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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. | Feb. 18, 1994.

Opinion

NEWCOMER.

*1 Presently before the court is plaintiffs' Motion for Preliminary Injunctive Relief. After a hearing in this matter on February 7-9, 1994, and after considering the arguments of counsel, the court makes the following Findings of Fact and Conclusions of Law.

I. Findings of Fact.

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. 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, 49th, 53rd, 54th, 55th, 56th, 61st, and 62nd wards. *See* Plaintiffs' Exhibit 48. This election was particularly significant to both parties because control of the State Senate hung in the balance.

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

5. According to the certified results of the Philadelphia City Commissioners ("the Board"), sitting as the County Board of Elections, candidate Marks won 19,691 votes and candidate Stinson won 19,127 votes on the voting

machines on Election Day. *See* Official Certification, Plaintiffs' Exhibit 113.

6. According to the certified results of the Board, Marks won only 371 votes and Stinson won 1,396 votes from absentee ballots. *See* Official Certification, Plaintiffs' Exhibit 113.

7. 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).

8. 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).

9. 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).

10. 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.

*2 11. 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.

12. 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.

13. Absentee ballot applications are processed by the Board, which is charged with overseeing elections, and, which, in Philadelphia County, consists of the three County Commissioners, Democrat Chairman 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

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impartially.

14. The practice and procedure of the Board is to promptly time-stamp each application when it is received by the Board. (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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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 “Ballot”), and instructions. 25 P.S. § 3146.6; Plaintiffs’ Exhibit 3.

*3 20. 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.

21. 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.

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

23. 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.

24. In the event an elector votes in person on Election Day, the Declaration is marked “void” and the absentee ballot is not counted. Testimony of Dennis Kelly.

25. At the close of the polls on Election Day, absentee ballots are 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.

26. 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.

27. 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.

28. 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, because there is little or no safeguard against forged applications and ballots. Such an abuse took place in the instant action. *See* Testimony of Commissioner Talmadge; Voter Testimony.

29. 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 Testimony; Ruth Birchett; Voter Testimony.

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

31. The Board is under a statutory duty to strictly enforce

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the Election Code to avoid any partiality in the conduct of elections. Commissioner Talmadge, however, was unaware of 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 the Election Code. Testimony of Commissioner Talmadge; Dennis Kelly.

*4 32. 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 little or no evidence to suggest that the improper conduct of the Board was generalized and was not intended to favor any one candidate. The testimony supports an opposite finding that the malfeasance and nonfeasance of the Board was purposefully directed at favoring only Stinson, the democratic candidate. This is particularly important to a motion for an injunction where the court must weigh the equities involved.

33. 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 was also testimony establishing that in special circumstances, an applicant voter's spouse or close relative could obtain the Absentee Ballot Packages. This was the procedure until the 1993 Election. Testimony of Commissioner Kane, Reba Morella, and Peter Medina.

34. 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 committeepersons or Stinson campaign workers during the 1993 election. Plaintiffs' Exhibits 120, 121.

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

36. Reba Morella was an employee of the Board. Her responsibilities consisted of processing absentee ballot applications and ballots during the two weeks prior to the election. She did not observe absentee ballots being delivered to Democrat committeepersons 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.

37. 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. Most of employees of the Board were not aware of the irregularities. Testimony of Commissioner Talmadge, Kelly and Morella.

38. No witness, other than those involved in the malfeasance, was able to offer testimony that supported the existence of a 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, and Commissioner Talmadge*.

*5 39. Similarly, Peter Medina, a Democratic committeeperson who worked in various political divisions over the last 40 years, never saw Absentee Ballot Packages in the hands of any campaign worker prior to this election. Testimony of Peter Medina.

40. Stinson worker Josue Santiago came to 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.

41. The Board, through the conduct of Commissioners Tartaglione and Talmadge, Dennis Kelly, and their agents, engaged in a covert process which assisted 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. *See Testimony of Ruth Birchett, Dennis Kelly, and Commissioners Talmadge and Kane*.

42. 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.

43. Frank Felice ("Felice") served as the treasurer for the Stinson Campaign. Testimony of Martz and Jones.

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44. During July, August, and September, 1993, Stinson canvassed predominately Caucasian areas of the district with Craig Cummons, Frank Felice, 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 20 absentee ballots from each division. Testimony of Jones; Stinson Deposition, at p. 114; Plaintiffs' Exhibit 113.

45. 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.

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

47. 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.

