

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CASSANDRA ADAMS JONES *et al.*,

Petitioners,

v.

ROBERT TORRES, IN HIS CAPACITY AS
SECRETARY OF THE COMMONWEALTH
OF PENNSYLVANIA *et al.*,

Respondents.

No. 717 MD 2018

ORDER

AND NOW, this _____ day of _____, 2019, upon consideration of the Preliminary Objections filed by the Respondent Speaker Michael C. Turzai, in his official capacity as constitutional officer of the Pennsylvania House of Representatives, to the Petition for Review, and any response thereto, it is hereby **ORDERED** that the Preliminary Objections are **SUSTAINED**. Paragraphs (c) through (h) of the Prayer for Relief contained in the Petition for Review are **DISMISSED**. American Civil Liberties Union of Pennsylvania is **DISMISSED** as a party petitioner in this action.

BY THE COURT:

_____, J.

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NOTICE TO PLEAD

To: Petitioners

You are hereby notified to file a written response to these Preliminary Objections within thirty (30) days from service hereof or a judgment may be entered against you.

Respectfully submitted,

Dated: January 14, 2019

By: /s/Kathleen A. Gallagher
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**PRELIMINARY OBJECTIONS OF
RESPONDENT SPEAKER MICHAEL C. TURZAI,
IN HIS OFFICIAL CAPACITY AS CONSTITUTIONAL OFFICER OF
THE PENNSYLVANIA HOUSE OF REPRESENTATIVES**

Respondent Speaker Michael C. Turzai, in his official capacity as constitutional officer of the Pennsylvania House of Representatives, files these Preliminary Objections to the Petition for Review filed by the Petitioners.

PRELIMINARY STATEMENT

While the Court has the authority to review constitutionality of the statutory provision at issue, the Court does not have the power to impose the Petitioners' requested relief.¹ Well-established principles of separation of powers strictly limit courts' authority to correct a constitutional infirmity.

¹ Speaker Michael C. Turzai, in his official capacity as constitutional officer of the Pennsylvania House of Representatives, will address the constitutionality of the statutory provision at issue in his Answer, which will be filed after these Preliminary Objections are resolved.

As set forth herein, this Court should sustain these Preliminary Objections for the following reasons:

First, Paragraphs (c) through (h) of the Prayer for Relief in the Petition set forth various proposed changes to the Pennsylvania Election Code which exceed the Court’s authority. That portion of the requested relief would amount to “legislating from the bench,” usurping the Legislature’s exclusive authority.

Second, Petitioner American Civil Liberties Union of Pennsylvania (“ACLU-PA”) lacks standing to bring this action. The right to vote is “personal and individual”; as an organization, ACLU-PA lacks the required “substantial, direct, and immediate” interest in this litigation.

I. FACTUAL BACKGROUND

1. The Petitioners—comprised of 9 individuals and 1 organization—filed the subject Petition for Review with the Pennsylvania Commonwealth Court on November 13, 2018.

2. The Petition for Review focuses on a single statutory provision of the Pennsylvania Election Code, specifically, 25 P.S. § 3146.6(a).

3. The Petitioners seek various forms of relief from this Court: (1) a declaration regarding the constitutionality of 25 P.S. § 3146.6(a); (2) an injunction precluding the execution of 25 P.S. § 3146.6(a); (3) establishment of “a new

absentee ballot return deadline”; and (4) various orders directing the Respondents to take specific actions. (Petition for Review at p. 42–44).

II. PRELIMINARY OBJECTIONS

4. Pursuant to Pennsylvania Rule of Civil Procedure 1028(a), “[p]reliminary objections may be filed by any party to any pleading” based upon grounds including “failure of a pleading to conform to law” and “legal insufficiency of a pleading (demurrer).” Pa. R. Civ. P. 1028(a)(2), (4).

5. The Rules also provide that “[a]ll preliminary objections shall be raised at one time. They shall state specifically the grounds relied upon and may be inconsistent. Two or more preliminary objections may be raised in one pleading.” Pa. R. Civ. P. 1028(b).

A. First Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(2): Paragraphs (c) through (h) of Petitioners’ Prayer for Relief Fail to Conform to Law

6. All preceding paragraphs of these Preliminary Objections are incorporated by reference as if fully stated herein.

7. In their Prayer for Relief, the Petitioners request relief that the Court is not lawfully authorized to grant. The offending requests must be struck for their failure to conform to the law.

