



Testimony presented by Ray Murphy
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Senate State Government Committee Hearing:
Modernizing Pennsylvania's Election Laws

• 10 a.m. to noon on Tuesday, April 30, 2019

Majority Chairman Folmer, Minority Chairman Williams and members of the Committee: Thank you for providing an opportunity to Keystone Votes to testify about the bipartisan efforts to modernize Pennsylvania's electoral process. Your work on these issues is important and timely.

Over the last year, our commonwealth has seen more serious, bipartisan conversation than it has in a generation on efforts to modernize the election code, enhance election security, and offer all voters more convenient and modern options for participation.

As a nonpartisan coalition comprising 40 organizations that have been working for years to update Pennsylvania's election laws, the members of the Keystone Votes coalition are encouraged by the momentum and attention these issues have gained so early in the 2019-20 legislative session.

We look forward to working with all of you, and other stakeholders, to ensure the best forms of these bills become reality, with the goal of bringing more eligible voters into the process.

Streamlined and more cost-efficient election administration is an important goal, as outlined by this legislative package. But modernizing our elections is also about addressing the needs of all Pennsylvania voters to make voting more convenient and equally accessible for all.

As state coordinator for Keystone Votes and deputy director of Pennsylvania Voice, I will outline for the committee our analyses of **Senate Bills 411 through Senate Bill 422**. The analyses were created by many individual members of the coalition, including Disability Rights PA, Common Cause, the ACLU of PA, community organizations and more. I will begin with the bills we support, then discuss the bills that require amendments to gain our support, and close with the bills we oppose. In each case, I will provide our reasoning to help the committee as it continues its review of this legislative package.

Two measures have our full support.

They include **S.B. 412**, which would repeal the provision of the Pennsylvania Constitution that excludes federal, state, county and municipal employees from serving as poll workers; and **S.B. 422**, which would

establish the Pennsylvania Election Law Advisory Board to study the election code for modernization purposes, examine new technology, evaluate the electoral process, and more.

Specifically, with respect to S.B. 422, should this advisory board be created, we would hope the legislature looks to the expertise of Keystone Votes and its members for possible appointments to support its mission.

There are several measures that, as drafted, we would oppose. However, with revisions or amendments, Keystone Votes could support them. I will describe each of them in detail here.

Let me begin with S.B. 411, which proposes a constitutional amendment to empower voters to request and submit absentee ballots for any reason --- allowing them to vote early and by mail.

When this measure was first unveiled in January, the stated goal was to eliminate the burdensome restrictions on absentee ballots. Keystone Votes agrees with the concept. In fact, making the use of absentee ballots less restrictive so eligible voters could vote early and vote by mail has been a platform of Keystone Votes since its inception. There's no reason every voter should have to vote on one specific day.

Optional vote by mail gives residents a more convenient way to participate in our democracy, especially the increasing number of individuals who work long and nontraditional hours. Voting by mail without excuse also protects access to our democracy for people with disabilities and senior citizens, without putting up unnecessary hurdles or invading their privacy. It can make Election Day easier for counties as well, as fewer people actually vote in person, resulting in shorter lines and reducing burdens on election officials and poll workers.

Expanding access to absentee ballots is also a well-tested concept: more than 30 states in the country offer voters this option. As a result, there is a wide and deep body of experience with the implementation of this practice that Pennsylvania county election administrators can draw upon should the General Assembly update absentee voting laws here.

However, the vision of "no excuse" absentee voting in this proposal is too restrictive, as it would only offer absentee ballots as an option for voters who were away from their municipality on Election Day. That inadvertently limits who can participate and provides little convenience to voters.

A perfect example is with first responders and medical professionals who work double shifts, sometimes longer than 12 hours. They could easily live in the same municipality where they work. Their shift prevents them from being able to get to the polls. Yet, they would not be enabled to vote by absentee ballot if this constitutional amendment were to pass because they remain within the municipality where they live, and the legislature would not be required to act to protect them under this amendment. Because early in-person voting is not allowed in the state, and there is so far no proposed statutory change to allow no-excuse absentee voting, these continued restrictions on absentee ballots essentially deny them of their right to vote.

For these reasons, requiring the excuse of absence from a voter's municipality should not be a requirement for voting absentee. Our current system is out of step with how people live and work. Our government should make voting more convenient by providing additional opportunities for voters to

cast their ballots. Voting by mail gives Pennsylvanians an option that works for any schedule. **Keystone Votes supports modifying the existing statute to give all voters that option.**

Another concern with the proposal is that, based on the way the measure is drafted, it would strip current constitutional guarantees of the right to vote absentee from people with disabilities, county employees, and others if they can't vote in person because of illness, disability, religious observance, election day duties, unless they too were away from their municipality.

We do not believe that is the intent of the measure.

The simplest solution to these challenges is to withdraw S.B. 411, and instead modify the existing statute to broaden the scope of absentee voting to give all voters the option to vote by mail.

The Pennsylvania Constitution lists certain categories of voters who are to be allowed to vote by absentee ballot. They include:

- eligible voters who will be absent from the municipality where they live because their duties, occupation or business require them to be elsewhere;
- eligible voters who are unable to attend at their proper polling places because of illness or physical disability;
- eligible voters who will not attend a polling place because of the observance of a religious holiday; or
- eligible voters who cannot vote because of election day duties.

