

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

Filed 2/24/2022 7:11:00 PM Supreme Court Middle District
14 MAP 2022

In the
Supreme Court of Pennsylvania

DOUG McLINKO,
Petitioner/Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE;
AND LEIGH M. CHAPMAN IN HER OFFICIAL CAPACITY AS ACTING
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA,
Respondents/Appellants.

TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H.
ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID
MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J.
BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN
MOUL, FRANCIS X. RYAN, AND DONALD “BUD” COOK,
Petitioners/Appellees,

v.

LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS
ACTING SECRETARY OF THE COMMONWEALTH OF
PENNSYLVANIA, AND THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF STATE
Respondents/Appellants.

**BRIEF OF THE AMERICA FIRST POLICY
INSTITUTE AS *AMICUS CURIAE* IN SUPPORT
OF DESIGNATED APPELLEES**

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

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Other Authorities

Associated Press, <i>Man Admits to Voter Fraud in Casting Dead Mother’s Ballot</i> , U.S. News & World Report (Apr. 30, 2021), https://www.usnews.com/news/best-states/pennsylvania/articles/2021-04-30/man-admits-to-voter-fraud-in-casting-dead-mothers-ballot	19
<i>Building Confidence in U.S. Elections</i> , Comm’n on Fed. Election Reform (Sept 2005), https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf	2, 9, 13
Catherine Kim, <i>Poll: 70 Percent of Republicans Don’t Think the Election was Free and Fair</i> , Politico (Nov 9, 2020), https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488	12
Daniel Chaitin, <i>Pennsylvania’s Democratic Governor Admits to Violating State Election Law</i> , Washington Examiner (Nov 6, 2021), https://www.washingtonexaminer.com/news/campaigns/pennsylvanias-democratic-governor-admits-to-violating-state-election-law	8
Emily Jacobs, <i>Jerry Nadler Slammed Paper Ballots as ‘Extremely Susceptible to Fraud’ in 2004</i> , N.Y. Post (May 27, 2020),	

https://nypost.com/2020/05/27/jerry-nadler-warned-of-possible-paper-ballot-fraud-in-2004/	10, 11
<i>Fed. Prosecution of Election Offenses</i> 28 (Richard C. Pilger eds., Dep’t of Justice 8th ed. 2017)	14, 15
Fred Lucas, <i>7 Ways the 2005 Carter-Baker Report Could Have Averted Problems with 2020 Election</i> , <i>The Daily Signal</i> (Nov 20, 2020), https://www.dailysignal.com/2020/11/20/7-ways-the-2005-carter-baker-report-could-have-averted-problems-with-2020-election	12, 13
John C. Fortier & Norman J. Ornstein, <i>Election Reform: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform</i> , <i>U. Mich. J.L. Reform</i> 483 (2003)	7
Ken Blackwell & Hogan Gidley, <i>Every Legal Vote is Equal to Every Other Legal Vote, Not More, Not Less</i> , <i>America First Policy Institute Center for Election Integrity</i> (2021), https://americafirstpolicy.com/assets/uploads/files/AFPI-Center_for_Election_Integrity-Center_Overview_Paper.pdf	4
Laura Parker, <i>Why ‘Close-Call’ Presidential Elections are Happening More Often</i> , <i>National Geographic</i> (Nov 4, 2020), https://www.nationalgeographic.com	14
Ohio Secretary of State, <i>Duties & Responsibilities – Chief Elections Officer</i> , https://www.sos.state.oh.us/secretary-office/duties	5
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<i>Pennsylvania 2020 Post-Election Poll Key Findings Report</i> , Muhlenberg College (January 2021) https://www.muhlenberg.edu/aboutus/polling/politicselectionssurveys/archivedpolls/pa2020post-electionpoll/	10
Press Release, Az. Att’y Gen., <i>Scottsdale Woman Accused of Voting in Name of Deceased Person Indicted</i> , (July 12, 2021), https://www.azag.gov/press-release/scottsdale-woman-accused-voting-name-deceased-person-indicted	16
Press Release, Az. Att’y Gen., <i>Scottsdale Woman Pleads Guilty for Casting Illegal Vote in Name of Her Deceased Mother, Accused</i>	

of Voting in Name of Deceased Person Indicted, (Feb 1, 2022),
<https://www.azag.gov/press-release/scottsdale-woman-pleads-guilty-casting-illegal-vote-name-her-deceased-mother>..... 16, 17

