Received 11/9/2021 10:27:00 PM Commonwealth Court of Pennsylvania

Filed 11/9/2021 10:27:00 PM Commonwealth Court of Pennsylvania
244 MD 2021

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG McLINKO, Petitioner, v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, et al., Respondents.	**CASES CONSOLIDATED** No. 244 MD 2021

TIMOTHY BONNER, et al., Petitioners, v. VERONICA DEGRAFFENREID, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, et al., Respondents.	No. 293 MD 2021

RESPONDENTS' RESPONSE IN OPPOSITION TO INTERVENORS-PETITIONERS' BRIEF IN SUPPORT OF PETITIONERS' APPLICATIONS FOR SUMMARY RELIEF

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Pursuant to the Court's Order dated October 26, 2021, Respondents, the Department of State of the Commonwealth of Pennsylvania and Acting Secretary of the Commonwealth Veronica Degraffenreid, submit this response in opposition to the Brief in Support of Petitioners' Applications for Summary Relief filed by Intervenors-Petitioners Butler County Republican Committee, York County Republican Committee, and Washington County Republican Committee on November 2, 2021 ("Republican Committees' Brief" or "Comms. Br.").

I. INTRODUCTION

There is little in the Republican Committees' Brief that requires a new response, as the vast majority of their submission relies on arguments previously advanced by the other Petitioners. Because the Republican Committees present no new arguments with respect to the constitutionality of Act 77, laches, or the statutory time bar, Respondents respectfully incorporate their previous submissions on these issues.[1]

Respondents' present brief focuses on the issue of standing. Like McLinko

[1] Specifically, Respondents refer the Court to, and incorporate by reference: Memorandum in Opposition to Petitioner[McLinko]'s Application for Summary Relief and in Support of Respondents' Cross-Application for Summary Relief (filed Aug. 26, 2021); Reply in Support of Respondents' Cross-Application for Summary Relief (filed Sept. 15, 2021); Memorandum in Support of Respondents' Application for Summary Relief Regarding the *Bonner* Petition (filed Sept. 30, 2021); Respondents' Response in Opposition to the *Bonner* Petitioners' Application for Summary Relief (filed Oct. 14, 2021); Brief in Support of Respondents' Preliminary Objections to Petitioner McLinko's Amended Petition for Review (filed Oct. 15, 2021); Respondents' Application for Leave to File Reply to Petitioner McLinko's Response in Opposition to Respondents' Preliminary Objections to Amended Petition for Review and Exhibit A thereto (filed Nov. 2, 2021).

and the *Bonner* Petitioners, the Republican Committees have failed to demonstrate their standing to challenge the constitutionality of Act 77. The Republican Committees do not allege any facts showing that they—or their "members"—have sustained a substantial, particularized injury caused by the availability of mail-in voting. Accordingly, they are not proper petitioners in the first place, and their claims must be dismissed.

II. LIKE THE OTHER PETITIONERS, THE REPUBLICAN COMMITTEES LACK STANDING

"In Pennsylvania, a party to litigation must establish as a threshold matter that he or she has standing to bring an action." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (citing cases). To satisfy the standing requirement, a litigant must be "aggrieved," i.e., he or she must have a "substantial, direct, and immediate interest in the matter." *Id.* "To have a substantial interest, the concern in the outcome of the challenge must surpass 'the common interest of all citizens in procuring obedience to the law.'" *Id.* (quoting *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003)). To satisfy the criterion of directness, a litigant must "demonstrat[e] that the matter caused harm to the party's interest." *Id.* at 140 (internal quotation marks omitted). "Finally, the concern is immediate if that causal connection is not remote or speculative." *Id.* (internal quotation marks omitted).

