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## Mail-in Voting and the Pennsylvania Constitution

Stephen E. Friedman

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# Mail-In Voting and the Pennsylvania Constitution

*Stephen E. Friedman\**

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## ABSTRACT

Pennsylvania was at the center of many of the disputes that arose after the hotly contested 2020 presidential election. One of the most significant challenges was a claim that Pennsylvania's newly enacted mail-in voting law violated the state's constitution. Plaintiffs in one lawsuit asked that all mail-in ballots be discarded, which would have shifted Pennsylvania's electoral votes to Donald Trump. When this lawsuit failed, challengers unsuccessfully objected to Congress counting Pennsylvania's electoral votes. A core argument both in court and in Congress was that the Pennsylvania Constitution requires in-person voting except where it specifically provides otherwise. The claim is supported by two older Pennsylvania Supreme Court cases, the more recent of which is nearly a century old.

This Article argues instead that no-excuse mail-in voting is consistent with the Pennsylvania Constitution. The language of the constitution provides the General Assembly ample authority to enact such legislation. Further, the current legislation on mail-in voting differs in crucial respects from the statutes found unconstitutional in the 1862 and 1924 cases. Finally, the constitutional provision on absentee voting does not, as some have argued, render mail-in voting unconstitutional. Instead, it reinforces and confirms the legislature's authority in this regard. The Pennsylvania Supreme Court has refrained from addressing the claim on the merits, thus leaving this important issue unresolved.

## INTRODUCTION

In 2019, the Pennsylvania General Assembly enacted sweeping legislation enabling all Pennsylvanians to vote by mail. The legislation, known as Act 77,<sup>1</sup> passed the Republican-controlled legislature with broad bipartisan support and was signed into law by Governor Tom Wolf, a Democrat, on October 31, 2019.<sup>2</sup> The legislation gave the Pennsylvania Supreme Court exclusive jurisdiction to hear a challenge to the Act's constitutionality and provided that any challenges should be brought within 180 days.<sup>3</sup> No such challenge was brought until after the conclusion of the hotly contested November 2020 presidential election.

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1. Act of Oct. 31, 2019, No. 77, 2019 Pa. Laws 552.
2. See *infra* notes 24–32 and accompanying text.
3. Act of Oct. 31, 2019 § 13(2), (3).

The election in Pennsylvania was close, and there was a clear partisan split when it came to the method of voting. Joseph R. Biden, Jr. defeated Donald J. Trump by only eighty thousand votes among the approximately 6,836,000 votes cast for the two main candidates.<sup>4</sup> About thirty-eight percent of the votes cast were mail-in or absentee. Biden won by a margin of more than three-to-one among mail-in ballots (nearly two million votes to Trump’s nearly 600,000), while Trump won by almost two-to-one among those who voted on election day (approximately 2,731,000 to Biden’s 1,409,000).<sup>5</sup> Biden was thus awarded Pennsylvania’s twenty electoral college votes on the strength of his large margin among mail-in voters.

After the 2020 election, Act 77 became a focus of efforts to either switch Pennsylvania’s electoral votes from Biden to Trump or to discount the state’s electoral votes completely. Representative Mike Kelly, a Pennsylvania Congressman, took the first approach. He asked the Pennsylvania Commonwealth Court to exclude all mail-in ballots—which would have resulted in Trump winning Pennsylvania’s electoral votes—or, in the alternative, to direct the Republican-controlled Pennsylvania General Assembly to select Pennsylvania’s electors.<sup>6</sup> Representative Kelly claimed Act 77 violated the Pennsylvania Constitution, arguing that the constitution requires all voting be done by “offering your ballot in *propria persona* at the polling place on election day” except for those voters the constitution specifically states should be able to vote by absentee ballot.<sup>7</sup> He pointed to two older Pennsylvania Supreme Court cases, the more recent of which was nearly one hundred years old, to support the claim.<sup>8</sup> He argued that mail-in voting would require an amendment to the Pennsylvania Constitution and that Act 77 was void *ab initio*.<sup>9</sup> Judge Patricia McCullough of the Commonwealth

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4. *Pennsylvania Elections – Summary Results*, PA. DEP’T STATE, <https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G> (last updated Oct. 10, 2021, 2:30 PM).

5. *Id.*

6. Complaint for Declaratory and Injunctive Relief at 22, 24, *Kelly v. Commonwealth*, No. 620 M.D. 2020, 2020 WL 7224280 (Pa. Commw. Ct. Nov. 27, 2020). Cited documents in this lawsuit are available at <http://www.pacourts.us/news-and-statistics/cases-of-public-interest/election-2020/kelly-parnell-frank-kierzek-magee-sauter-kincaid-and-logan-v-wolf-boockvar-pa-general-assembly-and-the-commonwealth-of-pennsylvania> and also are on file with the author.

7. *Id.* at 6.

8. Memorandum of Law in Support of Motion for Emergency/Special Prohibitory Injunction at 4, 6, *Kelly*, 2020 WL 7224280 (discussing *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924)).

9. Complaint for Declaratory and Injunctive Relief at 21–22, *Kelly*, 2020 WL 7224280.

Court granted a preliminary injunction.<sup>10</sup> She concluded that the petitioners “appear to have established a likelihood to succeed on the merits because Petitioners have asserted the [Pennsylvania] Constitution does not provide a mechanism for the legislature to allow for expansion of absentee voting without a constitutional amendment.”<sup>11</sup> Judge McCullough further concluded: “Petitioners . . . have a viable claim that the mail-in ballot procedures set forth in Act 77 contravene” Article VII, Section 14 on absentee balloting.<sup>12</sup> The Pennsylvania Supreme Court promptly considered the case, vacated the preliminary injunction, and dismissed the petition with prejudice based on the doctrine of laches.<sup>13</sup> Although the court’s decision prevented the disenfranchisement of millions of voters, the court left unresolved the core question of whether Act 77 is constitutional because it did not address the issue on the merits.<sup>14</sup>

Efforts then moved to Congress. When Congress reconvened after the awful events of January 6, 2021,<sup>15</sup> Senator Josh Hawley of Missouri joined with members of the House of Representatives to unsuccessfully object to the counting of Pennsylvania’s electoral votes.<sup>16</sup> His statements on the floor of the United States Senate echoed Representative Kelly’s claims. Senator Hawley stated that the Pennsylvania Constitution had been “interpreted for over a century to say that there is no mail-in balloting permitted except for in very narrow circumstances, which is also provided for in the law.”<sup>17</sup>

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10. *Kelly*, 2020 WL 7224280, at \*4 (describing injunction entered).

11. *Id.* at \*5.

12. *Id.*

13. *Kelly v. Commonwealth*, 240 A.3d 1255, 1255–57 (Pa. 2020), *cert. denied*, 141 S. Ct. 1449 (2021).

14. The matter very much remains in controversy. After the writing of this Article, a member of the Bradford County Board of Elections filed a case in the Commonwealth Court, challenging the constitutionality of voting by mail in Pennsylvania. See *Petition for Review in the Nature of a Declaratory Judgment, McLinko v. Commonwealth*, No. 244 M.D. 2021 (Pa. Commw. Ct. July 26, 2021). Briefing has also been submitted by the Department of State of Pennsylvania and the Acting Secretary of the Commonwealth. See *Memorandum in Opposition to Petitioner’s Application for Summary Relief and in Support of Respondents’ Cross-Application for Summary Relief, McLinko v. Commonwealth*, No. 244 M.D. 2021 (Pa. Commw. Ct. Aug. 26, 2021). The Respondents forcefully address the matter at issue in this Article primarily beginning with page 31 of the brief. *Id.* at 31–52. This brief and other materials relevant to the McLinko litigation can be found at <https://www.pacourts.us/news-and-statistics/cases-of-public-interest/doug-mclinko-v-commonwealth-of-pennsylvania-dept-of-state-and-veronica-degraffenreid>. Whatever the Commonwealth Court decides, an appeal to the Pennsylvania Supreme Court is very likely.

15. See Jonathan Tamari & Jeremy Roebuck, *The Chaos Inside—From Furious Debate to Diving for Cover*, PHILA. INQUIRER, Jan. 7, 2021, at A1 (describing the breach of the Capitol).

16. 167 CONG. REC. H98 (daily ed. Jan. 6, 2021).

17. *Id.* at S25.

The legislature had acted, he said, “irregardless of what the Pennsylvania Constitution said.”<sup>18</sup>

This Article argues that Act 77 is fully consistent with the Pennsylvania Constitution. The claim to the contrary, while not frivolous, is unsustainable. First, unlike the United States Constitution, the Pennsylvania Constitution is not a constitution of enumerated powers but rather one in which all legislative power is granted to the General Assembly. It is thus incumbent on those opposing the constitutionality of Act 77 to identify a clear limitation in the constitution on the legislature’s authority to implement mail-in voting. No such limitation exists. Second, the judicial imposition of the in-person voting requirement is based on an incorrect reading of ambiguous language in the Pennsylvania Constitution. Third, Act 77 differs in material respects from the absentee voting statutes found unconstitutional in earlier cases. Finally, the current absentee voting provision in the current constitution differs significantly from the version considered by the Pennsylvania Supreme Court in 1924. The current version does not limit legislative authority to implement mail-in voting, but instead confirms it.

