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HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
Michele D. Hangley (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
John Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200

OFFICE OF ATTORNEY GENERAL
Stephen Moniak (I.D. No. 80035)
Karen M. Romano (I.D. No. 88848)
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-2717

PENNSYLVANIA GOVERNOR'S OFFICE OF GENERAL COUNSEL
Kenneth L. Joel (I.D. No. 72370)
333 Market Street, 17th Floor
Harrisburg, PA 17101
(717) 787-9348

PENNSYLVANIA DEPARTMENT OF STATE
Kathleen M. Kotula (I.D. No. 318947)
306 North Office Bldg.
401 North Street
Harrisburg, PA 17120-0500
(717) 783-1657

TUCKER LAW GROUP, LLC
Joe H. Tucker, Jr. (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
Jessica A. Rickabaugh (I.D. No. 200189)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondents

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' RESPONSE IN OPPOSITION TO THE *BONNER* PETITIONERS' APPLICATION FOR SUMMARY RELIEF

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Respondents, Acting Secretary of the Commonwealth Veronica Degraffenreid and the Department of State of the Commonwealth of Pennsylvania, submit this response in opposition to the *Bonner* Petitioners' Application for Summary Relief ("Pet'rs Appl."), which was filed on September 30, 2021. To minimize duplicative briefing, Respondents respectfully incorporate by reference their parallel Application for Summary Relief, which was also filed on September 30, 2021.

I. INTRODUCTION

The *Bonner* Petitioners ("Petitioners"), fourteen members of the Pennsylvania House of Representatives, fail to allege any facts showing that they are (or will be) injured by Act 77's mail-in voting procedures. Indeed, all of them have been elected in one or more elections conducted under these procedures, and eleven of them *voted for* these very procedures as members of the General Assembly. Petitioners claim that the Election Code provisions they challenge were facially unconstitutional at the time of their October 2019 enactment, yet—for reasons that remain entirely unexplained—they failed to bring suit until late August 2021, a month after Bradford County Board of Elections member Doug McLinko filed a nearly identical lawsuit. In fact, nine months *before* Petitioners' filed suit, the Pennsylvania Supreme Court dismissed an identical constitutional claim, seeking the same declaratory relief, on the basis of those petitioners'

"unmistakable," "complete failure to act with due diligence in commencing [a] facial constitutional challenge … ascertainable upon Act 77's enactment." *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020). Needless to say, Petitioners have also failed to comply with Act 77's statutory time bar, which required constitutional challenges to be brought within six months of the statute's enactment.

The consequences of these indisputable facts are clear: Petitioners lack standing; and Petitioners' claims are even more untimely than the claim rejected in *Kelly*. These defects are fatal to Petitioners' lawsuit: a court cannot adjudicate any claims—even important constitutional claims—unless they are presented by a plaintiff with standing who is neither guilty of laches nor subject to a statutory time bar. Petitioners are out of court three times over.

In any event, Petitioners' constitutional arguments are meritless. There is nothing in the text or structure of the current Pennsylvania Constitution that prohibits the General Assembly from providing for the return of ballots by mail, let alone does so "clearly, palpably, and plainly." Moreover, Petitioners completely ignore that, even if they could surmount the many procedural obstacles to their claims, and even if their interpretation of the Constitution were correct, an overwhelming number of Act 77's applications would still be constitutional—and their facial challenge would thus fail; a facial challenge can succeed only where there are *no circumstances* under which the statute would be valid. Finally,

Petitioners' attempt to federalize their state constitutional challenge is baseless. For multiple reasons, Petitioners' federal-law claims also fail as a matter of law.

