

IN THE SUPREME COURT OF PENNSYLVANIA

No. 32 MAP 2020

MICHAEL CROSSEY, DWAYNE THOMAS, IRVIN WEINREICH, BRENDA
WEINREICH, AND THE PENNSYLVANIA ALLIANCE FOR RETIRED
AMERICANS

Appellants,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH, AND
JESSICA MATHIS, DIRECTOR OF THE BUREAU OF ELECTION SERVICES
AND NOTARIES

Appellees.

BRIEF OF APPELLANTS

Appeal from May 28, 2020 Order of the Commonwealth Court of Pennsylvania at
Docket No. 266 MD 2020

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I. STATEMENT OF JURISDICTION

This is an appeal from the Commonwealth Court's order denying Appellants' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review, issued on May 28, 2020. That opinion is attached as Addendum A.

The Supreme Court has exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter which was originally commenced in the Commonwealth Court, 42 Pa.C.S. § 723; Pa. R.A.P. 1101, and of appeals from orders of the Commonwealth Court denying an injunction, Pa. R.A.P. 311(a)(4); *see also* 42 Pa.C.S. § 5105(c). Appellants commenced this matter in the Commonwealth Court pursuant to its original jurisdiction under 42 Pa.C.S. §§ 761(a), 764(2).

II. ORDER OR OTHER DETERMINATION IN QUESTION

On May 28, 2020, Commonwealth Court of Pennsylvania (Leavitt, J.) entered the following order under docket No. 266 MD 2020:

AND NOW, this 28th day of May, 2020, Petitioners' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review is **DENIED**.

MARY HANNAH LEAVITT, President Judge

A complete copy of the Memorandum Opinion and Order on Appellants' Emergency Application for Special Relief in the Nature of a Preliminary Injunction

and for Expedited Review are attached as Addendum A. Appellants seek review of the entire order and opinion.

III. STATEMENT OF STANDARD AND SCOPE OF REVIEW

This Court reviews an order of the Commonwealth Court denying a preliminary injunction for abuse of discretion or error of law. *Weeks v. Dep't of Human Servs.*, 222 A.3d 722, 726, 730 (Pa. 2019). The scope of this Court's "review in preliminary injunction matters is plenary." *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 501 n.7 (Pa. 2014) (citing *Warehime v. Warehime*, 860 A.2d 41, 46 n.7 (Pa. 2004)). The Court will reverse the denial of a preliminary injunction if there appear to be no apparently reasonable grounds for the Commonwealth Court's decision. *Brayman Constr. Corp. v. Com., Dep't of Transp.*, 13 A.3d 925, 936 (Pa. 2011). The Court also will reverse the denial of a preliminary injunction when the Commonwealth Court misapplied the law or relied on palpably erroneous law. *Id.*

When examining conclusions of law or application of the law to a set of facts, the standard of review is de novo. *Laird v. Dep't of Pub. Welfare*, 23 A.3d 1015, 1024 (Pa. 2011); see also *City of Phila. v. Int'l Ass'n. of Firefighters, Local 22*, 999 A.2d 555, 565 n.11 (Pa. 2010). Further, the Commonwealth Court's factual findings must be supported by substantial evidence. *In re Nomination Petition of Gales*, 54

A. 3d 855, 857 (Pa. 2012); *Bell v. Thornburgh*, 420 A.2d 443, 450 (Pa. 1980); see also *Parker v. City of Philadelphia*, 137 A.2d 343, 346 (Pa. 1958).

IV. STATEMENT OF THE QUESTIONS INVOLVED

Did the Commonwealth Court err in denying Appellants’ Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review?

Suggested Answer: Yes.

In the alternative, upon finding that it lacked jurisdiction to grant the Application, did the Commonwealth Court err in failing to transfer Appellants’ Petition and/or Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review to the Supreme Court, pursuant to 42 Pa.C.S. §5103(a)?

Suggested Answer: Yes.

V. STATEMENT OF THE CASE

A. Procedural History

The Appellants are several Pennsylvania voters who, because of their advanced age, are especially vulnerable to severe illness from COVID-19, R. 6a-9a ¶¶ 12–15, and the organization to which they belong, The Pennsylvania Alliance for Retired Americans (“the Alliance”), which has over 335,000 members across the Commonwealth. R. 9a ¶ 16. Appellants filed a Petition for Declaratory and Injunctive Relief in the Commonwealth Court of Pennsylvania on April 22, 2020.

On May 8, Appellants filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review (“Emergency Application”) with the Commonwealth Court. Appellants’ Emergency Application requested an order requiring Appellees to adopt emergency procedures that would: (1) provide for the distribution of emergency write-in ballots to all voters who requested absentee ballots or mail-in ballots (collectively, “mail ballots”); (2) allow election officials to count mail ballots if postmarked by Election Day and delivered by June 9, 2020, seven days after Election Day; and (3) allow third parties to assist voters in delivering their mail ballots.

Between May 11-14, several individuals and entities applied for leave to intervene. The Court held a pre-hearing conference on May 19, and, at the Court’s suggestion, the parties agreed to bifurcate the issue of jurisdiction over the Emergency Application from the merits thereof. On May 28, President Judge Mary Hannah Leavitt issued a memorandum opinion concluding that the Commonwealth Court lacks jurisdiction to grant the Emergency Application, finding that “[t]he Secretary’s arguments on the issue of jurisdiction are compelling and when considered by the full Court may result in a transfer of the Petition to the Supreme Court,” and “[a]s such, the Court . . . lacks jurisdiction to grant the Preliminary Injunction Application.”

B. Prior determinations in this case

The only prior determination in this case is the Memorandum Opinion and Order on Appellants' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review issued on May 28, 2020, attached hereto as Addendum A.

C. Name of official whose determination is to be reviewed

The Honorable Mary Hannah Leavitt, President Judge of Commonwealth Court, issued the determination to be reviewed by this Court.

D. Factual chronology

In the June 2 primary election, for the first time, all eligible Pennsylvanians will have the opportunity to vote by mail. That access could not have come at a more important time: the COVID-19 pandemic has upended virtually all aspects of daily life. Schools and businesses are closed; most people are sheltering in their homes; more than 40 million Americans have lost their jobs; and more than 102,000 have died. The Commonwealth has not been spared. The virus has infected more than 70,000 Pennsylvanians and has claimed at least 5,373 lives. To stem the spread of the disease, the Governor has encouraged residents to stay at home, practice social distancing, and vote by mail. R. 4a-5a ¶ 7. To date, over 1.8 million Pennsylvanians, including Appellants, have decided to vote absentee or through mail-in voting (collectively, "mail voting") in the June 2 primary. R. 971a ¶ 12. But as unprecedented numbers of Pennsylvania voters seek to cast their ballots by mail, the

effects of the COVID-19 pandemic threaten to obstruct—and in some cases, entirely deny—access to the franchise. To ensure that Pennsylvanians can exercise their constitutional right to vote, Appellants requested that the Commonwealth Court enter a preliminary injunction that would: (1) allow election officials to count mail ballots (or emergency write-in ballots) delivered up to seven days after Election Day provided that the ballots were postmarked by Election Day; and (2) allow third parties to assist voters in delivering their mail ballots.¹ R. 45a.

1. The Commonwealth has not taken adequate measures to ensure that voters’ mail ballots will be counted in the primary.

The pandemic has caused U.S. Postal Service delivery delays and county backlogs in processing ballot requests, the devastating combination of which has resulted in many voters not receiving their mail ballots in a timely manner, let alone with enough time for their ballots to be delivered by 8 p.m. on Election Day. R. 10a-17a ¶¶ 19–33; R. 65a-67a; R. 932a-33a. The backlogs are astounding: on May 22, nearly 173,000 applications were still pending, and almost 70,000 ballots had yet to be mailed to voters whose applications were approved. R. 674a ¶¶ 6, 7. The following week, counties witnessed a surge in mail ballot requests, including at least

¹ The term “postmark” refers to any type of imprint applied by the USPS to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, it should be presumed to have been mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day. R. 45a.

501,117 between May 17 and 26 and at least 73,019 submitted on May 26 alone. R. 971a-972a ¶ 13.

Pennsylvania is poised to find itself repeating the disastrous experience of voters in Wisconsin in its recent April 7 primary. That election demonstrated the consequences of the State's failure to implement safeguards to ensure access to reliable, safe voting options, including vote by mail, in response to the COVID-19 pandemic. R. 68a-70a. According to statistics from the Wisconsin Elections Commission, on the day of their April election, there were 1,282,762 absentee ballot applications but only 1,273,374 absentee ballots issued—meaning 9,388 absentee ballots may not have even *been mailed* to the requesting voters by the time the voters were required to *return them*. R. 337a-45a. Had the Supreme Court of the United States not approved of a federal court's decision to extend the deadline for which ballots could be received and counted by elections officials, *see Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No. 19-1016, 2020 WL 1672702, at *2 (U.S. Apr. 6, 2020), tens of thousands—and possibly more than 100,000—ballots that were ultimately counted would have been rejected. R. 454a ¶ 50.

Two weeks out from Tuesday's election, Pennsylvania counties were *behind* where Wisconsin's counties were at the same point in time (two weeks out from its April election). R. 966a ¶ 5. Considering how things have unfolded over the course of the last nine days, there is no reason to believe that Pennsylvania counties are

going to make some miraculous comeback that Wisconsin counties were unable to accomplish. R. 971a-72a ¶¶ 12-13.

The U.S. Postal Service delays are equally alarming. Delivery is taking up to ten days in *each direction*. In Montgomery County, the Department of State (“DOS”) reports that “for reasons not within Montgomery County’s control, many ballots that the county has mailed have been delayed in arriving at voters’ homes” and “these delays may make it more difficult for voters who requested ballots *well in advance* of the application deadline to return those ballots on time.” R. 675a ¶ 12 (emphasis added). Montgomery County election officials attribute these delays to mail delivery and stated in their Petition that “the United States Post Office confirmed that absentee and mail-in ballots . . . could take up to ten days to be delivered.” R. 1009a ¶ 11; *see also* R. 955a ¶ 6. Secretary Boockvar, at a town hall meeting earlier this month, acknowledged that delivery is taking twice as long in the Commonwealth. R. 62a-63a. Indeed, Appellant Dwayne Thomas waited almost two weeks before receiving his ballot on May 26, mailed his ballot on May 27, and now has less than one week for his ballot to be received by election officials by the June 2 deadline, but mail delivery in the Commonwealth may take up to 10 days. R. 952a-53a ¶ 3-4; R. 955a ¶ 6; R. 1009a ¶ 11.

