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HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Michele D. Hangley (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
John G. Coit (I.D. No. 324409)
Christina C. Matthias (I.D. No. 326864)
John B. Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200

KRAMER LEVIN NAFTALIS & FRANKEL LLP

Barry H. Berke*
Dani R. James*
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9308

*(*Pro Hac Vice Motions Pending)*

OFFICE OF ATTORNEY GENERAL

Karen M. Romano (ID No. 88848)
Keli M. Neary (ID No. 205178)
Nicole M. Boland (ID No. 314061)
Stephen M. Moniak (ID No. 80035)
Strawberry Square, 15th Floor
Harrisburg, PA 17120
(717) 787-2717

Counsel for Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MIKE KELLY, SEAN PARNELL, THOMAS A. FRANK, NANCY KIERZEK, DEREK MAGEE, ROBIN SAUTER, MICHAEL KINCAID, and WANDA LOGAN, Petitioners, v. COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GENERAL ASSEMBLY, THOMAS W. WOLF, and KATHY BOOCKVAR, Respondents,	No. 620 MD 2020

DNC SERVICES CORP. / DEMOCRATIC NATIONAL COMMITTEE,

Proposed Intervenor –Respondent.

RESPONDENTS' BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS TO PETITIONERS' PETITION FOR REVIEW

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Respondents, Governor Thomas W. Wolf, Secretary of the Commonwealth Kathy Boockvar, and the Commonwealth of Pennsylvania, submit the following Memorandum of Law in support of their Preliminary Objections.

I. INTRODUCTION

The relief Petitioners seek is simply breathtaking. They ask this Court to invalidate Pennsylvania's voting laws, undo the results of Pennsylvania's general election, and disenfranchise several million voters. While draped in the driest of historical arguments, Petitioners' claim is audacious; to grant it would undercut the very foundations of Pennsylvania's democracy and snatch the most basic of rights from its people.

If it were ever possible to allege a harm serious enough to justify such a remedy, no such allegation has been made here. Instead, Petitioners' claim has no merit at all, and must be dismissed at the pleading stage. First, Petitioners lack standing. They allege no particular harm from the supposed constitutional violation they allege; therefore, they have no right to pursue their claim in court. Second, this Court lacks jurisdiction. Pennsylvania's Election Code prescribes particular and specific procedures for altering or overturning election results, and precludes all other remedies.

Third, Petitioners have waited for far, far too long to bring this claim. They should have brought it, if at all, within the 180 days provided in the statute at issue.

Instead, they waited until well past the last minute—after the election had taken place, the votes had been counted, and election administrators were in the process of certification—to spring their claim at a time when it could inflict maximum damage. Finally, even if Petitioners could surmount all these problems, their claims have no merit. The Pennsylvania Constitution simply does not mean what Petitioners say it means, and presents no barrier to the enactment and implementation of mail-in voting.

II. STATEMENT OF JURISDICTION

Respondents object to the exercise of this Court's jurisdiction because jurisdiction to resolve election disputes "is founded entirely upon statute and cannot be extended beyond the limits defined by the General Assembly." *Rinaldi v. Ferrett*, 941 A.2d 73, 78 (Pa. Commw. Ct. 2007).

III. STATEMENT OF THE CASE[1]

In 2019, with broad and bipartisan support, the Pennsylvania legislature enacted Act 77 of 2019, which made several important updates and improvements to Pennsylvania's Election Code. Among these were provisions that, for the first

[1] For purposes of the Preliminary Objections, Respondents assume, but do not admit, the truth of the Petition's well-pleaded factual allegations. In ruling on preliminary objections, the Court must accept well-pleaded allegations as true, but "need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion." *Torres v. Beard*, 997 A.2d 1242, 1245 (Pa. Commw. Ct. 2010) (citations omitted).

time, offered the option of mail-in voting to Pennsylvania electors who did not qualify for absentee voting. This historic change was a significant development that has undeniably made it easier for all Pennsylvanians—including Petitioners—to exercise their right to vote.

In passing Act 77, the legislature was undoubtedly well aware that implementing such a significant overhaul of Pennsylvania's voting laws would be a lengthy and complex endeavor, and that challenges to the law's constitutionality therefore should be brought and addressed before this implementation began. Accordingly, the legislature included a provision that required all constitutional challenges to be brought within 180 days of its effective date. *See* Section 13(3) of Act 77 ("An action under [certain enumerated provisions, including the mail-in ballot provisions] must be commenced within 180 days of the effective date of this section," or April 28, 2020.).