II. ARGUMENT

A. Petitioners' Application for Summary Relief Fails to Address Standing, Laches, or the Statutory Time Bar

Petitioners filed an amicus brief with respect to the cross-applications for summary relief litigated in the *McLinko* case last month. *See Amicus Curiae* Brief in Support of Petitioner's Application for Summary Relief, No. 244 M.D. 2021 (filed Sept. 9, 2021). As a result, Petitioners were well aware of Respondents' arguments that Petitioners' constitutional challenge was foreclosed by both laches and the statutory time bar set forth in Section 13(3) of Act 77. Indeed, counsel for Petitioners also represented the *Kelly* petitioners; in that case, counsel acknowledged, before the Supreme Court of the United States, that the Pennsylvania Supreme Court held in *Kelly* that laches bars a facial constitutional challenge to Act 77 seeking prospective declaratory relief, *i.e.*, the very claim Petitioners reassert here. *See* Petition for Writ of Certiorari at 16, *Kelly v. Pennsylvania*, No. 20-810 (U.S. Dec. 11, 2020) ("[T]he Supreme Court of Pennsylvania held that *the doctrine of laches barred any equitable remedy—injunctive, declaratory, retrospective, prospective, affirmative, or otherwise*—for Petitioners' constitutional challenges to Pennsylvania's no-excuse mail-in ballot system." (emphasis added)). Moreover, in response to questions from the Court at

the oral argument in *McLinko* on September 22, 2021, Respondents' counsel explained why Petitioners here have failed to plead standing.

Remarkably, however, Petitioners' Application for Summary Relief fails to address *any* of these multiple procedural bars to relief. Accordingly, Respondents respectfully reserve the right to seek leave to submit a reply brief if Petitioners attempt to address these issues in their response to Respondents' Application for Summary Relief. Respondents also respectfully incorporate by reference their Reply in Support of Respondents' Cross-Application for Summary Relief, which was filed in the *McLinko* matter on September 15, 2021, and refuted arguments Petitioners had raised as *amici* on the issues of, *inter alia*, laches and Act 77's statutory time bar.

B. Act 77's Mail-In Voting Method Is Not Unconstitutional

As Respondents previously demonstrated, Petitioners do not come close to carrying their "very heavy burden" of proving that a statute duly enacted by the General Assembly is facially unconstitutional.[1] *Commonwealth v. Bullock*, 913 A.2d 207, 212 (Pa. 2006).

[1] As noted, Respondents incorporate by reference herein their parallel Application for Summary Relief Regarding the *Bonner* Petition, which refutes many of the arguments raised in Petitioners' Application.

1. Petitioners Ignore Fundamental Principles of Constitutional Interpretation

As a matter of first principles, although Petitioners pay lip service to the standards governing constitutional challenges to statutes enacted by the General Assembly, *see* Pet'rs Appl. 10, Petitioners conspicuously fail to apply these standards. Critically, it is not sufficient for a petitioner to show that a statute conceivably oversteps the General Assembly's bounds under some plausible reading of the Constitution. To the contrary, because the General Assembly, unlike the United States Congress, "possess[es] all legislative power except such as is prohibited by *express* words or *necessary* implication," *Commonwealth v. Stultz*, 114 A.3d 865, 876 (Pa. Super. Ct. 2015) (emphasis added); *accord Stilp v. Commonwealth*, 974 A.2d 491, 494-95 (Pa. 2009), "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) (emphasis in original).

If anything, that deference to the legislature applies with even greater force where, as here, the petitioner does not claim the invasion of any constitutional right, or that Act 77 violates the separation of powers among the coordinate branches of government, but instead seeks to abridge the legislature's exercise of its core powers to enact policy in the public interest—here, the power to enact procedures making exercise of the franchise more convenient and accessible for all Pennsylvania voters. *See United Artists' Theater Circuit, Inc. v. City of Phila.*, 635

A.2d 612, 616 (Pa. 1993) ("[T]he police power of a state embraces regulations designed to promote the public convenience or the general prosperity …." (emphasis omitted)); *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 ….'"). In fact, far from violating any constitutional right, Act 77 directly underwrites one of the core guarantees of the Constitution's Free and Equal Elections Clause: By ensuring that voters who live far from their polling places or have difficulty taking time off work on election day—or who avoid indoor public spaces out of fear of contracting COVID-19—are afforded equal access to the franchise, Act 77's mail-in voting procedures ensure that "all aspects of the electoral process, to the greatest degree possible, [are] kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802, 804 (Pa. 2018) (construing PA. CONST. art. I, § 5).[2] In sum, it is difficult to imagine a legislative act entitled to more judicial

