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**NOTICE TO PLEAD**

Petitioners: You are hereby notified to file a written response to the enclosed Preliminary Objections within thirty (30) days from service hereof, or a judgment may be entered against you.

/s/ Michele D. Hangle

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

DOUG McLINKO,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF STATE, et al.,

Respondents.

**CASES  
CONSOLIDATED**

No. 244 MD 2021

TIMOTHY BONNER, et al.,

Petitioners,

v.

VERONICA DEGRAFFENREID, in her official  
capacity as Acting Secretary of the Commonwealth  
of Pennsylvania, et al.,

Respondents.

No. 293 MD 2021

**RESPONDENTS' PRELIMINARY OBJECTIONS**  
**TO THE *BONNER* PETITIONERS' PETITION FOR REVIEW**

Respondents, Acting Secretary of the Commonwealth Veronica Degraffenreid and the Department of State of the Commonwealth of Pennsylvania, hereby present Preliminary Objections to the Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief (“Pet.”) filed by Petitioners in case no. 293 M.D. 2021.

## **I. INTRODUCTION**

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

on a number of procedural grounds. And even if this case could surmount those procedural hurdles, it would fail to state a claim on which relief can be granted.

## **II. BACKGROUND**

### **A. Act 77 of 2019 Is Signed into Law with Bipartisan Support, and the Statutory Period for Challenges Expires**

1. In 2019, with the support of a bipartisan supermajority of both legislative chambers, the Pennsylvania General Assembly enacted Act 77 of 2019, which made several important updates and improvements to Pennsylvania’s Election Code. Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. 2019-77 (S.B. 421) (West) (“Act 77”).

2. Act 77 included provisions that, for the first time, offered the option of mail-in voting to Pennsylvania electors who did not qualify for absentee voting. *See* 25 Pa. Stat. §§ 3150.11–3150.17. This change was a significant development that made it easier for all Pennsylvanians to exercise their right to vote and brought the state in line with the practice of dozens of other states. Act 77’s other provisions included the elimination of straight-ticket voting, changes to registration and ballot deadlines, and modernization of various administrative requirements.

3. Reflecting the complex negotiations and policy tradeoffs that were involved in persuading a Republican-controlled legislature and a Democratic Governor to support the legislation, the General Assembly included a nonseverability provision stating that invalidation of certain sections of the act,

including the mail-in ballot provisions and the straight-ticket voting provisions, would void almost all of the Act. *See* Act 77 § 11.

4. The General Assembly also understood that implementing such a significant overhaul of Pennsylvania's voting laws would be a lengthy, complex, and resource-intensive endeavor. It also understood the risk of bad-faith gamesmanship, namely, the possibility that certain actors might wait to see the electoral results of Act 77's grand bipartisan compromise before determining whether to challenge it, filing suit only if and when the political effects of the statute were perceived as unfavorable to the would-be petitioners' partisan interests. It therefore sought to ensure that any challenges to the constitutionality of Act 77's major provisions, including mail-in voting, would be resolved before Act 77 was fully implemented. Section 13(3) of Act 77 thus provided that all constitutional challenges to Act 77 had to be brought within 180 days of the statute's effective date. *See* Act 77 § 13(3).

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

**B. While Petitioners Inexplicably Delay Filing This Lawsuit, the Electorate Learns to Rely on Mail-In Voting, and the Commonwealth and Counties Invest Substantial Resources in It**

6. Because of voters' and election workers' concerns about in-person voting in a pandemic, voters have chosen to vote by mail-in or absentee ballot in numbers far exceeding what was expected before the pandemic took hold.

7. In the June 2020 primary election, 1.5 million ballots—more than half of the total ballots cast—were cast by mail-in or absentee ballot.

8. In the June 2020 primary election, the unexpected numbers of mail-in and absentee ballot applications led, in some counties, to delays in processing applications, issuing ballots, and canvassing voted ballots.

9. In anticipation of a high-turnout election in November 2020, the Commonwealth and county election administrators invested substantial amounts of time and money in ways to smooth the mail-in and absentee ballot process.

10. Counties and the Commonwealth also spent many hours training election workers and administrators to process mail-in ballot applications and manage the voting process.

11. Finally, the Commonwealth, the counties, and many third parties have devoted enormous resources to educating voters about mail-in voting.

12. Of the approximately 6.9 million Pennsylvanians who voted in the 2020 general election, approximately 2.7 million cast a mail-in or absentee ballot.

13. Many Pennsylvanians have also opted to vote by mail in future elections.

14. Act 77 allows “[a]ny qualified registered elector [to] request to be placed on a permanent mail-in ballot list file.” 25 Pa. Stat. § 3150.12(g)(1). Once an elector does so, a mail-in ballot application will be automatically mailed to the elector at the beginning of each year, and the elector’s return of that application will cause her to be sent a mail-in ballot for each election during that year. *Id.* An elector who has requested to be placed on this permanent list therefore has every reason to expect that she need take no further affirmative steps to be able to vote; the Election Code assures her that elections officials will send her the appropriate materials at the appropriate time.