8. The Pennsylvania Constitution provides that “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” PA. CONST. art. II, § 1.

9. Beyond the power to declare a statute unconstitutional upon review, the judiciary’s power is strictly circumscribed. This is because the Pennsylvania General Assembly—not the judiciary—holds the sole power to write the laws for the Commonwealth. As recently as this past month, the Pennsylvania Supreme Court reaffirmed this basic principle, stating that the judiciary “may not usurp the province of the legislature by rewriting [statutes]...as that is not [the court’s] proper role under our constitutionally established tripartite form of governance.” *In re: Fortieth Statewide Investigating Grand Jury*, No. 75, 77–82, 84, 86–87, 89 WM 2018, slip. op. at 12–13 (Pa. Dec. 3, 2018).

10. This doctrine applies with greater force in cases where the Pennsylvania Election Code is at issue. The Pennsylvania Supreme Court has explicitly recognized that “[t]he power to regulate elections is a legislative one, and has been exercised by the general assembly since the foundation of the government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54 (1869)); *see also Agre v. Wolf*, 284 F. Supp. 3d 591 (E.D. Pa. 2018) (Smith, C.J., mem.) (“The process for crafting procedural regulations is textually committed to state legislatures and to Congress.”).

11. Time and again, the Pennsylvania Supreme Court has declared that the judiciary's role is to interpret legislation, not to write it. Thus, where the court determines that a law is unconstitutional, the court must deliberately refrain from rewriting the law because the court "lack[s] the power and authority" to make any statutory changes. *Glancey v. Casey*, 288 A.2d 812, 818 (Pa. 1972) ("Our function is to interpret the law; that function does not embrace the right to make law or to legislate."); *see also Heller v. Frankston*, 475 A.2d 1291, 1296 (Pa. 1984) ("Where a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of this Court to design an alternative scheme which may pass constitutional muster."); *Commonwealth v. Hopkins*, 117 A.3d 247, 262 (Pa. 2015) ("[W]e will not judicially usurp the legislative function and rewrite [the statute] Rather, we leave it to our sister branch for an appropriate statutory response").

12. In light of this, and in proper deference to the Legislature, when a court invalidates a law, the court must grant the Legislature sufficient time to consider and enact remedial legislation. *See, e.g., Robinson Twp. v. Commonwealth*, 147 A.3d 536, 582–83 (Pa. 2016) (staying decision for 180 days "in order to allow the General Assembly sufficient time to devise a legislative solution"); *Cali v. Philadelphia*, 177 A.2d 824, 835 (Pa. 1962). The court cannot take unilateral action to rewrite the law, as that would overstep the bounds of its authority. *Robinson Twp.*, 147 A.3d at 583; *Cali*, 177 A.2d at 835.

13. Should this Court determine that the provision at issue is unconstitutional, the Court has no authority to issue the orders or take any actions requested by the Petitioners in paragraphs (c) through (h) of the Petitioners' Prayer for Relief; such relief requires legislative action. Such action by the Court would be a clear "excession of the scope of [the Court's] power and authority," *Glancey*, 288 A.2d at 817, and would amount to prohibited "judicial legislation," *see State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971) ("Conceivably, the statute could be rewritten so as to avoid constitutional infirmities. However, such a task lies properly with the Legislature, for additional editing of [the statute] on our part would amount to judicial legislation.").

14. Ignoring the well-established precedent regarding the judiciary's proper role and limitations in reviewing the constitutionality of statutes, the Petitioners nonetheless ask this Court to assume legislative duties in their requests for relief. Specifically, in paragraph (c) of the Prayer for Relief, the Petitioners ask the Court to "[e]stablish a new ballot return deadline ... if the Pennsylvania legislature fails to enact a constitutionally compliant absentee ballot return deadline in a timely manner." Petition for Review, Prayer for Relief ¶ (c).

15. While the Court has the power to review § 3146.6(a), it cannot direct the Legislature *how* to fix any alleged constitutional defect. "Establish[ing] a new ballot return deadline" is but one of many possible approaches. If § 3146.6(a) is

held to be unconstitutional, it is the sole province of the Legislature to determine how to address it.