Multiple counties have confirmed that they will not be able to surmount their backlogs in time for ballots to be delivered and returned by the deadline of 8 p.m.

on Tuesday, June 2. R. 932a-33a. Delaware County has publicly stated that voters will not even be receiving their requested ballots until close to or even on Election Day. R. 990a-95a. In Bucks County, some mail ballots are still being mailed out today. Emergency Pet. ¶ 14, *In re Extension of Time for Absentee and Mail-in Ballots to be Received and Counted in the 2020 Primary Election*, No. 2020-02322 (Bucks Cty. Ct. Com. Pl. May 28, 2020) (“Bucks County Emergency Pet.”). Best case scenario, those voters will *receive* their ballots on June 5—days after the election. R. 955a ¶¶ 6-7. But some may not receive their ballot until June 10, a full eight days *after*. Two counties—Montgomery and Bucks—have taken the extraordinary step of filing emergency petitions requesting permission to count ballots received by June 9, 2020.² R. 1009a ¶ 17. Montgomery County’s Petition, which was filed at the behest of the DOS, was dismissed by its Court of Common Pleas on Wednesday. R. 1016a. The Bucks County’s Petition is being held until Tuesday. Bucks County Emergency Pet.

It is no wonder that these counties are pleading for relief. These backlogs have accumulated despite county officials working back-breaking hours. In Bucks County, the Board of Elections has solicited help from other county departments,

² Not only is Montgomery County facing backlogs and delays, but now hundreds of ballots have been returned to the Board of Elections because of a glitch in the SURE system. R. 1008a ¶ 17. All of the wrongly returned ballots were from addresses that included apartment or unit numbers, disproportionately affecting renters who are often lower income voters. *Id.*; R. 1015a.

worked more than twelve hours every day—including on weekends and holidays—and has processed approximately 2,000 applications per day. Bucks County Emergency Pet. ¶ 12. Despite these heroic efforts, county officials have been clear that the backlogs mean that many voters will not be able to receive a ballot and send it back in time to arrive on June 2. R. 1018-1023a; *see also id.* 990a-994a (Delaware County Commissioner stating she is “very worried that people are going to be disenfranchised”).

2. The Commonwealth has not taken measures to ensure safe alternatives for voters who cannot deliver their ballots by mail in time to be counted.

Voters who seek to avoid the vagaries of mail delivery must risk their health and visit their local county board of elections (“county board”) office to deliver their ballots in person because Pennsylvania law prohibits them from seeking delivery assistance from third parties. R. 20a-24a ¶¶ 42–51; R. 74a-75a. The counties that have publicly advised of their inability to keep up with the surge of mail ballot requests are located in areas where the prevalence of COVID-19 is highest. R. 674a ¶ 4. Voters who do not receive a ballot in time, or who are concerned that their ballot will not arrive at the county by June 2 (and, at this rate, that is likely for any voter who mailed their ballot on or after May 26) will be forced to physically visit a county board of elections office, potentially putting their health at risk. For the elderly and medically vulnerable, this choice is unconscionable. Voting in person poses similar

dangers and then some: many counties have drastically consolidated polling place locations—some by the 60 percent permitted under Act 12, and some by nearly 90 percent with authorization from the Secretary. R. 978a.

Efforts to consolidate, though meant to aid counties in administering an election when many poll workers are unwilling to staff polling places during the pandemic, severely limit access to in-person voting both because there are fewer locations packing more voters into fewer sites creates additional health risks. The General Assembly’s House Leaders even acknowledged that significantly reducing the number of polling places “threatens public health” and “artificially concentrates voters” into fewer locations, which “is completely at odds with the recommendation of social distancing,” and “undermines the core of our Republic—free and fair elections.” R. 984a-85a. Several counties, including Montgomery and Fayette, believe that “polling places will be inadequately staffed or not staffed at all” simply because it “will not have enough people who are eligible and willing to do it.” R. 103a-108a, 111a-117a.

Many of the issues associated with in-person voting and mail delivery delays could be avoided if voters could seek assistance in delivering their ballots on Tuesday. But alas, the Commonwealth will not bend, even during a global pandemic. For example, the Pennsylvania Alliance for Retired Americans, whose members are among the most vulnerable to COVID-19, would organize to aid its members who

require assistance getting their ballots returned by June 2 but who cannot trust their mail service. R. 9a ¶ 16; *see also* R. 953a ¶ 5. But the Commonwealth prohibits any such assistance. Voters are therefore caught in a catch-22: voting by mail imposes a significant risk of disenfranchisement, while voting in person imposes significant health risks, especially given the consolidation of polling places. Absent judicial intervention, tens of thousands of Pennsylvania voters (and perhaps even more) will be left without a safe, reliable option to exercise their constitutional right to vote and to participate in a free and equal election.

E. Statement of the determination under review

The determination under review is the Commonwealth Court’s Memorandum Opinion and Order on Appellants’ Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review issued on May 28, 2020, attached hereto as Addendum A. The Commonwealth Court listed the six elements of the test that courts apply in determining whether to issue a preliminary injunction, but did not evaluate the Emergency Application under those six elements. Instead, the court’s denial of the Emergency Application was based on its agreement with the Secretary’s argument that Appellants raised a challenge concerning the constitutionality of Sections 1306 and 1306-D of the Election Code, 25 P.S. §§ 3146.6, 3150.16; that Section 13(2) of Act of Oct. 31, 2019, P.L. 552. No. 77 (“Act 77”) vests the Supreme Court with exclusive jurisdiction over such claims; and, as a

result, the Commonwealth Court lacked jurisdiction to grant the Emergency Application. Addendum A at 4-9.

The Commonwealth Court also found that the Secretary “presented a compelling case that the county boards of elections have a direct interest in the Petition and as such are indispensable parties.” *Id.* at 8-9.

VI. SUMMARY OF THE ARGUMENT

The court below committed several legal errors in finding that the “Secretary’s arguments on the issue of subject matter jurisdiction are compelling” and concluding that it lacked jurisdiction to grant Appellants’ Emergency Application. First, the Commonwealth Court misapplied Act 77’s exclusive jurisdiction requirement by reading the clause in isolation and interpreting it to apply to *all* constitutional claims that implicate provisions in Act 77. The Commonwealth Court’s broad interpretation of the exclusive jurisdiction clause, Act 77, § 13(2), is irreconcilable with accompanying provisions that impose a 180-day deadline (which fell on April 28, 2020) to bring any such claims before the Supreme Court, *id.* § 13(3). This interpretation would render the Act unreviewable after April 28, thus violating separation of powers.

Second, the Commonwealth Court erred in applying Act 77’s exclusive jurisdiction clause to Appellants’ claims concerning the ban against third-party ballot delivery assistance, even though the law pre-dates Act 77.

Third, to the extent the Commonwealth Court determined that county boards of elections were indispensable parties, its ruling is contrary to well-established precedent, including several voting rights-related matters in which this or other courts of the Commonwealth have granted relief without the involvement of all 67 county boards of elections. Appellants' requested relief implicates only ministerial acts of county boards that are mandated by statute, over which they have no discretion.

Even if the Commonwealth Court did in fact lack jurisdiction to grant Appellants' Emergency Application, the court abused its discretion in failing to transfer the matter to this Court immediately under 42 Pa.C.S. § 5103(a). Pa. R. App. P. 751(a). The record provides ample basis, based on undisputed facts, for a preliminary injunction. This Court should therefore reverse the Commonwealth Court's ruling and remand with instructions to enter Appellants' requested injunction, or exercise its exclusive and original jurisdiction and grant Appellants' Emergency Application.³

VII. ARGUMENT

Appellants seek expedited review of the Commonwealth Court's denial of their Emergency Application on two main grounds. First, the Commonwealth Court

³ As Appellants explain below, *see infra* § VII.B, their requested relief does not require this Court to apply Act 77's non-severability clause. To the extent the Court determines that any of Appellants' claims or requests for relief would indeed require the Court to apply Act 77's non-severability clause, Appellants withdraw that claim or request.

abused its discretion in concluding that it lacked jurisdiction to grant Appellants' request for preliminary injunction and in denying the Emergency Application. If this Court agrees, however, that the Commonwealth Court lacked jurisdiction under Section 13(2) of Act 77, then the Supreme Court has original jurisdiction over the claims asserted in Appellants' Emergency Application and those claims should have been transferred to the Supreme Court pursuant to 42 Pa.C.S. § 5103(a).

A. The Commonwealth Court erred in finding that Appellants were unlikely to succeed on the merits, based on its determination that it lacked jurisdiction to grant Appellants' Emergency Application.

1. The Commonwealth Court misread Act 77's exclusive jurisdiction clause by ignoring its context, and misapplied it to Appellants' Emergency Application.

The Commonwealth Court held that Appellants “raised a challenge ‘concerning the constitutionality’ of Sections 1306 and 1306-D of the Election Code,” Addendum A at 8, and thus concluded that it lacked jurisdiction over the Emergency Application. But in doing so the court improperly read Act 77's exclusive jurisdiction clause in isolation, without reference to the context in which it appears—including accompanying provisions that impose a 180-day deadline on claims asserted under the Supreme Court's exclusive jurisdiction—and adopted an interpretation that led to an absurd result and raises serious constitutional questions.