Press Release, Delaware Ctny. Dist. Att’y, (Dec 21, 2020),
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Press Release, Mich. Att’y Gen., *AG Nessel Takes Action to Ensure Fair & Free Elections*, (Nov. 13, 2020),
https://www.michigan.gov/ag/0,4534,7-359-92297_47203-545014--,00.html 17

Press Release, Mich. Att’y Gen., *Canton Township Man Pleads Guilty to Misdemeanor Election Law Violation*, (Jan 20, 2021),
<https://www.michigan.gov/ag/0,4534,7-359--549907--s,00.html>..... 17

Press Release, Nev. Att’y Gen., *Attorney General Ford Announces Guilty Plea of Las Vegas Man Charged with Voter Fraud*, (Nov. 16, 2021), https://ag.nv.gov/News/PR/2021/Attorney_General_Ford_Announces_Guilty_Plea_of_Las_Vegas_Man_Charged_with_Voter_Fraud..... 15, 16

Press Release, Nev. Att’y Gen., *Attorney General Ford Announces Voter Fraud Charges* (Oct 21, 2021), https://ag.nv.gov/News/PR/2021/Attorney_General_Ford_Announces_Voter_Fraud_Charges/ 16

Press Release, Tex. Att’y Gen., *AG Paxton Announces Joint Prosecution of Gregg County Organized Election Fraud in Mail-In Balloting Scheme* (Sept 23, 2020),
<https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-joint-prosecution-gregg-county-organized-election-fraud-mail-balloting-scheme> 18

Press Release, Tex. Att’y Gen., *OP-ED: Mail-In Ballots: A Threat to Democracy*, (Sept 1, 2020), <https://www.texasattorneygeneral.gov/news/releases/op-ed-mail-ballots-threat-democracy> 11

Press Release, Tex. Att’y Gen., *Paxton Helps Secure Fair and Safe Elections for Gregg County*, (Jan 25, 2022),
<https://www.texasattorneygeneral.gov/news/releases/paxton-helps-secure-fair-and-safe-elections-gregg-county> 18

Quinn Scanlan, *Here’s how states have changed the rules around voting amid the coronavirus pandemic*, ABC News (Sept. 22, 2020), <https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089> 11, 12

Samuel Adams, *Extract of a Letter from the Southward*, Boston Gazette (Apr 2, 1781), <https://www.gutenberg.org/cache/epub/2094/pg2094.html> 2

Table 1: States with No-Excuse Absentee Voting, Nat’l Conf. of State Leg. (January 3, 2022) <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx>..... 7

The Case Against Mass-Mail in Ballots, America First Policy Institute 1 (Aug 19, 2021), <https://americafirstpolicy.com/latest/the-case-against-massmail-in-ballots> 7, 8

The Top 25 Common-Sense State Election Integrity Reforms, America First Policy Institute Center for Election Integrity (2021), <https://www.documentcloud.org/documents/21108981-afpis-top-25-common-sense-state-election-integrity-reforms> 5

Pursuant to Pa. R.A.P. 531, the America First Policy Institute, by and through its counsel, files this *Amicus Curiae* brief on behalf of designated appellees, Doug McLinko, Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald “Bud” Cook.

INTEREST OF AMICUS CURIAE

The America First Policy Institute (AFPI) is a non-profit, non-partisan research institute dedicated to the advancement of policies that put the American People first. Its guiding principles are liberty, free enterprise, the rule of law, America-first foreign policy, and a belief that American workers, families, and communities are the key to the success of our country. It is the mandate of policymakers to advance and serve these interests above all others. As part of its mission, AFPI houses the Center for Election Integrity, which participates in a national effort to conduct research, educate stakeholders, and develop policies that help make it easy to vote, but hard to cheat. AFPI, thus, works with state partners to highlight measures and best practices that ensure free and fair elections

throughout the United States and promote confidence in United States representative democracy.¹

INTRODUCTION

Elections are the heart of democracy. They are the instrument for the people to choose leaders and hold them accountable. At the same time, elections are a core public function upon which all other government responsibilities depend. If elections are defective, the entire democratic system is at risk.

