IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: NOMINATION PETITIONS OF CAROLINE AVERY AS CANDIDATE FOR REPRESENTATIVE IN CONGRESS FOR THE FIRST CONGRESSIONAL DISTRICT AND MICHAEL DOYLE AS CANDIDATE FOR REPRESENTATIVE IN CONGRESS FOR THE TWELFTH CONGRESSIONAL DISTRICT	:	No. 28 MM 2022
PETITION OF: MICHAEL ZOLFO, ERIC SLOSS AND SANDOR ZELEKOVITZ, Objectors	:	

CONCURRING STATEMENT

JUSTICE WECHT **Filed: March 28, 2022**

I have searched our single-sentence *per curiam* Order[1] in this case for evidence that a majority of this Court's Justices believes that the Commonwealth Court was or has been "sitting on its hands," or that we denied that court "the benefit of any doubt" or otherwise "doubt[ed] the good faith of the Commonwealth Court's reliance on" a somewhat opaque footnote in this Court's decision in *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711, 735 (Pa. 2012) ("*Holt I*"). Concurring Statement (Brobson, J.) at 6-8. And I have come up empty-handed. I cannot emphasize

[1] That Order provided: "**AND NOW**, this 28th day of March, 2022, the Emergency Application for a Writ of Mandamus and/or Extraordinary Relief is **DISMISSED AS MOOT**, as the Commonwealth Court is timely holding the hearings pursuant to our prior Order." *In re Nomination Petitions of Avery & Doyle*, 28 MM 2022 (Pa. Mar. 28, 2022) (*per curiam*).

enough how far these characterizations diverge from my reasons for joining this Court's Order.

First and foremost, the Commonwealth Court's decision to relist the previously scheduled March 31 and April 4 hearings in the above-captioned matters for Tuesday, March 29, rendered the Applicants' request for relief moot. While not technically in compliance with the plain language of our Order in *Carter v. Chapman*, 7 MM 2022, 2022 WL 549106, at *1 (Pa. Feb. 23, 2022) (*per curiam*) (establishing March 25, 2022 as the "[l]ast day that may be fixed by the Commonwealth Court for hearing on objections that have been filed to nomination petitions")—which would have been impossible to satisfy as of the date of this Court's Order here—the Commonwealth Court's reconsideration of its initial scheduling orders nevertheless made it possible for that court to "render decisions involving objections to nomination petitions" by March 29, *i.e.*, within the bounds set by our Order. *Id.* Thus, due to the Commonwealth Court's intervening action, Applicants no longer could demonstrate that the court would fail to perform its duty within the *Carter* time frame so as to justify resort to any of the extraordinary bases for relief set forth in their Application.

That said, this dispute raises important questions regarding the nature of our orders in election matters and the lower courts' compliance with them, and I respectfully disagree with Justice Brobson's analysis on that subject.

At issue here are provisions of the Election Code pertaining to judicial resolution of objections to nomination petitions, which have existed in substantially the same form since the Code's adoption in 1937. Section 977 provides:

> All nomination petitions and papers received and filed within the periods limited by this act shall be deemed to be valid, unless, within seven days

> after the last day for filing said nomination petition or paper, a petition is presented to the court specifically setting forth the objections thereto, and praying that the said petition or paper be set aside. . . . Upon the presentation of such a petition, the court shall make an order fixing a time for hearing which shall not be later than ten days after the last day for filing said nomination petition or paper, and specifying the time and manner of notice that shall be given to the candidate or candidates named in the nomination petition or paper sought to be set aside. On the day fixed for said hearing, the court shall proceed without delay to hear said objections, and shall give such hearing precedence over other business before it, and shall finally determine said matter not later than fifteen (15) days after the last day for filing said nomination paper.

25 P.S. § 2937.

Justice Brobson fairly describes the real-world concerns with treating these statutory deadlines as "mandatory, not directory," including the practicability of "hold[ing] all hearings on all objections, regardless of number and complexity, within 3 days of the filing of the objections and issu[ing] decisions within 5 days thereafter." Concurring Statement (Brobson, J.) at 2-3. As it so happens, these very concerns animated this Court's earliest decisions interpreting Section 977 soon after the Code's adoption.

