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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**No. 717 MD 2018**

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CASSANDRA ADAMS JONES, ET AL.  
*Petitioners,*

v.

KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF  
THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,  
*Respondents.*

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**In the Original Jurisdiction of the Commonwealth Court  
Pursuant to 42 Pa.C.S. § 761(a)**

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**MEMORANDUM OF LAW  
IN SUPPORT OF PRELIMINARY OBJECTIONS  
OF RESPONDENT JOSEPH B. SCARNATI III**

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Pursuant to Pennsylvania Rules of Civil Procedure 1028(a)(2), (a)(4), and (a)(5) and the Court's January 23, 2019 scheduling order, Respondent Joseph B. Scarnati III, by and through his undersigned counsel, Obermayer Rebmann Maxwell & Hippel LLP, timely files this Memorandum of Law in support of his Preliminary Objections to Petitioners' Petition for Review.

### **STATEMENT OF JURISDICTION**

Petitioners filed a Petition for Review addressed to this Court's original jurisdiction pursuant to 42 Pa. Cons. Stat. § 761(a).

### **STATEMENT OF STANDARD AND SCOPE OF REVIEW**

The question presented by a demurrer under Pa. R.C.P. 1028(a)(4) is whether, based on the facts averred in the Petition for Review and all inferences reasonably deducible from those averments, it is certain under the law that no recovery is possible. *MacElree v. Phila. Newspapers, Inc.*, 674 A.2d 1050, 1056 (Pa. 1996). Preliminary objections based on legal insufficiency will be sustained when, based on the facts pleaded, it is clear and free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief. *Hosp. & Healthsystem Ass'n of Pa. v. Pa. Dep't of Pub. Welfare*, 888 A.2d 601, 607 n.12 (Pa. 2005).

## **ORDER IN QUESTION**

There is no order pending review as the Petition for Review is addressed to the Court's original jurisdiction. The matter before this Court is Respondent Joseph B. Scarnati III's Preliminary Objections to the Petition for Review.

### **STATEMENT OF QUESTIONS INVOLVED**

1. Should certain requests for relief be stricken because there are no allegations against Senator Scarnati justifying such relief, and such relief would violate Pennsylvania's separation of powers doctrine?

Suggested Answer: Yes.

2. Does the American Civil Liberties Union of Pennsylvania ("ACLU-PA") lack standing to bring this action 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?

Suggested Answer: Yes.

### **STATEMENT OF THE CASE**

Petitioners filed a Petition for Review addressed to this Court's original jurisdiction on or about November 13, 2018 pursuant to 42 Pa. Cons. Stat. § 761(a) Pet. for Review ("Pet.") ¶ 27. 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. The remaining Petitioner, the 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.

Petitioners allege that the deadline established in the Pennsylvania Election Code, 25 P.S. §§ 2600 *et seq.*, for the return of completed absentee ballots to election officials infringes on various constitutional rights. Specifically, Petitioners challenge the requirement set forth in 25 P.S. § 3146.8(a) that absentee ballots of certain categories of absentee voters will not be counted unless received by the appropriate county board of elections “no later than five o’clock P.M. on the Friday immediately preceding the primary or November election.”<sup>1</sup> Petitioners complain that this deadline, in conjunction with delays by the U.S. Postal Service

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<sup>1</sup> A different deadline applies to certain other classes of absentee voters. For members of the military, their spouses and dependents, and other groups listed in 25 P.S. §§ 3146.1(a) through (h), the deadline for return of a timely postmarked absentee ballot is five o’clock P.M. on the seventh day following an election. 25 P.S. § 3146(g)(1).

in delivering documents relevant to the absentee voting process 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. 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 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.

The Petition 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.<sup>2</sup> 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.<sup>3</sup> 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 deadline for voting by absentee ballot violates the First and Fourteenth Amendments of the United States Constitution by imposing “significant burdens on the fundamental right to vote” and by “depriving

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<sup>2</sup> 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.

<sup>3</sup> Petitioners are unclear in their attempt to define the class of similarly situated voters who are allowed to vote. This class may consist of members of the military and other groups identified in 25 P.S. §§ 3146.1(a) through (h) (see footnote 1, above), or it may simply be the class of voters who returned their absentee ballots in time to be counted. While reserving the right to raise the issue in a future motion, Respondent expresses no position in these Preliminary Objections as to whether the difference in treatment between Petitioners and voters in these other classes states a constitutional claim.

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.

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.

Pet. 42–44.

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. On January 14, 2019, Senator Scarnati filed Preliminary Objections to the Petition for

Review. On January 23, 2019, this Court entered an Order setting forth a briefing schedule for preliminary objections. Pursuant to the scheduling order, Senator Scarnati now files this Memorandum of Law in support of his Preliminary Objections.

