

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

Nos. 14, 15, 17, 18 and 19 MAP 2022

DOUG McLINKO,
Petitioner/Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, *et al.*,
Respondents/Appellants.

TIMOTHY R. BONNER, *et al.*,
Petitioners/Appellees/Cross-Appellants,

v.

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

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

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

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ARGUMENT

II. The Commonwealth Court erred in failing to grant the Bonner Petitioners' requested relief for the Commonwealth's violation of federal law.

Respondents seek to mischaracterize the Bonner Petitioners' argument to state that the delegation of authority to make laws for federal elections converts "every alleged violation of state election law into a federal constitutional claim." *See* Initial Brief of Appellants, p. 70. The Bonner Petitioners make no such argument. That is a straw man argument of Respondents' own construction. Indeed, Respondents fail to address the Bonner Petitioners' argument that states exceed their U.S. Constitutional delegation of authority in the conduct of federal elections when states violate their own constitutions when exercising their lawmaking power with respect to the conduct of federal elections.

Respondents construct yet another straw man or attempted diversion when arguing "[a] violation of state law does not state a claim under § 1983." *See* Initial Brief of Appellants, p. 70 (citing *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 391 (W.D. Pa. 2020) and other cases). The Bonner Petitioners do not premise their Fourteenth Amendment claim upon a violation of state law. The Bonner Petitioners clearly state that the Commonwealth violated the United States Constitution by (1) exceeding the federal constitutional delegation of power granted to the state legislature when the legislature violated the Pennsylvania

Constitution in the exercise of lawmaking authority in the conduct of federal elections and (2) failing to prescribe places for casting votes for **all** of the votes cast in federal elections as required by the United States Constitution, Article I, § 4.¹

In *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), an equal protection claim under the Fourteenth Amendment was also premised on vote dilution by a state legislature, in that case due to a constitutionally deficient apportionment plan. The Supreme Court in *Reynolds* did not find, as Respondents attempt to suggest, that the only type of vote dilution that could form the basis of an equal protection claim under the Fourteenth Amendment was vote dilution caused by malapportionment, and Respondents point to no language in *Reynolds* to support that it was so limited. Indeed, to the contrary, subsequent caselaw clearly provides:

Although the reapportionment cases dealt with situations where population deviations across legislative districts resulted in the inequitable and unconstitutional debasement of the voting franchise, the principle that vote dilution unconstitutionally violates equal protection extends to matters *beyond* malapportioned legislative districts.

Pierce v. Allegheny County Bd. of Elections, 324 F. Supp. 2d 684, 695 (W.D.Pa. 2003) (emphasis added).

¹As explained in the Bonner Petitioners' initial brief, Act 77 only requires in person votes to be cast in any particular place, whereas no-excuse mail-in votes can be cast/mailed from anywhere in the world.

As the Commonwealth Court explained in its opinion in support of its emergency preliminary injunction in *Kelly v. Commonwealth*, 620 M.D. 2020 at p.12, n.5 (provided in Appendix A), *vacated* 240 A.2d 1255 (Pa. 2020):

Reynolds, which established the “one person, one vote” doctrine, is the seminal case on voter dilution. Under this concept, a mail-in voting process that would exceed the limits of absentee voting prescribed in Pa. Const. Article VII sec 14 could be construed as violating the “one person one vote.” In that event, the sheer magnitude of the number of mail-in ballots would not be a basis to disregard not only this provision of the Pennsylvania Constitution but also the “one person, one vote” doctrine established by *Reynolds*, one of the bedrock decisions of the U.S. Supreme Court.

The vote dilution here, from allowing and counting votes cast illegally, namely in violation of the Pennsylvania and United States Constitutions, is certainly a valid basis for an equal protection claim as well.

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CONCLUSION

For the aforementioned reasons and the reasons stated in the Bonner Petitioners' initial brief, the Bonner Petitioners respectfully urge this Court to (1) affirm the Commonwealth Court's declaration that Act 77 violates Article VIII, § 1 of the Pennsylvania Constitution; (2) declare that Act 77 further violates Article I, § 2, Article I, § 4, Article II, § 1, and the 24th and 17th Amendments of the U.S. Constitution and, pursuant to 28 U.S.C. § 1983; (3) enjoin Respondents from distributing, collecting, and counting no-excuse mail-in ballots in future state and federal elections; (4) award the Bonner Petitioners' nominal damages, reasonable costs and expenses of this action, including attorneys' fees and costs; and (5) provide such other and further legal and equitable relief as this Court deems just and proper.

