

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CASSANDRA ADAMS JONES, et al., :
Petitioners, :

v. :

Docket No. 717 MD 2018

ROBERT TORRES, et al., :
Respondents. :

ORDER

AND NOW, this _____ day of _____, 2019, upon consideration of the Preliminary Objections filed by Respondent Joseph B. Scarnati III to the Petition for Review and any response thereto, it is hereby **ORDERED** that the Preliminary Objections are **SUSTAINED**.

It is further **ORDERED** that:

1. Petitioners’ Prayer for Relief is **DISMISSED** to the extent it seeks an order compelling the Legislature or any of its members, including Respondent Scarnati, to take action, and that items “c” through “h” are Prayer for Relief are hereby **STRICKEN**; and

2. The American Civil Liberties Union of Pennsylvania (“ACLU-PA”) is **DISMISSED** as a party petitioner in this action.

BY THE COURT:

, J

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NOTICE TO PLEAD

To: Petitioners Cassandra Adams Jones, Ariela Berg, Felicia Cooper, Radharani Howard, Kenedy Kieffer, Sarah Mearhoff, Kelly Myers, John Neugebauer, Edward Ream, and the American Civil Liberties Union of Pennsylvania:

You are hereby notified to file a written response to the enclosed Preliminary Objections within twenty (20) days from service hereof or a judgment may be entered against you.

Respectfully,

/s/ Lawrence J. Tabas

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III

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PRELIMINARY OBJECTIONS OF RESPONDENT JOSEPH B. SCARNATI III

Pursuant to Pennsylvania Rules of Civil Procedure 1028(a)(2), (a)(4), and (a)(5),

Respondent Joseph B. Scarnati III (“Senator Scarnati”), by and through his undersigned counsel, hereby files these Preliminary Objections to the Petition for Review.

PROCEDURAL HISTORY AND FACTUAL ALLEGATIONS

1. Petitioners filed a Petition for Review addressed to this Court’s original jurisdiction on or about November 13, 2018 pursuant to 42 Pa.C.S. § 761(a). Pet. for Review (“Pet.”) ¶ 27.

2. Pursuant to an uncontested Application for Extension of Time, this Court entered an Order on December 13, 2018 extending the time for Senator Scarnati to file and serve his response to the Petition for Review to January 14, 2019.

3. Among the Petitioners are nine individuals (“Individual Petitioners”) who allege, *inter alia*, that they are residents of Pennsylvania, eligible and registered to vote in this state, and were allegedly disenfranchised in the November 2018 general election as a result of the facts and statutory provisions described in the Petition for Review. Pet. ¶¶ 12–20, 51–60.

4. The remaining Petitioner, the American Civil Liberties Union of Pennsylvania (“ACLU-PA”), alleges that it is a public interest organization dedicated to protecting civil rights, and that the protection of citizens’ right to vote and overcoming impediments to voting are parts of its mission. Pet. ¶ 21. ACLU-PA further alleges that it has previously litigated voting rights and election reform cases, that its future work will involve helping absentee voters to vote, and that it brings this suit “on behalf of itself” because it will in the future have to expend resources helping absentee voters unless the requested relief is granted. Pet. ¶¶ 61–64.

5. Petitioners have sued Senator Scarnati only in his official capacity as President Pro Tempore of the Pennsylvania Senate, and have alleged that “[a]s President Pro Tempore, Senator Scarnati is responsible for referring every bill and joint resolution which may be introduced in the Senate or received from the House of Representatives to the appropriate standing committee.” Pet. ¶ 24.

6. Petitioners allege that the deadline for the return by voters to election officials of completed absentee ballots that is established in two sections of the Pennsylvania Election Code, 25 P.S. §§ 3146.6(a) and 3146.8(a), in conjunction with delays by the U.S. Postal Service in delivering documents relevant to the absentee voting process in Pennsylvania and delays by various unidentified county boards of elections, result in the inability of some voters to vote by absentee ballot as required by the Pennsylvania Constitution.

