

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.

Applewhite v. Commonwealth, ___ Pa. ___, ___, ___ A.3d ___, ___ (Pa., No. 71 MAP 2012, filed September 18, 2012) (per curiam), slip op. at 6-7. Thus, I am to preliminarily determine: 1) whether the procedures being used for deployment of the Department of State identification cards (DOS IDs) comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards; and 2) whether I am still convinced 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.

After several phone conferences with counsel, additional discovery consisting of substantial document production, and submission of pre-hearing memoranda, I presided over an additional hearing beginning September 25, 2012. Thereafter, I received excellent post-hearing memoranda. Based on these proceedings, I make the following supplemental preliminary determinations.

Liberal Access

From the time of initial deployment on August 27, 2012, until the first day of the hearing, September 25, 2012, the DOS ID was issued as a “safety net,” that is, it was issued only when the more rigorous procedures for secure PennDOT IDs could not be satisfied. The Supreme Court, however, described this situation as “still contrary to the Law’s liberal access requirement” Applewhite, ___ Pa. at ___, ___ A.3d at ___; slip op. at 4.

The new procedure proposed the first day of the hearing will cure this deficiency if implemented as described. As believably explained by Kurt Myers, Deputy Secretary for Transportation, the new procedure will eliminate the so-called “exhaustion” requirement, will eliminate the requirement for two proofs of residency, and will result in the DOS ID no longer being a “safety net” product. Additional proposed changes credibly described by Shannon Royer, Deputy Secretary for the Commonwealth, will obviate the necessity for a second trip to a PennDOT Drivers Licensing Center to obtain the DOS ID.

I have three problems with the testimony regarding the proposed changes. First and foremost, the evidence is similar in kind to the prospective “assurances of government officials” testimony which the Supreme Court found an unsatisfactory basis for a “predictive judgment.” Id. at ___, ___ A.3d at ___, slip op. at 6. Second, the proposed changes are to occur about five weeks before the general election, and I question whether sufficient time now remains to attain the goal of liberal access. Third, the proposed changes are accompanied by candid admissions by government officials that any new deployment will reveal

unforeseen problems which impede implementation. These admissions were corroborated by anecdotal evidence offered by Petitioners regarding the initial roll-out of the DOS IDs in August. For these reasons, I cannot conclude the proposed changes cure the deficiency in liberal access identified by the Supreme Court.

Nevertheless, acknowledgement should be made of improvements in system design by government officials since initial deployment of the DOS ID. These include a more streamlined procedure for validating birth dates, improved scheduling of individuals manning the DOS Help Desk, a more structured referral system for complex Help Desk inquiries, and some extended hours at PennDOT Drivers Licensing Centers, to name a few. Outreach and voter education efforts by PennDOT and DOS, believably described by Deputy Secretaries Myers and Royer, are extensive, surpassing predictions made in the earlier hearing. These existing structural improvements, together with the proposed enhanced access to the DOS ID and additional time, will place the Commonwealth in a better position going forward.

Disenfranchisement

After the first hearing, I made the following preliminary determination:

Although not necessary for preliminary injunction purposes, my estimate of the percentage of registered voters who did not have photo ID as of June, 2012, is somewhat more than 1% and significantly less than 9%, based on the testimony of Rebecca K. Oyler and inferences favorable to Respondents. I rejected Petitioners' attempts to inflate the numbers in various ways.

Applewhite v. Commonwealth, No. 330 M.D. 2012, 2012 WL 3332376, at *3, n.16 (Pa. Cmwlth. Aug. 15, 2012) (unreported).

As of the most recent hearing, between 9300 and 9500 PennDOT IDs for voting have been issued. Also, between 1300 and 1350 DOS IDs have been issued. Further, PennDOT statistics for issuance of initial drivers' licenses and initial photo IDs for the period March, 2012, through September, 2012, show a slight increase over the same period in 2011. Pet'rs' Ex. 136. The increase is in the magnitude of 1000 to 2000 a month. Id.

I expected more photo IDs to have been issued by this time. For this reason, I accept Petitioners' argument that in the remaining five weeks before the general election, the gap between the photo IDs issued and the estimated need will not be closed. I reject Respondents' argument that my initial estimate was overblown.

Consequently, I am not still convinced in my 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. Under these circumstances, I am obliged to enter a preliminary injunction. Applewhite, ___ Pa. at ___, ___ A.3d at ___, slip op. at 7.

Form of Preliminary Injunction

At my invitation, the parties offered argument on the form of a preliminary injunction. Importantly, Petitioners concede that parts of Act 18

(relating to proof of identification for absentee voting) do not cause injury and may be implemented. Therefore, they no longer seek a total ban on implementation of Act 18. Also, Respondents concede that procedures for deployment of the DOS IDs did not conform to the liberal access requirement as explained by the Supreme Court and that some injunction relating to that activity is appropriate. Respondents highlight changes already made and others recently proposed.

