

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 330 CD 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.

**PETITION FOR SUPPLEMENTAL INJUNCTION
TO ENFORCE COURT'S OCTOBER 2, 2012, ORDER**

Petitioners move this Honorable Court, pursuant to Pa. R. A. P. 1532(a), to order special relief in the form of a supplemental preliminary injunction to enjoin Respondents from 1) continuing to disseminate false information about the need for photo ID on Election Day, on the ground that these actions directly promote voter disenfranchisement on Election Day, November 6, 2012; and 2) to order the Commonwealth to take necessary and proper corrective measures to remediate the misinformation it has spread since this Court's injunction, specifically, to publish widely the clear and unambiguous message that photo ID is not required to vote this Election Day and that, contrary to anything else they may have heard, people without photo ID have the right to vote on November 6 and will be permitted to do so even without photo ID. As grounds Petitioners aver as follows:

The Commonwealth Sent *False* Information to Seniors' Homes Just Last Week Telling them they Must Have Photo ID to Vote

1. Late in the week of October 8, an unknown but likely significant number of Pennsylvania seniors received a mailing from PACE/PACENET, a program administered by the Commonwealth's Department of Aging, promoting prescription drug benefits to older Pennsylvanians. See Exhibit 1, attached.¹
2. Included in the mailing was a Department of State card about the Voter ID Law, which on the front falsely states: "Voters are required to show photo ID on Election Day." *Id.* at p.3. The reverse side reiterates that "A photo ID is required when voting in Pennsylvania," and proceeds to list acceptable ID's. *Id.* at p.4. The card does not list the DOS ID. Nowhere is the recipient told that he or she can vote without ID on November 6.
3. On Monday afternoon, October 15, Petitioners' counsel sent an email alerting Respondents' attorney, Mr. Cawley, to the problem. Exhibit 2. The message asked Mr. Cawley to a) apprise Petitioners' counsel, by the close of business on Tuesday, October 16, how many people received the PACE/PACENET mailing; and b) pledge that corrective notices will be sent immediately to everyone who received the false information. Mr. Cawley acknowledged receipt of the message, but as of this time neither he nor anyone else on behalf of the Commonwealth has responded to Petitioners' attorneys' request.
4. The PACE/PACENET mailing falsely informs voters that they must have a photo ID to vote on Election Day.

¹ Exhibit 1 was delivered on or about October 10 to a gentleman in Wilkes Barre. Identifying information has been redacted to protect his privacy.

5. The Commonwealth has continued to publicize other outdated information advising voters that they need Photo ID on Election Day. Petitioners' counsel has received dozens of complaints from people that they have heard and seen radio and television ads that still say voters need Photo ID to vote. As recently as October 11, some PennDOT locations were still displaying outdated posters and information telling people they need ID to vote. *See* Timothy McNulty, Pennsylvania sending mixed messages on voter ID requirements, Pittsburgh Post-Gazette (October 12, 2012) (<http://www.post-gazette.com/stories/news/us/pennsylvania-sending-mixed-messages-on-voter-id-requirements-657274/>). While perhaps unintentional, the effect of transmitting false information is equally damaging regardless whether it was purposeful.
6. The Commonwealth's dissemination of false information about the photo ID requirement in effect on November 6 runs counter to the goals of Pennsylvania's voting laws, which are designed to assure a free and fair election by, among other things, prohibiting dissemination of false or misleading information to the electorate about voting. 25 P.S. § 3547 (barring the use of "any . . . fraudulent device" that "impedes, prevents, or otherwise interferes with the free exercise of the elective franchise by any voter."); 25 P.S. § 3527 (imposing penalties "[i]f any person . . . shall conspire with others to commit any of the offenses herein mentioned, or in any manner to prevent a free and fair primary or election"); *see also Commonwealth v. Martin*, 72 Montg. 42 (1955) (analyzing application of Section 3527 to condemn a false and misleading mailer claiming an endorsement from the opposite political party but holding that the defendant could not "be said to prevent a free and fair election by fraud . . . so far as the actual voting is concerned" where the mailer was never distributed).

