

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,
and KATHY BOOCKVAR,

Respondents.

Docket No. 620 M.D. 2020

**BRIEF IN OPPOSITION TO
PRELIMINARY OBJECTIONS OF
RESPONDENT PENNSYLVANIA
GENERAL ASSEMBLY**

Filed on behalf of Petitioners,
The Honorable Mike Kelly, Sean
Parnell, Thomas A. Frank, Nancy
Kierzek, Derek Magee, Robin Sauter,
Michael Kincaid, and Wanda Logan

Counsel of Record for Petitioners:

Gregory H. Teufel
Pa. Id. No. 73062
OGC Law, LLC
1575 McFarland Road, Suite 201
Pittsburgh, PA 15228
412-253-4622
412-253-4623 (facsimile)
gteufel@ogclaw.net

INTRODUCTION

Petitioners incorporate by reference their November 22, 2020, Memorandum of Law in Support of Motion for Emergency/Special Prohibitory Injunction, as if fully set forth herein.

ARGUMENT

I. Legal Standard for Preliminary Objections.

Petitioners incorporate by reference the statement of the legal standard in their response to the Preliminary Objections of Respondents Commonwealth of Pennsylvania, Governor Thomas W. Wolf, and Secretary of the Commonwealth Kathy Boockvar.

II. Respondent's First Preliminary Objection should be overruled because this Court has jurisdiction.

Respondent's First Preliminary Objection should be overruled because this Court has jurisdiction. The exclusive jurisdiction clause of Act 77 (Act of October 31, 2019, P.L. 552, No. 77 ("Act 77")) is expired and has no legal effect. As a result, this Court has jurisdiction pursuant to 42 Pa.Cons.Stat. § 761(a)(1) ("Against the Commonwealth government, including any officer thereof, acting in his official capacity").

Act 77's exclusive grant of jurisdiction to the Supreme Court expired on April 28, 2020. While this Court found applicable the exclusive jurisdiction provision of Act 77 to a challenge to Sections 1306 and 1306-D of the Election

Code in *Crossey v. Boockvar*, Pa. Commw. No. 266 MD 2020, this Court also noted in its Recommended Findings of Fact and Conclusions of Law that such transfer was because “the Supreme Court had exclusive jurisdiction if a challenge was brought within 180 days of Act 77’s effective date.” *Id.*, Recommended Findings of Fact and Conclusions of Law (Filed Sept. 04, 2020) (the Court also bifurcated the matter and retained jurisdiction over the preliminary injunction). This complies with Section 13 of Act 77, which states as follows.

Section 13. The following apply:

(1) This section applies to the amendment or addition of the following provisions of the act: (i) Section 102. (ii) section 1003(a). (iii) Section 1007(b). (iv) Section 1107. (v) Section 1110. (vi) Section 1107-A. (vii) Section 1109-A. (viii) Section 1112-A(a). (ix) Section 1216(d). (x) Section 1222(a) and (b). (xi) Section 1223. (xii) Section 1231. (xiii) Section 1232. (xiv) Section 1233. (xv) Section 1302. (xvi) Section 1302.1. (xvii) Section 1302.2. (xviii) Section 1305. (xix) Section 1306. (xx) Section 1308. (xxi) Article XIII-D.

(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). 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.

(3) An action under paragraph (2) must be commenced within 180 days of the effective date of this section.

Act 77. Thus, while Act 77 did initially confer exclusive jurisdiction on the Supreme Court to address constitutional challenges to certain provisions therein, that exclusive jurisdiction terminated 180 days after Act 77 was passed, on April 28, 2020. Respondents questionably suggest that because the 180-day time period

for exclusive jurisdiction is contained within paragraph 3 of Section 13 – rather than paragraph 2, which contains the grant of exclusive jurisdiction - that the exclusive jurisdiction is perpetual. Respondents’ fail to mention that paragraph 3 specifically applies only to paragraph 2. This provides for an unallowable interpretation of Section 13 that is “absurd ... or unreasonable.” 1 Pa. C.S. § 1922(1).

Immediately after stating that “jurisdiction does not have an expiration date” because the “jurisdictional grant and 180-day window are in separate subsections of Section 13 ... [and] are independent of one another[,]” Respondents continue on to argue that the 180-day time period does in fact apply to the paragraph 2; but only when bringing constitutional challenges after the 180-day window. Respondents provide no legal basis for this interpretation of Act 77’s 180-day time window. Rather Respondents, in a footnote, provide cases to support the notion that a “limitations period may be raised as a preliminary objection....”

The suggestion that Petitioners would ever be precluded from challenging the constitutionality of a statute because of a provision included in legislation would be an interpretation that is both “absurd,” 1 Pa. C.S. § 1922(1), and violative of “the Constitution of the United States [and] this Commonwealth”. *Id.* § 1922(3). As noted in *William Penn School District v. Pa. Dep’t of Ed.*, 170 A.2d 412, 418 (Pa. 2017):

It is settled beyond peradventure that constitutional promises must be kept. Since *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803), it has been well-established that the separation of powers in our tripartite system of government typically depends upon judicial review to check acts or omissions by the other branches in derogation of constitutional requirements. That same separation sometimes demands that courts leave matters exclusively to the political branches. Nonetheless, “[t]he idea that any legislature ... can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions.” *Smyth v. Ames*, 169 U.S. 466, 527, 18 S.Ct. 418, 42 L.Ed. 819 (1898).

(emphasis added); see also *Robinson Twp., Wash. Cty. v. Commonwealth*, 83 A.3d 901, 927 (Pa. 2013) (“[I]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts.”). While consistent with and pursuant to the Pennsylvania Constitution the Legislature can set the jurisdiction of the court, it has no authority to limit the window of time in which the constitutionality of a law can be challenged.

Lastly, Section 13 of Act 77 would also be invalidated by future amendments to the Pennsylvania Election Code, such as occurred with Act 12 of 2020. See Act of Mar. 27, 2020, Section 1, P.L. No. 41, No. 12 (hereinafter “Act 12”). Act 12, inter alia, amended Section 1302, which is noted in Act 77 as being subject to the 180-day exclusive jurisdiction period. Respondent’s reading of Section 13 of Act 77 would limit any judicial review of the constitutionality of

changes made to Act 77 by Act 12 to a period of 1 month (i.e., from March 27, 2020 to April 28, 2020). Taking Respondents' argument to the extreme, If the provisions noted in Section 13 of Act 77 were to be amended again at some time in the future, Respondents' interpretation of the 180-day window would effectively preclude judicial review of any amendment to those provisions because such review would not be within the 180-day initial window ending on April 28, 2020. To limit voters without a forum for addressing violations to their constitutional rights would be an "absurd" and "unreasonable" reading of the statute, as well as an unconstitutional reading. 1 Pa. C.S. § 1922(1), (3)

III. Respondent's Second Preliminary Objection should be overruled because statutes cannot place a limit on the time within which their constitutionality can be challenged.

Respondent's Second Preliminary Objection should be overruled because statutes cannot place a limit on the time within which their constitutionality can be challenged. Petitioners incorporate by reference their argument in Section II above regarding time-barring constitutional challenges.

IV. Respondent's Third Preliminary Objection should be overruled because Act 77 is unconstitutional.

Respondent's Third Preliminary Objection should be overruled because Act 77 is unconstitutional. Respondent alleges that the decision in *Chase v. Miller*, 41 Pa. 403 (1862), concerned only a challenge to a statute seeking to permit soldiers fighting in the Civil War to cast ballots in elections in Pennsylvania. *Id.* In reality,

the *Chase* Court was confronted with an election for the Luzerne County District Attorney which was contested on numerous grounds, including “a large number of fraudulent votes cast within the county,” in addition to allegations that detachments or companies of military servicemembers improperly held elections for the purpose of electing county officers of Luzerne in violation of the Pennsylvania Constitution and then-prevailing election laws. *See Chase*, 41 Pa. at 414.

Ezra B. Chase received a majority of the valid, lawful votes cast in Luzerne County, however, when votes polled by army soldiers were included, Jerome G. Miller had more total votes, resulting in a challenge concerning the legality and constitutionality of votes cast by volunteers in the army. *Id.* While Petitioner claims that the challenge was to a “statute seeking to ensure that Civil War soldiers fighting out-of-state could still vote back home,” the Court noted quite the opposite, finding that the legislature never “had any though whatever of legalizing military voting outside of our own territorial limits,” and instead “meant to give the citizen soldier who should be in actual service within the state on the day of the general election, an opportunity to vote, if his engagements detained him at the prescribed distance from his domicil.” *Chase*, 41 Pa. at 416-17. The Court discussed constitutional amendments to the Constitution of 1790 that had been approved in 1838 and implemented January 1, 1839, including the new requirement that a voter reside in the election district where he offers to vote, “the

main object of which was to identify the legal voter, before the election came on, and to compel him to offer his vote in his appropriate ward or township, and thereby to exclude disqualified pretenders and fraudulent voters of all sorts.” *Id.*

As noted by Respondents, the Pennsylvania Constitution provides 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. 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 Constitution also provides that “[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, [t]hat secrecy in voting be preserved.” Pa. Const. Art VII, § 5.

Unlike what Respondents argue, the binding Supreme Court precedent in *Chase v. Miller* and *In re Contested Election in Fifth Ward of Lancaster City* interpreting the same portions of Article VII, Sections 1 and 5 that exist today, states as follows:

To ‘offer to vote’ by ballot is to present one’s self, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it.

The ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicile. ***We cannot be persuaded that the Constitution ever contemplated any such mode of voting***, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. ***The Constitution meant, rather, that the voter, in propria persona, should offer his vote in an appropriate election district***, in order that his neighbors might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.

In re Contested Election in Fifth Ward of Lancaster City, 126 A. 199, 200 (1924)

(quoting *Chase v. Miller*, 41 Pa. 403, 418-19 (1864)) (emphasis added). To the extent that Act 77 allows for a voter to mail-in their vote, this violates binding Supreme Court precedent with regard to the interpretation of the constitutional meaning of “offer to vote by ballot.” Respondents fail to discuss this primary principle in their discussion of *Chase*. While residence in a district was one factor looked at by the Court, the primary basis for its holding, as well as that in the *Lancaster City* case, is the meaning of the 1838 amendment that added the specific words, “offer to vote” and “by ballot” to the Pennsylvania Constitution – which requirements still exist to this day. The Supreme Court noted:

Regarding the amendment as designed in general to exclude fraudulent voting, the question now is, what construction shall be given to its particular phraseology?

The amendment so understood, introduced not only a new test of the right of suffrage, to wit, a district residence, but a rule of voting also. Without the district residence no man shall vote, but having had the district residence, the right it confers is to vote in that district. Such is the voice of the constitution. The test and the rule are equally

obligatory. We have no power to dispense with either. Whoever would claim the franchise which the constitution grants, must exercise it in the manner the constitution prescribes.

Chase v. Miller, 41 Pa. at 419. The Supreme Court could not be more direct or clear on the fact that the *in propria persona* method of voting, in the district in which one resides, is a qualification for voting under the Pennsylvania Constitution.

Respondents also misstate the background and reasoning of the Supreme Court in *In re Contested Election in Fifth Ward of Lancaster City*. Since the *Chase* decision, the *Lancaster City* decision noted that “in so far as the qualifications of voters are concerned, except as to such persons as are in actual military service, practically the same provisions as theretofore controlling” existed. *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. at 136 (noting the age, residency, and in person voting “qualifications”). Additionally, a 1901 amendment to the Pennsylvania Constitution added even stricter election integrity requirements through the introduction of the secrecy requirement provision of Article VII, § 5. Pa. Const. Art. VII, § 5 (the ballot “or by such other method as may be prescribed by law” provision of the Constitution was unchanged since the *Chase* decision).

Just like *Chase*, the *Lancaster City* case dealt with an act that purported to grant the right to vote by mail to voters other than active military – the only constitutionally authorized exception to voting *in propria persona* – absent

constitutional authority. The court relied on the *Chase* decision’s definitional holding that the *in propria persona* method of voting is what the Constitution required.

Respondents state that certain inequities were “ultimately resolved by constitutional amendment and its attendant statutory framework, which together restored the franchise to Commonwealth residents[,]” but do not identify what constitutional amendments occurred since *Lancaster City* that would be relevant to the merits of this case. In fact, all provisions of the Pennsylvania Constitution relied upon in the *Lancaster City* decision remain either entirely or materially unchanged since the Pennsylvania Supreme Court struck down an illegal expansion of mail voting in that case.

Article VII, Section 4 (previously Article VIII, Section 4) remains exactly the same as it did when the 1924 case was decided. Article VII, Section 1 (previously Article VIII, Section 1) has only distinctly changed in three ways – each immaterial to this case - since the *In re Contested Election in Fifth Ward of Lancaster City* case: (1) the voting age requirement was changed to 18, from 21; (2) the state residency requirement was lowered from 1 year, to 90 days; and (3) Clause 3 was amended to allow a Pennsylvania resident who moves to another Pennsylvania county within 60 days of an election to vote in their previous county of residence. None of these changes to Article VII, Section 1 have any material

importance to the merits of this case, and none were in any way relevant to the Pennsylvania Supreme Court's decision in *In re Contested Election in Fifth Ward of Lancaster City*. Because the Pennsylvania Constitution's qualifications and requirements for voting remain materially unchanged since *In re Contested Election in Fifth Ward of Lancaster City*, the Supreme Court's holding in that case continues to be valid and binding precedent, applicable here.

Respondents are also mistaken with regard to the discretion of the legislature in altering methods of voting. Unfortunately, Respondents did not learn from history. Just like the legislature that enacted, and the Governor that signed, the Military Absentee Ballot Act of 1839, Respondents here enacted "careless legislation." *Chase*, 41 Pa. at 417. The Legislature should have acted more like the 1864 General Assembly that heeded the advice of the Attorney General in waiting for the constitutional amendment to allow for military absentee voting to be approved by the electors before passing legislation on the same subject.

Respondent argues that Petitioners mistake a mandate for a limit with regard to Article VII, § 14, but in direct conflict with that reasoning, the Court in *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924) stated "The old principle that the expression of an intent to include one class excludes another has full application here." In other words, the decision to amend the constitution to allow absentee voting for soldiers only was purposeful, and the

functional equivalent of the intentionally prohibiting absentee voting for any other voters.

Respondents mistake the meaning of Article VII, § 14, in the context of the other constitutional provisions discussed herein, as determined by binding Supreme Court precedent. The relevance of Article VII, § 14 can only be understood after first evaluating the qualifications for voting, and limitations on the legislature's ability to enact legislation. First, the Constitution provides for the requirements necessary to vote in Pennsylvania, according to the Supreme Court in *Chase* and *In re Contested Election in Fifth Ward of Lancaster City*. This includes the method of voting, which is “with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. The ballot cannot be sent by mail or express.” *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 200 (Pa. 1924) (quoting *Chase v. Miller*, 41 Pa. 403, 418-19 (1864)) (emphasis added). “For the orderly exercise of the right resulting from these qualifications ... the Legislature must prescribe necessary regulations But this duty and right inherently imply that such regulations are to be subordinate to the right As a corollary of this, no constitutional qualification of an elector can in the least be abridged, added to, or altered by legislation or the pretence of legislation.” *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924). Only with this

constitutional context and relevant caselaw as backdrop can the language of Article VII, § 14 be understood: it provides exceptions for the qualifications for voting (method of voting) prescribed by the Pennsylvania Constitution. This is what binding Pennsylvania Supreme Court Precedent has repeatedly held, going back to 1864 in *Chase v. Miller*. Understandably, Respondents are only able to cite to federal case law from the District of Columbia, and a U.S. Supreme Court case with an irrelevant holding, as persuasive evidence to try and circumvent what is well-settled, Supreme Court precedent under Pennsylvania law.

CONCLUSION

For the foregoing reasons, the Preliminary Objections of Respondent Pennsylvania General Assembly should be overruled.

Respectfully submitted,

OGC Law, LLC

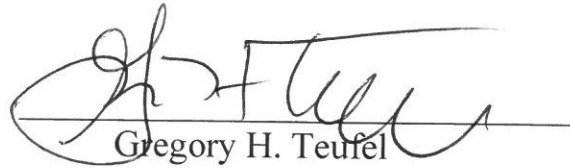


Gregory H. Teufel, Esq.
Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

I certify that 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.

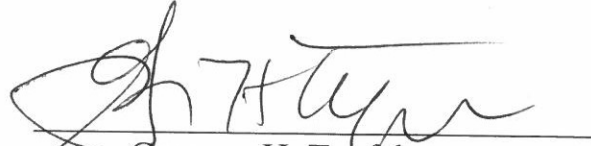
Date: November 24, 2020



Gregory H. Teufel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record on November 24, 2020 by this Court's electronic filing system.


Gregory H. Teufel