

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David H. Zimmerman and :
Kathy L. Rapp, :
Petitioners :

v. :

No. 33 M.D. 2024
Submitted: August 1, 2024

Al Schmidt, in his official capacity as :
Acting Secretary of the Commonwealth :
of Pennsylvania, the Commonwealth :
of Pennsylvania, Department of State, :
Adams County Board of Elections, :
Allegheny County Board of Elections, :
Armstrong County Board of :
Elections, Beaver County Board of :
Elections, Bedford County Board of :
Elections, Berks County Board of :
Elections, Blair County Board of :
Elections, Bradford County Board of :
Elections, Bucks County Board of :
Elections, Butler County Board of :
Elections, Cambria County Board of :
Elections, Cameron County Board of :
Elections, Carbon County Board of :
Elections, Centre County Board of :
Elections, Chester County Board of :
Elections, Clarion County Board of :
Elections, Clearfield County Board of :
Elections, Clinton County Board of :
Elections, Columbia County Board of :
Elections, Crawford County Board of :
Elections, Cumberland County Board :
of Elections, Dauphin County Board :
of Elections, Delaware County Board :
of Elections, Elk County Board of :
Elections, Erie County Board of :
Elections, Fayette County Board of :
Elections, Forest County Board of :
Elections, Franklin County Board of :
Elections, Fulton County Board of :
Elections, Greene County Board of :

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Elections, Huntingdon County Board :
of Elections, Indiana County Board of :
Elections, Jefferson County Board of :
Elections, Juniata County Board of :
Elections, Lycoming County Board of :
Elections, Lackawanna County Board :
of Elections, Lancaster County Board :
of Elections, Lawrence County Board :
of Elections, Lebanon County Board :
of Elections, Lehigh County Board of :
Elections, Luzerne County Board of :
Elections, McKean County Board of :
Elections, Mercer County Board of :
Elections, Mifflin County Board of :
Elections, Monroe County Board of :
Elections, Montgomery County Board :
of Elections, Montour County Board :
of Elections, Northampton County :
Board of Elections, Northumberland :
County Board of Elections, Perry :
County Board of Elections, Philadelphia :
County Board of Elections, Pike County :
Board of Elections, Potter County :
Board of Elections, Schuylkill County :
Board of Elections, Snyder County :
Board of Elections, Somerset County :
Board of Elections, Sullivan County :
Board of Elections, Susquehanna :
County Board of Elections, Tioga :
County Board of Elections, Union :
County Board of Elections, Venango :
County Board of Elections, Warren :
County Board of Elections, :
Washington County Board of :
Elections, Wayne County Board of :
Elections, Westmoreland County Board :
of Elections, Wyoming County Board :
of Elections, and York County Board :
of Elections, :
Respondents :

**BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE MATTHEW S. WOLF, Judge¹**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE COHN JUBELIRER FILED: August 23, 2024**

David H. Zimmerman, member of the Pennsylvania House of Representatives for the 99th District, and Kathy L. Rapp, member of the Pennsylvania House of Representatives for the 64th District (together, Petitioners), filed a Petition for Review (Petition) in this Court’s original jurisdiction seeking declaratory and injunctive relief against Al Schmidt, the Secretary of the Commonwealth (Secretary),² the Commonwealth of Pennsylvania, Department of State (Department), and all 67 county boards of elections (County Boards) (collectively, Respondents). Petitioners also filed an application for summary relief, seeking a declaration that certain provisions of the Pennsylvania Election Code (Election Code),³ namely, Section 1306(a), 25 P.S. § 3146.6(a),⁴ and Section 1308(a), 25 P.S.

¹ This election law matter is being considered by a special panel pursuant to Section 112(b) of this Court’s Internal Operating Procedures, 210 Pa. Code § 69.112(b) (“The President Judge may designate Judges to serve on a special court en banc or panel to hear election law matters, appellate or original jurisdiction, on an expedited basis.”).

² Petitioners named the Secretary as the “Acting” Secretary; however, the Secretary officially became so on June 29, 2023.

³ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

⁴ Section 1306(a) of the Election Code, added by Section 11 of the Act of March 6, 1951, P.L. 3, provides, relevantly:

(Footnote continued on next page...)

§ 3146.8(a),⁵ the relevant guidance provided by the Secretary, and the policies and practices of the County Boards violate article VII, section 14(a) of the Pennsylvania Constitution, PA. CONST. art. VII, § 14(a).⁶ Specifically, Petitioners argue that

Except as provided in paragraphs (2) and (3), at any time after receiving **an official absentee ballot**, . . . the elector shall . . . mark the ballot . . . and then fold the ballot, enclose and securely seal the same in the envelope This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and **the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election**.

25 P.S. § 3146.6(a) (emphasis added).

⁵ Section 1308(a) of the Election Code, added by Section 11 of the Act of March 6, 1951, P.L. 3, provides:

The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, [Sections 1301-D-1307-D, added by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), 25 P.S. §§ 3150.11-3150.17,] **shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections**. An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).

