IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko, Petitioner	:	**CASES CONSOLIDATED**
v.	:	No. 244 M.D. 2021
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 J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook, Petitioners	:	
v.	:	No. 293 M.D. 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: February 16, 2022

Before the Court is the "Appellees' Joint Application to Terminate (Eliminate) Automatic Stay in Both Appeals" (Joint Application) filed by Petitioners Doug McLinko, Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn F. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook, and Intervenors the Butler County Republican Committee, the York County Republican Committee, and the Washington County Republican Committee (collectively, Petitioners). The Joint Application seeks to vacate the automatic stay[1] of this Court's orders of January 28, 2022, declaring that the Act of October 31, 2019, P.L. 552, No. 77 (Act 77),[2] which established a system of no-excuse mail-in voting, violates Article VII, Section 1 of the Pennsylvania Constitution. PA. CONST. art. VII, §1.[3] *See McLinko v. Commonwealth*, __ A.3d __

[1] The automatic stay was occasioned by the appeal of Veronica Degraffenreid, the Acting Secretary of the Department of State, and the Commonwealth of Pennsylvania, Department of State (collectively, Acting Secretary). On January 8, 2022, Leigh M. Chapman was appointed Secretary of the Commonwealth, succeeding Veronica Degraffenreid. *See* https://www.governor.pa.gov/newsroom/gov-wolf-names-leigh-m-chapman-new-acting-secretary-of-the-commonwealth/ (last visited February 16, 2022).

[2] Act 77 amended the Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, *as amended,* 25 P.S. §§2600-3591.

[3] It states:

> *Every citizen* twenty-one years of age, possessing the following qualifications, *shall be entitled to vote* at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State ninety (90) days immediately preceding the election.
>
> 3. *He or she shall have resided in the election district where he or she shall offer to vote* at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

PA. CONST. art. VII, §1 (emphasis added).

(Pa. Cmwlth., No. 244 M.D. 2021, filed January 28, 2022), and *Bonner v. Degraffenreid*, __ A.3d __ (Pa. Cmwlth., No. 293 M.D. 2021, filed January 28, 2022). Article VII, Section 1 was adopted in 1838 and definitively construed in 1862 by the Pennsylvania Supreme Court to mean that electors must appear in person, at "their proper polling place[]," and on Election Day in order to vote. *McLinko*, __ A.3d at __, slip op. at 25. The ability to vote at another time and place, *i.e.*, by absentee ballot, requires specific constitutional authorization. *Id.* at __, slip op. at 32. This Court held that, consistent with Pennsylvania Supreme Court precedent, a constitutional amendment is a necessary prerequisite to the legislature's establishment of a no-excuse mail-in voting system such as that set forth in Act 77. *McLinko*, __ A.3d at __, slip op. at 35.[4]

The Acting Secretary appealed the Court's January 28, 2022, decisions to the Pennsylvania Supreme Court that same day, thereby triggering an automatic stay ancillary to the appeal. *See* PA. R.A.P. 1702 (stay ancillary to appeal) *and* 1736(b) (a self-executing automatic supersedeas attaches upon the taking of an appeal and continues through the pendency of the appeal process).[5] On January 31, 2022, Petitioners filed the Joint Application seeking a termination of the automatic

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[4] The Court rejected the Acting Secretary's contention that Article VII, Section 4 of the Pennsylvania Constitution, PA. CONST. art VII, §4, authorized Act 77. *McLinko*, __ A.3d at __, slip op. at 31-32.

This 1901 constitutional provision pre-dated the Supreme Court decision that any deviation from the requirement of in-person voting at an elector's polling place on Election Day required express authorization in the Constitution. *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924) (*Lancaster City*). The Supreme Court further explained that the language in Section 4 for "such other method as may be prescribed by law[,]" PA. CONST. art. VII, §4, was adopted to allow the use of voting machines. *Lancaster City*, 126 A. at 201. It goes without saying that voting machines can only be employed at a polling place.

[5] Because this case was filed in this Court's original jurisdiction, this Court retains jurisdiction over stay applications during an appeal. *See* PA. R.A.P. 1701(b)(1).

stay. On February 1, 2022, the Court directed the Acting Secretary to file any answer to the Joint Application by noon on Friday, February 4, 2022. The Acting Secretary filed an answer opposing Petitioners' Joint Application.[6]

> To prevail on a petition to vacate an automatic supersedeas,
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> the petitioner must establish: (1) that he is likely to prevail on the merits; (2) that without the requested relief he will suffer irreparable injury; and (3) that the removal of the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest.

