

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JONES, et al.,

Petitioners,

v.

TORRES, et al.,

Respondents.

Docket No. 717 MD 2018

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,

Date: January 16, 2019

By: /s/ Kenneth L. Joel
KENNETH L. JOEL
Deputy General Counsel
Attorney ID No. 72370
OFFICE OF GENERAL COUNSEL
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Fax: (717) 787-1788
Email: kennjoel@pa.gov

Counsel for Executive Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JONES, et al.,

Petitioners,

v.

TORRES, et al.,

Respondents.

Docket No. 717 MD 2018

**EXECUTIVE RESPONDENTS' PRELIMINARY OBJECTIONS
TO PETITION FOR REVIEW**

Respondents Tom Wolf, former Acting Secretary Torres, and Commissioner Marks (“Executive Respondents”), by and through their undersigned counsel, hereby raise Preliminary Objections to the Petition for Review filed in the above-captioned case pursuant to Pennsylvania Rule of Appellate Procedure 1516(b) and Pennsylvania Rule of Civil Procedure 1028. In support of their Preliminary Objections, Executive Respondents allege as follows:

Background

1. On November 13, 2018, Petitioners filed the Petition for Review in the instant matter, invoking this Honorable Court’s original jurisdiction. *See* Petition ¶ 27.

2. Based on the copy received by Governor Wolf, it does not appear that Petitioners served the Office of Attorney General. Likewise, it does not appear that Petitioners provided the mandated Rule 235 Notice to the Office of Attorney

General. *See* Pa. R. Civ. P. 235; Pa. R. Civ. P. 422.¹

3. Petitioners are comprised of the ACLU of Pennsylvania and a handful of individual voters. *See* Petition, ¶¶ 12-21. As to the individual voters, the Petitioners allege the following.

4. Jones is a resident of Pennsylvania who moved from Clarion County to Philadelphia County on October 14, 2018. Petition, ¶ 12. Jones does not allege specifically when their absentee ballot application was sent—merely claiming that it was before 5:00 pm on October 30, 2018. Petition, ¶ 54.² Jones alleges that their ballots arrived after November 2, 2018. Petition, ¶ 54. Jones asserts that they “anticipate that their professional obligations will require them to vote by absentee ballot in the future.” Petition, ¶ 54.

5. Berg is registered to vote in Allegheny County. Petition, ¶ 13. She is in Chicago and received her absentee ballot application from Allegheny County on October 9, 2018. Petition, ¶ 56. Berg mailed the application “later that week” and received her absentee ballot on November 2, 2018. Petition, ¶ 56. She “anticipates having to vote by absentee ballot in the future, as she will still be enrolled in the Emerging Leaders program during the May 2020 primary.” Petition, ¶ 56.

¹ Pursuant to the Commonwealth Attorneys Act, the General Assembly has obligated the Attorney General to defend the constitutionality of statutes on behalf of the Commonwealth. *See* 71 P.S. § 732.204(a)(3). Accordingly, the Attorney General may advance additional arguments to those set forth by Executive Respondents.

² In ¶ 12, only Cassandra Jones is identified; however, in ¶ 54 her husband, Christopher, is also identified. We assume that Petitioners wish to cast a wide a net as possible and, thus, assume that the constitutional challenges are being asserted on Cassandra and Christopher.

6. Cooper is a student who is registered to vote in Allegheny County. Petition, ¶ 14. Cooper is attending the University of Connecticut. Petition, ¶ 60. She alleges that she mailed her absentee ballot application on or about October 20, 2018 and that she received her ballot on November 5, 2018. Petition, ¶ 60. She “anticipates graduating in May of 2021 and having to vote by absentee ballot in Pennsylvania in the 2020 elections.” Petition, ¶ 60.

7. Howard is a student who is registered to vote in Juniata County. Petition, ¶ 15. Howard is a student in Georgia. Petition, ¶ 59. She mailed her absentee ballot application on or about October 25, 2018 and she received her ballot on November 3, 2018. Petition, ¶ 59. Howard “anticipates graduating in 2020 and having to vote by absentee ballot in Pennsylvania in the 2020 primary election.” Petition, ¶ 59.