7. Here, the Commonwealth has distributed - and continues to distribute - false and misleading information about voting requirements on November 6. This conduct should be condemned by “[a]ll decent citizens” as anathema to a “free and fair” election. *Id.*

The Commonwealth has Failed to Counteract the Intensive Media Campaign Prior to the Injunction, Leaving the False Impression that Voters Still Need Photo ID to Vote on November 6.

8. Since this Court’s October 2 injunction, the Commonwealth has made virtually no effort to counteract the public belief, fostered through its intensive education campaign, that voters will be required to show id to vote on November 6.
9. The Commonwealth has issued a single press release since October 2, and that was on the date of decision. Entitled, “Governor Corbett, Secretary Aichele Issue Statements on Court Ruling,” the statement praises the Court’s “decision to uphold the constitutionality of the voter ID law,” and explains that the Commonwealth will continue with education efforts “to let Pennsylvanians know the voter ID law is still on track to be fully implemented for future elections.” Exhibit 3.
10. Nestled inconspicuously at the end of the fourth paragraph is an acknowledgment that “voters will be requested to show ID, but ID will not be required to vote.”
11. In contrast, prior to the October 2 injunction, the Department of State and other Commonwealth agencies and officials broadcast extensively the message that under the new law voters could not vote without photo ID. By way of example:
 - a. Between the Law’s passage and the Court’s injunction, the Department of State issued eleven press releases, all of which in some fashion told voters that they would not be permitted to vote without a photo ID on Election Day. *See*

<http://www.dos.state.pa.us/portal/server.pt/community/newsroom/12416> (last accessed on October 18, 2012 at 9:02 p.m.).

- b. The Department of State mailed letters in July to 759,000 people identified as potentially not having PennDOT-issued ID to tell them that they could not vote in November without a photo ID;
- c. In September, the Department of State mailed post cards to all households in Pennsylvania with a registered voter alerting people that, without photo ID, they would not be permitted to vote in November; and
- d. Department of State Secretary Aichele, Deputy Secretary Shannon Royer, Press Spokesperson Ron Ruman, Governor Corbett and other Commonwealth officials and employees generated copious amounts of public information telling people that without photo ID they could not vote on Election Day. They did so through countless press conferences, public appearances and pervasive commentary in the media. *See*, Exhibit 4 (Remand Trial Respondents' Exhibit 3 - memorandum from Sweeney to Royer).

12. Since the October 2 injunction, the Commonwealth has done nothing anywhere close to comparable to counter the barrage of what is now false information about people's right and ability to vote on November 6, to wit:

- a. The Department of State has not issued a single press release since October 2 to counter their previous extensive advertising and other informational efforts to alert voters that they must have Photo ID to vote on Election Day;
- b. The Commonwealth has not sent a mailing to any households correcting the prior written mailings alerting voters that photo ID is needed to vote; and

c. Petitioners' counsel has been unable to locate a single news story documenting either a press conference or public comments by Secretary Aichele, Deputy Secretary Royer, Press Secretary Ruman, Governor Corbett or any other high-ranking Commonwealth official telling voters that, contrary to everything they have been told for the preceding six months, under the Court's injunction voters do not need photo ID to vote this Election Day and that voters without photo ID will be allowed to vote.

13. The radio silence from the Commonwealth about the abrupt change in voting requirements occasioned by the Court's October 2 injunction, and the failure to affirmatively correct six months of what is now false information about the need to have photo ID to vote on November 6 is indefensible and reasonably likely to disenfranchise voters without photo ID who have been led to believe they cannot vote and thus are likely not to bother trying.

The Commonwealth's Current Advertising and Informational Efforts are Inadequate to Convey Accurate Information about the Requirements for Election Day.

