

## COMMONWEALTH COURT OF PENNSYLVANIA

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330 MD 2012 13 Pages

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Viviette Applewhite; Wilola :  
 Shinholster Lee; Grover :  
 Freeland; Gloria Cuttino; :  
 Nadine Marsh; Dorothy :  
 Barksdale; 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.

No. 330 M.D. 2012

The Commonwealth of Pennsylvania; :  
 Thomas W. Corbett, in his capacity :  
 as Governor; Carole Aichele, in her :  
 capacity as Secretary of the :  
 Commonwealth, :  
 Respondents :

HEARD: July 15, 2013

BEFORE: HONORABLE BERNARD McGINLEY, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE McGINLEY**

**FILED:** August 16, 2013

**DETERMINATION on RENEWED APPLICATION  
for PRELIMINARY INJUNCTION**

Before the Court is Petitioners' renewed application for a preliminary injunction to enjoin enforcement of certain provisions of the Act of March 14, 2012, P.L. 195, No. 18 (Act 18), commonly known as the "Voter ID Law." Upon reviewing the evidence on the preliminary injunction, hearing argument and considering the submissions of both parties, which represent their respective best interests, I conclude a preliminary injunction is warranted.

### **Procedural Context**

A preliminary injunction enjoining certain identification aspects of the Voter ID Law has been in place through all elections held since its enactment. Initially, after remand from our Supreme Court, on October 2, 2012, the Honorable Robert E. Simpson issued a preliminary injunction as to the November 2012 Presidential election. Significantly, he enjoined implementation and enforcement of the voter identification requirements, enabling qualified electors to cast a regular ballot without showing qualifying photo identification at the polls.<sup>1</sup> At that time, when the trial on the merits had not yet been scheduled, a preliminary injunction limited to that single election seemed appropriate.

Then, as the trial on the merits could not be held prior to the primary election in May 2013, the parties agreed to continue the preliminary injunction on the same terms as Judge Simpson previously ordered and stipulated to its extension through the May primary. This Court approved the stipulation by order issued on February 19, 2013. Respondents thus conceded to the “soft rollout” of the Voter ID Law for that third election.<sup>2</sup>

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<sup>1</sup> Judge Simpson’s October order also enjoined Respondents from requiring registered electors to apply for a Pennsylvania Department of Transportation (PennDOT) ID before seeking issuance of a free Department of State (DOS) ID. PennDOT and DOS have since abandoned this “exhaustion requirement,” obviating any need to enjoin that process.

<sup>2</sup> The “soft rollouts” were written into Act 18 to provide a transition, from January 1, 2012, through September 17, 2012, encompassing the May 2012 primary, permitting qualified electors to adjust to its mandate to show compliant photo ID before casting a regular ballot.

Under the preliminary injunction in effect for each election to date, poll workers were permitted to request photo identification, but qualified electors were not required to show it. Complicating the matter, poll workers were required to “inform the elector that he or she will be required to comply with that [proof of identification requirement, necessitating compliant photo ID] when voting at future elections ... unless an exemption applies.” Section 10(2) of Act 18, 25 P.S. §3050 (Historical and Statutory Notes). However, as the May 2013 primary elections reflect, the information the poll workers were responsible for relaying was not accurate, and its inaccuracy could not be foreseen at the time of its communication.

The trial on the permanent injunction commenced in July 2013, pursuant to this Court’s scheduling order. However, the trial exceeded the projected timeframes, and the Court finds itself in much the same position as last summer, facing the limitations presented by an upcoming “Election Day” in November.

Recognizing the circumstances and time constraints which accompany the November 2013 election, both Respondents and Petitioners have agreed to a preliminary injunction for the next election. Indeed, Respondents here request the continuation of a preliminary injunction on the same terms as originally issued last October, as a fourth “soft rollout.” The differences in the relief sought surround the mechanism of the injunction and its duration. In light of the agreement of the parties to the imposition of a preliminary injunction in some form, it is unnecessary to analyze each of the elements of proof for a preliminary injunction. The Court will focus instead upon the parties’ respective arguments regarding duration and form of the injunction.

### **Purpose of Preliminary Injunction**

The sole object of a preliminary injunction is to preserve the existing status until the merits of the controversy may be fully determined. Mahanoy Twp. Auth. v. Deaper, 356 Pa. 573, 52 A.2d 653 (1947). In deciding a preliminary injunction, it is neither necessary nor proper to decide the case as on final hearing. Crestwood Sch. Dist. v. Topito, 463 A.2d 1247 (Pa. Cmwlth. 1983). In contrast to a permanent injunction, a preliminary injunction does not judge the merits since, by definition, it is a *temporary* remedy granted until the dispute is satisfactorily resolved. Appeal of Little Britain Twp., 651 A.2d 606 (Pa. Cmwlth. 1994).

