

IN THE SUPREME COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas,
Irvin Weinreich, Brenda Weinreich, and
the Pennsylvania Alliance for Retired
Americans,

Petitioners/Appellants,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis,
Director of the Bureau of Election
Services and Notaries,

Respondents/Appellees.

JURISDICTIONAL STATEMENT

Pursuant to Pennsylvania Rules of Appellate Procedure 909 and 910, Petitioners/Appellants Michael Crossey, Dwayne Thomas, Irvin Weinreich, Brenda Weinreich, and the Pennsylvania Alliance for Retired Americans (collectively, “Appellants”) submit this Jurisdictional Statement in support of their Notice of Appeal from the Commonwealth Court in 266 MD 2020.¹

I. OPINION BELOW

This is an appeal from the court’s order denying Appellants’ Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for

¹ In light of the imminent June 2 primary, and the urgency for relief in advance of the election, Petitioners are prepared to comply with an accelerated or modified briefing schedule to facilitate the Court’s expedited review.

Expedited Review, issued on May 28, 2020. That order is attached as Appendix A. The opinion is not reported for publication.

II. BASIS FOR JURISDICTION OF THE SUPREME COURT

The Supreme Court has exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter which was originally commenced in the Commonwealth Court, 42 Pa. C.S. § 723; Pa. R.A.P. 1101, and of interlocutory appeals as of right from orders of the Commonwealth Court denying an injunction, Pa. R.A.P. 311(a)(4); see also 42 Pa. C.S. § 5105(c). Petitioners commenced this matter in the Commonwealth Court pursuant to its original jurisdiction under 42 Pa. C.S. §§ 761(a), 764(2).

III. TEXT OF ORDER IN QUESTION

Appellants seek review of the entire order of the Commonwealth Court, attached as Appendix A. The text of the order is as follows:

ORDER

AND NOW, this 28th day of May, 2020, Petitioners' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review is **DENIED**.

MARY HANNAH LEAVITT, President Judge

IV. CONCISE STATEMENT OF PROCEDURAL HISTORY

Petitioners filed a Petition for Declaratory and Injunctive Relief in the Commonwealth Court of Pennsylvania on April 22, 2020. On May 8, Petitioners filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction with the Commonwealth Court. Between May 11-14, several individuals and entities applied for leave to intervene. The Court held a pre-hearing conference on May 19 and, at the Court's suggestion, the parties agreed to bifurcate the issue of jurisdiction over the Preliminary Injunction Application from the merits thereof. Both the parties and the proposed intervenors filed memoranda of law on their respective positions regarding jurisdiction. On May 28, President Judge Mary Hannah Leavitt issued a memorandum opinion concluding that the Commonwealth Court lacks jurisdiction to grant the Preliminary Injunction Application, reasoning that (1) "the Secretary's assertion that the Supreme Court has exclusive jurisdiction over the Petition under Section 13(2) of Act 77 appears meritorious," and (2) the Secretary presented a compelling case that the county boards of elections are indispensable parties.

V. QUESTIONS PRESENTED FOR REVIEW

Did the Commonwealth Court err in denying Appellants' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review?

In the alternative, upon finding that it lacked jurisdiction to grant the Application, did the Commonwealth Court err in failing to transfer Appellants' Petition and/or Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review to the Supreme Court, pursuant to 42 P.S. §5103(a)?

Dated: May 28, 2020


Marc E. Elias*
Uzoma N. Nkwonta*
Emily R. Brailey*
Stephanie I. Command*
Zachary J. Newkirk*
Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211

Sarah L. Schirack**
PERKINS COIE LLP
1029 W. 3rd Ave., Suite 300
Anchorage, AK 99517
Telephone: 907.279.8561

Counsel for Petitioners

* Admitted pro hac vice.

