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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

DOUG McLINKO,  
Petitioner,  
  
v.  
  
COMMONWEALTH OF PENNSYLVANIA, et al.,  
Respondents.

No. 244 MD 2021

**MEMORANDUM IN OPPOSITION TO PETITIONER'S APPLICATION  
FOR SUMMARY RELIEF AND IN SUPPORT OF RESPONDENTS'  
CROSS-APPLICATION FOR SUMMARY RELIEF**

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## Other Authorities

Aaron Moselle, <i>How Philly-Area Election Boards Will Count Your Mail Ballot</i> , WHY Y (Oct. 26, 2020), <a href="https://why.org/articles/how-philly-area-election-boards-will-count-your-mail-ballot/">https://why.org/articles/how-philly-area-election-boards-will-count-your-mail-ballot/</a> .....	6
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Respondents, the Department of State of the Commonwealth of Pennsylvania and Acting Secretary of the Commonwealth Veronica Degraffenreid, file this Memorandum in opposition to Petitioner's Application for Summary Relief and in support of Respondents' Cross-Application for Summary Relief.

## **I. INTRODUCTION**

Petitioner, Doug McLinko, is a member of the Bradford County Board of Elections. He is a long-standing critic of Pennsylvania's mail-in voting procedures and of the statute that authorized them, Act 77 of 2019. Nonetheless, although Act 77 was signed into law nearly two years ago, Petitioner inexplicably waited until late last month to challenge its constitutionality. In the meantime, Pennsylvanians have voted with mail-in ballots in three statewide elections, the Commonwealth and Pennsylvania's counties have invested enormous resources in implementation of the new voting procedures, and Pennsylvania voters have come to rely on mail-in voting.

Petitioner's claim must be dismissed on a number of procedural grounds. First, Petitioner cannot predicate standing on his role as a member of a Board of Elections; he has no authority to act for the three-person Board, and even if he did, the Board would have no interest in this dispute that exceeds that of an ordinary citizen. Second, the suit is untimely, because it is brought outside the statutory time limit for challenges set forth in Act 77.

Third, the case is barred under the doctrine of laches. This is the second time that the claim that Act 77's mail-in voting provisions are unconstitutional has come before the courts. The first time, some eight months ago, the Pennsylvania Supreme Court quickly dismissed the case on laches grounds. The Court held that the petitioners in that case had failed to act with due diligence when they allowed two elections to go by before filing their claim, and that their delay had caused substantial prejudice to Pennsylvania voters. In this case, the Petitioner waited even longer, allowing not two, but three, elections to pass before filing suit. There is no excuse for his tardiness, and the prejudice is extreme.

Even if this case could overcome the procedural hurdles listed above, it would fail. Petitioner's argument relies on a tortured reading of the Pennsylvania Constitution that would give the Legislature authority to prescribe methods of voting in one section, while smuggling an in-person voting requirement into a different section that does not deal with methods of voting at all. The only basis for Petitioner's contention is two century-old cases that are inapplicable (because they dealt with long-since-replaced versions of the Constitution) and were wrongly decided at the time. While the Court need not and should not reach the merits of this case, if it does, it should take the opportunity to put an end to the theory that an obscure phrase in the Pennsylvania Constitution somehow makes it impossible for

the General Assembly to make modern, convenient, and secure methods of voting available to Pennsylvania voters.

## **II. FACTUAL BACKGROUND**

### **A. Pennsylvania’s Act 77**

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

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

provisions and the straight-ticket voting provisions, would void almost all of the Act. *See Act 77 § 11.* The General Assembly also understood that implementing such a significant overhaul of Pennsylvania's voting laws would be a lengthy, complex, and resource-intensive endeavor. It therefore sought to ensure that any challenges to the constitutionality of Act 77's major provisions, including mail-in voting, would be resolved before Act 77 was implemented. Section 13(3) of Act 77 thus provided that all constitutional challenges to Act 77 had to be brought within 180 days of the statute's effective date. *See Act 77 § 13(3).*

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

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

**1. In the 15 Months Between the End of Act 77’s Statutory Challenge Period and the Filing of This Lawsuit, the Commonwealth and the Counties Invest Millions of Dollars and Untold Amounts of Time in Adapting to Mail-In Voting and Educating the Voting Public**

Under any circumstances, adding mail-in voting to the Commonwealth’s existing voting methods (in-person and absentee voting) would have been a major endeavor. The COVID-19 pandemic, however, turned implementation of mail-in voting from a difficult task to a Herculean one. Because of voters’ and election workers’ concerns about in-person voting in a pandemic, voters chose to vote by mail-in or absentee ballot in numbers far exceeding what was expected before the pandemic took hold. (Affidavit of Jonathan Marks (“Marks Aff.”) ¶ 6.) In the June 2020 primary election, 1.5 million ballots—more than half of the total ballots cast—were cast by mail-in or absentee ballot. (*Id.* ¶ 7.)

While the June 2020 primary election was fairly and effectively run, the unexpected numbers of mail-in and absentee ballot applications led, in some counties, to delays in processing applications, issuing ballots, and canvassing voted ballots. (*Id.* ¶ 8.) Accordingly, in anticipation of a high turnout election in November 2020, the Commonwealth and county election administrators invested



substantial amounts of time and money in ways to smooth the mail-in and absentee ballot process. (*Id.* ¶¶ 9–20.) For example, many county boards of elections purchased new machinery to process the increased volume of mail-in ballots. (*Id.* ¶¶ 15–19.)<sup>1</sup>

Counties and the Commonwealth also spent untold hours training election workers and administrators to process mail-in ballot applications and manage the voting process. (*Id.* ¶¶ 14–18.) Finally, the Commonwealth, the counties, and many third parties have devoted enormous resources to educating voters about mail-in voting. (*Id.* ¶ 12.) The Pennsylvania Department of State alone, for example, spent \$13.7 million on communications to educate voters about the availability of mail-in voting, and to encourage voters to apply early for mail-in ballots. (*Id.*) County boards of elections made similar efforts.

Those efforts were enormously successful; Pennsylvania voters have enthusiastically embraced mail-in voting. Of the approximately 6.9 million Pennsylvanians who voted in the 2020 general election, approximately 2.7 million cast a mail-in or absentee ballot. (*Id.* ¶ 10.) Many Pennsylvanians have also opted

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

to vote by mail in future elections. Act 77 allows “[a]ny qualified registered elector [to] request to be placed on a permanent mail-in ballot list file.” 25 Pa. Stat. § 3150.12(g)(1). Once an elector does so, a mail-in ballot application will be automatically mailed to the elector at the beginning of each year, and the elector’s return of that application will cause her to be sent a mail-in ballot for each election during that year. *Id.* An elector who has requested to be placed on this permanent list therefore has every reason to expect that she need take no further affirmative steps to be able to vote; the Election Code assures her that elections officials will send her the appropriate materials at the appropriate time. (Marks Aff. ¶ 24.) Currently, approximately 1,380,000 Pennsylvania voters are on the permanent mail-in ballot list file established by Act 77. (*Id.* ¶ 25.).