This Court first confronted Section 977's constraints in *In re Objections to Nomination Papers of "Socialist Labor,"* 1 A.2d 831 (Pa. 1938) ("*Socialist Labor*"). There, an objector timely filed[2] a petition to set aside the nomination papers of four candidates for statewide office running under the banner of the political body "Socialist Labor." Due

[2] At the time *Socialist Labor* was decided, Section 977 required objectors to file their petitions "within five days after the last day for filing the said nomination petition or paper." 1 A.2d at 832 n.1 (quoting Act of June 3, 1937, P.L. 1333, No. 320, § 2937). Although that filing deadline subsequently was increased to seven days, where it now stands, the statutory language concerning the ten- and fifteen-day windows for the lower courts to set hearing dates and resolve challenges, respectively, has never been altered.

to "the pressure of judicial business," the Court of Common Pleas of Dauphin County[3] scheduled the hearing on the objector's petition for a date just beyond the ten-day window prescribed by Section 977. *Id.* at 833. The candidates moved to dismiss the petition in part on the grounds that the court's scheduling order violated the Election Code. *Id.* at 831. The court denied the motion, heard testimony, and ultimately set aside the nomination papers, prompting the candidates' direct appeal to this Court. *Id.* at 832.

The merits of the underlying challenge are not important here. What matters is the Court's treatment of the Code's time limits. Reasoning that the General Assembly's "intent and purpose in enacting Section 977 was to secure a prompt decision of questions affecting candidates for office," the Court acknowledged the Legislature's power to "fix a time within which ministerial acts of procedure must be performed by litigants and parties so that the court may acquire jurisdiction of the subject matter," and declined to "alter this legislative mandate." *Id.* Regarding the judiciary's role in adjudicating these matters, however, the Court addressed the practical difficulties attendant to the Code's tight time constraints:

> The time within which such questions may be resolved is frequently very short. While courts will respect and follow legislative enactments pertaining to election procedure, they will not do so where such enactments are infringements on the judicial power, or where the provision is clearly incompatible with important judicial business, or impossible of judicial performance. [Section 977] requires the court not only to set a definite day for hearing but to determine and decide, within a fixed time, the various questions presented in election matters. . . .
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> Where the act to be performed within a fixed time involves the exercise of purely judicial functions, such as hearing and decision of matters properly

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[3] The jurisdiction previously exercised by the courts of common pleas over these matters subsequently was "transferred to the Commonwealth Court by the Appellate Court Jurisdiction Act of 1970," 17 P.S. § 211.14(a)(57). *In re Moore*, 291 A.2d 531, 533 n.5 (citing Act of Jan. 6, 1970, P.L. (1969) 434).

> before the court, or where it is impossible of judicial performance . . . within the time fixed by the legislature, such provisions will be held to be directory and not mandatory.

Id. (citing *In re Election Cases*, 65 Pa. 20, 34 (1870)) (cleaned up).

In prior cases involving various Election Code commands that voters, candidates, objectors, and the like "shall" do some act, I criticized what I viewed as arbitrary (and sometimes gratuitous) efforts to distinguish seemingly unambiguous statutory language sometimes as "mandatory" and other times as merely "directory."[4] Those debates need not be rehashed here. Notwithstanding its use of that vexatious terminology, in relegating Section 977's scheduling parameters to "directory" status, the *Socialist Labor* Court's decision appropriately turned upon separation-of-powers principles. *See id.* (identifying "infringements on the judicial power" as a ground for noncompliance with legislative directives regarding the "exercise of purely judicial functions"). And this Court consistently has reaffirmed that principled distinction as applied to the Election Code's timing provisions in the ensuing decades. *See, e.g.*, *In re Nomination Papers of Am. Labor Party*, 44 A.2d 48, 50 (Pa. 1945) ("Clearly the legislature intended all provisions of Section 977 to be mandatory. It could not, however, constitutionally impose upon the courts mandatory duties pertaining to the exercise of the judicial function."); *Moore*, 291 A.2d at 533 ("The scheduling of hearings is definitely a 'purely judicial function,' as is also the 'specifying of the time and manner of notice' which [Section 977] directs the court

[4] *See, e.g.*, *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1080-87 (Pa. 2020) (Wecht, J., concurring and dissenting); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 390-92 (Pa. 2020) (Wecht, J., concurring); *accord In re Cohen for Office of Phila. City Council-at-Large*, 225 A.3d 1083, 1092-96 (Pa. 2020) (Wecht, J., dissenting).

to include in its order."); *Holt I*, 38 A.3d at 721 n.10; *accord In re Shapp*, 383 A.2d 201, 204 (Pa. 1978).

In Section 977, the General Assembly has made clear its intent that challenges to nomination papers and petitions be heard and resolved by the Commonwealth Court within two weeks or so of the filing deadlines, in order to ensure an orderly process in the runup to a primary election. And I have no doubt that the Commonwealth Court has sought assiduously to observe those time frames, indeed, especially so under the difficult circumstances of a compressed election calendar. So, too, has this Court strived to protect the Legislature's preferred primary schedule to the extent possible by moving expeditiously to resolve impasse litigation over the Commonwealth's congressional map as well as challenges to the Legislative Reapportionment Commission's ("LRC") Final Plan for state House and Senate districts. In slightly modifying the calendar for both congressional and state legislative primary elections this year, our Orders reflected the reality that the work of our Commonwealth's principal election administrators—the Department of State and the county boards of elections—necessarily is constrained by other state and federal election deadlines, particularly April 2, the federal deadline for sending remote military-overseas absentee ballots under the federal Uniformed and