"Pennsylvania is a fact-pleading state." *Briggs v. Sw. Energy Prod. Co.*, 224 A.3d 334, 351 (Pa. 2020). Accordingly, to plead standing, "a party must plead

facts which establish a direct, immediate and substantial injury." *Open PA Schools v. Dep't of Educ.*, No. 504 M.D. 2020, 2021 WL 129666, at *6 (Pa. Commw. Ct. Jan. 14, 2021) (en banc) (citing *Pa. Chiropractic Fed'n v. Foster*, 583 A.2d 844, 851 (Pa. Commw. Ct. 1990)). "If a petition contains only 'general averments' or allegations that 'lack the necessary factual depth to support a conclusion that the [petitioner] is an aggrieved party,' standing will not be found." *Id.* (quoting *Pa. State Lodge, Fraternal Order of Police v. Dep't of Conservation & Natural Res.*, 909 A.2d 413, 417 (Pa. Commw. Ct. 2006)). The Republican Committees' Petition—like McLinko's and the *Bonner* Petitioners' pleadings—fails to plead standing.

A. The Republican Committees' Arguments Fail to Cure McLinko's and the *Bonner* Petitioners' Lack of Standing

Ironically, the Republican Committees devote much of their Brief to attempting to establish the standing of *other* petitioners. But even assuming *arguendo* that one petitioner had standing to argue for the standing of another, the Republican Committees' arguments are unavailing. Respondents have addressed almost all of these contentions in their previous briefing, which they incorporate by reference herein.

Puzzlingly, the Republican Committees assert that the *Bonner* Petitioners' interests "are distinguishable from the interest shared by all other citizens" "because the parties directly and immediately affected are opposed to those

adversely affected." Comms. Br. 12. The Republican Committees appear to have conflated the requirements of traditional standing—which include the demonstration of an interest that is "substantial," that is, different from and greater than the interest shared by all other citizens—with those of taxpayer standing, which is a narrow alternative to traditional standing. *See Americans for Fair Treatment, Inc. v. Phila. Fed'n of Teachers*, 150 A.3d 528, 536 (Pa. Commw. Ct. 2016).

Insofar as the Republican Committees are attempting to argue that the *Bonner* Petitioners have taxpayer standing—as the *Bonner* Petitioners themselves contend in their belated opposition to Respondents' Application for Summary Relief[2]—the effort is unavailing. As this Court has explained, a petitioner wishing to invoke the doctrine of taxpayer standing must, in its petition for review, plead facts establishing the prerequisites of such standing; where a "Petition simply lists the … criteria [for taxpayer standing] without description or explanation of how Petitioners fall within the … taxpayer exception [to the requirements of traditional standing]," the Petition is deficient and must be dismissed. *Atiyeh v.*

[2] *See* Petitioners' Brief in Response to Respondents' Application for Summary Relief and Preliminary Objections 24–27 (filed Nov. 2, 2021). Pursuant to this Court's Order dated September 24, 2021, Respondents' and the *Bonner* Petitioners' respective applications for summary relief were each filed on September 30, 2021. Accordingly, each side was required to file any response to the other's application by no later than October 14, 2021. *See* Pa.R.A.P. 123(b). In compliance with that deadline, Respondents filed their response on October 14. The *Bonner* Petitioners, by contrast, did not respond until November 2, 2021, more than two-and-one-half weeks late.

Commonwealth, No. 312 M.D. 2012, 2013 WL 3156585, at *6 (Pa. Commw. Ct. May 28, 2013); *see also Open PA Schools*, 2021 WL 129666, at *6 ("a party must plead facts" that establish the legal requirements of standing). The *Bonner* Petitioners' Petition for Review does not even list the criteria for taxpayer standing. Indeed, conspicuously absent from the Petition is any mention of taxpayer standing (or its prerequisites) whatsoever. Because the *Bonner* Petition does not even acknowledge, let alone attempt to allege the existence of, the necessary predicates of taxpayer standing, that doctrine provides no basis to salvage the *Bonner* Petitioners' claims. *See Atiyeh*, 2013 WL 3156585, at *6.

B. The Republican Committees Fail to Plead a Basis for Standing

The Republican Committees also fail to plead any cognizable basis for their own standing. As an initial matter, their argument is analytically confused, failing to distinguish properly between "representative" and "organizational" standing and inventing a third category of "individual" standing (notwithstanding that none of the Intervenors-Petitioners is an individual). In any event, none of the Republican Committees' theories confers standing to challenge Act 77.