Americans are losing confidence in the fairness of elections. . . .

Building Confidence in U.S. Elections, Comm’n on Fed. Election Reform (Sept. 2005), <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf>, (hereinafter “Carter-Baker Report”).

The foundation of American self-government is liberty. The people’s natural liberty is expressed by their ability to vote in free and fair elections. As Samuel Adams said, “Let each citizen remember at the moment he is offering his vote . . . that he is executing one of the most solemn trusts in human society for which he is accountable to God and his country” Samuel Adams, *Extract of a Letter from the Southward*, Boston Gazette (Apr. 2, 1781), <https://www.gutenberg.org/cache/epub/2094/pg2094.html>.

¹ We certify that no one other than AFPI paid in whole or in part for the preparation of this *amicus curiae* brief or authored in whole or in part this brief. See Pa. R.A.P. 531(b)(2).

In each election, eligible voters should cast one ballot at one time that is counted by election officials once. When the people believe that this simply democratic equation is not respected, they lose confidence in the electoral process and develop a distrust of their elected representatives. As demonstrated below, there is a crisis of confidence in America's electoral system. With this case, the Court can restore faith in American elections and set the standard for the rest of our country.

The Commonwealth Court of Pennsylvania held that Act 77's no-excuse absentee voting provision violates the Pennsylvania Constitution. Its ruling was primarily based upon this Court's well-established precedent that Article VII, Section 1's requirement that eligible electors "'offer to vote' requires the physical presence of the elector, whose 'ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicile.'" *McLinko v. Dep't of State*, No. 244 M.D. 2021, 2022 WL 257659, at *14 (Pa. Commw. Ct. Jan 28, 2022) (quoting *Chase v. Miller*, 41 Pa. 403, 419 (1862)). To permit "[n]o-excuse mail-in voting," the court reasoned, would require "a constitutional amendment to end the Article VII, Section 1 requirement of in-person voting." *Id.* at *25. Significantly, the public policy principle underlying Article VII, Section 1's in-person voting requirement is

“to exclude disqualified pretenders and fraudulent voters of all sorts.” *Id.* at *13 (quoting *Chase*, 41 Pa. at 418).

AFPI submits that this public policy concern has never been more important as confidence in the American electoral systems continues to erode. As the United States Supreme Court put it, “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The Court should affirm the Commonwealth Court’s decision that Act 77 is incompatible with the Pennsylvania Constitution in light of the stakes.

ARGUMENT

I. The Common-Sense Election Reform Proposals Developed by AFPI’s Center for Election Integrity Demonstrate that the Commonwealth Court Reached the Right Result.

AFPI’s Center for Election Integrity (CEI) is dedicated to the principle that “every legal vote is equal to every other legal vote, not more, not less.” Ken Blackwell & Hogan Gidley, *Every Legal Vote is Equal to Every Other Legal Vote, Not More, Not Less*, America First Policy Institute Center for Election Integrity (2021), https://americafirstpolicy.com/assets/uploads/files/AFPI-Center_for_Election_Integrity-Center_Overview_Paper.pdf. The Honorable Kenneth Blackwell is CEI’s Chairman. A former Cincinnati Mayor, Ohio Treasurer, and

Secretary of State, he is an expert on elections and election security.² Chairman Blackwell and CEI have identified 25 election reforms that, if implemented, will help restore confidence in our electoral process, safeguard the franchise, and ensure the integrity of our elections.

In AFPI’s report, “The Top 25 Common-Sense State Election Integrity Reforms,” CEI specifically targets mail-in ballot voting because it permits unique opportunities for voter fraud and abuse. *The Top 25 Common-Sense State Election Integrity Reforms*, America First Policy Institute Center for Election Integrity (2021), <https://www.documentcloud.org/documents/21108981-afpis-top-25-common-sense-state-election-integrity-reforms>. Therefore, CEI recommends, among other common-sense proposals, the elimination of no-excuse mail-in ballots and mass mailing of unsolicited mail-in ballots; a requirement that all ballots be returned to election officials by election day and before polls close; and comprehensive prohibitions on ballot harvesting, pre-filled absentee applications, and drop-boxes for mail-in ballots. *Id.* These reforms would ensure that legally