Overseas Citizens Absentee Voting Act ("UOCAVA"),[5] and May 17, the date fixed by the Election Code for Pennsylvania's unified primary.[6]

Fundamentally, though, *this* is not a case about the effect of *statutory* commands. In an exercise of our plenary supervisory authority over Pennsylvania's Unified Judicial System—a responsibility imposed (and a prerogative conferred) upon us by the Commonwealth's Constitution[7]—this Court instructed the Commonwealth Court to hold hearings on challenges to the nomination petitions of congressional candidates by Friday,

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[5] *See* 52 U.S.C. § 20302(a)(8)(A) (requiring the States to "transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election"); *see also* 25 Pa.C.S. § 3508(a)(1) ("[N]ot later than 45 days before the election, the county election board in each jurisdiction participating in the election shall transmit a ballot and balloting materials to all covered voters who by that date submit a valid military-overseas ballot application.").

[6] *See* 25 P.S. § 2753(a) ("There shall be a General primary preceding each general election which shall be held on the third Tuesday of May in all even-numbered years, except in the year of the nomination of a President of the United States, in which year the General primary shall be held on the fourth Tuesday of April.").

[7] *See* PA. CONST. art. V, § 2(a) ("The Supreme Court shall be the highest court of the Commonwealth and in this Court shall be reposed the supreme judicial power of the Commonwealth."); *see also* 42 Pa.C.S. § 502 ("The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722."); *id.* § 726 ("Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done."); *see generally Bd. of Revision of Taxes, City of Phila. v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2010) ("This Court may assume, at its discretion, plenary jurisdiction over a matter of immediate public importance that is pending before another court of this Commonwealth. Although employed to similar effect, our extraordinary jurisdiction is distinct from our King's Bench jurisdiction, which allows us to exercise power of general superintendency over inferior tribunals even when no matter is pending before a lower court.") (citations omitted).

March 25, and to resolve all objections by Tuesday, March 29. Here, the Commonwealth Court failed to meet at least one of those deadlines. When several petitioners, Applicants here, sought reconsideration of that court's modified schedule, it declined. Our command seemingly being clear, those individuals sought relief from this Court. But for the lower court's late modification of its own orders, I would have been inclined to grant Applicants relief. However, far from intimating an expectation that the court "justify [its] scheduling decisions in [its] scheduling orders," Concurring Statement (Brobson, J.) at 7, my inclination in favor of the Applicants' position simply reflects the well-settled principle that "[w]here the orders of the Supreme Court" and an inferior tribunal conflict, "any order of this Court obviously is 'supreme.'" *In re Bruno*, 101 A.3d 635, 688 (Pa. 2014).

Justice Brobson's suggestion that a majority of the Justices of this Court somehow "impl[ied] through language" in Monday's *per curiam* Order a lack of due diligence or presumed bad faith on the Commonwealth Court's part, or that we might transgress in adopting what he calls "the extreme remedy of this Court's public interference with another court's docket," Concurring Statement (Brobson, J.) at 5, 7, is perplexing and off-target. Every working day, this Court dispassionately assesses the rulings of all manner of Pennsylvania tribunals for legal error, abuses of discretion, or other substantive or procedural irregularities. Not infrequently, this Court in one fashion or another "interferes" with Pennsylvania courts' rulings—and, sometimes, their dockets. Seldom does this involve a qualitative judgment regarding the lower court's motives. It is nothing more than this Court ensuring regularity and consistency in the law.

The mere departure from our scheduling Order does not suggest bad faith. It may, in fact, reflect a good-faith misapprehension of governing law arising from an overly broad

reading of a lengthy footnote from this Court's 2012 decision in *Holt I*. Indeed, both the Commonwealth Court and Justice Brobson cite that footnote for the proposition that our Order establishing new deadlines for nomination petition challenges may be considered "directory." Their reliance on that passage is misplaced.

While that footnote served two important functions, it provides no authority for an inferior tribunal to issue orders in conflict with our own. In the first half of the footnote, this Court explained the necessity of "adjust[ing]" the election calendar for that year's state House and Senate primary election. Pursuant to Article II, Section 17, of the Pennsylvania Constitution, the LRC's adoption of a Final Plan for state legislative districts automatically triggers a thirty-day period during which "[a]ny aggrieved person may file an appeal" in this Court challenging the plan as "contrary to law." PA. CONST. art. II, § 17(d). Although the LRC in *Holt* had adopted its Final Plan by December 12, 2011, the constitutionally prescribed appeals period delayed this Court's consideration of appeals challenging the plan until January 2012. That was significant because 2012 was a presidential election year, meaning that Pennsylvania's primary election would be in April, rather than May, effectively pulling the nomination petition circulation period forward by a month for every office on the primary ballot. *See* 25 P.S. § 2753(a).

