



**BRIEF OF *AMICI CURIAE*, JOANNA E. MCCLINTON, DEMOCRATIC  
LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES  
ON BEHALF OF THE HOUSE DEMOCRATIC CAUCUS AND  
JAY COSTA, DEMOCRATIC LEADER OF THE SENATE OF  
PENNSYLVANIA ON BEHALF OF THE SENATE DEMOCRATIC  
CAUCUS, IN SUPPORT OF THE APPELLANTS**

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House Democratic Leader, State Representative Joanna E. McClinton, on behalf of the Democratic Caucus of the Pennsylvania House of Representatives, and Senate Democratic Leader, State Senator Jay Costa, on behalf of the Democratic Caucus of the Senate of Pennsylvania (collectively, “*Amici Curiae*”), by and through their undersigned counsel, file this *Amici Curiae* brief in support of Appellants, the Department of State of the Commonwealth of Pennsylvania and the Acting Secretary of the Commonwealth of Pennsylvania.

**I. STATEMENT OF INTEREST OF AMICI CURIAE**

State Representative Joanna E. McClinton is a duly elected member of the Pennsylvania House of Representatives representing the 191st House District, including Delaware and Philadelphia counties. Representative McClinton serves as the Leader of the House Democratic Caucus. The House Democratic Caucus is currently comprised of 89 state representatives.

State Senator Jay Costa is a duly elected member of the Senate of Pennsylvania representing the 43rd Senate District, including Allegheny County. Senator Costa serves as the Leader of the Senate Democratic Caucus. The Senate Democratic Caucus is currently comprised of twenty state senators.

*Amici Curiae* have an interest in this case because the questions before this Court involve the legislative power of the General Assembly and the proper constitutional interpretation of a state statute expanding access to the right to vote

in Pennsylvania. *Amici curiae* are integral parts of the General Assembly. A political party caucus is one of two constituencies that comprise each the Senate and the House of Representatives, and, as the Pennsylvania Constitution explicitly recognizes, the two caucuses operate as part of each chamber through their leaders. *Precision Mktg., Inc. v. Com., Republican Caucus of the Sen. of Pa./AKA Sen of Pa. Republican Caucus*, 78 A.3d 667, 672 (Pa. Commw. Ct. 2013). The Senate and House Democratic Caucuses are integral parts of the Pennsylvania Senate and House of Representatives, and, therefore, the General Assembly. *See id.* at 675. *Amici Curiae* believe this Court would benefit from hearing the perspective of members of the Senate and House Democratic Caucuses germane to the underlying issues in this case.

*Amici Curiae* file this brief pursuant to Pa.R.A.P. 531(b)(1)(i). *Amici Curiae* disclose that no other person or entity other than the *Amici Curiae* or counsel paid, in whole or in part, for the preparation of this *Amici Curiae* brief or authored, in whole or in part, this *Amici Curiae* brief. *See* Pa.R.A.P. 531(b)(2).

## II. INTRODUCTION

Act 77 is constitutional, and Appellees' claims were filed neither within the time limit, nor in the Supreme Court of Pennsylvania, as set forth in Act 77. The Commonwealth Court erred in finding that Act 77 is unconstitutional, as the General Assembly has broad constitutional authority to enact laws which do not

violate either the Pennsylvania Constitution or the United States Constitution.

Neither constitution bars the General Assembly from instituting the expansion of methods of voting found in Act 77, and the Appellees' and the Commonwealth Court's reliance on two outdated decisions by this Court—one from 1862 and the other from 1924—controverts modern principles of constitutional interpretation and rests upon provisions of the Pennsylvania Constitution that have materially changed over the past century.

Further, Appellees' claims should be dismissed because they were brought outside the statutory time limit for challenges set forth in Act 77 and were not initiated in the Supreme Court of Pennsylvania as required by that statute. Thus, the Commonwealth Court erred in exercising jurisdiction over the Appellees' claims.

As Act 77 moved through the legislative process as Senate Bill 421, it had wide bipartisan support<sup>1</sup> and was championed by the Republican majorities in both

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<sup>1</sup> The House of Representatives Roll Call Vote on Final Passage of Senate Bill 421, Printer's Number 1330 was 138 Yeas and 61 Nays. Pennsylvania House of Representatives, *House Roll Calls*, PENNSYLVANIA GENERAL ASSEMBLY, [https://ldpc6.legis.state.pa.us/cfdocs/Legis/RC/Public/rc\\_view\\_action2.cfm?sess\\_yr=2019&sess\\_ind=0&rc\\_body=H&rc\\_nbr=781](https://ldpc6.legis.state.pa.us/cfdocs/Legis/RC/Public/rc_view_action2.cfm?sess_yr=2019&sess_ind=0&rc_body=H&rc_nbr=781). (last visited Feb. 14, 2022).