## I. ACT 77

Act 77 amended the Pennsylvania Election Code and expanded the availability of mail-in voting for all Pennsylvanians.<sup>19</sup> It “created for the first time in Pennsylvania the opportunity for all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on Election Day[.]”<sup>20</sup> As further amended in 2020, the Pennsylvania Election Code defines a qualified mail-in elector as any “qualified elector.”<sup>21</sup> All qualified electors were able to vote by mail in the 2020 election. Under Act 77, voters can return their ballots in a number of ways. They can mail them or deliver them in person to the county board of elections.<sup>22</sup> The Pennsylvania Supreme Court has held that county boards of elections can also use drop boxes for the return of ballots.<sup>23</sup>

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18. *Id.*

19. See 25 PA. CONS. STAT. § 3150.11(a) (providing that a “qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article”).

20. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 352 (Pa. 2020), *cert. denied*, 141 S. Ct. 732 (2021).

21. 25 PA. CONS. STAT. § 2602(z.6).

22. *Id.* § 3150.16(a).

23. *Boockvar*, 238 A.3d at 361 (authorizing use of drop boxes).

Act 77 was broadly bipartisan and passed after careful consideration. Republican Senate Majority Leader Jack Corman expressed his support for the bill during the floor debate. He noted that the legislative process had begun in earnest in 2017 with a series of hearings on the reform and modernization of Pennsylvania elections that extended over twenty-seven months.<sup>24</sup> Representative Bryan Cutler, a Republican and the Pennsylvania House of Representatives Majority Leader, observed that the legislation had not been “written to benefit one party or the other.”<sup>25</sup> He noted that it had been developed “over a multiyear period” with input from across the state and “serves to preserve the integrity of every election and lift the voice of every voter in the commonwealth.”<sup>26</sup> Senator Lisa Boscola, a Democrat, noted that “[m]aking voting easier for people cannot be bad for our democracy.”<sup>27</sup> The legislation “allow[s] a living room or a kitchen table to be a polling place.”<sup>28</sup> She observed that providing a no-excuse mail-in option “takes voting to voters instead of making voters come to us . . . . [O]ur democracy will be stronger if more votes are counted.”<sup>29</sup> Act 77 was approved by the legislature with broad support. The House of Representatives approved it by a vote of 138 to 61,<sup>30</sup> and the Senate by a vote of 35 to 14.<sup>31</sup> Governor Wolf, a Democrat, signed the bill into law on October 31, 2019.<sup>32</sup>

## II. THE PENNSYLVANIA CONSTITUTION GRANTS THE LEGISLATURE AUTHORITY TO ENACT MAIL-IN VOTING

### *A. A Crucial Difference Between Pennsylvania Constitutional Law and Federal Constitutional Law*

The Pennsylvania Constitution contains a far broader grant of legislative authority than does the United States Constitution.

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24. S. 2019-46, 1st Sess., at 1002 (Pa. 2019).

25. Kim Jarrett, *Bill to Make It Easier to Vote in Pennsylvania, Though End of ‘Straight Ticket Voting’ Irks Some*, CTR. SQUARE (Nov. 1, 2019), [https://www.thecentersquare.com/pennsylvania/bill-to-make-it-easier-to-vote-in-pennsylvania-though-end-of-straight-ticket-voting/article\\_6a15cba4-fc19-11e9-968c-4bdc9aba0696.html](https://www.thecentersquare.com/pennsylvania/bill-to-make-it-easier-to-vote-in-pennsylvania-though-end-of-straight-ticket-voting/article_6a15cba4-fc19-11e9-968c-4bdc9aba0696.html).

26. *Id.*

27. S. 2019-46, 1st Sess., at 1000 (Pa. 2019).

28. *Id.*

29. *Id.*

30. H. 2019-64, at 1741 (Pa. 2019) (indicating roll call vote in the House of Representatives).

31. S. 2019-46, 1st Sess., at 1002–03 (Pa. 2019) (indicating roll call vote in the Senate).

32. Press Release, Governor Tom Wolf, Governor Signs Election Reform Bill Including New Mail-In Voting (Oct. 31, 2019), <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/>.

Under the United States Constitution, “Congress can pass no laws but those which the Constitution authorizes either expressly or by clear implication; while the [Pennsylvania General] Assembly has jurisdiction of all subjects on which its legislation is not prohibited.”<sup>33</sup> The Pennsylvania Constitution, unlike the United States Constitution, “allows the legislature every power which it does not positively prohibit.”<sup>34</sup> The “rule of interpretation for the [Pennsylvania] state constitution differs totally from that which is applicable to the constitution of the United States.”<sup>35</sup>

Those challenging a Pennsylvania statute’s constitutionality bear a “very heavy burden of persuasion.”<sup>36</sup> Under Pennsylvania law, “there is a presumption of constitutionality”<sup>37</sup> and a statute will not be held to violate the constitution unless it can be shown to do so “clearly, palpably and plainly.”<sup>38</sup> The violation must be such “as to leave no doubt or hesitation in the minds.”<sup>39</sup> Any uncertainty should be “resolved in favor of a finding of constitutionality.”<sup>40</sup> As the Pennsylvania Supreme Court observed, “ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government, and should never be stricken down by the courts unless in plain violation of the fundamental law.”<sup>41</sup>

The “fundamental rule of construction” is that the language of the constitution controls and “must be interpreted in its popular sense, as understood by the people when they voted on its adoption.”<sup>42</sup> Accordingly, the next subpart addresses the language of the constitution, which is the “ultimate touchstone” in assessing the constitution’s meaning.<sup>43</sup>

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33. *Commonwealth v. Hartman*, 17 Pa. 118, 119 (1851). *See also* *Weister v. Hade*, 52 Pa. 474, 477 (1866) (noting well settled nature of the proposition that the Pennsylvania legislature “has jurisdiction of all subjects on which its legislation is not prohibited” by the Pennsylvania Constitution).

34. *Ruano v. Barbieri*, 400 A.2d 235, 239 (Pa. Commw. Ct. 1979) (citing *Weister*, 52 Pa. at 477).

35. *Hartman*, 17 Pa. at 119.

36. *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006).

37. *Spidle v. Livingston Const. Co.*, 457 A.2d 565, 567 (Pa. Super. Ct. 1983) (citing *Bensalem Twp. Sch. Dist. v. Cnty. Comm’rs of Bucks Cnty.*, 303 A.2d 258, 262 (Pa. Commw. Ct. 1973)).

38. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 782 (Pa. 2018).

39. *In re Canvass of Absentee Ballots of 1967 Gen. Election*, 245 A.2d 258, 260 (Pa. 1968) (quoting *Land Holding Corp. v. Bd. of Fin. & Revenue*, 130 A.2d 700, 706 (Pa. 1957)).

40. *Stilp*, 905 A.2d at 939 (quoting *Payne v. Dep’t of Corrections*, 871 A.2d 795, 800 (Pa. 2005)).

41. *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914).

42. *Stilp*, 905 A.2d at 939.

43. *Id.*



*B. The Plain Language of the Pennsylvania Constitution Supports the Constitutionality of Act 77*

The Pennsylvania Constitution includes a broad grant of legislative power, providing that the “legislative power of this Commonwealth shall be vested in the General Assembly.”<sup>44</sup> The “power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government.”<sup>45</sup> The legislature possesses the power to “pass statutes fixing the manner in which elections shall be conducted.”<sup>46</sup> Regarding the orderly exercise of the right to vote, the legislature “must prescribe necessary regulations, as to the places, mode, and manner, and whatever else may be required to insure its full and free exercise.”<sup>47</sup> The Pennsylvania Supreme Court implicitly recognized in 1862 that the constitutional grant of legislative authority to the General Assembly empowered that body to enact absentee balloting.<sup>48</sup> The crucial issue thus becomes whether any limitation on that power exists in the constitution.

If there were a constitutional limitation on the legislature’s authority to enact mail-in voting, it would presumably be found in Article VII, Section 4, which is captioned in part “Method of Elections.” That section provides as follows: “All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, [t]hat secrecy in voting be preserved.”<sup>49</sup> The section includes one—and only one—stated restriction on legislative authority in this regard, which is that whatever method of voting the legislature adopts must preserve secrecy.<sup>50</sup> As the highest court of New York observed in 1920 when interpreting nearly-identical language in the New York Constitution, the “restriction upon the

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44. PA. CONST. art. II, § 1.