8. Kieffer is a graduate student who is registered to vote in York County. Petition, ¶ 16. Kieffer is in school in South Dakota and she mailed her absentee ballot application on October 16 or 17 and received her absentee ballot on November 2, 2018. Petition, ¶ 57. She “anticipates graduating in 2020 and having to vote by absentee ballot in Pennsylvania in the 2020 primary election.” Petition, ¶ 57.

9. Mearhoff is a journalist who is registered to vote in Berks County. Petition, ¶ 17. Mearhoff travels frequently for work and accepted a job in mid-October 2018 in South Dakota. Petition, ¶ 52. Mearhoff fails to allege when she specifically mailed her ballot application—merely stating that it was before October

30, 2018—but she claims that she received her ballot on November 3, 2018, which was after the return deadline. Petition, ¶ 52. Mearhoff also says that she “anticipates ... frequent out-of-town professional obligations” and it is “likely she will have to vote again by absentee ballot in the future.” Petition, ¶ 52.

10. Myers is a costume designer who is registered to vote in Butler County. Petition, ¶ 18. Myers constantly rotates between short-term contracts that require her to spend months at a time at locations all over the country. Petition, ¶ 53. Myers alleges that she mailed her application on October 23 or October 24 and received her ballot on November 2, 2018. Petition, ¶ 53. Myers “anticipates having to vote by absentee ballot in future elections because she is constantly traveling for work.” Petition, ¶ 53.

11. Neugebauer is a law student who is registered to vote in Montgomery County. Petition, ¶ 19. Neugebauer is in his second year of law school at American University in Washington, DC. Petition, ¶ 58. He mailed his absentee ballot application on October 25, 2018 and received it on November 2, 2018. Petition, ¶ 58. Neugebauer “anticipates graduating in 2020 and having to vote by absentee ballot in Pennsylvania in the 2020 primary election.” Petition, ¶ 58.

12. Ream is an EMT who is registered to vote in Perry County. Petition, ¶ 20. Ream learned, at some unspecified date, that he was scheduled to work a twenty-four-hour shift beginning at 7:00 am on election day. Petition, ¶ 55. On October 27, 2018, Ream mailed his absentee ballot application and he received it on October 31,

2018. Petition, ¶ 55. He asserts that he was unable to return it by November 2, 2018. Petition, ¶ 55. Ream “anticipates that his varied and unexpected schedule as an emergency responder will require him to vote by absentee ballot in the future.” Petition, ¶ 55.

13. As for the ACLU of Pennsylvania, it alleges that it is a non-profit and nonpartisan public-interest organization. Petition, ¶ 21. The ACLU further alleges that it has a long history of litigating, as the attorneys for individuals, election and voting cases and “anticipates that a portion of its election-protection work will in the future involve helping absentee voters vindicate their right to vote.” Petition, ¶ 64. The ACLU alleges that, because of these efforts, additional resources will be expended to help future absentee voters overcome the “systemic and recurring problems at issue in this case.” Petition, ¶ 64.

14. Petitioners challenge the constitutionality of the Friday deadline for the receipt of absentee ballots, which is established by the Pennsylvania Election Code (“Election Code”). *See, e.g.*, Petition, ¶ 11 (making clear that Petitioners challenge the Friday deadline asserting that the deadline is unconstitutional on its face and as applied to the individual Petitioners).³

³ Petitioners make reference to 25 P.S. § 3146.2a(a), which allows Pennsylvania voters until 5:00 p.m. on the Tuesday prior to election day to apply for an absentee ballot and 25 P.S. § 3146.8(a), which provides that absentee ballot shall not be counted if received in the office of the county board of election later than 5:00 pm on the Friday immediately preceding election day. *See* 25 P.S. § 3146.2a(a); 25 P.S. § 3146.8(a). The reality, however, is that voters need not wait until the Tuesday before election day to apply for their ballot. This fact is confirmed by the allegations in

15. The specific statutory provisions challenged were signed into law on December 11, 1968. *See*, Act 375 of 1968 (Act of Dec. 11, 1968, P.L. 1183, No. 375).

16. Governor Wolf was elected in November 2014 and inaugurated on January 20, 2015, nearly 50 years after the passage of the challenged provisions. As such, Governor Wolf had no role in the enactment of these provisions.