7. Specifically, with reference to the 2018 general election, Petitioners allege that

“[d]espite following the requirements prescribed in the Pennsylvania Election Code [25 P.S. §§ 2600 *et seq.*], all Petitioners received their [absentee] ballots too late to return them by the 5:00 p.m. November 2 deadline and were thus disenfranchised.” Pet. ¶ 51.

**PETITIONERS’ CAUSES OF ACTION
AND PRAYER FOR RELIEF**

8. The Petition for Review alleges four causes of action:

A. Count I alleges that the absentee ballot delivery deadline established by 25 P.S. § 3146.8(a) impermissibly burdens the fundamental right to vote by rendering it difficult, and sometimes impossible, for qualified voters, including Individual Petitioners, to submit their absentee ballots in time to be counted, and therefore violates the Pennsylvania Constitution, Article I, Section 5 and/or Article VII, Section 1.¹ Pet. ¶¶ 68–78.

B. Count II alleges that the absentee ballot delivery deadline established by 25 P.S. § 3146.8(a) violates the equal protection guarantees of Article I, Sections 1, 5 and 26 of the Pennsylvania Constitution by denying the right to vote to eligible voters, including Individual Petitioners, who do not receive their absentee ballots with sufficient time to return their completed ballots to county boards of elections to have their votes counted, while allowing other similarly situated voters to vote. Pet. ¶¶ 85–87.

C. Counts III alleges that the statutory provisions governing voting by absentee ballot provide insufficient time for some voters to apply for, obtain, and return their absentee ballots in time to be counted, and therefore violate Article VII, Sections 14(a) of the Pennsylvania Constitution. Pet. ¶¶ 97–101.

D. Count IV alleges that the statutory provisions governing voting by absentee ballot violate the First and Fourteenth Amendments of the United States Constitution by imposing

¹ Paragraph 66 of the Petition for Review is confusing in that it cites Article VII, Section 1 of the Pennsylvania Constitution, but quotes Article I, Section 5.

“significant burdens on the fundamental right to vote” and by “depriving voters who are out of town on Election Day of a meaningful opportunity to vote” despite there being only a minimal governmental interest in enforcing the time deadlines for absentee voting. Pet. ¶¶ 104, 105.

9. Petitioners’ Prayer for Relief asks this Court, in part, to:

...

c. Establish a new absentee ballot return deadline that complies with the Pennsylvania and United States Constitutions, if the Pennsylvania legislature fails to enact a constitutionally compliant absentee ballot return deadline in a timely manner;

d. Order Respondents to direct county boards of elections to accept absentee ballots that they receive as of the new absentee ballot return deadline;

e. Order Respondents to establish a new date on which county boards of elections may begin mailing absentee ballots to voters who have submitted valid absentee ballot applications;

f. Order Respondents to direct county boards of elections to begin mailing absentee ballots to voters starting on the newly established initial date;

g. Order Respondents to establish a new, later deadline by which county boards of elections may complete their review and tabulation of all absentee ballots, to account for additional volume of absentee ballots received near, on, and after Election Day;

h. Order Respondents to direct county boards of elections to complete their review and tabulation of all absentee ballots by the newly established deadline;

**FIRST PRELIMINARY OBJECTION
PURSUANT TO PA.R.C.P. 1028(a)(4) – LEGAL INSUFFICIENCY
OF THE PETITION FOR REVIEW**

10. The only specific allegation against Senator Scarnati is that he is “responsible for referring every bill and joint resolution which may be introduced in the Senate or received from the House of Representatives to the appropriate standing committee.” Pet. ¶ 24.

11. There is no allegation that Senator Scarnati supervises, controls, manages or is responsible for the operation of the Department of State, any county board of election, or any governmental agency that is responsible for the functioning of any part of the absentee ballot process.

12. There is no allegation that, if the current statutory provisions governing voting by absentee ballot were held to be unconstitutional by a court, Senator Scarnati would not perform his duty as a legislator and as President Pro Tempore of the Pennsylvania Senate to enact appropriate legislation in accordance with the requirements of the United States Constitution and the Pennsylvania Constitution.

