

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG MCLINKO,

Petitioner,

v.

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

Respondents,

TIMOTHY BONNER et al.,

Petitioners,

v.

DEGRAFFENREID et al.

Respondents,

and

DEMOCRATIC NATIONAL
COMMITTEE, and THE
PENNSYLVANIA DEMOCRATIC
PARTY

Proposed Intervenors-
Respondents.

Nos. 244 MD 2021

293 MD 2021

**PROPOSED INTERVENORS-RESPONDENTS'
APPLICATION TO INTERVENE**

Proposed Intervenors-Respondents, the Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”), respectfully file this

application to intervene in the consolidated litigation, and to participate fully therein as intervenors-respondents. If permitted to intervene, the Applicants request to file the attached Preliminary Objections and Application for Summary Relief.

I. INTRODUCTION

Petitioner in this case challenges the constitutionality of Act 77, the Pennsylvania statute allowing any eligible voter in Commonwealth to cast his or her ballot by mail. The relief Petitioner requests would significantly impede the ability of a large number of Democratic members and supporters to exercise their fundamental right to vote and impair the electoral prospects of the Applicants' candidates.

No party to this proceeding adequately represents the Applicants' interests. Respondents have the duty to enforce Pennsylvania law, which is distinct from the Applicants' particularized interest in having their candidates assume office and its voters' ballots counted. The Applicants' unique interests make intervention not just permissible, but in fact mandatory. *See Larock v. Sugarloaf Twp. Zoning Hr'g Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

II. LEGAL STANDARD

Applications to intervene in original jurisdiction matters before the Commonwealth Court are governed by Pennsylvania Rule of Appellate Procedure 1531(b), which mirrors the standards set forth in Pennsylvania Rules of Civil Procedure 2326-2350. Rule 2327 denotes four categories of persons or entities that may intervene “[a]t any time during the pendency of an action,” including any person or entity that has “any legally enforceable interest” that may be affected by a judgment in the action. Pa. R.C.P. 2327(4). Rule 2329 provides certain grounds for refusal to permit the intervention of a person who fits within the parameters of Rule 2327, including that such person’s interests are “already adequately represented.” Pa. R.C.P. 2329(2). “Considering Rules 2327 and 2329 together, the effect of Rule 2329 is that if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present.” *Larock*, 740 A.2d at 313. And even if a ground for refusal under Rule 2329 is present, the Court still possesses discretion to permit intervention. *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Servs.*, 225 A.3d 902, 908 (Pa. Commw. Ct. 1999) (citing *Larock*, 740 A.2d at 313).

III. ARGUMENT

The DNC is a national committee (as that term is defined under 52 U.S.C. §30101) dedicated to electing local, state, and national candidates of the Democratic Party to public office throughout the United States, including in Pennsylvania. The PDP is the DNC's coordinate party within the Commonwealth and is the largest political party by registration in Pennsylvania. As of October 4, 2021, 4,024,658 registered voters in Pennsylvania are members of the PDP. *See Voting & Election Statistics, PENNSYLVANIA DEPARTMENT OF STATE, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Pages/VotingElectionStatistics.aspx> (visited October 8, 2021).* The PDP is a “major political party” as defined in the Pennsylvania Election Code. 25 P.S. §§ 2601. In each general, midterm, and municipal election, the PDP regularly nominates individuals for Pennsylvania's federal, state, and local offices. The DNC's membership and constituents in the Commonwealth include past and future individuals qualified to vote in the Commonwealth, and past and future candidates for offices across the Commonwealth. The DNC and PDP have dedicated significant resources to encourage its supporters and constituents to vote, including by mail. These efforts have been successful; 2020 election turnout in the Commonwealth was the highest in decades, with more than 2.6 million voters casting a ballot by mail.

The Applicants thus have particularized interests in defending the constitutionality of Act 77.

