Received 9/15/2021 8:25:27 PM Commonwealth Court of Pennsylvania

Filed 9/15/2021 8:25:00 PM Commonwealth Court of Pennsylvania
244 MD 2021

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, et al.,
Respondents.

No. 244 MD 2021

REPLY IN SUPPORT OF RESPONDENTS' CROSS-APPLICATION FOR SUMMARY RELIEF

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

Pursuant to the Order dated August 27, 2021, Respondents, the Department of State of the Commonwealth of Pennsylvania and Acting Secretary of the Commonwealth Veronica Degraffenreid, submit this Reply in further support of Respondents' Cross-Application for Summary Relief.

I. INTRODUCTION

Petitioner, a board of elections official, seeks to challenge the validity of the board's enabling legislation, which is the exclusive source of the board's duties and authority. Petitioner claims that the Election Code provisions he challenges were facially unconstitutional at the time of their October 2019 enactment, yet he proceeded to administer no fewer than *three* elections under the challenged provisions, failing—for reasons that remain entirely unexplained—to bring suit until late July 2021. Indeed, Petitioner filed suit 8 months *after* the Pennsylvania Supreme Court dismissed an identical constitutional claim, seeking the same declaratory relief, on the basis of those petitioners' "unmistakable," "complete failure to act with due diligence in commencing [a] facial constitutional challenge … ascertainable upon Act 77's enactment." *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020). Needless to say, Petitioner has also failed to comply with Act 77's statutory time bar, which required constitutional challenges to be brought within 6 months of the statute's enactment.

The consequences of these indisputable facts are clear: Petitioner lacks standing; and Petitioner's claim is even more untimely than the claim rejected in *Kelly*. As shown below, Petitioner's attempts to avoid these multiple procedural bars all fail. And contrary to Petitioner's unsupported suggestion, the substance of his claim cannot overcome its procedural defects: a court cannot adjudicate any claims—even important constitutional claims—unless they are presented by a plaintiff with standing who is neither guilty of laches nor subject to a statutory time bar. Petitioner is out of court three times over.

In any event, Petitioner's merits arguments also fail. Petitioner's interpretation of the Pennsylvania Constitution is as strained as his attempt to analogize mail-in voting to racial discrimination. *See* Pet'r Reply 16. Not only does Petitioner not claim the infringement of any individual right, but there is nothing in the text or structure of the current Constitution that prohibits the General Assembly from providing for the return of ballots by mail, let alone does so "clearly, palpably, and plainly." Finally, Petitioner completely ignores that, even if he could surmount the many procedural obstacles to his claim, and even if his interpretation of the Constitution were correct, an overwhelming number of Act 77's applications would still be constitutional—and his facial challenge would thus fail.

II. ARGUMENT

A. Petitioner Lacks Standing to Challenge the Constitutionality of Act 77

There is no "constitutional claim" exception to the requirements of standing. All claims must be brought by someone with (among other things) a substantial, particularized interest that is directly harmed by the challenged action or statute. Petitioner fails to establish these elements of standing. And as Petitioner's reply underscores, his status as an individual member of the Bradford County Board of Elections cannot confer the requisite interest. The law makes expressly clear that agencies may *not* question the constitutionality of their enabling legislation. In other words, Petitioner is an especially improper person to assert the claim raised in the Petition.

Petitioner's alternative appeal to the doctrine of taxpayer standing is equally unavailing. Petitioner has failed to plead the facts necessary to establish such standing—and cannot do so.

1. A Board of Elections Lacks Standing to Challenge the Constitutionality of Its Enabling Legislation

(a) A Board of Elections' Duties to Administer the Election Code Do Not Confer Standing to Challenge the Code's Constitutionality

Administrative bodies do not have standing to attack a statute on the ground that that statute confers authority on them. While Petitioner pivots to this argument in his Reply, Pennsylvania law rejects it.

Originally, Petitioner insisted that his "belie[f]" that Act 77's mail-in voting procedures are unconstitutional gave him standing. Pet. ¶ 4; Pet'r Opening Br. 4. In his Reply, however, Petitioner effectively concedes that this kind of asserted personal dilemma does *not* suffice to confer standing. Pet'r Reply 3-4. Indeed, both Pennsylvania and federal courts have specifically rejected Petitioner's theory of standing. *See, e.g.*, *Hunt v. Pa. State Police*, 983 A.2d 627, 634–37 (Pa. 2009); *In re Admin. Order No. 1-MD-2003*, 936 A.2d 1 (Pa. 2007); *accord Ashwander v. Tenn. Valley Auth.*, 297 US. 288, 347–48 (1936) (Brandeis, J., concurring) (citing cases); *Thomas v. Mundell*, 572 F.3d 756, 761 (9th Cir. 2009) ("[A] public official's 'personal dilemma' in performing official duties that he perceives to be unconstitutional does not generate standing."). In fact, even an official expressly threatened with contempt and imprisonment for disobeying a statutory duty—a circumstance not alleged here—lacks standing. *See Admin. Order*, 936 A.2d at 359; *Admin. Order*, 882 A.2d 1049, 1053 (Pa. Commw. Ct. 2005) (Leavitt, J., dissenting).

Now, Petitioner contends that "the law does not *categorically*" deny public officials standing to challenge the lawfulness of their official duties. Pet'r Reply 4 (emphasis added). Because boards of elections have certain duties and authority *under* the Election Code that are "not purely ministerial," he says, boards may facially challenge the constitutionality *of* the Election Code. *Id.* at 7; *see also id.* at

8 (relying on "the quasi-judicial nature of [certain board of elections] duties *under* Act 77" (emphasis added)). Yet Petitioner offers no explanation of *why* this should be so. He provides no rationale for why the boards' authority to, for example, "issu[e] rules and regulations *under* the election code," Pet'r Reply 3 (emphasis added), or to determine whether a write-in vote for "Joseph Kratochvil" should be counted as a vote for a candidate whose full name is "Joseph Kratochvil, Jr.," *In re McCracken*, 88 A.2d 787 (Pa. 1952), somehow confers standing.

In fact, Petitioner fundamentally misapprehends the case law governing administrative agencies' standing. Courts have recognized agency standing to challenge actions and legal rules that allegedly *encroach* upon the agency's discretionary authority or *interfere* with the agency's ability to perform its duties. They have not, however, recognized agency standing just because a statute gives an agency some authority.

