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2024 UT 36

**Colby Jenkins, Petitioner,**

**v.**

**Beaver County, Ginger McMullin, Garfield County, Camille Moore, Iron County, Jon Whittaker, Kane County, Chameill Lamb, Millard County, Marki Rowley, Piute County, Kali Gleave, Sevier County, Steven C. Wall, Washington County, Felicia Snow, Wayne County, Ryan Sullivan, and Lieutenant Governor Deidre Henderson, Respondents.**

**No. 20240815**

**Supreme Court of Utah**

**August 15, 2024**<sup>[a]</sup>

Heard: August 9, 2024

On Petition for Extraordinary Writ

A.J. Ferate, Courtney Powell, Oklahoma City, Okla., Scott Young, Salt Lake City, for petitioner.

Sean D. Reyes, Att'y Gen., Sarah Goldberg, Asst. Solic. Gen., Scott Cheney, Kyle Kaiser, Asst. Att'ys Gen., Salt Lake City, for respondent Lieutenant Governor Diedre Henderson.

Von Christiansen, Leo G. Kanell, Beaver, for respondent Beaver County and Ginger McMullin.

Barry L. Huntington, Panguitch, for respondent Garfield County and Camille Moore.

Chad E. Dotson, Sam E. Woodall, Cedar City, for respondent Iron County and Jon Whittaker.

Robert C. Van Dyke, Kanab, for respondent Kane County and Chameill Lamb.

Michael Winn, Loa, for respondent Wayne County and Felicia Snow.

Eric Clarke, Victoria H. Hales, St. George, for respondent Washington County and Ryan Sullivan.

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PER CURIAM.

¶1 This matter is before the court on Colby Jenkins's amended petition for extraordinary relief, filed on July 31, 2024. We requested expedited responses from the Lieutenant Governor, counties, and county clerks named in the petition, and we held oral argument on August 9, 2024. For the reasons explained below, we deny the petition.

Analysis

¶2 The petition arises out of the 2024 primary election contest between Colby Jenkins and Celeste Maloy to become the Utah Republican Party candidate for the United States House of Representatives in Utah's Second Congressional District. Following the tally of the ballots and a recount, election officials determined Ms. Maloy had prevailed by a narrow margin. During the tallying process, some ballots were rejected as untimely because they were not postmarked by the deadline specified in Utah's election code, which requires that, "to be valid, a ballot . . . must be . . . clearly postmarked before election day, or otherwise clearly marked by the post office as received by the post office before election day." Utah Code § 20A-3a-204(2)(a)(i).

¶3 Mr. Jenkins challenges the rejection of these late ballots. He asserts that many of the ballots were mailed before election day but were not postmarked by the deadline because of variations in United States Postal Service practices for processing mail from different regions of the state. Specifically, he alleges that while most Utah mail is processed in Salt Lake City, some mail from southern Utah is processed in Las Vegas, and he asserts that it takes longer

for such mail to receive a postmark. He seeks an order from this court requiring that the untimely ballots be accepted and counted.

¶4 As an initial matter, the Lieutenant Governor questions whether Mr. Jenkins possesses the third-party standing that would

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allow him to assert constitutional arguments on behalf of the voters whose ballots were not counted. *See generally Planned Parenthood Ass'n of Utah v. Utah*, 2024 UT 28, ¶¶ 45-81, \_\_\_ P.3d. \_\_\_. We note that the Lieutenant Governor does not contend that Mr. Jenkins lacks traditional standing, the absence of which might rob this court of jurisdiction over the petition. Rather, the Lieutenant Governor suggests that Mr. Jenkins runs afoul of the prudential concerns that keep us from normally allowing someone to raise the arguments that might more properly belong to another. The party asserting third-party standing bears the burden of establishing its ability to raise others' claims. *See id.* ¶ 48. Here, Mr. Jenkins did not attempt to meet that burden in his petition, and, when given the opportunity at oral argument, he did not address the requirements for third-party standing.

¶5 But we need not decide whether Mr. Jenkins' claims assert arguments that belong to other voters. Nor must we decide whether he possesses third-party standing. This is because his petition falls well short of establishing that he is entitled to the relief he seeks.

¶6 In his petition, Mr. Jenkins fails to identify any instance where election officials failed to comply with any statutory mandate. Instead, he maintains that the statutory postmark requirement is unconstitutional for two reasons. First, he argues that the requirement results in differential treatment of ballots mailed by voters depending on where the mail is processed. Second, he argues that relying on the United States Postal Service to postmark ballots interferes with the fundamental right to vote. Mr. Jenkins has failed to meet his burden of demonstrating an entitlement to the relief he requests because he has not adequately briefed

either constitutional argument. *See, e.g., 1600 Barberry Lane 8 LLC v. Cottonwood Residential O.P. LP*, 2021 UT 15, ¶ 53, 493 P.3d 580 (holding that a party who fails to adequately brief an issue "will almost certainly fail" to satisfy that party's burden of persuasion (cleaned up)); *Pinder v. Duchesne Cnty. Sheriff*, 2020 UT 68, ¶ 36, 478 P.3d 610 (same).

