Received 9/9/2021 12:04:20 AM Commonwealth Court of Pennsylvania

Filed 9/9/2021 12:04:00 AM Commonwealth Court of Pennsylvania
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.

ORIGINAL JURISDICTION
Docket No. 244 M.D. 2021

***AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR SUMMARY RELIEF**

Filed on behalf of *Amici*, 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, by leave of court granted by Order dated September 3, 2021 in this matter

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are a group of 14 members of the Pennsylvania House of Representatives ("the House") who are all qualified registered electors. Timothy R. Bonner (hereinafter "Bonner") is a member of the House serving Mercer County (Part) and Butler County (Part). Bonner was elected to the House on March 17, 2020, and took office on April 6, 2020, after Act 77 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 ("Act 77")), was passed by the House. David H. Zimmerman (hereinafter "Zimmerman") is a member of the House serving Lancaster County (Part). Zimmerman voted against Act 77 when it was passed by the House. Timothy F. Twardzik (hereinafter "Twardzik") is a member of the House serving Schuylkill County (Part). Twardzik was elected to the House in the fall of 2020, and took office on January 5, 2021, after Act 77 was passed by the House.

P. Michael Jones (hereinafter "Jones") is a member of the House serving Lancaster County. Barry J. Jozwiak (hereinafter "Jozwiak") is a member of the House serving Berks County (Part). Kathy L. Rapp (hereinafter "Rapp") is a member of the House serving Warren County, Crawford County (Part), and Forest County (Part). David Maloney (hereinafter "Maloney") is a member of the House serving Berks County (Part). Barbara Gleim (hereinafter "Gleim") is a member of the House serving Cumberland County (Part). Robert Brooks (hereinafter

"Brooks") is a member of the House serving Westmoreland County (Part) and Allegheny County (Part). Aaron J. Bernstine (hereinafter "Bernstine") is a member of the House serving Beaver County (Part), Butler County (Part) and Lawrence County (Part). Dawn W. Keefer (hereinafter "Keefer") is a member of the House serving York County (Part) and Cumberland County (Part). Dan Moul (hereinafter "Moul") is a member of the House serving Adams County (Part). Francis X. Ryan (hereinafter "Ryan") is a member of the House serving Lebanon County (Part). Donald "Bud" Cook (hereinafter "Cook") is a member of the House serving Fayette County (Part) and Washington County (Part). Jones, Jozwiak, Rapp, Maloney, Gleim, Brooks, Bernstine, Keefer, Moul, Ryan and Cook voted in favor of Act 77 when it was passed by the House.

Amici do not file this brief in their official capacities as House members, but rather in their personal capacities. *Amici* have an interest in ensuring that the citizens of Pennsylvania are not disenfranchised by denying them the right to approve an amendment to the Pennsylvania Constitution that would permit no-excuse mail-in voting. The Pennsylvania Constitution grants the people of Pennsylvania the right to vote on any amendment to the Pennsylvania Constitution, and the final say on whether any such amendment is permitted. Act 77 denied the people that right to vote on whether to effectively eliminate the constitutional limits on absentee voting and to permit all otherwise eligible voters to vote with

absentee or mail-in ballots without excuse. *Amici* seek to return the power to approve all amendments to the Pennsylvania Constitution to the people of Pennsylvania.

The *amici* who voted in favor of Act 77 were never given a briefing on the constitutional history of absentee or mail-in voting at the time they approved Act 77 and are not constitutional lawyers by training. Having been made aware of the constitutional issues, they now seek to have Act 77 stricken as unconstitutional because it has not been approved by the Pennsylvania voters.

This Court found a likelihood of success on the merits of this constitutional challenge in a similar 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 refused to consider the merits of the constitutional issues and dismissed that case in a *per curiam* Order on the grounds of laches. *Amici* respectfully urge the Court to grant Petitioner's request for summary relief. The relief sought by Petitioner will uphold the Pennsylvania and U.S. Constitutions and restore to the people the right to vote

on any amendment to the Pennsylvania Constitution's requirements expanding absentee voting.[1]

Introduction and Summary of the Argument

Act 77, the most expansive and fundamental change to the Pennsylvania Election Code since it was enacted in 1937, unlawfully implemented no-excuse mail-in balloting. Act 77 violates the Constitution of the Commonwealth of Pennsylvania because it permits all electors to vote by mail, without qualifying for a constitutionally prescribed exemption as currently required by the Pennsylvania Constitution, Art. VII, § 14.