(b) Petitioner Ignores the Case Law Governing the Standing of Administrative Agencies

Petitioner's argument for standing is much like that of the Clerk of Court in *Administrative Order*. There, the Clerk claimed that an administrative order violated a higher-order law—there, a statute. Here, Petitioner claims that a statute violates a higher-order law—the Pennsylvania Constitution. In *Administrative Order*, the Supreme Court found nothing in the authority granted to the Clerk by the statute he invoked (or the Constitution) that "suggest[ed] the power to interpret

statutes and to challenge the actions of the court that the clerk perceives to be in opposition to a certain law." *Admin. Order*, 936 A.2d at 361. Because the Clerk "had no authority by virtue of his office to interpret the [administrative] Order's compliance with the [statute invoked]," his "interest in challenging the legality of the Order [was] the same as that of any other citizen," and he therefore lacked standing. *Id.*

By contrast, agencies have standing to challenge acts that interfere with the exercise of their statutory duties. *See, e.g.*, *Pa. Gaming Control Bd. v. City Council of Phila.*, 928 A.2d 1255, 1265–66 (Pa. 2007); *Pa. Game Comm'n v. Dep't of Envtl. Res.*, 555 A.2d 812, 815–16 (Pa. 1989). In *Pennsylvania Game Commission*, one agency, the Game Commission, brought suit challenging the decision of another agency, the Department of Environmental Resources ("DER"), to issue a solid waste permit. The Game Commission contended that DER's decision violated the Dam Safety and Encroachments Act ("DSEA") and threatened to damage lands and wildlife under the Game Commission's control. The Pennsylvania Supreme Court held that the Game Commission had standing to challenge DER's issuance of the permit because the Commission's enabling act "expressly gives the Commission the power to enforce the DSEA where a violation of it would adversely impact upon the property under the Commission's control." *Id.* at 816. Similarly, in *Pennsylvania Gaming Control Board*, the Court held that

the Gaming Control Board had standing to challenge a Philadelphia ballot question that would prohibit gaming in the Philadelphia. The Gaming Control Board had a substantial, particularized interest because the local measure "diminishe[d] the authority [the Board was] given under the [Pennsylvania Gaming] Act to satisfy its statutory duty to locate licensed facilities in cities of the first class." *Id.* at 1266 (emphasis added).

Significantly, the agencies in *Pennsylvania Game Commission* and *Pennsylvania Gaming Board* had standing because an *external* source directly threatened the agencies' ability to perform duties under their enabling legislation. This is not such a case. Boards of election are solely a creation of the Election Code and have only the authority and duties prescribed by the Code. *See* 25 Pa. Stat. §§ 2641–2642.[1] Here, then, a board of elections official seeks to challenge the constitutionality of the board's enabling act itself. But the Election Code cannot encroach on, or interfere with, a board of elections' authority or duties under the Election Code. Accordingly, under the Pennsylvania Supreme Court's decisions in *Administrative Order, Pennsylvania Game Commission*, and *Pennsylvania Gaming Board*, Act 77's mail-in voting procedures do not inflict an injury on boards of elections sufficient to generate standing.

[1] *See also Pa. Liquor Control Bd. v. Beh*, 215 A.3d 1046, 1061 n.22 (Pa. Commw. Ct. 2019) ("[a]gencies are creatures of statute and, thus, only have the authority to act pursuant to their official duties as established by their enabling legislation").

The only decision Petitioner cites in support of standing, *Robinson Township v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012), *rev'd in part*, 83 A.3d 901 (Pa. 2013), is consistent with the analysis above and only underscores the error of Petitioner's position. In *Robinson Township*, the plaintiffs claimed that Act 13, which (*inter alia*) prohibited municipalities from imposing zoning restrictions on fracking activities, violated the Environmental Rights Amendment to the Pennsylvania Constitution ("ERA"), Pa. Const. art. I, § 27. In holding that the municipality plaintiffs had standing to assert that claim, the Supreme Court explained that the municipalities had "constitutional duties respecting the environment," and alleged "that the challenged statute interfere[d]" with those duties. 83 A.3d at 920. Indeed, the Court's opinion noted that the ERA made municipalities "public trustees" responsible for protecting the quality of the environment. *Id.* at 977; *see Marcellus Shale Coalition v. Dep't of Envtl. Prot.*, 193 A.3d 447, 485 (Pa. Commw. Ct. 2018) (acknowledging that "local government is a … trustee" under the ERA). The Supreme Court also observed that "constitutional commands regarding municipalities' obligations and duties to their citizens cannot be abrogated by statute." *Robinson Twp.*, 83 A.3d at 977.[2]

[2] Petitioner ignores all of this Supreme Court analysis, focusing exclusively on one sentence from this Court's earlier opinion, which addressed the standing of the municipal-official plaintiffs. Petitioner disregards that, in holding that those plaintiffs had standing, the Supreme Court relied *not* on their status "as local elected officials," but rather on their status "as landowners and residents of townships." 83 A.3d at 918. Notably, in discussing, in a footnote, whether the municipal-official plaintiffs might have standing in their official capacity, the

In other words, the municipalities in *Robinson Township*, like the plaintiff agencies in *Pennsylvania Game Commission* and *Pennsylvania Gaming Control Board*, could claim precisely what boards of elections cannot claim here: authority and duties with which a challenged statute or order is allegedly interfering. Each of those plaintiffs could lay claim to authority *outside* the statute or order they were challenging—in *Robinson Township*, authority conferred on the municipalities by the Pennsylvania Constitution itself. As shown above, the situation in this case is starkly different. That is dispositive of Petitioner's claim to standing.

(c) Petitioner's Standing Theory, If Accepted by the Courts, Would Have Sweeping Implications

The implications of Petitioner's theory—namely, that any agency with statutory authority to make quasi-judicial determinations *under* the terms of its enabling legislation can facially challenge the constitutionality *of* its enabling legislation—are astonishing. Any public benefits agency—indeed, in Petitioner's view, every agency employee charged with determining whether an applicant is statutorily eligible for benefits—would have standing to challenge whether the statutory benefits regime itself is constitutional. And each of Pennsylvania's many thousands of election officials, elected to fill positions in each of Pennsylvania's

---

Supreme Court expressly tied the concept of such standing to the officials' status and duties as trustees under the ERA. *Id.* at 918 n.9 (invoking principle that "person with special interest in charitable trust may bring action for enforcement of trust").

thousands of election districts, would have standing to challenge the constitutionality of any Election Code procedure to which she is required to adhere. Such a rule would turn fundamental principles of administrative law and standing directly on their head.[3]

2. Petitioner Fails to Show That an Individual Member of a Multi-Member Board of Elections Has Standing to Invoke the Board's Interest

As Respondents previously demonstrated, even if the Bradford County Board of Elections had a substantial interest in this lawsuit, Petitioner as an individual member does not. Resp. Br. 19-21. Neither case that Petitioner relies on refutes this point.