1. The Republican Committees Conflate Multiple Distinct Standing Doctrines and Satisfy None

At the outset, it is important to clarify the law the Republican Committees attempt to invoke. Although the Republican Committees claim to have "organizational," "representative," and "individual" standing, *see* Comm. Br. 12,

they do not define the differences between these ostensible doctrines. Indeed, Respondents are unaware of a doctrine of "individual" standing—particularly as applied to petitioners, such as Republican Committees, that are organizational entities—and Republican Committees cite no authority in support of this purportedly separate theory.

By "representative" standing, the Republican Committees appear to be invoking a doctrine that is often referred to as associational standing. Under this doctrine, "[a]n association has standing to bring an action on behalf of its members where at least one of its members is suffering an immediate or threatened injury as a result of the challenged action." *Americans for Fair Treatment, Inc. v. Phila. Fed'n of Teachers*, 150 A.3d 528, 533 (Pa. Commw. Ct. 2016). Importantly, "[t]o have standing on this basis, the plaintiff organization must allege sufficient facts to show that at least one of its members has a substantial, direct and immediate interest" in the litigation. *Id.* at 534. "Where the organization has not shown that any of its members have standing, the fact that the challenged action implicates the organization's mission or purpose is not sufficient to establish standing." *Id.*

By "organizational" standing, the Republican Committees are presumably asserting that they have a substantial, direct, and immediate interest in challenging Act 77's constitutionality in their own right. *See Vandeusen v. Bordentown Invs., LLC*, No. 08-3207, 2009 WL 235551, at *2 (D.N.J. Jan. 29, 2009) (distinguishing

"organizational standing," whereby "an organization may be granted standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the organization or association itself may enjoy," from "associational standing," whereby "an association may assert claims on behalf of its members, but only where the record shows that the organization's individual members themselves have standing to bring those claims" (cleaned up)); 33 Fed. Prac. & Proc. § 8345 (2d ed.) ("An organization satisfies constitutional standing to sue on its own behalf if it has suffered injury as an entity and can make the necessary showings of causation and redressability.").

The seminal organizational standing case is *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In *Havens*, "a realty company and one of its employees were alleged to have engaged in racial 'steering' in violation of the Fair Housing Act." *Fair Housing Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 75 (3d Cir. 1998). One of the plaintiffs, HOME, was a "nonprofit organization … whose purpose was to make equal opportunity in housing a reality…. Its activities included the operation of a housing counseling service, and the investigation and referral of complaints concerning housing discrimination." *Havens*, 455 U.S. at 368. HOME alleged that it had suffered a direct, individualized injury because the racial discrimination it was challenging had directly undermined its mission of encouraging open housing *and* required it to

expend resources to combat this injury. The Court found that HOME had standing. *Id.* at 378–79. As the Third Circuit and other courts have explained, *Havens* "did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted upon the organization's programs." *Fair Housing*, 141 F.3d at 79 (quoting *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994)). "[T]he 'drain on the organization's resources' … was simply another manifestation of the injury that [the defendants' assertedly illegal practices] had inflicted upon the organization's non-economic interest." *Id.* (internal quotation marks omitted).

As set forth below, the Republican Committees have failed to allege facts demonstrating either representative or organizational standing. Their claim to "individual standing" is also unavailing, not least because the Republican Committees are not individuals, and the Republican Committees fail to cite any case law in support of this purported doctrine.[3]

[3] In arguing for "individual standing," the Republican Committees assert simply that one or more individual Republican voters have standing. Comms. Br. 16. As discussed above, that contention is, in this context, an argument for representative or associational standing. As shown below, however, the Republican Committees fail to establish such standing.

