

IN THE SUPREME COURT OF PENNSYLVANIA
Nos. 14 MAP 2022 & 15 MAP 2022 (Consolidated)
Nos. 17, 18, & 19 MAP 2022 (Cross Appeals)

DOUG McLINKO,
Petitioner/Appellee

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE,
Respondents/Appellants.

TIMOTHY BONNER, et al.,
Petitioners/Appellees,

v.

LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the
Commonwealth of Pennsylvania, et al.,
Respondents/Appellants.

On Appeal from the January 28, 2022, Orders of the Commonwealth Court,
Nos. 244 MD 2021 and 293 MD 2021

BRIEF OF AMICUS CURIAE HONEST ELECTIONS PROJECT
IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Honest Elections Project (the “Project”) is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable, and legal measures that legislatures put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. The Project has a significant interest in this case, as it implicates the legislature’s role in setting the rules for elections and the constitutional constraints thereon. As *amicus curiae*, the Project submits this brief in support of Appellees.

Pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure, no person or entity other than the Project and its counsel paid in whole or in part for the preparation of this brief or authored any part of this brief.

SUMMARY OF ARGUMENT

In enacting Act 77, which added Article XIII-D of the Pennsylvania Election Code,¹ the Commonwealth attempted to alter election voting rules in a manner that the Pennsylvania Constitution does not authorize. Specifically, Act 77 establishes that any qualified elector may vote by mail. The Pennsylvania Constitution, on the other hand, requires qualified electors to present their ballots in person at a designated polling place on Election Day, unless they meet one of the constitutional exceptions for absentee voting set forth in the Pennsylvania Constitution. *See* PA. CONST. art. VII, §§ 1, 14. In so doing, the Commonwealth attempted an end-run around the Pennsylvania Constitution without undertaking the necessary constitutional amendment process. While legitimate and commendable policy justifications may exist for implementing universal mail-in voting with appropriate safeguard and controls, at least equally legitimate interests weigh against such measures. Most importantly, there is no general right to vote by mail inherent anywhere within the United States or Pennsylvania Constitutions. No legislation, including Act 77, can justify the Commonwealth’s contravention of its own constitution—even in light of a COVID-19 pandemic that came to fruition *after* Act 77’s passage.

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 3150.11–3150.17. Article XIII-D was added by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

The Pennsylvania Constitution does not allow universal voting by mail for very good reasons at the time the Commonwealth's constitution was adopted—the prevention of electoral fraud, the preservation of voter confidence in the integrity of elections, and ensuring the orderly administration of elections. The previous 2 years since Act 77's enactment have demonstrated these concerns are well founded. Indeed, these are very real problems that at least match the Commonwealth's interest in adhering to its own constitutional limitations on voting by mail—particularly when different counties administer vote by mail differently so that citizens of one county are treated differently than citizens of another.

The lack of any heightened interest in no-excuse mail in voting and the existence of very legitimate and real interests in maintaining absentee voting, only weaken the Commonwealth's ability to implement such measures in contravention of its Constitution. For this reason, and for those proffered by Appellees and the Commonwealth Court below, the Court should affirm the Commonwealth Court's decision declaring no-excuse mail-in voting unconstitutional and void.

ARGUMENT

I. **THERE IS NO CONSTITUTIONAL RIGHT TO NO-EXCUSE VOTING BY MAIL**

There is no unconditional right to vote by mail under either the United States or Pennsylvania Constitutions. Furthermore, the constitutional limitations on the right to vote are not automatically abridged by the mere existence of a pandemic or any other phenomenon. Accordingly, the Commonwealth cannot buttress its attempts to side-step its own constitutional safeguards by citing to any heightened interest in protecting voting rights.

A. **There is no federal constitutional right to absentee voting**

As the United States Supreme Court and numerous other courts have repeatedly emphasized, as a matter of federal law, “there is no constitutional right to an absentee ballot.” *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) (citing *McDonald*, 394 U.S. at 807–809). Accordingly, when there is no indication that a state has made it more difficult to vote in-person, but has imposed some limit on absentee voting, “[i]t is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots.” *McDonald*, 394 U.S. at 807. But there is no cognizable federal constitutional right to receive absentee ballots. *Id.* at 807–09. Accordingly, unless the state “in fact absolutely prohibited” a plaintiff from voting in any method, the state has not implicated their voting rights. *McDonald*, 394 U.S. at 808 n.7.