Respectfully submitted,



Gregory H. Teufel
Attorney for the Bonner Petitioners

CERTIFICATE OF WORD COUNT

I certify that this brief contains 753 words, as determined by the word-count feature of Microsoft Word.



Date: March 2, 2022

Gregory H. Teufel

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CERTIFICATE OF COMPLIANCE

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.

Date: March 2, 2022



Gregory H. Teufel

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offices sought by Petitioners, but also, for the office of president and vice president of the United States of America as well as statewide, regional and local offices.

On November 21, 2020, the Honorable Mike Kelly, Sean Parnell, Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter, Michael Kincaid, and Wanda Logan (collectively, Petitioners), filed a Complaint for Declaratory and Injunctive Relief in this Court against the Commonwealth of Pennsylvania, the Pennsylvania General Assembly, the Honorable Thomas W. Wolf, and Kathy Boockvar (collectively, Respondents), which this Court indicated it would treat as a petition for review addressed to the Court's original jurisdiction (Petition). In the Petition, Petitioners allege that the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), which added and amended various absentee and mail-in voting provisions in the Pennsylvania Election Code (Election Code),¹ is unconstitutional and void *ab initio* because it purportedly contravenes the requirements of the Pennsylvania Constitution. Petitioners allege that Article VII, section 14 of the Pennsylvania Constitution provides two exclusive mechanisms by which a qualified elector may cast his or her vote in an election: (1) by submitting his or her vote *in propria persona* at the polling place on election day; and (2) by submitting an absentee ballot, but only if the qualified voter satisfies the conditions precedent to meet the requirements of one of the four, limited exclusive circumstances under which absentee voting is authorized under the Pennsylvania constitution. (Petition, ¶16.) Petitioners allege that mail-in voting in the form implemented through Act 77 is an attempt by the legislature to fundamentally overhaul the Pennsylvania voting system and permit universal, no-excuse, mail-in voting absent any constitutional authority. *Id.*, ¶17. Petitioners argue that in order to amend the Constitution, mandatory procedural

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

requirements must be strictly followed. Specifically, pursuant to Article XI, Section 1, a proposed constitutional amendment must be approved by a majority vote of the members of both the Pennsylvania House of Representatives and Senate in two consecutive legislative sessions, then the proposed amendment must be published for three months ahead of the next general election in two newspapers in each county, and finally it must be submitted to the qualified electors as a ballot question in the next general election and approved by a majority of those voting on the amendment. According to Petitioners, the legislature did not follow the necessary procedures for amending the Constitution before enacting Act 77 which created a new category of mail-in voting; therefore, the mail-in ballot scheme under Act 77 is unconstitutional on its face and must be struck down. *Id.*, ¶¶27, 35-37. As relief, Petitioners seek, *inter alia*, a declaration and/or injunction that prohibits Respondents from certifying the November 2020 General Election results, which include mail-in ballots that are permitted on a statewide basis and are allegedly improper because Act 77 is unconstitutional.

On November 22, 2020, Petitioners filed a Motion for Emergency/Special Prohibitory Injunction (Emergency Motion), and a Memorandum of Law in Support of the Emergency Motion. In the Emergency Motion, Petitioners seek to enjoin Respondents from taking official action to tabulate, compute, canvass, certify, or otherwise finalize the results of the November 3, 2020 General Election. They submit that this Court must intervene immediately in order to prevent irreparable injury from the resulting wrongs of an election conducted pursuant to an unconstitutional and invalid mail-in ballot voting scheme (Motion at 2.) They claim their right to relief is clear and they are likely to succeed on the merits because they have showed that a substantial legal question must be

resolved to determine the rights of the parties. They contend that the Pennsylvania Constitution requires voting to take place in person, subject only to specified absentee voting exceptions. They point out that Article VII, Section 14 provides the *only* such exceptions to the *in propria persona* voting requirement of the Pennsylvania Constitution, in four specific circumstances. It states:

(a) The Legislature shall, by general law, provide a manner in which, and 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, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

(b) For purposes of this section, “municipality” means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.

PA. CONST. Art. VII, § 14.

