

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

v. :

No. 266 M.D. 2020

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

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY PRESIDENT JUDGE LEAVITT

FILED: June 17, 2020

Before the Court is the preliminary objection of Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries (collectively, Secretary) to the Petition for Declaratory and Injunctive Relief (Petition) filed by four individuals and the Pennsylvania Alliance for Retired Americans (collectively, Alliance). The Secretary challenges this Court’s jurisdiction¹ over the Petition, which alleges that the COVID-

¹ The Secretary also (1) demurs to the Petition on the basis that the Alliance failed to allege a constitutional violation, (2) challenges the Alliance’s standing and the ripeness of its claims, and (3) objects on the basis that the Secretary is immune from suit to the extent the Petition seeks an order compelling her to provide prepaid postage on mail-in ballots. The Court limits its review at

19 pandemic will cause disruptions to elections and result in violations of the Pennsylvania Constitution.² The Petition raises constitutional claims regarding certain provisions of the Election Code³ (Code) related to absentee and mail-in ballots, a method of voting that was added to the Election Code by the Act of October 31, 2019, P.L. 552 No. (Act 77), and the Code’s ban on third-party assistance in ballot delivery.

As relief, the Alliance seeks an order declaring unconstitutional the Commonwealth’s failure to: provide prepaid postage for absentee and mail-in ballots; allow for counting of mail-in ballots delivered after 8:00 p.m. on Election Day (to the extent that this does not trigger Act 77’s non-severability clause); allow for third-party assistance in the collection of ballots; and establish standards for signature verification by the county boards of elections. The Alliance also seeks an injunction to provide relief from the above-described omissions from the Election Code.

On May 8, 2020, the Alliance filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review

this time to the Secretary’s preliminary objection grounded in jurisdiction under the Act of October 31, 2019, P.L. 552, No. 77 (Act 77) and the Alliance’s answer thereto.

² The Alliance alleges that the Commonwealth’s actions or lack thereof result in violations of the Pennsylvania Constitution, specifically Article 1, Section 5 (“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST., art. 1, §5); Article 1, Section 1 (“All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” PA. CONST. art. 1, § 1); and Article 1, Section 26 (“Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.” PA. CONST., art. 1, §26).

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

(Preliminary Injunction Application). The Court held a prehearing conference on May 19, 2020, during which the Secretary advised the Court of her intention to file preliminary objections challenging this Court's jurisdiction over the Petition. The parties agreed with the Court's suggestion to bifurcate the issue of jurisdiction over the Preliminary Injunction Application from the merits. Upon review of the parties' respective memoranda on the issue of jurisdiction, the Court issued a May 28, 2020 opinion and order denying the Alliance's Preliminary Injunction Application on the basis that the Secretary made a meritorious claim that this Court lacks jurisdiction over the Petition under Act 77. On review, the Supreme Court dismissed as moot the Alliance's appeal of the denial of its Preliminary Injunction Application. *See Crossey v. Boockvar* (Pa. No. 32 MAP 2020, filed June 4, 2020). The Court now considers the jurisdictional issue.

Preliminary Objections

The Secretary argues that this Court must transfer the Petition to the Supreme Court because Act 77 vests the Supreme Court with exclusive jurisdiction over constitutional challenges to the deadlines set forth therein. Section 1306 of the Election Code establishes a deadline for receipt of absentee ballots and Section 1306-D establishes a deadline for receipt of mail-in ballots. Both provisions mandate that local boards of elections must receive absentee and mail-in ballots no later than 8:00 p.m. on Election Day in order to be counted. 25 P.S. §§3146.6(c), 3150.16(c). Each count of the Petition includes a challenge to the Election Day deadline itself and maintains that the deadline cannot be implemented anywhere within the Commonwealth.⁴ Thus, according to the Secretary, the Supreme Court has exclusive jurisdiction to hear the Alliance's claims.

⁴ *See* Pet. Count I, ¶ 63 ("Pennsylvania's failure to provide additional safeguards for voters whose mail ballots, due to mail delivery disruptions, arrive at the local county boards of elections office

The Alliance rejoins that the Petition does not challenge the constitutionality of any provision of Act 77 nor does the Petition require the Court to declare any such provision unconstitutional. Alternatively, the Alliance argues that the Secretary misreads Act 77's exclusive jurisdiction clause to apply to all constitutional claims, explaining that the received-by deadline clause was not intended to apply to the emergency, election-specific relief sought here. The Alliance further maintains that to interpret the exclusive jurisdiction clause to apply to claims seeking emergency election-specific relief or to as-applied claims would bar all future challenges to Act 77 now that the 180-day period has lapsed. This is an absurd result, and the legislature cannot shield its enactments from judicial review. Moreover, the jurisdictional clause does not apply to laws or procedures that pre-date Act 77, such as the ban on ballot delivery assistance.