In *Robinson Township*, the Pennsylvania Supreme Court relied on the petitioner-officials' status as individual landowners and residents, rather than their status as officials. *Robinson Twp.*, 83 A.3d at 918. In that individual capacity, of course, the issue of whether their claims are endorsed by the municipality as a whole does not arise. Perhaps even more significantly, the municipalities of which those officials were members *did* join in the *Robinson Township* lawsuit. *See* 52

[3] *See, e.g.*, *Brown v. Montgomery Cnty.*, 918 A.2d 802, 807 (Pa. Commw. Ct. 2007); 1 Pa. Law Encyclopedia, *Administrative Law and Procedure* § 31 (2021) ("An administrative agency is without power to determine the constitutionality of its enabling legislation."); *accord, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 76 (1976) (observing that "the constitutionality of [the challenged statute]" was a "question … beyond the [agency's] competence"); *Mass. Bay Transp. Auth. v. Auditor of Commonwealth*, 724 N.E.2d 288, 295 (Mass. 2000) ("Agencies, which are creations of the State, may not challenge the constitutionality of State statutes." (internal quotation marks omitted)).

A.3d at 468 & n.3. Unsurprisingly, then, neither this Court nor the Supreme Court addressed the issue of whether individual officials, standing alone, could represent the interests of a multi-member body.[4]

Petitioner's appeal to *Fumo v. City of Philadelphia*, 972 A.2d 487 (Pa. 2009), is also unavailing. There, the Pennsylvania Supreme Court held that state legislators had standing to challenge the City of Philadelphia's license for use of certain submerged lands, based on the allegation that that decision "usurp[ed] … their right as legislators to cast a vote … on licensing the use of the Commonwealth's submerged lands." *Id.* at 502. In that case, too, the Court did not address the question of whether individual members of a multi-member body could assert the interests of the body as a whole. *See supra* note 4. Moreover, the nature of the interest at issue in *Fumo* bore no resemblance to the interest asserted by Petitioner here. Each of the *Fumo* legislators asserted a right "to cast a vote" on whether to license the use of the Commonwealth's submerged lands; they contended that Philadelphia's action had improperly denied them that right to cast a vote. As already discussed, however, neither Petitioner as an individual, nor the

[4] Even under federal law, where standing is a constitutional prerequisite to jurisdiction, the U.S. Supreme Court has made clear that a judicial decision that does not affirmatively *reject* an argument that plaintiff lacks standing is not precedent for the proposition that standing exists. *See Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (stating that "the existence of unaddressed jurisdictional defects has no precedential effect"). That rule applies *a fortiori* under Pennsylvania law, where standing is not a jurisdictional issue, and courts thus refuse to consider standing issues that are not specifically pressed by the parties. *See Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708, 717 (Pa. 2009).

Bradford County Board of Elections as a body, can claim that the Election Code's mail-in voting provisions infringe on any rights or authority held by the Board.

3. The Doctrine of Taxpayer Standing Does Not Avail Petitioner

Although Petitioner did not assert taxpayer standing in his application for summary relief, his Reply Brief attempts to rely on that doctrine. For multiple reasons, the Court should reject Petitioner's belated attempt to assert taxpayer standing.

As an initial matter, like the petition dismissed in *Atiyeh v. Commonwealth*, No. 312 M.D. 2012, 2013 WL 3156585 (Pa. Commw. Ct. May 28, 2013), the Petition here fails to plead any basis for taxpayer standing. In *Atiyeh*, "the Petition simply list[ed] the five established criteria [for taxpayer standing] without description or explanation of how Petitioners fall within the *Biester* taxpayer exception [to the requirements of traditional standing]." *Id.* at *6. The Petition here suffers from exactly the same defect: it does nothing more than "list the five established criteria" for taxpayer standing "without description or explanation of how Petitioner[] fall[s] within" the doctrine. (*See* Pet. ¶ 45.) Indeed, the Petition here is, if anything, even *more* deficient than the *Atiyeh* petition, which at least alleged that the Petitioners were taxpayers. *See Atiyeh*, 2013 WL 3156585, at *7

(Leavitt, J., dissenting); *see* Resp. Br. 21 n.8. Due to these basic defects, Petitioner's invocation of taxpayer standing is unavailing.[5]

There are other fatal deficiencies as well. As Respondents previously noted, in addition to the five criteria cited by Petitioner and *Amici*, a party invoking taxpayer standing must show that the challenged action affects "plaintiff's status *as a taxpayer*." *Id.* (quoting *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497, 515 (Pa. Commw. Ct. 2019)). Petitioner has no response; he does not even attempt to make such a showing, and, in fact, the only evidence on this point shows that the taxpayer injury would come from *granting* the relief Petitioner seeks. Resp. Br. 21 n.8 (citing Marks Aff. ¶¶ 11–22).

Nor can Petitioner satisfy the taxpayer-standing criteria he does recite. In particular, Petitioner cannot show that "no other persons are better situated to assert the claim." (Pet. ¶ 45.) As shown above, board of elections officials are, if anything, uniquely *unsuited* to bring a facial challenge to the constitutionality of the Election Code. *See supra* Section II.A. Even *Amici* concede that Respondents, the Acting Secretary of the Commonwealth and the Department of State, are better

[5] This deficiency, standing alone, would typically lead to dismissal of the Petition without prejudice, with leave to file an amended petition. *Atiyeh*, 2013 WL 3156585, at *7. But Petitioner has asked the Court—successfully—for permission to have this case resolved on expedited applications for summary relief. This Court cannot enter summary relief in Petitioner's favor under a Petition that fails to plead standing. Accordingly, even if this Court were to grant Petitioner leave to file an amended petition, his pending application for summary relief would have to be denied. In any event, as shown below, there are other, incurable reasons why Petitioner cannot invoke taxpayer standing.

situated than Petitioner. Amicus Br. 16. After all, the Secretary's office, unlike that of the board of elections, is recognized by the Pennsylvania Constitution. *See, e.g.*, Pa. Const. art. IV, § 15. Contrary to *Amici*'s assertion, the fact that better situated persons "did not choose to institute legal action" does not establish taxpayer standing. *See* Amicus Br. 16. Petitioner does not—and cannot—assert that Respondents are "beneficially affected" by Act 77; rather, they simply believe it is constitutional. *See Fumo*, 972 A.2d at 506 ("Surely, the fact that more appropriate governmental parties have not elected to challenge a particular governmental decision cannot be enough on its own to generate taxpayer standing—particularly where those executive authorities are not 'beneficially affected' by the decision.").

For all of these reasons, Petitioner fails to establish taxpayer standing.

B. Petitioner's Inequitable Delay Means that His Claims Cannot Go Forward

In his response to Respondents' laches argument, Petitioner rewrites the contents of his Petition and the state of Pennsylvania law. According to Petitioner, a grant of the relief he seeks will not disenfranchise any voters; his delay in filing this case was both blameless and harmless; application of the laches doctrine would violate Pennsylvania law; and the Court must overlook Petitioner's inequitable behavior in order to protect, somehow, the rights of more innocent litigants to challenge Pennsylvania statutes. None of this holds up to examination.