The Senate Roll Call Vote on Concurrence in the House Amendments of Senate Bill 421, Printer's Number 1330 was 35 Yeas and 14 Nays. Pennsylvania State Senate, *Senate Roll Calls*, PENNSYLVANIA GENERAL ASSEMBLY, [https://ldpc6.legis.state.pa.us/cfdocs/Legis/RC/Public/rc\\_view\\_action2.cfm?sess\\_yr=2019&sess\\_ind=0&rc\\_body=S&rc\\_nbr=311](https://ldpc6.legis.state.pa.us/cfdocs/Legis/RC/Public/rc_view_action2.cfm?sess_yr=2019&sess_ind=0&rc_body=S&rc_nbr=311) (last visited Feb. 14, 2022).



the House and Senate as “historic election reform.”<sup>2</sup> This is highlighted by the remarks of Republican State Representative Russ Diamond on final passage of the bill:

Mr. Speaker, often when I go around home and I talk to my constituents, one of their biggest complaints is "Why can't you people up in Harrisburg work together?" I want to hold up this bill, SB 421, as one of those bills where we actually did work together. It is my understanding that the Governor, the Senate, the House, Republicans and Democrats, were all in on the crafting of this bill. We have adopted both Republican and Democratic amendments to this bill. I think it is a perfect example of how we all worked together to make this bill great, to modernize our election systems and bring ourselves a little bit closer to being in the 21st century. So, Mr. Speaker, I wholeheartedly support this bill and ask my colleagues to vote "yes."

2019 Pa. Legislative Journal—House 1739 (Oct. 29, 2019) (remarks of State Representative Russ Diamond).

On October 31, 2019, the Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”) was signed into law amending the Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, No. 320, *as amended*, 25 P.S. § 2601 *et. seq.*, (“Election Code”).

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<sup>2</sup> The Republican Caucus of the Pennsylvania House of Representatives issued a press release calling the passage of SB 421 “Historic Election Reform.” With the then Majority Leader of the Pennsylvania House of Representatives and current House Speaker quoted as saying: “This bill was not written to benefit one party or the other, or any one candidate or single election. It was developed over a multi-year period, with input from people of different backgrounds and regions of Pennsylvania. It serves to preserve the integrity of every election and lift the voice of every voter in the Commonwealth.” Pennsylvania House Republican Caucus, *Historic Election Reform*, PA HOUSE GOP, [www.pahousegop.com/electionreform](http://www.pahousegop.com/electionreform) (last visited Feb. 14, 2022).

Among other changes made to the Election Code, including the elimination of straight-ticket voting and various changes to registration and ballot deadlines, Act 77 permits no excuse mail-in voting for qualified electors. Specifically, Act 77 provides that “[a] qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article.” 25 P.S. § 3150.11(a). The term “qualified mail-in elector” has the same meaning as the term “qualified elector,” *id.* § 3150.11(b), which is defined as “any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth,” *id.* § 2602(t).

In addition, Act 77 contained a provision requiring all constitutional challenges be brought within 180 days of the effective date of the statute. Act 77, § 13(3). The statutory 180-day period for challenges to the law expired on April 28, 2020. The Commonwealth and counties throughout the Commonwealth have spent significant time, money and resources implementing and educating voters about the changes made to the Election Code by Act 77. *See Marks Aff.* ¶¶ 12-14, 18-19.

On July 26, 2021, Appellee McLinko, a Bradford County election official, filed a petition for review with the Commonwealth Court challenging the constitutionality of Act 77. The *Bonner* Appellees, fourteen Republican members

of the Pennsylvania House of Representatives, eleven of whom voted in favor of Act 77,<sup>3</sup> subsequently filed a petition on August 31, 2021 similarly challenging the constitutionality of Act 77 and requesting an injunction against Appellants from enforcing the provisions of Act 77. In an order dated January 28, 2022, the Commonwealth Court denied the Appellants’ application for summary judgment and granted the Appellees’ application for summary judgment holding that Act 77 violates Article VII, section 1 of the Pennsylvania Constitution. *McLinko v. Commonwealth, et al.*, No. 244 MD 2021 at 1-3 (Pa. Commw. Ct. Jan. 28, 2022).

