
IN THE SUPREME COURT OF PENNSYLVANIA

MELINDA DELISLE; JACQUES DELISLE; ADAM DELISLE; BRYAN IRWIN; CHARLES CELLA; DEBORAH CELLA; MARY CAY CURRAN; ELIZA HARDY JONES; KRISTA NELSON; EILEEN MCGOVERN; CEDRIC HARDY,

Petitioners,

No. 95 MM 2020

v.

KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; AND JESSICA MATHIS, IN HER CAPACITY AS DIRECTOR OF THE BUREAU OF ELECTION SERVICES AND NOTARIES OF THE PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

PETITIONERS' BRIEF IN SUPPORT OF THIS COURT'S JURISDICTION OVER THE PETITION FOR REVIEW, OR IN THE ALTERNATIVE, REQUESTING THIS COURT'S EXERCISE OF KING'S BENCH OR EXTRAORDINARY JURISDICTION

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INTRODUCTION

While Petitioners and Respondents disagree on aspects of this case, and in particular the scope of relief appropriate to remedy the problems that have arisen for voting by mail due to the pandemic, all parties agree that this Court has original jurisdiction over this action. As Respondents assert in their opposition to Petitioners' preliminary injunction application, "Respondents agree with Petitioners that the Court has jurisdiction over the Petition for Review pursuant to Act 77." PI Opp. 16 n.12. In addition, the Commonwealth Court, just this morning, denied a preliminary injunction in the *Crossey* case on the ground that this Court has exclusive jurisdiction over constitutional challenges to the received-by deadline pursuant to Act 77. Order, *Crossey v. Boockvar*, No. 266 MD 2020 (Pa. Commw. Ct. May 28, 2020).

For good reason. The plain text of Act 77 unambiguously establishes that this Court maintains original jurisdiction over this action. Act 77 gives this Court "exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of" certain provisions, including the provisions setting forth the received-by-election-day deadline for absentee and mail-in ballots. Act of Oct. 31, 2019 ("Act 77") § 13(2), P.L. 552, No. 77. Act 77's 180-day limitations period, which is in a separate provision from the jurisdiction-conferring provision, does not affect this Court's jurisdiction, has been waived by

Respondents, and cannot be constitutionally applied to preclude Petitioners' constitutional claims in any event.

Even if this Court concluded that Act 77 does not confer original jurisdiction over this action, or if the Court prefers not to resolve that question, Petitioners respectfully request that this Court exercise jurisdiction over this action under its King's Bench authority. The June 2 primary has descended into chaos and the right to vote of tens of thousands of Pennsylvania citizens is in peril just days before the primary.

Petitioners' preliminary injunction application detailed the various backlogs and mail delays that are jeopardizing the ability of voters to timely submit absentee and mail-in ballots, and things have gotten worse in just the three days since Petitioners filed their application. Montgomery County has filed its own lawsuit seeking to extend the received-by deadline for absentee and mail-in ballots because of a host of problems that will make it impossible for many voters there to submit their ballots on time. Delaware County, which still has not mailed ballots to roughly 6,000 voters, has started advising voters that “[b]ased on the date of mailing of your ballot, there may be insufficient time for your ballot to be returned by mail.”¹ Philadelphia will not finish processing applications until today, the Thursday before the election. And as of this filing, ten of the eleven Petitioners

¹ <https://twitter.com/Elaijuh/status/1265644669855203330>.

still have not yet received their ballots, and at least four Petitioners have not even been sent their ballots according to the Department of State’s tracking information.

Respondents no longer seriously dispute that judicial intervention is necessary to protect the constitutional rights of voters, and Respondents appear not to dispute that *this Court* could properly provide some relief from the received-by deadline in this action. Respondents disagree only about the scope of relief that should be granted, arguing that it should be limited to the specific counties for which the Department of State has admitted to the greatest problems. But extending the deadline only for individual counties is not a tenable solution where there are statewide elections, as well as congressional and state legislative elections that span multiple counties, on the ballot. Among other problems, such a county-specific solution would invariably lead to federal litigation—potentially in both the U.S. Supreme Court and U.S. district court—challenging the disparate deadlines on federal equal protection grounds, which would only exacerbate the chaos.

Whether via original jurisdiction under Act 77 or under this Court’s King’s Bench authority, this Court’s immediate intervention is necessary to provide clarity and a uniform solution that protects the fundamental rights of Pennsylvanians across the Commonwealth. Unless this Court grants relief to protect the voting rights of tens or hundreds of thousands of Pennsylvania voters, no court will.