The basic legal question is whether the constitution sets a ceiling or a floor. If it sets a ceiling, the legislature can allow only voters who fall into one of these four categories to cast absentee ballots. If it sets a floor, the legislature must allow voters in these four categories to cast absentee ballots, but may go further and allow other categories of voters to do so, including by allowing any voter to opt to cast an absentee ballot.

Our analysis concludes that this provision operates as a "floor," not as a "ceiling." In other words, it lists the minimum set of permissible absentee voters, not the maximum set. If this were not the case, there are other categories of voters not named in the constitution whose current ability to vote by absentee ballot would be subject to a legal challenge --- specifically, spouses of military members, and then anyone who is away from their home for leaves of absence for teaching or education, vacations, sabbatical leaves, and all other absences associated with the elector's duties, occupation or business, including an elector's spouse who accompanies the elector.

Since the General Assembly can exercise any powers not denied to it by the Pennsylvania Constitution or federal law, members can extend absentee voting above this floor.

That means a constitutional amendment is not necessary to improve access to absentee ballots and transition to an optional vote by mail system. And it means the General Assembly can act on this measure in line with other proposals in this plan, rather than requiring votes in two consecutive legislative sessions, which would unnecessarily delay the reform effort.

For the benefit of the committee, the analysis Keystone Votes secured from one of its members --- the Public Interest Law Center --- is included with this written testimony.

To summarize our coalition's position on **S.B. 411**, we oppose a constitutional amendment that only requires the legislature to provide for absentee ballots to be cast by voters who are physically outside of their town between 7 a.m. and 8 p.m. as too narrow a vision. We would enthusiastically support a statutory version of this bill that allows any voter --- regardless of whether they are in or out of their city or town --- to qualify for an absentee ballot to optionally vote by mail.

When it comes to setting procedures for optional voting by mail, as proposed in **S.B. 414**, this measure offers a vast improvement to the current system but still includes several elements that deserve closer examination.

Although both of these options are much better than current law, Keystone Votes is concerned that requiring two different deadlines (Section 1306, Subsection (b)) to return mail ballots will create confusion. Voters would have the option to drop off an absentee ballot to the county election office by 8 p.m. on Election Day. However, if they mail in the ballot, it must be postmarked the day before the election. Why not make the rules consistent for those who mail ballots, and allow any ballot postmarked on Election Day to count as a valid vote?

The benefits of a bifurcated system seem minimal. An absentee ballot postmarked the day before the election will be accepted by counties for up to seven days after the election. What substantial difference will there be if these ballots were postmarked one day later? This raises the risk of a bifurcated system: offering two different deadlines could be interpreted as a violation of the constitution's equal protection clause.

The last issue we would cite with **S.B. 414** has to do with transparency.

The General Assembly is focused on openness and transparency, as shown by these hearings and the public discussions around these measures. But the provision in this measure to take away the responsibility to post a list of absentee ballot voters at the polls is counter to that effort (Section 1302.3). If the physical posting of a list is too onerous, then voters' records should be marked in the state's SURE system, with the Department of State required to make voter file updates that are publicly available in real time. Hiding the list of these voters, and only making it available to candidates or campaigns, is problematic.

A simple way to address transparency is to mark up the public voter file to note who:

- requests an absentee ballot;
- returns an absentee ballot;
- joins the permanent early vote list; or
- casts their ballot at a vote center vs. their polling place.

Among other areas of confusion with this measure: The option to return voted ballots "in person" isn't clear enough. Who is eligible to return an absentee ballot to the county? Is it only the voter? Or can it be a representative? These issues need to be addressed. So do a number of sections in this measure that would need to be updated if optional vote by mail via absentee ballots becomes law.

Again, Keystone Votes believes **S.B. 414** would greatly improve the current system. However, having a different deadline for returning your ballot by mail versus in person is problematic.

S.B. 415 would allow voters to join a permanent absentee voting list. Once a voter opts in, they automatically receive an absentee ballot for all future elections.

This is an important and a necessary bill. Optional vote by mail is a great means to increase participation and guarantee access for all. Allowing voters to permanently vote by mail --- rather than applying for a ballot for every election ---- is a best practice in other states.

However, the process outlined in this measure to create the permanent list is overly cumbersome. The bill leaves it to each county to create its own permanent early vote list application, which could create a patchwork of requirements. As it stands now, the current application for an absentee ballot is created by the Department of State and thus standardized across all 67 counties.

Keystone Votes suggests modifying the bill to mandate that the Department of State create this application in a paper and an online form, and with the minimum number of required fields needed to match the applicant to the voter file. The current absentee voter registration application, as well as the voter registration application form, also should be modified to include a checkbox that allows a voter to be added to the permanent list.

Allowing county boards of elections to create vote centers or introduce curbside drop-off of absentee ballots for people with disabilities, as proposed by S.B. 416, is a good idea and one that Keystone Votes supports. However, some of the voter assistance provisions included in this measure most likely would violate the federal Voting Rights Act.