For the reasons set forth herein, this Court should grant relief to Appellants and find that the Commonwealth Court erred both: (i) in holding that Act 77 is unconstitutional and void *ab initio* under the Pennsylvania Constitution, and (ii) by exercising jurisdiction over Appellees’ claims because Act 77 clearly confers

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<sup>3</sup> Representative Aaron J. Bernstine (District 10, Lawrence, Beaver and Butler counties), Representative Robert Brooks (District 54, Westmoreland and Allegheny counties), Representative Donald Cook (District 49, Washington and Fayette counties), Representative Barbara Gleim (District 199, Cumberland County), Representative P. Michael Jones (District 93, York County), Representative Barry J. Jozwiak (District 5, Berks County), Representative Dawn W. Keefer (District 92, York and Cumberland counties), Representative David Maloney (District 130, Berks), Representative Dan Moul (District 91, Adams County), Representative Kathy L. Rapp (District 65, Warren, Crawford and Forest counties), and Representative Francis X. Ryan (District 101, Lebanon County) all voted “Yea” on Final Passage of Senate Bill 421, Printer’s Number 1330 on Tuesday, October 29, 2019. Pennsylvania House of Representatives, *House Roll Calls*, PENNSYLVANIA GENERAL ASSEMBLY, [https://ldpc6.legis.state.pa.us/cfdocs/Legis/RC/Public/rc\\_view\\_action2.cfm?sess\\_yr=2019&sess\\_ind=0&rc\\_body=H&rc\\_nbr=781](https://ldpc6.legis.state.pa.us/cfdocs/Legis/RC/Public/rc_view_action2.cfm?sess_yr=2019&sess_ind=0&rc_body=H&rc_nbr=781). (last visited Feb. 14, 2022).

exclusive jurisdiction to the Supreme Court of Pennsylvania and requires challenges to Act 77 to be filed within 180 days of enactment and with that court.

### **III. ARGUMENT**

Act 77 is constitutional. The General Assembly has broad constitutional authority to enact any law which is not prohibited by the constitutions of either this Commonwealth or the United States. Act 77 was passed by the General Assembly with bipartisan support and signed into law by the Governor, and Appellees have identified nothing in the state or federal constitution prohibiting the provisions of Act 77 that expand access to the right to vote in Pennsylvania. Further, the Commonwealth Court erred in denying Appellants' application to dismiss Appellees' claims, as the suits were untimely and brought outside the statute's 180-day time limit for constitutional challenges.

#### **A. The Commonwealth Court erred in holding that Act 77 is unconstitutional and void *ab initio* under the Pennsylvania Constitution.**

Act 77 is constitutional. The reliance by both Appellees and the Commonwealth Court on two outdated decisions by this Court—one from 1862 and the other from 1924—controverts modern principles of constitutional interpretation and rests upon provisions of the Pennsylvania Constitution that have materially changed over the past century.

Article II, section 1 of the Pennsylvania Constitution gives to the General Assembly the legislative power of this Commonwealth. “The legislative power of

this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” Pa. Const. art. II, § 1. All “powers not expressly withheld from the General Assembly inhere in it.” *Stilp v.*

*Commonwealth*, 974 A.2d 491, 494-95 (Pa. 2009). The General Assembly possesses “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).

The provisions of Act 77 are presumed constitutional, and this Court should not rule otherwise unless the provision clearly, palpably, and plainly violates the constitution. This applies both to the universal mail-in ballot provisions of Act 77, as well as the provisions relating to the exclusive jurisdiction of the Pennsylvania Supreme Court over constitutional challenges to Act 77 and the requirement that such a challenge be brought within 180 days of enactment. “Legislation enacted by the General Assembly enjoys a presumption of constitutionality. ‘Accordingly, a statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution.’ Any doubts about whether a challenger has met this high burden are resolved in favor of finding the statute constitutional.”

*Germantown Cab Co. v. Philadelphia Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019) (citations omitted). The Pennsylvania Supreme Court has noted:

The right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all

courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases; one department of the government is bound to presume that another has acted rightly. The party who wishes us to pronounce a law unconstitutional, takes upon himself the burden of proving, beyond all doubt, that it is so. . . . Nothing will [make a statute void] but a *direct* collision between its provisions and those of the federal or state constitution.

