

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES WALSH,	:	No. 4:24-CV-01878
	:	
Plaintiff,	:	(Chief Judge Brann)
	:	
v.	:	
	:	
LUZERNE COUNTY, LUZERNE	:	
BUREAU OF ELECTIONS,	:	
and LUZERNE COUNTY BOARD	:	
OF ELECTIONS AND REGISTRATION,	:	
	:	
Defendants.	:	

**DEFENDANT LUZERNE COUNTY BOARD**  
**OF ELECTIONS AND REGISTRATION'S REPLY BRIEF**

**I. Introduction:**

Defendant Luzerne County Board of Elections and Registration ("Board") submits the present Reply Brief in response to Plaintiff's memorandum of law (Doc. 42) which opposes the Board's Motion to Dismiss Plaintiff's Third Amended Complaint. ("Motion," Doc. 37). As Plaintiff fails to rebut any aspect of the Motion, dismissal of the Third Amended Complaint (Doc. 30) remains compelling.

**II. Argument:**

**i. Plaintiff fails to establish standing:**

A primary consideration which the Board has raised since the genesis of this matter (*see* Doc. 38) is the question of Plaintiff's standing. As this Court is without

jurisdiction to proceed unless Plaintiff's standing is firmly established, it is critical that this threshold matter be addressed. *See, e.g., Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016) ("Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. ... Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element.") (cleaned up). Notably, in its principal brief the Board outlines at length Plaintiff's failure in this regard. *See*, Doc. 38 at 6-12. For his part, and despite his best effort, Plaintiff's presentation does nothing to diminish the merit of the Board's argument.

For example, while Plaintiff alleges that several thousand voters or prospective voters have had their individual rights violated by the Board and the related defendants, none of these individuals are named or even remotely identified. And while the alleged violations consisted of supposed failure to either timely process voter registration requests or applications for mail in ballots, there are no allegations that Plaintiff suffered any of these harms himself. *See* Doc. 42 at 2-4. Instead, Plaintiff (who is the only individual specifically named and identified in the Third Amended Complaint) asserts vague rights not unique to himself but which, at best, are purely ancillary to the rights of these vast and unnamed others.

Such a thin constitutional strand cannot survive standing analysis. Nor does Plaintiff's legal review help his cause.

Claiming constitutional standing since he is (was) a candidate for office and therefore entitled to assert the rights of voters whose voting rights are allegedly impaired by governmental action, Plaintiff makes the excessively definitive statement that "the Third Circuit has **concluded** that a candidate has standing to represent and assert the rights of voters." Doc. 42 at 7 (emphasis added). In support, Plaintiff cites only one case from this Circuit which, respectfully, comes nowhere near the absolute conclusion he suggests. *Id.*, citing *Pennsylvania Psychiatric Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278 (3d Cir. 2002). In fact, *Pennsylvania Psychiatric Soc.*, has nothing whatsoever to do with voting rights but instead addresses the limited exceptions which allow for consideration of "third party" standing. In doing so, the Court merely recognizes that in some circumstances there is a *possibility* that a candidate can advance voters' rights: "[C]andidates for public office **may** be able to assert the rights of voters." *Id.* at 288, n.10.

This is a far cry from any claim that Plaintiff (under the facts alleged, and where he has flatly failed to advance any individual and/or specific harm to himself) has standing to bring the present action. A deeper dive into *Pennsylvania Psychiatric Soc.* (and the case which underlies the hypothetical in that decision's footnote) makes this abundantly clear.

For example, in *Pennsylvania Psychiatric Soc.'s* footnote 10 (which is the basis for Plaintiff's position that the Third Circuit supports his "standing" in this instance), the Court refers to a First Circuit opinion as "permitting [a] candidate for public office to raise voters' rights[.]" But the position of the "candidate" in that case, *Mancuso v. Taft*, 476 F.2d 187 (1st Cir. 1973), bears no resemblance to Plaintiff's position presently.

In *Mancuso*, the Court addressed a provision in the Cranston, Rhode Island, Home Rule Charter which prohibited certain public officials from seeking elective office. Because this "*candidacy restriction* [had an] impact on voting rights," the Court held that "*both* candidates and voters may challenge [it] on its face on equal protection grounds..." *Mancuso*, 476 F.2d at 190 (emphasis added). Unlike the present situation, the *Mancuso* plaintiff was allowed to advance voters' rights since these were linked to the "restrictions" placed on his own "candidacy." In our case, there is nothing to suggest any similar type of impediment to Plaintiff as a candidate in his own right. Instead, Plaintiff argues that vague and poorly defined harms have come to unnamed voters' rights, but has failed to link these harms to him in particular. As such, neither *Pennsylvania Psychiatric Soc.*, nor *Mancuso* do anything to advance Plaintiff's standing.