ARGUMENT

I. This Court Has Jurisdiction Under Section 13 of Act 77

This Court has jurisdiction—indeed exclusive jurisdiction—over this action under § 13 of Act 77. Section 13(2) grants this Court “exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1)” of Section 13. Act 77 § 13(2). Paragraph 1, in turn, covers a list of provisions, including the provisions of Act 77 that establish the received-by-election-day deadline for absentee and mail-in ballots. *Id.* § 13(1)(xx), (xxi) (covering § 1306, § 1308, and Article XIII-D, which created the received-by deadline). This lawsuit is a “challenge to,” and seeks a “declaratory judgment concerning,” “the constitutionality of” these provisions containing the received-by deadline. *Id.* § 13(2). Accordingly, this lawsuit falls squarely within Act 77’s exclusive-jurisdiction provision.

Indeed, in their preliminary injunction opposition, Respondents state that they “agree with Petitioners that the Court has jurisdiction over the Petition for Review pursuant to Act 77.” PI Opp. 16 n.12. Respondents do not contest this Court’s jurisdiction because the plain text of § 13(2) is clear that original jurisdiction over Petitioners’ claims resides in this Court.

Respondents further agree that Act 77’s 180-day statute of limitations—which is in § 13(3), a separate provision from the jurisdiction-conferring

provision—does not deprive this Court of jurisdiction. And because the limitations period is not jurisdictional, Respondents’ failure to raise the limitations period as an affirmative defense waives any reliance on the provision.

Statutes of limitations are not jurisdictional, but rather are “for the benefit of the defendant and may be waived.” *Smith v. Pa. R.R.*, 156 A. 89, 91 (Pa. 1931). This Court has looked to federal case law on the jurisdictional status of statutory timing requirements, *see Commonwealth v. Fahy*, 737 A.2d 214, 222 (Pa. 1999), and federal case law makes clear that “[f]iling deadlines” are quintessential “claim-processing rules” and are presumptively non-jurisdictional. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (holding that 120-day appeal period was non-jurisdictional).

Although the legislature may in certain instances change the default rule and attach jurisdictional consequences to a filing deadline, there is zero indication that it intended to do so in Act 77, much less “clear” evidence sufficient to upset the default rule. *Henderson*, 562 U.S. at 435, 441. Only § 13(2) uses the term “jurisdiction.” Section 13(3), which contains the 180-day limitations period, “does not speak in jurisdictional terms or refer in any way to the jurisdiction of” this Court. *Id.* at 438. Nor does the title of Section 13 as a whole refer to jurisdiction. This provision is thus unlike the one-year statute of limitations applicable to filing a PCRA petition, which this Court has deemed jurisdictional because it is

contained in a section entitled “Jurisdiction.” *Commonwealth v. Peterkin*, 722 A.2d 638, 641 (Pa. 1998); *Fahy*, 737 A.2d at 222.

Even if Act 77’s 180-day limitation period were jurisdictional, however, it still would not deprive this Court of jurisdiction because doing so would itself be unconstitutional as applied to this case. As explained in Petitioners’ preliminary injunction application, limitations periods can never apply to foreclose prospective constitutional challenges to Pennsylvania statutes. As this Court has held in the analogous context of laches, “laches and prejudice can never be permitted to amend the Constitution.” *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988). Laches cannot “bar an attack upon the constitutionality of a statute as to its future operation, especially where the legislation involves a fundamental question going to the very roots of our representative form of government and concerning one of its highest prerogatives.” *Id.* at 188-89 (quoting *Wilson et ux. v. Phila. School Dist.*, 195 A. 90, 99 (Pa. 1937)). This rule that laches cannot “prevent the court from declaring an act void in violation of the constitution” has been part of Pennsylvania law for over a century. *Id.*

A statutory limitations period is no different. The General Assembly cannot insulate its statutes from judicial review by legislative fiat. To hold otherwise would contravene Art. I, § 10 of the Constitution, which declares that “[a]ll courts shall be open; and every man for an injury done him . . . shall have remedy by due

course of law, and right and justice administered without sale, denial or delay.”

Holding that a statute of limitations may bar this Court from assessing the prospective constitutionality of a statute would effectively allow the legislature to “amend the Constitution,” *Sprague*, 550 A.2d at 188, and would leave millions of Pennsylvanians for generations to come with no remedy to address denials of the right to vote or any other constitutional violation of the legislature’s choice.