Pursuant to Pennsylvania Rule of Civil Procedure No. 1028(a), preliminary objections may raise a question of subject matter jurisdiction. Pa.R.C.P. No. 1028(a)(1). *See also* Pa.R.A.P. 1516(b) (relating to original jurisdiction petitions for review and identifying the pleadings allowed). "When preliminary

after 8:00 p.m. on Election Day will arbitrarily disenfranchise thousands of voters for reasons outside their control. ... Thus, Petitioners, and many Pennsylvanians who vote by mail, will face an impermissible risk of arbitrary disenfranchisement, in violation of their constitutional rights."); Count II, ¶ 64 ("Pennsylvania's prohibition on third party ballot collection assistance further denies voters their right to vote a free and fair election."); Count II, ¶ 71 ("Pennsylvania's rejection of ballots delayed by mail service disruptions, the prohibition on third party ballot collection assistance, the failure to provide [prepaid] postage for mail ballots, and the arbitrary rejection of mail ballots through signature matching substantially burdens the right to vote and [bears] heavily on certain groups of voters without sufficient justification."); and Count III, ¶ 77 ("Pennsylvania's failure to provide safeguards to voters whose ballots are delivered after the Election Day Receipt Deadline, due to postal service disruptions caused by the ongoing public health emergency, is neither a reliable nor fair way to administer voting by mail. Rejecting ballots after the Election Day Receipt Deadline under these circumstances effectively requires some voters to submit their ballots blindly, with no reasonable assurances that they will be delivered in time, even when submitted well in advance of Election Day.").

objections raise a question of subject matter jurisdiction, “[t]he trial court’s function is to determine whether the law will bar recovery due to a lack of subject matter jurisdiction.”” *Kimmel Township Taxpayers Association v. Claysburg Kimmel School District*, 604 A.2d 1149, 1152 (Pa. Cmwlth. 1992) (quoting *In re Ordinance No. 1-9-86, Logan Township, Blair County*, 542 A.2d 1051, 1053 (Pa. Cmwlth. 1988)). A court must have subject matter jurisdiction over the controversy because without it, any judgment rendered would be void. *Stedman v. Lancaster County Board of Commissioners*, 221 A.3d 747 (Pa. Cmwlth. 2019). Subject matter jurisdiction is conferred solely by the Pennsylvania Constitution and its laws. *Id.* at 755-56 (quoting *Commonwealth v. Locust Township*, 968 A.2d 1263, 1268-69 (Pa. 2009)).

Discussion

When the General Assembly enacted Act 77, it included a jurisdictional provision to address challenges arising under the Act filed within 180 days of its effective date. Section 13(b) of Act 77 provides in part:

(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.

Section 13(b)(2), (3) of Act 77. Subparagraph (1) delineates the Election Code sections that the General Assembly amended or added in Act 77 and, if challenged

within 180 days of Act 77's effective date, are subject to the Supreme Court's exclusive jurisdiction. Among other provisions of the Code, subparagraph (1) of Section 13 identifies Sections 1306, relating to absentee ballots, and Article XIII-D, which includes Section 1306-D, relating to mail-in ballots. The amendment to Section 1306 and the addition of Section 1306-D took effect immediately, that is, October 31, 2019. The Petition, filed on April 22, 2020, falls within the 180-day period. Accordingly, the Court must review the Alliance's allegations to determine whether they raise constitutional challenges to Act 77's added and amended provisions. The Court concludes that they do.

The Petition challenges as unconstitutional the requirement that the local boards of elections receive mail-in and absentee ballots no later than 8:00 p.m. on Election Day and that each elector must either personally mail or deliver the absentee or mail-in ballot. 25 P.S. §§3146.6, 3150.16(c). Regarding absentee ballots, Section 1306(a) provides: "Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret [mark the ballot] and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed 'Official Absentee Ballot.'" 25 P.S. §3146.6(a). Section 1306(a) further requires the "*elector* [to] send same by mail, postage prepaid, except where franked, or deliver [the absentee ballot] in person to said county board of election." *Id.* (emphasis added). Subsection (c) of Section 1306 states that "a completed absentee ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." 25 P.S. §3146.6(c).

Section 1306-D sets forth similar requirements for use of a mail-in ballot: “[a]ny time after receiving an official mail-in ballot, but on or before eight o’clock P.M. the day of the primary or election, the mail-in elector shall, in secret [mark the ballot] and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed ‘Official Mail-in Ballot.’” 25 P.S. §3150.16(a). Subsection (a) further requires the “*elector* [to] send same by mail, postage prepaid, except where franked, or deliver [the mail-in ballot] in person to said county board of election.” *Id.* (emphasis added). Subsection (c) of Section 1306-D states that “a completed mail-in ballot must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” 25 P.S. §3150.16(c).

The Alliance seeks broad relief. It asks the Court to “[d]eclare unconstitutional the Commonwealth’s failure to: ... (ii) provide additional procedures that allow mail ballots delivered after 8:00 p.m. on the Election Day, due to mail delivery delays or disruptions, to be counted – to the extent such declaration does not trigger Act 77’s non-severability provision; [and] (iii) allow third party mail ballot collection assistance.” Pet. for Declaratory and Injunctive Relief, Prayer for Relief, p.34. While the Petition’s allegations focus on the 2020 primary, the Prayer for Relief is not limited to any particular election or period. Thus, the Petition presents a constitutional challenge to Act 77’s requirement that local boards of elections must receive absentee and mail-in ballots by 8:00 p.m. on Election Day and the ban on third-party ballot assistance.

The Supreme Court has exclusive jurisdiction over the Petition because the Alliance filed the Petition within 180 days of the effective date of Act 77. Accordingly, the Court sustains the Secretary’s preliminary objection as to

jurisdiction under Act 77 and transfers the matter to the Supreme Court of Pennsylvania. *See* 42 Pa.C.S. §5103(a).

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge

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ORDER

AND NOW, this 17th of June, 2020, the preliminary objection of Respondents Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries, to this Court's jurisdiction over the Petition for Declaratory and Injunctive Relief under the Act of October 31, 2019, P.L. 552, is SUSTAINED and this matter is transferred to the Supreme Court of Pennsylvania.

The Prothonotary shall include a certified copy of the docket entries with the transfer.

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge

Certified from the Record

JUN 17 2020

And Order Exit