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

On November 21, 2020, on the eve of certification of the 2020 presidential election, a different group of petitioners filed a lawsuit that challenged Act 77 on grounds identical to those asserted here. In *Kelly v. Commonwealth*, No. 68 MAP 2020 (Pa. Sup. Ct.), *exercising extraordinary jurisdiction over* No. 620 MD 2020 (Pa. Commw. Ct.), the petitioners alleged—as Petitioner does here—that the mail-in balloting provisions of Act 77 violate the Pennsylvania Constitution. Complaint for Declaratory and Injunctive Relief ¶ 1, *Kelly v. Commonwealth*, No. 620 MD

2020 (Pa. Commw. Ct. Nov. 21, 2020) (“*Kelly* Complaint”). The *Kelly* petitioners relied on arguments and authorities identical to those Petitioner asserts here. *See id.* ¶¶ 16–18, 66–74; Memorandum of Law in Support of Motion for Emergency/Special Prohibitory Injunction at 1–8, *Kelly v. Commonwealth*, No. 620 MD 2020 (Pa. Commw. Ct. Nov. 22, 2020). They sought the same relief Petitioner seeks 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 *McLinko* Pet. ¶¶ 31–33 (same).

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

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<sup>2</sup> Justice Wecht’s concurrence in *Kelly* describes, in detail, the many opportunities that the *Kelly* petitioners had to challenge Act 77.

Petitioners could have brought this action at any time between October 31, 2019, when Governor Wolf signed Act 77 into law, and April 28, 2020, when this Court still retained exclusive jurisdiction over constitutional challenges to it. The claims

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

**3. Petitioner, an Election Administrator and Vocal Critic of Act 77, Offers No Excuse for His Delay in Filing This Suit**

Neither the Petition in this case, nor Petitioner’s Brief in Support of his application for summary relief, explains why Petitioner waited for nearly two years after Act 77 was passed, while three elections took place using mail-in voting, to file this suit. Petitioner’s papers do not even mention the substantially identical *Kelly* case. Petitioner cannot claim ignorance of the law; as he acknowledges, he is himself an election administrator, charged with administering Act 77 and other

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then could have been adjudicated finally before the June [2020] primary, when no-excuse mail-in voting first took effect under Act 77—and certainly well before the [2020] General Election, when millions of Pennsylvania voters requested, received, and returned mail-in ballots for the first time. Petitioners certainly knew all facts relevant to their present claims during that entire period. Indeed, “the procedures used to enact [Act 77] were published in the Legislative Journal and available to the public” since at least October 2019. Likewise, “[t]he provisions of the Constitution that the [General Assembly] purportedly violated were also readily available.” And yet, Petitioners did nothing.

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

election laws. “As a member of the Board of Elections, McLinko must oversee the lawful administration of all aspects of elections, including voter registration, the voting process, and tabulation of votes. He must also certify the results of all primary and general elections in the county to the Secretary of State.” (Pet. ¶ 4.)<sup>3</sup> He knew of Act 77 well before the statutory challenge deadline expired. Indeed, the Bradford County Board of Elections published a March 2020 “Voter Guide to Act 77 Changes,” which describes at length both Act 77 generally and mail-in voting. Bradford County Board of Elections, *Voter Guide to Act 77 Changes*, (March 2020), available at <https://bradfordcountypa.org/wp-content/uploads/2020/03/2020-Voter-Guide-to-Act-77-Changes.pdf>.

Petitioner also has vocally opposed Act 77 and criticized the legislators who passed it. On January 2, 2021, the Morning Times reported that Petitioner said the following in an interview with Steve Bannon:

*We’re mad. We have a rally coming, and Steve, we thank you guys for what you are doing.... We expect that anybody that voted for Act 77 — which started the Keystone steal, because without this state doing what they did the rest of the country couldn’t have followed suit and stole it — they should step down. We’re mad.*

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<sup>3</sup> Petitioner was last reelected to the Bradford County Board of Commissioners in 2019 and has been in office since at least 2011. See <https://bradfordcountypa.org/wp-content/uploads/2019/12/2019-General-Results.pdf> (2019 election results); <https://bradfordcountypa.org/wp-content/uploads/2019/02/2015-General-Results.pdf> (2015 election results); <https://bradfordcountypa.org/wp-content/uploads/2019/02/2011-General-Results.pdf> (2011 election results).

Pat McDonald, *McLinko Goes after Yaw, Legislature on Steven Bannon Show*, MORNING TIMES (Jan. 2, 2021), available at [https://web.archive.org/web/20210103173836/http://www.morning-times.com/news/article\\_2cd4d3ff-64d1-5c54-9d75-af4d334c798a.html](https://web.archive.org/web/20210103173836/http://www.morning-times.com/news/article_2cd4d3ff-64d1-5c54-9d75-af4d334c798a.html) (emphasis added).

On January 7, 2021—one day after rioters breached the United States Capitol in an attempt to prevent Congress from counting presidential electoral votes—Petitioner reportedly spoke at a “Freedom Rally” at which he argued (without evidence) that Act 77 led to “major voter fraud”:

On the subject of voting, Raimo and McLinko brought up PA Act 77, which was signed in October of 2019 and that allowed for no excuse mail-in voting, extended the deadline to register for future elections, and included several measures to encourage absentee voting. *Raimo and McLinko suggested this law was unconstitutional and led to major voter fraud but no evidence of such has arisen since November.*

Matt Jennings, *200 People Attend ‘Freedom Rally’ in Towanda*, THE CANTON INDEPENDENT SENTINEL (Jan. 7, 2021) <http://www.myweeklysentinel.com/community/200-people-attend-freedom-rally-in-towanda> (emphasis added).

### III. ARGUMENT

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

Petitioner attempts to predicate standing on his status as a member of the Bradford County Board of Elections. But his argument fails for at least two

different reasons. First, it is well settled that a public official's duties to administer a statute do not give that official a substantial, particularized interest in litigation regarding the statute's constitutionality. Second, the Board of Elections is a multi-member body that can act only by majority decision. Put differently, even if the Bradford County Board of Elections as a body had standing to bring this lawsuit (as it does not), Petitioner alone does not.

**1. Under Pennsylvania Supreme Court Precedent, the Board of Elections' Duties to Administer the Election Code Do Not Confer Standing to Challenge the Code's Constitutionality**

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

or speculative.” *Id.* (internal quotation marks omitted). Petitioner fails to satisfy this test.

Petitioner asserts an interest solely in his capacity as “a member of the Bradford County Board of Elections,” which is responsible for the “administration of all aspects of elections” and for “certify[ing] the results of all primary and general elections in the county to the Secretary of State.” (Pet. ¶¶ 3–4; *accord* Petitioner’s Brief in Support of Application for Summary Relief (“Pet’r Br.”) 8.) According to Petitioner, because he “believes that administering ballots pursuant to [Act 77] is unconstitutional,” he “needs and is entitled to a declaratory judgment as to the constitutionality of Act 77,” so that he can be assured that, in discharging his duties under the Election Code, he is not “acting unlawfully.”<sup>4</sup> (Pet. ¶ 4; *accord id.* ¶¶ 42–44; Pet’r Br. 8.)