Beginning with the Military Absentee Ballot Act of 1839, the Pennsylvania Supreme Court consistently rejected all attempts to expand absentee voting by statute, uniformly holding that a constitutional amendment is required to expand absentee voting beyond the categories provided in the Pennsylvania Constitution. Act 77 is the Commonwealth's latest attempt to override, through legislation alone, the limitations on absentee or mail-in voting contained in the Pennsylvania Constitution. In doing so, the Commonwealth has disenfranchised its citizens by denying them the right to approve an amendment to the Pennsylvania Constitution that would permit no-excuse mail-in voting. Any allegation that absentee voting is

[1] No one other than *amici* or their counsel paid in whole or in part for the preparation of this brief or authored in whole or in part this brief. *See* Pa.R.A.P. 531(b)(2).

different than mail-in voting is a distinction without a difference. Absentee and mail-in voting are the same and both must comply with the provisions of the Pennsylvania Constitution.

ARGUMENT

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

There is no statutory time bar to Petitioner's 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. Section 13 is 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 October 31, 2019. 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 also bifurcated the matter and retained jurisdiction over the preliminary injunction. *Id*.

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.

Lastly, 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. Respondent's 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. Although "laches may bar a challenge to a statute based upon procedural deficiencies in its enactment." *Stilp v. Hafer*, 718 A.2d 290, 294 (Pa. 1998), 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 (Pa. 1937).

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 expanded absentee voting through Act 77, despite limitations to such expansion. Act 77 itself is not a constitutional amendment, which would be the type of procedural laches challenge raised by the Respondents (and would fail in any case). Such a patent and substantive violation of the Constitution cannot be barred by the mere passage of time – "To so hold would establish a dangerous precedent, the evil effect of which might reach far beyond present expectations." *Wilson*, 195 A. at 99. Violating the constitutional limits on absentee voting is not a mere procedural issue, but rather one of substance.

Even assuming that laches can apply to retrospective relief of a substantive constitutional challenge, which the Pennsylvania Supreme Court appears to have

accepted in *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020) (*per curiam*), 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 Petitioner to disprove laches.

In *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 134-35, 126 A. 199 (1924) (herein-after *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 voted 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).

There is not the slightest evidence or reason to believe that Petitioner was guilty of want of due diligence in the instant action. Petitioner is 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 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 Petitioner, who is not an attorney and had no specialized knowledge, with failure to institute an action more promptly, while Respondents possess extremely specialized knowledge, and failed to take any corrective actions. In light of Respondents' collective failures in enacting and enforcing Act 77, they should have acted; that they did not do so puts 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*). In *Kelly*, the petitioners sought retrospective relief, "to invalidate the ballots of the millions of Pennsylvania voters who utilized the mail-in voting procedures established by Act 77." *Id*. at 1256. Here, Petitioner seeks only prospective relief. In *Kelly*, in support of applying laches to dismiss the claim, the 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 the Petitioner seeks here. 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*. 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. 10 of their Memorandum in Opposition to Petitioner's Application for Summary Relief ("Respondents' Memo"). Nevertheless, they attempt to treat *Kelly* as if it were binding precedent yet 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. Allowing such a basis for a laches defense would insulate virtually any unconstitutional law from challenge, as governments frequently incur costs in implementing laws. Here the government knew the law was unconstitutional, it should not be permitted to hide behind spending taxpayer money in unreasonable reliance on an unconstitutional law as a means of preventing constitutional challenge.

III. Petitioner has standing to challenge the constitutionality of Act 77.

Petitioner has 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, Petitioner has 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 other citizens.

Moreover, although to have standing a party must ordinarily have an interest in the controversy that is distinguishable from the interest shared by 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 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 the Petitioner has standing to maintain this action.

IV. 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*.

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 current language of Article VII, § 4 remains identical to the language the Pennsylvania Supreme Court interpreted in *Lancaster City*. Article VII, §1 has been altered in three ways since the 1924 case: (1) the voting age requirement was changed to 18, from 21; (2) the state residency requirement was lowered from 1 year, to 90 days; and (3) Clause 3 of Article VII, § 7 was amended to allow a Pennsylvania resident who moves to another County within 60 days of an election to vote in their previous county of residence. These changes to Article VII, § 1 are not relevant to the Court's reasoning in *Lancaster* City. Pennsylvania Constitution's remains, for all relevant purposes, unchanged since 1924 with regard to the qualifications and requirements for voting in

elections. Respondents' actions in passing Act 77 without first amending the Constitution directly contravene binding precedent and it is respectfully submitted that this Court should invalidate the Act.