45. *Winston*, 91 A. at 522 (citation omitted).

46. *In re New Britain Borough Sch. Dist.*, 145 A. 597, 598–99 (Pa. 1929).

47. *Page v. Allen*, 58 Pa. 338, 347 (1868).

48. See discussion *infra* note 93 and accompanying text.

49. PA. CONST. art. VII, § 4.

50. This provision, adopted in 1901, appears to have been intended to facilitate the use of electronic and mechanical voting machines. See *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924) (suggesting the provision on secrecy was “likely added in view of the suggestion of the use of voting machines, yet the direction that privacy be maintained is now part of our fundamental law”); S. 1901-2, 1st Sess., at 1543 (Pa. 1901) (statement of Gov. William A. Stone) (describing purpose of the amendment as the “substitution of voting machines for our present system of balloting”). The language, however, is broader than just permitting the use of electronic voting machines.

exercise of legislative wisdom and provision in the matter of elections [imposed by this language] could scarcely be less stringent.”<sup>51</sup>

Both the General Assembly and the Pennsylvania Supreme Court have been careful to meet that secrecy requirement. The Pennsylvania Election Code provides for secrecy in mail-in balloting by requiring the use of both an inner envelope marked only as “Official Election Ballot,” and a larger envelope.<sup>52</sup> After receiving an official mail-in ballot, the elector is to mark the ballot in secret and seal the ballot in the envelope marked “Official Election Ballot,” and then enclose this secrecy envelope within the larger envelope.<sup>53</sup> The Election Code further provides that a ballot should be set aside and declared void if submitted in a secrecy envelope with any “text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference . . . .”<sup>54</sup> The Pennsylvania Supreme Court, in *Pennsylvania Democratic Party v. Boockvar* held that the requirement of submitting a ballot within the larger envelope is mandatory, and failure to comply renders an elector’s ballot invalid.<sup>55</sup> Such enforcement was necessary to ensure compliance with the constitutional secrecy requirement.<sup>56</sup>

There are other places we might expect to find a limitation on the legislature’s authority to enact mail-in voting if such a limitation existed. We might expect to see it among the “restrictions on legislative power” found in Article III, Sections 28–37 of the constitution.<sup>57</sup> But no such limitation is found there, either. We might also expect to see it among the twenty-eight limitations on governmental authority laid out in Article I of the constitution as the Declaration of Rights.<sup>58</sup> The Declaration of Rights does include a crucial limitation on legislative power in elections, though not on the ability to implement mail-in voting. The Free and Equal Elections Clause in the Declaration of Rights provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time

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51. *Burr v. Voorhis*, 128 N.E. 220, 224 (N.Y. 1920) (interpreting language in the New York Constitution that “[a]ll elections by the citizens, except for such town officers as may be law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved”).

52. 25 PA. CONST. STAT. § 3150.14.

53. *Id.* § 3150.16.

54. *Id.* § 3146.8(g)(4)(ii).

55. 238 A.3d 345, 378–80 (Pa. 2020), *cert. denied*, 141 S. Ct. 732 (2021).

56. *Id.* at 377 (setting forth the argument that compliance with the secrecy provisions was necessary to avoid violation of the secrecy requirement).

57. PA. CONST. art. III, §§ 28–37 (setting forth several restrictions on legislative authority grouped under the heading “Restrictions on Legislative Power”).

58. *Id.* art. I (containing twenty-eight sections designed to protect the “general, great, and essential principles of liberty and free government”).

interfere to prevent the free exercise of the right of suffrage.”<sup>59</sup> Under this provision, while the General Assembly may regulate elections, those regulations may not render the exercise of the franchise “so difficult and inconvenient as to amount to a denial.”<sup>60</sup> Further, this provision requires that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.”<sup>61</sup> It was under this provision that the Pennsylvania Commonwealth Court enjoined the implementation of a law requiring voter identification in Pennsylvania, because the legislation did not provide for a “non-burdensome provision of a compliant photo ID to all qualified electors.”<sup>62</sup>

Pennsylvania’s implementation of mail-in voting is of course not prohibited by the Free and Equal Clause. To the contrary, Act 77 effectuates that provision’s directive. The whole purpose of Act 77 was to expand access and make voting easier. Indeed, it was pursuant to this provision that the Pennsylvania Supreme Court in the November 2020 general election extended the deadline for receipt of mailed-in ballots by three days due to postal delays and other concerns.<sup>63</sup>

A few other limitations on elections are set forth explicitly and unambiguously in the constitution. Laws regulating the holding of elections “shall be uniform throughout the state.”<sup>64</sup> And while the legislature is able to establish the method for voting, the constitution dictates the date for elections.<sup>65</sup> The Pennsylvania Supreme Court has stated that beyond the limitations specifically set forth on dates and methods, “the Legislature has the power to regulate the details of place, time, manner, etc., in the general interest, for the due and orderly exercise of the franchise by all electors alike.”<sup>66</sup>

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59. *Id.* art. I, § 5.

60. *De Walt v. Bartley*, 24 A. 185, 186 (Pa. 1892).

61. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018).

62. *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at \*18 (Pa. Commw. Ct. Jan. 17, 2014).

63. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 369–72 (Pa. 2020), *cert. denied*, 141 S. Ct. 732 (2021).

64. PA. CONST. art. VII, § 6. This provision does allow that some laws relating to registration can be enacted for cities only and the Constitution also makes it possible for some, but not all, counties, cities, boroughs, towns or townships to use voting machines or other mechanical devices for tabulating votes. *Id.*

65. *Id.* art. VII, § 2. The General Assembly can, by two-thirds vote in each house, change the date. *Id.*

66. *Indep. Party Nomination*, 57 A. 344, 345 (Pa. 1904). This opinion includes some language that requires explanation. The court stated that the constitution regulates the time “and, in a general way, the method, to wit, by ballot, with certain specified directions as to receiving and recording it.” *Id.* Although this is a 1904 opinion, the Supreme Court appears to be erroneously referencing language that was amended in 1901. The language in effect

The Pennsylvania Constitution also includes a provision setting forth the qualifications for voting. The section is as follows:

Every citizen 21 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 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 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 60 days preceding the election.<sup>67</sup>

Nothing in this language limits the power of the legislature to select a particular method of voting. The provision simply lists qualifications a voter must possess to be entitled to vote and by its terms does nothing more.

This section limits the legislature's power to some degree, of course. The legislature could not enact legislation that required ninety days' residence in the election district to vote or that permitted someone with only thirty days' residence in the election district to vote because such legislation would be adding to or taking away from the sixty-day qualification set forth in the constitution. This point is illustrated by *McCafferty v. Guyer* in which the Pennsylvania Supreme Court held unconstitutional legislation that barred from voting those who had been deemed deserters from military service.<sup>68</sup> The legislation was not a mere "regulation of the mode of exercise of the right to an elective franchise," which would be constitutional, but a deprivation of the right to vote granted by the constitution.<sup>69</sup> The question posed in the case was: "Can then the legislature take away from an elector his right to vote, while he

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between 1874 and 1901 did include the narrower language the court is referring to but that language was changed in 1901. See *infra* Part III.B.

67. PA. CONST. art. VII, § 1.

68. 59 Pa. 109, 109 (1868).

69. *Id.* at 111.

possesses all the qualifications required by the Constitution?”<sup>70</sup> The court answered no to this question.<sup>71</sup>

Similarly, in *Page v. Allen*, also an 1868 Pennsylvania Supreme Court opinion, the court addressed a registration law that would have had the practical effect of increasing the period of residency.<sup>72</sup> At the time, the constitution provided for ten days’ residence in the election district to be eligible to vote. The registration law at issue would have effectively required twenty days’ residence because the statute required ten days’ residence in order to register and such proof had to be made at least ten days before election day.<sup>73</sup> The court noted that, regarding the orderly exercise of the right to vote, the legislature “must prescribe necessary regulations, as to the places, mode, and manner, and whatever else may be required to insure its full and free exercise.”<sup>74</sup> But that power is not unrestricted. The constitutional qualifications to be an elector “are defined, fixed and enumerated” in the constitution.<sup>75</sup> Those qualifications could not be “abridged, added to, or altered by legislation.”<sup>76</sup> The registration law was thus unconstitutional.<sup>77</sup>

The Pennsylvania Election Code does not conflict with the qualifications provision of the constitution. Indeed, it defines “qualified mail-in elector” to simply “mean a qualified elector.”<sup>78</sup> And “qualified elector” is, in turn, defined as “any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth.”<sup>79</sup> As a logical matter, then, there cannot be a conflict.