Under well-established Pennsylvania Supreme Court precedent, Petitioner’s purported interest is insufficient to confer standing. In multiple cases, the Supreme Court has made clear that public officials cannot demonstrate a “substantial interest” by asserting that their duties are unlawful. *See, e.g., Hunt v. Pa. State*

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<sup>4</sup> Petitioner asserts that Act 77 puts him in the position of “acting unlawfully *at the risk of disenfranchising voters.*” (Pet. ¶ 4; Pet’r Br. 8 (emphasis added).) The meaning of the italicized language is unclear. If Petitioner means to say that he would disenfranchise voters if he refused to count mail-in ballots based on his belief that Act 77 is unconstitutional, he is certainly correct, but that fact does not confer standing to *challenge* the Act. If Petitioner instead means to imply that mail-in voting somehow disenfranchises voters, he is obviously incorrect (and standing to challenge any such disenfranchisement would lie with the voters, not Petitioner).



*Police*, 983 A.2d 627, 634–37 (Pa. 2009); *In re Admin. Order No. 1-MD-2003*, 936 A.2d 1 (Pa. 2007), *aff'g* 882 A.2d 1049 (Pa. Commw. Ct. 2005) (en banc).

The Court's decision in *In re Administrative Order No. 1-MD-2003* is particularly instructive. In that case, the Clerk of Court of Berks County challenged an order to seal the court records of certain criminal defendants with expunged criminal histories. 936 A.2d at 3–4. The Clerk claimed that the order violated a statute. *Id.* at 4. The Clerk asserted standing based on the same kind of interest Petitioner advances here: that “his office as clerk of courts” imposed on him “a constitutional and statutory obligation ... to maintain court records for public access.” *Id.* at 8. Because the Clerk “ha[d] sworn an oath to maintain the records of the court” in accordance with the law, the Clerk argued, he had a substantial interest in obtaining a ruling on whether the challenged order compelled him to act unlawfully. *Admin. Order*, 882 A.2d at 1052. The Clerk also noted that the challenged order had expressly threatened him with contempt if he failed to comply. *Id.* at 1053 (Leavitt, J., dissenting).

Sitting *en banc*, the Commonwealth Court held that the Clerk of Court had not shown standing because he had identified “no adverse effect to [himself from the challenged order], beyond that of the common citizen’s interest in seeing the law followed.” *Id.* at 1052 (majority opinion). Judge Leavitt filed “a lone dissent contending that [the Clerk] had standing to challenge the [o]rder,” 936 A.2d at 4,

based on precisely the theory propounded by Petitioner here: that “the duties of [the Clerk’s] office” imposed on him responsibilities to carry out and uphold the law—and therefore interests—that “the common citizen” does not share. 882 A.2d at 1053–54 (Leavitt, J., dissenting).

The Supreme Court granted allocatur and affirmed the *en banc* Commonwealth Court. The Supreme Court explained that neither the Clerk’s constitutional and statutory obligations to maintain court records for public access, nor his contention that the challenged order interfered with the execution of his official duties and subjected him to the threat of contempt sanctions for non-compliance, sufficed to establish a particularized interest sufficient to confer standing. Although the office of Clerk of Court was recognized in the Pennsylvania Constitution, the Clerk’s role, “while vitally important, is purely ministerial,” that is, the Clerk’s authority “must derive from either statute or rule of court.” 936 A.2d at 9. Crucially, the Clerk “had no authority by virtue of his office to interpret [the challenged order’s] compliance with [the statute at issue].” *Id.* Because the challenged order did not threaten to impinge on any grant of constitutional discretionary authority, and because the Clerk had a ministerial duty to comply with the challenged order, the Clerk’s “interest in challenging the legality of the Order [was] the same as that of any other citizen” and “cannot be deemed substantial.” *Id.*; accord, e.g., *Hunt*, 983 A.2d at 169–71 (State Police

have no standing to challenge expungement order because its duties under expungement statute “are of a ministerial nature”); *see also Commonwealth, Dep’t of Health v. Hanes*, 78 A.3d 676, 691 n.30 (Pa. Commw. Ct. 2013) (citing cases from other jurisdictions and noting “the historical rule that a public official acting in his or her official capacity does not have standing to challenge the validity of a statute”).<sup>5</sup>

This precedent controls here. In administering the mail-in voting provisions of Act 77, county boards of elections are discharging purely ministerial duties. Such boards obviously have no discretion to determine whether to allow electors to vote by mail. Rather, they have ministerial obligations to send mail-in ballots to electors who submit applications for such ballots in compliance with the requirements of the Election Code (of which Act 77 is a part), *see* 25 Pa. Stat.

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<sup>5</sup> Courts in other jurisdictions have likewise rejected public officials’ attempts to establish standing to bring constitutional challenges to statutes or orders by alleging that compliance would violate their oath to uphold the law. *See, e.g., Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347–48 (1936) (Brandeis, J., concurring) (“[T]he challenge by a public official interested only in the performance of his official duty will not be entertained.” (citations omitted)); *Drake v. Obama*, 664 F.3d 774, 780 (9th Cir. 2011) (rejecting argument that active duty military personnel have standing to challenge President Obama’s constitutional qualifications “because they are required to take an oath in which they swear to support and defend the Constitution of the United States” and would face disciplinary action if they “refuse to follow President Obama’s orders”; holding that plaintiff “asserts nothing more than an abstract constitutional grievance that, far from being particularized to him, is shared by all citizens generally”); *Thomas v. Mundell*, 572 F.3d 756, 761 (9th Cir. 2009) (“[A] public official’s ‘personal dilemma’ in performing official duties that he perceives to be unconstitutional does not generate standing.”); *Finch v. Miss. State Med. Ass’n*, 585 F.2d 765, 773–74 (5th Cir. 1978) (same); *Town of Charlestown v. United States*, 696 F. Supp. 800, 809–12 (D.R.I. 1988) (same).

§§ 3150.11–3150.15, and to receive and canvass ballots returned by those electors in compliance with the Code, *see* 25 Pa. Stat. § 3146.8.

Indeed, if anything, Petitioner’s standing argument is even weaker than that of the Clerk of Court in *Administrative Order*. First, Petitioner has not been expressly threatened with contempt for non-compliance. Second, unlike the office of Clerk of Court, county boards of elections were not “created by ... constitutional provision.” *See Admin. Order*, 936 A.2d at 9. They were created by the General Assembly and exist solely by virtue of the Election Code itself, for the purpose of implementing the Code’s provisions. *See* 25 Pa. Stat. § 2641(a) (“[A] county board of elections ... shall have jurisdiction over the conduct of primaries and elections in such county, *in accordance with the provisions of this act.*” (emphasis added)); *id.* § 2642 (“[t]he county boards of elections ... shall exercise, *in the manner provided by this act*, all powers granted to them *by this act*, and shall perform all the duties imposed upon them *by this act*” (emphasis added)). In the words of the Pennsylvania Supreme Court, “[t]he duties of the County Board of Elections are purely ministerial. They are prescribed by the Election Code. They are given no discretion.” *Shroyer v. Thomas*, 81 A.2d 435, 437 (Pa. 1951); *accord In re Mun. Reappointment of Twp. of Haverford*, 873 A.2d 821, 833 n.17 (Pa. Commw. Ct. 2005) (“The duties of a board of elections under the Election Code are ministerial and allow for no exercise of discretion.”); *see also Phila.*

*Firefighters' Union, Local 22 ex rel. Gault v. City of Phila.*, 78 A.3d 16, 21 n.10 (Pa. Commw. Ct. 2013) (explaining that “[a] ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority” and citing *Shroyer*’s description of the duties of a county board of elections).