A. The Applicants have a legally enforceable, particularized interest in this matter.

The Applicants’ institutional interests and the rights of their members stand to be adversely affected should petitioner’s requested relief be granted. Petitioner McLinko requests a declaration that Act 77 violates the Pennsylvania Constitution. McLinko Amended Pet. at 14-15. Many Democrats have cast mail ballots based on Act 77 in the past and would do so again in the future, and many other Democrats running for office in the Commonwealth would receive votes cast by mail. Petitioner’s legal challenge thus threatens the ability of Democrats to vote as well as the electoral prospects of Democratic candidates up and down the ballot—all of which implicates the Applicants’ legally enforceable interests. Under similar circumstances, courts in the Commonwealth and around the country have routinely granted intervention to political party committees such as the Applicants—particularly in cases where plaintiffs seek to impose restrictions on voting access in ways that undermine the ability of one party’s voters to vote or harm the electoral prospects of the party’s candidates.¹ The Applicants were each also granted

¹ See *Paher v. Cegavske*, 2020 WL 2042365, at *4 (D. Nev. Apr. 28, 2020) (granting the DNC intervention in an election-law case brought by a conservative interest group); *Donald J. Trump for President, Inc. v. Murphy*, 2020 WL 5229209, at *1 (D.N.J. Sept. 1, 2020) (granting the Democratic Congressional Campaign

intervention in several election-related cases in Pennsylvania during the last election cycle.²

Indeed, given petitioner's request for declaratory relief and the extent to which the Applicants' interests are implicated, their participation may well be required under Pennsylvania's Declaratory Judgments Act. That law provides that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any

Committee ("DCCC") intervention in a lawsuit by a Republican candidate and party entities); Minute Entry (ECF No. 37), *Cook Cty. Republican Party v. Pritzker*, No. 20-cv-4676 (N.D. Ill. Aug. 28, 2020) (granting the DCCC intervention in a lawsuit by a Republican party entity); *Issa v. Newsom*, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (granting the DCCC and the California Democratic Party intervention in a lawsuit by a Republican congressional candidate); Order (ECF No. 35), *Donald J. Trump for President v. Bullock*, No. 6:20-cv-66 (D. Mont. Sept. 8, 2020) (granting the DCCC, the Democratic Senatorial Campaign Committee, and the Montana Democratic Party intervention in a lawsuit brought by four Republican party entities); *see also* Memorandum Order (ECF No. 309), *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-00966-NR (W.D. Pa. Aug. 3, 2020) (granting a non-profit organization standing to represent its members in a lawsuit by Republican presidential and congressional candidates).

² *See In re Canvassing Observation*, No. 30 EAP 2020 (Pa. Nov. 17, 2020); *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, Nos. 31, 32, 33, 34, 35 EAP 2020, 29 WAP 2020 (Pa. Nov. 23, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, ECF No. 72 (W.D. Pa. Nov. 12, 2020); Oral Order, *Donald J. Trump for President, Inc. v. Montgomery Cty. Bd. of Elections*, No. 2020-18680 (Pa. Com. Pl. Nov. 10, 2020); Oral Order, *Donald J. Trump for President, Inc. v. Phila. Cty. Bd. of Elections*, Nos. 201100874, 201100875, 201100876, 201100877, & 201100878 (Pa. Com. Pl. Nov. 13, 2020); Oral Order, *Donald J. Trump for President, Inc. v. Bucks Cty. Bd. of Elections*, No. 2020-05786 (Pa. Com. Pl. Nov. 17, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-00966, ECF 309 (W.D. Pa. Aug. 3, 2020); *Libertarian Party of Pa. v. Boockvar*, 5:20-cv-2299, ECF 49 (E.D. Pa. July 8, 2020).

interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” 42 Pa. C.S. §7540(a). This provision “is mandatory and, prior to the enactment of the Declaratory Judgments Act, our Supreme Court had held that a declaratory judgment action will not lie unless all interested parties who could be affected by the judgment are joined.” *Allegheny Cty. v. Commonwealth*, 453 A.2d 1085, 1087 (Pa. Commw. Ct. 1983); *accord Stilp v. Commonwealth*, 910 A.2d 775, 785 (Pa. Commw. Ct. 2006). The Applicants, and their candidate and voter members assuredly have interests that would be affected by the proposed declaratory relief; having declared those interests, their participation in this matter is required before any declaratory judgment can issue. The Applicants are therefore entitled to mandatory intervention.

B. Respondents do not adequately represent the Applicants’ interests.

Although the Applicants share respondents’ interest in defending the validity of Act 77, the Applicants’ interests diverge somewhat from those of respondents. Respondents’ duties are solely defined by Pennsylvania law, and they are bound to represent all Pennsylvanians. Respondents have no interest in which candidates win an election; and they likewise do not have millions of members who have voted by mail and desire to do so in the future. By contrast, the Applicants have a strong interest in ensuring that their candidates prevail and that their members have the fullest opportunity to vote afforded them by law. Respondents therefore do not

adequately represent the Applicants’ interests. *See Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (“[W]hen the proposed intervenors’ concern is not a matter of ‘sovereign interest,’ there is no reason to think the government will represent it[.]” (quotation marks omitted)); *Issa*, 2020 WL 3074351 at *3 (“While Defendants’ arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures.”).