25 P.S. § 3146.8(a) (emphasis added).

⁶ Article VII, section 14(a) provides:

The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of

(Footnote continued on next page...)

article VII, section 14(a) provides that the delivery and canvassing of absentee ballots must be done in the district where the elector resides, but pursuant to the statutory provisions and the Secretary's guidance, the County Boards are receiving and canvassing absentee ballots on a county-wide basis. Respondents have filed various preliminary objections (POs) and cross-applications for summary relief seeking dismissal of the Petition asserting Petitioners lack standing, the claims are barred by the doctrine of laches, and this Court is bound by nearly half-a-century-old Supreme Court precedent addressing the exact issue raised by Petitioners, which found no constitutional violation. Because we agree that the Court is bound by the Supreme Court precedent, we grant Respondents' applications for summary relief, deny Petitioners' application for summary relief, dismiss the Petition with prejudice, and dismiss the POs as moot.

I. FILINGS AND ARGUMENTS

Petitioners filed their Petition on January 30, 2024, to which Respondents filed various answers or POs. Following a status conference on June 10, 2024, the Court issued an Order reflecting the parties' agreement that there were no issues of fact, the most expeditious way to resolve this matter was on cross-applications for summary relief, and the POs would be considered simultaneously with any cross-applications for summary relief. (June 10, 2024 Order.) Due to the voluminous number of parties and filings, this opinion combines the relevant arguments and summarizes the parties' filings as many of the arguments raised therein overlap.

a county employee, may vote, and **for the return and canvass of their votes in the election district in which they respectively reside.**

PA. CONST. art. VII, § 14(a) (emphasis added).

A. *Petitioners' Petition and Application for Summary Relief*

1. The Petition

Petitioners are incumbent members of the Pennsylvania House of Representatives, were reelected in 2022, and are running for reelection in 2024. They are seeking an order from this Court directing that “absentee votes be delivered to and canvassed at the” elector’s **local precinct** or polling location, and **not** at the county board level, in accordance with article VII, section 14(a), “[t]o ensure the integrity and legitimacy of the electoral franchise, including [Petitioners’] next reelection[.]” (Petition ¶¶ 8, 12.) Petitioners each allege that the county boards of elections in their respective districts reported receiving absentee ballots but that neither Petitioner received any absentee votes in their favor. (*Id.* ¶¶ 7, 11.) Petitioners assert that they have standing to pursue this action under *Bonner v. Chapman*, 298 A.3d 153, 162-63 (Pa. Cmwlth. 2023), (Petition ¶ 13), and that this Court has “the inherent power to enjoin the enforcement of unconstitutional statutes, . . . policies[,] and procedures,” (*id.* ¶ 20). Petitioners allege that “[a]rticle VII, [s]ection 14 unambiguously dictates that all absentee ballots must be submitted to (‘returned’) and counted at (‘canvassed’) the local polling place or precinct (‘election district’).” (*Id.* ¶ 27.) Notwithstanding this requirement, Petitioners explain that “the Election Code appears to have been amended” to add Sections 1306 and 1308, and contend these provisions are in direct contradiction to article VII, section 14, by providing for the delivery to and canvassing of absentee ballots by the county boards rather than local precincts. (*Id.* ¶¶ 40-46.)

Taking the above allegations into consideration, Petitioners contend in Count I that Sections 1306 and 1308 “contravene and are inherently incompatible with [a]rticle VII, [s]ection 14,” and request that we “enter judgment in their favor

and grant Petitioners relief[.]” (*Id.* ¶ 65, Wherefore Clause.) In Count II, Petitioners assert that the Secretary and Department have issued guidance and/or directed the public to send absentee ballots to the electors’ county boards and not to their local polling place in contravention of article VII, section 14.” (*Id.* ¶¶ 67-72.) As relief, Petitioners seek a declaratory judgment decreeing that Sections 1306 and 1308 are facially unconstitutional and that the “[o]fficial [g]uidance and/or the [p]olicy and [p]ractice described above are [] unconstitutional[.]” (*Id.*, Prayer for Relief.) Further, Petitioners request an injunction prohibiting Respondents from enforcing Sections 1306 and 1308, issuing and enforcing guidance to that effect, and canvassing absentee ballots at the county boards or anywhere that is not at the district level.

2. Petitioners’ Application and Arguments

Petitioners assert in their Application for Summary Relief (Petitioners’ Application) that they are entitled to their requested relief because Sections 1306 and 1308 are clearly at odds with the plain language of article VII, section 14. Petitioners admit that the Supreme Court’s opinion in *In re Canvass of Absentee Ballots of 1967 General Election*, 245 A.2d 258 (Pa. 1968) (*In re Canvass*), is binding on this Court and believe it should be overturned by the Supreme Court. (See Petitioners’ Brief (Br.) in Support (Supp.) at 20 n.9.) Petitioners also argue that, under a former version of the Election Code, the county boards of elections initially received and processed absentee ballots, which were then distributed to the local election boards for canvassing and inspection. (Petitioners’ Omnibus Br. in Opposition (Opp’n) to POs at 8-9.) Petitioners explain that “[o]n April 23, 1968,¹ following the 1967 joint resolution passed by the General Assembly, the electorate approved an amended constitutional provision that renumbered and revised then

[a]rticle VIII, [s]ection 19 to [a]rticle VII, [s]ection 14” and “revised former [a]rticle VIII, [s]ection 19, in pertinent part, to remove the permissive and directory word ‘may’ . . . and replace it with the mandatory and imperative ‘shall.’” (*Id.* at 6 (footnote omitted).) Petitioners continue that “[a]pproximately 8 months after the electorate approved the new [a]rticle VII, [s]ection 14, the General Assembly, in an apparent response to the change in language from ‘may’ to ‘shall,’ revised the provisions of the Election Code pertaining to absentee ballots” and mandated that the local election boards “receive and canvass absentee ballots.” (*Id.* at 7.) Petitioners contend that “the Election Code continued to provide for the return and canvass of absentee ballots at the local polling place, precinct, or election district from 1968 to 2019, for over 50 years.” (*Id.* at 10.) Petitioners assert that “[t]here is no evidence or reason to believe, especially at this stage in this litigation, that there were any practical, financial, or administrative problems with returning and canvassing absentee ballots at the local election districts.” (*Id.* at 10-11.)

