

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 330 MD 2012

VIVIETTE APPLEWHITE; WILOLA SHINHOLSTER LEE; GLORIA CUTTINO; NADINE MARSH; BEA BOOKLER; JOYCE BLOCK; HENRIETTA KAY DICKERSON; DEVRA MIREL (“ASHER”) SCHOR; THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA STATE CONFERENCE; HOMELESS ADVOCACY PROJECT,

PETITIONERS,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THOMAS W. CORBETT, IN HIS CAPACITY AS GOVERNOR; CAROL AICHELE, IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH,

RESPONDENTS.

PETITIONERS’ POST-HEARING BRIEF

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Dated: August 7, 2012

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PETITIONERS' POST-HEARING BRIEF

Petitioners submit this post-hearing brief to address new issues that have been brought before this Court. In all other respects, Petitioners rest on the pre-hearing brief filed July 15, 2012. Petitioners also direct the Court to the fine amicus brief filed by the Pennsylvania AFL-CIO in this case.

INTRODUCTION

The evidence at the hearing demonstrates that as many as a million registered voters do not currently have a form of ID that will enable them to vote in November. The evidence also shows that Petitioners and many other registered voters lack the underlying documentation to obtain a Pennsylvania Department of Transportation (“PennDOT”) ID despite repeated attempts to obtain one. Petitioners demonstrated that other voters may have the required documents but due to disability, infirmity or lack of access to transportation cannot get to one of the relatively few licensing facilities that issue IDs. Notwithstanding that the Commonwealth knows and has known that many Pennsylvanians cannot obtain PennDOT ID, the PennDOT ID is the “universal ID” under the Photo ID Law (or, “the Law”) -- the one form of ID that in theory all eligible voters are supposed to be able to get in order to exercise the franchise. In apparent reaction to this lawsuit, the Commonwealth has recently announced that in the future it will unveil a new form of ID with fewer requirements. PennDOT, which will be issuing the new card on behalf of the Department of State (“DOS”), projects that the first cards will be available to the public on August 27, but it is by no means certain that this date will hold.

Petitioners submit this post-hearing brief to address (1) this announced new DOS card, (2) the Georgia voter ID law, which Respondents purportedly used as a model for the Photo ID Law, and (3) the argument that the Commonwealth, Governor, and Secretary of the Commonwealth are all proper parties to this action.

ARGUMENT

I. A Preliminary Injunction May Not be Avoided by Promises of Future Conduct

As a matter of law, Respondents' stated intention to introduce the DOS ID is an insufficient substitute for a preliminary injunction. It is well established that an injunction cannot be defeated by a promise to take remedial action in the future. *See Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974); *Puerto Rico Org. for Political Action v. Kusper*, 350 F. Supp. 606 (N.D. Ill. 1972). The foregoing principle applies with special force when, as here, the proposed remedy will not solve all the problems posed by the Photo ID Law.

A. The Commonwealth's Plan to Create a New DOS Photo ID In the Future Is a Legally Insufficient Basis to Avoid a Preliminary Injunction

Respondents' plan to create a new DOS photo ID sometime in the future, approximately two months before the November election, is inadequate to vitiate a preliminary injunction. When evaluating the need for a preliminary injunction, action announced by a defendant after the commencement of litigation does not obviate the need for injunctive relief. It is the Court that is in the best position to protect the fundamental rights of the Petitioners by granting a preliminary injunction.

A preliminary injunction cannot be denied simply because the offending party undertakes to resolve the offending activity after the litigation commences. *Torres*, 381 F. Supp at 312-13; *Puerto Rican Org. for Political Action*, 350 F. Supp at 611. Pennsylvania courts have similarly recognized that "a defendant in a suit in equity may not oust a court's jurisdiction merely by performing an act sought to be enjoined." *Faden v. Philadelphia Hous. Auth.*, 424 Pa. 273, 277 n.3, 227 A.2d 619, 621 n.3 (1967).¹

¹ In other contexts, courts have similarly held that a defendant's promise to take some future action is no basis to deny a preliminary injunction. This principle has been recognized in cases

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Instead, court action is the proper remedy to protect the fundamental right to vote. In *Puerto Rican Organization for Political Action v. Kusper*, for example, the court held that a preliminary injunction was warranted to compel defendant election commissioners to make bilingual election materials available for Puerto Rican-born voters, despite promises by the election commissioners that the materials would be available. 350 F. Supp. at 611. The court granted the preliminary injunction because the defendant refused to enter into a legally enforceable agreement to perform the promised action. *Id.* at 608. Without an injunction, the right to vote would depend on the court's prediction whether the defendant would actually follow through on its unenforceable promise. *Id.* at 611.