Consequently, the *Holt* Court had to reconcile the fact that, if it did not adjust the primary election calendar, its review of the LRC's Final Plan that January following the thirty-day appeals period would have directly conflicted with the window in which candidates seeking the political parties' nomination for a seat in the General Assembly could begin to circulate nomination petitions. This Court noted that it

> was cognizant that the LRC's timeline in adopting a Final Plan had ensured that the appeals [challenging the Final Plan] would carry into the period

> when nomination petitions could begin to be circulated, and that any mandate other than outright denial or dismissal of the appeals could cause disruption of that process. Therefore, the *per curiam* order also was careful to adjust the primary election schedule and, consistently with the order we entered on February 14, 1992, [in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992),] the last time a presidential primary occurred in a reapportionment year, we directed that petition signatures collected before our mandate issued would be deemed valid as to timeliness. *See* Order, 1/25/12 (*per curiam*).

Holt I, 38 A.3d at 721 n.10.

This Court then explained the source of *its* authority to alter the dates governing the judiciary's consideration of petition challenges, which should now be familiar:

> Our adjustment of the primary election calendar does not alter the discretion vested in the Commonwealth Court, which will be tasked in its original jurisdiction with hearing any objections to nominating petitions. The Election Code provides a very restrictive time schedule, specifically including a ten day cut-off for hearings and a fifteen day deadline for decisions. 25 P.S. § 2937. However, this Court recognized that appeals of this nature entail the "exercise of purely judicial functions." *In re Moore*, 291 A.2d 531, 534 (Pa. 1972). Thus, as it respects the judicial function, the Election Code's deadlines are understood in this context as "directory," although the deadlines and requirements of the Code will remain mandatory as to petitioners.

Id. (citing *Mellow*, 607 A.2d at 224; *Shapp*, 383 A.2d at 204). And it is here that the Commonwealth Court and Justice Brobson conflate two distinct sources of scheduling authority.

While I have no doubt that the Commonwealth Court in this case in good faith believed that this statement provided it some flexibility to further adjust the dates we established in *Carter*, nothing in *Holt* or the authorities it cited countenances such tinkering. Properly contextualized, I understood this Court's assurances that the lower court's discretion would otherwise remain unaltered as a reference to the *manner* in which that tribunal hears and resolves nomination challenges in its original jurisdiction—*e.g.*, that the court retains ample latitude to direct the form and method of submitting

challenges, to take witness testimony, and to run the hearings generally—so long as it did so within the time frame set by this Court. The Commonwealth Court's discretion did not extend to deviating from our scheduling instructions at its own volition, and that court misapprehended its own power in doing so.

Citing past practices, Justice Brobson contends that this Court's silence in the face of similar deviations has implicitly sanctioned the approach taken by the Commonwealth Court here. He cites *In re Nomination Petition of Gales*, 54 A.3d 855 (Pa. 2012), as an example of this Court's failure to criticize the Commonwealth Court for "not strictly adher[ing] to the hearing and decision dates set forth in the Election Code" when it held an evidentiary hearing on the objections at issue "beyond the dates set forth in the Court's Per Curiam Order" in *Holt I*. Concurring Statement (Brobson, J.) at 4 (noting that "the Commonwealth Court held an evidentiary hearing on the objections on March 6 and 7, 2012, and issued its order on the last day of the hearing"). While it is true that this Court did not criticize the lower court's scheduling decision in *Gales*, it had good reason to exercise such restraint: no one asked this Court to intervene, even though the lower court's technical noncompliance with our scheduling Order might have warranted such intervention had someone sought relief on that basis. *Cf. Taylor v. King*, 130 A. 407, 409 (Pa. 1925) (explaining that a governmental body's historical course of conduct will not *ipso facto* "justify [ ] judicial approval" for all time notwithstanding noncompliance with the law, and that "such action will be restrained *when properly attacked*") (emphasis added).

I would take no pleasure in stepping on the Commonwealth Court's best efforts to resolve the deluge of nomination challenges it faces statewide. But our order in *Carter* was clear, well-reasoned, and tailored to ensure that this primary cycle's timing conforms

with federal law and accounts for the difficulties of preparing and distributing primary ballots to Pennsylvania voters all over the world. It is true that we have held in past cases that separation-of-powers concerns effectively rendered legislative attempts to control certain aspects of the judicial process merely advisory. But in this case, only one power was implicated—ours to direct Pennsylvania's Unified Judiciary. If we are to administer the judiciary effectively, the lower courts' adherence to our directives cannot be optional.

Justices Todd, Donohue and Dougherty join this concurring statement.