

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

Docket Nos. 14 MAP 2022 & 15 MAP 2022 (Consolidated)
Nos. 17, 18 & 19 MAP 2022 (Cross Appeals)

DOUG McCLINKO,
Appellee,
v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF STATE, et al.

Appellants.

TIMOTHY BONNER, et al.,

Appellees,
v.

**VERONICA DEGRAFFENFREID, in her official capacity as Acting
Secretary of the Commonwealth of Pennsylvania, et al.,**

Appellants.

**BRIEF FOR AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN
SUPPORT OF APPELLEES**

Appeal from the Order of the Commonwealth Court at No. 244 & 293 MD 2021 dated January 28, 2022.

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Dated: February 25, 2022

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I. INTEREST OF AMICUS CURIAE

Landmark Legal Foundation (“Landmark”) is a public interest law firm committed to preserving the principles of limited government, separation of powers, federalism and election integrity. Landmark has submitted numerous amicus briefs in cases before federal courts advocating for implementation of necessary protections to ensure the integrity of the voting process.

Landmark submits this brief in support of Appellees. For reasons stated, Landmark asks the Court to affirm the lower court’s decision and grant the relief sought by Appellees.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members or its counsel made a monetary contribution to its preparation or submission.

II. SUMMARY OF ARGUMENT

As the saying goes, “If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell.” Carl Sandburg, *The People, Yes* 551, (Harcourt, Brace and Company 1936). Appellants and their supporting amici pound the metaphorical table by arguing for a legislative power grab. Their position ignores

Pennsylvania's Constitution, hundreds of years of history, stare decisis and the inherent risks of universal vote-by-mail. They do so even though the Commonwealth has – as recently as 1985 – amended its constitution to increase access to absentee voting. Appellants and supporting amici believe implementing a new voting process that conflicts with the Pennsylvania Constitution can be implemented merely by legislative fix. They are wrong. Past practice and case law mandates that Pennsylvania can only expand its vote-by-mail system through constitutional amendment.

Article VII, section 1 of the Pennsylvania Constitution states that an otherwise eligible individual shall have a right to vote provided “he or she shall have resided in the election district where he or she shall offer to vote at least 60 days immediately preceding the election...” Pa. Const. art. VII, § 1. And the Pennsylvania Supreme Court has ruled that the phrase “offer to vote” means “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). “Offer to vote” expressly excludes mail voting. *Id.* For that reason, exceptions to this standing exclusion need to be clearly stated in the Constitution.

Changes to the voting process must not conflict with the Pennsylvania Constitution. The Supreme Court of Pennsylvania reaffirmed this principle in

1924 when it ruled that the General Assembly must follow the “wording of the Constitution” when enacting new voting regulations. *In re Contested Election of Fifth Ward of Lancaster City*, 126 A. 199, 200 (Pa. 1924). Thus, if the Pennsylvania Constitution limits absentee voting to military personnel deployed in the field, the Pennsylvania legislature could not enact a law permitting any person to vote via absentee ballot. The primacy of the Pennsylvania Constitution stands and increased access to absentee voting must be implemented through the amendment process.

Landmark submits this brief to: (1) alert the Court to the dangers in the vote-by-mail process and how those dangers undermine ballot secrecy; and (2) underscore the primacy of the Pennsylvania constitution, especially in matters pertaining to voting.

States may only enact universal vote-by-mail provided they have closely followed the process set forth in a state’s constitution. Maximizing the opportunities for in-person voting is the best way to protect the integrity of the vote and minimize opportunities for malfeasance. When states recklessly implement universal vote-by-mail, they open their electoral systems to malfeasance and loss of public confidence in the integrity of the process.

III. ARGUMENT

A. Vote-by-mail systems are particularly vulnerable to voting fraud and errors.

Vote-by-mail or “absentee” voting, while becoming fashionable nationally as a method of voting, is particularly vulnerable to corruption such as vote manipulation, voter intimidation and fraud. What began as an exception for individual voters who would be absent from their locale on election day, has become common practice in many states. Vote-by-mail should be an exception to be used in limited circumstance – not the default that is fraught with risk. The best way to ensure elections are free and fair and not viewed with suspicion is through in-person voting.

