

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,

v.

VERONICA DEGRAFFENREID et al.,

Respondents,

and

DEMOCRATIC NATIONAL COMMITTEE, and THE
PENNSYLVANIA DEMOCRATIC PARTY,

Proposed Intervenors-Respondents.

Nos. 244 MD 2021
293 MD 2021

**PROPOSED INTERVENORS-RESPONDENTS' BRIEF IN SUPPORT OF
PRELIMINARY OBJECTIONS AND APPLICATION FOR SUMMARY
RELIEF**

TABLE OF CONTENTS

	Page
Table of Authorities	iii
I. Introduction.....	1
II. Factual Background.....	2
A. Pennsylvanians Have Used Mail Ballots In The Last Three Elections And Will Use Them In The Upcoming November Elections	2
B. Despite Administering Three Elections Governed By Act 77, Petitioner Waited Nearly Two Years To Challenge the Act’s Constitutionality	5
III. Argument	6
A. The Amended Petition Should Be Dismissed Because Of Petitioner’s Substantial and Prejudicial Delay In Filing Suit	6
B. The Amended Petition Should Be Dismissed Because Petitioner Has Not Alleged A Cognizable Injury Sufficient To Establish Standing.....	9
C. The Amended Petition Should Be Dismissed Because Nothing In The Pennsylvania Or U.S. Constitutions Precludes The General Assembly From Establishing Universal No-Excuse Mail Voting	13
1. Petitioner’s Reading Of Article VII, Section 1 Is Contrary To The Constitutional Text, Structure, and History.....	14
a. Section 1’s plain language shows that it governs <i>who</i> is eligible to vote, not <i>how</i> voting must be conducted ...	15
b. The structure of Article VII also forecloses petitioner’s reading	17
c. History further confirms that Article VII, section 1 does not govern whether voting must be in person	20
2. <i>Chase</i> and <i>Lancaster City</i> , Which Interpreted Prior Versions Of The Pennsylvania Constitution, Do Not Govern This Case.....	22
3. If <i>Chase</i> and <i>Lancaster City</i> Are Binding, They Should Be Overruled By The Pennsylvania Supreme Court.....	24

IV. Conclusion26
Certificate of Compliance27
Certificate of Service27

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>A.S. v. Pennsylvania State Police</i> , 636 Pa. 403 (2016).....	16
<i>Ali v. Federal Bureau of Prisons</i> , 552 U.S. 214 (2007)	19
<i>Animal Legal Def. Fund v. United States Dep’t of Agric.</i> , 935 F.3d 858 (9th Cir. 2019)	19
<i>Board of Educ. v. Allen</i> , 392 U.S. 236 (1968).....	10
<i>Board of Educ. of Mt. Sinai Union Free Sch. Dist. v. New York State Teachers Ret. Sys.</i> , 60 F.3d 106 (2d Cir. 1995).....	10
<i>Caba v. Weaknecht</i> , 64 A.3d 39 (Pa. Commw. Ct. 2013).....	13
<i>Chase v. Miller</i> , 41 Pa. 403 (1862).....	22, 23, 24, 25
<i>Christensen v. Harris Cnty.</i> , 529 U.S. 576 (2000)	19
<i>Cinram Mfg., Inc. v. W.C.A.B. (Hill)</i> , 601 Pa. 524 (2009)	24
<i>City of S. Lake Tahoe v. Cal. Tahoe Reg’l Planning Agency</i> , 625 F.2d 231 (9th Cir. 1980)	11
<i>Commonwealth v. Alexander</i> , 243 A.3d 177 (Pa. 2020)	25, 26
<i>Commonwealth v. Johnson</i> , 144 Pa. 377 (1891)	15
<i>Commonwealth v. Smith</i> , 646 Pa. 588 (2018).....	16
<i>Drake v. Obama</i> , 664 F.3d 774 (9th Cir. 2011).....	11
<i>Erie & North-East R.R. Co. v. Casey</i> , 26 Pa. 287 (1856).....	13
<i>Friends of Lackawanna v. Dunmore Borough Zoning Hearing Bd.</i> , 186 A.3d 525 (Pa. Commw. Ct. 2018).....	11
<i>Holiday Lounge, Inc. v. Shaler Enters. Corp.</i> , 441 Pa. 201 (1971).....	6
<i>Housing Auth. of Cnty. of Chester v. Pa. State Civil Serv. Comm’n</i> , 556 Pa. 621 (1999).....	10

