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63 MAP 2024

IN THE SUPREME COURT OF PENNSYLVANIA

No. 63 MAP 2024

DAVID H. ZIMMERMAN and KATHY L. RAPP,

Appellants,

v.

AL SCHMIDT, in his official capacity as Secretary of the Commonwealth of Pennsylvania, et al.,

Appellees.

BRIEF OF APPELLEE BERKS COUNTY BOARD OF ELECTIONS

Appeal from the Commonwealth Court's Order entered August 23, 2024, at No. 33 MD 2024, Dismissing Appellants' Petition for Review

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September 9, 2024

Jeffrey D. Bukowski, Esquire
Attorney I.D. No. 76102
SMITH BUKOWSKI, LLC
1050 Spring Street, Suite 1
Wyomissing, PA 19610
(610) 685-1600
JBukowski@SmithBukowski.com
Wyomissing, PA 19610

Attorneys for Respondent
Berks County Board of Elections

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I. COUNTERSTATEMENT OF THE CASE

For brevity and lack of repetition, Berks County incorporates by reference the Statement of the Case from respondents Secretary of the Commonwealth Al Schmidt and the Department of State's September 9, 2024 Brief of Appellee. These sections thoroughly discuss the history of voting and absentee voting and the procedural history of this action.

The only additional fact that Berks County adds is that Petitioner David H. Zimmerman represents Pennsylvania's 99th Legislative District, which consists of parts of Lancaster County and Berks County, which contain 241 and 202 election districts, respectively. Pet. ¶¶ 5-6 & Pet. Ex. A.[1] Although Petitioner Zimmerman's 99th House District includes parts of both Lancaster County and Berks County, the Petition does not allege Berks County improperly canvassed absentee ballots affecting the results of his 2022 reelection on a county-wide basis. Pet. ¶ 7. Nevertheless, Berks County did and does, consistent with the requirements of the Election Code, centrally canvass absentee ballots on a county-wide basis. 25 Pa. Stat. § 3146.8(g).

[1] Contrary to Petitioners' allegation, the 99th District also encompasses parts of Berks County. *See* https://www.vote.pa.gov/Pages/Pennsylvania-Redistricting-House-of-Representative.aspx.

II. SUMMARY OF ARGUMENT

Petitioners cannot show that 25 P.S. §§ 3146.6(a) and 3146.8(a) clearly, palpably, and plainly violate Pennsylvania Constitution, Article VII, § 14. To the contrary, the Pennsylvania Supreme Court long ago squarely addressed and rejected Petitioners' legal theory, concluding the intent of the operative language at issue in this case, in what is now Article VII, § 14—"and for the return and canvass of their votes in the election district in which they respectively reside"—was not to require canvassing of absentee ballots in each local election district. *See In re Canvass of Absentee Ballots of 1967 Gen. Election*, 245 A.2d 258, 259 (Pa. 1968) ("*1967 Canvass*"); *In re 223 Absentee Ballot Appeals*, 245 A.2d 265, 266 (Pa. 1968) ("*223 Absentee Ballots*").

In *1967 Canvass*, the Supreme Court concluded "the framers of the controverted constitutional amendment never intended that the actual counting of the absentee ballots . . . be performed in the local districts as against the more-convenient, expeditious, business-like operation of having them tabulated on a county-wide basis." *1967 Canvass*, 245 A.2d at 263. Instead, "what the Constitution aims at is the counting of each vote not By [sic] the local elections district but in such a manner that the computation appears on the return In [sic] the

district where it belongs." *Id.* at 264. In other words, the Constitution simply requires absentee votes to be added to the tallies of "the districts in which the absentee voters respectively resided." *Id.*

The Petition for Review filed by Petitioners fails to refer to, address, or attempt to distinguish *1967 Canvass* or *223 Absentee Ballots*, and Petitioners' post hoc attempts to distinguish these decisions are unavailing. Petitioners now attempt to distinguish *1967 Canvass* based on the undisputed fact that the third word of Article VII, § 14 now says "shall" whereas the provision before the Court in *1967 Canvass* said "may."