Some of the proposed changes specifically conflict with federally guaranteed rights around assistance to people with disabilities, or those who need assistance in a language other than English. The voter deciding whether or not they need help is the only tenable standard to make sure people get the assistance that is rightfully guaranteed. Among our chief concerns:

- Providing the assistant's name and address as part of the voter's record (Section 1218.2(c)(1)) is likely to intimidate some voters and assistors from getting and receiving help.
- Some of new Section 1218.3 ("Unlawful Assistance") would intimidate voters with disabilities or who are not proficient in English and intimidate their assistants, preventing those voters from getting assistance to which they are entitled.
- Because of the provision regarding not counting the ballots (Section 1218.3(c)), the bill could force people who need assistance to vote a provisional ballot, or worse, be denied the opportunity to vote entirely if they are wrongly accused by poll workers.
- The definition of "assistance" (Section 1200) generally may limit the type of assistance people who are entitled to it can get, depending on how it is enforced.
- The provision related to assistance for marking the ballot (Section 1218.2) is too limited and conflicts with federal law.

The idea for vote centers is a good one. Secure and convenient opportunities to vote are important. Within this bill, however --- unrelated to the actual vote center concept --- there are changes to voter assistance that, if not withdrawn, would force us to oppose the legislation.

S.B. 418 would reduce the number of backup ballots required per precinct from 110 percent to a number derived from a formula based on past turnout.

Keystone Votes sympathizes with county election officials who are concerned about wasting time and resources to produce backup ballots that may never be used. But we believe the formula to determine the actual number needs to be fine-tuned, because it relies on an average of three previous election cycles and may not yield accurate results.

For example, to determine the number of paper ballots required for the 2020 General Election, the formula would average the number of voters in the 2017, 2018 and 2019 General Elections, and then add 10 percent to that averaged total. Based on past turnout, this could result in a significant under-projection of the actual number of ballots required in a 2020 presidential year election.

Rather than focusing on the passage of time, it makes more sense to build a formula that averages presidential year turnout in presidential elections, gubernatorial turnout in a gubernatorial elections, etc., so the average more accurately reflects why voters are going to the polls that year.

Pre-registering youth to vote, as we understand the sponsor's intent in **S.B. 420**, is among the foundational issues of Keystone Votes. Many young, first-time voters may be unaware of Pennsylvania's registration deadlines or even how to register to vote. Offering young people aged 16 and 17 the opportunity to preregister to vote would make it easier for these voters to cast a ballot once they turn 18, and would engage them in the voting process early on.

A majority of Pennsylvania voter registrations are generated by the Pennsylvania Department of Transportation. Youth voter pre-registration would increase if 16-year-olds could pre-register when they first get a driver's license. Otherwise, they may not be offered another chance to register through PennDOT until their 21st birthday when they renew their license.

As drafted, this bill will not allow the state or counties to enjoy any of the cost-savings that pre-registration for youth laws create in other states. Instead, it actually adds a layer of bureaucracy by creating a two-step process when this could be efficiently done in one step. The bill requires PennDOT to keep records of individuals under 18 who seek a license and then follow up with them to fill out registration forms once they reach the age of eligibility to vote in the next election.

Rather than adding in an extra layer of bureaucracy, what most states do is allow 16- and 17-year-olds to transmit an application to vote to the Department of State, in the same way as anyone else, but their names are withheld from poll books until the election at which they come of age. At that point in time, county election boards would mail these voters a Voter Registration ID card, and add their names to the poll books, and thus they are eligible to vote. Pennsylvania should do the same.

Separate from the legislative package, Keystone Votes also believes that in addition to the enactment of voting modernization laws as modified, based on the feedback above, we posit the idea that these laws cannot be effectively implemented without the provision of funds to the Department of State and all of the county election boards for trainings as well as updates to cybersecurity infrastructure.

Three other measures are outside our scope, so we have no opinion on them as a coalition.

They include **S.B. 413**, which would amend the Pennsylvania Constitution to eliminate the requirement for a separate ballot or a separate column on voting machines for the retention of justices, judges, and justices of the peace; **S.B. 417**, which would require write-in vote candidates to get at least as many write-in votes as the number of petition signatures required by code for the office they are seeking; and **S.B. 421**, which would abolish straight ticket or straight party voting as an option in general elections.



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MEMORANDUM

To: Keystone Votes Coalition
From: Ben Geffen
Date: March 19, 2019
Subject: Constitutionality of Potential No-Excuse Absentee Voting Legislation

QUESTION PRESENTED

Could the General Assembly enact a no-excuse absentee voting system without an amendment to the Pennsylvania Constitution?

SHORT ANSWER

Very likely yes. The Pennsylvania Constitution lists certain categories of voters who are to be allowed to vote by absentee ballot. This provision appears to operate as a “floor,” not as a “ceiling”; that is, it lists the minimum set of permissible absentee voters, not the maximum set. Since the General Assembly can exercise any powers not denied to it by the Pennsylvania Constitution or federal law, it can extend absentee voting above this floor. The matter is not one hundred percent clear, because two old Pennsylvania Supreme Court decisions held that earlier versions of the Pennsylvania Constitution set a ceiling on absentee voting, but subsequent changes in the law and on the ground make it unlikely those old decisions would apply today.

