

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOCKET NO. 244 M.D. 2021

DOUG MCLINKO,

PETITIONER,

v.

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

RESPONDENTS.

**BRIEF IN SUPPORT OF APPLICATION FOR SUMMARY RELIEF IN
THE FORM OF A DECLARATORY JUDGMENT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
INTRODUCTION.....	5
STATEMENT OF UNDISPUTED MATERIAL FACTS	8
ARGUMENT	10
I. THE PENNSYLVANIA CONSTITUTION REQUIRES IN- PERSON VOTING EXCEPT FOR THE LIMITED CIRCUMSTANCES STATED IN ARTICLE VII, § 14.	10
II. THE TEXT OF ARTICLE VII, § 14 REQUIRES VOTING TO OCCUR IN PERSON AT A POLLING PLACE.....	17
III. THE GENERAL ASSEMBLY CANNOT LEGISLATE AROUND THE CONSTITUTION.	19
IV. ACT 77 RENDERS ARTICLE VII, § 14 SUPERFULOUS. .	23
CONCLUSION.....	26
CERTIFICATE OF COMPLIANCE.....	28
CERTIFICATE OF SERVICE.....	29

TABLE OF AUTHORITIES

Cases

<i>Board of Revision of Taxes, City of Philadelphia v. City of Philadelphia</i> , 4 A.3d 610 (Pa. 2010).....	19
<i>Chase v. Miller</i> , 41 Pa. 403 (1862)	7, 12, 14, 15, 16, 29
<i>In re Contested Election in Fifth Ward of Lancaster City</i> , 126 A. 199 (Pa. 1924).....	7, 11, 12, 14, 16, 17
<i>Off. of Gen. Couns. v. Bumsted</i> , 247 A.3d 71 (Pa. Commw. Ct. 2021)	25
<i>Thompson v. Thompson</i> , 223 A.3d 1272 (Pa. 2020).....	25
<i>Tr. Under Agreement of Taylor</i> , 164 A.3d 1147 (Pa. 2017).....	19, 25
<i>Wolf v. Scarnati</i> , 233 A.3d 679 (Pa. 2020).....	20, 22, 23, 24

Statutes

25 P.S. § 3146.2(a)	25
25 P.S. § 3146.2(i)(1).....	25
25 P.S. § 3146.2b(d)	26
25 P.S. § 3150.12	26
25 P.S. § 2642(k)	9

25 P.S. § 3154(a)	9
25 P.S. § 2601, et. seq.....	6, 9
25 Pa.C.S. § 2602 (z.6).....	6, 9, 17
25 Pa.C.S. § 3150.11(a).....	6, 10, 26
35 Pa.C.S.A. § 7301(c)	23

Constitutional Provisions

Pa. Const. art. VII, § 14.....	7, 12, 17, 18
Pa. Const. art.VII, § I	6, 7, 11, 17
Pa. Const. art. VIII, § 6 (Pa. Const. 1874)	13
Pa. Const. art. VII, § 1.....	7, 10, 11

Legislation

P.L. 309 of 1923	12
P.L. 522, No. 77 of 2019	6, 9
SB 411 of 2019	21, 22

Treatises

<i>Losing Votes by Mail</i> , 13 New York University Journal of Legislation and Public Policy 573-601 (Fall 2010).....	18
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Report of the Commission on Federal Election Reform, <i>Building Confidence in U.S. Elections</i> , 54 (2005)	18
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INTRODUCTION

This case concerns the constitutionality of a statute, specifically P.L. 522, No. 77 of 2019 (Act 77). It does not involve claims of election fraud or stolen elections. It does not seek to overturn the result of any past election. It does not ask the Court to opine on the propriety of no-excuse mailed voting. Rather, the narrow question before the Court is whether the mailed ballot provisions of Act 77, passed in October 2019, violate Article VII, § 1 of the Pennsylvania Constitution.

Act 77 made changes to the Pennsylvania Election Code, 25 Pa.C.S. § 2601, et. seq. Those changes included the addition of a qualified mail-in elector as a class of voter eligible to vote. 25 Pa.C.S. § 2602 (z.6). The Act defines a qualified mail-in elector as any elector in the Commonwealth, i.e., anyone who is eligible to vote. *Id.* Under the Act, any qualified voter may vote by mail for any reason or no reason whatsoever (no excuse). 25 Pa.C.S. § 3150.11(a). But the Act violates Article VII, § I of the Pennsylvania Constitution.

