

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG MCLINKO,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF STATE, and VERONICA
DEGRAFFENREID, in her official capacity as Acting
Secretary of the Commonwealth of Pennsylvania,

Respondents,

TIMOTHY BONNER et al.,

Petitioners,

and

BUTLER COUNTY REPUBLICAN COMMITTEE, et al,
Intervenors-Petitioners,

v.

VERONICA DEGRAFFENREID et al.,

Respondents,

and

DEMOCRATIC NATIONAL COMMITTEE, and THE
PENNSYLVANIA DEMOCRATIC PARTY,

Intervenors-Respondents.

Nos. 244 MD 2021
293 MD 2021

**INTERVENORS-RESPONDENTS' BRIEF IN SUPPORT OF
RESPONDENTS' APPLICATION FOR SUMMARY RELIEF AND IN
OPPOSITION TO PETITIONERS' APPLICATIONS FOR SUMMARY
RELIEF**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND.....	2
A. Act 77 Has Allowed All Pennsylvania Voters To Use Mail Ballots In The Last Four Elections.....	2
B. Mr. McLinko Waited Nearly Two Years—During Which He Administered Three Elections Under Act 77—To Challenge the Act’s Constitutionality.....	5
C. Despite Having Voted On Act 77 And Run In Elections Governed By The Law, The <i>Bonner</i> Petitioners Waited Nearly Two Years To Challenge Act 77’s Constitutionality.....	6
III. ARGUMENT.....	6
A. Laches Bars Petitioners’ Challenges.....	6
B. No Petitioner Has Standing.....	9
1. <i>Mr. McLinko</i>	9
2. <i>The Bonner Petitioners</i>	12
C. The Commonwealth’s Application For Summary Relief Should Be Granted Because Nothing In The Pennsylvania Or U.S. Constitution Precludes The General Assembly From Establishing Universal No-Excuse Mail Voting.....	12
1. <i>Petitioners’ Reading Of Article VII, Section 1 Is Contrary To The Constitutional Text, Structure, And History</i>	14
a. Section 1’s plain language shows that it governs who is eligible to vote, not how voting must be conducted.....	15
b. The structure of Article VII also forecloses petitioners’ reading.....	17
c. History further confirms that Article VII, section 1 does not govern whether voting must be in person.....	21
d. A constitutional amendment providing that certain voters “shall”—as opposed to “may”—be permitted to vote without appearing in person confirms that neither section 1 nor section 14 renders Act 77 invalid.....	22

2. *Chase And Lancaster City, Which Interpreted Prior Versions Of The Pennsylvania Constitution, Do Not Govern This Case* 23

3. *If Chase And Lancaster City Are Binding, They Should Be Overruled*..... 26

4. *The Bonner Petitioners’ Federal Constitutional Claims Are Meritless*..... 28

IV. CONCLUSION..... 31

CERTIFICATE OF COMPLIANCE 32

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>A.S. v. Pennsylvania State Police</i> , 143 A.3d 896 (Pa. 2016).....	16
<i>Ali v. Federal Bureau of Prisons</i> , 552 U.S. 214 (2007)	20
<i>Animal Legal Def. Fund v. United States Dep’t of Agric.</i> , 935 F.3d 858 (9th Cir. 2019).....	20
<i>Arizona State Legislature v. Arizona Independent Redistricting Commission</i> , 576 U.S. 787 (2015).....	29
<i>Blackwell v. Commonwealth State Ethics Commission</i> , 567 A.2d 630 (Pa. 1989).....	21
<i>Bush v. Palm Beach County Canvassing Board</i> , 531 U.S. 70 (2000).....	29
<i>Caba v. Weaknecht</i> , 64 A.3d 39 (Pa. Commw. Ct. 2013).....	13
<i>Cavanaugh v. Davis</i> , 440 A.2d 1380 (Pa. 1982).....	19
<i>Chase v. Miller</i> , 41 Pa. 403 (1862).....	24, 26
<i>Christensen v. Harris County</i> , 529 U.S. 576 (2000).....	20
<i>Cinram Manufacturing, Inc. v. W.C.A.B. (Hill)</i> , 975 A.2d 577 (Pa. 2009)	25
<i>City of Milwaukee v. Illinois</i> , 451 U.S. 304 (1981)	17
<i>City of Pittsburgh v. Fraternal Order of Police</i> , 161 A.3d 160 (Pa. 2017)	26
<i>City of South Lake Tahoe v. California Tahoe Regional Planning Agency</i> , 625 F.2d 231 (9th Cir. 1980).....	10
<i>Commonwealth v. Alexander</i> , 243 A.3d 177 (Pa. 2020).....	26, 27
<i>Commonwealth v. Johnson</i> , 22 A. 703 (Pa. 1891).....	15
<i>Commonwealth v. Smith</i> , 186 A.3d 397 (Pa. 2018).....	16

<i>Consumer Product Safety Commission v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980).....	17
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 493 F. Supp. 3d 331 (W.D. Pa. 2020).....	30
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 502 F. Supp. 3d 899 (M.D. Pa. 2020).....	30
<i>Donald J. Trump For President, Inc. v. Secretary of Pennsylvania</i> , 830 F. App'x 377 (3d Cir. 2020).....	27, 30
<i>Erie & North-East Railroad Co. v. Casey</i> , 26 Pa. 287 (1856).....	13
<i>Friends of Lackawanna v. Dunmore Borough Zoning Hearing Board</i> , 186 A.3d 525 (Pa. Commw. Ct. 2018).....	10
<i>Gill v. Whitford</i> , 138 S. Ct. 1916 (2018).....	29
<i>Housing Authority of County of Chester v. Pennsylvania State Civil Service Commission</i> , 730 A.2d 935 (Pa. 1999).....	10
<i>In re Contested Election in Fifth Ward of Lancaster City</i> , 126 A. 199 (Pa. 1924).....	21, 24, 25
<i>In re Determination of Priority of Commission Among Certain Judges of Superior Court & Commonwealth Court</i> , 427 A.2d 153 (Pa. 1981).....	21
<i>In re Hickson</i> , 821 A.2d 1238 (Pa. 2003).....	11
<i>Jubelirer v. Rendell</i> , 953 A.2d 514 (Pa. 2008).....	19
<i>Kauffman v. Osser</i> , 271 A.2d 236 (Pa. 1970).....	12
<i>Kelly v. Commonwealth</i> , 240 A.3d 1255 (Pa. 2020).....	7
<i>Kirtsaeng v. John Wiley & Sons, Inc.</i> , 568 U.S. 519 (2013).....	25
<i>Markham v. Wolf</i> , 136 A.3d 134 (Pa. 2016).....	9, 11
<i>McPherson v. Blacker</i> , 146 U.S. 1 (1892).....	29
<i>Nader v. FEC</i> , 725 F.3d 226 (D.C. Cir. 2013).....	11, 12