² As Ohio Secretary of State, from 1999 to 2007, Chairman Blackwell was “Ohio’s chief elections officer” who oversaw “the elections process and appoint[ed] the members of boards of elections in each of Ohio’s 88 counties. The Secretary of State supervises the administration of election laws; reviews statewide initiative and referendum petitions; chairs the Ohio Ballot Board, which approves ballot language for statewide issues; canvasses votes for all elective state offices and issues; investigates election fraud and irregularities; trains election officials, and works with counties to train poll workers.” Ohio Secretary of State, *Duties & Responsibilities – Chief Elections Officer*, <https://www.sos.state.oh.us/secretary-office/duties-responsibilities/> (last visited Feb. 24, 2022).

competent voters cast ballots and legitimate ballots are counted. CEI's proposals, then, clearly comport with the history of absentee voting, the policy concerns that arise in no-excuse mail-in voting, and the textual requirements of the Pennsylvania Constitution. AFPI, therefore, urges this Court to affirm the Commonwealth Court's decision.

II. The Recent History of No-Excuse Mail-In Voting Favors Restrictions on Pennsylvania's Practice.

CEI's proposals were not developed in a vacuum. They were, in large measure, a response to the explosion in no-excuse mail-in voting regimes across the country. By way of background, absentee voting, in one form or another, was a rare but acceptable method of casting the ballot during the colonial era and early America. In the Massachusetts colony, during the 17th Century, "men could vote from home if their homes were 'vulnerable to Indian attack,'" and Continental Army soldiers in Hollis, New Hampshire, could vote in writing "in 1775 during the American Revolution." Olivia Waxman, *Voting by Mail Dates Back to America's Earliest Years. Here's How It's Changed Over the Years*, Time (Sept 28, 2020), <https://time.com/5892357/voting-by-mail-history/>. It was the exigencies of the Civil War, however, that necessitated America's embrace of "absentee voting on a large scale, as so many of the men who were eligible to vote were away from home fighting." *Id.* Under the supervision of state officials, Union soldiers, for instance,

were permitted to vote in field hospitals and camps. *Id.* In these instances, the common denominator is an inarguable case for good cause shown.

While good cause, such as military service, has historically justified absentee ballot voting since the inception of the American republic, it was generally considered an exception to voting in person and intended to be exercised only by bona fide voters. *Cf.* John C. Fortier & Norman J. Ornstein, *Election Reform: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, U. Mich. J.L. Reform 483, 492-93 (2003) (noting that early proponents of absentee balloting recognized that it “could be in tension with the Australian ballot,” raised “serious questions about fraud and coercion,” and that “Courts struck down a number of state [absentee balloting] laws for violating state constitutional provisions that protected the right to a secret ballot or required voting in person”). Despite the deeply rooted history of good cause absentee voting, in 2000, Oregon became the first state to implement a no-excuse absentee ballot system. *The Case Against Mass-Mail in Ballots*, America First Policy Institute 1 (Aug 19, 2021), <https://americafirstpolicy.com/latest/the-case-against-massmail-in-ballots>. Now, 34 states and the District of Columbia permit no-excuse mail-in voting. *Table 1: States with No-Excuse Absentee Voting*, Nat’l Conf. of State Leg. (Jan. 3, 2022) <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx>.

The compelling concern with the proliferation of no-excuse mail-in voting is application—that is, ensuring that only bona fide voters receive and cast these ballots. The COVID-19 pandemic has shown how vulnerable state systems with no-excuse mail-in ballots are to corruption.

As AFPI outlined in its August 19, 2021, white paper:

The America First Policy Institute’s Center for Election Integrity recognizes that the system instituted by many states such as Pennsylvania, Georgia, and Michigan in 2020 under the guise of COVID-19 disregarded the sanctity of the vote. Newly implemented systems saw every person on a voter roll, regardless of whether they requested a ballot or not, receive a live ballot through the United States Postal Service. Moreover, this system permitted ballots to be dropped off in a drop box in pre-select locations, oftentimes with no security or chain of custody to show their security. This removed any obstacles from ballots being illegally trafficked. Indeed, the security of these ballots was so negligent that ballot drop boxes were sometimes vandalized and torched.

