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United States District Court, E.D. Pennsylvania.

Bruce S. MARKS, et al.

v.

William STINSON, et al.

No. CIV. A. 93-6157. | April 26, 1994.

*1 After a hearing on a motion for preliminary injunctive relief on February 7 through 9, 1994, and after a two week final hearing in this matter on March 28 through April 8, 1994, and after considering the evidence, the briefs and arguments of counsel, and the statutory and common law of the Commonwealth of Pennsylvania, the court makes the following Findings of Fact and Conclusions of Law. They represent the combined final findings from both the initial and final hearings.

Opinion

NEWCOMER.

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I. Findings of Fact.

Introduction

1. Plaintiffs are Bruce S. Marks, Kathy Steck, Emanuel Lorenzo, Lydia Colon, Lillian Cruz, Diana Irizarry, Ruth Martinez, Zoraida Rodriguez, Yesenia Vasquez, and the Republican State Committee.

2. Defendants are William Stinson, the William Stinson Campaign, the Philadelphia County Board of Elections (Margaret M. Tartaglione, John F. Kane, Alexander Z. Talmadge, Jr.), and various Doe and Roe defendants.

3. In addition to the parties previously named in this action, the court granted a motion to intervene from Ida Dougherty, Daniel J. Sears, Josephine Martin Sears, Mary Martin, Joseph J. Jordan, Anne Jordan, Mary Sullivan, Mary Mendoloski, Anna Hagan, and Robert Les ("intervenors"). The intervenors each allegedly cast a

legal absentee ballot in the November 2, 1993, Second Senatorial District. Three of the intervenors testified at trial: Robert W. Les, Mary Martin, and Josephine Martin Sears.

4. Republican Bruce Marks ("Marks") and Democrat William Stinson ("Stinson") were candidates for the Pennsylvania State Senate in an election conducted on November 2, 1993, in the Second Senatorial District (the "District"). The election was held to fill the remaining portion of a term which expires in December, 1994. The District consists of all or part of the 7th, 18th, 19th, 20th, 23rd, 33rd, 37th, 42nd, 43rd, 49th, 53rd, 54th, 55th, 56th, 61st, and 62nd wards. *See* Plaintiffs' Exhibit 48. This election was particularly significant to both parties because, at the time of the election, control of the State Senate hung in the balance.

*2 5. A significant portion of the District consists of African-American and Latino voters. Testimony of Voters.

6. According to the certified results of the Philadelphia

City Commissioners (“the Board”), sitting as the County Board of Elections, candidate Marks received 19,691 votes and candidate Stinson received 19,127 votes on the voting machines on Election Day, for a difference of 564 additional votes for Marks. *See* Official Certification, Plaintiffs’ Exhibit 113 and P–88.

7. According to the certified results of the Board, Marks received 371 votes and Stinson received 1,396 votes from absentee ballots. *See* Official Certification, Plaintiffs’ Exhibit 113 and P–88.

8. William Stinson was certified as the winner of the 1993 Special Election for the Second Senatorial District by a plurality of 461 votes. *See* Official Certification, Plaintiffs’ Exhibit 113 and P–88.

Casting Absentee Ballots

9. Pennsylvania permits a qualified elector to vote by absentee ballot in the event that the elector is, *inter alia*, absent from the Commonwealth or county of residence “because his duties, occupation or business require him to be elsewhere during the entire period the polls are open” or is physically unable to go to the polls. 25 P.S. § 3146.1(j) & (k).

10. An elector seeking to vote by absentee ballot must submit a proper absentee ballot application, including a statement that the elector expects to be out of the county on Election Day or that the elector is physically unable to go to the polls, with a declaration stating the nature of the disability and the name, address, and telephone number of the attending physician. 25 P.S. § 3146.2(e)(1) & (2).

11. The application requires that the elector provide a “post office address to which ballot is to be mailed.” 25 P.S. § 3146.2(e)(1) & (2).

12. In Philadelphia County, the application has a mailing label on it for the address, which is removed and affixed to the Absentee Ballot Package when the application is approved. Testimony of Dennis Kelly.

13. Although the law requires the elector to provide the “reason for his absence”, the application in use in Philadelphia County inexplicably does not require this provision, increasing the possibility of widespread abuse of absentee ballots. 25 P.S. § 3146.2(e)(1); Plaintiffs’ Exhibit 1.

14. In Philadelphia, the application is not available in a Spanish translation even though approximately twenty-five (25) percent of the District is Spanish speaking and absentee ballots and declarations are

available in a Spanish translation. Testimony of Commissioner Talmadge; Plaintiffs’ Exhibit 1–3. The inability of some voters to understand the application was a significant factor in facilitating the abuse that occurred in the Second Senatorial District. Testimony of Voters.

15. Absentee ballot applications are processed by the Board and the Board is charged with overseeing elections. The Board consists of the three County Commissioners, Democrat Chairperson Margaret Tartaglione (“Tartaglione”), Democrat Alexander Talmadge, Jr., Esq. (“Talmadge”), and Republican John Kane (“Kane”). 25 P.S. § 3146.2b. Although the Board is controlled by one party, it has a statutory and constitutional obligation to conduct elections fairly and impartially.

*3 16. The practice and procedure of the Board is to promptly time-stamp each application when it is received. Testimony of Commissioner Talmadge and Dennis Kelly. The Board is required to process absentee ballot applications to determine if they meet the legal requirements and to notify an applicant immediately if an application is rejected. 25 P.S. § 3146.2b.

17. The Board does not check the signatures on absentee ballot applications against the signatures on voter registration (binder) cards to prevent forgeries, even though Commissioner Talmadge asserts that it is official policy to do so. Testimony of Commissioner Talmadge and Dennis Kelly.

18. If the absentee ballot application meets the required criteria and is otherwise complete, the Ward, Division, and Registration number (or Control number) is placed on the application by the Board. The Control number is the same number that appears on the voter registration or permanent binder card. Testimony of Dennis Kelly.

19. The Board is required to maintain all applications as public records for two years. 25 P.S. §§ 3146.2(i), 3146.9. The application states, as required by law, that “a voter who receives an absentee ballot ... and, who, on election day, is capable of voting at the appropriate polling place must void the absentee ballot and vote in the normal manner.” 25 P.S. § 3146.2(i); Plaintiffs’ Exhibit 1.

20. The deadline for receipt of applications is 5:00 p.m. on the Tuesday before the election, which in the instant case was October 26, 1993. 25 P.S. § 3146.2a.

21. After approving an absentee ballot application, the Board is to mail or deliver the corresponding absentee ballot package to the elector using the mailing label existent on the application. 25 P.S. § 3146.5. The absentee ballot package (“Absentee Ballot Package”) consists of an outer envelope in which is enclosed a declaration envelope (the “Declaration” or “Declaration Envelope”), an inner envelope (the “Inner Envelope”), a ballot (the

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“Ballot”), and instructions. 25 P.S. § 3146.6; Plaintiffs’ Exhibit 1B. The Ballot also states in English and Spanish: “Warning—If you are able to vote in person on election day, you **MUST** go to your polling place, void your absentee ballot and vote there.” Absentee Ballot Package, P-3.

22. Pennsylvania law does not permit the Board to deliver an Absentee Ballot Package to any person other than the applicant elector, 25 P.S. § 3146.5, and, upon receipt, an elector is to mark the Ballot “in secret.” 25 P.S. § 3146.6. After marking the Ballot, an elector is to seal it in the Inner Envelope, seal the Inner Envelope in the Declaration Envelope, and execute the declaration on the Declaration Envelope. Testimony of Dennis Kelly and Commissioner Talmadge. The instructions, which are the only published information provided to the public and voters, expressly provide in Spanish and English that the absentee ballot must be voted in secret and mailed or delivered “in person” to the Board. These instructions have been approved by the Board and their counsel and restate the provisions of 25 P.S. § 3146.6 of the Election Code to the public and voters. Testimony of Fred Voigt, Pasquale Visco, Charles Bernard, and Edward Schulgen; Absentee Ballot Package, P-3. Pennsylvania law prohibits any campaigning within ten (10) feet of a polling place and no campaigning within the polling place itself. 25 P.S. § 3060; Voigt Testimony.

*4 23. Democrat committee person Jennie Bolno testified that in twenty years, voters in her division received their Absentee Ballot Packages by mail without problem. Bolno Testimony. However, in the event that there are certain persons who physically cannot reach the polls, employees of the Commissioners’ Office have delivered and returned absentee ballots. Testimony of Bernard and Schulgen. The Election Code also provides for voters who need special assistance.

24. The elector is then to “send by mail” or deliver “in person” the executed Declaration Package to the Board. 25 P.S. § 3146.6. The deadline for receipt of absentee ballots is 5:00 p.m. on the Friday before the Election, which in the instant case was October 29, 1993.

25. Ballots are then collected and distributed to polling places on Election Day. 25 P.S. § 3146.8(a); Testimony of Dennis Kelly.

26. An absentee ballot cast by a voter who is in the county of residence and able to go to the polls on Election Day is void as a matter of law, and an absentee ballot voter has a duty to go to the polls and void the ballot in the event such voter is in the county and able to do so. 25 P.S. § 3146.6b.

27. In the event an elector votes in person on Election Day, the Declaration is to be marked “void” and the

absentee ballot is not to be counted. Testimony of Dennis Kelly.

28. At the close of the polls on Election Day, absentee ballots are to be canvassed by opening the Declaration Envelopes, removing, mixing, and then opening the sealed Inner Envelopes, and then counting the ballots. This procedure is conducted to ensure the secrecy of the vote. 25 P.S. § 3146.8.

29. Once the inner envelopes are mixed and opened, it is difficult, if not impossible, to match a ballot with a particular voter. Testimony of Dennis Kelly.

30. The overall absentee ballot process is designed to provide the same privileges and protections as if the absentee voter were to cast a ballot at the polls. Testimony of Commissioner Talmadge.

31. If campaign and party workers who deliver applications to the Board are also given the corresponding Absentee Ballot Packages to deliver to voters, grave opportunity for misconduct is created. For example, there is little or no safeguard against forged applications and ballots, or, when ballots are not completed in secret, the partisan political worker has control over which ballots are subsequently returned and counted. These abuses as well as other illegal activities took place in the instant action. *See, e.g.*, Testimony of Commissioner Talmadge and Birchett; Voter Testimony.

32. Providing Absentee Ballot Packages to campaign and party workers also creates an opportunity for other abuses, such as campaign workers directing completion of, or even completing the applications and ballots for voters. *See infra* Findings of Fact. This practice was routinely conducted by Stinson campaign workers. Testimony of Commissioner Talmadge; Ruth Birchett Testimony; Voter Testimony.

*5 33. Democrats have controlled the County Board of Elections at least since 1971. Testimony of Dennis Kelly; Commissioner Talmadge.

34. The Board is under a statutory duty to strictly enforce the Election Code to avoid any partiality in the conduct of elections. Commissioner Talmadge, however, was unaware of the existence of certain statutory provisions and admitted that certain other provisions were not followed. Commissioner Talmadge and Dennis Kelly both testified that they knew of and even condoned certain Board activities of the Commission that contradicted clear and unambiguous provisions of the Election Code. Testimony of Commissioner Talmadge; Dennis Kelly. Commissioner Tartaglione also knew of, and even directed certain illegal activities, through the office of Commissioner Talmadge. Such activities were specifically designed to favor the Democratic candidate,

William Stinson. Board employees, such as Charles Bernard, Pasquale Visco, and Board employee Edward Schulgen, Esq., confirmed that the Board knowingly violated provisions of the Election Code and followed alleged unwritten procedures in so doing. Bernard Testimony; Schulgen Testimony; Visco Testimony. The alleged unwritten procedures were not known to Republicans or other interested persons. The alleged unwritten procedures were only known to Democrats during the 1993 Special Election. It was established that the Commissioners' Office had previously accepted very limited numbers of absentee ballots to be coordinated through partisan workers prior to the 1993 election. However, these situations always involved approximately two or three absentee ballots. Testimony of Commissioner Kane; Testimony of Voigt. In contrast, the Commissioners' Office secretly processed hundreds of applications and hundreds of absentee ballots through partisan Stinson Campaign workers during the 1993 Special Election.

