

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 717 MD 2018

CASSANDRA ADAMS JONES *et al.*,

Petitioners,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS ACTING
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA *et al.*,

Respondents.

**BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS OF
RESPONDENT SPEAKER MICHAEL C. TURZAI,
IN HIS OFFICIAL CAPACITY AS CONSTITUTIONAL OFFICER OF
THE PENNSYLVANIA HOUSE OF REPRESENTATIVES**

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PRELIMINARY STATEMENT

In their constitutional challenge of provisions within Pennsylvania's Election Code, the Petitioners seek more than the Court can offer. They do not merely ask the Court to declare the absentee ballot return deadline unconstitutional. Rather, they ask the Court to impose a new deadline, substituting the judgment of other states' legislatures or the Court's own preferences for the General Assembly's exclusive constitutional mandate to regulate the time, place, and manner of absentee voting in this Commonwealth. The Court is "not a Supreme, or even a Superior Legislature," and it has "no power to redraw the Constitution or to rewrite Legislative Acts or Charters, desirable as that sometimes would be." *Cali v. Philadelphia*, 177 A.2d 824, 835 (Pa. 1962). Yet Paragraphs (c) through (h) of the Petition's Prayer for Relief invite the Court to do just that, usurping the Legislature's exclusive authority.

In addition, the American Civil Liberties Union of Pennsylvania (the "ACLU-PA") lacks the substantial, direct, and immediate interest in this litigation to establish standing as a party petitioner. The right to vote is "personal and individual." That the ACLU-PA may have assisted absentee voters in the past, and may do so in the future, does not give it standing. The substantial, direct, and immediate interest in having one's absentee vote counted belongs to the voters who cast the ballots, not the organizations that choose to assist them.

STANDARD OF REVIEW

“Preliminary objections may be filed by any party to any pleading” based upon grounds which include “failure of a pleading to conform to law” and “legal insufficiency of a pleading (demurrer).” Pa. R. Civ. P. 1028(a)(2), (4).

“When ruling on preliminary objections, this court must accept as true all well pled allegations of material fact and all reasonable inferences deducible therefrom.” *Pittsburgh Bd. of Pub. Educ. v. Pa. Human Rel. Comm’n*, 820 A.2d 838, 840 (Pa. Commw. 2003). “The Court is not required to accept as true any conclusions of law or expressions of opinion.” *Indep. Oil & Gas Ass’n v. Pa. PUC*, 804 A.2d 693, 698 (Pa. Commw. 2002). “In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by a refusal to sustain them.” *Allegheny Sportsmen’s League v. Ridge*, 790 A.2d 350, 354 (Pa. Commw. 2002).

STATEMENT OF QUESTIONS INVOLVED

1. Whether paragraphs (c) through (h) of the Prayer for Relief exceed the Court's authority and should be dismissed with prejudice?

Suggested answer: Yes.

2. Whether the American Civil Liberties Union of Pennsylvania lacks standing and should be dismissed from this action?

Suggested answer: Yes.

STATEMENT OF THE CASE

The Petitioners invoked the Court's original jurisdiction, requesting the Court to declare the absentee ballot return deadline set forth in 25 P.S. § 3146.6 unconstitutional and to establish a new deadline. On November 13, 2018, Petitioners filed their Petition for Review. On January 14, 2019, Speaker Turzai, in his official capacity as constitutional officer of the Pennsylvania House of Representatives, filed preliminary objections.

ARGUMENT

I. Paragraphs (c) Through (h) Of Petitioners’ Prayer For Relief Fail To Conform To Law And Are Legally Insufficient

The Petitioners request relief that the Court is not lawfully authorized to grant. 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. Indeed, Article VII, Section 14(a) of the Pennsylvania Constitution explicitly vests the “Legislature” with the power to establish the laws governing the time, place, and manner in which absentee voting may be conducted. Paragraphs (c) through (h) of Petitioners’ Prayer for Relief run afoul of basic separation of powers principles and should be stricken.

A. Legislative Power, Particularly with Respect to Absentee Voting, Is Vested Solely in the General Assembly

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. The Pennsylvania Supreme Court recently 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).

This fundamental 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.”).

The Pennsylvania Constitution is even more explicit regarding the separation of powers in the context of absentee voting. It provides:

The Legislature shall, by general law, 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, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. art. VII, § 14(a) (emphasis added).

The Legislature has the exclusive authority to provide for the time, place, and manner of absentee voting. Even if some portion of the absentee ballot statute is ruled unconstitutional, the Legislature is the only body with the power to enact any new absentee ballot laws to take its place.

