

Supreme 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

v.

The COMMONWEALTH of Pennsylvania; Thomas W. Corbett, in his capacity as governor; Carole Aichele, in her capacity as Secretary of the Commonwealth.

Appeal of 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.

Argued Sept. 13, 2012.

Decided Sept. 18, 2012.

617 Pa. 563, 54 A.3d 1

BEFORE: CASTILLE (elected '93) (C.J.), SAYLOR ('97), EAKIN ('01), BAERR ('03), TODD ('07), McCAFFERY ('07), JJ.

ORDER

PER CURIAM.

***566**....Appellate courts review an order granting or denying a preliminary injunction for an abuse of discretion.

...The Voter ID Law....contemplates that the primary form of photo identification to be used by voters is a Department of Transportation (PennDOT) driver's license or the non-driver equivalent provided under Section 1510(b) of the Vehicle Code. Furthermore, the Law specifically requires that—notwithstanding provisions of ***567** Section 1510(b) relating to the issuance and content of the cards—PennDOT shall issue them at no cost:

to any registered elector who has made application therefor and has included with the completed application a statement signed by the elector declaring under oath or affirmation that the elector does not possess proof of identification ... and requires proof of identification for voting purposes.

As such, **the Law establishes a policy of liberal access to Section 1510(b) identification cards.**

However, as implementation of the Law has proceeded, PennDOT—apparently for good reason—has refused to allow such liberal access. Instead, the Department continues to vet applicants for Section 1510(b) cards through an identification process that Commonwealth officials appear to acknowledge is a rigorous one. Generally, the process requires the applicant to present a birth certificate with a raised seal (or a document considered to be an equivalent), a social security card, and two forms of documentation showing current residency.^{FN1} The reason why PennDOT will not implement the Law as written is that the Section 1510(b) driver's license equivalent is a secure form of identification, which may be used, for example, to board commercial aircraft.

FN1. Applicants whose information is already in PennDOT's database may be exempted from these requirements. See N.T. at 466.

The Department of State has realized, and the Commonwealth parties have candidly conceded, that the Law is not being implemented according to its terms....It is also clear to state officials that, if the Law is enforced in a manner that prevents qualified and eligible electors from voting, the integrity of the upcoming General Election will be impaired.

Faced with the above circumstances and the present litigation asserting that the Law will impinge on the right of suffrage, representatives of the state agencies have testified under oath that they are in the process of implementing several remedial measures on an expedited basis....

In the above landscape, Appellants have asserted a facial constitutional challenge to the Law and seek to preliminarily enjoin its implementation. They contend, most particularly, that a number of qualified members of the Pennsylvania voting public will be disenfranchised in the upcoming General Election, because—given their personal circumstances and the limitations associated with the infrastructure through which *569 the Commonwealth is issuing identification cards—these voters will not have had an adequate opportunity to become educated about the Law's requirements and obtain the necessary identification cards....

.....Upon review, we find that the disconnect between what the Law prescribes and how it is being implemented has created a number of conceptual difficulties in addressing the legal issues raised. Initially, the focus on short-term implementation, which has become necessary given that critical terms of the *570 statute have themselves become irrelevant, is in tension with the framing of Appellants' challenge to the Law as a facial one (or one contesting the Law's application across the widest range of circumstances). In this regard, however, we agree with Appellants' essential position that if a statute violates constitutional norms in the short term, a facial challenge may be sustainable even though the statute might validly be enforced at some time in the future. Indeed, the most judicious remedy, in such a circumstance, is the entry of a preliminary injunction, which may moot further controversy as the constitutional impediments dissipate.

Overall, we are confronted with an ambitious effort on the part of the General Assembly to bring the new identification procedure into effect within a relatively short timeframe and an implementation process which has by no means been seamless in light of the serious operational constraints faced by the executive branch. Given this state of affairs, we are not satisfied with a mere predictive judgment based primarily on the assurances of government officials, even though we have no doubt they are proceeding in good faith.

Thus, we will return the matter to the Commonwealth Court to make a present assessment of the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available. In this regard, the court is to consider **whether the procedures being used for deployment of the cards comport with the requirement of liberal access** which the General Assembly attached to the issuance of PennDOT identification cards. If they do not, or if the Commonwealth Court is not still **convinced** in its predictive judgment that there will be **no voter disenfranchisement** arising out of the Commonwealth's implementation of a voter identification requirement for purposes of the upcoming election, that court is obliged to enter a preliminary injunction.