A preliminary injunction must be crafted so as to be no broader than is necessary for the petitioner's interim protection. Santoro v. Morse, 781 A.2d 1220 (Pa. Super. 2001); Anchel v. Shea, 762 A.2d 346 (Pa. Super. 2000); Langston v. Nat'l Media Corp., 617 A.2d 354 (Pa. Super. 1992); Three Cnty. Servs., Inc. v. Phila. Inquirer, 486 A.2d 997 (Pa. Super. 1985); see 15 STANDARD PENNSYLVANIA PRACTICE 2D §83:7 at 32 (2010 ed.) See also Crowe ex rel. Crowe v. Sch. Dist. of Pittsburgh, 805 A.2d 691, 694 (Pa. Cmwlt. 2002) (preliminary injunction must be “narrowly tailored to address the wrong plead [sic] and proven.”). “Even if the essential prerequisites of an injunction are satisfied, the court must fashion a remedy ‘reasonably suited to abate [the harm].’” The Woods at Wayne Homeowners Ass’n v. Gambone Bros. Constr. Co., Inc., 893 A.2d 196, 207 (Pa. Cmwlt. 2006) (quoting John G. Bryant Co., Inc. v. Sling Testing & Repair Inc., 471 Pa. 1, 7, 369 A.2d 1164, 1167 (1977)); see also Big Bass Lake Cmty. Ass’n v. Warren, 950 A.2d 1137 (Pa. Cmwlt. 2008) (court must narrowly tailor its remedy to abate the injury).

Our Supreme Court identified the possibly offending conduct which is the focus of my current attention: procedures for deployment of the DOS IDs which fail to comport with the requirement of liberal access found in Section 206(b) of the Pennsylvania Election Code (Election Code),¹ 25 P.S. §2626(b); and voter disenfranchisement. Applewhite, ___ Pa. at ___, ___ A.3d at ___, slip op. at 2-3, 6-7. Consistent with this Court’s responsibility to narrowly tailor the remedy to abate the harm, I will enter a preliminary injunction addressing the conduct identified by the Supreme Court.

Regarding the liberal access requirement, I adopt most of the language proposed by Respondents.

For several reasons, I reject Petitioners’ request to enjoin all outreach and education efforts required by Section 206(a) of the Election Code, 25 P.S. §2626(a). Petitioners assert that those efforts will mislead the public if election officials are enjoined from asking for photo ID at the polls.

First, as discussed below, I reject the premise upon which Petitioners’ argument is based. That is, I reject the underlying assertion that the offending activity is the request to produce photo ID; instead, I conclude that the salient offending conduct is voter disenfranchisement. As a result, I will not restrain election officials from asking for photo ID at the polls; rather, I will enjoin enforcement of those parts of Act 18 which directly result in disenfranchisement.

¹ Act of June 3, 1937, P.L. 1333, as amended. Section 206 was added by the Act of March 14, 2012, P.L. 195, No. 18.

Second, Petitioners' outreach/education request is aimed at a different statutory provision, Section 206(a) of the Election Code, which was not cited by the Supreme Court and was not clearly part of its "liberal access" analysis.

Finally, Petitioners' request is made without reference to the General Assembly's express intent that during the transition into full implementation of Act 18, education efforts at the polls continue. This is set forth in Section 10(2) of Act 18, 25 P.S. §3050 (Historical and Statutory Notes), quoted below.

As to voter disenfranchisement, I carefully reviewed the language of the Election Code after amendment by Act 18. The language of disenfranchisement is found in the part of the Election Code dealing with provisional ballots: "A provisional ballot shall not be counted if" Section 1210(a.4)(5)(ii), 25 P.S. §3050(a.4)(5)(ii). This language pre-existed Act 18, but Act 18 added two new circumstances when a provisional vote will not be counted. Both of these new circumstances relate to electors who are unable to produce proof of identification.

More specifically, the relevant subsection of Section 1210 of the Election Code, 25 P.S. §3050(a.4)(5)(ii), provides as follows (with deletions and additions by Act 18 highlighted by strikethrough and underline, respectively):

(ii) A provisional ballot shall not be counted if:

(A) either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual;

(B) the signature required under clause (3) and the signature required under clause (2) are either not genuine or are not executed by the same individual; or

(C) a provisional ballot envelope does not contain a secrecy envelope;

(D) in the case of a provisional ballot that was cast under subsection (a.2)(1)(i), within six calendar days following the election the elector fails to appear before the county board of elections to execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot and that the elector is indigent and unable to obtain proof of identification without the payment of a fee; or

(E) in the case of a provisional ballot that was cast under subsection (a.2)(1)(ii), within six calendar days following the election, the elector fails to appear before the county board of elections to present proof of identification and execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of the proof of identification and an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot.

