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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Docket Nos. 14, 15, 17, 18, & 19 MAP 2022 (Consolidated)

DOUG McLINKO,

Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF STATE, *et al.*,

Appellants.

TIMOTHY BONNER, *et al.*,

Appellees,

v.

LEIGH M. CHAPMAN, in her official capacity as
Acting Secretary of the Commonwealth, *et al.*,

Appellants.

BRIEF OF *AMICI CURIAE* CITIZENS UNITED, CITIZENS UNITED FOUNDATION, AND THE PRESIDENTIAL COALITION, LLC IN SUPPORT OF ALL APPELLEES

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

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STATEMENT OF INTERST OF *AMICI CURIAE*

Citizens United and Citizens United Foundation are nonprofit organizations, exempt from federal taxation under Internal Revenue Code sections 501(c)(4) and 501(c)(3), respectively. These *amici* have an unwavering dedication to restoring citizen control over government through education, advocacy, and other grass-roots efforts focused on reasserting the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. The Presidential Coalition, LLC is an IRC section 527 political organization. This *amici* seeks to educate the American public on the value of having principled leadership at all levels of government.

To further their missions, all three *amici* engage in litigation, including filing *amicus* briefs, which demonstrate how principled leadership, traditional American values, and a commitment to the proper construction, interpretation, and application of federal and state constitutions and statutes should guide judicial decisions. In 2010, the *amici* won a U.S. Supreme Court case known as *Citizens United v. FEC*, which struck down as unconstitutional a federal law prohibiting corporations and unions from making expenditures in federal elections.

Other than the *amici*, their members, and their counsel, no person or entity paid in whole or in part for the preparation of this brief or authored in whole or in part this brief.

SUMMARY OF THE ARGUMENT

The Commonwealth Court's decision holding Act 77 to be unconstitutional should be upheld as it is based upon a proper construction, interpretation, and application of Article VII, Section 14 of the Pennsylvania Constitution. The correctness of that decision is confirmed by three tools this Court uses to interpret constitutional provisions: (i) the text of the provision; (ii) relevant legislative history; and (iii) the maxim *expressio unius est exclusio alterius*.

First, the text of Article VII, Section 14 supports the Commonwealth Court's decision. The Commonwealth's entire argument *contra* is that the 1967 amendment, which changed the word "may" to "shall," was significant—a tectonic shift from limiting the General Assembly's power to conferring on it unlimited power in the realm of authorizing non-in-person voting at the polls on Election Day ("non-in-person voting"). But, the Commonwealth is wrong. There is nothing to show that the electorate, when it voted to approve the amendment in 1967, understood that one change to carry the significance so desperately required by the Commonwealth. None of the opening briefs (by the parties or their *amici*) point to any such evidence. Perhaps because the only logical conclusion, based on the question on the ballot in 1967, was that if any change was being made by

that word change it was to restrict the ability of the General Assembly to authorize non-in-person voting. Moreover, this Court's prior interpretation of "shall" in the Pennsylvania Constitution confirms that while Article VII, Section 14 allows the General Assembly to enact different methods for non-in-person voting, those methods may apply only to the categories of qualified electors identified in Section 14.

Second, legislative history affirmatively confirms the Commonwealth Court's decision. When the House voted to approve the proposed amendments in 1967, it was only after being told the amendment would have only one major change—and it was not the alleged tectonic shift from "may" to "shall." Moreover, when the General Assembly passed the two subsequent amendments to Article VII, Section 14, affirmative legislative history shows the Constitution needed to be amended to expand the scope of qualified electors who could vote other than in-person. That all is bolstered by the myriad bills introduced since 1967 that show the General Assembly knew it had to amend the Constitution to expand non-in-person voting.

Finally, the interpretive maxim *expressio unius est exclusio alterius* compels the conclusion that the Commonwealth Court was correct. As this Court has done numerous times before, it should apply that interpretive maxim and find that with the sovereign people's specific delineation of

powers to the General Assembly in the Constitution in this area, there is no room for the courts to introduce new powers.

Here, not only does the specific language of Article VII, Section 14 support the Commonwealth Court's decision but the specific legislative history behind the amendment at issue, the other relevant legislative history, and an interpretative maxim all also support the Commonwealth Court's decision. Therefore, like the Commonwealth Court, this Court should rule that Act 77 is unconstitutional.

ARGUMENT

The Commonwealth Court is correct. Article VII, Section 14 of the Pennsylvania Constitution limits to those identified in Section 14 the qualified electors able to vote other than in-person. The express language requires that conclusion. The legislative history behind Senate Bill 6, which proposed the amendment to Article VII, Section 14, requires that conclusion. The legislative history surrounding subsequent amendments to and attempts to amend Section 14 requires that conclusion. And the interpretive maxim *expressio unius est exclusio alterius* requires that conclusion. Accordingly, this Court should affirm the Commonwealth Court's ruling below.