The vote-by-mail process provides opportunities for fraud and intimidation that are not present in traditional, in-person voting. This process also undermines the constitutional mandate that secrecy in the voting be preserved. Pa. Const. art. VII, § 4. Simply put, it is harder to preserve secrecy when someone completes his or her vote outside the protections of the voting booth.

Opportunities for fraud abound when individuals vote by mail ballot. *U.S. Elections: Report of the Commission on Federal Election Reform* 46 (2005)

(“Carter-Baker Report”).¹ The reason is simple: vote-by-mail occurs outside the strictly regulated confines of the precinct, where election officials guard against undue influence and electioneering, ensure compliance with voting laws and maintain chain of custody of ballots. For these reasons, the Carter-Baker Report concluded that absentee ballot process “remains the largest source of potential voter fraud.” *Id.*

Experience teaches us that fraud occurs in several ways. First, blank ballots mailed to wrong addresses or apartment buildings can be intercepted and filled out by bad actors. *Id.* Second, voters are particularly susceptible to pressure or intimidation when voting at home or nursing homes. *Id.* Finally, third-party organizations can operate illicit “vote buying schemes” that “are far more difficult to detect when citizens vote by mail.” *Id.*

Even a study skeptical of the incidence of voter fraud acknowledges the dangers inherent to vote-by-mail. It notes that – when fraud does occur, “absentee ballots are the method of choice.” *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 56 (2014).

¹ <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf> (February 16, 2022).

These concerns are not new and have been recognized since the advent of absentee voting. During the Civil War, when states began implementing absentee voting to accommodate the large number of deployed soldiers, state legislatures recognized the problems such as lack of privacy, the opportunity for voter fraud, and corruption. John C. Fortier & Norman J. Ornstein, *Symposium: Election Reform: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 494 (2003). For example, in October 1864, individuals in Baltimore and Washington “were arrested and charged with ‘falsely personating and representing officers and soldiers in the United States service, and with falsely and fraudulently signing and forging names of such officers and soldiers... for the purpose of transmitting the votes of the soldiers to be used at the general election.’” *Id.* at 496.

Registration errors also make an already vulnerable voting system even more susceptible to fraud. Should ineligible individuals receive vote-by-mail ballots, unscrupulous organizations can easily exploit the situation and commit wholesale voter fraud. Such exploitation has occurred before. In 2004, 1,700 voters registered in both New York and California requested vote-by-mail ballots to be mailed to their home in the other state with no investigation. Carter-Baker Report at 12. In Allegheny County, the Public Interest Legal Foundation (PILF) documented 12,450 specific instances of voter list irregularities resulting in a

settlement with the county to remedy the errors. *PILF v. Voyer, et al.*, (Case No. 2:20-cv-279 W.D. Pa., 2020).

In short, “there are no safeguards for the voter in the absentee ballot system to ensure he or she is not coerced or paid to vote a certain way.” Fortier & Ornstein, at 503. Voting outside the confines of the voting precinct removes the “curtain of secrecy” allowing others to see the completed ballot. *Id.*

Thus, the Pennsylvania Constitution enshrines secrecy as a necessary component of any method of voting enacted by the legislature. Pa. Const. art. VII, § 4. And the Pennsylvania Constitution rightly limits who can vote by mail. The legislature, however, cast this principle aside when it passed Act 77 which implemented a system of no-excuse mail-in voting.²

According to the Heritage Foundation, which documents incidents of voter fraud, three instances of absentee voting fraud occurred in Pennsylvania in the last two years. In two cases, individuals reportedly used their deceased mother’s identification to procure absentee ballots to cast a fraudulent vote. In the third case, an individual reportedly “picked up girls” and persuaded them to sign

² Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”), 25 P.S. §§3150.11-3150.17

absentee ballots in the names of deceased individuals. The Heritage Foundation, *Election Fraud Cases*.³

B. California serves as a warning to Pennsylvania of the dangers associated with vote-by-mail voting.

Vote-by-mail can serve as a useful tool to ensure that certain voters with specific circumstances have a chance to participate in the political process. It can, however, lead to ballot harvesting and the attendant problems that arise when unscrupulous actors target vulnerable populations. Despite efforts by amici to paint widespread use of vote-by-mail as an overwhelmingly safe and secure process, its widespread use can lead to voter confusion and loss of confidence in the integrity of the electoral process.⁴ Recent events in California show the many problems that arise when vote-by-mail is widely implemented with few controls.

