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NOTICE TO PLEAD

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

/s/ Michele D. Hangley

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG McLINKO,

Petitioner,

v.

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

Respondents.

**CASES
CONSOLIDATED**

No. 244 MD 2021

TIMOTHY BONNER, et al.,

Petitioners,

v.

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

Respondents.

No. 293 MD 2021

RESPONDENTS' PRELIMINARY OBJECTIONS
TO PETITIONER McLINKO'S AMENDED PETITION FOR REVIEW

Respondents, the Department of State of the Commonwealth of Pennsylvania and Acting Secretary of the Commonwealth Veronica Degraffenreid, hereby present Preliminary Objections to the Amended Petition for Review in the Nature of an Action for a Declaratory Judgment (“Am. Pet.”) filed by Petitioner Doug McLinko (“Petitioner”).

I. INTRODUCTION

Petitioner 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 July 2021 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 massive 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. And even if this case could surmount those procedural hurdles, it would fail to state a claim on which relief can be granted.

II. BACKGROUND

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

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

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

3. Reflecting the complex negotiations and policy tradeoffs that were involved in persuading a Republican-controlled legislature and a Democratic Governor to support the legislation, the General Assembly included a nonseverability provision stating that invalidation of certain sections of the act, including the mail-in ballot provisions and the straight-ticket voting provisions, would void almost all of the Act. *See* Act 77 § 11.

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

5. Act 77 was signed into law and became effective on October 31, 2019. The statutory 180-day period for challenges to the law expired on April 28, 2020. Neither 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 Electorate Learns to Rely on Mail-In Voting, and the Commonwealth and Counties Invest Substantial Resources in It

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

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

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

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

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

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

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

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

14. Act 77 allows “[a]ny qualified registered elector [to] request to be placed on a permanent mail-in ballot list file.” 25 Pa. Stat. § 3150.12(g)(1). Once an elector does so, a mail-in ballot application will be automatically mailed to the elector at the beginning of each year, and the elector’s return of that application will cause her to be sent a mail-in ballot for each election during that year. *Id.* An

elector who has requested to be placed on this permanent list therefore has every reason to expect that she need take no further affirmative steps to be able to vote; the Election Code assures her that elections officials will send her the appropriate materials at the appropriate time.

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

15. In November 2020, almost 13 months after Act 77’s enactment, a different group of petitioners filed a lawsuit that challenged Act 77 on grounds identical to those asserted here.

16. In *Kelly v. Commonwealth*, No. 68 MAP 2020 (Pa. Sup. Ct.), *exercising extraordinary jurisdiction over* No. 620 MD 2020 (Pa. Commw. Ct.), the petitioners alleged—as 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. 68 MAP 2020 (Pa. Commw. Ct. Nov. 21, 2020).

17. 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 M.D. 2020 (Pa. Commw. Ct. Nov. 22, 2020).

18. The *Kelly* petitioners 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* Am.

Pet. ¶¶ 56–58 (same).

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

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

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

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

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

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

24. The Amended Petition does not explain 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.

25. Petitioner cannot claim ignorance of the law; as he acknowledges, he is himself an election administrator, charged with administering Act 77 and other 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.” (Am. Pet.

¶ 5.)¹

¹ 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). “This Court may take judicial notice of official court records and public documents at the preliminary objection stage.” *Barnes v. Commw., Dep’t of Corr.*, No. 41 M.D. 2017, 2017 WL 3687644, at *1 n.1 (Pa. Commw. Ct. Aug. 28, 2017) (collecting authority).

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

27. 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>.

28. Petitioner reviewed this “Voter Guide to Act 77 Changes” before or around the time it was published by the Bradford County Board of Elections.

III. PRELIMINARY OBJECTIONS

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

29. “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).

30. 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.*

31. “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)).

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

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

34. Petitioner fails to satisfy the test for standing.

1. The Board of Elections’ Duties to Administer the Election Code Do Not Confer Standing to Challenge the Code’s Constitutionality

35. Petitioner asserts a substantial interest 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.” (Am. Pet. ¶¶ 3, 5.)

