

PEOPLE; PENNSYLVANIA STATE :
CONFERENCE; HOMELESS :
ADVOCACY PROJECT :

DISSENTING STATEMENT

MR. JUSTICE McCAFFERY

FILED: September 18, 2012

I completely agree with Justice Todd that the existing record in this case, together with the arguments and admissions made by the Commonwealth in its briefs and by its attorneys at argument before this Court, is fully sufficient to determine, without equivocation, that a preliminary injunction should be granted through the November 6, 2012 general election. I thus fully join her excellent dissenting statement.

As Justice Todd astutely observes, the Per Curiam Order merely gives the Commonwealth Court another opportunity to “predict” whether the implementation of Act 18 would disenfranchise any otherwise qualified elector in the November election, based on anticipated evidence of the Commonwealth’s latest efforts – unmoored from the actual text of Act 18 and without benefit of governing regulation – to issue Photo ID cards to those who still lack them. However, a new prediction from the lower court will have no more legal significance before this Court than the existing one, and I *predict* that, once again, we will be presented with a record that establishes that many thousands – indeed, ultimately **uncountable** numbers – of otherwise qualified electors will lack a Photo ID for purposes of the upcoming election, and hence will be disenfranchised, despite the Commonwealth’s last ditch efforts to loosen the standards established by Act 18. 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.

There is no doubt that the record, as it is, establishes the immediate and irreparable harm required for the injunction.¹ Prior to enacting Act 18, the General Assembly clearly failed to sufficiently consider the burdens and impediments that the law's requirements would place upon "the most vulnerable segments of our society." Per Curiam Order at 5. When Appellants' lawsuit challenging the constitutionality of Act 18 placed a spotlight on these burdens and impediments, the agencies charged with implementing Act 18 began efforts, first on or about May 23, 2012, and then on or about August 27, 2012, to relax the procedures for obtaining the requisite ID. Although these efforts may be laudable, they necessarily suffer from the compressed timeframe in which they are expected to achieve the purported goals of Act 18. Indeed, the August 27, 2012 effort was instituted a mere ten weeks before the election. Where a fundamental constitutional right is at issue – arguably **the** fundamental right – an implementation of even a lesser burden on the exercise of that right, ten weeks before it is to be exercised, is simply unreasonable and constitutionally insupportable. Indeed, the Commonwealth's activities in this regard are a tacit admission that Act 18 is simply not ready for the prime time of the November 6, 2012 election.²

¹ Initially, it must be observed that the Commonwealth Court plainly erred by requiring Appellants to show immediate and "inevitable" harm. Perhaps that court made this error because of its mistaken belief that the only issue before it was whether a legislative requirement for a Voter Photo ID **generally** was facially unconstitutional, rather than whether the hasty implementation of Act 18 for purposes of the November 6, 2012 election violated the Pennsylvania Constitution.

² Additionally, I believe that Appellants have established that the availability of the PennDOT locations where the Commonwealth's efforts are to take place are inadequate to the task in regard to the November election because of limited hours, limited (...continued)

By contrast, the stipulations of the Commonwealth establish that, particularly as concerns the November 6, 2012 election, there is no genuine mischief for Act 18 to remedy. The Commonwealth stipulated, in relevant part, on July 12, 2012, as follows:

1. There have been no investigations or prosecutions of in-person voter fraud in Pennsylvania; and the parties do not have direct personal knowledge of any such investigations or prosecutions in other states;
2. The parties are not aware of any incidents of in-person voter fraud in Pennsylvania and do not have direct personal knowledge of in-person voter fraud elsewhere;
3. [The Commonwealth] will not offer any evidence in this action that in-person voter fraud has in fact occurred in Pennsylvania or elsewhere;
4. The sole rationale for the Photo ID law that will be introduced by [the Commonwealth] is that contained in [the Commonwealth's] amended answer to Interrogatory 1, served June 7, 2012.^[3]
5. [The Commonwealth] will not offer any evidence or argument that in[-]person voter fraud is likely to occur in November 2012 in the absence of the Photo ID law [Act 18].

Indeed, the Commonwealth offered **no** evidence below of the existence of in-person voter fraud in this state or that in-person voter fraud is likely to occur in the upcoming election. The Commonwealth's interest in the implementation of this law, at least as concerns the November election, is somewhere from slight to symbolic. I wholeheartedly reject the arguments made by counsel for the Commonwealth before

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locations, and a failure to take measures that were implemented by other states, such as the use of mobile Photo ID units.