*Erie & North-East Railroad v. Casey*, 26 Pa. 287, 300-301 (Pa. 1856).

Appellees bear a heavy burden in this case, given that their claims are in the form of a facial constitutional challenge. *See Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020). “Though . . . all constitutional challenges to statutes are, by their nature, uphill battles, a facial challenge is ‘the most difficult challenge to mount successfully.’” *Caba v. Weaknecht*, 64 A.3d 39, 50 (Pa. Commw. Ct. 2013) (citation omitted). “A statute is facially unconstitutional only where there are no circumstances under which the statute would be valid.” *Germantown*, 206 A.3d at 1041. Appellees have not, and cannot, meet this burden and the Commonwealth Court erred in deciding that they had.

The Appellees identify no provision of the Pennsylvania Constitution that restricts the authority of the General Assembly to enact either the mail-in ballot provisions of Act 77, the provisions granting exclusive jurisdiction to the Pennsylvania Supreme Court, or the time limitation to bring a constitutional claim. In arriving to its conclusion that the universal mail-in ballot provision of Article 77

is unconstitutional, the Commonwealth Court relied on two cases decided under an earlier version of the Pennsylvania Constitution containing provisions materially different from those in the current Constitution. This reliance controverts modern principles of constitutional interpretation and fails to justify both the legal conclusion reached by the Commonwealth Court and the result desired by Appellees.

The Commonwealth Court held that Act 77 specifically violates Article VII, section 1 of the Pennsylvania Constitution. *McLinko*, No. 244 MD 2022 at 49.

That section reads:

Qualifications of Electors:

Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.

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

Pa. Const. art VII, § 1. The Commonwealth Court also looked to Article VII, section 4, which 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.” *Id.* § 4.

The Commonwealth Court’s conclusion is constrained by its limited analysis of the plain language of Article VII, sections 1 and 4 and does not comport with the statutory construction principle of *in pari materia* when those sections are read together.

In *Chase v. Miller*, 41 Pa. 403 (Pa. 1862) and in *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924), the Supreme Court invalidated laws passed by the legislature designed to give certain voters who were absent from their election district on an election day the ability to vote absentee from a place outside their home election district. Neither case, however, concerns the methods by which a qualified voter may vote within their election district. The 1839 law at issue in *Chase* provided that soldiers in military service “may exercise the right of suffrage *at such place* as may be appointed by the commanding officer of the troop or company to which they shall respectively belong.” *Chase v. Miller*, 41 Pa. 403, 421 (Pa. 1862) (emphasis added). The core of the decision in *Chase* was that the provisions of Article 3, section 1 of the Pennsylvania Constitution of 1838 required a qualified voter “to have a ten days’ residence in an election



district” and “having had the district residence, . . . had the right to vote in *that district.*” *Id.* at 419. Thus, it required that the voter must vote in the appropriate election district. *Id.* And, further, that the legislature could not abdicate its responsibility for forming election districts by authorizing a military commander to form such districts and hold elections therein. *Id.* at 421. While the Court in *Chase* mentions that “to offer to vote . . . is to present oneself . . . and make manual delivery of the ballot to the officer appointed by law to receive it,” *id.* at 419, the decision focused on the creation of improper election districts by military officers and the location of the suffrage by soldiers:

It permits the ballot-box, according to the court below, to be opened anywhere, within or without our state, with no other guards than such as commanding officers, who may not themselves be voters, nor subject to our jurisdiction, may choose to throw around it; and it invites soldiers to vote where the evidence of their qualifications is not at hand; and where our civil police cannot attend to protect the legal voter, to repel the rioter, and to guard the ballots after they have been cast.

*Id.* at 424. Regardless, the Commonwealth Court relied on dicta in *Chase* to reach its conclusion. More importantly, *Chase* was decided before the addition of the “Methods of Elections” language of Article VII, section 4 of the present Pennsylvania Constitution and, thus, is wholly distinguishable from the present matter before the Court.