This distinction—between the Applicants’ interest ensuring the broadest access for their voters and in the election of their candidates, on the one hand, and respondents’ interest in representing all Pennsylvanians and discharging their statutory duties, on the other hand—is critical here because it also differentiates the Applicants’ interests from the citizenry in general. *See City of Phila. v. Commonwealth*, 575 Pa. 542, 560-561 (2003) (“Petitioners’ complaints stem from aspects of the bill under review that have particular application to Philadelphia. Therefore, Petitioners’ interest in the outcome of the litigation ... surpasses that of Pennsylvania citizens generally in procuring obedience to the law.”).

Pennsylvania courts have previously granted intervention (and reversed denials of intervention) where intervenors were aligned with the government's litigation position but possessed unique and personal interests not adequately addressed by government respondents. *See D.G.A. v. Dep't of Human Servs.*, 2020 WL 283885, at *7 (Pa. Commw. Ct. Jan. 21, 2020) (citing *Benjamin ex rel. Yock v. Dep't of Pub. Welfare*, 701 F.3d 938 (3d Cir. 2012)); *Larock*, 740 A.2d at 314 (reversing the denial of intervention by town residents opposed to a change in commercial licensing to allow the operation of rock quarry, which the government board had also denied, on the ground that the residents' opposition to the quarry and the government's interests in protecting its authority were not the same). Third Circuit precedent applying federal law is to the same effect. The Court explained in one case, for example, that "when an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden [of establishing inadequacy of representation] is comparatively light." *Kleissler*, 157 F.3d at 972; *accord Yock*, 701 F.3d at 958.

C. The Applicants' interests in this consolidated matter are broader than the *Bonner* Petitioners' asserted interests.

The Applicants' interests here exceed in scope those asserted by the *Bonner* Petitioners. The *Bonner* Petitioners are Republican Party candidates and officeholders. *See generally* Bonner Pet. Applicants here have their associational

interests with candidates, officeholders, and millions of registered Democratic voters. To the extent the *Bonner* Petitioners have standing to adjudicate Act 77's constitutionality, so too do Applicants.

D. Intervention is uniquely appropriate in these circumstances.

Finally, even if the Court were to find that one of the bases in Rule 2329 for refusing intervention is met, “the court is given the discretion to allow or to refuse intervention [] where the petitioner falls within one of the classes enumerated in Rule 2327.” *Allegheny Reprod. Health Ctr.*, 225 A.3d at 908. This dispute presents a compelling case for allowing intervention. The widespread use of mail ballots in Pennsylvania during last year’s election cycle demonstrates that millions of residents of the Commonwealth, many of whom are registered Democrats, prefer to vote by mail—and thus also demonstrates that invalidating Act 77 would impose an increased burden on the right to vote of an enormous number of Pennsylvania Democrats. Further, as of October 8, 2021, 71% of the 856,206 mail-in ballot requests for the 2021 General Election came from registered Democrats. *See Mail Ballot Request Application Statistics*, PENNSYLVANIA DEPT. OF STATE, *available at* <https://data.pa.gov/stories/s/czx3-en55> (visited Oct. 8, 2021). Such a burden on the most fundamental of all rights should of course not be imposed lightly. Permitting the Applicants to intervene would help ensure that this Court’s decision is made with the benefit of a full airing of views.

E. The Applicants' intervention will not affect the schedule set forth in this consolidated matter.

The Applicants are aware of this Court's September 30, 2021 Scheduling Order in the consolidated matter. The Applicants are prepared to present their Brief in Support of their Preliminary Objections and Application for Summary Relief, concurrently with the brief due from the Respondents in the McLinko Petition, i.e., on or before October 15, 2021, and in that filing present all of the Applicants' arguments relevant to this consolidated litigation. Accordingly, no alterations would need to be made to the Scheduling Order by virtue of the Applicants' intervention.

IV. CONCLUSION

The application of the DNC and the PDP to intervene should be granted.