DISCUSSION

Current Pennsylvania law allows voters to cast absentee ballots only for certain reasons, such as absence from their municipality of residence on election day because of work duties. The majority of other states offer “no-excuse absentee voting,” also known as “optional vote-by-mail,” permitting any voter to choose to vote by absentee ballot. *See* National Conference of State Legislatures, *Absentee and Early Voting*, <http://www.ncsl.org/research/elections-and->

[campaigns/absentee-and-early-voting.aspx#no_excuse](#) (listing 28 states plus the District of Columbia) (last visited Mar. 19, 2019). These systems enjoy broad public support and boost turnout. This memorandum addresses whether the Pennsylvania General Assembly could enact no-excuse absentee voting through legislative action alone, or whether an amendment to the Pennsylvania Constitution would be necessary. It concludes that legislative action would very likely suffice, although two old Pennsylvania Supreme Court decisions leave slight uncertainty.

I. **The Pennsylvania Constitution's absentee voting provision does not explicitly state whether the legislature can enact a no-excuse absentee voting system**

The Pennsylvania Constitution expressly requires the General Assembly to allow for certain voters to cast absentee ballots:

The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors [1] who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or [2] who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or [3] who will not attend a polling place because of the observance of a religious holiday or [4] who cannot vote because of election day duties, in the case of a county employee, 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) (brackets and numbers added). This provision singles out four categories of voters who must be allowed to vote by absentee ballot. The basic legal question considered in this memorandum is whether this provision sets a ceiling or a floor. If it sets a ceiling, the legislature can allow **only** voters who fall into one of these four categories to cast absentee ballots. If it sets a floor, the legislature must allow voters in these four categories to cast absentee ballots, but may go further and allow other categories of voters to do so, including by allowing **any** voter to opt to cast an absentee ballot.

No Pennsylvania judicial decision has resolved whether article VII, § 14(a) sets a floor or a ceiling. *But see Kauffman v. Osser*, 441 Pa. 150 (1970) (in-person voters used ceiling theory to challenge statute allowing voters on vacation to cast absentee ballots; Supreme Court rejected challenge on standing and justiciability grounds, without any decision on the merits); *see also id.* at 158 (Cohen, J., dissenting) (agreeing with challengers' ceiling theory).

II. Pennsylvania's current statutory scheme is based on the floor theory

Under the Pennsylvania Election Code, to obtain an absentee ballot a voter must sign a declaration certifying one of a limited number of reasons for voting absentee. *See* 25 P.S. § 3146.2; *see also* Absentee Ballot Application, available at https://www.votespa.com/Voting-in-PA/Documents/Absentee_Ballot_Application.pdf (last visited Mar. 19, 2019). A voter who submits an absentee ballot but ends up being in town and able to vote on election day is required to go to the polling place, void the absentee ballot, and cast an in-person ballot. 25 P.S. § 3146.6(b); *accord Marks v. Stinson*, 19 F.3d 873, 876 (3d Cir. 1994).

The Election Code carries out the mandate of article VII, § 14(a) by providing for voters in each of the four specified categories to cast absentee ballots. 25 P.S. § 3146.1(g), (j) (voters out of town because of duties, occupation or business); *id.* § 3146.1(k) (illness or physical disability); *id.* § 3146.1(n) (religious holiday); § 3146.1(m) (county employees with election-day duties). Notably, however, the Election Code extends absentee balloting to numerous categories of voters beyond the four categories delineated in the Constitution, as will be discussed in more detail in part (IV)(B)(1) of this memorandum. For example:

- A person in the military service of the United States may vote by absentee ballot “regardless of whether he is present in the election district of his residence” and “regardless of whether he is registered or enrolled.” 25 P.S. § 3146.1(a). This provision goes beyond the constitutional requirement to provide absentee balloting for persons whose duties, business or occupation require them to be elsewhere by permitting absentee balloting for voters in the military service regardless of actual absence on election day.
- Spouses and dependents of military personnel who by reason of their association are not present in their voting location also may vote by absentee ballot, even though their absence is not strictly required by their own duties, business or occupation. 25 P.S. § 3146.1(b) (2012).
- Persons whose spouses are absent due to their duties, occupation or business are entitled to vote by absentee ballot if they are accompanying their absent spouses. *See* 25 P.S. § 2602(z.3) (defining “duties, occupation or business” to include “an elector’s spouse who accompanies the elector”).
- Voters on a leave of absence for teaching or education, on vacation, and on sabbatical leave are entitled to vote by absentee ballot, absences that are specifically included by the Legislature in its definition of “duties, occupation or business.” *See id.* (defining “duties, occupation or business” to include leaves of absence for teaching or education, vacations, [and] sabbatical leaves”).