*Lancaster City* was also decided under an earlier version of the Pennsylvania Constitution. The 1923 law at issue in this case permitted a voter who was absent from his election district and the county of which he was an elector, but was within the United States, to request an absentee ballot and complete it in the presence of an election official before Election Day. In *Lancaster City*, at the conclusion of Election Day in 1923, the Democratic candidate for councilman lead by eight votes. *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 200 (Pa. 1924). A counting of the absentee ballots in the race gave the Republican candidate a nine-vote lead. *Id.* The Democratic candidate then challenged the results arguing that the 1923 Absentee Voting Act was unconstitutional. *Id.* The Supreme Court agreed invalidating the statute on the basis that the relevant provisions of the 1874 Constitution had only extended the ability to vote outside the elector's home election district (absentee voting) to voters in military service, and thus impliedly excluded all others. *Id.* at 200-201.

It will be noticed that the 'offer to vote' must still be in the district where the elector resides, the effect of which requirement is so ably discussed by Justice Woodward in *Chase v. Miller*, supra. Certain alterations are made so that absent voting in the case of soldiers is permissible. This is in itself significant of the fact that this privilege was to be extended to such only.

*Id.* at 201.

As Judge Wojcik so aptly provides in his Concurring and Dissenting Opinion in *McLinko, Lancaster City* stands for the proposition that the General Assembly may not by statute extend the scope of [absentee voting] already specifically provided for in article VII, section 14 of the Constitution. The Supreme Court's holding in that case in no way limits the authority conferred upon the General Assembly by article VII, section 4 to provide for a new and different method of voting such as the no-excuse mail-in ballot provisions of Act 77.

*McLinko*, No. 244 MD 2022 at MHW 7-8 (Wojcik, J. concurring and dissenting).

**B. The Commonwealth Court erred in exercising jurisdiction over Appellees' claims because Act 77 clearly confers exclusive jurisdiction to the Supreme Court of Pennsylvania and requires challenges to Act 77 to be filed within 180 days of enactment.**

The clear legislative intent of Act 77 was to provide exclusive jurisdiction to the Supreme Court of Pennsylvania and only allow challenges to the constitutionality of the universal mail-in ballot provisions within 180 days of enactment. The Commonwealth Court erred in exercising jurisdiction of Appellees' claims for two reasons: first, because the claims were not brought to the Pennsylvania Supreme Court, and second, because the claims were raised after 180 days of the enactment of Act 77.

Section 13(2) of Act 77 confers exclusive jurisdiction to the Supreme Court of Pennsylvania:

The Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1). The Supreme Court may take action it deems appropriate, consistent with the Supreme Court retaining jurisdiction over the matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief.

Act 77, § 13(2). Section 13(3) of Act 77 provides that constitutional challenges to Act 77 “must be commenced within 180 days of [October 31, 2019].” Act 77, §§ 13(3), 15(3).

In its *McLinko* decision, the Commonwealth Court concluded that, despite its explicit language, section 13 of Act 77 does not establish a statute of limitations for bringing a constitutional challenge, and that the General Assembly did not impose a time bar for seeking clarity “on whether Act 77 comports with the Pennsylvania Constitution.” *McLinko*, No. 244 MD 2021 at 44-45. The Commonwealth Court explained further:

Act 77 gave the Pennsylvania Supreme Court exclusive jurisdiction to hear challenges to the enumerated provisions of Act 77 for the first 180 days after enactment. Thereafter, such constitutional challenges reverted to this Court in accordance with the Judicial Code . . . The Supreme Court had exclusive jurisdiction to entertain constitutional challenges to certain sections of Act 77 for the first 180 days, or until April 28, 2020, and its exclusive jurisdiction terminated as of that day. Section 13 of Act 77 is not a statute of limitations.

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Section 13 did not establish a 180-day statute of limitations for bringing a constitutional challenge to Act 77. It could not do so without violating separation of powers.

*Id.* at 46, 48.

The Commonwealth Court’s reasoning is flawed. First, there is no violation of separation of powers for the General Assembly to establish a timeframe to bring a claim against Act 77; rather, it is the exclusive prerogative of the General Assembly to do so. Indeed, “[i]t is well settled that a statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute, and before the bar takes effect.” *Turner v. People of State of New York*, 168 U.S. 90, 94 (1897). *See Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273 (1983).