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**Applications for admission pro hac
vice forthcoming*

October 8, 2021

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Clifford B. Levine

CLIFFORD B. LEVINE

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served upon all counsel of record on October 08, 2021, by this Court's electronic filing system.

/s/ Clifford B. Levine
CLIFFORD B. LEVINE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG MCLINKO,

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DEMOCRATIC NATIONAL
COMMITTEE, and THE
PENNSYLVANIA DEMOCRATIC
PARTY

Proposed Intervenors-
Respondents.

Nos. 244 MD 2021

293 MD 2021

**[PROPOSED] ORDER GRANTING THE APPLICATION TO INTERVENE
OF THE DEMOCRATIC NATIONAL COMMITTEE AND THE
PENNSYLVANIA DEMOCRATIC PARTY**

AND NOW, this ___ day of _____, 2021, and upon consideration of the application to intervene filed by the Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”), it is hereby ORDERED that the application is GRANTED. The Court DIRECTS the Prothonotary to enter the DNC and the PDP on the docket in this matter as an intervenors-respondents, and to DOCKET their application and related materials.

BY THE COURT:

_____, J.

PROPOSED FILING

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG MCLINKO,

Petitioner,

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

Respondents,

TIMOTHY BONNER et al.,

Petitioners,

v.

VERONICA DEGRAFFENREID et al.

Respondents

And

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PENNSYLVANIA DEMOCRATIC PARTY

Proposed Intervenors-Respondents.

**Nos. 244 MD 2021
293 MD 2021**

**PROPOSED INTERVENORS-RESPONDENTS' PRELIMINARY
OBJECTIONS TO THE MCLINKO PETITIONER'S AMENDED
PETITION FOR REVIEW AND APPLICATION FOR SUMMARY RELIEF**

Proposed intervenors-respondents DNC Services Corp. / Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”) present the following preliminary objections to petitioner Doug McLinko’s amended petition in

case number 244 MD 2021. DNC and PDP relatedly request that this Court grant summary relief dismissing the petition because, as the preliminary objections below show, respondents have a “clear” right to dismissal. *See* Pa.R.A.P 1532(b).¹

INTRODUCTION

Act 77 is constitutional. The General Assembly has broad constitutional authority to enact any law not prohibited by the state or federal constitutions. Petitioner identifies nothing (in either constitution or elsewhere) that limits this sweeping authority in a way that barred the General Assembly from expanding access to the right to vote as Act 77 did. Instead, petitioner relies on two Pennsylvania Supreme Court decisions—one from 1862 and one from 1924—to argue that the term “offer to vote” in Article VII, section 1 of the state constitution requires a voter to appear in person—and thus necessarily prohibits broad vote-by-mail measures like Act 77. But those cases are distinguishable for the reasons stated below, *see* ¶¶29-31, and at paragraphs 96-110 of respondents’ preliminary objections to the initial petition. They provide no support for petitioner’s claim.²

¹ As cases 244 MD 2021 and 293 MD 2021 have been consolidated, the DNC and PDP request that these preliminary objections also apply to the operative petition in case 293 MD 2021. In addition, the DNC and PDP incorporate by reference the preliminary objections filed by respondents in this case on August 30, 2021, and in case number 293 MD 2021 on September 30, 2021. The DNC and PDP reserve the right to incorporate respondents’ preliminary objections to the amended petition.

² The DNC and PDP preserve for further review, if necessary, the argument that the two decisions are wrong and should be overruled.

Petitioner's challenge is also marred by several significant procedural defects that independently require dismissal. First, equitable principles bar petitioner—who has apparently administered *three* elections under Act 77—from belatedly challenging a law that has allowed millions of Pennsylvanians to vote by mail and on which Respondents and the DNC and PDP have relied in allocating their resources. The petition should thus be dismissed under laches. Second, petitioner cannot demonstrate any substantial, immediate, and direct harm that he in particular will suffer from the challenged law's operation. Accordingly, the petition should be dismissed for lack of standing.