The Section 13(3) deadline came and went without any facial challenge to the constitutionality of Act 77's provisions. Since then, in the face of the COVID-19 pandemic and an associated surge in mail-in and absentee voting, election administrators across the Commonwealth have worked to interpret Act 77's provisions and put them in place. As the Court is undoubtedly well aware, Pennsylvania's state courts also made significant efforts in this regard, resolving many disputed interpretations of the statute under what were often emergent

deadlines. During this period, the Commonwealth of Pennsylvania held two elections—a primary election on June 2, 2020, and a general election on November 3, 2020. At no time during the 180-day period, the runup to the primary election, or the runup to the general election did Petitioners (or anyone else) claim in any proceeding whatsoever that Act 77 was unconstitutional on its face. In fact, three of the Petitioners here, Congressman Kelly, Mr. Parnell, and Ms. Logan, ran in the 2020 primary and general election, presumably garnering votes cast on the same mail-in ballots that they now claim to be unconstitutional.

Even after the November 3 election, Petitioners held their fire. It was only when the results of the election—in particular, of the presidential election—became clear that Petitioners acted. They filed their Complaint in the late afternoon of Saturday, November 21, 2020, just two days before the counties' statutory deadline for certifying their election results to the Secretary. 25 Pa. Stat. § 2642(k). Late the next day—just one day before the statutory deadline—Petitioners filed a Motion for an Emergency/Special Prohibitory Injunction. Nothing in Petitioners' filings indicates why Petitioners waited for more than a year to seek a remedy for Act 77's supposed unconstitutionality, and Petitioners have not offered (and cannot offer) any justification for their delay.

Even after Petitioners filed their Complaint, they did not serve it; instead, the Court ordered them to do so. The Court then held an initial conference on

November 23, the counties' certification deadline, and indicated that Respondents' jurisdictional briefing would be due the next morning. At 5:50 p.m., however, the Court ordered Respondents to file their Preliminary Objections and briefs in support by 11:00 p.m. that night.

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. Do Petitioners have standing to challenge the constitutionality of Act 77's mail-in voting regime, where Petitioners do not plead any facts showing any particularized, substantial interest in the matter, but rather assert, at most, only a generalized interest in compliance with the law?

Suggested answer: No.

2. Does the Court have jurisdiction to invalidate the results of the November 2020 election, enjoin certification of those results, or take any other step to override or alter Commonwealth officials' statutory obligations to implement the choices that the Commonwealth's qualified electors have made, where such relief is not provided for or contemplated in Pennsylvania's Election Code?

Suggested Answer: No.

3. Does the Pennsylvania Constitution preclude the General Assembly from extending mail-in voting beyond the absentee voter categories in Article VII, § 14?

Suggested Answer: No.

4. Should the Court disenfranchise millions of Pennsylvania voters, despite the fact that the doctrine of laches prohibits courts from imposing a prejudicial remedy, such as disenfranchisement, where a petitioner has unduly delayed in bringing suit, like the Petitioners did here by waiting more than a year to challenge Act 77?

Suggested Answer: No.

5. May Petitioners initiate and pursue a constitutional challenge to the no-excuse mail-in voting scheme created by Act 77 more than a year following enactment of Act 77, where Act 77 explicitly provides that such challenges must

have been brought within the first 180 days following its enactment?

Suggested Answer: No.

V. ARGUMENT

A. PRELIMINARY OBJECTION 1: PETITIONERS' CLAIMS FAIL AS A MATTER OF LAW BECAUSE PETITIONERS LACK STANDING TO ASSERT THEM

The Petition for Review is a textbook example of a pleading that fails for lack of standing. It is well settled that, to have standing, "one who seeks to challenge governmental action must show a direct and substantial interest." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975). The requirement of a "substantial interest" means that "there must be some discernible adverse effect to some interest *other than the abstract interest of all citizens in having others comply with the law.*" *Id.* at 282 (emphasis added); *accord Szoko v. Twp. of Wilkins*, 974 A.2d 126, 1219-20 (Pa. Commw. Ct. 2009) ("[A] plaintiff must have an interest in the matter that is distinguishable from the interest shared by other citizens; to surpass that common interest, the plaintiff's interest must be substantial, direct and immediate. A substantial interest in the outcome of a dispute is an interest that surpasses the common interest of all citizens in seeking obedience to the law." (internal citation omitted)). As this Court has repeatedly held, a plaintiff/petitioner cannot survive preliminary objections based on a lack of standing unless the party has "pleaded facts demonstrating [the requisite] direct, substantial and present interest in th[e]

matter." *Szoko*, 974 A.2d at 1220; *Com. Higher Educ. Assistance Agency v. State Employes' Ret. Bd.*, 617 A.2d 93, 94 (Pa. Commw. Ct. 1992) ("[T]o have standing, a party must … plead facts which establish a direct, immediate, and substantial interest."), *aff'd sub nom. Com., Higher Educ. Assistance Agency (PHEAA) v. State Employees' Ret. Bd.*, 636 A.2d 629 (Pa. 1994).