A. The Sole Question Before This Court Is Whether Act 77 Is Unconstitutional

Before addressing the specific arguments below, the *amici* feel constrained to state they, like this Court when deciding the constitutionality of statutes, are taking no position in this brief on whether Act 77 was good or bad. *See, e.g., Busser v. Snyder*, 128 A. 80, 83 (Pa. 1925) ("In passing on the constitutionality of an act such as the one before us, we do not for a moment question the high purpose that prompted those who are interested in the class of citizens therein provided for; nor do we wish to be understood as condemning such steps as wrongly directed; we are restricted to the question of the constitutional validity of the statute."); *Commw. v. Moir*, 49 A.

351, 353 (Pa. 1901) ("It is no part of our business to discuss the wisdom of this legislation. . . . Much of the argument and nearly all of the specific objections advanced, are to the wisdom and propriety and the justice of the act, and the motives supposed to have inspired its passage. With these we have nothing to do, they are beyond our province and are considerations to be addressed solely to the legislature. . . . Our only duty and our only power is to scrutinize the act with reference to its constitutionality, to discover what if any provision of the constitution it violates."). Rather, the *amici*'s sole interest in this brief is to ensure that the correct construction, interpretation, and application of law is followed relative to this Court's analysis of Article VII, Section 14 of the Pennsylvania Constitution.

Amici note further that various briefs supporting Appellants argue essentially the slippery slope argument—that if Act 77 is unconstitutional then other statutes also may be unconstitutional—and that declaring Act 77 unconstitutional now would jeopardize or make meaningless myriad costs incurred by the Commonwealth. Neither argument holds water when determining a statute's constitutionality. *See Busser*, 128 A. at 84 ("[I]f the instant act violates the Constitution, our duty is plain, regardless of the consequences to other appropriations."); *Commw. ex rel. Barratt v. McAfee*, 81 A. 85, 89 (Pa. 1911) ("The argument that the solution arrived at will

postpone the popular choice is of no avail against constitutional provisions adopted by the people themselves."). Thus, if a statute violates the Pennsylvania Constitution, it is of no consequence that the Commonwealth expended funds to implement that unconstitutional legislation.

Accordingly, the sole question before the Court is whether Act 77 is constitutional. And the resounding, reasoned answer, as provided by the Commonwealth Court, is that Act 77 is unconstitutional.[1]

B. <u>The Language of Pennsylvania Constitution Article VII, Section 14 Confirms Non-In-Person Voting Is Limited to the Situations Specified Therein</u>

The express language of Article VII, Section 14 supports the Commonwealth Court's reasoned interpretation. The Commonwealth erroneously asserts the Commonwealth Court erred in its decision, in part, because the 1967 amendment to Article VII, Section 14 effectuated a tectonic shift in the authority of the General Assembly to authorize, by legislation only, exceptions to in-person voting. The minor textual change in 1967 cannot bear the weight of the argument.

[1] While there may be a presumption of constitutionality of legislative acts, that "presumption is neither irrebuttable nor conclusive. . . . When constitutional powers have been exceeded by the legislature . . ., it is the obligation of the judiciary to preserve the fundamental law and declare contrary actions null and without effect." *Citizens Committee to Recall Rizzo v. Board of Elections*, 367 A.2d 232, 244 (Pa. 1976).

1. The constitutional amendment of 1967 was limited

The General Assembly passed the proposed amendment at issue in two consecutive legislative sessions. *See* *https://ballotpedia.org/Pennsylvania_Question_6,_Voter_Residency_Requirements_and_Absentee_Voting_Amendment_(May_1967)* (last accessed February 22, 2022). Importantly, the proposed amendment at issue included changes to other sections of Article VII, in addition to Section 14. *See* May 16, 1967, P.L. 1048, J.R. 5; 1967 Pa. Laws 1048. But as to Section 14, the proposed amendment made only four changes: (i) it changed "may" to "shall"; (ii) it changed "voters" to "electors"; (iii) it deleted "unavoidably" from the requirement a voter "be unavoidably absent from the State or county"; and (iv) it added a comma after "county of their residence". *See* May 16, 1967, P.L. 1048, J.R. 5; 1967 Pa. Laws 1048. The change upon which the Commonwealth rests its entire argument regarding this Section is the change of "may" to "shall." But, that argument ignores directives on how to interpret constitutional text and this Court's prior decision interpreting a similar constitutional provision. The Commonwealth's argument must be rejected.

2. There is no evidence the voters in 1967 understood the change from "may" to "shall" effectuated the tectonic interpretative shift the Commonwealth urges

When interpreting the Constitution, this Court is charged with ensuring the language is construed how the people who voted on the provision understood it. *See Yocum v. Commw.*, 161 A.3d 228, 239 (Pa. 2017) ("The constitutional language must be interpreted as the average person would have understood it when it was adopted."); *Citizens Committee to Recall Rizzo*, 367 A.2d at 250 (Nix, J., concurring) (The Constitution "is entitled to a construction, as nearly as may be, in accordance with the intent of its makers."); *Busser*, 128 A. at 83 ("Words must be understood in their general and popular sense, as the people who voted on the Constitution understood them, and we should not go beyond this meaning unless the language is so ambiguous that we need to ascertain the mischief to be remedied.").[2] There is no indication the people who voted on May 16, 1967, for this amendment understood the change from "may" to "shall" to represent the tectonic shift the Commonwealth now needs to support its appeal. In fact, the evidence is to the contrary.