SUMMARY OF ARGUMENT

1. Petitioner's claims are barred by laches. The General Assembly enacted Act 77 on October 31, 2019 (while also deferring the law's implementation to elections held after April 28, 2020). Yet petitioner failed to file his petition until a few months ago, after three elections had occurred under the law's provisions. And his belated request to invalidate the law and prohibit future no-excuse mail voting would prejudice not only respondents and the DNC and PDP—all three of which have invested substantial time and money in establishing and furthering the mail-voting system—but also the millions of Pennsylvanians who have come to rely on the availability of mail-voting. Given petitioner's unexplained delay and the resulting prejudice, laches requires denying petitioner's requested relief and

dismissing this action, just as the Pennsylvania Supreme Court dismissed a comparable suit that was filed last year. *See Kelly v. Commonwealth*, 240 A.3d 1255, 1256-1257 (Pa. 2020) (per curiam), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021).

2. Petitioner lacks standing to bring this action because he has not alleged any sufficiently concrete and particularized injury. While petitioner claims that his position as an elected official provides him with special status to challenge Act 77 because he may have to execute the law's requirements in a future election, he cites no case that adopts that novel standing theory. And although petitioner also invokes Pennsylvania's taxpayer-standing doctrine, he does not meet its stringent requirements—both because others (like petitioners in the companion *Bonner* litigation) have also challenged the Act's constitutionality and because there are still others who would have a better claim to standing.

3. Even taking all of petitioner's factual allegations as true, Act 77 is constitutional. The General Assembly has the authority to pass any law not clearly prohibited by another provision of the Pennsylvania Constitution or by the U.S. Constitution; particularly where, as here, it has acted pursuant to an express grant of authority. Petitioner's only claim that the General Assembly has exceeded its authority rests on a stark misreading of Article VII, section 1 and Article VII, section 14 of the Pennsylvania Constitution. Even if petitioner's reading were plausible, it

would not be sufficient, as any doubts are resolved in favor of the General Assembly's legislative authority.

BACKGROUND

4. Act 77 was signed into law on October 31, 2019. Am. Pet. ¶7. It allows Pennsylvanians to “vote by mail for any reason or no reason whatsoever (no excuse).” *Id.* ¶10. It also made “other sweeping changes to the Pennsylvania Election Code,” *id.* ¶7, including (1) the creation of a 50-day mail-voting period and permanent mail and absentee ballot lists, (2) the addition of fifteen days for voter registration, (3) the extension of the deadline for submitting mail and absentee ballots until 8:00 pm on election day, and (4) the elimination of straight-party ticket voting. *See* Press Release, Tom Wolf, Gov., Pa., Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting (Oct. 31, 2019), <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting>; Jonathan Lai, *Pa. 's election system is on the verge of the largest changes in decades — in time for the 2020 election*, Phila. Inquirer (Oct. 23, 2019), *available at* <https://www.inquirer.com/politics/pennsylvania/pa-election-reform-deal-20191023.html>.

5. The June 2020 primary elections, November 2020 general elections, and May 2021 primary elections were conducted under Act 77. Over 6.8 million Pennsylvanians voted in the November 2020 general election, including roughly 2.7

million using mail ballots. *See* Pa. Dep’t of State, *Official Returns* (Nov. 3, 2020), <https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G&IsActive=0/> (last visited Oct. 8, 2021).

6. The Commonwealth-wide municipal and judicial elections are scheduled for November 2, 2021. In preparation for that and future elections, the Pennsylvania Department of State adheres to Act 77’s mandate that “any qualified voter may apply for a mail-in ballot.” Pa. Dep’t of State, *Voting by mail-in or absentee ballot is safe, secure, and easy* (Nov. 3, 2020), <https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx> (last visited Oct. 8, 2021).

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

8. Petitioner filed his initial petition for review in this Court on July 26, 2021, seeking a judgment declaring that all of Act 77—together with the broad swath of the Pennsylvania Election Code that was added by Act 77—is unconstitutional. Petitioner filed the amended petition on September 29, 2021, seeking the same relief. Am. Pet. ¶¶56-58.

9. Petitioner names as respondents the Pennsylvania Department of State and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth.

10. Petitioner claims Act 77 is unconstitutional because it was enacted without following the procedures for an amendment to the state constitution, which he alleges is required to provide for no-excuse mail voting. *See* Am. Pet. ¶¶37-39.

11. Petitioner claims he is injured by Act 77's alleged unconstitutionality because (1) he is an elected official who will be "called upon to make quasi-judicial judgments" on Act 77 and (2) he is a Pennsylvania taxpayer. *See* Am. Pet. ¶¶42-55.