Article VII, § I of the Pennsylvania Constitution prescribes four criteria to be a qualified elector eligible to vote in an election. A person must be:

- a. 18 years of age or older;
- b. A citizen of the United States for at least one month;
- c. A resident of Pennsylvania for at least 90 days immediately before the date of the election; and
- d. A resident of the “election district where he or she shall **offer to vote** at least 60 days immediately preceding the election.”

Pa. Const. art. VII, § 1 (emphasis added).

The Pennsylvania Supreme Court has long held that the term “offer to vote” means to physically present a ballot at a polling place and that Article VII, § 1 requires in-person voting. *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924); *Chase v. Miller*, 41 Pa. 403 (Pa. 1862).

Article VII, § 14 of the Pennsylvania Constitution contains the only exception to the rule that voters must physically present their ballots on election day. The Pennsylvania Supreme Court has twice declared legislation unconstitutional for permitting Pennsylvania voters to vote by means other than physically presenting a ballot at their district on election day because because voting options can only be expanded by amending the Pennsylvania Constitution. *Id.*

Act 77 is another legislative attempt to circumvent the constitutional amendment process to expand the category of voters eligible to vote by mail. Like the previous attempts, this Court should declare it unconstitutional.

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STATEMENT OF UNDISPUTED MATERIAL FACTS

Doug McLinko is a member of the Bradford County Board of Elections. As a member of the Board of Elections, McLinko must oversee the lawful administration of all aspects of elections, including voter registration, the voting process, and the tabulation of votes. He must also certify the results of all primary and general elections in the county to the Secretary of State. 25 Pa. Stat. Ann. § 2642(k); 25 Pa. Stat. Ann. § 3154(a). McLinko believes that administering ballots pursuant to P.L. 552, No. 77 (Act 77) is unconstitutional and places him in an untenable position of acting unlawfully at the risk of disenfranchising voters. To lawfully perform his duties, McLinko needs and is entitled to a declaratory judgment as to the constitutionality of Act 77.

In October 2019, the Pennsylvania General Assembly passed P.L. 552, No. 77 (Act 77), which made sweeping changes to the Pennsylvania Election Code, 25 Pa.C.S. § 2601, et. seq. Those changes included the addition of a qualified mail-in elector as a class of voter eligible to vote. 25 Pa.C.S. § 2602 (z.6). The Act defines a qualified mail-in elector as any elector in the Commonwealth, i.e., anyone eligible to vote. *Id.* Under the

Act, any qualified voter may vote by mail for any reason or no reason whatsoever (no excuse). 25 Pa.C.S. § 3150.11(a).

The Act violates Article VII, § I of the Pennsylvania Constitution.

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ARGUMENT

I. THE PENNSYLVANIA CONSTITUTION REQUIRES IN-PERSON VOTING EXCEPT FOR THE LIMITED CIRCUMSTANCES STATED IN ARTICLE VII, § 14.

The Pennsylvania Constitution prescribes the qualifications to be eligible to vote. Article VII, § 1, established four criteria. A person must be:

- a. 18 years of age or older;
- b. A citizen of the United States for at least one month;
- c. A resident of Pennsylvania for at least 90 days immediately before the date of the election; and
- d. A resident of the “election district where he or she shall **offer to vote** at least 60 days immediately preceding the election.”

Pa. Const. art. VII, § 1 (emphasis added)

The Pennsylvania Supreme Court has long held that the term “offer to vote” means to physically present a ballot at a polling place and that Article VII, § 1 requires in-person voting. For example, in *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924), the

Pennsylvania Supreme Court held that the term “offer to vote” means “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 law to receive it.” *Id.* (quoting *Chase v. Miller*, 41 Pa. 403 (Pa. 1862)).

Article VII, § 14 of the Pennsylvania Constitution contains the only exception to the rule that voters must physically present their ballots on election day. Under that section, voters can vote by absentee ballot (by mail) when they are (a) absent from their residence on the election day because of business, (b) unable to attend in person because of illness or disability, (c) unable to attend because of the observance of a religious holiday or (d) unable to vote because of election day duties.

In *In re Contested Election in Fifth Ward of Lancaster City*, the Supreme Court declared unconstitutional a Pennsylvania statute, P.L. 309 of 1923, that authorized a form of no-excuse mail-in voting similar to Act 77. *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. at 201. P.L. 309 of 1923 authorized any voter who was outside of his election district on election day because of his business or occupation to vote

early by using an absentee ballot¹. However, the Pennsylvania Constitution in 1923 only authorized voting absentee if a voter was in the military. *See* Article VIII, § 6 (Pa. Const. 1874).