Section 13(2) of Act 77 does indeed confer exclusive jurisdiction on the Supreme Court to address constitutional challenges to certain provisions of the Act,

but reading that provision in isolation, as the lower court did, tells only part of the story. A court’s analysis cannot end there because the very next subsection, Section 13(3), states that an “action under paragraph (2)” (the exclusive jurisdiction clause) “must be commenced within 180 days of the effective date of this section.” Reading those clauses together suggests that the reference to “constitutional challenges” was limited to facial attacks and not the emergency, election-specific relief that Appellants seek here. *See Clearwater Constr., Inc. v. Northampton Cty. Gen. Purpose Auth.*, 166 A.3d 513, 517-18 (Pa. Commw. Ct. 2017). If the Court interprets the exclusive jurisdiction clause (and its accompanying deadline) to apply to Applications seeking election-specific relief or as-applied claims, it would bar all future challenges now that the 180 days have expired, invoking a result which is not only absurd but plainly unconstitutional. *See, e.g., William Penn Sch. Dist.*, 170 A.3d at 418 (“The 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.”) (alterations in original); *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.”).

The broader statutory structure and the timeline imposed for implementing Act 77 reveal the General Assembly’s intent and further illustrate this point:

October 31, 2019: Act 77 was enacted but *could not be applied to any election held before April 28, 2020.*

April 28, 2020: The deadline to assert constitutional challenges to Act 77 before the Supreme Court under the exclusive jurisdiction clause.

April 28, 2020: The original primary election date (as scheduled when the General Assembly passed Act 77), and the first date by which Act 77 could be applied to any election.⁴

As the above timeline shows, the General Assembly’s deadline ensured that the exclusive jurisdiction clause would run its course and expire before a single election was *completed* under Act 77’s voting procedures, which would only make sense if the clause were limited to facial challenges to permanently invalidate provisions of the Act. As this Court recognized, “as-applied challenges require application of the ordinance to be ripe,” and “facial challenges are . . . ***ripe upon mere enactment.***” *Phila. Entm’t & Dev. Partners, L.P. v. City of Phila.*, 937 A.2d 385, 392 n.7 (Pa. 2007) (emphasis added). Thus, the exclusive jurisdiction clause’s litigation deadline necessarily limited the scope of claims that could be asserted under Section 13(2) to facial challenges—the type of claim that could (1) be asserted well before any

⁴ This timeline did not materialize, of course, as the General Assembly, in response to the COVID-19 pandemic, enacted legislation moving the primary election to June 2.

election, (2) result in the permanent invalidation of an Act 77 provision, and (3) disturb its legislative compromise. If the exclusive jurisdiction clause applied to claims for temporary relief or as-applied challenges, however, no court would have jurisdiction to consider any constitutional challenge to Act 77's provisions after the April 28 deadline. This would leave voters without a forum to vindicate their constitutional rights, especially in instances where the effects of statewide emergencies threaten to deny them access to a free and equal election, and the General Assembly will have rendered its legislative enactments unreviewable, indefinitely. See 1 Pa.C.S. § 1922(1) (requiring presumption "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable"); *id.* § 1922(3) (requiring presumption "[t]hat the General Assembly does not intend to violate the Constitution of the United States or this Commonwealth"). Pennsylvania law not only counsels against interpreting statutes to achieve such unlawful ends, but also requires that the Commonwealth Court strictly construe provisions decreasing its jurisdiction. 1 Pa.C.S. § 1928(7). The court failed to do either.

This Court has recognized that Section 13(2) cannot plausibly apply to all constitutional claims. In denying the Petition for Review in *Delisle, et al., v. Boockvar, et al.*, No. 95 MM 2020 (Pa. May 29, 2020), which asserted a constitutional challenge to the ballot receipt deadline introduced through Act 77, this

Court transferred the Petition to the Commonwealth Court rather than dismiss it entirely, even though the statutory deadline for asserting “challenges to . . . the constitutionality of a provision” of Act 77 had expired. Act 77, § 13(3) (stating such claims must be commenced by April 28, 2020). Interpreting Section 13(2) to address only the types of facial challenges that would permanently void a provision within Act 77 and upset the General Assembly’s “grand bargain” is consistent with later provisions setting a deadline for actions under Section 13(2), Act 77, §§ 13(3), 14, and gives effect to all provisions within Section 13.⁵ *See In re Tr. Under Deed of David P. Kulig Dated Jan. 12, 2001*, 175 A.3d 222, 234 (Pa. 2017) (noting courts must consider “the object to be attained” by the statute and “the consequences of a particular interpretation”). For as-applied challenges, the Commonwealth Court remains the appropriate forum in the first instance to resolve fact intensive claims “that generally lie outside the [Supreme] Court’s purview.” *Delisle, et al., v. Boockvar, et al.*, No. 95 MM 2020 (Pa. May 29, 2020) (Wecht, J., concurring).

Finally, to the extent the Commonwealth Court found that Appellants’ claims were facial constitutional challenges to Act 77—a position that even Appellees did not advance—that, too, is legal error. Appellants’ Petition and Emergency Application made clear, repeatedly, that Appellants did not seek to invalidate

⁵ This is not to say, and Appellants do not suggest, that a deadline or date limitation on facial constitutional challenges would be lawful either. However, that question is not currently before the Court.

permanently any provisions in Act 77, but instead requested temporary relief to ensure access to a free and equal election during the COVID-19 pandemic, and even then the requested relief is limited to those voters who submit their ballots by mail; voters who submit ballots in person would be subject to the same rules. *See Watt v. W.C.A.B. (Boyd Bros. Transp.)*, 123 A.3d 1155, 1164-65 (Pa. Commw. Ct. 2015) (noting as-applied challenges seek to prevent application of a law “under the factual circumstances before the Court”). Even assuming Appellants raised a constitutional challenge to a provision in Act 77—a point which Appellants dispute—that challenge and the Emergency Application sought to address the effects of the COVID-19 pandemic on the electoral process and cannot be considered a facial challenge much less a claim to permanently invalidate a provision of Act 77. *See also* R. 628a (“Petitioners make . . . narrow as-applied, rather than facial, challenge[s]”).

2. The Commonwealth Court misapplied Act 77’s exclusive jurisdiction clause to laws that pre-date the Act.

The Commonwealth Court also erred in finding that Appellants’ claims triggered Act 77’s exclusive jurisdiction clause because it ignored the distinction between provisions that were enacted through Act 77 and those that pre-date the Act. This was legal error because Section 13(2) of Act 77 (the exclusive jurisdiction clause) is expressly limited to “amendment[s] or addition[s]” to specific sections of the Election Code. By extending the jurisdictional clause to all portions of Sections

1306 and 1306-D, the Commonwealth Court disregarded long-standing rules of statutory construction and failed to adhere to the Act’s plain language.

By its terms, the jurisdictional clause is quite limited in scope. It applies only to “amendment[s]” or “addition[s]” to certain portions of the Election Code, including Sections 1306 and 1306-D. Act 77, § 13(1); *see also* 25 P.S. §§ 3146.6, 3150.16. In other words, rather than extend exclusive jurisdiction to all regulations that appear in Sections 1306 or 1306-D, the express language of Act 77 makes clear that the Supreme Court’s exclusive jurisdiction is tethered only to the portions of the law that were added or amended.

In determining which portions of Sections 1306 or 1306-D are “amendment[s]” or “addition[s],” Pennsylvania’s Statutory Construction Act guides the Court’s interpretation of the statute. *See Clearwater Constr., Inc.*, 166 A.3d at 517 (“Because this matter involves an issue of statutory interpretation, our analysis is guided by the principles of the Statutory Construction Act . . .”). It states that “[w]henever a section or part of a statute is amended . . . the portions of the statute which were not altered by the amendment shall be construed as effective from the time of their original enactment” 1 Pa.C.S. § 1953. Section 1961 further clarifies that “[w]henever a statute reenacts a former statute, the provisions common to both statutes shall date from their first adoption.” And, when a “statute is repealed” but its provisions “are at the same time reenacted in the same or substantially the same

terms by the repealing statute, the earlier statute shall be construed as continued in active operation,” and “[a]ll rights and liabilities incurred under such earlier statute are preserved and may be enforced.” 1 Pa.C.S. § 1962.

All of these provisions make clear that courts must look to the substance of the enactment and distinguish between portions of the statute that were altered and the portions that were left unchanged. Only the altered portions are considered to have been amended or newly-enacted. These rules of construction are also consistent with the plain language of the exclusive jurisdiction clause, which distinguishes between newly-enacted and pre-existing laws. Act 77, § 13(1) (“This section applies to the amendment or addition . . .”), and further confirms that the jurisdiction clause does not apply to the delivery assistance ban or any other pre-existing election law.

Section 1306 of the Election Code has long required voters to submit their own ballots to their county boards of elections, *see* Art. XIII, § 1306 of Act of Jun. 3, 1937, P.L. 1333, No. 320. And the statutory language imposing this ban remains unaltered:

The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector **shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.**

25 P.S. § 3146.6(a) (emphasis added). Act 77 amended Section 1306 in several ways, to be sure, including by expanding the deadline for receipt of absentee ballots from

5 p.m. on the Friday before the election to 8 p.m. on Election Day. But because language imposing the delivery assistance ban appears in Section 1306 without alteration, Pennsylvania law requires the Court to interpret the ban—a “portion[] of the statute which w[as] not altered by the amendment”—in its original form and to treat it as if it were “effective from the time of [its] original enactment.” 1 Pa.C.S. § 1953. Act 77 may have relocated or re-codified existing statutory language, but such technical alterations are neither “amendments” nor “additions” under Pennsylvania law. *See, e.g., Com. v. MacDonald*, 347 A.2d 290, 294 (Pa. 1975) (“Section 5903(a) of the Crimes Code was derived, without any pertinent changes, from section 524 of the Penal Code. Thus it is presumed that the General Assembly intended to retain the prior law except as it was explicitly altered.”). It is indeed telling that if a court were to enjoin Act 77 in its entirety, the delivery assistance ban would still exist in exactly the same form, which further demonstrates that the ban was not enacted by Act 77. *See Wygant v. Gen. Elec. Co.*, 113 A.3d 310, 313 (Pa. 2015) (voiding of repealing statute revives the original).⁶

The same rules of construction apply to Section 1306-D, which introduces new procedures allowing voters to cast mail-in ballots, and in doing so restates verbatim the long-standing delivery assistance ban among other pre-existing laws.