<i>In re Contested Election in Fifth Ward of Lancaster City</i> , 281 Pa. 131 (1924).....	<i>passim</i>
<i>In re Determination of Priority of Comm’n Among Certain Judges of Superior Ct. & Commonwealth Ct.</i> , 493 Pa. 555 (1981).....	19
<i>In re Hickson</i> , 573 Pa. 127 (2003).....	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)	24
<i>Markham v. Wolf</i> , 635 Pa. 288 (2016).....	9, 12
<i>Nader v. FEC</i> , 725 F.3d 226 (D.C. Cir. 2013).....	12
<i>Pittsburgh Palisades Park, LLC v. Commonwealth</i> , 585 Pa. 196 (2005).....	12
<i>Robinson Twp. v. Commonwealth</i> , 52 A.3d 463 (Pa. Commw. Ct. 2012)	11
<i>Robinson Twp. v. Commonwealth</i> , 623 Pa. 564 (2013).....	11
<i>Scarnati v. Wolf</i> , 643 Pa. 474 (2017).....	15
<i>South Dakota v. Wayfair, Inc.</i> , 138 S. Ct. 2080 (2018).....	26
<i>Sprague v. Casey</i> , 520 Pa. 38 (1988).....	6
<i>Stilp v. Commonwealth</i> , 601 Pa. 429 (2009).....	13
<i>Stilp v. Hafer</i> , 553 Pa. 128 (1998)	6, 7, 8
<i>Taylor v. Coggins</i> , 244 Pa. 228 (1914).....	6
<i>Troutman v. Court of Common Pleas (In re Administrative Order No. 1-MD-2003)</i> , 594 Pa. 346 (2007).....	10
<i>Whitman v. American Trucking Ass’ns</i> , 531 U.S. 457 (2001).....	17-18
<i>York Legal Assistance Grp. v. BIA</i> , 987 F.3d 207 (2d Cir. 2021)	19
<i>Zauflik v. Pennsbury Sch. Dist.</i> , 104 A.3d 1096 (Pa. 2014).....	17

CONSTITUTIONS

Pa. Const.	
art. VII §4.....	<i>passim</i>
art. VII, §1.....	<i>passim</i>
art. VII, §14.....	18, 19, 20, 22, 23
Pa. Const. of 1838	
art. III, §1	20
art. III, §2	20
Pa. Const. of 1874	
art. VIII, §4	19, 20
art. VIII, §6	19
Pa. Const. of 1968	20, 22

STATUTES

1949 Pa. Laws 2138	21
1957 Pa. Laws 1019	21
2019 Pa. Laws 552 (Act 77)	<i>passim</i>
25 Pa. Stat.	
§2602	3
§2602(z.3).....	21
§3146	21
§3150.11	3

LEGISLATIVE MATERIALS

1966 Pa. Leg. J. 518-House	22
Pa. H.B. 442 (1967)	21

OTHER AUTHORITIES

Barreto, Matt, et al., <i>Vote By Mail: Debunking The Myth of Voter Fraud</i> (Apr. 14, 2020), https://latino.ucla.edu/wp-content/uploads/2020/04/LPPI-VRP-Voter-Fraud-res.pdf	25
--	----

Durkee, Alison, *‘No Evidence’ of Election Fraud in Battleground States, Statistical Analysis Finds as Trump Continues False Claims*, Forbes (Feb. 19, 2021), <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>.....23

Kamarck, Elaine & Christine Stenglein, *Low rates of fraud in vote-by-mail states show the benefits outweigh the risks*, The Brookings Institute (June 22, 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/>25

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* (Oct. 5, 2021), <https://whyy.org/articles/a-voter-guide-to-pennsylvanias-2021-judicial-elections-2/>4

Pa. Dep’t of State, *Official Returns* (Nov. 3, 2020), <https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G&IsActive=0/>4

Pa. Dep’t 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).18

Proposed intervenors-respondents, the Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”), submit this brief in support of their preliminary objections to the amended petition of Doug McLinko and application for summary relief.¹

I. INTRODUCTION

Act 77 is constitutional. The General Assembly has broad constitutional authority to enact any law not prohibited by the state or federal constitutions. Petitioner identifies nothing (in either constitution or elsewhere) that limits this sweeping authority so as to bar the General Assembly from expanding access to the right to vote as Act 77 did. Instead, petitioner relies 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 prohibits broad vote-by-mail measures like Act 77. But those