Rickert v. Latimore Township, 960 A.2d 912, 923 (Pa. Cmwlth. 2008) (quoting *Solano v. Pennsylvania Board of Probation and Parole*, 884 A.2d 943, 944 (Pa. Cmwlth. 2005)).

The Court agrees with Petitioners that they are likely to prevail on the merits and rejects the Acting Secretary's arguments to the contrary.

The Acting Secretary intimates that the *McLinko* and *Bonner* decisions are not likely to stand because each was a "closely divided 3-2 decision" of an *en banc* panel. Answer to Joint Application at 2, 6. The fact that the Court's decision was not unanimous does not, in any way, predict the outcome of the Supreme Court's review. For example, the Pennsylvania Supreme Court affirmed the decision of a divided five-member *en banc* panel in *League of Women Voters of Pennsylvania v. Boockvar* (Pa. Cmwlth., No. 578 M.D. 2019, filed January 7, 2021), *affirmed*, 265 A.3d 207 (Pa. 2021) (upholding this Court's decision that Victim's Right Amendment violated the procedure for amending the Pennsylvania Constitution).[7]

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[6] Intervenors the Democratic National Committee and the Pennsylvania Democratic Party did not submit an answer to the Joint Application; however, they concur with the Acting Secretary's opposition to the Joint Application. Democratic Intervenors' Letter, 2/4/2022, at 1.

[7] In *League of Women Voters*, Judge Ceisler filed an opinion in support of the order announcing the judgment of the Court, which Judge Wojcik joined. Judge McCullough filed an opinion in

Likewise, the Supreme Court declined review of a split *en banc* decision of this Court in *Penjuke v. Pennsylvania Board of Probation and Parole*, 203 A.3d 401 (Pa. Cmwlth. 2019), *appeal denied*, 228 A.3d 254 (Pa. 2020).[8] Each review by the Supreme Court turns on the merits of this Court's decision without regard to whether that decision was unanimous or the result of a split vote.

The Acting Secretary believes that the Pennsylvania Supreme Court will overrule *Chase v. Miller*, 41 Pa. 403 (1862), and *Lancaster City*, 126 A. 199. It is true that the Supreme Court has the power to overrule *Chase* and *Lancaster City*, but the Acting Secretary has not identified the error in either decision. The place requirement for exercise of the voting franchise was added to the Pennsylvania Constitution in 1838, and its operative language, *i.e.*, "offer to vote," has not changed since then. PA. CONST. art. VII, §1. The Supreme Court established in 1862 that the entitlement to vote created in Article VII, Section 1, compelled the qualified elector "to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by the law to receive it." *Chase*, 41 Pa. at 419. The Acting Secretary argues, in conclusory fashion, that *Chase* and *Lancaster City* are "outliers" and directs the Court to *Lemons v. Noller*, 63 P.2d 177 (Kan. 1936). Answer to Joint Application at 15. In *Lemons*, the Kansas Supreme Court concluded that an elector can waive his right to cast a ballot in secrecy by choosing to vote by absentee ballot and, thus, refused to issue a writ of mandamus to change the outcome of an election.

Lemons does not support the Acting Secretary's claim that *Chase* and *Lancaster City* are "outliers." *Lemons* concerned whether an absentee voting

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support of the Court's order. Judge Leavitt filed an opinion in opposition to the Court's order, which Judge Fizzano Cannon joined.

[8] The decision in *Penjuke* was 4-3, with one judge concurring in the result only.

provision in the Kansas constitution allowing those in military service to vote by absentee ballot implicitly denied other electors the right to vote by absentee ballot. *Lemons*, 63 P.2d at 181. The merits of *Chase* and *Lancaster City* will not be evaluated by comparison to *Lemons*, which offers a meandering discourse at best. In any case, *Chase* and *Lancaster City* are consistent with decisions by other state courts and their understanding of their constitutions. *See* John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and The Secret Ballot*: *Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 498 (2003) (noting that Pennsylvania and other states were required to amend their constitutions before enacting an absentee voting system because of the state constitutional requirement of in-person voting). *See also McLinko*, ___ A.3d at ___, slip. op. at 30, n.26 (explaining that the New York legislature put no-excuse mail-in voting to the voters as a constitutional amendment because of the constitutional limits on availability of absentee voting).