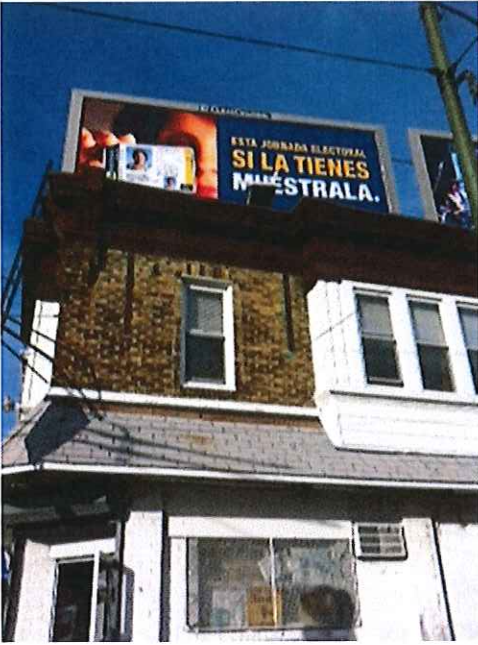
14. The Commonwealth's information campaign has been re-tooled to conform to the injunction, but the changes have been so slight and subtle that they do not and cannot effectively offset and counter the widely publicized pre-injunction messaging that voters without photo ID will not be permitted to vote in November.

15. By way of example, ads like the one displayed below are running across the Commonwealth on buses and billboards with a picture of a driver's license and small-font subtitle stating "this Election Day if you have it..." and then in far larger bold font the campaign slogan, "SHOW IT":



This photograph was taken in Harrisburg on Wednesday, October 17.

16. Billboards bearing the same message have been displayed in urban areas, like this one depicted in an October 17 photograph of a Spanish-language billboard in a Hispanic neighborhood of Philadelphia:



17. This subtle change to the “Show It” campaign, inserting “if you have it” into the phrase, is the sum total of the Commonwealth’s educational efforts to alert people that the onslaught of pre-injunction news telling voters that they need photo ID to vote is no longer true.
18. Similarly on information and belief the visuals in television advertisements continue to portray the “Show It” theme, suggesting that identification is required, with the only modification being a voiceover explaining that people will be asked, but not required to show photo ID. Petitioners’ attorneys have been besieged with complaints from voters who do not hear, had the sound turned down, or did not happen to be in the room during the voiceover and who missed the message.
19. Upon information and belief, the Commonwealth has not broadcast or displayed publicly the clear, unambiguous message that voters do not need a photo ID to vote this Election Day, in any format, anywhere in the Commonwealth. Rather, they have saturated the media market, consistent with its pre-injunction plan to heavily backload informational

efforts, with the ambiguous “SHOW IT” advertisements that fail to communicate clearly and effectively that the law has been changed for this election and that, contrary to the information blizzard of the past six months, photo ID is not required to vote on Election Day.

20. Adding to voter confusion is a proliferation of non-governmental efforts that also mislead voters to believe that ID is required. For instance, just recently the utility company PECO sent mailings to 1.3 million customers in the Philadelphia area with outdated information telling people that they must have ID on Election Day in order to vote. *See* Bob Warner, *PECO admits to sending incorrect voter ID info to 1.3 million customers*, Philadelphia Inquirer, October 17, 2012 (http://articles.philly.com/2012-10-17/news/34527190_1_voter-id-law-cathy-engel-menendez-peco-spokeswoman). A copy of the offending PECO newsletter, with the “Your Vote Counts” message that photo ID is still needed to vote, is attached as Exhibit 5.
21. As opposed to the Commonwealth’s non-response to our complaint about the false PACE/PACENET mailing, PECO announced a corrective mailing the next day. *See* http://www.philly.com/philly/news/local/20121018_Peco_pulls_back_on_erroneous_newsletter.html.
22. Even if unintentional, the effect of this governmental and non-governmental misinformation is to confuse and mislead voters further into believing that they need photo ID to vote on Election Day.
23. In light of the widespread media campaign before October 2 telling voters they need photo ID to vote and the continuation to the present of that message by governmental and non-governmental agents, the Commonwealth’s slight and subtle shift in messaging

syntax is plainly inadequate to correct what is now, after the injunction, false information telling voters that they need photo ID to vote on Election Day.

Corrective Measures, Along with Clear and Unambiguous Messaging, is Needed from the Commonwealth to Prevent Voter Disenfranchisement.