¹ As cases 244 MD 2021 and 293 MD 221 have been consolidated, the DNC and PDP request that this Court also apply this brief to the operative petition in 293 MD 2021. In addition, the DNC and PDP incorporate by reference (1) respondents’ October 8, 2021 preliminary objections to petitioner’s amended petition, (2) respondents’ August 26, 2021 memorandum in response to petitioner’s application for summary relief and in support of respondents’ cross-application for summary relief, and (3) respondents’ September 30, 2021 memorandum in support of its application for summary relief in case number 293 MD 2021. The DNC and PDP also reserve the right to incorporate respondents’ brief in support of their preliminary objections to the amended petition.

cases are distinguishable for the reasons stated below. *See infra* pp.24-26. They provide no support for petitioner’s claims.²

Petitioner’s challenge is also marred by two procedural defects, each of which independently requires dismissal. First, equitable principles bar petitioner—who has apparently administered *three* elections under 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. The amended petition should thus be dismissed under the doctrine of laches. Second, petitioner cannot demonstrate any substantial, immediate, and direct harm that he in particular will suffer from the challenged law’s operation. Accordingly, the amended petition should be dismissed for lack of standing.

II. FACTUAL BACKGROUND

A. Pennsylvanians Have Used Mail Ballots In The Last Three Elections And Will Use Them In The Upcoming November Elections

Act 77 was signed into law on October 31, 2019. Am. Pet. ¶7. It allows Pennsylvanians to “vote by mail for any reason or no reason whatsoever (no excuse).” *Id.* ¶10. 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

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.24-26.

in this Commonwealth in the manner provided under this 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,” Am. Pet. ¶7, including (1) creating a 50-day mail-voting period; (2) allowing voters to request to receive 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, and May 2021 primary elections were conducted under Act 77. Because of the COVID-19 pandemic, “a significant percentage of Pennsylvania voters cast a mail-in or absentee

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>.

ballot during the 2020 election[s]”—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.

Commonwealth-wide municipal and judicial elections are scheduled for November 2, 2021; mail ballots for those elections have already been requested by hundreds of thousands of voters and are being sent out by county election administrators. *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 has accordingly held in this litigation that 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).

⁵ <https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G&IsActive=0/> (visited Oct. 15, 2021).

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

In preparation for the November 2021 election and future elections, the Pennsylvania Department of State has made clear that it adheres to Act 77’s mandate 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 the counties 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. Despite Administering Three Elections Governed By Act 77, Petitioner Waited Nearly Two Years To Challenge the Act’s Constitutionality

Petitioner has been an election official in Bradford County for a decade. *See* Mem in Opp’n to Pet’r’s Appl. for Summ. Relief at 10 n.3. Accordingly, he has executed Act 77’s requirements in the three elections since it was enacted. Petitioner 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

⁷ <https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx> (visited Oct. 15, 2021).

Code that was added by Act 77—is unconstitutional. Petitioner filed the amended petition on September 29, 2021, seeking the same relief. Am. Pet. ¶¶56-58.

Petitioner claims Act 77 is unconstitutional because it was enacted without following the procedures for an amendment to the state constitution, which he alleges is required to provide for no-excuse mail voting. *See* Am. Pet. ¶¶37-39. He alleges he has standing to challenge Act 77’s alleged unconstitutionality because (1) he is an elected official who will be “called upon to make quasi-judicial judgments” on Act 77 and (2) he is a Pennsylvania taxpayer. *See* Am. Pet. ¶¶42-55.

III. ARGUMENT

A. The Amended Petition Should Be Dismissed Because Of Petitioner’s Substantial and Prejudicial Delay In Filing Suit

Laches—a defense that “may be raised and determined by preliminary objection,” *Holiday Lounge, Inc. v. Shaler Enters. Corp.*, 441 Pa. 201, 204 (1971)—bars claims when there has been “(1) a delay arising from [petitioner’s] failure to exercise due diligence and (2) prejudice to the [opposing parties] resulting from the delay.” *Stilp v. Hafer*, 553 Pa. 128, 134 (1998) (citing *Sprague v. Casey*, 520 Pa. 38, 45 (1988)). Both elements are met here.

First, petitioner plainly failed to act with due diligence in instituting this action. As discussed, petitioner has been aware of Act 77—or should have been, which is what matters, *see Stilp*, 553 Pa. at 135; *Taylor v. Coggins*, 244 Pa. 228, 231 (1914)—at least since the law was enacted on October 31, 2019. *See supra* pp.3-5.