In the election at issue, 8 votes separated the Democratic candidate from his Republican opponent. *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. at 133. But once the absentee ballots were counted, the Republican nudged ahead by 9 votes. *Id.* The Democratic candidate challenged the results of the election and argued that because P.L. 309 was unconstitutional. *Id.* He argued that the absentee ballots should be excluded. *Id.* The Supreme Court agreed and affirmed the election in favor of the Democratic candidate based only on the ballots cast in person on election day.

P.L. 309 enacted a form of early voting whereby “a qualified voter who by reason of his duties, business, or occupation [may be] unavoidably absent from his lawfully designated election district, and outside of the county of which he is an elector, but within the confines of the United States” could request an absentee ballot and complete it in the presence

¹ A complete copy of P.L. 309 of 1923 is attached at Exhibit B to the petition for review.

of an election official before election day. *Id.* In reviewing the law, the Supreme Court held “whether such legislation can be sustained in Pennsylvania depends upon the wording of our Constitution” *Id.*

In declaring the legislation unconstitutional, the Supreme Court held that the General Assembly could only confer voting rights consistent with the Pennsylvania Constitution, which at that time limited absentee voting to military servicemembers. *Id.* at 201. The Court held “[t]he Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed.” *Id.* at 201. The Court concluded by stating “[h]owever laudable the purpose of the act of 1923, it cannot be sustained. If it is deemed necessary that such legislation be placed upon our statute books, then an amendment to the Constitution must be adopted permitting this to be done. For the reasons stated, the only assignment of error is overruled.” *Id.*

That case is in accord with the Pennsylvania Supreme Court’s decision in *Chase v. Miller*, 41 Pa. 403 (Pa. 1862). That case involved a district attorney’s race. *Id.* at 414. 165 votes separated E.B. Chase from his opponent Jerome G. Miller. Based on the ballots cast in person on election day, Chase led Miller 5811 to 5646. *Id.* But there remained to be counted

420 votes from Pennsylvanian soldiers fighting in the Civil War who cast ballots by mail under the Military Absentee Act of 1813. *Id.* If those military votes were counted, Miller would pull ahead of Chase 6066 to 5869. *Id.* In *Chase*, the Pennsylvania Supreme Court decided whether the Military Absentee Act was constitutional and, accordingly, if the military votes could be counted.

Under that Act, a Pennsylvania citizen “in any actual military service in any detachment of the militia or corps of volunteers under requisition of the President of the United States” on election day, could vote “at any such place as the commanding officer” directed. *Id.* at 416. The question before the Court was whether the Act could be “reconciled with the 1st section of article 3^d of the amended constitution.” *Id.* at 418. Article III, § 1 of the 1838 Constitution, like our current Article VII, § 1 used the term “offer to vote” in declaring voting eligibility. The Court ruled it could not, held that the Military Absentee Act was unconstitutional, and invalidated 420 absentee military votes. *Id.* at 428-429

The Court held that the 1838 Pennsylvania Constitution required in-person voting and no provision of the Constitution permitted votes to be received by mail holding:

“To “offer to vote” by ballot, is 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 law to receive it. **The ballot cannot be sent by mail or express**, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil. **We cannot be persuaded that the Constitution ever contemplated any such mode of voting**, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. The Constitution meant, rather, that the voter, in propria persona, should offer his vote in an appropriate election district, in order that his neighbors might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.”

Id. at 419 (emphasis added)

The Court explained the reason that “offer to vote” means to vote in person at your election district is because Article III, § 1 of the 1838 Constitution conferred the right to vote on those who met the criteria for suffrage. *Id.* One of those criteria was that the voter be a resident of a voting district. *Id.* But the right conferred under Article III, § 1 **was the right to vote in that district.** *Id.* (Importantly, following the Court’s decision in *Chase*, the Pennsylvania Constitution was amended to permit military members to vote by mail.)

On two occasions, the Pennsylvania Supreme Court has invalidated legislation designed to expand the means and methods of voting beyond what the Pennsylvania Constitution allowed. Act 77 did what the

Pennsylvania Supreme Court twice said could not be done: It granted electors the ability to cast a ballot without being physically present without first amending the Pennsylvania Constitution. Like the Military Absentee Act and the Act of May 22, 1923 before it, Act 77 is impermissible and unconstitutional absent a formal amendment to the Pennsylvania Constitution.

The General Assembly can only confer voting rights consistent with the Pennsylvania Constitution. *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. at 201. The Pennsylvania Constitution provides for in-person voting, Article VII, § 1 or mailed voting by absentee ballot, Article VII, § 14. Through Act 77, the General Assembly conferred voting rights that are inconsistent with the Pennsylvania Constitution. Beyond the four classifications of persons who may vote absentee by mail set forth in Article VII, § 14, Act 77 expanded voting by mail to all eligible voters. 25 Pa.C.S. § 2602 (z.6).