B. The Court May Only Interpret, Uphold, or Strike Down a Statute; It Must Allow the Legislature to Change It

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); *accord Heller v. Frankston*, 475 A.2d 1291 (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."). "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

In *Glancey*, twenty-eight judges were appointed to newly created positions in the Philadelphia Municipal Court and Traffic Court on January 1, 1969; prior to

that time, each of the judges had served as magistrate judges. 288 A.2d at 814. From the time of their appointment on January 1, 1969 until October 17, 1969, they were paid the same salaries they had been paid while serving as magistrate judges. *Id.* On October 17, 1969, the General Assembly enacted legislation providing for a higher salary scale for these judges. *Id.* at 815. The legislation was retroactive to July 1, 1969. *Id.* The judges commenced an action in mandamus in the Commonwealth Court, seeking to make the pay increase retroactive to January 1. The Commonwealth Court sustained preliminary objections, and the Supreme Court affirmed. The Supreme Court noted that even if it found the statute setting the pay scale to be unconstitutional, “we lack the power and authority to substitute in [the applicable section] a clause making salaries retroactive to January 1, 1969.” *Id.* at 818. In other words, the Supreme Court recognized that “[o]ur function is to interpret the law; that function does not embrace the right to make law or to legislate.” *Id.*

Similarly, in *Commonwealth v. Hopkins*, 117 A.3d 247 (Pa. 2015), the Supreme Court held that numerous provisions of the two-strikes mandatory minimum sentencing provision in the “drug-free school zones” statute were unconstitutional. *Id.* at 262. But the Court restrained itself from doing more. Rather, the Supreme Court noted that “[i]t is beyond our province to, in essence, rewrite Section 6317 to transform its sentencing commands” *Id.* at 261. It

concluded that “we will not judicially usurp the legislative function and rewrite [the statute] Rather, we leave it to our sister branch for an appropriate statutory response” *Id.* at 262.

As a direct consequence of this limit on judicial power, when a court invalidates a law, it must grant the Legislature sufficient time to consider and enact remedial legislation. Thus, for example, when the Supreme Court determined that a statute requiring only public water facilities to be informed of a spill was unconstitutional, rather than striking down the provision altogether, it stayed its decision for 180 days “in order to allow the General Assembly sufficient time to devise a legislative solution.” *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 582–83 (Pa. 2016).

The Court cannot take unilateral action to rewrite the law, as that would overstep the bounds of its authority. *Id.* at 583; *Cali v. Philadelphia*, 177 A.2d 824, 835 (Pa. 1962). “[E]diting of a statute” by the Court “would amount to judicial legislation.” *State Bd. of Chiropractic Exam’rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971). For the Court to assume “the power to write legislation would upset the delicate balance in our tripartite system of government.” *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), *rev’d on other grounds*, 529 U.S. 277 (2000).

C. Petitioners' Prayer for Relief Violates the Separation of Powers Doctrine

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.

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.” (Pet. at 43 ¶ (c)).

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.

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. 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.” 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 well-established limits on the Court’s power.

Because the Court cannot grant the requested relief set forth in paragraphs (c) through (h) of the Petitioners’ Prayer for Relief, the offending requests must be stricken for failure to conform to law and for legal insufficiency. *See* Pa. R. Civ. P. 1028(a)(2), (4); *Allegheny Sportsmen’s League v. Ridge*, 790 A.2d 350 (Pa. Commw. 2002).

II. Petitioner ACLU-PA Does Not Have Standing

In a voting rights case, only persons who have or seek the right to vote have standing to obtain relief. The ACLU-PA, as a “non-profit, nonpartisan public-interest organization,” (Pet. ¶ 21), does not have standing to pursue this action.

“[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)). “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).

“A ‘substantial interest’ is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law.” *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). “A ‘direct’ interest requires a showing that the matter complained of caused harm to the party’s interest.” *Id.* “An ‘immediate’ interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it.” *Id.*

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, or, as Petitioners state, “protecting the fundamental right to vote,” (Pet. ¶ 1). “[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*). 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); *League of Women Voters of Pa. v. Commonwealth*, 261 MD 2017 (Pa. Commw. Nov. 13, 2017) (dismissing League of Women Voters of Pennsylvania as a party petitioner).

So too here. The right to vote via absentee ballot is a “personal and individual” right. 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. It therefore lacks standing.

In the Petition for Review, the ACLU-PA notes its “long history” of participation in “voting-rights and election-reform cases, as well as its “election protection” efforts (Pet. ¶¶ 61–64). But this “long history” does not establish a substantial, direct, and immediate interest in this litigation. Indeed, while the ACLU-PA may have assisted out-of-state Pennsylvania students to obtain court orders directing County Boards of Election to accept untimely absentee ballots,

(Pet. ¶ 63), the substantial, direct, and immediate interest in having those absentee votes counted belonged to those students, not the ACLU-PA.

The ACLU-PA also avers that it reasonably anticipates that it may “expend additional resources helping absentee voters” have their untimely votes counted. (Pet. ¶ 64). That the ACLU-PA may choose to expend resources to help voters with absentee ballots does not give it standing. First, ACLU-PA is under no obligation to expend any resources to further the “common interest of all citizens in procuring obedience to the law.” *In re Hickson*, 821 A.2d at 1243. Second, even if the ACLU-PA chooses to assist these voters, its interest is neither direct nor immediate. Rather, the substantial, direct, and immediate interest in the validity of one’s absentee ballot belongs only to the voter.

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

CONCLUSION

For the reasons set forth above, 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 (1) dismiss paragraphs (c) through (h) of the Prayer for Relief with prejudice and (2) dismiss American Civil Liberties Union of Pennsylvania from this action.

Dated: March 8, 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: March 8, 2019

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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