*6 48. Numerous absentee ballot applications solicited with Stinson's personal involvement were obtained in violation of the Election Code. Testimony of Jones.

49. The Stinson Campaign also used a strategy whereby workers would tell people they could vote from home, even though many such people were unemployed 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.

50. 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.

51. Jones approached Stinson and complained that there was improper conduct taking place in reference to the ballot applications. Stinson advised him to try and have the applications corrected and to give them back to solicitors Cummings and Campaign Treasurer Felice to see if the applications could be corrected. Jones carried out Stinson's instructions, but the same type of problems continued. Testimony of Jones.

52. 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.

53. Stinson told Jones that he was never going to lose another election because of the absentee ballots. Stinson then admonished Jones for placing the dates on applications instead of leaving the date blank. Testimony of Jones.

54. Jones raised questions with Frank Felice and others as to 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.

55. 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, Jones resigned. Testimony of Jones.

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

57. Stinson stated at deposition that the applications in the white 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.

58. The Absentee Ballot abuse was further developed by various committeepersons 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.

*7 59. In addition, Absentee Ballots were forged in this division. Testimony of Pedro Figueroa.

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

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

62. Anthony Rotondo, a Democrat committeeperson, obtained several illegal absentee ballots in the 43rd ward, 18th division. Adverse inference from Rotondo Fifth

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Amendment testimony. In addition, Absentee Ballot Packages were provided directly to Democrat Committeepersons throughout the District. Testimony of Dennis Kelly.

63. 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 Democratic State Committee was published to show that William Stinson was four (4) percent behind Bruce Marks. Testimony of Jones.

64. 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 scheme that was employed earlier. The “joke” at the campaign was that the Hispanics would sign anything. Testimony of Jones.

65. In response to the poll, the Stinson Campaign began an effort 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.

66. 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, and reported to Stinson. Testimony of Birchett and Martz.

67. 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.

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

69. Peter Medina, a Democrat Committeeperson, assisted Santiago as part of the Latino Team. Testimony of Medina.

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

71. 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.

*8 72. 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.

73. The 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. *Id.*; Testimony of Martz and Birchett.

74. The Stinson Campaign obtained approximately 1,000 absentee ballot applications from the minority areas of the district. Almost 400 absentee ballot applications were submitted to the Board for approval by the Stinson Campaign for unregistered voters from minority areas. Plaintiffs’ Exhibit 90.

75. Most of the Rejected Applications used “Out of County” as an excuse for an absentee ballot. *See Rejected Applications.*

76. At least \$4,000 was specially allocated to implement this scheme from a political action committee associated with Democrat State Senator Vincent Fumo. Testimony of Martz and Birchett.

77. The scheme was further executed by having Birchett and others under her direction and control submit applications to the Board through Commissioner Talmadge’s office by hand delivery. Testimony of Birchett.

78. The applications were delivered to Commissioner Talmadge’s office in order for Commissioner Talmadge to provide Absentee Ballot Packages in return to the Stinson Campaign. Testimony of Birchett and Commissioner Talmadge.

79. Prior to his contact with Ruth Birchett in her capacity as a Stinson worker, Commissioner Talmadge was aware that she worked for Stinson, and she had worked on Talmadge’s campaign in 1991. Testimony of Commissioner Talmadge.

80. 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

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materials and the ballot declarations to campaign workers. Testimony of Commissioner Talmadge.

81. 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.

82. Delivery of Absentee Ballots Packages to the Stinson Campaign workers was not initially disclosed to Commissioner Kane nor 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.

*9 83. 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 between the voter and the Stinson Campaign workers, and was a discriminatory practice which favored one candidate and party over another.

84. 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 were executing 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 even forged other ballots. Testimony of Voters.

85. Voters also completed applications and Declaration Packages after the statutory deadline for receipt by the Board and such ballots were counted by the Board. Testimony of Medina and Voters.

86. 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 did not even know that they had signed absentee ballot applications. Testimony of Medina.

87. 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.

88. 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.

89. 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 two members of the Board and was known and ratified by Candidate Stinson. Testimony of Jones, Medina, Commissioner Talmadge; Adverse inference from Fifth Amendment testimony of Santiago, Ascencio, Landers, and Pratt.

90. 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.

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

*10 92. 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, several people were trying to conceal the absentee ballot solicitation scheme of the Stinson Campaign. Testimony of Kelly, Jones, and Commissioner Talmadge.