III. The broad scope of the General Assembly’s powers under the Constitution further supports the floor theory

It is a long-settled principle of Pennsylvania law that “powers not expressly withheld from the General Assembly inhere in it.” *Stilp v. Pennsylvania*, 601 Pa. 429, 435 (2009) (citing *Commonwealth ex rel. Kelley v. Keiser*, 340 Pa. 59, 66 (1940)). Constitutional limitations on the power of the legislature must therefore be narrowly construed, and the courts may not expand those limits. “The Constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument, we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature possibly could.” *Id.* (quoting *Russ v. Commonwealth*, 210 Pa. 544, 544 (1905)). Nowhere does the Constitution expressly limit the General Assembly’s power to expand the categories of absentee voters, and so under this principle the courts should not read such a restriction into the Constitution.

Article VII, § 14(a) states that the General Assembly must provide for absentee balloting for certain classes of qualified electors. What the General Assembly is otherwise prohibited from doing is a matter of implication rather than literal text. Put differently, the Constitution’s only explicit prohibition is for the General Assembly to deny absentee balloting to the four categories of voters enumerated by article VII, § 14(a). The Constitution lacks any language such as “shall only” or “no more than” that would designate those categories as a limit. Because the power to provide for categories of electors in addition to those clearly mandated is not “expressly withheld” from the General Assembly in article VII, § 14(a), a limit on such power by uncertain implication risks improperly “extending the list” of things the Constitution prohibits.

Additional support for the “floor” interpretation comes from article VII, § 4, which states: “All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.” This provision reinforces the notion that the General Assembly has broad discretion to “prescribe[] by law” the mechanisms for elections.

IV. Cases under former versions of the Constitution identified ceilings on absentee voters, but those cases would be unlikely to compel a similar outcome under the current Constitution

The best argument for the “ceiling” theory would be that it is compelled by two old decisions of the Pennsylvania Supreme Court, *Chase v. Miller*, 41 Pa. 403 (1862) and *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131 (1924). These decisions struck

down attempts by the General Assembly to expand access to absentee balloting under nineteenth-century iterations of the state constitution. Although those decisions were issued under prior constitutions, we cannot completely discount the risk that courts could apply them to the modern Constitution as well, holding the four categories of article VII, § 14(a) to form an exhaustive list of permissible reasons for voting by absentee ballot. But as discussed below, there are several reasons to think that outcome would be unlikely.

A. The argument that *Chase and Lancaster City* bar no-excuse absentee voting

Pennsylvania's 1838 Constitution made no mention of absentee voting. In 1839, the legislature passed a statute allowing active-duty soldiers to vote by absentee ballot. Some 23 years later, near the beginning of the Civil War, the outcome of a tight election for Luzerne County District Attorney depended on whether absentee ballots cast by soldiers were valid. In *Chase*, the Pennsylvania Supreme Court held that the statute permitting absentee voting was unconstitutional, under this provision of the 1838 Constitution (emphasis added):

In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the state one year, and in the election district where he offers to vote ten days immediately preceding such election, and within two years paid a state or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector.

41 Pa. at 418. The Supreme Court's holding was based on two interpretive steps. First, the court held that "offers to vote" means "votes in person." *Id.* at 419.¹ Second, the court held that this provision sets a ceiling on eligible voters, i.e., the legislature cannot extend the franchise to anyone not specified in this constitutional provision. *See id.*; *see also McCafferty v. Guyer*, 59 Pa. 109, 111-12 (1868) ("It has always been understood that the legislature has no power to confer the elective franchise upon other classes than those to whom it is given by the Constitution, for the description of those entitled is regarded as excluding all others."). On this basis, the court held that "the Constitution of 1838 made the precise place of voting an element of suffrage." 41 Pa. at 417.

¹ The term "offer to vote" has been carried over to the current Constitution. Pa. Const. art. VII, § 1(3) ("He or she shall have resided in the election district where he or she shall offer to vote . . .").

Two years after *Chase*, the constitution was amended to specifically permit active-duty soldiers to vote by absentee ballot. Both the “offer to vote” language and the new language about active-duty soldiers were carried over into the next constitution, which took effect in 1874.

In 1923, the legislature passed a statute permitting absentee voting by a voter “who by reason of his duties, business or occupation [may be] unavoidably absent from his lawfully designated election district” on election day. Soon thereafter, the outcome of a close race for city council in Lancaster turned on whether such absentee votes were valid. In *Lancaster City*, the Supreme Court said they were not. The logic of this holding was that the “offer to vote” language still required in-person voting as an element of suffrage, and the only exceptions would be for categories of voters “specifically named” in the 1874 Constitution. 281 Pa. at 137. The Court also applied the maxim *expressio unius est exclusio alterius* (“the express mention of one thing excludes all others”) to conclude that the 1874 Constitution’s list of voters eligible to cast absentee ballots was exhaustive. *Id.* (“The old principle that the expression of an intent to include one class excludes another has full application here.”).

In the current 1968 Constitution, the “specifically named” categories of voters have been expanded to include various groups, including those out of town for work, and those who cannot vote in person because of illness or physical disability. But a proponent of the ceiling theory would argue that under the reasoning of *Chase* and *Lancaster City*—which have never been explicitly overruled—no one outside of those “specifically named” categories can vote by absentee ballot without a constitutional amendment, because the “offer to vote” language of article VII, § 1(3) requires in-person voting, with the only permissible exceptions listed in article VII, § 14.