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

15. In November 2020, almost 13 months after Act 77’s enactment, a different group of petitioners, represented by the same counsel who represents Petitioners here, filed a lawsuit that challenged Act 77 on grounds identical to those asserted here.

16. In *Kelly v. Commonwealth*, No. 68 MAP 2020 (Pa. Sup. Ct.), *exercising extraordinary jurisdiction over* No. 620 MD 2020 (Pa. Commw. Ct.), the petitioners alleged—as Petitioners do here—that the mail-in balloting provisions of Act 77 violate the Pennsylvania Constitution. Complaint for

Declaratory and Injunctive Relief ¶ 1, *Kelly v. Commonwealth*, No. 68 MAP 2020 (Pa. Commw. Ct. Nov. 21, 2020).

17. The *Kelly* petitioners relied on arguments and authorities identical to those Petitioners assert here. *See id.* ¶¶ 16-18, 66-74; Memorandum of Law in Support of Motion for Emergency/Special Prohibitory Injunction at 1-8, *Kelly v. Commonwealth*, No. 620 M.D. 2020 (Pa. Commw. Ct. Nov. 22, 2020).

18. The *Kelly* petitioners sought the same relief Petitioners seek here—a declaration that Act 77 is unconstitutional and was void when enacted—along with an order enjoining certification of the November 2020 presidential election. *Compare Kelly* Complaint at 22 (seeking declaratory relief), *with Bonner* Pet. ¶ 57 & p. 25 (same).

19. The Pennsylvania Supreme Court, exercising extraordinary jurisdiction, dismissed the *Kelly* petition with prejudice. *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020) (*per curiam*).

20. In a *per curiam* Order, the currently sitting members of the Supreme Court stated that the *Kelly* petition “violates the doctrine of laches given [the *Kelly* petitioners’] complete failure to act with due diligence in commencing their facial constitutional challenge, which was ascertainable upon Act 77’s enactment.” *Id.* at 1256. The Court noted that more than a year had gone by, and millions of

Pennsylvanians had voted in the 2020 primary and general elections, since Act 77 was passed. *Id.*

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

22. Chief Justice Saylor's view, however, did not carry the day; the Court rejected all the relief the *Kelly* petitioners sought—both injunctive and declaratory, retrospective and prospective—on laches grounds.

23. The Petition does not even mention the *Kelly* case.

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

24. The Petition does not explain why Petitioners waited for nearly two years after Act 77 was passed, while three elections took place using mail-in voting, to file this suit.

25. Petitioners cannot claim ignorance of the law; they are legislators responsible for *making* Pennsylvania law. (Pet. ¶¶ 3–16.) Indeed, twelve of them

voted on Act 77, and eleven voted *in favor of* the statute. (*Id.*) The remaining two Petitioners were active candidates no later than January 2020.<sup>1</sup> (*Id.* ¶¶ 3, 12.)

26. Petitioners knew of Act 77 well before the statutory challenge deadline expired.

27. In early December 2020, ten of the Petitioners,<sup>2</sup> in their capacity as members of the General Assembly, filed an amicus brief in support of the *Kelly* petitioners' unsuccessful application asking the Supreme Court of the United States to reverse the Pennsylvania Supreme Court's decision and to enjoin Pennsylvania from certifying the results of the November 2020 general election.<sup>3</sup>

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<sup>1</sup> See <https://www.politicspa.com/hd8-tim-bonner-nominated-as-gop-candidate-for-special-election/93482/> (Petitioner Bonner nominated as Republican candidate in January 2020); [https://www.standardspeaker.com/news/tim-twardzik-officially-announces-123rd-district-candidacy/article\\_9301f322-b130-5ae1-ba83-ced20b719715.html](https://www.standardspeaker.com/news/tim-twardzik-officially-announces-123rd-district-candidacy/article_9301f322-b130-5ae1-ba83-ced20b719715.html) (Petitioner Twardzik announces candidacy in January 2020).

<sup>2</sup> Those ten Petitioners are P. Michael Jones, David H. Zimmerman, Kathy L. Rapp, David Maloney, Barbara Gleim, Aaron J. Bernstine, Dawn Keefer, Dan Moul, Francis X. Ryan, and Donald “Bud” Cook.

<sup>3</sup> See Brief for Members of the Pennsylvania General Assembly, as *Amicus Curiae* in Support of Applicants/Petitioners, *Kelly v. Pennsylvania*, No. 20A98 (U.S. filed Dec. 7, 2020).

### III. PRELIMINARY OBJECTIONS

#### A. **First Preliminary Objection: Petitioners Lack Standing to Challenge the Constitutionality of Act 77 (Pa. R. Civ. P. 1028(a)(5))**

28. “In Pennsylvania, a party to litigation must establish as a threshold matter that he or she has standing to bring an action.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (citing cases).