13. There is no allegation that, if the current statutory provisions governing voting by absentee ballot were found to be unconstitutional by a court, the Pennsylvania legislature or any of its members would not perform their duties to enact appropriate legislation in accordance with the requirements of the United States Constitution and the Pennsylvania Constitution.

14. To the extent that the Prayer for Relief asks this Court to order Senator Scarnati or the Pennsylvania Senate or House of Representatives to enact legislation, or to enact legislation having specific provisions or content, such demands are contrary to the doctrine of separation of powers. *Heller v. Frankson*, 475 A.2d 1291, 1296 (Pa. 1984) (“[I]t is not the role of [the courts] to design an alternative scheme which may pass constitutional muster.”).

15. Petitioners' demands in Requests "c" through "h" of their Prayer for Relief that Senator Scarnati, or the Pennsylvania Senate or House of Representatives, or any of their members, be ordered by this Court to enact legislation, or to enact legislation having specific provisions or content, are contrary to the doctrine of separation of powers. *Id.* ("[I]t is not the role of [the courts] to design an alternative scheme which may pass constitutional muster.").

16. Petitioners' demands in Requests "c" through "h" of their Prayer for Relief that the Pennsylvania Senate or House of Representatives be ordered by this Court to enact legislation, or to enact legislation having specific provisions or content, are contrary to the presumption that the legislature and its members, including Senator Scarnati, will perform their duties in a manner consistent with constitutional requirements. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 801 (Pa. 2018); 1 Pa.C.S. § 1922(3).

17. Petitioners' demands in Requests "c" through "h" of their Prayer for Relief that the Pennsylvania Senate or House of Representatives, and any of their members, be ordered by this Court to enact legislation, or to enact legislation having specific provisions or content, are contrary to Article VII, Section 14(a) of the Pennsylvania Constitution, which delegates exclusively to the legislature the power and duty to ". . . provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence . . ."

18. Under the facts alleged, the Petition is insufficient as a matter of law to permit this Court to grant the relief requested in Requests "c" through "h" of the Prayer for Relief.

WHEREFORE, for the reasons above, Respondent Scarnati respectfully requests that this Honorable Court enter an order establishing a schedule for the briefing by the parties on these Preliminary Objections and setting a date for oral argument; and thereafter grant the Preliminary

Objections of Senator Scarnati on the basis of Pa.R.C.P. 1028(a)(4), and strike Requests “c” through “h” from Petitioners’ Prayer for Relief.

**SECOND PRELIMINARY OBJECTION
PURSUANT TO PA.R.C.P. 1028(a)(2) – FAILURE
OF THE PETITION FOR REVIEW TO CONFORM TO LAW**

19. Senator Scarnati incorporates paragraphs 1 through 18, above.

20. The relief sought in Requests “c” through “h” in the Prayer for Relief of the Petition for Review is contrary to law for the reason that, under the allegations of the Petition, such relief is barred by Article VII, Section 14(a) of the Pennsylvania Constitution.

WHEREFORE, for the reasons above, Respondents respectfully request that this Honorable Court enter an order establishing a schedule for briefing by the parties on these Preliminary Objections and setting a date for oral argument; and thereafter grant the Preliminary Objections of Senator Scarnati on the basis of Pa.R.C.P. 1028(a)(2), and strike Requests “c” through “h” from Petitioners’ Prayer for Relief.

**THIRD PRELIMINARY OBJECTION
PURSUANT TO PA.R.C.P. 1028(a)(5) – LACK OF CAPACITY TO SUE**

21. Senator Scarnati incorporates paragraphs 1 through 20, above.

22. The American Civil Liberties Union of Pennsylvania (“ACLU-PA”) lacks standing to sue in this case because the right to vote and the right to have one’s vote counted is at issue, and the ACLU-PA is not an entity authorized to vote in the Commonwealth.