⁶ Even if the Commonwealth Court had determined that the ban on ballot delivery assistance was subject to the exclusive jurisdiction requirement, the court still had authority to consider such claims and provide relief for voters who cast *absentee* ballots.

Section 1306-D effectively relocates, or at most, re-enacts portions of Section 1306, and its continuation of prior law, applied to a new category of voters, is nonetheless effective as of the date of its original enactment—which was well before Act 77. This is consistent with Pennsylvania Supreme Court precedent recognizing that when a new statute incorporates pre-existing law, those rules “continue in active operation, so that all rights and liabilities incurred thereunder are preserved and may be enforced.” *Bell v. Abraham*, 22 A.2d 753, 755 (Pa. 1941) (holding provisions of 1933 Banking Code expressly incorporating pre-existing shareholder liability rules continued the operation of those rules from original enactment, including the rights and liabilities incurred thereunder).

Section 1306-D’s restatement of the long-standing ban on ballot delivery assistance could just as easily have been expressed by cross-referencing the pre-existing law in 25 P.S. § 3146.6, or by adding the term “mail-in ballot” to the previously-enacted statute, neither of which would have altered or amended the delivery assistance ban. *See* 1 Pa.C.S. § 1953. That is effectively what the General Assembly did in enacting Section 1306-D and re-stating provisions from a different section of the Election Code.⁷ Because Pennsylvania law requires that provisions

⁷ The legislature’s decision to copy the full text of Section 1306’s long-standing ballot delivery assistance ban into Section 1306-D is also a technical alteration which reveals little about its intent, and, indeed, may have been compelled by Pennsylvania’s Constitution. Article III, section 6 states that “[n]o law shall be revived, amended, or the provisions thereof extended or conferred, by

pertaining to the same subject matter should be construed as one, 1 Pa.C.S. § 1932, and the language of the pre-existing ban on ballot delivery assistance was not altered by Act 77, the ban pre-dates Act 77 and thus is not subject to the exclusive jurisdiction clause regardless of where it appears. It would be an absurd result to subject the same statutory language to different jurisdictional requirements. See *Royal Indemn. Co. v. Adams*, 455 A.2d 135, 141 (Pa. Super. Ct. 1983) (citing *Girard Sch. Dist. v. Pittenger*, 392 A.2d 261 (Pa. 1978)). Thus, even if the Commonwealth Court lacked jurisdiction to provide any relief that would extend the ballot receipt deadline, that is not the case for the ban on ballot delivery assistance which has been the law in Pennsylvania for many years.

3. The Commonwealth Court erred in determining that the case for treating county boards as indispensable parties was compelling.

To the extent the Commonwealth Court's ruling was grounded on the failure to add indispensable parties, it breaks from longstanding precedent and misapplies the relevant standards. Neither Appellees nor even the court below, were able to identify a single Pennsylvania authority that has ever held that all county elections boards are indispensable parties in any lawsuit seeking statewide relief to enforce the constitutional right to vote. The court's ruling cites allegations from the Petition

reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length." Pa. Const. Art. III § 6.

that reference several non-discretionary duties of county boards of elections—i.e., processing mail ballot applications and receiving and counting ballots—and also points to measures that were not included in Appellants’ narrow Emergency Application (i.e., pre-paid postage and training on signature verification to be provided by the Secretary). The court engaged in no further analysis to explain the import of these observations, concluding instead that the Secretary presented a compelling case that the county boards have a direct interest in the Petition and are indispensable. Addendum A at 9.

The Commonwealth Court thus concluded that the involvement of county boards in enforcing Appellants’ requested relief potentially required their participation in this matter, but that is not the appropriate standard for determining whether a party is indispensable. If that were the case, every county board would be indispensable in every case that potentially affects the conduct of elections. *But see League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (implementing court-draw reapportionment plan without county boards); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Jan. 17, 2014) (addressing challenge to voter ID law without county boards). The court listed but failed to apply any of the four factors that guide this decision: (1) whether absent parties have a right or an interest related to the claim, (2) the nature of that right or interest, (3) whether the right or interest is essential to the merits of

the issue, and (4) whether there is prejudice to the absent party or justice can be afforded without violating the due process rights of absent parties. *Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953, 956 (Pa. 1981). None are applicable here.

a. County boards do not have interests essential to the merits of Appellants’ Emergency Application.

When a lawsuit affects only ministerial duties of government officials, those officials are not indispensable to its resolution. *Miguel v. McCarl*, 291 U.S. 442, 455 (1934) (holding that, “although he might have been joined as a proper[] party,” a disbursing officer was not an indispensable party to a lawsuit against a superior officer because his duty was “plainly prescribed” and “ministerial”). Appellants do not allege that county election officials have abused authority delegated to them. Far from it. Rather, Appellants allege that the counties are acting within their statutorily prescribed power, but that the Commonwealth’s failure to provide for additional safeguards during a global pandemic—namely, by counting mail ballots received after 8 p.m. on Election Day and permitting voters to rely on the assistance of others in delivering mail ballots—will deny citizens access to free and equal elections.

Appellants’ requested relief will only incidentally affect the performance of the county boards’ duties that are mandated by statute and over which they have no discretion, *see* 25 P.S. §§ 3146.6(c); 3150.16(c) (requiring county election officials to receive absentee and mail-in ballots and accept or discard ballots that come in right at or right after 8 p.m.), which does not rise to the level of being indispensable

to this case. While county election officials may be required to distinguish between late ballots and timely ballots based on postmarks, canvass more ballots, and hear more challenges, those are all tasks which county election officials are already required to perform. Pennsylvania law, moreover, already requires county election officials to accept military-overseas ballots “if the voter has declared under penalty of perjury that the ballot was timely submitted,” even if the postmark is unreadable. 25 Pa.C.S. § 3511(a). And it permits some voters to designate an agent of their choice to deliver their mail ballot. *See DiPietrae*, 666 A.2d at 1135. But such incidental effects on the rights or interests of a nonincluded party are not enough to render the party indispensable. Rather, “the time honored presumption that public officials will perform their duties properly” eliminates the need for their participation in this case. *Nason v. Commonwealth*, 494 A.2d 499, 502 (Pa. Commw. Ct. 1985); *see also Wudkwyh v. Borough of Canonsburg*, 533 A.2d 1104, 1108 (Pa. Commw. Ct. 1987).

To be sure, county election officials also have some discretionary duties in administering elections, *see Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952), but that discretionary power is limited by both the Election Code and the guidance of the Secretary and DOS. For instance, county election officials are charged with determining which absentee ballots count. 25 P.S. §§ 3150.16(b)(1), 3146.6(c), 3150.16(c), § 3146.2a(a.3). But the Secretary and DOS advise counties on how to

make that determination. *Id.* § 1222(f) (requiring Secretary to “promulgate regulations necessary to establish, implement and administer the SURE system”); R. 745a-833a (directing county boards on how to record absentee ballot applications, mail absentee ballots, and count absentee ballots); *see also* R. 834a-40a (instructing counties on the implementation of Act 77). Although county election boards are responsible for investigating violations of the Election Code, 25 P.S. § 2642(i), those investigations are guided by the Secretary and DOS’s interpretation of what constitutes a vote. *Id.* § 2624(h)(1) (“[The Voting Standards Board] shall have the power and duty to develop uniform and nondiscriminatory standards that define what constitutes a valid vote cast through a paper ballot and what constitutes a valid vote through each type of electronic voting system used in the Commonwealth.”); *see also id.* § 2624(c) (“The Secretary of the Commonwealth shall serve as chair of the Board.”). Similarly, county election officials have the discretion to make and issue “rules, regulations and instructions . . . as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” *Id.* § 2642(f)-(g). But that duty, too, extends only as far as the election code permits. *Id.* (“[N]ot inconsistent with law. . . .”). The Secretary and DOS also derive broad authority to administer elections from the National Voter Registration Act, 52 U.S.C. § 20509 (“NVRA”), and the Help America Vote Act, 52 U.S.C. § 21081 (“HAVA”). Those laws require each state’s chief election official to carry out the state’s election

responsibilities in a uniform and nondiscriminatory manner, which includes instructing county officials on election administration issues.

The Secretary and DOS have not only exercised their authority to direct and guide county election officials, they have defended their ability to do so in court. During the 2008 primary election, several county election officials prohibited voters from entering polling locations because they were wearing t-shirts endorsing candidates. R. 725a. In response, the Secretary and DOS sent a letter to county election officials advising them that the election code permits voters to passively electioneer. R. 857a-59a. When two election judges filed a lawsuit alleging that the Secretary and DOS were “without jurisdiction or authority to interpret [provisions of the election code] and then broadcast that position to election officials as if it is the settled law of this Commonwealth,” R. 877a, the Secretary and DOS argued that HAVA and the NVRA, as well as decisions of the Supreme Court of Pennsylvania, require them to “earnestly endeavor to provide the counties with [their] advice and opinion so they can act uniformly and without discrimination.” R. 911a. The court agreed. R. 841a-56a. These laws make clear that county election officials are no more indispensable to this lawsuit than county prosecutors are to a constitutional challenge involving provisions of the criminal code.

b. Granting Appellants’ requested relief would not prejudice the county boards, nor would it violate their due process rights.

Because the relief requested in Appellants’ Emergency Application would at most have incidental effects on statutory duties that are subject to the guidance of superior officers, granting such relief in the county boards’ absence would not offend Due Process. *See Banfield v. Cortés*, 922 A.2d 36, 44 (Pa. Commw. Ct. 2007) (overruling preliminary objection claiming that the case should be dismissed for failure to join the 56 counties operating direct recording electronic voting systems). As noted above, the relief sought in the Emergency Application implicates only statutory duties over which county boards have no discretion. *See Pa. Sch. Bds. Ass’n, Inc. v. Com. Ass’n of Sch. Adm’rs, Teamsters Local 502*, 696 A.2d 859, 868 (Pa. Commw. Ct. 1997) (holding Governor was an indispensable party to claim alleging that he violated his statutory and constitutional duties by approving challenged act **but not** to claims that merely implicated his final approval authority); *id.* (“Were we to hold otherwise, the Governor would become an indispensable party to every action challenging the constitutionality of legislation.”).

