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IN THE SUPREME COURT OF PENNSYLVANIA

DOUG MCLINKO, Appellee v. COMMONWEALTH OF PENNSYLVANIA, *et al.*, Appellants	14 MAP 2022
CONSOLIDATED WITH	
TIMOTHY R. BONNER, *et al.*, Appellees v. LEIGH M. CHAPMAN, *et al.*, Appellants	15 MAP 2022
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Brief of *Amici Curiae* Molly Mahon, Pam Auer, Marisa Niwa, Matthew Jennings, Cindy Jennings, Disability Rights Pennsylvania, Leah Marx, and Hassan Bennett

Appeal from the Order of the Commonwealth Court at No. 244 & 293 MD 2021 dated January 28, 2022.

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INTRODUCTION

Twice per year, hundreds of thousands to millions of Pennsylvanians exercise their sacred right to vote using mail-in or absentee ballots. For some voters, this is a convenience, but for Amici and similarly situated voters, this is the only way to access the franchise. With little regard for its practical implications, the Commonwealth Court struck down Act 77's expansion of mail-in voting based on two antiquated cases that are neither applicable nor consistent with Pennsylvania's modern constitution. Amici submit this brief in support of Respondents to provide historical context for those two cases and to offer their own stories to demonstrate why this Court should reverse.

INTERESTS OF THE AMICI

Amici curiae are Molly Mahon, Pam Auer, Marisa Niwa, Matthew Jennings, Cindy Jennings, Leah Marx, Hassan Bennett (collectively, Individual Amici), and Disability Rights Pennsylvania.[1] Each of the Individual Amici is a Pennsylvania elector who would face disenfranchisement if this Court affirms, or who would have been disenfranchised in a recent election under the legal theory of the decision below. Amicus Disability Rights Pennsylvania represents many individuals whose ability to vote is jeopardized if this Court affirms. Amici share an interest in ensuring that they themselves and many other Pennsylvanians in

[1] This brief was paid for and authored entirely by amici and their counsel.

similar situations will maintain the ability to participate in our democracy by casting mail-in or absentee ballots.

Molly Mahon

Molly Mahon has worked for the last six years as a nurse in the Neonatal Intensive Care Unit (NICU) at Children's Hospital of Philadelphia. She works three day shifts per week, often including Tuesdays. A day shift runs from 7:00a.m. to 7:25p.m. She lives in South Philadelphia and commutes to and from work by bus. In order to arrive at work on time, she must leave home by about 6:00a.m., and she gets home between 8:15p.m. and 8:45p.m. Ms. Mahon's polling place is located inside the Mummers Museum at 2nd Street and Washington Avenue. Even if she left work as early as possible and took a taxi or rideshare car to the Mummers Museum, she would be unlikely arrive by 8:00p.m., when the polls close. Ms. Mahon typically requests not to be assigned a shift on election days, so that she can vote in person, but sometimes she is unable to avoid an election-day shift. Under pre-Act 77 rules, Ms. Mahon was ordinarily ineligible for an absentee ballot on days when she worked, because she was not absent from Philadelphia on election day. Thanks to Act 77, she was able to vote by mail in 2020, and she plans to continue voting by mail on election days when she works a NICU shift, assuming Act 77 remains in effect. Voting is important to Ms. Mahon,

particularly because as a nurse she supports candidates who share her values about healthcare.

Pam Auer

Pam Auer resides in Harrisburg, Pennsylvania. She has been a registered Pennsylvania voter since 1988 and consistently votes in every election. Ms. Auer has physical disabilities, including spina bifida and multiple autoimmune diseases. Her disabilities impact her mobility and physical activities. She has weakness in her legs, has great difficulty walking, and must use a mobility scooter to perform necessary and daily activities inside and outside her home. In addition, her autoimmune diseases cause chronic fatigue. Ms. Auer lives alone. She is able to vote in person, but only with significant difficulty. Her polling place, which is in a local elementary school, is several miles from her home. Public transportation is not a viable option and she must drive from her home or work to get to her polling place. Because it is possible for her to vote in person notwithstanding her physical disabilities, she would not qualify for an absentee ballot under pre-Act 77 rules. To vote in person, she must first load her scooter in the back of her car's hatchback so that she can get from the parking lot to the polling place and move about the polling place. Being able to vote by mail-in ballot greatly simplifies and facilitates her right to vote at every election. In addition, in October 2020 Ms. Auer had spinal surgery. She expected to recover quickly and vote in person and thus did not

qualify for an absentee ballot. Being able to apply for a mail-in ballot in advance without a reason protected Ms. Auer's right to vote when, in the days leading up to the November 2020 election, her recovery was slower than anticipated, and on election day she was still unable to load her scooter in her car and drive.