The Petition fails to meet this standard. It pleads ***no facts whatsoever*** showing any particularized, substantial interest held by any of the petitioners. Indeed, the only interest the Petition alleges will be harmed is the "interest of all citizens in having others comply with the law." *Wm. Penn*, 346 A.2d at 282. The Petition could not be clearer on this point: the only two paragraphs that come close to identifying an alleged "injury" confirm that the interest asserted by Petitioners is an abstract interest in compliance with the law. (*See* Petition ¶ 90 (asserting that "[i]f the requested relief is not granted, Defendants will continue to wrongfully count and certify improper mail-in ballots that are not permitted under the Pennsylvania Constitution"); *id.* ¶ 93 (referring to the purported "harm" of "allowing Defendants to continue to wrongfully count and certify improper mail-in ballots").)

The Petition identifies no other purported harms. Two of the Petitioners, Representative Mike Kelly and Sean Parnell, are alleged to bring the lawsuit as candidates for federal office as well as voters/citizens. (Petition *id.* ¶¶ 2-3.) But

the Petition nowhere alleges that they sustained any particularized injury as a result of Act 77. Not only that, but the Petition specifically avers that Representative Kelly was "re-elected" in the November 2020 election that was conducted under Act 77 (*id.* ¶ 2). Without well-pleaded facts showing a particularized, cognizable injury, there is no standing.

The same is true of the remaining Petitioners, who are individual voters/citizens (and is also true of Representative Kelly and Mr. Parnell insofar as they assert claims in that capacity). No interest is alleged other than an interest in ensuring elections are conducted in accordance with the law as Petitioners allege it to be. That is plainly insufficient to plead standing. *See Szoko*, 974 A.2d at 1220.

Particularly instructive, given its facts, is this Court's decision in *In re Gen. Election 2014*, No. 2047 CD 2014, 2015 WL 5333364, at *3-4 (Pa. Commw. Ct. Mar. 11, 2015), which was unanimously decided by a panel comprising Judges McCullough and Brobson as well as then-President Judge Pellegrini. In that case, certain voters in Philadelphia (the "Objectors") had challenged a decision allowing other Philadelphia voters to vote by absentee ballot. *Id.* at 1. The Objectors contended they had standing "because they are registered electors in the City of Philadelphia and they have a substantial, immediate and pecuniary interest that the Election Code by obeyed[,] and the absentee ballots … cast affected the outcome of the General Election in which [Objectors] voted." *Id.* at *3. This Court rejected

that argument and affirmed the trial court decision finding lack of standing.

This Court held that the trial court had "properly cited *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970)." *Id.* at *3. In *Kauffman*, certain voters had brought a declaratory judgment action challenging the validity of amendments to the Election Code that "permit[ted] 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. As this Court recognized, the standing principles dispositive of *Kauffman* were also dispositive of Objectors' challenge to the absentee ballots at issue in *In re General Election 2014*. *See* 2015 WL 5333364, at *4.

This line of precedent controls this case. Petitioners here have alleged

nothing more than that Act 77, by allowing for no-excuse mail-in voting, has permitted ballots to be cast (in two past elections) that, according to Petitioners' interpretation of the Pennsylvania Constitution, should not have been allowed to be cast. (According to Petitioners, if those voters did not qualify for absentee ballots, they should have been directed to vote in person at a polling place.) No Petitioners asserts any facts showing a particularized, substantial injury. Under inveterate standing principles generally, and under *Kauffman* and *In re General Election* specifically, the Petition must be dismissed for lack of standing.

It is also worth noting that this conclusion is completely in keeping 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). As explained by a recent, thoroughly reasoned decision on standing by the United States Court of Appeals for the Third Circuit, allegations that the casting or counting of unlawful votes "dilutes" the influence of voters who cast lawful votes state only a generalized grievance that cannot, as a matter of law, confer standing. *See Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120, at *12 (3d Cir. Nov. 13, 2020). Of course, Petitioners here do not *even* assert any such "vote-dilution" theory of harm. But even if they had, such allegations would fail to confer standing as a matter of law.

Because, as a threshold matter, the Petition fails to plead facts showing that Petitioners have a direct, substantial, and present interest in this matter, the Petition must be dismissed. *Szoko*, 974 A.2d at 1220.

B. PRELIMINARY OBJECTION 2: PETITIONERS ARE BARRED FROM ASSERTING THIS CONSTITUTIONAL CHALLENGE TO ACT 77 BEYOND THE STATUTORILY-PROVIDED 180-DAY PERIOD FOR BRINGING SUCH CHALLENGES

Petitioners bring this action over six months *after* the applicable deadline to do so ran, on April 28, 2020. The Petition must therefore be dismissed.