The Commonwealth Court’s analysis failed to address any of these factors, which clearly demonstrate, consistent with long-standing precedent, that it can grant statewide relief in voting rights claims without inviting all 67 county boards of elections to participate in the lawsuit.

4. Appellants clearly established all required elements for a preliminary injunction and are entitled to relief.

Appellants met all six of the required elements for preliminary injunctive relief: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest. *SEIU Healthcare Pa. v. Commonwealth*, 104 A. 3d 495, 502 (Pa. 2014) (citing *Warehime v. Warehime*, 580 Pa. 201, 209–10 (2004)). Evidence presented by Appellants, much of which was later corroborated by Appellees and county boards, demonstrates that thousands of voters will be disenfranchised absent an injunction and Appellants, thus, have a clear right to relief.

a. Appellants presented evidence demonstrating a serious risk of imminent widespread disenfranchisement and a clear right to relief.

When Appellants filed their Emergency Application over three weeks ago, counties had warned that their limited resources would be no match for the surge of

mail ballot applications. It was already clear that COVID-19's impact on the U.S. Postal Service threatened to delay the subsequent delivery of mail ballots—both from county boards to voters and then back to the counties. Statements from Appellees and county boards since then have only corroborated that, unless the Court acts and does so swiftly, a substantial number of voters stand to be disenfranchised, facts that firmly establish that Appellants are entitled to relief.

b. Delays in processing mail ballot applications.

First, Appellees have admitted that some counties will not be able to fulfill all mail ballot applications with sufficient time to reach voters and allow voters to mail them back before 8 p.m. on Election Day. According to Appellees, on May 22, nearly 173,000 applications were still pending, and almost 70,000 ballots had yet to be mailed to voters whose applications were approved. R. 674a ¶¶ 6, 7. And as of May 27, the number of voters who have applied for absentee ballots has grown to nearly 1.8 million. R. 971a ¶ 12.

If there was any doubt that this backlog was insurmountable under current conditions, some counties have expressly confirmed that they will not be able to deliver ballots to voters in time for them to be counted on June 2. In Mercer County, officials warned “[a]s fast as we can put them out, they’re coming in even faster,” R. 985a-88a, and predicted that requests for mail ballots will double immediately before the deadline. *Id.*; R. 989a-94a (counties across the state expected a surge of

requests before the deadline). Between May 17 and 26, at least 501,117 new mail ballot requests were submitted, with at least 73,019 submitted on May 26 alone. R. 971a-72a ¶ 13; *see also* R. 989a-94a (tens of thousands of voters have been applying for mail ballots every day leading up to the deadline); R. 676a ¶ 15 (Philadelphia County faced almost 20,000 outstanding ballot applications to process, and almost 17,000 approved applications for which ballots still had to be sent to voters).

Both Montgomery County and Bucks County took the extraordinary step of filing emergency petitions, apparently based on the recommendation of the Department of State (“DOS”), in their respective Court of Common Pleas requesting permission to count ballots received up to June 9, 2020. R.1003a-1012a ¶ 17. Bucks County was still mailing ballots two days after the deadline for mail ballot applications and predicts that voters may not receive their ballots until June 1. Bucks County Emergency Petition ¶¶ 10, 14. Montgomery County was not only facing backlogs and delays in processing applications and mail service, but hundreds of ballots had been returned to the Board of Elections because of a glitch in the Statewide Uniform Registry of Electors (“SURE”) system. *Id.* Neither Court of Common Pleas has yet to grant relief. R. 1015a-16a.

County officials have been clear that these backlogs mean that many voters will not be able to receive a ballot and send it back in time to arrive on June 2. R. 1018a-23a; *see also* R. 991-95 (Delaware County Commissioner stating she is “very

worried that people are going to be disenfranchised”); R. 955a-56a ¶ 7. Worse still, some of the counties that have come forward are located in areas where the prevalence of COVID-19 is highest. R. 674a ¶ 4. Voters are therefore caught in a Catch 22: voting by mail imposes a significant risk of disenfranchisement, while voting in person imposes significant health risks, especially given the consolidation of polling places. Absent the Court’s intervention, tens of thousands of Pennsylvania voters (and perhaps even more) will be left without a safe, reliable means of exercising their right to vote and to a free and equal election.

c. Mail delivery delays.

Even in an alternate reality where all counties were able to keep up with mail ballot requests, Appellees have also conceded that mail delivery delays have prevented voters from receiving their mail ballots in a timely manner. In Montgomery County, the DOS reports that “for reasons not within Montgomery County’s control, many ballots that the county has mailed have been delayed in arriving at voters’ homes” and “these delays make it more difficult for voters who requested ballots well in advance of the application deadline to return those ballots on time.” R. 675a ¶ 12. Montgomery County election officials attribute these delays to mail delivery and stated in their Petition that “the United States Post Office confirmed that absentee and mail-in ballots . . . could take up to ten days to be delivered.” R. 1009a ¶ 11; *see also* R. 955a ¶ 6.

These statements not only corroborate Appellants' claims, but they also mirror remarks made by Secretary Boockvar at a town hall meeting earlier this month where she claimed that mail delivery is taking twice as long as usual in the Commonwealth.⁸ Indeed, Appellant Dwayne Thomas waited almost two weeks before receiving his ballot on May 26; Mr. Thomas has less than one week for his ballot to be received by June 2, but mail delivery in the Commonwealth may take up to 10 days. R.428a-29a ¶ 3-4; R. 955a ¶ 6; R. 1009a ¶ 11.

The effects of delayed mail delivery and mail ballot application backlogs on voters' access to the franchise cannot be reasonably disputed. As the application deadline neared, counties witnessed a large surge in mail ballot requests, including at least 501,117 between May 17 and 26 and at least 73,019 submitted on May 26 alone. R. 437a ¶ 13. Already at capacity, the counties and the U.S. Postal Service cannot process these applications and get them to the voters in time for the voters to then mail them back so that the counties will receive them by June 2. R. 955a-56a ¶ 7. Tens of thousands of voters (including Appellant Thomas), and potentially more, are at risk of disenfranchisement absent relief from this Court. Appellants and many other Pennsylvania voters do not have reasonable access to in-person voting, nor do they have any reasonable assurance that their mail ballots will be delivered to their

⁸ May 6 Town Hall, Secretary Boockvar remarks at 12:10, <https://www.senatorhughes.com/newsroom/audio/>

county boards on time in light of the current mail service disruptions. *See, e.g.*, R. 429a ¶ 4; R. 477a ¶ 4. Their only other alternative, to seek assistance from others in submitting their ballots, is prohibited by Pennsylvania law. 25 P.S. §§ 3146.6(a); 3150.16(a). At every turn, Pennsylvania voters will encounter barriers to the franchise that, collectively, “amount to a denial” of the right to vote. *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914).

d. Appellants are likely to succeed on their Free and Equal Elections Clause Claims.

Pennsylvania’s Constitution imposes a clear and unambiguous duty on the Commonwealth to ensure that *all* elections are “free and equal.” *League of Women Voters of Pa. v. Commonwealth*, 178 A. 3d 737, 803 (Pa. 2018); Pa. Const. art. I, § 5. This affirmative right, which “has no federal counterpart” and outstrips the protections in the federal constitution, protects voters against “regulation[s] of the right to exercise the franchise [that] **deny the franchise itself, or make it so difficult as to amount to a denial.**” *League of Women Voters of Pa.* 178 A.3d at 810 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)) (emphasis added). Elections are “free and equal” only when “no constitutional right of the qualified elector is subverted or denied him.” *Winston*, 91 A. 520 at 523. The guarantee of a “free and equal” election also requires that “inconveniences [of voting regulations] if any bear upon all in the same way under similar circumstances.” *Winston*, 91 A. 520 at 523; *see also League of Women Voters*, 178 A.3d at 811. And it applies with equal force even if voting

rights are denied or impeded “by inadvertence.” *League of Women Voters*, 178 A.3d at 810 (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)).

The Pennsylvania Supreme Court has further recognized that the Free and Equal Elections Clause reaches “all aspects of the electoral process, to the greatest degree possible.” *Id.* at 804. Courts, thus, have broad authority when enforcing its provisions because the Clause “strike[s] . . . at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *Id.* at 809 (quotation and citation omitted); *see also id.* at 822 (“[O]ur Court possesses broad authority to craft meaningful remedies when required.”). The COVID-19 related disruptions to daily life in the Commonwealth, and to the electoral process specifically, have left Pennsylvanians with a dearth of reasonably accessible options for voting in the upcoming election. And if the Free and Equal Elections Clause is to have any meaning, it must require, at the very least, that state officials adopt reasonable safeguards to prevent large-scale disenfranchisement in the midst of the current public health emergency. *Applewhite*, 2014 WL 184988 at *23 (“Disenfranchising voters ‘through [no] fault of the voter himself’ is plainly unconstitutional.” (quoting *Appeal of Norwood*, 116 A.2d 547, 553 (Pa. 1955))).

In order to provide the free and equal election mandated by the Pennsylvania Constitution, election officials must implement safeguards, in advance, to ensure

that voters are able to cast mail ballots and minimize the risk of arbitrary disenfranchisement for reasons outside the voters' control.

e. Appellants are likely to succeed on their Equal Protection Clause claims.

Because many Pennsylvanians currently lack any reliable and safe means of delivering their mail ballot by the fast approaching Election Day deadline, and may not seek assistance of a third party whom they trust to deliver their ballot for them, the absence of any safeguards to ensure their ability to cast an effective ballot during the COVID-19 pandemic imposes a severe burden on the right to vote in violation of the equal protection provisions of the Pennsylvania Constitution. This burden, which falls most heavily on the most vulnerable members of the electorate, triggers the highest levels of scrutiny and cannot be justified by any sufficient governmental interest.