Both parties represent in their most recent briefs that nothing has changed since Judge Simpson issued the initial preliminary injunction. See Petitioners' Br. at 2 ("nothing has changed since last fall to justify lifting the preliminary injunction"); Respondents' Br. at 7 ("the testimony at the hearing does not show changed circumstances"). This Court must disagree.

Although the evidentiary record has not changed, the prior injunctions did not stop time. Through the passage of time, two elections have been held with another fast approaching. During the repeated "soft rollouts," elections officials informed electors who were registered and qualified to vote that compliant photo ID would be required at the next election. Thus, active voters have been told repeatedly that they could not vote without compliant photo ID. Heeding the warning offered by philosopher George Santayana, that those who do not learn from the past are condemned to repeat it, this Court modifies the prior injunction.

### **Duration**

In October 2012, this Court was not in a position to foresee the shortfall of the initial preliminary injunction's duration, necessitating repeated extension. The "transition period" that the General Assembly designed to expire seven months after passage of the Voter ID Law, is now cued, by party agreement, to extend at least 20 months. What it drafted as temporary has gained permanence. At some point, this "transition" must end.

While it is this Court's intention to finally determine the merits of the permanent injunction before any subsequently scheduled elections, this Court does not control such matters. Although the parties may be amenable to extending a preliminary injunction at a later date, the Court is unable to rely on their willingness to agree to such terms should another election occur before this stage is completed. Certainly, it is preferable for all involved to devote our collective attention to the primary case on the merits and resolve the preliminary injunction issue with some finality. In an abundance of caution, the Court takes this opportunity to save all participants from expending additional resources caused by addressing this issue on an election-by-election basis.

Imposing a preliminary injunction until a final decision is rendered on the permanent injunction, as is traditional, makes sense now that the trial on the merits is completed. This will allow the parties and this Court to address the permanent injunction without distraction or distress from impending elections. Further, this injunction accounts, as best it can, for unplanned exigencies.

Therefore, this preliminary injunction shall continue in full force and effect until this Court concludes proceedings on the merits of the permanent injunction.<sup>3</sup>

### **Form of Injunction**

Our Supreme Court recognized in its decision on appeal, after this Court initially denied preliminary injunctive relief that: “the right to vote in Pennsylvania, as vested in eligible, qualified voters, is a fundamental one.” Applewhite v. Commonwealth, \_\_ Pa. \_\_, \_\_, 54 A.3d 1, 3 (2012) (*per curiam*). Judge Simpson’s order was eminently reasonable at the time issued in its implicit assumption that an extended soft rollout would relay accurate information and not impair this right.

As explained in the Supplemental Determination, Act 18 is severable. See Applewhite v. Commonwealth, Dep’t of State, (Pa. Cmwlth., No. 330 M.D. 2012, filed Oct. 2, 2012), slip op. at 10-11 (citing Section 103(a) of the Election Code, 25 P.S. §2603(a)). Accordingly, this Court may enjoin those provisions that may result in disenfranchisement and, in effect, mislead eligible, qualified voters.

I adopt Judge Simpson’s thoughtful approach and language, with slight modification, narrowly tailored to prevent further inaccuracies at the polls. John G. Bryant Co., Inc. v. Sling Testing & Repair, Inc., 471 Pa. 1, 369 A.2d 1164 (1977) (preliminary injunction must be narrowly tailored to abate the wrong).

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<sup>3</sup> Although Petitioners requested relief until all appeals are exhausted to the Supreme Court, the Court declines to enter such a sweeping edict. In the event that one of the parties seeks to stay the final decision on the merits of the permanent injunction, that party may seek a stay on the basis provided in PUC v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983).

The Court agrees with Respondents that merely *asking* an elector to produce compliant photo ID does not cause disenfranchisement, and election officials are not asked to discontinue that practice here. Yet, the Court cannot (in good conscience) ignore the fact that the information conveyed to electors, if relayed at all, at the last two regularly scheduled elections, was inaccurate. Through two preliminary injunctions, and three “soft rollouts,” poll workers were to inform qualified electors that they would not be able to vote at the next election unless they had a compliant photo ID. Each time, this statement, although well-intentioned and hoped to be correct when made, turned out to be wrong. That is because, as our highest court reminded us, this Court is not able to predict the future.

Again, just as this Court cannot predict the actions of government officials, the Court cannot divine the future so as to ensure the statement that: “elector[s] ... will be required to comply with [the proof of identification, *i.e.*, compliant photo ID] requirement when voting at future elections” will be consistently accurate.