Petitioners also explain that they have standing as they are candidates in an upcoming election, and they run the risk of defeat if an unconstitutional law is upheld. Thus, Petitioners assert, their interests are substantial, direct, and immediate in knowing whether Respondents may continue to enforce an unconstitutional law. Petitioners argue the doctrine of laches is not applicable because they are seeking “prospective relief,” and while their requested relief may incur costs and burdens, the constitutional requirements outweigh those concerns. (Petitioners’ Omnibus Br. in Opp’n to POs at 37.)

B. Respondents’ POs, Application, and Arguments

Various Respondents filed POs and applications for summary relief seeking dismissal of the Petition. The Secretary and Department, as well as a majority of

County Boards, filed POs asserting Petitioners lack standing and demurred to both Counts I and II. Adams County Board of Elections filed the same POs but added that the Petition is barred by the doctrine of laches. The Secretary and Department later filed an application for summary relief, which was joined by numerous County Boards,⁷ and Adams County Board of Elections filed a separate application for summary relief, which was also joined by various County Boards⁸ (together, Respondents' Applications). Many of these arguments overlap, and, thus, unless otherwise noted, the summarized arguments below relate to all Respondents.⁹

First, Respondents assert that Petitioners lack standing as they have not shown they are aggrieved and thus lack a substantial, immediate, and direct interest in the outcome of this dispute. In particular, Respondents maintain that Petitioners have not asserted any harm due to absentee ballots being delivered and canvassed at the county level, nor have they explained how their interest surpasses that of ordinary citizens.

Second, Respondents argue that Petitioners have failed to state a claim and Respondents are entitled to summary relief because this Court is bound by *In re Canvass* and a companion case, *In re 223 Absentee Ballot Appeals*, 245 A.2d 265 (Pa. 1968) (*In re 223*), which resolved the very question Petitioners present here.

⁷ Allegheny, Armstrong, Bedford, Berks, Blair, Bradford, Bucks, Butler, Carbon, Centre, Chester, Clarion, Clearfield, Clinton, Columbia, Crawford, Dauphin, Delaware, Fayette, Franklin, Huntingdon, Indiana, Jefferson, Lackawanna, Lawrence, Lehigh, Luzerne, Monroe, Montgomery, Montour, Northumberland, Philadelphia, Snyder, Somerset, Susquehanna, Tioga, Venango, Warren, Westmoreland, and York County Boards of Elections join in the Secretary and Department's Application for Summary Relief.

⁸ Armstrong, Bedford, Bradford, Butler, Clarion, Fayette, Somerset, Susquehanna, Tioga, Warren, and Westmoreland County Boards of Elections join in Adams County Board of Elections' Application for Summary Relief.

⁹ It appears that Lancaster County Board of Elections, which is part of Petitioner Zimmerman's 99th District, has not filed an application for summary relief or joined any filed application for summary relief.

Respondents also respond to Petitioners' argument that the return and canvass of absentee ballots has occurred at the district level for over 50 years. The Secretary and Department contend that between 1968 and 2019, county boards of elections "recei[ved]" absentee ballots, secured them, and distributed them to the voters' election districts for canvassing. (Secretary and Department's Br. in Opp'n to Petitioners' (Pet'rs') Application (Appl.) at 20-21 (quoting Section 8 of the Act of December 11, 1968, P.L. 1183, 1198, No. 375).) Therefore, the Secretary and Department contend that Petitioners' requested relief, that we declare Sections 1306 and 1308 unconstitutional, seeks "[f]or the first time [that] more than 9,000 polling places, most of which are in public buildings, . . . receive and store absentee ballots in the weeks ahead of Election Day." (*Id.* at 21.) The Secretary and Department also argue that the 1968 amendments are consistent with *In re Canvass* in that article VII, section 14 "does not **require** absentee voters to return absentee ballots to election districts to be counted," and only requires that "absentee votes are counted 'in such a manner that the computation appears on the return **in** the district where it belongs.'" (*Id.* at 22, 25 (citing *In re Canvass*, 245 A.2d at 264) (emphasis in Secretary and Department's Br. in Opp'n to Pet'rs' Appl.).) Further, the Secretary and Department argue that the former version of article VII, section 14, then renumbered article VIII, section 19, was amended on May 16, 1967, and not April 23, 1968, as Petitioners contend. (Secretary and Department's Br. in Supp. of Appl. at 8.) The Secretary and Department express some confusion, however, as to why the Supreme Court cited article VIII, section 19, in *In re Canvass*, as opposed to article VII, section 14, as that language had already been amended by the time of the election at issue in *In re Canvass* and the Supreme Court's decision therein, but note that the Supreme Court was at least "aware" of the amendment as it acknowledged

article VII, section 14, in its decision. (*Id.* at 22 n.8.) Adams County Board of Elections also explains that the “core issue” in *In re Canvass* was “the central canvassing of absentee ballots by the county [] board[s] rather than local election boards” and that case “cited to the exact same statute and constitutional provision that Petitioners cite to today.” (Adams County Board of Elections’ Appl. at 18.)