I. Mr. Jenkins' Argument that the Statutory Postmark Requirement Results in Unequal Treatment of Voters in Violation of Article I, Section 2 of the Utah Constitution

¶7 Mr. Jenkins first asserts that the statutory postmark requirement violates article I, section 2 of the Utah Constitution, which states: "All political power is inherent in the people; and all free governments are founded on their authority for their equal

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protection and benefit, and they have the right to alter or reform their government as the public welfare may require." Utah Const. art. I, § 2. Mr. Jenkins claims the statutory postmark requirement violates that provision because it is inconsistent with equal protection principles. Although article I, section 2 references "equal protection," Mr. Jenkins' petition cites no case where we have analyzed an equal protection challenge under that constitutional provision. Indeed, his petition fails to cite any Utah case addressing any aspect of that (or any other constitutional) provision. Nor does he analyze the plain language of the constitutional text and its original public meaning. *See State v. Barnett*, 2023 UT 20, ¶ 10, 537 P.3d 212. And even if we were to interpret his article I, section 2 claim as an equal protection claim under article I, section 24, Mr. Jenkins' petition again fails to cite any cases or provide any analysis pertaining to that provision.

¶8 At oral argument, Mr. Jenkins referenced *League of Women Voters of Utah v. Utah State Legislature*, 2024 UT 21, \_\_\_ P.3d. \_\_\_, and asserted it was an equal protection case. It wasn't. That decision addressed the allocation of legislative authority between the

people and the state legislature in the particular context of initiatives altering or reforming the government. Mr. Jenkins also cited *Gallivan v. Walker*, 2002 UT 89, 54 P.3d 1069. Although the court's opinion in that case addressed article I, section 24 in the context of a challenge to a multi-county signature requirement for initiatives, Mr. Jenkins has not explained how that analysis has any bearing on the statutory postmark provision at issue here, let alone mandates the relief he seeks. "Mere mention of a constitutional right, phrase, or principle does not raise a constitutional claim." *Salt Lake City v. Kidd*, 2019 UT 4, ¶ 35, 435 P.3d 248. As we have observed, "[a] party may not simply point toward a pile of sand and expect the court to build a castle. In both district and appellate courts, the development of an argument is a party's responsibility . . . ." *Id.*

¶9 We also note that the evidence in the record before us shows that the late ballots Mr. Jenkins seeks to have counted were not all processed in Las Vegas. Mr. Jenkins' petition alleges that approximately 1,171 ballots were rejected as postmarked after the statutory deadline. But according to the respondents' declarations, most of those ballots were not processed by the Las Vegas facility where the alleged delays occurred. For example, of the 659 ballots that were rejected for unclear or late postmarks in Washington County, only 244 were processed in Las Vegas. And we do not know how many of those 244 ballots were placed in the mail before

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primary election day. But we are not required to resolve these factual questions because, regardless of the number of ballots at issue, Mr. Jenkins has not demonstrated a constitutional violation.

## II. Mr. Jenkins' Argument that the Statutory Postmark Requirement Interferes with the Right to Vote in Violation of Article I, Section 17 of the Utah Constitution

¶10 Mr. Jenkins' argument under article I, section 17 of the Utah Constitution is likewise

inadequately briefed. That provision states in relevant part: "All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. art. I, § 17. In essence, Mr. Jenkins argues that the statutory postmark requirement relies on the United States Postal Service to postmark ballots and that such reliance on the Postal Service is a form of interference that article I, section 17 proscribes. But his petition does not analyze the meaning of article I, section 17. In particular, he offers no textual analysis or caselaw that speaks to the meaning of the word "interfere," nor any test this court should employ to assess whether a civil power has unconstitutionally interfered with the right to vote.

¶11 Nor does Mr. Jenkins give us anything, in the form of caselaw or argument, that would allow us to conclude that the statutory postmark requirement invites unconstitutional interference with the right to vote. And a constitutional violation is not apparent under these facts. Voters who wish to take advantage of mail-in voting can ensure that their ballots are timely postmarked by mailing them well in advance of the election deadline or by taking their ballots to the post office and asking for them to be postmarked.<sup>[1]</sup>

## Conclusion

¶12 Mr. Jenkins has failed to adequately brief his constitutional challenges to subsection 20A-3a-204(2)(a) of the Utah Code, and he therefore has failed to meet his burden of demonstrating that he is entitled to the relief he seeks. Accordingly, we deny his petition for extraordinary relief.

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Notes:

<sup>[\*]</sup> This decision was originally issued as an order on August 13, 2024. The text is identical.

<sup>[1]</sup> Voters also have the option to bypass the Postal Service entirely by returning their ballots to either a ballot drop box or a polling location.

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