17. Petitioners fail to allege how Governor Wolf is statutorily or constitutionally charged with any duty with respect to the enforcement or administration of the challenged provisions.

18. Petitioners name Executive Respondents in their official capacities only, asserting that:

- a. Former Acting Secretary Torres is responsible for the general supervision and administration of Pennsylvania's elections and election laws. Petition, ¶ 22.
- b. Commissioner Marks is responsible for the supervision and administration of the Commonwealth's elections and electoral process. Petition, ¶ 23.

the Petition that make clear that at least some of the individual Petitioners applied for their absentee ballot before October 30, 2018. *See* Petition, ¶¶ 53, 55-60 (Ream applied on October 27; Neugebauer applied on October 25; Myers applied on October 23 or 24; Kieffer Applied on October 16 or 17; Howard applied on October 25; Cooper applied on October 20; Berg applied week of October 9 and actually received her application on October 9).

c. Governor Wolf is responsible for signing bills into law. Petition, ¶ 26.

19. Petitioners make no further allegations regarding Governor Wolf and seek no relief against him. *See generally* Petition; Petition (Prayer for Relief).⁴

Preliminary Objection I—Nonjoinder of a Necessary Party—Pa. R. Civ. P. 1028(a)(5)

20. Paragraphs 1-19 above are reincorporated by reference as if fully set forth herein.

21. Petitioners all allege that they submitted their applications for absentee ballots to their respective counties and they further claim that they did not receive their absentee ballots with sufficient time to mail them back before the deadline. *See* Petition, ¶¶ 51-60.

22. The Election Code requires that absentee ballot applications be submitted to and approved by county boards of elections. *See* 25 P.S. §§ 3146.2, 3146.2a(a) & 3146.2b.

23. Petitioners acknowledge submitting applications to county boards of elections. *See* Petition, ¶¶ 51-60. *See also* Petition, ¶ 70 (“county boards of elections routinely fail to deliver absentee ballots to voters in time for them to be returned by the Friday statutory deadline, even though these qualified absentee electors have timely applied for their ballots”).

⁴ Petitioners have also sued Legislative Respondents—Joseph B. Scarnati, III, the Senate President Pro Tempore and Michael C. Turzai, the Speaker of the Pennsylvania House of Representatives. Legislative Respondents are separately represented.

24. Petitioners allege that they called their respective county board of elections and that certain statements were made to them by persons at the county board of elections. *See* Petition, ¶¶ 51-60.

25. Petitioners have not joined those county elections officials despite the fact that Petitioners seek to alter conduct of the counties.

26. Put another way, Petitioners' claims relate wholly to the counties' responsibilities, rather than to the actions of Executive Respondents.⁵

27. Indeed, much of the relief requested through this litigation involves the counties. *See* Petition, Prayer for Relief, ¶¶ d, e, f, h.

28. A court must join the necessary party or, if that is not possible, dismiss the action “[w]henver it appears by suggestion of the parties or otherwise...that there has been a failure to join an indispensable party.” Pa. R. Civ. P. 1032(b).⁶

29. As such, the counties referenced by the individual Petitioners are necessary parties to this litigation. Pa. R. Civ. P. 1028(a)(5); *Orman v. Mortg., I.T.*, 118 A.3d 403, 406 (Pa. Super. 2015) (failure to join a necessary party raises a question of the Court's subject matter jurisdiction).

WHEREFORE, Executive Respondents respectfully request that this Court sustain these Preliminary Objections and dismiss Petitioners' Petition for Review.

⁵ The individual Petitioners could have applied for their absentee ballots sooner.

⁶ Executive Respondents have asserted a Preliminary Objection seeking dismissal of the Petition's facial constitutional claims. Should this Court allow the facial claims to proceed, then all 67 counties are necessary to this litigation.

Preliminary Objection II—Legal Insufficiency of the Pleading/Failure to State a Claim (Demurrer)—Pa. R. Civ. P. 1028(a)(4)

30. Paragraphs 1-29 above are reincorporated by reference as if fully set forth herein.

31. Petitioners assert that provisions of the Election Code that they challenge through this litigation are “facially” unconstitutional. *See* Petition, Prayer for Relief, ¶ a (seeking a declaration that the Friday absentee ballot return deadline is “unconstitutional and invalid because it violates the rights of Petitioners and *other current and future absentee voters in Pennsylvania*”) (emphasis added); Petition, ¶ 11 (making clear that the position of Petitioners is that the challenged Friday deadline provision of Pennsylvania’s Election Code is unconstitutional on its face).