Respondents further highlight, as the Supreme Court did in *In re Canvass* and *In re 223*, the administrative difficulties that would arise if this Court granted Petitioners their requested relief. For example, the Secretary and Department highlight that “[t]o comply with Petitioners’ requested relief, [] [the] County [Boards] would have to expend significant resources to open and staff 9,159 temporary polling places for several weeks to receive and securely store absentee ballots.” (Secretary and Department’s Br. in Supp. at 30 (citing Petition, Ex. A.)) The Secretary and Department also note that “polling places are usually schools, municipal buildings, or other public buildings, . . . [which] would create serious security and custody concerns, as well as logistical nightmares for functioning public spaces.” (*Id.*)

Adams County Board of Elections also highlights these logistical concerns and adds that Petitioners’ requested relief would create a system where mail-in ballots “would be canvassed in a central location by the [C]ounty [B]oard[s],” while “absentee ballots, which are not substantively different from mail-in ballots, would be required to be canvassed in the thousands of polling sites,” which creates equal protection concerns. (Adams County Board of Elections’ Appl. at 14-15.) Adams County further highlights the fact that election districts “do not have designated mailing addresses,” and polling locations are often “not government-owned and are not designed to securely accept mail.” (*Id.* at 20.) Moreover, Adams County Board

of Elections asserts it is difficult to find polling places, which would be further complicated should Petitioners' requested relief be granted, because of the length of time they would be needed. (*Id.*) In addition, Adams County Board of Elections points out that these locations would have to be staffed "every day from the time absentee ballots are sent to voters until Election Day at 8 p[.]m[.]," as well as after the election for purposes of counting military ballots, resulting in significant expense to taxpayers. (*Id.* at 21.) Petitioners' requested relief would also have the effect of delaying Election Day returns, as local election boards would have to remain at the polling site after polls close to canvass absentee ballots. (*Id.*)

Last, Adams County Board of Elections, and those that joined that board's filings, asserts that Petitioners' claims are barred by the doctrine of laches as Petitioners have been in office for several years and the practice of which they complain has been statutorily authorized for over 50 years. Further, the County Boards would suffer substantial hardship due to the chaos that would ensue by granting the requested relief, which would require an overhaul to the current system for counting absentee ballots.

II. ANALYSIS

Pennsylvania Rule of Appellate Procedure 1532(b) states that "[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear." Pa.R.A.P. 1532(b). This Court may only grant an application for summary relief where "a party's right to judgment is clear and no material issues of fact are in dispute." *Banfield v. Cortes*, 110 A.3d 155, 165 (Pa. 2015). The right to relief must be "free from doubt." *O'Rourke v. Pa. Dep't of Corr.*, 730 A.2d 1039, 1041 (Pa. Cmwlth. 1999). We likewise view the record "in the light most favorable to the non-

moving party[.]” *Id.* We will review the cross-applications herein with these standards in mind.¹⁰

A. Standing

Standing is a threshold matter,¹¹ and “[o]ur inquiry is whether the putative plaintiff has demonstrated that she is ‘aggrieved,’ by establishing a substantial, direct and immediate interest in the outcome of the litigation.” *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 309 A.3d 808, 832 (Pa. 2024) (citing *Robinson Township, Washington County v. Commonwealth of Pennsylvania*, 83 A.3d 901, 917 (Pa. 2013)).

A substantial interest in the outcome of litigation is one that surpasses the common interest of all citizens in procuring obedience to the law. *Pa. Fed’n of Dog Clubs v. Commonwealth*, 105 A.3d 51 (Pa. Cmwlth. 2014) A direct interest requires a causal connection between the asserted violation and the harm complained of. *Id.* An interest is immediate when the causal connection is not remote or speculative. *Id.*

Phantom Fireworks Showrooms, LLC v. Wolf, 198 A.3d 1205, 1215 (Pa. Cmwlth. 2018). With respect to a substantial interest, “there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). Additionally, “[g]enerally speaking, in our Commonwealth, standing is granted more liberally than in federal courts.” *Allegheny Reprod. Health Ctr.*, 309 A.3d at 832.

¹⁰ As stated in the June 10, 2024 Order, the POs, which raise substantially the same arguments, will be considered alongside Respondents’ Applications.

¹¹ Standing is an issue that “must be raised at the soonest possible opportunity[.]” *In the Interest of K.N.L.*, 284 A.3d 121, 150 n.22 (Pa. 2022). Respondents have done so by raising this issue in their POs and in their applications.

All parties point to *Bonner* to support their positions on standing. In that case, this Court addressed, among other things, whether the petitioners had standing to enforce the nonseverability provision of Act 77 of 2019 (Act 77)¹² where, they claimed, various court decisions seemed to invalidate certain provisions in Act 77. Many of the petitioners were past and future candidates for office who argued that this status provided them a direct, substantial, and immediate interest in whether the respondents were “permitted to continue to enforce and administer a law . . . that has become void by its own terms, and [that] their interests [were] distinguishable from the interests shared by all other citizens.” *Bonner*, 298 A.3d at 162 (internal quotation marks and citation omitted). These petitioners also asserted they had standing because “their elections [would be] impacted by ballots that do not meet the requirements of the applicable law and by having to spend campaign funds to adapt their campaigns to comply with a now-void Act 77.” *Id.* The Court “conclude[d] it [wa]s **not sufficiently clear and free from doubt** that [these p]etitioners lack standing so as to grant the [c]ross-[a]pplications and/or sustain the POs on this basis.” *Id.* (emphasis added). Further, the Court concluded that it was not clear that the candidate petitioners did not have standing because as a class of candidates for office, these petitioners’ interests were distinguishable “from the citizenry at large.” *Id.* at 163.