Two separate provisions of the Pennsylvania Constitution address Appellants' right to equal protection of the law. Article I, Section 1 states that "[a]ll men are born equally free and independent, and have certain inherent and inalienable 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." And Article I, Section 26 provides that neither the Commonwealth nor any other political subdivision can deny to any person "the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

Burdens on fundamental rights implicate the equal protection clauses and in reviewing whether such burdens rise to a constitutional violation, courts in the Commonwealth apply the same standards adopted by “the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991) (citing *James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302 (Pa. 1984)). This analysis, commonly referred to as the *Anderson-Burdick* test, requires courts to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiffs’ rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see also *In re Zulick*, 832 A.2d 572, 580 (Pa. Commw. Ct. 2003) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), which in turn cites the *Anderson-Burdick* balancing test). Where the restrictions are severe, “the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). But all burdens, “[h]owever slight” they may appear, “must be justified by relevant and []legitimate state interests sufficiently weighty to justify the limitation.”

Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008) (controlling op.) (quotation marks omitted).

The Commonwealth’s ban on third-party delivery assistance leaves voters with little choice but to submit their ballots to the vagaries of mail delivery during the COVID-19 pandemic and imposes a severe burden on the right to vote. Recent admissions from DOS and county boards of elections establish that the delays in delivery mail ballots to voters, and the still ongoing backlog in processing mail ballot requests, have prevented some voters from receiving their ballots even to this day, which means tens of thousands of voters will not receive their ballots in time to mail them back by the Election Day deadline and are at risk of disenfranchisement. *See supra* Part II.B.1; *see also Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1034 (9th Cir. 2020) (en banc) (concluding that a ballot collection and delivery ban posed an undue hardship on voters—even before the rise of the current health crisis); R. 952a-54a ¶¶ 3-4. Courts confronted with laws that threaten complete disenfranchisement, even when those laws affected far fewer voters than will be the case in Pennsylvania, have held that such laws impose a severe burden on the right to vote. *See, e.g., Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (disqualifying provisional ballots that constituted less than 0.3 percent of total votes inflicted “substantial” burden on voters); *Ga. Coal. for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1264 (N.D. Ga. 2018) (finding severe burden

where 3,141 individuals ineligible to register); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 948–49 (W.D. Wis. 2016) (finding severe burden when fewer than 100 qualified voters were disenfranchised). That tens of thousands of Pennsylvanians could be denied the right to vote in the June 2 primary is undoubtedly a severe burden on their constitutional rights.

The Commonwealth’s failure to provide additional safeguards for voters by permitting ballot delivery assistance or additional time to have their ballots delivered to election officials under these circumstances is subject to strict scrutiny and ultimately fails this test because it is not narrowly tailored to advance a compelling interest. *See, e.g., Fla. Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) (“If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does.”). But even if the Court found that the burdens at issue are less than severe, they nonetheless must be accompanied by state interests “sufficiently weighty” to justify the restriction. *Obama for Am. v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012); *see also League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1215–16 (N.D. Fla. 2018) (“However slight that burden may appear . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”). In this case, under either standard, the failure to implement procedures that allow election officials to count ballots postmarked by

Election Day and delivered up to seven days after the Election, and the failure to allow voters to seek assistance from third-parties to deliver their ballots cannot survive any level of scrutiny.

The safeguards that Appellants seek are already fixtures of Pennsylvania's electoral process which are currently being applied to a subset of voters, and have been for years, so the justifications for not extending them more broadly are not credible. The Commonwealth already allows military-overseas voters to submit ballots up to seven days after Election Day as long as they are mailed by a certain date, *see* 25 Pa.C.S. § 3511(a), and even when a ballot's postmark is unreadable, the Commonwealth already has a solution for that, too: election officials must accept the ballot if the voter declares under penalty of perjury that the ballot was timely submitted. *Id.* § 3511(b). Pennsylvania election officials also allow disabled voters to designate an agent of their choice to deliver their mail ballots. *DiPietrae*, 666 A.2d at 1135. None of these measures have upended the electoral process, nor will they undermine any legitimate government interest.

There is nothing sacrosanct about the ballot receipt deadline. County boards have seven days after Election Day to examine provisional ballots. *Id.* at § 3050(a.4)(4). Challenges and appeals to provisional ballots can last another nine days. *Id.* at § 3050(a.4)(4)(ii), (v). Pennsylvania officials have 20 days to certify election results to the Secretary. 25 P.S. § 2642(k). And, to date, at least two county

boards of elections have filed lawsuits in their Court of Common Pleas seeking extensions of the ballot receipt deadline because they have determined that they will not be able to get mail ballots to voters in time for those voters to return them by Election Day. Bucks County Emergency Petition; R. 1007a-11a. There is no evidence that Appellants' requested relief will upend post-election procedures, and the statements from county boards themselves requesting extensions demonstrate that such relief is entirely feasible and necessary to protect the right to vote. *Id.*

To the extent the Commonwealth cites fraud prevention to justify the ban on ballot delivery assistance, that rationale fails here because the Commonwealth cannot demonstrate a sufficient connection between the regulation—a ban on delivering voted, sealed mail ballots—and the fraud it seeks to address because delivering ballots that are already voted and sealed is several steps removed from most fraudulent acts (i.e., forging ballots or voting unlawfully); thus, it is an ineffective fraud-prevention tool. *See Applewhite*, 2014 WL 184988, at *21 (noting absence of “a nexus between photo identification . . . and the integrity of elections[] when prior elections accepted a number of types of proof to verify identity”). Pennsylvania voters, for instance, can submit their ballots by mail, or, in some counties, in a drop box without anyone knowing who physically delivered the ballot. Indeed, that is how the perpetrators of the fraudulent scheme in North Carolina's Ninth Congressional District race avoided detection: they delivered ballots through

the post office or returned them “back to the voter for hand-delivery to the local Board of Elections.” R. 1061a ¶ 65. It defies logic to suggest that a ban on obtaining ballot delivery assistance (even from immediate family members), which would be undetectable in many cases, would deter individuals who plan to forge ballots and commit fraud. Instead, the requirement unduly burdens and punishes those who attempt to follow the letter of the law and are least likely to be engaged in misconduct. In any event, courts across the country have found assertions of voter fraud that rely on isolated incidents to be insufficient to support laws suppressing ballot delivery assistance. *Democratic Nat’l Comm.*, 948 F.3d at 1007 (rejecting the argument that a single incident in North Carolina established that Arizona had a legitimate interest in outlawing non-fraudulent ballot collection); R.1035a (Conclusions of Law ¶ 4, *Driscoll et al. v. Stapleton*, No. DV 20-408, (Mt. Dist. Ct. May 22, 2020)); *cf.* R. 1089a-1143 (*Priorities USA et al. v. Nessel*, No. 19-13341 (E.D. Mich. May 22, 2020) (noting that vague assertions of voter fraud were not a state interest sufficient to support a motion to dismiss)).

Almost by the hour, undisputed, corroborating evidence is mounting to show that the threat of disenfranchisement that Appellants sought to address in their Emergency Application is no longer just highly likely, but plainly and undeniably imminent. Voters should not be forced to choose between risking their health by casting a ballot in-person, or their constitutional right to vote by turning their ballot

over to the vagaries of mail delivery, and the failure to provide adequate safeguards to ensure access to the franchise violates the Pennsylvania Constitution's Equal Protection Clauses.

f. Absent an injunction, Appellants and other Pennsylvania voters will suffer irreparable harm.

Absent an injunction, tens of thousands of eligible votes (and perhaps more) will be discarded after 8 p.m. on June 2. The Appellants in this case, and thousands of other voters, are facing real, irreparable harm of the severest degree. *See Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986). Appellant Thomas, for instance, mailed his ballot only six days before Election Day, R. 953. ¶ 4, but given the mail delivery delays that have been confirmed by county boards, his ballot may not arrive before the deadline.

Furthermore, it is now clear that thousands of applications, including those of Alliance's members, were still being processed and ballots had yet to be sent as of May 28, and completing that process may take the counties up to Election Day or the day before. R. 674a-76a ¶¶ 6, 12, 13, 15-16; R. 971a ¶ 12; R. 955a ¶ 6; R. 990a-95a. Countless Pennsylvanians who receive their ballots late and believe that they have run out of time will simply not vote. "[O]nce the election occurs, there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina*, 769

F.3d 224, 247 (4th Cir. 2014). Thus, the injury that Appellants and other Pennsylvania voters will face absent an injunction is irreparable.

g. Appellants' requested injunction is reasonably suited to abate the elevated threat of disenfranchisement in the upcoming elections and is not factually impossible.

Appellants are not asking this Court to upend the electoral process; quite the opposite. The Emergency Application seeks safeguards that are already built into the Pennsylvania's law and are currently being implemented for certain categories of voters (and have been for years). *See, e.g.*, 25 Pa.C.S. § 3511(a) (election officials must count military-overseas ballots delivered by the seventh day after the election); *id.* § 3511(b) (election officials must accept military-overseas ballots with late or unreadable postmarks if the voter declares under penalty of perjury that the ballot was timely submitted); *DiPietrae*, 666 A.2d at 1135 (allowing disabled voters to designate an agent of their choice to deliver their mail ballot). The requested relief protects the franchise using already-existing procedures to minimize the risk of large-scale disenfranchisement from mail service disruptions and ballot processing delays during the COVID-19 pandemic, which have also been upheld by other courts. *See Republican Nat'l Comm.*, 2020 WL 1672702 at *1 (granting stay but leaving intact district court order extending the received-by deadline for ballots submitted by Election Day). The Deputy Secretary for the DOS's Elections Commission acknowledges that this relief will allow more Pennsylvanians to vote

during the pandemic. R. 669a ¶ 49 (“I also agree that in the event of significant backlogs in application processing due to COVID-19, a breakdown in the postal service, or other developments, an extension of the ballot receipt deadline . . . might be necessary to avoid an undue burden on the right to vote.”). Appellants seek no more than what is required to ensure access to the franchise.