32. As to Federal constitutional claims, a “party asserting a facial challenge ‘must establish that no set of circumstances exist under which the Act would be valid.’” *Heffner v. Murphy*, 745 F.3d 56, 65 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 220 (2014) (citing and quoting *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011) and *United States v. Salerno*, 481 U.S. 739, 745 (1987)). This is a “particularly demanding standard and is the ‘most difficult challenge to mount successfully.’” *Heffner*, 745 F.3d at 65 (quoting *Salerno*, 481 U.S. at 745).

33. As to state constitutional claims, a challenger must demonstrate that a substantial number of the challenged statute’s potential applications are unconstitutional (the “plainly legitimate sweep” standard). Under the plainly

legitimate sweep standard, a law will be found facially invalid only when its invalid applications are so real and substantial that they outweigh the statute's plainly legitimate sweep. *See Commonwealth v. Ickes*, 873 A.2d 698 (Pa. 2005).

34. A statute is facially invalid when its state constitutional deficiency is so evident that proof of actual unconstitutional applications is not needed. *See generally Clifton v. Allegheny County*, 969 A.2d 1197 (Pa. 2009).

35. Here, the individual Petitioners number 10 in total. Petition, ¶¶ 12-20.

36. Petitioners concede that “[m]any eligible absentee electors in Pennsylvania timely submit their applications for absentee ballots *and* receive them with sufficient time to deliver their completed ballots to their respective county boards of elections in time to have their votes counted.” Petition, ¶ 85 (emphasis in original).

37. Petitioners own allegations establish that the challenged provisions are capable of constitutional operation, and do regularly operate in a constitutional manner.

38. As such, Petitioners’ facial constitutional challenges are without merit and must be dismissed.⁷

⁷ The ACLU admits that it helped four “out-of-state Pennsylvania students, who did not receive timely absentee ballots, exercise their right to vote by obtaining court orders from Allegheny County judges directing the County Elections Division to accept the students’ ballots.” Petition, ¶ 63. In other words, voters similarly situated to the individual petitioners here had their votes counted in the most recent election.

WHEREFORE, Executive Respondents respectfully request that this Court sustain these Preliminary Objections and dismiss Petitioners' Petition for Review.

Preliminary Objection III—Legal Insufficiency of the Pleading/Failure to State a Claim (Demurrer)/ Lack of Ripeness/Lack of Standing—Pa. R. Civ. P. 1028(a)(4)/Pa. R. Civ. P. 1028(a)(1)/Pa. R. Civ. P. 1028(a)(5)

39. Paragraphs 1-38 above are reincorporated by reference as if fully set forth herein.

40. Petitioners also assert “as applied” constitutional challenges and seek a declaration that their rights were violated and that injunctive relief is warranted in light of their inability to vote in November 2018. *See* Petition, ¶ 11. *See also* Petition, Prayer for Relief, ¶¶ a, b.

41. An “as-applied attack ... does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.” *U.S. v. Marcavage*, 609 F.3d 264 (3d Cir. 2010).

42. Plaintiffs may not secure declaratory relief as to past alleged constitutional violations, nor may they secure a future injunction to remedy past conduct. *See Mollett v. Leitch*, 511 Fed. Appx. 172 (3d Cir. 2013) (dismissing requested declaratory relief and reasoning that “in the context of an action for declaratory relief, a plaintiff must be seeking more than a retrospective opinion that he was wrongly harmed by the defendant”) (further quotations and citations omitted); *Corliss v. O’Brien*, 200 Fed. Appx. 80 (3d Cir. 2006) (upholding dismissal

of a plaintiff's declaratory relief claim, which asked that the District Court "declare that his constitutional rights were violated"); *Hodinka v. Delaware Cty.*, 759 F. Supp. 2d 603, 610 (E.D. Pa. 2011) ("[d]eclaratory judgment is inappropriate solely to adjudicate past conduct").

43. Because the relief sought by Petitioners would not, and cannot, remedy the harm of which they complain, the Petition fails to state a claim on which relief may be granted.