24. Petitioners acknowledge this Court's refusal to enjoin the Commonwealth's informational and educational efforts directed toward helping voters get photo ID. A combination of Commonwealth malfeasance and nonfeasance, however, has produced an environment clouded by confusion and misinformation that is likely to result in voter disenfranchisement, which contravenes the letter and spirit of the Pennsylvania Supreme Court's directive that this Court issue an injunction to prevent voter disenfranchisement. *Applewhite v. Commonwealth*, No. 71 MAP 2012, 2012 WL 4075899, at *7 (Pa. Sept. 18, 2012).

WHEREFORE, Petitioners respectfully request that this Court order the Commonwealth to take the following actions to forestall the likelihood of voter disenfranchisement:

- a. Advise Petitioners' attorneys about all mailings sent since October 2 from Commonwealth agencies that, like the PACE/PACENET mailing, included false information that voters need photo ID to vote on Election Day;
- b. Send corrective notices forthwith to every person to whom the Commonwealth sent false information since October 2 clearly and unambiguously informing them in bold, large print in both English and Spanish: "Photo ID is not required to vote this Election Day. Contrary to anything else you may have heard, people without photo ID have the right to vote on November 6 and will be permitted to vote without a Photo ID." The notices may indicate that first-time voters will have to

produce some form of ID, but not necessarily photo ID, to prove identity as required under prior law;

- c. Immediately cease running any broadcast, print, electronic, Internet or other advertisements or displays that still tell voters or suggest they must have photo ID to vote;

- d. Re-word robocalls, set to be made at the end of October, to say clearly and unambiguously that, "Photo ID is not required to vote this Election Day.

Contrary to anything else you may have heard, people without photo ID have the right to vote on November 6 and will be permitted to vote without a Photo ID."

The robocalls may indicate that first-time voters will have to produce some form of ID, but not necessarily photo ID, to prove identity as required under prior law;

- e. Distribute within one week to all Pennsylvania media outlets, county departments of election and any other entities to whom the Department of State typically sends press releases on election-related matters, a press release that tells people that, "Photo ID is not required to vote this Election Day. Contrary to anything else you may have heard, people without photo ID have the right to vote on November 6 and will be permitted to vote without a Photo ID." The message may indicate that first-time voters will have to produce some form of ID, but not necessarily photo ID, to prove identity;

- f. Direct Secretary Aichele to announce at least 36 hours in advance and then hold a press conference attendant to issuance of the press release described in the foregoing paragraph to tell reporters that, "Photo ID is not required to vote this Election Day. Contrary to anything else you may have heard, people without

photo ID have the right to vote on November 6 and will be permitted to vote without a Photo ID.”

In addition to a proposed order effecting the above-described relief, Petitioners attach a proposed order directing the Commonwealth to respond to this Petition by noon on Monday, October 22.

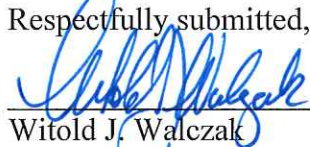
David P. Gersch
Michael Rubin
Dorian Hurley
Rachel Frankel
Rosemary Smith
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: +1 202.942.5000
Facsimile: +1 202.942.5999
David.Gersch@aporter.com

Jennifer R. Clarke
Attorney ID No. 49836
Benjamin D. Geffen
Attorney ID No. 310134
Public Interest Law Center of
Philadelphia
1709 Benjamin Franklin Parkway,
2nd Floor
Philadelphia PA 19103
Telephone: +1 215.627.7100
Facsimile: +1 215.627.3183

Marian K. Schneider
Attorney I.D. No. 50337
Pennsylvania Consulting Attorney
Advancement Project
295 E. Swedesford Road # 348
Wayne, PA 19087
Telephone: +1 610.644.1925
Facsimile: +1 610.722.0581

Dated: October 19, 2012

Respectfully submitted,



Witold J. Walczak
Attorney ID No. 62976
ACLU of Pennsylvania
313 Atwood Street
Pittsburgh, PA 15213
Telephone: 412.681.7736
Facsimile: 412.681.8707
vwalczak@aclupa.org