93. The original Rejected Applications were delivered to Commissioner Talmadge for return delivery back to Ruth Birchett within a week prior to the Election. This was inconsistent with Dennis Kelly's prior testimony at a deposition on January 25, 1994. Testimony of Dennis Kelly.

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

95. 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 it.

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96. Commissioner Talmadge knew about the Rejected Applications, facilitated the distribution of hundreds of 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.

97. 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.

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

THE IMPROPER CERTIFICATION

99. On November 18, 1993, the Board certified Candidate Stinson as the winner of the election from the Second Senatorial District. However, this was done during the course of a public hearing prior to concluding the Board's 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.

100. 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.

101. 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 scheme. 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, that the absentee ballot scheme would not have tainted the election in such an invidious manner.

*11 The appeal and challenge structure is grounded in the rudimentary supposition that the process is fair and not inherently flawed. The Stinson Campaign activities relating to the absentee ballots were improper. 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.

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).

2. This Court has jurisdiction pursuant to the Civil Rights Act and the Voting Rights Act.

3. Federal Rule of Civil Procedure 65 requires that notice be given to adverse parties. During closing arguments on February 9, 1994, counsel for the Board argued that the Board did not have notice of the hearing nor that injunctive relief was being considered against his clients. In their pleadings, plaintiffs set forth specific injunctive relief sought against each of the defendants, and at conference in this matter, all the parties were made aware of the scope of discovery and this was tailored to the injunctive relief sought against the defendants. In addition, counsel for the Board was present at the entirety of the proceedings, participated in discovery, and cross-examined and called witnesses at the hearing.

4. Standard for a Preliminary Injunction:

When ruling on a motion for preliminary injunctive relief pursuant to Federal Rule of Civil Procedure 65, a district court must consider four factors: (1) the likelihood that the movant will prevail on the merits at a final hearing; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued; and (4) the public

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interest. *S & R Corporation v. Jiffy Lube International, Inc.*, 968 F.2d 371, 374 (3d Cir.1992). All four factors should favor preliminary relief before the injunction will issue. *Id.* Moreover, the grant of injunctive relief is an “extraordinary remedy which should be granted only in limited circumstances.” *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir.1989). Additionally, the courts have consistently recognized that this extraordinary remedy is only available where the party seeking injunctive relief has no adequate remedy at law. *Franks GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 n. 3 (3d Cir.1985); *see also Justin Industries v. Choctaw Securities, L.P.*, 747 F.Supp. 1218, 1220 (N.D.Tex.1990).

*12 The court agrees with defendants to the extent that an injunction in this type of case is appropriate only in the most unusual circumstances. Under most circumstances, it is desirable to allow the legislative body to function without a federal court interfering into the state’s legislative and political processes. In determining whether a preliminary injunction should issue, the criteria are to be applied, and in addition, the court must exercise judgment sensitive to all the interests likely to be affected by an injunction and the suitability of the underlying controversy to judicial resolution. *See, e.g., Cintron–Garcia v. Romero–Barcelo*, 671 F.2d 1, 5 (1st Cir.1982). In essence, a district court must engage in a balancing of harms, and in a case such as this, plaintiffs have an up-hill battle in demonstrating that they have met their burden.

A. Likelihood of Prevailing on the Merits:

The first requirement that the movant must meet before an injunction will issue is the reasonable probability of eventual success in the litigation. *Instant Air Freight Co.*, 882 F.2d at 800. In the instant case, plaintiffs have set forth substantial evidence supporting each of their claims. Substantial evidence was presented establishing massive absentee ballot fraud, deception, intimidation, harassment, and forgery. Candidate Stinson knew of and ratified the procedures, and the Board participated in and later tried to conceal its involvement in the scheme. This is supported by the plaintiffs’ exhibits such as the returned absentee ballot applications, the phone bank scripts, and the direct testimony of Jones, Kelly, and Commissioner Talmadge.