Petitioner may protest that not *all* of a board of elections’ duties are *purely* ministerial. To be sure, a board of elections may exercise “quasi-judicial functions” in determining, for example, whether a given ballot application or ballot does, in fact, comply with the Election Code’s requirements—in the same way that a clerk of court may determine whether a party’s court filing complies with the applicable rules and orders of the court. *Trump v. Phila. Cnty. Bd. of Elections*, No. 02035, 2020 WL 6192972, at \*6 (C.P. Phila. Cnty. Oct. 3, 2020), *aff’d and opinion adopted by* No. 983 C.D. 2020, 2020 WL 6260041 (Pa. Commw. Ct. Oct. 23, 2020). But just as the Clerk of Court in *Administrative Order* had a purely ministerial duty to seal the court records, so too are the duties of boards of elections to administer the mail-in voting provisions of the Election Code purely ministerial. *See Trump*, 2020 WL 6260041, at \*9 (expressly recognizing the following board of elections acts as “ministerial”: “process[ing] voters’

applications for mail-in ballots; ... provid[ing] mail-in ballots to voters ...; and ... receiv[ing] completed, sealed, mail-in ballots from voters”).

Moreover, even when boards of elections are making quasi-judicial determinations *under* the Election Code, they lack authority to question the constitutionality of Code provisions. *Brown v. Montgomery Cnty.*, 918 A.2d 802, 807 (Pa. Commw. Ct. 2007) (“[S]tate and local agencies charged with the enforcement of a statute lack the competency to change that statute or to decide that it is unconstitutional.”); *see also In re Voter Referendum Petition Filed Aug. 5, 2008*, 981 A.2d 163, 170 (Pa. 2009) (characterizing a board of elections decision as “the decision of a local agency”). Under the Pennsylvania Supreme Court’s precedent, that is dispositive of Petitioner’s claim to standing. *See Administrative Order*, 936 A.2d at 9 (denying standing to the Clerk of Court because the Clerk “had no authority by virtue of his office to interpret [the challenged order’s] compliance with [the statute invoked by the Clerk]”).

## **2. Petitioner Lacks Standing Because He Is Only a Single Member of a Multi-Member Body**

Even assuming *arguendo* that Petitioner had identified some “substantial interest” in this lawsuit held by the Bradford County Board of Elections (and he has not), this action would still fail for lack of standing because it was not brought by the Board or even a majority thereof. Petitioner suggests that he, individually, is charged with overseeing the administration of elections and certifying election

results. (Pet. ¶ 4; Pet’r Br. 8.) But in contrast to the Clerk of Court in *Administrative Order*, the Board of Elections has only *collective* duties and powers. The Election Code expressly provides that “[a]ll actions of a county board shall be decided by a majority vote of all the members.”<sup>6</sup> 25 Pa. Stat. § 2643(a). In other words, even if Petitioner wanted to exclude mail-in ballots from the election returns certified by the Board (in violation of the plain terms of the Election Code), that desire would be completely ineffectual without the concurrence of a majority of the Board.<sup>7</sup> This fact further underscores that Petitioner’s asserted interest is no more substantial than that of any other person, and that the dispute he brings to this Court is not “real and concrete.” *Markham*, 136 A.3d at 140; *see also Szoko v. Twp. of Wilkins*, 974 A.2d 1216 (Pa. Commw. Ct. 2009) (one township commissioner lacked standing to bring a declaratory judgment action challenging the employment contract between the township and the township manager); *Miller v. Bd. of Prop. Assessment, Appeals & Review of Allegheny Cnty.*, 703 A.2d 733 (Pa. Commw. Ct. 1997) (one member of the board

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<sup>6</sup> While the Code may carve out exceptions to this rule, 25 Pa. Stat. § 2643(a), Respondents are not aware of any such exception pertinent to this case.

<sup>7</sup> Pursuant to the requirements of the Pennsylvania Sunshine Act, the Board’s deliberations and decision-making regarding any such proposal would have to take place in an open and public meeting. *See* 65 Pa. Cons. Stat. §§ 701–716.

of commissioners lacked standing to appeal the trial court’s order declaring the county’s property tax assessment practice to be unlawful).<sup>8</sup>

**B. As Made Clear by the Supreme Court’s Decision in *Kelly v. Commonwealth*, Petitioner’s Claim Is Barred by the Doctrine of Laches**

**1. The Supreme Court Has Already Decided That Laches Bars the Claim Petitioner Asserts Here**

Even if Petitioner had standing, his 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. In *Kelly v.*

*Commonwealth*, the currently sitting members of the Supreme Court dismissed the same facial constitutional challenge seeking the same relief. The Supreme Court held that the *Kelly* petitioners—who filed suit on November 21, 2020—“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

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<sup>8</sup> The Petition includes a paragraph that perfunctorily recites several of the elements of taxpayer standing. (Pet. ¶ 45.) But it offers no factual allegations—and Petitioners’ application for summary relief offers no evidence or argument—to establish any of the requisite elements. That alone is dispositive. *See Szoko v. Township of Wilkins*, 974 A.2d 1216, 1220 (Pa. Commw. Ct. 2009) (plaintiff must plead facts sufficient to establish proffered theory of standing, including taxpayer standing). Indeed, Petitioner does not even allege that he is a taxpayer. And he neither alleges nor offers any evidence to show that taxpayers would be injured in the absence of the relief Petitioner seeks—which is essential to taxpayer standing. *See Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497, 515 (Pa. Commw. Ct. 2019) (taxpayer standing requires that petitioner show, *inter alia*, that the challenged action affects “plaintiff’s status as a taxpayer” (emphasis in original)). In fact, the only record evidence bearing on this question shows that, particularly given Petitioner’s egregious delay in filing suit, the taxpayer injury would come from *granting* the relief Petitioner seeks. *See supra* Section III.B.2.b; Marks Aff. ¶¶ 11–22.



1256. The Petition here, which asserts an identical facial constitutional challenge to Act 77, was filed on July 26, 2021, nearly eight months after *Kelly* was decided. It is thus even more untimely. Petitioner’s lawsuit should therefore meet the same fate as *Kelly*. *See id.* at 1256–57.