This Court’s decision in *Yanakos v. UPMC*, 218 A.3d 1214 (Pa. 2019), which concerned an arguably jurisdictional statute of repose, confirms that unconstitutional limitations periods do not deprive the Court of jurisdiction even when the limitations period is denominated jurisdictional. *Yanakos* invalidated under intermediate scrutiny a statute of repose limiting a common-law tort remedy because the period of repose was not “substantially related to achieving an important government interest.” *Id.* at 1222. As explained in Petitioners’ preliminary injunction application, the 180-day limitations clock would fail intermediate scrutiny. Respondents bear the burden of justifying the 180-day limitation under intermediate scrutiny, *id.* at 1223, but they have not even invoked it in their preliminary objections or preliminary injunction opposition brief. For present purposes, however, what matters is that if Act 77’s limitations period were jurisdictional, the limitations period in *Yanakos* would have been too. Both refer in similar language to the time period by which a claim must be “commenced.” *Id.* at

1217; Act 77 § 13(3). Yet *Yanakos* did not dismiss for lack of jurisdiction. Upon finding that the limitations period was unconstitutional, the Court remanded for the lower court to hear the case. 218 A.3d at 1227.

Moreover, even if the 180-day statute of limitations could be constitutionally applied in the context of a *facial* challenge to Act 77's received-by deadline, it still could not constitutionally foreclose an *as-applied* challenge like this one. As-applied challenges turn on the application of a law to specific facts and circumstances. The General Assembly cannot prevent citizens from bringing an as-applied constitutional challenge where the facts and circumstances underlying the challenge arose after the purported statute of limitations has lapsed. That is the case here. The backlogs in county boards of elections and mail delays giving rise to Petitioners' claims have only crystalized now, in late May 2020. Petitioners allege that it has now become clear that county boards of elections are unable to process applications in time for the received-by deadline, that Petitioners and other Pennsylvania voters have sent in absentee and mail-in ballot applications and have not yet received their ballots (including because of admitted mail delays), and that they will be deprived of the right to vote in the absence of relief from this Court because it is now too late for them to receive their ballots in time to fill them out and ensure they will be received by June 2. Since these facts and circumstances

arose *after* the 180-day period ended, it would violate the Pennsylvania Constitution to hold that the 180-day period nonetheless bars Petitioners' lawsuit.

Application of the 180-day limitations period is especially unwarranted given this Court's dismissal with prejudice of a prior lawsuit challenging the received-by deadline on the ground that those petitioners' claims were too speculative at that time. *See Order, Disability Rights Pa. v. Boockvar*, No. 88 MM 2020 (Pa. May 15, 2020). The *Disability Rights Pennsylvania* suit was filed one day before the 180 days had run, and respondents argued in their first Preliminary Objection that petitioners had not stated a constitutional violation because petitioners' allegations about a backlog in ballot-application processing and mail-delivery delay were just "theories" and were too "speculative" at that time to support a claim that "Pennsylvanians will be deprived of the right to vote."

Disability Rights Pa., DOS POs at 11, 13. This Court dismissed on the basis of that preliminary objection. *See Order at 1-2, Disability Rights Pa.*; *see also* Concurring Statement of Justice Wecht at 1-2 (concurring and noting that "circumstances may change" but that "the possibility that votes may be suppressed due to late ballot delivery, as presently alleged, is too remote at this time to constitute a cognizable injury").

In light of the Court’s disposition of *Disability Rights Pennsylvania*, it simply cannot be that the 180-day period deprives the only court in Pennsylvania with jurisdiction to hear this action from in fact hearing this action.

II. In the Alternative, this Court Should Exercise its King’s Bench Jurisdiction Over this Case²

Even if this Court does not have original jurisdiction over this case pursuant to Act 77, or to avoid resolving that question, the Court can and should exercise jurisdiction pursuant to its King’s Bench authority. “[T]he present action presents an issue of immense public concern and requires immediate judicial resolution.”

Friends of Danny DeVito v. Wolf, No. 68 MM 2020, 2020 WL 1847100, at *8 (Pa. Apr. 13, 2020). There is a desperate need for this Court to safeguard the rights of Pennsylvania voters in the election less than a week away. Absent this Court’s intervention, it is certain that tens or hundreds of thousands of voters will be disenfranchised and others will risk their health and lives to ensure that their votes are counted.