The seminal United States Supreme Court decision that squarely governs this issue in federal jurisprudence is *McDonald v. Board of Election Commissioners*. In *McDonald*, the United States Supreme Court held that an Illinois statute denying certain inmates mail-in ballots did not restrict their right to vote. *Id.* at 807. Instead, it burdened only their *asserted* right to an absentee ballot because there was no evidence that the state would not provide them another way to vote. *Id.* at 807-08. Put differently, there was no indication that the inmates were “in fact absolutely prohibited from voting by the State[.]” *Id.* at 808 n.7 (emphasis added). The absentee rules did “not themselves deny [the inmates] the exercise of the franchise; nor, indeed, d[id] Illinois’ Election Code so operate as a whole[.]” *Id.* at 807–08. Accordingly, the *McDonald* Court applied only rational-basis review, not strict scrutiny, and easily upheld the absentee-ballot scheme. *Id.* at 808–11. The state’s refusal to give the inmates a mail ballot was not irrational, “particularly in view of the many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may [have been] extremely difficult, if not practically impossible.” *Id.* at 809-10.

In the wake of COVID-19, and government measures to combat the virus, the United States Supreme Court seemed to reaffirm *McDonald* in *Texas Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020). In that case, the Texas Democratic Party and other plaintiffs challenged Texas’s law permitting only voters ages 65 and older

to vote by mail without providing an excuse, alleging that the law was unconstitutional considering COVID-19. *See also Texas Democratic Party v. Abbott*, No. 20-cv-438 (W.D. Tex.) (filed April 7, 2020) (ECF No. 9 – Amend. Compl.); *Id.* (ECF No. 15 – Motion for Preliminary Injunction). The United States District Court for the Western District of Texas agreed and issued a preliminary injunction that allowed every voter to vote absentee if they had a “fear” of contracting the virus, but a Fifth Circuit motions panel quickly stayed the injunction. *Tex. Democratic Party*, 961 F.3d 389, 412 (5th Cir. 2020). Like the Pennsylvania Constitution, “Texas has similarly decided to give only some of its citizens the option to vote by mail.” *See id.* at 403. The United States Supreme Court, with no noted dissents, denied an application to vacate the Fifth Circuit’s stay. *Tex. Democratic Party v. Abbott*, 140 S. Ct. at 2015.

Unsurprisingly, the federal circuits have followed suit, holding that there is no unqualified right for all people to vote via absentee ballot. For example, in *Griffin v. Roupas*, the Seventh Circuit upheld a district court’s motion to dismiss a claim on behalf of “working mothers who contend[ed] that because it [was] a hardship for them to vote in person on election day, the United States Constitution require[d] Illinois to allow them to vote by absentee ballot.” 385 F.3d 1128, 1129 (7th Cir. 2004). In affirming the district court’s opinion, the Seventh Circuit noted that:

In essence the plaintiffs are claiming a blanket right of registered voters to vote by absentee ballot. For it is obvious that a federal court is not

going to decree weekend voting, multi-day voting, all-mail voting, or Internet voting (and would it then have to buy everyone a laptop, or a Palm Pilot or Blackberry, and Internet access?). That leaves as the only alternative that will satisfy the plaintiffs a general hardship exemption from the requirement of in-person voting; and as a practical matter that means absentee voting at will. For “hardship” is a subjective category dependent on personal circumstances that cannot be codified but must be left to the judgment of each voter. It is hardly to be supposed that election officials would require proof of hardship or question claims of hardship; the necessary inquiry would be unmanageable.

Id. at 1130. That court went on to note that there are many other issues created by unencumbered mail voting. *Id.* at 1130-31. *See also infra* at Sec. II.

B. State courts narrowly construe constitutional provisions regarding voting by mail

State courts have also narrowly construed the vote by mail or absentee voting provisions of state constitutions. *See, e.g., Fisher v. Hargett*, 604 S.W. 3d 381 (Tenn. 2020) (rejecting a state constitutional challenge to election procedures that anticipated an increase in absentee voting in light of COVID-19 but “not expressly provid[ing] . . . for any expansion of those persons who are eligible to vote absentee by mail pursuant to the [state’s] statute . . .”); *In re State*, 602 S.W.3d 549 (Tex. 2020) (narrowly construing Texas’s absentee voting justifications and holding that lack of immunity to COVID-19 is not itself a “physical condition” that renders a voter eligible to vote by mail within the meaning of Texas Law).