In 1949, the Pennsylvania Constitution was amended to also allow bedridden or hospitalized war veterans the ability to vote absentee. Pa. Const. Art. VIII, § 18 (1949). In 1957, the legislature began the process of amending the constitution to allow civilian absentee voting in instances where unavoidable absence or physical disability prevented them from voting in person. *See Absentee Ballots Case*, 423 Pa. 504, 508, 224 A.2d 197, 199-200 (1966). Because of the restrictions and safeguards under Article XI, the 1957 amendment to the constitution did not go into effect until 1960. *Id.* The constitutional amendment effectively expanded eligibility for absentee voting to include only two categories of qualified electors: (1) those who on election day would be absent from their municipality of residence because of their duties, occupation, or business; and (2) those who are unable to attend their proper polling place because of illness or physical disability. Pa. Const. Art. VII, § 19 (1957).

Issues arose immediately with the canvassing and computation of ballots under the newly expanded absentee voting system, and any challenges to absentee ballots that were rejected by the board of elections resulted in the challenged ballots being placed with ballots that were not challenged to be counted, making it

impossible to correct if it was later determined that the decision to reject the challenge was incorrect. *See Absentee Ballots Case*, 423 Pa. 504, 509, 224 A.2d 197, 200 (Pa. 1966). In response, "the legislature added further amendments by the Act of August 13, 1963, P.L. 707, 25 Pa.Stat. § 3146.1 *et seq*. (Supp. 1965)" to require the board of elections to mark any ballot that was disputed as "challenged," hold a hearing on the objections, and the decision was opened up to review by the court of common pleas in the county involved. *Id.* Until all challenges were resolved, the board of elections was required to desist from canvassing and computing all challenged ballots to avoid the possible mixing of valid and invalid ballots. *Id.* In 1967 following the Constitutional Convention, the Pennsylvania Constitution was reorganized and Article VII, § 19 was renumbered to Article VII, § 14.

On November 5, 1985, the citizens of Pennsylvania approved another amendment to Article VII, § 14 of the Pennsylvania Constitution, which added religious observances to the list of permissible reasons for requesting an absentee ballot (the "1985 Amendment"). The 1985 Amendment began as HB 846, PN 1963, which would have amended the Pennsylvania Election Code to provide absentee ballots for religious holidays and for the delivery and mailing of ballots. *See* Pa. H. Leg. J. No. 88, 167th General Assembly, Session of 1983, at 1711 (Oct. 26, 1983) (considering HB 846, PN 1963, entitled "An Act amending the

'Pennsylvania Election Code,' …further providing for absentee ballots for religious holidays and for the delivery and mailing of ballots."). However, the legislative history recognized that because the Pennsylvania Constitution specifically delineates who may receive an absentee ballot, a constitutional amendment was necessary to implement these changes. HB 846, PN 1963 was thus changed from a statute to a proposed amendment to the Pennsylvania Constitution. *Id.* (statement of Mr. Itkin) ("[T]his amendment is offered to alleviate a possible problem with respect to the legislation. The bill would originally amend the Election Code to [expand absentee balloting] …. Because it appears that the Constitution talks about who may receive an absentee ballot, we felt it might be better in changing the bill from a statute to a proposed amendment to the Pennsylvania Constitution.").

On November 4, 1997, the citizens of Pennsylvania approved another amendment to Article VII, § 14 of the Pennsylvania Constitution, which expanded the ability to vote by absentee ballot to qualified voters who were outside of their *municipality of residence* on election day, where previously absentee voting had been limited to those outside of their *county of residence* (the "1997 Amendment"). *See* Pa. H. Leg. J. No. 31, 180th General Assembly, Session of 1996 (May 13, 1996) The legislative history of the 1997 Amendments recognized the long-known concept that there existed only two forms of voting: (1) in-person, and (2) absentee

voting and that the 1997 Amendment would not change the status quo; namely that "people who do not work outside the municipality [or county] or people who are ill and who it is a great difficulty for them to vote but it is not impossible for them to vote, so they do not fit in the current loophole for people who are too ill to vote but for them it is a great difficulty to vote, they cannot vote under [the 1997 Amendment]." *Id.* at 841 (statement of Mr. Cohen).

