

[J-97-2020]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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|------------------------------------|---|------------------------------|
| MICHAEL CROSSEY, DWAYNE THOMAS, | : | No. 108 MM 2020 |
| IRVIN WEINREICH, BRENDA WEINREICH, | : | |
| AND THE PENNSYLVANIA ALLIANCE | : | |
| FOR RETIRED AMERICANS, | : | |
| | : | |
| Petitioners | : | |
| | : | SUBMITTED: September 8, 2020 |
| | : | |
| v. | : | |
| | : | |
| | : | |
| KATHY BOOCKVAR, SECRETARY OF | : | |
| THE COMMONWEALTH, AND JESSICA | : | |
| MATHIS, DIRECTOR OF THE BUREAU OF | : | |
| ELECTION SERVICES AND NOTARIES, | : | |
| | : | |
| Respondents | : | |

ORDER

PER CURIAM

DECIDED: September 17, 2020

This matter involves a challenge similar to that addressed in *Pennsylvania Democratic Party, et al. v. Boockvar, K., et al.*, 133 MM 2020. As we discussed therein, in October 2019, the General Assembly amended the Election Code¹ to create the option for all voters, without the need to offer an excuse, to vote by mail. Under these extensive amendments, commonly referred to as “Act 77,”² all qualified Pennsylvania voters may request and cast their ballots by mail. 25 P.S. § 3150.11(a). As in *Pennsylvania Democratic Party*, at issue herein is the constitutionality of the dates under the Election

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

² Act of October 31, 2019, P.L. 552.

Code on which a mail-in ballot must be applied for and received by a county board of election in light of the unique circumstances that exist due to delays with the USPS system and connected to the COVID-19 pandemic.³

On April 22, 2020, Petitioners, four duly registered (and retired) Pennsylvania voters and the Pennsylvania Alliance for Retired Americans, filed a petition for declaratory and injunctive relief in the Commonwealth Court's original jurisdiction against Respondents Kathy Boockvar, the Secretary of the Commonwealth, and Jessica Mathis, the Director of the Bureau of Election Services and Notaries. On May 8, 2020, Petitioners filed an emergency application for a preliminary injunction and expedited review, limited to emergency relief for the June 2, 2020 primary election. The Commonwealth Court denied relief, determining that it lacked subject matter jurisdiction to decide the case on the ground that Act 77 specifies that this Court had exclusive jurisdiction over all claims regarding its constitutionality during the first 180 days after enactment.⁴ The Commonwealth Court transferred the case to this Court on or about June 17, 2020.

³ See 25 P.S. §3150.12a(a) (a voter must submit a mail-in ballot application to a county board of elections by "the first Tuesday prior to the day of any primary or election"); and 25 P.S. 3150.16(c) (providing, in part, "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").

⁴ Section 13(2) of Act 77 provides that "[t]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1). The Supreme Court may take action it deems appropriate, consistent with the Supreme Court retaining jurisdiction over the matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief." Section 13(3) indicates that "[a]n action under paragraph (2) must be commenced within 180 days of the effective date of this section." Petitioners' petition for review was filed within this 180-day limit.

After the transfer,⁵ this Court granted Petitioners' Application for Leave to File an Amended Petition by July 13, 2020. In their Amended Petition, Petitioners assert three claims. First, Petitioners challenge the constitutionality of the provisions of Act 77 requiring that mail-in ballots be received on Election Day. Specifically, Petitioners maintain that, because of delays by the United States Postal Service in mail delivery, the high volume of mail-in voting during the COVID-19 pandemic, and delays in the processing and delivery of applications for ballots, Pennsylvania voters will be disenfranchised because those who timely request a mail-in ballot on the application deadline (October 27, 2020) may be unable to receive, complete and return the ballot by mail it so that it is received by county boards of election on or before the "received-by" deadline of 8:00 p.m. on Election Day. Thus, Petitioners seek an extension of the "received-by" deadline for mail-in ballots. Petitioners also claim that Respondents have failed to remove barriers to voting by mail by not providing voters with prepaid postage on mail-in ballots, and by not allowing voters to obtain third-party assistance in the return of mail-in ballots.⁶

Regarding the claims before this Court, it is hereby **ORDERED**:

⁵ This Court granted applications for leave to intervene filed on behalf of President Pro Tempore Joseph B. Scarnati, III, and Majority Leader of the Senate Jake Corman (collectively, "Senate Intervenors"), and on behalf of the Speaker of the House of Representatives Bryan Cutler and House Majority Leader Kerry Benninghoff ("House Intervenors"). Without prejudice to their ability to file briefs as *amicus curiae* pursuant to Pa.R.A.P. 531, we denied the applications for leave to intervene filed by the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee.

⁶ On August 26, 2020, this Court issued an order appointing The Honorable Mary Hannah Leavitt, President Judge of the Commonwealth Court, as a Special Master to conduct an evidentiary hearing on the claims raised and to provide us with her recommendation. We gratefully acknowledge President Judge Leavitt's timely and extensive efforts to generate a complete evidentiary record as well as her thoughtful recommendations.

Petitioners' request that the received-by deadline for mail-in ballots be adjusted is **DISMISSED AS MOOT** based on this Court's decision in *Pennsylvania Democratic Party, et al. v. Boockvar, K., et al.*, 133 MM 2020, in which this Court provided a three-day extension of the mail-in ballot received-by deadline.

Petitioners' request that prepaid postage be provided on mail-in ballots is **DISMISSED AS MOOT** as the Secretary of State, Kathy Boockvar, has announced that the Department of State will provide funding to county boards of election for postage on mail-in ballots. See <https://www.media.pa.gov/Pages/State-Details.aspx?newsid=391> (published July 31, 2020).

Petitioners' request that voters be permitted to obtain third-party assistance in the return of mail-in ballots is **DENIED**. It has long been the law of this Commonwealth, per 25 P.S. §3146.6(a), that third-person delivery of absentee ballots is not permitted. See *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004) ("Section 3146.6(a) unequivocally provides that 'the elector shall send [the absentee ballot] by mail, postage [prepaid], except where franked, or deliver it in person to the board of election.' ... Thus, under the statute's plain meaning, a non-disabled absentee voter has two choices: send the ballot by mail, or deliver it in person."). Act 77 adds a substantially identical provision for mail-in ballots, which we likewise conclude forbids third-party delivery of mail-in votes. 25 P.S. § 3150.16(a) ("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.").

All other outstanding motions are **DISMISSED AS MOOT**.

Chief Justice Saylor files a concurring and dissenting statement in which Justices Donohue and Mundy join.

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CONCURRING AND DISSENTING STATEMENT

CHIEF JUSTICE SAYLOR

DECIDED: September 17, 2020

I would not dismiss the Petitioner’s request for extension of the deadline for receipt of mail-in ballots as moot. Instead, I would have employed this case as the vehicle to decide that issue on the evidentiary record developed before President Judge Leavitt in accordance with this Court’s assignment, and I would have resolved the matter based on the rationale set forth by Justice Donohue in her concurring and dissenting opinion in *Pennsylvania Democratic Party v. Boockvar*, 133 MM 2020.

In all other respects, I join the *per curiam* Order.

Justices Donohue and Mundy join this concurring and dissenting statement.