B. Why the Supreme Court would probably uphold expansion by statute

Chase was based on skepticism that absentee balloting, then a new innovation, could work at all; *Lancaster City* was decided when absentee balloting was still a very limited phenomenon. Notably, the *Chase* court was fearful of **any** form of absentee voting. *See, e.g.*, 41 Pa. at 419 (“We cannot be persuaded that the constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage.”). *Chase* took as a premise that any absentee voting “opens a wide door for most odious frauds.” *Id.* at 425. Some of the *Chase* court’s concerns were grounded in conditions particular to the Civil War, such as stories of “political speculators, who prowled

about the military camps watching for opportunities to destroy true ballots and substitute false ones, [and] to forge and falsify returns.” *Id.* More generally, *Chase* was decided over 150 years ago, when ballots were still printed and distributed by political parties, mail moved by pack animal and steam train, and voter registration was a relatively recent innovation.

Many decades later, four developments in the law and in the practical realities of voting provide reason to believe that a twenty-first-century Supreme Court would not apply *Chase* and *Lancaster City*, either by treating them as abrogated or by expressly overruling them. These four developments are discussed below.

1. The Election Code has long allowed some categories of voters to cast absentee ballots, beyond the categories named in the Constitution

Two Pennsylvania laws, passed before or nearly contemporaneously with Pennsylvania’s current (1968) Constitution, create classes of people who can vote by absentee ballot despite not being named in the constitution. First, in 1963, the legislature enacted a provision that allows spouses of military members to vote by absentee ballot. 25 P.S. § 3146.1(b); *accord* 25 P.S. § 2602(w)(2).² Second, while the 1968 Constitution permits absentee voting by people who will be out of town on election day “because their duties, occupation or business require them to be elsewhere,” Pa. Const. Art. VII, § 14(a), a statute passed in December 1968—only months after the finalization of the 1968 Constitution—has extended the scope of this constitutional provision well beyond its plain meaning. This statute provides that “The words ‘DUTIES, OCCUPATION OR BUSINESS’ shall include leaves of absence for teaching or education, vacations, sabbatical leaves, and all other absences associated with the elector’s duties, occupation or business, and also include an elector’s spouse who accompanies the elector.” 25 P.S. § 2602(z.3) (emphases added).

The fact that these statutes have been on the books for so long—indeed, one predates the present Constitution—has legal as well as practical significance. The chief legal significance is the Supreme Court’s presumption against finding a statute unconstitutional, particularly when the statute has long been in force. *See, e.g., Robinson Twp. v. Commonwealth*, 623 Pa. 564, 633

² For elections for federal offices, since 1986 military spouses have been permitted to vote by absentee ballot under a federal statute called the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which trumps any limitations in state law. *See* 52 U.S.C. §§ 20302(a)(1), 20310(1)(C), 20310(3). However, UOCAVA does not apply to elections for state or local offices.

(2013) (“Regarding any duly enacted statute, courts begin with the presumption that the General Assembly did not intend to violate the Pennsylvania Constitution, in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths.

Accordingly, a statute is presumed valid and will be declared unconstitutional only if the challenging party carries the heavy burden of proof that the enactment clearly, palpably and plainly violates the Constitution. The practical implication of this presumption is that any doubts are to be resolved in favor of a finding of constitutionality.” (internal citations, quotation marks, and brackets omitted)); *In re Absentee Ballots Case (No. 1)*, 431 Pa. 165, 169-70 (Pa. 1968) (“In considering whether a statute offends against the Constitution, the courts look at it through historical as well as analytical eyes. ‘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 off the statute books unless it is convinced beyond all peradventure of doubt that it violates a provision of the fundamental law.’ *Wilson v. Philadelphia School District*, 328 Pa. 225, 242 (1937). . . . We refer to the hitherto freedom from attack of the election code (on the subject of county canvassing of absentee ballots), only for the purpose of showing that the absence of constitutional condemnation would suggest that the lawmakers of the state are satisfied it conforms to the Constitution. Otherwise, it would be reasonable to suppose that, considering the number of times the Legislature has had opportunity to review the code, if the county canvassing of absentee ballots were as flagrant a violation of the Constitution as the appellants contend, the Legislature would have noted this, and made the demanding correction.”).

Here, the legislature believed these expansions to be constitutional, even contemporaneously with the finalization of the new constitution. And the Supreme Court rejected a challenge to some of these expansions when they were still young, albeit on standing grounds. *Kauffman v. Osser*, 441 Pa. 150 (1970). However, three dissenting justices in *Kauffman* would have reached the merits and would have found the statute unconstitutional. *Id.* at 158 (Cohen, J., dissenting) (“This is such a clear constitutional violation and such an open invitation to fraud that justice and the sanctity of the ballot demand a remedy.”).

In addition, the five decades of treating the constitutional provision as a floor suggest that it would no longer be appropriate to follow *Lancaster City* by applying the maxim *expressio unius est exclusio alterius*. *Cf. Consumers Educ. & Protective Ass’n v. Nolan*, 470 Pa. 372, 388

(1977) (“We recognize that merely to hold automatically that the legislature’s intent does not encompass something not specifically included in a statute that contains specific provisions can sometimes thwart that intent.”); *cf. also Commonwealth v. Williams*, 539 Pa. 249, 253 (1994) (“Where there is no ambiguity, there is no room for interpretation.”).