1. Because the November Election Is Already Underway, the Relief Petitioner Seeks Would Disenfranchise Voters

In his attempt to persuade the Court that this case is nothing like *Kelly v. Commonwealth*, Petitioner insists that the relief that he seeks is purely prospective and will not "disenfranchise a single Pennsylvania voter" or "prejudice[] any particular person, and certainly no one who cast a ballot in reliance on Act 77." Pet'r Reply at 13; *see id.* at 16-17 (arguing that relief will not "jeopardize ballots previously cast"). This is not true. Petitioner is asking the Court to forbid the use of mail-in ballots in the November 3, 2021 general election, *see* Petitioner's Application for Expedited Briefing and Summary Relief ¶ 5 (July 26, 2021), and mail-in voting in that election has already begun. Counties were statutorily authorized to begin processing mail-in ballot applications and mailing ballots to people on the permanent mail-in voting list on September 13. *See* 25 Pa. Stat. § 3160.12a (application processing may begin 50 days before Election Day); 25 Pa. Stat. § 3150.15 (mailing of ballots). Ballot mailings will speed up in the last two weeks of September. By the end of September, counties will likely have mailed out tens of thousands of ballots; in many places, voters will be streaming to election offices to request mail-in ballots in person, fill them out, and hand them in.[6]

[6] In 2020, for example, Philadelphia opened satellite election offices for this purpose on September 29, five weeks before Election Day. *Trump v. Phila. Cnty. Bd. of Elections*, No. 983 C.D. 2020, 2020 WL 6260041, at *2 (Pa. Commw. Ct. Oct. 23, 2020).

Accordingly, an order prohibiting mail-in voting in the November 2021 election would invalidate ballots already cast, confuse and inconvenience voters, and upend the ongoing administration of the election. By waiting until July 26 to file, Petitioner guaranteed that it would be impossible for this Court to rule early enough to avoid these unacceptable consequences. As an elections official, Petitioner should know every detail of the election calendar; he should have known, and likely did know, that the timing of his lawsuit would make it impossible for this Court to grant the relief he seeks without invalidating cast votes and disrupting the November election.

As discussed *infra* and in Respondents' earlier brief, Resp. Br. 21–28, laches bars both retrospective and prospective relief in this case, as it did in *Kelly*.[7] Accordingly, Petitioner cannot hide behind the fiction that he seeks only prospective relief.

[7] Both Petitioner and *Amici* attempt to downplay the fact that in *Kelly*, the Supreme Court dismissed both retrospective and prospective claims on laches grounds. Petitioner asserts, incorrectly, that *Kelly* involved only retrospective relief. Pet'r Reply 12. *Amici*, whose counsel also represented the *Kelly* petitioners, acknowledge, as they must, that the *Kelly* petitioners sought prospective relief, but suggest that the Supreme Court somehow overlooked this fact. *See* Amicus Br. at 13 ("[T]he brief Pennsylvania Supreme Court *per curiam* opinion made no mention of [prospective relief] ….") . *Amici* ignore then-Chief Justice Saylor's opinion, which partially dissented from the majority's decision precisely *because* it dismissed the claim for prospective relief, as well as their own counsel's filings in the U.S. Supreme Court. *See* Resp. Br. 22–23.

2. Petitioner Cannot Refute Respondents' Showing That His Delay in Filing Suit Was Both Inequitable and Highly Prejudicial

As Respondents explained in their Memorandum, Petitioner's 635-day delay in bringing this case was even more unreasonable than the 387-day delay in *Kelly*. *See* Resp. Br. 24–25. Petitioner's only response is to say, contrary to all evidence, that his supposedly "short delay" in filing this case was not "unreasonable." Pet'r Reply 15. In fact, his delay was neither short nor reasonable. In *Kelly*, the Court observed that the petitioners' "want of due diligence" was "unmistakable," 240 A.3d at 1256; a lack of due diligence is even more unmistakable in this case, filed eight months and one election after *Kelly*.[8]

In arguing that his delay, even if unreasonable, was harmless, Petitioner mischaracterizes Respondents' filings. He argues that the Commonwealth and counties took every possible step to implement mail-in voting as soon as Act 77 went into effect, and then did nothing more, spending nothing while Petitioner delayed filing his lawsuit. Pet'r Reply 15–16. But that is not what Respondents argued, and it would not make any sense. Respondents have showed that the

[8] Citing *Sprague v. Casey*, 550 A.2d 184 (Pa. 1988), *Amici* argue that laches cannot bar a claim if the party that opposes the claim did not itself attempt to bring the claim. Amicus Br. 12–13. Neither *Sprague* nor any other Pennsylvania precedent supports this argument. *Sprague* concluded, without explanation, that the respondents in that case had reason to file their own claim to test a novel and untested interpretation of state law, but had inequitably failed to do so. 550 A.2d at 188. The case does not set forth a general rule that potential defendants are required to sue themselves to avoid the application of laches. Such a rule would essentially wipe out the doctrine of laches and insulate delinquent litigants, such as Petitioner, from the consequences of their actions.

Commonwealth and the counties made significant investments in mail-in voting after the 2020 primary election, when it became clear that a great deal of additional processing equipment and education was needed to ensure that voting and canvassing would go smoothly in the high-turnout presidential election. *See* Resp. Br. 25–28. Petitioner's theory that election officials across the Commonwealth made one-time investments to implement mail-in voting, and then did not spend another cent during the many months that Petitioner delayed filing his claim, is utterly implausible.[9]

3. Pennsylvania Law Does Not Require a Court to Disregard Grossly Inequitable Conduct When Constitutional Issues Are Involved

Petitioner argues that under Pennsylvania law, laches cannot be a defense to a constitutional challenge to a statute. Pet'r Reply 13–15. That is not correct. *See Kelly*, 240 A.3d 1255 (holding that laches barred a retroactive and prospective challenge to Act 77); *Sernovitz v. Dershaw*, 127 A.3d 783, 789–94 (Pa. 2015) (applying doctrine akin to laches to hold that petitioners could not challenge 22-

[9] *Amici* make the novel argument that expenditures of public funds can never establish the prejudice required for a laches defense. Amicus Br. 14. They cite no precedent for their proposition that taxpayers' money has no value in a laches analysis, and it is not the law. Indeed, an avoidable waste of taxpayer dollars may make a court more likely, rather than less, to apply laches. "The requirement of diligence, and the loss of the right to invoke the arm of a court of equity in case of laches, is particularly applicable where the subject-matter of the controversy is a public work. In a case of this nature, where a public expenditure has been made, or a public work undertaken, and where one, having full opportunity to prevent its accomplishment, has stood by and seen the public work proceed, a court of equity will more readily consider laches." *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U.S. 685, 698 (1898).

year-old statute); *Stilp v. Hafer*, 718 A.2d 290, 294 (Pa. 1998) (affirming ruling that laches barred a procedural constitutional challenge to a statute); *see also McGuire v. City of Philadelphia*, 245 Pa. 287, 293 (1914) ("If the question of the constitutionality of the act … had been raised promptly after its passage, we have no doubt that it would have been held to be legislation forbidden by the Constitution by clearest implication. But for more than a score of years it remained unchallenged, and, in the interval, municipalities acted upon its authority, and millions of dollars have been borrowed and disbursed in reliance upon it. It is for this reason that we do not now feel any imperative necessity which would justify us in striking it down.").