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[2] *See also Etter v. McAfee*, 78 A. 275, 276 (Pa. 1910) ("[T]he safe and proper rule is to give the words used their plain and popular meaning."); *Page v. Allen*, 58 Pa. 338, 346 (Pa. 1868) ("[T]he constitution [ ] is always to be understood in its plain, untechnical sense.").

The language on the ballot for Question 6 (Senate Bill 6 or Joint Resolution 5) was:

> Shall article eight of the Constitution relating to suffrage and elections be amended by reducing residence requirements to register and vote in the State from one year to ninety days proceeding [*sic*] an election; providing the Legislature shall regulate in voting of electors absent from the State or county of their residence and repealing five sections of the Constitution relating to absentee voting, violations of the election law, residence provisions and appointments of elections overseers?

https://ballotpedia.org/Pennsylvania_Question_6,_Voter_Residency_Requirements_and_Absentee_Voting_Amendment_(May_1967). (last accessed February 22, 2022). Thus, the voters were told that the amendment at issue would remove certain provisions relating to absentee voting and would require the General Assembly to provide for absentee voting in only one specific instance—when electors are "absent from the State or county of their residence" on Election Day. That combination (removing existing absentee voting provisions and adding one provision limited to one specific absence) would lead a voter to understand that non-in-person voting was being restricted, not expanded limitlessly as the Commonwealth now contends.

Additionally, all agree that Article VII, Section 14 of the Pennsylvania Constitution expressly addresses the ability of the General Assembly to allow non-in-person voting. Because of that, the General Assembly cannot

legislate outside the boundaries provided by Section 14. “It is only when the constitution fails to deal with a subject that the general assembly may legislate upon it.” *Commw. ex rel. Barratt*, 81 A. at 87 (citation omitted); *see also Citizens Committee to Recall Rizzo*, 367 A.2d at 254 (Nix, J., concurring) (“The ultimate source of power which determines the legitimacy of the legislative delegation is the people of the Commonwealth and their views have been expressed through their Constitution. The perimeters provided by the Constitution may not be exceeded without an affirmative expression from all of the citizens of the Commonwealth.”). Moreover, it matters not whether those boundaries are provided by express terms or by implication; it long has been the law in Pennsylvania that the General Assembly cannot stray outside those boundaries in enacting legislation. *See, e.g., Page*, 58 Pa. at 345-46 (“In other words, in construing the constitution of this state, whatever is not expressly denied to the legislative power is possessed by it. . . . I assent to this, but not that the inhibitions of the constitution must be always express. They are equally effective, and not less to be regarded, when they arise by implication, and this is the case when the legislative provision is repugnant to some provision of the constitution.”).

The plain language of Article VII, Section 14 supports the Commonwealth Court’s decision that non-in-person voting in Pennsylvania

is limited to only those specific situations set forth in Section 14. Any other reading divests the electorate of their right to dictate to the legislature how they constitutionally have determined elections are to be held in this Commonwealth.

3. This Court's precedent undermines the Commonwealth's reliance on the change from "may" to "shall"

This Court has recognized that "shall" in the Pennsylvania Constitution sets a ceiling on the ability of the legislature to act. The Commonwealth's argument defies that holding and should be rejected.

In 1976, this Court was required to interpret Article VI, Section 7 of the Pennsylvania Constitution to determine whether the Mayor of Philadelphia was subject to recall. *Citizens Committee to Recall Rizzo*, 367 A.2d at 244. This Court concluded that recall was not appropriate because the mandatory "shall" language of that constitutional provision precluded that method of removing a civil officer. The relevant language provided:

> All civil officers elected by the people, except the Governor, the Lieutenant Governor, members of the General Assembly and judges of the courts of record, **shall** be removed by the Governor *for reasonable cause, after due notice and full hearing*, on the address of two-thirds of the Senate.

Id. (italics emphasis in original; bold emphasis added).

Applying the reasoning advanced by the Commonwealth here, the use of a recall method would have been acceptable because the constitutional provision did not limit the removal of civil officers *only to* removal for reasonable cause. But this Court rejected that type of interpretation. Instead, it determined that while the language allowed the General Assembly to provide for different methods or manners of removal (e.g., other than impeachment), whatever method or manner of removal the General Assembly created, that method or manner must be based on a removal for cause.

> Thus, while the legislature may provide for different methods of removal, different, for example, from impeachment, the method chosen must always be premised on cause, demonstrated after notice and hearing, and sufficient, under the Constitution, to permit removal. The "cause" requirement of Article VI, Section 7, is a broad requirement, expressly applicable to all civil officers, whether they be created by the Constitution or the legislature. The legislature is bound to follow its dictates when it determines a method of removal for an elected civil officer.