Marisa Niwa

Marisa Niwa is 48 years old. She has been a registered voter in Pennsylvania since she was 18 years old and regularly votes in most elections. Ms. Niwa has Down syndrome, as well as a severe hearing impairment for which she wears bi-lateral hearing aids. She lives in a community home in Bethel Park in Allegheny County and relies on a staff member or a family member to drive her to her polling place on election day. Ms. Niwa also needs a person to accompany her inside the polling place as it is in a large church, is noisy, and she is not always able to hear the instructions from poll workers. Ms. Niwa works at the Giant Eagle Supermarket. It is challenging for her to arrange for transportation to and from her polling place around her work schedule because a staff member or family member is not always available to drive and accompany her inside. Under pre-Act 77 rules, Ms. Niwa would not qualify for an absentee ballot. Being able to vote by mail-in ballot allows Ms. Niwa to vote independently and ensures that she can continue to vote in every election. In addition, as a person with Down syndrome, Ms. Niwa is more vulnerable to becoming seriously ill from COVID-19 because of an

accompanying cardiac defect and respiratory problems. Being able to vote by mail in November 2020 before a vaccine was available also allowed Ms. Niwa to vote without risking her health. Upon learning about the decision below, Ms. Niwa was very concerned. She does not think it is fair that people with disabilities like herself may be forced to choose between the difficulties and barriers to voting in person, or not voting at all.

Matthew Jennings and Cindy Jennings

Matthew Jennings is a 28-year-old resident of Lititz, Lancaster County. He resides with Cindy Jennings, his 58-year-old single mother. Both are registered Pennsylvania voters who regularly vote in every election. Ms. Jennings is the sole caregiver for Matthew, who has multiple disabilities. Matthew must use a wheelchair for mobility. He is also nonverbal and communicates using an electronic device. In addition, he was recently diagnosed with cancer. Prior to being able to vote by mail-in ballot, Cindy and Matthew Jennings voted in person. Voting is extremely difficult for them. Ms. Jennings must load Matthew in and out of a van. On rainy election days, they must wait in line outside in the rain. Ms. Jennings simply does not have enough hands to hold an umbrella and manipulate Matthew's wheelchair, so they often get soaking wet. Even if Matthew might have been eligible to vote by absentee ballot under pre-Act 77 rules, Ms. Jennings would not qualify, and in any event she is unable to leave Matthew alone. Prior to the

pandemic Matthew attended a day program but that program closed. When the day program reopened, they did not have sufficient staff for everyone to return, including Matthew. At the same time, there is a severe shortage of in-home care providers in Pennsylvania and Ms. Jennings is unable to hire additional help. Being able to vote by mail-in ballot in 2020 and 2021 ensured that Ms. Jennings and Mr. Jennings were able to exercise their constitutional right to vote, from the comfort and safety of their home. If voting by mail-in ballot is eliminated, Matthew and Cindy Jennings both face a serious risk of disenfranchisement.

Disability Rights Pennsylvania

Disability Rights Pennsylvania (DRP) is the protection and advocacy organization designated by the Commonwealth of Pennsylvania pursuant to federal law to protect the rights of, and advocate for, Pennsylvanians with disabilities so that they may live the lives they choose, free of abuse, neglect, discrimination, and segregation. According to United States Census data, individuals with disabilities make up approximately 13% of Pennsylvania's population. DRP works to ensure the right to vote independently and privately for all people with disabilities within the Commonwealth, and seeks to eliminate the many barriers to voting for people with disabilities that impede participation in the voting process. Still many barriers to voting remain. Voters with visual disabilities may encounter voting machines that they cannot use without assistance. Just getting to the polling place can be a

challenge because of lack of transportation. DRP believes voting by mail is a vital option that protects the right to vote for these individuals who are not always eligible for absentee ballots. And unlike with absentee ballots, voters using mail-in ballots do not have to provide a reason for not voting in person. This means that voters with disabilities do not have to disclose information about their disabilities in order to vote.

Leah Marx

Leah Marx is from Westmoreland County, but in October 2021 she and her husband began temporarily living in Washington State, where he is an active-duty member of the United States Army serving at the Headquarters Detachment of the 390th Military Police Battalion at Joint Base Lewis-McChord. Ms. Marx is a regular voter in elections for federal, state, and local offices. For the November 2021 general election, her only options for voting were to cast an absentee ballot pursuant to 25 P.S. § 3146.1(b) or a mail-in ballot pursuant to Act 77, as she could not return to Westmoreland County from Washington State to vote in person. While living in Washington State, Ms. Marx continues to work at her longtime job in Pittsburgh as a landscape designer, which she is able to do by telecommuting. Ms. Marx is the mother of a school-age child, and it is particularly important to her to vote in school board elections. If the lower court ruling stands, military spouses

like Ms. Marx will lose access not only to mail-in ballots as created by Act 77, but also to absentee ballots, as detailed below.