However, as discussed in the next part of this Article,<sup>80</sup> in a case from 1862 and another from 1924, the Pennsylvania Supreme Court mistakenly and somewhat inexplicably concluded that nestled within this section on qualifications—not in the section on voting methods, not among the listed restrictions on the power of the legislature, not in the Declaration of Rights, and not in the type of clear language we see elsewhere when it comes to elections—is a restriction that the legislature must require in person voting. This supposed restriction, found in the middle of the third listed

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70. *Id.*

71. *Id.* at 111–12.

72. 58 Pa. 338, 351 (1868).

73. *Id.* at 351–53.

74. *Id.* at 347.

75. *Id.* at 346.

76. *Id.* at 347.

77. *Id.* at 351–53.

78. 25 PA. CONS. STAT. § 2602(z.6).

79. *Id.* § 2602(t).

80. See *infra* Parts III.A, III.C.

qualification and expressed in highly ambiguous language, is at the core of the argument that mail-in voting is unconstitutional. This Article addresses and refutes that argument.

Additionally, the constitution includes a provision on absentee voting at Article VII, Section 14. That section mandates that the legislature provide a manner, time, and place for voting for several large categories of voters, including those absent from their residence “because their duties, occupation, or business require them to be elsewhere” during an election and those unable to vote at a polling place because of illness or physical disability, observance of a religious holiday, or because of duties as county election workers. The legislature is required to exercise its legislative authority to provide for the return and canvass of their votes in the election district in which they reside.<sup>81</sup> This crucial provision is discussed more fully in Part IV.B.

### III. DISCUSSION AND CRITIQUE OF TWO KEY PRECEDENTS

#### A. *Chase v. Miller*

The purported requirement of in-person voting originated in the 1862 Pennsylvania Supreme Court case, *Chase v. Miller*.<sup>82</sup> In *Chase*, the court addressed whether absentee votes cast by soldiers should be counted in a district attorney election.<sup>83</sup> The court held that the constitution barred the counting of absentee ballots from soldiers serving in the Civil War who had voted away from their election districts during an election.<sup>84</sup>

Absentee voting by soldiers had been permitted in Pennsylvania since the War of 1812.<sup>85</sup> The 1813 statute permitting such voting provided that so long as soldiers were more than two miles from where they would ordinarily vote, they could exercise their right of suffrage “at such place as may be prescribed by the commanding officer.”<sup>86</sup> The captain or commanding officer was to serve as election judge, and after the election was to transmit a return to election officials in the soldiers’ home county.<sup>87</sup>

Until 1862 it seemed uncontroversial that the General Assembly possessed authority to provide for this type of voting. In 1861, the

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81. PA. CONST. art. VII, § 14.

82. 41 Pa. 403 (1862).

83. *Id.* at 414.

84. *Id.* at 414–15.

85. Act of March 29, 1813, ch. 3769, 1812-1813 Pa. Laws 70.

86. *Id.* § 1.

87. *Id.* §§ 2–3.

Pennsylvania Supreme Court case *Hulseman v. Rems* addressed the decision of election judges to count soldiers' absentee ballots in a municipal election.<sup>88</sup> Although the issue of the statute's constitutionality was not directly raised, the court could not find "any argument" restricting the ability of soldiers to also vote in municipal elections.<sup>89</sup>

This all changed with *Chase v. Miller*. At issue in *Chase* was the validity of the relevant provision of the General Election Law of July 2, 1839 ("1839 General Election Law")<sup>90</sup> under which army volunteers had voted. As with the 1813 legislation, the 1839 General Election Law provided that qualified citizens in military service during the election could "exercise the right of suffrage at such place as may be appointed by the commanding officer of the troop, or company, to which they shall respectively belong, as fully as if they were present at the usual place of election."<sup>91</sup> The question before the court was whether this provision of the 1839 General Election Law was constitutional.

The 1839 law was nearly identical to the one passed during the War of 1812 permitting soldier voting.<sup>92</sup> The 1813 Act had been consistent with the Pennsylvania Constitution, according to the court.<sup>93</sup> The 1790 Constitution in effect in 1813 included the exact same grant of legislative authority to the General Assembly as that found in the current constitution,<sup>94</sup> providing that the "legislative power of this Commonwealth shall be vested in the General Assembly."<sup>95</sup> The key question was thus whether anything had been added to the constitution between 1813 and 1862 that limited the legislature's authority to enact absentee voting. The court found such a limitation in a curious and ambiguous phrase added in 1838.

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88. 41 Pa. 396 (1861).

89. *Id.* at 399.

90. Act of July 2, 1839, No. 192, 1838-9 Pa. Laws 519.

91. *Id.* § 43.

92. See *Chase v. Miller*, 41 Pa. 403, 416 (1862) (noting that the 1839 statute was "virtually a reprint" of the 1813 Act).

93. *Id.* at 417 (observing that to the extent that the 1813 Act gave soldiers serving in Pennsylvania the opportunity to vote when away from their residence on election day, "there was nothing the State Constitution, when the Act of 1813 was passed, which its terms could be thought to contravene").

94. PA. CONST. art. II, § 1 (providing that the "legislative power of this Commonwealth shall be vested in the General Assembly").

95. PA. CONST. of 1790, art. I, § 1 (setting forth quoted language). All prior versions of the Pennsylvania Constitution, as well as amendments to such constitutions, are available on the Duquesne Law School's "Pennsylvania Constitution Website," at <https://www.paconstitution.org>. The author is grateful for this exceptionally helpful website which includes many other resources on the Pennsylvania Constitution.

The versions of Article III on elections in both the 1790 Constitution (in effect in 1813) and the 1838 Constitution are very similar and consist of three sections. The first section of each version sets forth the qualifications for electors—specifying who has the right to vote.<sup>96</sup> The second section is exactly the same in both versions, providing that “[a]ll elections shall be by ballot, except those in their representative capacities, who shall vote viva voce.”<sup>97</sup> The third section, protecting electors from arrest during voting, is also identical.<sup>98</sup> So what language in the constitution changed that would limit the previously held power of the legislature?

The language on voting qualifications changed in two ways. Prior to the amendment, the constitution spoke of a “freeman” having the right to vote, thus barring women from voting. To the shame of Pennsylvania, the 1838 amendments maintained that injustice and added another by incorporating the word “white” in front of “freeman,” thus enshrining racism into the Pennsylvania Constitution and depriving Black Pennsylvanians of their right to vote.<sup>99</sup>

The change more relevant to this Article dealt with residency requirements. The 1790 Constitution provided in part that “[i]n elections by the citizens[,] every freeman of the age of twenty-one years, having resided in the State two years next before the election[]” and who had paid state or county tax “shall enjoy the rights of an elector.”<sup>100</sup> The 1838 Constitution added a qualification that the elector must have resided “in the election district where he offers to vote, ten days immediately proceeding [sic] such election” to be able to exercise the rights of an elector.<sup>101</sup> The court speculated that this amendment was “probably suggested” by the 1836 registry law for Philadelphia.<sup>102</sup>

The language appears to simply add a requirement of residence in the election district to the requirement of state residence. However, the court read this seemingly straightforward addition as also mandating a particular *method* of voting. The court tied the “offers to vote” language from the district residency qualification into the language in a different section of the constitution at the time

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96. See PA. CONST. of 1790, art. III, § 1 (setting forth qualifications for voting); PA. CONST. of 1838, art. III, § 1 (same).

97. Compare PA. CONST. of 1790, art. III, § 2 (setting forth the quoted language), with PA. CONST. of 1838, art. III, § 2 (same).

98. Compare PA. CONST. of 1790, art. III, § 3 (protecting electors from arrest during voting), with PA. CONST. of 1838, art. III, § 3 (same).

99. PA. CONST. of 1838, art. III, § 1.

100. PA. CONST. of 1790, art. III, § 1.

101. PA. CONST. of 1838, art. III, § 1.

102. Chase v. Miller, 41 Pa. 403, 418 (1862).



providing that elections “shall be by ballot,”<sup>103</sup> and concluded that “[t]o ‘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.”<sup>104</sup>

The court thus read “offers to vote” in the section on voter qualifications as establishing not just a new qualification of residence in the election district, “but a rule of voting also.”<sup>105</sup> The required manner to exercise the right to vote, according to the court, was that the voter, “in *propria persona*, should offer his vote in an appropriate election district, in order that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.”<sup>106</sup> A 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 domicile [sic].”<sup>107</sup> The court stated that the constitution “[never] contemplated any such mode of voting,”<sup>108</sup> even though votes had been cast in this fashion since 1813. The court concluded that army voters had cast their votes outside of their election district and that their votes, and all other votes cast this way in the quarter century since 1838, had been “without authority of law.”<sup>109</sup> The court stated that the “offers to vote” language “undoubtedly”<sup>110</sup> carried the meaning the court ascribed to it and that it was guided by the words’ “plain and literal import” because that is how the people of Pennsylvania presumably understood them when they adopted the amendment.<sup>111</sup>

The court read too much into this language. First, for the court’s assessment to be accurate, Pennsylvania voters considering the proposed amendments to the 1838 Constitution would had to have believed that an amendment framed in terms of listing qualifications a voter needed to exercise the “rights of an elector” also contained within it a required form of voting. They would had to have read the language referring to the “election district where he offers to vote” not as simply identifying the district in which the voter seeks to vote or to have their vote counted, but rather as mandating a required method of voting and as taking away from the legislature a previously held power to determine such method. These

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103. PA. CONST. of 1838, art. III, § 2.