There is no value in inaccurate information, and the Court does not deem inaccurate information “educational.” It is not a matter of confusion— it is a matter of accuracy. This Court and election officials have a duty to provide correct information at the polls to qualified electors who exercise their vested right to vote. Regardless of whether a request for photo ID causes confusion, telling a qualified elector that he or she will not have the right to vote in future elections if he or she does not obtain compliant photo ID, when that information has been erroneous at



best, deceptive at worst, will not be continued. Not when this Court has witnessed two prior injunctions where the information, in effect, misled qualified electors.

This preliminary injunction does not mandate Respondents to take any action or promote any particular message. Greater Nanticoke Educ. Ass'n v. Greater Nanticoke Area Sch. Dist., 938 A.2d 1177 (Pa. Cmwlth, 2007). Rather, they are ordered to refrain from implementing discrete parts of the Voter ID Law. This preliminary injunction will not define the content of any forecasts.<sup>4</sup> Having learned from past patterns, this limited modification in form of the preliminary injunction is compelled to prevent repeated inaccuracies. The Court will not continue or facilitate the possibility of disseminating misinformation.

### **Conclusion and Directive**

After a full trial, a preliminary injunction is entered until this Court issues a final appealable determination on the merits of the permanent injunction. This is preferable to contending with each election, and potential special election, as it comes.

The terms of the prior preliminary injunctions are modified to enjoin poll workers from informing qualified electors that compliant photo ID is required at future elections. This preliminary injunction will have the effect of extending the majority of the express transition provisions of Act 18 through our final appealable decision on the merits. Specifically, the Court enjoins the requirement

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<sup>4</sup> Following Judge Simpson's lead, I leave the education provisions in Section 206(a) of the Election Code, 25 P.S. §2626(a), intact and education at the polls may continue.

in Section 10(2) of Act 18, which states “the election official that requested the proof of identification... [shall] inform the elector that he or she will be required to comply with that requirement when voting at future elections....”

For the foregoing reasons, I enter the following order.

A handwritten signature in black ink, appearing to read "Bernard L. McGinley". The signature is written in a cursive style with a large, looped final letter.

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BERNARD L. MCGINLEY, Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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The Commonwealth of Pennsylvania; :  
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 as Governor; Carole Aichele, in her :  
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 Respondents :

**ORDER**

**AND NOW**, this 16<sup>th</sup> day of August, 2013, after a full trial and upon consideration of the oral and written arguments of counsel regarding the modification and/or continuation of a preliminary injunction, and in recognition that both parties are amenable to continuing a preliminary injunction in some form, it is **ORDERED** and **DECREED** as follows:

Petitioners' preliminary injunction previously granted by this Court's order dated October 2, 2012, shall continue in effect **AS MODIFIED** as follows.

Based on the foregoing Determination on Renewed Application for Preliminary Injunction, the Respondents and their agents, servants and officers are hereby **PRELIMINARILY ENJOINED** from:

Implementing or enforcing that part of Act 18 which amends Section 1210(a.2) of the Election Code, 25 P.S. §3050(a.2), and Section 1210(a.4)(5)(ii) of the Election Code, 25 P.S. §3050(a.4), until this Court enters a final appealable decision on the merits of the permanent injunction, and thus affects the election on November 5, 2013, and any subsequent elections until such time. It is the intent of this Preliminary Injunction to extend the transition procedures described in **Section 10(1)** of Act 18 until proceedings before this Court have concluded.

As to **Section 10(2)** of Act 18, implementing or enforcing the following transition procedure(s): “the election official that requested the proof of identification shall ... inform the elector that he or she will be required to comply with that requirement when voting at future elections.” It is the intent of this Preliminary Injunction to enjoin verbally informing electors about the necessity of proofs of identification for future elections. Because this Preliminary Injunction shall continue until this Court renders a final appealable decision on the permanent injunction, such information would not be accurate in the event the decision does not become final before any future regularly scheduled or special elections.

Nothing in this Preliminary Injunction shall preclude the Commonwealth from following transition procedures described in Section 10(2) of Act 18, as they relate to providing written information only. All other provisions of Act 18 remain in effect.

As this is the third order imposing a preliminary injunction, with no party requesting or posting a bond to date, and the parties having stipulated to continuing a preliminary injunction previously, the Court finds that no bond is necessary to support continuation of a preliminary injunction in the form set forth herein.

The Court resolves to act on the permanent injunction expeditiously.



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BERNARD MCGINLEY, Judge

Certified from the Record

AUG 16 2013

and Order Exit