[2] Notably, Respondents are not asking this Court to decide whether mail-in voting is *required* by the Pennsylvania Constitution. The only question presented by this case is whether the Pennsylvania Constitution clearly, palpably, and plainly *prohibits* the General Assembly from providing for mail-in voting. The Pennsylvania Supreme Court's recent decisions regarding the Free and Equal Elections Clause confirm that the answer is no.

deference than the one at issue here. Under well-settled jurisprudence, the courts must do everything reasonably possible to construe the Pennsylvania Constitution in a way that upholds Act 77.

Fortunately for Pennsylvania voters, that is not a difficult task: Petitioners fail to show that their construction of the current Pennsylvania Constitution is even a reasonable one, let alone that it is the *only* reasonable interpretation, such that the Constitution "clearly, palpably, and plainly" prohibits voters from returning their ballots by mail.

2. Petitioners Ignore the Text and Structure of the Constitution

Petitioners make no attempt to reconcile their interpretation with the fact that the "offer to vote" language on which they rely does not appear in a provision addressing *methods* of voting (which methods are expressly committed to the General Assembly's near-plenary discretion in a separate constitutional provision, *see* PA. CONST. art. VII, § 4), but rather appears in a description of a durational-residency requirement addressed to *who* may vote, *see* PA. CONST. art. VII, § 1. And they do not dispute that a voter can "reside" in an election district even while physically absent from the district. *See* Memorandum in Support of Respondents' Application for Summary Relief Regarding the *Bonner* Petition 33–34 (filed Sept. 30, 2021) ("Resp. Br.").

Moreover, Petitioners' interpretation of Article VII, § 1 would render Article VII, § 14 self-contradictory and incoherent. *See* Resp. Br. 36–37. That fact alone is sufficient to require rejection of Petitioners' constitutional claim. *See Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1126 (Pa. 2014) ("the Constitution [should be read as] an integrated whole"); *see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (Pa. 1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (internal citations omitted)).

Not only do Petitioners focus exclusively on the three words "offer to vote," and improperly ignore the rest of the provision in which those words appear (as well as other constitutional provisions bearing on the question at hand), but Petitioners' interpretation of even those three words is untenably cramped. As the North Carolina Supreme Court has observed, "[a]n offer to vote may be made in writing, and that is what the absent voter does when he selects his ballots and attaches his signature to the form and mails the sealed envelope to proper official[s]." *Jenkins v. State Bd. of Elections*, 104 S.E. 346, 349 (N.C. 1920). Indeed, as Respondents previously pointed out, the evidence of original

understanding in this case shows that, *even in 1838*, "offer to vote" was not understood to require voters to be physically present in their election district when casting their ballot. *See* Resp. Br. 49.

Petitioners' argument re-writes the Constitution. Article VII, § 4 is the section of the Pennsylvania Constitution that addresses whether "methods [of voting] comply with the Pennsylvania Constitution." It is expressly entitled "Method of elections"—in contrast to § 1 (which contains the "offer to vote" language), which is entitled *only* "Qualifications of electors" (emphasis added). And § 4 expressly grants the Legislature the authority to "prescribe[] by law" the "method[s]" by which elections shall be conducted, subject only to one restriction—namely, "[t]hat secrecy in voting be preserved." PA. CONST. art. VII, § 4. Section 4 manifestly does not include the proviso "so long as electors vote only in person at polling places within their respective election districts," or even "subject to restrictions set forth elsewhere in this Article." There is simply no way to reconcile Article VII, § 4 with the notion that the Pennsylvania Constitution "clearly, palpably, and plainly" prohibits the General Assembly from authorizing voters to return their ballots by mail.

