Received 9/30/2021 9:03:34 PM Commonwealth Court of Pennsylvania

Filed 9/30/2021 9:03:34 PM Commonwealth Court of Pennsylvania
244 MD 2021 and additional consolidated case(s)

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
Michele D. Hangley (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
John Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200

OFFICE OF ATTORNEY GENERAL
Stephen Moniak (I.D. No. 80035)
Karen M. Romano (I.D. No. 88848)
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-2717

PENNSYLVANIA GOVERNOR'S OFFICE OF GENERAL COUNSEL
Kenneth L. Joel (I.D. No. 72370)
333 Market Street, 17th Floor
Harrisburg, PA 17101
(717) 787-9348

PENNSYLVANIA DEPARTMENT OF STATE
Kathleen M. Kotula (I.D. No. 318947)
306 North Office Bldg.
401 North Street
Harrisburg, PA 17120-0500
(717) 783-1657

TUCKER LAW GROUP, LLC
Joe H. Tucker, Jr. (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
Jessica A. Rickabaugh (I.D. No. 200189)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG McLINKO, Petitioner, v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, et al., Respondents.	**CASES CONSOLIDATED** No. 244 MD 2021

TIMOTHY BONNER, et al., Petitioners, v. VERONICA DEGRAFFENREID, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, et al., Respondents.	No. 293 MD 2021

MEMORANDUM IN SUPPORT OF RESPONDENTS' APPLICATION FOR SUMMARY RELIEF REGARDING THE *BONNER* PETITION

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

Respondents, Acting Secretary of the Commonwealth Veronica Degraffenreid and the Department of State of the Commonwealth of Pennsylvania, file this Memorandum in support of their Application for Summary Relief.

I. INTRODUCTION

Petitioners are fourteen current members of the Pennsylvania House of Representatives. Eleven of them were not only legislators at the time Act 77 was passed; they voted *to enact* the very mail-in voting procedures they now claim are facially unconstitutional. The remaining Petitioners were either in office when Act 77 was passed or were active candidates no later than January 2020. Nonetheless, although Act 77 was signed into law nearly two years ago, Petitioners inexplicably waited until late last month to challenge its constitutionality; even then, they brought only a "tag along" suit, which was filed a month behind a virtually identical lawsuit by Bradford County Board of Elections member Doug McLinko. In the meantime, Pennsylvanians have voted with mail-in ballots in three statewide elections, the Commonwealth and Pennsylvania's counties have invested massive resources in implementation of the new voting procedures, and Pennsylvania voters have come to rely on mail-in voting.

Petitioners' claims must be dismissed on a number of procedural grounds. First, Petitioners fail to plead a basis for standing; they do not allege any facts showing that they have a substantial, particularized interest in the challenged

provisions of Act 77. Second, the suit is untimely, because it is brought outside the statutory time limit for challenges set forth in Act 77.

Third, the case is barred under the doctrine of laches. Petitioners' and McLinko's now-consolidated lawsuits represent the second time that the claim that Act 77's mail-in voting provisions are unconstitutional has come before the courts. The first time, some ten months ago, the Pennsylvania Supreme Court quickly dismissed the case on laches grounds. The Court held that the petitioners in that case had failed to act with due diligence when they allowed two elections to go by before filing their claim, and that their delay had caused substantial prejudice to Pennsylvania voters. In this case, Petitioners waited even longer, allowing not two, but three, elections to pass before filing suit—and ensuring, through their delinquent timing, that yet another election (a fourth) would transpire before this Court could rule on their Petition. There is no excuse for their tardiness, and the prejudice is extreme.

Even if this case could overcome the procedural hurdles listed above, it would fail. Petitioners' argument relies on a tortured reading of the Pennsylvania Constitution that would give the Legislature authority to prescribe methods of voting in one section, while smuggling an in-person voting requirement into a different section that does not deal with methods of voting at all. The only basis for Petitioners' contention is two century-old cases that are inapplicable (because

they dealt with long-since-replaced versions of the Constitution) and were wrongly decided at the time. While the Court need not and should not reach the merits of this case, if it does, it should take the opportunity to put an end to the theory that an obscure phrase in the Pennsylvania Constitution somehow makes it impossible for the General Assembly to make modern, convenient, and secure methods of voting available to Pennsylvania voters.

II. FACTUAL BACKGROUND

A. Pennsylvania's Act 77

In 2019, with the support of a bipartisan supermajority of both legislative chambers—including eleven of the Petitioners bringing this lawsuit—the Pennsylvania General Assembly enacted Act 77 of 2019, which made several important updates and improvements to Pennsylvania's Election Code. Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. 2019-77 (S.B. 421) (West) ("Act 77"). Act 77 included provisions that, for the first time, offered the option of mail-in voting to Pennsylvania electors who did not qualify for absentee voting. *See* 25 Pa. Stat. §§ 3150.11–3150.17. This change was a significant development that made it easier for all Pennsylvanians to exercise their fundamental right to vote and brought the state in line with the practice of dozens of other states. Act 77's other provisions included the elimination of straight-ticket voting, changes to

registration and ballot deadlines, and modernization of various administrative requirements.

Reflecting the complex negotiations and policy tradeoffs that were involved in persuading a Republican-controlled legislature and a Democratic Governor to support the legislation, the General Assembly included a nonseverability provision stating that invalidation of certain sections of the Act, including the mail-in ballot provisions and the straight-ticket voting provisions, would void almost all of the Act. *See* Act 77 § 11. The General Assembly also understood that implementing such a significant overhaul of Pennsylvania's voting laws would be a lengthy, complex, and resource-intensive endeavor. It also understood the risk of bad-faith gamesmanship, namely, the possibility that certain actors might wait to see the electoral results of Act 77's grand bipartisan compromise before determining whether to challenge it, filing suit only if and when the political effects of the statute were perceived as unfavorable to the would-be petitioners' partisan interests. The General Assembly therefore sought to ensure that any challenges to the constitutionality of Act 77's major provisions, including mail-in voting, would be resolved before Act 77 was implemented. Section 13(3) of Act 77 thus provided that all constitutional challenges to Act 77 had to be brought within 180 days of the statute's effective date. *See* Act 77 § 13(3).

Act 77 was signed into law and became effective on October 31, 2019. The statutory 180-day period for challenges to the law expired on April 28, 2020. Neither Petitioners nor anyone else challenged the constitutionality of Act 77's authorization of mail-in voting before that date.

B. While Petitioners Inexplicably Delay Filing This Lawsuit, the Statutory Challenge Period Expires, the Electorate Learns to Rely on Mail-In Voting, the Commonwealth and Counties Invest Substantial Resources in It, and Identical Claims Are Dismissed on Laches Grounds

1. In the 16 Months Between the End of Act 77's Statutory Challenge Period and the Filing of This Lawsuit, the Commonwealth and the Counties Invest Millions of Dollars and Untold Amounts of Time in Adapting to Mail-In Voting and Educating the Voting Public

Under any circumstances, adding mail-in voting to the Commonwealth's existing voting methods (in-person and absentee voting) would have been a major endeavor. The COVID-19 pandemic, however, turned implementation of mail-in voting from a difficult task to a Herculean one. Because of voters' and election workers' concerns about in-person voting in a pandemic, voters chose to vote by mail-in or absentee ballot in numbers far exceeding what was expected before the pandemic took hold. (Affidavit of Jonathan Marks ("Marks Aff.") ¶ 6, *McLinko v. Commonwealth*, No. 244 MD 2021 (Pa. Commw. Ct. filed Aug. 26, 2021) (attached as Exhibit A hereto). In the June 2020 primary election, 1.5 million

ballots—more than half of the total ballots cast—were cast by mail-in or absentee ballot. (*Id.* ¶ 7.)

While the June 2020 primary election was fairly and effectively run, the unexpected numbers of mail-in and absentee ballot applications led, in some counties, to delays in processing applications, issuing ballots, and canvassing voted ballots. (*Id.* ¶ 8.) Accordingly, in anticipation of a high turnout election in November 2020, the Commonwealth and county election administrators invested substantial amounts of time and money in ways to smooth the mail-in and absentee ballot process. (*Id.* ¶¶ 9–20.) For example, many county boards of elections purchased new machinery to process the increased volume of mail-in ballots. (*Id.* ¶¶ 15–19.)[1]

Counties and the Commonwealth also spent untold hours training election workers and administrators to process mail-in ballot applications and manage the voting process. (*Id.* ¶¶ 14–18.) Finally, the Commonwealth, the counties, and many third parties have devoted enormous resources to educating voters about mail-in voting. (*Id.* ¶ 12.) The Pennsylvania Department of State alone, for

[1] Among other expenditures, Philadelphia County spent $5 million on "nearly three-dozen pieces of election equipment" used to sort and process mail-in ballots; Montgomery County spent $1.5 million on a high-speed mail sorter and 15 envelope extractors; and Bucks County spent about $1 million on envelope extractors and high-speed mail scanners. Aaron Moselle, *How Philly-Area Election Boards Will Count Your Mail Ballot*, WHYY (Oct. 26, 2020), https://whyy.org/articles/how-philly-area-election-boards-will-count-your-mail-ballot/.

example, spent $13.7 million on communications to educate voters about the availability of mail-in voting, and to encourage voters to apply early for mail-in ballots. (*Id.*) County boards of elections made similar efforts.

Those efforts were extremely successful; Pennsylvania voters have enthusiastically embraced mail-in voting. Of the approximately 6.9 million Pennsylvanians who voted in the 2020 general election, approximately 2.7 million cast a mail-in or absentee ballot. (*Id.* ¶ 10.) Many Pennsylvanians have also opted to vote by mail in future elections. Act 77 allows "[a]ny qualified registered elector [to] request to be placed on a permanent mail-in ballot list file." 25 Pa. Stat. § 3150.12(g)(1). Once an elector does so, a mail-in ballot application will be automatically mailed to the elector at the beginning of each year, and the elector's return of that application will cause her to be sent a mail-in ballot for each election during that year. *Id.* An elector who has requested to be placed on this permanent list therefore has every reason to expect that she need take no further affirmative steps to be able to vote; the Election Code assures her that elections officials will send her the appropriate materials at the appropriate time. (Marks Aff. ¶ 24.) Currently, approximately 1,380,000 Pennsylvania voters are on the permanent mail-in ballot list file established by Act 77. (*Id.* ¶ 25.).