<i>New York Legal Assistance Group v. BIA</i> , 987 F.3d 207 (2d Cir. 2021).....	20
<i>Ohio ex rel. Davis v. Hildebrandt</i> , 241 U.S. 565 (1916).....	29
<i>Pittsburgh Palisades Park, LLC v. Commonwealth</i> , 888 A.2d 655 (Pa. 2005)	11
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	29
<i>Robinson Township v. Commonwealth</i> , 52 A.3d 463 (Pa. Commw. Ct. 2012)	10
<i>Robinson Township. v. Commonwealth</i> , 83 A.3d 901 (Pa. 2013).....	10
<i>Scarnati v. Wolf</i> , 173 A.3d 1110 (Pa. 2017).....	15
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932).....	29
<i>South Dakota v. Wayfair, Inc.</i> , 138 S. Ct. 2080 (2018).....	27
<i>Sprague v. Casey</i> , 550 A.2d 184 (Pa. 1988).....	9
<i>Stilp v. Commonwealth</i> , 974 A.2d 491 (Pa. 2009).....	13
<i>Stilp v. Hafer</i> , 718 A.2d 290 (Pa. 1998)	7, 8, 9
<i>Taylor v. Coggins</i> , 90 A. 633 (Pa. 1914)	7
<i>Troutman v. Court of Common Pleas (In re Administrative Order No. 1-MD-2003)</i> , 936 A.3d 1 (Pa. 2007).....	10
<i>Whitman v. American Trucking Ass 'ns</i> , 531 U.S. 457 (2001).....	18
<i>Zauflik v. Pennsbury School District</i> , 104 A.3d 1096 (Pa. 2014)	17

CONSTITUTIONS

Pa. Const.	
art. VII, §1	14, 16, 25
art. VII, §4	13, 17, 24
art. VII, §14.....	18, 22, 24
Pa. Const. of 1838	
art. III, §1	21

Pa. Const. of 1874	
art. VIII, §4.....	21
art. VIII, §6.....	21
Pa. Const. of 1968.....	24, 26

STATUTES

1949 Pa. Laws 2138.....	22
1957 Pa. Laws 1019.....	22
25 Pa. Stat.	
§2602.....	3
§2602(z.3)	23
§3146.....	23
§3150.11	2, 3

LEGISLATIVE MATERIALS

1966 Pa. Leg. J. 518-House.....	23
Pa. H.B. 442 (1967)	22

OTHER AUTHORITIES

Barreto, Matt, et al., <i>Vote By Mail: Debunking The Myth of Voter Fraud in Mail Ballots</i> , UCLA Latino Policy & Politics Initiative (Apr. 14, 2020), https://latino.ucla.edu/wp-content/uploads/2020/04/LPPI-VRP-Voter-Fraud-res.pdf	27
Durkee, Alison, ‘ <i>No Evidence</i> ’ of Election Fraud in Battleground States, <i>Statistical Analysis Finds as Trump Continues False Claims</i> , Forbes (Feb. 19, 2021), https://www.forbes.com/sites/alisdurkee/2021/02/19/no-evidence-of-election-fraud-in-battleground-states-statistical-analysis-finds-as-trump-continues-false-claims/?sh=2dc330a83315	27
Kamarck, Elaine & Christine Stenglein, <i>Low rates of fraud in vote-by-mail states show the benefits outweigh the risks</i> , Brookings Inst. (June 2, 2020), https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks/	27

Lai, Jonathan, *Pa. 's Election System is on the Verge of the Largest Changes in Decades—in Time for the 2020 Election*, Phila. Inquirer (Oct. 23, 2019), <https://www.inquirer.com/politics/pennsylvania/pa-election-reform-deal-20191023.html>3

Meyer, Katie, *A Voter Guide to Pennsylvania's 2021 Judicial Elections*, WHYY (Oct. 5, 2021), <https://whyy.org/articles/a-voter-guide-to-pennsylvanias-2021-judicial-elections-2/>4

Pennsylvania Department of State, *Official Returns* (Nov. 3, 2020), <https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G&IsActive=0/>4

Pennsylvania Department of State, *Voting by Mail-in or Absentee Ballot is Safe, Secure, and Easy*, <https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx>5

Press Release, Tom Wolf, Gov., Pa., Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting (Oct. 31, 2019), <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting>.....3

Scalia, Antonin & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012). 19

Intervenors-respondents, the Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”), submit this brief in support of respondents’ application for summary relief and in opposition to the applications for summary relief filed by petitioners Doug McLinko and Timothy Bonner, et al.¹

I. INTRODUCTION

The law challenged in these cases, Pennsylvania Act 77, is constitutional. The General Assembly has broad constitutional authority to enact any law not prohibited by the state or federal constitution. Petitioners identify nothing (in either constitution or elsewhere) that limits this sweeping authority in a way that bars the General Assembly from expanding access to the right to vote as Act 77 did. Instead, petitioners primarily rely on two Pennsylvania Supreme Court decisions—one from 1862 and one from 1924—to argue that the term “offer to vote” in Article VII, section 1 of the state constitution requires a voter to appear in person and thus

¹ The DNC and PDP request that this filing also be treated either as a brief in support of their October 8, 2021 preliminary objections and application for summary relief or as an application for summary relief. Additionally, the DNC and PDP incorporate by reference (1) respondents’ and intervenors-respondents’ October 8, 2021 preliminary objections to Mr. McLinko’s amended petition, (2) respondents’ August 26, 2021 memorandum in opposition to Mr. McLinko’s application for summary relief and in support of respondents’ cross-application for summary relief, (3) respondents’ September 30, 2021 memorandum in support of their application for summary relief in *Bonner*, (4) respondents’ October 14, 2021 response in opposition to the *Bonner* petitioners’ application for summary relief, and (5) respondents’ and intervenors-respondents’ October 15, 2021 briefs in support of their preliminary objections to Mr. McLinko’s amended petition for review.

prohibits vote-by-mail measures like Act 77. For the reasons stated below, *see* pp.23-30, these cases provide no support for petitioners' claims.²

Petitioners' challenges are also marred by two procedural defects, each of which independently requires dismissal. First, laches bars Mr. McLinko (who claims to have administered three elections under Act 77) and the *Bonner* petitioners (most of whom were members of the Pennsylvania House of Representatives that passed Act 77) from belatedly challenging a law that has allowed millions of Pennsylvanians to vote by mail and on which respondents and the DNC and PDP have relied in allocating their resources. Second, petitioners lack standing because they have alleged no substantial, immediate, and direct harm that they, in particular, will suffer from the challenged law's operation.