Here, we likewise conclude, as we did in *Bonner*, that it is “not sufficiently clear and free from doubt” that Petitioners do not have standing in this matter considering their status as past and current candidates with a quickly approaching election. 298 A.3d at 162. Petitioners are concerned with “integrity and legitimacy of the electoral franchise” and assert that Respondents promote the practice of or

¹² Among other changes to the Election Code, Act 77 expanded mail-in voting to all registered voters without requiring a reason to vote by mail.

engage in a practice “whereby absentee votes are sent to, received by, and canvassed at” the County Boards, which could potentially include votes for them, in contravention of article VII, section 14. (Petition ¶¶ 8, 12, 39, 47-60.) Petitioners’ status confers an interest in this matter that is distinguishable “from the citizenry at large.” *Bonner*, 298 A.3d at 163. Accordingly, we will not dismiss the Petition on this basis.¹³

B. Merits

In reviewing whether a statute is constitutional, “we are guided by the principle that ‘acts passed by the General Assembly are strongly presumed to be constitutional.’” *Commonwealth v. Neiman*, 84 A.3d 603, 611 (Pa. 2013) (quoting *Pa. State Ass’n of Jury Comm’rs v. Commonwealth*, 64 A.3d 611, 618 (Pa. 2013)). Further, we will declare a statute “unconstitutional only if it is shown to be clearly, palpably, and plainly [violative of] the Constitution.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 384 (Pa. 2020) (quoting *West Mifflin Area Sch. Dist. v. Zahorchak*, 4 A.3d 1042, 1048 (Pa. 2010)) (alterations in *Boockvar*).

Petitioners argue that their right to relief is clear as Sections 1306 and 1308 of the Election Code plainly violate article VII, section 14, while, conversely,

¹³ This Court also recognizes that it is better to issue election-related decisions, where possible, before they confer a political benefit. See Matthew Queen and Richard L. Hansen, *Ready for the Storm? What Judges Should Know About Election Law*, 108 JUDICATURE 34, 35-36 (2024), available at <https://judicature.duke.edu/articles/what-judges-should-know-about-election-law/> (last visited Aug. 21, 2024) (“The worst situation is when a judge is called upon to make outcome-determinative rulings [I]t is far better, when possible, to rule on the substantive legal issues **before it is clear who would politically benefit from such a ruling.** . . .”) (emphasis added). The Supreme Court apparently also recognizes the importance of addressing the merits of election matters before they become determinative as it recently granted a petition for allowance of appeal in *In re: Canvass of Provisional Ballots in the 2024 Primary Election* (Pa., No. 328 MAL 2024, filed July 24, 2024) (per curiam), where the ultimate resolution of the issue in that matter would not affect the outcome of the primary election, but may become outcome determinative in the upcoming 2024 general election.

Respondents argue that their right to relief is clear because this Court is bound by the Supreme Court's decision in *In re Canvass*, which Petitioners concede but argue the Supreme Court should overturn. The relevant constitutional, statutory, and precedential history is as follows. In 1951, Section 1306 was added to the Election Code by Section 11 of the Act of March 6, 1951, P.L. 3, and provided:

At any time after receiving an **official military ballot**, but on or before the day of the election, the elector, for the purpose of voting, may appear before any person of this or any other state or territory of the United States authorized to administer oaths by Federal, State or military laws. The elector shall first display the ballot to such person as evidence that the same is unmarked, and then shall proceed to mark the ballot with pencil, crayon, indelible pencil or ink, in the presence of such person, but in such manner that the person administering the oath is unable to see how the same is marked, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Military Ballot." This envelope shall then be placed in the second one, on which is printed the affidavit of the elector, the jurat of the person before whom the elector appears, and the address of the elector's county board of election. The elector shall then fill out, subscribe and swear to the affidavit printed on such envelope, and the jurat shall be subscribed and dated by the person before whom the affidavit was taken. Such envelope shall then be securely sealed and **the elector shall send same by mail to said county board of election.**

25 P.S. § 3146.6 (1951) (emphasis added). In 1951, Section 1308(a) was also added to the Election Code by Section 11 of the Act of March 6, 1951, P.L. 3, and provided, relevantly:

The county boards of election, upon receipt of official military ballots in such envelopes, shall safely keep the same until they meet to canvass official military ballots, which canvass shall begin immediately

25 P.S. § 3146.8(a) (1951) (emphasis added). In 1963, these provisions were amended by Sections 22 and 24 of the Act of August 13, 1963, P.L. 707, respectively, which included a revision to change “military ballot” to “absentee ballot,” but provided the same procedure as in 1951 for these ballots to be **delivered to and canvassed** by the **county boards** of elections. *See* 25 P.S. § 3146.6 (1963); 25 P.S. § 3146.8(a) (1963). These were the statutory provisions at issue in *In re Canvass*.