Hassan Bennett

Hassan Bennett lives in Philadelphia and has worked since February 2020 as a bail navigator and client advocate for the Defenders Association of Philadelphia. He has been registered to vote in Philadelphia since 2004. In 2018, Mr. Bennett was detained in Curran-Fromhold Correctional Facility on State Road in Philadelphia awaiting trial. While there, a corrections officer brought him an application for an absentee ballot. Mr. Bennett filled it out and signed it and gave it back to the guard. As the election neared, the guard brought him his absentee ballot packet. Mr. Bennett completed his ballot and returned it to the guard. Mr. Bennett's understanding was that the jail would mail his completed ballot packet to the Philadelphia County Board of Elections to be counted. Mr. Bennett was acquitted after trial and released from detention on May 6, 2019. Elections are important to him and he votes regularly, including voting in person in 2020. If the decision below is upheld, other pretrial detainees like him risk being denied the right to vote, because they do not fall within any of the categories of absentee voters named in Article VII, § 14.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This appeal presents pure questions of law as to the constitutionality of a statute, and therefore the scope of review is plenary, and the standard of review is *de novo*. *E.g.*, *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 929 (Pa. 2017).

QUESTIONS INVOLVED

1. Should *Chase* and *Lancaster City* be reaffirmed in the twenty-first century?

   Proposed answer: No.

2. Would the decision below disenfranchise a wide range of citizens, including voters who work long shifts, have disabilities, are married to service members, or are incarcerated while awaiting trial?

   Suggested answer: Yes.

SUMMARY OF ARGUMENT

Nothing in the Pennsylvania Constitution prohibits legislation enacting no-excuse mail-in voting. The Commonwealth Court invalidated Act 77 based on two old decisions of this Court: *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election of Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924). Considering itself bound by these two precedents, the Commonwealth Court held that the General Assembly could not excuse anyone from in-person voting except for people who fall within one of the narrow categories specifically enumerated in Article 7, § 14 of the Pennsylvania Constitution. This was error and should be reversed.

Not only was the decision in *Chase* based on a previous constitution that made no provision for absentee voting, but it was based on factual assumptions and concerns about elections that long ago became obsolete. Thereafter, in *Lancaster City*, this Court simply reapplied the reasoning of *Chase* without consideration of its historical context and despite an intervening constitutional change that expressly empowered the General Assembly to provide for absentee voting.

As demonstrated by Amici, applying these outworn decisions to modern-day elections would disenfranchise many thousands of Pennsylvania voters whose work or life circumstances prevent them from voting in person. Moreover, the Commonwealth Court failed to grapple with the fact that Act 77 was not the first time the General Assembly has expanded absentee voting beyond the categories named in Article VII, § 14. Statutes passed over fifty years ago created additional classes of voters—including military spouses, vacationers, and voters accompanying their spouses on business travel—who may vote by absentee ballot. Under the Commonwealth Court's logic, the General Assembly was also prohibited from enacting those laws, and these voters would also face disenfranchisement. To the extent *Chase* and *Lancaster City* lead to such unjust results, this Court should disregard or overrule those decisions and uphold Act 77.

ARGUMENT

I. *Chase* and *Lancaster City* Should Not Be Reaffirmed in the Twenty-First Century

Chase and *Lancaster City* are anachronisms overridden by intervening constitutional amendments and the development of a statewide voter-registration system. As noted in another election-law dispute, the Court is "not constrained to closely and blindly re-affirm constitutional interpretations of prior decisions which have proven to be unworkable or badly reasoned." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 759 n.38 (Pa. 2012). Under long-recognized principles of stare decisis, courts may diverge from previous rulings that have "been duly tested by experience" and "found to be inconsistent with the sense of justice or with the social welfare." *Flagiello v. Pa. Hospital*, 208 A.2d 193, 207 (Pa. 1965) (citation omitted). This is particularly so when construing constitutions. *See Margiotti v. Lawrence*, 193 A. 46, 48 (Pa. 1937).

It would be hard to find a decision more out of sync with modern concepts of voting rights than a nineteenth-century ruling that all voters must appear in person. The *Chase* majority's reading of a residency requirement's reference to the "election district where [a voter] offers to vote" to prohibit voting by mail, 41 Pa. at 418, is explicable only by its origin in a bygone world in which elections were communal social events and a voter's eligibility was determined principally by his neighbors' eyewitness identifications. Today, every state has some form of

absentee voting, five states hold their elections entirely or mostly by mail, and 34 states plus the District of Columbia make available the kind of no-excuse mail-in voting provided by Act 77.[2] As Amici's stories demonstrate, applying *Chase* to today's context would be both unworkable and deeply unjust.