Amici make a slightly different argument: that laches can bar a procedural constitutional challenge to a statute, but can never bar a substantive challenge.[10] Amicus Br. 8–9. The precedents point to a more flexible standard. The seminal case on this issue is *Wilson v. School District of Philadelphia*, 195 A. 90 (Pa. 1937).[11] In that case, the petitioners challenged a statute that had been in effect for

[10] *Amici* also list several election-related cases in which, they argue, laches did not bar recovery. *See* Amicus Br. 11–12 (citing *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924); *Chase v. Miller*, 41 Pa. 403 (1862); *League of Women Voters v. Commonwealth*, 179 A.3d 1080 (Pa. 2018); and *In re Canvass of Absentee and Mail-In Ballots*, 241 A.3d 1058 (Pa. 2020)). It is not clear how these cases are helpful, however, because it does not appear that laches was raised as a defense in any of them.

[11] *Amici* also cite *Stilp* and *Sprague* on this point. *See* Amicus Br. at 8–9. Neither of these cases involved a substantive constitutional challenge, however, so their discussion of such challenges is *dicta*, and each points to *Wilson* as the relevant authority. *See Stilp*, 718 A.2d at 293; *Sprague*, 550 A.2d at 188–89.

many years. The opinion does not discuss whether the petitioners had themselves acted inequitably; instead, it considers whether the age of the statute, without more, meant that laches should apply. The Supreme Court held that laches should not apply, "especially [because] the legislation involves a fundamental question going to the very roots of our representative form of government." *Id.* at 99. The Court noted that it was required to act because the statute in question "violate[d] one of the most fundamental principles of our Constitution," the principle that the legislature could not delegate its taxing authority. *Id.* It also took steps to ensure that its ruling would not be disruptive, by explaining that the ruling would have no retroactive effect and using its equitable powers to ensure that the *status quo* would remain in place for two years. *Id.* at 100–02.

In declining to apply laches, then, the *Wilson* Court engaged in a traditional weighing of the equities. Here, as in *Kelly*, a similar weighing of the equities requires a different result. Unlike in *Wilson*, Petitioner has clearly engaged in inequitable conduct; unlike in *Wilson*, the constitutional concerns involved are not "fundamental" (indeed, as discussed *infra*, they are illusory); and unlike in *Wilson*, there is no way for the Court to mitigate the extreme prejudice that would arise from an overturning of Act 77.

4. Contrary to Petitioner's Argument, Holding Petitioner to Account for His Misconduct Will Not Prevent Future, Innocent Petitioners from Pursuing Their Claims

Petitioner argues that if his claim is dismissed on the basis of laches, it will set Pennsylvania law on a slippery slope that would bar good faith challenges to unconstitutional statutes. According to Petitioner, he stands shoulder to shoulder with the civil rights giants who challenged some of this country's most unjust laws—poll taxes, literacy tests for voting, school segregation—and if he loses here, such unjust laws cannot be challenged in the future. *See* Pet'r Reply 16–17.

But Respondents are not asking the Court to rule that no one can challenge potentially unconstitutional laws. Respondents are not even asking the Court to rule that laches would bar every challenge to Act 77. Rather, Respondents are asking the Court to look at the specific circumstances before it and hold, as the Supreme Court held in *Kelly*, that Petitioner's conduct was so dilatory, and its consequences so prejudicial, that Petitioner is not entitled to relief. An individualized, equitable holding that Petitioner must face the consequences of his actions will not bind future litigants and will not prevent others from seeking to invalidate unconstitutional statutes.

C. Act 77's 180-Day Time Bar Precludes Petitioner's Claim

The 180-day time bar set forth in Section 13 of Act 77[12] is clear, and is clearly within the General Assembly's power to impose, at least with respect to

[12] Act of Oct. 31, 2019, P.L. 552, No. 77, § 13 ("Section 13").

claims that the Act is facially unconstitutional. In his attempt to persuade the Court that he was entitled to miss this statutory deadline by nearly a year and a half, Petitioner argues that the statute does not mean what it says, that Pennsylvania Supreme Court opinions do not mean what *they* say, and that a legislature does not have the authority to limit the time in which claims can be brought. None of these arguments can succeed.

1. The "Void *ab Initio*" Theory Petitioner Relies Upon Is Not Pennsylvania Law, and Could Not Apply in Any Event

Petitioner argues that Section 13 is irrelevant because, according to Petitioner's Reply, the Pennsylvania Supreme Court has held that "[a] statute held unconstitutional is considered void in its entirety and inoperative as if it had no existence from the time of its enactment." Pet'r Reply 18, 21 (quoting *Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Twp.*, 907 A.2d 1033, 1037 (Pa. 2006)). But *Glen-Gery* does not hold that, and the quote, which appears *twice* in Petitioner's Reply, is not accurate. The quoted text omits the critical first three words of the sentence: "Under this theory …." *Id.* at 1037. The sentence appears within a block quote in a background discussion of a historical doctrine that, the *Glen-Gery* opinion points out, Pennsylvania law does not apply across the board. *Id.* at 1037–40. *Glen-Gery*'s actual holding is much more narrow: "[A] claim alleging a procedural defect affecting notice or due process rights in the enactment of an ordinance may be brought notwithstanding [a statutory time bar] because, if

proven, the ordinance would be rendered void *ab initio.*" *Id.* at 1035. Here, there is no allegation that Petitioner did not receive adequate notice of Act 77; accordingly, the limited void *ab initio* doctrine discussed in *Glen-Gery* does not apply.

Moreover, even if Pennsylvania law were as Petitioner describes it, Section 13's time bar would stand. While Petitioner's Petition is unclear on this point, his claim appears to be that "the mailed ballot provisions of Act 77"—which are just one portion of a sprawling statute—are unconstitutional. Pet'r Opening Br. 5. Although the statute provides that many of its other provisions will be "void" if other provisions fall, *see* Act of Oct. 31, 2019, P.L. 552, No. 77, § 11, Section 13 does not appear on this list. Accordingly, even if Petitioner could prevail on the merits, it would not void or invalidate Section 13.