On November 5, 1957, article VIII, section 19, was adopted and provided a provision for “Absentee Voting Due to Illness or Absence,” which stated:

The Legislature **may**, by general law, provide a manner in which, and the time and place at which, qualified voters who may, on the occurrence of any election, be unavoidably absent from the State or county of their residence because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability, may vote, and **for the return and canvass of their votes in the election district in which they respectively reside.**

Formerly PA. CONST. art. VIII, § 19 (emphasis added). On May 16, 1967, before *In re Canvass*,¹⁴ article VIII, section 19, was amended and subsequently renumbered

¹⁴ *In re Canvass* was decided on September 4, 1968, and involved the November 7, 1967 General Election. According to the Governor’s Proclamations of July 7, 1967, P.L. 1063 and P.L. 1077, the constitutional amendment was approved by the electorate at the May 16, 1967 primary. Petitioners contend that the electorate approved the constitutional amendment on April 23, 1968. (Pet’rs’ Omnibus Br. in Opp’n to POs at 6.) For support, they cite the Constitution available on the General Assembly’s website. (*Id.* at 6 n.3.) Following the table of contents, the website references seven “Proposals” that were recommended by a Constitutional Convention and approved by the electorate on April 23, 1968. Pa. Gen. Assemb., The Const. of Pa., *available at* <https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&t1=0>, (last visited Aug. 22, 2024). However, those seven Proposals did not involve elections. *See* Constitutional Proposals Adopted by the Convention at 7, *available at* https://www.paconstitution.org/wp-content/uploads/2019/09/Constitutional_Prop.pdf (last visited Aug. 22, 2024) (setting forth the **(Footnote continued on next page...)**)

as article VII, section 14, retitling the provision as “Absentee Voting” and providing as follows:

The Legislature **shall**, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and **for the return and canvass of their votes in the election district in which they respectively reside.**

PA. CONST. art. VII, § 14(a) (emphasis added).

In *In re Canvass*, the Supreme Court addressed whether the 1963 version of Section 1308 “clearly, palpably, [and] plainly” violated article VIII, section 19, of the Pennsylvania Constitution because it provided a process for “the return and canvass of absentee ballots on a county-wide basis” for a general election that took place on November 7, 1967. 245 A.2d at 260. The Supreme Court concluded that the 1963 version of Section 1308 was constitutional because the **procedure** of delivering and counting absentee ballots at the county level, **which are then “applied . . . to the districts in which the absentee voters respectively resided[,]”**

ballot questions addressing the seven Proposals to appear on the ballot at the April 23, 1968 primary). The General Assembly website does identify various constitutional amendments including the May 16, 1967 one. Pa. Gen. Assemb., The Const. of Pa., *available at* <https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=0> (last visited Aug. 22, 2024) (stating “[b]y statute, 1 Pa.C.S. § 906, the Constitution, as amended by referenda of May 17, 1966, November 8, 1966, **May 16, 1967**, and April 23, 1968, and as numbered by proclamation of the Governor of July 7, 1967, shall be known and may be cited as the Constitution of 1968”) (emphasis added). Notwithstanding that the amendment predated the Constitution of 1968, pursuant to statute, it is to be referred to as the “Constitution of 1968.” *See* 1 Pa.C.S. § 906(b).

is **wholly consistent with article VIII, section 19**, now article VII, section 14(a). *Id.* at 264 (emphasis added). In other words, “what the Constitution aims at is the **counting of each vote not by the local elections district but in such a manner that the computation appears on the return in the district where it belongs.**” *Id.* (some emphasis added). The Supreme Court explained that the interpretation proffered by the petitioners in *In re Canvass* would create logistical difficulties for “opening, challenging, counting, and tabulating [] these ballots in each” district polling location. *Id.* at 263 (internal quotation marks omitted). The Supreme Court concluded that because “[t]he [c]ounty [b]oard of [e]lections tallied the absentee votes and **applied the tallies to the districts in which the absentee voters respectively resided,**” the process was constitutional and the Court was “inevitably [led] to the conclusion that the framers of the controverted constitutional amendment^[15] never intended that the actual counting of the absentee ballots was to be performed in the local districts **as against the more-convenient, expeditious, business-like operation of having them tabulated on a county-wide basis.**” *Id.* at 263 (emphasis added). In the companion case of *In re 223*,¹⁶ the Supreme Court reiterated its holding from *In re Canvass* and concluded “that no person has been deprived of any properly cast vote because the whole operation of the computation took place at the county level instead of at the district level.” *In re 223*, 245 A.2d at 268.

¹⁵ It is unclear whether the Supreme Court was speaking to article VIII, section 19, or the newly amended article VII, section 14. However, both article VIII, section 19, and article VII, section 14, provided “for the return and canvass of their votes in the election district in which they respectively reside.” PA. CONST. art. VII, § 14(a); *formerly* PA. CONST. art. VIII, § 19, which was the language at issue in *In re Canvass*.

¹⁶ *In re 223* involved absentee ballots cast in the November 8, 1966 election. 245 A.2d at 265-66.

In 1968, after *In re Canvass* and *In re 223*, and after article VIII, section 19 was amended and renumbered to article VII, section 14, Sections 1306 and 1308 were amended again. See Section 8 of the Act of December 11, 1968, P.L. 1183. Section 1306 continued to provide for the delivery of absentee ballots to the county boards of elections. See 25 P.S. § 3146.6 (1968). Section 1308, however, was amended to change the procedure for canvassing ballots, and provided, relevantly, that the ballots should be distributed on election day to the election district:

The county boards of election, upon receipt of official absentee ballots in such envelopes, shall safely **keep the same in sealed or locked containers** until they **distribute same to the appropriate local election districts** in a manner prescribed by the Secretary of the Commonwealth.