104. *Chase*, 41 Pa. at 419.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 422.

110. *Id.* at 419.

111. *Id.*

Pennsylvania voters would had to have concluded that “offers to vote” actually means “offers his vote physically and in person only.” Further, they would had to have understood that it meant that this is the only possible way to vote, ever. They would had to have concluded that a change to the permitted form of voting was being made even though the separate constitutional provision on the method of voting was completely unchanged. And they would had to have understood that they were voting to remove the rights of soldiers in the field to vote, and to annul an existing statute providing such a right. It seems quite improbable that ordinary Pennsylvanians would have gleaned all this from the three words “offers to vote” located in the middle of the third listed residency qualification in a section on voting qualifications.

The Pennsylvania legislature, just a few months after the adoption of the amendment, apparently did not share the court’s understanding of the language either. The amendments to the Pennsylvania Constitution were approved by the voters of Pennsylvania in October of 1838 and announced in the presence of the members of both houses of the General Assembly on December 11, 1838.<sup>112</sup> Yet, less than seven months later, the General Assembly passed the 1839 General Election Law<sup>113</sup> providing for soldiers to vote by absentee ballot away from their election district of residence.<sup>114</sup> The legislature itself did not feel constrained to adopt in-person voting as the sole method of voting.

The court in *Chase v. Miller* dismissed this seemingly strong evidence of the amendment’s meaning. The court noted that the act “was a long one.”<sup>115</sup> Additionally, the court implied that the process had been rushed—the revisers of the civil code had drafted the language in 1834 but the legislature had not taken it up until late in the session and approved it on the last day of the session.<sup>116</sup> The legislature had, according to the court, been “careless” and had “hurried” to pass the legislation.<sup>117</sup> The court thus chose not to adopt what has in more recent times been described as a “judicial

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112. 13 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG, MAY 2, 1837, 260–62 (1839) (announcement of vote on the amendments to the constitution). The records of the constitutional debates are available on the Duquesne Law School Pennsylvania Constitution Website, at <https://www.paconstitution.org>.

113. See *Chase*, 41 Pa. at 417 (indicating legislation approved by the General Assembly on June 25, 1839).

114. See Act of July 2, 1839, No. 192, 1838-9 Pa. Laws 519 (setting forth language on soldier absentee voting).

115. 41 Pa. at 417.

116. *Id.*

117. *Id.*

presumption that . . . sister branches take seriously their constitutional oaths,” but instead to assume the legislators had not considered the 1838 amendments on voting when they enacted a massive piece of legislation on that very issue seven months after the adoption of those amendments.<sup>118</sup>

The debates of the Pennsylvania Constitutional Convention of 1837–1838 also support the conclusion that the language listing qualifications was not intended by the delegates to restrict voting to a particular method but rather to ensure that an elector’s vote was counted in the correct district and one to which the elector had a basic connection. The amendment adding the “offers to vote” language was made by Emanuel Reigart, a delegate from Lancaster. Reigart stated “in a few words” why he had made the amendment. He pointed out that the committee of the whole had reported that a voter who, among other things, “shall have been assessed [a tax] at least ten days before the election, shall enjoy the rights of an elector . . . .”<sup>119</sup> Reigart indicated “it was quite obvious to him, that there should be a residence of ten days in the district, required of the man offering to vote.”<sup>120</sup> The adoption of Reigart’s amendment would, in his view, “settle the difficulty as to residence. A man must have been a resident in the district ten days before he could vote, so that a sufficient time would be allowed for him to be assessed. A residence was obtained by the payment of a tax.”<sup>121</sup> The ten-day residency qualification was not about a method or manner of voting but about giving time for a tax assessment and assigning each voter to an appropriate district.

Walter Craig, a Washington County delegate, also spoke to the purpose of the amendment. He observed that without the amendment “no residence will be required, to entitle a man to vote in any district, ward, or borough where he may choose to exercise this privilege.”<sup>122</sup> Without the amendment, a voter could pick whatever election district suited the voter. “The object of the amendment is to prevent this amalgamation, so to speak, of electors from different parts of the state; it is to keep within their own proper districts.”<sup>123</sup> Each voter could be linked to a single election district for voting purposes and not have their votes counted in any election district

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118. *Stilp v. Commonwealth*, 905 A.2d 918, 938 (Pa. 2006).

119. 9 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG MAY 2, 1837, 296 (1838) (statement of Delegate Reigart).

120. *Id.*

121. *Id.*

122. *Id.* at 300 (statement of Delegate Craig).

123. *Id.*

other than the one to which they are connected by residency. Another delegate, James Biddle from Philadelphia, expressed concern about a single voter casting multiple votes, with “one voter giving in a vote at perhaps one or two wards in the city,” which the amendment would help prevent.<sup>124</sup>

Further, in the debate on the amendment there appears to be no discussion of any negative impact the language would have on military voters voting under the then-existing and nearly quarter century old law providing for soldiers to vote away from their district. If this amendment was intended to work such a disenfranchisement, this would presumably have been mentioned and debated. Emanuel Reigart could not have said “this provision could do no possible harm to any human being” as it would indeed harm certain soldiers by disenfranchising them.<sup>125</sup>

### *B. Amendments After Chase v. Miller*

Between *Chase v. Miller* and the next crucial decision in 1924, several constitutional amendments were enacted. Work began immediately after the decision in *Chase* on an amendment to ensure soldiers could vote. Governor Andrew Gregg Curtin explained that the amendment was needed because the Pennsylvania Supreme Court had determined the act providing for soldier voting was unconstitutional because of a “phrase in the constitutional amendments of 1838.”<sup>126</sup> This meant the disenfranchisement of thousands, which the governor described as a “hard measure.”<sup>127</sup> He recommended that steps be taken promptly to ensure that the soldiers could vote.<sup>128</sup> On February 5, 1863, an amendment was introduced to address the issue and was approved by the citizens of

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124. *Id.* at 309 (statement of Delegate Biddle). Given that in-person voting was the norm at the time (absentee voting for soldiers aside), Biddle seems to have assumed the voting would be done in person, observing that “[a]t present, voters have a chance of voting in different wards, but if they are required to have fixed residences, as this amendment proposes, it will be in the power of some one at the polls, to point out where another resides.” *Id.* This does not mean that the language requires the continuation of and exclusive use of such a method. If that had been intended, it would have been plainly set forth and not buried in a provision in the residency qualifications. Another delegate, Benjamin Martin of Philadelphia, expressed concern about the ambiguity of the language, noting that the amendment would disfranchise the “mechanical and laboring classes” of society and urged that instead of adopting the amendment, the constitution should “point out clearly and explicitly—without the use of ambiguous language, which may admit of one construction, or may admit of another—what shall entitle a man to vote in the state of Pennsylvania.” *Id.* at 304–05 (statement of Delegate Martin).

125. *Id.* at 296.

126. H. Jan. 7, 1863, 1st Sess., at 24 (Pa. 1863) (statement of Governor Andrew G. Curtin).

127. *Id.*

128. *Id.*

Pennsylvania in August 1864.<sup>129</sup> The amendment provided as follows:

Whenever any of the qualified electors of this commonwealth shall be in any actual military service under a requisition from the President of the United States or by the authority of this commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual place of election.<sup>130</sup>

The language setting forth voting qualifications was also amended. By 1924, the reference to “every white freeman” had been replaced by “every male citizen.” The “offers to vote” language was slightly tidied up, so in 1924 it stated that the citizen had to “have resided in the election district where he shall offer to vote,” and the residency in the district qualification was increased from ten days to two months.<sup>131</sup>

Language added in the 1874 Constitution seemed to undermine the *Chase v. Miller* court’s conclusion that the constitution’s provision on voting qualifications had created not just voting qualifications but also a requirement as to how that vote must be cast.<sup>132</sup> The relevant provision in the 1874 Constitution began: “Every male citizen, twenty-one years of age, *possessing the following qualifications*, shall be entitled to vote at all elections[.]”<sup>133</sup> The provision listed four qualifications, including: “Third—He shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election.”<sup>134</sup> It could hardly be clearer that this section deals with qualifications only. In-person voting is simply not a “qualification” that can be possessed by a voter, such as residency in a district. The structure of the section shows that its focus is on voter qualifications, not voting methods.