PRELIMINARY OBJECTION I
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (LACHES)

12. The DNC and PDP incorporate the foregoing paragraphs as if set forth at length.

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

14. First, petitioner could have brought this action as soon as Act 77 was signed into law on October 31, 2019—almost two years ago. Much like the litigants who sought to challenge Act 77’s constitutionality weeks after the November 2020 election, petitioner has instead “delayed this suit until [multiple] elections were conducted” and as a result played “a dangerous game at the expense of every Pennsylvania voter.” *Kelly v. Commonwealth*, 240 A.3d 1255, 1261 (Pa. 2020) (Wecht, J., concurring). This is so even though petitioner apparently has overseen the implementation of Act 77 in three elections during that time. *See* Am. Pet. ¶5; *supra* ¶7. Notably, however, petitioner provides no explanation for his extreme delay.³

15. Second, respondents and proposed intervenors (as well as voters) have been prejudiced by petitioner’s delay. “Prejudice may be found where there has been some change in the condition or relations of the parties which occurs during

³ Petitioner’s failure to file this suit sooner is particularly inexcusable given that section 13(3) of Act 77 requires that constitutional challenges to the no-excuse vote-by-mail provision be filed within 180 days of its enactment. *See Kelly*, 240 A.3d at 1258 (Wecht, J., concurring) (noting that had Act 77 been challenged within the 180-day limit, any constitutional questions could have been resolved before the June 2020 primaries). Whether or not the 180-day deadline would bar the petition as an independent matter, it is highly relevant to equitable inquiry under laches. Section 13(3) put potential challengers on notice of the strong public-policy interests in resolving any disputes over the constitutionality of the Commonwealth’s voting system not only before millions of Pennsylvania residents came to rely on it, but also before challenges to the law could cause substantial confusion and disruption with any soon-to-be-held election.

the period the complainant failed to act.” *Stilp*, 553 Pa. at 135. Here, the change has been considerable, involving the implementation of a statewide mail-voting program used by millions of voters. Respondents have expended substantial resources and investment in establishing an election administration system to implement Act 77, most if not all of which will have been wasted if petitioner prevails. *See* Mem in Opp’n to Pet’r’s Appl. for Summ. Relief 6-7 & n.1. The DNC and PDP have similarly invested time and money educating candidates and voters in Pennsylvania about this election regime; those resources would likewise have been wasted if Act were invalidated. Moreover, more than 1.38 million Pennsylvania voters (including hundreds of thousands of members of the Pennsylvania Democratic Party) have already requested to be placed on the permanent mail-in ballot list, *id.* 7—likely because they concluded that voting by mail is the safest or simplest option for them to exercise the franchise. All of them would be unexpectedly removed from that list if Act 77 were overturned, potentially creating untold administrative burdens and confusion shortly before an election. *See id.*

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

PRELIMINARY OBJECTION II
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (LACK OF STANDING)

17. The DNC and PDP incorporate the foregoing paragraphs as if set forth at length.

18. To have standing to sue, a plaintiff must have an interest in the litigation that is “substantial, direct, and immediate.” *Markham v. Wolf*, 635 Pa. 288, 298 (2016). “The keystone to standing in these terms is that the person must be negatively impacted in some real and direct fashion” in a manner that “surpass[es] the common interest of all citizens in procuring obedience to the law.” *Id.* (internal quotation marks omitted). The amended petition identifies two theories of standing. Neither has merit.

19. First, petitioner alleges that he has standing because he will be “called upon to make quasi-judicial judgments on a statute [he] perceive[s] as unconstitutional.” Am. Pet. ¶43. But public officials generally cannot demonstrate a “substantial interest” in challenging a law simply by asserting that their duties are unlawful. For example, in *Troutman v. Court of Common Pleas (In re Administrative Order No. 1-MD-2003)*, 594 Pa. 346 (2007), the Pennsylvania Supreme Court held that a court clerk did not have standing to challenge an administrative order requiring him to expunge certain public records, even though he believed that the order violated Pennsylvania law, *id.* at 361. The only case

petitioner cites to support this standing theory (*Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012)) involved elected officials who “were also township landowners and residents,” *Friends of Lackawanna v. Dunmore Borough Zoning Hearing Bd.*, 186 A.3d 525, 533 (Pa. Commw. Ct. 2018) (citing *Robinson*). It was the latter status that created the requisite substantial, direct, and immediate interest in “a state statute allowing oil and gas operations” in their area. *Id.*; *see also Robinson Twp. v. Commonwealth*, 623 Pa. 564, 592 (2013) (relying on the fact that officials “live[d] in a residential district in which, contrary to the prior legal regime, Act 13 now permits oil and gas operations”).