36. 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.” (Am. Pet. ¶ 5; *accord id.* ¶¶ 42–49.)

37. 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 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).

38. This precedent controls here. County boards of elections 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. § 3150.11–.15, and to receive and canvass ballots returned by those electors in compliance with the Code, *see* 25 Pa. Stat. § 3146.8. *See also Shroyer v. Thomas*, 81 A.2d 435, 437 (Pa. 1951) (“The duties of the County Board of Elections are ... prescribed by the Election Code.”).

39. Petitioner notes that, although boards of elections have no discretion as to whether to count ballots returned in compliance with the requirements of Act 77, boards of elections do have certain quasi-judicial duties and discretionary

authority under other provisions of the Election Code. Contrary to Petitioner’s suggestion, however, the fact that boards of elections have certain quasi-judicial duties and discretionary authority *under* the Election Code does not give Petitioner standing to challenge the constitutionality *of* the Election Code.

40. Pennsylvania courts have granted administrative agencies and public officials standing to challenge a statute or action that encroaches on the agencies’ or officials’ authority or interferes with the exercise of their duties. *See, e.g., Pa. Gaming Control Bd. v. City Council of Phila.*, 928 A.2d 1255, 1265–66 (Pa. 2007) (holding that Game Commission had standing to challenge decision of the Department of Environmental Resources that purportedly violated a statute that the Game Commission’s enabling act authorized the Game Commission to enforce); *Pa. Game Comm’n v. Dep’t of Env’tl. Res.*, 555 A.2d 812, 815–16 (Pa. 1989) (holding that Gaming Control Board had standing to challenge a Philadelphia ballot question that would “diminish[] the authority [the Board was] given under the [Pennsylvania Gaming] Act”); *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (municipalities and municipal officials had standing to claim that a statute violated the Environmental Rights Amendment to the Pennsylvania Constitution because the Amendment made municipalities and municipal officials “trustees” of public resources and gave municipalities “constitutional duties respecting the environment,” and “the challenged statute [allegedly] interfere[d]”

with municipalities' performance of those duties). These cases necessarily involve situations in which the agency or public-official petitioners can lay claim to authority *outside* the statute or order they are challenging.

41. This is not such a case. Here, a board of elections official seeks to challenge the constitutionality of the board's enabling act itself (*i.e.*, the Election Code)—despite the fact that boards of elections are solely a creation of the Election Code and have only the authority and duties prescribed by the Code. *See* 25 Pa. Stat. §§ 2641–2642.

42. Because boards of elections do not have authority or duties outside of what the Election Code (including Act 77) provides, a board of elections official cannot claim that the Election Code (including Act 77) encroaches on, or interferes with, a board of elections' authority or duties. Accordingly, the duties and authority of a board of elections official cannot establish a substantial, particularized interest that is invaded by Act 77—and Petitioner thus lacks standing to challenge the statute.

43. Furthermore, boards of elections have no authority to question the constitutionality of the Election Code. *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 alone is dispositive of Petitioner’s claim to standing. *See Admin. 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

44. Even assuming *arguendo* that Petitioner had identified some “substantial interest” in this lawsuit held by the Bradford County Board of Elections (as 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.

45. The Election Code expressly provides that “[a]ll actions of a county board shall be decided by a majority vote of all the members.” 25 Pa. Stat. § 2643(a).

46. 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.

47. 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).

3. Petitioner Lacks Taxpayer Standing Because He Has Failed to Plead Facts Establishing the Prerequisites of Such Standing and Is, in Fact, Uniquely *Unsuited* to Challenge the Election Code

48. Petitioner also fails to plead taxpayer standing.

49. To establish taxpayer standing, a petitioner “must show the following: (1) [if the petitioner is not granted standing,] the governmental action in question would [] go unchallenged; (2) those who are directly and immediately affected by the action complained of benefit from the action and thus are not inclined to challenge it; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no other person is better suited to bring the challenge.”