35. Commissioner Tartaglione also distributed Absentee Ballot Packages in her home to Democrat committee persons, such as Mark Lopez, during weekly 62nd ward meetings prior to the election. Committee persons, including Mark Lopez, also would deliver applications directly to Commissioner Tartaglione's office, Room 130, and then obtain the Absentee Ballot Packages, directly from Tartaglione's office, for delivery to the homes of the voters. When in voters' homes, Lopez would encourage voters to cast votes for Democratic candidates. *See* Tartaglione Deposition; Lopez Testimony.

36. If the Board does not strictly enforce the Election Code, the potential for abuse arises, especially when irregular conduct favors one political party. In the instant action, there was no credible evidence to establish that the improper conduct of the Board was generalized and was not intended to favor any one candidate. The testimony establishes that the malfeasance and nonfeasance of the Board was purposefully directed at favoring only Stinson, the Democrat candidate. This is particularly important in considering final equitable relief.

*6 37. In the past, the policy and practice of the Board was to follow the Election Code and mail or personally deliver Absentee Ballot Packages only to an applicant voter. There are special circumstances where an applicant voter's spouse or close relative could obtain the Absentee Ballot Packages, or in very limited circumstances and in very limited numbers other persons were allowed to handle absentee ballots. There has never been a procedure like that followed in the 1993 Special Election regarding absentee ballots. Testimony of Commissioner Kane, Reba Morella, Peter Medina, Fred Voigt, and others. Fred Voigt is the Executive Director of the Committee of Seventy. Voigt, who has been involved in elections in Philadelphia since 1972, was unaware of any written procedures or any

public notice which informed Republican committee persons or others that Absentee Ballot Packages could be obtained for delivery to voters.

38. Commissioner Tartaglione was unaware of any meeting of the Board where it was publicly disclosed that Absentee Ballot Packages were permitted to be delivered to voters by candidates or their supporters and further was unable to identify any of the Democrat ward leaders and committee people listed on the "Democrat Machine Team" exhibit who were aware of this practice. Tartaglione Deposition. When shown Absentee Ballot Packages, Commissioner Tartaglione asserted that it was "illegal" for anyone but the voter to be in possession of the ballot. *See* Tartaglione Deposition, page 89, line 7 to page 95, line 2.

39. Commissioner Tartaglione's testimony was inconsistent with the position taken by the Board at trial that Absentee Ballot Packages were routinely and openly provided to Republican and Democrat Committee people.

40. Commissioner Kane offered uncontradicted testimony that no Republican committee people obtained Absentee Ballot Packages from his office. Kane specifically instructed Bruce Marks that Absentee Ballot Packages were required to be mailed to voters and were not permitted to be delivered by committee people or campaign workers. Kane Testimony; Marks Testimony. Commissioner Kane's secretary, Kathleen Orth, confirmed that Kane's office only mailed Absentee Ballot Packages to voters and did not provide them to Republican Committee persons or campaign workers. Testimony of Orth.

41. The Marks Campaign did not conduct, nor were any Marks Campaign workers aware of any absentee voting procedure such as the Stinson Campaign conducted with the Commissioners' Office. *See, e.g.,* Testimony of Charles Santore, and Bruce Marks.

42. Board employee Visco testified that the absentee ballot procedure was executed pursuant to an opinion of the City Solicitor. This testimony was without merit. The letter which contained the opinion allegedly relied upon by the Board was located only two weeks before trial and was unrelated to the delivery of Absentee Ballot Packages and the return of completed ballots. *See* Testimony of Schulgen.

The 1993 Special Election

*7 43. In the 1993 Election, Absentee Ballot Packages were provided in bulk, through the offices of Commissioners Tartaglione and Talmadge, to the Stinson

Campaign for delivery directly to voters. *See* Stinson Deposition, at p. 180; Testimony of Martz, Birchett, and Commissioner Talmadge. The official minutes of the Commissioners' public meetings on October 20 and 27, 1993, however, reflect that Dennis Kelly, supervisor of elections, stated that Absentee Ballot Packages were being mailed to voters. It was not disclosed at the meeting that thousands of Absentee Ballot Packages were being delivered to Democrat committee persons or Stinson campaign workers during the 1993 election. Plaintiffs' Exhibits 120, 121.

44. Commissioner Kane, the Republican City Commissioner, was not aware that other Commissioners permitted absentee ballots to be delivered to Democrat committee persons or to Stinson campaign workers. *See* Testimony of Commissioner Kane.

45. Reba Morella was an employee of the Board. Her responsibilities included processing absentee ballot applications and ballots during the two weeks prior to the election. She did not observe absentee ballots being delivered to Democrat committee persons or to Stinson campaign workers during normal office hours. Rather, the standard operating procedure during normal office hours was to mail Absentee Ballot Packages only to the voter or to allow the voter's spouse to pick it up personally. Testimony of Reba Morella.

46. Commissioner Talmadge and Dennis Kelly, in violation of the Election Code, were secretly conducting activities relating to the Absentee Ballot Packages. Commissioner Tartaglione was aware of, and ratified, these activities and also handled a certain number of absentee ballots. Most employees of the Board were not aware of the irregularities. Testimony of Commissioner Talmadge, Kelly and Morella; Deposition of Commissioner Tartaglione.

47. No witness offered any credible evidence that supported the existence of a public practice allowing Absentee Ballot Packages to be delivered to any campaign or political workers for delivery to voters prior to, or during, the 1993 Election. *See* Testimony of Martz, Birchett, Commissioner Talmadge, Voigt, Marks. There were a very limited number of absentee ballots handled by partisan workers prior to the 1993 Special Election. This usually related to situations involving close relatives and was never part of a plan, scheme, or conspiracy, and was never part of some open policy or practice of the Board.

48. For example, Peter Medina, a Democrat Committee persons who worked in various political divisions over the last forty (40) years, never saw Absentee Ballot Packages in the hands of any campaign worker prior to this election. Testimony of Peter Medina.

49. Stinson worker Josue Santiago approached Medina one or two days before the Election (which would be three days after the deadline for the return of absentee ballots to the Board) with a legal size box full of Absentee Ballot Packages that he was delivering throughout minority areas of the District. Santiago convinced Medina that the law had changed to permit Santiago to have in his possession the Absentee Ballot Packages. Medina had never heard of such a procedure before Santiago communicated it to him. Testimony of Peter Medina. Here is an example of hundreds of absentee ballots being cast after the deadline. As will be discussed, there are other factors to consider. However, when viewing this evidence in conjunction with the evidence to be discussed *infra*, the effect of the illegally cast absentee ballots becomes abundantly clear.

*8 50. The Board, through the conduct of Commissioners Tartaglione and Talmadge, Dennis Kelly, and their agents, engaged in a covert process specifically designed to assist the Stinson Campaign by delivering, and/or knowingly allowing the delivery of, hundreds of Absentee Ballot Packages directly to the Stinson Campaign and other Stinson supporters, rather than mailing or delivering them to voters. This conspiracy was conducted to favor William Stinson and was coordinated through the Board, Stinson Campaign workers, and ratified by Stinson himself. *See* Testimony of Birchett, Kelly, Jones, and Commissioners Talmadge and Kane.

The Stinson Campaign Organization

51. The campaign entity organized under Pennsylvania law for the Stinson Campaign was registered as the "Committee to Elect Bill Stinson". Joseph Martz served as the campaign manager and was paid through Rendell '91, a political action committee associated with Democrat Mayor Ed Rendell. Plaintiffs' Exhibit 11; Testimony of Joseph Martz.

52. Frank Felici served as the Treasurer for the Stinson Campaign. Testimony of Martz and Jones.

53. During July, August, and September, 1993, Stinson canvassed predominately Caucasian areas of the district with Craig Cummons, Frank Felici, William Jones, and others. During the canvassing, the canvassers solicited absentee ballot applications from individuals, including persons registering to vote for the first time, pursuant to a plan to obtain twenty (20) absentee ballots from each division. Cummons had worked for Stinson in Stinson's 1991 City Council Campaign and had obtained absentee votes for Stinson. Testimony of Jones; Stinson Deposition, at p. 114; Plaintiffs' Exhibit 113. In October, 1993, Robert O'Brien began overseeing the Stinson Campaign

in the non-minority areas. Testimony of O'Brien.

54. O'Brien reviewed the applications obtained by the Stinson Campaign and routinely filled in the dates on those which were not complete. As a result, although registration and absentee ballot applications were obtained simultaneously and registrations were submitted before the October 4th deadline, many absentee applications were dated after being obtained, and in some instances, after the deadline. The alterations to some of the applications are made clear by the different colored ink on the originals. O'Brien Testimony; *see* original Exhibit Applications P-227.

55. O'Brien instructed Cummons to deliver approximately 540 completed applications to the Commissioners' Office and obtain the corresponding Absentee Ballot Packages for delivery to the homes of the voters. Cummons Testimony; O'Brien Testimony.

56. Cummons made three trips to deliver the applications in a large box marked "Stinson Campaign". Birchett also delivered completed applications to Tartaglione's office at the direction of O'Brien. Cummons received from the Board's office the corresponding Absentee Ballot Packages in an envelope designated "Stinson Campaign" for delivery by the campaign workers to the homes of the voters. Cummons Testimony; Birchett Testimony; O'Brien Testimony.

*9 57. As a result of the Stinson Campaign's conduct in the non-minority areas, the Stinson Campaign received over 500 Absentee Ballot Packages from the Commissioners' Office for delivery to the homes of the voters. O'Brien Testimony.

58. O'Brien then broke the Absentee Ballot Packages down by ward and division and provided them to Stinson Campaign workers to take into the homes of the voters. The Packages were then returned to O'Brien for delivery to the Board. O'Brien Testimony.

59. Cummons received his instructions from O'Brien and delivered Absentee Ballot Packages to voters and then delivered the completed absentee ballots to the Stinson Campaign. Cummons Testimony.

60. Robert O'Brien delivered forty (40) Absentee Ballot Packages obtained by his workers to Democrat committeeman Mark Lopez. Lopez then delivered these Packages into the homes of the voters in Commissioner Tartaglione's 62nd ward. Testimony of O'Brien.

61. Commissioner Tartaglione conducted similar activities in the 62nd ward by distributing Absentee Ballot Packages directly to her campaign workers in her own home during weekly ward meetings. O'Brien Testimony; Lopez Testimony; Tartaglione Deposition, at page 60,

line 17 to page 64, line 15.

62. Stinson issued instructions to Joseph Martz, his Campaign Manager, and to O'Brien to direct the campaign workers, when delivering the Absentee Ballot Packages into the homes of the voters, to instruct the voter to either check the straight Democratic box, or to check off the individual Democratic names, and then to return the completed absentee ballot to O'Brien. O'Brien kept a tight reign on all absentee ballots and was assured by the workers that his instructions were being carried out. Testimony of O'Brien.

63. As a result of this practice and procedure, and the delivery of absentee ballots into the homes of the voters with the instructions to vote for Stinson, approximately 450 absentee ballots in favor of Stinson were returned to the Stinson Campaign. The ballots were then delivered to the Board by Craig Cummons in two or three deliveries. O'Brien Testimony; Cummons Testimony; Exhibits P-204 and P-213. Although the Board was aware that absentee ballots were being returned by the Stinson Campaign in massive quantities, no voters testified that they relied on representations by the Board in permitting their absentee ballots to be delivered by campaign workers and returned by the Stinson Campaign.

64. Many persons who were hesitant to register because they simply did not want to go to the polls were told that they could fill out an absentee ballot application and obtain an absentee ballot out of convenience. Many applications were received based on this misrepresentation. Testimony of Jones; Testimony of Voters.

65. Many of the applications listed the basis for voting absentee as being out of the county when it was clear in most of the situations that in July, August, or September the voter had no basis to believe he or she would be out of the county on Election Day. Testimony of Jones; Voter Testimony.

