decide whether to vote by mail (and run the risk that his vote would not be counted if Act 77 were invalidated) or in person (and run the risk that his vote would be diluted by mail ballots). These theories suffer from the same basic defect as the rest of petitioners' standing arguments. As to the former, mere belief that a law may be unconstitutional is insufficient to establish standing. Moreover, Mr. Piccola's purported concern about having his mail ballot counted would both apply to any of the millions of Pennsylvanians who vote by mail, and in any event is unreasonable—and hence not cognizable—because the state cannot constitutionally invalidate a vote once it has been validly cast, *see Griffin v. Burns*, 570 F.2d 1065, 1074-1075 (1st Cir. 1978). As to the latter, the Party Committees allege no facts establishing that voters who

cast mail ballots (or could cast them in the future) hold views contrary to, or support candidates not supported by, Mr. Piccola. *See supra* p.4.

The only other harm the Party Committees posit (Br. 14-16) is that they have had to divert resources to inform and educate voters about Act 77's vote-by-mail provisions. While that sometimes is sufficient to confer organizational standing, the Party Committees' own primary authority for this point acknowledges that it "is not always sufficient." *Applewhite v. Commonwealth*, 2014 WL 184988, at *8 (Pa. Commw. Ct. Jan. 17, 2014). That case, moreover, found standing only because the Commonwealth's "repeated alteration[s]" to the voter-ID law challenged there had caused the organizations at issue "to *waste*, not merely divert[,] resources to perform [their] voter education efforts." *Id.* Here, in contrast, Act 77's vote-by-mail provisions have not changed since the law was enacted. Put another way, the Party Committees' argument is that they will be required to spend money in the future on educating voters because the law continues to change. That injury would not be redressed, and in fact would likely be exacerbated, by invalidating Act 77 and thereby changing current law.

C. Nothing In The Pennsylvania Or U.S. Constitution Precludes The General Assembly From Establishing Universal No-Excuse Mail Voting

As the DNC and PDP explained (Br. 12-23), nothing in the text, structure, or history of the Pennsylvania Constitution restricts the General Assembly's broad

legislative authority to determine the "method of elections," Pa. Const. art. VII, §4, which includes the power to authorize universal vote-by-mail elections. The Pennsylvania Supreme Court's decisions in *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924), do not alter that conclusion, as each involved earlier iterations of the Pennsylvania Constitution and—in any event—did not make any effort to reconcile their interpretation of Article VII, §1 with the text of Article VII, §4. DNC/PDP Br. 23-26.

The Party Committees say nothing about the constitutionality of Act 77. The *Bonner* petitioners' arguments (which rely almost entirely on *Lancaster City* and *Chase*) lack merit.

1. *The* Bonner *Petitioners' State-Law Arguments Fail*

The *Bonner* petitioners first argue (Opp. 27-28) that respondents "ignore … *stare decisis*" in urging this Court to distinguish *Lancaster City* and *Chase*. But that doctrine applies only when a prior case has squarely decided the specific issue at hand. *See Commonwealth v. Alexander*, 243 A.3d 177, 195-196 (Pa. 2020). *Chase* and *Lancaster City* did not resolve the question presented here, as they did not interpret the current constitution. DNC/PDP Br. 23-26.

The *Bonner* petitioners contend, however (Opp. 27), that *Chase* and *Lancaster City* control because the text of the Pennsylvania Constitution "ha[s] not materially

changed" since those cases were decided. That is demonstrably incorrect. When *Chase* was decided, the Pennsylvania Constitution neither authorized absentee voting nor gave the legislature the power to prescribe voting "by ballot *or by such other method as may be prescribed by law*." Pa. Const. art. VII, §4. And *Lancaster City* failed to engage with that language, instead deferring to *Chase*'s outdated analysis. PDP/DNC Br. 24; *see Lancaster City*, 126 A. at 200. In addition, *Lancaster City* relied on the prior version of the constitution's absentee-ballot provision, a version that stated that the legislature "may" allow certain specified categories of voters to cast absentee ballots. In contrast, the current version uses the word "shall"—establishing a floor, not a ceiling, on the General Assembly's legislative authority regarding absentee balloting. *See* DNC/PDP Br. 19-20, 25.