Any relief, moreover, must be granted statewide because COVID-19 does not recognize county lines or municipal boundaries, nor are the U.S. Postal Service’s well-recognized problems limited to a single locality. *See Fla. Democratic Party*, 215 F. Supp. 3d at 1258 (extending relief to entire state).⁹ And a seven-day window to ensure that delayed mail ballots can be counted is appropriate to prevent the specific harm that is resulting from the COVID-19 pandemic. R.966a-67a ¶ 6. Far more expansive relief has been granted to protect the right to vote when unforeseen conditions interfere with the electoral process. *See, e.g., In re General Election-1985*, 531 A.2d 836 (Pa. Commw. Ct. 1987) (affirming the suspension of an election after extreme weather forced Washington County to declare a state of emergency).

⁹ A piecemeal approach that attempts to target specific counties subjects voters elsewhere, who are similarly affected by the disruptions in the electoral process, to varying standards, depending on where they live and the willingness of their county boards of elections to file suit or publicize their difficulties. *See Bush v. Gore*, 531 U.S. 98, 105-06 (2000).

h. Greater injury will result from refusing, as opposed to granting, Appellants' requested injunction.

The evidence discussed above, which details the injuries Appellants and countless Pennsylvania voters will face absent an injunction, weighs heavily in Appellants' favor. *Marcellus Shale Coal. v. Dep't of Env'tl. Prot. of Commonwealth*, 185 A.3d 985, 1014 (2018) (Donohue, J., concurring and dissenting); *see also Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1181 (Pa. Commw. Ct. 2016). The ballot receipt deadline will not upend or complicate the electoral process, and, tellingly, the county election boards that have weighed in publicly do not suggest as much. Their concern is the denial of the franchise that will occur absent relief from the Court. Any potential burden to the Commonwealth is far outweighed by the potential widespread disenfranchisement that will result absent injunctive relief.

Appellants' requested remedy also presents no risk of voter confusion and would not disrupt the "status quo," which already has been upended—not by any judicial order, but by the COVID-19 pandemic and the consequent delays in processing mail ballot requests and delivering ballots. To the extent that voters believe that the ballot receipt deadline still applies and return their ballots accordingly, their votes will, of course, still be counted. Ultimately, Appellants' requested relief will result in more voters being able to cast their ballots and ensures those ballots will be counted.

i. Granting Appellants’ requested injunction would serve the public interest.

The public interest “favors permitting as many qualified voters to vote as possible.” *Obama for Am. v. Husted*, 697 F.3d at 437. Indeed, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (quotation marks omitted). The Pennsylvania Supreme Court has recognized that the right to vote is “pervasive of other basic civil and political rights” and that voting rights are “the bedrock of our free political system.” *Bergdoll v. Kane*, 731 A. 2d 1261, 1269 (Pa. 1999) (quotation omitted). Therefore, an injunction requiring Appellees to conduct elections in compliance with Pennsylvania’s Constitution “so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy.” *U.S. v. Berks Cty., Pa.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003).

B. Appellants’ requested relief does not implicate Act 77’s non-severability clause.

Pennsylvania Supreme Court precedent and long-held rules of statutory construction have made clear that non-severability clauses are not “inexorable commands.” *Stilp v. Commonwealth*, 905 A.2d 918, 972 (Pa. 2006); *see also* 1 Pa.C.S. § 1925 (“The provisions of every statute shall be severable.”). Severance is presumed where “a statute can stand alone absent the invalid provision.” *Stilp*, 905

A.2d at 970. Ultimately, the court does not “deem[] nonseverability clauses to be controlling in all circumstances . . . but instead [it] will effectuate [its] independent judgment concerning severability.” *Id.* at 980. By including the non-severability provision, Act 77 purports to bind a broad range of Election Code provisions and its enforcement would only exacerbate (exponentially) constitutional harm identified in Appellants’ Emergency Application. If the Court were to extend the deadline for the receipt of mail ballots and permit voters to seek assistance from others in delivering their ballots, the rest of Act 77, including the provisions addressing no-excuse mail-in voting, could easily “stand alone,” and applying the non-severability provision would lead to an absurd and unconscionable result. *Id.* at 970. That is, in finding unconstitutional the failure to count mail ballots delivered after Election Day, or the failure to permit ballot delivery assistance, the Court would be required as a remedy to eliminate mail-in ballots (or no-excuse absentee voting) entirely, making the cure significantly worse than the disease and contravening the statute’s overarching purpose. The Commonwealth’s long-held rules of statutory interpretation and Pennsylvania Supreme Court precedent counsel against enforcing a non-severability provision that would strip the right to vote from over 1.8 million Pennsylvanians who have already requested a mail ballot, many of whom have already received their ballots, or to void the registrations of those voters who registered during the additional two weeks provided by Act 77. In all cases, the Court’s “goal must be to

enfranchise and not to disenfranchise.” *In re Luzerne Cty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) (citing *Appeal of James*, 105 A.2d 64 (Pa. 1954)).

C. The Commonwealth Court, upon finding that it lacked jurisdiction to grant Appellants’ Emergency Application, should have immediately transferred the matter to the Supreme Court as required by law.

If this Court agrees that the Commonwealth Court lacked subject matter jurisdiction to grant Appellants’ Emergency Application, and that this Court has exclusive jurisdiction over Appellants’ claims under Section 13(2) of Act 77, then the matter should have been transferred to this Court, which, pursuant to its original jurisdiction, may grant Appellants’ Emergency Application. Pennsylvania law required the Commonwealth Court, upon its jurisdictional ruling, to transfer the record to the Supreme Court where it shall be treated as if originally filed on April 22, 2020—the date Appellants filed their lawsuit. 42 Pa.C.S. § 5103(a).¹⁰ Specifically, 42 Pa.C.S. § 5103(a) states:

A matter which is within the exclusive jurisdiction of a court or magisterial district judge of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court . . . **where it shall be treated as originally filed in the transferee court . . . on the date when first filed in the other tribunal.**

¹⁰ In fact, Appellants requested such relief in the event that the Commonwealth Court determined that it lacked jurisdiction over Appellants’ Emergency Application. See R. 731a-32a.

Id. (emphasis added). Any further court action by the Commonwealth Court is “null and void” if it lacks subject matter jurisdiction. *See Grimm v. Grimm*, 149 A.3d 77, 84 (Pa. Super. Ct. 2016).

That the court made its finding in the context of Appellants’ Emergency Application, and not in granting the Secretary’s preliminary objections, does not permit the court to retain the matter for further proceedings either. The “issue of subject matter jurisdiction may be raised by the parties at any stage of the proceedings or by the court *sua sponte*.” *Mastrocola v. Se. Pa. Transp. Auth.*, 941 A.2d 81, 88 (Pa. Commw. Ct. 2008). The Secretary challenged the court’s subject matter jurisdiction in response to Appellants’ Emergency Application, R. 582a, and the court, relying on those arguments, concluded that it lacked jurisdiction to grant the Emergency Application. Addendum A at 9. The court, therefore, should have transferred the claims addressed in the Emergency Application to the Supreme Court under 42 Pa.C.S. § 5103(a), and could have retained jurisdiction over the remaining claims. *Sinwell v. Com., Pa. Bd. of Prob. & Parole*, 406 A.2d 597, 600 (Pa. Commw. Ct. 1979) (transferring a portion of a matter “to the appropriate court pursuant to 42 Pa.C.S. § 5103(a)” but “retain[ing] jurisdiction as to the petitioner’s claim that” fell within court’s jurisdiction). In failing to do so, the Commonwealth Court abused its discretion (which effectively denied Appellants the ability to seek relief from another forum), and this Court should, in turn, exercise original jurisdiction over

Appellants' Emergency Application and grant their requested relief. In the alternative, the Court should reverse the Commonwealth Court's denial of the Emergency Application and enter a preliminary injunction in Appellants' favor.

VIII. CONCLUSION

An election will take place in just a few days, and the fundamental right to vote is at stake. There is virtually no dispute among the parties that potentially thousands of voters will not receive their mail ballots in time to submit them before the Election Day deadline. Several different groups, including county boards of elections, have sought relief in various forums to prevent this widespread disenfranchisement to no avail. Appellants in this case have established a clear right to relief based on evidence that is largely undisputed by Appellees. This Court should therefore reverse the Commonwealth Court's denial of Appellants' Emergency Application with instructions to enter their requested preliminary injunction, or, in the alternative, if the Court agrees that it has exclusive jurisdiction, the evidence in the record provides more than sufficient basis for this Court to grant Appellants' Emergency Application and order Appellees to direct county boards of elections to: (1) allow voters who requested mail ballots to submit emergency write-in ballots; (2) treat all mail-in ballots and absentee ballots postmarked by Election Day and delivered by June 9, 2020, as timely submitted and count all such ballots if

they are otherwise valid; and (3) allow third parties to assist voters in delivering mail-in and absentee ballots.¹¹

Dated: May 30, 2020

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¹¹ The term “postmark” is defined above. *See supra* note 1. Officials may alternatively apply the same procedures for determining the postmark date on military-overseas ballots. *See* 25 Pa.C.S. § 3511(b) (requiring election officials to accept military-overseas ballots with late or unreadable postmarks if the voter declares under penalty of perjury that the ballot was timely submitted).

ADDENDUM A

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: May 28, 2020

On April 22, 2020, the Pennsylvania Alliance for Retired Americans and four individuals, two of whom are members of the Alliance (collectively, Alliance), filed a Petition for Declaratory and Injunctive Relief (Petition) in this Court's original jurisdiction against the Secretary of the Commonwealth, Kathy Boockvar, and the Director of the Bureau of Election Services and Notaries, Jessica Mathis (collectively, Secretary). Alleging disruptions to the June 2, 2020, primary election from the COVID-19 pandemic, the Alliance raises constitutional claims about provisions of the Pennsylvania Election Code (Election Code)¹ related to mail-in ballots, which is a method of voting that was added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77). On May 8, 2020, the Alliance

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2600-3591.

filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review (Preliminary Injunction Application). For the following reasons, the Court denies the Preliminary Injunction Application.