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129. JOSIAH HENRY BENTON, VOTING IN THE FIELD 197–200 (1915) (describing amendment process).

130. PA. CONST. of 1838, art. III, § 4 (amended 1864).

131. *Id.* art. VIII, § 1 (amended 1901).

132. See *Chase v. Miller*, 41 Pa. 403, 419 (1862) (stating that the amendment created not just a residency requirement as a qualification, but also a rule as to how the right to vote must be exercised).

133. PA. CONST. of 1874, art. VIII § 1 (emphasis added). The provision was also amended in 1901 to subject the right to vote to legislation on registration. PA. CONST. of 1874, art. VIII § 1 (amended 1901).

134. PA. CONST. of 1874, art. VIII, § 1.

The separate provision on the method of voting underwent two changes, and the second of these changes also undermined *Chase v. Miller*. The relevant language in 1862—relied on in *Chase v. Miller* and the precise wording of which was essential to the court’s holding—provided that all elections were to be by ballot.<sup>135</sup> That language became narrower in 1874, and then broader in 1901. The 1874 Constitution included language that supported the *Chase* court’s focus on the physical act of voting. That provision began with the same language that “[a]ll elections by the citizens shall be by ballot.”<sup>136</sup> It went on, however, to specifically set forth the permissible method of voting:

Every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the elector who presents the ballot. Any elector may write his name upon his ticket or cause the same to be written thereon and attested by a citizen of the district. The election officers shall be sworn or affirmed not to disclose how any elector shall have voted unless required to do so as witnesses in a judicial proceeding.<sup>137</sup>

This narrow language was completely changed in 1901. The 1901 amendment, which is the current language, stated that “[a]ll elections by the citizens shall be by ballot or *by such other method as may be prescribed by law*: Provided, [t]hat secrecy in voting be preserved.”<sup>138</sup> Gone is the requirement of a physical presentation of the ballot. Indeed, elections need not even be by ballot anymore. While it appears that the purpose of the amendment was to provide for the use of voting machines,<sup>139</sup> the broad language is not limited to that. And to be clear, this section is not the source of the legislature’s authority to enact absentee voting—that authority is granted by the broad statement in Article II that the “legislative power of this Commonwealth shall be vested in the General Assembly.”<sup>140</sup> But because the language in the 1838 constitution was so essential to the court’s holding that offering to vote meant offering to vote by physical presentation of a ballot, the change to that language undermines the court’s holding in *Chase v. Miller*. As discussed in the

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135. See PA. CONST. of 1838, art. III, § 2.

136. PA. CONST. of 1874, art. VIII, § 4.

137. *Id.*

138. PA. CONST. of 1874, art. VIII, § 4 (amended 1901) (emphasis added).

139. See *supra* note 50.

140. PA. CONST. art. II, § 1.

next section, however, the Pennsylvania Supreme Court did not fully appreciate the impact of the change when it next took up the issue in 1924. Instead, it compounded its error from 1862.

*C. In re Contested Election in Fifth Ward of Lancaster City*

Somewhat surprisingly, neither the 1874 nor 1901 amendments described above had a significant impact when the court next considered the issue in 1924. The court in *In re Contested Election in Fifth Ward of Lancaster City* was again faced with a challenge to absentee voting and again found a statute permitting voting out of the election district unconstitutional.<sup>141</sup> In this case, a number of electors had cast votes in accordance with a 1923 absentee voting statute.<sup>142</sup> That statute made it possible for a duly qualified voter who, because of their duties, business or occupation was unavoidably away from home, to vote outside their election district.<sup>143</sup> Such a voter could apply for and obtain an “official absent voter’s ballot.”<sup>144</sup> The voter was to appear before an officer authorized to administer oaths and mark the ballot “under the scrutiny” of this officer.<sup>145</sup> The process called for the voter to first display the blank ballot to the officer, then to fill it in in their presence and then to seal it within the appropriate envelopes.<sup>146</sup> The voter was to then return the envelope with the ballot in it by registered mail.<sup>147</sup>

The court noted that an act of the legislature is presumptively valid,<sup>148</sup> but still found the statute unconstitutional.<sup>149</sup> The court determined that *Chase v. Miller* was controlling and quoted at length from that opinion, including language indicating that the constitution requires voting in *propria persona* and that ballots cannot be mailed into the election district.<sup>150</sup> The court observed that the language on qualifications had changed only very slightly and was practically the same in 1924 as it had been in 1862.<sup>151</sup> The minor changes did not change the core point, which was that the ‘offer to vote’ still had to be in the district where the elector

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141. 126 A. 199, 200, 201 (Pa. 1924).

142. *Id.* at 200.

143. Act No. 201 § 1, 1923 Pa. Laws 309.

144. *Id.* § 2.

145. *Id.* § 1.

146. *Id.* § 9.

147. *Id.* § 11.

148. *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 200 (Pa. 1924).

149. *Id.* at 201.

150. *Id.* at 200 (quoting *Chase v. Miller*, 41 Pa. 403, 419 (1862)).

151. *Id.* at 201.

resides.<sup>152</sup> The court ignored the clarification in the 1874 Constitution that had explicitly framed Article VIII, Section 1 as a simple list of qualifications to be possessed by an elector.

The court also disregarded the changes made to the constitution's language on voting methods. Had it attended to those changes, the result would have been different. The logic of *Chase v. Miller* went something like this: The constitution requires an elector to "offer to vote." The constitution says that voting must be by ballot. Therefore, the correct inquiry is what it means to offer to vote by ballot, which the court in *Chase v. Miller* concluded meant physical presentation of a ballot. But that same logic could not be applied in the same way in 1924 because the requirement of voting by ballot had been eliminated and replaced with broader language. The "updated" logic should have been: *The constitution requires an elector to "offer to vote." Voting may be by ballot or whatever other method the Legislature selects. Therefore, the key is what it means to offer to vote by whatever method selected by the Legislature.* Instead, however, the court actually seemed to focus on the need for the "personal presentation of the ballot,"<sup>153</sup> even though this had not been the governing language in the constitution since 1901.

The court then turned to the 1864 amendment that allowed soldiers in service outside their election district to vote. The court held that this amendment determined "those who, absent from the district, may vote other than by personal presentation of the ballot[.]"<sup>154</sup> According to the court, "those . . . permitted are specifically named" in the amendment, and the "old principle that the expression of an intent to include one class excluded another has full application here."<sup>155</sup> The amendment provided for voting only by those in military service away from their usual place of election and no others. According to the court, the legislature had no authority to facilitate out-of-district voting for any other group.<sup>156</sup>

That the amendment addressed the voting rights of soldiers explicitly is not surprising. The amendment is best seen as an effort to promptly and precisely undo the damage wrought by the court in 1862 and to restore the state of affairs that existed before that decision. The amendment was a focused and direct rebuke of the Pennsylvania Supreme Court.

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152. *Id.*

153. *Id.* at 200, 201.

154. *Id.* at 201.

155. *Id.*

156. *Id.* at 201.



Further, the “old principle” referred to by the court is far more appropriately applied to the constitutional provision dealing directly with the method of voting. As noted, that language, unchanged since 1901, states that: “All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, [t]hat secrecy in voting be preserved.”<sup>157</sup> The requirement of secrecy is the only qualification or restriction set forth on the voting method provided by law. If there were others, they would presumably be set forth there as well.<sup>158</sup>

#### IV. THE CONSTITUTIONALITY OF MAIL-IN VOTING

To recap, the Pennsylvania Constitution grants all legislative power to the General Assembly and there is no clear limitation on the legislature’s ability to provide for mail-in voting. The two Pennsylvania Supreme Court precedents relied on by opponents of mail-in voting are premised on a strained interpretation of language in the constitution, reading “offers to vote” and “shall offer to vote” as setting forth a required mode of voting and limiting the power of the legislature.

The interpretation of the constitution in these two cases is untenable for a number of reasons. First, the words “shall offer to vote” simply do not bear the meaning of “shall vote in person at the polling place and by no other means.” This conclusion is bolstered by the fact that Article VII, Section 1 is framed as a numbered list of qualifications that an elector must possess in order to vote, and not as a section containing any restrictions on legislative power (which are ordinarily set forth explicitly). The language simply identifies the correct election district in which an elector’s vote should be tallied. Second, there is a provision in the constitution on the method for voting and that provision does not require in person-voting. Instead, it includes one restriction on the legislature (that secrecy in voting be provided for) and no other. Third, regulation of elections is a core legislative function. Fourth, the Pennsylvania legislature, just a few months after the amendment was adopted, passed a piece of legislation that provided for voting by absentee ballot for soldiers, showing that the legislature at the time did not interpret the constitution in the manner urged by the Pennsylvania Supreme Court

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157. PA. CONST. of 1874, art. VIII, § 4 (amended 1901). The language is identical in the current constitution. PA. CONST. art. VII, §4.