** Not admitted in Pennsylvania. Pro hac vice application pending.

By: 
Adam C. Bonin
LAW OFFICE OF ADAM C.
BONIN
The North American Building
121 South Broad Street, Suite 400
Philadelphia, PA 19107
Telephone: (267) 242-5014
Facsimile: (215) 701-2321
adam@boninlaw.com

APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, :
Irvin Weinreich, Brenda Weinreich, :
and the Pennsylvania Alliance :
for Retired Americans, :
Petitioners :

v. :

No. 266 M.D. 2020

Kathy Boockvar, Secretary of the :
Commonwealth, and Jessica Mathis :
Director of the Bureau of Election :
Services and Notaries, :
Respondents :

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY PRESIDENT JUDGE LEAVITT

FILED: May 28, 2020

On April 22, 2020, the Pennsylvania Alliance for Retired Americans and four individuals, two of whom are members of the Alliance (collectively, Alliance), filed a Petition for Declaratory and Injunctive Relief (Petition) in this Court's original jurisdiction against the Secretary of the Commonwealth, Kathy Boockvar, and the Director of the Bureau of Election Services and Notaries, Jessica Mathis (collectively, Secretary). Alleging disruptions to the June 2, 2020, primary election from the COVID-19 pandemic, the Alliance raises constitutional claims about provisions of the Pennsylvania Election Code (Election Code)¹ related to mail-in ballots, which is a method of voting that was added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77). On May 8, 2020, the Alliance

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2600-3591.

filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review (Preliminary Injunction Application). For the following reasons, the Court denies the Preliminary Injunction Application.

In the Petition, the Alliance challenges the Election Code's requirement that a voter's absentee or mail-in ballot must be received by the county board of elections by 8:00 p.m. on Election Day. It also challenges the Election Code's prohibition against third parties assisting voters in the delivery of their absentee and mail-in ballots and, relatedly, alleges the potential disenfranchisement of voters who are unable to provide their own postage to return their mail ballots. Finally, the Alliance alleges that the Secretary's failure to provide any guidance to county boards of elections on how to verify signatures on mail-in ballots will result in the arbitrary rejection of some ballots.

The four individual petitioners allege they are at risk of being disenfranchised because the county boards of elections may fall behind in processing absentee and mail-in ballot applications. The individual petitioners do not want to vote in person due to health concerns related to the COVID-19 pandemic. Alleging budgetary and staffing issues with the United States Postal Service, the individual petitioners fear their ballots may not be received by the 8:00 p.m. Election Day deadline. They believe they will need third-party assistance in returning their ballots.

The Alliance seeks an order declaring unconstitutional the Commonwealth's failure to: provide prepaid postage for absentee and mail-in ballots; allow for counting of mail-in ballots delivered after 8:00 p.m. on Election Day (to the extent that this does not trigger Act 77's non-severability clause); allow for third-party assistance in the collection of ballots; and establish standards for

signature verification by the county boards of elections. The Alliance also seeks an injunction to require an extension of the ballot return deadline; prepaid postage on all absentee and mail-in ballots; third-party collection of absentee and mail-in ballots; and training in signature matching for the county boards of elections.

On May 8, 2020, the Alliance filed a Preliminary Injunction Application to direct the Secretary to adopt procedures for emergency write-in ballots for all voters who request mail-in ballots; to designate all ballots as emergency ballots; and to count all such ballots if postmarked by Election Day and received within seven days thereof. The Alliance also seeks to enjoin the enforcement of Sections 1306 and 1306-D of the Election Code, 25 P.S. §§3146.6, 3150.16,² to the extent that they prohibit third parties from delivering any voter's ballot to a local board of elections.

The Court held a pre-hearing conference on May 19, 2020. At the conference, the Secretary confirmed the statement in her answer to the Preliminary Injunction Application that she intended to file preliminary objections to challenge this Court's jurisdiction over the Petition. At the Court's suggestion, the parties agreed to bifurcate the issue of jurisdiction over the Preliminary Injunction Application from the merits thereof. The Court provided the parties and proposed intervenors³ an opportunity to file memoranda of law on their respective positions regarding jurisdiction.⁴ Having reviewed the memoranda of law, the Court now

² Added by the Act of October 31, 2019, P.L. 552, No. 77.

³ Proposed intervenors include President Pro Tempore Joseph B. Scarnati, III, and Majority Leader of the State Senate Jake Corman; Speaker of the House of Representatives Mike Turzai and Majority Leader of the House Bryan Cutler; and the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee.

⁴ The Court deferred briefing of Respondents other preliminary objections.

considers the two bases upon which the Secretary asserts this Court lacks jurisdiction over the Petition and, by extension, the Preliminary Injunction Application.