The conduct of the Stinson Campaign and Board, through the conduct of Commissioner Tartaglione and Talmadge and their agents goes well beyond a “garden variety” election dispute and attacks the very integrity of the electoral process itself. Plaintiffs have established a likelihood of success on their claims that such activity

violates:

i. the First Amendment rights of Plaintiffs by illegally discriminating in favor of Democrat Stinson over Republican Marks. *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir.) *cert denied*, 434 U.S. 968, 98 S.Ct. 513, 54 L.Ed.2d 455 (1977). *Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175–176, 97 S.Ct. 421, 426, 50 L.Ed.2d 376 (1976); *Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315, 1332–1334 (N.D. Ill.1979), *judgment vacated on other grounds*, 829 F.2d 1387 (7th Cir.1987).

ii. the equal protection rights of Plaintiffs by illegally discriminating in favor of Democrat Stinson over Republican Marks with no rational reason or purpose. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); *Libertarian Party of Indiana v. Marion County Bd. of Voter Registration*, 778 F.Supp. 1458 (S.D. Ind.1991);

iii. the substantive due process right of Plaintiffs to a free and fair election. *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964); *Duncan v. Poythress*, 657 F.2d 691, 704, (5th Cir.1981), *cert. dismissed*, 459 U.S. 1012, 103 S.Ct. 368, 74 L.Ed.2d 504 (1982);

*13 iv. 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. *Brier v. Luger*, 351 F.Supp. 313 (M.D. Pa.1972).

In addition, plaintiffs have demonstrated the likelihood of success on their claims in that the Stinson Campaign and Democrat party workers, in conjunction with the Board, conspired to violate the Election Code and Voting Rights Act by targeting Latino and African–American voters for fraud, intimidation, and deception in order to obtain illegal absentee ballots for Stinson.

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 met their burden of demonstrating a likelihood of success on the merits.

B. Irreparable Harm:

The second criteria a movant must establish before an injunction will issue is proof of irreparable harm. In order

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to demonstrate irreparable harm, “the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial.” *Instant Air Freight Co.*, 882 F.2d at 801. Furthermore, the request for monetary relief has not been considered to constitute irreparable harm for the purposes of a preliminary injunction. *See id.* The Supreme Court, in determining the applicability of monetary relief to the grant of a preliminary injunction, has stated:

[t]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury ... Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murry, 415 U.S. 61, 90 (1964) (quoted in *Instant Air Freight Co.*, 882 F.2d at 801). Thus, it is evident that the harm “must be of a peculiar nature, so that compensation in money cannot atone for it.” *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 92 (3d Cir.1988).

In the present case, plaintiffs have set forth substantial evidence demonstrating that they will suffer irreparable harm. An improperly seated state representative and the loss of constitutional freedoms constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347 (1976). The plaintiffs have alleged more than mere monetary harm, and even more importantly, plaintiffs set forth substantial evidence demonstrating that the absentee ballot scheme was a widespread effort to improperly obtain absentee ballots. Plaintiffs have not been subjected to this type of scheme for an extended period and simply decided to bring a claim at this juncture. Plaintiffs have repeatedly tried to have their claims heard, but due to the failure of the Board to consider their claims, plaintiffs have been foreclosed from receiving any relief. A racially discriminatory strategy was conducted by the defendants by actively misrepresenting and abusing the use and vote by minority Latino, Afro-American, elderly and other absentee ballot voters. In essence, defendants carried out an improper scheme to favor one candidate. Money alone cannot address these claims and time is of the essence. *Cf. Cintron-Garcia v. Romero Barcelo*, 671 F.2d 1, 3–4 (1st Cir.1982) (where challenged practices have been openly in existence for years prior to challenge, injunctive relief is inappropriate).

*14 Plaintiffs, and even the entire state, suffer irreparable harm when a state representative is not properly elected. *See, e.g., Bell v. Southwell*, 376 F.2d 659 (5th Cir.1969). This is ordinarily a matter within the sound discretion of the state, but in exceptional cases involving massive improper conduct, plaintiffs should be allowed to have their claims heard and an injunction issue if substantial evidence supports their claims.

C. The Extent to which the Defendants Will Suffer Irreparable Harm if the Preliminary Injunction is Issued.

The irreparable harm suffered by the plaintiff exceeds any injury that may result to the defendants. With regards to the Board, it is their duty to ensure that elections are proper and fair. If an injunction is tailored to promote this end, the Board would not suffer any harm.

D. The Public Interest.

The public interest is served when courts enforce free and fair elections. *See Reynolds v. Sims*, 377 U.S. 533 (1964). While it is true that the State of Pennsylvania has a great interest in the outcome of its elections and should be able to resolve disputes without federal court intervention, the public interest is served in the extraordinary case, as here, when massive improper conduct has taken place by private and public workers. The public interest is served when the integrity of the election process is upheld and when adequate remedial measures are afforded complainants.

5. 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 (S.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).