The Case Against Mass-Mail in Ballots at 2. The lack of safeguards creates a system ripe for abuse. Indeed, even the Governor of Pennsylvania, Tom Wolfe, admitted that he violated Pennsylvania law when his wife dropped off his mail-in ballot during a 2021 municipal election. See Daniel Chaitin, *Pennsylvania’s Democratic Governor Admits to Violating State Election Law*, Washington Examiner (Nov 6, 2021), <https://www.washingtonexaminer.com/news/campaigns/pennsylvanias-democratic-governor-admits-to-violating-state-election-law>.

Where electoral systems create a hospitable climate for electoral abuse and voter fraud to occur, the Court need not engage in a rigorous interrogation as to its extent. As the Commission on Federal Election Reform observed, while disagreement exists as to “the magnitude of voter fraud—with some believing the problem is widespread and others believing that it is minor—there is no doubt that it occurs,” and that is sufficient for the Court to affirm the Commonwealth Court’s decision striking down Act 77. *Carter-Baker Report* at 18. AFPI respectfully requests that it does so.

III. No-Excuse Mail-In Voting Creates a Lack of Confidence in Our Elections.

The public’s trust and confidence in our electoral processes are indispensable to representative democracy and republican government. As the Supreme Court observed, “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Purcell*, 549 U.S. at 4. Although dicta, the Supreme Court’s insight is significant because it concentrates on voter confidence and fears, thereby strongly suggesting that a state’s indisputable “compelling interest in preserving the integrity of its election process” includes measures that bolster the confidence of the electorate. *Id.* (quoting *Eu v. San Fran.*

Cnty. Democratic Central Comm., 489 U.S. 214, 231 (1989)). By affirming the Commonwealth Court’s decision, this Court will preserve the confidence boost Pennsylvania voters no doubt received when Act 77 was invalidated.

The data support this. In January 2021, Muhlenberg College polled “406 Pennsylvania’s who participated in the 2020 general election.” *Pennsylvania 2020 Post-Election Poll Key Findings Report*, Muhlenberg College (January 2021) <https://www.muhlenberg.edu/aboutus/polling/politicselectionssurveys/archivedpolls/pa2020post-electionpoll/>. Notably, “[a]bout 1 in 3 Pennsylvanians who voted in the 2020 general election indicated that they *were not at all confident* that the final results of the election accurately reflected how Pennsylvanians voted in the November election.” *Id.* (emphasis in original). Moreover, Pennsylvania voters “are highly divided on potential limiting of the use of mail ballots in future elections, with 51% disagreeing with limiting this method of voting, and 47% agreeing that limits to mail voting should be put in place.” *Id.* When almost half of Pennsylvania voters have no faith in no-excuse mail-in voting, there is a voter confidence problem in the Keystone State’s electorate that clamors for redress by this Court.

Notably, the fears that emanate from casting mail-in ballots bridge the political divide. Indeed, in 2004, Congressman Jerold “Jerry” Nadler, the veteran Democratic politician and current Chairman of the House Judiciary Committee,

observed that, “as a very experienced practical politician from New York, [I] feel constrained to observe that in my experience in New York, paper ballots are extremely susceptible to fraud,” and “with the old clunky voting machines that we have in New York, the deliberate fraud is way down compared to paper.” Emily Jacobs, *Jerry Nadler Slammed Paper Ballots as ‘Extremely Susceptible to Fraud’ in 2004*, N.Y. Post (May 27, 2020), <https://nypost.com/2020/05/27/jerry-nadler-warned-of-possible-paper-ballot-fraud-in-2004/>. The congressman continued, “I want a paper trail, I want a paper somewhere, but pure paper with no machines? I can show you experience which would make your head spin.” *Id.* Similarly, Republican Texas Attorney General Ken Paxton echoed this concern in an op-ed when he quoted a South Texas prosecutor (and registered Democrat) who testified in a legislative hearing in Austin that, “Any time you have ballots that are outside the polling location, you’re going to have fraud . . . I would never recommend everyone voting by mail—it invites fraud.” Press Release, Tex. Att’y Gen., *OP-ED: Mail-In Ballots: A Threat to Democracy*, (Sept. 1, 2020), <https://www.texasattorneygeneral.gov/news/releases/op-ed-mail-ballots-threat-democracy>.