Chase and *Lancaster City* have informed the conduct of elections in Pennsylvania for over 100 years. *McLinko*, __ A.3d at __, slip op. at 28-29. Each incremental expansion of the opportunity to vote by absentee ballot has been preceded by a specific amendment to Article VII, Section 14 of the Pennsylvania Constitution. PA. CONST. art. VII, §14(a).[9] *McLinko*, __ A.3d at __, slip op. at 32. Except the most recent one.

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[9] It states:

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

As the Pennsylvania Supreme Court recently stated, "[t]o reverse a decision, we demand a special justification, over and above the belief that the precedent was wrongly decided." *Commonwealth v. Alexander*, 243 A.3d 177, 196 (2020) (quoting *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020)). In deciding whether to overrule its prior decision, the Supreme Court considers several factors, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Alexander*, 243 A.3d at 196 (quoting *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2177-78 (2019)). The age of the decision is another factor. *Alexander*, 243 A.3d at 196. The holdings of *Chase* and *Lancaster City* meet all these factors. More importantly, each decision is firmly grounded in the text of the Pennsylvania Constitution.[10]

The Court also agrees with Petitioners that the use of an unconstitutional voting system constitutes, in itself, irreparable harm. *See generally SEIU Healthcare Pennsylvania v. Commonwealth*, 104 A.3d 495, 508 (Pa. 2014) (violation of a statutory mandate establishes irreparable injury). Indeed, it has long been established that the continuation of "unlawful conduct constitutes irreparable injury." *Pennsylvania Public Utility Commission v. Israel*, 52 A.2d 317, 321 (Pa. 1947).

Harm to other persons interested in this matter is difficult to evaluate. Should the automatic supersedeas be vacated, electors will be unable to avail themselves of no-excuse mail-in voting, but they will still be able to vote in person

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PA. CONST. art. VII, §14(a).

[10] The textual support for the Supreme Court's ruling in *Chase*, 41 Pa. 403, has strengthened over time. The verb has changed from the declarative form "offers to vote," PA. CONST. art. III, §(1838), to the imperative form "shall offer to vote." PA. CONST. art III, §1 (adopted in 1874). *See McLinko*, ___ A.3d at ___, slip. op. at 13, n.15.

at their polling places on Election Day. If electors meet even one of the express enumerated exceptions to the in-person voting requirement in Article VII, Section 14(a) of the Constitution, they may vote by absentee mail-in ballot. The enumerated exceptions apply to electors who are absent from their municipality on Election Day "because their duties, occupation or business" require them to be elsewhere or who are in residence in their election district but cannot attend their proper polling place "because of illness or physical disability[.]" PA. CONST. art. VII, §14(a). Election duties or observance of a religious holiday also provide a basis for absentee, mail-in voting. *Id.* It may be inconvenient for an elector to return to the pre-Act 77 election system, but it is difficult to discern any "harm" in having electors vote at their assigned polling place, as they have done since 1838.

This leaves the adverse impact upon the public interest with regard to the primary election scheduled for May 17, 2022. The statutory deadline for counties to send mail-in ballot applications to electors on the permanent mailing list was Monday, February 7, 2022, and the counties have sent applications to over 1.3 million electors. Answer to Joint Application at 9-10. The Acting Secretary argues that this Court should forbear from altering the *status quo* while the Supreme Court considers the constitutionality of Act 77. Notably, this is also a year in which both the congressional and state legislative districts must be configured because of the 2020 census results. Petitioners seek prospective relief, which suggests that the effect of the declaratory judgment could be deferred beyond the primary election if affirmed by the Supreme Court.[11]

[11] *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (judgment deferred 60 days to permit implementation of fallback provisions in statute); *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294, 299-300 (1955) (courts of equity may consider "complexities arising from the transition to a system of public education freed of racial discrimination" after the declaration that

An orderly election is in the public interest. *Costa v. Cortes*, 143 A.3d 430, 441 (Pa. Cmwlth. 2016) (observing the need for "an orderly and lawful election process"). Lifting the automatic supersedeas now, while cross-appeals[12] are pending in the Pennsylvania Supreme Court, will not advance an orderly election process. Immediate implementation of this Court's decision will require county boards of election to notify voters of a change in voting requirements, so that voters will know the options available for the 2022 primary election. If the Supreme Court reverses this Court's decision, then the county boards of election will have to notify the public of the reversal of their prior notice. This will create confusion and uncertainty, which is not in the public interest. *Accord id.* at 442 (observing that ordering the removal of a ballot question from the primary ballot "would not be in the public interest as it would only foment further uncertainty among the public as to whether they should vote on [the ballot question] and whether, if they do, their votes will be counted").