2. The Republican Committees Fail to Plead Representative Standing Because They Do Not Allege Facts Showing that Any of Their Members Has a Substantial, Direct, and Immediate Interest in Challenging the Constitutionality of Act 77's Mail-in Voting Procedures

The Republican Committees cannot satisfy the requirements of representative standing because they fail to identify a substantial, direct, and immediate interest of any individual member that is injured by Act 77. *Americans for Fair Treatment*, 150 A.3d at 533. Their Petition points to two such purported interests. First, the Republican Committees assert that because mail-in voting is supposedly unconstitutional, each vote cast in accordance with Act 77's mail-in voting procedures "will diminish the votes constitutionally cast in each [of the Republican Committees' three counties]." Republican Committees' Petition for Review ¶ 21. But as Respondents have previously shown, this type of "vote dilution" theory of standing is legally bankrupt; for that reason, it has been repeatedly and consistently rejected by both Pennsylvania and federal courts. *See* Memorandum in Support of Respondents' Application for Summary Relief Regarding the *Bonner* Petition 13–16 (Sept. 30, 2021) (citing cases).

Second, the Republican Committees contend that their voters have a substantial, direct, and immediate interest in challenging Act 77 because uncertainty over the lawfulness of mail-in voting raises the risk that, if they cast a mail-in vote, it may not be counted. *See* Republican Committees' Petition for

Review ¶ 18; *see also* Comms. Br. 16 (invoking the purported dilemma of a voter who "had to decide whether to use a no-fault mail-in ballot and take the risk that his mail-in ballot and Republican vote may not be counted if Act 77 is unconstitutional" (cleaned up)). That argument is, frankly, perverse. To the extent such uncertainty exists, it is not the product of Act 77, which is the source of the mail-in voting rights such a voter wishes to utilize; rather, the uncertainty is the product of the very claims the Republican Committees seek to prosecute. A voter's interest in being secure in her ability to vote by mail cannot confer standing to *challenge* the constitutionality of mail-in voting. And, of course, if a given voter has no interest in preserving the right to vote by mail, she faces no risk from any "uncertainty" over the outcome of this litigation; she can simply choose to vote in person. The Republican Committees' "uncertainty" theory of standing is a snake eating its own tail.

3. The Republican Committees Fail to Plead Organizational Standing Because They Make No Showing That Act 77 Directly Injures Their Mission

The Republican Committees' argument for "organizational standing" fares no better. That argument rests on the allegation that the Committees have devoted resources to educating their votes about Act 77's mail-in voting procedures. *See* Republican Committees' Petition for Review ¶¶ 17-19; Comms. Br. 14–16. But an organization cannot obtain standing simply by alleging that it has spent resources

to educate its voters about how to take advantage of an additional method of voting, and that it would (obviously) not continue to spend those resources in that manner if that voting method no longer existed. There must also be factual allegations that the resources are being spent to counteract a direct injury that the challenged action has inflicted on the organization. *Fair Housing*, 141 F.3d at 79. Nowhere in the Republican Committees' pleading do they assert that—let alone explain how—the availability of an additional method of voting has visited a particularized, substantial injury on the Republican Committees. That the Republican Committees *chose* to expend resources on encouraging their voters to vote by mail does not constitute a cognizable injury. *See, e.g.*, *Fair Emp't Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (where an organization's alleged injury-in-fact "results not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices[,]" that spending is not an injury for standing purposes); *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (citing *Fair Emp't Council*, 28 F.3d at 1276); *United Poultry Concerns v. Chabad of Irvine*, 743 F. App'x 130, 131 (9th Cir. 2018) (same); *Donald J. Trump for Pres., Inc. v. Way*, No. 20-10753, 2020 WL 6204477, at *11 (D.N.J. Oct. 22, 2020) (same); *see also Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 288 (3d Cir. 2014) (stating that plaintiff cannot "manufacture standing by choosing to expend resources") (citation and quotation

omitted)).