3. Petitioners' New Argument, Based on No-Longer-Extant Language from Earlier Versions of the Constitution, Is Unavailing

In their Application for Summary Relief, Petitioners advance an argument omitted from their Petition. Petitioners suggest that language in the 1776 Pennsylvania Constitution, which provided that elections for certain offices would take place "at the time and place for electing representatives [for the general assembly]," somehow precluded the General Assembly for providing for absentee or mail-in voting procedures. Pet'rs Appl. 19–20; *see* PA. CONST. of 1776, art. I, § 19. Regrettably, Petitioners take liberties in their paraphrasing of the constitutional language and often fail to cite the specific provisions to which they are purported referring. *See* Pet'rs Appl. 19–20. And, notably, Petitioners do not cite *any* authority supporting their interpretation of this language. In fact, Petitioners' argument fails for at least two fundamental reasons.

First, contrary to Petitioners' assertion, the "time and place" language Petitioners cited does not "outline a 'time and place for electing representatives in general assembly.'" Pet'rs Appl. 19 (emphasis omitted). It simply says that, wherever and whenever elections for representatives in assembly should occur, so too should occur the elections for certain others officials. *See* PA. CONST. of 1776, art. I, §§ 19, 31. The current Constitution takes the same approach. *See, e.g.*, PA. CONST. art IV, § 2 ("the Governor … shall be chosen on the day of the general

election, by the qualified electors of the Commonwealth, at the places where they shall vote for Representatives"). In other words, the language on which Petitioners rely is intended to ensure the consolidation of elections for different offices, not to limit the places from which a ballot can be returned.

Second, Petitioners' argument is contradicted by the absentee voting provision in what is now Article VII, § 14. As noted, that provision states that "[t]he Legislature shall … provide a manner by which, *and the time and place* at which, qualified electors [who may] be absent from the municipality of their residence [for certain reasons may vote absentee]." *Id.* (emphasis added). That provision makes crystal-clear that Petitioners' interpretation of the "time and place" phrase is wrong. That phrase obviously does not prohibit absentee or mail-in voting because it appears in a clause whose very purpose, as Petitioners have previously acknowledged, is to provide for such voting. *See, e.g.*, Pet. ¶ 24 (stating that the absentee-ballot provision in Article VII, § 14 addresses certain "exceptions to in-person voting").

Remarkably, Petitioners now seem to take the position (contrary to their previous acknowledgement) that, because of this "time and place" language, *even voters within the categories specifically set forth in Article VII, § 14* cannot return their ballots by mail, but can only return them at specifically prescribed "places." *See* Pet'rs Appl. 20 n.1 ("Although Petitioners do not challenge it in this case, it is

important for the Court to note that the Absentee voting provision of the Pennsylvania Constitution, PA. CONST. Art. VII, § 14, also **requires** the legislature to identify the 'time and place,' along with the manner, where absentee voting can taken place."). Such an interpretation would, of course, lead to an absurd result. On its face, Article VII, § 14 is designed to ensure that, as a matter of constitutional right, voters who have to travel anywhere in the world for work, or are bedridden, are able to cast a ballot. That purpose would be completely thwarted if such voters were, as Petitioners now seem to suggest, able to vote only at polling places or similar specifically designated places. Petitioners' interpretation would also mean that *all* of the absentee ballots returned by mail over many decades have been invalid. In sum, Petitioners' argument underscores the legal bankruptcy of their tortured construction.

4. *Chase* and *Lancaster City*, Which Were Decided Under Earlier Constitutions, Do Not Dictate the Result Here

Perhaps recognizing that their interpretation is at odds with the text and structure of the current Constitution, as well as modern principles of constitutional interpretation, Petitioners rely heavily on the 1862 and 1924 decisions in *Chase* and *Lancaster City*. But as Respondents previously demonstrated, those decisions do not control the question before this Court, which arises under a different Constitution and, indeed, a different era of constitutional jurisprudence.