Chase's antiquity does not lend it additional credibility. Old case law tends to be more strongly protected by stare decisis, because often it has occasioned reliance. Cases with a long lineage tend to have multiple precedents to overcome. *See Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). But *Chase* has not spawned many subsequent rulings. The nearly century-old *Lancaster City* decision is its last direct descendant.

If anything, the reliance issue runs in the opposite direction. For decades, the General Assembly and Pennsylvania courts have acted as if they have the power to expand absentee status beyond the express categories named in the constitution. Certainly, in this case "the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants." *Flagiello*, 208 A.2d at 207 (citation

[2] *See* Nat'l Conf. of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, Table 1 (2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx.

omitted). Indeed, the legislators now challenging Act 77's constitutionality acted in reliance on Chase's *lack* of precedential power when they passed Act 77.

This Court should not follow *Chase* and *Lancaster City*, "which are unsuited to modern experience and which no longer adequately serve the interests of justice." *Id.*

A. *Chase* Is Based on Antiquated Assumptions About Elections That Have Not Applied for Over a Century

Chase v. Miller invalidated an 1839 law allowing soldiers to vote where they were stationed. To reach that result, the Court construed an 1838 constitutional requirement that a voter reside for ten days "in the election district where he offers to vote." 41 Pa. 403, 418 (1862). The decision was delivered in a politically fraught wartime context, and was based in part on what the Court viewed as an unconstitutional delegation of civilian political processes to military authorities in the midst of the Civil War. *See id.* at 422–23. Even absent the wartime context, the reasoning and result of *Chase* are explicable only because elections in the nineteenth century were conceptually and structurally different from elections today.

At the time of *Chase*, elections in Pennsylvania, as in most states, were community events. As one historian explains, "One did not simply 'vote,' in the nineteenth century; in the parlance of the times, one 'attended' or 'went to the election.'" John F. Reynolds, *Testing Democracy: Electoral Behavior and*

Progressive Reform in New Jersey, 1880-1920 34 (1988). At the 1837 Pennsylvania Constitutional Convention, delegates were concerned with facilitating "the attendance" of voters, and spoke of large numbers of voters "assembled together" at elections. 2 *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania* 24–25 (1837). The continuing communal quality of nineteenth-century elections is reflected in a speech at the convention by a delegate named George Woodward, who later joined this Court and wrote the *Chase* opinion. He explained he would hesitate to change the traditional day for elections—"a day on which the people had been accustomed from the days of the revolution, to meet and consult, and decide who should rule over them." *Id.* at 27. His vision of a communal day devoted to the election no longer resonates.

The communal nature of nineteenth-century elections was not just conceptual; it was structural. Although votes were no longer cast by a show of hands in a public meeting, the actual voting process was far from secret. Voters cast ballots, or "tickets," printed by the different parties that were distinctive enough that "the voter's partisan preferences were rarely any secret." Reynolds at 36; *see also Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1882 (2018) (highlighting the historical use of "pre-made ballots" in the form of "'party tickets'" that were "distinctive in appearance"); *Commonwealth v. Coryell*, 9 Pa. D. 632, 635 (Pa. Quar. Sess. 1900) (noting the "old system under which the

different parties printed their ballots"). Today's government-printed, standard ballots did not come into use in Pennsylvania until 1891, via legislation that also provided for "voting in a room where electioneering and solicitation of votes is forbidden," and covering the numbers on the ballots to prevent election officials from learning who had voted for whom, thus "removing the temptations to violate their oaths of secrecy." *De Walt v. Barley*, 24 A. 185, 187 (Pa. 1892). In fact, the secrecy oaths themselves were not constitutionally mandated until 1874, twelve years after *Chase*. *See* Pa. Const. art. VIII, § 4 (1874).

Those structural changes reflect a fundamental shift from understanding elections as expressive public performances in which a community chose its representatives through organized competition, to understanding them as an administrative process facilitating private choices founded on individual rights. This administrative process should ensure fairness, accuracy, and efficiency, but has no substantive political value in and of itself—at least none that is constitutionalized.

Things were different in 1862. As one scholar put it, at the time of the Civil War voting was seen "as a communal, public right belonging not to individuals as autonomous actors, but to the local community where individuals participated as members." David A. Collins, *Absentee Soldier Voting in Civil War Law and Politics* (2014) (Ph.D. dissertation, Wayne State Univ.), at 7. Another observes that

"when nineteenth-century Americans imagined the act of voting," they envisioned a "masculine, communal, deliberative model of election." Adam I.P. Smith, *No Party Now: Politics in the Civil War North* 15 (2006). In that context, allowing individuals to cast ballots outside the community affected by their voting choices was a radical departure.