Petitioners argue that outside of the aforementioned prescribed situations, the Constitution does not provide a mechanism for the legislature to allow for expansion of absentee voting. Consequently, Act 77 is illegal and void *ab initio* because it attempts to expand the constitutionally-established exceptions to *in propria persona* voting requirements. (Motion at 30-31.) According to Petitioners, Act 77 did this by creating a false distinction between the existent “absentee voting”

and “mail-in voting” – and “absentee voting” is only constitutionally authorized under the four limited circumstances specifically delineated in Section 14.

Petitioners contend that without an immediate temporary injunction, Pennsylvania’s electoral votes will be cast, electors will be appointed and this Court will lose any authority to provide relief to Petitioners. *Id.* at 22. Petitioners argue that greater injury will result from allowing the certification of election results pursuant to an unconstitutional no excuse mail-in voting scheme than from prohibiting it. Specifically, they contend that no voters will be disenfranchised by the result of a slight delay in certifying the results. Conversely, they argue, if the limited injunction is not granted, the harm to all Pennsylvanians is irreparable because they will suffer the fruits of an unconstitutional election. *Id.* at 24.

By order of November 22, 2020, this Court observed that Petitioners had not properly served the Petition upon the Respondents, directed service of the Petition and the Court’s order in accordance with Rule 1514 of the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. 1514, and further directed that Petitioners file proof of service thereof with the Prothonotary by 10:00 a.m. Monday, November 23, 2020. Upon the filing of the proof of service, the Court scheduled an expedited telephonic status conference with all counsel of record and unrepresented parties for November 23, 2020, at 3:00 p.m. when this status conference convened in the matter, the Secretary of the Commonwealth and the Governor had not certified the results of the November 5, 2020 general election. Indeed, during the course of the status conference counsel for Respondents stated to this Court that the Secretary was only in the process of certifying the results of the election.

Following the status conference with counsel, the Court entered an order on November 23, 2020, directing Respondents to file Preliminary Objections, directing the DNC Services Corporation/Democratic National Committee (Proposed Intervenor)² to file an *amicus curiae* brief in support of its proposed Preliminary Objections filed with the Court, and further directing Petitioners to file answers and briefs in opposition to the Preliminary Objections. The parties were asked specifically to address the application of Section 13(1), (2) and (3) of Act 77, and whether a party is permitted to challenge the constitutionality of Act 77 in any court subsequent to the expiration of the 180 days. (Per Curiam Order, November 23, 2020 at 1.)

Pursuant to the Court's November 23, 2020 order, the Pennsylvania General Assembly filed its Preliminary Objections and a Memorandum of Law in Support thereof, and Secretary Kathy Boockvar (Secretary), the Honorable Thomas W. Wolf, and the Commonwealth of Pennsylvania (collectively, Executive Respondents), together filed Preliminary Objections and a brief in support thereof. Proposed Intervenor has filed an *amicus* brief in support of its Preliminary Objections.

By order of November 24, 2020, this Court, upon further consideration of Petitioners' Emergency Motion, ordered Respondents to file and serve answers to Petitioners' Emergency Motion, and directed that Proposed Intervenor may file a brief as *amicus curiae* in opposition to Petitioners' Emergency Motion, by 12:30 p.m. on the same date. Petitioners complied with the Court's order and filed answers

² On November 23, 2020, the DNC Services Corporation/Democratic National Committee (Proposed Intervenor), sought leave to intervene in this matter. As of the filing of this memorandum opinion, the Court has not yet ruled upon Proposed Intervenor's motion for leave to intervene. The Court notes, however, that Proposed Intervenor filed proposed Preliminary Objections to the Petition with this Court on November 23, 2020.

and briefs in opposition to the General Assembly's and Executive Respondents' Preliminary Objections. The General Assembly and Executive Respondents have filed their respective answers to Petitioners' Emergency Motion, and Executive Respondents also filed a brief in opposition to the Emergency Motion. Finally, Proposed Intervenor filed an *amicus curiae* brief in opposition to Petitioners' Motion.³ The Petitioners' Emergency Motion was thus ripe for disposition by order and opinion.

