

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG McLINKO,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents.

No. 244 MD 2021

AFFIDAVIT OF JONATHAN MARKS

I, Jonathan Marks, declare and affirm under the penalties of 18 Pa.C.S.

§ 4904 that:

1. I am the Deputy Secretary for Elections and Commissions for the Department of State (the “Department”) of the Commonwealth of Pennsylvania, a position I have held since February 2019. Prior to being appointed as Deputy Secretary, I served as Commissioner for the Department’s Bureau of Commissions, Elections and Legislation. I submit this Affidavit in opposition to Petitioner’s Application for Summary Relief and in support of Respondents’ Cross-Application for Summary Relief.

2. In my current and former positions, I have been responsible, together with the Secretary of the Commonwealth and other officials, for helping to lead the Department’s efforts to ensure that Pennsylvania’s elections are free, fair, secure,

and accessible to all eligible voters. In that capacity, I have worked closely with county executives, elections directors, and personnel in the Commonwealth's 67 counties.

Act 77's Amendments to the Pennsylvania Election Code

3. On October 31, 2019, Governor Wolf signed into law Act 77 of 2019, which amended Pennsylvania's Election Code in several respects.

4. Among other reforms, Act 77 provided that electors who were not eligible for absentee ballots would be permitted to vote with mail-in ballots. Before Act 77 was passed, voters who did not qualify for absentee ballots were required to vote in person at their polling places on election day.

5. As a result of Act 77, the Department and Pennsylvania's county boards of elections (the "counties") anticipated that counties would have to deal with a large increase in the number of ballots they would receive by mail.

6. Those expectations, however, had not accounted for the effects of the COVID-19 pandemic, which took hold in Pennsylvania in March 2020. Due to voters' concerns that voting in person at polling places on election day might expose them to the virus—and given the absence of any vaccine, which was not generally available to the public until 2021—a significant percentage of Pennsylvania voters cast a mail-in or absentee ballot during the 2020 election

cycle. These numbers far exceeded what Pennsylvania elections administrators had planned for prior to the pandemic.

7. The first statewide election following the enactment of Act 77 was the 2020 primary election, which was held on June 2, 2020. In that election, the majority of voters—nearly 1.5 million people—cast a mail-in or absentee ballot, while approximately 1.3 million Pennsylvanians voted in person on June 2.

8. One consequence of the massive use of mail-in voting was that certain counties fell behind in the processing of mail-in ballot applications and the issuance of mail-in ballots.

Following the 2020 Primary Election, the Department and Counties Expended Substantial Resources for the Purpose of Implementing Act 77's Mail-In Voting Procedures

9. Based on historical experience, Pennsylvania election administrators anticipated that a significantly greater number of Pennsylvanians would vote in the 2020 general election than had voted in the 2020 primary election. In addition, due in large part to the ongoing COVID-19 pandemic, election administrators expected that a large percentage of these voters would vote by mail—many more than the number of mail-in voters in the primary election.

10. These expectations were borne out. Of the approximately 6.9 million Pennsylvanians who voted in the 2020 general election, approximately 2.7 million cast a mail-in or absentee ballot.

11. In anticipation of these high numbers, and based on their experience in the 2020 primary election, Pennsylvania election administrators invested significant resources to educate voters about the mail-in voting procedures made available by Act 77; to avoid the delays in application processing and mail-in ballot issuance that had affected certain counties during the primary election; and to minimize the time it would take to process and tabulate millions of returned mail-in ballots.

12. Recognizing that many voters who vote in general elections, particularly in presidential years, do not vote in primary elections and are less familiar with the electoral system than primary voters, the Department, as well as certain counties, continued their extensive public relations efforts to educate voters about the availability of mail-in voting, and to encourage voters to apply early for mail-in ballots, thereby easing the administrative burden on elections officials. The Department alone spent approximately \$13.7 million on these communications between the 2020 primary and general election.

13. Certain counties that fell behind in the issuance of mail-in and absentee ballot applications and ballots during the primary election also invested additional resources in the general election, including purchasing equipment to streamline their fulfillment of ballot requests.

14. Counties also had to invest substantial resources into training additional election workers to process mail-in ballot applications.

15. In the lead-up to the 2020 general election, a particular concern of election administrators was the time it would take to process the large volume of mail-in ballot submissions and tabulate votes.