It was with this communal understanding of elections that *Chase* declared 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." 41 Pa. at 419. To the *Chase* majority, this was not so much a legal interpretation as a simple statement of social fact. Voting without showing up in person was difficult to comprehend. It was unthinkable that a ballot would 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 [sic]." *Id.* Thus, the Court explained that "we cannot be persuaded that the constitution ever contemplated any such mode of voting." *Id*. As one commentator observed, "The truth seems to be that there was a natural hostility to the idea of voting in any manner other than by personal appearance, and it must be admitted that the idea was new and outside general experience at the time the problem first arose." H.L.R., Note, *Review of Absentee Voters Legislation in Pennsylvania*, 73 U. Pa. L. Rev. 176, 179 (1925).

During the Civil War, several other state supreme courts considered whether remote soldier voting conflicted with state constitutional requirements. The three courts that upheld remote soldier voting against election residency requirements did so on a plain-meaning analysis,[3] while the two courts that, like *Chase*, struck down remote soldier voting turned to cultural history and tradition.[4] For example, the Wisconsin Supreme Court, applying the plain meaning of the specific constitutional text, declared "it is not enough to say that the framers of the constitution never contemplated or 'dreamed of' a law authorizing a ballot to be cast outside of the state. That may be conceded, but no prohibition can be implied from it." *State ex rel. Chandler v. Main*, 16 Wis. 398, 415 (1863). In contrast, the Michigan Supreme Court, "[c]onstruing the provision in the light of the history of the country up to the time of its adoption," shared the *Chase* majority's view that "by the terms 'to vote' or to 'offer to vote,' in a township or ward, would . . . be at once understood a personal presentation of the vote at that place to the inspectors

[3] *Morrison v. Springer*, 15 Iowa 304 (1863); *Lehman v. McBride*, 15 Ohio St. 573 (1863); *State ex rel. Chandler v. Main*, 16 Wis. 398 (1863).

[4] *See Bourland v Hildreth*, 26 Cal. 161 (1864); *People ex rel. Twitchell v Blodgett*, 13 Mich. 127 (1865). In addition, three New England courts issued advisory opinions that found remote soldier voting inimical to their constitutions' prescription of traditional town "electors' meetings" at which all voting was to take place. *In re Opinion of Justices*, 30 Conn. 591, 596–97 (1862); *see also In re Opinion of Justices*, 44 N.H. 633 (1863); *In re Opinion of the Judges*, 37 Vt. 665 (1865).

or officers presiding at such election." *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 155 (1865). After all, "[s]uch had been the uniform mode in all the American states from their first organization." *Id.*

Similarly, even the challenged 1839 legislation in *Chase* authorizing soldiers to vote in the field did not conceive of absentee voting as a process in which voters would individually return ballots from various remote locations. Rather the law enacted a complex recreation of communal elections in military camps. Soldiers in active service who on election day were more than ten miles from the place where they otherwise would be entitled to vote 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.'" *Chase*, 41 Pa. at 416 (quoting General Election Law of July 2, 1839). The trial court, which found the statute constitutional, observed that "by giving the manner in which votes shall be received," the law effectively established "the places where the companies may be on the day of the general election as election districts." *Chase v. Miller*, 2 Luzerne Observer 73, 77 (Pa. Quar. Sess. 1862).

Chase's response to this reveals another historical context that drove the opinion, not operative today. The Court stated that the General Assembly might have constitutionally declared election districts in military camps. 41 Pa. at 409. But instead the statute delegated to military commanders the power to fix election

locations and shape election procedures. This was constitutionally invalid, primarily because "the legislature have no power to authorize a military commander to make an election district." *Id.* at 422. Election administration "is a part of the civil administration," and "no civil functions . . . can be delegated to a military commander." *Id.* Concerns about allowing military commanders to take over election procedures doubtless ran especially high in the midst of a civil war, with armed troops stationed on domestic soil. One historian observed that during the war, "Democrats frequently charged Republicans with military tyranny and unconstitutionally centralizing the government. Giving soldiers the ballot and bullet would create a standing army on American soil that would lead to the collapse of the American republic." Jonathan W. White, *Citizens and Soldiers: Party Competition and the Debate in Pennsylvania over Permitting Soldiers to Vote, 1861-64*, 5 Am. Nineteenth Century Hist. 47, 64 (2004).

Finally, *Chase*'s rejection of absentee voting was driven not solely by historical concepts of voting and concerns about turning over elections to military control. There also was a functional concern: fraud. The Court feared that permitting soldier voting would "break down all the safeguards of honest suffrage." 41 Pa. at 419. At the time, there was some reason for this worry. Pennsylvania had no statewide voter-registration system, only a (politically fraught) voter-registration law that applied just in Philadelphia. *See id.* at 418–19.