Here, Pennsylvania’s Constitution has not created any burden on the right to vote, but instead has only made it easier to vote by providing for absentee or mail-

in voting. The Constitution has done so while retaining some absentee voting requirements. “[T]his is not a case in which the state applied its own policy, adopted a rule, or enacted a statute that burdened the right to vote” whatsoever. *Coalition v. Rafensperger*, No. 1:20-cv-1677, 2020 U.S. Dist. LEXIS 86996, 2020 WL 2509092 at *9 n.2 (N.D. Ga. May 14, 2020).

There is absolutely no burden on the right to vote here, and the Pennsylvania Constitution’s excuse requirement for absentee voting cannot be subverted without following the proper procedures for amendment. The Commonwealth therefore lacks any kind of heightened interest that may justify an end-run around the proper procedural safeguards associated with amending the Pennsylvania Constitution. The Court should therefore affirm the Commonwealth Court’s decision declaring no-excuse mail-in voting unconstitutional and void.

C. Pennsylvania requires a constitutional amendment before eliminating the requirement of electors to “offer to vote” in person

Act 77 is not the first time that the Legislature has attempted to expand the right to vote by mail or absentee ballot, only for this Court to reject the proposed expansion because it violated the Pennsylvania Constitution. For example, the Legislature passed the 1923 Absentee Voting Act, seeking to expand the right to vote via absentee ballot to civilians who could not vote in person on election day. *See* Act of May 22, 1923, P.L. 309. At the time, the Pennsylvania Constitution

limited absentee voting to those electors who were absent by reason of active military service. PA. CONST. art. VIII, § 6 (1874). This Court declared the 1923 Absentee Voting Act unconstitutional, noting “[w]hether such legislation can be sustained in Pennsylvania depends upon the wording of our Constitution.” *In re Contested Election of Lancaster City’s Fifth Ward Election*, 126 A. 199, 200 (Pa. 1924) (“*Lancaster City*”). This Court concluded that any expansion of voting by absentee ballot required a constitutional amendment:

However laudable the purpose of the Act of 1923, it cannot be sustained. If it is deemed necessary that such legislation be placed upon our statute books, then an amendment to the Constitution must be adopted permitting this to be done.

Id. at 201.

At the time *Lancaster City* was decided—and still today—the Pennsylvania Constitution also provides that “[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.” PA. CONST. art. VII, § 4. But this Court’s analysis in *Lancaster City* made clear that this provision did not provide the exception to swallow the rule. Absent a constitutional exception, an elector must “offer to vote” by ballot—i.e., to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it.” *Chase v. Miller*, 41 Pa. 403, 419 (1862). Act 77 attempts to circumvent this long-settled precedent.

Pennsylvania's Constitution creates only a limited right to vote via absentee ballot, requiring the Legislature to:

provide a manner in which, at 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

PA. CONST. art. VII, § 14. Act 77, of course, would extend far beyond these limitations, providing an unqualified right to vote by mail, but without a concurrent amendment to the Constitution.

Indeed, it appears the Legislature acknowledged the need to amend the Constitution to accommodate Act 77. Senate Bill 411, Printer's No. 1012 (2019), proposed to amend Article VII, Section 14 of the Pennsylvania Constitution to align with Act 77. But the Senate Bill did not pass, and the Constitution was not amended. Act 77 thus got out over the Constitution's skis, alleviating the requirement for electors to "offer to vote" in person at their district in circumstances far broader than what is permitted under Article VII, Section 14. Although a constitutional amendment to facilitate no-excuse mail-in voting might one day be adopted, Act 77 cannot validly "be placed on the statute books" until that day comes to pass.

II. STRONG POLICY CONSIDERATIONS WEIGH AGAINST PERMITTING UNLIMITED NO-EXCUSE MAIL-IN VOTING ABSENT APPROPRIATE SAFEGUARDS.

In addition to the lack of voting rights implications imposed by Pennsylvania’s excuse requirement for absentee voting—under either the Pennsylvania or federal constitutions—there are strong policy considerations that weigh against permitting unlimited no-excuse voting by mail without sufficient safeguards. Indeed, some of these concerns have been experienced by jurisdictions within the Commonwealth only within the previous two years. These concerns include prevention of election fraud, preservation of voter confidence in the integrity of elections, and the safeguarding of the orderly administration of elections.