*10 66. Candidate Stinson and his campaign workers instructed the canvassers not to fill in the date on the absentee ballot applications in order to conceal that the applications had been solicited many months prior to Election Day. Testimony of Jones. This procedure was also followed late in the campaign to conceal that hundreds of applications and hundreds of absentee ballots were obtained by Stinson workers after the application and absentee ballot deadlines. *See* Testimony of Cummons and Birchett.

67. Numerous absentee ballots and applications solicited with Stinson's personal involvement were obtained in violation of the Election Code. Testimony of Jones.

68. The Stinson Campaign also used a strategy whereby

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workers would tell people they could vote from home, even though many such people were unemployed, for example, and were not going to be out of the county. There was simply no attempt to establish that any of the people were going to be out of the county. The “out of the county” exception was the easiest exception because it was virtually impossible to verify. Testimony of Jones.

69. After working in the field for a few weeks, Jones was assigned to review applications after canvassing each evening and to complete, when appropriate, necessary information for submission to the Board. Jones became concerned that the applications were being obtained in an illegal manner. Testimony of Jones.

70. Jones approached Stinson and complained that improper conduct was taking place in reference to the ballot applications. Stinson advised him to try and have the applications corrected and to return them to solicitors Cummons and Campaign Treasurer Felici for correction. Jones carried out Stinson’s instructions, but the same type of problems continued. Testimony of Jones.

71. After he realized that the situation had not been corrected, Jones again approached Stinson and informed Stinson that the applications were still being obtained in an improper manner. Stinson directed Jones to use his best judgment and if fifty (50) percent of it looked correct, then he was satisfied. Testimony of Jones. Stinson ratified, facilitated, and conducted procedures to obtain illegal absentee ballots.

72. Stinson told Jones that he was never going to lose another election because of absentee ballots. Stinson then admonished Jones for placing the dates on applications instead of leaving the date blank. Testimony of Jones. This was a standard practice of Stinson Campaign workers.

73. Jones raised questions with Frank Felici and others about the absentee ballots and applications, and Jones was assured that it would not be relevant because Stinson was going to win by such a large margin. Testimony of Jones.

74. After these discussions with Stinson and other campaign workers, Jones became increasingly concerned about the absentee ballot problem and was worried that if he submitted the absentee ballot applications to the Board, he would be the “fall guy” in the event this information became public. In light of this and the continuing illegal activities, Jones resigned. Testimony of Jones.

*11 75. Jones was considered to be a good worker by Stinson, who stated he had no problems with Jones’ performance. Stinson Deposition, at p. 101.

76. Stinson stated at his deposition that the applications in the Caucasian areas were submitted directly to

Commissioner Tartaglione’s office and corresponding Absentee Ballot Packages were returned directly to the Stinson Campaign. Stinson Deposition, at p. 101.

Absentee Ballot Programs of Other Stinson Supporters

77. The Absentee Ballot process was further abused by various committee persons in the District. For example, Fani Papanikalau, a Democrat committeewoman, obtained several illegal absentee ballots in the 42nd ward, 6th division. Adverse inference from Papanikalau Fifth Amendment Testimony.

78. In addition, Absentee Ballots were forged in this division. Testimony of Pedro Figueroa.

79. Barbara Landers, a Democrat committee person, obtained several illegal absentee ballots in the 43rd ward, 19th division. Adverse inference from Landers Fifth Amendment Testimony.

80. Voters were misled into improperly voting by absentee ballots in this division. Testimony of Voters.

81. Anthony Rotondo, a Democrat committee person, Patricia Hughes, Democrat ward leader in the 7th Ward, and Donald Brophy, Democrat Chairman of the 7th Ward obtained several illegal absentee ballots. In addition, Absentee Ballot Packages were provided directly to Democrat committee persons throughout the District. Testimony of Dennis Kelly. Numerous Democrat workers from the 53rd ward, including ward leader Christine Solomon, and committee persons Anthony Iannarelli and Felix Saldutti, also obtained illegal absentee ballots in this ward where Stinson obtained 178 absentee votes.

82. Various voters testified throughout the proceedings. The voters often expressed anger and disillusionment over the entirety of the election process. *See, e.g.*, Testimony of Marjorie Fine, N.T. 4/6/94, at 282.

The Minority Absentee Ballot Program

83. Approximately three weeks before the Election, Jones received a phone call from Marge Summers, a worker for the Stinson Campaign. Summers told him that a new internal poll from the Democrat State Committee was published and showed that William Stinson was four (4) percent behind Bruce Marks. Testimony of Jones. This was an initial motive to target specific minority groups. What followed was an intentional and deliberate scheme

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conducted by the Stinson Campaign and the Commissioners' Office to abridge the right to vote of hundreds of persons based on their race.

84. At that time, Summers disclosed to Jones that the Stinson Campaign was going to saturate the Hispanic areas with applications and that the saturation was going to use the same general scheme that was employed earlier. The "joke" in the Stinson Campaign was that the Hispanics would sign anything. Testimony of Jones. The Stinson Campaign then specifically targeted Latino and African-Americans as groups to saturate with the illegal absentee ballot program. Testimony of Jones; Testimony of Voters.

*12 85. In response to the poll, the Stinson Campaign scheme was to convince Latino and African-American voters to cast absentee ballots using, *inter alia*, "Out of County" as the excuse for absentee voting. Testimony of Voters; Jones; and Adverse inference from Ascencio, Landers, Pratt, and Santiago Fifth Amendment Testimony.

86. Ruth Birchett served as the campaign director for the African-American and Latino areas. Testimony of Birchett and Martz. Josue Santiago ("Santiago") was responsible for overseeing the absentee ballot program in the Latino areas. He was hired directly by Stinson, reported to Stinson, and his activities were ratified by Stinson. Testimony of Birchett and Martz.

87. Sultan Mateen ("Mateen") was responsible for overseeing the absentee ballot program in the African-American areas. Angel Ascencio ("Ascencio") was a worker on the Latino Team who solicited absentee ballot applications and ballots. Testimony of Birchett; Adverse Inference, Ascencio Fifth Amendment Testimony.

88. Ramon Pratt ("Pratt") was a Latino Team worker who solicited absentee ballot applications and ballots. Adverse Inference Pratt Fifth Amendment Testimony; Birchett Receipts.

89. Peter Medina, a Democrat Committee person, assisted Santiago as part of the Latino Team. Testimony of Medina.

90. Several other persons were identified by voters as Stinson supporters who conducted the same absentee ballot procedure. Testimony of Voters.

91. The absentee application and ballot scheme consisted of deceiving Latino and African-American voters into believing that the law had changed and that there was a "new way to vote" from the convenience of one's home. Testimony of Voters; Adverse inference from Fifth Amendment testimony of Santiago, Pratt, and Ascencio.

92. Birchett was instructed to direct Stinson Campaign workers to have voters cast votes for Stinson. Although she claims not to have followed these instructions, the evidence is overwhelming that Stinson workers exerted improper influence over many persons they solicited. Testimony of Birchett; Testimony of Voters.

93. Prior to their contact with Ruth Birchett in her capacity as a Stinson worker, Commissioner Talmadge and Brown were aware that Birchett worked for Stinson, and she had worked on Talmadge's campaign in 1991. Testimony of Commissioner Talmadge.

94. Even though he has a duty to know and understand the Election Code and stated that he was aware of most of the absentee voting requirements, Commissioner Talmadge approved the absentee ballot procedure even though the procedure involved providing official absentee ballot materials and the ballot declarations to campaign workers. Testimony of Commissioner Talmadge.

95. Ruth Birchett even questioned both Candidate Stinson and Commissioner Talmadge as to the propriety of this scheme. She was assured that it was proper. Testimony of Birchett and Commissioner Talmadge.

96. Delivery of Absentee Ballots Packages to the Stinson Campaign workers was not initially disclosed to Commissioner Kane nor was it on the public record of the meetings held by the County Commissioners on October 20 and 27, 1993. Such meetings only disclosed the incorrect information that the Absentee Ballot Package were being returned to the voters by mail. Plaintiffs' Exhibits 120 and 121.

*13 97. The Board's delivery of Absentee Ballot Packages to the Stinson Campaign was designed to aid the Stinson Campaign in obtaining more votes through personal contact with the voter and the Stinson Campaign workers, and was a discriminatory practice which favored one candidate and party over another.

98. Based on this scheme, whereby the Stinson Campaign retained custody of the Absentee Ballot Packages from the Board to the voter and back again, a sampling of over 30 voters testified that in numerous instances Stinson workers executed applications, ballots, and/or declarations without the voter understanding the nature of the document. In addition, there was significant testimony indicating Stinson workers exerted improper influence over voters in the voters' homes. For example, Stinson workers would either instruct the voter to check certain places on the ballot, or in some instances, the workers even filled out the ballots for certain voters and forged other ballots. Testimony of Voters.

99. Voters also completed applications and Declaration

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Packages after the statutory deadline for receipt by the Board and such ballots were counted by the Board. Testimony of Medina and Voters.

100. Peter Medina obtained Absentee Ballot Packages from voters on November 1, three days after the statutory deadline. Medina acknowledged that, on approaching the voters with their ballots, most of the voters were unaware that they had signed absentee ballot applications. Testimony of Medina.

101. The testimony of the voters is credible, especially given the Board's undisputed failure to properly time-stamp official documents such as the Rejected Applications.

102. Some voters testified that they do not want their own illegal votes to count in light of the manner in which their votes were obtained. Some voters testified that they voted as they would have voted had they gone to the polls. Testimony of Voters.

103. The Stinson Campaign and Stinson workers conducted a widespread and deliberate scheme throughout the Latino and African-American areas to knowingly misrepresent election procedures and illegally obtain absentee votes. This scheme was known to at least Commissioners Talmadge and Tartaglione, and to Dennis Kelly, and was known and ratified by Candidate Stinson. Testimony of Jones, Medina, Birchett, Brown, and Commissioners Tartaglione and Talmadge.

The \$1.00 Per Ballot Program

104. One part of the scheme involved paying field workers \$1.00 per application or ballot obtained. Testimony of Martz and Birchett, and Adverse Inference from Fifth Amendment Testimony of Santiago, Pratt, and Ascencio. Ruth Birchett testified that at least \$500 to \$700 was dispensed in this effort to obtain such amount of votes. It was established at the final hearing that Birchett paid approximately \$600 to Stinson field workers for absentee ballots at the rate of \$1.00 per ballot. Testimony of Birchett, N.T. 3/28/94, at 199, 203, 204, 218, 225.

*14 105. The general scheme was also implemented through the use of phone bank scripts in English and Spanish which informed voters that they could elect Bill Stinson by voting from home. Plaintiffs' Exhibit 8. The English translation of the Spanish script could reasonably lead a person to believe that there was a new way to vote. Testimony of Martz and Birchett.

106. After receiving Absentee Ballot Packages from Commissioner Talmadge's office, Birchett distributed said ballots to Stinson Campaign workers, Josue Santiago, Sultan Mateen, Willie Torres, Ramon Pratt, Angel Ascencio, and others to be taken to the homes of the voters. The Campaign workers were to obtain a Stinson vote from the voter and return the absentee ballots directly to Ruth Birchett. Voters were often told how to vote or were improperly influenced into voting for Stinson, and voters were seldom able to cast their ballots in secret. Ruth Birchett also delivered 113 ballot packages to Patricia Hughes' home for her distribution to additional absentee voters within the 7th Ward. Birchett Testimony; Talmadge Testimony; Absentee Ballot Receipts, Exhibit P-10; Martz Testimony; Exhibit P-5.

107. Birchett accounted for all payments for absentee ballots and collected receipts from various campaign workers representing the payments of \$1.00 per absentee ballot declaration she received from them after they obtained the ballot from the voters' home. Birchett Testimony; Receipts, Exhibit P-10; Martz Testimony.

108. Birchett testified that she did not start making any payments for applications or ballots until after the contributions targeted for the minority area were received. The first contribution, a \$4000 contribution from the Committee for a Democratic Majority PAC, was received on October 25, 1993, and a subsequent contribution was received on October 28, 1993. Birchett Testimony; Exhibit P-11. The timing of these payments is substantial evidence that the receipts, as listed below, corresponded to ballots and not applications, because the deadline for applications had passed.