In the rest of the Commonwealth, on-scene community elections provided the primary method of assuring that only eligible voters participated. Requiring a voter to "offer his vote" in person "in an appropriate election district" would ensure "that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful." *Id.* at 419. Accordingly, the Court opined that the 1838 amendment requiring an elector's ten-day residence "in the election district where he offers to vote" served as an anti-fraud device, and was "probably suggested" by the Philadelphia registration law, "the main object of which was to identify the legal voter . . . and to exclude disqualified pretenders and fraudulent voters of all sorts." *Id.* at 418.

Just as the switch to viewing elections as processes for exercising purely individual voting rights rather than as communal decision-making has undermined the conceptual basis of *Chase*, so has the adoption of statewide voter registration obviated the rationale for in-person community voting. Both conceptually and functionally, *Chase*'s constitutional interpretation is based on a social context that disappeared long ago, undermining its precedential and persuasive authority.

B. *Lancaster City* Simply Reinscribes *Chase*'s Ruling and Should Not Control This Case

In 1923, the General Assembly again expanded absentee voting—now for civilians—and again the Court struck it down. *See Lancaster City*, 126 A. 199 (Pa. 1924). Without elaboration, *Lancaster City* quoted the assertion in *Chase* that:

> 'To 'offer to vote' by ballot, is to present one's self, 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 . . . . We cannot be persuaded that the Constitution ever contemplated any such mode of voting.

Id. at 200 (quoting *Chase*, 41 Pa. at 419).

Lancaster City's reliance on *Chase* is dubious because intervening constitutional developments abrogated *Chase* and validated the new absentee-voting legislation. The logic of the holding in *Lancaster City* was that the "offer to vote" language still required in-person voting as an element of suffrage, and the only exceptions would be for categories of voters "specifically named" in the 1874 Constitution. 126 A. at 201. The Court also applied the maxim *expressio unius est exclusio alterius* to conclude that the 1874 Constitution's list of voters eligible for absentee ballots was exhaustive. But it essentially ignored a 1901 constitutional amendment that modified the longstanding mandate that elections "be by ballot" to expressly allow "such other method as may be prescribed by law: Provided, that secrecy in voting be preserved." Pa. Const. art. VIII, § 4 (1874, as amended 1901). Having mentioned the amendment, *Lancaster City* was silent as to its effect on the General Assembly's authority to enact remote voting methods. Instead it simply pointed back to *Chase*, stating that "[i]t will be noticed that the 'offer to vote' must still be in the district where the elector resides, the effect of which is so ably discussed by Justice Woodward in *Chase v. Miller*." 126 A. at 201.

This reliance on *Chase* was particularly surprising because, by the time *Lancaster City* was decided, over 30 other states had approved absentee-voting statutes, often despite constitutional language nearly identical to the text at issue in *Chase*. Between 1916 and 1939, ten decision addresses the legality of absentee-voting laws, including *Lancaster City.* Seven courts upheld absentee-voting laws.[5] The two state courts that struck down absentee voting laws in addition to *Chase* did so for reasons quite distinct from *Chase's* rationale.[6]

By 1924, then, the concept of what it meant to vote had shifted to the exercise of a right that belonged to an individual partly by virtue of the individual's connection to a community, but which need not necessarily be performed in the geographic bounds of that community, at least not so long as the ballot cast by the voter ended up in the hands of that community's election officials. As one contemporaneous court explained, "A ballot cast pursuant to this statute is in effect one cast in the county, township, and voting precinct of the absent voter, even though the voting process begins in another county." *Jones v. Smith*, 264 S.W. 950,

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[5] *Straughan v. Meyers*, 187 S.W. 1159 (Mo. 1916); *Jenkins v. State Bd. Of Elections of N.C.*, 104 S.E. 346 (N.C. 1920); *Goodell v. Judith Basin Cty*., 224 P. 1110 (Mont. 1924); *Jones v. Smith*, 264 S.W. 950 (Ark. 1924); *Moore v. Pullem*, 142 S.E. 415 (Va. 1928); *Bullington v. Grabow*, 298 P. 1059 (Colo. 1931); *Lemons v. Noller*, 63 P.2d 177 (Kan. 1936).

[6] *See Thompson v. Scheier*, 57 P.2d 293 (N.M. 1936); *State v. Lyons*, 5 A.2d 495 (Del. Ct. Gen. Sess. 1939).