However, the very next morning after the status conference, on November 24, 2020, the Executive Respondents filed a brief with an appended Press Release dated 11/24/20 from the Department of State (Executive Respondents' Br. in Op. to Motion for Emergency Injunction, Exhibit A.) The Press Release stated that "Following certification of the presidential vote submitted by all 67 counties late Monday, [the Secretary] today certified the results of the November 3 election in Pennsylvania for president and vice president of the United States." *Id.*

The Press Release as well as Respondents' briefs, assert that certification only occurred regarding the results for president and vice president. Based on this information in the Press Release, Respondents argue the entire dispute is moot. A review of the Department's website did not contain any additional information regarding the status of the certification process, nor the entry of any formal public record of such certification. Also, nothing was entered regarding certification of the election results.

³ The Court notes that proposed *amici curiae* Christine Todd Whitman, John Danforth, Lowell Weicker, Constance Morella, Christopher Shays, Carter Phillips, Stuart Gerson, Donald Ayer, John Bellinger III, Edward J. Larson, Michael Stokes Paulsen, Alan Charles Raul, Paul Rosenzweig, Robert Shanks, Stanley Twardy, Keith E. Whittington, and Richard Bernstein (Proposed *Amici Curiae*), have filed an Application for Leave to File Amicus Brief in opposition to Petitioners' Motion (Application). Proposed *Amici Curiae* have attached a brief in opposition to Petitioners' Motion as Exhibit 1 to their Application.

On November 25, 2020, Petitioners responded to Executive Respondents' Brief in Opposition to Motion for Emergency Injunction and Press Release by filing a Supplemental Application for Emergency Relief, which raises additional compelling concerns and questions of fact in support of their underlying Petition for Review regarding the formal requirements and status of the certification process, and whether Respondents might have short-circuited the certification process to purportedly avert this Courts' determination on the merits by declaring victories in the presidential and vice presidential elections, while leaving certification of the elections for the other offices for another time. Petitioners' Supplemental Application for Emergency Relief also raise the issue of whether the results of an election can be certified piecemeal. It is also noted Petitioners alleged that notwithstanding Respondents' Press Release, the dispute was not moot because the certification process for the presidential and vice presidential elections had not been perfected because there were additional steps that need to be completed, including: issuance of commissions to persons elected, pursuant to 25 P.S. § 3160; issuance of certificates election, and transmission of such certificates to the Speaker of the House of Representatives of the United States, in the case of the election of representatives in Congress, pursuant to 25 P.S. § 3163; issuance of certificates of election to the persons elected members of the Senate and House of Representatives of the Commonwealth, and presentation of the several returns of the same elections before the senate and House of Representatives pursuant to 25 P.S. § 3164; delivery of the returns of elections for Auditor General and State Treasurer to the President of the Senate, so that they be "declared elected thereto," the making and filing of certificates for all such elections, the issuance of commissions for all such elections, and the issuance of commissions for each election of Judge of every court, pursuant

to 25 P.S. § 3165; issuance of certificates of election to successful candidates of elections pursuant to 25 P.S. § 2621; delivery of certificates of election for each presidential and vice presidential elector pursuant to 25 P.S. § 3166 (Petitioners' Supplemental Application for Emergency Relief at 4.)

Accordingly, in careful consideration of the exigencies and time constraints in this matter of statewide and national import, and the longstanding constitutional mandate that every citizen of this Commonwealth is entitled to no less than a fair and free election, it was necessary to preliminarily enjoin, on an emergency and temporary basis, Executive Respondents from undertaking any other actions with respect to the certification of the results of the presidential and vice presidential elections, if indeed anything else needs to be done, pending an evidentiary hearing to ascertain the facts of this matter and to determine if the dispute is moot.

Inasmuch as the Secretary had not certified the remaining results of the 2020 general election, it was also necessary to enjoin, on an emergency and preliminary basis, any attempt to certify these results as well. In light of the factual, constitutional and legal issues raised, it was incumbent upon the Court to immediately enter such emergency preliminary injunction to maintain the status quo and ensure that all of the parties and the citizens of the Commonwealth of Pennsylvania were not denied their right to a fair and free election.

Based upon the record before it, this Court has sufficient grounds to enjoin Respondents from further certification activities on an **emergency preliminary basis**, pending the results of the evidentiary hearing it had scheduled for this date, after which the Court would have determined if a preliminary injunction

should issue.⁴ Since the Court is sitting in equity it has the power to fashion such relief as it is vitally important that the status quo be preserved pending further judicial scrutiny. *Com. ex rel. Corbett v. Snyder*, 977 A.2d 28, 43 (Pa. Cmwlth. 2009). (“[t]he purpose of preliminary injunctive relief is to maintain the status quo until the case can be investigated and adjudicated.”)