Preliminary Injunction Standards

“The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order was made, it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined.” *Appeal of Little Britain Twp. From Decision of Zoning Hearing Board of Little Britain Twp., Lancaster County, Pa.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994). A preliminary injunction is a temporary remedy granted until the parties’ dispute can be fully resolved. *Id.* A party seeking a preliminary injunction bears a heavy burden of proof and must establish all of the following criteria:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages;
- (2) greater injury will occur from refusing to grant the injunction than from granting it;
- (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct;
- (4) the petitioner is likely to prevail on the merits;
- (5) the injunction is reasonably suited to abate the offending activity; and
- (6) the public interest will not be harmed if the injunction is granted.

Brayman Construction Corp. v. Department of Transportation, 13 A.3d 925, 935 (Pa. 2011) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*,

828 A.2d 995, 1001 (Pa. 2003)). Because the grant of an injunction is such a harsh and extraordinary remedy, each criterion must be satisfied. *Pennsylvania ALF-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996). “[W]hen a preliminary injunction contains mandatory provisions which will require a change in the positions of the parties, it should be granted even more sparingly than one which is merely prohibitory.” *Zebra v. School District of the City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972).

In its request for a preliminary injunction, the Alliance seeks the performance of positive acts by the Secretary and the county boards of elections. The requested preliminary injunction will require the Secretary to adopt procedures for emergency write-in ballots for all voters who request them. Those procedures must designate all ballots as emergency ballots, and the county boards of elections must count them if postmarked by Election Day and received within seven days thereafter. The requested preliminary injunction will also enjoin enforcement of Sections 1306 and 1306-D of the Election Code so that third parties may collect ballots.

Jurisdiction and Act 77

The threshold issue is whether the Court has jurisdiction to order the relief requested and, for preliminary injunction purposes, whether the Alliance is likely to prevail on the merits. A court must have subject matter jurisdiction over the controversy because, without it, any judgment rendered would be void. *Stedman v. Lancaster County Board of Commissioners*, 221 A.3d 747, 755 (Pa. Cmwlth. 2019). Subject matter jurisdiction is conferred solely by the Pennsylvania Constitution and its laws; the test for whether a court has subject matter jurisdiction is whether the court has the ability to determine controversies in the same general

class as the controversy at issue. *Id.* at 755-56 (quoting *Commonwealth v. Locust Township*, 968 A.2d 1263, 1268-69 (Pa. 2009)).

When it enacted Act 77, the General Assembly included specific provisions on jurisdiction to decide constitutional challenges arising under the act. More specifically, Section 13(2) of Act 77 provides:

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 final judgment in connection with such a challenge or request for declaratory relief.

Section 13(2) of Act 77. In short, the legislature has vested exclusive jurisdiction in our Supreme Court to hear challenges to certain sections of the Election Code, delineated in subsection (1) of Section 13 of Act 77. Relevant here, subsection (1) provides that “[t]his section applies to the amendment or addition of the following provisions of the act: ... (xix) Section 1306 ... [and] (xxi) Article XIII-D.” Section 13(1) of Act 77.

Section 1306 of the Election Code, 25 P.S. §3146.6, relates to voting by absentee ballots. It provides a deadline for receipt of absentee ballots as follows: “a completed absentee ballot must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” 25 P.S. §3146.6(c). Article XIII-D of the Election Code includes Section 1306-D. It similarly provides a deadline for receipt of mail-in ballots as follows: “a completed mail-in ballot must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” 25 P.S. §3150.16(c).

The Petition challenges, *inter alia*, the received-by deadlines found in Sections 1306 and 1306-D. The Alliance stresses that it has lodged an as-applied challenge to avoid the risk of disenfranchisement.⁵ However, it seeks a statewide injunction to extend the received-by deadline set forth in Sections 1306 and 1306-D of the Election Code, arguing that it cannot be constitutionally applied anywhere in the Commonwealth. The Alliance’s claim that the absence of its proposed safeguards renders Act 77 unconstitutional is no different from a facial challenge to the statute as unconstitutional.