In 2016, California amended its election laws to permit any individual to return the mail ballot of another with no limitation as to the number of ballots collected or relationship to the voter. 2016 Cal. Stat. AB-1921. Unlike here, the state constitution did not proscribe this change. Ballot collectors can be paid by any source so long as compensation is not based on the number of ballots

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https://www.heritage.org/voterfraud/search?combine=&state=PA&year=&case_type=All&fraud_type=All (February 23, 2022).

⁴ See, e.g., Brief for Amicus Curiae Philadelphia County Board of Elections, as Amicus Curiae Supporting Appellants.

collected. Cal. Elec. Code § 3017(e)(1). Next, California's Voter's Choice Act (VCA) encouraged counties to shift to vote-by-mail. 2016 Ca. Stat. SB-450.

Under the VCA, California will automatically send each registered voter a ballot 28 days before the election. Voters can, in turn, return their ballot by mail, take the ballot to a drop-off location, or cast it in person at a designated county vote center.

Id.

California's unregulated ballot-collection laws and its failures associated with the voter list maintenance created the perfect storm on Election Day 2018. Widespread errors lead to frustration, confusion and possible disenfranchisement in the 2018 election. An independent audit of voting registration practices commissioned by the state conclude that California's efforts to automate voter registration resulted in close to 84,000 duplicate registrations with more than double the number with faulty political party designations. John Myers, *Nearly 84,000 duplicate voter records found in audit of California's 'motor voter' system*, Los Angeles Times (Aug. 9, 2019).⁵

California does not limit who may handle ballots and places few restrictions on ballot collection. While ballot harvesters in California are required to write their name, signature and relationship to the voter on the vote-by-mail envelope, a

⁵ <https://www.latimes.com/california/story/2019-08-09/duplicate-voter-records-audit-california-motor-voter-system> (February 25, 2022).

failure to provide this information will not cause a disqualification of the ballot.

Cal. Elec. Code §3011(a) – (c).

The lack of any significant regulation on the vote-by-mail process led to widespread ballot harvesting in California in 2018. Political operatives, “known as ‘ballot brokers’ identify specific locations, such as large apartment complexes or nursing homes” to exploit the voting process. U.S. House of Representatives Committee on House Administration Republicans, *Political Weaponization of Ballot Harvesting in California 2* (May 14, 2020) (“Committee Report”).⁶ After establishing relationships with individuals at these locations, ballot brokers would “encourage, and even assist, these unsuspecting voters in requesting a mail-in ballot; weeks later when the ballot arrives in the mail the same ballot brokers are there to assist the voter in filling out and delivering the ballot.” *Id.* As noted in the Committee Report, “This behavior can result in undue influence in the voting process and destroys the secret ballot, a long-held essential principle of American elections intended to protect voters.” *Id.* It continued, “These very scenarios are what anti-electioneering laws at polling locations are meant to protect against. A voter cannot wear a campaign button to a polling location, but a political operative can collect your ballot in your living room?” *Id.*

⁶ <https://republicans-cha.house.gov/committee-republicans-report-ballot-harvesting-californian> (February 17, 2022).

Ballot harvesting affected the outcome of several races for the U.S. House of Representatives in California. For example, in the 39th Congressional district, Young Kim, the Republican candidate, led the vote count on election night and in the week following election day. Ms. Kim even traveled to Washington D.C. for orientation as a new member of the House. “Two weeks later, the Democrat challenger was declared the winner after 11,000 mail ballots were counted, many of which were harvested.” *Id.* at 3. In the 21st Congressional district, Republican David Valadao led by almost 5,000 votes on election night. The final tally of votes, however, led to Mr. Valadao’s Democratic challenger winning by 862 votes – a swing of 5,701 votes. *Id.* These votes “heavily favored the Democrat candidate at a much higher rate than previously counted ballots.” *Id.* The swing in counted votes was due largely to the large number of vote-by-mail ballots that had been dropped off at the polls and were processed and counted in the days following the election. “In Orange County alone, 250,000 mail ballots were turned in on Election Day.” *Id.* at 4. Such last-minute actions can overwhelm election officials’ ability to properly validate every ballot before the certification deadline.