Petitioner cannot avoid *Kelly* by emphasizing that the present case “does not seek to overturn the result of any past election.” Pet’r Br. 5. 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. ¶¶ 31–33 (seeking declaration that Act 77 violates the Pennsylvania Constitution and is void). Indeed, Chief Justice Saylor partially dissented in *Kelly* precisely because he disagreed with the majority’s decision to apply the doctrine of laches to the prospective, declaratory relief portion of the petition for review. *See* 240 A.3d at 1262 (Saylor, C.J., concurring and dissenting). Particularly given the existence of this partial dissent, it is clear that the *Kelly* majority dismissed the entirety of the *Kelly* petition—including the claim for a prospective declaratory judgment—on laches grounds. Confirming this point, in his ensuing Petition for Writ of Certiorari to the Supreme Court of the United States (which the Court denied), Congressman Kelly correctly described the Pennsylvania Supreme Court’s

decision as “a final adjudication on the merits of the case below,” in which “the Supreme Court of Pennsylvania held that *the doctrine of laches barred any equitable remedy—injunctive, declaratory, retrospective, prospective, affirmative, or otherwise*—for Petitioners’ constitutional challenges to Pennsylvania’s no-excuse mail-in ballot system.” Petition for Writ of Certiorari at 16, *Kelly v. Pennsylvania*, No. 20-810 (U.S. Dec. 11, 2020) (emphasis added).<sup>9</sup> *Kelly* squarely applies here. In accordance with the Supreme Court’s decision last November, this Court should dismiss the Petition for Review with prejudice. *See* 240 A.3d at 1257 (“[W]e grant the application for extraordinary jurisdiction ... and dismiss with prejudice Petitioners’ petition for review.”)<sup>10</sup>

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

As *Kelly* reflects, the circumstances of this case establish all the required elements of the laches defense. “[L]aches is an equitable doctrine that bars relief when a complaining party is guilty of [1] want of due diligence in failing to

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<sup>9</sup> Available at [https://www.supremecourt.gov/DocketPDF/20/20-810/163577/20201211142442551\\_Petition%20for%20Writ%20of%20Certiorari%20FINAL.pdf](https://www.supremecourt.gov/DocketPDF/20/20-810/163577/20201211142442551_Petition%20for%20Writ%20of%20Certiorari%20FINAL.pdf).

<sup>10</sup> Because *Kelly* was decided in a *per curiam* opinion, the opinion is technically not binding precedent. Notably, however, this is not a situation in which a party is seeking to distill a rule of decision from one case and apply it to different facts in another. *Kelly* is not only on all fours with this case; it *is* this case. As shown above, *Kelly* involved an *identical claim* seeking *identical relief*, decided eight months ago by the *exact same justices* who currently sit on the Supreme Court. If *Kelly*’s decision is not actually *res judicata* here, it is only because Petitioner did not join in the *Kelly* petitioners’ action (though he easily could have), but inexplicably waited to file suit until yet another eight months had elapsed. Respondents respectfully submit that, in these circumstances, there can be no real question that this Court should adhere to the directly-on-point ruling of the Supreme Court.

promptly institute an action [2] to the prejudice of another.” *Id.* at 1256 (quoting *Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998)). Petitioner unduly delayed by waiting for more than a year and a half after Act 77’s enactment before bringing his claim. And voiding Act 77 would cause profound prejudice, rendering useless millions of dollars already spent on implementing Act 77, while at the same time costing millions more to re-educate the public and jeopardizing the right to vote of the many Pennsylvanians already taking advantage of Act 77’s provisions. (Marks Aff. ¶¶ 9–26.)

**(a) Petitioner Unduly Delayed in Bringing His Claim**

First, Petitioner undeniably failed to exercise reasonable diligence in initiating this action. In *Kelly*, the petitioners filed their suit challenging the constitutionality of Act 77 on November 21, 2020—387 days and two elections—after the Governor signed Act 77 into law. Here, Petitioner filed suit on July 26, 2021—635 days and three elections—after the Governor signed Act 77. *See also Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Commw. Ct. 2004) (applying laches to challenge to ballot referendum because it was initiated “thirteen months following the election”).

Nor can Petitioner, a long-time member of the Bradford County Board of Elections, plausibly claim that his delay was justified by ignorance or unawareness of Act 77. “The test is not what the plaintiff knows, ‘but what he might have

known by the use of the means of information within his reach with the vigilance the law requires of him.” *In re Mershon’s Est.*, 73 A.2d 686, 687 (Pa. 1950) (citation omitted). As a member of the Board of Elections, Petitioner, like the candidate-petitioners in *Kelly*, is in the election business. “But it occurred to none of them to challenge the constitutionality of Act 77 before [the 2020 primary election], or indeed before participating in and contemplating the results of the 2020 General Election.” *Kelly*, 240 A.3d at 1258 (Wecht, J., concurring). Compounding the lack of diligence here, even after the *Kelly* decision, Petitioner waited to bring his challenge until after administering the May 18, 2021 primary election as a Board of Elections member. In other words, Petitioner “sat by and did nothing until after” *yet another* election passed.<sup>11</sup> *See Yorks v. Altmiller*, 113 A. 415, 416 (Pa. 1921). “Such laches a court of equity cannot overlook.” *Id.*

**(b) Petitioner’s Delay Is Enormously Prejudicial**

Second, if the Court grants the requested relief, Petitioner’s undue delay will cause substantial prejudice throughout the Commonwealth. “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. Here,

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<sup>11</sup> Of course, in an important sense, Petitioner did not merely do nothing. Rather, he actively administered *three different elections*—over a period of *one-and-a-half years*—in accordance with Election Code provisions that Petitioner claims were facially unconstitutional as of October 2019, the moment they were enacted. This conduct only makes the case for laches stronger.

Petitioner's delay would significantly prejudice the Commonwealth and municipalities, as well as voters throughout Pennsylvania.

To mitigate any prejudice, Petitioner 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). He did not do so. While Petitioner failed to act, the Commonwealth and municipalities across Pennsylvania spent millions of dollars and many, many hours implementing Act 77 and educating elections workers and voters about universal mail-in voting. *See supra* Section II.B; Marks Aff. ¶¶ 11–20.

These costs, which would not have been incurred had Petitioner successfully challenged Act 77 before the law became operative (or at least before the June 2020 primary election), *see* Marks Aff. ¶ 20, are themselves sufficient to establish the prejudice element of laches. For example, in *Koter*, this Court applied laches where the petitioner waited 13 months to challenge a passed referendum. 844 A.2d at 34. The Court held that “in the thirteen months following the election, the Board [of Elections] has taken steps to implement provisions of the referendum. A challenge at this late date prejudices that Board since it has already begun to act upon the referendum's terms, and prejudices the electorate that has enacted the provision and awaits its implementation.” 844 A.2d at 34; *see also Fulton v. Fulton*, 106 A.3d 127, 135 (Pa. Super. Ct. 2014) (applying laches because

defendants spent “sums relating to the upkeep, maintenance, or improvements to the properties” during plaintiff’s delay, “all of which would cause prejudice to [defendants]” if the requested relief was granted). Election officials across Pennsylvania have not only “taken steps to implement” Act 77—as in *Koter*, they have spent millions of dollars and hundreds of hours in that process. Petitioner’s decision to wait until now to challenge Act 77, instead of challenging the law before it took effect, means that granting the requested relief would render all of the above a forfeiture.

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

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

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

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

**1. The Statutory Time Bar Applies to Petitioner’s Claim**

Sections 13 of Act 77 states that certain constitutional challenges to the Pennsylvania Election Code, including challenges to Act 77’s mail-in voting provisions, “must be commenced within 180 days” of October 31, 2019. Act of Oct. 31, 2019, P.L. 552, No. 77, § 13(3) (referring to provisions cited in § 13(1)). The provisions subject to this time bar include precisely the ones challenged by Petitioner here. *Compare* provisions cited in *id.* § 13(1), *with* provisions cited in Pet. ¶¶ 7–9, 31–33. Thus, the Petition is a paradigmatic example of an action that was required to be filed by April 28, 2020. That date has long since come and gone.