Similarly, the cost to taxpayers of notifying electors of a change, twice, is also relevant to the public interest analysis. *Accord id.* at 436 (noting the possible waste of $1 million in costs to taxpayers for advertising a ballot question, if that question were later removed from the ballot). As stated above, approximately 1.3 million mail-in ballot applications have been sent to Pennsylvania electors for the

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racial discrimination in public education is unconstitutional). *McLinko* and *Bonner* concern not just the Secretary of the Commonwealth but all the county boards of election.

[12] Subsequently, on February 4, 2022, Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn F. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook filed a notice of cross-appeal of this Court's January 28, 2020, decision in *Bonner* in the Supreme Court, which has been docketed at No. 19 MAP 2022. Then, on February 7, 2022, Intervenors the Butler County Republican Committee, the York County Republican Committee, and the Washington County Republican Committee also filed a notice of cross-appeal of this Court's decision in *Bonner* in the Supreme Court.

primary election. The cost of postage, printing, and employee time to revoke these applications is not in the record but cannot be trivial. That expenditure would prove unnecessary, and moreover, would have to be incurred yet again in order to reverse the first notice required by the Supreme Court's decision on appeal.

Nevertheless, there is also an important competing public interest in safeguarding the public from unconstitutional legislation. As this Court observed in *Costa*, "the public interest is best served by adhering to the text of the Pennsylvania Constitution . . . ."[13] *Id.* at 442; *see also id.* ("[a] critical role of this Court is to save the public from unlawful or unconstitutional decisions by the other two branches of government . . . ."). However, this competing interest must be balanced with those stated above and viewed in light of the exigency arising from the short time remaining before the primary election. Recognizing this exigency, the Supreme Court has scheduled expedited argument on the cross-appeals of this Court's decisions for March 8, 2022. As such, there remains sufficient time for the Supreme Court to consider and decide the parties' appeals in advance of the primary election.

Given the particular challenges of this election year, the Court agrees that the *status quo ante* should be preserved while the Pennsylvania Supreme Court considers the merits of the *McLinko* and *Bonner* decisions, which are listed for argument on March 8, 2022. For this reason, the Court will delay vacating the supersedeas until March 15, 2022. This will allow the county boards of election to defer sending any notices until the Supreme Court has decided the appeal in this matter. If the declaratory judgment is affirmed, the county boards of elections can

[13] In *Costa*, 430 A.3d at 436-37, this Court acknowledged the undesirable financial consequences of moving the proposed constitutional amendment from the April 2016 ballot to the November 2016 ballot, but ultimately concluded it could not consider the cost, where doing so would impinge upon the legislature's authority to enact resolutions on placement of a constitutional question on the primary ballot. *Id.* at 436. Here, no such impingement on legislative authority is involved.

promptly inform the electorate that one must qualify for an absentee ballot to vote by mail. The deadline for receipt of absentee mail-in ballot applications by local election boards is May 10, 2022,[14] and this deadline can be met by electors needing an absentee ballot. All other electors can appear at their "proper polling places" and vote in person. PA. CONST. art VII, §14(a). If the Supreme Court reverses this Court's orders and holds that no-excuse mail-in voting is constitutional, all of the forms of voting currently in place would continue in due course.

This timeline gives the Supreme Court seven days to issue its decision, with a formal opinion likely to follow thereafter.[15] Deferring the vacating of the supersedeas to March 15, 2022, does not disturb the Supreme Court's schedule and avoids the risk of unnecessary public confusion or cost, while recognizing the magnitude of the public interest in holding a primary election in 2022 that is not affected by any doubt as to the constitutionality of the forms of voting permitted.

For these reasons, the Court will grant Petitioners' Joint Application, but it will deny Petitioners' request to immediately vacate the automatic stay.

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

[14] https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx (last visited February 16, 2022).

[15] In election cases, a gap between the Supreme Court's order and its opinion is not uncommon. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (opinion filed on February 7, 2018, on an order filed January 22, 2018); *In re Cohen for Office of Philadelphia City Council-at-Large*, 225 A.3d 1083 (Pa. 2020) (opinion filed February 19, 2020, on an order entered on October 3, 2019).

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v.	:	No. 293 M.D. 2021
Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State, Respondents	:	

O R D E R

AND NOW, this 16th day of February, 2022, it is ORDERED that Petitioners-Appellees' Joint Application to Terminate (Eliminate) Automatic Stay is hereby GRANTED effective March 15, 2022.

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

Order Exit
02/16/2022