2. Nine Months Before This Case Is Filed, the Pennsylvania Supreme Court Dismisses Identical Claims on Laches Grounds

On November 21, 2020, on the eve of certification of the 2020 presidential election, a different group of petitioners, represented by the same counsel who represents Petitioners here, filed a lawsuit that challenged Act 77 on grounds identical to those asserted here. In *Kelly v. Commonwealth*, No. 68 MAP 2020 (Pa. Sup. Ct.), *exercising extraordinary jurisdiction over* No. 620 MD 2020 (Pa. Commw. Ct.), the petitioners alleged—as Petitioners do here—that the mail-in balloting provisions of Act 77 violate the Pennsylvania Constitution. Complaint for Declaratory and Injunctive Relief ¶ 1, *Kelly v. Commonwealth*, No. 620 MD 2020 (Pa. Commw. Ct. Nov. 21, 2020) ("*Kelly* Complaint"). The *Kelly* petitioners relied on arguments and authorities identical to those Petitioners assert here. *See id.* ¶¶ 16–18, 66–74; Memorandum of Law in Support of Motion for Emergency/Special Prohibitory Injunction at 1–8, *Kelly v. Commonwealth*, No. 620 MD 2020 (Pa. Commw. Ct. Nov. 22, 2020). They sought the same relief Petitioners seek here—a declaration that Act 77 is unconstitutional and was void when enacted—along with an order enjoining certification of the November 2020 presidential election. *Compare Kelly* Complaint at 22 (seeking declaratory relief), *with Bonner* Pet. ¶ 57 & p. 25 (same).

The Pennsylvania Supreme Court, exercising extraordinary jurisdiction, dismissed the *Kelly* petition with prejudice. *Kelly*, 240 A.3d 1255. In a *per curiam* Order, the currently sitting members of the Supreme Court stated that the *Kelly* petition "violates the doctrine of laches given [the *Kelly* petitioners'] complete failure to act with due diligence in commencing their facial constitutional challenge, which was ascertainable upon Act 77's enactment." *Id.* at 1256. The Court noted that more than a year had gone by, and millions of Pennsylvanians had voted in the 2020 primary and general elections, since Act 77 was passed. *Id.*[2]

Chief Justice Saylor partially dissented, stating that, while he agreed that the injunctive relief the *Kelly* petitioners sought could not be granted, he disagreed with the majority's decision to apply the doctrine of laches to the prospective, declaratory relief portion of the petition for review. *See* 240 A.3d at 1262 (Saylor,

---

[2] Justice Wecht's concurrence in *Kelly* describes, in detail, the many opportunities that the *Kelly* petitioners had to challenge Act 77.

> Petitioners could have brought this action at any time between October 31, 2019, when Governor Wolf signed Act 77 into law, and April 28, 2020, when this Court still retained exclusive jurisdiction over constitutional challenges to it. The claims then could have been adjudicated finally before the June [2020] primary, when no-excuse mail-in voting first took effect under Act 77—and certainly well before the [2020] General Election, when millions of Pennsylvania voters requested, received, and returned mail-in ballots for the first time. Petitioners certainly knew all facts relevant to their present claims during that entire period. Indeed, "the procedures used to enact [Act 77] were published in the Legislative Journal and available to the public" since at least October 2019. Likewise, "[t]he provisions of the Constitution that the [General Assembly] purportedly violated were also readily available." And yet, Petitioners did nothing.

240 A.3d at 1258 (Wecht, J., concurring) (citations omitted).

C.J., concurring and dissenting). This view, however, did not carry the day; the Court rejected all the relief the *Kelly* petitioners sought—both injunctive and declaratory, retrospective and prospective—on laches grounds.

3. Petitioners, Who Are Legislators and Former Candidates, Offer No Excuse for Their Delay in Filing This Suit

The Petition in this case offers no explanation of why Petitioners waited for nearly two years after Act 77 was passed, while three elections took place using mail-in voting, to file this suit. The Petition does not even mention the substantially identical *Kelly* case, which was litigated by the same counsel who represents Petitioners here. Petitioners cannot claim ignorance of the law; they are legislators responsible for *making* Pennsylvania law. (Pet. ¶¶ 3–16.) Indeed, twelve of them voted on Act 77, and eleven voted *in favor of* the statute. (*Id.*) The remaining two Petitioners were active candidates no later than January 2020.[3] (*Id.* ¶¶ 3, 12.) All of them knew of Act 77 well before the statutory challenge deadline expired.

Petitioners have also long been aware of the claims they assert in this lawsuit. Indeed, in early December 2020, ten of the Petitioners,[4] in their capacity

[3] *See* *https://www.politicspa.com/hd8-tim-bonner-nominated-as-gop-candidate-for-special-election/93482/* (Petitioner Bonner nominated as Republican candidate in January 2020); https://www.standardspeaker.com/news/tim-twardzik-officially-announces-123rd-district-candidacy/article_9301f322-b130-5ae1-ba83-ced20b719715.html (Petitioner Twardzik announces candidacy in January 2020).

[4] Those ten Petitioners are P. Michael Jones, David H. Zimmerman, Kathy L. Rapp,

as members of the General Assembly, filed an amicus brief in support of the *Kelly* petitioners' unsuccessful application asking the Supreme Court of the United States to reverse the Pennsylvania Supreme Court's decision and to enjoin Pennsylvania from certifying the results of the November 2020 general election.[5]

III. ARGUMENT

A. Petitioners Lack Standing to Challenge the Constitutionality of Act 77

Petitioners assert that they "do not bring [their] action in their official capacities" but rather as "registered Pennsylvania voters" and "past and likely future candidates for office." (Pet. ¶ 17.) But Petitioners fail to plead any facts demonstrating that they are cognizably injured by Act 77 in any of these capacities. In the absence of any such factual allegations, Petitioners lack standing to pursue their claims.

1. Petitioners' Status as Registered Electors Does Not Confer Standing to Challenge a Method of Voting Available on Equal Terms to All Eligible Voters

"In Pennsylvania, a party to litigation must establish as a threshold matter that he or she has standing to bring an action." *Markham v. Wolf*, 136 A.3d 134,

---

David Maloney, Barbara Gleim, Aaron J. Bernstine, Dawn Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook.

[5] *See* Brief for Members of the Pennsylvania General Assembly, as *Amicus Curiae* in Support of Applicants/Petitioners, *Kelly v. Pennsylvania*, No. 20A98 (U.S. filed Dec. 7, 2020), available at https://www.supremecourt.gov/DocketPDF/20/20-810/162797/20201207110117475_20A98%20General%20Assembly%20amicus.pdf.

140 (Pa. 2016) (citing cases). To satisfy the standing requirement, a litigant must be "aggrieved," *i.e.*, he or she must have a "substantial, direct, and immediate interest in the matter." *Id.* "To have a substantial interest, concern in the outcome of the challenge must surpass 'the common interest of all citizens in procuring obedience to the law.'" *Id.* (quoting *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003)). To satisfy the criterion of directness, a litigant must "demonstrat[e] that the matter caused harm to the party's interest." *Id.* at 140 (internal quotation marks omitted). "Finally, the concern is immediate if that causal connection is not remote or speculative." *Id.* (internal quotation marks omitted).

"Pennsylvania is a fact-pleading state." *Briggs v. Sw. Energy Prod. Co.*, 224 A.3d 334, 351 (Pa. 2020). Accordingly, to plead standing, "a party must plead facts which establish a direct, immediate and substantial injury." *Open PA Schools v. Dep't of Educ.*, No. 504 M.D. 2020, 2021 WL 129666, at *6 (Pa. Commw. Ct. Jan. 14, 2021) (en banc) (citing *Pa. Chiropractic Fed'n v. Foster*, 583 A.2d 844, 851 (Pa. Commw. Ct. 1990). "If a petition contains only 'general averments' or allegations that 'lack the necessary factual depth to support a conclusion that the [petitioner] is an aggrieved party,' standing will not be found." *Id.* (quoting *Pa.*

State Lodge, Fraternal Ord. of Police v. Dep't of Conservation & Nat. Res., 909 A.2d 413, 417 (Pa. Commw. Ct. 2006)). The Petition here fails to plead standing.

Although Petitioners purport to assert their claims as "registered voters," they fail to plead any facts showing that voters have any substantial, particularized interest that is invaded by Act 77's mail-in voting procedures. To the contrary, Petitioners assert only "the common interest of all citizens in procuring obedience to the law." *Markham*, 136 A.3d at 140. Notwithstanding Petitioners' conclusory assertion of "disenfranchise[ment]" (Pet. ¶ 90), the ability to cast one's vote by mail in no way burdens their (or anyone's) voting rights. Act 77's mail-in voting procedures are available equally to all voters.

Pennsylvania case law—decided by both this Court and the Pennsylvania Supreme Court—confirms that voters lack standing to challenge Act 77. In *In re Gen. Election 2014*, No. 2047 CD 2014, 2015 WL 5333364 (Pa. Commw. Ct. Mar. 11, 2015), certain voters in Philadelphia (the "Objectors") challenged a decision allowing other Philadelphia voters to vote by absentee ballot. *Id.* at *1. The Objectors contended that they had standing "because they are registered electors in the City of Philadelphia." *Id.* at *3. This Court rejected that argument and affirmed the trial court's decision finding lack of standing.

As this Court noted, resolution of the standing question was controlled by the Pennsylvania Supreme Court's earlier decision in *Kauffman v. Osser*, 271 A.2d

236 (Pa. 1970). *Gen. Election 2014*, 2015 WL 5333364, at *3. In *Kauffman*, certain voters had brought a declaratory judgment action challenging the validity of amendments to the Election Code that "permit[t]ed electors and their spouses who are on vacation to vote by absentee ballot." *Id.* (describing *Kauffman*). Like Petitioners here, the *Kauffman* plaintiffs alleged that the statute had expanded the scope of absentee voting beyond what the Pennsylvania Constitution allowed. *Kauffman*, 271 A.2d at 238. But the Supreme Court ruled that the Plaintiffs did not "have a justiciable interest or standing" necessary to maintain the action. *Id.* As the Supreme Court noted, "it is hornbook law that a person whose interest is common to that of the public generally, in contradistinction to an interest peculiar to himself, lacks standing to attack the validity of a legislative enactment." *Id.* at 239. The Supreme Court held that *Kauffman* was precisely such a case; among other fatal flaws, "the interest which [the plaintiffs] claim[ed] [was] nowise peculiar to them but rather [was] an interest common to that of all other qualified electors." *Id.* at 240. These same standing principles were also dispositive of the Objectors' challenge to the absentee ballots at issue in *In re General Election 2014*. *See* 2015 WL 5333364, at *4.

This conclusion is also consonant with federal jurisprudence on standing, which the Pennsylvania Supreme Court has repeatedly looked to in explicating the concept of standing under Pennsylvania law. *See Hous. Auth. of Cnty. of Chester*

v. Pa. State Civil Serv. Comm'n, 730 A.2d 935, 939 (Pa. 1999). Indeed, courts have repeatedly and consistently rejected the "vote dilution" theory of injury that Petitioners advance in this case. (*See* Pet. ¶ 88 (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).) According to this theory, any voter has standing to challenge a purportedly unlawful voting procedure on the ground that votes cast according to such procedures supposedly "dilute" votes cast in accordance with lawful procedures. But as numerous courts have recognized, the "vote dilution" precedents to which Petitioners appeal are inapposite. "[I]n the racial gerrymandering and malapportionment contexts, vote dilution occurs when voters are harmed compared to 'irrationally favored' voters from other districts." *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (citing *Baker v. Carr*, 369 U.S. 186, 207-08 (1962)). "By contrast, 'no single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.'" *Id.* (citing *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 356 (3d Cir. 2020), *vacated as moot*, No. 20-740, 2021 WL 1520777 (U.S. Apr. 19, 2021). Accordingly, "[v]ote dilution in *this* context is a 'paradigmatic generalized grievance that cannot support standing.'" *Id.* at 1314–15 (emphasis added).