29. To satisfy the standing requirement, a litigant must be “aggrieved,” *i.e.*, he or she must have a “substantial, direct, and immediate interest in the matter.” *Id.*

30. “To have a substantial interest, concern in the outcome of the challenge must surpass ‘the common interest of all citizens in procuring obedience to the law.’” *Id.* (quoting *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003)).

31. To satisfy the criterion of directness, a litigant must “demonstrat[e] that the matter caused harm to the party’s interest.” *Id.* (internal quotation marks omitted).

32. “Finally, the concern is immediate if that causal connection is not remote or speculative.” *Id.* (internal quotation marks omitted).

33. “Pennsylvania is a fact-pleading state.” *Briggs v. Sw. Energy Prod. Co.*, 224 A.3d 334, 351 (Pa. 2020). Accordingly, to plead standing, “a party must plead facts which establish a direct, immediate and substantial injury.” *Open PA*

*Schools v. Dep't of Educ.*, No. 504 M.D. 2020, 2021 WL 129666, at \*6 (Pa. Commw. Ct. Jan. 14, 2021) (en banc) (citing *Pa. Chiropractic Fed'n v. Foster*, 583 A.2d 844, 851 (Pa. Commw. Ct. 1990)).

34. “If a petition contains only ‘general averments’ or allegations that ‘lack the necessary factual depth to support a conclusion that the [petitioner] is an aggrieved party,’ standing will not be found.” *Id.* (quoting *Pa. State Lodge, Fraternal Ord. of Police v. Dep't of Conservation & Nat. Res.*, 909 A.2d 413, 417 (Pa. Commw. Ct. 2006)).

35. The Petition here fails to plead standing.

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

36. Although Petitioners purport to assert their claims as “registered voters,” they fail to plead any facts showing that voters have any substantial, particularized interest that is invaded by Act 77’s mail-in voting procedures. To the contrary, Petitioners assert only “the common interest of all citizens in procuring obedience to the law.” *Markham*, 136 A.3d at 140.

37. Notwithstanding Petitioners’ conclusory assertion of “disenfranchise[ment]” (Pet. ¶ 90), the ability to cast one’s vote by mail in no way burdens their (or anyone’s) voting rights. Act 77’s mail-in voting procedures are available equally to all voters.

38. Pennsylvania case law—decided by both this Court and the Pennsylvania Supreme Court—confirms that voters lack standing to challenge Act 77. See *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970); *In re Gen. Election 2014*, No. 2047 CD 2014, 2015 WL 5333364 (Pa. Commw. Ct. Mar. 11, 2015).

39. In *Kauffman*, certain voters had brought a declaratory judgment action challenging the validity of amendments to the Election Code that “permit[t]ed electors and their spouses who are on vacation to vote by absentee ballot.” *Gen. Election 2014*, 2015 WL 5333364, at \*3 (describing *Kauffman*).

40. 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.

41. The Supreme Court ruled that the *Kauffman* 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.

42. This conclusion is also consonant with federal jurisprudence on standing, which has repeatedly and consistently rejected the kind of “vote dilution” theory of standing advanced by Petitioners here. *See, e.g., Wood v. Raffensperger*, 981 F.3d 1307, 1314–15 (11th Cir. 2020); *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 356–60 (3d Cir. 2020) (collecting cases), *vacated as moot*, No. 20-740, 2021 WL 1520777 (U.S. Apr. 19, 2021); *Hudson v. Haaland*, 843 F. App’x 336, 337–38 (D.C. Cir. 2021); *O’Rourke v. Dominion Voting Sys. Inc.*, 20-3747, 2021 WL 1662742, at \*4–9 (D. Colo. Apr. 28, 2021) (collecting numerous cases).

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

43. Petitioners also fail to plead a basis for standing as candidates. They nowhere explain how universal mail-in voting—which, again, is a method of voting equally available to *all* Pennsylvania voters, *and which eleven of the Petitioners voted for*—injures them “as past and likely future candidates for office.” (Pet. ¶ 17.)

44. That failure is fatal to the Petition because there is nothing about one’s status as a candidate that talismanically confers standing to challenge any election-related rule; a candidate-petitioner, like any other petitioner, must allege facts showing a substantial, particularized interest in the specific claims alleged. *See, e.g., In re Pickney*, 524 A.2d 1074 (Pa. Commw. Ct. 1987) (holding that

incumbent candidate lacked standing to challenge nominating petition of candidate belonging to a different political party); *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013) (although plaintiff candidate “might have been able to establish standing [to challenge an Federal Election Commission decision] if he had shown that the FEC’s determination injured his ability to fight the next election,” he had not adequately alleged such facts); *cf. Biener v. Calio*, 361 F.3d 206, 210–11 (3d Cir. 2004) (candidate had sufficiently pled standing to challenge filing fee for party primary election by alleging that payment of the fee in protest had “depleted two-thirds of his campaign funds”).

45. Because Petitioners plead no facts whatsoever demonstrating that they have a “substantial, direct, and immediate interest in the matter,” *Markham*, 136 A.3d at 140, the Petition must be dismissed. *See Open PA Schools*, 2021 WL 129666, at \*6; *Warren v. State Ethics Comm’n*, No. 234 M.D. 2018, 2019 WL 114061, at \*2 (Pa. Commw. Ct. Jan. 7, 2019).