Section 13(2) of Act 77 provides that the "Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality" of certain enumerated provisions, including parts of Section 1306 and all of Article XIII-D of Act 77. Act of October 31, 2019 (P.L. 552, No. 77), § 13(2), 2019 Pa. Legis. Serv. Act. 2019-77. These provisions created the opportunity for all qualified Pennsylvania electors to vote by mail without providing an excuse. These are the very statutory provisions that Petitioners' constitutional challenge targets.[2] Count I of the Petition seeks a

[2] The Petition seeks "a declaratory judgment declaring unconstitutional and void *ab initio* the Act 77 provisions that created a new option to vote by mail without providing an excuse." Pet. Count I, Wherefore Clause. The Petition also explicitly identifies Article III-D of Act 77, 25 P.S. § 3146.6(c) (part of Section 1306 of Act 77), and 25 P.S. § 3150.16 (enacted as part of Article XIII-D of Act 77). Pet. ¶¶ 1, 81. Article III-D of Act 77 sets forth the no-excuse mail-in voting scheme. Section 3150.16 sets forth some of the specific procedures for no-excuse mail-in

declaratory judgment declaring these specific provisions of Act 77 unconstitutional, and Count II seeks a prohibitory injunction preventing the Defendants from certifying the results of the November 3 General Election, a consequence that purportedly flows directly from such a declaration. The Petition is nothing less than a quintessential example of the type of action identified in Section 13(2). Section 13(3) of Act 77 provides that "[a]n action under paragraph (2) must be commenced within 180 days of the effective date of this section," that is, October 31, 2019. That 180-day period expired on April 28, 2020, or more than six months ago, and Petitioners missed the deadline. Petitioners' claims are invalid and cannot be pursued in this Court or elsewhere. *See Crossey v. Boockvar*, 239 A.3d 14, 15 n.4 (Pa. 2020) (noting that "Petitioners' petition for review [challenging the constitutionality of certain aspects of Article XIII-D of Act 77] was filed within [the] 180-day limit" and deciding Petitioners' claims on the merits).[3]

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voting. Section 3146.6(c) addresses requirements for effectively voting an absentee ballot. They are all among the list of provisions that are subject to a facial constitutional challenge only within the first 180 days following Act 77's enactment, pursuant to Section 13 of Act 77. Act No. 2019–77, Section 13(1)(xix), (xxi), Section 13(2)-(3).

[3] 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. *Cf. Delisle v. Boockvar*, 234 A.3d 410, 410-11 (Pa. 2020) (transferring to the Pennsylvania Commonwealth Court, rather than dismissing case asserting as-applied challenge to Act 77 based on COVID-19

Under the plain terms of Act 77, this challenge was only viable in the Pennsylvania Supreme Court within the first 180 days following Act 77's enactment. Petitioners' claim must be dismissed.

C. PRELIMINARY OBJECTION 3: THE PETITION MUST BE DISMISSED BECAUSE THE COURT LACKS JURISDICTION

While Petitioners style their Complaint as a challenge to the constitutionality of a statute, the relief they seek is to either change the general election's results or halt certification of those results. *See* Compl. ¶ 22 (asking Court to "declar[e] invalid any certification of results that include the tabulation of unauthorized votes"), *Id*. ¶ 24 (asking Court to alter election results to include only certain ballots, enjoin certification altogether, or circumvent election results altogether and invent a new method of appointing Pennsylvania's presidential electors). Because the Election Code does not provide for the type of relief Petitioners request, however, the Court lacks jurisdiction.

Because "[j]urisdiction to resolve election disputes is not of common law origin but is founded entirely upon statute," it "cannot be extended beyond the

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pandemic due to its filing outside of the 180 day time limit). The Petition here does not present such a challenge. Petitioners assert a classic facial challenge to the constitutionality of Act 77's introduction of no-excuse mail-in voting. They do not challenge any particular implementation of this scheme, or its application to a particular set of facts; rather, they allege that the no-excuse mail-in ballot scheme ***itself*** is unconstitutional, under any and all circumstances. Such a claim, brought over a year after the enactment of Act 77, is plainly barred. Act of October 31, 2019 (P.L. 552, No. 77), § 13(3), 2019 Pa. Legis. Serv. Act. 2019-77.

limits defined by the General Assembly"—that is, the statutory provisions providing for the resolution of election disputes are "the exclusive means" by which such disputes may be pursued and resolved. *Rinaldi v. Ferrett*, 941 A.2d 73, 78 (Pa. Commw. Ct. 2007); *see also Brunwasser v. Fields*, 409 A.2d 352, 354, 357 (Pa. 1979) ("the proper remedies for violations of the Election Code are to be found within the comprehensive legislative framework of the Code itself.") (holding that where statutory procedure was found to be "fully effective to redress appellant's grievances" regarding alleged campaign finance-related Election Code violations by winning candidate, "it must follow that [the relevant statutory procedure] is the exclusive method by which [such violations] may be remedied"); *Tartaglione v. Graham*, 573 A.2d 679, 680 n.3 (Pa. Commw. Ct. 1990) ("'election contest' proceedings are wholly statutory, and jurisdiction must be found in the Code or in some other statute incorporating the Code by reference") (citing *Reese v. County Board of Elections of Lancaster County*, 308 A.2d 154 (Pa. Commw. Ct. 1973)); *Lurie v. Republican Alliance*, 192 A.2d 367, 369 (Pa. 1963) (holding that where the Election Code provides a particular procedure for pursuing certain types of claims asserting Code violations, and "specifically designates" a particular court for hearing such claims, "complainants [a]re legally required to follow the Code's prescriptions in" bringing such claims).