This is exactly the sort of "vote dilution" alleged by Petitioners here. Petitioners do not challenge malapportioned or gerrymandered legislative districts.

They do not allege election fraud. Nor does their constitutional challenge concern *who* may vote. Rather, Petitioners challenge the validity of certain rules prescribing *how* the votes of qualified electors may be received, rules that apply to every voter in the same way. Put differently, Petitioners do not claim a right to prevent any particular persons from casting a vote; their interest, properly understood, is in ensuring that the statutorily prescribed *methods* of voting are within the scope of the legislature's constitutional authority. Such an interest is, of course, a generalized interest in obedience to the law. Unsurprisingly, then, courts—including the Pennsylvania Supreme Court—have consistently rejected the "vote dilution" theory of standing advanced by Petitioners here. *Kauffman*, 271 A.2d at 239 (rejecting argument that appellant voters had standing to challenge constitutionality of statute allowing electors on "vacation" to vote by absentee ballot based on theory that "electors in Philadelphia who intend to vote in person at the polls … will have their votes diluted by the absentee votes"); *accord, e.g.*, *Wood*, 981 F.3d at 1314–15; *Bognet*, 980 F.3d 336 at 356–60 (collecting cases); *Hudson v. Haaland*, 843 F. App'x 336, 337–38 (D.C. Cir. 2021); *O'Rourke v. Dominion Voting Sys. Inc.*, 20-3747, 2021 WL 1662742, at *4–9 (D. Colo. Apr. 28, 2021) (collecting numerous cases).

2. Petitioners Fail to Demonstrate That Act 77 Has Injured Them (or Will Injure Them) in Their Roles as Past or Potential Future Candidates

Petitioners also fail to plead a basis for standing as candidates. They nowhere explain how universal mail-in voting—which, again, is a method of voting equally available to *all* Pennsylvania voters, *and which eleven of the Petitioners voted for*—injures them "as past and likely future candidates for office." (Pet. ¶ 17.) That is fatal to the Petition because there is nothing about one's status as a candidate that talismanically confers standing to challenge any election-related rule; a candidate-petitioner, like any other petitioner, must allege facts showing a substantial, particularized interest in the specific claims alleged. *See, e.g.*, *In re Pickney*, 524 A.2d 1074 (Pa. Commw. Ct. 1987) (holding that incumbent candidate lacked standing to challenge nominating petition of candidate belonging to a different political party); *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013) (although plaintiff candidate "might have been able to establish standing [to challenge an Federal Election Commission decision] if he had shown that the FEC's determination injured his ability to fight the next election," he had not adequately alleged such facts); *cf. Biener v. Calio*, 361 F.3d 206, 210–11 (3d Cir. 2004) (candidate had sufficiently pled standing to challenge filing fee for party primary election by alleging that payment of the fee in protest had "depleted two-thirds of his campaign funds"). Petitioners plead no facts whatsoever

demonstrating that they have a "substantial, direct, and immediate interest in the matter." *Markham*, 136 A.3d at 140. The Petition must therefore be dismissed. *See Open PA Schools*, 2021 WL 129666, at *6 (where "a petition contains … allegations that 'lack the necessary factual depth to support a conclusion that the [petitioner] is an aggrieved party,' standing will not be found"); *Warren v. State Ethics Comm'n*, No. 234 M.D. 2018, 2019 WL 114061, at *2 (Pa. Commw. Ct. Jan. 7, 2019) (petition will be dismissed for lack of standing if it fails to "allege how [the challenged law or action] causes [the petitioner] harm"); *see also Atiyeh v. Commonwealth*, No. 312 M.D. 2012, 2013 WL 3156585, at *4–6 (Pa. Commw. Ct. May 28, 2013) (petition that merely asserts that petitioners satisfy standing criteria, but does not explain how petitioners do so, will be dismissed for lack of standing).

Because Petitioners fail to plead facts showing a substantial, particularized interest in their claims, the Petition must be dismissed for lack of standing.

B. As Made Clear by the Supreme Court's Decision in *Kelly v. Commonwealth*, Petitioners' Challenge Is Barred by the Doctrine of Laches

1. The Supreme Court Has Already Decided That Laches Bars the Challenge Petitioners Assert Here

Even if Petitioners had standing, their claims would be barred by laches. Indeed, the Pennsylvania Supreme Court has *already decided* that the claims asserted in this Petition should be dismissed for laches. In *Kelly v.*

Commonwealth, the currently sitting members of the Supreme Court dismissed the same facial constitutional challenge seeking the same relief. The Supreme Court held that the *Kelly* petitioners—who filed suit 13 months after Act 77's enactment, and were represented by the same counsel as Petitioners here—"fail[ed] to file their facial constitutional challenge in a timely manner," and the Court dismissed the *Kelly* petition in its entirety under the doctrine of laches. 240 A.3d at 1256. The Petition here, which asserts an identical facial constitutional challenge to Act 77, was filed on August 31, 2021, nine months after *Kelly* was decided. It is thus even more untimely. Petitioners' lawsuit should therefore meet the same fate as *Kelly*. *See id.* at 1256–57.

Petitioners cannot avoid *Kelly* by emphasizing that the present case does not seek to overturn the result of any past election. Although the *Kelly* petitioners sought to enjoin certification of the November 2020 election results, they *also* sought a prospective declaration that Act 77 was, going forward, invalid. *Compare Kelly*, 240 A.3d at 1256 ("Petitioners sought a declaration that the aforementioned provisions [of Act 77] were unconstitutional and void *ab initio*."), *with* Pet. at p. 25 (seeking declaration that Act 77 violates the Pennsylvania Constitution and is void). Indeed, Chief Justice Saylor partially dissented in *Kelly* precisely because he disagreed with the majority's decision to apply the doctrine of laches to the prospective, declaratory relief portion of the petition for review. *See* 240 A.3d at

1262 (Saylor, C.J., concurring and dissenting). Particularly given the existence of this partial dissent, it is clear that the *Kelly* majority dismissed the entirety of the *Kelly* petition—including the claim for a prospective declaratory judgment—on laches grounds. Confirming this point, in his ensuing Petition for Writ of Certiorari to the Supreme Court of the United States (which the Court denied), Congressman Kelly correctly described the Pennsylvania Supreme Court's decision as "a final adjudication on the merits of the case below," in which "the Supreme Court of Pennsylvania held that *the doctrine of laches barred any equitable remedy—injunctive, declaratory, retrospective, prospective, affirmative, or otherwise*—for Petitioners' constitutional challenges to Pennsylvania's no-excuse mail-in ballot system." Petition for Writ of Certiorari at 16, *Kelly v. Pennsylvania*, No. 20-810 (U.S. Dec. 11, 2020) (emphasis added).[6] *Kelly* squarely applies here. In accordance with the Supreme Court's decision last November, this Court should dismiss the Petition for Review with prejudice. *See* 240 A.3d at 1257

[6] Available at https://www.supremecourt.gov/DocketPDF/20/20-810/163577/20201211142442551_Petition%20for%20Writ%20of%20Certiorari%20FINAL.pdf.

("[W]e grant the application for extraordinary jurisdiction … and dismiss with prejudice Petitioners' petition for review.")[7]

2. The Doctrine of Laches Squarely Applies to This Case

As *Kelly* reflects, the circumstances of this case establish all the required elements of the laches defense. "'[L]aches is an equitable doctrine that bars relief when a complaining party is guilty of [1] want of due diligence in failing to promptly institute an action [2] to the prejudice of another.'" *Id.* at 1256 (quoting *Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998)). Petitioners unduly delayed by waiting for almost two years after Act 77's enactment before bringing their challenge. And voiding Act 77 would cause profound prejudice, rendering useless millions of dollars already spent on implementing Act 77, while at the same time costing millions more to re-educate the public and jeopardizing the right to vote of

[7] Because *Kelly* was decided in a *per curiam* opinion, the opinion is technically not binding precedent. Notably, however, this is not a situation in which a party is seeking to distill a rule of decision from one case and apply it to different facts in another. *Kelly* is not only on all fours with this case; it *is* this case. As shown above, *Kelly* involved an *identical claim* seeking *identical relief*, decided ten months ago by the *exact same justices* who currently sit on the Supreme Court. If *Kelly*'s decision is not actually res judicata here, it is only because Petitioners did not join in the *Kelly* petitioners' action (though they easily could have, and most Petitioners did directly participate in the *Kelly* proceedings as *amici curiae*, *see supra* note 5), but inexplicably waited to file suit until yet another nine months had elapsed. Respondents respectfully submit that, in these circumstances, there can be no real question that this Court should adhere to the directly-on-point ruling of the Supreme Court.

the many Pennsylvanians already taking advantage of Act 77's provisions. (Marks Aff. ¶¶ 9–26.)

(a) Petitioners Unduly Delayed in Bringing Their Claims

First, Petitioners undeniably failed to exercise reasonable diligence in initiating this action. In *Kelly*, the petitioners filed their suit challenging the constitutionality of Act 77 on November 21, 2020—*387 days and two elections*—after the Governor signed Act 77 into law. Here, Petitioners filed suit on August 31, 2021—*671 days and three elections*—after the Governor signed Act 77. *See also Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Commw. Ct. 2004) (applying laches to challenge to ballot referendum because it was initiated "thirteen months following the election").

Nor can Petitioners, sitting members of the House of Representatives, plausibly claim that their delay was justified by ignorance or unawareness of Act 77. "The test is not what the plaintiff knows, 'but what he might have known by the use of the means of information within his reach with the vigilance the law requires of him.'" *In re Mershon's Est.*, 73 A.2d 686, 687 (Pa. 1950) (citation omitted). As elected legislators, Petitioners, like the candidate-petitioners in *Kelly*, are in the election business.[8] "But it occurred to none of them to challenge the

[8] As noted above, *see supra* note 3 and accompanying text, twelve of the fourteen House Petitioners voted on Act 77 in 2019, and the remaining two House Petitioners were active candidates no later than January 2020.

constitutionality of Act 77 before [the 2020 primary election], or indeed before participating in and contemplating the results of the 2020 General Election." *Kelly*, 240 A.3d at 1258 (Wecht, J., concurring). Compounding the lack of diligence here, even after the *Kelly* decision—*which most of Petitioners urged the Supreme Court of the United States to overturn*[9]—Petitioners waited to bring their challenge until after the May 18, 2021 primary election. In other words, Petitioners "sat by and did nothing until after" *yet another* election passed. *See Yorks v. Altmiller*, 113 A. 415, 416 (Pa. 1921). And even then, it is far from clear that Petitioners would *ever* have brought suit if McLinko had not first filed his nearly identical challenge a month earlier. By the time Petitioners filed this tag-along action, it was too late to adjudicate their claims before the November 2021 election—which will be the *fourth* successive statewide election to be conducted under Act 77's mail-in voting procedures. *See* Order dated September 3, 2021 (denying Petitioners' application seeking to have this case heard during the Court's September 2021 argument panel "in light of the time constraints"). "Such laches a court of equity cannot overlook." *Yorks*, 113 A. at 416.