44. In an attempt to manufacture a live dispute, Petitioners all allege that they "anticipate" voting by absentee ballot in future elections. *See* Petition, ¶¶ 51-60. The ACLU also alleges that it may be called on, in the future, to assist voters in litigation. Petition, ¶ 64.

45. The next opportunity to vote is May 2019.

46. Unquestionably, several contingencies must fall into place for Petitioners. For example, as for the Joneses, they now live in Philadelphia and, presumably, will need to register to vote there. There is no suggestion that they cannot vote in person in May 2019 or beyond.

47. As to all of the individual Petitioners, Petitioners do not allege that they cannot apply for an absentee ballot earlier in the process, that their absentee ballot will not be received by the relevant county before the statutory deadline, or that their absentee ballot will otherwise be rejected due solely to the timing of receipt.

48. Thus, Petitioners have alleged no facts to demonstrate that they will be “disenfranchised” in any future election. As such, their “as applied” constitutional challenges are not ripe. *See, e.g., Wyatt, Virgin Islands, Inc. v. Government of the Virgin Islands*, 385 F.3d 801, 806-07 (3d Cir. 2004) (rejecting claim on ripeness grounds and reasoning that a “dispute is not ripe for judicial determination if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all”) (internal quotations omitted but quoting *Doe v. County of Centre, PA*, 242 F.3d 437, 453 (3d Cir. 2001), which in turn quotes *Texas v. U.S.*, 523 U.S. 296, 300 (1998)). *See also Constitution Party of Pa. v. Cortés*, 712 F. Supp. 2d 387 (E.D. Pa. 2010) (dismissing challenges to Election Code because claims were not ripe); *Bayada Nurses, Inc. v. Department of Labor and Industry*, 8 A.3d 866, 874 (Pa. 2010) (the doctrine of ripeness “is a judicially-created principle which mandates the presence of an actual controversy”).

49. And, finally, the individual Petitioners lack standing to seek declaratory and/or injunctive relief for their “as-applied” challenges based on past conduct, particularly as Petitioners plead no facts to indicate that the circumstances that led to the alleged deprivation are likely to reoccur. *See In re Gen. Election 2014 Kauffman*, 111 A.3d 785 (Pa. Cmwlth. 2015).

WHEREFORE, Executive Respondents respectfully request that this Court sustain these Preliminary Objections and dismiss Petitioners’ Petition for Review.

Preliminary Objection IV—Legal Insufficiency of the Pleading/Failure to State a Claim (Demurrer)/Sovereign Immunity—Pa. R. Civ. P. 1028(a)(4)/Pa. R. Civ. P. 1028(a)(1)

50. Paragraphs 1-49 above are reincorporated by reference as if fully set forth herein.

51. Petitioners seek, in part, affirmative injunctive relief. To that end, they ask this Court to: (a) establish a new absentee ballot return deadline; (b) order Respondents to direct county boards of election to accept absentee ballots that are received as of the new deadline; (c) order Respondents to establish a new date for county boards of election to begin mailing absentee ballots to voters; (d) order Respondents to direct county boards of election to begin mailing absentee ballots to voters on this newly established date; (e) order Respondents to establish a new, later deadline by which county boards of election may complete their review and tabulation of all absentee ballots; (f) order Respondents to direct county boards of elections to complete their review and tabulation of all absentee ballots by this newly established date. Petition, Prayer for Relief, ¶¶ c, d, e, f, g, h.

52. These requests for mandatory injunctive relief against Executive Respondents are barred by sovereign immunity. *See Stackhouse v. Commonwealth*, 892 A.2d 54, 61 (Pa. Cmwlth. 2006) (“sovereign immunity bars claims seeking mandatory injunctions to compel affirmative action by Commonwealth officials”).

53. Additionally, such relief—directing Executive Respondents to enact legislation—violates the separation of powers doctrine. *See, e.g., In re Fortieth*

Statewide Investigative Grand Jury, 191 A.3d 750, 759 (Pa. 2018) (noting that courts are not authorized to insert words into a statute); *see also 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) (“[t]o aggregate to ourselves the power to write legislation would upset the delicate balance in our tripartite system of government”); *First Citizens Nat. Bank v. Sherwood*, 879 A.2d 178, 182 (Pa. 2005) (declining to interfere with a statutory scheme developed by the legislature on separation of powers grounds).