158. The court also expressed some concerns about secrecy in voting. Although the court did not decide the issue, it stated that it “may well be argued” that mail-in voting would result in the disclosure of a vote, “undoubtedly the result if but one vote so returned in a single district.” *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. at 201.

decades later. And fifth, the debates of the Constitutional Convention indicate that the concern was ensuring that a vote be counted only in the voter's election district of residence as opposed to limiting legislative power on voting methods.

This Part of the Article presents three additional arguments in support of the constitutionality of Act 77. Part IV.A briefly argues that a 1959 amendment supports the proposition that the reference to an election district in which a voter "shall offer to vote" merely identifies the district in which a voter's ballot should be counted and does not require a particular mode of voting or restrict the legislature's power. Part IV.B discusses key differences between Act 77 and the statutes found unconstitutional in 1862 and 1924, leading to a conclusion that Act 77 is constitutional. Part IV.C sets forth key distinctions between the constitutional provision adopted in 1864 and the current provision on absentee voting.

#### *A. A 1959 Amendment Undermines the Two Key Precedents*

A 1959 amendment to the constitution provides some indication that the language "shall offer to vote" does not carry the significance placed on it by the Pennsylvania Supreme Court.<sup>159</sup> The amendment, which set the required residence in the election district at sixty days, addressed a situation in which a Pennsylvania citizen moves from one election district to another within sixty days of the election. Such a citizen would not be eligible to vote in either the old or the new district because they would lack the required sixty-day residency in any election district. The amendment solved this problem by adding an exception to the qualification that a person must reside sixty days in the election district in which they "shall offer to vote." Pursuant to the amendment, an otherwise qualified elector "may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty days preceding the election."<sup>160</sup>

The precise language matters. The Pennsylvania Supreme Court in 1862 and 1924 embraced the notion that the "offers to vote" or "shall offer to vote" language is absolutely essential and establishes a required method of voting. And yet, this exception added in 1959 does not provide that the impacted electors "may offer their vote" in the previous district but simply that they "may, if a resident of Pennsylvania, vote in the election district from which he or she

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159. PA. CONST. of 1874, art. VII, § 1 (amended 1959).

160. *Id.*

removed her residence.”<sup>161</sup> If the “shall offer to vote” language had the meaning the court assigned to it, it would have been essential to carry it over for these voters as well. Because the reference to an election district in which the elector “shall offer to vote” simply identifies the district in which the elector intends their vote to be counted, it was not necessary to carry the language over. The amendment identifies the relevant voting district in different terms—as the election district from which the elector removed their residence. In other words, repeating the phrase “shall offer to vote” would have been essential if it established a method of voting, but superfluous if it merely identified the relevant election district. The omission of the phrase signals that the latter is the more correct reading. The current constitution includes language that is essentially identical to the 1959 amendment<sup>162</sup> and so calls into question a key underpinning of *Chase v. Miller* and *In re Contested Election in Fifth Ward of Lancaster City*.

### *B. Relevant Differences Between Act 77 and the Two Statutes Previously Found Unconstitutional*

#### *B.1. A Voting Method for Everyone*

Act 77 differs materially from the statutes deemed unconstitutional in *Chase v. Miller* and *In re Contested Election in Fifth Ward of Lancaster City*. Act 77 is not a carve-out or an exception for a limited number of voters as was the case with the 1839 and 1923 laws. It is, instead, a new method of voting available to *all* qualified electors in the state and so represents legislative action of a different type and character. The legislative authority granted by Article II, Section 1, more clearly encompasses the General Assembly’s power to establish a voting method for all Pennsylvanians as opposed to a method for a subset of voters. The Pennsylvania Supreme Court expressed this idea in a 1904 opinion which recognized that the General Assembly has the “power to regulate the details of place, time, manner, etc., in the general interest and, for the due and orderly exercise of the franchise by *all electors* alike.”<sup>163</sup>

Similarly, the constitution requires all election laws be uniform throughout the state.<sup>164</sup> All that is required for uniformity is that persons in the same circumstance be treated alike,<sup>165</sup> and both the

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161. *Id.*

162. PA. CONST. art. VII, § 1, cl. 3.

163. *Indep. Party Nomination*, 57 A. 344, 345 (Pa. 1904) (emphasis added).

164. *See* PA. CONST. art. VII, § 6.

165. *Winston v. Moore*, 91 A. 520, 524 (Pa. 1914).

1839 and 1923 statutes presumably met that standard. But the Pennsylvania Supreme Court has indicated that the requirement of uniformity goes to “matters of procedure, methods and machinery of voting and like matters with respect to electors and voting.”<sup>166</sup> And one key inquiry identified by the court in an earlier case is that uniformity is satisfied when “there is no distinction as to the right of each elector to cast his ballot.”<sup>167</sup> In its general uniformity and applicability to all voters in Pennsylvania, Act 77 stands on firmer ground than the earlier statutes.

A broader implementation of mail-in voting also alleviates one of the concerns of the court in *In re Contested Election*. The court had expressed concern that when only a small number of electors use absentee ballots, the danger of compromising secrecy becomes more significant.<sup>168</sup> But with over a third of voters casting their vote by mail in the 2020 election, such a concern is no longer relevant.<sup>169</sup> Increasing the number of such voters is *more* protective of secrecy, not less so.

Finally, the Free and Equal Elections Clause<sup>170</sup> countenances and supports no-excuse mail-in voting. The clause provides, among other things, that “[e]lections shall be free and equal.”<sup>171</sup> The clause means “every voter shall have the same right as any other voter”<sup>172</sup> and that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters.”<sup>173</sup> As noted, the Pennsylvania Supreme Court extended the deadline for receipt of mailed-in ballots by three days under this provision for the November 2020 election.<sup>174</sup>

This is not to say that the Free and Equal Elections Clause requires mail-in voting. Nor does it override clear constitutional requirements for voting. But the clause provides important guidance. As discussed above, where there is ambiguity as to whether a statute is constitutional or not, any doubts should be resolved in favor of constitutionality.<sup>175</sup> Judicial deference should be at its highest

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166. *Cali v. City of Philadelphia*, 177 A.2d 824, 829 (Pa. 1962).

167. *Winston*, 91 A. at 524.

168. *See supra* note 158.

169. *See supra* note 5 and accompanying discussion.

170. PA. CONST. art. I, § 5.

171. *Id.*

172. *Winston*, 91 A. at 522.

173. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 369 (Pa. 2020) (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018)), *cert. denied*, 141 S. Ct. 732 (2021).

174. *Id.* at 371.

175. *See discussion supra* Part II.A; *see also Payne v. Commonwealth Dep’t of Corr.*, 871 A.2d 795, 800 (Pa. 2005) (“Any doubts are to be resolved in favor of a finding of constitutionality.”).

when it comes to the legislature's efforts to remove impediments to voting to effectuate the promise and command of a provision in the constitution to make voting more open and to provide all voters the same right to cast their ballot. This is especially true in this context because the right to vote is "fundamental and 'pervasive of other basic civil and political rights . . .'"<sup>176</sup>

### *B.2. Voting "In the District"*

The most logical reading of voting "in" an election district focuses not on a physical act in a particular location but rather on determining in which district a voter's ballot should be counted. Even the court in *Chase v. Miller* acknowledged this to some degree by stating it might be "defensible" for the legislature to provide for electors to cast their vote in a neighboring election district under certain circumstances.<sup>177</sup> The Pennsylvania Supreme Court, in a somewhat similar context, rejected an overly literal reading of the language "in the election district." In *In re Canvass of Absentee Ballots of 1967 General Election*, the court addressed a challenge to the constitutionality of legislation that provided for the County Board of Elections to canvass absentee ballots.<sup>178</sup> The challengers claimed that because the constitution instructed the legislature to provide a means for the "return and canvass of [absentee] votes in the election district in which [absentee voters] respectively reside," the votes would have to physically be counted in the election districts as the constitution says, and not in a centralized location.<sup>179</sup> The court rejected that argument. It noted that absentee voting is a "salutary feature in our democratic processes of government."<sup>180</sup> The court held that given the complexity of counting ballots in each district as opposed to a central location, the drafters of the constitution did not contemplate that the counting of the votes had to take place, literally, in the election district.<sup>181</sup>

But even assuming that an aspect of physical presence in the election district is called for, Act 77 stands on firmer ground than the previous statutes. Act 77 supports voting in the district in a way those statutes did not. Those statutes established regimes in

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176. *Banfield v. Cortes*, 110 A.3d 155, 176 (Pa. 2015) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)).

177. 41 Pa. 403, 424 (1862) (noting a tradition of voters in some areas of Luzerne County voting in nearby election districts which they did not reside).

178. 245 A.2d 258, 260 (Pa. 1968).