II. FACTUAL BACKGROUND

A. Act 77 Has Allowed All Pennsylvania Voters To Use Mail Ballots In The Last Four Elections

Act 77, signed into law on October 31, 2019, allows Pennsylvanians to “vote by mail for any reason or no reason whatsoever (no excuse).” *McLinko Am. Pet.* ¶¶7-10; *accord Bonner Pet.* ¶¶50-51. In particular, the Act provides that “[a] qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this

² The DNC and PDP preserve for further review, if necessary, the argument that the two decisions are wrong and should be overruled. *See infra* pp.26-28.

article.” 25 Pa. Stat. §3150.11(a). (The term “qualified mail-in elector” has the same meaning as “qualified elector,” *id.* §3150.11(b), which is “any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth,” *id.* §2602(t).) Act 77 also made other “changes to the Pennsylvania Election Code,” McLinko Am. Pet. ¶7, including (1) creating a 50-day mail-voting period; (2) allowing voters to request applications for mail-in or absentee ballots for all primary, general, and special elections held in a given year; (3) adding fifteen days for voter registration, (4) extending the deadline for submitting mail and absentee ballots until 8:00 pm on election day, and (5) eliminating straight-party-ticket voting. *See* Press Release, Tom Wolf, Gov., Pa., Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting (Oct. 31, 2019)³; Lai, *Pa. ’s Election System is on the Verge of the Largest Changes in Decades—in Time for the 2020 Election*, Phila. Inquirer (Oct. 23, 2019).⁴

The June 2020 primary elections, November 2020 general elections, May 2021 primary elections, and November 2021 municipal elections were conducted under Act 77. Because of the COVID-19 pandemic, “a significant percentage of Pennsylvania voters cast a mail-in or absentee ballot during the 2020 election[s]”—

³ <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting>.

⁴ <https://www.inquirer.com/politics/pennsylvania/pa-election-reform-deal-20191023.html>.

a “number[] [that] far exceeded what Pennsylvania elections administrators had planned for prior to the pandemic.” Affidavit of Jonathan Marks in Support of Respondents (“Marks Aff.”) ¶6 (Aug. 26, 2021). For example, of the approximately 6.9 million Pennsylvanians who voted in the November 2020 general election, roughly 2.7 million used mail ballots. *See* Pa. Dep’t of State, *Official Returns* (Nov. 3, 2020)⁵; *see also* Marks Aff. ¶10.

For the November 2021 elections, mail ballots were requested by and sent to hundreds of thousands of voters. *See* Meyer, *A Voter Guide to Pennsylvania’s 2021 Judicial Elections*, WHYY (Oct. 5, 2021)⁶; *see also* Marks Aff. ¶26 (noting that as of August 26, 2021, 1.38 million voters had placed themselves on the list to receive a mail-in ballot for the November 2021 election and roughly 740,765 had already had their application for a mail-in ballot approved). This Court accordingly held earlier in this litigation that Mr. McLinko’s request for prospective relief “is not available for the November 2021 election because it is already underway.” Order Consolidating Bonner and McLinko Petitions at 2 (Sept. 24, 2021).

In preparation for the November 2021 election (and future elections), the Pennsylvania Department of State made clear that it adheres to Act 77’s mandate

⁵ <https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G&IsActive=0/> (visited Nov. 2, 2021).

⁶ <https://whyy.org/articles/a-voter-guide-to-pennsylvanias-2021-judicial-elections-2/>.

that “[a]ny qualified voter may apply for a mail-in ballot.” Pa. Dep’t of State, *Voting By Mail-in or Absentee Ballot is Safe, Secure, and Easy*.⁷ The Department has spent significant resources educating voters about the availability of mail-in voting, and individual counties have invested in the machinery—and election-worker training—necessary to handle the increased number of mail ballots. Marks Aff. ¶¶12-14, 18-19. If Act 77 is invalidated, the Department and counties throughout the Commonwealth will have to spend “millions of dollars of resources to educate voters regarding the change,” or risk significant voter confusion and inadvertent voter disenfranchisement. *Id.* ¶¶21-22.

B. Mr. McLinko Waited Nearly Two Years—During Which He Administered Three Elections Under Act 77—To Challenge the Act’s Constitutionality

Mr. McLinko has been an election official in Bradford County for a decade. *See* Mem in Opp’n to McLinko Pet’r’s App. for Summ. Relief 10 n.3. Accordingly, he executed Act 77’s requirements in the first three elections after it was enacted. Mr. McLinko filed his initial petition for review in this Court on July 26, 2021, seeking a judgment declaring that all of Act 77—and hence the broad swath of the Pennsylvania Election Code that was added by the law—is unconstitutional. Specifically, he claims Act 77 is unconstitutional because it was enacted without

⁷ <https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx> (visited Nov. 2, 2021).

following the procedures for an amendment to the state constitution, which he alleges is required to provide for universal no-excuse mail voting. *See id.* ¶¶37-39. Mr. McLinko filed an amended petition on September 29, 2021, seeking the same relief as his original petition. McLinko Am. Pet. ¶¶56-58.

C. Despite Having Voted On Act 77 And Run In Elections Governed By The Law, The *Bonner* Petitioners Waited Nearly Two Years To Challenge Act 77’s Constitutionality

The *Bonner* petitioners are fourteen Republican members of the Pennsylvania House of Representatives, eleven of whom voted in favor of Act 77 in 2019. *Bonner* Pet. ¶¶3-16. The remaining three either voted against Act 77 or were candidates for Pennsylvania office shortly after the law was enacted. *See* Commonwealth Br. in Support of Summ. Relief 10 & n.3.

Although ten of the *Bonner* petitioners signed an amicus brief in support of a suit raising a similar challenge to Act 77 in November 2020, Commonwealth Br. in Support of Summ. Relief 10-11 nn.4-5, the *Bonner* petition challenging Act 77 was not filed until August 31, 2021.

III. ARGUMENT

A. Laches Bars Petitioners’ Challenges

Laches bars claims when there has been “(1) a delay arising from [petitioners’] failure to exercise due diligence and (2) prejudice to the [opposing parties] resulting

from the delay.” *Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998). Both elements are met here.