WHEREFORE, Executive Respondents respectfully request that this Court sustain these Preliminary Objections and dismiss Petitioners’ Petition for Review.

Preliminary Objection V—Legal Insufficiency of the Pleading/Failure to State a Claim (Demurrer)—Pa. R. Civ. P. 1028(a)(4)

54. Paragraphs 1-53 above are reincorporated by reference as if fully set forth herein.

55. The caption of the Petition and paragraphs 22, 23 and 26 of the Petition identify the Executive Respondents in their official capacities only.

56. The sole averment that mentions former Acting Secretary Torres is paragraph 22 which alleges that former Acting Secretary Torres is responsible for the general supervision and administration of Pennsylvania’s elections and election laws. *See* Petition, ¶ 22.

57. The sole averment that mentions Commissioner Marks is paragraph 23 which alleges that Commissioner Marks is responsible for the supervision and

administration of the Commonwealth's elections and electoral process. *See* Petition, ¶ 23.

58. The sole averment that mentions Governor Wolf is paragraph 26 which alleges that Governor Wolf "is responsible for signing bills into law." *See* Petition, ¶ 26.

59. The Petition does not allege any facts to support a claim that Governor Wolf plays *any* role in enforcing or administering the Election Code, or even had any role in enactment of the challenged provisions.

60. As a matter of law, the Election Code does not vest any powers or duties of administration or enforcement of its provisions in the Office of the Governor. In fact, the Election Code does not impose any obligation on the Governor at all. *See* 25 P.S. §§ 2601 *et seq.*

61. Moreover, the Election Code charges former Acting Secretary Torres with specific, discrete and enumerated powers and duties, related to the conduct of elections, and as it relates to absentee voting, the Secretary's sole function is to prescribe the form of the absentee ballot application as well as other absentee balloting materials. *See* 25 P.S. §§ 3146.2(i), 3146.2a(a.1), 3146.4 & 3146.6a.

62. Commissioner Marks has no independent, free-standing power of "supervision and administration" under the Election Code; rather, he carries out some of the specifically-enumerated tasks and duties of the Secretary of the Commonwealth on behalf of the Secretary.

63. None of the averments of the Petition allege any action or inaction by the Executive Respondents that could be deemed to provide a cause of action against them.

64. The Governor’s general obligation to “faithfully execute” the laws or sign legislation into law is insufficient to render the Governor a proper respondent. *See, e.g., Pa. School Boards Ass’n, Inc. v. Commonwealth Ass’n of Sch. Adm’rs.*, 696 A.2d 859, 868 (Pa. Cmwlth. 1997) (challenge to constitutionality of a statute does not render the Governor proper defendant), *appeal dismissed*, 704 A.2d 631 (Pa. 1998); *Rode v. Delarciprete*, 845 F.2d 1195, 1208-09 (3d Cir. 1988) (same).

65. Without a substantive allegation against Governor Wolf, the Petition is legally insufficient against Governor Wolf. *See Wagaman v. Attorney General*, 872 A.2d 244, 247 (Pa. Cmwlth. 2005).

66. Without a substantive allegation against Governor Wolf, there exists no legal claim or controversy between Governor Wolf and the Petitioners.

67. Further, even though there is a general allegation against former Acting Secretary Torres and Commissioner Marks—that they supervise the election process—there are no facts alleged against them as it relates to the individual Petitioners’ “disenfranchisement.” In fact, the individual Petitioners make clear that there was a “delay” in receiving absentee ballots from the counties and that this “delay” prevented their ballots from being counted. *See, e.g.,* Petition, ¶¶ 51-60.

68. Accordingly, absent substantive allegations against Governor Wolf, former Acting Secretary Torres and Commissioner Marks, the Petition is legally deficient and should be dismissed.

WHEREFORE, Executive Respondents respectfully request that this Court sustain these Preliminary Objections and dismiss Petitioners' Petition for Review.

Preliminary Objection VI—Legal Insufficiency of the Pleading/Failure to State a Claim (Demurrer)—Pa. R. Civ. P. 1028(a)(4)

69. Paragraphs 1-68 above are reincorporated by reference as if fully set forth herein.

70. Petitioners assert that various circumstances prevented them from voting in the November 2018 election. *See* Petition, ¶¶ 51-60.