In reaching its conclusion about the Legislature's intent, the Supreme Court in *1967 Canvass* did not rely on, or even mention, the fact the constitutional language said "may" as opposed to "shall," leaving the Legislature free to ignore it, even though this amendment had been ratified when *1967 Canvass* was decided in September 1968. More importantly, the intended meaning of the above language did not suddenly change simply because the amendment adopted by the Legislature and ratified by the electorate made the allowance of voting by absentee ballot for the designated classes of qualified absentee electors mandatory.

Judge McCullough's concurring opinion below invites this Court to take a "fresh look" at its 1968 decisions. After further review, those decisions should stand. *See Commonwealth v. Alexander*, 664 Pa. 145, 243 A.3d 177, 196 (2020) ("To reverse a decision, we demand a special justification, over and above the belief that the precedent was wrongly decided.") (quoting *Allen v. Cooper*, 589 U.S. 248, 259, 140 S. Ct. 994, 206 L.Ed.2d 291 (2020)).

1967 Canvass and *223 Absentee Ballots* were correctly decided. But even if this Court would not have reached the same conclusion back in 1968, there is no special justification to cease following these decisions after fifty-five years of the reliance on them, especially when doing so would lead to an absurd result and chaos.

Berks County also supports and joins in Secretary Schmidt and the Commonwealth's arguments as set forth in their brief.

III. ARGUMENT

A. THIS COURT SHOULD AFFIRM THE COMMONWEALTH COURT'S DECISION GRANTING SUMMARY RELIEF AND DISMISSING AS MERITLESS THE PETITION FOR REVIEW

1. The challenged Election Code provisions do not clearly, palpably, or plainly violate Article IV, § 14 of the Pennsylvania Constitution.

Petitioners allege that two provisions of the Election Code requiring county boards of elections to receive and canvass absentee ballots—25 P.S. §§ 3146.6(a) and 3146.8(a)—violate Pennsylvania Constitution, Article VII, § 14. They seek declaratory and injunctive relief prohibiting the county boards of elections from receiving and centrally canvassing absentee ballots as required under the Election Code. Binding Supreme Court precedent forecloses this argument and requires the Court to affirm the Commonwealth Court's dismissal of the Petition for Review.

To obtain a declaratory judgment or a permanent injunction, Petitioners must establish a clear right to relief. *Bonner*, 298 A.3d at 161 (declaratory judgments); *Buffalo Twp. v. Jones*, 813 A.2d 659, 663 (Pa. 2002) (permanent injunctions). The Election Code, like all duly enacted legislation, enjoys "a strong presumption of constitutionality, and a challenging party bears a very heavy burden of persuasion." *McLinko*, 279 A.3d at 565 (citing *Stilp v. Commonwealth*, *Gen. Assembly*, 974

A.2d 491, 495 (Pa. 2009)). The statute must clearly, palpably, and plainly "violate an express or clearly implied prohibition in the Constitution before it will be held unconstitutional." *Id.* (citing *Russ v. Commonwealth*, 60 A. 169, 172 (Pa. 1905); *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 164 (Pa. 1853)). Any doubt is "resolved in favor of the constitutionality of the legislation." *Id.*

Petitioners cannot show that 25 P.S. §§ 3146.6(a) and 3146.8(a) clearly, palpably, and plainly violate Pennsylvania Constitution, Article VII, § 14. To the contrary, the Pennsylvania Supreme Court long ago squarely addressed and rejected Petitioners' legal theory. *See In re Canvass of Absentee Ballots of 1967 Gen. Election*, 245 A.2d 258, 259 (Pa. 1968) ("*1967 Canvass*"); *In re 223 Absentee Ballot Appeals*, 245 A.2d 265, 266 (Pa. 1968) ("*223 Absentee Ballots*"). Petitioners fail to refer to, address, or attempt to distinguish *1967 Canvass* or *223 Absentee Ballots* in their Petition.[2]

[2] On February 29, 2024, before Berks County filed its response to the Petition, its undersigned counsel contacted Petitioners' counsel to bring to their attention the *1967 Canvass* decision, thinking perhaps Petitioners and their counsel were not aware of it when they commenced this action, and asked them to voluntarily withdraw or discontinue this action to spare all 67 counties and the Department of State from the time and expense of defending against Petitioners' claims. Petitioners' counsel promptly responded and said they intend to distinguish this caselaw and therefore declined to withdraw this action.