First, petitioners failed to act with due diligence in instituting this action. As discussed, petitioners have been aware of Act 77—or should have been, which is what matters, *see Stilp*, 718 A.2d at 294; *Taylor v. Coggins*, 90 A. 633, 635 (Pa. 1914)—at least since the law was enacted in October 2019. *See supra* pp.5-6. And there can be no dispute that “[t]he provisions of the Constitution that [Act 77] purportedly violate[s] were also readily available” since well before that time. *Stilp*, 718 A.2d at 294. Petitioners therefore could have brought these actions two years ago.

Instead, much like the litigants who sought to challenge Act 77’s constitutionality weeks after the November 2020 elections, petitioners “delayed this suit until [multiple] elections were conducted,” and as a result played “a dangerous game at the expense of ... Pennsylvania voter[s].” *Kelly v. Commonwealth*, 240 A.3d 1255, 1261 (Pa. 2020) (Wecht, J., concurring), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021). If anything, petitioners’ delay is more egregious than the one-year delay that constituted an “unmistakable” “want of due diligence” in *Kelly*. *Id.* at 1256 (per curiam op.). For one thing, more time and two more elections have passed since then. Moreover, unlike those who challenged the law in 2020, Mr. McLinko oversaw the implementation of Act 77 three times after

its passage before he filed his challenge. *See* McLinko Am. Pet. ¶5; *supra* pp.5-6. And unlike the challengers in 2020, twelve of the fourteen *Bonner* petitioners voted on Act 77. *See* Bonner Pet. ¶¶3-16; *supra* p.6.

Second, respondents, the PDP, and the DNC (as well as millions of Pennsylvania voters) have been prejudiced by petitioners' substantial delay. "Prejudice may be found where there has been some change in the condition or relations of the parties which occurs during the period the complainant failed to act." *Stilp*, 718 A.2d at 294. Here, respondents have expended substantial resources to implement Act 77 and most if not all of those resources will have been wasted if petitioners prevail. *See* Mem. in Opp'n to McLinko Pet'r's App. for Summ. Relief 6-7 & n.1; Resp'ts' Prelim. Objs. To McLinko Pet'r's Am. Pet. ¶¶77-79; *see also supra* pp.4-5. The DNC and PDP have similarly invested time and money educating candidates and voters for future elections; those resources would likewise have been wasted if Act 77 were invalidated. *See* DNC Br. in Support of Motion to Intervene 3-6. Finally, more than 1.38 million Pennsylvania voters (including hundreds of thousands of members of the PDP) have already requested to be placed on the permanent mail-in ballot list, Mem. in Opp'n to McLinko Pet'r's App. for Summ. Relief 7—likely because they concluded that voting by mail is the safest or simplest

option for them to vote. All of them would be unexpectedly removed from that list if Act 77 were overturned, creating confusion and administrative burdens. *See id.*⁸

B. No Petitioner Has Standing

To have standing, a party must have an interest in the litigation that is “substantial, direct, and immediate.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). “The keystone to standing in these terms is that the person must be negatively impacted in some real and direct fashion” in a manner that “surpass[es] the common interest of all citizens in procuring obedience to the law.” *Id.* (quotation marks omitted).

1. *Mr. McLinko*

Mr. McLinko identifies two theories of standing, neither of which has merit.

First, he alleges that he has standing because he will be “called upon to make quasi-judicial judgments on a statute [he] perceive[s] as unconstitutional.” *McLinko Am. Pet.* ¶43; *McLinko App. Summ. Relief Reply* 3-9. But public officials generally cannot demonstrate a “substantial interest” in challenging a law simply by asserting

⁸ Mr. McLinko has suggested that laches is categorically inapplicable to constitutional challenges like his. *McLinko App. Summ. Relief Reply* 13. But his only support is “dicta in *Sprague [v. Casey]*, 550 A.2d 184, 188 (Pa. 1988).” *Stilp*, 718 A.2d at 293. More instructive is the Pennsylvania Supreme Court’s recent ruling in *Kelly*, which, while not binding on this Court, demonstrates that laches can be asserted against this kind of lawsuit.

that their duties are unlawful. *See Troutman v. Court of Common Pleas (In re Administrative Order No. 1-MD-2003)*, 936 A.3d 1, 8 (Pa. 2007).

The only case Mr. McLinko cites to support his novel standing theory (*Robinson Township v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012) (subsequent history omitted)) involved elected officials who had a cognizable interest in the litigation beyond their public-facing roles, in that they “were also township landowners and residents,” *Friends of Lackawanna v. Dunmore Borough Zoning Hearing Board*, 186 A.3d 525, 533 (Pa. Commw. Ct. 2018) (citing *Robinson*). It was the latter status that created the requisite interest in “a state statute allowing oil and gas operations” in their area. *Id.*; *see also Robinson Twp. v. Commonwealth*, 83 A.3d 901, 918 (Pa. 2013). Whereas in *Robinson* the elected officials were threatened with concrete injuries to their community and real property, in this case “the source of [Mr. McLinko’s] complaint ... is just abstract outrage at the enactment of [an allegedly] unconstitutional law”—Mr. McLinko “will lose nothing by enforcing [Act 77] save an abstract measure of constitutional principle.” *City of S. Lake Tahoe v. California Tahoe Reg’l Planning Agency*, 625 F.2d 231, 237 (9th Cir. 1980).⁹

⁹ “[I]n determining issues of standing, [Pennsylvania courts] ha[ve] looked to the federal courts’ interpretation of Article III of the United States Constitution.” *Housing Auth. of Cnty. of Chester v. Pennsylvania State Civil Serv. Comm’n*, 730 A.2d 935, 939 (Pa. 1999).

Second, Mr. McLinko asserts that he has standing as a taxpayer. McLinko Am. Pet. ¶50; McLinko Summ. App. Relief Reply 9-10. But the requirements for taxpayer standing are satisfied only “in rare instances,” *In re Hickson*, 821 A.2d 1238, 1245 n.6 (Pa. 2003), including if “the governmental action would otherwise go unchallenged” and “no other persons are better situated to assert the claim,” *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 662 (Pa. 2005). Mr. McLinko (who bears the burden to establish standing, *Markham*, 136 A.3d at 140) has made neither showing.

To be sure, Mr. McLinko alleges that if he “does not challenge the Act, it would likely go unchallenged.” McLinko Am. Pet. ¶55. But of course the *Bonner* petitioners have already filed their similar challenge, and other Pennsylvanians would have stronger claims, such as candidates for political office who could make a particularized showing that Act 77 injures their “ability to fight the next election,” *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013).¹⁰

¹⁰ Since his petition, Mr. McLinko has suggested that the first required showing for taxpayer standing is actually whether the underlying law “would likely go challenged *before the [next] election*.” App. Summ. Relief Reply 10 (emphasis added). He cites no authority for that claim, however. In any event, his underlying factual premise is wrong, as the *Bonner* petitioners did file prior to the November 2021 election.