(b) Petitioners' Delay Is Enormously Prejudicial

Second, if the Court grants the requested relief, Petitioners' undue delay will cause substantial prejudice throughout the Commonwealth. "Prejudice can be

[9] *See supra* note 5.

found where a change in the condition or relation of the parties occurs during the time the complaining party failed to act." *Koter*, 844 A.2d at 34. Here, Petitioners' delay would significantly prejudice the Commonwealth and municipalities, as well as voters throughout Pennsylvania.

To mitigate any prejudice, Petitioners could have brought suit any time between Act 77's enactment and its effective date six months later on April 28, 2020. *See Kelly*, 240 A.3d at 1258 (Wecht, J., concurring). They did not do so. While Petitioners failed to act, the Commonwealth and municipalities across Pennsylvania spent millions of dollars and many, many hours implementing Act 77 and educating elections workers and voters about universal mail-in voting. *See supra* Section II.B; Marks Aff. ¶¶ 11–20.

These costs, which would not have been incurred had Petitioners successfully challenged Act 77 before the law became operative (or at least before the June 2020 primary election), *see* Marks Aff. ¶ 20, are themselves sufficient to establish the prejudice element of laches. For example, in *Koter*, this Court applied laches where the petitioner waited 13 months to challenge a passed referendum. 844 A.2d at 34. The Court held that "in the thirteen months following the election, the Board [of Elections] has taken steps to implement provisions of the referendum. A challenge at this late date prejudices that Board since it has already begun to act upon the referendum's terms, and prejudices the

electorate that has enacted the provision and awaits its implementation." 844 A.2d at 34; *see also Fulton v. Fulton*, 106 A.3d 127, 135 (Pa. Super. Ct. 2014) (applying laches because defendants spent "sums relating to the upkeep, maintenance, or improvements to the properties" during plaintiff's delay, "all of which would cause prejudice to [defendants]" if the requested relief was granted). Election officials across Pennsylvania have not only "taken steps to implement" Act 77—as in *Koter*, they have spent millions of dollars and hundreds of hours in that process. Petitioners' decision to wait until now to challenge Act 77, instead of challenging the law before it took effect, means that granting the requested relief would render all of the above a forfeiture.

Moreover, beyond those already incurred costs, overturning Act 77 now would require reeducating millions of voters and risks disenfranchising untold numbers of Pennsylvanians. Although voiding Act 77 would change the permissible means of voting for all Pennsylvanians, millions who voted last November would have to be alerted that they are no longer permitted to vote using a method they used the last time they voted; many of these voters intend to use the same method in all future elections. Marks Aff. ¶¶ 21–26. In sum, granting the Petition would prejudice the Commonwealth and counties to the tune of millions of dollars and would jeopardize the fundamental right to vote of untold numbers of

Pennsylvanians. This is exactly the kind of prejudice that the laches doctrine is designed to prevent.

C. Petitioners' Facial Constitutional Challenge Is Statutorily Time-Barred Because It Was Filed More Than 180 Days After Act 77's Enactment

This action is also foreclosed by the applicable *statutory* deadline, which fell on April 28, 2020.

1. The Statutory Time Bar Applies to Petitioners' Claim

Sections 13 of Act 77 states that certain constitutional challenges to the Pennsylvania Election Code, including challenges to Act 77's mail-in voting provisions, "must be commenced within 180 days" of October 31, 2019. Act of Oct. 31, 2019, P.L. 552, No. 77, § 13(3) (referring to provisions cited in § 13(1)); *see* 2019 Pa. Legislative Journal—House 1740 (Oct. 29, 2019) (statement of State Government Committee Chair Garth Everett) (explaining that the purpose of Section 13(3) was "that suits be brought within 180 days so that we can settle everything before [Act 77] would take effect"); *see also Kelly*, 240 A.3d at 1257 (characterizing Section 13(3) as "providing for a 180-day period in which constitutional challenges may be commenced"); *id.* at 1262 (Saylor, C.J., concurring and dissenting) (stating that Section 13(3) embodies "the Legislature decision to insert … a 180-day time restriction curtailing challenges to the substantive import of the enactment"). The provisions subject to this time bar

include precisely the ones challenged by Petitioner here. *Compare* provisions cited in *id.* § 13(1), *with* provisions cited in Pet. ¶¶ 1, 64, 70. Thus, the Petition is a paradigmatic example of an action that was required to be filed by April 28, 2020. That date has long since come and gone.

2. Petitioners Do Not Try to Show That the Time Bar Is Inapplicable, Nor Could They

Because Petitioners' challenge unambiguously runs afoul of Section 13's 180-day limit, the Petition must be dismissed. Notably, the Petition does not discuss Section 13 at all, let alone attempt to explain why it is not dispositive. The only possible argument Petitioners could make that a duly enacted, plainly applicable statutory provision does not control is that the provision is unconstitutional. This would require Petitioners to carry the "very heavy burden" of demonstrating that the provision "clearly, palpably, and plainly" violates the Constitution. *Commonwealth v. Bullock*, 913 A.2d 207, 211–212 (Pa. 2006). Petitioners cannot do so.

"It is well settled that a statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute, and before the bar takes effect." *Turner v. People of State of New York*, 168 U.S. 90, 94 (1897). A "constitutional claim can become time-barred just as any other claim can. Nothing in the Constitution requires

otherwise." *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983) (collecting cases). Indeed, courts across the country have held that time limitations like the one in Act 77 are constitutional and consistent with due process. *See, e.g.*, *Dugdale v. U.S. Cust. and Border Protec.*, 88 F. Supp. 3d 1, 8 (D.D.C. 2015) (upholding constitutionality of federal law requiring filing within 60 days of implementation of constitutional challenges to certain statutory provisions, regulations, or procedures); *Greene v. Rhode Island*, 398 F.3d 45, 53–55 (1st Cir. 2005) (rejecting due process challenge to 180 day time limitation for bringing constitutional challenges to federal statute); *Cacioppo v. Eagle Cnty. Sch. Dist. Re-50J*, 92 P.3d 453, 464 (Colo. 2004) (upholding as constitutional five-day time limit on constitutional ballot contests); *Native Am. Mohegans v. United States*, 184 F. Supp. 2d 198, 202 (D. Conn. 2002) (holding that statutory 180 day time limitation for bringing constitutional challenges to statute "does not violate due process because plaintiffs' constitutional challenges could have been brought within 180 days of" statute's enactment).

Nor can Petitioners establish that the 180-day time-bar violated any of their constitutional rights on an as-applied basis. A statute's facial infirmities—like the one alleged by Petitioner—remain the same regardless of the passage of time: "facial challenges are … ripe upon mere enactment of the ordinance." *Phila.*

Ent'mt. & Dev. Partners v. City of Phila., 937 A.2d 385, 393 n.7 (Pa. 2007).[10] Indeed, as the Supreme Court noted in *Kelly*, a "facial constitutional challenge" to Act 77 "was ascertainable upon Act 77's enactment." 240 A.3d at 1256. Thus, Petitioners had ample time to bring their suit before the time-limitation ran.

Because the Petition is time-barred, it must be dismissed.

D. Petitioners' Claim Under the Pennsylvania Constitution Fails on the Merits

Quite apart from the fatal defects described above, Petitioners cannot carry their heavy burden of demonstrating that Act 77's mail-in voting provisions are unconstitutional. For this reason, too, the Petition must be dismissed.

All "powers not expressly withheld from the [Pennsylvania] General Assembly inhere in it." *Stilp v. Commonwealth*, 974 A.2d 491, 494–95 (Pa. 2009); *accord Commonwealth v. Stultz*, 114 A.3d 865, 876 (Pa. Super. Ct. 2015) (the "Legislature possess[es] all legislative power except such as is prohibited by express words or necessary implication" (internal quotation marks omitted)). Accordingly, "[i]t is foundational that all legislation duly enacted by the General Assembly enjoys a strong presumption of validity." *Bullock*, 913 A.2d at 211. "The burden to overcome this presumption is heavy: '[A] statute will not be

[10] This Court need not decide whether the 180-day limitation would be applicable to an as-applied constitutional challenge to Act 77 based on circumstances that first arise after the 180-day period has elapsed. The Petition here does not present such a challenge.

declared unconstitutional unless it *clearly*, *palpably*, and *plainly* violates the Constitution.'" *Caba v. Weaknecht*, 64 A.3d 39, 49 (Pa. Commw. Ct. 2013) (quoting *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 393 (Pa. 2005)) (emphasis in original). Consequently, "[a]ll doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster." *Working Families Party v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019).

Petitioners face an even heavier burden here because their claims take the form of a facial constitutional challenge. *See Kelly*, 240 A.3d at 1256 (observing that the same constitutional arguments Petitioners assert here constituted a "facial challenge to those provisions of Act 77 … establishing universal mail-in voting in the Commonwealth of Pennsylvania"). As this Court has noted, "[t]hough … all constitutional challenges to statutes are … uphill challenges, a facial challenge is 'the most difficult to mount successfully.'" *Caba*, 64 A.3d at 50. "'A statute is facially unconstitutional only where there are no circumstances under which the statute would be valid,'" that is, only where "the law is unconstitutional in all of its applications." *Haveman v. Bureau of Prof'l & Occupational Affairs*, 238 A.3d 567, 572 (Pa. Commw. Ct. 2020) (quoting *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019)). Petitioners fall well short of carrying this burden.

1. Petitioners' Interpretation Contravenes Both the Text and Structure of the Pennsylvania Constitution

"[I]n interpreting provisions of the Pennsylvania Constitution, [the court's] ultimate touchstone is the actual language of the constitution itself." *Yocum v. Commonwealth, Pa. Gaming Control Bd.*, 161 A.3d 228, 239 (Pa. 2017). The court seeks the "ordinary, natural interpretation the ratifying voter would give" to those provisions, and avoids reading them "in a strained or technical manner." *Zemprelli v. Daniels*, 436 A.2d 1165, 1170 (Pa. 1981) (internal quotation marks omitted). Petitioners' challenge to Act 77's mail-in voting provisions rests on two provisions of the Pennsylvania Constitution: Article VII, § 1, entitled "Qualifications of electors," which prescribes the age, citizenship, and residency requirements that a person must satisfy to be deemed eligible to register and vote in Pennsylvania elections; and Article VII, § 14, entitled "Absentee voting," which *requires* that "[t]he Legislature … provide a manner in which qualified voters who may, on the occurrence of any election, be absent from the municipality of their residence [for certain specifically defined reasons]," or "unable to attend a polling place" for reasons of illness, disability, or religious observance, may vote. As shown below, Petitioners' arguments are belied by the plain language of these provisions, as well as the structure of Article VII as a whole.

