

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

VIVIETTE APPLEWHITE, *et al.*,
Petitioners,
v.
THE COMMONWEALTH OF
PENNSYLVANIA, THOMAS CORBETT,
Governor, and CAROL AICHELE,
Secretary of the Commonwealth,
Respondents.

Case No. 330 MD 2012

RECEIVED & FILED
COMMONWEALTH COURT
OF PENNSYLVANIA
2012 MAY 14 P 1:08

**REPLY IN SUPPORT OF
PETITIONERS' REQUEST FOR EXPEDITED
DISCOVERY, BRIEFING, AND HEARING SCHEDULE**

In its response, the Commonwealth does not contest that by its own estimate close to 100,000 voters are without the photo ID required by the Photo ID law or that the Petitioners' right to vote is severely burdened by the Photo ID law. Nor does the Commonwealth contest the obvious: that the election is less than six months away. Nonetheless, the Commonwealth opposes Petitioners' request for a preliminary injunction and an expedited schedule based on the unsupported argument that no preliminary relief is needed. The Commonwealth's position is groundless.

The Propriety of a Preliminary Injunction and the Need for Expedition. The Commonwealth asserts in a single sentence that "there is no need for an immediate preliminary injunction," and that the "Court can conduct a hearing on the merits of the case" in September. Response ¶ 8. As a threshold procedural matter, while the Commonwealth is hedging its language, it appears to be arguing for a denial of a preliminary injunction on grounds that the merits case can be fully litigated by September. If that is the Commonwealth's position, it should say so.

The more substantive matter is that the Commonwealth entirely fails to address the viability of its schedule. Under the Commonwealth's proposed plan, the case should be tried the week of September 10. We estimate a hearing will take approximately 5 to 7 days. This allows less than 45 days between the end of the hearing and Election day for post-hearing briefs, argument and decision by this Court. The Commonwealth also omits any mention of the briefing, argument and decision of an appeal even though it is a virtual certainty that the losing side will seek an appeal.

The Commonwealth does not address these issues because its position is untenable. In *United States v. Commonwealth*, 2004 WL 2384999 (M.D. Pa. 2004), involving whether Ralph Nader's name would appear on absentee ballots, the Commonwealth argued, and the United States District Court accepted, that last minute changes to election processes would wreak havoc by "undermining public confidence in the process" and "jeopardiz[ing] the efficient and fair administration of elections in Pennsylvania." *Id.* at *6. The Commonwealth's proposed schedule threatens the same type of chaos in the upcoming election.

Preparations for administering the next election will begin in earnest this Summer when the counties begin preparing training materials for poll workers and assembling supply kits for polling places. The scale of these efforts is massive. Philadelphia plans to train approximately 8500 poll workers at a cost of about \$20 per person. The pace of preparations will increase as the election approaches. Tens of thousands of new and amended voter registrations must be processed. Absentee ballots will be applied for and must be mailed in September and October. Allegheny County expects to receive approximately 35,000 absentee ballot requests. A last minute ruling will be confusing to poll workers and voters, will create unnecessary costs for

County elections offices and will be time consuming to implement, thereby detracting from other resource-intensive tasks necessary to administer an efficient election.

This case concerns the fundamental right to vote which is guaranteed by the express terms of the Pennsylvania Constitution. *See* Pa. Const. art. VII § 1 (“every citizen,” having certain qualifications “shall be entitled to vote at all elections”); Pa. Const. art. I, § 5 (“no power, civil or military, shall ...prevent the free exercise of the right of suffrage.”). To ensure that the courts have an opportunity to make a considered decision in time for election preparations of Petitioners’ application for a preliminary injunction concerning whether the franchise will be severely burdened for perhaps one hundred thousand citizens, and to allow time for election preparations, an expedited schedule of the kind proposed by Petitioners should be ordered.

The Commonwealth’s Claim that its Agencies are Fixing the Problem. The Commonwealth justifies its request for a delayed resolution of the case with a conclusory claim that its agencies are “involved in ongoing efforts to assure that no qualified voter will be denied the opportunity to cast a ballot for lack of proper identification.” Response ¶ 8.b. The Commonwealth does not say what its agencies propose to do or when they propose to do it. This argument for delay is entitled to no weight. If and when the Commonwealth implements the “fix” contemplated by the Commonwealth’s lawyers, ***then*** the Petitioners can test, and the Court can evaluate, whether the “fix” will be timely or effective. For the reasons set forth above and in our moving papers, this case should move forward expeditiously along the lines suggested in Petitioners’ proposed order.

The Commonwealth’s Discovery Dodge. The Commonwealth’s complaint that it cannot agree to an expedited discovery schedule without knowing the scope of all discovery requests is beside the point. Discovery will have to be expedited in this case no matter what the schedule is.

It is routine in preliminary injunctions for the parties to work cooperatively with regard to discovery and a schedule. The Commonwealth has chosen not to do so because it wishes to argue for a September hearing. The better course would be for the parties to work together to come up with a discovery schedule that will assist in ensuring prompt resolution of this case.¹

The Commonwealth's Continuing Delay. Faced with the Commonwealth's conclusory assertions, Petitioners' counsel sent the Commonwealth's attorneys a letter, by email early in the morning on May 9 asking (i) what changes the Commonwealth intended when it wrote that its agencies were working to ensure that qualified voters would not be denied the opportunity to cast a ballot; (ii) when the Commonwealth would reveal its plans in that regard; and (iii) what witness would factually support the Commonwealth's implicit position that this case could be tried in September and still permit any changes to be implemented in a timely and orderly fashion. Petitioners also asked for the Commonwealth's position on discovery in light of requests served on Petitioners earlier in the week. Finally, Petitioners' counsel suggested a telephone conference call to resolve these issues. Petitioners have received no response.

Because the right at issue is fundamental and the resolution of this dispute will affect literally millions of voters and thousands of elections officials and workers administering the election, and because the Commonwealth's proposed schedule will not allow the Pennsylvania courts to resolve the dispute in an orderly and timely fashion, Petitioners respectfully request that the Court enter their proposed order expediting discovery, briefing and hearing in this case.

¹ Petitioners served document requests and interrogatories on the Commonwealth on May 8. These requests seek basic information about the Commonwealth's justification for the law and persons likely to be burdened and disenfranchised.

Dated: May 14, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I am this 14th day of May 2012, serving the foregoing Petitioners' Reply in Support of Petitioner's Request for Expedited Discovery, Briefings, and Hearing Schedule, upon the persons and in the manner indicated below, which satisfies the requirement of Pa. R. A.P.

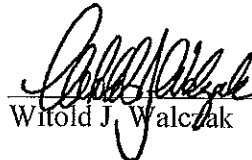
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