

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

**MEMORANDUM OF LAW IN SUPPORT OF
PRELIMINARY OBJECTIONS OF RESPONDENT
PENNSYLVANIA GENERAL ASSEMBLY**

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Respondent the Pennsylvania General Assembly, by its counsel, Stradley Ronon Stevens & Young, LLP, submits this memorandum of law in support of its preliminary objections.

I. INTRODUCTION AND BACKGROUND

In this case, petitioners challenge Pennsylvania Act 77 of 2019. Petitioners seek a declaratory judgment that section 8 of the Act—which adds provisions to the Election Code in new Article XIII-D—is unconstitutional, causing Act 77 to fail in its entirety. *See* Petition for Review, ¶¶75, 81, 87. For the reasons detailed below, the General Assembly submits that exclusive jurisdiction over this dispute lies with the Pennsylvania Supreme Court. In the alternative, the Legislature asserts petitioners’ action fails and must be dismissed because it is untimely and because Act 77 fully complies with the Pennsylvania Constitution.¹

II. QUESTIONS PRESENTED

1. Does this Court lack jurisdiction?

Suggested answer: yes.

2. Is petitioners’ action time-barred?

Suggested answer: yes.

¹ As noted in the General Assembly’s entry of appearance, the Legislature continues to object on service grounds. While petitioners have asserted that they served the General Assembly by First Class US Mail on November 23, 2020, the General Assembly has not received original process and thus reserves all its rights as to service, and does not waive that issue by this submission.

3. Does Act 77 comply with the Pennsylvania Constitution?

Suggested answer: yes.

III. ARGUMENT

A. The Pennsylvania Supreme Court has exclusive jurisdiction.

The General Assembly first objects because this Court lacks jurisdiction over this action. *See* Pa.R.Civ.P. 1028(a)(1). Act 77 specifies that the Supreme Court of Pennsylvania—not this Court—has exclusive jurisdiction to hear petitioners’ challenge. Section 13 of the enactment states, in subsection 2:

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).

Paragraph (1) of section 13 in turn provides:

This section applies to the amendment or addition of the following provisions of the act:

* * *

(xxi) Article XIII-D.

In sum, Act 77 specifies that the Supreme Court has exclusive jurisdiction to render a declaratory judgment concerning the constitutionality of Article XIII-D. That is precisely what petitioners seek here. Petitioners thus ask this Court to provide relief only the Supreme Court is authorized to grant.

This exclusivity is inarguably constitutional. All of the Commonwealth’s legislative powers are vested in the General Assembly. *See* PA. CONST. ART. II, §1

(“The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.”). Among the Legislature’s powers are the exclusive discretion to shape or change this Court’s and the Supreme Court’s respective jurisdictions. *See* PA. CONST. ART. V, §2 (“The Supreme Court ... shall have such jurisdiction as shall be provided by law.”) & §4 (same, for Commonwealth Court). And the General Assembly has done so. *See* 42 Pa.C.S. §§721-727 (jurisdiction of Supreme Court); *id.*, §§761-764 (jurisdiction of Commonwealth Court). Some statutes mandate that certain cases must bypass this Court and the Superior Court. *See, e.g.* 42 Pa.C.S. §722(7) (mandating direct Supreme Court review of trial court order declaring a statute unconstitutional);² 42 Pa.C.S. §722(4) (providing for Supreme Court’s exclusive appellate jurisdiction in death penalty cases).³

The Legislature sometimes provides the Supreme Court with exclusive original jurisdiction—particularly for constitutional challenges. For instance, Act 71 of 2004 (P.L. 572), which dealt with gaming, specified that “[t]he Pennsylvania

² *See Mallory v. Norfolk Southern Railway Company*, 2020 WL 6375871, at *2 (Pa. Super. Oct. 30, 2020) (transferring case to Supreme Court under section 722(7)).

³ *See Commonwealth v. Kindler*, 147 A.3d 890, 893 (Pa. 2016) (noting that 42 Pa.C.S. §722(4) empowers the Supreme Court with exclusive jurisdiction of appeals from final orders in which the death penalty has been imposed); *see also In re Rizzo*, 20 A.3d 546, 548 (Pa. Commw. 2011) (transferring matter to the Supreme Court because this court lacked subject matter jurisdiction over appeals from final orders of the courts of common pleas in cases relating to “[t]he right to public office” under 42 Pa.C.S. §722(2)); *Egan v. Mele*, 634 A.2d 1074 (Pa. 1993) (vacating Commonwealth Court order for same reason).