As this precedent makes clear, Petitioners cannot invoke this Court's equity jurisdiction in an attempt to circumvent the statutory strictures of the Election Code. As shown above, there are prescribed avenues for challenging the results of an election after it has already taken place—including, in particular, an election contest under 25 P.S. § 3291 *et seq.* Because Petitioners have not availed themselves of these statutory forms of action, this Court lacks jurisdiction to adjudicate Petitioners' claims.

D. PRELIMINARY OBJECTION 4: THE PETITION MUST BE DISMISSED BECAUSE PETITIONERS' CLAIMS ARE BARRED BY LACHES

This case is why laches exists. "Laches bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another." *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). The two elements of laches are "(1) a delay arising from Appellants' failure to exercise due diligence and (2) prejudice to the Appellees resulting from the delay." *Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998) (citing *Sprague*, 550 A.2d at 187-88). Petitioners were not diligent in bringing their claim and they seek to disenfranchise millions. There is no better candidate for laches than this case.

First, Petitioners unduly delayed. 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. Petitioners' more-than-one-year delay is

a quintessential failure to act diligently. *See 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"). Moreover, Petitioners' grounds for challenging Act 77 are no different today than they would have been on the day of enactment; the Constitution has not changed since Act 77 became law, meaning Petitioners have no possible legitimate excuse for delaying. *See In re Mershon's Est.*, 73 A.2d 686, 687 (Pa. 1950) ("If by diligence a fact can be ascertained, the want of knowledge so caused is no excuse for a stale claim. 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.'" (citation omitted)).

Petitioners would also be hard pressed to find a way to prejudice more people in a more significant manner. Since Act 77's enactment, the Department has administered two elections in Pennsylvania pursuant to Act 77. Now, more than two weeks after millions of Pennsylvanians cast votes, Petitioners seek to disenfranchise every single voter who participated in the November 3, 2020 presidential election. *See* Pet. for Review at 24. Disenfranchising voters for no fault of their own is as prejudicial as it is antithetical to our democracy. *See In re Contest of Election for Off. of City Treas. from Seventh Legis. Dist. (Wilkes-Barre City) of Luzerne County*, 162 A.2d 363, 365-66 (Pa. 1960) (holding that, in

election contest, courts "cannot allow the carelessness or even fraud of the election officers to defeat the election and frustrate the will of the electorate.… the rights of voters are not to be prejudiced by the errors or wrongful acts of election officers").

Because of the substantial prejudice disenfranchisement causes to voters, courts in Pennsylvania and across the country have applied laches in election cases to avoid late changes to election law that would deprive Americans of the right to vote. *See Public Interest Legal Found. v. Boockvar*, No. 20-2905 at *12, 14 (M.D. Pa. Oct. 20, 2020) ("[W]e decline to order such drastic action simply because Plaintiff elected to file its suit on the eve of the national election…. In an election where the margins may be razor-thin, we will not deprive the electorate of its voice without notice or proper investigation on the basis of an ill-framed and speculative venture launched at this late date."); *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 404-05 (E.D. Pa. 2016) (denying preliminary injunction based on, *inter alia*, prejudicial delay and proximity to election, where political party and voters waited until 18 days before election before moving for preliminary injunction prohibiting enforcement of county-residence restriction on poll watchers, and the "requested relief … would alter Pennsylvania's laws just five days before the election"); *Stein v. Boockvar*, No. 16-6287, 2020 WL 2063470, at *19-20 (E.D. Pa. Apr. 29, 2020) (laches barred relief where relief sought, namely, order requiring decertification, prior to November 2020 election, of voting

machines used in Philadelphia and other counties, would "effectively disenfranchise" voters); *Maddox v. Wrightson*, 421 F. Supp. 1249, 1252 (D. Del. 1976) (lawsuit filed "a mere five weeks before the election" was barred by laches where plaintiffs "were aware of ballot access difficulties at least seven weeks before th[e] suit was filed"); *Dobson v. Dunlap*, 576 F. Supp. 2d 181, 187-88 (D. Me. 2008) (rejecting plaintiffs' effort to excuse their delay in filing suit by pointing to pendency of lawsuit brought by another claimant; plaintiff "voters cannot have it both ways: they cannot disassociate themselves from the [prior] action for purpose of preclusion" while relying on the action to excuse their delay).

