

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Docket No. 04-4421

Lynn E. Landes,
Plaintiff-Appellant, Pro Se

v.

MARGARET TARTAGLIONE,
in her official capacity as Chair of the City commissioners of Philadelphia;

PEDRO A. CORTES,
in his official capacity as Secretary of the Commonwealth of Pennsylvania;

ALBERTO GONZALES,
in his official capacity as the Attorney General of the United States,
Defendants-Appellees

**On Appeal from an Order of the United States District Court
for the Eastern District of Pennsylvania**

BRIEF OF APPELLANT

Lynn E. Landes
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In propria persona

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Edmond A. TIRYAK v. Thomas P. JORDAN et al., No. 78-3816 (1979)

STATEMENTS

(1) Subject Matter & Appellate Jurisdiction

A. This case is brought Article I § 2 of the U.S. Constitution, the First Amendment, the Fourteenth Amendment, and 42 U.S.C. §1983 - Civil action for deprivation of rights.

B. This court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiff's action for declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202; and by Rules 57 and 65 of the Federal Rules of Civil Procedure.

C. The Basis for the Court of Appeal's Jurisdiction. When a motion for judgment is granted and judgment entered thereon, that judgment is clearly a final decision and hence appealable when it disposes of all claims against all parties. (28 U.S.C §1291)

(2) Issue

Did the Plaintiff-Appellant submit credible evidence of a violation of law against her constitutional right to vote and to have votes counted properly by Defendants-Appellees, under which the District Court is obligated to grant her standing?

(3) Case

Plaintiff-Appellant filed a complaint in U.S. District Court for the Eastern District of Pennsylvania against the use of absentee voting in elections for public office as a violation of Plaintiff's right to vote and to have votes counted properly. The District Court granted Defendants' Motion to Dismiss on standing and Plaintiff timely appealed.

(4) Facts

- A. For elections in the city and county of Philadelphia, the City Commissioners provide for absentee voting. Ballot scanners from Danaher Corporation (Delaware) are used to count absentee ballots. Hart Intercivic of Texas provides the software for the ballot scanners
- B. Plaintiff-Appellant is a U.S. citizen, a resident, a registered voter, and a freelance journalist in the City and County of Philadelphia. She asserts that the use of absentee voting is a violation of her constitutional right to vote and to have votes counted properly. Plaintiff also asserts that her role as a journalist, a watchdog for democracy, is rendered moot in that the use of absentee voting makes the voting process effectively unobservable and therefore denies her the opportunity to determine if vote fraud or system failure has occurred. Plaintiff asked the Court to declare unconstitutional: actions, laws, and regulations by the City and County of Philadelphia, the Commonwealth of Pennsylvania, and the U.S. Congress that allow or approve the use of absentee voting in elections for public office, including, but not limited to: 4 PA Code § 171.11 and 42 U.S.C.1973ff-2(a), and to enjoin the Philadelphia City Commissioners from using absentee voting in elections for public office; to enjoin the Secretary of the Commonwealth from approving absentee

voting in elections for public office; and to order the U.S. Attorney General to enforce voting rights in the City and County of Philadelphia;

C. Defendants argued and the District Court ruled that Plaintiff does not meet the constitutional and prudential requirements for standing.

(5) Related Cases & Proceedings

Did Plaintiff-Appellant submit credible evidence of a violation of law against her constitutional right as a qualified citizen and journalist to vote and to have votes counted properly by Defendants-Appellees, under which the District Court is obligated to grant her standing?

Yes, plaintiff submitted credible evidence that her constitutional rights have been violated. *First*, Congress and the Courts set two strict standards for the voting process: A) voters qualified to vote shall be allowed to vote, and B) their votes shall be counted properly. *Second*, Congress also set standards for observing if those rights have been violated (42 U.S.C. §1973f - the role of the Federal Observer). The use of absentee voting denies any party (Federal Observers, election officials, poll watchers, the press, or the public) the right to observe the

voting process in a meaningful or effective way under 42 U.S.C. §1973f. **Third**, although absentee voting has been promoted as a **convenience** for voters who cannot or do not make it to the polls on Election Day, the U.S. Supreme Court decided last year that convenience should not supersede a citizen's fundamental rights. (*Tennessee v. Lane*, No. 02-1667(2004)) The use of absentee voting is a violation of Plaintiff's fundamental right to vote and to have votes counted in a manner that can be observed in a meaningful or effective way. (Emphasis added by Plaintiff)

A. Voters qualified to vote shall be allowed to vote.

The citizens' right to vote is guaranteed under Article I, § 2 of the U.S. Constitution (*Wesberry v. Sanders*, 376 U.S. 1, 1964), the Fourteenth Amendment, and other Amendments and federal laws.