109. \$4,000 was specially allocated to the Stinson Campaign from a political action committee associated with Democrat State Senator Vincent Fumo. Testimony of Martz and Birchett.

110. Birchett paid the campaign workers "on the spot" rather than at a later time. One reason for paying workers immediately was that the workers needed the money for staple products. Birchett Testimony.

111. Birchett discussed the \$1.00 per absentee ballot scheme with Howard Cain, who in turn helped obtain the funds for the scheme. Birchett Testimony.

112. Certain of the \$1.00 per ballot receipts identified by Ruth Birchett as payments in this program are identified as follows from P-10, at page 109:

No.	Date	Person	Amount
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1	10/29/93	Josue Santiago	\$169
6	10/30/93	Willie Torres	65
7	10/29/93	Sultan Mateen	49
11	10/27/93 & Ruth Birchett	162	
	10/28/93		
12	10/26/93	Sultan Mateen	170
	10/28/93	Sultan Mateen	109

*15 113. With the exception of Receipt 12, all of the above receipts were dated after October 26, 1993, the last date for submitting applications. Exhibit P-10. The receipts are also significant because of the Commissioners' failure to properly time-stamp applications and ballots. Normally, applications are received in City Hall, Room 138, and time-stamped. Testimony of Spinosi. However, the failure to follow this standard procedure is further evidence that the above listed \$1.00-per-ballot ballots were being received and processed after the deadlines. Testimony of Commissioner Talmadge, Kelly, Medina, Spinosi. The court also heard evidence, primarily at the initial hearing, establishing that hundreds of absentee ballots were illegally cast in addition to those listed above. However, the receipts listed above represent specific numbers of illegally cast ballots. As will be discussed, the court further finds that the vast majority of these ballots were cast by voters who could not have subsequently gone to the polls or otherwise have cast a legal vote.

114. In considering Birchett's trial testimony, and its inconsistencies with her deposition testimony, the content and description of the receipts in P-10, Exhibit 209 and all the other evidence, the court finds that over 600 absentee ballots were returned to Ruth Birchett by Stinson Campaign workers operating throughout the Second Senatorial District. The Campaign workers delivered Absentee Ballot Packages into the homes of the voters, influenced them to vote for Bill Stinson, and were paid \$1.00 per ballot for each ballot returned to Birchett. Birchett then delivered the ballots to Commissioner Talmadge's office and to City Hall, Room 138, where the ballots were thereafter counted on Election Day. Exhibits P-9, P-10, P-209; Birchett Testimony; Commissioner Talmadge Testimony; Brown Testimony; Stinson Applications (P-91); Stinson Rejected Applications (P-90). Martz's testimony corroborated that receipts, such as Receipt 1, were for the \$1.00 per ballot payment. Exhibit P-10.

115. Most, if not all, of the \$1.00 per ballot votes were cast for Stinson. This finding is based on the following: a) Stinson Campaign workers solicited said ballots in the homes of voters and often directed, coerced, and/or intimidated voters to vote for Stinson; b) the Campaign workers had a political and financial interest in obtaining votes for Stinson; c) certain voters testified that they cast absentee ballots for Stinson in connection with the late absentee ballot canvassing and that they were often unduly influenced to do so; and d) because the Campaign workers often directed how a voter should cast his or her ballot and because not all ballots were properly sealed in their envelopes or time-stamped by the Commissioners' Office, the workers had control of which ballots were returned and subsequently counted.

116. Each of the \$1.00 per ballot votes were cast after the deadline for absentee balloting. However, a finding that there were over 600 absentee ballots cast for William Stinson after the absentee ballot deadline is not sufficient by itself to ensure the electorate that Bruce Marks would have won a plurality of the vote. In light of the Third Circuit's mandate, this court must also consider whether these absentee voters who were defrauded could have otherwise gone to the polls or cast a legal ballot.

Unregistered Voters Casting Absentee Ballots

*16 117. The absentee ballot applications corresponding to the above listed Birchett receipts were processed primarily, if not entirely, through Commissioner Talmadge's office. This procedure was known to Commissioner Tartaglione. Testimony of Commissioner Talmadge; Birchett; and Brown.

118. Ruth Birchett called Commissioner Talmadge's office and spoke first to Tonya Brown, Commissioner Talmadge's secretary, and then to Talmadge himself. Brown Testimony.

119. Pursuant to an instruction from Commissioner Tartaglione, Ruth Birchett telephoned Commissioner Talmadge's office and spoke with Tonya Brown. Brown informed Commissioner Talmadge that Birchett was on the telephone and told him that Birchett had been instructed to call.

120. Commissioner Tartaglione was not going to process hundreds of absentee applications and return the corresponding ballots to Birchett. However, Tartaglione instructed Birchett to speak with Commissioner Talmadge, and the processing of hundreds of ballots began in earnest. Brown Testimony.

121. Birchett was not credible when she denied providing

this information to Brown in light of the numbers of ballots she handled, the number of trips she made to Commissioner Talmadge's office, and her other contacts with the Commissioners' Office. Birchett Testimony; Brown Testimony.

122. After speaking with Birchett, Commissioner Talmadge directed Brown to implement a program to process massive numbers of Democrat applications and ballots. This program was specifically designed to favor the Democrat candidate. Commissioner Talmadge permitted his office to favor the Stinson Campaign despite the fact that neither he nor Brown had ever conducted such a widespread procedure prior to the Stinson Campaign. Commissioner Talmadge Testimony; Brown Testimony; Birchett Testimony. If individuals were ever permitted to handle absentee ballots for another person, the number of ballots was always very few in number and it was almost always concerning an absentee ballot for a family member. *See, e.g.*, Testimony of Commissioner Kane.

123. Birchett then obtained a case of approximately 1,000 absentee ballot applications from Brown. Birchett Testimony. After the Stinson field workers obtained completed applications, they were given to Birchett for return to Brown.

124. When Birchett made the first delivery of applications, she was introduced to Dennis Kelly in Room 138 where the applications were received for processing. Brown Testimony. During this trip, she also delivered completed applications which she received from Stinson's field director in the non-minority area, Robert O'Brien, who directed her to deliver them to Commissioner Tartaglione's office. Birchett Testimony; Stinson Deposition.

125. Approximately 200 to 300 applications were delivered to Brown in Commissioner Talmadge's office the first time, and Brown was told to have them processed to obtain Absentee Ballots Packages for return to Birchett. Brown Testimony. When Birchett delivered the applications, she believed that she would receive back the corresponding Absentee Ballot Packages from Commissioner Talmadge. Birchett Testimony.

*17 126. After the applications were processed, Brown was informed by Charles Bernard, a Board employee, that many applications had been rejected because the applicants were not registered to vote. Although Bernard denied having provided this information to Brown, his denial was not credible in light of the other testimony concerning the numbers of unregistered voters. Brown Testimony; Bernard Testimony.

127. Brown communicated this information to Birchett. Birchett Testimony. Brown was then instructed by

Commissioner Talmadge to call Birchett to pick up the Absentee Ballot Packages for delivery to the voters. Brown Testimony. When Birchett picked up the first batch of Absentee Ballot Packages, she dropped off a second batch of applications. Birchett Testimony.

128. Based on the information regarding problems associated with the first batch, Brown picked ten applications at random and checked them to determine whether the applicants were registered voters. Her computer check revealed that all ten applicants were unregistered. Testimony of Brown. This is significant because the random sample, although not large in number, demonstrates that a large percentage of the applications, and therefore the subsequent ballots, were cast by persons who could not have voted at the polls.

129. Brown informed Commissioner Talmadge of the unregistered voters associated with the first batch of returned applications and of her own investigation concerning the second batch of applications to Commissioner Talmadge. Testimony of Brown, N.T. 3/28/94, at 119.

130. Commissioner Talmadge instructed Brown to take the second batch of applications to Room 138 and “stay out of it.” Testimony of Brown, N.T. 3/28/94, at 122. After the second batch of applications was processed, Talmadge instructed Brown to call Birchett to pick up the corresponding Absentee Ballot Packages. Brown Testimony.

131. Following a third and fourth delivery of applications from the Stinson Campaign, Commissioner Talmadge again instructed Brown to call Birchett to pick up the corresponding Absentee Ballot Packages. Brown Testimony.

132. In excess of 1,000 applications from the Minority Area were submitted by the Stinson Campaign. Exhibit P-91.

133. Brown estimated that over 500 Absentee Ballot Packages were delivered from Commissioner Talmadge’s office to the Stinson Campaign in the four deliveries of which Brown was aware. Testimony of Brown, N.T. 3/28/94, at 124-25.

134. In sum, approximately 600 (but in any event in excess of 462) unregistered voters cast absentee ballots for William Stinson after the deadline for submitting absentee ballot applications based on the \$1.00-per-ballot program alone. Most of these voters could not have subsequently gone to the polls to cast a legal vote for Stinson because the voters were not registered. In addition, there were other illegally cast absentee ballots for William Stinson that resulted from the absentee ballot scheme, for example, the forged absentee ballot of Pedro Figueroa.

The \$1.00-per-ballot receipts are enough to satisfy the court that William Stinson received in excess of 462 illegal votes by persons who could not have otherwise voted legally, and these other illegal votes provide overwhelming support for the finding that there were in excess of 462 illegal votes for William Stinson. There was no evidence that voters relied on representations by the Board in voting by absentee ballot when they were not qualified to do so. Instead, the Board’s written instructions on the application and in the Absentee Ballot Package, in Spanish and English, make clear that a voter in the county must go to the polls. There was no evidence to suggest that any voters returned their absentee ballots through committee persons or Stinson Campaign workers based on representations by the Board. Instead, the written instructions of the Board make clear that a voter must either mail or deliver the completed ballot “in person” to the Board.

***18** 135. Bruce Marks would have won the 1993 Special Election in the Second Senatorial District but for the wrongdoing as set forth in these Findings.

136. The electorate can be certain that Marks obtained a plurality of the legal votes and that Bruce Marks may properly fill the vacant Senate seat from the Second District.

The Board’s Covert Processing of Ballots

137. Approximately 400 applications were rejected by the Board as being “not in binder” and/or “not in system”, in other words, unregistered persons (the “Rejected Applications”). Plaintiffs’ Exhibit 90. One application was filed by Stinson worker Sultan Mateen. Only sixty of these original applications bore the stamp of the Board’s office.

138. Normally, applications are received in Room 138 and time-stamped. Spinosi Testimony. After being time-stamped, the applications are bundled for delivery to the Commissioners’ Office at Delaware and Spring Garden Streets for processing.

Antoinette Spinosi is the Board employee who was responsible for overseeing the processing of applications, which entailed checking registration records to determine whether applicants were registered to vote. Spinosi Testimony.

139. If an applicant is not listed in the computer system, the application would be marked “NIS”—“not in system.” Applications could also be checked against the actual voter registration binders. If an applicant is not listed in the binder, the application would be marked “NIB”—“not

in binder.” Spinosi Testimony.

140. On any given day between October 11, when processing began, and October 26, the deadline for applications, only a few applications were rejected throughout the entire City of Philadelphia for not being registered to vote. Spinosi Testimony.

141. Not more than five (5) to ten (10) applications were rejected per day over this sixteen (16) day period, or a total of no more than 160 applications city-wide. Spinosi Testimony. This is significantly less than the close to 400 Rejected Applications returned to Birchett for the Second District alone. Spinosi testified that no such amount of Rejected Applications passed through her office. The Rejected Applications were processed outside the normal course by someone other than Spinosi, even though Spinosi stated that no one else was permitted to process applications and that it would be improper to process them any where except in her office. Dennis Kelly originally testified that he received the Rejected Applications from Delaware and Spring Garden Streets before returning them to Talmadge. Spinosi and Talmadge have both contradicted the testimony of Kelly. Spinosi Testimony; Exhibit P-90; Exhibit Spinosi 1, 2, and 3; and Exhibit P-224; Testimony of Commissioner Talmadge; Testimony of Kelly.