Applying laches here is also procedurally proper. Laches may be raised in preliminary objections if its "existence … is clear on the face of the record." *In re Marushak's Estate*, 413 A.2d 649, 651 (1980); *accord Meier v. Maleski*, 648 A.2d 595, 604 n.15 (Pa. Commw. Ct. 1994) ("[L]aches may be raised by preliminary objection[.]"). Here, there is no dispute that Petitioners knew or should have known, from the moment Act 77 was enacted on October 31, 2019, *see* Pet. ¶ 54, about its alleged constitutional infirmity. *Compare* Pet ¶ 55 (describing press release announcing Act 77), *with* Pa. Const. art. VII, § 14 (showing no amendments since Act 77 was enacted in 2019). Nor is there any dispute that "Act 77[] introduc[ed] no-excuse mail-in voting" and "millions of people [] avail[ed] themselves of the opportunity to cast their ballots from home in the very first year

that the law applied." *In re: Canvass Of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 29 WAP 2020, 2020 WL 6866423 (Pa. Nov. 23, 2020) (Wecht, J., concurring and dissenting). It is thus clear on the face of the record that laches applies to Petitioners' attempt to disenfranchise those millions of voters.[4]

For the doctrine of laches to have any meaning, the Court must apply it here.

E. PRELIMINARY OBJECTION 5: THE PETITION MUST BE DISMISSED BECAUSE IT FAILS TO STATE A CLAIM

Petitioners bear the significant burden of showing that Act 77 violates the Pennsylvania Constitution, a claim that is cognizable only where the injury is concrete. "There is a presumption that lawfully enacted legislation is constitutional. Should the constitutionality of legislation be challenged, the challenger must meet the burden of rebutting the presumption of constitutionality by a clear, palpable and plain demonstration that the statute violates a constitutional provision." *Yocum v. Commonwealth of Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 238 (Pa. 2017) (citation and quotation omitted); *see also Ketterer v. Com., Dep't of Transp.,* 574 A.2d 735, 736 (Pa. Commw. Ct. 1990) ("A statute is cloaked with a strong presumption of constitutionality and one

[4] The Court may also apply laches to a constitutional challenge, such as that of Petitioners, so long as the challenge is backwards looking. *See Stilp*, 718 A.2d at 293 (distinguishing case refusing to apply laches to constitutional challenges where plaintiff "sought to prevent an unconstitutional act from occurring rather than challenge an act that already occurred"). Here, Petitioners seek only to challenge an act that already occurred: the November 3, 2020 presidential election. Pet. for Review at 24. Applying laches is therefore proper under *Stilp*.

who attacks it bears the burden of demonstrating that the legislation "clearly, palpably and plainly violates the constitution." (quoting *Hayes v. Erie Insurance Exchange*, 425 A.2d 419, 421 (Pa. 1981)).

At baseline, Pennsylvania's Constitution confers upon the General Assembly the authority to pass laws and to legislate on any matter not prohibited by the Pennsylvania or federal constitutions. *See* Pa. Const. art. II, § 1 (granting "[t]he legislative power of this Commonwealth" to the General Assembly). It is a long-settled principle of Pennsylvania law that "powers not expressly withheld from the General Assembly inhere in it." *Stilp v. Pennsylvania*, 601 Pa. 429, 435 (2009) (citing *Commonwealth ex rel. Kelley v. Keiser*, 340 Pa. 59, 66 (1940). Therefore, simply because a particular legislative duty is listed in the Constitution does not prevent the General Assembly from crafting other legislation on that topic.

Petitioners speculate, however, that because the Pennsylvania Constitution directs the General Assembly to provide certain voters the right to vote by absentee ballot in Article VII, § 14, it cannot extend the same right to others not included in the list. Petitioners claim Act 77 is unconstitutional because it was passed without "following the necessary procedure" to provide for no-excuse mail-in voting, which they allege requires a constitutional amendment. Compl. ¶ 1; *see also* Compl. ¶¶ 27, 53. Simply put, Petitioners attempt to read a requirement that all voting proceed "*in propia persona*" into the Constitution that is not there *See, e.g.,*

Compl. ¶ 16.

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

> The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors [1] who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or [2] who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or [3] who will not attend a polling place because of the observance of a religious holiday or [4] who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

Pa. Const. art. VII, § 14(a) (brackets and numbers added). This provision singles out four categories of voters who must be allowed to vote by absentee ballot. It provides a floor, not a ceiling—the legislature must allow voters in these four categories to cast absentee ballots, but may go further and allow other categories of voters to do so, including by allowing any voter to opt to cast a mail-in ballot.

Petitioners' attempt to read Article VII, § 14 more narrowly violates basic rules of construction. First, "[w]hen the words of a [provision] are clear and unambiguous, 'the letter of it is not to be disregarded under the pretext of pursuing its spirit.'" *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (quoting 1 Pa. C.S. § 1921(b)). Here, the words of Article VII, § 14 provide simply

that the General Assembly "shall" provide absentee voting as an option to certain classes of voters. Nothing in the language of Section 14 proscribes the General Assembly from providing similar voting options to other classes of voters, and Petitioners offer no reason to suggest otherwise.