**WHEREFORE**, Respondents respectfully request that this Court sustain their Preliminary Objection and enter an order dismissing the Petition for lack of standing.

**B. Second Preliminary Objection: Demurrer – As Made Clear by the Supreme Court’s Decision in *Kelly v. Commonwealth*, Petitioners’ Challenge Is Barred by the Doctrine of Laches (Pa. R. Civ. P. 1028(a)(4))**

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

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

47. The Supreme Court held that the *Kelly* petitioners—who filed suit 13 months after Act 77’s enactment, and were represented by the same counsel as Petitioners here—“fail[ed] to file their facial constitutional challenge in a timely manner,” and the Court dismissed the *Kelly* petition in its entirety under the doctrine of laches. 240 A.3d at 1256.

48. The Petition here, which asserts an identical facial constitutional challenge to Act 77, was filed on August 31, 2021, nine months after *Kelly* was decided. It is thus even more untimely. *See id.* at 1256-57.

49. Petitioners cannot avoid *Kelly* by emphasizing that the present case does not seek to overturn the result of any past election. Although the *Kelly* petitioners sought to enjoin certification of the November 2020 election results, they *also* sought a prospective declaration that Act 77 was, going forward, invalid. *Compare Kelly*, 240 A.3d at 1256 (“Petitioners sought a declaration that the

aforementioned provisions [of Act 77] were unconstitutional and void *ab initio.*”); *with* Pet. at p. 25 (seeking declaration that Act 77 violates the Pennsylvania Constitution and is void); *see also Kelly*, 240 A.3d at 1262 (Saylor, C.J., concurring and dissenting) (partially dissenting from majority ruling because Chief Justice Saylor disagreed with the majority’s decision to apply the doctrine of laches to the prospective, declaratory relief portion of the petition for review).

50. In accordance with the Supreme Court’s decision last November, this Court should dismiss the Petition for Review with prejudice. *See* 240 A.3d at 1257.

## **2. The Doctrine of Laches Squarely Applies to This Case**

51. As *Kelly* reflects, the circumstances of this case establish all the required elements of the laches defense.

52. “[L]aches is an equitable doctrine that bars relief when a complaining party is guilty of [1] want of due diligence in failing to promptly institute an action [2] to the prejudice of another.” *Id.* at 1256 (quoting *Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998)).

53. Petitioners undeniably failed to exercise reasonable diligence in initiating this action.

54. In *Kelly*, the petitioners filed their suit challenging the constitutionality of Act 77 on November 21, 2020—387 days and two elections—

after the Governor signed Act 77 into law. Here, Petitioners filed suit on August 31, 2021—*671 days and three elections*—after the Governor signed Act 77. *See also Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Commw. Ct. 2004) (applying laches to challenge to ballot referendum because it was initiated “thirteen months following the election”).

55. Petitioners, sitting members of the House of Representatives, cannot plausibly claim that their delay was justified by ignorance or unawareness of Act 77.

56. “The [due diligence] test is not what the plaintiff knows, ‘but what he might have known by the use of the means of information within his reach with the vigilance the law requires of him.’” *In re Mershon’s Est.*, 73 A.2d 686, 687 (Pa. 1950) (citation omitted). As elected legislators, Petitioners, like the candidate-petitioners in *Kelly*, are in the election business.

57. Compounding the lack of diligence here, even after the *Kelly* decision—which most of Petitioners urged the Supreme Court of the United States to overturn<sup>4</sup>—Petitioners waited to bring their challenge until after the May 18, 2021 primary election.

58. Furthermore, it is far from clear that Petitioners would *ever* have brought suit if McLinko had not first filed his nearly identical challenge a month

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<sup>4</sup> *See supra* note 3.

earlier. By the time Petitioners filed this tag-along action, it was too late to adjudicate their claims before the November 2021 election—which will be the *fourth* successive statewide election to be conducted under Act 77’s mail-in voting procedures. *See* Order dated September 3, 2021 (denying Petitioners’ application seeking to have this case heard during the Court’s September 2021 argument panel “in light of the time constraints”).

59. If the Court grants the requested relief, Petitioners’ undue delay will cause substantial prejudice throughout the Commonwealth.

60. “Prejudice can be found where a change in the condition or relation of the parties occurs during the time the complaining party failed to act.” *Koter*, 844 A.2d at 34.

61. To mitigate any prejudice, Petitioners could have brought suit any time between Act 77’s enactment and its effective date six months later on April 28, 2020. *See Kelly*, 240 A.3d at 1258 (Wecht, J., concurring). They did not do so.

62. While Petitioners failed to act, the Commonwealth and municipalities across Pennsylvania spent millions of dollars and many, many hours implementing Act 77 and educating elections workers and voters about universal mail-in voting.