“[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.” *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (as quoted in *In re Nomination Paper of Nader*, 905 A.2d 450, 459-60 (Pa. 2006)).² The public’s interest in the maintenance, order,

² Although Pennsylvania’s Free Speech and Association Clauses provide protections broader than its federal counterpart, the Supreme Court of Pennsylvania still relies on the federal *Anderson/Burdick* jurisprudence to adjudicate claims related to the administration of elections and voting rights. *Working Families Party v. Commonwealth*, 209 A.3d 270, 284-286 (Pa. 2019) (relying on *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)). Furthermore, the Supreme Court of Pennsylvania has ruled that Pennsylvania’s equal protections provisions are co-extensive with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002).

and integrity of elections is compelling. *See, e.g., Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008).

In *Griffin v. Roupas*, Judge Posner described the many issues that can accompany unlimited absentee voting. “Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting.” *Griffin*, 385 F.3d at 1130-31 (citing John C. Fortier & Norman J. Ornstein, “Symposium: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform,” 36 U. MICH. J.L. & REFORM 483 (2003); William T. McCauley, “Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy,” 54 U. MIAMI L. REV. 625, 631–32 (2000); Michael Moss, “Absentee Votes Worry Officials as Nov. 2 Nears,” NEW YORK TIMES (late ed.), Sept. 13, 2004, p. A1.). In this way, Judge Posner compared no-excuse absentee voting to take-home exams:

Absentee voters . . . are more prone to cast invalid ballots than voters who, being present at the polling place, may be able to get assistance from the election judges if they have a problem with the ballot. And because absentee voters vote before election day, often weeks before, . . . they are deprived of any information pertinent to their vote that surfaces in the late stages of the election campaign. The major parties are reported to be encouraging their core supporters to vote by absentee ballot so that, having as it were put them in the bag, the parties can redirect their efforts and pitch to the waverers.

Id. at 1131 (citing *Nader v. Keith*, 385 F.3d 729, 732-33 (7th Cir. 2004); R.W. Apple Jr., “Kerry Pins Hopes in Iowa on Big Vote From Absentees,” NEW YORK TIMES

(nat'l ed.), Sept. 28, 2004, p. A18; John Harwood, "Early Voting Begins in Presidential Battlegrounds: In Iowa, 'Ballot Chasers' Seek Decisions and an Edge Weeks Before Election Day," WALL ST. J., Sept. 27, 2004, p. A1; Moss, *supra*; Ron Lieber, "Cast a Ballot From the Couch: Absentee Voting Gets Easier," WALL ST. J., Sept. 2, 2004, p. D1.).

Voting fraud and illegal electoral activity associated with voting by mail have occurred in the Commonwealth. *See Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994) (upholding grant of injunction where two elections officials conspired with a candidate to cause illegally obtained absentee ballots to be cast and where the County Board of elections rejected 400 of the absentee ballots because the ballots were from unregistered voters); *Opening of Ballot Box of the First Precinct of Bentleyville*, 143 Pa. Commw. 12, 598 A.2d 1341 (1991) (Four signatures on absentee ballots did not match those on the application for the absentee ballots. The election challenger alleged fraud and the court agreed. However, the challenger did not timely file her petition within the timeframe of 20 days after the election and the petition was denied. The court held that if the petition had been filed in time, the votes could have been invalidated.); *In re Ctr. Twp. Democratic Party Supervisor Primary Election*, 4 Pa. D. & C.4th 555 (C.P. 1989) (Absentee ballot applications and absentee ballots were completed and submitted for 15 persons who do not exist. One individual who was a close associate of a candidate signed for the 15 fraudulent absentee ballots and

hand carried them from the election bureau office. That candidate then beat their opponent by 14 votes. The nomination was voided, and a run-off election was ordered.). Completely unsecured mail voting only serves to increase the chance for voting fraud, or other illegal electoral activity, which not only undermines democracy, but decreases voter confidence in elections. Any such mail voting policies must be accompanied by controls to allow election officials to assure the integrity of elections.