(a) Article VII, § 1 Addresses *Who* May Vote, Not *How* They May Vote

(i) The Text and Structure of Article VII, § 1—and of Other Constitutional Provisions—Confirm That § 1 Is a "Qualifications" Clause, Not a "Methods" Clause

As its title indicates, Section 1 of Article VII sets forth the criteria for voting eligibility in Pennsylvania. It provides, in its entirety:

> Qualifications of electors.
>
> Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State ninety (90) days immediately preceding the election.
>
> 3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

PA. CONST. art. VII, § 1 (underlining added). Based on its plain language, structure, and title, the meaning of this provision is clear. It limits the right to vote in Pennsylvania elections to citizens of a certain age who have been a U.S. citizen for at least a month. It also prescribes durational-residency requirements—namely,

the prospective voter must have resided in Pennsylvania at least 90 days immediately preceding the election and have resided in the specific election district in which she seeks to vote for at least 60 days. Article VII, § 1 also provides for cases in which a person was qualified to vote in an election district but then moves her residence to a different Pennsylvania election district within 60 days of an election. That person is not eligible to vote in her new district's electoral contests (because she does not satisfy the 60-day residency requirement), so § 1 allows her to vote in her old district's contests.

As the authority interpreting "residence" makes clear, the qualifications set forth in § 1 do *not* include any requirement of physical presence at the time of the election; a person may maintain a "residence" in a given state and election district even while she is physically absent from them. The constitutional concept of residence is synonymous with the concept of domicile; it refers to the elector's "permanent or true home," the place to which, when she engages in temporary departures, she "intends to return." *In re Case of Fry*, 71 Pa. 302, 309–10 (1872); *accord In re Stack*, 184 A.3d 591, 597 (Pa. Commw. Ct. 2018) (citing *In re Lesker*,

105 A.2d 376, 380 (Pa. 1954)). This definition is consistent with the meaning of the term "residence" as it is used in the Election Code.[11]

Indeed, the other constitutional provision on which Petitioners rely, Article VII, § 14, further confirms that physical absence, without an intention to establish a new permanent abode, does not defeat residence. That provision mandates that the Legislature establish a means for certain "qualified electors" who are "absent from the municipality of their residence" on election day to vote in their election district's electoral contests, and to provide "for the return and canvass of their votes *in the election district in which they respectively reside*." PA. CONST. art. VII, § 14(a) (emphasis added).

As shown above, nothing in the text or structure of Article VII, § 1 indicates that it is imposing restrictions on the *method* by which voters may vote. Rather, that constitutional provision is addressed to the subject matter identified in its title: it establishes the age, citizenship, and durational-residency "qualifications" to vote. Put differently, the provision addresses *who* may vote in a given election, not *how* they may vote.

---

[11] *See* 25 Pa. Stat. § 2814 (prescribing that, "[i]n determining the residence of a person desiring to register or vote, … (a) [t]hat place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning[; and] (b) [a] person shall not be considered to have lost his residence who leaves his home and goes into another state or another election district of this State for temporary purposes only, with the intention of returning").

(ii) The Phrase "Offer to Vote" Does Not Smuggle a Restriction on Voting Methods into a Provision Expressly Addressed Solely to Who May Vote

Petitioners, however, purport to divine a restriction on method from the third qualification enumerated in § 1, namely, the requirement that a prospective voter "shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election." PA. CONST. art. VII, § 1. According to Petitioners, the modifying clause "where he or she shall offer to vote," which describes the election district in which the voter must *reside*, should be understood as a constitutional prohibition on the Legislature's allowing qualified voters to vote other than in person. But Petitioners' interpretation is precisely the sort of "strained" construction of constitutional text that Pennsylvania courts are required to avoid. *Zemprelli*, 436 A.2d at 1170. If the framers of the Pennsylvania Constitution had intended to limit the voting methods that the Legislature could establish, they could, of course, have done so clearly and easily—in a provision expressly addressing voting *methods* rather than who is qualified to vote.

In fact, the Pennsylvania Constitution *does* contain a separate provision expressly addressing the "method" of voting. Article VII, § 4, which is entitled "Methods of elections; secrecy in voting," states that "[a]ll 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." PA. CONST. art. VII, § 4 (emphasis added). In other words, the plain words of the constitutional provision specifically addressed to voting methods *expressly give the Legislature plenary power over such methods*, subject only to the requirement that any method authorized by the Legislature preserve the secrecy of the vote.[12] The existence of this separate provision further belies Petitioners' interpretation of Article VII, § 1. *See Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1126 (Pa. 2014) ("the Constitution [should be read as] an integrated whole").

Article VII, § 14, the other provision on which Petitioners rely, also directly undermines their interpretation of § 1. According to Petitioners' reading of § 1, which interpolates a restriction on allowable voting *methods* into a list of "[q]ualifications of electors," PA. CONST. art. VII, § 1, a person cannot be a qualified elector unless she votes in person in her election district. But that interpretation cannot be reconciled with the plain language of § 14, which provides that "qualified electors" must be given "a manner" of voting from outside their election district in certain circumstances causing them to be "absent from the municipality of their residence" on election day. PA. CONST. art. VII, § 14. If

[12] In the case of Act 77's mail-in voting procedures, the secrecy requirement is met through the use of "secrecy envelopes" in which voters must insert their completed ballots. *See* 25 Pa. Stat. § 3150.16(a); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 353, 378–80 (Pa. 2020) (discussing PA. CONST. art. VII, § 4).

Petitioners' reading of § 1 were correct, § 14 would be oxymoronic because a person voting other than in person in her election district could, ipso facto, *never* be a "qualified voter." But if the language of § 1 is given its natural meaning, § 14 makes perfect sense: The Legislature must provide certain categories of "qualified voters"—that is, voters who satisfy the age, citizenship, and durational-residency requirements of § 1—with "a manner" of voting absentee. PA. CONST. art. VII, § 14.

The latter interpretation of § 1 gives meaning to all of its terms. Each absentee voter under § 14 must "have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election," just as he or she must "have resided in the State ninety (90) days immediately preceding the election." PA. CONST. art. VII, § 1. In other words, that absentee voter cannot "offer to vote" in an election district other than the one in which her residence is located. For example, an elector residing in Philadelphia cannot vote for the commissioners of Allegheny County, just as an elector residing in one election district cannot vote in the judge-of-elections race of another election district.[13] Indeed, the language of Section 14 expressly recognizes and complies

[13] Numerous courts have recognized that this is the plain and natural meaning of the "offer to vote" language, which is by no means unique to the Pennsylvania Constitution. *See, e.g.*, *Lemons v. Noller*, 63 P.2d 177, 185 (Kan. 1936) ("[A]lthough our Constitution prescribes the qualifications of voters[,] it does not prescribe the manner or form of holding elections, [and] it was within its constitutional power for the Legislature to provide that an offer to vote in the township or ward in which the elector resides, could be made [by electors physically located

with this requirement. *See* PA. CONST. art. VII, § 14 (providing that the Legislature must provide "for the return and canvass of [absentee electors'] votes *in the election district in which they respectively reside*" (emphasis added).)[14]

In sum, according to Petitioners' interpretation, a relative clause modifying a durational-residency requirement in a provision delimiting *who* may vote, *see* PA. CONST. art. VII, § 1, should be construed as an oblique prohibition on voting *methods*—notwithstanding that a separate constitutional provision expressly gives the General Assembly nearly unrestricted authority to prescribe the "method[s]" of voting, PA. CONST. art. VII, § 4. As recognized by courts considering materially identical provisions of other state constitutions, Petitioners' construction contravenes basic rules of grammar and syntax, and it cannot be reconciled with

---

outside of their township or ward at the time of the election]."); *Jenkins v. State Bd. of Elections*, 104 S.E. 346, 349 (N.C. 1920) ("An offer to vote may be made in writing, and that is what the absent voter does when he selects his ballots and attaches his signature to the form and mails the sealed envelope to proper official[s]. The section [of the North Carolina Constitution containing "offer to vote" language materially identical to that at issue here] requires only that he must make that offer in the precinct where he has resided, etc."); *Straughan v. Meyers*, 187 S.W. 1159, 1162 (Mo. 1916) (construing provision of Missouri Constitution conditioning eligibility to vote on the elector's "hav[ing] resided in the county, city, or town where he shall offer to vote at least 60 days immediately preceding the election" and stating: "It is clear that this section does not undertake to prescribe the manner in which a choice shall be expressed, or a vote cast, or the ballots prepared, deposited, or counted, but merely the qualifications of the voters. It is true, under this provision, a person can vote only in the place of his residence, but this constitutes no inhibition against any particular method the Legislature may provide to enable him to so vote."). *Accord* cases cited *infra* note 15.

[14] As the Pennsylvania Supreme Court has explained, the clear purpose of this constitutional language is to ensure "the counting of each [absentee] vote … in such a manner that the computation appears on the return *in the district where it belongs*." *In re Canvass of Absentee Ballots of 1967 Gen. Election*, 245 A.2d 258, 264 (Pa. 1968) (emphasis added).

the Constitution's text or structure.[15] At an absolute minimum, Petitioners' argument turns the fundamental principles of constitutional interpretation discussed above—which require courts to sustain legislative enactments unless they "*clearly*, *palpably*, and *plainly*" violate the Constitution—directly on their head. *See Caba*, 64 A.3d at 49.

(b) Act 77 Does Not Render Article VII, § 14 Superfluous

Petitioners contend that, if Article VII, § 1 did not require in-person voting at polling places, then there would have been no reason for § 14. (*See* Pet. ¶ 69 (contending that Act 77 "makes [Article VII, § 14] moot").) According to Petitioners, § 14's prescription of "specific circumstances" in which the Legislature is required to allow absentee voting must be read as affirmatively *prohibiting* voters who do not fall into the prescribed categories from voting by

[15] *See, e.g.*, *Moore v. Pullem*, 142 S.E. 415, 421 (Va. 1928) (refusing to construe the phrase "the precinct in which he offers to vote" as imposing a requirement of in-person voting: "To suppose that the draftsmen of the Constitution paused in the writing of these elaborate provisions relating to these different subjects [*i.e.*, voting qualifications, registration and prerequisites] and interrupted the sequence of thought to digress and to interpolate the requirement that the voter must be personally present to tender his ballot on the day of election, and that in this unusual way and by this equivocal language they intended to inhibit the General Assembly from passing [an absentee voting] statute, appears to us to ignore fundamental rules of construction. The method of voting is elsewhere [in the constitution at issue] specifically and unequivocally committed to the legislative discretion."); *Goodell v. Judith Basin Cnty.*, 224 P. 1110, 1114 (Mont. 1924) ("In order … to hold that the clause 'at which he offers to vote' was intended to fix the place or describe the manner of voting, we must assume that the learned men who drafted [the qualifications provision], stopped short in the midst of defining the qualifications of an elector and injected an idea of an entirely different character; but no one familiar with the rudiments of English would undertake to define qualifications and place or manner of voting, by the use of the language employed in [the qualifications provision]."); additional cases cited *supra* note 13.

mail. (*Id.* ¶ 61.) But Petitioners' argument is, once again, at odds with the plain language of the Constitution. Article VII, § 14 does not *permit* the Legislature to provide a method for certain voters to cast their ballot other than in person; it *requires* the Legislature to do so. *See* PA. CONST. art. VII, § 14 ("The Legislature *shall* … provide a manner in which [certain specific groups of absentee electors] may vote …."). That the Legislature is constitutionally *required* to allow certain groups of electors to vote other than in person does not suggest—let alone carry the "necessary implication," *see Stultz*, 114 A.3d at 876—that the Legislature is *prohibited* from allowing others to vote by mail.