63. These costs, which would not have been incurred had Petitioners successfully challenged Act 77 before the law became operative (or at least before

the June 2020 primary election), are themselves sufficient to establish the prejudice element of laches.

64. Moreover, beyond those already incurred costs, overturning Act 77 now would require reeducating millions of voters and risks disenfranchising untold numbers of Pennsylvanians.

65. Although voiding Act 77 would change the permissible means of voting for all Pennsylvanians, millions who voted last November would have to be alerted that they are no longer permitted to vote using a method they used the last time they voted; many of these voters intend to use the same method in all future elections.

**WHEREFORE**, Respondents respectfully request that this Court sustain their Preliminary Objection and enter an order dismissing the Petition as barred by the doctrine of laches.

**C. Third Preliminary Objection: Demurrer – Petitioners’ Facial Constitutional Challenge Is Statutorily Time-Barred Because It Was Filed More Than 180 Days After Act 77’s Enactment (Pa. R. Civ. P. 1028(a)(4))**

66. This action is also foreclosed by the applicable statutory deadline, which fell on April 28, 2020, more than a year ago.

67. Sections 13 of Act 77 states that certain constitutional challenges to the Pennsylvania Election Code, including challenges to Act 77’s mail-in voting

provisions, “must be commenced within 180 days” of October 31, 2019. Act of Oct. 31, 2019, P.L. 552, No. 77, § 13(3) (referring to provisions cited in § 13(1)).

68. The provisions subject to this time bar include precisely the ones challenged by Petitioners here. *Compare* provisions cited in *id.* § 13(1), with provisions cited in Pet. ¶¶ 1, 64, 70.

69. Petitioners failed to file this action until long after the April 28, 2020 deadline had come and gone.

70. Because Petitioners’ claim unambiguously runs afoul of Section 13’s 180-day limit, the Petition must be dismissed.

**WHEREFORE**, Respondents respectfully request that this Court sustain their Preliminary Objection and enter an order dismissing the Petition for failure to state a claim.

**D. Fourth Preliminary Objection: Demurrer – Petitioners’ Claim Under the Pennsylvania Constitution (Count I of the Petition) Fails on the Merits (Pa. R. Civ. P. 1028(a)(4))**

71. Petitioners cannot carry their heavy burden of demonstrating that Act 77’s mail-in voting provisions are unconstitutional. For this reason, too, the Petition fails to state a claim.

72. All “powers not expressly withheld from the [Pennsylvania] General Assembly inhere in it.” *Stilp v. Commonwealth*, 974 A.2d 491, 494–95 (Pa. 2009). Accordingly, “[i]t is foundational that all legislation duly enacted by the General

Assembly enjoys a strong presumption of validity ....” *Commonwealth v. Bullock*, 913 A.2d 207, 211 (Pa. 2006).

73. “The burden to overcome this presumption is heavy: ‘[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) (quoting *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 393 (Pa. 2005)) (emphasis in original). Consequently, “[a]ll doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.” *Working Families Party v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019).

74. Petitioners face an even heavier burden here because their claims take the form of a facial constitutional challenge. *See Kelly*, 240 A.3d at 1256 (observing that the same constitutional arguments Petitioners assert here constituted a “facial challenge to those provisions of Act 77 ... establishing universal mail-in voting in the Commonwealth of Pennsylvania”). “A statute is facially unconstitutional only where there are no circumstances under which the statute would be valid,” that is, only where “the law is unconstitutional in all of its applications.” *Haveman v. Bureau of Prof'l & Occupational Affairs*, 238 A.3d

567, 572 (Pa. Commw. Ct. 2020) (quoting *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019)).

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

74. Petitioners' challenge to Act 77's mail-in voting misinterprets two provisions of the Pennsylvania Constitution: one that prescribes *who* is eligible to register and vote in Pennsylvania elections, *see* Article VII, § 1, and one that *requires* that the Legislature provide some voters the option to vote absentee, *see* Article VII, § 14. Properly understood, neither provision supports Petitioners' challenge.

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

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

Qualifications of electors.

Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections subject,

however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.

1. He or she shall have been a citizen of the United States at least one month.
2. He or she shall have resided in the State ninety (90) days immediately preceding the election.
3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

Pa. Const. art. VII, § 1 (underlining added).

76. Based on its plain language, structure, and title, the meaning of this provision is clear: it limits the right to vote in Pennsylvania elections to citizens of a certain age who have been a U.S. citizen for at least a month.

77. Article VII, § 1 also prescribes durational-residency requirements—namely, the prospective voter must have resided in Pennsylvania at least 90 days immediately preceding the election and have resided in the specific election district in which she seeks to vote for at least 60 days.

78. As the authority interpreting “residence” makes clear, the qualifications set forth in § 1 do *not* include any requirement of physical presence at the time of the election; a person may maintain a “residence” in a given state and election district even while she is physically absent from them. *In re Case of Fry*,

71 Pa. 302, 309-10 (1872); *accord In re Stack*, 184 A.3d 591, 597 (Pa. Commw. Ct. 2018) (citing *In re Lesker*, 105 A.2d 376, 380 (Pa. 1954)).