Although the Republican Committees invoke *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014), in support of their organizational standing argument, that case only underscores the deficiencies in the Committees' allegations. Unlike Act 77, the challenged statute in *Applewhite* undeniably *burdened* the right to vote and threatened to deny it outright to voters unable to satisfy the statutory requirements. That is why this Court stated that "[t]he litigation implicates the violation of the right to vote protected in the Pennsylvania Constitution." *Id.* at *7. The organizational plaintiffs in that case were "organizations concerned with protecting the right to vote of Pennsylvanians and maximiz[ing] their opportunities to exercise that right." *Id.* Thus, as with the organizational plaintiff in *Havens*, the challenged action directly injured the organizational plaintiffs' mission, and the resources expended by those organizations were needed to counteract that injury. There is simply no comparison with Act 77, which makes voting *easier* for and *more accessible* to all Pennsylvania voters. The Republican Committees cannot claim a substantial, particularized injury based on their expenditures encouraging their voters to make the most of the procedures they now challenge.

Indeed, the case law has repeatedly rejected standing arguments similar to those asserted by the Republican Committees here. For example, in *Donald J.*

Trump for President, Inc. v. Cegavske, 488 F. Supp. 3d 993 (D. Nev. 2020), the Trump Campaign, the Republican National Committee, and the Nevada Republican Party challenged a Nevada statute "expand[ing] mail-in voting due to the COVID-19 pandemic." *Id.* at 996. Although the plaintiffs contended that they had both direct organizational standing as well as representative standing on behalf of Republican voters, the court squarely rejected both theories and dismissed the complaint. *See id.* at 999–1004. Of particular note, the plaintiffs argued that they had organizational standing because the challenged statute purportedly "force[d] them 'to divert resources and spend significant amounts of money educating Nevada voters.'" *Id.* at 1001. But the court recognized that plaintiffs had not plausibly alleged that the mail-in voting law injured them in any way. "If plaintiffs did not expend any resources on educating their voters on [the new statute], their voters would proceed to vote in-person as they overwhelmingly have in prior elections. [The statute] does not abolish in-person voting." *Id.* at 1002 (internal citation omitted). As the court explained, the cases plaintiffs had cited, in which courts had found organizational standing to challenge voting laws, were readily distinguishable. In those cases—as in *Applewhite*—"the challenged law has a direct and specific impact on a voter's ability to vote…. But here, the challenged law expands access to voting through mail without restricting prior access to in-person voting. Thus, … plaintiffs need not divert resources to enable or encourage

their voters to vote." *Id.* at 1002. Other courts have reached similar conclusions. *See, e.g.*, *Donald J. Trump for President, Inc. v. Way*, No. CV2010753, 2020 WL 6204477, at *8–9 (D.N.J. Oct. 22, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 381 (W.D. Pa. 2020) (citing *Cegavske* approvingly). The same result obtains here.

III. THE REPUBLICAN COMMITTEES' CLAIMS ARE EVEN MORE UNTIMELY THAN THOSE OF McLINKO AND THE *BONNER* PETITIONERS AND THUS BARRED ON BOTH EQUITABLE AND STATUTORY GROUNDS

Finally, Respondents note that the Republican Committees' claims, like the claims of the other Petitioners, are barred by laches as well as the time limitation in Section 13(3) of Act 77. Like McLinko and the *Bonner* Petitioners, the Republican Committees are in the election business. *See* Republican Committees' Petition for Review ¶¶ 13, 17. "But it occurred to none of them to challenge the constitutionality of Act 77 before [the 2020 primary election], or indeed before participating in and contemplating the results of the 2020 General Election." *Kelly v. Commonwealth*, 240 A.3d 1255, 1258 (Pa. 2020) (Wecht, J., concurring). In fact, the Republican Committees waited to bring their challenge until after both McLinko and the *Bonner* Petitioners had filed suit, by which time it was too late to adjudicate their claims before the November 2021 election—which was the *fourth* successive statewide election to be conducted under Act 77's mail-in voting procedures. There is no reason why the Republican Committees could not have

asserted their claims within 180 days of Act 77's enactment. Accordingly, for the same reasons that McLinko's and the *Bonner* Petitioners' claims are foreclosed by laches and Act 77's statutory time-bar, so too are the Republican Committees'.

IV. CONCLUSION

For the foregoing reasons, and those set forth in their previous briefing, Respondents respectfully request that the Republican Committees' Petition for Review be dismissed with prejudice.

Respectfully submitted,

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Dated: November 9, 2021

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