Id., at 245. The concurrence in *Rizzo* saw the use of "shall" as even more stringent and would have held the removal provision in the Constitution to be the sole and exclusive method for removing any elected officer. *Id.*, at 250 (Nix, J., concurring) ("A close reading of this [Article VI, Section 7, clause 3] language is not necessary to observe that, like the first clause in Article VI,

Section 7, its terms are mandatory, admitting of no exception. It indisputably applies to *all elected* officers, and sets forth in unambiguous language the exclusive method, absent impeachment, conviction of crime or misbehavior in office, of removing such elected officers. No other construction may reasonably be imposed on the language.") (emphasis in original).

The same interpretation holds here, either under the majority decision or the concurrence. While there is nothing in Article VII, Section 14 that prevents the General Assembly from enacting methods (or manners) of voting otherwise than in-person at the polls on Election Day, that voting must be limited to the situations identified therein. PA. CONST. art. VII, § 14(a). For example, the Constitution left up to the wisdom of the General Assembly whether the "manner in which" the person not voting in-person was, for example, by (i) absentee ballot sent through the mail; (ii) allowing in-person voting by that person on days other than Election Day; or (iii) sending someone from the Board of Elections to the person's residence with a ballot for the voter to complete and return. But the Pennsylvania Constitution limited that "manner" only to those specific situations identified in Article VII, Section 14. The language is mandatory and admits no exceptions to the categories of voters for whom non-in-person voting is permitted. *See Citizens Committee to Recall Rizzo*, 367 A.2d at 250 (Nix, J., concurring).

And just as a "removal scheme which is premised on something less [than cause] is unconstitutional and void," *id.*, at 246, a manner of voting otherwise than in-person at the polls on Election Day is unconstitutional and void if it expands beyond those situations permitted by Article VII, Section 14.

C. Relevant Legislative History Supports the Commonwealth Court's Interpretation of Pennsylvania Constitution Article VII, Section 14

If Section 14's plain language were not enough to convince this Court that Act 77 is unconstitutional, the legislative history also supports the Commonwealth Court's decision. Legislative history is a tool used to assist in interpreting the Constitution. *See, e.g., Lawless v. Jubelirer*, 789 A.2d 820, 830 (Pa. Commw. Ct. 2002), aff'd 811 A.2d 974 (Pa. 2002). The legislative history of Senate Bill 6 (the legislative vehicle to propose the constitutional amendment) and the legislative history of subsequent amendments and attempted amendments to Section 14 confirms that non-in-person voting is limited to those situations provided-for in Section 14.

1. Legislative history of Senate Bill 6 confirms the 1967 amendment did not substantively change Article VII, Section 14

The Commonwealth concedes that using "may" in Section 14 before the 1967 amendment was a ceiling, e.g., setting the outer limit of when the

General Assembly could authorize non-in-person voting. *See, e.g.,* Brief of Appellants, pp. 54-55. If the change from "may" to "shall" then carried the significant change to Section 14 that the Commonwealth contends (from limiting the General Assembly's authority to providing it absolutely limitless authority), that intent surely would have been known to and discussed by the General Assembly in passing Senate Bill 6 in 1967. But that is not the case.

When Senate Bill 6 was discussed in the Pennsylvania House on its third reading, before its unanimous passage (with one member not voting), this supposedly significant change was not even mentioned. *See generally* House Legislative Journal, Session of 1967, Vol. 1, No. 6, at 84 (January 30, 1967).[3] Not only was this one word change not mentioned, there was an affirmative representation of what the "only major change" was in Senate Bill 6 and it was not the change from "may" to "shall."[4]

> Mr. GALLEN. Mr. Speaker, a few very brief remarks on the contents of Senate bill [*sic*] No. 6. This proposed constitutional amendment, which passed both Houses in the last session unanimously, would shorten the time a person must reside in the State from one year to 90 days in order to vote, and for a person who has returned to Pennsylvania, it would shorten the time from six months to 90 days. *This is*

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[3] There was no discussion of the change from "may" to "shall" in the Senate on its amendment and passage of Senate Bill 6 on January 16, 1967. *See* Senate Legislative Journal, Session of 1967, Vol. 1, No. 3, at 34-35, 37-38 (January 16, 1967).

[4] Senate Bill 6 proposed amendments to more than just Section 14. *See* May 16, 1967, P.L. 1048, J.R. 5; 1967 Pa. Laws 1048.

> *the only major change that this constitutional amendment makes,* and it will allow many more of our citizens to be franchised.

House Legislative Journal, Session of 1967, Vol. 1, No. 6, at 84 (January 30, 1967) (emphasis added).[5] Therefore, there is a clear, plain, and direct legislative history that the General Assembly, when it proposed changing "may" to "shall" in Section 14, did not intend to effectuate the sea change now claimed by the Commonwealth. *See Citizens Committee to Recall Rizzo*, 367 A.2d at 250 (Nix, J., concurring) (The Constitution "is entitled to a construction, as nearly as may be, in accordance with the intent of its makers.").