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

80. According to Petitioners, the modifying clause “where he or she shall offer to vote,” which describes the election district in which the voter must *reside*, should be understood as a constitutional prohibition on the Legislature’s allowing qualified voters to vote other than in person.

81. If the framers of the Pennsylvania Constitution had intended to limit the voting methods that the Legislature could establish, they could, of course, have done so clearly and easily—in a provision expressly addressing voting *methods* rather than who is qualified to vote.

82. In fact, the Pennsylvania Constitution *does* contain a separate provision expressly addressing the “method” of voting. Article VII, § 4, which is entitled “Methods of elections; secrecy in voting,” states that “[a]ll elections by the citizens shall be by ballot *or by such other method as may be prescribed by law*;

Provided, That secrecy in voting be preserved.” Pa. Const. art. VII, § 4 (emphasis added).

83. In other words, the plain words of the constitutional provision specifically addressed to voting methods expressly gives the Legislature plenary power over such methods, subject only to the requirement that any method authorized by the Legislature preserve the secrecy of the vote. Thus, the existence of Article VII, § 4 further belies Petitioners’ interpretation of Article VII, § 1. *See Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1126 (Pa. 2014) (“the Constitution [should be read as] an integrated whole”).

84. Respondents’ interpretation of § 1 gives meaning to all of its terms. Each voter under § 14 must “have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election,” just as he or she must “have resided in the State ninety (90) days immediately preceding the election.” Pa. Const. VII, § 1. For example, an elector residing in Philadelphia cannot vote for the commissioners of Allegheny County, just as an elector residing in one election district cannot vote in the judge-of-elections race of another election district.

85. According to Petitioners’ interpretation, a relative clause modifying a durational-residency requirement in a provision delimiting *who* may vote, *see* Pa. Const. art. VII, § 1, should be construed as an oblique prohibition on voting

*methods*—notwithstanding that a separate constitutional provision expressly gives the General Assembly nearly unrestricted authority to prescribe the “method[s]” of voting, Pa. Const. art. VII, § 4.

86. Petitioners’ construction contravenes basic rules of grammar and syntax, and it cannot be reconciled with the Constitution’s text or structure.

87. At an absolute minimum, Petitioners’ argument turns the fundamental principles of constitutional interpretation discussed above—which require courts to sustain legislative enactments unless they “*clearly, palpably, and plainly*” violate the Constitution—directly on their head. *See Caba*, 64 A.3d at 49.

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

88. Petitioners contend that, if Article VII, § 1 did not require in-person voting at polling places, then there would have been no reason for § 14. *See* Pet. ¶ 69 (contending that Act 77 “makes [Article VII, § 14] moot”).

89. Petitioners’ argument is, once again, at odds with the plain language of the Constitution. Article VII, § 14 does not *permit* the Legislature to provide a method for certain voters to cast their ballot other than in person; it *requires* the Legislature to do so. *See* Pa. Const. art. VII, § 14 (“The Legislature *shall* ... provide a manner in which [certain specific groups of absentee electors] may vote ...”). That the Legislature is constitutionally *required* to allow certain groups of electors to vote other than in person does not suggest—let alone carry

the “necessary implication,” *see Stultz*, 114 A.3d at 876—that the Legislature is *prohibited* from allowing others to vote by mail.

90. An earlier absentee-voting provision, existing in an earlier version of the Pennsylvania Constitution, said “may” instead of “shall.” *See* 1957 Pa. Laws 1019.

91. This change in language underscores that Article VII, § 14 sets a floor for absentee voting; it does not establish a ceiling. *See, e.g., Mathews v. Paynter*, 752 F. App’x 740, 744 (11th Cir. 2018) (distinguishing “shall” from “may” and noting that the former term “does not impliedly limit government authority”).

92. This interpretation is supported by decades of history, during which the Election Code has continuously allowed categories of voters not named in Article VII, § 14 to vote absentee. *See, e.g.,* 25 Pa. Stat. § 3146.1(b) (military spouses); 25 Pa. Stat. § 2602(z.3) (electors on vacations).

93. Soon after the current Constitution was ratified in 1968, the Pennsylvania Supreme Court rejected a challenge to some of these expansions when they were still young, albeit on standing grounds. *Kauffman v. Osser*, 271 A.2d 236 (1970).

94. So far as Respondents are aware, no other challenges to these enactments were ever brought. Thus, for virtually the entire life of the current

Constitution, the Election Code has provided for absentee voting outside the scope of the requirements in Article VII, § 14.

95. Although the General Assembly had many opportunities to remove these provisions if they were, in fact, believed to be unconstitutional, it never did. This fact reinforces what the plain language of the constitutional provision dictates: § 14 requires the General Assembly to facilitate voting for certain groups; it does not prohibit the General Assembly from aiding others.