Article V, Section 10(a) of the Pennsylvania Constitution provides that this Court “shall exercise general supervisory and administrative authority over all courts and justices of the peace.” “The General Assembly has codified” this broad “King’s Bench authority” by providing that the “Supreme Court shall have and

² In the alternative to King’s Bench jurisdiction, Petitioners request that this Court exercise extraordinary jurisdiction over this action pursuant to 42 Pa.C.S. § 726.

exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.” *Friends of Danny DeVito*, 2020 WL 1847100, at *8 (quoting 42 Pa. C.S. § 502). This Court’s precedent has long “described the King’s Bench power in the broadest of terms”; it encompasses “every judicial power that the people of the Commonwealth can bestow under the Constitution of the United States.” *In re Bruno*, 101 A.3d 635, 666 (Pa. 2014) (quotation marks omitted). This Court “may exercise King’s Bench powers over matters where no dispute is pending in a lower court.” *Friends of Danny DeVito*, 2020 WL 1847100, at *8 (quotation marks omitted).³

This Court will invoke its King’s Bench authority “to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.” *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015); *see also Friends of Danny DeVito*, 2020 WL 1847100, at *8 (“issue of immense public

³ Although there is another action relating to the deadline for absentee and mail-in ballots pending in the Commonwealth Court, “there is not an identity of the petitioners in that case with those in this action,” which is what matters for King’s Bench purposes. *Friends of Danny DeVito*, 2020 WL 1847100, at *8 n.8.

concern and require[ing] immediate judicial resolution”). This case amply meets those standards.

First, the issues raised in this case are of immense public importance. As explained in the Petition for Review and accompanying preliminary injunction application, it is now even more apparent that enforcement of the received-by deadline during the ongoing pandemic *will*—not simply *may*—disenfranchise tens if not hundreds of thousands of Pennsylvania voters who timely requested mail-in ballots, and will force other Pennsylvania citizens to risk their health and lives to ensure that their ballots are counted by voting in person at a polling place. In particular, Commonwealth officials have explained in recent court filings that the unprecedented increase in absentee and mail-in ballot applications has resulted in extreme backlogs and delays at the county boards of elections in processing and approving applications and sending approved applicants their ballots, and that there have also been mail-delivery delays in at least one large county. *See Mem. in Supp. of Pets.’ Emergency Application (“Mem.”) at 11-16.*

In just the three days since Petitioners filed their petition for review and application for a preliminary injunction, the situation has grown even more dire:

- On May 26, the USPS regional spokesperson for Pennsylvania said that voters should “mail their completed ballots *at least one week before the due*

date” to ensure they meet the received-by deadline. (One week before the received-by deadline was Tuesday, May 25—two days ago.)⁴

- On May 26, the final day to apply for an absentee and mail-in ballots, applications spiked dramatically across the Commonwealth. On this one day alone, there were more than 73,000 applications submitted statewide.⁵
- On May 26, the Montgomery County Board of Elections filed an emergency petition in the Court of Common Pleas requesting a one-week extension of the received-by deadline for absentee and mail-in ballots.⁶ The Board explained that: (1) it has received numerous reports of voters “who have not received their absentee or mail-in ballots, despite the fact that the ballots were mailed to them,” and USPS has informed the Board that ballots could take “*up to ten days to be delivered*” by mail; (2) a technical issue in the Department of State’s software for processing applications had “resulted in *errors appearing on address labels*” for ballots mailed to voters, and numerous ballots were returned by USPS as undeliverable due to this issue; and (3) Montgomery County still had 3,000 applications not yet processed at all. The Court of Common Pleas denied the Board’s petition for relief, and the Board reportedly plans to appeal.
- On May 26, Montgomery County’s chief operating office and clerk of its elections board said: “we’ll have the proof ... after this primary that thousands of voters will very likely not have their votes counted” due to the received-by-election-day deadline.⁷
- On May 26, the Chief of Staff to Philadelphia Mayor Jim Kenney said: “Unfortunately, due to the current backlog, the City is in jeopardy of not

⁴ Jonathan Lai, *Thousands of Pennsylvania voters might not get their mail ballots in time to actually vote*, May 26, 2020, Phila. Inquirer, <https://www.inquirer.com/politics/election/pa-mail-ballots-deadline-2020-primary-20200526.html> (emphasis added).