The 2020 election cycle laid bare the confidence crisis mass mail-in voting instigates and intensifies. In response to the COVID-19 pandemic, states had to adjust their electoral processes to accommodate burdensome public health

restrictions. Quinn Scanlan, *Here's how states have changed the rules around voting amid the coronavirus pandemic*, ABC News (Sept 22, 2020), <https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089>. Some “states conducted primarily all-mail elections. There were some that proactively sent applications to vote by mail to registered voters. And some states loosened restrictions around who qualified to cast an absentee mail ballot and what voters needed to provide in order to do so.” *Id.* This patchwork of voting modifications—even assuming the good faith of election officials who supported “loosened restrictions around who qualified to cast an absentee mail ballot”—shook the confidence of large swaths of voters who viewed these measures as a classic cure the disease, kill the patient dead-end. *See, e.g.,* Catherine Kim, *Poll: 70 Percent of Republicans Don't Think the Election was Free and Fair*, Politico (Nov 9, 2020), <https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488>. (“70 percent of Republicans now say they don't believe the 2020 election was free and fair, a stark rise from the 35 percent of GOP voters who held similar beliefs before the election.”).

The Court will recall that, in the 2000 presidential election, the structural flaws of America's elections were on display for the world to witness, resulting in a “tumultuous 36-day postelection battle” that “was settled by the U.S. Supreme Court decision that . . . awarding Florida's 25 electoral votes and the presidency to

Republican George W. Bush over Democrat Al Gore.” Fred Lucas, *7 Ways the 2005 Carter-Baker Report Could Have Averted Problems with 2020 Election*, The Daily Signal (Nov 20, 2020), <https://www.dailysignal.com/2020/11/20/7-ways-the-2005-carter-baker-report-could-have-averted-problems-with-2020-election>. From this election disorder came the blue-ribbon, bipartisan Commission on Federal Election Reform—colloquially known as the Carter-Baker Commission for its co-chairmen, former President Jimmy Carter and former Secretary of State James Baker—to address voting and election integrity issues. *Id.* Relevant here, the Commission concluded that “[a]bsentee ballots remain the largest source of potential voter fraud.” *Carter-Baker Report* at 46.

To address potential voter fraud and other means of abuse, the Commission recommended voter ID standards nationwide. *Id.* at 80. As the 2020 general election demonstrated, that proposal went nowhere, and the electorate’s manifest lack of faith in our electoral processes increased dramatically with the most recent presidential contest. Therefore, this Court should uphold the Commonwealth Court’s decision and, in so doing, bolster confidence in Pennsylvania’s elections. AFPI urges the Court to do so.

IV. No-Excuse Mail-In Voting Leads to Fraud.

It is not only the perception of voter fraud—and the concomitant lack of confidence that assessment engenders in the electoral—but actual voter fraud that

no-excuse mail-in ballots permit that should trouble the Court. In *Crawford v. Marion Cnty. Election Bd.*, Justice John Paul Stevens opined that voter fraud “perpetrated using absentee ballots” demonstrates (1) “the risk of voter fraud [is] real”; and (2) “it could affect the outcome of a close election.” 553 U.S. 181, 195-96 (2008). This concern is especially timely because modern American elections are decided by close margins, particularly at the presidential level. Laura Parker, *Why ‘Close-Call’ Presidential Elections are Happening More Often*, National Geographic (Nov. 4, 2020), <https://www.nationalgeographic.com/history/article/why-close-call-presidential-elections-are-more-likely-today> (“The 2020 race is the third presidential election of the last six that’s gone down to the wire.”). All indicators suggest this trend will continue into the foreseeable future. *Id.* (“Given the polarization of our electorate today, we’re never going to see a 60 percent landslide or a 20 percent margin in the popular vote,’ says Bruce Schulman, an American history professor at Boston University. Americans are just so closely divided along party lines that wide margins of victory are becoming rarer.”). Justice Stevens’s observation, therefore, should inform this Court’s analysis of the Commonwealth Court’s decision.