142. Occasionally, Spinosi would get “special” groups of applications to process. This “special treatment” was rare. Otherwise, approved applications are bundled in groups of fifty (50) and returned to Kelly. Spinosi Testimony.

***19** 143. Applications submitted by Democrat committee persons and the Stinson Campaign were not sent to Spinosi for processing nor returned to Kelly. Such applications would have been bundled with other applications and it would have been impossible to separate these “special applications” from applications processed in the normal course in order for the corresponding Absentee Ballot Packages to be provided to committee persons and the Stinson Campaign. The applications that were received through Commissioner Talmadge’s office by Birchett and Brown, Commissioner Tartaglione’s office by Birchett, and Dennis Kelly’s office by Craig Cummons, directed by Robert O’Brien, were in groups of hundreds of applications for special processing, which Spinosi testified were not processed by her department. Spinosi Testimony; Bernard Testimony; Visco Testimony; Tartaglione Deposition; Birchett Testimony; O’Brien Testimony; Brown Testimony; Cummons Testimony; Talmadge Testimony.

144. Charles Bernard testified that rejected applications received after the date of registration were returned to the voters within two weeks after the Election. Bernard could not explain why original applications that were rejected by the Commission were in the Commission’s office and

delivered to the Attorney General. Bernard Testimony; Exhibit P-225; Original Applications delivered to Attorney General’s office by Dennis Kelly and Robert Lee.

145. The Rejected Applications were normally retained by the Board (*see, e.g.*, Voigt Testimony) and the massive amount of Rejected Applications which were not returned to the voter (*See* Bernard Testimony), or maintained as original records of the Commission, as provided by the Election Code (*See* Exhibits P-86, 87), were returned to the Stinson Campaign as part of an attempt to conceal wrongful conduct.

146. Kelly did not disclose this information to the Pennsylvania Attorney General’s office when questioned about the procedures. Testimony of Dennis Kelly.

147. Martz advised Ruth Birchett to discard the Rejected Applications. This is further evidence that the Stinson Campaign knew of the improper absentee ballot activities and later tried to conceal such activities.

148. Commissioner Talmadge knew about the Rejected Applications, facilitated the distribution of hundreds of Rejected Applications to Stinson Campaign workers, intentionally failed to enforce the Election Code, and later attempted to conceal this activity. Testimony of Commissioner Talmadge, Birchett, and Kelly.

149. Despite hundreds of applications being returned to the Board, no one made any effort to investigate this conduct even though one returned application could stimulate such an inquiry. Testimony of Commissioner Talmadge and Kelly. This is further evidence of the larger conspiracy being conducted between Commissioners Tartaglione and Talmadge, other Board employees, and several Stinson Campaign workers.

150. The practice of returning absentee ballot applications to a party or candidate was done outside the normal course of the Board.

***20** 151. Applications submitted by Democrat committee persons and the Stinson Campaign were given special processing separate from the Delaware and Spring Garden program in the Democrat Commissioners’ offices and separated by ward and division for return to the committee persons and Stinson Campaign. Spinosi Testimony; Bernard Testimony; Visco Testimony.

152. The Rejected Applications were delivered from the Delaware Avenue and Spring Garden Street office, where they were processed, to the custody of Dennis Kelly, who returned them to Commissioner Talmadge, who in turn delivered them to Ruth Birchett. No record of the Rejected Applications was kept. Testimony of Dennis Kelly.

153. No notification was given to the persons who submitted the Rejected Applications that such applications were rejected, nor was notice provided to applicants regarding the reasons why their applications were rejected. In light of the returned applications, Dennis Kelly's inaccurate reports at the Board's meetings, the secret dealings between the Board and Stinson Campaign workers, and other testimony, Commissioners Tartaglione and Talmadge, other Commissioners' Office employees (like Dennis Kelly), and Stinson Campaign workers attempted to conceal the absentee ballot scheme whereby hundreds of applications and ballots were processed outside of the established procedures of the Commission, in violation of the Election Code, with the purpose of favoring Candidate Stinson. Testimony of Kelly, Jones, Brown, Spinosi, and Commissioner Talmadge.

154. The court has considered that there were a few illegally cast votes for Marks, but this number is small compared to the over 462 illegally cast absentee votes for Stinson and this number does not alter the result. The court does not suggest that any illegally cast votes are insignificant or should not be corrected, but as far as the matter presently before the court, the number of illegal votes cast in favor of Candidate Marks were relatively few and are not outcome determinative. Further, and more importantly, there was no evidence to suggest that any of the dozen or so illegal votes for Marks were related to an illegal scheme or plan, or that said votes were knowingly processed by the Board of Elections, or that Marks knew or promoted any such illegal conduct.

155. For example, Joseph Giedemann, a Republican Committee person, picked up and delivered approximately ten ballots, but there was no evidence to suggest that this activity was part of a scheme approved by the Republican candidate, that the procedure was facilitated by the Board of Commissioners, that Mr. Giedemann was associated with the Marks Campaign, or that Mr. Giedemann conspired with any other person to knowingly mislead voters.

156. Charles Bernard, an Election Clerk for the Board of Commissioners, described a procedure whereby certain persons in the Commissioners' Office provided applications and ballots to both Republicans and Democrats and that the Commission generally did not follow proper Election Code procedures in disseminating and accepting absentee ballots. *See, e.g.*, Testimony of Catherine Orth, Kenneth Evans, Pasquale Visco, and Hillel Levinson. This testimony, along with similar testimony from other defense witnesses, does not discredit plaintiffs' claims but simply further illustrates that the Commissioners have not been complying with the Election Code for a substantial period. This evidence did not establish that the Commissioners previously favored one candidate over another, but plaintiffs have

demonstrated that Commissioners Talmadge and Tartaglione did conduct illegal activities which favored the Democrat candidate in the 1993 Special Election in the Second Senatorial District in addition to a variety of other violations which have been conducted for many years. It is not a defense for the Commissioners to claim that they should not be liable for specific illegal conduct relating to the 1993 Special Election because the Commissioners have failed to observe certain other election laws for several decades. Such evidence does not diminish plaintiffs' claims that Commissioners Talmadge and Tartaglione favored the Democrat candidate over the Republican candidate, but instead such evidence further demonstrates that the Commission, candidates, and certain public officials have knowingly failed to follow the clear and unambiguous terms of the Election Code.

*21 157. Hillel Levinson, a defense witness formerly Managing Director of the City of Philadelphia and more recently associated with Intervenor's counsel in the practice of law, testified that it was "fair" for certain candidates or persons to benefit from procedures not authorized by the Election Code if the spirit of any such procedures was to enfranchise voters. The court does not agree.

158. In sum, the Commissioners' Office generally has not followed the Election Code. Specifically with reference to the 1993 Special Election, Commissioners Talmadge and Tartaglione and other members of the Commissioners' Office specifically aided and favored the Democrat candidate. As discussed in the court's prior findings, Commissioners Talmadge and Tartaglione could have prevented much of the illegal activity that occurred even if the Stinson campaign had acted illegally. If the Commissioners would have observed and enforced the Election Code, the Stinson Campaign could not have illegally altered the outcome of the election. Not only did the Commission not correct the known illegal activities, the Commission also facilitated the scheme and then attempted to conceal the conspiracy.

159. One overarching observation from the totality of these proceedings is that many voters, political workers, and election officials are not properly informed, or have intentionally refused to be informed, of the rudiments of the Election Code. Defendants put forth evidence of irregularities and even illegalities in the election process that have been conducted for many years. Such evidence does not diminish plaintiffs' claims, but instead further establishes the need for City officials, candidates, and the electorate to become aware of the basics of the election process and the election laws. If certain practices are different than the election laws, the City and the Commonwealth should either change the law or enforce the law, but not merely arbitrarily enforce or ignore certain laws. The court will not condone certain activities simply because they may be traced back to the time of

William Penn, especially when such activities are covert, designed to promote the interests of those in power, and are expressly contrary to established law and when certain persons rely and depend on those laws. The electorate cannot be confident of any election results if the Election Code is not followed. The Circuit Court stated that, “Our primary concern ... [is] to promote the public’s interest in having legislative power exercised only by those to whom it has been legally delegated. This interest is not served by arbitrarily ignoring the absentee vote....” *Marks v. Stinson*, Nos. 94–1247 and 94–1248, slip op. at 29–30 (3d Cir., March 16, 1994). It is equally as important that the election laws are not arbitrarily enforced. Such laws are enacted to ensure that election results are worthy of the public’s confidence.

The Improper Certification

160. On November 18, 1993, the Board certified Candidate Stinson as the winner of the election from the Second

*22 Senatorial District. However, this was done during the course of the public hearing prior to issuing their findings of fact and conclusions of law. The decision to certify Stinson was made on November 18, 1993 when all other candidates for Election in the County of Philadelphia were certified on November 22, 1993. Testimony of Commissioner Talmadge; Deposition of Tartaglione.

161. The Board certified Stinson during the hearing even though Commissioner Talmadge knew that the Election Code provided two days to appeal a decision of the Board with respect to challenges and even though he knew Marks was going to appeal. Marks did appeal. 25 P.S. § 3146.8(e) requires the County Board to suspend any action in canvassing, computing, and certifying the winner pending the 48 hour period during which Marks had a right to appeal the City Commissioners’ decision and 25 P.S. § 3157 requires the Board to suspend certification pending such appeal.

162. The actions of the Board were designed to, and did in fact, prevent any realistic opportunity to appeal the certification in the State court system. The Board applied the Election Code in a discriminatory manner designed to favor one candidate. Certifying Stinson in this manner would end inquiries into the election abuse in which Commissioners Tartaglione and Talmadge participated. The Board conducted nothing more than mock hearings and intentionally reached decisions that would not reveal their involvement in the ongoing absentee ballot voting conspiracy. Defendants alleged plaintiffs consistently failed to avail themselves of the proper appeal procedures.

Plaintiffs were never given the opportunity to present their claims because the safeguards failed at every level. Commissioner Talmadge readily admitted that if the Board would have properly performed its function even in light of the conduct of the Stinson Campaign, then the absentee ballot scheme would not have tainted the election in such an invidious manner.

163. The appeal and challenge structure is grounded in the rudimental supposition that the process is fair and not inherently flawed. The Stinson Campaign activities relating to the absentee ballots were illegal. Nonetheless, this abuse should have been corrected by the Board. The improper actions of the Board deprived the plaintiffs from ever having their claims heard. Based on the Board’s decision with reference to the challenges, the Board deprived the Court of Common Pleas of jurisdiction to consider plaintiffs’ substantive claims. In short, the Board participated in an improper scheme and were then called upon to sit in judgment of that very conduct.

The Expert Witnesses

164. Three different experts testified at the final hearing: plaintiffs’ expert, Dr. Brian Sullivan; intervenors’ expert, Dr. Paul Shaman; and court appointed expert, Dr. Orley Ashenfelter.

Dr. Brian Sullivan

165. Dr. Brian Sullivan testified as an expert in econometrics and survey research. N.T., 3/29/94, at 14; P–211.

*23 166. Dr. Sullivan reviewed a survey of absentee voters in the November, 1993 Special Election that was conducted by workers associated with the Marks’ Campaign shortly after the election. Sullivan Testimony, N.T., 3/29/94; P–212. Initially, Dr. Sullivan examined the survey to determine whether the data it produced were sufficiently reliable. Sullivan Testimony, N.T., 3/29/94, at 15. To determine the reliability of the survey data, Dr. Sullivan reviewed the form of the questionnaires used in the survey and the affidavits of the survey workers. He found that the initial form of the questionnaire lacked a signature line for the voter. He designated the 285 questionnaires of this type as “pretest” and, in accordance with survey research practice, did not analyze them. N.T., 3/29/94, at 25–26. The second form of questionnaire used by the survey contained a signature line for the voter to verify the accuracy of the survey worker’s write-up of the interview. N.T., 3/29/94, at 17, 24.