Supreme Court shall have exclusive jurisdiction to hear any challenge to or to render a declaratory judgment concerning the constitutionality of this part.” *Id.*, §1 (adding 4 Pa.C.S. §1904).⁴ After enactment, Act 71 was challenged as unconstitutional in an action commenced in the Supreme Court. *See Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383 (Pa. 2005) (“*PAGE*”). The Court noted it did not “stand in our customary posture as an appellate court,” given the jurisdiction provision. Despite the “unique posture,” the court “conclude[d] that we have jurisdiction over this matter to resolve Petitioners’ challenges and request for declaratory judgment.” *Id.* at 392-93.

In view of the Supreme Court’s decision in *PAGE*, there can be no doubt that Section 13 of Act 77 of 2019 is constitutional. Thus, the Supreme Court has exclusive jurisdiction to hear petitioners’ challenge and request for a declaratory judgment concerning the constitutionality of that enactment.

⁴ The General Assembly also has conferred exclusive jurisdiction on the Supreme Court in other circumstances, including the Pennsylvania Intergovernmental Cooperation Authority Act. *See* 53 P.S. §12720.702 (“[t]he Pennsylvania Supreme Court shall have exclusive jurisdiction to hear any challenge to or to render a declaratory judgment concerning the constitutionality of” the Act); *Local 22 v. Commonwealth*, 613 A.2d 522 (Pa. 1992) (noting that, under §12720.702, the Court had exclusive jurisdiction); 24 P.S. §20-2013-B (similar provision in School Code); 24 P.S. §6-636.1(h) (same); *West Phila. Achievement Charter Elem. Sch. v. Sch. Dist. Of Phila.*, 132 A.3d 957 (Pa. 2016) (noting that, under 24 P.S. §6-691, the Court had exclusive jurisdiction).

What's more, this Court has already invoked Section 13 in holding that another challenge to Act 77 was within the Supreme Court's exclusive jurisdiction. In *Crossey v. Boockvar*, Pa. Commw. No. 266 MD 2020, this Court was presented with challenges to portions of Act 77 also listed in paragraph (1) of Section 13—including a challenge to Article XIII-D. By order dated June 17, 2020 this Court held the matter fell within the Supreme Court's exclusive jurisdiction, and transferred the case there. The Supreme Court concurred, accepting jurisdiction and deciding the matter on the merits. *See* Pa. Supr. No. 108 MM 2020 (orders of Aug. 26, 2020 & Sept. 17, 202 at 2 n.4). This Court should follow the example of *Crossey* and transfer this matter to the Supreme Court.

Petitioners have suggested that the Supreme Court's exclusive jurisdiction is confined to Act 77's 180-day window (discussed in the section below) for challenges to certain provisions of the enactment. Petitioners contend this means the Supreme Court has exclusive jurisdiction for the first 180 days, but then this Court has jurisdiction. But that is not what Act 77 says. It says the Supreme Court has exclusive jurisdiction over the enactment's constitutionality—period. Its jurisdiction does not have an expiration date. The jurisdictional grant and 180-day window are in separate subsections of Section 13. So they are independent of one another. Thus, even though the 180-day window ended long ago, nothing about it divests the Supreme Court of its exclusive jurisdiction.

In sum, because the Supreme Court has exclusive jurisdiction, this Court lacks it. If the Court were to proceed further, despite the plain words of Act 77, there is a substantial risk that the Supreme Court may ultimately rule that this Court's efforts—though well-intentioned—were a nullity. Thus, the General Assembly submits the case should be transferred to the Supreme Court now, or dismissed so petitioners may re-file in that Court.

B. This case is time-barred.

Second, petitioners' action is legally insufficient because it is time-barred.⁵ *See* Pa.R.Civ.P. 1028(a)(4). 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). Paragraph (2), as noted, applies to petitioners' challenge. Act 77 was effective on October 31, 2019, and thus the 180-day challenge window ended on April 28, 2020. Petitioners filed this action on November 11, 2020, or 207 days after the 180-day window ended. Thus, their action is time-barred.

⁵ A limitations period may be raised as a preliminary objection if the defense is clearly applicable from the face of the pleadings. *McCulligan v. Pennsylvania State Police*, 123 A.3d 1136, 1140 (Pa. Commw. 2015), *aff'd*, 135 A.3d 580 (Pa. 2016); *Davis v. Commonwealth*, 660 A.2d 157, 159 (Pa. Commw. 1995); *Factor v. Goode*, 612 A.2d 591, 592 (Pa. Commw. 1992).

C. Act 77 complies with the Pennsylvania Constitution.

In the event the Court reaches the merits, the General Assembly submits the Court should dismiss petitioners' action for legal insufficiency. *See* Pa.R.Civ.P. 1028(a)(4).

Petitioners contend the Pennsylvania Constitution prohibits mail-in voting except in certain narrow circumstances. Although deceptively straight-forward, this argument is predicated on a fundamental misreading of both the Pennsylvania Constitution and petitioners' authorities. The votes petitioners seek to invalidate were cast by a constitutional method. Petitioners' aged authorities, on the other hand, deal only with the constitutionality of extra-territorial voting—not the in-state voting at issue here.

Under the Pennsylvania Election Code, a “qualified elector” is “any person” who possesses “all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election.” 25 P.S. §2602. And the Pennsylvania Constitution mandates that citizens of the Commonwealth “possessing the following qualifications” may vote in Commonwealth elections:

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. In addition, Article VII of the Pennsylvania Constitution grants the Legislature broad discretion as to how voting may be done: “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).

Act 77 does not alter the requirements for a “qualified voter”; instead, it adopts that definition wholesale. *See* 25 P.S. §2602(z.6); Pet. Mem. at 31-32. The constitutionality of the Act is further assured by 25 P.S. §3150.11, which states that “[t]he term ‘qualified mail-in elector’ shall not be construed to include a person not otherwise qualified as a qualified elector in accordance with the definition in section 102(t).” *Id.* Thus, petitioners do not—indeed, cannot—dispute that the “qualified electors” whose method of voting they seek to void meet the facial requirements of the Pennsylvania Constitution: they are (i) citizens, who (ii) have resided in the state 90 days immediately preceding the election, and (iii) have resided in the election district in which they vote at least 60 days immediately prior

to the election. Nor can petitioners dispute that the Legislature is constitutionally authorized to “prescribe” the method by which these “qualified electors” may cast their votes.

Not surprisingly, then, petitioners do not identify any constitutional or statutory language that suggests otherwise. Instead, they invoke two outdated Pennsylvania Supreme Court opinions that interpret substantially different constitutional provisions and Commonwealth statutes and apply them to inapposite facts. As explained below, petitioners’ authorities address the constitutionality of extra-territorial voting in the era before absentee voting. They do not dictate any particular constitutional method of casting votes.

In *Chase v. Miller*, 41 Pa. 403 (1862), for instance, the petitioners challenged a statute seeking to ensure that Civil War soldiers fighting out-of-state could still vote back home. Section 43 of the Election Law of 1839 stated:

any of the citizens of this Commonwealth, qualified as hereinbefore provided, shall be in any actual military service in any detachment of the militia or corps of volunteers under a requisition from the President of the United States, or by the authority of this Commonwealth, on the day of the general election, such citizens 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, as fully as if they were present at the usual place of election.

Id. at 416. This created an apparent conflict with then-Article III, Section I of the Pennsylvania Constitution:

In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the state one year, and in the election district where he offers to vote ten days immediately preceding such election, and within two years paid a state or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector.

Id. at 418. As the Supreme Court pointed out, the soldiers in question did not “reside ... in the election district” where they sought to vote in the “ten days immediately preceding such election.” *Id.* at 419. The court reasoned that, because residence in the “election district” was a condition precedent to voting, the soldiers were not “qualified” under the Pennsylvania Constitution.

Further, the court took issue with the statute’s reliance on federal officers of the United States Army to create out-of-state polling places, which it deemed an unconstitutional delegation that violated sacrosanct principles of federalism and separation of powers. *Id.* at 422. As the court explained, “[i]f, then, the legislature did not and could not authorize the military commander to form an election district, how could there be any constitutional voting under the 43d section?” *Id.* Holding that there could not, the court found that a soldier could only enjoy his franchise when he “return[ed] to his election district.” *Id.* at 423.