The county board of elections shall then **distribute the absentee ballots, unopened, to the absentee voter's respective election district** concurrently with the distribution of the other election supplies. Absentee ballots shall be **canvassed immediately** and continuously without interruption until completed after the close of the polls on the day of the election in each election district. . . .

25 P.S. § 3146.8(a) (1968) (emphasis added).

In 2019, Act 77 amended Sections 1306 and 1308. Today, Section 1306(a) of the Election Code continues to provide that the absentee ballots be delivered to the county board:

Except as provided in paragraphs (2) and (3), at any time after receiving an official **absentee ballot**, . . . the elector shall . . . mark the ballot . . . and then fold the ballot, enclose and securely seal the same in the envelope This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and **the elector shall send same by mail, postage**

prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added). Section 1308 of the Election Code returned to the pre-1968 procedure of the absentee ballots being canvassed by county boards of elections:

The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, [Sections 1301-D-1307-D, added by Act 77, 25 P.S. §§ 3150.11-3150.17,] shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections. An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).

25 P.S. § 3146.8(a) (emphasis added).

Petitioners argue that the previous version of article VII, section 14, was amended in new article VIII, section 19, to change “may” to “shall,” and, after *In re Canvass*, Section 1308 was also amended to provide for the return and canvassing of absentee ballots at the district level consistent with the newly amended article VII, section 14. This shows, per Petitioners, that the legislature understood that the return and canvassing of ballots should take place at the district level. Petitioners are correct that former article VIII, section 19 was amended to change “may” to “shall,” which is in the current provision, PA. CONST. art. VII, § 14(a), and that after *In re Canvass* was decided, Section 1308 was amended to provide for the canvassing of absentee ballots at the voting districts, 25 P.S. § 3146.8(a) (1968). Petitioners are also correct that Act 77 of 2019 changed the procedure to the canvassing of absentee ballots at the county level, 25 P.S. § 3146.8(a). All parties recognize that the statutory

language of today’s Section 1308 provides for the same **procedure** as the version of Section 1308 analyzed by the Supreme Court in *In re Canvass* – that the county boards of elections shall canvass absentee ballots – and that the Supreme Court determined that it complies with the Supreme Court’s interpretation of the constitutional provision. The Supreme Court explained that Section 1308 provides for “the **counting of each vote** not by the local elections district but **in such a manner that the computation appears on the return in the district where it belongs.**” *In re Canvass*, 245 A.2d at 264 (some emphasis added). We acknowledge there is a question, as the Secretary and Department recognize, as to whether the Supreme Court analyzed the 1963 version of Section 1308 under former article VIII, section 19, which it quotes, or article VII, section 14, which it acknowledges. Regardless, the Supreme Court held that the process of returning and canvassing absentee ballots at the county level served the intent of the language found in the constitutional provisions – “for the return and canvass of [electors’] **votes,**” **not ballots**, “in the election district in which they respectively reside,” PA. CONST. art. VII, § 14(a), *formerly* PA. CONST. art. VIII, §19 – and the same procedure is provided in the statutory provision challenged by Petitioners here. Accordingly, we agree with the parties that we are bound by the decision in *In re Canvass*.

To the extent that Petitioners appear to argue that Section 1306 is unconstitutional as it does not provide for the sending and delivering of absentee ballots to the voting districts by the absentee voters, we believe the reasoning of *In re Canvass* would also be applicable and binding on this Court. Just as in 1967, today, as the Respondents contend, district polling locations are usually schools or public and municipal buildings, which are used for election purposes only on election days and cannot receive absentee ballots except on election days. Both *In re Canvass* and

In re 223 recognized the logistical difficulties of delivering absentee ballots to each district polling location in the weeks before the November 1967 election. These logistical difficulties continue to exist today, and as in 1967, Petitioners' requested relief would create logistical "nightmares," such as opening and staffing **over 9,000 temporary polling locations not just on Election Day but before and after Election Day, as well**, needing places to securely store absentee ballots, and needing places to securely mail absentee ballots. (See Secretary and Department's Br. in Supp. at 30 (citing Petition, Ex. A.); Adams County Board of Elections' Appl. at 14-15, 20-21.) Not to mention, Petitioners' requested relief would create a different system for mail-in ballots, "which are not substantively different from" absentee ballots. (Adams County Board of Elections' Appl. at 14-15.) Moreover, Petitioners do not seem to refute that Section 1306 has consistently provided that absentee ballots be mailed or delivered to the county boards of elections. (See Pet'rs' Omnibus Br. in Opp'n to POs at 5 & 10 n.4 (citing the 1951 version of Section 1306, 25 P.S. § 3146.6(a) (1951), which provided for the mailing of military/absentee ballots to the county boards of elections and remained so throughout the amendments to Section 1308 in 1968¹⁷).