In these companion cases, candidates challenged 25 P.S. § 3146.8, which then—as it does now—required county boards of elections to canvass absentee ballots. The candidates claimed the county boards of elections "had no constitutional authority to canvass" absentee votes because the Constitution, through the language "for the return and canvass of their votes in the election district in which they respectively reside," required absentee ballots to be canvassed in each election district. *1967 Canvass*, 245 A.2d at 260; *223 Absentee Ballots*, 245 A.2d at 265-66. That is the same argument Petitioners make here.

The Supreme Court rejected the above argument in both cases, calling it "a stultification of reason and justice, as well as a jettisoning of common sense." *1967 Canvass*, 245 A.2d at 262. Most significantly, the Court concluded "the framers of the controverted constitutional amendment never intended that the actual counting of the absentee ballots . . . 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. Instead, "what the Constitution aims at is the counting of each vote not By [sic] the local elections district but in such a manner that the computation appears on the return In [sic] the district where it belongs." *Id.* at 264.

In other words, the Constitution simply requires absentee votes to be added to the tallies of "the districts in which the absentee voters respectively resided." *Id.* This requirement is obvious given that many federal, state, and local officeholders only represent certain geographic constituencies. Voters elect these officeholders based upon where the voter resides, which correlates to the voter's election district. Because Berks County covers several Pennsylvania Legislative Districts, Berks County must—and does—include absentee ballot votes cast for Pennsylvania House Representative to each individual voter's election district.

The Supreme Court was motivated in part by the practical impossibility of the above argument. The Court noted that a "district election board sits on election day and, after the polls close, the members thereof immediately proceed to tabulate the results shown on the voting machines, or the written ballots. When this has been accomplished, the job of the district election board is done. Its operation is at an end." *223 Absentee Ballots*, 245 A.2d at 266; *see also* 25 P.S. § 2676.

"The County Board, on the other hand, is a permanent body functioning continuously throughout its tenure of office." *223 Absentee Ballots*, 245 A.2d at 266. Even if election districts were to tally the absentee votes, the county boards of elections still would have final approval during the computation. Thus,

accepting the candidates' argument would only inject an unnecessary extra step into the process. *Id.* at 268.

The Supreme Court found persuasive the logic of a New Jersey decision reaching the same conclusion about the same constitutional language. *1967 Canvass*, 245 A.2d at 264 (discussing *Miller v. Town of Montclair*, 108 A. 131, 133-34 (N.J. Sup. Ct. 1919), *aff'd sub nom. Brown v. Borough of Dunellen*, 108 A. 925 (1919), and *aff'd*, 108 A. 926 (1919)).[3] In *Miller*, the plaintiffs argued the New Jersey Soldier Voting Act was unconstitutional because it required absentee ballots to be returned to and counted by the county boards of elections instead of the election districts. *Id.* at 133.

The New Jersey court had "no particular difficulty" rejecting this argument, holding instead that what "the Constitution aims at is the counting of each vote so that it appear[s] on the return in the district where it belongs; the method of securing this result is left to the Legislature, which, in the present case, has said that the county board shall open and count the votes." *1967 Canvass*, 245 A.2d at

[3] New Jersey's constitution likewise permitted active military servicemembers to vote by absentee ballots and included language identical to the relevant Pennsylvania Constitution language here: "for the return and canvass of their votes in the election districts in which they respectively reside." *Miller*, 108 A. at 134.

264 (quoting *Miller*, 108 A. at 134). Because there was "no question that such votes as were received and counted appeared on the returns of the proper districts," the New Jersey court upheld the Soldier Voting Act as constitutional. *Id.* (quoting *Miller*).

1967 Canvass and *223 Absentee Ballots* are directly on point and squarely reject Petitioners' claims. The relevant statutory and constitutional language is functionally identical. So too are the practical considerations, including the "chaotic and highly disruptive" situation that would occur if all 67 county boards of elections were required to divert absentee ballots to 9,000 plus temporary polling places for canvassing by local election district officials.