### **SUMMARY OF ARGUMENT**

No matter what one thinks of Petitioners' objections to Pennsylvania's absentee ballot law, it would be a violation of separation of powers for this Court to order Senator Scarnati to take legislative action, or to order the Legislature to enact legislation containing specific provisions or content. In addition, the ACLU-PA lacks standing due to the nature of the claims in this case. Therefore, Petitioners' prayer for relief should be stricken to the extent it seeks to direct the Senator or the Legislature to take legislative action or to enact specific legislation, and the ACLU-PA should be removed for lack of standing to sue.

## ARGUMENT

**A. Petitioners’ requested relief is legally insufficient to support the relief requested, and fails to conform to the law under the separation of powers doctrine.**

There are two reasons why the Petition for Review falls well short of stating a claim against Senator Scarnati for the relief sought in Requests “c” through “h” of the Prayer for Relief. First, the Petition is devoid of any allegation of involvement by this Respondent that supports a court compelling Senator Scarnati—or the General Assembly as a body, even if it were a party to this action, which it is not—to enact legislation having specific substantive provisions, which is what Petitioners are requesting. Second, under the facts alleged in the Petition, an order granting the relief sought in Requests “c” through “h” of the Prayer for Relief, to the extent that it would compel legislative action, would clearly violate the separation of powers doctrine.

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. This is the only specific allegation against Senator Scarnati. There is no allegation that Respondent 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, nor that Respondent Scarnati was involved in, or is responsible for, the enactment of the current Election Code provisions governing absentee ballot voting.<sup>4</sup> And, crucially, there is no allegation that, if the disputed Election Code provisions governing absentee ballots were invalidated 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.

In contrast to the allegations against the Senator, the Petition for Review is replete with allegations that Respondents Wolf, Boockvar and Marks (“Executive Respondents”) are responsible for the administration, supervision and enforcement of the absentee ballot provisions at issue in this case, and the Petition describes with specificity the ways in which their administration of the law has allegedly harmed the Petitioners. Pet. ¶¶ 22–23, 34, 36–40.

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<sup>4</sup> The absence of any specific allegation of involvement of Senator Scarnati in the administration of the Election Code, coupled with the constitutional provisions discussed below committing executive power to the Governor and legislative power to the General Assembly, especially in the area of election law, mean that the Petition’s single, generalized statement that 25 P.S. § 3146.8(a) is “enforced by Respondents,” *see* Pet. ¶ 94, should not be accepted by this court as a sufficient basis upon which to order legislative action by Senator Scarnati.

Even assuming the truth of Petitioners’ averments, and giving Petitioners the benefit of all reasonable inferences therefrom, the Petition fails to support the specific equitable relief requested in Requests “c” through “h” of the Prayer for Relief. As directed at Senator Scarnati in his official capacity, these Requests for relief in effect ask this court to compel the General Assembly to enact legislation having specific provisions. There is no basis for such relief. Admittedly, in highly unusual circumstances, the Pennsylvania Supreme Court has taken an active role in prescribing a specific remedy for unconstitutional legislation. *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). But this is an extraordinary action for a court to take, and is confined to cases where the legislature is unable or unwilling to take appropriate action to discharge its constitutional responsibilities. (“When, however, the legislature is unable or chooses not to act, it becomes the judiciary’s role to determine the appropriate redistricting plan.” *Id.* at 822.) There is no such allegation in the present Petition, and therefore this court must adhere to the usual presumption, based on our appellate decisions and on the Statutory Construction Act, that the legislature in general, and Respondent Scarnati in particular, will perform their duties consistent with constitutional requirements. 1 Pa.C.S. § 1922(3); *League of Women Voters*, 178 A.3d at 801. For this reason alone, Requests “c” through “h” of the Prayer for Relief must be dismissed.

There is a second reason why those parts of the Prayer for Relief that demand an order compelling specific legislative action must be dismissed. Granting such relief would violate the doctrine of separation of powers. Even if the General Assembly were a party to this litigation, which it is not, the Court could not order the General Assembly to enact a new absentee ballot law in this case without violating the principle of separation of powers:

A basic precept of our form of government is that the executive, the legislature and the judiciary are independent, co-equal branches of government. ... Under the principle of separation of the powers of government, however, *no branch should exercise the functions exclusively committed to another branch.*

*Beckert v. Warren*, 439 A.2d 638, 642 (Pa. 1981) (citations omitted).