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

96. Petitioners rely on two cases decided under earlier versions of the Pennsylvania Constitution that are at odds with modern principles of constitutional interpretation and that construed materially different constitutional provisions. *See Chase v. Miller*, 41 Pa. 403 (1862); *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (1924).

97. The *Chase* Court did not consider a voting method remotely similar to the secure, confidential mail-in ballot procedures established by Act 77.

98. *Chase* invalidated a statute that essentially authorized Civil War military commanders to form election districts at out-of-state military camps and to

hold elections therein, bereft of any of the key features that protect elections administered by civil authorities. *Chase*, 41 Pa. at 424.

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

100. Significantly, the Constitution of 1838 did not contain the provision set forth in Article VII, § 4 of the current Constitution, which expressly grants the General Assembly plenary power to “prescribe[] the “method[s]” of voting, subject only to the requirement that “secrecy in voting be preserved.” Pa. Const. art VII, § 4. That change alone is sufficient to distinguish *Chase*’s interpretation of the

Constitution of 1838—and, in particular, its opinion that, under the earlier charter, “[t]he ballot c[ould] not be sent by mail or express,” *Chase*, 41 Pa. at 419.

101. *Lancaster City*, decided in 1924, also does not support Petitioners’ arguments about the meaning of the current Constitution, which was ratified in 1968.

102. At issue in *Lancaster City* was a statute allowing the return of ballots by voters who, “by reason of [their] duties, business or occupation,” are “absent from [their] lawfully designated election district[s]” on election day. 126 A. at 200.

103. The *Lancaster City* Court acknowledged the new constitutional provision expressly granting the Legislature authority to determine the “method” of voting (which had been added, by amendment to the Constitution of 1878, in 1901, *see* 1901 Pa. Laws 882), but the Court appeared to conclude that, whatever the *method* by which the ballot was returned to county officials, the *place* of the elector’s “‘offer to vote’ must still be in the district where the elector resides.” 126 A. at 201.

104. The *Lancaster City* Court found it significant that the then-existing Constitution “made [it] so that absent voting in the case of soldiers is permissible.” *Id.*; *see* Pa. Const. of 1878 art. VIII, § 6. The Court believed that this provision implicated “[t]he old principle that the expression of an intent to include one

class,” *i.e.*, military electors, “excludes another,” *i.e.*, non-military electors. 126 A. at 201. Because the challenged statute allowed non-military electors to vote from outside their election districts, the Court invalidated it. *Id.*

105. As discussed above, however, the constitutional provisions addressing absentee voting have not remained static in the century that has elapsed since *Lancaster City*.

106. In 1949, an amendment was adopted providing that “[t]he General Assembly *may*, by general law, provide a manner in which” disabled war veterans could vote by absentee ballot. 1949 Pa. Laws 2138 (emphasis added).

107. Similar amendments in 1953 and 1957 provided that the General Assembly “*may*” allow certain other categories of absentee voters. 1953 Pa. Laws 1496; 1957 Pa. Laws 1019.

108. In 1967, still another amendment (carried over into the 1968 Constitution) provided that “[t]he Legislature *shall*, by general law, provide a manner in which” various categories of voters can vote by absentee ballot. Pa. Const. art. VII, 14 (emphasis added).

109. Following this change, the General Assembly passed laws allowing other qualified voters not enumerated in the Constitution to vote absentee. *See, e.g.*, 25 Pa. Stat. § 2602(z.3) (electors on vacations, or sabbatical leaves). That

history is entirely consistent with the General Assembly’s own power to enact the scheme set forth in Act 77.

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

**3. *Chase* and *Lancaster City* Were Wrongly Decided and Are Irreconcilable with Modern Principles of Constitutional Interpretation**

111. Even if those previous cases were textually on all fours with this one (as they are not), they should not be followed: they were wrong at the time they were decided, and, if anything, are even more erroneous under current jurisprudence governing constitutional challenges to duly enacted statutes. *See Caba*, 64 A.3d at 49 (setting forth applicable standards).

112. The *Chase* opinion was expressly informed by the anti-democratic sentiments of its era.

113. The 1838 Constitution was the first in Pennsylvania history—and also the last—to restrict voting to “white” citizens. *Chase*, 41 Pa. at 418 (construing Pa. Const. of 1838 art. III, § 1).

114. The *Chase* opinion not only noted this reactionary trajectory; *Chase* appeared to celebrate it. *See, e.g., id.* at 426.

115. These anti-democratic convictions are wholly alien to the modern Constitution.

116. In addition, as discussed above, *Chase*'s interpretation of the durational-residency requirement in Article VIII, § 1 is completely unmoored from the text and structure of the Constitution.

117. Where a contemporary reader would expect to find actual analysis of the text, structure, and original public understanding of Article VIII, § 1, *Chase* proclaims the Court's own policy views regarding how elections ought to be administered—and asserts that the Constitution must “undoubtedly” reflect the same beliefs. *Id.* at 419.