In fact, an earlier absentee-voting provision, existing in an earlier version of the Pennsylvania Constitution, said "may" instead of "shall." *See* 1957 Pa. Laws 1019. This change in language underscores that Article VII, § 14 sets a floor for absentee voting; it does not establish a ceiling. *See, e.g.*, *Mathews v. Paynter*, 752 F. App'x 740, 744 (11th Cir. 2018) (distinguishing "shall" from "may" and noting that the former term "does not impliedly limit government authority"); *see also Commonwealth v. Garland*, 142 A.2d 14, 17 (Pa. 1958) (holding that "the legislative use of the word 'may' in the first portion of the sentence and the word 'shall' in the second portion" is "[p]articularly significant"); *Zimmerman v. O'Bannon*, 442 A.2d 674, 677 (Pa. 1982) (refusing "to ignore the mandatory connotation usually attributed to the word 'shall'"); *Georgia-Pacific Corp. v.*

Unemployment Comp. Bd. of Review, 630 A.2d 948, 959 n.22 (Pa. Commw. Ct. 1993) ("[A] change of language in subsequent statutes on the same matter indicates a change of legislative intent." (quoting *Haughey v. Dillon*, 108 A.2d 69, 72 (Pa. 1954)). Thus, the Pennsylvania Constitution provides that the General Assembly *must* allow voters in the enumerated categories to cast absentee ballots, but may also go further—by exercising its broad powers to "prescribe[]" the permissible "method[s]" of voting, PA. CONST. art. VII, § 4—and allow other categories of voters to vote by mail, including by allowing any voter to opt to cast a mail-in ballot.[16]

Significantly, this interpretation is supported by decades of history, during which the Election Code has continuously allowed categories of voters not named in Article VII, § 14 to vote absentee. *See, e.g.*, 25 Pa. Stat. § 3146.1(b) (military spouses); 25 Pa. Stat. § 2602(z.3) (electors on vacations).[17] Soon after the current Constitution was ratified in 1968, the Pennsylvania Supreme Court rejected a challenge to some of these expansions when they were still young, albeit on standing grounds. *Kauffman v. Osser*, 271 A.2d 236 (1970). So far as Respondents are aware, no other challenges to these enactments were ever brought.

[16] Contrary to Petitioners' unsupported assertion, this interpretation does not render § 14 superfluous, but rather gives it an essential purpose: It provides constitutional rights to certain groups of voters, which the General Assembly must respect and may not take away.

[17] Acceptance of Petitioners' argument would, at least impliedly, invalidate these decades-old provisions as well as Act 77.

Thus, for virtually the entire life of the current Constitution, the Election Code has provided for absentee voting beyond the scope of the requirements in Article VII, § 14. Although the General Assembly had many opportunities to remove these provisions if they were, in fact, believed to be unconstitutional, it never did. This fact reinforces what the plain language of the constitutional provision dictates: § 14 requires the General Assembly to facilitate voting for certain groups; it does not prohibit the General Assembly from aiding others.[18]

2. Petitioners' Reliance on Two Cases from Earlier Constitutional Epochs Is Misplaced

Petitioners do not meaningfully grapple with any of the exegetical issues set forth above. Instead, Petitioners rely on two cases decided under earlier versions

---

[18] Petitioners try to make much of the fact that the Pennsylvania General Assembly began, but did not complete, the process of amending the Pennsylvania Constitution in S.B. 413 of 2019. For multiple reasons, their reliance on this proposed amendment is puzzling. First, on its face, the proposed amendment would not merely have clarified that the General Assembly *may* allow mail-in voting. That amendment would have *prohibited* the General Assembly from requiring *any* voter to vote in person at a polling place. *See* Pet. ¶ 42 (amendment would have provided that statutes prescribing the "manner" of voting "may not require a qualified elector to physically appear at a designated polling place on the day of the election"). Put differently, contrary to Petitioners' suggestion, Respondents' interpretation of the Pennsylvania Constitution in no way renders the content of the proposed constitutional amendment superfluous. The same is true, of course, of the post-1968 amendments to Article VII, § 14, on which Petitioners also rely. None of those amendments was superfluous because each of them *required* the General Assembly to allow absentee voting for the classes of persons at issue, giving those persons constitutional rights.

Second, Petitioners erroneously rely on the statements of individual legislators regarding the need for the proposed amendment. *See, e.g.*, Pet. ¶ 38. Those statements obviously do not bind the courts, who have the ultimate authority to construe the Constitution. Indeed, the Pennsylvania Supreme Court has expressly warned against relying on the statements of individual legislators as a guide to interpreting even ratified constitutional text. *See Commonwealth ex rel. Margiotti v. Lawrence*, 193 A. 46, 48–49 (Pa. 1937). Still less, then, can Petitioners attempt to construe a charter ratified in 1968 based on the statements of individual

of the Pennsylvania Constitution. *See Chase v. Miller*, 41 Pa. 403 (1862); *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (1924). Not only is the analysis in these cases at odds with modern principles of constitutional interpretation, but material provisions of the Constitution have changed in the interim. As discussed above, under the current Constitution adopted in 1968, the Election Code has long allowed categories of voters not named in Article VII, § 14, to vote by mail. In short, the cases cited by Petitioners are inapposite and do not support the result Petitioners seek here.

(a) The Cases on Which Petitioners Rely, Which Were Decided Under Different Constitutions Containing Different Language, Are Not Controlling

The *Chase* Court did not consider a voting method remotely similar to the secure, confidential mail-in ballot procedures established by Act 77. *Chase* invalidated a statute that essentially authorized Civil War military commanders to form election districts at out-of-state military camps and to hold elections therein,

---

legislators in 2019.

Indeed, if the events surrounding the proposed amendment have any relevance to the present proceeding, it is to show that the General Assembly did *not* believe that Act 77 violated the Constitution of 1968. After all, both houses of the Republican-controlled General Assembly enacted Act 77 with supermajorities of nearly 70% (a percentage that included 11 of the Petitioners themselves, *see* Pet. ¶¶ 3–16), and the bill was signed into law by the Democratic Governor. *See Clifton v. Allegheny Cnty.*, 969 A.2d 1197, 1211 (Pa. 2009) (noting "the presumption that, when enacting any statute, the Legislature does not intend to violate the Constitutions of the United States or of this Commonwealth"). Accordingly, to the extent the General Assembly's interpretation of the Constitution has a role to play here, it necessarily militates in favor of sustaining the legislative enactment.

bereft of any of the key features that protect elections administered by civil authorities:

> [The statute at issue] permits the ballot-box, according to the court below, to be opened anywhere, within or without our state, with no other guards than such as commanding officers, who may not themselves be voters, subject to our jurisdiction, may choose to throw around it; and it invites soldiers to vote where the evidence of their qualifications is not at hand; and where our civil police cannot attend to protect the legal voter, to repel the rioter, and to guard the ballots after they have been cast.
>
> It is scarcely possible to conceive of any provision and practice that could, at so many points, offend the cherished policy of Pennsylvania in respect to suffrage.

Chase, 41 Pa. at 424. Indeed, the *Chase* Court believed that this scheme not only "open[ed] a wide door for most odious frauds," but that such frauds had actually been committed: "[P]olitical speculators … prowl[] about the military camps watching for opportunities to destroy true ballots and substitute false ones, to forge and falsify returns, and to cheat citizen and soldier alike out of the fair and equal election provided for by law." *Id.* at 425. Unsurprisingly, then, in rejecting the argument that the constitutional phrase "offer to vote" prohibited a civil absentee voting statute, the Supreme Court of North Carolina found *Chase* inapposite:

> [*Chase*] differs very materially from the [case] under consideration. The substance of that decision, as we read it, was that under the Constitution of Pennsylvania the right of a soldier to vote is confined to and must be exercised in the election district where he resided when he entered the military service, and that the Legislature could not

> authorize a military commander to form an election district and hold an election therein.
>
> The election laws which attempted to confer the right of suffrage upon federal soldiers absent on military service … are wholly unlike in principle, as well as in detail, the North Carolina Absent Voters Act.

Jenkins v. State Bd. of Elections, 104 S.E. 346, 349 (N.C. 1920).

Petitioners ignore the above-discussed analysis in *Chase* and instead rely heavily on another portion of the *Chase* opinion. In that passage, the Court opined that, when construed together, two provisions of the 1838 Pennsylvania Constitution—which (1) limited the right to vote to "white freem[e]n" citizens "having resided in the state one year, and in the election district where [they] offer[] to vote ten days immediately preceding such election, and within two years paid a state or county tax," *Chase*, 41 Pa. at 418 (quoting PA. CONST. of 1838, art. III, § 1), and (2) required all elections to be "by ballot," *id.* (discussing PA. CONST. of 1838, art. III, § 2)—"undoubtedly" required each voter "to make manual delivery of the ballot to [elections] officers" at their respective polling places. *Id.*

Significantly, however, the Constitution of 1838 did not contain the provision set forth in Article VII, § 4 of the current Constitution, which expressly grants the General Assembly plenary power to "prescribe[] the "method[s]" of voting, subject only to the requirement that "secrecy in voting be preserved." PA. CONST. art VII, § 4. That change alone is sufficient to distinguish *Chase*'s interpretation of the Constitution of 1838—and, in particular, its opinion that,

under the earlier charter, "[t]he ballot c[ould] not be sent by mail or express," *Chase*, 41 Pa. at 419. *See Moore v. Pullem*, 142 S.E. 415, 422 (Va. 1928) (refusing to construe the phrase "the precinct in which he offers to vote," which appeared in the voter-qualifications provision of the Virginia Constitution, as imposing a requirement of in-person voting, particularly because "[t]he method of voting is elsewhere specifically and unequivocally committed to the legislative discretion").