The same rationales outlined in *In re Canvass* and *In re 223* apply to this case. "It is elementary that unless the United States Supreme Court reverses a decision of [the Pennsylvania Supreme] Court, or [the Pennsylvania Supreme] Court overrules its own prior decision, 'the law emanating from the decision remains law.' *Fiore v. White*, . . . 757 A.2d 842, 847 ([Pa.] 2000)." *Commonwealth v. Reid*, 235 A.3d 1124,

¹⁷ It appears that Petitioners do not cite to the 1951 version of Section 1306, as their quoted material does not match the 1951 version. (See Pet'rs' Br. in Supp. at 5 n.3.) Nevertheless, Petitioners' citation and argument shows they acknowledge that military/absentee ballots have been mailed or delivered to the county boards of elections and that process has remained through the amendments as described above.

1159 (Pa. 2020). *In re Canvass* and *In re 223* held, as constitutional, the current procedure whereby absentee ballots are delivered and canvassed at the county level **but the votes therein are then applied to the districts where the absentee voters reside**, based on the Supreme Court’s interpretation of the language of article VII, section 14. Given the Supreme Court’s interpretation, which we must apply, Petitioners have not met the **high bar** of rebutting the strong presumption that Sections 1306 and 1308 “clearly, palpably, and plainly” violate article VII, section 14. *Boockvar*, 238 A.3d at 384; *Neiman*, 84 A.3d at 611.¹⁸ Accordingly, unless and until the Supreme Court reinterprets Section 1306 and 1308 under article VII, section 14, and concludes otherwise, we are bound by *In re Canvass* and its sound logic.

III. CONCLUSION

In sum, Petitioners have standing to bring this matter as their status as present and future candidates confers upon them a substantial, direct, and immediate interest in knowing whether their candidacy may be affected by a purportedly unconstitutional provision. However, as Respondents argue and Petitioners concede, we are bound by the Supreme Court’s precedent and ruling outlined in *In re Canvass*. Accordingly, we grant Respondents’ Applications, deny Petitioners’ Application, dismiss the Petition with prejudice, and dismiss the POs as moot.

/s/ Renée Cohn Jubelirer

RENÉE COHN JUBELIRER, President Judge

¹⁸ Due to our disposition, we need not consider whether the Petition is barred by the doctrine of laches.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David H. Zimmerman and :
Kathy L. Rapp, :
Petitioners :

v. :

No. 33 M.D. 2024

Al Schmidt, in his official capacity as :
Acting Secretary of the Commonwealth :
of Pennsylvania, the Commonwealth :
of Pennsylvania, Department of State, :
Adams County Board of Elections, :
Allegheny County Board of Elections, :
Armstrong County Board of :
Elections, Beaver County Board of :
Elections, Bedford County Board of :
Elections, Berks County Board of :
Elections, Blair County Board of :
Elections, Bradford County Board of :
Elections, Bucks County Board of :
Elections, Butler County Board of :
Elections, Cambria County Board of :
Elections, Cameron County Board of :
Elections, Carbon County Board of :
Elections, Centre County Board of :
Elections, Chester County Board of :
Elections, Clarion County Board of :
Elections, Clearfield County Board of :
Elections, Clinton County Board of :
Elections, Columbia County Board of :
Elections, Crawford County Board of :
Elections, Cumberland County Board :
of Elections, Dauphin County Board :
of Elections, Delaware County Board :
of Elections, Elk County Board of :
Elections, Erie County Board of :
Elections, Fayette County Board of :
Elections, Forest County Board of :
Elections, Franklin County Board of :
Elections, Fulton County Board of :
Elections, Greene County Board of :

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Elections, Huntingdon County Board :
of Elections, Indiana County Board of :
Elections, Jefferson County Board of :
Elections, Juniata County Board of :
Elections, Lycoming County Board of :
Elections, Lackawanna County Board :
of Elections, Lancaster County Board :
of Elections, Lawrence County Board :
of Elections, Lebanon County Board :
of Elections, Lehigh County Board of :
Elections, Luzerne County Board of :
Elections, McKean County Board of :
Elections, Mercer County Board of :
Elections, Mifflin County Board of :
Elections, Monroe County Board of :
Elections, Montgomery County Board :
of Elections, Montour County Board :
of Elections, Northampton County :
Board of Elections, Northumberland :
County Board of Elections, Perry :
County Board of Elections, Philadelphia :
County Board of Elections, Pike County :
Board of Elections, Potter County :
Board of Elections, Schuylkill County :
Board of Elections, Snyder County :
Board of Elections, Somerset County :
Board of Elections, Sullivan County :
Board of Elections, Susquehanna :
County Board of Elections, Tioga :
County Board of Elections, Union :
County Board of Elections, Venango :
County Board of Elections, Warren :
County Board of Elections, :
Washington County Board of :
Elections, Wayne County Board of :
Elections, Westmoreland County Board :
of Elections, Wyoming County Board :
of Elections, and York County Board :
of Elections, :
Respondents :

ORDER

NOW, August 23, 2024, the Application for Summary Relief filed by Al Schmidt, in his official capacity as Secretary of the Commonwealth of Pennsylvania and the Commonwealth of Pennsylvania, Department of State, and the Application for Summary Relief filed by Adams County Board of Elections, both of which are joined in by various other County Boards of Elections (collectively, Respondents), are **GRANTED**, the Application for Summary Relief filed by David H. Zimmerman and Kathy L. Rapp (Petitioners) is **DENIED**, the Petition for Review filed by Petitioners is **DISMISSED WITH PREJUDICE**, and the Preliminary Objections of Respondents are **DISMISSED** as moot.

/s/ Renée Cohn Jubelirer

RENÉE COHN JUBELIRER, President Judge