No less an authority than the United States Department of Justice (the DOJ) has confirmed Justice Stevens’s concerns. In its 2017 Federal Prosecution of Election Offenses monograph, the DOJ’s Public Integrity Section states that

“[a]bsentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the present of election officials and the structured environment of a polling place.” *Fed. Prosecution of Election Offenses* 28 (Richard C. Pilger eds., Dep’t of Justice 8th ed. 2017). Worse still, federal election fraud prosecutors found “[a]bsentee ballot frauds” are among the more “common examples” of voter fraud. *Id.* at 26. The monograph concludes that “election fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters.” *Id.* at 27.

Given the DOJ’s findings and the deeply divided nature of American electoral politics, it is likely that instances of voter fraud will increase in the coming years. In deciding on Act 77’s constitutional viability, this Court has the opportunity to get ahead of future election mischief and the resulting social turmoil and mercenary election litigation this conduct necessitates by affirming the Commonwealth Court’s decision.

Recent state prosecutions for mail-in ballot fraud—no excuse and excuse required alike—confirm the DOJ’s prosecutorial findings. These cases illustrate the ease with which absentee ballot fraud was perpetrated in the 2020 election.

Nevada: On October 21, 2021, Nevada Attorney General Aaron Ford charged Donald Kirk Hartle with two counts of voter fraud for voting twice in the 2020 general election, once for himself and once by mailing in his deceased wife’s

absentee ballot. Press Release, Nev. Att’y Gen., *Attorney General Ford Announces Voter Fraud Charges* (Oct. 21, 2021), https://ag.nv.gov/News/PR/2021/Attorney_General_Ford_Announces_Voter_Fraud_Charges/. On November 16, 2021, Hartle pleaded guilty to voting more than once at the same election, a felony. Press Release, Nev. Att’y Gen., *Attorney General Ford Announces Guilty Plea of Las Vegas Man Charged with Voter Fraud*, (Nov. 16, 2021), https://ag.nv.gov/News/PR/2021/Attorney_General_Ford_Announces_Guilty_Plea_of_Las_Vegas_Man_Charged_with_Voter_Fraud. He will serve a “one-year term of informal probation,” and “[i]f he stays out of trouble for that one-year term, he will be permitted to withdraw his felony plea” and, instead, plead guilty to conspiracy to commit voting more than once at same election, a gross misdemeanor. *Id.* The terms of his plea require that he pay a \$2,000.00 fine. *Id.*

Arizona: On May 4, 2021, Arizona Attorney General Mark Brnovich announced a felony illegal voting charge against Tracey Kay McKee for forging her deceased mother’s signature on a mail-in ballot and then casting it early in the 2020 general election in Maricopa County. Press Release, Az. Att’y Gen., *Scottsdale Woman Accused of Voting in Name of Deceased Person Indicted*, (July 12, 2021), <https://www.azag.gov/press-release/scottsdale-woman-accused-voting-name-deceased-person-indicted>. On February 1, 2022, McKee pleaded guilty to attempted illegal voting, a felony. Press Release, Az. Att’y Gen., *Scottsdale*

Woman Pleads Guilty for Casting Illegal Vote in Name of Her Deceased Mother, Accused of Voting in Name of Deceased Person Indicted, (Feb. 1, 2022), <https://www.azag.gov/press-release/scottsdale-woman-pleads-guilty-casting-illegal-vote-name-her-deceased-mother>. She will appear in court for sentencing on March 2, 2022. *Id.*

Michigan: On November 13, 2020, Michigan Attorney General Dana Nessel charged Paul Parana with impersonating a voter and election law forgery, felonies both, for forging his daughter's signature on an absentee ballot and casting it by mail for the 2020 general election. Press Release, Mich. Att'y Gen., *AG Nessel Takes Action to Ensure Fair & Free Elections*, (Nov. 13, 2020), https://www.michigan.gov/ag/0,4534,7-359-92297_47203-545014--,00.html. On January 20, 2021, Parana pleaded guilty to the lesser charge of misdemeanor election law violation, and the court sentenced him to 90 days probation with an order to pay costs and fees of about \$1,100. Press Release, Mich. Att'y Gen., *Canton Township Man Pleads Guilty to Misdemeanor Election Law Violation*, (Jan. 20, 2021), <https://www.michigan.gov/ag/0,4534,7-359--549907--s,00.html>.