The remainder of Article VII is not to the contrary. Section 4 states: "All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved." Pa. Const. art. VII, § 4. This provision reinforces the notion that the General Assembly has broad discretion to "prescribe[] by law" the mechanisms for elections, so long as they provide for secrecy of the ballot. Act 77 does so—by requiring a secrecy envelope—as the Pennsylvania Supreme Court has recognized. *See Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020). Act 77's no excuse mail-in voting regime does not offend any language in Article VII, but is a natural outgrowth of the General Assembly's legislative power to "prescribe by law" how Pennsylvania's elections will run.

Petitioners also argue that outdated, inapplicable Pennsylvania case law forecloses Act 77's mail-in voting regime. Petitioners cite *Chase v. Miller*, 41 Pa. 403 (1862) and *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131 (1924), two decisions limiting the extension of absentee balloting under prior iterations of the Pennsylvania Constitution. For example, in *Chase*, the Court

construed language well past its prime from the 1838 Constitution, which provided that "In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the state one year, and in the election district where he **offers to vote** ten days immediately preceding such election, and within two years paid a state or county tax." *See Chase* 41 Pa. at 419. There, the Court interpreted "offers to vote" to mean "votes in person" and held this constitutional provision precluded absentee voters, *i.e.*, that the legislature could not extend the franchise to anyone who does not "offer to vote." *Id.* The Court in *Lancaster* held likewise—that the "offer to vote" language required in-person voting as an element of suffrage, and the only exceptions would be for categories of voters "specifically named" in the 1874 Constitution, which provided for limited categories of absentee voters. 281 Pa. at 137.

Both cases based their holdings on a fear of absentee voting that no longer exists, and is not reflected in other current, constitutional voting practices provided for by the Election Code. *Chase*, for example, was based on skepticism that absentee balloting, then a new innovation, could work at all, and *Lancaster City* was decided when absentee balloting was still a very limited phenomenon. Notably, the *Chase* court was fearful of **any** form of absentee voting. *See, e.g.*, 41 Pa. at 419 ("We cannot be persuaded that the constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it

would break down all the safeguards of honest suffrage."). *Chase* took as a given that any absentee voting "opens a wide door for most odious frauds." *Id.* at 425. And some of the *Chase* court's concerns were grounded in conditions particular to the Civil War, such as stories of "political speculators, who prowled about the military camps watching for opportunities to destroy true ballots and substitute false ones, [and] to forge and falsify returns." *Id.* More generally, *Chase* was decided over 150 years ago, when ballots were still printed and distributed by political parties, mail moved by pack animal and steam train, and voter registration was a relatively recent innovation. Decades later, several developments in the law and in the practical realities of voting suggest the Supreme Court has left *Chase* and *Lancaster City* behind

First, the Election Code has long allowed categories of voters not named in the Constitution to vote absentee. For example, in 1963, the legislature enacted a provision that allows spouses of military members to vote by absentee ballot. 25 P.S. § 3146.1(b); *accord* 25 P.S. § 2602(w)(2). And, while the 1968 Constitution permits absentee voting by people who will be out of town on election day "because their duties, occupation or business require them to be elsewhere," Pa. Const. Art. VII, § 14(a), a statute passed in December 1968—only months after the finalization of the 1968 Constitution—extended the scope of this constitutional provision well beyond its plain meaning. This statute provides that "The words

'DUTIES, OCCUPATION OR BUSINESS' shall include leaves of absence for teaching or education, vacations, sabbatical leaves, and all other absences associated with the elector's duties, occupation or business, and also include an elector's spouse who accompanies the elector." 25 P.S. § 2602(z.3). These go well beyond the categories in Article VII, § 14 that Petitioners claim are outer limits for the General Assembly's ability to prescribe voting by mail.

These statutes are significant due to the Supreme Court's presumption against finding a statute unconstitutional, particularly when the statute has long been in force. *See, e.g.*, *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 633 (2013) ("Regarding any duly enacted statute, courts begin with the presumption that the General Assembly did not intend to violate the Pennsylvania Constitution, in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths. Accordingly, a statute is presumed valid and will be declared unconstitutional only if the challenging party carries the heavy burden of proof that the enactment clearly, palpably and plainly violates the Constitution. The practical implication of this presumption is that any doubts are to be resolved in favor of a finding of constitutionality.") (internal citations, quotation marks, and brackets omitted). Here, the legislature believed these expansions to be constitutional, even contemporaneously with the finalization of the new constitution. And the Supreme Court rejected a challenge to some of these

expansions when they were still young, albeit on standing grounds. *Kauffman v. Osser*, 441 Pa. 150 (1970).