⁵ See Supplemental Decl. of Dr. Marc Meredith at 9, *Crossey v. Boockvar*, No. 266 MD 2020 (Commw. Ct.) (filed May 28, 2020).

⁶ See *In re Extension of Time for Absentee and Mail-in Ballots To Be Received and Counted in the 2020 Primary Election*, No. 2020-cv-06413 (Pa. Ct. Comm. Pleas).

⁷ Lai, supra n.4.

getting ballots out to voters in time for the June 2nd primary and we need your support.”⁸

- On May 26, Delaware County issued a press release stating that it still had not processed 6,000 applications, and that ballots would not be mailed out to these voters until Thursday, May 28.⁹
- On May 26, Delaware County Councilwoman Christine Reuther said: “There are going to be many people who are still going to be receiving their ballots very close to election day or on election day. I’m very worried that people are going to be disenfranchised.”¹⁰
- On May 27, Delaware County began informing voters being mailed their ballots: “***Based on the date of mailing of your ballot, there may be insufficient time for your ballot to be returned by mail to the County by 9 pm on Tuesday, June 2.***”¹¹ While the County informed voters of alternative ways to deliver their ballots to designated locations in person, many voters face significant obstacles in traveling to those locations, including voters who do not have a car and who fear the personal and public health risks of using public transportation at this time.
- As of this filing, on May 28, ten of the eleven Petitioners have not yet received their absentee or mail-in ballots, including several of the Petitioners who submitted their applications weeks or even months ago. At least four Petitioners have not even been sent their ballots as of this filing, according to the Department of State’s tracking information.

Respondents’ effort to minimize all of the problems that are threatening the integrity of the upcoming primaries fall short. Respondents assert that “Petitioners

⁸ *Id.*

⁹ Press Release, May 26 Update on the June 2 Primary Election in Delaware County, <https://www.lansdowneborough.com/DocumentCenter/View/875/May-27-Delaware-County-Voting-Update>.

¹⁰ Lai, *supra* n.4.

¹¹ <https://twitter.com/Elaijuh/status/1265644669855203330>.

only present evidence of ‘backlogs’ in four counties.” PI Opp. at 10. But those four counties—Philadelphia, Montgomery, Delaware, and Alleghany—constitute more than *a third of Pennsylvania’s total electorate*. Moreover, Petitioners’ evidence is focused on these counties because these are the counties for which the Department of State has selectively chosen to provide information in their filings. The only statewide statistics the Department has provided—showing a backlog of 241,270 voters who had submitted an application but had not yet been sent a ballot as of May 22—show that backlogs are plaguing counties across the Commonwealth. Philadelphia, Delaware, and Alleghany Counties collectively accounted for about 100,000 of these applications (Secretary Marks did not provide data for Montgomery County), meaning that there was a backlog of about 140,000 applications across the remaining counties, just eleven days before the election. Indeed, online data shows that, as of May 27, Mercer and Fayette Counties still had not sent ballots to 10% of voters with approved applications.¹²

As for these four counties, the updated information that Respondents provide is not nearly as rosy as Respondents suggest. The tweet to which Respondents cite regarding Philadelphia states that applications that had already been “approved” would be mailed on Tuesday, but says nothing about when applications not yet approved would be approved and actually mailed, which of course is the only thing

¹² Meredith Supplemental Decl., *supra*, at 8.

that matters to the voter.¹³ Indeed, Philadelphia officials have since indicated that they will not finish processing applications until Thursday, May 28, five days before the primary.¹⁴ Allegheny County states that it finished “processing” application over the weekend, but was still mailing out ballots through at least Wednesday, such that some Allegany voters will almost surely not receive their ballots until the weekend or later.¹⁵ And Respondents do not offer any new positive information at all regarding the backlogs and mail delays in Delaware and Montgomery Counties. Petitioners did not and do not dispute that election officials in these counties and others have made heroic efforts to process applications as quickly as possible, but getting ballots to voters sufficiently before election day has simply not been possible due to the effects of a once-in-a-century pandemic.

The question of whether the Pennsylvania Constitution requires relief from the inevitable disenfranchisement and burdens on the right to vote that will result in these circumstances is a public concern of the highest order that warrants King’s Bench review. There are contested statewide, congressional, and legislative primaries on the June 2 ballot that are of immense importance. And this Court has repeatedly recognized the paramount, fundamental public importance of voting and

¹³ <https://twitter.com/PhillyVotes/status/1265052824028753920>

¹⁴ <https://twitter.com/Elaijuh/status/1265784020232781825>.