Attorneys for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Docket No. 330 MD 2012

CERTIFICATE OF SERVICE

I certify that I am this 19th day of October 2012, serving the foregoing MOTION FOR SUPPLEMENTAL INJUNCTION TO ENFORCE COURT'S OCTOBER 2, 2012, ORDER, upon the persons and in the manner indicated below, which service satisfies the requirement of Pa. R. A.P. 121:

Service by email per agreement with Respondents' Counsel as follows::

Patrick S. Cawley, Esq.
pcawley@attorneygeneral.gov
Senior Deputy Attorney General

Calvin R. Coons, Esq.
ckoons@attorneygeneral.gov
Senior Deputy Attorney General

John G. Knorr III, Esq.
jknorr@attorneygeneral.gov

Office of Attorney General
Civil Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

Kevin P. Schmidt, Esq.
kevschmidt@pa.gov
Deputy General Counsel
Governor's Office of General Counsel
17th Floor, 333 Market Street
Harrisburg, PA 17101

Alfred W. Putnam, Esq.
Alfred.Putnam@dbr.com
D. Alicia Hickok, Esq.
Alicia.Hickok@dbr.com
Drinker Biddle & Reath LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996



Witold J. Walczak
Attorney ID No. 62976
ACLU of Pennsylvania
313 Atwood Street
Pittsburgh, PA 15213
Telephone: 412.681.7736
Facsimile: 412.681.8707
vwalczak@aclupa.org

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 330 CD 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.

ORDER DIRECTING COMMONWEALTH RESPONSE

AND NOW, this _____ day of October, 2012, upon consideration of Petitioners' Petition for Supplemental Injunction to Enforce Court's October 2, 2012 Order, it is hereby ORDERED that Respondents are ordered to file and serve a response on or before noon on Monday, October 22, 2012.

Hon. Robert Simpson, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 330 CD 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.

ORDER DIRECTING SUPPLEMENTAL RELIEF

AND NOW, this _____ day of October, 2012, upon consideration of Petitioners' Petition for Supplemental Injunction to Enforce Court's October 2, 2012 Order, and for good cause shown, it is hereby ORDERED that the petition be, and hereby is, GRANTED. Accordingly, Respondents are ordered to:

- a. Advise Petitioners' attorneys of how many people were sent false information that they need photo ID to vote, as occurred with the PACE/PACENET mailing, and to tell Petitioners' attorneys what other mailings from the Commonwealth included the false, outdated literature by October ____, 2012;
- b. Send corrective notices forthwith to every person to whom the Commonwealth sent false information since October 2, as identified in the preceding paragraph, clearly and unambiguously informing them that, "Photo ID is not required to vote

this Election Day. Contrary to anything else you may have heard, people without photo ID have the right to vote on November 6 and will be permitted to vote without a Photo ID.”

- c. Immediately cease running any broadcast, print, electronic, Internet or other advertisements or displays that still tell voters they must have photo ID to vote;
- d. Re-word robocalls, set to be made before Election Day, to say clearly and unambiguously that, “Photo ID is not required to vote this Election Day.

Contrary to anything else you may have heard, people without photo ID have the right to vote on November 6 and will be permitted to vote without a Photo ID.”

- e. Distribute no later than October 30, to all Pennsylvania media outlets, county departments of election and any other entities to whom the Department of State typically sends press releases on election-related matters, a press release that tells people that, “Photo ID is not required to vote this Election Day. Contrary to anything else you may have heard, people without photo ID have the right to vote on November 6 and will be permitted to vote without a Photo ID.” The message may indicate that first-time voters will have to produce some form of ID, but not necessarily photo ID, to prove identity;
- f. Direct Secretary Aichele to announce at least 36 hours in advance and then hold, on or before October 30, a press conference attendant to issuance of the press release described in the foregoing paragraph to tell reporters that, “Photo ID is not required to vote this Election Day. Contrary to anything else you may have heard, people without photo ID have the right to vote on November 6 and will be permitted to vote without a Photo ID.”

IT IS SO ORDERED.

Hon. Robert Simpson, Judge