

ORDER ON MOTION

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003542-21T2 MOTION NO.: M-003846-22 BEFORE: PART E JUDGE(S): CARMEN MESSANO KATIE A. GUMMER
---	---

MOTION FILED: 03/20/2023	BY: TAHESHA WAY
ANSWER(S)	BY: MODERATE PARTY
FILED:	RICHARD A. WOLFE

SUBMITTED TO COURT: April 17, 2023

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 1st day of May, 2023, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT

MOTION TO DISMISS APPEAL	DENIED
OR IN THE ALTERNATIVE	
TRANSFER TO LAW DIVISION	DENIED

SUPPLEMENTAL:

After receiving two brief extensions, respondent Tahesha Way, Secretary of State, filed this motion seeking to dismiss the appeal or, alternatively, transfer the appeal to the Law Division. The motion is denied for the following reasons.

Appellants raise a facial constitutional challenge to provisions of Title 19. While we have held that "an administrative agency does not have jurisdiction to rule upon a facial challenge to the constitutionality of the statute under which it operates," In re Earle Asphalt Co.,

401 N.J. Super. 310, 318 (App. Div. 2008), aff'd, 198 N.J. 143 (2009) (citing Abbott v. Burke, 100 N.J. 269, 299 (1985)), the Secretary of State has in the past addressed the constitutionality of our election statutes and has been upheld in such rulings by the Supreme Court, see, e.g., Comm. to Recall Menendez v. Wells, 204 N.J. 79 (2010). Regardless of whether the Secretary could have or should have considered appellants' constitutional claims in this matter, the law is clear that we may and should consider such constitutional arguments on appeal. See Earle Asphalt, 401 N.J. Super. at 318 (constitutional challenge to pay-to-play laws affecting contractor's ability to bid for state contracts "properly before" the court even though not raised, and agency had no jurisdiction to address).

We also reject respondent's contention that the matter should be transferred to the Law Division to develop a more complete record. Putting aside the lateness of such a request, as the Court said in Menendez, issues involved in a facial constitutional challenge are "'purely legal,' and thus 'appropriate for judicial resolution' without developing additional facts." 204 N.J. at 99 (quoting Abbott Lab'ys v. Gardner, 387 U.S. 136, 149 (1967)).

Moreover, as appellants correctly assert, respondent fails to identify any specific factual issues relevant to appellants' facial constitutional challenges that should be addressed if the appeal was transferred to the Law Division. Instead, it argues for transfer based solely on the claim that the certifications and other exhibits included with the notice of petition served on the Secretary of State would otherwise go un rebutted. Under the Rules of Court, all documents submitted to the Secretary become part of the appellate record. See Rule 2:5-4(a). Those documents, which have been submitted in appellants' appendix, are of little if any assistance to the court in deciding the legal issues relating to appellants' facial constitutional challenge, and their submission does not violate respondent's due process rights.

The third volume of appellants' appendix includes items not submitted to the Secretary of State. Appellants argue these materials are included for the court's convenience. We find no reason to strike them from the appendix, as such material – in particular, legal and scholarly authorities – maybe useful to the court. See, e.g., Menendez, 204 N.J. at 106, 109, 177, 121. Respondent may be free to submit similar materials as it deems necessary.

FOR THE COURT:



CARMEN MESSANO, C.J.A.D.

N/A STATEWIDE
ORDER - REGULAR MOTION
JC