2. Petitioner's Reading of Act 77's Statutory Time Bar Is Incorrect

Petitioner's reading of Section 13 as nothing more than "an exclusive jurisdiction provision granting the Pennsylvania Supreme Court exclusive jurisdiction to hear challenges to Act 77 *for the first 180 days*," Pet'r Reply Br. 18 (emphasis in original), is inconsistent with the language of the statute, the legislative history, and common sense. Section 13(2) provides that "[t]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality" of key provisions

of Act 77. There are no date restrictions in this provision. In a separate provision, Section 13(3), the General Assembly provided that "an action under paragraph 2"—that is, "a challenge to or [request for] a declaratory judgment concerning the constitutionality" of one of Act 77's key provisions—must be brought within 180 days of Section 13's effective date. These two provisions provide two separate rules: Constitutional challenges to Act 77 must be brought within 180 days, and they must go before the Supreme Court. If the General Assembly had intended to provide only for a 180-day period of exclusive jurisdiction in the Supreme Court, it would have done so in a single provision; it did not do so, and nothing in either Section 13(2) or Section 13(3) indicates that it meant to do so.[13]

The available legislative history confirms that Section 13(3) is what it appears to be—a time bar. In a colloquy on the House floor, State Government Committee Chair Garth Everett states 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." 2019 Pa. Legislative Journal—House 1740 (Oct. 29, 2019).

[13] To the extent Sections 13(2) and 13(3) present an interpretive difficulty, it is with respect to as-applied challenges to Act 77's constitutionality based on events that take place after the 180-day period ends. A holding that such challenges can be time-barred before they are ripe would raise due process concerns; the courts, if and when such claims arise, could plausibly determine that Section 13 cannot apply to those challenges. But the challenge in *this* case is facial, not as-applied, and Petitioner could have brought it on the date the statute went into effect. Accordingly, the time bar raises no due process concerns in this case, and the Court must apply Section 13(3) as written.

As well as being inconsistent with the statutory language and the legislative history, Petitioner's reading of Section 13 simply makes no sense. Section 13, along with the nonseverability provision in Section 11, was included in Act 77 to ensure that the legislature's grand bipartisan statute would either stand or fall as a whole, and that if it were to fall, it would fall before it was put into effect. *See* 2019 Pa. Legislative Journal—House 1740 (Oct. 29, 2019). The General Assembly was aware that overturning an election statute after the public had come to rely on it would be disruptive, costly, and potentially disenfranchising. *Id.* It likely also wished to discourage political candidates from waiting to see their election results before they decided whether to challenge the statute. Section 13's 180-day time limit for facial constitutional challenges and its exclusive jurisdiction provision were each sensible tools to achieve these goals of promptness and finality: The time limit prevented potential litigants from sitting on their rights, and the jurisdictional provision ensured that constitutional challenges, if timely filed, would be resolved quickly in the Commonwealth's highest court.

Under the interpretation that Petitioner advances, however, Section 13 serves no practical purpose. There appears to be no reason—certainly Petitioner has not identified one—why the General Assembly would want the Supreme Court to determine facial constitutional challenges brought in the first 180 days, and then pass the jurisdictional baton to the Commonwealth Court to make the same types

of constitutional decisions. Indeed, such a rule would not just fail to prevent dilatory filings; it might *cause* them, because some litigants might reasonably choose to wait to file until the jurisdictional changeover date. This would be an absurd result. *See* 1 Pa. Cons. Stat. § 1922(1).[14]

3. Legislatures Have the Power to Set Deadlines for Filing Litigation

Petitioner's final argument is that "[u]nder the Pennsylvania Constitution, the Pennsylvania legislature cannot completely shield its legislation from scrutiny by the Commonwealth's judiciary." Pet'r Reply 20. This may be so, but it has nothing to do with this case. The General Assembly provided a generous window for constitutional challenges to Act 77's key provisions. Petitioner could have brought his claim within that window; the fact that he did not is his fault, not the legislature's. Thus, this case is nothing like *Marbury v. Madison*, 5 U.S. 137 (1803), or *William Penn School District v. Pennsylvania Department of Education*, 170 A.3d 414 (Pa. 2017). In those cases, the party opposing review contended that the judiciary could *never* review the constitutionality of a statute. In this case, the

[14] *Amici* argue that the 180-day time limit of Section 13(3) is "absurd" because it would preclude challenges to further amendments of Act 77. But Section 13 does not say that; it applies to challenges to Act 77's "amendment or adoption" of various provisions of the Election Code, and not amendments of those provisions set forth in newer (or older) statutes. Section 13(1) ("This section applies to the amendment or addition of the following provisions ….). In any event, *this* case does not challenge a post-Act 77 election procedure; it expressly challenges the universal mail-in voting procedures introduced by Act 77. Put differently, even if the 180-day time bar would be unconstitutional as applied to challenges to *later* statutory enactments (assuming *arguendo* that the time bar was written to apply to such enactments), it would not be unconstitutional as applied to this case. *See supra* note 13.

legislature simply restricted *when* litigation could be brought—something that is entirely within its power.

D. Act 77's Mail-In Voting Method Is Not Unconstitutional

As Respondents previously demonstrated, Petitioner does not come close to carrying his "very heavy burden" of proving that a statute duly enacted by the General Assembly is facially unconstitutional. *Commonwealth v. Bullock*, 913 A.2d 207, 212 (Pa. 2006). Petitioner and *Amici* fail to respond to many of Respondents' arguments as to why Act 77 is constitutional. The rebuttals they do attempt are unpersuasive.

1. Petitioner and *Amici* Ignore Fundamental Principles of Constitutional Interpretation

As a matter of first principles, Petitioner and *Amici* conspicuously fail to acknowledge—or apply—the standards governing constitutional challenges to statutes enacted by the General Assembly. Critically, it is not sufficient for a petitioner to show that a statute conceivably oversteps the General Assembly's bounds under some plausible reading of the Constitution. To the contrary, because the General Assembly, unlike the United States Congress, "possess[es] all legislative power except such as is prohibited by *express* words or *necessary* implication," *Commonwealth v. Stultz*, 114 A.3d 865, 876 (Pa. Super. Ct. 2015) (emphasis added); *accord Stilp v. Commonwealth*, 974 A.2d 491, 494-95 (Pa. 2009), "a statute will not be declared unconstitutional unless it *clearly*, *palpably*,

and *plainly* violates the Constitution," *Caba v. Weaknecht*, 64 A.3d 39, 49 (Pa. Commw. Ct. 2013). If anything, that deference to the legislature applies with even greater force where, as here, the petitioner does not claim the invasion of any constitutional right, but instead seeks to abridge the legislature's exercise of its core powers to enact policy in the public interest—here, the power to enact procedures making exercise of the franchise more convenient and accessible for all Pennsylvania voters. *See United Artists' Theater Circuit, Inc. v. City of Phila.*, 635 A.2d 612, 616 (Pa. 1993) ("[T]he police power of a state embraces regulations designed to promote the public convenience or the general prosperity …." (emphasis omitted)); *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 ….'").