Nor does *Lancaster City*, decided in 1924, control Petitioners' challenge under the current Constitution dating from 1968. At issue in *Lancaster City* was a statute allowing the return of ballots by voters who, "by reason of [their] duties, business or occupation," are "absent from [their] lawfully designated election district[s]" on election day. 126 A. at 200. The *Lancaster City* Court acknowledged the new constitutional provision expressly granting the Legislature authority to determine the "method" of voting (which had been added, by amendment to the Constitution of 1874, in 1901, *see* 1901 Pa. Laws 882), but the Court appeared to conclude that, whatever the *method* by which the ballot was returned to county officials, the *place* of the elector's "'offer to vote' must still be in the district where the elector resides." 126 A. at 201. In this regard, the Court found it significant that the then-existing Constitution "made [it] so that absent voting in the case of soldiers is permissible." *Id.*; *see* PA. CONST. of 1874, art. VIII, § 6. The Court believed that this provision implicated "[t]he old principle

that the expression of an intent to include one class," *i.e.*, military electors, "excludes another," *i.e.*, non-military electors. 126 A. at 201. Because the challenged statute allowed non-military electors to vote from outside their election districts, the Court invalidated it. *Id.*

As discussed above, however, the constitutional provisions addressing absentee voting have not remained static in the century that has elapsed since *Lancaster City*. In 1949, an amendment was adopted providing that "[t]he General Assembly *may*, by general law, provide a manner in which" disabled war veterans could vote by absentee ballot. 1949 Pa. Laws 2138 (emphasis added). Similar amendments in 1953 and 1957 provided that the General Assembly "may" allow certain other categories of absentee voters. 1953 Pa. Laws 1496; 1957 Pa. Laws 1019. In 1967, however, still another amendment (carried over into the 1968 Constitution) provided that "[t]he Legislature *shall*, by general law, provide a manner in which" various categories of voters can vote by absentee ballot. 1967 Pa. Laws 1048 (emphasis added); *see* PA. CONST. art. VII, § 14. Following this change, the General Assembly passed laws allowing other qualified voters not enumerated in the Constitution to vote absentee. *See, e.g.*, 25 Pa. Stat. § 2602(z.3) (electors on vacations, or sabbatical leaves). That history is entirely consistent with the General Assembly's own power to enact the scheme set forth in Act 77.

In sum, the opinions in *Chase* and *Lancaster City*, interpreting earlier constitutions containing language materially different from the current charter, are readily distinguishable.

(b) *Chase* and *Lancaster City* Were Wrongly Decided and Are Irreconcilable With Modern Principles of Constitutional Interpretation

Even if those previous cases were textually on all fours with this one (as they are not), they should not be followed: they were wrong at the time they were decided—as compellingly shown by numerous decisions in other jurisdictions, *see supra* notes 13, 15—and, if anything, are even more erroneous under current jurisprudence governing constitutional challenges to duly enacted statutes. *See Caba*, 64 A.3d at 49 (setting forth applicable standards).

The *Lancaster City* Court appeared to view itself as largely bound by *Chase*. The root of the problem, then, lies in the 1862 opinion. First, the *Chase* opinion was expressly informed by the anti-democratic sentiments of its era. Indeed, the 1838 Constitution was the first in Pennsylvania history—and, thankfully, also the last—to restrict voting to "white" citizens. *Chase*, 41 Pa. at 418 (construing PA. CONST. of 1838, art. III, § 1). The *Chase* opinion not only noted this reactionary trajectory; *Chase* appeared, sadly, to celebrate it. *See, e.g.*, *id.* at 426 ("[The Pennsylvania Constitution of 1838] withholds [suffrage] altogether from four-fifths of the population, however much property they may have to be taxed, or however

competent in respect of prudence and patriotism, many of them may be to vote. And here let it be remarked, that all our successive constitutions have grown more and more astute on this subject."). These anti-democratic convictions are wholly alien to the modern Constitution.

Second, as explained more fully above, *see supra* Section III.D.1.(a), *Chase*'s interpretation of the durational-residency requirement in Article III, § 1 is completely unmoored from the text and structure of the 1838 Constitution. And *Chase* is downright dismissive of evidence of how the "offer to vote" phrase was actually understood at the time of ratification. *See id.* at 417 (acknowledging that an 1813 statute had previously allowed voting to occur outside of a voter's election district, and that, in 1839, only months after the 1838 Constitution took effect, the General Assembly had enacted a voting statute retaining "the substance of the Act of 1813," but conjecturing that the General Assembly was "careless" and must have overlooked the "offer to vote" language in the 1838 Constitution). Where a contemporary reader would expect to find actual analysis of the text, structure, and original public understanding of Article III, § 1, *Chase* proclaims the Court's own policy views regarding how elections ought to be administered—and asserts that the Constitution must "undoubtedly" reflect the same beliefs. *Id.* at 419. The Court even opines that a voter's "neighbours" should be allowed to "challenge" his vote at the time it is cast, *see id.*—a suggestion utterly ungrounded in anything the

1838 Constitution actually said. This mode of "interpretation" is irreconcilable with well-settled, inveterate principles of modern jurisprudence, particularly in a case that does not assert the violation of any individual rights. *See, e.g.*, *Commonwealth v. Torsilieri*, 232 A.3d 567, 596 (Pa. 2020) ("[W]hile courts are empowered to enforce constitutional rights, they should remain mindful that 'the wisdom of public policy is one for the legislature, and the General Assembly's enactments are entitled to a strong presumption of constitutionality rebuttable only by a demonstration that they clearly, plainly, and palpably violate constitutional requirements.'"); *see also* PA. CONST. art. I ("Declaration of Rights").[19] It is unsurprising, then, that in interpreting the same "offer to vote" phrase in other state constitutions, multiple courts have squarely—and persuasively—rejected *Chase*'s construction. *See supra* notes 13, 15; *see also* Note, *Review of Absentee Voters*

[19] Not only does the Pennsylvania Constitution's Declaration of Rights not support Petitioners' argument; it affirmatively undermines their position. As recently construed by the Pennsylvania Supreme Court, the Declaration's Free and Equal Elections Clause, which "has no federal counterpart," reflects "the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802, 804 (Pa. 2018). By ensuring that voters who live far from their polling places or cannot take time off work on election day—or who avoid indoor public spaces out of fear of contracting COVID-19—are afforded equal access to the franchise, Act 77's mail-in voting regime directly vindicates the purpose of the Free and Equal Elections Clause.

Legislation in Pennsylvania, 73 U. PA. L. REV. 176 (1925) (cataloguing the numerous flaws in the *Chase* and *Lancaster City* decisions).

(c) Even If *Lancaster City* Were Binding, It Would Not Sustain Petitioners' Facial Challenge to Act 77

Finally, it is worth noting that even if the *Lancaster City* holding did control here (as it does not), it would not support Petitioners' facial challenge to Act 77. As *Lancaster City* acknowledged, a provision post-dating *Chase*, and set forth in Article VII, § 4 of the current Constitution, makes unmistakably clear that the General Assembly may prescribe the "method[s]" of voting so long as they protect the secrecy of the vote. *Lancaster City* nonetheless held (wrongly) that the 1874 Constitution limited the *place from which* electors could return their ballots. According to the 1924 decision, absentee voting, *i.e.*, voting by electors located outside of their election districts of residence, was permissible only for the groups specifically enumerated in the 1874 Constitution. *See Lancaster City*, 126 A. at 201 (describing the "proposition controlling this case" as: "a law giving to voters the right to cast their ballots at some place other than the election district in which they reside [is] unconstitutional").

Significantly, however, Act 77 supplemented, rather than superseded, Pennsylvania's pre-existing absentee voting laws. Those pre-existing statutory provisions have remained in effect. *See* Election Code art. XIII, 25 Pa. Stat. §§ 3146.1–3146.9 (article addressing absentee electors); *compare* Election Code

art. XIII-D, 25 Pa. Stat. §§ 3150.11–3150.17 (separate article addressing mail-in electors). As previously noted, those pre-existing provisions enable virtually anyone who will be outside their election district on election day—including anyone on "vacation," 25 Pa. Stat. § 2602(z.3)—to cast an absentee ballot. The principal innovation of Act 77, then, was to allow voters located *within* their election districts, *i.e.*, *non*-absentee voters, to vote by mail. Indeed, a great number of ballots cast under the authority of Act 77—and likely the overwhelmingly majority, certainly during the COVID-19 pandemic—have been returned by voters who wish to vote from home rather than at their polling place. Even under *Lancaster City*'s holding, such voters undeniably "offer to vote" "in the[ir] election district" in accordance with a "method … prescribed by law." PA. CONST. art. VII, §§ 1, 4. There can be no dispute that all of *those* applications of Act 77 are constitutional.

Moreover, a substantial number of the "mail-in" ballots cast under Act 77 are actually returned by voters *in person*. *See* 25 Pa. Stat. § 3146.5(b)(2).[20] Those applications of Act 77 are also untouched by Petitioners' argument. In short, it is plainly not the case, even under Petitioners' untenable reading of the Constitution,

[20] Pennsylvania Department of State, *Act 77 Changes to the Election Code* at 2, https://www.pacounties.org/GR/Documents/Act%2077%20-%20Election%20Reform%20Bill%20summary.pdf (explaining that "[c]ounty election boards are now required to immediately process walk-in applications for both mail-in and civilian absentee voters. Voters must be allowed to complete their application request and cast their mail-in or absentee ballot while in the county office.").

that Act 77 "is unconstitutional in all of its applications." *Haveman*, 238 A.3d 567, 572 (Pa. Commw. Ct. 2020). For this reason, too, Petitioners' facial constitutional challenge necessarily fails. *See Germantown Cab Co.*, 206 A.3d at 1041 (facial challenge can succeed "only where there are no circumstances under which the statute would be valid").

E. Petitioners' Federal Constitutional Claims Are Wholly Derivative of Their Fatally Flawed State Constitutional Claim and Fail for Other Reasons as Well

The Petition purports to assert federal constitutional claims (Counts II and III) alongside its claim under the Pennsylvania Constitution (Count I). Each of the federal claims, however, is predicated on Petitioners' assertion that Act 77's mail-in voting procedures violate the Pennsylvania Constitution. Count II of the Petition alleges that "[w]hen a state legislature violates its state constitution[] … in furtherance of its … authority to regulate federal elections and appoint [presidential electors," the state legislature also "violates the U.S. Constitution's delegation to the states of the lawmaking power for federal elections." Pet. ¶¶ 82–84 (alleging violation of U.S. CONST. art. I, §§ 2, 4, art. II, § 1, amend. XVII). Count III alleges that "[a]llowing mail-in ballots to be counted which," in Petitioners' view, "exceed the limitations for permitted absentee voting under the Pennsylvania Constitution," effects vote dilution violating the "14th Amendment Due Process and Equal Protection Guarantees." Pet. ¶ 88. Because each of these

federal-law claims rests on the premise that Act 77 violates the Pennsylvania Constitution, the analysis above disposes of the federal claims as well.