The right to vote is given under the Constitution to all "qualified" citizens. (42 U.S.C. § 1971, *Reynolds v. Sims* 377 U.S. 533, 1964) Absentee voting denies election officials, poll watchers, Federal Observers, the press, or the public the opportunity to observe if the person who filled out the ballot was a "qualified"

citizen.

The U.S. Supreme Court has recognized that only polling precincts can provide voters protection from intimidation and election fraud. In *Burson v. Freeman*, 504 U.S. 191, 206 (1992), the Court said, “*In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.*” (Emphasis added by Plaintiff) Absentee voting provides the voter no protection from *intimidation* nor does it provide election officials, Federal Observers, poll watchers, the press, or the public with an effective or meaningful opportunity to discover *election fraud*. (Emphasis added by Plaintiff)

Voter intimidation is prohibited under 42 U.S.C. § 1973i. Prohibited acts, “(b) *Intimidation, threats, or coercion - No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate,*

threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 1973a (a), 1973d, 1973f, 1973g, 1973h, or 1973j(e) of this title.”

What is a vote? In *Bush et. al v. Gore et. al* (No. 00-949), the Supreme Court wrote, "A 'legal vote,' as determined by the (Florida) Supreme Court, is one in which there is a 'clear indication of the intent of the voter'." The Court accepted that definition as, "unobjectionable as an abstract proposition and a starting principle." The use of absentee voting denies the voter the opportunity to prove that the ballot cast is a "clear indication" of the voter's intent. There is no way to determine if a voter is intimidated or coerced. There is no effective way to determine if a voter's ballot is altered, lost, replaced, or destroyed. Any result produced by absentee voting is circumstantial evidence, at best, of the voter's intent. In that same vein, "The terms 'vote' or 'voting' includes all action necessary to make a vote **effective** in any primary, special, or general election." (42 U.S.C. § 1973l (c)(1)). Absentee voting interferes with the citizens' ability to make their votes "effective" or to know if they, in fact, voted at all or if their votes were

counted. (Emphasis added by Plaintiff)

In *United States v. Mosley* (238 U.S. 383, 1915), the Court decided, "*The right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.*" Casting a ballot into a box is not only a right; it is also a responsibility. Federal Observers, poll watchers and others have no way to determine if the voter was intimidated or their ballots were lost, replaced, altered, or damaged when absentee voting is used.

B. Qualified citizens have the constitutional right to have their votes "counted properly". (*Allen v. Board of Elections and Wesberry v. Sanders*, 42 U.S.C. §1973f)

Voters, either by themselves or through their representatives, such as the press, poll watchers, or Federal Observers, must have the opportunity to observe the voting process uninterrupted (i.e., from start to finish) in order to determine if votes are "counted properly". That opportunity is denied when absentee voting is used.

There is no effective way to determine if votes are "properly counted" because the marking and casting of absentee ballots is effectively unobservable. The use of absentee voting constitutes a *secret or concealed processing of the vote*, which is a

“prohibited act” under 42 U.S.C. § 1973i(a) *Failure or refusal to permit casting of tabulation of vote, and (d) Falsification or **concealment of material facts** or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties. Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or **conceals a material fact**, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.*

The federal standard for observing elections is described in the oversight function of Federal observers in U.S. Code, Title 42, Chapter 20, Subchapter I-A, § 1973f, “*Observers at elections; assignment; duties; reports: Whenever an examiner is serving under subchapters I-A to I-C of this title in any political subdivision, the Director of the Office of Personnel Management may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision **for the purpose of observing whether persons who are entitled to vote are being permitted to vote**, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision **for the purpose of observing whether***

votes cast by persons entitled to vote are being properly tabulated.” The use of absentee voting conceals the voting process and therefore denies Federal Observers, poll watchers, the press, or the public the right or the opportunity to observe if "persons who are entitled to vote are being permitted to vote" or "whether votes cast by persons entitled to vote are being properly tabulated". (Emphasis added by Plaintiff)

In *Edmond A. Tiryak v. Thomas P. Jordan et al.*, No. 78-3816 (1979), the Court ruled, “...*the poll-watcher's function is to guard the integrity of the vote. No activity is more indelibly a public function than the holding of a political election.*”

The roll of the poll watcher is to ensure the proper administration of the voting process is amply supported under federal law. That roll is reported in U.S.