Here, as in *1967 Canvass* and *223 Absentee Ballots*, Petitioners do not challenge **how** absentee ballots will be counted but only **where** they will be counted. *1967 Canvass*, 245 A.2d at 262; *223 Absentee Ballots*, 245 A.2d at 268. Also then, as now, Petitioners do not allege any results will change if absentee ballots are canvassed in election districts. *Id.*; *223 Absentee Ballots*, 245 A.2d at 268. Therefore, the Court should reject Petitioners' attempt to force "absurd consequences" on voters and county boards of elections. *1967 Canvass*, 245 A.2d at 264.

Because *1967 Canvass* and *223 Absentee Ballots* are controlling precedent, this Court is bound to follow them and reject Petitioners' identical arguments.

Petitioners argue replacement of the word "may" with the word "shall" at the beginning of Article VII, § 14(a), makes this case materially different from *1967 Canvass* and *223 Absentee Ballots*. This argument is foreclosed by the Supreme Court's decision in *McLinko v. Department of State*, 279 A.3d 539, 581 (Pa. 2022) (analyzing history of PA. CONST. Art. VII, § 14 in determining constitutionality of Act 77 permitting universal mail-in ballots). On this issue, the Majority in *McLinko* said:

> Article VII, Section 14 guarantees that regardless of the legislature's exercise of its authority to determine the way that votes may be cast, those classes of absentee voters designated within it will be guaranteed the ability to participate in the electoral process. Whether or not Act 77's universal mail-in provisions survive future legislatures, Article 14 guarantees the constitutionally designated qualified voters a way to exercise their franchise regardless of their location on Election Day.

McLinko, 279 A.3d at 581; *see also id.* at 594-95 (Wecht, J., concurring) ("The electorate having amended the operative verb in Section 14 from the permissive 'may' to the obligatory 'shall' in 1967, this provision now functions as a bulwark against the prospect of a temporal majority that might stand to benefit if the populations enumerated therein were excluded from the democratic process. Were

that hypothetical antidemocratic majority to repeal the Election Code in its entirety, Section 14 guarantees those discrete classes of electors relief in the form of an absentee ballot.").

Justice Wecht's explanation makes it clear the change from "may" to "shall" merely removed the Legislature's discretion to discontinue the right to vote by absentee ballot for the designated classes of electors. The Majority in *McLinko* makes it clear there is no similar constitutional guarantee for the right to vote by no-excuse mail-in ballot. *McLinko*, 279 A.3d at 581 ("nothing in Article VII prohibits the legislature from eliminating the ability of qualified voters to cast their votes by mail, just as nothing in the Constitution required it to do so.")

Petitioners try to factually distinguish *1967 Canvass* and *223 Absentee Ballots* because in both those cases the Court was faced with invalidating absentee ballots that had already been cast, *see 1967 Canvass*, 245 A.2d at 262 (challenging 5,506 absentee ballots), whereas here, Petitioners seek declaratory relief that is prospective. But this difference in procedural posture cannot and should not affect the Court's interpretation of the constitutional provision at issue.

The constitutional language, relevant history, and practical consequences provide ample support for the constitutionality of 25 P.S. §§ 3146.6(a) and

3146.8(a). *See, e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802-15 (Pa. 2018) (interpreting Pennsylvania Constitution by examining language, history, Pennsylvania case law, and other considerations). Accordingly, the Commonwealth Court's decision dismissing the Petition should be affirmed.

2. The doctrine of stare decisis also justifies affirming the Commonwealth Court's decision.

In the nearly fifty-five years since the Pennsylvania Supreme Court decided *1967 Canvass* and *223 Absentee Ballots* no one—not the Pennsylvania Supreme Court, not the General Assembly, and not another state with similar language—has concluded that this language requires absentee ballots to be returned to and canvassed in local election districts. That should not change now. Judge McCullough's concurring opinion below invites this Court to take a "fresh look" at these 1968 decisions. After further review, they should stand.