Similarly, in *Torres v. Sachs*, the court found injunctive relief necessary to compel the availability of bilingual election materials. 381 F. Supp. at 312-13. The court granted the injunction even though the defendants had taken some action to ensure the availability of the election materials. *Id.* at 312. The court reasoned that the fact that the defendants had resolved to take some steps to provide the materials was "an inadequate assurance for such a fundamental right." *Id.* at 313. Further, the court found significant the fact that the defendants only began to take these steps to make the materials available *after* litigation commenced. *Id.*

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of patent and copyright infringement. *See, e.g., Pan American World Airways, Inc. v. Flight 001, Inc.*, 2007 WL 2040588, *6 n.5 (S.D.N.Y. July 13, 2007); *Consumers Union v. Theodore Hamm Brewing Co.*, 314 F. Supp. 697, 701 (D. Conn. 1970); *Mercury Record Corp. v. Buckingham Record Co.*, 226 F. Supp. 427, 429 (S.D.N.Y. 1963). In addition, the mootness doctrine is premised on the idea that defendant's voluntary action, aimed at abating the alleged misconduct, is generally insufficient to divest the court of its role in determining the underlying merits of the case. In such circumstances, this court has stated that "[t]he defendant bears the heavy burden of proving that there is no reasonable expectation that the past conduct will be repeated." *Allen v. Colautti*, 417 A.2d 1303, 1306 (Pa. Cmwlth. Ct. 1980) (emphasis added). Here, Respondents have not demonstrated that the disenfranchisement of Pennsylvania voters has ceased and Respondents cannot assure the Court that every voter who needs ID will have one before Election Day. *See also DeJohn v. Temple University*, 537 F.3d 301, 309 (3d Cir. 2008).

B. The Commonwealth's Promise of Future Conduct Is a Particularly Inadequate Basis To Avoid a Preliminary Injunction Since It Is Not Apparent That the New DOS Card Will In Fact Solve the Problems Created By the Photo ID Law

The foregoing principle applies with special force when, as here, there is no assurance that the future conduct will solve the problem. An injunction is appropriate when a defendant makes an unreliable representation that it will voluntarily abate the offending activity. *Pan American World Airways, Inc. v. Flight 001, Inc.*, 2007 WL 2040588 at *6 n.5 (S.D.N.Y. July 13, 2007). Here, this principle applies, as it is not apparent that the new DOS card will in fact solve the problems created by the Photo ID Law.

In *Torres*, for example, the court determined that the steps the defendant board of elections planned to undertake (after the commencement of litigation) did not adequately provide for the availability of bilingual materials, and were insufficient to ensure that Puerto Rican-born citizens had the materials necessary to make an informed vote. 381 F. Supp. at 311. As a result, the court granted an injunction to compel the availability of the materials. *Id.* at 312-13. Likewise, in *Puerto Rican Organization for Political Action*, the fact that the defendant refused to enter into a legally enforceable agreement to make bilingual materials available meant that it was uncertain that the defendant's proposed conduct would ensure the availability of the materials. 350 F. Supp. at 611 "[A]bsent an injunction, they would be free to decide at any time before or during the election not to carry out all or any part of the contemplated program." *Id.*

Respondents' stated plan to issue the DOS ID at some point prior to election does not obviate the need for Court action. Significantly, as discussed below, the DOS ID fails to sufficiently address Petitioners' claims; thus, action by this Court is necessary.

First, it is not apparent whether the new DOS card will enable all qualified voters to exercise the franchise. For example, if the social security number doesn't match the applicant's

name, this could raise a red flag that could prevent the issuance of the ID. Hr'g Tr. 25:15-26:14, July 30, 2012. In addition, getting to PennDOT -- in some cases repeatedly -- will be a problem for many voters, especially in counties with no drivers license center or counties with centers having limited hours. Hr'g Tr. 196:22- 198:1, July 27, 2012; Hr'g Tr. 10:15-23, July 30, 2012. *See also* Ex. 25.

Second, the Commonwealth has no plan to issue the card in sufficient numbers. As many as one million registered voters lack valid photo ID under the Photo ID Law, Hr'g Tr. 77:2-6, July 26, 2012; Hr'g Tr. 15:21-16:4, July 30, 2012; Hr'g Tr. 146:10-20, July 30, 2012, (and certainly many hundreds of thousands), but the Commonwealth is preparing to issue only several thousand DOS IDs. Hr'g Tr. 210:5-211:4, July 27, 2012; Hr'g Tr. 37:17-38:4, July 30, 2012. The Commonwealth concedes it has no plan to give ID to anything like the number of people who lack it.