Constitution: Annotations p.18, § 4. Elections, Clause 1. Congressional Power to

Regulate, Federal Legislation Protecting Electoral Process, “*More recently,*

Congress has enacted, in 1957, 1960, 1964, 1965, 1968, 1970, 1975, 1980, and

1982, legislation to protect the right to vote in all elections, federal, state, and

local, through the assignment of federal registrars and poll watchers, suspension

of literacy and other tests, and the broad proscription of intimidation and reprisal,

whether with or without state action.” (P.L. 85-315, Part IV, Sec. 131, 71 Stat.

634, 637 (1957); P.L. 86-449, Title III, Sec. 301, Title VI, 601, 74 Stat. 86, 88, 90

(1960); P.L. 88-352, Title I, Sec. 101, 78 Stat. 241 (1964); P.L. 89- 110, 79 Stat. 437 (1965); P.L. 90-284, Title I, Sec. 101, 82 Stat. 73 (1968); P.L. 91-285, 84 Stat. 314 (1970);P.L. 94-73, 89 Stat. 400 (1975); P.L. 97-205, 96 Stat. 131 (1982). Most of these statutes are codified in 42 U.S.C. Sec. 1971et seq. The penal statutes are in 18 U.S.C. Sec. Sec. 241-245.)

Does the lack of effective observation of the voting process violate the Equal Protection Clause? Yes, full and fair enforcement of voting rights depends on the *opportunity* to detect vote fraud and system failure. The use of absentee voting denies enforcement officials, poll watchers, the press and the public that opportunity and is therefore a violation of the Equal Protection Clause. (Emphasis added by Plaintiff)

Although absentee voting has been promoted as a convenience for voters who can not or will not make it to the polls on Election Day, the U.S. Supreme Court has decided that convenience should not supersede a citizen's fundamental rights.

Writing for the majority in *Tennessee v. Lane*, No. 02-1667(2004), Justice John Paul Stevens said, "...states may not justify infringement on fundamental rights by pointing to the administrative convenience or cost savings achieved by maintaining

barriers to the enjoyment of those rights.”

Is the federal court the proper venue? Yes, a state’s discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation, the state system cannot directly conflict with federal election laws on the subject. (*McDonald v. Board of Election, 394 U.S. 802 (1969)*).

Plaintiff argues that the use of absentee voting denies effective public participation and meaningful oversight of the voting process and is therefore a violation of federal law. In addition, Plaintiff has the right to file a Complaint in federal court before other remedies are exhausted, under Title 42, Chapter 20, §1971(d)

Jurisdiction; exhaustion of other remedies – “The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.”

(6) Standard of Review

When a motion for summary judgment is granted and judgment entered thereon, that judgment is clearly a “final decision” and hence appealable when it disposes of

all claims against all parties. 28 U.S.C §1291.

ARGUMENT

(1) Summary of Argument

Plaintiff-Appellant meets the constitutional requirements for standing: A) she suffered an injury, B) there exists a connection between the injury and the conduct complained of, C) the injury would be remedied by a favorable decision. Plaintiff also meets the prudential component of standing, D) she is asserting her own rights, E) her claim is not abstract or a generalized grievance, and F) her complaint is protected by federal laws and the Constitution. Plaintiff has a fundamental right to vote and to have votes counted properly. The use of absentee voting violates Plaintiff's rights as a citizen, a voter, and a journalist.

(2) Argument

A. The Plaintiff suffered an injury as a voter and a journalist. Her challenge is to the process. The use of absentee voting is the harm. The use of absentee voting denies voters the right to meaningful participation and effective public oversight of the voting process. It constitutes a "Deprivation of Civil Rights" under 42 U.S.C. §1983. In plain language, Plaintiff cannot see what is not there. She cannot determine if vote fraud or system failure occurred. This

effectively negates (or makes moot) the oversight and inspection role of election officials, poll watchers, Federal Observers, and journalists. It is an oversight role has been clearly recognized by the federal and state government. Therefore, it does not follow that it is legal to render the oversight role meaningless through the use of absentee voting. Lastly, the use of absentee voting conceals material facts in violation of 42 U.S.C. §1973i(d).

Defendants have argued Plaintiff must prove discrimination took place. However, laws under 42 U.S.C. Chapter 20, Sub. I–A—Enforcement of Voting Rights, apply not only to allegations of discrimination. According to §1973a Proceeding to enforce the right to vote (2) as part of any final judgment if the court finds that violations of the **fourteenth or fifteenth amendment** justifying equitable relief have occurred in such State or subdivision. (Emphasis added by Plaintiff) The Fourteenth Amendment applies to all voters, whereas the Fifteenth Amendment places the emphasis on claims of discrimination in violation of civil rights. That said, voting rights belong to all qualified voters. There is no place in federal law or the Constitution where it states that only certain classes of voters may enjoy federal or state enforcement of their right to vote.