2. Legislative history of subsequent amendments to Article VII, Section 14 confirms that any expansion of non-in-person voting must be by way of a constitutional amendment

Not only does the legislative history of Senate Bill 6 support the Commonwealth Court's interpretation of Article VII, Section 14, the legislative history associated with subsequent amendments to Section14 also supports that interpretation.

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[5] Moreover, the "and it will allow many more of our citizens to be franchised" language cannot be read to refer to the change of "may" to "shall" because (i) the use of "it" grammatically must refer to the "only major change" that Mr. Gallen discussed and (ii) the permitting or restricting of non-in-person voting does not enlarge or constrict the number of citizens who are "franchised."

a. Legislative history behind the November 5, 1985 Amendment to Article VII, Section 14 expressly recognizes that expansion of non-in-person voting must be by way of a constitutional amendment

In the 1983-84 and 1985-86 legislative sessions, the General Assembly passed a proposed amendment to Article VII, Section 14 that would add to the qualified electors who could be permitted to vote otherwise than by in-person at the polls on Election Day those "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". *See* H.B. 846 (PN 3430), 167th Leg. (Pa. 1983);[6] H.B. 240 (PN 257), 169th Leg. (Pa. 1985).[7] When the General Assembly first attempted to add these new categories, though, the House attempted to do it simply by amending the Election Code. *See* H.B. 846 (PN 952), 167th Leg. (Pa. 1983).[8] But the House realized it could not amend the Election Code without a prior Constitutional Amendment, so the bill was amended to be a proposed constitutional amendment.

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[6] https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=1983&sessInd=0&billBody=H&billTyp=B&billNbr=0846&pn=3430 (last accessed February 22, 2022).

[7] https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=1985&sessInd=0&billBody=H&billTyp=B&billNbr=0240&pn=0257 (last accessed February 22, 2022).

[8] https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=1983&sessInd=0&billBody=H&billTyp=B&billNbr=0846&pn=0952 (last accessed February 22, 2022).

> Mr. ITKIN. Mr. Speaker, this amendment is offered to alleviate a possible problem with respect to the legislation. The bill would originally amend the Election Code to permit absentee balloting for persons who, because of religious observances, would not be able to vote.
>
> Because it appears that the Constitution talks about who may receive an absentee ballot, we felt it might be better in changing the bill from a statute to a proposed amendment to the Pennsylvania Constitution. The amendment that I am offering now will do just that.
>
> The substance of the bill stays the same, but instead of being a proposed statute, it is now a proposed amendment to the Constitution.

House Legislative Journal, Session of 1983, No. 88, at 1711 (October 26, 1983).

Mr. Itkin and the rest of the House knew this Court long had held that it is "only when the constitution fails to deal with a subject that the general assembly may legislate upon it." *Commw. ex rel. Barratt*, 81 A. at 87 (citation omitted); *see also Citizens Committee to Recall Rizzo*, 367 A.2d at 254 (Nix, J., concurring) ("The ultimate source of power which determines the legitimacy of the legislative delegation is the people of the Commonwealth and their views have been expressed through their Constitution. The perimeters provided by the Constitution may not be exceeded without an

affirmative expression from all of the citizens of the Commonwealth."). This supports the Commonwealth Court's decision.

b. Legislative history behind the November 4, 1997 Amendment to Article VII, Section 14 confirms that expansion of non-in-person voting must be by way of a constitutional amendment

In the 1995-96 and 1997-98 legislative sessions, the General Assembly passed a proposed amendment to Article VII, Section 14 that would change the absence requirement from being "absent from the State or county" to being "absent from the municipality" and add a definition of "municipality." *See* H.B. 1865 (PN 2287), 179th Leg. (Pa. 1995);[9] H.B. 171 (PN 2015), 181st Leg. (Pa. 1997).[10]

When House Bill 1865 was discussed in the House, the prime sponsor, Mr. Herman, reiterated that any change to non-in-person voting needed to be done by way of a constitutional amendment.

> The State Constitution requires that you be out of the county on election day for work-related reasons if you want to be able to cast an absentee ballot, ...
>
> They can go to the polls and vote themselves; true. But in the event that their business relationships prevent them from doing that, should they not be able

[9] https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=1995&sessInd=0&billBody=H&billTyp=B&billNbr=1865&pn=2287 (last accessed February 22, 2022).

[10] https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=1997&sessInd=0&billBody=H&billTyp=B&billNbr=0171&pn=2015 (last accessed February 22, 2022).

> to have an absentee ballot? The current Constitution already requires that. The only problem is, you have to be out of the county, and your counties, 67 counties, are not homogenous. . . . But most of the other counties are very large, and thus, because of a transforming society, where more and more people are traveling long distances for work, they are unable to get to their proper polling site physically and cast that vote, and that is why some, not a lot but some, need the opportunity to have an absentee ballot *and currently are constitutionally prevented from doing so*.