23. To have standing, a party in an action must establish “a substantial, direct and immediate interest in the outcome of the litigation.” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013) (quoting *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)).

24. It is true that an association “has standing as representative of its members to bring a cause of action even in the absence of injury to itself, if the association alleges that at

least one of its members is suffering immediate or threatened injury as a result of the action challenged.” *Id.* at 922 (citing *Phila. Med. Soc’y v. Dep’t of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012)).

25. But Pennsylvania courts have repeatedly and recently held that an association does not have standing, even on behalf of its members, when the right to vote and the right to have one’s vote counted is the subject of the challenge. Order ¶ 4, *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (Pa. Commw. Ct. filed Nov. 13, 2017) (dismissing the League of Women Voters of Pennsylvania because it was not authorized by law to exercise the right to vote in the Commonwealth); *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002); *Albert v. 2001 Legis. Reapportionment Comm’n*, 790 A.2d 989, 994–95 (Pa. 2002).

26. “[T]he right to vote is personal” and the rights sought to be vindicated in a challenge are “personal and individual.” *Albert*, 790 A.2d at 995 (quoting *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964)).

27. When “the right to vote and the right to have one’s voted counted is the subject matter of a . . . challenge,” then “any entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing.” *Id.* at 994–95; *see also Erfer*, 794 A.2d at 330 (dismissing Democratic Committee).

28. In other words, an entity not authorized by law to exercise the right to vote in the Commonwealth does not have a direct, substantial, and immediate interest in litigation over the right to vote and the right to have one’s vote counted.

29. The standing decisions in *Albert* and *Erfer* are not limited to gerrymandering challenges.

30. Rather, the determinative factor in the standing decisions was that the challenges

sought to vindicate “the right to vote and the right to have one’s vote counted.” *Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95.

31. In this case, Individual Petitioners seek to vindicate the right to vote and the right to have their vote counted because they assert they could not return their absentee ballots in time to have them counted.

32. The ACLU-PA, by contrast, brings this suit “on behalf of itself” because it will in the future have to expend resources helping absentee voters unless the requested relief is granted. Pet. ¶¶ 21, 61–64.

33. But there is no allegation that the ACLU-PA itself is an entity authorized by law to vote in the Commonwealth. *See Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95.

34. Entities including a state political party (the Pennsylvania State Democratic Committee), governmental entities (the Board of Commissioners of Radnor Township, the Board of Commissioners of the Township of Lower Merion, the Township of Lower Merion, the Township of Ross, and the North Hills School District), civic groups (the Lehigh Valley Coalition for Fair Reapportionment, the Neighborhood Club of Bala Cynwyd, and the League of Women Voters of Radnor Township), and political party committee chairs (Dennis J. Sharkey and Nora Winkelman in their representative capacities as chairs of Republican and Democratic committees)—notwithstanding their own institutional, organizational interests in voting rights, as the ACLU-PA alleges in this case—have each been held not to have standing in voting rights cases. *See Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95.

35. Thus, the ACLU-PA lacks capacity to sue—either individually or on behalf of its members—due to the nature of the claims in this case and must be dismissed as a party.

WHEREFORE, for the reasons above, Respondent Scarnati respectfully requests that this

Honorable Court enter an order establishing a schedule for the briefing by the parties on these Preliminary Objections and setting a date for oral argument; and thereafter grant the Preliminary Objections of Senator Scarnati on the basis of Pa.R.C.P. 1028(a)(5), and dismiss the American Civil Liberties Union of Pennsylvania from this case.

Respectfully submitted,

/s/ Lawrence J. Tabas

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CERTIFICATE OF SERVICE

I, Timothy J. Ford, hereby certify that, this 14th day of January, 2019, I caused a true and correct copy of Respondent Joseph B. Scarnati III’s Preliminary Objections to be served through the Court’s Electronic Filing System.

Respectfully submitted,

By: /s/ Timothy J. Ford
Timothy J. Ford, Esq.
Counsel for Respondent Joseph B. Scarnati III

Dated: January 14, 2019