(a) Petitioners Do Not—and Cannot—Dispute That the *Chase* Opinion Rested on a Constitutional Provision That Was Subsequently Amended so as to Provide the General Assembly with Near-Plenary Authority to Prescribe the Permissible Methods of Voting

Petitioners effectively concede that *Chase* is distinguishable because it was decided before the addition of the "methods" provision appearing in Article VII, § 4 of the current Constitution. Indeed, the *Chase* Court expressly acknowledged that its conclusion was based not merely on the "offer to vote" language in what was then Article III, § 1, but also on the language of Article III, § 4, which was subsequently amended and became Article VII, § 4 of the 1968 Constitution. *See* Chase, 41 Pa. at 491. At the time of *Chase*, however, not only did this provision *not* give the General Assembly near-plenary authority over the "method" of voting; it did not give the General Assembly any discretion whatsoever. *See* PA. CONST. of 1838, art. I, § 2. *Chase*'s interpretation of materially different provisions in the 1838 Constitution does not bind this Court's interpretation of the current Constitution. *See Moore v. Pullem*, 142 S.E. 415, 422 (Va. 1928) (refusing to construe the phrase "the precinct in which he offers to vote," which appeared in the voter-qualifications provision of the Virginia Constitution, as imposing a requirement of in-person voting, particularly because "[t]he method of voting is elsewhere specifically and unequivocally committed to the legislative discretion").

(b) Petitioners Completely Ignore That, After *Lancaster City* Was Decided, the Constitution's Absentee Voting Provision Was Amended, Changing a Ceiling on Absentee Voting (*Permitting* the General Assembly to Allow Absentee Voting for Certain Groups) into a Floor (*Requiring* the General Assembly to Allow Absentee Voting for Certain Groups)

In light of the post-*Chase* introduction of what is now Article VII, § 4, Petitioners are forced to rely on the holding in *Lancaster City*, which invalidated an absentee voting statute (and did not address methods of voting *within* a voter's election district). That invalidation was expressly based on the Court's interpretation of a provision in the 1874 Constitution, which the Court construed as "permit[ting]" only certain specific identified groups of persons to vote absentee. *In Re: Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 at 201. The Court applied the canon of *expressio unius*, holding that the naming of these specific classes should be construed as a prohibition on absentee voting by anyone else. *Id.*

As Respondents previously explained, that conclusion does not control here for at least two related reasons. First, between 1924 and the ratification of the 1968 Constitution, the language of the Constitution's absentee-voting provision went through several changes—including, in particular, a change from "may" to "shall" in 1967, which was carried over into the current Constitution. Second, and roughly coincident with that change, the General Assembly authorized absentee

voting by classes of persons beyond those enumerated in the Constitution. *See* Resp. Br. 46–48.

Petitioners ignore these facts altogether. They insist that *Lancaster City*'s holding—that the absentee-voting provision *in the 1874 Constitution* sets a ceiling on absentee voting rather than a floor—is binding, without acknowledging the intervening change in constitutional language or the fact that, when the change from "may" to "shall" occurred, the General Assembly began authorizing absentee voting far beyond the categories set forth in the Constitution. *See* Pet'rs Reply 26–27. Indeed, although Petitioners discuss other amendments to the absentee voting provision, they conveniently fail to acknowledge the 1967 amendment changing "may" to "shall."[3] Pennsylvania courts have made clear that the difference between these two words is important and, *contra* Petitioners, cannot simply be ignored. *See, e.g.*, *Commonwealth v. Garland*, 142 A.2d 14, 17 (Pa. 1958) (holding that "the legislative use of the word 'may' in the first portion of the sentence and the word 'shall' in the second portion" is "[p]articularly significant"); *Zimmerman v. O'Bannon*, 442 A.2d 674, 677 (Pa. 1982) (refusing "to ignore the mandatory connotation usually attributed to the word 'shall'"); *accord Mathews v.*

[3] *See* Pet'rs Appl. 25 (stating that "[i]n 1967 following the Constitutional Convention, the Pennsylvania Constitution was reorganized and Article VII [sic], § 19 was renumbered to Article VII, § 14," but failing to mention that, earlier in the same year, Article VII, § 19 had been amended).

Paynter, 752 F. App'x 740, 744 (11th Cir. 2018). As Respondents previously noted, that the drafters of the constitutional provision deliberately *changed* "may" to "shall" is particularly significant. *See Georgia-Pacific Corp. v. Unemployment Comp. Bd. of Review*, 630 A.2d 948, 959 n.22 (Pa. Commw. Ct. 1993) ("[A] change of language in subsequent statutes on the same matter indicates a change of legislative intent." (quoting *Haughey v. Dillon*, 108 A.2d 69, 72 (Pa. 1954)).