The *Bonner* petitioners relatedly argue (Br. 29) that no "interpretive principle" justifies reading the word "shall" to enumerate only the situations where absentee voting *must* be allowed, as opposed to establishing an exclusive list of those situations. That too is wrong: The interpretive principle (which the DNC and PDP already identified) is that words in the constitution are given their "natural and ordinary meaning." *Scarnati v. Wolf*, 173 A.3d 1110, 1118 (Pa. 2017), *quoted in* DNC/PDP Br. 15. The ordinary meaning of "shall" is to create a mandate only for what is specified, with no implicit effect on anything else. For example, if a student is told that she "shall" read the first chapter of a book for homework one night, that

is in no way a prohibition on her reading additional chapters that night. And as the DNC and PDP also explained, the U.S. Supreme Court (following this principle) has held that the word "shall" in a statute denotes "a minimal guarantee" rather than "setting forth [an] exclusive" list. *Christensen v. Harris County*, 529 U.S. 576, 583 (2000); *City of Pittsburgh v. Fraternal Order of Police*, 161 A.3d 160, 167-168 (Pa. 2017); DNC/PDP Br. 19-20. Again, the *Bonner* petitioners simply do not answer the DNC's and PDP's arguments.[1]

Moreover, because the Pennsylvania legislature has plenary power, limits on that power cannot be lightly implied. *Russ v. Commonwealth*, 60 A. 169, 172 (1905). Where a constitutional provision gives the legislature a certain power—through use of the term "may"—the canon against superfluity may justify treating that authorization (standing alone) as an implied limit on the legislature's power to take similar, unenumerated action. But that is not true of a mandate that the legislature act. In that circumstance, no limit on the legislature's *power* can be judicially implied; the only limit is that the legislature is not *required* to do more than specified.

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[1] The *Bonner* petitioners point (Opp. 29) to the fact that Article VII, section 1 permits the General Assembly to make "laws" that modify that section's scope, whereas section 14 includes no similar language. That *undermines* petitioners' case. If the General Assembly can "enact laws as they see fit" to change section 1's requirements, *id.*, then Act 77 would be within the General Assembly's power even if petitioners' reading of section 1's "offer to vote" language were correct.

The *Bonner* petitioners next assert (Opp. 29-30) that certain amendments to section 14 (amendments that added classes of Pennsylvanians eligible to vote absentee) were "surplusage" if the provision is understood as a floor rather than a ceiling. The three examples they cite were all enacted *before* the may/shall change in 1967, when (at least in *Lancaster City*'s view) the provision did indeed act as a ceiling on who could vote absentee. In any event, legal drafters frequently insert language to make clear that certain actions are permitted, even though the actions were not forbidden in the first place. DNC/PDP Br. 20 n.13. Indeed, there are "many examples of Congress legislating in that hyper-vigilant way, to remove any doubt as to things not particularly doubtful in the first instance." *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1074 (2018).

The *Bonner* petitioners also fail to overcome a fatal flaw in their position: If *Chase* and *Lancaster City* hold that only Pennsylvanians who cast their votes in person constitute "qualified electors" for purposes of section 1, and if section 14 permits only qualified voters to cast absentee ballots, then their argument would preclude any absentee voting and render section 14 a nullity. *See* DNC/PDP Br. 18-19. While the *Bonner* petitioners' response is difficult to parse, they appear to argue (Opp. 31) that section 14 gives the General Assembly special authority to provide the "place" that the classes of voters listed may "offer to vote" and thus section 14 supersedes section 1's requirement that a ballot be cast in person. That is unavailing

because section 14 gives the General Assembly the authority to set the "place" of voting only *for qualified electors*. *See* Pa. Const. art. VII, §14 ("The legislature shall … provide a manner in which, and the time and place at which, *qualified electors* … may vote."). Even if this response were correct, in other words, it would still be true that petitioners' reading of section 1 renders section 14 a nullity. That cannot be right.[2]