Firearm Owners Against Crime v. City of Harrisburg, 218 A.3d 497, 514 (Pa. Commw. Ct. 2019). In addition, a petitioner must show that the relief sought is necessary to avoid “harm” to the petitioner “*as a taxpayer.*” *Id.* at 514–15.

50. “Pennsylvania is a fact-pleading state.” *Briggs v. Sw. Energy Prod. Co.*, 224 A.3d 334, 351 (Pa. 2020). Accordingly, to plead standing, “a party must plead facts” that establish the legal prerequisites of standing. *Open PA Schools v. Dep’t of Educ.*, No. 504 M.D. 2020, 2021 WL 129666, at *6 (Pa. Commw. Ct. Jan.

14, 2021) (en banc) (citing *Pa. Chiropractic Fed'n v. Foster*, 583 A.2d 844, 851 (Pa. Commw. Ct. 1990)); see *Atiyeh v. Commonwealth*, No. 312 M.D. 2012, 2013 WL 3156585 (Pa. Commw. Ct. May 28, 2013) (holding that assertion of taxpayer standing was insufficiently pled).

51. Where a “Petition simply lists the ... criteria [for taxpayer standing] without description or explanation of how Petitioners fall within the ... taxpayer exception [to the requirements of traditional standing],” the Petition is deficient and must be dismissed. *Atiyeh*, 2013 WL 3156585, at *6.

52. With respect to many of the criteria for taxpayer standing, the Amended Petition here simply states that Petitioner has satisfied the application requirements “without description or explanation of how Petitioner” has done so. *Id.* (See Am. Pet. ¶¶ 50-55 (asserting, in conclusory fashion, that there is no person better situated to challenge the constitutionality of Act 77, that those directly affected by the action are beneficially affected and not inclined to challenge it, and that if Petitioner is not allowed to challenge the Act, it would likely go unchallenged).)

53. Further, Petitioner fails to acknowledge, let alone attempt to plead facts to satisfy, the requirement that the relief he seeks is necessary to avoid injury to taxpayers *as taxpayers*. *Firearm Owners Against Crime*, 218 A.3d 497 at 514–15. Indeed, the only evidence on this point shows that the taxpayer injury would

come from *granting* the relief Petitioner seeks. *See* Respondents’ Application for Summary Relief Regarding the *Bonner* Petition at 24–26 (filed Sept. 30, 2021) (citing Affidavit of Jonathan Marks ¶¶ 11–22).

54. The Amended Petition also fails to show that no other persons are better situated to challenge Act 77.

55. As shown above, board of elections officials like Petitioner are uniquely *unsuited* to bring a facial challenge to the constitutionality of the Election Code, which is the exclusive source of the boards’ duties and authority. *See supra* Paragraphs 29–47.

56. In addition, as the *Bonner* Petitioners concede, Respondents, the Acting Secretary of the Commonwealth and the Department of State, are better situated to challenge the constitutionality of Act 77 than Petitioner McLinko. *See Amicus Curiae* Brief in Support of Petitioner’s Application for Summary Relief at 16 (filed Sept. 9, 2021). After all, the Secretary’s office, unlike that of the board of elections, is recognized by the Pennsylvania Constitution. *See, e.g.*, Pa. Const. art. IV, § 15.

57. The fact that Respondents did not choose to challenge Act 77 does not establish taxpayer standing. Petitioner does not—and cannot—assert that Respondents are beneficially affected by Act 77; rather, Respondents believe the statute is constitutional. *See Fumo v. City of Phila.*, 972 A.2d 487, 506 (Pa. 2009)

(“Surely, the fact that more appropriate governmental parties have not elected to challenge a particular governmental decision cannot be enough on its own to generate taxpayer standing—particularly where those executive authorities are not ‘beneficially affected’ by the decision.”).

58. As a class of potential petitioners, candidates are also better situated to challenge Election Code provisions than boards of elections officials. Candidates are “directly ... affected” by such provisions because candidates compete for election under the procedures set forth in the Election Code. *Firearm Owners Against Crime*, 218 A.3d at 514.