71. Petitioners do not assert that any action or inaction of Executive Respondents prevented them from voting either by absentee or regular ballot.

72. Petitioners instead assert that the Election Code should be reconstituted in a manner that accommodates the various circumstances that prevented them from voting.

73. With respect to regulations of elections, the United States Constitution requires that election regulations be reasonable, neutral, and do not work a “severe restriction” on the right to vote. *See, e.g., Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003); *see also Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006).

74. As a matter of “[c]ommon sense, as well as constitutional law,” courts have held that the government “must play an active role in structuring elections; as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *In re Zulick*, 832 A.2d 572, 578 (Pa. Cmwlth.) (quotation omitted), *aff’d*, 834 A.2d 1126 (Pa. 2003); *see also Banfield*, 110 A.3d at 176-77 (the Commonwealth “may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.”).

75. Courts have routinely recognized that States may determine how the right to vote may be expanded by absentee ballot. *See, e.g., McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 809–11 (1969) (upholding the limited categories of voters entitled to absentee ballots in Illinois law).

76. Under the circumstances pled by Petitioners, these provisions of the Election Code expand, rather than restrict the opportunity to vote, and comport with Constitutional requirements.

WHEREFORE, Executive Respondents respectfully request that this Court sustain these Preliminary Objections and dismiss Petitioners’ Petition for Review.

Preliminary Objection VII—Legal Insufficiency of the Pleading/Failure to State a Claim (Demurrer) as to Count III—Pa. R. Civ. P. 1028(a)(4)

77. Paragraphs 1-76 above are reincorporated by reference as if fully set forth herein.

78. Count III of the Petition for Review asserts a violation of the Pennsylvania Constitution.

79. The Pennsylvania Constitution requires the legislature to provide for absentee voting for certain enumerated categories of voters. Pa. Const. art. VII, § 14(a).

80. The Pennsylvania Constitutional requirements relating to development of absentee ballots do not vest the Governor with any duty beyond the legislative act of approving or vetoing such legislation. *Id.* Similarly, this Pennsylvania Constitutional provision vests former Acting Secretary Torres and Commissioner Marks with no duty or obligation. *Id.*

WHEREFORE, Executive Respondents respectfully request that this Court sustain these Preliminary Objections and dismiss Petitioners' Petition for Review.

Preliminary Objection VIII—Legal Insufficiency of the Pleading/Failure to State a Claim (Demurrer) as to Counts II and IV—Pa. R. Civ. P. 1028(a)(4)

81. Paragraphs 1-80 above are reincorporated by reference as if fully set forth herein.

82. In Counts II and IV, Petitioners assert that the Pennsylvania Election Code violates the Federal and Pennsylvania Constitutions' guarantees of equal

protections of the law.

83. Petitioners' complaint asserts that there exist two classifications of absentee voters: those whose votes were "counted," and those whose votes were not counted.

84. The Pennsylvania Election Code, however, is neutral as to such classifications.

85. Petitioners' myriad of individual circumstances, pled at length in the Petition for Review, rather than any classification expressed in or resulting from the application of the Election Code, resulted in Petitioners' alleged inability to cast a ballot.

86. Where a statute is neutral on its face and in its effect, it does not offend equal protections guarantees. *See, e.g., Working Families Party v. Commonwealth*, 169 A.3d 1247, 1257 (Pa. Cmwlth. 2017).

WHEREFORE, Executive Respondents respectfully request that this Court sustain these Preliminary Objections and dismiss Petitioners' Petition for Review.

Preliminary Objection IX— Lack of Standing—Pa. R. Civ. P. 1028(a)(4)

87. Paragraphs 1-86 above are reincorporated by reference as if fully set forth herein.

88. The ACLU-PA is a "non-profit, nonpartisan public-interest organization[]." Petition, ¶ 21.

89. The ACLU-PA is not an eligible voter and does not seek to become an eligible voter.

90. Because the ACLU-PA may not vote, may not seek an absentee ballot, and is not harmed by the alleged actions of respondents, it has no direct, immediate or substantial interest in this matter, which seeks to invalidate absentee voting provisions.