The practical implication is that a judicial reaffirmation of *Chase* and *Lancaster City* to bar no-excuse absentee voting would also wipe out longstanding provisions of the Election Code, which have for over fifty years extended the absentee ballot to military spouses voting for non-federal offices, to Pennsylvanians who are on vacation on election day, and to voters accompanying their spouses on business travel. While these corollary holdings would likely not be self-executing, a judicial rejection of no-excuse absentee balloting on the basis of a ceiling theory would expose the courts to criticism for undermining longstanding statutes that presumably enjoy wide public support.

2. *Chase* and *Lancaster City* were based on worries that are obsolete

The rationale of *Chase*, and of *Lancaster City* (which relied on *Chase*), long ago became obsolete. Both decisions were founded on the fear that any form of absentee voting would open the floodgates to fraud. In modern times, absentee voting is no longer a novelty. In the many decades since *Chase* and *Lancaster City*, the state constitution has been amended repeatedly, beginning in 1864, to initiate and expand absentee voting. By now, this expansion has become so broad that it no longer is tenable to read the constitution, as *Chase* did, as disfavoring all absentee voting so as to prevent “odious frauds,” and judicial attitudes have changed accordingly. *See generally In re Absentee Ballots Case (No. 1)*, 431 Pa. 165, 171 (1968) (“Absentee voting is a salutary feature in our democratic processes of government. It assures the exercise of the most sacred privilege of citizenship, namely, a participation in the selection of those who are to guide the destiny of community, state and nation, even though illness or pressing business might make it impossible for the elector to appear at the voting poll in his district on election day.”).

In light of these expansions of absentee voting, passing a no-excuse law in the twenty-first century would not give a voter previously unavailable opportunities to commit fraud, since under decades-old law she already can simply state that she will be out of town for work or

vacation on election day and on that basis alone cast an absentee ballot.³ There are also now protections to prevent interlopers from tampering with absentee ballots, including the statutory requirement that absentee ballots be returned by voters themselves, either by placing them in the mail or delivering them in person to the county board of election. *See* 25 P.S. § 3146.6(a)(1); *see also In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 577 Pa. 231, 246 (2004) (“The provision at issue limits the number of third persons who unnecessarily come in contact with the ballot and thus provides some safeguard that the ballot was filled out by the actual voter, and not by a perpetrator of fraud, and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it, or even to destroy it.”).⁴

3. More recent decisions suggest the legislature has broad powers to decide who may vote by absentee ballot

Two Pennsylvania court decisions reflect a recognition that the 1968 Constitution gives the legislature broad powers to decide who may vote by absentee ballot. Neither of these cases

³ One election in modern Pennsylvania history was marred by extensive absentee-ballot fraud. *See Marks v. Stinson*, No. 93-cv-6157, 1994 U.S. Dist. LEXIS 5273 (E.D. Pa. Apr. 26, 1994), *aff'd without opinion*, 37 F.3d 1487 (3d Cir. 1994). The scheme in *Marks* involved pressuring voters to select a particular candidate, as well as intentional violations of the Election Code by certain election officials in Philadelphia. Among many other misdeeds, the fraudsters tricked targeted voters into believing that absentee voting was open to anyone who preferred to vote from home, *see id.* at *30-31, *35. While this fraudulent scheme did use as one of its mechanisms absentee voting by people not legally qualified to do so, the scheme would not have worked without the participation of multiple election officials, and legalizing no-excuse absentee balloting would not make it substantially easier to repeat or to hide a *Marks*-type scheme.

⁴ North Carolina officials recently nullified a U.S. House election after uncovering a fraudulent scheme involving absentee ballots. *See, e.g., Amy Gardner, N.C. Board Declares a New Election in Contested House Race After the GOP Candidate Admitted He Was Mistaken in His Testimony*, Wash. Post, Feb. 21, 2019, available at https://www.washingtonpost.com/politics/candidate-says-new-congressional-election-warranted-in-north-carolina/2019/02/21/acae4482-35e0-11e9-854a-7a14d7fec96a_story.html. In that scheme, a campaign operative “allegedly assembled a crew of election workers to illegally collect, fill out and forge mail-in ballots.” *Id.* Such a scheme would be at least theoretically possible in Pennsylvania irrespective of whether Pennsylvania allowed no-excuse absentee balloting. And, as in North Carolina, anyone perpetrating such a scheme would probably get caught, also irrespective of whether no-excuse absentee balloting were allowed. *See Maggie Astor, North Carolina's Election Turmoil*, N.Y. Times, Dec. 3, 2018, available at <https://www.nytimes.com/2018/12/03/us/politics/north-carolina-election-fraud-.html> (reporting that the scheme surfaced in part thanks to statistical anomalies in absentee ballot request and return rates in two counties, and in part thanks to reports from voters from whom the fraudsters had illegally collected ballots).

squarely addressed the question of how broadly the legislature could expand access to the absentee ballot; rather, they held that the legislature could deny absentee voting to incarcerated felons. In *Martin v. Haggerty*, 548 A.2d 371, 374-75 (Pa. Commw. Ct. 1988), the Commonwealth Court stated:

The Legislature has chosen to extend the franchise to certain categories of voters who would otherwise not be able to vote through the provisions in the Code allowing for absentee ballots. However, it has not seen fit to extend the privilege of voting by absentee ballots to all citizens otherwise qualified who for some reason other than those listed in Section 1301 of the Code cannot attend their regular place. It is the Legislature's prerogative to regulate registration and thus decide who may receive an absentee ballot.