Further, after five decades of allowing absentee voting beyond the "specifically named" categories of Article VII, § 14, suggests it would no longer be appropriate to follow *Lancaster City* by applying the maxim *expressio unius est exclusio alterius*. *Cf. Consumers Educ. & Protective Ass'n v. Nolan*, 470 Pa. 372, 388 (1977) ("We recognize that merely to hold automatically that the legislature's intent does not encompass something not specifically included in a statute that contains specific provisions can sometimes thwart that intent."); *cf. also Commonwealth v. Williams*, 539 Pa. 249, 253 (1994) ("Where there is no ambiguity, there is no room for interpretation.").

Practically, too, a judicial reaffirmation of *Chase* and *Lancaster City* to bar no-excuse absentee voting would also wipe out longstanding provisions of the Election Code, which have for over fifty years extended the absentee ballot to military spouses voting for non-federal offices, to Pennsylvanians who are on vacation on election day, and to voters accompanying their spouses on business travel. While these corollary holdings would likely not be self-executing, rejecting Act 77 under *Chase* and *Lancaster City* would expose the courts to criticism for undermining longstanding statutes upon which voters have relied for decades.

More recent decisions suggest the legislature has broad powers to decide

who may vote by absentee ballot. Two in particular recognize that the 1968 Constitution gives the legislature wide discretion to decide who may vote by mail. Neither of these cases squarely addressed the question of how broadly the legislature could expand access to the absentee ballot; rather, they held that the legislature could deny absentee voting to incarcerated felons. *See, e.g., Martin v. Haggerty,* 548 A.2d 371, 374-75 (Pa. Commw. Ct. 1988). ("It is the Legislature's prerogative to regulate registration and thus decide who may receive an absentee ballot."). The Supreme Court's decision in *Ray v. Commonwealth*, 442 Pa. 606, 609 (1971), also suggests that Article VII sets a floor, not a ceiling for the General Assembly. There the Court stated that "the Legislature has the power to define 'qualified electors' in terms of age and residency requirements." Because it treats the age and residency requirements of Article VII, § 1, as a floor, *Ray* can be seen as abrogating *Chase* and *Lancaster City*, insofar as those decisions treated an earlier constitution's list of qualified electors as a ceiling. More generally, if the 1968 Constitution sets a floor for qualified electors in Article VII, § 1, then by the same logic it sets a floor for absentee voters in Article VII, § 14.

Finally, the change from "may" to "shall" in the 1968 Constitution gives the legislature more power to set categories of absentee voters. Specifically, in the context of absentee voting, there is textual support for the claim that the modern constitution intended to turn a ceiling into a floor, by changing the word "may" to

"shall." A 1949 constitutional amendment added that "[t]he General Assembly may, by general law, provide a manner in which" disabled war veterans can vote by absentee ballot. Similar amendments in 1953 and 1957 said the General Assembly "may" allow certain categories of people to vote by absentee ballot. *See generally Absentee Ballots Case*, 423 Pa. 504, 508 (1966). But in 1967, another amendment (which was carried over into 1968 Constitution), said "[t]he Legislature **shall**, by general law, provide a manner in which" various categories of voters can vote by absentee ballot (emphasis added). This shift to "shall" carried forward in all future absentee balloting amendments, and reflects the modern Pennsylvania Constitution's grant of general discretion to set qualifications for absentee voting, so long as the General Assembly allows certain types of voters to cast absentee ballots

Petitioners make much of the fact that the General Assembly started a process to amend the Constitution to allow for no-excuse absentee voting, then abandoned that quest. *See* Compl. ¶¶ 36-53. Although the Pennsylvania Senate did originate a Bill to amend Article VII, § 14 of the Constitution, the General Assembly did not carry the Amendment through to the point where it would be put on the ballot for the voters to consider. If anything, the General Assembly recognized that, as no challenges had been made to Act 77 within the prescribed time frame, it was likely constitutional and no amendment was necessary.

Accordingly, because Petitioners' constitutional claims are legally insufficient, the claims must be dismissed pursuant to Pa. R. Civ. P. 1028(a)(4).

VI. CONCLUSION

For the foregoing reasons, the Court should sustain Respondents' Preliminary Objections.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: November 23, 2020

By: */s/ Michele D. Hangley*
Michele D. Hangley (ID No. 82779)
Robert A. Wiygul (I.D. No. 310760)
Christina C. Matthias (I.D. No. 326864)
John G. Coit
John B. Hill
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300

OFFICE OF ATTORNEY GENERAL

By: */s/ Karen M. Romano*
Karen M. Romano (ID No. 88848)
Keli M. Neary (ID No. 205178)
Nicole M. Boland (ID No. 314061)
Stephen M. Moniak (ID No. 80035)
Strawberry Square, 15th Floor
Harrisburg, PA 17120
(717) 787-2717

KRAMER LEVIN NAFTALIS & FRANKEL LLP

Barry H. Berke*
Dani R. James*
1177 Avenue of the Americas
New York, New York 10036
(212)715-9308
*(*Pro Hac Vice Motions to be Filed)*

Counsel for Respondents

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: November 23, 2020

/s/ Michele D. Hangley
Michele D. Hangley