¹⁵ <https://www.post-gazette.com/news/politics-local/2020/05/27/Primary-2020-Allegheny-County-voters-mail-in-ballots/stories/202005270092>.

voting rights—an importance reflected in the Constitution’s “plain and sweeping” guarantee of free and equal elections. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 815 (Pa. 2018). The right to vote “is pervasive of other basic civil and political rights and is the bedrock of our free political system.” *Bergdoll v. Kane*, 731 A.2d 1261, 1268-69 (Pa. 1999). If any court in the Commonwealth is to determine the constitutionality of a widespread infringement of this bedrock right during a pandemic, it should be this Court.

Second, “immediate judicial resolution” is necessary to avoid “the deleterious effects arising from delays incident to the ordinary process of law.” *Friends of Danny Devito*, 2020 WL 1847100, at *8 (quoting *Williams*, 129 A.3d at 1206). Here those deleterious effects come in two forms. One is the immediate, irreparable injury that may befall Petitioners and tens or hundreds of thousands of other Pennsylvania voters if the constitutionality of the received-by deadline is not conclusively resolved now. Mem. 31-32. If a court does not resolve the constitutional questions presented now, tens or hundreds of thousands of Pennsylvanians risk being disenfranchised, and others may endanger their lives and the lives of others by going to the polls in person rather than risking that their mail-in ballot will arrive too late. These are constitutional injuries of the greatest magnitude, “impacting virtually all Pennsylvanians.” *Friends of Danny DeVito*, 2020 WL 1847100, at *8.

Conclusively resolving this question now—in this Court—also would provide uniformity and avoid the chaos that would result from addressing these issues on a county-by-county basis, as Respondents propose. As mentioned, one Pennsylvania county (Montgomery County) already filed a lawsuit in the Court of Common Pleas seeking an extension of the received-by deadline. The petition was denied and the County reportedly plans to appeal. Meanwhile, the Department of State continues to encourage the filing of individual petitions in the Courts of Common Pleas seeking county-specific relief. *See* PI Opp. at 23 (suggesting that “the Courts of Common Pleas are able to fashion appropriate relief” for “specific counties experiencing delays”).

The result of such county-by-county lawsuits would be that different counties could have different deadlines, even though statewide elections and congressional and state legislative elections spanning multiple counties are on the ballot. The Department seems to contemplate, for example, that for the contested Democratic primary in Congressional District 1, the Montgomery County portion of the district would have a different deadline for absentee and mail-in ballots than the Bucks County portion of the district. Among other issues, this ad hoc approach would undoubtedly prompt federal litigation asserting that the disparate deadlines violate the federal Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98 (2000). Swift resolution of the issues presented in this Petition on a statewide basis would

provide for a uniform resolution of the merits, one way or the other, and would avoid the inevitable chaos that would follow from county-by-county lawsuits, and concomitant federal litigation, in the days leading up to the primary election.

This Court’s recent decision in *Friends of Danny DeVito* confirms why King’s Bench jurisdiction is warranted here. There, this Court exercised King’s Bench jurisdiction in a statutory and constitutional challenge to the Governor’s COVID-19-related shutdown order, explaining that the “case present[ed] issues of immediate and immense public importance impacting virtually all Pennsylvanians and thousands of Pennsylvania businesses, and that continued challenges to the Executive Order will cause further uncertainty.” 2020 WL 1847100, at *8. The same is true here. The constitutionality of the received-by deadline in light of the problems that have unfolded due to the pandemic must be resolved by the courts, and it should be this Court that resolves these issues.

Indeed, if this Court concludes that it lacks original jurisdiction and declines to exercise King’s Bench jurisdiction, this Court would have to transfer this case to the Commonwealth Court pursuant to 42 Pa.C.S. § 5103, rather than dismiss the case. The Commonwealth Court would then be pressed to immediately resolve Petitioners’ application for a preliminary injunction, and however the Commonwealth Court rules, presumably the losing side will file an emergency

appeal to this Court. The net result would be that this case would be back in this Court in a few days, but in even more of an emergency posture.

For all of these reasons, if this Court has any doubt about its jurisdiction under Act 77, it should exercise King's Bench authority to hear this case and should grant Petitioners' requested emergency relief.