Texas: On September 24, 2020, Texas Attorney General Ken Paxton announced over 100 felony charges, including "fraudulent use of an application for a mail-in ballot," against Gregg County Commissioner Shannon Brown, Marlana Jackson, Charlie Burns, and DeWayne Ward for organizing a

vote harvesting scheme during the 2018 Democratic primary election. To increase the pool of ballots needed to swing the race in Brown's favor, the group targeted young, able-bodied voters to cast ballots by mail by fraudulently claiming the voters were "disabled," in most cases without the voters' knowledge or consent. Under Texas election law, mail ballots based on disability are specifically reserved for those who are physically ill and cannot vote in-person as a result.

Press Release, Tex. Att'y Gen., *AG Paxton Announces Joint Prosecution of Gregg County Organized Election Fraud in Mail-In Balloting Scheme* (Sept. 23, 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-joint-prosecution-gregg-county-organized-election-fraud-mail-balloting-scheme>.

On January 20, 2022, "Shannon Brown and his wife, Marlena Jackson, each pleaded guilty to one count of election fraud, a Class A misdemeanor, for their role" in the Gregg County organized election fraud. Press Release, Tex. Att'y Gen., *Paxton Helps Secure Fair and Safe Elections for Gregg County*, (Jan. 25, 2022), <https://www.texasattorneygeneral.gov/news/releases/paxton-helps-secure-fair-and-safe-elections-gregg-county>. The court sentenced them "to one year of probation and a fine of \$2,000." *Id.*

Pennsylvania: Indeed, in the Keystone State, with Act 77 in force, Delaware County District Attorney Jack Stollsteimer charged Bruce Bartman, on December 21, 2020, with unlawful voting, a misdemeanor, and perjury, a felony, for unlawfully registering his deceased mother and casting an absentee ballot for her by mail in the 2020 general election. Press Release, Delaware Ctny. Dist. Att'y,

(Dec. 21, 2020), <https://int.nyt.com/data/documenttools/press-release-on-criminal-charges-against-bruce-bartman/00763f9543d066ea/full.pdf>. He also unlawfully registered his deceased mother-in-law but did not cast that absentee ballot. *Id.* On April 30, 2021, Bartman pleaded guilty to unlawfully voting and perjury, and the court sentenced him to five years of probation. Associated Press, *Man Admits to Voter Fraud in Casting Dead Mother's Ballot*, U.S. News & World Report (Apr. 30, 2021), <https://www.usnews.com/news/best-states/pennsylvania/articles/2021-04-30/man-admits-to-voter-fraud-in-casting-dead-mothers-ballot>.

These criminal prosecutions demonstrate that mail-in ballot fraud is real. As close margins continue to decide election outcomes, there is every reason to believe voter fraud will proliferate. By affirming the Commonwealth Court's decision, this Court will significantly reduce "disqualified pretenders and fraudulent voters of all sorts" from corrupting Pennsylvania's elections. AFPI respectfully requests that it does so.

CONCLUSION

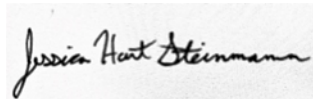
The judgment of the Commonwealth Court should be affirmed.

Dated: February 24, 2022

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

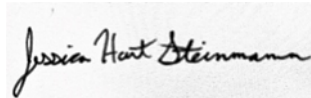
Pursuant to Pa. R.A.P. 127, we certify that this filing complied with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Pursuant to Pa. R.A.P. 531(b)(3), we certify that this filing contains 4,022 words, excluding those exempted by Pa. R.A.P. 2135(b). In making this representation, we have relied on the word count function of the word processing system used to prepare this filing.

Dated: February 24, 2022



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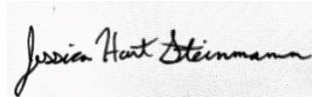
PROOF OF SERVICE

We certify that on February 24, 2022, the brief for America First Policy Institute as *Amicus Curiae* in support of designated appellees was filed through PACFile and, as a result, has been sent electronically to all registered PACFile counsel of record, which satisfies the requirements of Pa. R.A.P. 121.

Dated: February 24, 2022



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