Plaintiff cites two other cases in this line of argument (Doc. 42 at 7), neither of which boost his standing claim. In *Walgren v. Bd. of Selectmen of Town of*

*Amherst*, 519 F.2d 1364, 1365 n.1 (1st Cir. 1975), the Court addressed a question of whether a "caucus" schedule which resulted in election of a town council was constitutionally infirm, but noted that the "[district] court did not pass on the issue of [the candidate-plaintiff's] standing, in light of its view of the merits."

Accordingly, *Walgren* offers no definitive or applicable position on standing for Plaintiff to grasp.

In *Fugazi v. Padilla*, No. 2:20-CV-00970-KJM-AC, 2020 WL 2539286, at \*1 (E.D. Cal. May 19, 2020), the district court addressed a "non-party[']s application to be joined as defendant, or in the alternative to intervene." In that case, the "non-party" had prevailed in a primary election under a provision of California law which sent the top two candidates to the general election for state Assembly. The losing third place candidate had sought a recount which, if successful, would have cost the "non-party" her place on the general election ballot. In this context, the district court found the "[non-party's] ability to protect her interests would be impaired if at this point she were not joined to this action." *Id.* at 2.

In each of these cases, there were structural issues which had potential and specific impacts on the candidates themselves. In *Fugazi* (and distinct from the present case), not only did the "non-party" candidate have a specific and personal interest in the outcome of the matter (essential to her establishing standing), but

any advancement of voter rights which her participation advanced were likewise protected in that "various individuals who voted in the primary by mail" were also participating plaintiffs. *Id.* at 1.

Similarly, the issue in *Walgren* (and again, unlike the present) involved specific and identifiable procedural impediments which impacted the candidate, and not (as here) just the alleged voters.

The same is true regarding Plaintiff's reliance on *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich. 2004). Although the standing issue was aimed at political parties and not individual candidates asserting voter rights, that case (and again unlike the issues presented herein), dealt with specific and identifiable directives issued by the defendant governmental election officials. In that context, the court affirmed the organizational standing of the parties, given the potential injury the defendant *directives* may have on the parties' members.

Instantly, there is no such specific, identifiable directive, policy, mandate, rule or plan allegedly issued by the Board which impedes the thousands of allegedly impacted voters and registrants, nor anything remotely connected directly to Plaintiff similar to the links the *Walgren*, *Fugazi*, or *Bay County* courts found which allowed for the appropriate finding of standing in those cases. All that remains in this case is, as noted in the Board's principle brief, is a candidate who advances nothing other than the disconnected claims of unnamed individuals

which are not connected to Plaintiff himself. Constitutional standing cannot rest on such a disjointed argument.

Even if there were some basis to find Plaintiff's constitutional success on this issue, the doctrine of prudential standing would still impede this Court from proceeding further. As recently noted:

[p]rudential standing [ ] derives from judge-made doctrines [ ] meant to help the courts avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those best suited to assert a particular claim.

*Jackson v. KWU Co.*, No. 4:24-CV-01275, 2024 WL 4279504, at \*2 (M.D. Pa. Sept. 24, 2024)(cleaned up).

As further recognized in *Jackson*, a plaintiff's claim to prudential standing is supported, among potential other considerations, when:

- (1) he is asserting his own legal rights, rather than those of another;
- (2) his grievance is not abstract and generalized; and
- (3) his "complaint fall[s] within the zone of interests protected by the law invoked."

*Id.*

None of these principles are at play here: Plaintiff is clearly not advocating rights of his own, but instead those of others, (i.e., the faceless thousands of alleged mail in voters and new registrants), and is likewise advancing clearly "abstract and generalized" claims (i.e. unsubstantiated and vague violations of these alleged voter and registrant rights). On the third point noted in *Jackson*, and while this

Court is always cognizant of the rights of voters, there is nothing specific in the Third Amended Complaint to invite the Court into an *identifiable* "zone" where its exercise of jurisdiction would be "prudent."

In this light, Plaintiff fails both the constitutional and prudential tests attendant to standing, thus requiring dismissal of the Third Amended Complaint.

**ii. This matter is moot:**

Despite Plaintiff's attempts, he fails to diminish application of mootness principles outlined in the Board's motion to dismiss and its principal brief. Docs. 37 and 38. What is most troubling about Plaintiff's argument on this issue is his focus on something which has not been raised in the Third Amended Complaint and is thus unavailable presently, namely his perceived challenge to Pennsylvania's statutory electoral structure, first raised in his opposition brief. Doc. 42.

Initially, Plaintiff argues that the constitutional threshold question of mootness does not prevent the court's exercise of jurisdiction if the alleged aggrieved conduct is "capable of repetition yet evading review." *See, e.g., Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017). There is no disagreement with that general principle, but in this case, Plaintiff offers no background to support its application. As the *Hamilton* court noted:

[t]he capable-of-repetition doctrine is a *narrow* exception that applies only in exceptional situations where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is



a reasonable expectation that the same complaining party will be subject to the same action again.