The relief sought by the Alliance would not merely supplement, but supplant, provisions set forth in Act 77. Those provisions impose an 8:00 p.m. Election Day deadline for the receipt of absentee and mail-in ballots and preclude a third party from assisting in the delivery of ballots. The Alliance seeks to modify

⁵ See Petition ¶63 (“Pennsylvania’s failure to provide additional safeguards for voters whose mail ballots, due to mail delivery disruptions, arrive at the local county boards of elections office after 8:00 p.m. on Election Day will arbitrarily disenfranchise thousands of voters for reasons outside their control. ... Thus, Petitioners, and many Pennsylvanians who vote by mail, will face an impermissible risk of arbitrary disenfranchisement, in violation of their constitutional rights.”); ¶64 (“many voters will be forced to incur the burden and health risks of personally delivering their completed mail-in ballots to ensure they arrive on time, or risk disenfranchisement.”); ¶66 (“Pennsylvania’s failure to provide an opportunity for eligible citizens to vote by mail, without cost, violates the Free and Equal Protection Clause.”); ¶71 (“Pennsylvania’s rejection of ballots delayed by mail service disruptions, the prohibition on third party ballot collection assistance, the failure to provide [prepaid] postage for mail ballots, and the arbitrary rejection of mail ballots through signature matching substantially burdens the right to vote and bear[s] heavily on certain groups of voters without sufficient justification.”); and ¶77 (“Pennsylvania’s failure to provide safeguards to voters whose ballots are delivered after the Election Day Receipt Deadline, due to postal service disruptions caused by the ongoing public health emergency, is neither a reliable nor fair way to administer voting by mail. Rejecting ballots after the Election Day Receipt Deadline under these circumstances effectively requires some voters to submit their ballots blindly, with no reasonable assurances that they will be delivered in time, even when submitted well in advance of Election Day.”).

these provisions of the Election Code on the theory that they may disenfranchise voters in violation of their constitutional right to vote.

Because the Alliance has raised a challenge “concerning the constitutionality” of Sections 1306 and 1306-D of the Election Code, 25 P.S. §§3146.6, 3150.16, the Secretary’s assertion that the Supreme Court has exclusive jurisdiction over the Petition under Section 13(2) of Act 77 appears meritorious.

Indispensable Parties

Indispensable parties are those whose rights are so directly connected with and affected by the litigation that they must be a party to the action to protect their rights; their absence renders void any court order or decree for lack of jurisdiction. *CRY, Inc. v. Mill Service, Inc.*, 640 A.2d 372, 375 (Pa. 1994) (quoting *Scherbick v. Community College of Allegheny County*, 387 A.2d 1301, 1303 (Pa. 1978)). In *Mechanicsburg Area School District v. Kline*, 431 A.2d 953, 956 (Pa. 1981), the Supreme Court determined that consideration of indispensable parties should involve consideration of at least the following:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

The Petition alleges that the county boards of elections are falling behind in processing mail-in ballot applications; unconstitutionally omitting prepaid postage for ballot return; and will be employing “arbitrary” standards to match voter signatures. Petition ¶59. The Alliance seeks a mandatory injunction to compel county boards of elections to adopt new standards and procedures for counting

ballots. Specifically, the Alliance seeks to require the county boards of elections to: provide prepaid postage for mail-in ballots; receive and count ballots after the 8:00 p.m. deadline; train election board officials on signature verification; and allow for a cure where there are mismatched signatures.

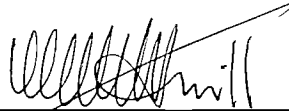
The Secretary contends that the Petition's accusations against the county boards of elections makes them indispensable parties. She further contends that this Court cannot order the county boards of elections to provide postage and to implement emergency procedures without being allowed to defend. Without the presence of indispensable parties, the Court lacks jurisdiction. *Powell v. Shepard*, 113 A.2d, 261, 264-65 (Pa. 1955).

The Secretary has presented a compelling case that the county boards of elections have a direct interest in the Petition and as such are indispensable parties.

Conclusion

The Secretary's arguments on the issue of jurisdiction are compelling and when considered by the full Court may result in a transfer of the Petition to the Supreme Court. The Court does not believe the Alliance is likely to prevail on the question of this Court's jurisdiction over the subject matter of the Petition.

As such, the Court concludes it lacks jurisdiction to grant the Preliminary Injunction Application. Accordingly, the request will be denied.



MARY HANNAH LEAVITT, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, :
Irvin Weinreich, Brenda Weinreich, :
for Retired Americans, :
Petitioners :

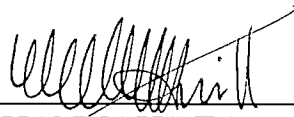
v. :

No. 266 M.D. 2020

Kathy Boockvar, Secretary of the :
Commonwealth, and Jessica Mathis :
Director of the Bureau of Election :
Services and Notaries, :
Respondents :

ORDER

AND NOW, this 28th day of May, 2020, Petitioners' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review is **DENIED**.



MARY HANNAH LEAVITT, President Judge