Thus, disenfranchisement expressly occurs during the provisional ballot part of the in-person voting process, which is addressed in subsections (a.2)² and (a.4) of

² This subsection of the Election Code, 25 P.S. §3050(a.2), provides as follows (with deletions and additions by Act 18 highlighted by strikethrough and underline, respectively):

(a.2) ~~If the elector is unable to produce identification or the elector's identification is challenged by the judge of elections, the~~

(Footnote continued on next page...)

Section 1210. It is this part of the process which must be enjoined to prevent disenfranchisement.

The public policy of this Commonwealth favors severability. PPG Indus., Inc. v. Bd. of Finance & Revenue, 567 Pa. 580, 790 A.2d 261 (2001); Lebanon Valley Farmers Bank v. Commonwealth, 27 A.3d 288 (Pa. Cmwlth. 2011).

The provisions of every statute shall be severable. Section 1925 of the Statutory Construction Act of 1972, 1 Pa. C.S. §1925. Further,

If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void

(continued...)

~~elector shall be permitted to cast a provisional ballot in accordance with subsection (a.4).~~ If any of the following apply, the elector shall be permitted to cast a provisional ballot in accordance with subsection (a.4):

(1) The elector is unable to produce proof of identification:

(i) on the grounds that the elector is indigent and unable to obtain proof of identification without the payment of a fee; or

(ii) on any other grounds.

(2) The elector's proof of identification is challenged by the judge of elections.

provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Id.

As our Supreme Court explains:

In addition to applying to ‘every’ statute and employing mandatory terms, Section 1925 is notable because it is not merely boilerplate. Thus, Section 1925 does not mandate severance in all instances, but only in those circumstances where a statute can stand alone absent the invalid provision. Section 1925 sets forth a specific, cogent standard, one which both emphasizes the logical and essential interrelationship of the void and valid provisions, and also recognizes the essential role of the Judiciary in undertaking the required analysis.

Stilp v. Commonwealth, 588 Pa. 539, 626-27, 905 A.2d 918, 970 (2006) (citation omitted).

Significant for current purposes, Section 103(a) of the Election Code, 25 P.S. §2603(a), provides (with emphasis added):

The provisions of this act are severable, and if any article, section or clause of this act, or part thereof, is held to be unconstitutional, the decision shall not be construed to affect or invalidate any other provisions of this act, or the act as a whole. It is hereby declared as the legislative intent that this act would have been adopted had such unconstitutional provision not been included therein.

Although not addressed by the parties, the General Assembly expressed its intentions about how Act 18 was to operate during its initial implementation, described as the “soft run” during the first hearing. In Section 10 of Act 18, the General Assembly explained that during the first elections after its passage, an otherwise qualified elector who does not provide proof of identification may cast a ballot that shall be counted without the necessity of casting a provisional ballot.

In particular, Section 10 of Act 18, which appears as a note to 25 P.S. §3050, provides in its entirety (with emphasis added):

Section 10. The following shall apply to elections held after January 1, 2012, and prior to September 17, 2012:

(1)(i) Except as provided under subparagraph (ii) and notwithstanding any law, election officials at the polling place at an election held after January 1, 2012, shall request that every elector show proof of identification.

(ii) Notwithstanding subparagraph (i), prior to September 17, 2012, if the elector does not provide proof of identification and the elector is otherwise qualified, the elector may cast a ballot that shall be counted without the necessity of presenting proof of identification and without the necessity of casting a provisional ballot, except as required by the act.

(2) Beginning January 1, 2012, if any elector votes at a polling place at an election and does not provide proof of identification and will be required to provide proof of identification beginning September 17, 2012, the election official that requested the proof of identification shall provide to the elector written information prescribed by the Secretary of the Commonwealth briefly describing the voter identification

requirement created by this act and inform the elector that he or she will be required to comply with that requirement when voting at future elections beginning September 17, 2012, unless an exemption applies.

Consistent with this expressed intent, and consistent with principles of severability, I will enjoin enforcement of those provisions of Act 18 which amend the provisional ballot procedures of the Election Code and cause disenfranchisement based on failure to present photo ID for in-person voting. The injunction will have the effect of extending the express transition provisions of Act 18 through the general election.

For several reasons, I decline Petitioners' post-hearing invitation to enjoin Act 18's requirement that election officials request that an in-person voter show photo ID. First, Petitioner's invitation is made without reference to the General Assembly's express intent that during the transition period a request for photo ID be made even though the vote will be counted regardless of compliance with the request.