179. *Id.*

180. *Id.* at 261.

181. *Id.* at 263–64.

which voters would vote outside of their election district and the ballots would then be sent into the election district. The 1839 statute at issue in *Chase v. Miller* made it possible for those in military service to “exercise the right of suffrage at such place as may be appointed by the commanding officer.”<sup>182</sup> Although the court discussed the importance of voting in person and being observed by one’s neighbors, when the court articulated the actual “rule” set forth by the constitution, it was that the right conferred was the right to “vote in that district.”<sup>183</sup> Even the prohibition on votes being sent by “mail or express” seems to focus on votes being cast outside the district and then being sent and certified “into the county where the voter has his domicil [sic].”<sup>184</sup> It was the act of voting in-person outside the district that was at the core of the court’s concern. Similarly, in the 1923 law in *In re Contested Election in Fifth Ward of Lancaster City*, the actual in-person voting took place outside of the election district in front of an officer authorized to administer oaths.<sup>185</sup> The key requirement of the constitution, the court indicated, was that the “‘offer to vote’ must still be in the district where the elector resides.”<sup>186</sup>

In contrast, the key innovation of Act 77 is that it permits a new and convenient way of voting for those who are *in* the election district during the election. Consider a typical Pennsylvanian voting under Act 77. This voter would most likely request a ballot which is mailed to their home, located in the election district. They then sit down at the kitchen table in their house (still in the election district) and engage in the actual act of voting by filling out the ballot, sealing it with the secrecy envelope, and completing the required declaration. The marking of the ballot occurred in the election district, exactly as the legislation contemplates (though of course the ballot could be filled out anywhere). As Senator Boscola noted during the debate on the bill, the legislation would “allow a living room or a kitchen table to be a polling place.”<sup>187</sup> Unlike the prior statutes, Act 77 is designed to facilitate voting by the prescribed method in the election district.

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182. 41 Pa. at 416.

183. *Id.* at 419.

184. *Id.*

185. 126 A. 199, 200 (Pa. 1924); see Act No. 201 § 1, 1923 Pa. Laws 309.

186. 126 A. at 201.

187. S. 2019-46, 1st Sess., at 1000 (Pa. 2019).

*C. Relevant Differences Between the Current Provision on Absentee Voting and the “Soldier Voting” Provision from the Civil War*

The constitution’s current language on absentee voting differs materially from the “soldier voting” provision of the constitution construed in *In re Contested Election in Fifth Ward of Lancaster City* in 1924. The 1864 amendment was narrow, applying only to voters “in any actual military service.”<sup>188</sup> It provided a qualified right to vote “under such regulations as are or shall be prescribed by law,” thus leaving it to the legislature whether to enact such legislation.<sup>189</sup>

The current language on absentee voting, adopted in 1967, is very different both in framing and scope. While the 1864 amendment was directed towards a narrow class of voters to which it granted a conditional right if the legislature chose to act, the current language includes a very broad range of voters and is directed to the legislature as follows:

Absentee Voting. 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.<sup>190</sup>

This is a mandate. The legislature “shall, by general law, provide a manner . . . time and place” by which specified voters “may vote, and [shall provide] for the return and canvass of their votes in the election district” in which they reside.<sup>191</sup> This is a directive to the legislature to use a presumably existing power (to regulate elections as the legislature sees fit, subject only to constitutional limitations) in order to facilitate voting for the named categories of voters. To the extent the language does impose a limitation on the power of

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188. PA. CONST. of 1838, art. III, § 4 (amended 1864).

189. *Id.*

190. PA. CONST. art. VII, § 14(a).

191. *Id.*

the General Assembly, it is simply that the legislature cannot enact a voting system that does not accommodate the specified needs of these voters.

The directive to the legislature that it “shall” do certain things is only a statement of what it must do, not about what else it may do. An 1851 Pennsylvania Supreme Court opinion provides a relevant precedent. In *Commonwealth v. Hartman*, the court addressed a claim that a school law was unconstitutional.<sup>192</sup> The issue in *Hartman* was whether the General Assembly had exceeded its powers by creating a system of general education. Those challenging the constitutionality of the law claimed that the constitution’s language on schools included a limitation that the legislature could not exceed.<sup>193</sup> The constitution provided that “the legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the state *in such manner that the poor may be taught gratis.*”<sup>194</sup>

The court rejected the argument that this last clause limited the legislature’s power to act beyond providing free education for impoverished Pennsylvanians. The constitution instructed what the legislature “shall” do, and so required the legislature “to do thus much, but does not forbid them to do more. If they stop short of that point, they fail in their duty; but it does not result from this that they have no authority to go beyond it.”<sup>195</sup> The same principle—that where the constitution mandates action it is not setting a maximum—applies to the language on absentee voting just as well.

The Pennsylvania General Assembly has long understood itself as having authority to, at its discretion, provide absentee voting for citizens beyond those categories explicitly set forth in the constitution. In 1968, just one year after the current absentee voting amendment was approved, the legislature defined “duties, occupation or business” to include vacations and leaves of absence and “also include an elector’s spouse who accompanies the elector.”<sup>196</sup> Vacations and leaves of absence are a pretty big stretch and “elector’s spouse” cannot by any rational means be fit into the language of the constitution. A 1970 Pennsylvania Supreme Court opinion addressed a claim that the inclusion of spouses was unconstitutional as beyond the language of Article VII, Section 14. The court

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192. 17 Pa. 118, 119 (1851).

193. *Id.* at 119–20.

194. *Id.* (quoting PA. CONST. of 1838, art. VII, § 1) (emphasis added by court).

195. *Id.* at 120.

196. 25 PA. CONS. STAT. § 2602(z.3).



rejected the claim on the grounds of a lack of standing.<sup>197</sup> There has now been a half-century of elections in which those beyond the scope of groups named in the constitution have cast absentee ballots.

Act 77, far from conflicting with Article VII, Section 14, effectuates that constitutional provision. The constitution directs the legislature to ensure that any voters in the broad categories set forth have a method of voting to meet their needs. The Legislature has chosen to meet that obligation through a sensible means—providing a method of voting that will ensure all those voters will be able to vote by simply making it possible for all voters in the state to vote by mail-in ballot.

That is certainly a reasonable legislative course to implement the mandate and to ensure all are included and facilitated. This is particularly true because the categories of voters in Article VII, Section 14, are broader and vaguer than the carefully delineated category of soldiers in the 1864 Amendment. For instance, the legislature must facilitate absentee voting for electors who cannot go to their polling place because of “illness,” which is broad and vague enough to potentially cover all Pennsylvanians fearful of exposing themselves to infection during a pandemic.<sup>198</sup> Similarly, the constitution sweeps broadly when it requires the legislature to provide absentee voting for anyone who “may” be required to be absent on election day (as opposed to those who “will be” or “are” absent) because of their “duties, business or occupation.”<sup>199</sup> The term “duties” in particular is extraordinarily expansive.<sup>200</sup> Act 77 thus ensures compliance with the expansive constitutional mandate by extending a convenient method for voting to all Pennsylvanians. The Pennsylvania Supreme Court should have no qualms about affirming the constitutionality of Act 77.

#### CONCLUSION

Pennsylvania’s electoral votes were counted for Joe Biden, but the nation came very close to a much different result in which the votes cast by millions of Pennsylvania’s citizens would have been discounted and the choice made by the voters reversed. It is true that Representative Kelly’s lawsuit was dismissed with prejudice by the Pennsylvania Supreme Court, but before that happened, a judge on the Pennsylvania Commonwealth Court had ruled largely

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197. *Kauffman v. Osser*, 271 A.2d 236, 240 (Pa. 1970).

198. PA. CONST. art. VII, § 14(a).

199. *Id.*

200. See 25 PA. CONS. STAT. § 2602(z.3).

in his favor. Efforts to have Congress disregard Pennsylvania's electoral votes failed as well, but before that happened, 138 members of the House of Representatives and seven senators voted to sustain the objection.<sup>201</sup> In other words, Pennsylvania's electoral votes were in real jeopardy and will potentially remain in doubt unless the matter is fully resolved. That resolution could happen by a clarifying constitutional amendment, but a judicial resolution is more likely.<sup>202</sup> When the Pennsylvania Supreme Court again confronts the issue, as it almost certainly will, given pending litigation, it should directly resolve the matter by finding Act 77 constitutional.

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201. 167 CONG. REC. S38 (daily ed. Jan. 6, 2021) (roll call vote in Senate on the same); 167 CONG. REC. H112 (daily ed. Jan. 6, 2021) (roll call vote in House of Representatives on objection to Pennsylvania's electoral votes).

202. Amending the Pennsylvania Constitution requires the proposed amendment be approved by each house of the General Assembly in two consecutive legislative sessions and then approved by the voters. PA. CONST. art. XI, § 1.