Accordingly, the order of the Commonwealth Court is VACATED, and the matter is returned to the Commonwealth Court for further proceedings consistent with this Order. The Commonwealth Court is to file its supplemental opinion on or *571 before October 2, 2012. Any further appeals will be administered on an expedited basis.

Justice [TODD](#) files a Dissenting Statement which Justice [McCAFFERY](#) joins.
Justice [McCAFFERY](#) files a Dissenting Statement which Justice [TODD](#) joins.

Justice [TODD](#), dissenting.

I respectfully dissent.

....The majority correctly sets forth the standard of review that we, as the appellate court, are to apply in reviewing a lower court's order granting or denying a preliminary injunction. We review for an abuse of discretion. Yet, the majority utterly fails to apply that standard to this appeal. My application of the required standard leads me to the inescapable conclusion that the lower court indeed abused its discretion in *572 failing to find that irreparable harm of constitutional magnitude—the disenfranchisement of a substantial number of eligible, qualified, registered voters, many of whom have been proudly voting for decades—was likely to occur based on the present structure, timing, and implementation of Act 18; in my assessment, the lower court should have granted a preliminary injunction. Therefore, I would reverse.

Like the majority, I am not “satisfied with a mere predictive judgment based primarily on the assurances of government officials.” But, unlike the majority, I have heard enough about the Commonwealth's scramble to meet this law's requirements....

By remanding to the Commonwealth Court, at this late date, and at this most critical civic moment, in my view, this Court abdicates its duty to emphatically decide a legal controversy vitally important to the citizens of this Commonwealth. The eyes of the nation are upon us, and this Court has chosen to punt rather than to act. I will have no part of it.

Justice [McCAFFERY](#) joins this dissenting statement.

Justice [McCAFFERY](#), dissenting.

....In the end, it is this Court that must determine whether the Pennsylvania Constitution requires the entering of an immediate preliminary injunction prior to the November election. For the good of the electorate, and to foster respect for the judiciary and the integrity of the electoral process, I agree with Justice Todd that **now** is the time for this Court to make that decision.

....I was elected by the people of our Commonwealth, by Republicans, Democrats, Independents and others, as was every single Justice on this esteemed Court. I cannot now be a party to the potential disenfranchisement of even one otherwise qualified elector, including potentially many elderly and possibly disabled veterans who fought for the rights of every American to exercise their fundamental American right to vote. While I have no argument with the requirement that all Pennsylvania voters, at some reasonable point in the future, will have to present photo identification before they may cast their ballots, it is clear to me that the reason for the urgency of implementing Act 18 prior to the November 2012 election is purely political. That has been made abundantly clear by the House Majority Leader. *[Note from Professor Smith: See below for a news story quoting the Majority Leader's statement...]* I cannot in good conscience participate in a decision that so clearly has the effect of allowing politics to trump the solemn oath that I swore to uphold our Constitution. That Constitution has made the right to vote a right verging on the sacred, and that right should never be trampled by partisan politics.

...I would remand to the Commonwealth Court for the express purpose of directing that court to immediately grant a preliminary injunction.

Justice [TODD](#) joins this Dissenting Statement.

From June 26, 2012 posting of Philadelphia CBS affiliate: By Tony Romeo, Harrisburg bureau chief for KYW Newsradio..

HARRISBURG (CBS) — The majority leader of the Pennsylvania House has caused a stir with remarks about the controversial, recently-enacted voter photo ID law.

Speaking at the GOP state committee meeting over the weekend, House Majority

Leader Mike Turzai, an Allegheny County Republican, was running down a list of achievements by the legislature in the current session.

PoliticsPA.com reports Turzai as saying (quote) "Voter ID, which is going to allow Governor Romney to win the state of Pennsylvania, done." (endquote).

"He's saying that for the first time a Republican candidate – presidential candidate – is going to have a fairer playing field," says Turzai's spokesman Stephen Miskin. "Just like every other candidate is going to have a fairer playing field, because they're going to insure that the voter, that each individual vote, rather, is protected."

But Democrats pounced on Turzai's comment, portraying it as an admission of partisan motivations in enacting the new law, renewing their charge that it is an effort to suppress Democratic votes.