**2. Petitioner Does Not Try to Show That the Time Bar Is Inapplicable, Nor Could He**

Because Petitioner’s claim unambiguously runs afoul of Section 13’s 180-day limit, the Petition must be dismissed. Notably, Petitioner’s Application for Summary Relief does not discuss Section 13 at all, let alone attempt to explain why

it is not dispositive. The only possible argument Petitioner could make that a duly enacted, plainly applicable statutory provision does not control is that the provision is unconstitutional. This would require Petitioner to carry the “very heavy burden” of demonstrating that the provision “clearly, palpably, and plainly” violates the Constitution. *Commonwealth v. Bullock*, 913 A.2d 207, 211–212 (Pa. 2006). Not only does Petitioner fail even to attempt to carry this burden; he cannot do so.

“It is well settled that a statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute, and before the bar takes effect.” *Turner v. People of State of New York*, 168 U.S. 90, 94 (1897). A “constitutional claim can become time-barred just as any other claim can. Nothing in the Constitution requires otherwise.” *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983) (collecting cases). Indeed, courts across the country have held that time limitations like the one in Act 77 are constitutional and consistent with due process. *See, e.g., Dugdale v. U.S. Cust. and Border Protec.*, 88 F. Supp. 3d 1, 8 (D.D.C. 2015) (upholding constitutionality of federal law requiring filing within 60 days of implementation of constitutional challenges to certain statutory provisions, regulations, or procedures); *Greene v. Rhode Island*, 398 F.3d 45, 53–55 (1st Cir. 2005) (rejecting due process challenge to 180 day time limitation for bringing



constitutional challenges to federal statute); *Cacioppo v. Eagle Cnty. Sch. Dist. Re-50J*, 92 P.3d 453, 464 (Colo. 2004) (upholding as constitutional five-day time limit on constitutional ballot contests); *Native Am. Mohegans v. United States*, 184 F. Supp. 2d 198, 202 (D. Conn. 2002) (holding that statutory 180 day time limitation for bringing constitutional challenges to statute “does not violate due process because plaintiffs’ constitutional challenges could have been brought within 180 days of” statute’s enactment).

Nor can Petitioner establish that the 180-day time-bar violated any of his constitutional rights on an as-applied basis. A statute’s facial infirmities—like the one alleged by Petitioner—remain the same regardless of the passage of time: “facial challenges are ... ripe upon mere enactment of the ordinance.” *Phila. Ent’mt. & Dev. Partners v. City of Phila.*, 937 A.2d 385, 393 n.7 (Pa. 2007).<sup>12</sup> Indeed, as the Supreme Court noted in *Kelly*, a “facial constitutional challenge” to

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<sup>12</sup> This Court need not decide whether the 180-day limitation would be applicable to an as-applied constitutional challenge to Act 77 based on circumstances that first arise after the 180-day period has elapsed. The Petition here does not present such a challenge.

Act 77 “was ascertainable upon Act 77’s enactment.” 240 A.3d at 1256. Thus, Petitioner had ample time to bring his suit before the time-limitation ran.

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

#### **D. Petitioner’s Claim Fails on the Merits**

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

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

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

**1. Petitioner’s Interpretation Contravenes Both the Text and Structure of the Pennsylvania Constitution**

“[I]n interpreting provisions of the Pennsylvania Constitution, [the court’s] ultimate touchstone is the actual language of the constitution itself.” *Yocum v. Commonwealth, Pa. Gaming Control Bd.*, 161 A.3d 228, 239 (Pa. 2017). The court seeks the “ordinary, natural interpretation the ratifying voter would give” to

those provisions, and avoids reading them “in a strained or technical manner.” *Zemprelli v. Daniels*, 436 A.2d 1165, 1170 (Pa. 1981) (internal quotation marks omitted). Petitioner’s challenge to Act 77’s mail-in voting provisions rests on two provisions of the Pennsylvania Constitution: Article VII, § 1, entitled “Qualifications of electors,” which prescribes the age, citizenship, and residency requirements that a person must satisfy to be deemed eligible to register and vote in Pennsylvania elections; and Article VII, § 14, entitled “Absentee voting,” which *requires* that “[t]he Legislature ... provide a manner in which qualified voters who may, on the occurrence of any election, be absent from the municipality of their residence [for certain specifically defined reasons],” or “unable to attend a polling place” for reasons of illness, disability, or religious observance, may vote. As shown below, Petitioner’s arguments are belied by the plain language of these provisions, as well as the structure of Article VII as a whole.

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

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

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

Qualifications of electors.

Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.

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

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

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

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

105 A.2d 376, 380 (Pa. 1954)). This definition is consistent with the meaning of the term “residence” as it is used in the Election Code.<sup>13</sup>

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

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

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<sup>13</sup> See 25 Pa. Stat. § 2814 (prescribing that, “[i]n determining the residence of a person desiring to register or vote, . . . (a) [t]hat place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning[; and] (b) [a] person shall not be considered to have lost his residence who leaves his home and goes into another state or another election district of this State for temporary purposes only, with the intention of returning”).

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

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

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



In other words, the plain words of the constitutional provision specifically addressed to voting methods *expressly give the Legislature plenary power over such methods*, subject only to the requirement that any method authorized by the Legislature preserve the secrecy of the vote.<sup>14</sup> The existence of this separate provision further belies Petitioner’s interpretation of Article VII, § 1. *See Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1126 (Pa. 2014) (“the Constitution [should be read as] an integrated whole”).

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

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<sup>14</sup> In the case of Act 77’s mail-in voting procedures, the secrecy requirement is met through the use of “secrecy envelopes” in which voters must insert their completed ballots. *See* 25 Pa. Stat. § 3150.16(a); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 353, 378–80 (Pa. 2020) (discussing PA. CONST. art. VII, § 4).

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

The latter interpretation of § 1 gives meaning to all of its terms. Each absentee voter under § 14 must “have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election,” just as he or she must “have resided in the State ninety (90) days immediately preceding the election.” PA. CONST. art. VII, § 1. In other words, that absentee voter cannot “offer to vote” in an election district other than the one in which her residence is located. For example, an elector residing in Philadelphia cannot vote for the commissioners of Allegheny County, just as an elector residing in one election district cannot vote in the judge-of-elections race of another election district.<sup>15</sup> Indeed, the language of Section 14 expressly recognizes and complies

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<sup>15</sup> Numerous courts have recognized that this is the plain and natural meaning of the “offer to vote” language, which is by no means unique to the Pennsylvania Constitution. *See, e.g., Lemons v. Noller*, 63 P.2d 177, 185 (Kan. 1936) (“[A]lthough our Constitution prescribes the qualifications of voters[,] it does not prescribe the manner or form of holding elections, [and] it was within its constitutional power for the Legislature to provide that an offer to vote in the township or ward in which the elector resides, could be made [by electors physically located outside of their township or ward at the time of the election].”); *Jenkins v. State Bd. of Elections*, 104 S.E. 346, 349 (N.C. 1920) (“An offer to vote may be made in writing, and that is what the

with this requirement. *See* PA. CONST. art. VII, § 14 (providing that the Legislature must provide “for the return and canvass of [absentee electors’] votes *in the election district in which they respectively reside*” (emphasis added).)<sup>16</sup>

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

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absent voter does when he selects his ballots and attaches his signature to the form and mails the sealed envelope to proper official[s]. The section [of the North Carolina Constitution containing “offer to vote” language materially identical to that at issue here] requires only that he must make that offer in the precinct where he has resided, etc.”); *Straughan v. Meyers*, 187 S.W. 1159, 1162 (Mo. 1916) (construing provision of Missouri Constitution conditioning eligibility to vote on the elector’s “hav[ing] resided in the county, city, or town where he shall offer to vote at least 60 days immediately preceding the election” and stating: “It is clear that this section does not undertake to prescribe the manner in which a choice shall be expressed, or a vote cast, or the ballots prepared, deposited, or counted, but merely the qualifications of the voters. It is true, under this provision, a person can vote only in the place of his residence, but this constitutes no inhibition against any particular method the Legislature may provide to enable him to so vote.”). *Accord* cases cited *infra* note 17.