The legislative history of the 1967 amendment confirms what the plain text indicates: the General Assembly changed "may" to "shall" precisely because it intended to convert what was formerly a limited grant of legislative discretion into a constitutional right that the legislature could not take away. The bill proposing the amendment was entitled, "A Joint Resolution proposing that article eight, section nineteen of the Constitution [*i.e.*, what was then the absentee voting provision] be amended *by making it mandatory rather than permissive* for the General Assembly to provide for absentee voting." House Legislative Journal, Session of 1966, Vol, 1, No, 1, at 518 (July 12, 1996) (discussing House Bill 398) (emphasis added).[4] As indicated by the legislative history, what drove this change was the General Assembly's conviction—diametrically opposed to the anti-

[4] The substance of House Bill 398, which addressed only the absentee voting provision in what was then Article VIII of the 1874 Constitution, was later incorporated into a proposed constitutional amendment—which was passed by the General Assembly and then ratified—that also addressed other provisions in Article VIII. *See* Senate Legislative Journal, Session of 1966, Vol. 1, No. 1, at 303–304 (amending House Bill 422).

democratic sentiments expressed in *Chase*, *see* Resp. Br. 48–49—that "[t]he right to vote is among the most precious rights we have." House Legislative Journal, Session of 1966, Vol, 1, No, 1, at 518 (July 12, 1996) (statement of Representative Fineman).

The 1967 amendment clearly distinguishes *Lancaster City*—and, in particular, its reliance on the interpretive canon of *expressio unius*—because a provision requiring certain acts does not, under that canon, prohibit others. *See, e.g.*, *Mathews*, 752 F. App'x at 744 (unlike "may," the term "shall" "does not impliedly limit government authority").[5] And, indeed, the legislative history supports this interpretation of the 1967 amendment's effect.[6] As the majority leader of the House explained to that body, the intention behind the amendments to the elections article of the Constitution was "to make our constitution less restrictive and permit the legislature to adopt … statutory acts." Pennsylvania

[5] The canon of *expressio unius* "is merely a rule of statutory construction and not a substantive rule of law"; that is, it is merely a presumption regarding legislative intent (or, as here, intended constitutional meaning), which should never be confused with legislative intent itself. 2A Sunderland Statutory Construction § 47:25. Because of the intervening changes in constitutional language, this Court has evidence of intended constitutional meaning that did not exist in *Lancaster City*. In sum, whatever the merits of *Lancaster City*'s application of the canon of *expressio unius*, that decision does not control this Court's interpretation of the 1968 Constitution.

[6] As discussed below, the Pennsylvania Supreme Court has been skeptical of using the remarks of individual legislators to interpret constitutional text ratified by the electorate as a whole. Respondents cite the legislative history of the 1967 amendment merely to show that it is consistent with the 1967 amendment's plain language—and to provide yet another piece of evidence demonstrating that the current Constitution does not "clearly, palpably, and plainly" prohibit the enactment of Act 77's mail-in voting procedures.

Legislative Journal, Session of 1967, Vol. 1, No. 1, at 54 (Jan. 3, 1967) (statement of Representative Donaldson). It is unsurprising, then, that around the same time the 1967 amendment was passed, the General Assembly expanded the scope of voters allowed to vote absentee well beyond the boundaries of the specific groups identified in the Constitution. *See* Resp. Br. 47.

These facts readily distinguish *Lancaster City*'s holding. At an absolute minimum, given these changes, Petitioners cannot show that Article VII, § 14 "clearly, palpably, and plainly" sets a ceiling on absentee voting.