In the Petition, the Alliance challenges the Election Code's requirement that a voter's absentee or mail-in ballot must be received by the county board of elections by 8:00 p.m. on Election Day. It also challenges the Election Code's prohibition against third parties assisting voters in the delivery of their absentee and mail-in ballots and, relatedly, alleges the potential disenfranchisement of voters who are unable to provide their own postage to return their mail ballots. Finally, the Alliance alleges that the Secretary's failure to provide any guidance to county boards of elections on how to verify signatures on mail-in ballots will result in the arbitrary rejection of some ballots.

The four individual petitioners allege they are at risk of being disenfranchised because the county boards of elections may fall behind in processing absentee and mail-in ballot applications. The individual petitioners do not want to vote in person due to health concerns related to the COVID-19 pandemic. Alleging budgetary and staffing issues with the United States Postal Service, the individual petitioners fear their ballots may not be received by the 8:00 p.m. Election Day deadline. They believe they will need third-party assistance in returning their ballots.

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 require an extension of the ballot return deadline; prepaid postage on all absentee and mail-in ballots; third-party collection of absentee and mail-in ballots; and training in signature matching for the county boards of elections.

On May 8, 2020, the Alliance filed a Preliminary Injunction Application to direct the Secretary to adopt procedures for emergency write-in ballots for all voters who request mail-in ballots; to designate all ballots as emergency ballots; and to count all such ballots if postmarked by Election Day and received within seven days thereof. The Alliance also seeks to enjoin the enforcement of Sections 1306 and 1306-D of the Election Code, 25 P.S. §§3146.6, 3150.16,² to the extent that they prohibit third parties from delivering any voter's ballot to a local board of elections.

The Court held a pre-hearing conference on May 19, 2020. At the conference, the Secretary confirmed the statement in her answer to the Preliminary Injunction Application that she intended to file preliminary objections to challenge this Court's jurisdiction over the Petition. At the Court's suggestion, the parties agreed to bifurcate the issue of jurisdiction over the Preliminary Injunction Application from the merits thereof. The Court provided the parties and proposed intervenors³ an opportunity to file memoranda of law on their respective positions regarding jurisdiction.⁴ Having reviewed the memoranda of law, the Court now

² Added by the Act of October 31, 2019, P.L. 552, No. 77.

³ Proposed intervenors include President Pro Tempore Joseph B. Scarnati, III, and Majority Leader of the State Senate Jake Corman; Speaker of the House of Representatives Mike Turzai and Majority Leader of the House Bryan Cutler; and the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee.

⁴ The Court deferred briefing of Respondents other preliminary objections.

considers the two bases upon which the Secretary asserts this Court lacks jurisdiction over the Petition and, by extension, the Preliminary Injunction Application.

Preliminary Injunction Standards

“The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order was made, it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined.” *Appeal of Little Britain Twp. From Decision of Zoning Hearing Board of Little Britain Twp., Lancaster County, Pa.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994). A preliminary injunction is a temporary remedy granted until the parties’ dispute can be fully resolved. *Id.* A party seeking a preliminary injunction bears a heavy burden of proof and must establish all of the following criteria:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages;
- (2) greater injury will occur from refusing to grant the injunction than from granting it;
- (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct;
- (4) the petitioner is likely to prevail on the merits;
- (5) the injunction is reasonably suited to abate the offending activity; and
- (6) the public interest will not be harmed if the injunction is granted.

Brayman Construction Corp. v. Department of Transportation, 13 A.3d 925, 935 (Pa. 2011) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*,

828 A.2d 995, 1001 (Pa. 2003)). Because the grant of an injunction is such a harsh and extraordinary remedy, each criterion must be satisfied. *Pennsylvania ALF-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996). “[W]hen a preliminary injunction contains mandatory provisions which will require a change in the positions of the parties, it should be granted even more sparingly than one which is merely prohibitory.” *Zebra v. School District of the City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972).

In its request for a preliminary injunction, the Alliance seeks the performance of positive acts by the Secretary and the county boards of elections. The requested preliminary injunction will require the Secretary to adopt procedures for emergency write-in ballots for all voters who request them. Those procedures must designate all ballots as emergency ballots, and the county boards of elections must count them if postmarked by Election Day and received within seven days thereafter. The requested preliminary injunction will also enjoin enforcement of Sections 1306 and 1306-D of the Election Code so that third parties may collect ballots.

Jurisdiction and Act 77

The threshold issue is whether the Court has jurisdiction to order the relief requested and, for preliminary injunction purposes, whether the Alliance is likely to prevail on the merits. 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, 755 (Pa. Cmwlth. 2019). Subject matter jurisdiction is conferred solely by the Pennsylvania Constitution and its laws; the test for whether a court has subject matter jurisdiction is whether the court has the ability to determine controversies in the same general

class as the controversy at issue. *Id.* at 755-56 (quoting *Commonwealth v. Locust Township*, 968 A.2d 1263, 1268-69 (Pa. 2009)).

When it enacted Act 77, the General Assembly included specific provisions on jurisdiction to decide constitutional challenges arising under the act. More specifically, Section 13(2) of Act 77 provides:

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 final judgment in connection with such a challenge or request for declaratory relief.

Section 13(2) of Act 77. In short, the legislature has vested exclusive jurisdiction in our Supreme Court to hear challenges to certain sections of the Election Code, delineated in subsection (1) of Section 13 of Act 77. Relevant here, subsection (1) provides that “[t]his section applies to the amendment or addition of the following provisions of the act: ... (xix) Section 1306 ... [and] (xxi) Article XIII-D.” Section 13(1) of Act 77.

Section 1306 of the Election Code, 25 P.S. §3146.6, relates to voting by absentee ballots. It provides a deadline for receipt of absentee ballots as follows: “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). Article XIII-D of the Election Code includes Section 1306-D. It similarly provides a deadline for receipt of mail-in ballots as follows: “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 Petition challenges, *inter alia*, the received-by deadlines found in Sections 1306 and 1306-D. The Alliance stresses that it has lodged an as-applied challenge to avoid the risk of disenfranchisement.⁵ However, it seeks a statewide injunction to extend the received-by deadline set forth in Sections 1306 and 1306-D of the Election Code, arguing that it cannot be constitutionally applied anywhere in the Commonwealth. The Alliance’s claim that the absence of its proposed safeguards renders Act 77 unconstitutional is no different from a facial challenge to the statute as unconstitutional.

The relief sought by the Alliance would not merely supplement, but supplant, provisions set forth in Act 77. Those provisions impose an 8:00 p.m. Election Day deadline for the receipt of absentee and mail-in ballots and preclude a third party from assisting in the delivery of ballots. The Alliance seeks to modify

⁵ See Petition ¶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 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.”); ¶64 (“many voters will be forced to incur the burden and health risks of personally delivering their completed mail-in ballots to ensure they arrive on time, or risk disenfranchisement.”); ¶66 (“Pennsylvania’s failure to provide an opportunity for eligible citizens to vote by mail, without cost, violates the Free and Equal Protection Clause.”); ¶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 bear[s] heavily on certain groups of voters without sufficient justification.”); and ¶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.”).

these provisions of the Election Code on the theory that they may disenfranchise voters in violation of their constitutional right to vote.

Because the Alliance has raised a challenge “concerning the constitutionality” of Sections 1306 and 1306-D of the Election Code, 25 P.S. §§3146.6, 3150.16, the Secretary’s assertion that the Supreme Court has exclusive jurisdiction over the Petition under Section 13(2) of Act 77 appears meritorious.

Indispensable Parties

Indispensable parties are those whose rights are so directly connected with and affected by the litigation that they must be a party to the action to protect their rights; their absence renders void any court order or decree for lack of jurisdiction. *CRY, Inc. v. Mill Service, Inc.*, 640 A.2d 372, 375 (Pa. 1994) (quoting *Scherbick v. Community College of Allegheny County*, 387 A.2d 1301, 1303 (Pa. 1978)). In *Mechanicsburg Area School District v. Kline*, 431 A.2d 953, 956 (Pa. 1981), the Supreme Court determined that consideration of indispensable parties should involve consideration of at least the following:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

The Petition alleges that the county boards of elections are falling behind in processing mail-in ballot applications; unconstitutionally omitting prepaid postage for ballot return; and will be employing “arbitrary” standards to match voter signatures. Petition ¶59. The Alliance seeks a mandatory injunction to compel county boards of elections to adopt new standards and procedures for counting

ballots. Specifically, the Alliance seeks to require the county boards of elections to: provide prepaid postage for mail-in ballots; receive and count ballots after the 8:00 p.m. deadline; train election board officials on signature verification; and allow for a cure where there are mismatched signatures.

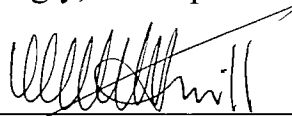
The Secretary contends that the Petition's accusations against the county boards of elections makes them indispensable parties. She further contends that this Court cannot order the county boards of elections to provide postage and to implement emergency procedures without being allowed to defend. Without the presence of indispensable parties, the Court lacks jurisdiction. *Powell v. Shepard*, 113 A.2d, 261, 264-65 (Pa. 1955).

The Secretary has presented a compelling case that the county boards of elections have a direct interest in the Petition and as such are indispensable parties.

Conclusion

The Secretary's arguments on the issue of jurisdiction are compelling and when considered by the full Court may result in a transfer of the Petition to the Supreme Court. The Court does not believe the Alliance is likely to prevail on the question of this Court's jurisdiction over the subject matter of the Petition.

As such, the Court concludes it lacks jurisdiction to grant the Preliminary Injunction Application. Accordingly, the request will be denied.

A handwritten signature in black ink, appearing to read 'Mary Hannah Leavitt', is written over a horizontal line.

MARY HANNAH LEAVITT, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, :
Irvin Weinreich, Brenda Weinreich, :
for Retired Americans, :
Petitioners :

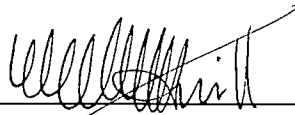
v. :

No. 266 M.D. 2020

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

ORDER

AND NOW, this 28th day of May, 2020, Petitioners' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review is **DENIED**.



MARY HANNAH LEAVITT, President Judge