951 (Ark. 1924). A legislature could "provide that an offer to vote in the township or ward in which the elector resides, could be made by subscribing to [an] affidavit." *Lemons v. Noller*, 63 P.2d 177, 185 (Kan. 1936). Voting was no longer understood primarily as participation in a community activity, but more as the *means* by which individual voting rights are instantiated: "The act of legally voting, as the term is understood in law, embodies the right to have the vote counted." *Straughan v. Meyers*, 187 S.W. 1159, 1162 (Mo. 1916). Thus, an absentee voting law "does not undertake to authorize a person to vote in a place other than that of his residence, but merely provides a system or method through which he may vote in the place of his residence." *Id.*

One possible explanation for *Lancaster City*'s reinscription of a nineteenth-century approach to elections was the fact that, unlike many other states, in 1924 Pennsylvania still had no statewide system of voter registration. *See* Jacob R. Neiheisel, *Reconciling Legal-Institutional and Behavioral Perspective in Voter Turnout*, 16 State Pol. & Pol'y Q. 432, 438–39 (2016). The 1901 amendments permitted the General Assembly to adopt registration systems, but it was not until 1937 that registration was extended statewide. Before 1937 more than half of Pennsylvania's counties had no mandatory personal registration requirements. *Id.* at 439. Thus, the *Lancaster City* Court had some reason to share the *Chase* Court's concern that allowing remote voting would undermine a principal mechanism for

determining voters' legitimate participation, namely visual identification by their neighbors. But if *Lancaster City* had reason to readopt *Chase's* proscription of remote voting, that reason has long since vanished.

II. Treating Article VII, § 14 as a "Ceiling" Would Disenfranchise Amici and Many Similarly Situated Citizens

The Commonwealth Court held that Article VII, § 14 "established the rules of absentee voting as both a floor and a ceiling." Op. at 33. If upheld, not only would Act 77's creation of optional mail-in balloting for all Pennsylvania electors violate the Constitution, but so would permitting ***anybody*** to vote by absentee ballot beyond the four categories delineated in Article VII, § 14.[7] For many of the millions of Pennsylvanians who have voted by mail in elections in the last two years, this would take away a welcome convenience. But for numerous voters, including Individual Amici and voters like them, voting by mail is their only realistic option for casting a ballot. For them, Act 77 and earlier expansions of absentee voting made voting not just easier, but possible.

[7] These four categories consist of "qualified electors":

1. "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";
2. "who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability";
3. "who will not attend a polling place because of the observance of a religious holiday"; or
4. "who cannot vote because of election day duties, in the case of a county employee."

Under the decision below, Amicus Molly Mahon and others who work long shifts, such as first responders, would be allowed to vote by absentee ballot only if "on the occurrence of any election" they will "be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere," Pa. Const. art. VII, § 14. This would reopen a pre-Act 77 gap large enough to swallow Ms. Mahon's right to vote. Whenever Ms. Mahon works an all-day shift at CHOP—something she cannot avoid on many election days—she is unable to go to her polling place at the Mummers Museum when the polls are open, *see* 25 P.S. § 3045. But she would be ineligible for an absentee ballot under the terms of Article VII, § 14, because she would not be "absent from the municipality of [her] residence." Her situation is far from unique, particularly in Philadelphia, where many residents work far from home yet within the expansive city's more than 140 square miles. Not only did the General Assembly act well within its rights when it remedied this problem through Act 77, but the changes brought about through Act 77 were necessary to provide access to the ballot for this critical group of voters.

Another category of voters eligible for absentee ballots under the bare standards of Article VII, § 14 are those "unable to attend at their proper polling places because of illness or physical disability." This provision would not allow Amici Pam Auer, Marisa Niwa, and Matthew Jennings to vote absentee. Although

voting in person costs them physical discomfort, requires dependence on relatives or friends, and exposes them to health and safety risks, they cannot aver they are "unable" to vote in person. Indeed, they each have voted in person. Act 77 has dramatically eased their participation in elections by allowing them to vote by mail.[8]

Moreover, Act 77 permits a voter to cast a mail-in ballot without providing a reason for not voting in person. But to vote by absentee ballot on the basis of an illness or a physical disability, a voter must submit a Pennsylvania Application for Absentee Ballot[9] to the county board of elections disclosing the "Nature of illness or physical disability" along with a physician's name and phone number. Many of the constituents DRP serves are uncomfortable disclosing this information to local authorities.

Act 77 has also ensured access to the ballot for Amicus Cindy Jennings and others who provide care for people with disabilities. DRP reports that nearly 13,000 people in Pennsylvania with intellectual disabilities or autism are on a

[8] *See also* Jonathan Lai, *The Turnout Gap Between Voters With and Without Disabilities Grew in 2018*, PHILA. INQUIRER (July 22, 2019) ("[V]oters with disabilities may feel embarrassed when they have to request assistance to cast a ballot. The attention can feel like a spotlight, especially when there are other voters waiting to use the machines in high-turnout elections.").