2. *The Bonner Petitioners*

The *Bonner* petitioners do not explain why they have standing, merely alleging that they bring suit “as past and likely future candidates for office and as private citizens and registered Pennsylvania voters.” *Bonner Pet.* ¶17. Neither potential standing theory holds water.

First, Act 77 cannot inflict on registered voters the particularized injury required under Pennsylvania law, *see supra* p.9, since its vote-by-mail procedures apply equally to all registered voters: Not only can anyone qualified to vote in Pennsylvania cast a ballot by mail, but any possible harm suffered would also be “common to that of all other qualified electors,” *Kauffman v. Osser*, 271 A.2d 236, 239 (Pa. 1970).

Second, and relatedly, status as past and future candidates does not establish standing. While a candidate for office would have standing to challenge Act 77 if she articulated specific, particularized reasons for why the law affects her chances of electoral victory, *cf. Nader*, 725 F.3d at 229, the *Bonner* petitioners have not even tried to clear that bar.

C. Summary Relief For the Commonwealth Should Be Granted Because Nothing In The Pennsylvania Or U.S. Constitution Precludes The General Assembly From Establishing Universal No-Excuse Mail Voting

Petitioners’ challenges also fail because Act 77 is manifestly constitutional.

The General Assembly’s power to legislate is vast. Article II, section 1 of Pennsylvania’s Constitution gives all “[t]he legislative power of this Commonwealth” to the General Assembly, thereby conferring the authority to enact law on any matter not prohibited by the Pennsylvania or federal constitution. In other words, all “powers not expressly withheld from the General Assembly inhere in it,” *Stilp v. Commonwealth*, 974 A.2d 491, 494-95 (Pa. 2009), and “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). Given these background principles, “[t]he party who wishes [a court] to pronounce a law unconstitutional[] takes upon himself the burden of proving, beyond all doubt, that it is so.... Nothing will [void a statute] but a *direct* collision between its provisions and those of the federal or state constitution.” *Erie & North-East R.R. Co. v. Casey*, 26 Pa. 287, 300-301 (1856). This rule applies with even greater force here, where the Constitution spells out the General Assembly’s broad authority to determine the “method of elections.” Pa. Const. art. VII, §4.

Petitioners identify nothing in the Pennsylvania Constitution restricting the General Assembly’s authority to enact Act 77—much less anything that would satisfy their heavy burden to show a “direct collision” between that law and the constitution. They instead rely largely on two Pennsylvania Supreme Court cases (one from 1862 and the other from 1924), neither of which considered the current

version of the Pennsylvania Constitution or the current text and structure of Article VII. And while the *Bonner* petitioners advance two claims under the U.S. Constitution, neither is supported by relevant authority, and in fact neither adds anything to petitioners' arguments under the state constitution.

1. *Petitioners' Reading Of Article VII, Section 1 Is Contrary To The Constitutional Text, Structure, And History*

Petitioners' contention—that the Pennsylvania Constitution requires in-person voting for all voters except those specifically set forth in Article VII, section 14, for whom absentee voting must be afforded—cannot be reconciled with the plain language of the provisions they invoke.

Petitioners primarily rest their argument on the text italicized below in Article VII, section 1 of the Pennsylvania Constitution:

§1. Qualifications of electors.

Every citizen 21 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 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 60 days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, 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 60 days preceding the election.

Petitioners argue that the phrase “shall offer to vote” requires in-person voting. McLinko Am. Pet. ¶¶12-13; McLinko App. Summ. Relief Reply 21-26; Bonner Pet. ¶¶59-60; Bonner App. Summ. Relief 12. But as befits a provision entitled “Qualifications of electors,” section 1 establishes only that electors must vote in the jurisdiction where they reside; it does not speak to the *manner* in which they must vote. This plain-text reading is supported by the broader structure of Article VII and the history of how section 1 and related provisions in Article VII were enacted.

- a. Section 1’s plain language shows that it governs who is eligible to vote, not how voting must be conducted

The Pennsylvania Supreme Court has long instructed that the state constitution should be given its “natural and ordinary meaning.” *Scarnati v. Wolf*, 173 A.3d 1110, 1118 (Pa. 2017). That of course is consistent with more general principles that legal texts should be interpreted in a manner consistent with their “natural and most obvious import ... without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation.” *Commonwealth v. Johnson*, 22 A. 703 (Pa. 1891). Applying that principle here, section 1’s use of the phrase “where he or she shall offer to vote” is properly understood as setting forth the requirement that Pennsylvanians can vote in a

particular district only if they “have resided” in that district for a minimum period of time. This ensures that Pennsylvanians will vote only for issues that will directly affect them and for candidates who will directly represent them—i.e., that the outcomes of elections are representative of the views of the relevant community.

Indeed, even considered apart from the rest of the sentence in which it appears, the phrase “offer to vote” does not mean voters must cast their ballot in person. A mail-in voter “offer[s] to vote” in her district just as an in-person voter does. The only difference is that the former’s vote is delivered to local election officials by mail or hand and the latter’s by ballot box.¹¹

Courts, moreover, “do not read words in isolation, but with reference to the context in which they appear.” *Commonwealth v. Smith*, 186 A.3d 397, 402 (Pa. 2018); *accord A.S. v. Pennsylvania State Police*, 143 A.3d 896, 906 (Pa. 2016). Here, that context, i.e., the rest of section 1, confirms that the phrase “where he or she shall offer to vote” has its natural meaning. Specifically, section 1 is entitled “Qualifications of electors,” and the “offer to vote” language appears alongside other basic requirements to exercise the franchise, like age and citizenship. *See* Pa. Const. art. VII, §1. Nothing in section 1 purports to require or prohibit the specific manner

¹¹ This also answers the *Bonner* petitioners’ argument (App. Summ. Relief 19-20 & n.1) that Act 77 improperly jettisons the Pennsylvania Constitution’s traditional requirement that electors cast their ballots at a particular “time *and place*.” In-person voters and vote-by-mail voters who live in the same area submit their votes the same ultimate place—the location where ballots are being counted.

in which qualified electors cast their vote. It is directed at determining *who* is permitted to vote in specific elections and for specific races—not *how*.¹²

- b. The structure of Article VII also forecloses petitioners’ reading

Petitioners’ arguments are even more clearly wrong if the Pennsylvania Constitution is considered—as it must be—as “an integrated whole,” *Zauflik v. Pennsbury School District*, 104 A.3d 1096, 1126 (Pa. 2014). While section 1 lays out who may vote, another provision, section 4, expressly addresses how voting may be conducted. Entitled “Method of elections,” section 4 provides that “[a]ll elections by the citizens shall be by ballot *or by such other method as may be prescribed by law*; Provided, That secrecy in voting be preserved.” Pa. Const. art. VII, §4 (emphasis added). In other words, far from placing specific restraints on the General Assembly’s ability to establish how voting is conducted, the state constitution—in section 4—grants the General Assembly broad authority to do so.