Lastly, the *Bonner* petitioners claim (Opp. 31) that voting by mail is no more secure today than when *Chase* was decided in the early 1860s. That is meritless. Numerous reports in 2020 and 2021 found that mail-voting fraud is exceptionally rare, and even the Trump campaign conceded in litigation over the 2020 election that it was *not* alleging that any fraud had occurred in Pennsylvania. DNC/PDP Br. 26-27. That concession is consistent with the conclusion of the Stanford-MIT Healthy Elections Project, which analyzed more than 80 cases brought following the 2020 election and found that fraud allegations had no evidentiary support. *See* Kovacs-

[2] To the extent the *Bonner* petitioners mean to argue that it would be unnecessary for section 14 to allow the General Assembly to set the "place" for absentee voters to cast their ballots unless petitioners' reading of section 1 is correct, this ignores that section 14's language protects the absentee-voting scheme from modification *by statute*. *See* DNC/PDP Br. 20 n.13.

Goodman, *Post-Election Litigation Analysis and Summaries*, Stanford-MIT Healthy Elections Project (Mar. 10, 2021).[3]

The contrary authority the *Bonner* petitioners cite—a decade-old *New York Times* article—supports *respondents*, as it acknowledges that "fraud in voting by mail is far less common than innocent [voter] errors" like forgetting to sign the outside of a return envelope. *See* Bonner Opp. Ex. A at 1. Moreover, the *Times* explained much more recently that any suggestion that "mail-in ballots will lead to a 'rigged' election" is "[f]alse," noting that in 2016, Donald Trump prevailed in a majority of the states where "more than half of voters voted by mail." Qiu, *Fact-Checking Falsehoods on Mail-In Voting*, N.Y. Times (Sept. 26, 2020).[4]

2. *The* Bonner *Petitioners Fail To Redeem Their Federal Constitutional Claims*

As the DNC and PDP explained (Br. 28-30), the *Bonner* petitioners' federal constitutional claims rest on the premise that Act 77 violates the Pennsylvania Constitution and, in any event, are unsupported. Their brief offers no sound response. Indeed, the *Bonner* petitioners do not dispute that their federal claims depend on the success of their state-law claims. And they identify any new, on-point authority that supports their arguments on the merits.

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[3] https://healthyelections.org/sites/default/files/2021-06/Post-Election_Litigation_Analysis.pdf.

[4] https://www.nytimes.com/article/fact-checking-mail-in-voting.html.

Instead, the *Bonner* petitioners primarily contend (Opp. 35) that *Reynolds v. Sims*, 377 U.S. 533 (1964), did not expressly limit its vote-dilution holding to the specific facts of that case. That is true but irrelevant. Nothing in *Reynolds* suggests that the Supreme Court would have countenanced the *Bonner* petitioners' flawed vote-dilution argument. And petitioners identify not one case—from any court—that has adopted their theory of vote dilution in the 56 years since *Reynolds* was decided. The most recent authority instead supports respondents' position. *See, e.g.*, *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 389-390 (W.D. Pa. 2020); *accord Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 919-920 (M.D. Pa. 2020), *aff'd sub nom. Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 F. App'x 377 (3d Cir. 2020).

III. CONCLUSION

This Court should grant summary relief in favor of respondents and dismiss the petitions with prejudice.

November 9, 2021

Respectfully submitted,

/s/ Clifford B. Levine

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CERTIFICATE OF COMPLIANCE

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

/s/ Clifford B. Levine
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served upon all counsel of record on November 9, 2021 by this Court's electronic filing system.

/s/ Clifford B. Levine
CLIFFORD B. LEVINE