167. Dr. Sullivan also interviewed several survey workers regarding the design of the survey and the actual interviewing process. The instructions given to the survey workers were significant. The workers were urged to be accurate in recording voters' responses. In addition, most surveys do not require their workers to execute affidavits about the veracity of their recording; however, this survey did.

168. Dr. Sullivan also compared voters' interview sheets with the sworn testimony of the same voters in four separate proceedings that occurred after the survey. These included a voter who testified before the Board, three (3) voters chosen randomly from a witness list by a judge of the Court of Common Pleas, fourteen (14) voters who testified before another Judge of the Court of Common Pleas, and forty-three (43) voters who testified in the preliminary injunction hearing before this court.

169. Finally, Dr. Sullivan compared survey interview sheets with affidavits of probable cause filed by agents of the Pennsylvania Attorney General's Office in criminal cases arising from the election. Sullivan Testimony, N.T., 3/29/94, at 15-20. This is significant corroboration of the survey data.

170. Dr. Sullivan found a high correlation between the survey interview sheets of voters and the subsequent testimony of the same voters. Exhibit P-212. The fact that pending legal proceedings allowed voters who were interviewed by the survey to be subsequently examined under oath in court proceedings resulted in an unusually high degree of verification for survey research. N.T., 3/29/94, at 19.

171. Survey interview sheets for 1250 voters were provided to Dr. Sullivan. He eliminated 285 pretest interview sheets, twelve (12) duplicates, and any sheet for a non-absentee voter. Dr. Sullivan also eliminated from his primary analysis 406 survey sheets that were unsigned by an interviewed voter. The remaining interview sheets were sufficient in number to constitute a valid sample of the minority and other areas in the District. Sullivan Testimony.

*24 172. Without any verification or other means of

corroborating his survey data, Dr. Sullivan's report and opinions would have been much less significant. The integrity of any survey is initially predicated on the reliability of the raw data collected. Dr. Sullivan's raw survey data were compiled by partisan Marks supporters. However, the court finds that the data were reliable in light of the many verifications performed and statistical adjustments made to the data.

173. Based on this court's findings of types of illegal practices in absentee voting in its February 17, 1994, Memorandum Opinion, the survey showed that, out of 127 interviews in the "minority" areas, 116 or 91.34% absentee ballots were illegal. It also showed that, out of 332 interviews in the "other" areas, 270 or 81.3% absentee ballots were illegal. These percentages can be used to project that there were 1,395 total illegal absentee ballots cast in the election, 496 in the minority area and 899 in the other area. Sullivan Testimony.

174. This number of illegal absentee ballots is supported by the record evidence. Approximately 600 illegal absentee ballots were obtained through the Birchett program targeted at the minority areas; approximately 450 illegal absentee ballots were obtained through the O'Brien program in the white areas; and illegal absentee ballots were obtained, for example, through Democrat ward leader Christine Solomon in the 53rd ward and Commissioner Tartaglione in the 62nd ward.

175. On the basis of election statistics showing the percentage of absentee ballots cast for Stinson and Marks in each area, the total illegal absentee ballots cast in the election can be allocated to each candidate. Using this method of allocation, Stinson received 446 illegal absentee votes in the minority areas and 692 in the other areas. Marks received fifty (50) illegal absentee votes in the minority areas and 207 in the other areas. Sullivan Testimony, N.T., 3/29/94, at 43; P-212A, at 4 (Analysis B).

176. According to this analysis, the result of the election would be as follows:

Marks

Stinson

Original Vote¹

20,057

20,518

Illegal Minority	(50)	(446)
Illegal Other	(207)	(692)
Total:	19,800	19,380

177. Based on this approach, Marks won the election by 420 votes. This approach provides a reliability factor by removing absentee ballot votes from Marks, even though the Marks' campaign was not engaged in any illegal conduct, scheme, or conspiracy regarding absentee ballots. Defendants did offer evidence to establish that a small number of ballots were handled by Marks workers, but of the approximately twelve (12) votes, none were part of any plan to defraud voters. Thus, if the illegal absentee votes were removed only (or to a greater degree) from Stinson, Marks would have won the election by an even greater margin, approaching 900 votes.

*25 178. In recognition of the Third Circuit's opinion that, in some circumstances, it is appropriate to consider whether the voters who cast illegal absentee ballot votes would have either gone to the polls or otherwise cast legal votes, Dr. Sullivan calculated a vote "reallocation." This reallocation permitted the recapture of all illegal votes.

179. There is a statistical method by which to reallocate back to each candidate the number of votes that he would have received but for the wrongdoing of the defendants. Sullivan Testimony.

180. First, the total turnout percentages of voters in the District is determined from Board data. These percentages are 18.6% in the minority areas and 43.6% in the other areas. These rates reflect all votes cast in the election, including the absentee ballot votes, even though some voters did not vote for anyone in the senatorial race, and thus overstates the actual turnout figures, a favorable rate for Stinson. Then the turnout percentages are multiplied by the illegal votes. For the minority areas, 496 illegal

votes \times 18.6% = 92 "recaptured" votes. For the other areas, 899 illegal votes \times 43.6% = 392 "recaptured" votes. These "recapture" numbers represent a statistically-derived number of illegal absentee votes that would have been legally cast but for the wrongdoing of the defendants. These numbers, if anything, may overestimate the number of voters who would otherwise have lawfully voted in the special election, because the voters targeted by the defendants' unlawful scheme tended to be those who would not normally vote. Sullivan Testimony; Voter Testimony.

181. The recaptured votes can be reallocated to the candidates on the basis of their respective voting machine percentages. This is a sound basis because the distribution between the candidates of the absentee votes in the "unchallenged" areas of the District (where no illegality is alleged) is not statistically different from the distribution of machine votes. Sullivan Testimony.

182. Using the candidates' voting machine percentages, the allocation of "recaptured" votes is as follows: Out of 92 recaptured minority votes, 71 (76.83%) go to Stinson and 21 (23.17%) go to Marks. Out of 392 recaptured votes in the other areas, 173 (44.04%) go to Stinson and 219 (55.96%) go to Marks.

183. The reallocated "recaptured" votes, added to the previously adjusted tallies for the candidates are as follows:

Marks

Stinson

Original Vote	20,057	20,518
Illegal Minority	(50)	(446)
Illegal Other	(207)	(692)
Recaptured Votes		
Minority	21	71
Other	219 173	
Total:	20,040	19,624

184. According to this analysis, Marks would have won the election by 416 votes. As with the prior calculation, this calculation removed a certain number of absentee ballot votes from Marks, even though the Marks' campaign did not engage in any illegal conduct regarding absentee ballots. Thus, if the illegal absentee votes were removed only (or to a greater degree) from Stinson, Marks would have won the election by an even greater margin, again approaching 900 votes. Sullivan Testimony.

*26 185. The results stated above are to a degree of statistical reliability that exceeds 99%, based on a determination of standard deviations and statistical confidence levels. Sullivan Testimony.

186. On the basis of the above results, Dr. Sullivan concluded that the certification of Marks as the winner of the election is worthy of the confidence of the electorate.

Dr. Paul Shaman

187. Professor Paul Shaman testified as an expert on behalf of the intervenors. His testimony also supports the conclusion that Marks would have won the election but for the wrongdoing of the defendants. It should be noted at the outset that Dr. Shaman's research and projections

were based upon ranges of statistical probability. He did not intend his formula and charts to be used to calculate precise mathematical results. However, as the plaintiffs artfully pointed out on cross-examination, Dr. Shaman's own data and projections ultimately fully support the finding that Marks would have won the election but for the wrongdoing. Dr. Shaman acknowledged that his calculations are not as helpful if a precise number of illegal votes can be determined.

188. Professor Shaman created tables showing, for each of a series of ranges of possible combinations of improper votes, the probability that Marks won the election. Testimony of Shaman, N.T. 4/8/94, at 17-18. Professor Shaman's tables do not, by themselves, show the actual probability that Marks won the election. Without using "prior information", in other words some specific data, one cannot select an appropriate range in any of Dr. Shaman's tables.

189. Although Professor Shaman did not use any specific data in calculating his analysis, there is other evidence in the record which a statistician may use to determine the probability of a Marks victory. Dr. Shaman did rely upon specific information although specific numbers were not included in his ranges of probability.

190. Given that at least 1,000 ballots were illegally delivered to voters and returned to the Board by the

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Stinson Campaign and that these ballots represent improper votes for Stinson, the probability of a Marks win is 100% according to Shaman's chart. This is so even if 30% of the 1,000 ballots are deemed "recaptured" and entirely allocated to Stinson, which would overcompensate him in correcting for the effects of Stinson's wrongdoing.

191. The analysis of survey research conducted by Dr. Sullivan also provides such data. Dr. Sullivan's Analysis "B" (P-212A, p. 4) projected 1,138 illegal votes for Stinson and "recaptured" 244 for him, giving him a net of 894 "improper" votes in Professor Shaman's terms. It projected 257 illegal votes for Marks and "recaptured" 240 for him, giving him a net of 17 "improper" votes.

192. These data, applied to Professor Shaman's Table 1, also show a 100% probability of a Marks win.

193. Data obtained and used by Professor Shaman himself also can be used to find an appropriate range in his tables, as demonstrated by his testimony under cross-examination. Exhibit P-301, an article in the *Philadelphia Inquirer* dated March 25, 1994, which contained data on the results of an investigation into illegal absentee voting in the election in question, was admitted into evidence after being identified as prior information relied on by Dr. Shaman and after being referenced in his expert report. Exhibit I-5.

*27 194. A statistical projection done from the data in Exhibit P-301 shows that, of 1,757 absentee votes cast in the election, at least 636 were illegal without considering "technical illegalities" such as improper delivery and handling of ballots by campaign workers. The data show, further, that a projected 94% of these illegal ballots were for Stinson and only 6% were for Marks. Applying these data to Professor Shaman's Table 1, again results in a 100% probability of a Marks win.

195. Because the data in Exhibit P-301 excluded illegal delivery from the count and because the record shows that at least 1,000 ballots were illegally delivered to the Board by the Stinson campaign, a further projection can be done. As Professor Shaman noted, there may be overlap between the 636 ballots and the 1,000 ballots. Some may be in both categories. The most conservative assumption should therefore be used in the absence of a basis for determining the probable overlap.

196. The most conservative assumption is that 100% of the 636 ballots are also part of the group of 1,000. If this group is then allocated on the basis of the data in Professor Shaman's prior information source, on the basis of 94% and 6%, Stinson has 940 illegal ballots and Marks has 60. With these figures, Dr. Shaman's tables still show 100% probability of a Marks win.

197. Even if a "recapture" calculation were performed, using the turnout ratios and machine vote ratios as Dr. Sullivan did, the results would still be a 100% probability of a Marks win.

198. Professor Ashenfelter's regression analysis, as will be discussed *infra*, when applied to Professor Shaman's tables, also shows a 100% probability of a Marks win. As Ashenfelter explained, his linear regression predicted that Marks would win 133 more absentee votes than Stinson. Since Stinson actually got 1,025 more absentee votes than Marks, 1,158 absentee votes are estimated to have been illegal using this method. Because these would be subtracted from Stinson's total, again, there is a 100% probability of a Marks win. N.T. 4/8/94, at 174-176.

Dr. Orley Ashenfelter

199. The court appointed Princeton University Professor Orley Ashenfelter as an independent expert. At the time of Dr. Ashenfelter's appointment, the court was not aware that any experts were going to testify. In light of the Third Circuit's mandate, the court wanted to ensure that the opinions of at least one expert were going to be offered. Dr. Ashenfelter's opinions were considered equally with those of the other experts.

200. Dr. Ashenfelter employed a different method of analysis from that of the other experts. The Commissioners' Office provided Professor Ashenfelter with data on the machine and absentee votes for each candidate in the last 21 elections for the state senate in Philadelphia.

201. Dr. Ashenfelter analyzed the relationship between absentee votes and machine votes in these elections and compared that to the absentee and machine vote relationship in the November, 1993 Special Election. He quantified the relationships using regression analysis.