B. The use of absentee voting connects the injury, deprivation of civil rights, to the conduct complained of; it denies Plaintiff, as a citizen and a journalist, a meaningful opportunity to effectively observe the voting process.

C. The Court ruled that if relief was granted (i.e., the use of absentee voting was declared unconstitutional), Plaintiff had not proved that “the injury will be remedied”. Clearly, if the use of absentee voting was prohibited, the harm they inflict would cease; absentee voting would not be able to conceal the voting process. That would completely satisfy Plaintiff’s request in this case.

However, other harms also exist that cause a similar injury such as the use of voting machines. It is Plaintiff’s understanding that she could not ‘pile-on’ charges in one Complaint, which is why she filed two complaints; one against the use of absentee voting and the other against the use of voting machines.

(Docket No. 04-4439)

Plaintiff believes that the Australian paper ballot method (created in 1858 and introduced to America in the 1880’s) is the gold standard of voting, where voters go to their local polling precinct on Election Day in order to mark their ballots privately, cast them publicly, and have them counted publicly under the watchful eyes of poll watchers, the press, and the public. Ninety-five percent of

democratic nations, including most of Europe, use this method to vote.

D. Plaintiff is representing her own views. As a voter and a journalist, she is personally injured by the use of absentee voting. Though third parties may be affected by the Court's ruling on her Complaint, that is the case in any litigation.

E. The Court ruled, "*The injuries Plaintiff asserts are not particularized, concrete, or imminent, but are abstract and hypothetical.*" The Court does not say, but Plaintiff theorizes, that the evidence the Court considers "concrete" would be proof of vote fraud or system problems. Plaintiff respectfully disagrees on two points. Requiring proof of harm when the use complained of (absentee voting) precludes the gathering of such evidence, constitutes a classic Catch-22. Plaintiff's challenge is to the process; the use of absentee voting is the harm; it is a deprivation of a civil right. It is not necessary to prove that vote fraud or system failure took place, just as it was not necessary to prove that slavery resulted in physical harm to slaves. What if a slave owner lavished gifts, money, and other benefits on his slaves so that they lived a life of ease and comfort? Would that make the deprivation of their civil right of liberty any less unconstitutional?

The use of absentee voting denies all parties any effective opportunity to detect vote fraud or system failure. In common language, no one can see what is not there. No one can tell if ballots are being altered, lost, replaced, or destroyed. The use of absentee voting eliminates the security and privacy of the polls. It is an invitation to (and results in) vote fraud and voter intimidation. The Supreme Court agreed with that assessment in *Burson v. Freeman* (1992). The use of absentee voting effectively negates the oversight and inspection roll of election officials, poll watchers, Federal Observers, and journalists.

Although Plaintiff is challenging the process and not attempting to prove vote fraud or system failure, she has provided extensive documentation of vote fraud and election irregularities made possible through the use of absentee voting. In her Complaint, Plaintiff attached articles that reported on these problems, most notably, [How Bush Took Florida: Mining the Overseas Absentee Vote](#), New York Times, July 15, 2001. This in-depth report describes how the Bush campaign waged a legal and public relations offensive to pressure canvassing boards in Republican counties to accept overseas ballots for Bush that were illegal and should have been rejected, while at the same time pressing canvassing boards in Democratic counties to reject overseas ballots with

identical flaws.

Plaintiff also included in her exhibits a September 13, 2004 New York Times article entitled, “Absentee Votes Worry Officials as Nov. 2 Nears”, reporter Michael Moss writes, *“As both major political parties intensify their efforts to promote absentee balloting as a way to lock up votes in the presidential race, election officials say they are struggling to cope with coercive tactics and fraudulent vote-gathering involving absentee ballots that have undermined local races across the country. Some of those officials say they are worried that the brashness of the schemes and the extent to which critical swing states have allowed party operatives to involve themselves in absentee voting - from handling ballot applications to helping voters fill out their ballots - could taint the general election in November. In the four years since the last presidential election, prosecutors have brought criminal cases in at least 15 states for fraud in absentee voting. One case resulted in the conviction of a voting-rights activist this year for forging absentee ballots in a Wisconsin county race. In another case, a Republican election worker in Ohio was charged with switching the votes of nursing-home residents in the 2000 presidential race. And last year in Michigan, three city council members pleaded guilty in a vote-tampering case that included forged signatures and ballots altered by white-out.”*