There is no harm to Respondents by the relief fashioned by this Court. The “Safe Harbor” provision of 3 U.S.C. §5 does not expire until December 8, 2020, and the Electoral College does not vote for president and vice president until December 14, 2020. Additionally, Petitioners appear to have established a likelihood to succeed on the merits because Petitioners have asserted the Constitution does not provide a mechanism for the legislature to allow for expansion of absentee voting without a constitutional amendment. Petitioners appear to have a viable claim that the mail-in ballot procedures set forth in Act 77 contravene Pa.

⁴ FNA preliminary injunction may issue only upon the showing of six *essential* prerequisites, described as follows:

First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

Reed v. Harrisburg City Council, 927 A.2d 698, 702-03 (Pa. Cmwlth. 2007).

Const. Article VII Section 14 as the plain language of that constitutional provision is at odds with the mail-in provisions of Act 77. Since this presents an issue of law which has already been thoroughly briefed by the parties, this Court can state that Petitioners have a likelihood of success on the merits of its Pennsylvania Constitutional claim.

Without the emergency relief ordered by this Court, there would be the likelihood of irreparable harm to Petitioners. As to Petitioner Kelly, although it appears that he gained the most votes in the election for the office he seeks, that result has yet to be certified. Further, he may suffer irreparable harm prospectively should he seek election to public office in the future. If what may be an unconstitutional mail-in voting process remains extant, such mail-in ballots may make the difference as to whether he is successful or not.

As to Petitioners Parnell and Logan, mail-in ballots may have made the difference as to whether they have won or lost their respective elections. Hence, their fates may well turn upon the constitutionality of Act 77. The other voters in this case assert their constitutional voting rights as citizens of Pennsylvania would be irreparably harmed.

Conversely, since the relief ordered by the Court is on an emergency basis, Respondents face no irreparable harm. In any event, the matter of irreparable harm would have been assessed at the evidentiary hearing.

The relief ordered by this Court is also in the public interest. Any claim that the voters of this Commonwealth are disenfranchised by this Court's order are spurious. The Order at issue does nothing more than preserve the status quo pending further and immediate review. That being said, this Court is mindful that one of the alternative reliefs noted by Petitioners would cause the

disenfranchisement of the nearly seven million Pennsylvanians who voted in the 2020 General Election. Specifically, Respondents claim that a temporary stay would disenfranchise voters as the legislature would appoint the electors to the Election College. However, as noted, the legislature is not authorized to appoint the electors to the Electoral College until December 8, the “Federal Safe Harbor” date for certifying results for presidential electors. The Court agrees it would be *untenable* for the legislature to appoint the electors where an election has already occurred, *if* the majority of voters who did not vote by mail entered their votes in accord with a constitutionally recognized method, as such action would result in the disenfranchisement of every voter in the Commonwealth who voted in this election – not only those whose ballots are being challenged due to the constitutionality of Act 77. However, this is not the only equitable remedy available in a matter which hinges upon upholding a most basic constitutional right of the people to a fair and free election. Hence, Respondents have not established that greater harm will result in providing emergency relief, than the harm suffered by the public due to the results of a purportedly unconstitutional election.⁵

⁵ The U.S. Supreme Court has addressed various circumstances concerning disenfranchisement of votes. For instance, it has held the right to vote is foundational to our Republic and this fundamental right “can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). *Reynolds*, which established the “one person, one vote” doctrine, is the seminal case on voter dilution. Under this concept, a mail-in voting process that would exceed the limits of absentee voting prescribed in Pa. Const. Article VII sec 14 could be construed as violating the “one person one vote.” In that event, the sheer magnitude of the number of mail-in ballots would not be a basis to disregard not only this provision of the Pennsylvania Constitution but also the “one person, one vote” doctrine established by *Reynolds*, one of the bedrock decisions of the U.S. Supreme Court.

For all of the above reasons, the Court respectfully submits that the emergency preliminary injunction was properly issued and should be upheld pending an expedited emergency evidentiary hearing

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge

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