16. Pursuant to the requirements of the Election Code, each mail-in ballot was returned in two nested envelopes. After checking the voters' completion of the declaration printed on the outside envelopes, county election administrators had to open each of those envelopes in turn, and the ballot then needed to be reviewed and tabulated.

17. Per the Election Code, this canvassing of mail-in ballots did not take place at individual election districts staffed by local polling-place officials (as had previously been the case with the canvassing of absentee ballots); instead, pursuant to the provisions of Act 77, all mail-in and absentee ballots returned in a given county were canvassed by the county board of elections at a central location.

18. To ensure that the results of the election would be known within a reasonable time (and sufficiently in advance of post-election day deadlines prescribed by the Election Code), it was necessary for the counties to use scanning machines to scan and tabulate the votes in an automated fashion. Due to the massive volume of mail-in ballots received by certain counties, it was necessary

for those counties to procure additional automated equipment (such as envelopers, which open the envelopes) to process mail-in ballot submissions. A large number of counties also had to expend resources training additional workers to determine whether voters had sufficiently completed the declarations on the outside envelopes enclosing the mail-in and absentee ballots, and to perform various other aspects of the canvassing and vote-tabulation process.

19. Because of the large volume of mail-in ballot submissions expected to be received during the 2020 general election, many counties purchased ballot scanners and/or other automated mail-in ballot-processing machines during the period between the 2020 primary and general election, at a cost of millions of dollars. The Department is aware that \$605,000 was distributed to the counties through the CARES Act. Also, the Department is aware that counties that bought automated equipment to assist in the canvassing of mail-in ballots used county funds and private funds to purchase the equipment.

20. The expenditures described in Paragraphs 11–19 above were made specifically for the purpose of carrying out the mail-in voting procedures introduced by Act 77. If Act 77's mail-in voting procedures had been invalidated prior to the date of the expenditures described in Paragraphs 11-19 above, these expenditures would not have been made.

Eliminating Act 77's Mail-In Voting Procedures at This Juncture Would Require Election Officials to Spend Substantial Additional Resources to Educate Voters and Mitigate Disenfranchisement

21. Despite the challenges posed by COVID-19 and the unexpected volume of mail-in voting, Pennsylvania's election administrators successfully implemented Act 77's mail-in voting procedures during the 2020 election cycle. As discussed above, millions of voters were educated about the availability of mail-in ballots and voted by mail in the 2020 general election.

22. If Act 77's mail-in voting procedures were now eliminated, the Department and counties would have to invest millions of dollars of resources to educate voters regarding the change. In the absence of such expenditures, the elimination of no-excuse mail-in voting would create significant confusion about the permissible means of voting, leading to voter disenfranchisement.

23. Some of the very features of Act 77 that facilitate voting increase the likelihood that the Act's elimination would have disenfranchising effects.

24. For example, Act 77 allowed "[a]ny qualified registered elector [to] request to be placed on a permanent mail-in ballot list file." 25 P.S.

§ 3150.12(g)(1). Once an elector does so, a mail-in ballot application will automatically be mailed to the elector at the beginning of each year, and the elector's return of that application will cause her to be sent a mail-in ballot for each election during that year. *Id.* An elector who has requested to be placed on this

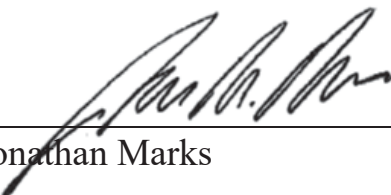
permanent list therefore has every reason to expect that she need take no further affirmative steps to be able to vote; the Election Code assures her that elections officials will send her the appropriate materials at the appropriate time.

25. As of the date of this Affidavit, approximately 1,380,342 Pennsylvania voters were on the permanent mail-in ballot list file established by Act 77.

26. As of the date of this Affidavit, approximately 740,765 Pennsylvanians have had their application for a mail-in ballot for the upcoming November 2, 2021, election approved. Of these ballots that have been approved, 736,534 are those of voters who are on the permanent mail-in list.

I declare that the facts set forth in this Affidavit are true and correct. I understand that this Affidavit is made subject to the penalties for unsworn falsification to authorities set forth in 18 Pa.C.S. § 4904.

Executed on August 26, 2021.


Jonathan Marks