Act 77 could be viewed as many different things. It could be viewed as laudable. It could be viewed as increasing voter enfranchisement. Or it could be viewed as an insecure means of voting fraught with the potential for mishandling, misplacement, or fraud. *See* Report of the

Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, 54 (2005); Charles Stewart III, *Losing Votes by Mail*, 13 New York University Journal of Legislation and Public Policy 573-601 (Fall 2010). But Act 77 is not constitutional.

II. THE TEXT OF ARTICLE VII, § 14 REQUIRES VOTING TO OCCUR IN PERSON AT A POLLING PLACE.

The text of Article VII, § 14 of the Pennsylvania Constitution requires that voting shall take place in person at a person's regular polling place and confirms that Act 77 is unconstitutional. It states:

“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.”

Pa. Const. art. VII, § 14 (emphasis added).

The first part of section 14 recognizes that in-person voting, whereby voters attend their proper polling place to cast their ballots, is the default constitutional rule. If voting in person at a proper polling

place were not the constitutional standard, then there would have been no reason for section 14 and its instruction to the General Assembly to prescribe an alternative means of voting when voters cannot follow the default constitutional rule of “attending their proper polling place” on election day. If the Pennsylvania Constitution did not require in-person voting by attending a proper polling place, then Article VII, § 14 makes little sense. The General Assembly could have simply passed legislation prescribing any number of means and methods by which one could cast a ballot.

Section 14 must also be read harmoniously with Article VII, § 1. *Tr. Under Agreement of Taylor*, 640 Pa. 629, 645, 164 A.3d 1147, 1157 (2017) (“A fundamental principle in statutory construction is that we must read statutory sections harmoniously.”) It must be read “together and in conjunction” with section 1. *Id.* (citing *Board of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 607 Pa. 104, 4 A.3d 610, 622 (2010)). Reading section 14 together and in conjunction with section 1 clarifies that under the Pennsylvania Constitution voting in person at a voter’s proper polling place is the rule, not the exception. This default constitutional rule strengthens the argument that Act 77 is unconstitutional.

Because the default rule provides for in-person voting with very limited, constitutionally prescribed exceptions, any attempt to change or modify this rule and the exceptions must be enshrined in the Pennsylvania Constitution. As a result, Act 77's significant modification of Pennsylvania constitutional scheme for voting is unconstitutional.

III. THE GENERAL ASSEMBLY CANNOT LEGISLATE AROUND THE CONSTITUTION.

The General Assembly cannot rewrite the constitution through legislation. *Wolf v. Scarnati*, 233 A.3d 679, 702 (Pa. 2020). But that is precisely what the General Assembly has sought to do in Act 77. Act 77 rewrites Article VII, § 14 as follows:

~~“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.”~~

Pa. Const. art. VII, § 14 (emphasis added).

It removes the penultimate conditions that a voter must (a) “**be unable to attend** their proper polling place” and (b) be unable to attend because of one of the four enumerated reasons for alternative means of voting to be used: (1) duties, occupation, and business; (2) illness or physical disability; (3) religious holiday; or (4) election day duties. While rewriting of Article VII, § 14 might be desirable, it can only be done through a constitutional amendment.

Article XI, § 1 of the Pennsylvania Constitution establishes the process by which the Constitution can be amended. In 2019, SB 411 was introduced, which would have properly commenced the process of amending Article VII, § 14 of the Pennsylvania Constitution to include all eligible voters rather than only the four categories of voters currently recognized to vote absentee (by mail). The legislative comments to that bill correctly noted that “Pennsylvania’s current Constitution restricts voters

wanting to vote by absentee ballot to situations where ‘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 observance of a religious holiday or who cannot vote because of election day duties.’ Pet., at Ex. B. That proposed constitutional amendment was designed to “eliminate these limitations, empowering voters to request and submit absentee ballots for any reason – **allowing them to vote early and by mail.**” *Id* (emphasis added).

The General Assembly recognized that the proper means to create a new class of eligible voters who could vote by mail was to amend the Pennsylvania Constitution. But, for reasons known only to the General Assembly, the amendment process was scrapped and replaced with Act 77. When the General Assembly enacts legislation that affronts the Pennsylvania Constitution, that legislation should be declared unconstitutional.