118. This mode of “interpretation” is irreconcilable with well-settled, inveterate principles of modern jurisprudence, particularly in a case that does not assert the violation of any individual rights. *See, e.g., Commonwealth v. Torsilieri*, 232 A.3d 567, 596 (Pa. 2020) (“[W]hile courts are empowered to enforce constitutional rights, they should remain mindful that ‘the wisdom of public policy is one for the legislature, and the General Assembly’s enactments are entitled to a strong presumption of constitutionality rebuttable only by a demonstration that they clearly, plainly, and palpably violate constitutional requirements.’”); *see also* Pa. Const. art. I (“Declaration of Rights”).

119. The *Lancaster City* Court largely deferred to *Chase*'s misguided analysis. *See* 126 A. at 200–01.

**4. Even If *Lancaster City* Were Binding, It Would Not Sustain Petitioners' Facial Challenge to Act 77**

120. Even if the *Lancaster City* holding did control here (as it does not), it would not support Petitioners' facial challenge to Act 77.

121. As *Lancaster City* acknowledged, a provision post-dating *Chase*, and set forth in Article VII, § 4 of the current Constitution, makes clear that the General Assembly may prescribe the “method[s]” of voting so long as they protect the secrecy of the vote.

122. *Lancaster City* nonetheless held that the 1878 Constitution limited the *place from which* electors could return their ballots. *See Lancaster City*, 126 A. at 201.

123. Significantly, Act 77 supplemented, rather than superseded, Pennsylvania's pre-existing absentee voting laws. Those pre-existing statutory provisions have remained in effect. *See* Election Code art. XIII, 25 Pa. Stat. §§ 3146.1-3146.9 (article addressing absentee electors); *compare* Election Code art. XIII-D, 25 Pa. Stat. §§ 3150.11-3150.17 (separate article addressing mail-in electors).

124. The principal innovation of Act 77 was to allow voters located *within* their election districts, *i.e.*, *non*-absentee voters, to vote by mail.

125. Even under *Lancaster City*'s holding, such voters undeniably “offer to vote” “in the[ir] election district” in accordance with a “method ... prescribed by law.” Pa. Const. art. VII, §§ 1, 4. Accordingly, all of those applications of Act 77 are indisputably constitutional.

126. Moreover, a substantial number of the “mail-in” ballots cast under Act 77 are actually returned by voters *in person*. See 25 Pa. Stat. § 3146.5(b)(2). Those applications of Act 77 are also untouched by Petitioners’ argument.

127. Accordingly, it is plainly not the case, even under Petitioners’ untenable reading of the Constitution, that Act 77 “is unconstitutional in all of its applications.” *Haveman*, 238 A.3d 567, 572 (Pa. Commw. Ct. 2020).

128. For this reason, too, Petitioners’ facial constitutional challenge necessarily fails. See *Germantown Cab Co.*, 206 A.3d at 1041 (facial challenge can succeed “only where there are no circumstances under which the statute would be valid”).

**WHEREFORE**, Respondents respectfully request that this Court sustain their Preliminary Objection for legal insufficiency of the pleading and dismiss the Petition with prejudice.

**E. Fifth Preliminary Objection: Demurrer – Petitioners’ Federal Constitutional Claims (Counts II and III of the Petition) Fail on the Merits (Pa. R. Civ. P. 1028(a)(4))**

129. The Petition purports to assert federal constitutional claims (Counts II and III) alongside its claim under the Pennsylvania Constitution (Count I).

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

131. Because each of the Petition’s federal-law claims rests on the premise that Act 77 violates the Pennsylvania Constitution, Respondents’ Fourth Preliminary Objection, set forth above, disposes of the federal claims as well.

132. In addition, the federal claims fail irrespective of the merits of the state-law claim.

133. Contrary to Petitioners’ unsupported assertion, the U.S. Constitution’s “delegat[ion of] authority to make federal laws for federal elections to the states’ legislative power,” (Pet. ¶ 80 (Count II)) does not convert every alleged violation of state election law into a federal constitutional claim. *See King v. Whitmer*, 505 F. Supp. 3d 720, 737 (E.D. Mich. 2020) (finding “no case ... supporting such an expansive approach”).

134. Nor can Petitioners bootstrap their state-law claim into a claim for violation of the U.S. Constitution’s Fourteenth Amendment. (*See* Pet., Count III.) *See Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 391 (W.D. Pa. 2020) (“A violation of state law does not state a claim under § 1983 ....” (quoting *Shiple v. Chi. Bd. of Election Comm’rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) (citing *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)))); *Bognet*, 980 F.3d at 354–55 (rejecting similar vote-dilution claim and citing same line of precedent); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711–12 (D. Ariz. 2020) (same).

135. Accordingly, even if Petitioners’ claims under the Pennsylvania Constitution had merit (and they do not), their federal claims would fail as a matter of law.

**WHEREFORE**, Respondents respectfully request that this Court sustain their Preliminary Objection for legal insufficiency of the pleading and dismiss the Petition with prejudice.

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**CERTIFICATION REGARDING PUBLIC ACCESS POLICY**

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

Dated: September 30, 2021

/s/ Michele D. Hangle  
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