¹² The *Bonner* petitioners rely heavily on a proposed amendment to the Pennsylvania Constitution that was never enacted and on minor amendments to Section 14 that *increased* the number of voters eligible to vote absentee. Bonner Pet. ¶¶37-49; Bonner App. Summ. Relief 4-8. Those sources shed little light on the meaning of section 1 because “unsuccessful attempts at legislation are not the best guides to legislative intent,” *City of Milwaukee v. Illinois*, 451 U.S. 304, 332 n.24 (1981), and “the views of a subsequent [legislature] form a hazardous basis for inferring the intent of an earlier one,” *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). Indeed, the General Assembly clearly did not believe a constitutional amendment was required to expand mail voting at the time it passed Act 77—with the votes of several of the *Bonner* petitioners.

That grant of authority confirms the implausibility of petitioners’ reading of the “offer to vote” language in section 1. It would be exceedingly bizarre for the constitution’s drafters to confer broad legislative authority over a subject (voting methods) in one provision of the document and then bury a sweeping and oblique limit on that authority amidst a list of qualifications for voting in another section (and without any acknowledgment that it *is* such a limit). Indeed, petitioners’ theory that this important restriction was tucked in among the recitation of voting qualifications is dubious even considered apart from section 4. After all, drafters “do[] not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—[they] do[] not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking Ass’n*s, 531 U.S. 457, 468 (2001).

Nor can reading section 1 to require people to vote in person be squared with Article VII, section 14. That provision, entitled “Absentee voting,” establishes that in-person voting is *not* always required, by mandating that Pennsylvanians “shall” be permitted to vote absentee in certain circumstances, including if someone cannot vote in person because of a business obligation, an illness, or observance of a religious holiday. Pa. Const. art. VII, §14. But because section 14 applies only to “qualified electors,” petitioners’ reading of section 1, which requires a Pennsylvanian to vote in person in order to be a “qualified elector,” would potentially render section 14 a nullity (because qualified electors by definition would

retain that status only *if* they vote in person). Petitioners never explain how, under their reading of section 1, a Pennsylvanian with a constitutional right to vote absentee under section 14 can nonetheless be a qualified voter. That is fatal to their argument, because “[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.” *Maracich v. Spears*, 570 U.S. 48, 69 (2013) (quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012)). The Pennsylvania Supreme Court has made the same point about the state constitution specifically, explaining that “because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible.” *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (quoting *Cavanaugh v. Davis*, 440 A.2d 1380, 1382 (Pa. 1982)). Petitioners’ reading violates that core canon.

Petitioners argue that section 14 supports their position because it provides (in their view) an *exclusive* list of which voters can vote without appearing in person. McLinko Am. Pet. ¶¶15-16; McLinko App. Summ. Relief Reply 26-27; Bonner Pet. ¶¶68-69, 74-75; Bonner App. Summ. Relief 2, 13. But it does not follow that because section 14 provides that the General Assembly “shall” (i.e., must) allow certain categories of Pennsylvanians to vote absentee, the General Assembly is forbidden from *allowing others* to do the same pursuant to the broad grant of

authority in Article VII, section 4. *See infra* pp.22-23; *Christensen v. Harris Cnty.*, 529 U.S. 576, 583 (2000) (explaining that language in the Fair Labor Standards Act mandating that employees “shall” be permitted to use compensatory time off in a certain manner “is more properly read as a minimal guarantee” than “as setting forth the exclusive method by which compensatory time can be used”).

Similarly, the fact that the Pennsylvania Constitution gives the General Assembly a specific command regarding how to use its broad power to determine the manner of voting for a certain subset of voters in no way places a broader limitation on how the General Assembly can use that power. Courts do “not woodenly apply limiting principles every time” a “broad interpretation of ... [a] clause could render [subsequent] specific enumerations unnecessary.” *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 226-227 (2007); *see also New York Legal Assistance Grp. v. BIA*, 987 F.3d 207, 217-218 & n.19 (2d Cir. 2021) (where a court was given broad statutory authority to craft equitable relief, a subsequent clause that gave the court authority to demand specific documents did not limit the court’s ability to demand other kinds of documents as well); *Animal Legal Def. Fund v. United States Dep’t of Agric.*, 935 F.3d 858, 871 (9th Cir. 2019) (similar).¹³

¹³ The *Bonner* petitioners assert (Bonner Pet. ¶69; Bonner App. Summ. Relief 15) that because Act 77 potentially sweeps in individuals who would otherwise qualify to vote absentee, the law “effectively repeals Article VII, § 14 and/or makes it moot.” *See also* McLinko App. Summ. Relief Reply 26-27 (similar). That is

- c. History further confirms that Article VII, section 1 does not govern whether voting must be in person

The revisions made to the Pennsylvania Constitution over the years provide still more evidence that sections 4 and 14 of Article VII—not section 1—control whether the General Assembly can authorize no-excuse mail-in voting. *See In re Determination of Priority of Comm'n Among Certain Judges of Super. Ct. & Commw. Ct.*, 427 A.2d 153, 156 (Pa. 1981) (considering constitutional text's history).

The 1838 Constitution originally mandated that elections be conducted “by ballot,” Pa. Const. of 1838 art. III, §1, and it limited the right to vote to those who had “resided ... in the election district where [they] offer[] to vote, ten days immediately pr[ece]ding such election,” *id.* §1. The 1874 Constitution then revised the “by ballot” requirement to give the General Assembly power to “prescribe” “the “method[s]” of voting, including by means “*other*” than “by ballot.” Pa. Const. of 1874, art. VIII, §4 (emphasis added). In 1901, that constitution was amended to provide that soldiers could vote while away from their home district, *id.* §6, *see also In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924).

wrong. While a future legislature retains the authority to “alter and repeal laws” like Act 77 without going through the constitutional-amendment process, *see Blackwell v. Commonwealth State Ethics Commission*, 567 A.2d 630, 636-637 (Pa. 1989), section 14 ensures that any such future statutory change could not deny the right to vote absentee to those covered by that section.