<sup>16</sup> As the Pennsylvania Supreme Court has explained, the clear purpose of this constitutional language is to ensure “the counting of each [absentee] vote ... in such a manner that the computation appears on the return *in the district where it belongs*.” *In re Canvass of Absentee Ballots of 1967 Gen. Election*, 245 A.2d 258, 264 (Pa. 1968) (emphasis added).

the Constitution’s text or structure.<sup>17</sup> At an absolute minimum, Petitioner’s 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**

Petitioner contends that, if Article VII, § 1 “did not require in-person voting by attending a proper polling place,” “then there would have been no reason for section 14.” Pet’r Br. 18; *see also id.* at 23–25 (arguing that “Act 77 renders Article VII, § 14 superfluous”). According to Petitioner, § 14’s prescription of “a list of specific grounds for absentee voting” must be read as affirmatively *prohibiting* voters who do not fall into the prescribed categories from voting by

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<sup>17</sup> *See, e.g., Moore v. Pullem*, 142 S.E. 415, 421 (Va. 1928) (refusing to construe the phrase “the precinct in which he offers to vote” as imposing a requirement of in-person voting: “To suppose that the draftsmen of the Constitution paused in the writing of these elaborate provisions relating to these different subjects [*i.e.*, voting qualifications, registration and prerequisites] and interrupted the sequence of thought to digress and to interpolate the requirement that the voter must be personally present to tender his ballot on the day of election, and that in this unusual way and by this equivocal language they intended to inhibit the General Assembly from passing [an absentee voting] statute, appears to us to ignore fundamental rules of construction. The method of voting is elsewhere [in the constitution at issue] specifically and unequivocally committed to the legislative discretion.”); *Goodell v. Judith Basin Cnty.*, 224 P. 1110, 1114 (Mont. 1924) (“In order ... to hold that the clause ‘at which he offers to vote’ was intended to fix the place or describe the manner of voting, we must assume that the learned men who drafted [the qualifications provision], stopped short in the midst of defining the qualifications of an elector and injected an idea of an entirely different character; but no one familiar with the rudiments of English would undertake to define qualifications and place or manner of voting, by the use of the language employed in [the qualifications provision].”); additional cases cited *supra* note 15.

mail. *Id.* at 24. But Petitioner’s argument is, once again, at odds with the plain language of the Constitution. Article VII, § 14 does not *permit* the Legislature to provide a method for certain voters to cast their ballot other than in person; it *requires* the Legislature to do so. *See* PA. CONST. art. VII, § 14 (“The Legislature *shall* ... provide a manner in which [certain specific groups of absentee electors] may vote ....”). That the Legislature is constitutionally *required* to allow certain groups of electors to vote other than in person does not suggest—let alone carry the “necessary implication,” *see Stultz*, 114 A.3d at 876—that the Legislature is *prohibited* from allowing others to vote by mail.

In fact, an earlier absentee-voting provision, existing in an earlier version of the Pennsylvania Constitution, said “may” instead of “shall.” *See* 1957 Pa. Laws 1019. This change in language underscores that Article VII, § 14 sets a floor for absentee voting; it does not establish a ceiling. *See, e.g., Mathews v. Paynter*, 752 F. App’x 740, 744 (11th Cir. 2018) (distinguishing “shall” from “may” and noting that the former term “does not impliedly limit government authority”). Thus, the Pennsylvania Constitution provides that the General Assembly *must* allow voters in the enumerated categories to cast absentee ballots, but may also go further—by exercising its broad powers to “prescribe[.]” the permissible “method[s]” of voting,

PA. CONST. art. VII, § 4—and allow other categories of voters to vote by mail, including by allowing any voter to opt to cast a mail-in ballot.<sup>18</sup>

Significantly, this interpretation is supported by decades of history, during which the Election Code has continuously allowed categories of voters not named in Article VII, § 14 to vote absentee. *See, e.g.*, 25 Pa. Stat. § 3146.1(b) (military spouses); 25 Pa. Stat. § 2602(z.3) (electors on vacations).<sup>19</sup> Soon after the current Constitution was ratified in 1968, the Pennsylvania Supreme Court rejected a challenge to some of these expansions when they were still young, albeit on standing grounds. *Kauffman v. Osser*, 271 A.2d 236 (1970). So far as Respondents are aware, no other challenges to these enactments were ever brought. Thus, for virtually the entire life of the current Constitution, the Election Code has provided for absentee voting beyond the scope of the requirements in Article VII, § 14. Although the General Assembly had many opportunities to remove these provisions if they were, in fact, believed to be unconstitutional, it never did. This fact reinforces what the plain language of the constitutional provision dictates: § 14

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<sup>18</sup> Contrary to Petitioner’s unsupported assertion, this interpretation does not render § 14 superfluous, but rather gives it an essential purpose: It provides constitutional rights to certain groups of voters, which the General Assembly must respect and may not take away.

<sup>19</sup> Acceptance of Petitioner’s argument would, at least impliedly, invalidate these decades-old provisions as well as Act 77.

requires the General Assembly to facilitate voting for certain groups; it does not prohibit the General Assembly from aiding others.

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

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

### **(a) The Cases on Which Petitioner Relies, Which Were Decided Under Different Constitutions Containing Different Language, Are Not Controlling**

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

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

[The statute at issue] permits the ballot-box, according to the court below, to be opened anywhere, within or without our state, with no other guards than such as commanding officers, who may not themselves be voters, subject to our jurisdiction, may choose to throw around it; and it invites soldiers to vote where the evidence of their qualifications is not at hand; and where our civil police cannot attend to protect the legal voter, to repel the rioter, and to guard the ballots after they have been cast.

It is scarcely possible to conceive of any provision and practice that could, at so many points, offend the cherished policy of Pennsylvania in respect to suffrage.

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

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



authorize a military commander to form an election district and hold an election therein.

The election laws which attempted to confer the right of suffrage upon federal soldiers absent on military service ... are wholly unlike in principle, as well as in detail, the North Carolina Absent Voters Act.