Notably, however, the federal claims fail irrespective of the merits of the state-law claim. Contrary to Petitioners' unsupported assertion, the U.S. Constitution's "delegat[ion of] authority to make laws for federal elections to the states' legislative power" (Pet. ¶ 80 (Count II)) does not convert every alleged violation of state election law into a federal constitutional claim. *See King v. Whitmer*, 505 F. Supp. 3d 720, 737 (E.D. Mich. 2020) (finding "no case … supporting such an expansive approach"). Nor can Petitioners bootstrap their state-law claim into a claim for violation of the U.S. Constitution's Fourteenth Amendment. (*See* Pet., Count III.) *See Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 391 (W.D. Pa. 2020) ("A violation of state law does not state a claim under § 1983 …." (quoting *Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) (citing *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)))); *Bognet*, 980 F.3d at 354–55 (rejecting similar vote-dilution claim and citing same line of precedent); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711–12 (D. Ariz. 2020) (same). Accordingly, even if Petitioners' claims under the Pennsylvania Constitution had merit (and they do not), their federal claims would fail as a matter of law.

IV. CONCLUSION

Petitioners fail to demonstrate standing; their claims are time-barred both statutorily and under the equitable doctrine of laches; and their constitutional arguments fail on the merits. Accordingly, Respondents respectfully request that their Application for Summary Relief be granted, and that the *Bonner* Petition be dismissed with prejudice.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: September 30, 2021

By: */s/ Michele D. Hangley*
Michele D. Hangley (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
John Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300

OFFICE OF ATTORNEY GENERAL

Stephen Moniak (I.D. No. 80035)
Karen M. Romano (I.D. No. 88848)
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-2717

PENNSYLVANIA GOVERNOR'S OFFICE OF GENERAL COUNSEL

Kenneth L. Joel (I.D. No. 72370)
333 Market Street, 17th Floor
Harrisburg, PA 17101
(717) 787-9348

PENNSYLVANIA DEPARTMENT OF STATE

Kathleen M. Kotula (I.D. No. 318947)
306 North Office Bldg., 401 North Street
Harrisburg, PA 17120-0500
(717) 783-1657

TUCKER LAW GROUP, LLC

Joe H. Tucker, Jr. (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
Jessica A. Rickabaugh (I.D. No. 200189)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondents

EXHIBIT A

Received 8/26/2021 4:32:11 PM Commonwealth Court of Pennsylvania

Filed 8/26/2021 4:32:00 PM Commonwealth Court of Pennsylvania
244 MD 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG McLINKO,
Petitioner,
v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents.

No. 244 MD 2021

AFFIDAVIT OF JONATHAN MARKS

I, Jonathan Marks, declare and affirm under the penalties of 18 Pa.C.S. § 4904 that:

1. I am the Deputy Secretary for Elections and Commissions for the Department of State (the "Department") of the Commonwealth of Pennsylvania, a position I have held since February 2019. Prior to being appointed as Deputy Secretary, I served as Commissioner for the Department's Bureau of Commissions, Elections and Legislation. I submit this Affidavit in opposition to Petitioner's Application for Summary Relief and in support of Respondents' Cross-Application for Summary Relief.

2. In my current and former positions, I have been responsible, together with the Secretary of the Commonwealth and other officials, for helping to lead the Department's efforts to ensure that Pennsylvania's elections are free, fair, secure,

and accessible to all eligible voters. In that capacity, I have worked closely with county executives, elections directors, and personnel in the Commonwealth's 67 counties.

Act 77's Amendments to the Pennsylvania Election Code

3. On October 31, 2019, Governor Wolf signed into law Act 77 of 2019, which amended Pennsylvania's Election Code in several respects.

4. Among other reforms, Act 77 provided that electors who were not eligible for absentee ballots would be permitted to vote with mail-in ballots. Before Act 77 was passed, voters who did not qualify for absentee ballots were required to vote in person at their polling places on election day.

5. As a result of Act 77, the Department and Pennsylvania's county boards of elections (the "counties") anticipated that counties would have to deal with a large increase in the number of ballots they would receive by mail.

6. Those expectations, however, had not accounted for the effects of the COVID-19 pandemic, which took hold in Pennsylvania in March 2020. Due to voters' concerns that voting in person at polling places on election day might expose them to the virus—and given the absence of any vaccine, which was not generally available to the public until 2021—a significant percentage of Pennsylvania voters cast a mail-in or absentee ballot during the 2020 election

cycle. These numbers far exceeded what Pennsylvania elections administrators had planned for prior to the pandemic.

7. The first statewide election following the enactment of Act 77 was the 2020 primary election, which was held on June 2, 2020. In that election, the majority of voters—nearly 1.5 million people—cast a mail-in or absentee ballot, while approximately 1.3 million Pennsylvanians voted in person on June 2.

8. One consequence of the massive use of mail-in voting was that certain counties fell behind in the processing of mail-in ballot applications and the issuance of mail-in ballots.

Following the 2020 Primary Election, the Department and Counties Expended Substantial Resources for the Purpose of Implementing Act 77's Mail-In Voting Procedures

9. Based on historical experience, Pennsylvania election administrators anticipated that a significantly greater number of Pennsylvanians would vote in the 2020 general election than had voted in the 2020 primary election. In addition, due in large part to the ongoing COVID-19 pandemic, election administrators expected that a large percentage of these voters would vote by mail—many more than the number of mail-in voters in the primary election.

10. These expectations were borne out. Of the approximately 6.9 million Pennsylvanians who voted in the 2020 general election, approximately 2.7 million cast a mail-in or absentee ballot.

11. In anticipation of these high numbers, and based on their experience in the 2020 primary election, Pennsylvania election administrators invested significant resources to educate voters about the mail-in voting procedures made available by Act 77; to avoid the delays in application processing and mail-in ballot issuance that had affected certain counties during the primary election; and to minimize the time it would take to process and tabulate millions of returned mail-in ballots.

12. Recognizing that many voters who vote in general elections, particularly in presidential years, do not vote in primary elections and are less familiar with the electoral system than primary voters, the Department, as well as certain counties, continued their extensive public relations efforts to educate voters about the availability of mail-in voting, and to encourage voters to apply early for mail-in ballots, thereby easing the administrative burden on elections officials. The Department alone spent approximately $13.7 million on these communications between the 2020 primary and general election.

13. Certain counties that fell behind in the issuance of mail-in and absentee ballot applications and ballots during the primary election also invested additional resources in the general election, including purchasing equipment to streamline their fulfillment of ballot requests.

14. Counties also had to invest substantial resources into training additional election workers to process mail-in ballot applications.

15. In the lead-up to the 2020 general election, a particular concern of election administrators was the time it would take to process the large volume of mail-in ballot submissions and tabulate votes.

16. Pursuant to the requirements of the Election Code, each mail-in ballot was returned in two nested envelopes. After checking the voters' completion of the declaration printed on the outside envelopes, county election administrators had to open each of those envelopes in turn, and the ballot then needed to be reviewed and tabulated.

17. Per the Election Code, this canvassing of mail-in ballots did not take place at individual election districts staffed by local polling-place officials (as had previously been the case with the canvassing of absentee ballots); instead, pursuant to the provisions of Act 77, all mail-in and absentee ballots returned in a given county were canvassed by the county board of elections at a central location.

18. To ensure that the results of the election would be known within a reasonable time (and sufficiently in advance of post-election day deadlines prescribed by the Election Code), it was necessary for the counties to use scanning machines to scan and tabulate the votes in an automated fashion. Due to the massive volume of mail-in ballots received by certain counties, it was necessary

for those counties to procure additional automated equipment (such as envelopers, which open the envelopes) to process mail-in ballot submissions. A large number of counties also had to expend resources training additional workers to determine whether voters had sufficiently completed the declarations on the outside envelopes enclosing the mail-in and absentee ballots, and to perform various other aspects of the canvassing and vote-tabulation process.

19. Because of the large volume of mail-in ballot submissions expected to be received during the 2020 general election, many counties purchased ballot scanners and/or other automated mail-in ballot-processing machines during the period between the 2020 primary and general election, at a cost of millions of dollars. The Department is aware that $605,000 was distributed to the counties through the CARES Act. Also, the Department is aware that counties that bought automated equipment to assist in the canvassing of mail-in ballots used county funds and private funds to purchase the equipment.

20. The expenditures described in Paragraphs 11–19 above were made specifically for the purpose of carrying out the mail-in voting procedures introduced by Act 77. If Act 77's mail-in voting procedures had been invalidated prior to the date of the expenditures described in Paragraphs 11-19 above, these expenditures would not have been made.

Eliminating Act 77's Mail-In Voting Procedures at This Juncture Would Require Election Officials to Spend Substantial Additional Resources to Educate Voters and Mitigate Disenfranchisement

21. Despite the challenges posed by COVID-19 and the unexpected volume of mail-in voting, Pennsylvania's election administrators successfully implemented Act 77's mail-in voting procedures during the 2020 election cycle. As discussed above, millions of voters were educated about the availability of mail-in ballots and voted by mail in the 2020 general election.

22. If Act 77's mail-in voting procedures were now eliminated, the Department and counties would have to invest millions of dollars of resources to educate voters regarding the change. In the absence of such expenditures, the elimination of no-excuse mail-in voting would create significant confusion about the permissible means of voting, leading to voter disenfranchisement.

23. Some of the very features of Act 77 that facilitate voting increase the likelihood that the Act's elimination would have disenfranchising effects.

24. For example, Act 77 allowed "[a]ny qualified registered elector [to] request to be placed on a permanent mail-in ballot list file." 25 P.S. § 3150.12(g)(1). Once an elector does so, a mail-in ballot application will automatically be mailed to the elector at the beginning of each year, and the elector's return of that application will cause her to be sent a mail-in ballot for each election during that year. *Id.* An elector who has requested to be placed on this

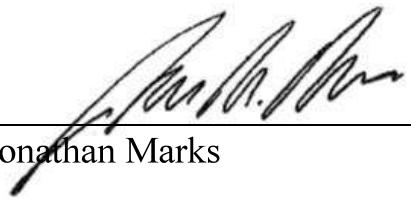
permanent list therefore has every reason to expect that she need take no further affirmative steps to be able to vote; the Election Code assures her that elections officials will send her the appropriate materials at the appropriate time.

25. As of the date of this Affidavit, approximately 1,380,342 Pennsylvania voters were on the permanent mail-in ballot list file established by Act 77.

26. As of the date of this Affidavit, approximately 740,765 Pennsylvanians have had their application for a mail-in ballot for the upcoming November 2, 2021, election approved. Of these ballots that have been approved, 736,534 are those of voters who are on the permanent mail-in list.

I declare that the facts set forth in this Affidavit are true and correct. I understand that this Affidavit is made subject to the penalties for unsworn falsification to authorities set forth in 18 Pa.C.S. § 4904.

Executed on August 26, 2021.



Jonathan Marks

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: September 30, 2021

/s/ Michele D. Hangley
Michele D. Hangley