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*, 553 Pa. at 135. Petitioner therefore could have brought this action nearly two years ago.

Instead, much like the litigants who sought to challenge Act 77’s constitutionality weeks after the November 2020 elections, petitioner “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.C.t. 1449 (2021). If anything, petitioner’s delay is even more egregious than the one-year delay that constituted an “unmistakable” “want of due diligence” in *Kelly*. *Id.* at 1256 (per curiam op.). Not only has more time (and yet another election) passed since then, but petitioner, unlike those who challenged the law in 2020, has overseen the implementation of Act 77 three times since its passage. *See* Am. Pet. ¶5; *supra* pp.5-6. Petitioner does not even attempt to provide an explanation for his significant delay—nor could he.⁸

⁸ Petitioner’s failure to file this suit sooner is particularly inexcusable given that section 13(3) of Act 77 requires that constitutional challenges to the no-excuse vote-by-mail provision be filed within 180 days of its enactment. *See Kelly*, 240 A.3d at 1258 (Wecht, J., concurring) (noting that had Act 77 been challenged within the 180-day limit, any constitutional questions could have been resolved before the June 2020 primaries). Whether or not the 180-day deadline would bar the petition as an

Second, respondents, the PDP, and the DNC (as well as millions of Pennsylvania voters) have been prejudiced by petitioner’s 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*, 553 Pa. at 135. Here, the change has been considerable, involving the implementation of a statewide mail-voting program used by millions of voters.

Respondents have expended substantial resources and investment in establishing an election administration system to implement Act 77, most if not all of which will have been wasted if petitioner prevails. *See* Mem. in Opp’n to Pet’r’s Appl. for Summ. Relief 6-7 & n.1; Resp’t’s Prelim. Objs. to 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.⁹

independent matter, it is highly relevant to equitable inquiry under laches. Section 13(3) put potential challengers on notice of the strong public-policy interests in resolving any disputes over the constitutionality of the Commonwealth’s voting system before millions of Pennsylvania residents came to rely on it—and before the pendency of litigation over the law could cause substantial confusion and disruption with any soon-to-be-held election.

⁹ The prejudice here is potentially magnified by the General Assembly’s inclusion of a non-severability provision in Act 77. *See* Act 77 §11; Am. Pet. ¶47. If that provision is given effect, invalidation of the Act’s no-excuse-voting provisions could void virtually the entire Act, upending numerous features of the state’s election infrastructure, including provisions revising poll-worker

Moreover, 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 Pet'r's Appl. 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, potentially creating untold administrative burdens and confusion. *See id.*

In sum, because petitioner offers no explanation for his nearly two-year delay in challenging Act 77, and because respondents and the DNC and PDP (as well as voters) would be prejudiced if petitioner's requested relief were granted, laches forecloses petitioner's claims and requires dismissal of this action.

B. The Amended Petition Should Be Dismissed Because Petitioner Has Not Alleged A Cognizable Injury Sufficient To Establish Standing

To have standing to sue, a party must have an interest in the litigation that is “substantial, direct, and immediate.” *Markham v. Wolf*, 635 Pa. 288, 298 (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

compensation (§3), extending the voter-registration deadline (§4), and altering the location for the canvassing of mail-in and absentee ballots (§7).

omitted). The amended petition identifies two theories of standing, neither of which has merit.

First, petitioner alleges that he has standing because he will be “called upon to make quasi-judicial judgments on a statute [he] perceive[s] as unconstitutional.” Am. Pet. ¶43. But public officials generally cannot demonstrate a “substantial interest” in challenging a law simply by asserting that their duties are unlawful. For example, in *Troutman v. Court of Common Pleas (In re Administrative Order No. 1-MD-2003)*, 594 Pa. 346 (2007), the Pennsylvania Supreme Court held that a court clerk did not have standing to challenge an administrative order requiring him to expunge certain public records, even though he believed that the order violated Pennsylvania law, *id.* at 361. Petitioner does not allege that he fears specific, concrete consequences for refusing to follow Act 77’s mandates, which federal case law suggests is further evidence of his lack of standing. *See Board of Educ. of Mt. Sinai Union Free Sch. Dist. v. New York State Teachers Ret. Sys.*, 60 F.3d 106, 112 (2d Cir. 1995) (no standing where plaintiffs failed to allege “that their positions as officials or funding for their schools is in jeopardy if they refuse to implement” the challenged state law).¹⁰

¹⁰ “[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*, 556 Pa. 621, 629 (1999).