*Id.* (emphasis added)(cleaned up).

The procedural history of this case belies any notion that a future challenge based on similar (and perhaps even better developed facts) would "evade review". This Court held a telephonic conference in this case well before the General Election at issue, and scheduled an evidentiary hearing prior to that Election (only to have Plaintiff himself ask for its cancellation). There is nothing to suggest that some yet unknown future allegation of impropriety could not be addressed in a timely and non-"evading" manner. As such, the "repetition-evading" doctrine is inapplicable in this case.

More questionable, however, are the assertions Plaintiff nonetheless makes regarding the statutory elements relevant to Pennsylvania elections. Although it remains a mystery as to whom the alleged harmful conduct of the Board and the County defendants was aimed, Plaintiff essentially acknowledges in this aspect of his argument that his real gripe is less with these defendants and more with the statutory structure attendant to elections in this Commonwealth. Referring, as he has in the Third Amended Complaint, to some future primary or general election,

and that the processing of new voter registrations and mail in ballot receipt are governed by a statutory timeline,<sup>1</sup> Plaintiff argues that:

[u]nless there is *a change in Pennsylvania statutory law* regarding the deadline for applications to vote and requests for mail-in ballots, it is highly likely that the same harm that occurred to voters in the most recent general election will reoccur in all future elections.

Doc. 42 at 13.

This assertion is the first time Plaintiff complains of Pennsylvania's statutory structure which governs elections, and now apparently places primary blame on that structure for the alleged constitutional harm to the anonymous voters mentioned in the Third Amended Complaint.<sup>2</sup> In doing so, he further dilutes any possible claim against the Board, and, more importantly, renders the allegations of his Complaint misplaced. In either case, what this argument does *not* do is further advance any reasonable application of the "repetition-evading" doctrine applicable to mootness issues. As his claim remains moot, this Court has no jurisdiction to proceed and must dismiss the Third Amended Complaint.

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<sup>1</sup> For the 2024 General Election, Plaintiff alleges these dates were October 21, 2024 and November 5, 2024 (Election Day), respectively. Doc. 42 at 13.

<sup>2</sup> Plaintiff follows this sentence with an argument that "this harm will repeat itself unless or until there is a court order enjoining Defendants from continuing to follow their internal practice and procedure of delaying and/or refusing to process the voters' applications in a timely manner." However, as noted previously and in the Board's principle brief, there is nothing of substance suggesting that there has been any practice or procedure by the Board to do anything other than follow the law and the requisite deadlines noted by Plaintiff.

**iii. Plaintiff's claims are not ripe:**

Plaintiff addresses this aspect of the Board's argument by conflating the threshold constitutional issues of standing and mootness with the third applicable consideration, ripeness. While there is some overlap between these points, Plaintiff's wholesale melding of the concepts does little to overcome the constitutional barriers he faces. This is especially so given the insufficiency of the Third Amended Complaint.

For example, in his opposition memorandum, Plaintiff claims that the Third Amended Complaint "allege[s that] in 2026 [he] intends to run for re-election," and cites ¶¶ 53 and 55 of the Complaint in support. Doc. 30. Unfortunately for Plaintiff, that is not what these two paragraphs say. Paragraph 55, at best, argues for enforcement of the "Election Code in the future." For its part, Paragraph 53 speaks only in vague and uncertain terms about future conduct "quite possibl[y]" causing Plaintiff "irreparabl[e] harm[] ... in the upcoming primary and/or general election," with no mention of any date of a Primary or General Election or that he intends to be a candidate in these elections. Without more (and as more fully outlined in the Board's principle brief), Plaintiff fails to advance any argument that his claim against the Board is currently ripe:

To evaluate ripeness, the Court must consider the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. A matter is not fit to be adjudicated if it is speculative

whether the problem will ever need solving.

*Love v. LLT Mgmt. LLC*, No. CV 24-6320 (MAS) (RLS), 2024 WL 3226883, at \*5 (D.N.J. June 28, 2024), *appeal dismissed*, No. 24-2214, 2024 WL 5279221 (3d Cir. Aug. 30, 2024)(cleaned up).

As it is far from clear that the mysterious harms of which Plaintiff complains are "problems" which "will ever need solving," his claims fail the ripeness test, again calling for dismissal of the Third Amended Complaint.<sup>3</sup>

### **III. Conclusion:**

For the foregoing reasons, Defendant Luzerne County Board of Elections and Registration reasserts its position that Plaintiff's Third Amended Complaint should be dismissed.

Respectfully submitted,

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<sup>3</sup> As Plaintiff fails to counter the Board's argument that the Third Amended Complaint should be dismissed for failure to state a claim upon which relief may be granted, Fed. R. Civ. P. 12(b)(6), the Board reasserts its principle argument, and again notes the failure of the Third Amended Complaint to plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). As there is nothing "plausible" about the Complaint's allegations, it should be dismissed.