91. Individual Petitioners claim that they applied for absentee ballots but that the delivery was delayed and, as a result, they were “disenfranchised.” Petition, ¶¶ 51-60.

92. In order to establish standing to bring suit, individual Petitioners must demonstrate, among other things, “causation of the harm to his interest by the matter of which he complains.” *William Penn Parking Garage v. Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975).

93. Here, there is no allegation that Executive Respondents prevented or delayed Petitioners from applying for absentee ballots. Indeed, the Petition makes clear that there are many Pennsylvanians who vote by absentee ballot. *See* Petition, ¶ 85.

94. Put another way, it was Petitioner’s conduct—not seeking an absentee ballot until very late in the process—that contributed to their “disenfranchisement.”

95. As such, neither the ACLU nor the individual Petitioners have standing to bring their claims.

WHEREFORE, Executive Respondents respectfully request that this Court sustain these Preliminary Objections and dismiss Petitioners' Petition for Review.

Respectfully submitted,

DENISE J. SMYLER
General Counsel

Date: January 16, 2019

By: /s/ Kenneth L. Joel

KENNETH L. JOEL
Deputy General Counsel
Attorney ID No. 72370

THOMAS P. HOWELL
Deputy General Counsel
Attorney ID No. 79527

OFFICE OF GENERAL COUNSEL
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Fax: (717) 787-1788

Counsel for Executive Respondents

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: January 16, 2019

/s/ Kenneth L. Joel

KENNETH L. JOEL

Deputy General Counsel

Attorney ID No. 72370

CERTIFICATE OF SERVICE

I, Kenneth L. Joel, hereby certify that on this 16th day of January 2019, the foregoing **Executive Respondents' Preliminary Objections to Petition for Review** has been served upon counsel in the manner indicated below, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

VIA eService

Counsel for Petitioners:

Witold J. Walczak
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
247 Fort Pitt Boulevard, 2nd Floor
P. O. Box 23058
Pittsburgh, PA 15222
Tel: (412) 681-7736
Fax: (412) 345-1255
Email: vwalczak@aclupa.org

Molly Tack-Hooper
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P. O. Box 60173
Philadelphia, Pa 19102
Tel: (215) 592-1513 x 113
Fax: (215) 592-1343
Email: mtack-hooper@aclupa.org

Seth F. Kreimer
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 Sansom Street
Philadelphia, Pa 19104
Tel: (215) 898-7447
Fax: (215) 573-2025
Email: skreimer@law.upenn.edu

[continued on next page]

VIA eService (cont'd)

Counsel for Joseph B. Scarnati, III:

Lawrence J. Tabas

Michael F. Eichert

Timothy J. Ford

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

Centre Square West

1500 Market Street, Suite 3400

Philadelphia, PA 19102

Tel: (215) 665-3000

Fax: (215) 665-3165

Email: lawrence.tabas@obermayer.com; michael.eichert@obermayer.com;
timothy.ford@obermayer.com

Counsel for Michael C. Turzai:

Kathleen A. Gallagher

Devin A. Winklosky

Russell D. Giancola

PORTER WRIGHT MORRIS & ARTHUR LLP

6 PPG Place, Third Floor

Pittsburgh, PA 15222

Tel: (412) 235-4500

Fax: (412) 235-4510

Email: kgallagher@porterwright.com; dwinklosky@porterwright.com;
rgiancola@porterwright.com

VIA FIRST-CLASS MAIL, postage pre-paid

Counsel for Petitioners:

Ezra Rosenberg

John Powers

Pooja Chaudhuri

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

1500 K Street NW, Suite 900

Washington, D.C. 20005

Tel: (202) 662-8600

Fax: (202) 783-0857

[continued on next page]

VIA FIRST-CLASS MAIL, postage pre-paid (cont'd)

Counsel for Petitioners:

Adriel I. Cepeda Derieux

Sophia Lin Lakin

Dale E. Ho

AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.

125 Broad Street, 18th Floor

New York, NY 10004

Tel: (212) 284-7334

Fax: (212) 549-2654

Date: January 16, 2019

/s/ Kenneth L. Joel

KENNETH L. JOEL

Deputy General Counsel

Attorney ID No. 72370