For example, in *Wolf v. Scarnati*, the Pennsylvania Supreme Court ruled that the General Assembly could not circumvent the presentment requirement of Article III, § 9. That case involved the Governor’s

emergency declaration issued in response to COVID-19. In March 2020, the Governor issued an emergency declaration under 35 Pa.C.S.A. § 7301(c). *Wolf*, 233 A.3d at 685. The plain text of that statute also stated, in pertinent part, “[t]he General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency.” *Id.* In June 2020, the General Assembly did just that and passed a concurrent resolution terminating the Governor’s emergency declaration. *Id.*

The central issue in that case was whether concurrent resolution, to be effective, still needed to be presented to the Governor and approved by him or, if vetoed, overridden by a two-thirds majority of both houses. *Id.* at 687. Petitioners argued that section 7301(c) was clear enough on its face and stated that presentment was not required. But the Supreme Court reviewed section 7301(c) and analyzed it based on what was permissible in the Pennsylvania Constitution. The Supreme Court ruled that the text of Article III, § 9 was clear:

“**Every** order, **resolution** or vote, to which the concurrence of both Houses may be necessary, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be

approved by him, or being disapproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.”

Id. at 687.

The Court ruled that Article III, § 9, required presentment of the concurrent resolution to the Governor for approval or veto notwithstanding the language of the statute. *Id.* at 695, 706.

The Legislature could not circumvent the constitutional requirement of presentment under Art. III, § 9. Similarly, Act 77 cannot stand when its provisions directly and plainly conflict with the Pennsylvania Constitution’s requirement that a voter present his ballot at the proper polling place except in four limited circumstances. The proper means to change constitutional voting rules is and has always been a constitutional amendment. Act 77 is an end round around that requirement and is unconstitutional.

IV. ACT 77 RENDERS ARTICLE VII, § 14 SUPERFLUOUS.

Besides impermissibly conferring voting rights on individuals in a manner inconsistent with the Pennsylvania Constitution, Act 77 rendered Article VII, § 14 superfluous. *Off. of Gen. Couns. v. Bumsted*, 247

A.3d 71, 78 (Pa. Commw. Ct. 2021) (“No provision of a statute shall be reduced to mere surplusage.”) Having prescribed a list of specific grounds for absentee voting, the General Assembly cannot abandon that list and expand the list to all citizens. *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) (“Under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters.”) Act 77 not only ignores the list prescribed in Article VII, § 14, it flouts the list entirely, and renders

Article VII, § 14 a useless constitutional appendage. It is equally difficult to read Act 77 in a way that does not cause it “to nullify, exclude or cancel” Article VII, § 14; *Tr Under Agreement of Taylor*, 164 A.3d at 1157 (2017).

Before Act 77, the only voters eligible to vote by mail were those qualified as absentee voters under the limited circumstances stated in Article VII, § 14. When a voter seeks to vote by absentee ballot under Art VII, § 14, the voter needs to first apply for the ballot. 25 P.S. § 3146.2(a). In that application, the voter must verify, under penalty of law, that the information contained in the application is correct. 25 P.S. § 3146.2(i)(1). The application must be reviewed and approved by the county board of

elections. 25 P.S. § 3146.2b. If the county board of elections does not approve the application, it must immediately notify the applicant. 25 P.S. § 3146.2b(d).

Under Act 77, however, any voter can vote by mail in the same manner that a qualified absentee voter previously voted. But the applicant does not have to go through the process of applying for a ballot, providing a sufficient basis for approval, and then risking that the ballot be denied. Rather, the voter simply has to apply for a ballot and, if he or she is a qualified elector (i.e. registered and eligible to vote), he or she will receive a mailed ballot. 25 P.S. § 3150.12. Unlike an application for an absentee ballot under section 14, no justification is required. *Id.* There is thus no logical reason why a voter would request an absentee ballot under Article VII, § 14 criteria, rather than simply requesting an ordinary mail ballot.

Act 77 relegates Article VII, § 14 to the dust bin. Because the General Assembly has no power to abrogate a section of the Pennsylvania Constitution by legislation, Act 77 is unconstitutional.

CONCLUSION

“Whoever would claim the franchise which the constitution grants, must exercise it in the manner the constitution prescribes.” *Chase*, 41 Pa. at 419. The Pennsylvania constitution does not prescribe universal no-excuse mailed voting. Accordingly, petitioner respectfully requests that this Court enter a declaratory judgment and declare that:

- (a) Act 77 violates the Pennsylvania Constitution;
- (b) 25 Pa.C.S. Chapter 14, Article XIII-D violates the Pennsylvania Constitution; and
- (c) Act 77 and 25 Pa.C.S. Chapter 14, Article XIII-D are void.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

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

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