5. Petitioners' Reliance on a Proposed Constitutional Amendment Is Misplaced

Petitioners try to make much of the fact that the Pennsylvania General Assembly began, but did not complete, the process of amending the Pennsylvania Constitution in S.B. 413 of 2019. For many reasons, their reliance on this proposed amendment is puzzling. First, on its face, the proposed amendment would not merely have clarified that the General Assembly *may* allow mail-in voting. That amendment would have *prohibited* the General Assembly from requiring *any* voter to vote in person at a polling place. *See* Pet'rs Appl. 6–7. (amendment would have provided that statutes prescribing the "manner" of voting "may not require a qualified elector to physically appear at a designated polling place on the day of the election"). Put differently, contrary to Petitioners'

assertion, Respondents' interpretation of the Pennsylvania Constitution in no way renders the content of the proposed constitutional amendment superfluous.[7]

Second, Petitioners erroneously rely on the statements of individual legislators regarding the need for the proposed amendment. Those statements obviously do not bind the courts, who have the ultimate authority to construe the Constitution. Indeed, the Pennsylvania Supreme Court has expressly warned against relying on the statements of individual legislators as a guide to interpreting even ratified constitutional text:

> Such statements must be understood to be merely the personal opinion of individual members of the [Constitutional] Convention. What the Convention adopted, and what the electors of the commonwealth accepted, is the Constitution as it is written…. [Those statements] … show[] the views of individual members, and … indicat[e] the reasons for their votes; but they give us no light as to the views of the large majority who did not talk; much less of the mass of our fellow citizens whose votes at the polls gave that instrument the force of fundamental law. We think it safer to construe the constitution from what appears upon its face.

Commonwealth ex rel. Margiotti v. Lawrence, 193 A. 46, 48–49 (Pa. 1937) (internal quotation marks omitted). Still less, then, can Petitioners attempt to construe a charter ratified in 1968 based on the statements of individual legislators in 2019.

[7] The same is true, of course, of the post-1968 amendments to Article VII, § 14, on which Petitioners also rely. None of those amendments was superfluous because each of them *required* the General Assembly to allow absentee voting for the classes of persons at issue, giving those persons constitutional rights.

Indeed, if the events surrounding the proposed amendment have any relevance to the present proceeding, it is to show that the General Assembly did *not* believe that Act 77 violated the Constitution of 1968. After all, both houses of the Republican-controlled General Assembly enacted Act 77 with supermajorities of nearly 70% (a percentage that included 11 of the Petitioners themselves[8]), and the bill was signed into law by the Democratic Governor. *See Clifton v. Allegheny Cnty.*, 969 A.2d 1197, 1211 (Pa. 2009) (noting "the presumption that, when enacting any statute, the Legislature does not intend to violate the Constitutions of the United States or of this Commonwealth"). Accordingly, to the extent the General Assembly's interpretation of the Constitution has a role to play here, it necessarily militates in favor of sustaining the legislative enactment.

6. Petitioners Effectively Concede That a Vast Number of Applications of Act 77 Are Constitutional, Defeating Petitioners' Facial Challenge

Finally, Petitioners fail to address that facial relief here is unavailable under any circumstances because even if *Lancaster City*'s holding were binding, it would not invalidate voting by mail (or in person outside of polling places) from *within* one's election district—including from one's home. *See* Resp. Br. 53–54.

At most, Petitioners suggest that *Lancaster City*'s holding had the effect of simply ratifying *Chase*. But as Respondents previously demonstrated, that was

[8] *See* Petition ¶¶ 3–16 (filed Aug. 31, 2021).

not—and could not be—the case. First, insofar as *Chase* indicated that the Constitution of 1838 prohibited any form of voting by mail, that conclusion did not survive the intervening addition of the "methods" provision currently set forth in Article VII, § 4 of the 1968 Constitution. Second, the holding of *Lancaster City* could not have addressed voting methods *within* election districts because the statute at issue in that case authorized mail-in voting only for voters *outside* of their counties of residence. *See Lancaster City*, 126 A. at 200. Third, the Court's own statement of its holding makes clear that it did not cover intra-election district voting. *See id.* at 201 (setting forth the "proposition controlling this case"). A facial challenge can succeed "only where there are no circumstances under which the statute would be valid." *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019).