The Pennsylvania Constitution vests the legislative power in the General Assembly. Pa. Const. art. II §1 (“The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.”) The power of the Supreme Court (and courts generally) is interpretative and not legislative:

[I]t is too often forgotten that under our basic form and system of Constitutional Government the power and duty of a Supreme Court is interpretative, not legislative. We are not a Supreme, or even a Superior Legislature, and we have no power to redraw the Constitution or to rewrite Legislative Acts or Charters, desirable as that sometimes would be.

*Cali v. City of Philadelphia*, 177 A.2d 824, 835 (Pa. 1962). The distinction has been described by our Supreme Court as follows:

Under Article II, Section 1 of our Constitution, the legislative power of the Commonwealth is vested in the General Assembly. PA. CONST. art. II, § 1. The legislative power is the power “to make, alter and repeal laws.” *Blackwell v. State Ethics Comm’n*, 523 Pa. 347, 567 A.2d 630, 636 (Pa. 1989) (quoting *Mount Lebanon v. County Bd. of Elections*, 470 Pa. 317, 368 A.2d 648 (Pa. 1977); *In re Marshall*, 363 Pa. 326, 69 A.2d 619, 626 (Pa. 1950)). Article IV, Section 2 vests “[t]he supreme executive power” in the Governor, who “shall take care that the laws be faithfully executed.” PA. CONST. Art. IV, § 2.

*Jubelirer v. Rendell*, 953 A.2d 514, 529 (Pa. 2008).

It follows that “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.” *Heller v. Frankston*, 475 A.2d 1291, 1296 (Pa. 1984).

Indeed, the general separation of powers principle is reinforced with respect to election laws by the express constitutional commitment to the legislature of the power and duties to enact legislation in this area. The Pennsylvania Constitution expressly provides that it is the *Legislature* that has the power to enact laws regarding absentee voting procedures:

(a) 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; *see also id.* art. VII § 1 (“Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as *the General Assembly* may enact.”) (emphasis added).

Under Articles VII, §§ 1 and 14 of the Pennsylvania Constitution, only the Legislature may implement the relief sought by Petitioners, to wit, “establish a new absentee ballot return deadline,” “establish a new date on which county boards of elections may begin mailing absentee ballots to voters,” and “establish a new, later deadline by which county boards of elections may complete their review and tabulation of all absentee ballots.” *See* items c, e and g of Petitioners’ Prayer for Relief. Neither Senator Scarnati nor the Courts have the authority or power to perform the requested actions.

Accordingly, even if the Court were to invalidate Pennsylvania’s absentee ballot law, the Court would have no power in this case to replace the absentee ballot law with a law or regulations of its own making. As a result, to the extent that items c through h of the Prayer for Relief seek to compel specific legislation, or enactment of regulations having the force of legislation, the Petition is insufficient as a matter of law and these sections of the Prayer for Relief must be stricken.

**B. The American Civil Liberties Union of Pennsylvania lacks standing to sue due to nature of the claims in this case.**

The 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. 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)).

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)). 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).

“[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)). When “the right to vote and the right to have one’s voted counted is the subject matter” of litigation, 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). 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.

The standing decisions in *Albert* and *Erfer* are not limited to gerrymandering challenges. Rather, the determinative factor in the standing decisions in these cases 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. The rights sought to be vindicated—not the type of election law claim, *i.e.*, partisan gerrymandering—determined the Court’s standing decisions in these cases.

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. 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.

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.

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) 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. Each of these organizations had its own institutional, organization interests in voting rights, as the ACLU-PA alleges in this case. 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.

## **CONCLUSION AND RELIEF REQUESTED**

For the reasons above, Respondent Scarnati respectfully requests that this Honorable Court grant the Preliminary Objections of Senator Scarnati on the basis of Pa.R.C.P. 1028(a)(2) and (a)(4), and strike Requests “c” through “h” from Petitioners’ Prayer for Relief, and grant the Preliminary Objection 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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Dated: March 7, 2019

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Petitioners, :

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v. :

Docket No. 717 MD 2018

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**KATHY BOOCKVAR, et al.,** :

Respondents. :

**CERTIFICATE OF SERVICE**

I, Timothy J. Ford, hereby certify that, this 7th day of March, 2019, I caused a true and correct copy of the Memorandum of Law in Support of Preliminary Objections of Respondent Joseph B. Scarnati III 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: March 7, 2019

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Respondents. :

**CERTIFICATE OF COMPLIANCE**

I, Timothy J. Ford, 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.

Respectfully submitted,

By: /s/ Timothy J. Ford

Timothy J. Ford, Esq.

*Counsel for Respondent Joseph B.*

*Scarnati III*

Dated: March 7, 2019