*28 202. Dr. Ashenfelter's linear regression analysis indicates that, if the 1993 election had been consistent with the historical relationship between machine and absentee voting, Marks would have received 133 more absentee votes than Stinson. This would give Marks an expected overall victory margin of 697 votes, 564 machine votes plus 133 absentee votes. Stinson, however, received 1,025 more absentee votes than Marks according to the results recorded by the defendant Commissioners, a difference of 1,158 votes from the expected result.

203. The 1,158 difference in absentee votes between the candidates in the 1993 election was more than three standard deviations larger than expected result. Such an outcome would therefore be expected to occur in fewer

than 1 in 100 cases.

204. Dr. Ashenfelter also performed a quadratic regression analysis to test whether the relationship between the difference in absentee votes and the difference in machine votes may be nonlinear. This analysis indicated that in 1993 Marks should have received 236 more absentee votes than Stinson. This would give Marks an overall victory margin of 800 votes, 564 machine votes and 236 absentee votes.

205. The actual absentee ballot results differed from the expected vote results by 1,261 votes. This result could be expected to occur in fewer than 1 in 100 cases. The statistical confidence level in this result is greater than 99%. Testimony of Dr. Ashenfelter.

206. According to Dr. Shaman, the quadratic regression analysis has a slightly higher statistical confidence level than the linear one. Testimony of Dr. Shaman. Regression analysis establishes firmly that the 1993 absentee voting difference is not consistent with the historical relationship between machine and absentee voting. Exhibit I-5.

207. The actual difference in absentee votes between the candidates may differ from the statistically expected difference for many possible reasons. After considering all the evidence, the record establishes one predominant reason for the large difference in 1993 from historically and statistically expected relationships: the pervasive scheme of the defendants to obtain absentee ballots for Stinson through illegal and discriminatory means. Stinson's absentee ballot votes were achieved through wrongdoing of numerous sorts: the "new way to vote" program targeted to minority voters; inducing white voters to vote from home for convenience; and the illegal delivery and return of hundreds of absentee ballots pursuant to a scheme involving the Commissioners' Office.

Conclusions Regarding Experts' Reports and Certification

208. Although there was some disagreement among the experts in their reports, there was substantial agreement among them on the methodologies as well as in the ultimate results discussed in their testimony.

209. As Professor Ashenfelter noted, the 1,158 illegal absentee vote figure that can be estimated from his linear regression analysis is not greatly different from the 1,395 figure that Dr. Sullivan projected. Testimony of Ashenfelter, N.T., 4/8/94, at 175.

*29 210. If Ashenfelter's quadratic regression analysis is

used, an estimate of 1,261 illegal votes is produced (1,025 236), which is even closer to Dr. Sullivan's projection. Exhibit Court-1.

211. Each expert's methodology and testimony independently establishes to a reasonable degree of scientific certainty that Marks would have won a plurality of the legal votes cast in the November 1993 Special Election if the wrongdoing had not occurred and the voters who cast illegal absentee ballots were to have gone to the polls at the established turnout ratios. The three experts employed three different types of analysis and three different types of reports based on different assumptions and data. This variety of analysis lends a great deal of credibility and weight to the finding that Marks would have won the election but for wrongdoing. While the numbers alone establish a very high likelihood that Marks would have won the election but for wrongdoing, the different expert reports provide the court, and more importantly the electorate (no matter whether the elector cast a ballot at the polls or by absentee), with a much higher degree of reliability. It is impossible to know with all mathematical certainty that Marks would have won but for the wrongdoing, but in light of the totality of the proceedings, the court is fully satisfied that Marks would have won the 1993 Special Election but for the wrongdoing and that Stinson failed to receive a plurality of the legally cast votes. Therefore, this court finds that the certification of Marks as the winner of the 1993 Special Election in the Second Senatorial District is worthy of the confidence of the electorate.

212. In sum, the totality of the evidence, from the testimony of the voters to the expert reports, establishes that the defendants conducted an illegal absentee ballot conspiracy and that the Commissioners covertly facilitated the scheme with the specific purpose of ensuring a victory for William Stinson. The Birchett receipts alone are sufficient to establish that William Stinson received in excess of 462 illegal absentee ballots cast by voters who could not have legally voted. However, it was also firmly established that hundreds of other absentee ballots were also cast for William Stinson. Finally, the opinions and reports of all three experts also provide a very high degree of statistical probability that support the finding that Marks would have won the election but for the wrongdoing.

213. The court will order the certification of Bruce Marks as the winner of the 1993 Special Election in the Second Senatorial District, because this court finds that the record evidence overwhelmingly supports the finding that Bruce Marks would have won the election but for wrongdoing.

II. Conclusions of Law.

1. Plaintiffs have standing to bring claims regarding

violations of the Civil Rights Act, 42 U.S.C. § 1983 and the Voting Rights Act, 42 U.S.C. §§ 1971, 1973. *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (candidate); *Harman v. Forssenius*, 380 U.S. 528 (1965) (voter); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (political party). The enforcement of election laws is necessary to preserve our most basic and fundamental rights. Specifically, this Commonwealth strictly construes the laws concerning absentee ballot voting. *See, e.g., Decision of County Board of Elections*, 29 D. & C.2d 499, 506–07 (1962).

***30** 2. This court has jurisdiction pursuant to the Civil Rights Act and the Voting Rights Act. 42 U.S.C. § 1983; 42 U.S.C. §§ 1971, 1973.

Civil Conspiracy

3. A civil conspiracy is “a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties ‘to inflict a wrong against or injury upon another,’ and ‘an overt act that results in damage.’” *Hampton v. Hanrahan*, 600 F.2d 600, 620–21 (7th Cir.1979), *rev’d in part on other grounds*, 446 U.S. 754 (1980) (citations omitted). In order to prove the existence of a civil conspiracy, a plaintiff is not required to provide direct evidence of the agreement between the conspirators; circumstantial evidence may provide adequate evidence of a conspiracy. *Id.* at 621 (citations omitted). A plaintiff seeking redress need not prove that each participant in a conspiracy knew the exact limits of the illegal plan or the identity of all participants therein. *Id.* (citations omitted). An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective, or possess the same motives for desiring the intended conspiratorial result. It simply must be shown that there was a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences. *Id.* Defendants engaged in a conspiracy to favor Democrat William Stinson and to disfavor Republican Bruce Marks. This Court is entitled to take an adverse inference when appropriate in a civil case from the Fifth Amendment testimony of various witnesses. *See Rad Services, Inc. v. Aetna Cas. and Sur. Co.*, 808 F.2d 271 (3d Cir.1986). However, even without any adverse inferences from the witnesses who invoked their rights under the Fifth Amendment, plaintiffs have still established the existence of a broad-based conspiracy involving the Stinson Campaign and the Board.

4. Defendants in this matter were acting under color of state law. Private parties involved in a conspiracy can be liable under 42 U.S.C. § 1983. To act under color of state law, it is enough that the actor is a willful participant in joint activity with the State or its agents. *Adickes v. Fress & Co.*, 398 U.S. 144, 152 (1970). *See also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). The Stinson Campaign (William Stinson, Joseph Martz, Ruth Birchett, and others) and the Board of Commissioners, through the conduct of Commissioners Tartaglione and Talmadge and their agents, entered into a civil conspiracy. This conspiracy went well beyond a garden variety election dispute, and it did not simply involve minor technical violations of the Commonwealth’s Election Code. The Stinson Campaign and the Board of Commissioners engaged in a conspiracy for the purpose of denying hundreds of voters in the Second Senatorial District, specifically Latinos and African-Americans, Bruce Marks, and the Republican party of rights and privileges as set forth in the Constitution and laws of the United States and of the Commonwealth of Pennsylvania. The conspirators intentionally engaged in a plan to promote the Democrat candidate by illegally soliciting and processing absentee ballots to help ensure that William Stinson would receive a plurality of votes in the highly contested Special Election in the Second Senatorial District. Plaintiffs established numerous and repeated violations of law designed to assist Democrat Candidate William Stinson and the Stinson Campaign.

***31** 5. Pennsylvania law requires that the Board must immediately notify an absentee ballot applicant if his or her application is rejected. 25 P.S. § 3146.2. The Board, through the conduct of Commissioners Tartaglione and Talmadge and their agents, willfully violated this provision. Commissioner Talmadge even instructed his secretary, Tonya Brown, to “stay out of it” when she attempted to investigate the Board’s misconduct in conjunction with the Stinson Campaign. Additionally, Commissioner Talmadge intentionally did not send notice to numerous rejected applicants in order to conceal the illegal solicitation of absentee ballot applications and the subsequent ballots.

6. Pennsylvania law requires absentee ballot applications to be received by the Board prior to 5:00 p.m. on the Tuesday prior to the election. 25 P.S. § 3146.2a. The Board violated this provision by accepting absentee ballot applications after the statutory deadline in order to illegally assist the Stinson Campaign.

7. Pennsylvania law requires that the Board must retain absentee ballot applications as public records for two years. 25 P.S. §§ 3146.2(i), 3146.9. The Board, through the conduct of Commissioner Talmadge and Supervisor Kelly and their agents, willfully violated this provision by returning hundreds of Rejected Applications to the Stinson Campaign to be destroyed pursuant to the

instructions of Stinson Campaign Manager Martz. This was done in order to conceal the illegal solicitation of applications and the underlying conspiracy.

8. Pennsylvania law requires that Absentee Ballot Packages be mailed or delivered by the Board to the voter. The Packages may not be given to campaign or other political workers to deliver to voters. 25 P.S. § 3146.5. The Board, through the conduct of Commissioners Tartaglione and Talmadge and their agents, willfully violated this provision by delivering Absentee Ballot Packages to the Stinson Campaign and Democrat Committee persons. Such activity was conducted to further the conspiracy to elect William Stinson.

9. Pennsylvania law requires that the voter complete the absentee ballot and return it either by mail or in person. 25 P.S. § 3146.6. The Board willfully violated this provision by accepting over one thousand completed absentee ballots from Stinson Campaign workers and Democrat Committee persons. Such activity was conducted to further the conspiracy to elect William Stinson.

10. Pennsylvania law requires absentee ballots to be received by the Board prior to 5:00 p.m. on the Friday prior to the election. 25 P.S. § 3146.6. The Board willfully violated this provision by accepting absentee ballots after this statutory deadline. Such activity was conducted to further the conspiracy to elect William Stinson.

11. Pennsylvania law requires the Board to suspend any action in canvassing and computing challenges pending a two (2) day period during which Marks had a right to appeal the Board's decision. 25 P.S. §§ 3146.8(e), 3157. The Board willfully violated this provision by certifying William Stinson during Marks' hearing even though the Board knew that Marks would appeal the Board's decision. The premature certification was issued to further the conspiracy to elect William Stinson and to conceal the Board's participation in the conspiracy.

***32** 12. The actions of the Board, through Commissioners Talmadge and Tartaglione, and Supervisor Kelly and their agents, constitute a custom and policy of the Board to favor the Democrat William Stinson and disfavor Republican Bruce Marks by knowingly violating provisions of state and federal law. *See, e.g., Hafer v. Melo*, 112 S.Ct. 358, 361–62 (1991) (entity's policy or custom must play part in violation of federal law). A single decision by a municipal body may constitute an act of official government policy under 42 U.S.C. § 1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). The instant conduct of the Board goes well beyond a single decision. The Board systematically, intentionally, and consistently engaged in a conspiracy to favor the Democrat Candidate and then engaged in an effort to

conceal the conspiracy. *Cf. Kasper v. Board of Election Commissioners*, 814 F.2d 332 (7th Cir.1987) (precinct captains working in conjunction with election judges who permit people to vote more than once constitutes state policy under section 1983). The conspiracy conducted by Commissioners Talmadge and Tartaglione, and Supervisor of Elections Dennis Kelly, and their approval of such conduct by other government workers and Stinson Campaign officials, was an unlawful policy designed to assist the Stinson Campaign and deprive voters of their constitutional right to vote in a free and fair election.

13. The Stinson Campaign, in conjunction with the Board, specifically targeted Latino and African-American voters to facilitate the absentee ballot conspiracy. At least with respect to the conspiracy as it related to the Latinos, the Stinson Campaign's conduct was especially egregious for its characterization of Latinos as people who would sign anything.