California’s experience highlights the need to promote in-person voting as the default and limit use of vote-by-mail. Implementation of no excuse vote-by-mail casts aside the fundamental principle of ballot secrecy and allows unscrupulous actors to adversely affect the outcome of elections.

C. Secrecy protects voters from intimidation and other forms of undue influence and expanding vote-by-mail undermines the principle of the secret ballot.

Voting outside the confines of the precinct exposes voters to intimidation and undue influence. The principles that underscore the need for ballot secrecy are discarded when large swaths of the population vote via mail. In short, preserving the secrecy in voting is particularly difficult when much of the population vote by mail.

The concept of a secret ballot gained prominence in 19th century England with the expansion of voting franchise to those beyond the landed gentry and nobles. “Men in humble circumstances” could now vote and thus “scandalous corrupt efforts to secure those new votes provided the rationale for [the secret ballot].” Allison R. Heyward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, 26 J.L. Politics 39, 45 (2010). To deter undue influence, Parliament adopted a secret ballot in 1872. *Id.*

The political philosopher Jeremy Bentham opposed the concept of the secret ballot but recognized that it could be useful “in all cases in which there is more to fear from the influence of particular wills, than to hope from the influence of public opinion.” *Id.* at 46 (citing, Jeremy Bentham “An Essay on Political Tactics,” in *The Works of Jeremy Bentham* (John Bowring ed., Edinburgh, William Tait 1843). Thus, “Bentham observed that secrecy was suitable in mass elections,

because it impeded vote buying, since the buyer cannot observe whether the voter followed through on the contract.” *Id.* Within the context of public elections, “secret voting... [is] most suited to prevent venality and to secure the independence of the electors.” *Id.*

These sentiments took hold in the United States as well. Like England, increased enfranchisement led to growing concerns about fraud and corruption. *Id.* at 45. The widespread use of printed ballots was susceptible to fraud. For example, an 1892 study found that an average of 16% of Connecticut voters “was up for sale at prices ranging from two to twenty dollars.” Fortier & Ornstein, at 489 (citing *The Nation*, May 19, 1892). Lack of secrecy along with the practice of patronage kept voters from voting across party lines. *Id.* As re-printed ballots of each party were a particular color, election observers “could determine the party for which the voter had cast a vote.” *Id.* at 490. And as “big city political machines doled out jobs to loyal supporters, voters knew that their jobs and other political favors depended on voting according to the local party bosses’ wishes.” *Id.*

This corruption set the stage for a voting reform movement. *Id.* “Between 1888 and 1900 Australian ballot reform swept the United States.” Heyward, at 50. And by 1910 almost all states had adopted the Australian ballot – a voting practice using a standard ballot and private voting booth. *Challenges for Election Reform* at 490. While use of this practice did not eliminate all fraud and corruption, its

effects were “salutary and dramatic.” *Id.* at 491. A letter published in a Boston newspaper discussed the effects of the Australian ballot on an election in Louisville, Kentucky:

It can hardly be possible that there is a city in the Union where open corruption has been more generally practiced than in Louisville... . It is an undeniable fact that in the late election there was, except in one place, no corruption successful, and but little attempted, and that with this evidence of its successful working the chances have greatly lessened that bribery will be tried. *Id.* (citing *Letter from Abram Flexuer to Editor*, *Boston Globe*, Jan. 11, 1889, at 6).

A letter to the editor of *The Nation* observed that the first election after use of the Australian ballot was “the first municipal election I have ever known which was not bought outright.” *Id.* (citing *Letter from F. to Editor*, *The Nation*, Dec. 13, 1888, at 476). The law implementing a Massachusetts law that took effect for the 1889 election “was an undoubted success.” *Id.* (citing L.E. Fredman, *The Australian Ballot: The Story of an American Reform* 7 (1968)). “It was generally agreed that the voting was fair and orderly, and there were more and better candidates.” *Id.*

Throughout the 20th Century, states expanded the use of absentee voting but most of these laws were limited in scope, and all were accomplished within a state’s constitutional framework. *Id.* at 504. So “[t]o the extent that a state’s constitution explicitly embraces in-person voting to combat fraud or protect the

secrecy of the ballot, it must carve out exceptions for absentee balloting.” *Id.* at 508.

