

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

THE HONORABLE MIKE KELLY,
SEAN PARNELL, THOMAS A.
FRANK, NANCY KIERZEK, DEREK
MAGEE, ROBIN SAUTER, MICHAEL
KINCAID, AND WANDA LOGAN,
Petitioners,

v.

COMMONWEALTH OF
PENNSYLVANIA, PENNSYLVANIA
GENERAL ASSEMBLY,
HONORABLE THOMAS W. WOLF,
KATHY BOOCKVAR,
Respondents.

NO. 620 MD 2020

**ANSWER OF RESPONDENT PENNSYLVANIA
GENERAL ASSEMBLY TO PETITIONERS' SUPPLEMENTAL
APPLICATION FOR EMERGENCY RELIEF**

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Respondent the Pennsylvania General Assembly, by its counsel, Stradley Ronon Stevens & Young, LLP, answers petitioners' supplemental application for emergency relief as follows:

1. For emergency injunctive relief, a petitioner must show "that it is likely to prevail on the merits." *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003); *see Weeks v. Dep't of Human Servs.*, 222 A.3d 722 (Pa. 2019) (affirming denial of preliminary injunction because appellant failed to demonstrate a likelihood of success on the merits); *Kaehl v. City of Pittsburgh*, 687 A.2d 41 (Pa. Commw. 1996) (same).

2. The claim here is that Pennsylvania Act 77 of 2019 violates Article VII of the Pennsylvania Constitution. *See* Petition for Review, ¶¶1, 16, 17, 54-60, 66, 75, 81, 87. Thus, to obtain injunctive relief, petitioners must show they are likely to prevail on that claim.

3. To succeed on the merits, petitioners carry a very heavy burden. "[E]very enactment of the General Assembly is presumed valid." *Weeks*, 222 A.3d at 727. A statute will "only be stricken if the challenger demonstrates that it clearly, palpably, and plainly violates the Constitution." *Id.* (cleaned up); *see also* 1 Pa.C.S. §1922(3) (presumption that the Legislature does not intend to violate the state or federal constitutions). "The party seeking to overcome the presumption of validity bears a heavy burden of persuasion." *Weeks*, 222 A.3d at 727 (citation

omitted). “Any doubts about whether a challenger has met this high burden are resolved in favor of finding the statute constitutional.” *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019).

4. For the reasons stated in the General Assembly’s preliminary objections (filed November 23, 2020 at 10:53 p.m., and incorporated herein by reference), and in its answer to petitioners’ motion for emergency/special prohibitory injunction (filed November 24, 2020 at 12:21 p.m., and incorporated herein by reference), it is not likely that petitioners will prevail on the merits.

5. First, petitioners cannot prevail before this Court because it lacks jurisdiction. Section 13(2) of Act 77 specifies that the Supreme Court of Pennsylvania—not this Court—has exclusive jurisdiction to hear petitioners’ challenge. This provision states 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),” and paragraph (1) in turn lists Article XIII-D—which petitioners challenge here.¹ *See* Act 77, §13(1)(xxi).

¹ It is constitutional for the General Assembly to specify the Supreme Court’s exclusive jurisdiction. *See Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 392-93 (Pa. 2005) (reviewing enactment with similar exclusive jurisdiction provision and deciding that, despite the “unique posture,” the court had “jurisdiction over this matter to resolve Petitioners’ challenges and request for declaratory judgment”).

6. This Court recently invoked these very provisions when it transferred the Act 77 challenge in the *Crossey* case to the Supreme Court's exclusive jurisdiction. The Supreme Court agreed with this Court's jurisdictional assessment and decided the merits. *See Crossey v. Boockvar*, Pa. Commw. No. 266 MD 2020 (order of June 17, 2020), Pa. Supr. No. 108 MM 2020 (orders of Aug. 26, 2020 & Sept. 17, 202 at 2 n.4).

7. For these reasons, the Supreme Court has exclusive jurisdiction over this dispute. Petitioners thus cannot succeed on the merits before this Court because they are asking for relief only the Supreme Court is authorized to grant.

8. Second, petitioners also cannot succeed on the merits because their claims are time-barred. Section 13(3) of Act 77 states that "[a]n action under paragraph (2) must be commenced within 180 days of the effective date of this section." Act 77, §13(3). As noted above, paragraph (2) applies to petitioners' challenge. Act 77 went into effect on October 31, 2019, so the 180-day challenge window ended on April 28, 2020. Petitioners filed this action on November 11, 2020. Therefore, it is time-barred.

9. Third, and finally, petitioners cannot show they are likely to succeed on the merits because their challenge under Article VII of the Pennsylvania Constitution fails as a matter of law.

10. Petitioners contend the Pennsylvania Constitution prohibits a voting method added by Act 77. This argument is predicated on a misreading of both the Constitution and petitioners' own authorities. The method of voting petitioners seek to invalidate is permitted by the Pennsylvania Constitution.

11. Article VII, Section 4 of the Pennsylvania Constitution grants the Legislature broad discretion in authorizing how citizens may vote. It states that “all elections by the citizens shall be by ballot or by such other method as may be prescribed by law.” PA. CONST. ART. VII, §4 (emphasis added).

12. Petitioners' attempt to limit voting to two methods (in-person and absentee) would render the legislative discretion conferred by Article VII, Section 4 meaningless. Their claim must fail for that reason alone. *See Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (“because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible”).

13. Beyond section 4, no other provision of Article VII prohibits any of the Election Code amendments contained in Act 77. *See, e.g.*, PA. CONST. ART. VII, §1 (qualifications of electors).

14. Petitioners nevertheless contend that the absentee voting provisions in Article VII, Section 14 serve as a restriction on voting methods. But they mistake a mandate for a limit. This provision states that “the Legislature shall, by general

law, provide a manner in which, and the time and place at which” absent electors may nonetheless cast their vote. PA. CONST. ART. VII, §4. By using the word “shall,” Section 14 requires the Legislature to enact absentee voting provisions as a constitutional “floor.” But that Section says nothing about what the legislature may—or may not—do in terms of voting methods. And, as noted, under Section 4, the General Assembly has the discretion to allow “such other methods” for voting—including those laid out in Act 77.

15. Petitioners’ claim is based on two older cases addressing decidedly different issues on very different facts. Those cases dealt only with voting statutes that expressly sought to extend voting access to locations beyond constitutional limits, as defined by the court at the time. *See Chase v. Miller*, 41 Pa. 403 (1862) (holding unconstitutional a statute permitting Civil War soldiers to vote at out-of-district, military-created polling places); *In re Contested Election in Fifth Ward of Lancaster County*, 281 Pa. 131 (1924) (holding unconstitutional a statute permitting out-of-state absentee ballots in the time before Article VII, Section 14). Thus, even if they remain good law, those cases do not foreclose the voting method challenged here. Nor could they, given the power vested by Article VII, Section 4. The *Chase* and *Lancaster* courts struck down statutes that expressly contravened then-applicable constitutional restraints on “qualified electors.” Act 77 does not.

In fact, it expressly incorporates the constitutional definition of a qualified elector. This difference is fatal to petitioners' claim that Act 77 was void *ab initio*.

16. In sum, petitioners' claims are based on a misapplication of Article VII of our Constitution and inapposite and outdated cases. Act 77 is constitutional. As a result, petitioners cannot show they are likely to succeed on the merits.

17. In light of the time constraints in this matter, the General Assembly reserves the right to more fully develop its legal arguments on these issues in future submissions.

For these reasons, Respondent Pennsylvania General Assembly requests that the Court deny petitioners' supplemental application for emergency relief.

Respectfully Submitted,

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Dated: November 25, 2020