The only case petitioner cites to support his novel standing theory (*Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012)) 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 Hr’g Bd.*, 186 A.3d 525, 533 (Pa. Commw. Ct. 2018) (citing *Robinson*). It was the latter status that created the requisite substantial, direct, and immediate interest in “a state statute allowing oil and gas operations” in their area. *Id.*; see also *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 592 (2013) (relying on the fact that officials “live[d] in a residential district in which, contrary to the prior legal regime, Act 13 now permits oil and gas operations”). Unlike the elected officials in *Robinson*, who were threatened with concrete injuries to their community and real property, “the source of [petitioner’s] complaint ... is just abstract outrage at the enactment of [an allegedly] unconstitutional law”—petitioner “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); accord *Drake v. Obama*, 664 F.3d 774, 780 (9th Cir. 2011) (rejecting argument that an active-duty military member had standing to challenge President Obama’s qualifications merely because he was required “to follow President Obama’s orders, despite his [alleged] ineligibility for the presidency”).

Second, petitioner asserts that he has standing as a taxpayer. Am. Pet. ¶50. But that rule applies “in rare instances,” *In re Hickson*, 573 Pa. 127, 139 n.6 (2003), and only 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*, 585 Pa. 196, 207 (2005). Petitioner (who bears the burden to establish standing, *Markham*, 635 Pa. at 297) has made neither showing.

Petitioner does make the bare allegation that if he “does not challenge the Act, it would likely go unchallenged.” Am. Pet. ¶55. But that allegation is refuted by the fact that the other petitioners in this consolidated proceeding—led by Timothy Bonner—have in fact already filed a similar challenge to Act 77. *See* Pet. for Review at 1, No. 244 MD 2021. Moreover, although petitioner asserts that no other person is “better situated to challenge the constitutionality of Act 77” given his status as an elected official, Am. Pet. ¶51, other Pennsylvanians could well have stronger claims, such as a candidate for political office who can 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).¹¹

¹¹ In a previous filing, petitioner suggested that the first required showing for taxpayer standing is actually whether the underlying law “would likely go challenged *before the [next] election*.” Reply Brief in Supp. of Appl. for Summ. Relief 10 (emphasis added). He cited no authority for that claim, however. In any event, his underlying factual premise was wrong, as the *Bonner* petitioners did file prior to the November 2021 election.

C. The Amended Petition Should Be Dismissed Because Nothing In The Pennsylvania Or U.S. Constitutions Precludes The General Assembly From Establishing Universal No-Excuse Mail Voting

Procedural infirmities aside, petitioner’s challenge fails 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. Committee, Gen. Assembly*, 601 Pa. 429, 435 (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).

Petitioner does not argue that Act 77 violates the U.S. Constitution. And he identifies nothing in the Pennsylvania Constitution restricting the General Assembly’s authority to enact Act 77—much less anything that would satisfy his

heavy burden to show a “direct collision” between that law and the constitution. He instead relies 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. The amended petition should be dismissed for failure to state a claim.

1. *Petitioner’s Reading Of Article VII, Section 1 Is Contrary To The Constitutional Text, Structure, and History*

Petitioner’s 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 he invokes.

Petitioner primarily rests his argument on the text italicized below in Article VII, section 1:

§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.

While petitioner argues that the phrase “offer[s] to vote” requires in-person voting, Am. Pet. ¶¶12-13, 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 amply 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 Pennsylvania Constitution should be given its “natural and ordinary meaning.” *Scarnati v. Wolf*, 643 Pa. 474, 489 (2017); *see also Commonwealth v. Johnson*, 144 Pa. 377 (1891) (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”). Section 1’s use of the phrase “where he or she shall offer to vote” is thus 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 officials

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 speak to whether a person must vote in person. A mail-in voter “offer[s] to vote” in their district just as an in-person voter does. The only difference is that the former’s vote is delivered to local elections officials by mail or hand and the latter’s by ballot box.

That straightforward reading is confirmed by the broader context in which the “offer to vote” language appears. *See A.S. v. Pennsylvania State Police*, 636 Pa. 403, 419 (2016); *Commonwealth v. Smith*, 646 Pa. 588, 597 (2018) (“[W]e do not read words in isolation, but with reference to the context in which they appear.”). 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 (requiring that a voter be at least 21 years old, a U.S. citizen, and a Pennsylvania resident). Nothing in section 1 purports to require or prohibit the specific manner 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*.