Further constitutional amendments in 1949 and 1957 provided that the General Assembly “may” provide a manner by which certain other categories of voters could vote absentee. *See* 1949 Pa. Laws 2138 (disabled veteran voters); 1957 Pa. Laws 1019 (occupation- or duty-based absence, and illness or disability).

Yet the drafters who added each of these absentee-voting provisions left unchanged the voter-qualification language in section 1 requiring that a person reside in the district where he “offer[s] to vote.” They apparently saw no conflict between allowing absentee voting in section 14, permitting the General Assembly to allow voting by a method “other” than “by ballot,” and retaining the “offer to vote” language in section 1. Accordingly, they could not have intended that the “offer to vote” language would require in-person voting in all circumstances.

- d. A constitutional amendment providing that certain voters “shall”—as opposed to “may”—be permitted to vote without appearing in person confirms that neither section 1 nor section 14 renders Act 77 invalid

In 1967, the constitution was further amended to replace the permissive language in section 14 (stating that the General Assembly “may” allow the listed categories of persons to vote absentee) with a mandate that the General Assembly “shall” permit such voters to do so. Pa. H.B. 442 (1967); Pa. Const. art. VII, §14. This move from permissive language to mandatory language makes clear that the categories of voters listed in section 14 as necessarily eligible for absentee voting are not exclusive. *See infra* pp.19-20. And it underscores that the drafters did not

believe section 1 inhibited the General Assembly’s ability to pass laws allowing for voting by methods other than in person.

Indeed, the General Assembly apparently recognized this, as it acted shortly thereafter to expand *by statute* the classes of individuals who can vote absentee beyond those expressly listed in section 14. Specifically, the General Assembly broadened the class of electors who can vote absentee because of job-related travel to include voters with “leaves of absence for teaching or education, vacations [and] sabbatical leaves,” as well as spouses who accompany an elector on his or her leave or vacation. 25 Pa. Stat. §2602(z.3); *see also* 25 Pa. Stat. §3146.1(k) (expanding types of qualifying disabilities).¹⁴

2. *Chase And Lancaster City, Which Interpreted Prior Versions Of The Pennsylvania Constitution, Do Not Govern This Case*

The petitions and motions for summary relief make no attempt to reconcile the text, structure, or history just discussed with petitioners’ reading of the

¹⁴ The debates surrounding the shift from “may” to “shall” further reinforce that the change was intended to set a constitutional floor. For example, one state representative opposed the change because he “object[ed] to” the fact that the constitution, if amended, “would compel this legislature to act” to provide absentee voting for certain classes of voters. 1966 Pa. Leg. J. 518-House (July 20, 1966) (Stmt. of Rep. Pancoast on H.B. 398). The House Majority Whip responded: “[A]lthough I do not foresee any legislative body ever usurping the right of the people to cast an absentee ballot, nevertheless I see no invasion of legislative prerogatives to *insure this basic constitutional proposal being incorporated* in a document as basic to democratic society as our constitution.” *Id.* (Stmt. of Rep. Fineman on H.B. 398 (emphasis added)).

Pennsylvania Constitution. Instead, petitioners largely just summarize two Pennsylvania Supreme Court decisions, *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924). In each case, the court rejected attempts to provide or expand opportunities for Pennsylvanians not physically present in their home districts to vote. Both cases are inapposite because they interpreted versions of the Pennsylvania Constitution that predated the current version, ratified in 1968.

In 1862, when *Chase* was decided, the constitution required all elections to occur only “by ballot,” which the court understood (in light of the prevailing practice at the time) to require each voter “to make manual delivery of the ballot” to his polling place. 41 Pa. at 419. The constitution did not then authorize absentee voting. In contrast, Article VII, section 4 now gives the legislature the power to prescribe methods of voting that go beyond the “by ballot” language. Pa. Const. art. VII, §4 (“All elections by the citizens shall be by ballot *or by such other method as may be prescribed by law*[.]” (emphasis added)). Section 14 also expressly requires that at least some voters be able to cast absentee ballots (i.e., to cast ballots other than by means of “manual delivery”). *See id.* §14 (“The Legislature shall ... provide a manner in which ... qualified electors who may ... be absent [on election day] ... or ... unable to [vote] at their ... proper polling places ... may vote” absentee.). These differences establish that *Chase* cannot control here.

In *Lancaster City*, meanwhile, the court did not consider whether the “or by such other method” language that had been added to follow “by ballot” by that time changed the constitutional analysis. *See* 126 A. at 201. While the court quoted the text in passing, it did not engage with that text, instead focusing on the constitutional provision governing “the qualifications for voters” (i.e., Article VII, section 1). *Id.*; *see also Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (declining to follow a prior precedent where “the point before us now was not then fully argued” and the prior decision did not “canvas” potential counterarguments); *Cinram Mfg., Inc. v. W.C.A.B. (Hill)*, 975 A.2d 577, 581 (Pa. 2009) (statement in a prior opinion that was not decisional is not binding).

In any event, *Lancaster City* relied on the existence of a constitutional provision that specifically allowed the General Assembly in its discretion to permit soldiers to vote absentee. *See* 126 A. at 201. The court reasoned that the constitution’s authorization for soldiers to vote absentee necessarily indicated an intention to exclude any other classes of voters from doing so. *See id.* (“The old principle that the expression of an intent to include one class excludes another has full application here.”). But the language on which *Lancaster City* relied—the “may” version of the absentee-voting provision—has since been superseded by the modern section 14, which substituted “shall” for “may” and thus established a floor, not a ceiling, for methods of voting beyond in person balloting. *See supra* pp.19-20,

22-23. The Pennsylvania Supreme Court has held that use of the words “may” and “shall” have very different consequences, such that a change from one word to the other requires that the matter in question be reexamined afresh. *See City of Pittsburgh v. Fraternal Order of Police*, 161 A.3d 160, 167-168 (Pa. 2017). Likewise here, this Court must review the entirety of Article 7 in the context of the 1968 Constitution, unhindered by century-old precedent interpreting a different version.

3. *If Chase And Lancaster City Are Binding, They Should Be Overruled*

Because *Chase* and *Lancaster City* are factually inapposite and interpreted older versions of the Pennsylvania Constitution, this Court should deem them not controlling here. If this Court concludes otherwise, however, they should be overruled by the Pennsylvania Supreme Court because they cannot be squared with the current constitution’s text, structure, and history. *See Commonwealth v. Alexander*, 243 A.3d 177, 201 (Pa. 2020) (*stare decisis* can be overcome based on “the absence of reliance interests,” and “the importance of having constitutional questions decided” correctly).