Stare decisis is "a principle as old as the common law itself." *Commonwealth v. Alexander*, 664 Pa. 145, 175, 243 A.3d 177, 195 (Pa. 2020) (quoting *Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 635 Pa. 636, 139 A.3d 1241, 1249 (2016) (Wecht, J., concurring)). The phrase "derives from the Latin maxim '*stare decisis et non quieta movere*,' which means to stand by the thing decided and not disturb the calm." *Id.* (quoting *Ramos v. Louisiana*,

590 U.S. 83, 115, 140 S. Ct. 1390, 1411, 206 L.Ed.2d 583 (2020) (Kavanaugh, J., concurring in part)). "Without stare decisis, there would be no stability in our system of jurisprudence." *Id.* at 175-176, 243 A.3d at 195 (quoting *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 208 A.2d 193, 205 (1965). It is therefore preferable for the sake of certainty to follow even questionable decisions because stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 176, 243 A.3d at 195-196 (citations, quotations omitted). The United States Supreme Court has stated, "To reverse a decision, we demand a special justification, over and above the belief that the precedent was wrongly decided." *Id.* at 176, 243 A.3d at 196 (citing *Allen v. Cooper*, 589 U.S. 248, 259, 140 S. Ct. 994, 1003, 206 L.Ed.2d 291 (2020) (quotation marks and citation omitted)).

Petitioners' only justification for revisiting *1967 Canvass* and *223 Absentee Ballots* is that standing by these cases threatens the integrity of elections throughout the Commonwealth. According to Petitioners, requiring local election district officials to count absentee ballots from voters in their districts "safeguards against obvious due process concerns, ensuring that ballots of similarly situated

people are received, processed, and counted in an identical manner." Pet. ¶ 39. Petitioners also argue that they brought this suit to "ensure the integrity and legitimacy of the electoral franchise." Pet. ¶¶ 8, 12. Neither of these arguments holds water.

The best way to ensure the integrity and legitimacy of the electoral franchise and ensure voters' absentee ballots are received, processed, and counted in an identical manner is to utilize—as the Election Code requires—one central location to undertake these activities with a single, centrally trained and supervised election staff, rather than in Berks County's 202 decentralized polling places by poll workers and other election district staff. Otherwise, voters in different election districts for the same election contest could have their ballots processed differently, and candidates would have a harder time observing the myriad absentee ballot canvassing locations, in addition to the centrally canvassed mail-in ballots.

Berks County would continue to receive and canvass mail-in ballots, which are not affected by Article VII, § 14. *See McLinko*, 279 A.3d at 581. The law treats absentee and mail-in ballots identically in many ways, including by requiring voters to return both absentee and mail-in ballots to county boards of elections. 25 P.S. §§ 3146.6(a) (absentee ballots), 3150.16 (mail-in ballots). If Petitioners were

to prevail, Berks County would be required to handle and canvass absentee ballots differently from mail-in ballots. Absentee ballots would have to be returned to polling places, which are only open on Election Day.

Because voters can return completed absentee ballots during the several weeks before Election Day, Berks County would be compelled to incur substantial costs to open and staff polling places to receive and securely store absentee ballots. 25 P.S. §§ 3146.5 (absentee ballots mailed 50 days before the election), 3146.6(a) (completed absentee ballots returned any time before 8:00 PM on Election Day). Also, because the Election Code requires public buildings, such as schools or municipal buildings, to be used wherever possible, 25 P.S. § 2727, requiring thousands of polling places to remain open for weeks would raise legitimate security and chain-of-custody concerns.

Similarly, although Berks County would continue to centrally pre-canvass and canvass mail-in ballots, it would have to provide substantial additional training and perhaps even additional expensive scanning equipment to election officials at each polling place to pre-canvass and canvass absentee ballots. Also, because Berks County accepts funds under the newly established Election Integrity Grant

Program,[4] each polling place would have to begin pre-canvassing at 7:00 AM on Election Day, begin canvassing at 8:00 PM on Election Day, and "continue without interruption until each ballot has been canvassed." 25 P.S. § 3260.2-A(j)(1), (2).

Separate from the significant cost, imposing these requirements also would cause Berks County election officials to take time away from their many other obligations overseeing free and fair in-person voting. *E.g.*, 25 P.S. §§ 3048-50. Berks County election district officials would have to continuously inspect and open absentee ballot return envelopes, remove the absentee ballot, and scan in the ballots to tally the results—only to return the absentee ballots back to the county board of elections for computation and certification. 25 P.S. § 3154(f).

The above absurd consequences were obvious to the Supreme Court in 1968, and they are just as obvious today.

"Where a statute has been in force for many years without any question as to its constitutionality being raised and engagements have been entered into on the strength of its validity, the court will not undertake the drastic measure of wiping it

[4] The grant program was created by Act of July 11, 2022, P.L. 1577, No. 88.

off the statute books unless it is convinced beyond all peradventure of doubt that it violates a provision of the fundamental law." *1967 Canvass*, 245 A.2d at 260-61 (internal quotation marks omitted). It has been fifty-five more years since *1967 Canvass* and *223 Absentee Ballots* were decided, and no one thought twice about the decisions until Petitioners—both legislators during the adoption of Act 77—filed their Petition nearly five years after its adoption. There is no basis to reverse these decisions, and the Commonwealth Court's decision dismissing the Petition should be affirmed.

The U.S. Supreme Court has "identified several factors to consider in deciding whether to overrule a past decision, including 'the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, ... and reliance on the decision.'" *Alexander*, 664 Pa. at 177, 243 A.3d at 196 (quoting *Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 180, 203, 139 S. Ct. 2162, 2177-78, 204 L.Ed.2d 558 (2019). The age of the challenged decision is also a relevant factor. *Id.* at 176, 243 A.3d at 196-197 (citing *Gamble v. United States*, 587 U.S. 678, 691, 139 S. Ct. 1960, 1969, 204 L.Ed.2d 322 (2019).

Although *1967 Canvass* and *223 Absentee Ballots* are constitutional cases, where stare decisis is at its weakest, none of the relevant factors justify this Court overruling them now.

IV. CONCLUSION

For the reasons explained above, this Honorable Court should affirm the Commonwealth Court's decision granting summary relief in favor of Respondents and dismissing the Petition with prejudice.

Dated: September 9, 2024

Respectfully submitted,

/s/Jeffrey D. Bukowski

Jeffrey D. Bukowski, Esquire
Attorney I.D. No. 76102
SMITH BUKOWSKI, LLC
Spring Street, Suite 1
Wyomissing, PA 19610
610) 685-1600
JBukowski@SmithBukowski.com

Attorneys for Respondent
Berks County Board of Elections

CERTIFICATE OF COMPLIANCE

I, Jeffrey D. Bukowski, Esquire, certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: September 9, 2024

/s/Jeffrey D. Bukowski

Jeffrey D. Bukowski, Esquire
Attorney I.D. No. 76102
SMITH BUKOWSKI, LLC
Spring Street, Suite 1
Wyomissing, PA 19610
610) 685-1600
JBukowski@SmithBukowski.com

Attorneys for Respondent
Berks County Board of Elections

CERTIFICATE OF LENGTH

I, Jeffrey D. Bukowski, Esquire, certify that this brief complies with the word count requirement set forth in Pa. R.A.P. 2135(a)(1). Excluding matters identified in Pa. R.A.P. 2135(b), this brief is 3,779 words. I have relied on Word's word count function to determine the length of this brief.

Dated: September 9, 2024

/s/Jeffrey D. Bukowski

Jeffrey D. Bukowski, Esquire
Attorney I.D. No. 76102
SMITH BUKOWSKI, LLC
Spring Street, Suite 1
Wyomissing, PA 19610
610) 685-1600
JBukowski@SmithBukowski.com

Attorneys for Respondent
Berks County Board of Elections

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date below, a true and correct copy of the foregoing **BRIEF OF APPELLEE BERKS COUNTY BOARD OF ELECTIONS** has been served upon the below counsel of record through the Court's PACFile system and/or by electronic mail or other means.

Dated: September 9, 2024

/s/Jeffrey D. Bukowski

Jeffrey D. Bukowski, Esquire
Attorney I.D. No. 76102
SMITH BUKOWSKI, LLC
Spring Street, Suite 1
Wyomissing, PA 19610
610) 685-1600
JBukowski@SmithBukowski.com

Attorneys for Respondent
Berks County Board of Elections