- b. The structure of Article VII also forecloses petitioner's reading

Petitioner's arguments also fail when the Pennsylvania Constitution is considered as "an integrated whole," *Zauflik v. Pennsbury Sch. Dist.*, 629 Pa. 1, 53(Pa. 2014). While section 1 lays out who may vote, another provision—section 4—expressly addresses how voting may be conducted. Section 4, entitled "Method of elections," provides in its entirety 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 legislature broad authority to do so.

That grant of authority confirms the implausibility of petitioner's 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 limitation on that authority amidst a list of qualifications for voting in another section (and without any acknowledgment that it *is* a limitation on that broad authority). Indeed, petitioner's 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’ns*, 531 U.S. 457, 468 (2001).

Reading section 1 to require people to vote in person cannot be squared with Article VII, section 14. That provision, entitled “Absentee voting,” establishes that in-person voting is *not* always required, by mandating that at least some Pennsylvanians “shall” be permitted to vote absentee. Pa. Const. art. VII, §14 (requiring the legislature to allow absentee voting under certain circumstances, including those arising from a business obligation, an illness, or religious holiday). But because section 14 applies only to “qualified electors,” petitioner’s reading of section 1, which would require a Pennsylvanian to vote in person to be a “qualified elector,” would potentially render section 14 a nullity (i.e., because qualified electors by definition would only retain that status *if* they vote in person). Petitioner never explains how a Pennsylvanian with a constitutional right to vote absentee under section 14 can nonetheless be a qualified voter under his theory of section 1. That is fatal to his 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.” Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012).

Petitioner argues that section 14 supports his position, in that (in his view) it provides an *exclusive* list of which voters can vote without appearing in person. Am. Pet. ¶¶15-16. But section 14 provides that the General Assembly “shall” (i.e., must) allow certain categories of Pennsylvanians to vote absentee. That mandatory language forbids the General Assembly from *denying* Pennsylvanians in those categories the right to vote absentee, but it does not preclude the General Assembly from *allowing others* to do the same (pursuant to the broad grant of authority in Article VII, section 4). *See Christensen v. Harris Cnty.*, 529 U.S. 576, 583 (2000), (explaining why this was the “proper *expressio unius* inference” to be drawn from comparable language). As the United States Supreme Court has explained, 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 York Legal Assistance Grp. v. BIA*, 987 F.3d 207, 217-218 & n.9 (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) (same).

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

Finally, the revisions made to the Pennsylvania Constitution through the years further show 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 Superior Ct. & Commonwealth Ct.*, 493 Pa. 555, 560 (1981) (considering constitutional text’s history). The same revisions likewise demonstrate that section 14 does not render Act 77 invalid.

The 1838 Constitution 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 pr[ece]ding such election.” Pa. Const. of 1838 art. III, §1. It also mandated that elections be conducted “by ballot,” *id.* §2. The 1874 Constitution retained the “offer to vote” language in the voter-qualifications provision but added language addressing the *method* of voting. Specifically, the 1874 Constitution (as amended in 1901) granted the General Assembly plenary power to “prescribe” “the “method[s]” of voting, including by means “other” than “by ballot.” Pa. Const. of 1874, art. VIII, §4. It also provided that soldiers could vote while away from their home district. *See id.* §6, *see also In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 136 (1924). Further 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).

While the drafters added each of these provisions, they left unchanged the voter-qualification language in section 1 requiring that a person reside in the district where he “offer[s] to vote.” They thus apparently saw no conflict between (1) retaining that language in section 1, (2) giving the General Assembly broad authority to determine how voting should be conducted in section 4, and (3) permitting absentee voting in section 14. They accordingly could not have intended that the “offer to vote” language would require in-person voting in all circumstances.

Further revisions to section 14 included in the 1967 constitutional amendments (and ratified in the 1968 version of the constitution) support this view. Specifically, the drafters replaced 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. 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* p.18-19. And it confirms 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 after the 1968 Constitution went into effect to expand by statute the classes of individuals who can vote absentee *beyond* those expressly listed in section 14. Specifically, the General Assembly expanded the class of electors who can vote absentee because of job-related travel to include “leaves of absence for teaching or education, vacations [and] sabbatical leaves” and spouses who accompany the elector on his or her leave or vacation. 25 Pa. Stat. §2602(z.3); *see also* 25 P.S. 3146.1(k) (expanding types of qualifying disabilities).¹²

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

The amended petition does not address the textual, structural, or historical defects just discussed with its reading of the Pennsylvania Constitution. Instead, it summarizes two Pennsylvania Supreme Court decisions, *Chase v. Miller*, 41 Pa. 403 (1862), and *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131

¹² The debates surrounding the shift from “may” to “shall” further confirm 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, 1996) (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. Pancoast on H.B. 398 (emphasis added)).