Second, the Commonwealth Court fails to accurately read the plain language of the statute. Section 13(2) of Act 77 clearly provides that “[t]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1).” Act 77, § 13(2). Section 13(3) provides that any action under section 13(2) be brought within 180 days of enactment. *Id.* § 13(3). When read together, these sections clearly: (i) assign exclusive jurisdiction of a constitutional challenge to the Pennsylvania Supreme Court, and (ii) require that any such claims

must be brought within 180 days of enactment. Even if this Court were to ignore the 180-day limitation, the provision assigning exclusive jurisdiction of Appellees' claims to the Supreme Court of Pennsylvania would still apply.<sup>4</sup> There was no reason for the Commonwealth Court not to read these two provisions together so as to afford both provisions their full meaning, and this Court should not make the same error.

It is clear from the plain language of Act 77 that the General Assembly intended for all constitutional challenges to be made so as not to unduly delay or interfere with an election, and also that elections held after the enactment of Act 77 would not be jeopardized by unresolved questions concerning the constitutionality of universal mail-in ballots. This intent is further elucidated by section 14 of Act 77, which states that “[Act 77] shall apply to elections held on or after April 28, 2020.” Act 77, § 14. This date is exactly 180 days after October 31, 2019—the date Act 77 was enacted. *See also Kelly*, 240 A.3d at 1257 n.4.

This intent was further explained by Chairman Garth Everett, the House State Government Committee Chair at the time Act 77 passed, in responding to

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<sup>4</sup> The nonseverability clause of Act 77 does not apply to section 13 of the act. Section 11 of Act 77 states: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.” *See Act 77*, § 11.

interrogation regarding the non-severability clause and timeline to bring challenges:

There is a nonseverability clause, and there is also the section ... that gives the Supreme Court of Pennsylvania jurisdiction, because the intent of this is that this bill works together, that it not be divided up into parts, and there is also a provision that the desire is...that suits be brought within 180 days so that we can settle everything before this would take effect.

2019 Pa. Legislative Journal—House 1740 (Oct. 29, 2019) (remarks of State Representative Garth Everett). It is clear from this passage that the General Assembly wanted certainty regarding Act 77’s constitutionality before voters cast their votes. The Commonwealth Court’s decision declaring Act 77 “void ab initio” would lead to an exactly opposite result.

Beyond the plain language of the statute and legislative record, this Honorable Court has already weighed in on the time limitations for a constitutional challenge to Act 77. On November 21, 2020—387 days after the enactment of Act 77, but still 247 days before Appellee McLinko filed his petition and a full 283 days before the *Bonner* Appellees filed their suit—a different group of petitioners filed suit in the Commonwealth Court challenging Act 77 on identical grounds to the claims raised in the present cases, including that the universal mail-in ballot provisions of Act 77 violate the Pennsylvania Constitution. Compl. for Declaratory and Injunctive Relief ¶ 1, *Kelly v. Commonwealth*, No. 620 MD 2020

(Pa. Commw. Ct. Nov. 21, 2020). Along with a declaration that Act 77 was unconstitutional and void *ab initio*, the *Kelly* petitioners also requested an order enjoining certification of the November 2020 presidential election. *Id.* at 22.

By *per curiam* Order this Honorable Court, exercising extraordinary jurisdiction, dismissed the *Kelly* petition with prejudice on laches grounds. *Kelly*, 240 A.3d at 1257. The Court recognized an “unmistakable” lack of due diligence on the part of the *Kelly* petitioners by bringing their suit more than a year after the enactment of Act 77 and after “millions of Pennsylvania voters had already expressed their will in both the June 2020 Primary Election and the November 2020 General Election.” *Id.* at 1256. As noted by Justice Wecht in his concurrence, the *Kelly* petitioners had ample time to commence a facial constitutional challenge in the time allotted by the very statute they sought to challenge and their failure to do so was grounds to dismiss with prejudice:

Petitioners could have brought this action at any time between October 31, 2019, when Governor Wolf signed Act 77 into law, and April 28, 2020, when this Court still retained exclusive jurisdiction over constitutional challenges to it. The claims then could have been adjudicated finally before the June primary, when no-excuse mail-in voting first took effect under Act 77—and certainly well before the General Election, when millions of Pennsylvania voters requested, received, and returned mail-in ballots for the first time. Petitioners certainly knew all facts relevant to their present claims during that entire period. Indeed, “the procedures used to enact [Act 77] were published in the Legislative Journal and available to the public” since at least October 2019. Likewise,



“[t]he provisions of the Constitution that the [General Assembly] purportedly violated were also readily available.” And yet, Petitioners did nothing.