III. Petitioners Have Not Failed to Join Indispensable Parties

Respondents also assert in their preliminary objections that the Court lacks jurisdiction because Pa. R. Civ. P. 1032(b) purportedly requires Petitioners to join each and every one of Pennsylvania's 67 county boards of elections in order to bring this action challenging the constitutionality of a provision of the Election Code. Their argument runs counter to precedent, cannot be reconciled with the statutory scheme governing the administration of Pennsylvania elections, and, if adopted, would be so practically burdensome that it would effectively shut down constitutional challenges to election-related restrictions.

Pennsylvania courts routinely resolve election-law challenges like this one without the parties that Respondents now claim are indispensable. In *Applewhite v. Commonwealth*, for example, the Commonwealth Court enjoined enforcement of a photo-identification statute without any counties or county officials as parties, even though counties were responsible for enforcing the photo-identification requirements that were enjoined. 2012 WL 4497211, at *7-8 (Pa. Commw. Ct.

Oct. 2, 2012); *see also Banfield v. Cortés*, 922 A.2d 36 (Pa. Commw. Ct. 2007) (overruling preliminary objection seeking dismissal for failure to join 56 counties in action concerning certain voting machines). Respondents do not cite a single Pennsylvania decision holding that county boards of elections are indispensable parties that must be joined in challenges to statutory, statewide election laws, and Petitioners are aware of none.

The dearth of precedent supporting Respondents’ position reflects that, in constitutional challenges like this one, counties do not remotely qualify as indispensable under this Court’s standard. “In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights.” *Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953, 957 (Pa. 1981) (quotation marks omitted).

Respondents do not explain what “rights” the county election boards would be seeking to defend in a case involving a uniform, statewide, statutory deadline.

To the contrary, Pennsylvania’s Election Code expressly charges the Secretary of the Commonwealth—a named Respondent in this case—with overseeing and implementing the Election Code and the counting of absentee and mail-in ballots in particular. The Secretary has authority to perform necessary duties under the Election Code, *see* 25 P.S. § 2621, and has authority specifically “to establish, implement and administer the SURE system,” *id.* § 1222(f), which

governs how county election boards record absentee and mail-in ballot applications, send such ballots to voters, process voters' completed ballots, and count the ballots. The Secretary also is delegated the power to "receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates and upon questions as required by the provisions of this act; to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates at such elections." *Id.* § 2621. And the Secretary prescribes the form of the application for absentee and mail-in ballots. *Id.* § 3146.2(i).

Moreover, independent of the Secretary's authority to direct the county boards of elections, county election boards must exercise their duties "in the manner provided by" the Election Code. 25 P.S. § 2642. Thus, if this Court declares a statewide, statutory deadline in the Election Code unconstitutional as applied during the pandemic, all county election boards and their officials, like all state officers, must abide by that decree.

That the requested relief may alter "counties' behavior and responsibilities" (P.O. ¶ 27) is not nearly enough to make all counties indispensable. Respondents' argument mirrors one that this Court directly rejected in *Kline*, which involved a dispute over subsidy funding for school districts under Pennsylvania statutes. 431 A.3d at 955-56. The respondents there argued that all Pennsylvania school boards

were indispensable because the requested relief could reduce the subsidy payments to which all other school districts were entitled. *Id.* at 958. This Court disagreed; even if the other districts might stand to lose funding, they did not have a right to “benefit from any error that may have been made in the calculation” of subsidies—at least not one so integral that their presence in the case was “essential to a determination on the merits.” *Id.*

If Respondents’ theory were correct, individuals in all future cases challenging statutes or government policy as unconstitutional would systematically need to effectuate service on dozens, if not thousands,¹⁶ of government officials across Pennsylvania. All of those parties would then have the ability to file separate motions and briefs—which would then require responsive filings—throughout the litigation. In every election law case, plaintiffs would need to name and serve, at minimum, nearly 70 defendants, and the courts would then potentially be subject to 70 different sets of briefs on every contested issue. “To sustain the

¹⁶ In a suit challenging the constitutionality of the Election Code’s poll-watcher procedures, for example, it would be necessary to name as respondents thousands of election judges across Pennsylvania. 25 P.S. § 2687(b) (“During those intervals when voters are not present in the polling place either voting or waiting to vote, the judge of elections shall permit watchers, upon request, to inspect the voting check list and either of the two numbered lists of voters maintained by the county board: Provided, That the watcher shall not mark upon or alter these official election records. The judge of elections shall supervise or delegate the inspection of any requested documents.”).

preliminary objection of failure to join an indispensable party would be inequitable and unjust,” *Kline*, 431 A.2d at 959, not just here but in scores of future civil rights cases fitting this mold. There is nothing to recommend Respondents’ argument that this Court break with precedent and impose such a novel and burdensome requirement.