Third, it is not clear that the DOS ID will actually be available on August 27, as Commonwealth witnesses stated. Petitioners do not doubt that the Commonwealth is working to make the card available by the end of August, but the date for the availability of the ID has already "slipped" from July 24 to August 27, Hr'g Tr. 49:5-22, July 27, 2012, and the contract under which the ID will be produced does not require completion by August 27. Hr'g Tr. 240:17-24, July 27, 2012. Whenever the DOS ID may become available, this disparity between the number of people requiring ID and the time left to accomplish the task evidences that the Commonwealth is not prepared to make sure that everyone has the ID necessary to vote under the new Law in time for November's election.

Thus, a preliminary injunction is still warranted.

II. The Commonwealth's Reliance on Georgia's Experience Is Misplaced

The Commonwealth argues that Georgia's implementation of its own photo ID law provides a model for Pennsylvania. However, Georgia has more locations for voters to obtain ID, and Georgia also allows all voters to cast absentee ballots without presenting photo ID.²

Lack of access to motor license offices was one of the reasons leading a federal court to preliminarily enjoin Georgia's original voter ID law. *See Common Cause/Georgia v. Billups*, 406 F. Supp.2d 1326, 1362-63 (N.D. Ga. 2005). After several years of litigation, Georgia's photo ID law was eventually upheld by the Georgia Supreme Court. *Democratic Party of Georgia, Inc. v. Purdue*, 288 Ga. 720, 720-24 (2011). The initial version of the law -- which was enjoined -- was similar to the Photo ID Law in several respects. Notably, like Pennsylvania, Georgia's license centers are spaced widely apart and are not found in every county. Georgia's law created one mobile photo ID unit, but the court found that to be insufficient to ensure that voters without access to transportation would be able to secure ID. *Common Cause/Georgia*, 406 F. Supp. 2d at 1362-63.

After the initial version of the law was enjoined, Georgia modified its law to require that every county registrar of voters provide at least one place where free ID could be obtained. Ga. Code Ann. § 21-2-417.1(a). As a result, Georgia now offers more than three times the number of

² The differences between the implementation of the Georgia and Pennsylvania Photo ID Laws were also discussed in the report just issued by the Pennsylvania Budget & Policy Center, which the Court inquired about during the hearing. *See* Pa. Budget & Policy Ctr., *Pennsylvania's Identity Crisis: Rushed Implementation of Voter ID Putting Voting Rights at Risk 5* (August 2012), <http://pennbpc.org/voter-ID>. Notably, the report also discusses the challenges associated with obtaining a PennDOT ID. *See id.* at 4-9.

locations to obtain a free ID compared to Pennsylvania.³ Georgia has more locations, even though its population is smaller than Pennsylvania.⁴

The free ID that can be obtained at any of the county registrar of voters requires far less documentation than the DOS ID requires. *See* Ga. Comp. R. & Regs. § 183-1-20-.01(4). For example, the card can be obtained by showing any card accepted for the provision of benefits, a voter registration application, a paycheck or paystub, or a Medicare, Medicaid, or social security statement. *Id.* In addition, as discussed at the hearing, *all* voters in Georgia are permitted to vote and have their votes count without a photo ID by voting absentee. Ga. Code Ann. §§ 21-2-380(b), 381(a)(1). In contrast, Pennsylvania has strict limits on absentee voting. For example, voters who are unable to make it to the polls for medical reasons must provide detailed medical reasons and a doctor's phone number. 25 P.S. § 3416.1.

III. The Commonwealth and the Governor are Proper Parties to this Action

Respondents argue in their pre-hearing brief that the Commonwealth and the Governor are not proper parties to this action. (They do not dispute the propriety of the Secretary of State as a party.) Respondents are mistaken.

First, the Commonwealth and the Governor are indispensable parties to the action under section 761(a) of the Judicial Code. 42 P.S. § 761(a). “[A]n indispensable party is one whose rights are so connected with the claims of the litigants that no relief can be granted without infringing on those rights.” *Vill. Charter Sch. v. Chester Upland Sch. Dist.*, 813 A.2d 20, 26 (Pa. Cmwlth. Ct. 2002). “[T]he Commonwealth party may be declared an indispensable party if

³ *See* Driver's License Customer Service Centers, Ga. Dep't of Driver Servs., <http://www.dds.ga.gov/locations/LocationList.aspx>; County Board of Registrars Offices, Ga. Sec'y of State, <http://sos.georgia.gov/cgi-bin/countyregistrarsindex.asp>.