House Legislative Journal, Session of 1996, No. 31, at 840-41 (May 13, 1996) (emphasis added).[11] Also relevantly, Representative Cohen from Philadelphia recognized that universal absentee balloting would require the General Assembly to pass such a constitutional amendment. "[I]f we want to have universal absentee ballots, we ought to say that and not get into the game of whether somebody fits in this little loophole or that little loophole. . . . I think if we want to have absentee ballot expansion, we ought to have across-the-board absentee ballot expansion and not this kind of absentee

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[11] While there are remarks on House Bill 1865 in both the House and Senate, only those from the House relate to the change to Article VII, Section 14. Also, during remarks about House Bill 171 in the House on June 11, 1997, Representative Cohen from Philadelphia continued the then-on-going discussion of the prevalence of fraud in non-in-person voting and that expanding non-in-person voting would lead to an increase in voter fraud throughout the Commonwealth.

ballot expansion." House Legislative Journal, Session of 1996, No. 31, at 840-41 (May 13, 1996).[12]

Thus, the legislative history behind the second amendment to Article VII, Section 14 since 1967 clearly, plainly, and directly supports the Commonwealth Court's conclusion that Section 14 limits the ability of the General Assembly to permit non-in-person voting only to those specific situations which Section 14 calls out.

3. Legislative history of subsequent attempts to amend Article VII, Section 14 confirms that any expansion of non-in-person voting must be by way of a constitutional amendment

Also supporting the Commonwealth Court's interpretation of Article VII, Section 14 are the myriad bills introduced since 1968 seeking to amend that provision. The General Assembly knew Article VII, Section 14 operates as a ceiling on its authority to expand non-in-person voting beyond the current

[12] The fact that Representative Cohen characterized absentee ballots as "loopholes" only solidifies the conclusion that in-person voting at the polls on Election Day is the required manner of exercising the right to vote in Pennsylvania. Representative Horsey, also from Philadelphia, noted that "[t]he mission is to encourage individual people themselves to go in front of that ballot box and to cast that vote. That is the mission that I believe the American democracy encourages – people, individual people, their bodies, to go in front of that ballot. And we should not make it easier through the absentee ballot process, because eventually we are going to be promoting fraud and we are going to be asking for it . . . ." *Id.*, at 840. *See also* PA. CONST. art. VII, § 14(a) (allowing absentee voting for certain electors who will "*be absent from the municipality* of their residence" because of certain things or electors who are "*unable to attend at their proper polling places* because of illness or physical disability or who *will not attend a pooling place* because of" certain things) (emphasis added); PA. CONST. art. VII, § 1(3) (elector must have resided for specified time in the election district "where he or she shall offer to vote").

list in Section 14. Even sampling just a few of those bills and related legislative histories reveals that, for decades, the legislature was aware the expansion of non-in-person voting required a constitutional amendment:

- 1981-82 legislative session: S.B. 1200, 165th Leg. (Pa. 1981) was introduced to amend Article VII, Section 14 to add "or for any other reason prescribed by the General Assembly" as a category of electors for whom the General Assembly could permit to vote otherwise than in-person at the polls on Election Day.[13]
- 1991-92 and 1993-94 legislative sessions: H.B. 2595, 176th Leg. (Pa. 1992) and H.B. 82, 177th Leg. (Pa. 1993), respectively, were introduced to amend Article VII, Section 14 to add the following italicized language: "The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors *may vote absentee, including, but not limited to, those* who may, on the occurrence of any election, be absent from . . . ."[14] While House Bill 2595 passed both houses, House

[13] https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=1981&sessInd=0&billBody=S&billTyp=B&billNbr=1200&pn=1450 (last accessed February 23, 2022).

[14] https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=1991&sessInd=0&billBody=H&billTyp=B&billNbr=2595&pn=3395 (last accessed February 23, 2022);

Bill 82 passed the House but did not come up for vote in the Senate.

- 2007-08 and 2009-10 legislative sessions: H.B. 2692, 192nd Leg. (Pa. 2008) and H.B. 333, 193rd Leg. (Pa. 2009), respectively, were introduced to amend Article VII, Section 14 to add the following italicized language: "The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors *may vote by mail, including, but not limited to, any military elector, as defined by law, and qualified electors* who may, on the occurrence of any election, be absent from . . . ."[15]
- 2011-12, 2013-14, and 2015-16 legislative sessions: S.B. 1172, 195th Leg. (Pa. 2011), S.B. 708, 197th Leg. (Pa. 2013), and S.B. 205, 199th Leg. (Pa. 2015), respectively, were introduced to amend Article VII, Section 14 so it provided simply: "The Legislature shall, by general law, provide a manner in which, and

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https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=1993&sessInd=0&billBody=H&billTyp=B&billNbr=0082&pn=0011 (last accessed February 23, 2022).