(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 iterations of the Pennsylvania Constitution that predated the current version (which, as explained, was ratified in 1968).

In 1862, when *Chase* was decided, the constitution required all elections to occur “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 places. 41 Pa. at 419. Moreover, the constitution did not then expressly authorize or require absentee voting. In contrast, Article VII, section 4 now expressly gives the legislature the power to prescribe methods of voting that go beyond the “by manual delivery of ballot” language. *See* 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; Provided, That secrecy in voting be preserved.”). Section 14, moreover, expressly contemplates that at least some voters will 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.).

In *Lancaster City*, meanwhile, the court did not consider whether the “or by such other method” language changed the constitutional analysis. *See* 281 Pa. at

136. While the court quoted the language in passing, it did not engage with that language, 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)*, 601 Pa. 524, 532 (2009) (statement in a prior opinion that was not decisional is not binding). In any event, *Lancaster City*’s ruling relied on the existence of a constitutional provision that specifically allowed the General Assembly to permit soldiers to vote absentee. 281 Pa. 136-137. The court reasoned that the constitution’s decision to permit only soldiers to vote absentee necessarily indicated an intention to exclude any other classes of voters from doing so. *Id.* at 137 (“The old principle that the expression of an intent to include one class excludes another has full application here.”). Importantly, the language that the *Lancaster City* Court relied upon—the “may” version of the absentee voting provision—has since been superseded by the modern section 14, *see supra* pp.20-21.

3. *If Chase and Lancaster City Are Binding, They Should Be Overruled By The Pennsylvania Supreme Court*

To the extent *Chase* and *Lancaster City* could be read to prohibit the General Assembly from enacting Act 77 pursuant to the current, 1968 version of the Pennsylvania Constitution, they cannot be squared with the current constitution’s

text, structure, and history (for the reasons given earlier), and should be overruled by the Pennsylvania Supreme Court. Although that court ordinarily adheres to its prior decisions under the doctrine of *stare decisis*, that presumption may be overcome in “the absence of reliance interests,” and based on “the importance of having constitutional questions decided” correctly. *Commonwealth v. Alexander*, 243 A.3d 177, 201 (Pa. 2020).

It is also noteworthy that the court in *Chase* based its decision not solely on the meaning of “offer to vote,” but also on its factual determination that voting in person was necessary to prevent fraud and secure the election. In the court’s words, one could “offer to vote” by ballot only by “present[ing] oneself” in person because there was “abundant reason for thinking that to permit ... [a] ballot [to] be sent by mail or express, [or] cast outside of all Pennsylvania election districts ... would break down all the safeguards of honest suffrage.” 41 Pa. at 419. The court’s conclusion—to which the *Lancaster City* court deferred—thus turned on concerns that are not relevant today, in an era of widespread mail voting where evidence of mail-voting fraud is exceedingly rare.¹³ Where, as here, because of significant

¹³ See, e.g., Barreto et al., *Vote By Mail: Debunking The Myth of Voter Fraud* (Apr. 14, 2020), <https://latino.ucla.edu/wp-content/uploads/2020/04/LPPI-VRP-Voter-Fraud-res.pdf>; Kamarck & Stenglein, *Low rates of fraud in vote-by-mail states show the benefits outweigh the risks*, The Brookings Institute (June 22, 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>; see also Durkee, ‘No Evidence’

societal and legal changes, the court that rendered the earlier erroneous 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, 2096-97, (2018); *see also Alexander*, 243 A.3d at 196 (referring to the U.S. Supreme Court’s application of *stare decisis* principles.).

As noted, the DNC and PDP preserve these arguments for further review.

IV. CONCLUSION

This Court should grant summary relief and dismiss the petition with prejudice.

October 15, 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*

of Election Fraud in Battleground States, Forbes (Feb. 19, 2021), <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>.

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 October 15, 2021 by this Court's electronic filing system.

/s/ Clifford B. Levine

CLIFFORD B. LEVINE