It is also noteworthy that *Chase* rested not solely on the meaning of “offer to vote,” but also on the court’s factual determination that voting in person was necessary to prevent fraud and secure the election. *See* 41 Pa. at 419. The court’s holding—to which the *Lancaster City* court deferred—thus turned on concerns that

no longer carry force today, when no-excuse mail voting has been widely adopted and evidence of mail-voting fraud is exceedingly rare, *see, e.g.*, Barreto et al., *Vote By Mail: Debunking The Myth of Voter Fraud in Mail Ballots*, UCLA Latino Policy & Politics Initiative (Apr. 14, 2020)¹⁵; Kamarck & Stenglein, *Low rates of fraud in vote-by-mail states show the benefits outweigh the risks*, Brookings Inst. (June 2, 2020)¹⁶; Durkee, *'No Evidence' of Election Fraud in Battleground States, Statistical Analysis Finds As Trump Continues False Claims*, Forbes (Feb. 19, 2021); *see also Donald J. Trump For President, Inc. v. Secretary of Pennsylvania*, 830 F. App'x 377, 381-382 (3d Cir. 2020) (noting that a Trump campaign lawyer “stressed the Campaign doesn’t plead [that] fraud” occurred in the 2020 Pennsylvania elections (quotation marks omitted)).¹⁷ Where, because of significant societal and legal changes, the court that rendered an earlier decision “did not have before it the present realities,” the court should be “vigilant in correcting the error.” *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096-2097 (2018); *see also Alexander*, 243 A.3d at

¹⁵ <https://latino.ucla.edu/wp-content/uploads/2020/04/LPPI-VRP-Voter-Fraud-res.pdf>.

¹⁶ <https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks>.

¹⁷ <https://www.forbes.com/sites/alisondurkee/2021/02/19/no-evidence-of-election-fraud-in-battleground-states-statistical-analysis-finds-as-trump-continues-false-claims/?sh=2dc330a83315>.

196 (referring to the U.S. Supreme Court’s application of *stare decisis* principles.).

That is the situation here.

4. *The Bonner Petitioners’ Federal Constitutional Claims Are Meritless*

Lastly, the *Bonner* petitioners argue that Act 77 violates (1) provisions in the U.S. Constitution that “delegate[] the authority to make laws for federal elections to the states’ legislative power,” *Bonner Pet.* ¶¶79-84 (citing U.S. Const. art. I, §§2-4; *id.* art. II, §1; *id.* amend. XVII); *see also* *Bonner App. Summ. Relief* 29-30, and (2) the Fourteenth Amendment’s prohibition on vote dilution, *Bonner Pet.* ¶¶86-90; *Bonner App. Summ. Relief* 31-32.

As an initial matter, both of these claims are premised on the assumption that Act 77 violates the Pennsylvania Constitution. *See Bonner Pet.* ¶83 (“When a state legislature violates its state constitution ... it also violates the U.S. Constitution.”); *id.* ¶88 (“Allowing mail-in ballots to be counted which *exceed the limitations* ... under the Pennsylvania Constitution can deny the right to vote ... in violation of [the] 14th Amendment.” (emphasis added)). They thus add nothing to this case (save a supposed hook for U.S. Supreme Court review). If petitioners’ challenges to Act 77 under the Pennsylvania Constitution are meritless, then the derivative federal claims fall as well. And if the challenges had merit, then Act 77 would be set aside irrespective of any federal constitutional violation.

Regardless, petitioners cite no case holding that a violation of a state constitution necessarily violates the U.S. Constitution. Four of the cases they cite for their delegation-of-authority claim all involved interpreting the U.S. Constitution’s use of the word “Legislature.” See *Arizona State Leg. v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 804-808 (2015) (addressing whether Article I, §4 of the U.S. Constitution “permit[s] Arizona’s use of a commission to adopt congressional districts,” and discussing *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916), and *Smiley v. Holm*, 285 U.S. 355 (1932)); *McPherson v. Blacker*, 146 U.S. 1, 34-35 (1892) (discussing whether Article I, §2 of the U.S. Constitution permitted a state legislature to divide authority to appoint presidential electors across each of the State’s congressional districts). The *Bonner* petitioners do not suggest that anything in this case turns on the meaning of a word or phrase in the U.S. Constitution. Similarly, *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 77 (2000) (per curiam), dealt with the exceptional case where a state supreme court suggested it could *alter* election laws after election day if those laws “unreasonabl[y]” restricted the counting of votes—a situation that the U.S. Supreme Court feared would lead to the courts substituting their policy judgment for that of the legislature. This case does not involve remotely comparable facts.

The lone case the *Bonner* petitioners cite for their vote-dilution argument is even further afield. That case, *Reynolds v. Sims*, 377 U.S. 533 (1964), involved an

equal-protection challenge to the apportionment of seats in the Alabama legislature, and the plaintiff voters “alleged facts showing disadvantage to themselves as individuals,” *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018) (quotation marks omitted). Not only do the *Bonner* petitioners fail to include such allegations in their petition, *see supra* p.12, but there is also no conceivable equal-protection violation here because Act 77 authorizes every qualified voter in Pennsylvania to cast a mail ballot. The argument that the Commonwealth “is *not* imposing a restriction on *someone else*’s right to vote” (here, by limiting who can vote by mail) does not state a viable vote-dilution claim. *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 389-390 (W.D. Pa. 2020); *accord Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 919-920 (M.D. Pa. 2020), *aff’d sub nom. Donald J. Trump for President*, 830 F. App’x 377 (3d Cir. 2020).

IV. CONCLUSION

This Court should grant summary relief in favor of respondents and dismiss the petitions with prejudice.

November 2, 2021

Respectfully submitted,

Seth P. Waxman*
Christopher E. Babbitt*
Daniel S. Volchok*
**WILMER CUTLER PICKERING
HALE AND DORR LLP**
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

/s/ Clifford B. Levine
Clifford B. Levine
Alex M. Lacey
Emma F. E. Shoucair
DENTONS COHEN & GRIGSBY P.C.
625 Liberty Ave.
Pittsburgh, PA 15222
(412) 297-4998
clifford.levine@dentons.com

**Appearing pro hac vice*

CERTIFICATE OF COMPLIANCE

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.

/s/ Clifford B. Levine
CLIFFORD B. LEVINE

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served upon all counsel of record on November 2, 2021 by this Court’s electronic filing system.

/s/ Clifford B. Levine
CLIFFORD B. LEVINE