[15] https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2007&sessInd=0&billBody=H&billTyp=B&billNbr=2692&pn=4131 (last accessed February 23, 2022); https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2009&sessInd=0&billBody=H&billTyp=B&billNbr=0333&pn=1233 (last accessed February 23, 2022).

the time and place at which, qualified electors may vote apart from physically appearing at the their designated polling place on the day of an election, and for the return and canvass of their votes in the election district in which they respectively reside."[16]

- 2015-16 legislative session: Two bills were introduced:
  - H.B. 1454, 199th Leg. (Pa. 2015) proposed adding the italicized language to Article VII, Section 14: "The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors *may vote by mail, including, but not limited to, any military elector, as defined by law, and qualified electors* who may, on the occurrence of any election, be absent from . . . ."[17]

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[16]https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2011&sessInd=0&billBody=S&billTyp=B&billNbr=1172&pn=1417 (last accessed February 23, 2022); https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2013&sessInd=0&billBody=S&billTyp=B&billNbr=0708&pn=0730 (last accessed February 23, 2022); https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2015&sessInd=0&billBody=S&billTyp=B&billNbr=0205&pn=0116 (last accessed February 23, 2022). This also confirms that in-person voting at the polls on election day is the standard under Pennsylvania law. Senator Schwank's Co-Sponsorship Memorandum for Senate Bill 205 made clear the purpose of the Bill was to "give Pennsylvania voters an opportunity enjoyed by voters in mot state" but not available under Pennsylvania law. https://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20150&cosponId=15638 (last accessed February 23, 2022).

[17]https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2015&sessInd=0&billBody=H&billTyp=B&billNbr=1454&pn=2044 (last accessed

- H.B. 1778, 200th Leg. (Pa. 2016) proposed to amend Article VII, Section 14 so it provided simply: "The Legislature shall, by general law, provide a manner in which, and the time and place at which, any qualified elector may vote by absentee ballot, and for the return and canvass of their votes in the election district in which they respectively reside."[18]

Thus, the legislative history completely supports the Commonwealth Court's interpretation of Article VII, Section 14. Whether you look to the legislative history of Senate Bill 6, the two subsequent amendments to Article VII, Section 14, or the myriad bills introduced in the decades after 1967, the General Assembly consistently understood a constitutional amendment was needed to expand non-in-person voting.

February 23, 2022). In his Co-Sponsorship Memorandum, Representative Cohen said the amendment would "*allow the General Assembly to enact legislation* to permit more Pennsylvania residents to vote by absentee ballot." https://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20150&cosponId=17885 (emphasis added) (last accessed February 23, 2022).

[18] https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2015&sessInd=0&billBody=H&billTyp=B&billNbr=1778&pn=2705 (last accessed February 23, 2022). In his Co-Sponsorship Memorandum, Representative Marshall stated that "Article VII, section [sic] 14 of the Pennsylvania Constitution establishes the current requirements for absentee voting. My legislation proposes to amend this constitutional provision to allow any qualified voter to cast a vote by absentee ballot." https://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20150&cosponId=19351 (last accessed February 23, 2022).

D. ***The Maxim** **_Expressio Unius Est Exclusio Alterius_** **Supports the Commonwealth Court's Interpretation of Article VII, Section 14***

Finally, if the plain text and the relevant legislative history were not enough, the maxim *expressio unius est exclusio alterius* also confirms the Commonwealth Court's interpretation of Article VII, Section 14 was correct. The maxim, which this Court uses to interpret constitutional provisions, provides that

> the expression of one thing in the constitution, is necessarily the exclusion of things not expressed. This I regard as especially true of constitutional provisions, declaratory in their nature. The remark of Lord Bacon, "that, as exceptions strengthen the force of a general law, so enumeration weakens, as to things not enumerated," expresses a principle of common law applicable to the constitution, which is always to be understood in its plain, untechnical sense.

Page, 58 Pa. at 346. Here, the people of Pennsylvania (in declaratory nature) identified specific instances in which they would allow the General Assembly to pass laws allowing for non-in-person voting. *See* PA. CONST. art. VII, § 14(a). Applying the maxim *expressio unius est exclusio alterius*, that identification or list requires the exclusion of other instances in which non-in-person voting is permitted. *Cf. Commw. ex rel. Barratt*, 81 A. at 87 (it is "only when the constitution fails to deal with a subject that the general

assembly may legislate upon it."); *Moir*, 49 A. at 358 ("[F]or when the constitution has once expressly spoken, all further debate is at an end.").

The Commonwealth may contend that using "shall" undermines the applicability of the maxim here. But that contention is wrong for two reasons. First, as noted above, the use of "shall" does not have the significance the Commonwealth so desperately needs. Second, even if using "shall" carried some significance, that significance is irrelevant with application of the maxim. As this Court has held, when the sovereign people have given the legislature specified power in one area, no court (including this one) may expand that power.

> There is no sounder or better settled maxim in the law than expressio unius est exclusio alterius, and when the authorities which have the right to control any subject, be they only parties to a private contract, or the sovereign people in the adoption of their constitution, have fully considered and determined what *shall be* the rights, *the powers*, the duties or the limitations under the instrument, *there is no longer any room for courts to introduce either new powers* or new limitations. To do so would, in the language of Chief Justice Black already quoted, "be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every casus omissus, to interpolate into it whatever in our opinion ought to have been there by its framers."