59. That the particular alleged candidates who are currently challenging Act 77 (namely, the *Bonner* Petitioners) have failed to assert—let alone plead facts showing—any injury from Act 77’s mail-in voting procedures, and have thus failed to plead standing,² does not change the fact that candidates are, as a class of persons, “better suited” to challenge Act 77 than Petitioner.

60. For all of these reasons, Petitioner lacks taxpayer standing.

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

² See Respondents’ Preliminary Objections to the *Bonner* Petitioners’ Petition for Review ¶¶ 28–34, 43–45 (filed Sept. 30, 2021).

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

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

61. 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 Amended Petition should be dismissed for laches.

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

63. Petitioner’s action 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. *See id.* at 1256-57.

64. Petitioner cannot avoid *Kelly* by emphasizing that the present case does not seek to overturn the result of any past election. Although the *Kelly* petitioners sought to enjoin certification of the November 2020 election results, they *also* sought a prospective declaration that Act 77 was, going forward, invalid. *Compare Kelly*, 240 A.3d at 1256 (“Petitioners sought a declaration that the aforementioned provisions [of Act 77] were unconstitutional and void *ab initio*.”);

with Am. Pet. ¶¶ 56–58 (seeking declaration that Act 77 violates the Pennsylvania Constitution and is void); *see also Kelly*, 240 A.3d at 1262 (Saylor, C.J., concurring and dissenting) (partially dissenting from majority ruling because Chief Justice Saylor disagreed with the majority’s decision to apply the doctrine of laches to the prospective, declaratory relief portion of the petition for review).

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

2. The Doctrine of Laches Squarely Applies to This Case

66. Beyond *Kelly*, when applying the laches two-step analysis, the applicability of the laches bar is clear.

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

68. Petitioner undeniably failed to exercise reasonable diligence in initiating this action.

69. 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”).

70. Petitioner, a long-time member of the Bradford County Board of Elections, cannot plausibly claim that his delay was justified by ignorance or unawareness of Act 77.

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

72. 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.

73. Further, by the time Petitioner filed this action, it was too late to adjudicate his claim before the November 2021 election—which will be the *fourth* successive statewide election to be conducted under Act 77’s mail-in voting procedures. *See* Order dated September 24, 2021 (holding that “prospective relief, as requested by petitioners, is not available for the November 2021 election because it is already underway”).

74. If the Court grants the requested relief, Petitioner’s undue delay will cause substantial prejudice throughout the Commonwealth.

75. “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.

76. 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.

77. 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.

78. 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), are themselves sufficient to establish the prejudice element of laches.

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

80. Although voiding Act 77 would change the permissible means of voting for all Pennsylvanians, millions who voted last November would have to be

alerted that they are no longer permitted to vote using a method they used the last time they voted; many of these voters intend to use the same method in all future elections.

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

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

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

82. Section 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)).

83. 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 Am. Pet. ¶¶ 8–10, 56–58.

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

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

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

D. Fourth Preliminary Objection: Demurrer – Petitioner’s Claim Fails on the Merits (Pa. R. Civ. P. 1028(a)(4))

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

87. All “powers not expressly withheld from the [Pennsylvania] General Assembly inhere in it.” *Stilp v. Commonwealth*, 974 A.2d 491, 494–95 (Pa. 2009). Accordingly, “[i]t is foundational that all legislation duly enacted by the General Assembly enjoys a strong presumption of validity” *Commonwealth v. Bullock*, 913 A.2d 207, 211 (Pa. 2006).

88. “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).

89. 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”). “A statute is facially unconstitutional only where there are no circumstances under which the statute would be valid,” that is, only where “the law is unconstitutional in all of its applications.” *Haveman v. Bureau of Prof'l & Occupational Affairs*, 238 A.3d 567, 572 (Pa. Commw. Ct. 2020) (quoting *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019)).

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

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

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

90. 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).

91. 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.