First Amendment Violation

14. Defendants violated plaintiffs First Amendment rights. The conduct of the defendants violated the plaintiffs' right of association guaranteed by the First Amendment by engaging in conduct pursuant to a custom and policy which denied plaintiffs and other individuals the freedom to form groups for the advancement of political ideas, as well as the freedom to campaign and vote for the candidates chosen by those groups. *See Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977) (citing *Buckley v. Valeo*, 424 U.S. 1, 39–59 (1976)); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). An election campaign is a means of disseminating ideas as well as attaining political office. *See Elections Board v. Socialist Workers Party*, 440 U.S. 173, 186 (1979). The defendants intentionally engaged in conduct designed to favor the Democrat Candidate and disfavor the Republican Candidate. Defendants did not act in good faith, and in any event, good faith is not a justification for a constitutional violation. *See Trotman v. Board of Trustees of Lincoln University*, 635 F.2d 216, 227 (3d Cir.1980), *cert. denied*, 451 U.S. 986 (1981).

Equal Protection Violation

***33** 15. The defendants actions denied plaintiffs their right to equal protection under the law by intentionally and illegally favoring the Democrat Candidate and discriminating against the Republican Candidate, *see Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Williams v. Rhodes*, 393 U.S.

23 (1968); *Libertarian Party of Indiana v. Marion County Bd. of Voter Registration*, 778 F.Supp. 1458 (S.D. Ind.1991), and by treating persons differently because of their race. After receiving information that they were down in the polls, defendants targeted Latino and African-American voters to further a conspiracy to secure illegal absentee ballots. Defendant Stinson argues that plaintiffs have alleged illegal activities throughout the Second District and not just in the minority neighborhoods. This is not completely accurate. Defendants initially were conducting illegal absentee ballot activities in the predominantly Caucasian neighborhoods. After the poll results, the Stinson Campaign, in conjunction with the Board, specifically and intentionally employed a race-based scheme to further their conspiracy to elect William Stinson.

In conducting the conspiracy with the Stinson Campaign, the Board discriminated against the Republican Party and the Marks Campaign and favored the Democrat Party and the Stinson Campaign. Commissioners Tartaglione and Talmadge, and their agents, and William Stinson and the Stinson Campaign intentionally and knowingly conducted a massive scheme which violated the Equal Protection rights of the plaintiffs.

Substantive Due Process Violation

16. The right of all qualified citizens to vote in state elections is constitutionally protected, through the Fourteenth Amendment, against intentional conduct by state officials which seriously undermines the fundamental fairness of the electoral process. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Defendants have violated plaintiffs substantive due process rights by conducting willful and intentional conduct which abused and contaminated the organic process by which candidates are elected. The Board intentionally conducted broad gauged unfairness derived from prejudice and bias. *See Griffin v. Burns*, 570 F.2d 1065 (1st Cir.1978). The willful, knowing, and illegal absentee ballot procedure followed by the Board, and as implemented by the Stinson Campaign, was incapable of preventing absentee ballot illegalities, and the conduct of the Board prevented any possibility of the Commonwealth's court system from reviewing any allegations of fraud. The conspiratorial procedure violated plaintiffs' substantive due process right to a free and fair election. *See Kasper v. Board of Elections Commissioners*, 814 F.2d 332, 343 (7th Cir.1987).

Voting Rights Act Violations

17. The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). *See also Brooks v. Nacrelli*, 331 F.Supp. 1350 (E.D.Pa.1971), *aff'd*, 473 F.2d 955 (3d Cir.1973). Claims brought pursuant to 42 U.S.C. §§ 1971(a)(2) and 1973(a) must be supported by facts indicating unlawful racial discrimination in connection with the election process.

***34** 42 U.S.C. § 1971(a)(2)(A) states:

(2) No person acting under color of law shall

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.

42 U.S.C. § 1973(a) states:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....

18. Plaintiffs have established deliberate racial discrimination by the defendants, acting under color of state law in a broad-based conspiracy, to discriminate against the Republican Candidate and favor the Democrat Candidate. Further, the practice of the Board and the Stinson Campaign was to target voters based on race and to abridge the voters' right to vote. The conduct of the defendants violated these sections of the Voting Rights Act by applying a "standard practice, or procedure different from the standards, practices, or procedures" in a discriminatory fashion in favor of presumed supporters of Democrat Stinson over presumed supporters of Republican Marks in the delivery of Absentee Ballot Packages.

19. The Stinson Campaign and Democrat party workers, in conjunction with the Board, conspired to violate the Voting Rights Act by targeting Latino and African-American voters for fraud, intimidation, and deception in order to obtain illegal absentee ballots for Stinson. The defendants violated the Voting Rights Act by conducting an illegal scheme to deny Latino and African-American voters the right to vote freely without illegal interference by Stinson Campaign workers and Democrat committee persons. *See Puerto Rican Legal*

Defense & Educ. Fund v. Gantt, 796 F.Supp. 681, 687 (E.D.N.Y.1992). Plaintiffs have firmly established that defendants violated the above stated sections of the Voting Rights Act.

Relief

20. Voting is of the most fundamental significance under our constitutional structure. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The public interest is served when the courts enforce free and fair elections. *See Reynolds v. Sims*, 377 U.S. 533 (1964). The public interest is served when the integrity of the election process is upheld. Federal courts in shaping equity decrees are “vested with broad discretionary power,” *Lemon v. Kurtzman*, 411 U.S. 192 (1973) and *Donohue v. Bd. of Elections*, 435 F.Supp. 957 (E.D.N.Y.1976), and have exercised their powers in enjoining persons from taking office and voiding elections. *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir.1969) (election invalidated and candidate enjoined from office); *Ury v. Santee*, 303 F.Supp. 119 (N.D. Ill.1969) (municipal election invalidated on due process and equal protection grounds and candidates enjoined from office).

A. Certification of Marks

*35 21. Pursuant to the mandate of the Third Circuit, this court may order the certification of a candidate if “it finds, on the basis of record evidence, that the designated candidate would have won the election but for the wrongdoing.” *Marks v. Stinson*, Nos. 94–1247 and 94–1248, slip op. at 29–30 (3d Cir., March 16, 1994). After three weeks of testimony and after giving full consideration to the standards as set forth by the Third Circuit and in light of the entirety of the admissible evidence, the court concludes that Bruce Marks would have won the election but for the wrongdoing. *Curry v. Baker*, 802 F.2d 1302, 1312–14 (11th Cir.1986) Accordingly, the court will order the Board to certify Bruce Marks as the winner of the 1993 Special Election in the Second Senatorial District.

22. The electorate may be confident that Bruce Marks will be seated as their Senator because he has established his credentials to fill the vacancy. No elector who legally cast a ballot, whether the ballot was cast at the polls or by absentee ballot, will be disenfranchised by this result. In addition, no voter who was illegally induced into voting improperly but who could have otherwise cast a legal ballot will be disenfranchised by this result.

B. Final Injunctive Relief Against the Board

23. In light of the broad-based conspiracy of Candidate Stinson, the Stinson Campaign, and the Board, and in light of the Board’s failure to fairly conduct its duties during the 1993 Special Election, injunctive relief is appropriate to ensure that voters understand the application procedures and that the Board’s procedures are followed so that constitutional and other rights are not violated. From the time when this action was originally filed, the court has been acutely aware that only in the most unusual circumstances should a federal court intervene in an area that is so traditionally state controlled. *See generally Gruenburg v. Kavanagh*, 413 F.Supp. 1132 (E.D.Mich.1976). Given the facts of this case, there is no reasonable alternative available and the court will therefore enter as final injunctive relief the Order previously entered in this action of February 17, 1994.

24. Various voters testified that they were angered and disillusioned by the Special Election and its aftermath. Many citizens have expressed a common thread of pent up feelings reflecting a long suppressed disgust and outrage at the officials and the system responsible. While this decision resolves the immediate issues and concerns raised by this litigation, it would be a delusion to conclude that the underlying evils which conceived and nurtured the wrongdoing involved have been eliminated. Only a concerned citizenry can do that. Only then will they have a permanent and justified confidence in the electoral process.

An appropriate Order follows.

ORDER

AND NOW, this day of April, 1994, consistent with the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that the court’s previous Order in this matter dated February 17, 1994, granting preliminary injunctive relief is ENTERED as the FINAL and PERMANENT INJUNCTION as follows:

*36 1. The Certification that Defendant William Stinson won a plurality of votes in the November 1993 Special Election issued on November 18, 1993 by the County Board of Commissioners, acting as the Board of Elections, is VOID, as contrary to law;

2. Defendant William Stinson is hereby ENJOINED from acting in any capacity to vote, perform any duties or otherwise act or hold himself out as the duly elected

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Senator from the Second Senatorial District of Philadelphia, Pennsylvania;

3. All absentee ballots, applications and materials issued by the defendant County Board of Commissioners, acting as the Board of Elections, from this point forward shall be distributed, at least in the Second Senatorial District, in the English language and in the Spanish language;

4. The County Board of Commissioners, acting in the capacity of the Board of Elections, their agents, servants and representatives and those acting in concert with them are hereby ENJOINED from distributing official absentee ballot material to any candidate or representatives of any candidate in connection with any election in a discriminatory manner. The official absentee ballot material, which is distributed from the County Board of Elections for use in primary or general elections after the receipt of a duly qualified absentee voter application processed pursuant to the Election Code 25 P.S. § 3146.2b, SHALL only be distributed by mailing same to the voter, or by hand delivery to the voter, pursuant to 25 P.S. § 3146.5;

5. The defendant County Board of Commissioners, acting in the capacity of the Board of Elections, their agents, servants and those acting in concert with them are hereby further ENJOINED from receiving any official absentee ballot materials or declarations from any candidate or candidate's workers, or by anyone other than the voter. The Board of Commissioners shall only accept such ballots if delivered to them in person by the voter, or mailed to them by the voter, pursuant to 25 P.S. § 3146.6;

6. The County Board of Commissioners, acting as the Board of Elections, SHALL maintain all official absentee ballot applications and all other absentee ballot materials in its possession for public access, and is ENJOINED from delivering or returning such records to any agent or other representative of any political party or candidate pursuant to 25 P.S. § 3146.9.

7. The defendant County Board of Commissioners, acting as the Board of Elections, is ENJOINED from employing discriminatory practices which involve applying the Election Code or any other law in a manner that favors or disfavors a candidate;

8. The County Board of Commissioners, acting as the Board of Elections, its agents, representatives, and those

acting in concert with them are further ORDERED to take all steps necessary within the office of the County Board of Elections to enforce the terms of this Order and to comply with the terms of the Election Code and other laws.

IT IS FURTHER ORDERED that:

***37 9.** The County Board of Commissioners, acting as the Board of Elections, is ORDERED to RECERTIFY the results of the 1993 Special Election in the Second Senatorial District based on the finding and conclusion that Bruce S. Marks received a PLURALITY of the legally cast votes, or in other words, that Bruce S. Marks would have won the election BUT FOR the wrongdoing. Such recertification is to be completed within forty-eight (48) hours of the date of this Order and is then to be transmitted forthwith to the Secretary of the Commonwealth as required by law;

10. The Absentee Ballot Applications utilized by the Philadelphia City Commissioners in the Second Senatorial District SHALL PROVIDE a space in which the elector shall state the reason for his or her absence from the county pursuant to 25 P.S. § 3146.2(e)(1);

11. All other provisions of the Election Code SHALL BE ENFORCED;

12. Judgment is ENTERED in FAVOR of plaintiffs;

13. Judgment is ENTERED AGAINST defendants; and

14. A hearing on damages will be scheduled by further Order of this court.

AND IT IS SO ORDERED.

1 There was a discrepancy of five votes for each candidate between the court's February 18 Memorandum Opinion and P-88, the return sheet. To comport with P-88, five votes have been deducted from both Marks and Stinson. To this extent, Dr. Sullivan's calculations, which were based on the court's earlier opinion, have been adjusted.

Footnotes