Moir, 49 A. at 359 (emphasis added); *see also Apt. Ass'n of Metro. Pittsburgh v. City of Pittsburgh*, 261 A.3d 1036, 1050 (Pa. 2021) (Wecht, J.) ("[T]he

more specifically the General Assembly describes what can be done, the more we must infer that its omission of other exercises of local authority were not merely accidental or due to the expectation that we would understand the specific delineations of authority to tacitly confer much more."); *Page*, 58 Pa. at 346 ("The expression of one thing in the constitution, is necessarily the exclusion of things not expressed. This I regard as especially true of constitutional provisions, declaratory in their nature.").

Here, the sovereign people of Pennsylvania specifically identified what the General Assembly can do to allow for non-in-person voting. That direction is limited to four discrete categories of qualified electors, those who:

- may be "absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere";
- "are unable to attend at their proper polling places because of illness or disability";
- "will not attend a polling place because of the observance of a religious holiday"; or
- "cannot vote because of election day duties, in the case of county employee".

PA. CONST. art. VII, § 14(a). That specific listing or enumeration must be construed to exclude all categories of qualified electors not so listed. *See, e.g., Lawless*, 789 A.2d at 829; *Citizens Committee to Recall Rizzo*, 367 A.2d at 252 n.11 (Nix, Jr., concurring); *Commw. ex rel. Maurer v. Witkin*, 25 A.2d 317, 319 (Pa. 1942); *Busser*, 128 A. 84; *Commw. ex rel. Barratt*, 81 A. at 87; *Etter*, 78 A. 276 (Pa. 1910); *Commw. ex rel. Carson v. Collier*, 62 A. 567, 569 (Pa. 1905); *Moir*, 49 A. at 358; *Respublica v. Gibbs*, 3 Yeates 429, 437 (Pa. 1802); *see also Apt. Ass'n of Metro. Pittsburgh*, 261 A.3d at 1053; *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) (Donahue, J.) (interpreting a statute that said contempt "shall" be punishable by three alternatives, "[t]he omission of language condoning the imposition of suspended sentences speaks volumes, as it effectively prohibits trial courts from imposing them for civil contempt of a child support order."); *Kegerise v. Delgrande*, 183 A.3d 997, 1005 n.12 (Pa. 2018) (Wecht, J.); *Reginelli v. Boggs*, 181 A.3d 293, 310 (Pa. 2018) (Wecht, J., dissenting).

CONCLUSION

The Commonwealth Court correctly interpreted Article VII, Section 14 of the Pennsylvania Constitution as limiting the categories of qualified electors able to vote other than in-person at the polls on Election Day. That interpretation is required by the text of Article VII, Section 14, which must be

interpreted in the manner it would have been understood by the citizens who approved that constitutional amendment in 1967.

The Commonwealth Court's interpretation also is supported by affirmative legislative history from 1967 noting that the change from "may" to "shall" was not substantive. And, legislative history from subsequent amendments and attempted amendments to Article VII, Section 14 confirm that the General Assembly understood its power to expand non-in-person voting was limited by the Constitution.

Finally, the interpretive maxim *expressio unius est exclusio alterius* applies to Article VII, Section 14 and confirms the Commonwealth Court's interpretation. As this Court said, speaking through Justice Wecht when discussing the maxim in the statutory interpretation context, "[t]he more specifically the General Assembly describes what can be done, the more we must infer that its omission of other exercises of local authority were not merely accidental or due to the expectation that we would understand the specific delineations of authority to tacitly confer much more." *Apt. Ass'n of Metro. Pittsburgh*, 261 A.3d at 1050. The same holds true here—the more specifically the sovereign people of Pennsylvania describe what the General Assembly can do, this Court must infer that omitting other exercises on that topic were not accidental or due to an expectation that the Court would

understand the specific delineation of authority to tacitly confer much more. *See id.*; *see also Thompson, 223 A.3d at 1277; Moir*, 49 A. at 359; *Page*, 58 Pa. at 346.

Thus, this Court should deny the appeal and uphold the Commonwealth Court's reasoned decision, based on a proper construction, interpretation, and application of Pennsylvania's Constitution, holding Act 77 to be unconstitutional.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I, Ronald L. Hicks, Jr., hereby certify that this **Brief of *Amici Curiae* Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC in Support of All Appellees** was prepared in word-processing program Microsoft Word (Microsoft Office Professional Plus 2016), and I further certify that, as counted by Microsoft Word (Microsoft Office Professional Plus 2016), this **Brief of *Amici Curiae* Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC in Support of All Appellees** contains 6883 words, excluding the parts of the brief exempted by Pa. R.A.P. 2135(b).

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RULE 127 CERTIFICATE OF COMPLIANCE

I certify that this **Brief of *Amici Curiae* Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC in Support of All Appellees** 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.

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