This language indicates judicial approval of a "floor" theory. *Martin* is not, however, a decision of the Supreme Court, and the quoted passage is arguably dictum.⁵

The Supreme Court's decision in *Ray v. Commonwealth*, 442 Pa. 606, 609 (1971), also suggests that article VII sets a floor. There the Court stated that "the Legislature has the power to define 'qualified electors' in terms of age and residency requirements." Because it treats the age and residency requirements of Article VII, § 1, as a floor, *Ray* can be seen as abrogating *Chase* and *McCafferty v. Guyer*, insofar as those decisions treated an earlier constitution's list of qualified electors as a ceiling. More generally, if the 1968 Constitution sets a floor for qualified electors in Article VII, § 1, then by the same logic it sets a floor for absentee voters in Article VII, § 14.

The New Jersey Supreme Court considered a nearly identical floor-versus-ceiling question for absentee voting, and it upheld the legislature's expansion of categories of absentee voters beyond members of the military, which was the sole category identified in the 1947 New Jersey Constitution. *Gangemi v. Berry*, 134 A.2d 1 (N.J. 1957). The *Gangemi* court reasoned that the state constitution, unlike the U.S. Constitution, is a limit on the otherwise plenary powers of the Legislature. This decision offers persuasive precedent for adopting a similar approach in Pennsylvania.

⁵ A dictum is "a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." Black's Law Dictionary 1102 (8th ed. 2004).

4. The change from “may” to “shall” in the 1968 Constitution gives the legislature more power to set categories of absentee voters

The current Constitution’s election provisions differ in numerous ways from prior iterations, so it is far from clear that election-law decisions under prior constitutions should have binding precedential force. Specifically in the context of absentee voting, there is textual support for the claim that the modern constitution intended to turn a ceiling into a floor, by changing the word “may” to “shall.” A 1949 constitutional amendment said that “[t]he General Assembly may, by general law, provide a manner in which” disabled war veterans can vote by absentee ballot. Similar amendments in 1953 and 1957 said the General Assembly “may” allow certain categories of people to vote by absentee ballot. *See generally Absentee Ballots Case*, 423 Pa. 504, 508 (1966) (“In 1957, the Pennsylvania Constitution was further amended by the addition of Art. 8, § 19, which permitted civilian absentee voting where unavoidable absence or physical disability justified the privilege. In 1960, the legislature implemented this constitutional authorization . . .”). But in 1967, another amendment (which was carried over into 1968 Constitution), said “[t]he Legislature shall, by general law, provide a manner in which” various categories of voters can vote by absentee ballot (emphasis added). This shift to “shall” was followed in both of the subsequent amendments relating to absentee voting, in 1985 and 1997. Likewise, the ballot question for the 1997 amendment is more consistent with a floor than a ceiling interpretation, as it characterizes the amendment as “requir[ing]”—not “permitting”—the legislature to expand the eligibility categories for absentee voting. Ballot Question Regarding Joint Resolution 1997-3, 27 Pa. Bull. 3993, 3994 (Aug. 9, 1997) (“Shall the Pennsylvania Constitution be amended to **require the enactment of legislation** permitting absentee voting by qualified electors who at the time of an election may be absent from the municipality where they reside because their duties, occupation or business require them to be elsewhere, which would change the current law permitting absentee voting by such qualified electors only when they are absent from the entire county where they reside?” (emphasis added)).

This textual shift suggests that by 1967, the modern constitutional framers intended to require the General Assembly to permit, at a minimum, specified categories of voters to cast absentee ballots. This reflects a significant change from the *Chase* court’s nineteenth-century discomfort with any form of non-in-person voting.

A likely counterargument would be that the “shall” amendments merely made permanent guarantees that certain types of voters could cast absentee ballots, without altering the basic

“offer to vote” requirement of in-person voting for categories of voters not named in article VII, § 14. But the more natural reading of the switch from “may” to “shall” is that under the modern Constitution, the General Assembly has general discretion to set qualifications for absentee voting but must allow certain types of voters to cast absentee ballots.

CONCLUSION

It is highly likely that the current Pennsylvania Constitution’s list of four categories of absentee voters sets a floor, not a ceiling. In other words, the General Assembly has the power to expand the categories of eligible absentee voters, including the power to allow any eligible voter to choose to vote by absentee ballot. Pennsylvania Supreme Court decisions from 1862 and 1924 cast a degree of doubt on this conclusion, but there are strong reasons to believe a no-excuse statute would withstand a court challenge,