IV. Sovereign Immunity Does Not Preclude One Aspect of the Relief Petitioners Seek

While Respondents concede in their preliminary objections that sovereign immunity is not jurisdictional, Petitioners address Respondents’ sovereign immunity argument here for completeness.

There is no “sovereign immunity” bar to any of the relief sought in this case, but in any event, it is undisputed that sovereign immunity does not bar the entire case. First, sovereign immunity “poses no bar to counts of a complaint where the counts only seek a declaration that certain provisions of an Act are unconstitutional.” *Legal Capital, LLC. v. Med. Prof'l Liab. Catastrophe Loss Fund*, 750 A.2d 299, 302 (Pa. 2000); *see also Fawber v. Cohen*, 532 A.2d 429, 434 (1987) (“Although declaratory relief does affirmatively affect the functioning of state officials administering our statutory law, it does not compel an affirmative act,” and sovereign immunity does not apply). Thus, as Respondents concede, sovereign immunity does not bar Petitioners’ request for a declaratory judgment declaring that Act 77’s received-by deadline is unconstitutional as applied to this

year's election in the midst of the COVID-19 crisis. Such declaratory relief would equally bind county officials across the state.

Second, it is undisputed that sovereign immunity does not bar Petitioners' request for an injunction barring "Respondents, their agents, officers, and employees from enforcing the received-by deadline," and enjoining "Respondents, their agents, officers, and employees ... to consider timely any absentee any absentee or mail-in ballot" that is postmarked by election day or received by the day after the election. PFR, Prayer for Relief ¶ c, d; *see Legal Capital*, 750 A.2d at 302-03. Respondents do not contend that sovereign immunity precludes this requested relief, and for good reason, as this relief simply enjoins Respondents against violating the law. If the Court issues such an injunction, Respondents will be forbidden from certifying any election results from counties that continue to apply Act 77's unconstitutional received-by deadline, and that do not count ballots postmarked by election day or received by the day after the election. Because Respondents must assert sovereign immunity for this Court to apply it, the Court need not consider any sovereign immunity defense to this aspect of Petitioners' requested relief.

Respondents narrowly contend that sovereign immunity bars only one aspect of the relief Petitioners seek, namely the request that Respondents issue specific directions to county clerks. *See* P.O. ¶¶ 31-32. That is incorrect for two reasons.

First, section 13(2) of Act 77 waived sovereign immunity when it granted this Court unrestrained jurisdiction to “hear a challenge” to the constitutionality of Act 77. Such challenges necessarily lie against Commonwealth officials, so the grant of jurisdiction without any immunity-related restrictions acts as a waiver. Section 13(2) of Act 77 stands in stark contrast to 42 Pa.C.S. § 761(a)(1)(v), the Act that grants jurisdiction to the Commonwealth Court over suits against Commonwealth officials. Section 761, unlike section 13(2), specifically excludes lawsuits that would trigger common-law sovereign immunity. *Fawber*, 532 A.2d at 433.

Regardless, ordering Respondents to direct county officials to count ballots submitted by 8 p.m. on election day would not constitute “affirmative action” barred under *Fawber*. As this Court explained in *Legal Capital*, the relevant question for sovereign immunity purposes is the underlying “goal” of the request for equitable relief. 750 A.2d at 303. Thus, in *Legal Capital*, once it was established that a state agency had a legal duty to pay certain funds to the plaintiff, the plaintiff’s request for an injunction requiring the agency to pay the plaintiff was not a request for “affirmative action,” but simply an attempt to “restrain the [state agency] from paying the wrong party.” *Id.* Likewise here, if the Court concludes that enforcing the received-by deadline is unconstitutional, Respondents would be prohibited from certifying election results that applied the received-by deadline to exclude ballots. Requiring Respondents to take the ministerial step of informing

county clerks that they must consider timely any absentee or mail-in ballot submitted by 8 p.m. on election day would simply help effectuate the prohibitory injunction barring enforcement of the received-by deadline.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction over this action.

Dated: May 28, 2020

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this document contains 6,283 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

Dated: May 28, 2020

By: /s/ Benjamin D. Geffen
Benjamin D. Geffen