Even absent fraud or illegal electoral conduct, well documented mistakes with absentee ballots have occurred in Pennsylvania even before the difficulties imposed by COVID-19 and the measures implemented to address the virus. *See In re November 3, 2009 Election for Council of Borough, 2009 Pa. Dist. & Cnty. Dec. LEXIS 208 (Allegheny County Dec. 2009)* (An error by an election official in misplacing one absentee ballot, which changed the vote and caused a tie in a borough's council person election, did not call for the absentee ballot to be thrown out since it was cast in accordance with the law and did not involve fraud or tampering); *In re Petition to Contest Nomination of Payton, No. 0049, 2006 Phila. Ct. Com. Pl. LEXIS 366 (C.P. Sep. 14, 2006)* (a candidate was stricken from the ballot and mounted a well-organized write-in campaign. Some voters wrote in the candidate for the wrong election and claimed some in-person and absentee votes were incorrectly calculated, changing the outcome of the election. The court granted

a recalculation). These risks of human error increase with an increase in the volume of voting by mail.

COVID-19 and the measures implemented to combat the virus have only increased the potential issues for voting by mail. For example, amid the 2020 primary and general elections, the United States Postal Service (“USPS”) suffered delays (due in-part to the substantial number of mail in ballots) and may have even lost many ballots. *See, e.g., USPS, Industry Alert: COVID-19 Continuity of Operations Update* (Apr. 17, 2020), <https://about.usps.com/newsroom/service-alerts/pdf/expected-delivery-changes-april-17.pdf>; *NAACP v. USPS*, No. 20-cv-2295, 2020 U.S. Dist. Lexis 208824 (D.D.C. 2020); Joseph Choi, *Thousands of mail ballots may be lost, Pittsburgh-area official says*, THE HILL, (Oct. 29, 2020), <https://thehill.com/homenews/state-watch/523397-thousands-of-mail-ballots-may-be-lost-pittsburgh-area-official-says>. A computer glitch in Allegheny County—the Commonwealth’s second largest county—caused tens of thousands of duplicate, misprinted, or otherwise incorrect ballots to be sent to voters there, leading to voter confusion and diminishing voter confidence in election integrity. Chris Potter, *Glitch Sends Duplicate Ballots To Voters, But System Prevents Double-Voting, County Says*, WESA NEWS (May 14, 2020), <https://www.wesa.fm/politics-government/2020-05-14/glitch-sends-duplicate-ballots-to-voters-but-system-prevents-double-voting-county-says>; The Associated Press, *Pennsylvania county*

says 29K wrong ballots were mailed out (Oct. 14, 2020), <https://apnews.com/article/pennsylvania-archive-elections-3a18b9037e66844b4aa7b08ae687c2dc>. See also Michelle Ye Hee, Elise Viebeck, *Voter confusion rattles election officials in Pennsylvania near Monday's deadline to register*, THE WASHINGTON POST (Oct. 19, 2020), https://www.washingtonpost.com/politics/voter-confusion-rattles-election-officials-in-pennsylvania-near-mondays-deadline-to-register/2020/10/19/87f9ab9c-0ff8-11eb-b1e8-16b59b92b36d_story.html. Indeed, Election administrators in Allegheny County did the same thing again in 2021, misprinting about 16,000 mail ballots during the municipal elections. See Chris Ullery, *Voting by mail in Montgomery County? Here's why you shouldn't return your ballot yet*, Courier Times (Oct. 5, 2021), <https://www.buckscountycouriertimes.com/story/news/2021/10/04/montgomery-county-replaces-16-000-misprint-mail-ballots/5987660001/>. In the end, underregulated voting by mail has inundated election officials, caused voter confusion, and undermined voter confidence in elections.

Therefore, legitimate and compelling policy considerations weigh against permitting unsecured voting by mail in the Commonwealth without appropriate safeguards. This further weakens the Commonwealth's interest in side-stepping the proper procedural safeguards associated with amending its constitution. The Court

should therefore affirm the Commonwealth Court's decision declaring no-excuse mail-in voting unconstitutional and void.

CONCLUSION

For the foregoing reasons, Amicus Curiae, the Honest Elections Project, respectfully requests the Court affirm the Commonwealth Court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains fewer than the 7,000 words permitted under Pa. R.A.P. 2135(a)(1), excluding the cover page, table of contents, and table of authorities. This word count relies upon the word count of the word processing software used to prepare this brief.

GALLAGHER GIANCOLA LLC

Dated: February 25, 2022

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Russell D. Giancola

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I certify that this filing complies with the provisions of the *Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

GALLAGHER GIANCOLA LLC

Dated: February 25, 2022

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