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

Petitioner ignores the above-discussed analysis in *Chase* and instead relies 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. VIII, § 1), and (2) required all elections to be “by ballot,” *id.* (discussing PA. CONST. of 1838, art. VIII, § 4)—“undoubtedly” required each voter “to make manual delivery of the ballot to [elections] officers” at their respective polling places. *Id.*

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

interpretation of the Constitution of 1838—and, in particular, its opinion that, under the earlier charter, “[t]he ballot c[ould] not be sent by mail or express,” *Chase*, 41 Pa. at 419. *See Moore v. Pullem*, 142 S.E. 415, 422 (Va. 1928) (refusing to construe the phrase “the precinct in which he offers to vote,” which appeared in the voter-qualifications provision of the Virginia Constitution, as imposing a requirement of in-person voting, particularly because “[t]he method of voting is elsewhere specifically and unequivocally committed to the legislative discretion”).

Nor does *Lancaster City*, decided in 1924, control Petitioner’s challenge under the current Constitution dating from 1968. At issue in *Lancaster City* was a statute allowing the return of ballots by voters who, “by reason of [their] duties, business or occupation,” are “absent from [their] lawfully designated election district[s]” on election day. 126 A. at 200. The *Lancaster City* Court acknowledged the new constitutional provision expressly granting the Legislature authority to determine the “method” of voting (which had been added, by amendment to the Constitution of 1874, in 1901, *see* 1901 Pa. Laws 882), but the Court appeared to conclude that, whatever the *method* by which the ballot was returned to county officials, the *place* of the elector’s “‘offer to vote’ must still be in the district where the elector resides.” 126 A. at 201. In this regard, the Court found it significant that the then-existing Constitution “made [it] so that absent voting in the case of soldiers is permissible.” *Id.*; *see* PA. CONST. of 1874, art.

VIII, § 6. The Court believed that this provision implicated “[t]he old principle that the expression of an intent to include one class,” *i.e.*, military electors, “excludes another,” *i.e.*, non-military electors. 126 A. at 201. Because the challenged statute allowed non-military electors to vote from outside their election districts, the Court invalidated it. *Id.*

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

(electors on vacations, or sabbatical leaves). That history is entirely consistent with the General Assembly’s own power to enact the scheme set forth in Act 77.

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

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

Even if those previous cases were textually on all fours with this one (as they are not), they should not be followed: they were wrong at the time they were decided—as compellingly shown by numerous decisions in other jurisdictions, *see supra* notes 15, 17—and, if anything, are even more erroneous under current jurisprudence governing constitutional challenges to duly enacted statutes. *See Caba*, 64 A.3d at 49 (setting forth applicable standards).

The *Lancaster City* Court appeared to view itself as largely bound by *Chase*. The root of the problem, then, lies in the 1862 opinion. First, the *Chase* opinion was expressly informed by the anti-democratic sentiments of its era. Indeed, the 1838 Constitution was the first in Pennsylvania history—and, thankfully, also the last—to restrict voting to “white” citizens. *Chase*, 41 Pa. at 418 (construing PA. CONST. of 1838, art. VIII, § 1). The *Chase* opinion not only noted this reactionary trajectory; *Chase* appeared, sadly, to celebrate it. *See, e.g., id.* at 426 (“[The

Pennsylvania Constitution of 1838] withholds [suffrage] altogether from four-fifths of the population, however much property they may have to be taxed, or however competent in respect of prudence and patriotism, many of them may be to vote. And here let it be remarked, that all our successive constitutions have grown more and more astute on this subject.”). These anti-democratic convictions are wholly alien to the modern Constitution.

Second, as explained more fully above, *see supra* Section III.D.1.(a), *Chase*’s interpretation of the durational-residency requirement in Article VIII, § 1 is completely unmoored from the text and structure of the Constitution. And *Chase* is downright dismissive of evidence of how the “offer to vote” phrase was actually understood at the time of ratification. *See id.* at 417 (acknowledging that an 1813 statute had previously allowed voting to occur outside of a voter’s election district, and that, in 1839, only months after the 1838 Constitution took effect, the General Assembly had enacted a voting statute retaining “the substance of the Act of 1813,” but conjecturing that the General Assembly was “careless” and must have overlooked the “offer to vote” language in the 1838 Constitution). Where a contemporary reader would expect to find actual analysis of the text, structure, and original public understanding of Article 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. The

Court even opines that a voter’s “neighbours” should be allowed to “challenge” his vote at the time it is cast, *see id.*—a suggestion utterly ungrounded in anything the 1838 Constitution actually said. This mode of “interpretation” is irreconcilable with well-settled, inveterate principles of modern jurisprudence, particularly in a case that does not assert the violation of any individual rights. *See, e.g., Commonwealth v. Torsilieri*, 232 A.3d 567, 596 (Pa. 2020) (“[W]hile courts are empowered to enforce constitutional rights, they should remain mindful that ‘the wisdom of public policy is one for the legislature, and the General Assembly’s enactments are entitled to a strong presumption of constitutionality rebuttable only by a demonstration that they clearly, plainly, and palpably violate constitutional requirements.’”); *see also* PA. CONST. art. I (“Declaration of Rights”).<sup>20</sup> It is unsurprising, then, that in interpreting the same “offer to vote” phrase in other state constitutions, multiple courts have squarely—and persuasively—rejected *Chase*’s construction. *See supra* notes 15, 17; *see also* Note, *Review of Absentee Voters*

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<sup>20</sup> Not only does the Pennsylvania Constitution’s Declaration of Rights not support Petitioner’s argument; it affirmatively undermines his position. As recently construed by the Pennsylvania Supreme Court, the Declaration’s Free and Equal Elections Clause, which “has no federal counterpart,” reflects “the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802, 804 (Pa. 2018). By ensuring that voters who live far from their polling places—or who avoid indoor public spaces out of fear of contracting COVID-19—are afforded equal access to the franchise, Act 77’s mail-in voting regime directly vindicates the purpose of the Free and Equal Elections Clause.

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

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

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

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

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

Moreover, a substantial number of the “mail-in” ballots cast under Act 77 are actually returned by voters *in person*. See 25 Pa. Stat. § 3146.5(b)(2).<sup>21</sup> Those applications of Act 77 are also untouched by Petitioner’s argument. In short, it is plainly not the case, even under Petitioner’s untenable reading of the Constitution,

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<sup>21</sup> Pennsylvania Department of State, *Act 77 Changes to the Election Code* at 2, <https://www.pacounties.org/GR/Documents/Act%2077%20-%20Election%20Reform%20Bill%20summary.pdf> (explaining that “[c]ounty election boards are now required to immediately process walk-in applications for both mail-in and civilian absentee voters. Voters must be allowed to complete their application request and cast their mail-in or absentee ballot while in the county office.”).



that Act 77 “is unconstitutional in all of its applications.” *Haveman*, 238 A.3d 567, 572 (Pa. Commw. Ct. 2020). For this reason, too, Petitioner’s 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”).

#### IV. CONCLUSION

Petitioner lacks standing; his claims are time-barred both statutorily and under the equitable doctrine of laches; and his constitutional argument fails on the merits. Accordingly, Respondents respectfully request that their Cross-Application for Summary Relief be granted, that Petitioner’s Application for Summary Relief be denied, and that the Petition be dismissed with prejudice.

Respectfully submitted,

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Dated: August 26, 2021

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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: August 26, 2021

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