92. Article VII, § 1 also prescribes durational-residency requirements—namely, the prospective voter must have resided in Pennsylvania at least 90 days

immediately preceding the election and have resided in the specific election district in which she seeks to vote for at least 60 days.

93. As the authority interpreting “residence” makes clear, the qualifications set forth in § 1 do *not* include any requirement of physical presence at the time of the election; a person may maintain a “residence” in a given state and election district even while she is physically absent from them. *In re Case of Fry*, 71 Pa. 302, 309-10 (1872); *accord In re Stack*, 184 A.3d 591, 597 (Pa. Commw. Ct. 2018) (citing *In re Lesker*, 105 A.2d 376, 380 (Pa. 1954)).

94. 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.

95. 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.

96. 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.

97. 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).

98. In other words, the plain words of the constitutional provision specifically addressed to voting methods *expressly gives the Legislature plenary power over such methods*, subject only to the requirement that any method authorized by the Legislature preserve the secrecy of the vote. Thus, the existence of Article VII, § 4 further belies 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”).

99. Respondents’ interpretation of § 1 gives meaning to all of its terms. Each voter under § 14 must “have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election,” just as he or she must “have resided in the State ninety (90) days immediately preceding the election.” Pa. Const. VII, § 1. For example, an elector residing in

Philadelphia cannot vote for the commissioners of Allegheny County, just as an elector residing in one election district cannot vote in the judge-of-elections race of another election district.

100. 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.

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

102. 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

103. 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 § 14.

104. 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.

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

106. 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”).

107. 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).

108. 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).

109. So far as Respondents are aware, no other challenges to these enactments were ever brought. Thus, for virtually the entire life of the current Constitution, the Election Code has provided for absentee voting outside the scope of the requirements in Article VII, § 14.

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

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

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

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

113. *Chase* invalidated a statute that essentially authorized Civil War military commanders to form election districts at out-of-state military camps and to hold elections therein, bereft of any of the key features that protect elections administered by civil authorities. *Chase*, 41 Pa. at 424.

114. Petitioner ignores this analysis from *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. III, § 1), and (2) required all elections to be “by ballot,” *id.* (discussing Pa. Const. of 1838 art. III, § 2)—“undoubtedly” required each voter “to make manual delivery of the ballot to [elections] officers” at their respective polling places. *Id.*

115. Significantly, the Constitution of 1838 did not contain the provision set forth in Article VII, § 4 of the current Constitution, which expressly grants the General Assembly plenary power to “prescribe[] the “method[s]” of voting, subject only to the requirement that “secrecy in voting be preserved.” Pa. Const. art VII,

§ 4. That change alone is sufficient to distinguish *Chase*'s interpretation of the Constitution of 1838—and, in particular, its opinion that, under the earlier charter, “[t]he ballot c[ould] not be sent by mail or express,” *Chase*, 41 Pa. at 419.

116. *Lancaster City*, decided in 1924, also does not support Petitioner's arguments about the meaning of the current Constitution, which was ratified in 1968.

117. 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.

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

119. The *Lancaster City* Court found it significant that the then-existing Constitution “made [it] so that absent voting in the case of soldiers is permissible.” *Id.*; *see* Pa. Const. of 1878 art. VIII, § 6. The Court believed that this provision

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

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

121. 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).

122. 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.

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

124. 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.

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

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

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

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

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

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

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

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

132. Where a contemporary reader would expect to find actual analysis of the text, structure, and original public understanding of Article III, § 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.

133. 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”).

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

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

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

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

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

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

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

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

141. Moreover, a substantial number of the "mail-in" ballots cast under Act 77 are actually returned by voters *in person*. See 25 Pa. Stat. § 3146.5(b)(2). Those applications of Act 77 are also untouched by Petitioner's argument.

142. Accordingly, it is plainly not the case, even under Petitioner's untenable reading of the Constitution, that Act 77 "is unconstitutional in all of its applications." *Haveman*, 238 A.3d 567, 572 (Pa. Commw. Ct. 2020).

143. 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").

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

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Dated: October 8, 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: October 8, 2021

/s/ Michele D. Hangle
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