[9] https://vote.pa.gov/Voting-in-PA/Documents/Absentee_Ballot_Application.pdf

waiting list for services so they can live in their communities with Medical Assistance home- and community-based services. While they wait, the vast majority of these individuals are cared for by their families. And even when they come off the waitlist, families and individuals now face a shortage of workers to provide the services. Indeed, the Pennsylvania Workforce Development Board reports that the Commonwealth is in the midst of a crisis caused by a shortage of workers whose job it is to care for others in their homes and communities.[10] No-excuse mail-in ballot voting pursuant to Act 77 is critical for these caregivers.

Even before Act 77, the General Assembly permitted absentee balloting for numerous types of voters beyond Article VII, § 14's four categories. *E.g.*, 25 P.S. § 3146.1(a) (absentee balloting permitted for any elector "in the military service of the United States regardless of whether at the time of voting he is present in the election district of his residence"); 25 P.S. § 2602(z.3) (extending "duties, occupation or business" to include "vacations" and "sabbatical leaves"). But the decision below characterizes the four categories of Article VII, § 14 as a "ceiling," Op. at 33; under that rationale, these expansions of absentee balloting are no more constitutional than Act 77's mail-in balloting system.

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[10] Pa. Workforce Development Board Healthcare Workforce Ad Hoc Committee, *Professional Care Worker Shortage Crisis Statement* (May 5, 2020), https://www.dli.pa.gov/Businesses/Workforce-Development/wdb/Documents/Professional-Care-Worker-Shortage-Crisis.pdf

Amicus Leah Marx falls into one of these categories. Last year she temporarily relocated from Westmoreland County to Washington State because of her husband's military service, and thus met the terms of a statute dating to 1963 that allows spouses of military members to vote by absentee ballot. 25 P.S. § 3146.1(b) (permitting absentee balloting by "[a]ny qualified elector who is a spouse or dependent residing with or accompanying a person in the military service of the United States if at the time of voting such spouse or dependent is absent from the municipality of his residence"); *accord* 25 P.S. § 2602(w)(2). If the decision below is affirmed, Section 3146.1(b) would be as unconstitutional as Act 77, since it would go over the "ceiling" of Article VII, § 14. This would cost Pennsylvanians like Ms. Marx the right to vote by mail in state and local elections,[11] because military spouses do not themselves have "duties, occupation or business [that] require them to be elsewhere," Pa. Const. art. VII, § 14. Indeed, like many workers today, Ms. Marx continues to telecommute to her job in Pittsburgh, so her "occupation or business" does not "require" her to be anywhere in

[11] For elections for federal offices, military spouses can vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which trumps limitations in state law. *See* 52 U.S.C. §§ 20302(a)(1), 20310(1)(C), 20310(3). However, UOCAVA does not apply to elections for state or local offices, including the school board races so important to Ms. Marx.

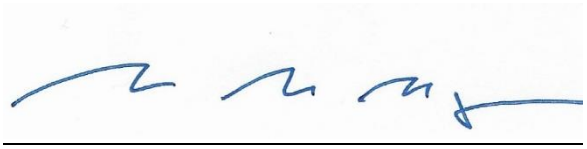
particular. Similarly, Pennsylvanians who are out of town on "vacations," *see* 25 P.S. § 2602(z.3), could lose access to absentee ballots.

Another group of citizens whom the decision below would wholly disenfranchise are those in pretrial custody or serving misdemeanor sentences, like Amicus Hassan Bennett. In Pennsylvania, these individuals retain the right to vote while in jail. *Voting by Untried Prisoners and Misdemeanants*, 1974 Op. Pa. Att'y Gen. No. 47, 67 Pa. D. & C.2d 449, 453 (1974). Yet their detention precludes them from appearing in person at their polling places. Perhaps a pretrial detainee confined in a jail outside his municipality of residence could be said to have a "duty" preventing him from voting in person, but a voter like Hassan Bennett who is jailed in his hometown clearly would not fit under any of the four categories in Article VII, § 14, and thus would be disenfranchised, despite enjoying a presumption of innocence.

CONCLUSION

Chase and *Lancaster City* have no place in modern Pennsylvania law. Amici's access to the ballot should not be limited by these anachronistic decisions, and the Court should reverse the decision below and uphold the constitutionality of Act 77.

Respectfully submitted,



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Dated: February 15, 2022

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

I further certify that this brief complies with the length limitation set forth in Pa.R.A.P. 531(b)(3). According to the word count of the word-processing system used to prepare this brief, the brief contains 6,999 words, not including the supplementary matter as described in Pa.R.A.P. 2135(b).

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