20. Second, Petitioner asserts that he has standing as a taxpayer. Am. Pet. ¶50. But that rule applies only if “the governmental action would otherwise go unchallenged” and “no other persons are better situated to assert the claim.” *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 207 (2005). Petitioner (who bears the burden to establish standing, *Markham*, 635 Pa. at 297) has made neither showing. While he makes the bare allegation that “if McLinko does not challenge the Act, it would likely go unchallenged,” Am. Pet. ¶55, that allegation is refuted by the fact that the other petitioners in this consolidated proceeding—led by Timothy Bonner—have in fact already filed a similar challenge to Act 77. *See* Pet. for Review at 1, No. 244 MD 2021. Moreover, although petitioner asserts that no other person is “better situated to challenge the

constitutionality of Act 77” given his status as an elected official, Am. Pet. ¶51, other Pennsylvanians could well have stronger claims, such as a candidate for political office who can make particularized showing that Act 77 injures their “ability to fight the next election,” *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013).

21. Because petitioner has not adequately alleged that he has suffered concrete and particularized injury, the petition should be dismissed for lack of standing.

**PRELIMINARY OBJECTION III
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM)**

22. The DNC and PDP incorporate the foregoing paragraphs as if set forth at length.

23. The amended petition should be dismissed for failure to state a claim because “the law says with certainty,” *N. Forests II, Inc. v. Keta Realty Co.*, 130 A.3d 19, 35 (Pa. Super. Ct. 2015), that Act 77 does not violate the Pennsylvania or U.S. Constitution.

24. The General Assembly’s power to legislate is vast. Article II, section 1 of Pennsylvania’s Constitution gives all “[t]he legislative power of this Commonwealth” to the General Assembly, thereby conferring the authority to legislate on any matter not prohibited by the Pennsylvania or federal constitutions. In other words, all “powers not expressly withheld from the General Assembly

inhere in it,” *Stilp v. Commonwealth*, 974 A.2d 491, 494-495 (Pa. 2006), and “a statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution,” *Caba v. Weaknecht*, 64 A.3d 39, 49 (Pa. Commw. Ct. 2013); accord *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 173 (1853) (“To make it void, [an Act of the legislature] must be clearly not an exercise of legislative authority, or else be forbidden so plainly as to leave the case free from all doubt.”). Accordingly, “[t]he party who wishes [a court] to pronounce a law unconstitutional, takes upon himself the burden of proving, beyond all doubt, that it is so.... Nothing will [void a statute] but a *direct* collision between its provisions and those of the federal or state constitution.” *Erie & N.-E., R.R. Co. v. Casey*, 26 Pa. 287, 300-301 (1856).

25. Petitioner (rightly) does not argue that Act 77 violates the federal constitution. He does contend that the Act violates two provisions of the Pennsylvania Constitution, but his arguments cannot be reconciled with the plain language of those provisions.

26. Petitioner primarily argues that Article VII, section 1 mandates in-person voting. *E.g.*, Am. Pet. ¶¶12-13. In reality, that provision merely states that a qualified elector “shall have resided in the election district where he or she shall offer to vote.” Pa. Const. art. VII, §1(3). A mail-in voter “offer[s] to vote” in their

district just as an in-person voter does. The only difference is that the former's vote is delivered to local elections officials by mail or hand and the latter's by ballot box.

27. Petitioner's argument also cannot be squared with the broader context of Article VII. The "offer to vote" language is from a section entitled "Qualifications of electors" and hence the language appears alongside other basic requirements to exercise the franchise, like age, citizenship, and residency. *See* Pa. Const. art. VII, §1 (requiring that a voter be at least 21 years old, a U.S. citizen, and a Pennsylvania resident). Nothing in section 1 purports to require or prohibit the specific *manner* in which qualified electors cast their vote.

28. In fact, the "[m]ethod of [e]lections" is covered by a different section of Article VII, section 4, which expressly provides that "[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law; Provided, That secrecy in voting be preserved." It would not make sense for the constitutional drafters to bury an important rule regarding how a vote may be cast in the midst of a list of otherwise straightforward qualifications for voting. After all, legislators "do[] not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—[they] do[] not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Finally, interpreting Article VII, section 1 to provide that an individual can qualify as an elector only if she votes in person would be impossible to square with Article VII, section 14, which

expressly *requires* the General Assembly to allow “qualified electors” to vote absentee under some circumstances (e.g., due to a business obligation, an illness, a religious holiday). *See* Pa. Const. art. VII, §14(a).