These standards easily dispose of this case: Petitioner fails to show that his construction of the current Pennsylvania Constitution is even a reasonable one, let alone that it is the *only* reasonable interpretation, such that the Constitution "clearly, palpably, and plainly" prohibits voters from returning their ballots by mail.

2. Petitioner and *Amici* Ignore the Text and Structure of the Constitution

Petitioner and *Amici* have no answer to Respondents' analysis of the actual text and structure of the Constitution. They make no attempt to reconcile their

interpretation with the fact that the "offer to vote" language on which they rely does not appear in a provision addressing *methods* of voting (which methods are expressly committed to the General Assembly's near-plenary discretion in a separate constitutional provision, *see* Pa. Const. art. VII, § 4), but rather appears in a description of a durational-residency requirement addressed to *who* may vote, *see* Pa. Const. art. VII, § 1. And they do not dispute that a voter can "reside" in an election district even while physically absent from the district. *See* Resp. Br. 35–36.

Moreover, neither Petitioner nor *Amici* dispute that their interpretation of Article VII, § 1 would render Article VII, § 14 self-contradictory and incoherent. *See* Resp. Br. 38–39. That fact alone is sufficient to require rejection of Petitioner's constitutional claim. *See Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1126 (Pa. 2014) ("the Constitution [should be read as] an integrated whole"); *see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (Pa. 1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (internal citations omitted)).

In lieu of any analysis of the actual content, grammar, or syntax of Article VII, § 1, or its relationship to other sections in the same Article, Petitioner relies on naked *ipse dixits*. First, he asserts that, "[i]f Pennsylvanians were polled in 1968 as to the meaning of the phrase 'offer to vote,' it is unlikely anyone would have believed it meant to vote by mail or by some other means." Pet'r Reply 23. With all due respect, a litigant cannot avoid confrontation with the text and structure of the Constitution by purporting to conjure the results of fictional 53-year-old polling out of thin air. Not only does Petitioner focus exclusively on the three words "offer to vote," and improperly ignore the rest of the provision in which those words appear (as well as other constitutional provisions bearing on the question at hand), but Petitioner's interpretation of even those three words is untenably cramped. As the North Carolina Supreme Court has observed, "[a]n 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]." *Jenkins v. State Bd. of Elections*, 104 S.E. 346, 349 (N.C. 1920). Indeed, as Respondents previously pointed out, the evidence of original understanding in this case shows that, *even in 1838*, "offer to vote" was not understood to require voters to be physically present in their election district when casting their ballot. *See* Resp. Br. 50.

Petitioner's attempt to address the "methods" provision in Article VII, § 4 is equally conclusory and ineffective. Petitioner asserts that that provision "only strengthens his argument, as the legislature may prescribe certain methods for elections only if those methods comply with the Pennsylvania Constitution, including the in-person voting requirement in Article VII, § 1." Pet'r Reply 25–26. Indeed, Petitioner goes so far as to claim that "Article VII, § 1 establishes the qualifications to vote *and* method of voting." *Id.* at 26 (capitalization omitted; emphasis added).

Petitioner's argument re-writes the Constitution. Article VII, § 4 *is* the section of the Pennsylvania Constitution that addresses whether "methods [of voting] comply with the Pennsylvania Constitution." It is expressly entitled "Method of elections"—in contrast to § 1, which is entitled *only* "Qualifications of electors" (emphasis added), and not, as Petitioner would have it, "Qualifications to Vote and Method of Voting," Pet'r Reply at 26. And § 4 expressly grants the Legislature the authority to "prescribe[] by law" the "method[s]" by which elections shall be conducted, subject only to one restriction—namely, "[t]hat secrecy in voting be preserved." Pa. Const. art. VII, § 4. Section 4 manifestly does not include the proviso "so long as electors vote only in person at polling places within their respective election districts," or even "subject to restrictions set forth elsewhere in this Article." There is simply no way to reconcile Article VII,

§ 4 with the notion that the Pennsylvania Constitution "clearly, palpably, and plainly" prohibits the General Assembly from authorizing voters to return their ballots by mail.

3. *Chase* and *Lancaster City*, Which Were Decided Under Earlier Constitutions, Do Not Dictate the Result Here

Perhaps recognizing that their interpretation is at odds with the text and structure of the current Constitution, as well as modern principles of constitutional interpretation, Petitioner and *Amici* rely heavily on the 1862 and 1924 decisions in *Chase* and *Lancaster City*.[15] But as Respondents previously demonstrated, those decisions do not control the question before this Court, which arises under a different Constitution and, indeed, a different era of constitutional jurisprudence.

Petitioner and *Amici* effectively concede that *Chase* is distinguishable because it was decided before the addition of the "methods" provision appearing in Article VII, § 4 of the current Constitution. They are thus forced to rely on the holding in *Lancaster City*, which invalidated an absentee voting statute (and did not address methods of voting *within* a voter's election district). That invalidation was expressly based on the Court's interpretation of a provision in the 1874 Constitution that identified certain classes of voters and allowed them to vote

[15] *Amici* assert, puzzlingly, that "*Chase* and *Lancaster City* have been consistently upheld." Amici Br. 23. But *Amici* cite no such cases affirming those holdings, and Respondents are aware of none. Indeed, so far as Respondents are aware, no court has considered the General Assembly's constitutional authority to regulate election methods in the century since *Lancaster City* (save, perhaps, for evaluating restrictions imposed by the Free and Equal Elections Clause in Article I, § 5), let alone under the 1968 Pennsylvania Constitution.

absentee. *Lancaster City*, 126 A. at 201. The Court applied the canon of *expressio unius*, holding that the naming of these specific classes should be construed as a prohibition on absentee voting by anyone else. *Id.*

As Respondents previously explained, that conclusion does not control here for at least two related reasons. First, between 1924 and the ratification of the 1968 Constitution, the language of the Constitution's absentee-voting provision went through several changes—including, in particular, a change from "may" to "shall." Second, and roughly coincident with that change, the General Assembly authorized absentee voting by classes of persons beyond those enumerated in the Constitution. *See* Resp. Br. 47–49.