^[3] Among the reasons cited were that requiring a photo ID “improves the security and integrity of elections in Pennsylvania”; “ensure[s] that the public has confiden[ce] in the electoral process”; and “detect[s] and deter[s] voter fraud”.

this Court that we must defer to the legislative findings and the evidence the legislature purportedly received concerning the existence or potentiality of in-person voter fraud. The Commonwealth declined to test such “evidence” in a court of law, and instead stipulated that, essentially, there was no known evidence of in-person voter fraud, and that Act 18 was not genuinely needed to combat in-person voter fraud in the November election. Stipulations have legal consequences, and the Commonwealth must live with those it entered. The purported evidence received by the legislature is thus of no moment,⁴ and the balance of potential harm unquestionably weighs heavily in favor of an injunction.

In its lucid and directed description of the **relevant** issues involved in this case, the Per Curiam Order corrects several grave errors made by the Commonwealth Court below. Notably, this Court determines that the immediate issue raised by Appellants concerns whether the implementation of Act 18 for purposes of the November 6, 2012 general election violates constitutional rights of qualified electors of this Commonwealth, which is a question distinct from that upon which the Commonwealth Court placed its basic focus: i.e., whether a Photo ID law **generally** violates such rights. See Per Curiam Order at 5-6. The Per Curiam Order also correctly determines that any voter disenfranchisement arising out of the Commonwealth’s implementation of a Voter Photo ID requirement before the November 2012 election **obliges** the Commonwealth Court to enter a preliminary injunction. See id. at 7.⁵ Notwithstanding the astute recognition

⁴ The Commonwealth’s arguments may have had greater resonance if Act 18 addressed a more innocuous subject, such as a licensure requirement for a **privilege**. However, Act 18 indisputably places new burdens upon a cherished **right**, and the **legal** evidence, or lack thereof, concerning the actual need for these new burdens assumes heightened significance when these burdens are challenged as unconstitutional.

⁵ See In re Canvass of Absentee Ballots of 1967 Gen. Election, 245 A.2d 258, 262 (Pa. 1968) (holding that the disenfranchisement of 5,506 citizens would be (...continued)

in the Per Curiam Order of the Commonwealth Court's errors and the Order's illumination of the Commonwealth Court's obligation to enter a preliminary injunction under certain circumstances, I believe circumstances already exist such that we should remand with the specific directive to the Commonwealth Court to immediately grant the requested preliminary injunction. I do not believe that further hearings are either necessary or appropriate.

The Commonwealth contends that the legislature, in enacting Act 18, relied in part upon the 2005 recommendations of the Commission on Federal Election Reform ("the Carter-Baker Commission"). However, the legislature pointedly ignored the Commission's recommendation that a Photo ID requirement be phased in over two federal election cycles to ease the transition from the existing system. The Carter-Baker Commission also wisely determined that confidence in our electoral process may be achieved in "a uniform voter identification system **that is implemented in a way that increases, not impedes, participation.**" Carter-Baker Commission (2005), at iii (emphasis added); see also id. at 6. Act 18, enacted in March 2012, and subsequently altered by ad hoc implementation procedures, which are still in flux, substantially threatens to do just the opposite. Where there is concededly no harm that will be remedied by implementing Act 18 prior to the November 2012 election, where the potential for harm to the cherished right to vote to uncountable numbers of citizens is substantially threatened, and where this harm cannot be remedied by any post-election

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"unconscionable"); and Perles v. Cnty. Return Bd. Of Northumberland Cnty., 202 A.2d 538, 540 (Pa. 1964) ("The disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter.").

lawsuit, contrary to the Commonwealth Court's astounding belief, the need for immediate judicial action cannot be denied.

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. Exhibit 42 at R.R. 2073a. 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.

Accordingly, I respectfully dissent from the Per Curiam Order to the extent that it does not direct the Commonwealth Court to grant immediate injunctive relief but, instead, remands to the Commonwealth Court for additional hearings. I would remand to the Commonwealth Court for the express purpose of directing that court to immediately grant a preliminary injunction.

Madame Justice Todd joins this Dissenting Statement.