7. Petitioners Cannot Recast Their Challenge Under the Pennsylvania Constitution as a Claim Under Federal Law

Respondents have already explained why Counts II and III of the Petition, which attempt to turn Petitioners' challenge under the Pennsylvania Constitution into federal constitutional claims, fail as a matter of law—and, indeed, fail irrespective of the merits of the state-law claim. Resp. Br. 53–54. Petitioners do not address any of the directly-on-point authorities cited by Respondents.

The cases Petitioners do cite are inapposite. With respect to Count II, Petitioners fail to identify any authority supporting the proposition that the

Elections Clause—or any of the other federal constitutional provisions invoked by Petitioner—converts an alleged violation of a state constitution into a federal claim. To be sure, there are numerous cases standing for the proposition that "state legislatures are constrained by restrictions imposed by state constitutions on their exercise of the lawmaking power, even when enacting election laws pursuant to U.S. Constitutional authority." Pet'rs. Appl.. Br. 30 (discussing *Smiley v. Holm*, 285 U.S. 355, 369 (1932)); *accord McPherson v. Blacker*, 146 U.S. 1, 25 (1892); *State of Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015).[9] But it is quite another thing to say that every violation of state election law, is, therefore, a violation of the federal constitution. Such a rule would have sweeping implications federalizing a wide swath of state-law issues. Indeed, there is no reason why, by its logic, such a rule would be limited to alleged violations of a state's constitution. If, as Petitioners argue, alleged violations of state laws

[9] The remaining case Petitioners cite, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000), also provides no support for Petitioners' position. That case raised—but did not resolve—the question whether there may be certain situations in which a state constitution's power to "circumscribe the legislative power" is *limited* by the Elections Clause (Article II, § 1, cl. 2) of the U.S. Constitution. *Id.* at 77; *see also* 78 (vacating and remanding the Florida Supreme Court's decision ordering a manual recount with respect to the 2000 presidential election because it was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2," and "unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5"). *Bush* does nothing to support Petitioners' theory that a legislative enactment's violation of its state constitution is, *ipso facto*, a violation of the federal constitution.

applicable to federal elections are actionable federal constitutional claims, then any state official could be sued under 42 U.S.C. § 1983 for allegedly violating virtually any state-law statute or administrative regulation touching elections. That is not the law, and Petitioners cite no case holding otherwise.

Petitioners also fail to marshal any relevant authority in support of Count III, which invokes the Fourteenth Amendment to the U.S. Constitution. As Respondents have already demonstrated, *Reynolds v. Sims*, 377 U.S. 533 (1964), is a malapportionment case and bears no resemblance to the type of so-called "vote dilution" Petitioners allege in this case. Resp. Br. 14–16, 54. Petitioners in this case allege neither malapportionment nor fraud. Contrary to their conclusory assertion, a mail-in voting method equally available to all qualified voters does not "disenfranchise" anyone. *See* Pet'rs Appl. 31-32. Petitioners fail to state any federal constitutional claim.

III. CONCLUSION

For the foregoing reasons, and those set forth in their earlier Memorandum, Respondents respectfully request that Petitioners' Application for Summary Relief be denied, that Respondents' Application for Summary Relief be granted, and that Petitioners' Petition for Review be dismissed with prejudice.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

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By: */s/ Michele D. Hangley*

Michele D. Hangley (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
John Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300

OFFICE OF ATTORNEY GENERAL

Stephen Moniak (I.D. No. 80035)
Karen M. Romano (I.D. No. 88848)
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-2717

PENNSYLVANIA GOVERNOR'S OFFICE OF GENERAL COUNSEL

Kenneth L. Joel (I.D. No. 72370)
333 Market Street, 17th Floor
Harrisburg, PA 17101
(717) 787-9348

PENNSYLVANIA DEPARTMENT OF STATE

Kathleen M. Kotula (I.D. No. 318947)
306 North Office Bldg., 401 North Street
Harrisburg, PA 17120-0500
(717) 783-1657

TUCKER LAW GROUP, LLC

Joe H. Tucker, Jr. (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
Jessica A. Rickabaugh (I.D. No. 200189)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondents

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 14, 2021

/s/ Michele D. Hangley
Michele D. Hangley