Second, I disagree with Petitioners' premise for their invitation. They assert that the "offending activity is the Commonwealth's attempt to impose on voters a photo ID requirement without providing liberal access to photo ID that can be used to vote." Pet'rs' Post-Hearing Br. at 15. This assertion is not consistent with that part of our Supreme Court's direction that I revisit my prior predictive judgment "that there will be no voter disenfranchisement" Applewhite, ___ Pa. at ___, ___ A.3d at ___, slip op. at 7. I understand the Supreme Court's language to identify the essential offending activity as voter disenfranchisement, not a

request to produce photo ID. The injunction is tailored to address that offending activity.

Third, the cases cited by Petitioners do not compel the result they seek. I reviewed the decisions in Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (Billups 2005), Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006), and Milwaukee Branch of NAACP v. Walker et al., No. 11 CV 5492 (Wis. Cir. Ct. Mar. 6, 2012) (unpublished), cert. denied, 811 N.W.2d 821 (Wis. 2012), cited by Petitioners in their post-hearing brief. I also reviewed the decision in Common Cause/Georgia, League of Women Voters of Georgia, Inc. v. Billups, 439 F. Supp.2d 1294 (N.D. Ga. 2006) (Billups 2006). However, these decisions do not alter my analysis. None of them provide a legal basis for me to ignore our Supreme Court's language of "no voter disenfranchisement," or the General Assembly's description of procedures to be used during the transition to full implementation of Act 18. Moreover, a careful reading of the entire injunctions in Billups 2005 and Billups 2006 reveals that the district court's primary focus was on voter disenfranchisement rather than on a request to show photo ID.

Similarly, I reject the Respondents' post-hearing argument that a possible remedy is to enjoin only operation of the disenfranchisement language added by Act 18 to Section 1210(a.4)(5)(ii) of the Election Code, discussed above. Thus, Respondents suggest that a qualified elector be asked to produce proof of identification, but be allowed to cast a provisional ballot. This argument fails to acknowledge the General Assembly's express intent that during the transition into

full implementation of Act 18, an otherwise qualified elector need not cast a provisional ballot.

Normally, a preliminary injunction will remain in place until a decision is reached on a permanent injunction. However, the Supreme Court's per curiam order directed me to reassess my "predictive judgment that there will be no voter disenfranchisement ... for purposes of the upcoming election" Applewhite, ___ Pa. at ___, ___ A.3d at ___, slip op. at 7. Based on this language, the duration of the current preliminary injunction is limited to the upcoming election. This is consistent with an injunction entered by another court in a photo ID challenge. Billups 2006.

Permanent Injunction

Petitioners' preserve their facial challenge to Act 18 because the statute contains no right to a non-burdensome means of obtaining the required identification. Pet'rs' Post-Hearing Br. at 5, n.5. Thus, I will begin planning for trial on a permanent injunction.

In this regard, my understanding of the Supreme Court's per curiam order is that I was to address certain discrete aspects of the case on remand, not that the burden of proof shifted to the Commonwealth. The parties have strongly divergent views on this point. If my understanding is incorrect, the Court's guidance will be needed.

Relatedly, the Supreme Court’s reference to “no voter disenfranchisement ... for purposes of the upcoming election,” Applewhite, ___ Pa. at ___, ___ A.3d at ___, slip op. at 7, has sparked debate between the parties. I understand the phrase to be focused on the preliminary injunction for purposes of the upcoming election. I do not understand the phrase to define the test for a facial validity challenge in the context of a permanent injunction. If that understanding is not correct, the Court’s guidance will be necessary.

For all these reasons, I enter the following order.

ROBERT SIMPSON, Judge

1) Requiring that a registered elector must apply for a PennDOT product prior to the elector's seeking issuance of a free DOS ID; and

2) 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), for the general election of November 6, 2012. It is the intent of this Preliminary Injunction to extend the transition procedures described in Section 10(1) of Act 18 beyond September 17, 2012, and through the general election of November 6, 2012. Nothing in this Preliminary Injunction shall preclude the Commonwealth from following transition procedures described in Section 10(2) of Act 18 (relating to additional education efforts to those not showing proof of identification for in-person voting) for the general election of November 6, 2012. All other provisions of Act 18 remain in effect.

The Court shall conduct a status conference with counsel on Thursday, December 13, 2012, at 10:00 a.m. in Courtroom 3001, third floor, Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, Pennsylvania. Petitioners shall arrange for a court reporter to be present. After the conference, the Court shall issue a scheduling order pertaining to the close of pleadings, completion of discovery, and trial on the application for a permanent injunction.

ROBERT SIMPSON, Judge