29. Petitioner does not address these textual or structural defects in his reading of the Pennsylvania Constitution. Instead, he summarizes (without analysis) two Pennsylvania Supreme Court decisions—one from 1862 and the other from 1924. *See Chase v. Miller*, 41 Pa. 403, 419 (1862); *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 135 (1924). Neither case supports petitioner, however, because each interpreted earlier iterations of the Pennsylvania Constitution rather than the current version, which was ratified in 1968.

30. Most notably, neither *Chase* nor *Lancaster City* addressed the current version of Article VII, section 14, which (as noted) provides that the General Assembly “shall, by general law, provide a manner in which” various categories of Pennsylvanians can vote absentee. That broadly worded provision is “properly read as a minimal guarantee,” *Christensen v. Harris County*, 529 U.S. 576, 583 (2000), establishing the situations where the General Assembly *must* permit non-in-person voting. As such, the “proper *expressio unius* inference is that [the General Assembly] may not ... *deny*” absentee ballots to the categories of voters listed in Article VII, section 14. *Id.* (emphasis added). The General Assembly apparently recognized this, as it acted shortly after the 1968 constitution went into effect to

expand by statute the classes of individuals who can vote, *see* P.L. 1183, No. 375 (Dec. 11, 1968) (codified at 25 Pa. Stat. §2602(z.3)) (extending the right to vote absentee to, for example, spouses of electors who are permitted to vote absentee).⁴

31. At the time *Chase* was decided, by contrast, the constitution required all elections to be “by ballot,” which the court understood (in light of the prevailing practice at the time) to require each voter “to make manual delivery of the ballot” to their polling places. 41 Pa. at 419. And in *Lancaster City*, the relevant constitutional language used the word “may” and thus merely gave the General Assembly the option to permit one narrow class of voters—soldiers—to vote from outside their election districts, 281 Pa. at 136-138, as opposed to the current language of section

⁴ The General Assembly had good reason to be keenly aware of the metes and bounds of Article VII, section 14, as legislators were closely involved in the 1968 constitutional convention. Among other things, thirteen of its political leaders (including the lieutenant governor and the majority and minority leaders of both houses) were official delegates. *See Stander v. Kelley*, 433 Pa. 406, 419 n.8 (1969). The General Assembly also identified the specific issues the constitutional convention would consider, and it barred the convention from considering others. *See* John L. Gedid, *Pennsylvania Constitutional Conventions—Discarding the Myths*, 82 Pa. B. Ass’n Q. 151, 165-166, 170-171 (2011).

14, which uses the word “shall” and thus does not limit the General Assembly’s power to expand the classes of Pennsylvanians who can cast votes by mail.⁵

32. To the extent *Chase* and *Lancaster City* can be read to prohibit the General Assembly from enacting Act 77—pursuant to the current, 1968 version of the Pennsylvania Constitution—they cannot be squared with the current constitution’s text and structure for the reasons just given, and should be overruled by the Pennsylvania Supreme Court. *See Commonwealth v. Alexander*, 243 A.3d 177, 201 (Pa. 2020) (*stare decisis* may be overcome based on “the absence of reliance interests, and the importance of having constitutional questions decided [correctly]”).

WHEREFORE, the DNC and PDP respectfully request that this Court sustain its preliminary objections, grant summary relief, and dismiss the petition with prejudice.

⁵ Petitioner cites section 14 to support his claims, on the theory that the provision provides an *exclusive* list of the categories of voters who can choose not to submit their ballot in person. Am. Pet. ¶¶15-16. But as discussed, section 14 sets only a constitutional *floor* on who can vote by mail—nothing in that provision purports to proscribe the General Assembly from providing similar voting options to other classes of voters.

October 8, 2021

Respectfully submitted,

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**Motions for Admission Pro Hac Vice Forthcoming*

CERTIFICATE OF COMPLIANCE

This filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Clifford B. Levine

CLIFFORD B. LEVINE

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served upon all counsel of record on October 8, 2021 by this Court's electronic filing system.

/s/ Clifford B. Levine

CLIFFORD B. LEVINE