Another exhibit Plaintiff provided was the September 25, 2003 Congressional Research Service Report to Congress, which stated, *“While the percentage of votes cast by absentee or mail ballot has been increasing in recent elections, some observers have expressed concerns that the method is more vulnerable to certain kinds of fraud and coercion of voters than is balloting at the polling place... According to the National Conference of State Legislatures, at least states have some form of early voting. Some have criticized early voting as distorting the electoral process and being open to certain kinds of fraud and abuse.”*

In an October 2001 Government Accounting Office (GAO) report, the authors stated, *“... some officials promote reforms such as early voting to enhance the accessibility of the electoral process to the general public, while others claim such a move could open the door to voter fraud and thus may come at the price of the integrity of the election system.”*

The District Court ruled that Plaintiff’s alleged injury amounts to a “generalized grievance” shared in substantially equal measure by all or a large class of citizens and is not sufficient to confer standing. Plaintiff respectfully disagrees.

First, this does not fit the definition of a “grievance” but rather a violation of civil rights. Laws have been passed and policies implemented that allow and/or mandate the use of absentee voting despite the fact that it conceals the voting process in violation of federal law and the Constitution. Second, the fact that third parties or “a large class of citizens” hold the same rights and suffer the same violation as Plaintiff, does not constitute grounds to dismiss. The Court’s ruling appears to indicate that Plaintiff can only assert a violation of rights in court if she has been the only victim or one of a select class of victims. If that were the case, it would send a powerful signal to others, which would be, ***if you are going to violate civil rights, make sure you victimize lots of people from various backgrounds.*** (Emphasis added by Plaintiff)

The Court ruled, “*Such concern involve questions of wide public significance that are most appropriately addressed by the legislative branch.*” Plaintiff respectfully disagrees. First, Plaintiff has the right to challenge acts of the legislative branch (*Reno v. American Civil Liberties Union, No. 96–511 (1997)*). Second, Plaintiff has the right to file a Complaint in federal court before other remedies are exhausted, under Title 42, Chapter 20, §1971(d). And lastly, the federal and state legislatures helped to cause the harm by passing laws that allowed for the use of absentee voting. It does not follow that

plaintiff should seek a remedy from those same parties. For example, if Plaintiff were the *only* person who filed a complaint in court challenging a city ordinance that denied *all* of its citizens access to its meetings (where business was conducted, issues debated, and votes cast), would it be legally sound for the Court to deny Plaintiff standing and direct her to seek a remedy from the very city council who passed the ordinance in the first place?

F. The Court ruled that Plaintiff's injury must be protected under federal law and the Constitution. Plaintiff bases her complaint on Article I § 2 of the U.S. Constitution, the First Amendment, the Fourteenth Amendment, and 42 U.S.C. §1983.

(3) Conclusion

Meaningful public participation, effective oversight, and full enforcement of voting rights are the keys to a functioning and transparent democracy. Election officials cannot legally administer the voting process anytime, anywhere, and in any manner they desire. Election officials must meet the two strict standards for voting set by Congress and the Courts; these are: 1) voters qualified to vote shall be allowed to vote, and 2) that their votes shall be counted properly. Congress set standards for

observing if those rights have been violated (42 U.S.C. §1973f - the role of the Federal Observer). The use of absentee voting denies Federal Observers, election officials, poll watchers, the press, or the public the right and opportunity to observe the voting process in a meaningful or effective way under 42 U.S.C. §1973f.

Voting is a right and a responsibility, very similar to performing jury duty, where citizens must show-up in order to participate. Considerations of convenience should not supersede Plaintiff's right as a journalist to observe the process in a meaningful manner. However, America is moving towards a day when no one need show up in order to vote. Increasingly, our elections are a virtual experience - a remote and private enterprise that requires *concealment and trust* – rather than the public function our founders intended that demands *transparency and scrutiny*. Where will it end?

Although Americans have been using absentee voting since the 1870's, the longevity of any custom or practice does not confer legitimacy. Slavery in America lasted over 250 years. Voting by absentee is potent weapon that can be used to manipulate election results and, consequently, control the government.

(Emphasis added by Plaintiff)

The U.S. Congress, The Commonwealth of Pennsylvania, and The City of Philadelphia have passed legislation and adopted policies that unlawfully deny Plaintiff the most important right of citizenship, the right to vote and to have votes counted properly. The use of absentee voting should be declared a violation of the U.S. Constitution and federal law. The Plaintiff is the proper person and federal court is the proper place to seek this remedy. Plaintiff respectfully requests her day in Court.

Lynn E. Landes, Pro Se

Dated this 29th Day of March, 2005

I am the Plaintiff-Appellant in the above action and I do hereby certify that the foregoing is true to the best of my knowledge.

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