6. In light of the massive scheme of Candidate Stinson and the Stinson Campaign, and in light of the failure of the Board to fairly conduct its duties, it would be grossly inequitable to allow Stinson to remain in office and for the Board to continue to conduct business as it did during the 1993 Election. In a similar circumstance, where a federal court addressed massive improper conduct on the part of a candidate, relief was granted which resulted in the certification of the candidate receiving the greatest number of legal votes without the requirement of a vote by vote canvass. *Curry v. Baker*, 802 F.2d 1302, 1312–14

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(11th Cir.1986) (in circumstances of “massive violations of state and federal law” there is no requirement to “use only mathematically precise voter-by-voter testimony to determine which candidate received the most legal votes cast.... Under this standard, massive voting irregularities could never be effectively redressed; it would put a premium on wrongdoing of enormous proportions”).

*15 7. The votes cast at the voting machines were not affected by the improper conduct of the Stinson Campaign or the Board, and no evidence indicates that the machine returns do not reflect the will of the electorate. The District should not be denied representation in the State Senate based on the efforts taken by the Stinson Campaign and the Board to conceal certain conduct relating to the absentee balloting procedures.

8. The will of the electorate is reflected in the votes cast on the voting machines. The public interest will be served by having Marks, the candidate who prevailed on the undisputed legal votes, serve the remaining months of the term, which expires in December, 1994, rather than declaring the seat vacant and scheduling a new election at the May primary. It would be inequitable to cause the Second Senatorial District to be without representation in the State Senate pending the outcome of a new election, especially in light of the fact that those voters in the District who exercised their vote legally have voiced their desire to have Marks serve as their State Senator. Another consideration in the balancing of equities in this case, though certainly not a binding one standing alone, is the cost that a new election would impose on the taxpayers of Philadelphia due to the fraud perpetrated by the City Commissioners.

Because time is of the essence, because it would be inequitable to order a new election, and because the Board acted improperly in administering the last election, the court will order that the election be recertified on the results of the ballots cast at the polls. *Id.* This is extraordinary relief; however, it is appropriate because extraordinary conduct by the Stinson Campaign and the Board tainted the entirety of the absentee ballots.

9. Injunctive relief is also appropriate against the Board to ensure that voters understand the application procedures (in their native language when appropriate) and that the Board’s procedures are followed so that constitutional and other rights are not violated. Proper respect is due to state proceedings. 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). Because the plaintiffs were unable to have their claims heard and because of the most unusual circumstances and the significant federal rights involved, this court has heard plaintiffs’ claims and will tailor specific injunctive relief.

An appropriate Order follows.

ORDER

AND NOW, this ___ day of February, 1994, upon consideration of plaintiffs’ Motion for Preliminary Injunctive Relief, and the responses and arguments thereto, and after a hearing in this matter, and consistent with the foregoing Memorandum Opinion, it is hereby ORDERED that said motion is GRANTED as follows:

1. The Certification that Defendant William Stinson had more votes than Bruce Marks issued on November 18, 1993 by the County Board of Commissioners acting as the Board of Elections is VOID, as contrary to law.

*16 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 Senator from the Second Senatorial District of Philadelphia, Pennsylvania.

3. The County Board of Commissioners acting as the Board of Elections is hereby ORDERED to recertify the results of the Second Senatorial District election based on the votes cast on the voting machines ONLY within seventy-two (72) hours of the date of this Order, and transmit such recertification to the Secretary of the Commonwealth as required by law.

4. All absentee ballots, applications and materials issued by the Defendant, the County Board of Commissioners, acting as the Board of Elections, shall from this point forward be distributed in the English language and in the Spanish language.

5. 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.

6. The defendant, Board of Commissioners, acting in the capacity of the County Board of Elections, their agents, servants and those acting in concert with them are hereby further ENJOINED from receiving any official absentee

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ballot materials or declarations from any candidate or its workers, or by anyone other than the voter in a discriminatory manner. 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.

7. 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 their possession for public access, and shall not deliver or return such records to any agent or other representative of any political party or candidate pursuant to 25 P.S. § 3146.9.

8. The defendant County Board of Commissioners, acting as the Board of Elections, shall not employ discriminatory practices which involve applying the Election Code or

any other law in a manner that favors or disfavors a candidate.

9. The County Board of Commissioners, acting as the Board of Elections, their agents, representatives and those acting in concert with them are further ordered to take all steps necessary within their department and 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.

*17 10. A trial in this matter will be scheduled by further Order of this court.

AND IT IS SO ORDERED.