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

Here too, Appellees display a clear failure to exercise due diligence in bringing their challenges to the constitutionality of Act 77. In fact, these cases present an even more egregious carelessness due to the respective positions and responsibilities of the Appellees and the time at which these cases come before this Court. Appellee McLinko claims standing as a member of the Bradford County Board of Elections, charged with overseeing the lawful administration of all aspects of elections therein. *See McLinko* Am. Pet. ¶¶ 3, 5; *McLinko v.*

*Commonwealth, et al.*, No. 244 MD 2021 at 5 (Pa. Commw. Ct. Jan. 28, 2022).

The *Bonner* Appellees are all elected state representatives in the Pennsylvania House of Representatives, twelve of whom voted on Act 77 and eleven of whom voted in favor of Act 77. *See Bonner* Pet. ¶¶ 3-16.

Four elections have been conducted in Pennsylvania since the passage of Act 77: the June 2020 primary elections, the November 2020 general elections, the May 2021 primary elections, and the November 2021 municipal elections.

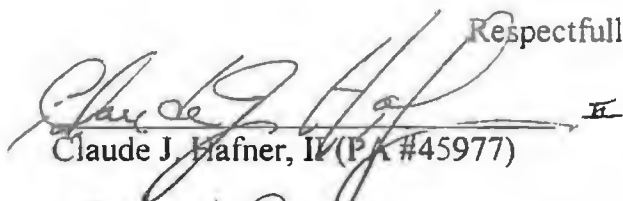
Millions of Pennsylvanians have exercised their franchise in those elections by casting their ballots by mail thanks entirely to the expansion of access under Act 77. The Commonwealth and every county in this Commonwealth have spent a

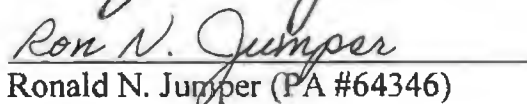
great many hours training personnel to administer elections under Act 77 and have devoted enormous resources to educate the public about the changes brought under Act 77. As this Honorable Court correctly determined in *Kelly*, the delay in bringing a constitutional claim after the great investment made by the government and the public is inappropriate and indicates a profound lack of due diligence on the part of Appellees. Thus, notwithstanding the explicit violation of the statutory requirement to bring a constitutional challenge to Act 77 within 180 days of enactment, Appellees failed to exercise due diligence in instituting these actions and their claims should be dismissed just as this Court determined in *Kelly*. See *Stilp v. Hafer*, 718 A.2d 290, 293-94 (Pa. 1998).

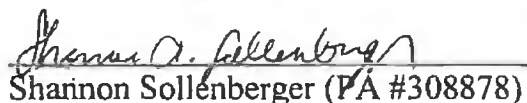
**IV. CONCLUSION**

For all the foregoing reasons, *Amici Curiae* respectfully request that this Court grant the relief sought by Appellants and find that the Commonwealth Court erred both: (i) in holding that Act 77 is unconstitutional and void *ab initio* under the Pennsylvania Constitution, and (ii) by exercising jurisdiction over Appellees' claims because Act 77 clearly confers exclusive jurisdiction to the Supreme Court of Pennsylvania and requires challenges to Act 77 to be filed within 180 days of enactment.

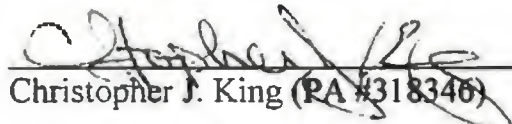
Respectfully submitted,

  
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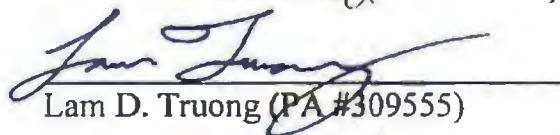
  
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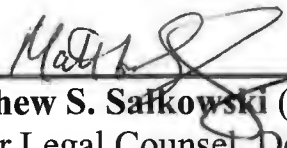
*Attorneys for Amici Curiae*

**Date:** February 15, 2022

## CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains 5,620 words. In making this certification, I have relied upon the word count function of the word-processing system used to prepare this Brief.

I further certify that this Brief 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.

  
\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am this day effectuating service of the foregoing document upon the persons and in the manner indicated below, which satisfies the requirements of Pa.R.A.P. 121:

**Service by PACFile eService as follows:**

All counsel of record

Respectfully submitted,



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**Date:** February 15, 2022