D. Supremacy of the Pennsylvania Constitution is not an antiquated assumption nor is the concept of amending the Constitution to accommodate changing voter preferences.

Amici writing in support of Appellants spend considerable time arguing that two cases reaffirming the principle that the legislature could override the Pennsylvania constitution by statute are antiquated. *See, e.g.*, Brief of Amici Curiae Molly Mahon, et al. as Amici Curiae Supporting Appellants, at 13. These arguments are misplaced. Whether the vote-by-mail should be used in Pennsylvania is beside the point. Should Pennsylvania wish to extend vote-by-mail, it must do so through the constitutional amendment process. Again, this principle is not new. States observed this practice as early as the Civil War when state constitutional provisions blocked efforts to enact legislation to provide for voting for deployed soldiers. *Challenges for Election Reform* at 496-497.

To preserve secrecy, deter fraud and ensure voters are free from intimidation and undue influence, the Pennsylvania constitution proscribes in-person voting. Exceptions to this rule must be enacted through a constitutional provision. *McLinko v. Commonwealth*, No. 244 M.D. 2021, LEXIS 12, at *39 (Pa. Cmwlth. Jan. 28, 2022).

Despite complaints from Appellants and their supporters, the Commonwealth of Pennsylvania can amend its voting processes via constitutional amendment as conditions dictate. In fact, it has done so multiple times since the colonial era. For example:

1776: Constitution amended to include the requirement that elections “shall be by ballot.” Pa. Const. § 32.

1790: Constitution amended to provide that “all elections shall be by ballot, except those persons in their representative capacities, who shall vote via voce.” Pa. Const. art. III, §2.

1838: Constitution amended imposing a place requirement for voting, “in the election district where [an elector] offers to vote[.]” Pa. Const. art. III, §1 (1838).

1864: Constitution amended for soldier voting. Pa. Const. art. III, §4.⁷

1949: Constitution amended for qualified war veteran voters who are absent from their county of residence due to injuries or illness suffered as a result of their military service. Pa. Const. art. VIII, §18.

1957: Constitution amended to expand absentee voting to individuals who cannot vote in-person by reason of illness or disability. Pa. Const. art. VIII, § 19.

1967: Three actions. (1) Repeal of art. VII, §18 as the provision for wounded veterans made redundant with passage of art. VIII, §19. (2) Renumbered Article VIII, Section 19 to current Article VII, Section 14 and altered the operative verb in this section from “may” to “shall”. (3) Renumbered the provision that a qualified elector must “offer to vote in the election district where he or she resides.”

⁷ Renumbered as Article VIII, § 6 in Pennsylvania’s 1874 Constitution.

1985: Constitution amended to extend absentee voting to individuals who could not vote in person due to a religious holiday or Election day duties. Pa. Const. art. VII, § 14 (1985).

Nothing prevents the Commonwealth from once again amending its constitution to alter vote-by-mail procedures. Until then, Article VII, Section 1's requirements for in-person voting are unquestionably the controlling authority on this issue.

The Pennsylvania legislature enacted a law in contravention of the Pennsylvania Constitution. And when the two are in conflict, constitutional mandates prevail. Legislation "no matter how laudable its purpose, that relaxes the in-person voting requirement must be preceded by an amendment to the Constitution 'permitting this to be done.'" *McLinko v. Commonwealth*, LEXIS 12, *16 (Pa. Cmwlth. Jan. 28, 2022). Pennsylvania amended its constitution as recently as 1985 to expand access to absentee voting. Nothing is preventing it from amending the constitution again. Until then, this Court is bound by its earlier decisions in *Chase* and *Lancaster* and must uphold the Commonwealth Court's decision.

IV. CONCLUSION

For the reasons set forth above, the Court should uphold the Order of the Commonwealth Court below.

Respectfully submitted,

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Dated: February 25, 2022

CERTIFICATE COMPLIANCE WITH WORD LIMIT

I certify that this Amicus Brief was prepared in word-processing program Microsoft Word on Microsoft Office, version 2016, and I further certify that as counted by Microsoft Word, this Brief contains 3666 words.

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

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