Sixty years later, in *In re Contested Election in Fifth Ward of Lancaster County*, 281 Pa. 131 (1924), the Supreme Court again addressed extra-territorial voters. At issue was a recently-enacted statute that sought to extend voting rights

to those ““who by reason of his duties, business, or occupation [may be] unavoidably absent from his lawfully designated election district, and outside of the county of which he is an elector, but within the confines of the United States,’ on the day of holding any election.” *Id.* at 134.

By that time, the Pennsylvania Constitution—having been amended on several occasions since *Chase*—set forth slightly different requirements for a “qualified elector”:

1. He shall have been a citizen of the United States at least one month.
2. He shall have resided in the state one year (or, having previously been a qualified elector or native-born citizen of the state, he shall have removed therefrom and returned, then six months), immediately preceding the election.
3. He shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election.

Id. at 136 (citing PA. CONST. ART. 8, §1). Although the Pennsylvania Constitution at that time allowed the legislature to alter the “method” of voting, the Court nonetheless noted that the residency requirement remained unchanged, no matter what method of voting might be used: “the residence required by the Constitution must be within the election district where the elector attempts to vote; hence a law giving to voters the right to cast their ballots at some place other than the election district in which they reside is unconstitutional.” *Id.* at 137. In other words, as in

Chase, the votes challenged in *Lancaster* were placed by those who failed to meet the constitutional requirements of a “qualified elector.”

This iniquity was ultimately resolved by constitutional amendment and its attendant statutory framework, which together restored the franchise to Commonwealth residents unable to vote at the polls in their “election district.” Tellingly, however, petitioners do not—and cannot—argue that the “qualified mail-in” voters under Act 77 failed to meet the kind of constitutional residency requirements that invalidated the absentee voter statutes in *Chase* and *Lancaster*—after all, those residency requirements are part of the qualifications for eligibility. *See, e.g.*, 25 P.S. §3150.11. Act 77 merely alters the method of voting permitted for those who otherwise satisfy the definition of a “qualified elector” under Article VII, Section 1 of the Constitution. Such a change is squarely within the Legislature’s constitutional discretion. PA. CONST. ART. VII, §4.

Despite the clear constitutionality of Act 77, petitioners argue that Article VII, §14—the absentee voter amendment that remedied the injustices of *Chase* and *Lancaster*—serves as a restriction. In quick summation, petitioners contend that the only Commonwealth citizens exempted from voting in person are those identified in Section 14—*i.e.*, those: (i) whose “duties, occupation or business require them to be elsewhere,” (ii) who cannot vote in person due to “illness or

physical disability,” (iii) who cannot vote due to religious observance, or (iv) who cannot vote in person because of election day duties. *See* Pets. Mem. at 30-31.

In so arguing, however, they mistake a mandate for a limit: Article VII, §14 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 these minimal provisions, as a constitutional floor. But it says nothing about what the legislature may or may not enact in an affirmative attempt to ensure the franchise is extended to as many Commonwealth citizens as possible. *See, e.g., FTC v. Tarriff*, 557 F. Supp. 2d 92 (D.D.C. 2005) (holding there is “no basis” for concluding that “the word ‘shall’ expresses not only a mandatory direction but a limiting principle.”); *cf. Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (holding that statutory language stating that federal courts “shall” have jurisdiction does not mean jurisdiction is exclusive to federal courts).

In sum, petitioners’ claims are based on inapposite and outdated authorities. By statutory definition, the voters at issue meet the express requirements of Article VII of our Constitution. Unsupported by either logic or law, petitioners’ arguments must be rejected.

IV. CONCLUSION

For these reasons, respondent the Pennsylvania General Assembly submits that this Court should: (1) order the transfer of this case to the Pennsylvania Supreme Court or dismiss it while allowing petitioners to re-file their petition in the Supreme Court of Pennsylvania; (2) dismiss this case as time-barred; or (3) dismiss this action because Act 77 complies with the Pennsylvania Constitution.

Respectfully Submitted,

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