16. The remaining paragraphs of the Petitioner's Prayer for Relief suffer from the same fatal legal infirmities. First, the requested relief in paragraphs (d) through (h) is directly related to and derived from the Court's impermissible establishment of "a new ballot return deadline" in paragraph (c). Second, all of the requested relief asks the Court to order the creation and implementation of specific statutory requirements and deadlines aimed at county boards of election.

17. Specifically, paragraph (d) orders the creation of a requirement "to accept absentee ballots...as of the new absentee ballot return deadline;" paragraph (e) orders the creation of a requirement "to establish a new date...[to] begin mailing absentee ballots;" paragraph (f) orders the creation of a requirement "to begin mailing absentee ballots...on the newly established date;" paragraph (g) orders the creation of a requirement "to establish a new, later deadline...[to] complete their review and tabulation of all absentee ballots;" and paragraph (h) orders the creation of a requirement "to complete their review and tabulation...by the newly established deadline."

18. All of these requested judicial orders are tantamount to legislation via judicial fiat. All of them usurp the Legislature's exclusive power to regulate elections. None of them comport with the law.

19. Accordingly, because the Court cannot grant the requested relief contained in paragraphs (c) through (h) of the Petitioners' Prayer for Relief as a matter of law, the offending requests must be struck pursuant to Pa. R. Civ. P. 1028(a)(2).

WHEREFORE, Respondent Speaker Michael C. Turzai, in his official capacity as constitutional officer of the Pennsylvania House of Representatives, respectfully requests that this Court sustain these Preliminary Objections and dismiss paragraphs (c) through (h) of the Prayer for Relief with prejudice.

B. Second Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Paragraphs (c) through (h) of Petitioners' Prayer for Relief Are Legally Insufficient

20. All preceding paragraphs of these Preliminary Objections are incorporated by reference as if fully stated herein.

21. The claims for relief contained in paragraphs (c) through (h) of the Respondents' Prayer for Relief fail to state any relief that the Court is lawfully authorized to grant. Accordingly, paragraphs (c) through (h) are legally insufficient pleadings and must be struck pursuant to Pa. R. Civ. P. 1028(a)(4).

WHEREFORE, Respondent Speaker Michael C. Turzai, in his official capacity as constitutional officer of the Pennsylvania House of Representatives, respectfully requests that the Court sustain these Preliminary Objections and dismiss paragraphs (c) through (h) of the Prayer for Relief with prejudice.

C. Third Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(1): Petitioner ACLU-PA Does Not Have Standing

22. All preceding paragraphs of these Preliminary Objections are incorporated by reference as if fully stated herein.

23. “[A] party has standing where that party is ‘aggrieved.’” *Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002) (citing *In re T.J.*, 739 A.2d 478, 481 (Pa. 1999)).

24. “For a party to be aggrieved, it must have: 1) a substantial interest in the subject matter of the litigation; 2) the party’s interest must be direct; and, 3) the interest must be immediate and not a remote consequence of the action.” *Id.* (quoting *In re T.J.*, 739 A.2d at 481); accord *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 994–95 (Pa. 2002).

25. The subject matter of this action is an “individual’s right to vote and to have that vote counted.” *Albert*, 790 A.2d at 994–95.

26. “[T]he right to vote is personal.” *Id.* at 995 (quoting *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964)). In reapportionment cases, courts have consistently held that “the rights sought to be vindicated in a suit challenging an apportionment scheme are ‘personal and individual.’” *Id.* (quoting *Reynolds*).

27. Any organization, therefore, that does not have the right to vote lacks standing. *Id.* (dismissing a local chapter of League of Women Voters); accord *Erfer, supra* (holding that the Democratic Committee did not have standing).

28. So too here. The right to vote via absentee ballot is a “personal and individual” right.

29. The ACLU-PA is an organization, and the Petition does not allege that the ACLU-PA is authorized to vote or that it is suing on behalf of its members.

30. Accordingly, ACLU-PA should be dismissed as a party petitioner in this action.

WHEREFORE, Respondent Speaker Michael C. Turzai, in his official capacity as constitutional officer of the Pennsylvania House of Representatives, respectfully requests that the Court sustain these Preliminary Objections and dismiss American Civil Liberties Union of Pennsylvania from this action.

Dated: January 14, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 127(a) of the Pennsylvania Rules of Appellate Procedure, I further certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: January 14, 2019

By: /s/ Kathleen A. Gallagher

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