Petitioner ignores these facts altogether. He insists that *Lancaster City*'s holding—that the absentee-voting provision *in the 1874 Constitution* sets a ceiling on absentee voting rather than a floor—is binding, without acknowledging the intervening change in constitutional language or the fact that, when the change from "may" to "shall" occurred, the General Assembly began authorizing absentee voting far beyond the categories set forth in the Constitution. *See* Pet'r Reply 26–27. Those facts readily distinguish *Lancaster City*'s holding. The canon of *expressio unius* "is merely a rule of statutory construction and not a substantive rule of law"; that is, it is merely a presumption regarding legislative intent (or, as here, intended constitutional meaning), which should never be confused with

legislative intent itself. 2A Sunderland Statutory Construction § 47:25. Because of the intervening changes in constitutional language, this Court has evidence of intended constitutional meaning that did not exist in *Lancaster City*. In sum, whatever the merits of *Lancaster City*'s application of the canon of *expressio unius*, that decision does not control this Court's interpretation of the 1968 Constitution. As Respondents previously noted, that the drafters of the constitutional provision deliberately *changed* "may" to "shall" is particularly significant because a provision requiring certain acts does not, under the canon of *expressio unius*, prohibit others. *See, e.g.*, *Mathews v. Paynter*, 752 F. App'x 740, 744 (11th Cir. 2018) (unlike "may," the term "shall" "does not impliedly limit government authority"); *see also 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)). At an absolute minimum, given these changes, Petitioners cannot show that Article VII, § 14 "clearly, palpably, and plainly" sets a ceiling on absentee voting.

Unlike Petitioner, *Amici* do make some attempt to address these intervening changes, but their analysis misses the mark. *Amici* are dismissive of the change in language from "may" to "shall." *See* Amicus Br. 24. But Pennsylvania courts have made clear that the difference between these two words is important and,

contra Amici, cannot simply be ignored. *See, e.g.*, *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'"); *accord Mathews*, 752 F. App'x at 744.[16]

Amici also fail to appreciate the extent to which their interpretation is at odds with the legal status quo that has prevailed for virtually the entire life of the current Constitution. For all of those many decades, the scope of voters allowed to vote absentee has far exceeded the scope of voters who must, as a matter of constitutional requirement under Article VII, § 14, be permitted to vote absentee. Attempting to minimize the extent of that exceedance, *Amici* acknowledge only "the fact that spouses of military members were allowed to vote when [§ 14] only allowed for military members." Amicus Br. 23. Tellingly, *Amici* ignore a far more significant category of absentee voter: since 1968, the Election Code has allowed any voters on "vacation[]" to vote absentee, *see* 25 Pa. Stat. § 2602(z.3)—even

[16] *Amici* contend that "[a]n affirmative 'shall' cannot give the legislature more discretion than 'may.'" *Amici* Br. 24. But that argument ignores that *Lancaster City*'s holding rested on its drawing of a *negative implication* from the absentee-voting provision in the Constitution of 1874. Under that reasoning, an express grant of permission in one area may plausibly (depending on other factors) be interpreted to imply a lack of permission in other areas. But the imposition of a requirement in one area implies, at most, the absence of a requirement in other areas; it does not imply a lack of permission. That was exactly the Court of Appeals' holding in *Mathews*, 752 F. App'x at 744.

though § 14, in pertinent part, requires the General Assembly to allow absentee voting only by electors who are "absent from the municipality of their residence[] because their duties, occupation or business require them to be elsewhere," Pa. Const. art. VII, § 14. Of course, to be away on "vacation" is exactly the opposite of being away because of one's "duties, occupations, or business." Over the last more-than-fifty years, countless Pennsylvanians have relied on § 2602(z.3) to cast their vote by mail. Petitioner and *Amici* now argue, 53 years after the provision was enacted, that all of those votes were unconstitutional; according to Petitioner and *Amici*, if Pennsylvanians are out of town on election day for any reason other than business or work necessity, they forfeit the fundamental right to vote. Respondents respectfully submit that the Court should reject that contention—and recognize that the Court is not bound by the Constitution of 1874, as interpreted in 1924.

4. *Amici*'s Reliance on a Proposed Constitutional Amendment Is Misplaced

Amici 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 many 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* Amicus Br. 26 (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 *Amici*'s suggestion, Respondents' interpretation of the Pennsylvania Constitution in no way renders the content of the proposed constitutional amendment superfluous.[17]

Second, *Amici* erroneously rely on the statements of individual legislators regarding the need for the proposed amendment. 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:

> Such statements must be understood to be merely the personal opinion of individual members of the [Constitutional] Convention. What the Convention adopted, and what the electors of the commonwealth accepted, is the Constitution as it is written…. [Those statements] … show[] the views of individual members, and … indicat[e] the reasons for their votes; but they give us no light as to the views of the large majority who did not talk; much less of the mass of our fellow citizens whose votes at the polls gave that instrument the force of fundamental law. We think it safer to construe the constitution from what appears upon its face.

[17] The same is true, of course, of the post-1968 amendments to Article VII, § 14, on which *Amici* also rely. None of those amendments were 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.

Commonwealth ex rel. Margiotti v. Lawrence, 193 A. 46, 48–49 (Pa. 1937) (internal quotation marks omitted). Still less, then, can *Amici* attempt to construe a charter ratified in 1968 based on the statements of individual 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 *Amici* themselves[18]), 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.

5. Petitioner and *Amici* Effectively Concede That a Vast Number of Applications of Act 77 Are Constitutional, Defeating Petitioner's Facial Challenge

Finally, neither Petitioner nor *Amici* address that facial relief here is unavailable under any circumstances because even if *Lancaster City*'s holding were binding, it would not invalidate voting by mail (or in person outside of

[18] *See* Petition ¶¶ 3–16, *Bonner v. Commonwealth*, No. 293 M.D. 2021 (Pa. Commw. Ct. Aug. 31, 2021).

polling places) from *within* one's election district—including from one's home. *See* Resp. 52–54.

At most, Petitioner and *Amici* obliquely suggest that *Lancaster City*'s holding had the effect of simply ratifying *Chase*. But as Respondents previously demonstrated, that was not—and could not be—the case. First, insofar as *Chase* indicated that the Constitution of 1838 prohibited any form of voting by mail, that conclusion did not survive the intervening addition of the "methods" provision currently set forth in Article VII, § 4 of the 1968 Constitution. Second, the holding of *Lancaster City* could not have addressed voting methods *within* election districts because the statute at issue in that case authorized mail-in voting only for voters *outside* of their counties of residence. *See Lancaster City*, 126 A. at 200. Third, the Court's own statement of its holding makes clear that it did not cover intra-election district voting. *See id.* at 201 (setting forth the "proposition controlling this case").

III. CONCLUSION

For the foregoing reasons, and those set forth in their earlier Memorandum, Respondents respectfully request that their Cross-Application for Summary Relief be granted, that Petitioner's Application for Summary Relief be denied, and that the Petition be dismissed with prejudice.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: September 15, 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

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 15, 2021

/s/ Michele D. Hangley
Michele D. Hangley