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' Memo, pp. 49. 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*, which is well settled, especially in the context of election law. The Pennsylvania Supreme Court has held that "for purposes of stability and predictability that are essential to the rule of law ... the forceful inclination of courts should favor adherence to the

general rule of abiding by that which has been settled." *Shambach v. Bickhart*, 845 A. 2d 793, 807 (Pa. 2004) (J. Saylor concurring). Certainty and stability in the law is crucial, and unless blindly following stare decisis perpetuates error, precedent must be followed. *See Stilp v. Com.*, 905 A. 2d 918, 967 (Pa. 2006). Holdings, "once made and followed, should never be altered upon the changed views of new personnel of the court." *In re Burtt's Estate*, 44 A.2d 670, 677 (Pa. 1945) (cited by *In re Paulmier*, 937 A. 2d 364 (Pa. 2007)). "Stare decisis simply declares that, for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." *Heisler v. Thomas Colliery Co.*, 118 A. 394, 395 (Pa. 1922).

The material facts of this case are identical -- the wording "offer to vote" remains identical in today's Pennsylvania Constitution to the Pennsylvania Constitution back in the times of *Chase* and *Lancaster City*. For the sake of consistency of law, the meaning must remain the same. This Court should consistently find that the term requires voting to be in person. Article VII, § 14 provides that contravening language, and does so specifically because of the limitation set by § 1. The Respondents 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 …").

Indeed, *Chase* and *Lancaster City* have been consistently upheld without any indication of perpetuating legal error. *Stare decisis*, as a principle, was established to provide predictability and stability through time. 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 at 807.

Moreover, consistent amendments to Article VII demonstrate a necessity to provide specific constitutional authority for each expansion of methods of voting beyond *in propria persona* voting, because of the strict requirement for in person voting. The Respondents' interpretation of the relevant constitutional provisions, if correct, would have obviated the need for many such prior Pennsylvania Constitutional amendments. Indeed, absent such restriction, amendments allowing for Military voting and absentee voting under Article VII, § 14 would be redundant.

Yet, Respondents point to the 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 when the amendment only allowed for military members. *See* Respondent's Memo, 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 justifiable 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 to "shall" in Article VII, § 14 indicates that "Article VII, § 14 sets a floor for absentee voting; it does not establish a ceiling." Respondents' Memo, p. 42. 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."

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 legislative history set forth in the Co-Sponsorship Memorandum of the proposed constitutional amendment (such memoranda accompany all proposed legislation) recognized that "Pennsylvania's current Constitution restricts voters wanting to vote by absentee ballot to [specific] situations…" The amendment proposes to "eliminate these limitations, empowering voters to request and submit absentee ballots for any reason – allowing them to vote early and by mail." Sen. Mike Folmer & Sen. Judith Schwank, Senate Co-Sponsorship Memoranda to S.B. 413 (Jan. 29, 2019, 10:46 AM), https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=28056.

S.B. 413, amending Article VII, § 14 of the Pennsylvania Constitution, was passed by both chambers and was filed with the Office of the Secretary of the Commonwealth on April 29, 2020. If S.B. 413 had passed both chambers again in the immediately subsequent legislative session, it would have appeared on a ballot for approval by a majority of Pennsylvania electors to be properly ratified, but the Commonwealth abandoned those efforts to amend the Pennsylvania Constitution. Had it been properly approved and ratified by a majority of electors in 2021, S.B. 413 would have amended Article VII, § 14 to allow any voter, for any reason, to vote by absentee ballot as follows:

(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. **A law under this subsection may not require a qualified elector to physically appear at a designated polling place on the day of the election.**

~~(b) For purposes of this section, "municipality" means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.~~ .

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

CONCLUSION

For the aforementioned reasons, *Amici Curiae* respectfully urge this Court to grant Petitioner's Application for Summary Relief.

Respectfully submitted,

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Attorney for Amici

CERTIFICATE OF WORD COUNT

I certify that this brief contains 6190 words, as determined by the word-count feature of Microsoft Word.

Date: September 8, 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: September 8, 2021

Gregory H. Teufel, Esq.