⁴ *See* Table 1, Population for States and Puerto Rico: July 1, 2011, U.S. Census Bureau, <http://www.census.gov/popest/data/maps/2011/popsizes-2011.html>.

meaningful relief cannot conceivably be afforded without the Commonwealth party's direct involvement in the action." *Id.*

Petitioners seek relief against the Commonwealth, Governor, and Secretary of the Commonwealth. *Contrast McDonough v. Commonwealth*, 364 A.2d 965 (Pa. Cmwlth. Ct. 1976). Governor Thomas Corbett has taken an active role in the oversight and execution of the Photo ID Law. As Secretary Aichele testified, the Governor has made the implementation of the Law a priority, personally directing most Pennsylvania government agencies to take steps to ensure that citizens have the required photo ID. Hr'g Tr. 49:9-50:2, July 31, 2012. In addition, the Commonwealth's involvement in imposing the law is far from minimal; testimony from state officials established that every Commonwealth agency is supposedly helping implement it. Hr'g Tr. 49:9-50:2, July 31, 2012; Hr'g Tr. 5:1-7, 4:1-14, July 27, 2012. To that end, Petitioners' requested relief, if granted, would necessarily implicate the Commonwealth and Governor's stated interests in implementing the Photo ID Law.

Furthermore, the cases relied on by Respondents in their brief are inapposite. For example, both *Piehl v. City of Philadelphia*, 930 A.2d 607 (Pa. Cmwlth. Ct. 2007) and *Glover v. SEPTA*, 794 A.2d 410 (Pa. Cmwlth. Ct. 2002) deal with issues of sovereign immunity and clerical errors in the caption of a complaint -- matters that have not been raised and are simply not at issue in this present action. Moreover, both *Ballroom, LLC v. Commonwealth*, 984 A.2d 582 (Pa. Cmwlth. Ct. 2009) and *Annenberg v. Commonwealth*, 686 A.2d 1380 (Pa. Cmwlth. Ct. 1996) concern questions related to the Commonwealth Court's original jurisdiction when the actions involved both non-Commonwealth and Commonwealth defendants. Furthermore, in finding the Commonwealth an improper party to the action, the courts in *Ballroom* and *Annenberg* found persuasive the fact that the Commonwealth's involvement in the matter was

minimal. *Ballroom, LLC*, 984 A.2d at 588; *Annenberg*, 686 A.2d at 1385. By contrast, here, all Respondents are Commonwealth parties, and the Court’s original jurisdiction over this matter is clearly established under section 761(a). *See* 42 P.S. § 761(a) (“The Commonwealth Court shall have original jurisdiction of all civil actions or proceedings ... [a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity”). Furthermore, the Photo ID Law is a state-wide law enacted by the Commonwealth, and, as noted above, the Commonwealth and Governor are both involved in the implementation of this Law. Thus, the Commonwealth and Governor are proper parties in this case and Respondents’ argument here is without merit.

CONCLUSION

For the reasons above, and the reasons presented in Petitioners’ pre-hearing brief filed July 15, and based on the testimony and evidence presented at the hearing, Petitioners’ Application for Special Relief in the Nature of a Preliminary Injunction should be granted.

Dated: August 7, 2012

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Respondents

Docket No. 330 MD 2012

CERTIFICATE OF SERVICE

I certify that I am this day of August 7, 2012, serving the foregoing Petitioners’ Post-Hearing Brief, upon the persons and in the manner indicated below, which service satisfies the requirement of Pa. R. A.P. 121:

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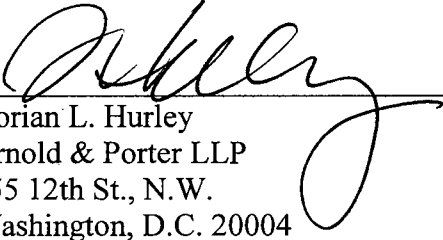
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**ORDER GRANTING APPLICATION FOR SPECIAL RELIEF
IN THE NATURE OF A PRELIMINARY INJUNCTION**

AND NOW, this day of , 2012, upon consideration of
Petitioners’ Petition for Review and Application for Special Relief in the Nature of a Preliminary
Injunction, and upon consideration of the testimony and evidence presenting at the hearing held
July 25-August 2, 2012, it is hereby **ORDERED** that said Application is **GRANTED**.

IT IS FURTHER ORDERED that Respondents and their agents, servants, and officers and
others are hereby **ENJOINED** from implementing, enforcing, or taking any steps to implement
or enforce the Photo ID Law that is the subject of said Petition and Application.

IT IS FURTHER ORDERED that any appeal of this order shall not act as an automatic
supersedeas in favor of the Commonwealth under Rule 1736(b) of the Appellate Rules.

BY THE COURT:
