Filed in Supreme Court

SEP 0 6 2012

Middle

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 71 MAP 2012

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

BRIEF OF AMICUS CURIAE THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF APPELLEES

Peter M. Rogers
Counsel of Record
ROGERS & ROGERS, P.C.
1806 Frick Building
437 Grant Street
Pittsburgh, PA 15219
T: 412-434-7500; F: 412-434-7544

Jay Alan Sekulow*
Stuart J. Roth*
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, NE
Washington, DC 20002
T: 202-546-8890; F: 202-546-9309

Robert W. Ash*
CeCe Heil*
Erik Zimmerman*
Marshall H. Goldman*
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent University Drive
Virginia Beach, VA 23464
T: 757-226-2489; F: 757-226-2836

Received in Supreme Court

SEP 6 2012

Middle

Counsel for Amicus
* not admitted to this Court's bar

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions and Statutes

Other Authorities

INTEREST OF AMICUS

Amicus, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued in numerous cases involving constitutional issues before the Supreme Court of the United States and other federal and state courts. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

The resolution of this case is a matter of substantial concern to the ACLJ because it raises the issue of whether Pennsylvania may enforce reasonable voting regulations to ensure that voters are who they say they are. The ACLJ believes that states may provide reasonable safeguards to protect such an important right from being abused through voter fraud. Moreover, the decision in this case may impact a host of state and local legislation around the country that requires varying degrees of verification to vote in order to protect the integrity of the electoral process.

SUMMARY OF ARGUMENT

First, Appellants have not met the imminent and irreparable injury requirements of a preliminary injunction because Appellants have failed to allege a current irreparable injury or a future imminent injury that is anything more than hypothetical and conjectural. Thus, Appellants' as-applied challenge is not ripe for judicial review. Second, Appellants' facial challenge fails because Appellants cannot meet the high burden of showing that there is no set of circumstances under which Act 18 could be constitutional.

ARGUMENT

I. BECAUSE THE HARMS ALLEGED ARE HYPOTHETICAL AND CONJECTURAL, AN AS-APPLIED CHALLENGE TO ACT 18 IS NOT RIPE FOR JUDICIAL REVIEW

Because Act 18 has not been applied to Petitioner-Appellants ("Appellants") and the alleged future harms are merely hypothetical and conjectural, an as-applied challenge is not ripe, and the Act may only be properly challenged on its face.

> [T]he doctrine of ripeness concerns the timing of a court's intervention in litigation. The basic rationale underlying the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."

Phila. Entm't & Dev. Partners v. City of Phila., 594 Pa. 468, 480, 481, 937 A.2d 385, 392, 393 (2007) (citations omitted) (dismissing a constitutional as-applied claim as "not ripe for adjudication" when "[t]he [zoning] Ordinance ha[d] not . . . been applied against the Property . . . and thus far, [Petitioner] only *anticipates* the Ordinance's application to hinder this use" (emphasis added)). Because "courts should not give answers to academic questions or render advisory opinions or make decisions based on assertions as to hypothetical events that might occur in the future," the Court should "declin[e] to address claims challenging the constitutionality or validity of a[n] . . . ordinance that has not been enforced or applied." *Id.* at 481, 937 A.2d at 392.[1]

---

[1] *See also, e.g., Bliss Excavating Co. v. Luzerne County*, 418 Pa. 446, 211 A.2d 532 (Pa. 1965) (dismissing as not ripe a claim that an ordinance that regulated the business of anthracite strip mining was unauthorized and preempted on the grounds that no attempt had been made to apply the ordinance against the plaintiffs' mining operations); *Roeder v. Borough of Hatfield*, 439 Pa. 241, 266 A.2d 691 (Pa. 1970) (dismissing as not ripe a claim of illegal spot zoning because no action had been taken under the ordinance).
Phila. Entm't & Dev. Partners, 594 Pa. 468, 480–81, 937 A.2d 385, 392 (2007).

A. Appellants Have Not Alleged that the Act has been Enforced or Applied Against Them

Appellants acknowledged that any substantial potential harm from Act 18 would not occur until the November 6, 2012, election:

> Under Act 18 . . . large numbers of registered voters in Pennsylvania will not have their votes counted on November 6, 2012 because they will be unable to present acceptable photo identification ('ID') as required by the Photo ID Law.

Petition for Review at ¶ 1, *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 3332376 (Pa. Commw. Ct. Aug. 15, 2012). Appellants further alleged that "the Photo ID Law erects such a burden that they are *likely* to lose their votes," *id.* at ¶ 3 (emphasis added), and "the true extent of the disenfranchisement wrought by the Photo ID Law *will not become evident until election day*." *Id.* at ¶ 5 (emphasis added).

Thus, Appellants allege only a possibility of future harms and not that Appellants have been currently injured or that Appellants have actually been disenfranchised through any application of the Act. Since Appellants allege only future harms, the doctrine of ripeness precludes Appellants' challenge unless the alleged future harms are certain, not merely "hypothetical events that might occur in the future." *See Phila. Entm't & Dev. Partners*, 594 Pa. at 481, 937 A.2d at 392.

B. Appellants' Claims of Possible Future Harm are Hypothetical and Conjectural

The lower court's conclusion that the Appellants' allegations of future harm fail the preliminary injunction immediacy and certainty requirements has been clearly affirmed. When the lead plaintiff, whom Appellants alleged was unable to obtain a photo ID, attempted to obtain one, she was issued a qualifying photo ID without delay. Jessica Parks, *Lead Plaintiff in Pennsylvania Voter ID Case Gets Her Photo ID*, Philly.com (Aug. 18, 2012), http://articles.philly.com/2012-08-18/news/33249335_1_penndot-id-new-voter-identification-law-penndot-center.

The Commonwealth Court, as the finder of fact in this case, concluded that Appellants "did not establish [] that disenfranchisement was immediate or inevitable." *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 3332376, at *3 (Pa. Commw. Ct. Aug. 15, 2012). Furthermore, the court was "not convinced [that] any qualified elector need be disenfranchised by Act 18," and

> based on the availability of absentee voting, provisional ballots, and opportunities for judicial relief for those with special hardships, [the court was] not convinced any of the individual Petitioners or other witnesses will not have their votes counted in the general election.

Id. at *4.

Nevertheless, Appellants alleged that,

> [s]ince Ms. Applewhite does not have and has been unable to obtain photo identification required by Pennsylvania's Photo ID Law, after voting in nearly every election for more than 50 Years, she will no longer be able to vote beginning in November.

Petition for Review ¶ 12. Yet, as noted above, on Thursday, August 16, 2012, Ms. Applewhite, the lead Appellant, "went to a PennDot office and was issued the photo ID card she needs to vote." Parks, *supra*. This further illustrates that each of the lead parties (and all Pennsylvania citizens) have the opportunity between now and November 6, 2012, to obtain the proper ID to vote in the election, assuming each citizen otherwise meets Pennsylvania voting criteria. The conjectural nature of Appellants' claims should preclude a court from addressing them until such time as the claims are certain and not merely hypothetical.

In sum, an as-applied challenge is precluded by the ripeness doctrine because Appellants have not alleged any current harm, and the alleged future harm is uncertain, hypothetical, and merely conjectural.

II. APPELLANTS FAIL TO MEET THE HIGH BURDEN REQUIRED FOR A SUCCESSFUL FACIAL CHALLENGE TO A LEGISLATIVE ENACTMENT

Because Appellants' claims are not ripe for an as-applied challenge, Appellants' claims must stand or fall as a facial challenge. Appellants' claims fail to meet the burden of a facial challenge.

"A statute is facially unconstitutional only where no set of circumstances exist[s] under which the statute would be valid." *Clifton v. Allegheny Cnty.*, 600 Pa. 662, 703, 969 A.2d 1197, 1222 (2009). An analysis of facial constitutionality does not take into consideration mere hypothetical cases, but rather real and substantial invalid applications of the statute. *Id.* Even if an "inevitable unjust application" or a "perceived flaw" of legislative intent were presumed, such a presumption alone would not meet the standard of a facial challenge. *Id.* at 705, 969 A.2d at 1223. The challenge must fail where the statute has a "plainly legitimate sweep." *Id.* at 704, 96 A.2d at 1223. Under the "legitimate sweep" standard, "a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary." *Id.* at 705 n.37, 969 A.2d 1223 n.37.

Furthermore, under Pennsylvania law, "[i]n ascertaining the intention of the General Assembly in the enactment of a statute," it is presumed that "the General Assembly . . . does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa. Cons. Stat. § 1922(1)–(3) (2012). As such, under Pennsylvania law, there is a "*presumption of constitutionality* that all legislative enactments enjoy under [] the rules of statutory construction."

Mixon v. Commonwealth, 759 A.2d 442, 447 (Pa. Commw. Ct. 2000) (emphasis added). Therefore, the *Mixon* court clarified,

> [a]ny party challenging a legislative enactment has a heavy burden, and [that] legislation will not be invalidated *unless it clearly, patently, and plainly violates the Constitution of this Commonwealth. Any doubts are to be resolved in favor of a finding of constitutionality.*

Id.; *see also* 1 Pa. Cons. Stat. § 1922(3) (noting the presumptions in ascertaining legislative intent).

Other jurisdictions require the same heavy burden to invalidate, via a facial challenge, legislative enactments similar to Act 18. For instance, in *Crawford v. Marion County Election Board*, the Supreme Court of the United States rejected a facial challenge to an Indiana voter ID statute by a 6–3 vote. 553 U.S. 181, 185 (2008). The Court reasoned that

> we cannot conclude that the statute imposes "excessively burdensome requirements" on any class of voters. [Therefore, a] *facial challenge must fail where the statute has a "plainly legitimate sweep."*

Id. at 202 (plurality opinion) (citations omitted). Because the law was viewed as a neutral, nondiscriminatory regulation of voting procedures, a '"ruling of unconstitutionality [would] frustrate[] the intent of the elected representatives of the people."' *Id.* at 203 (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006)).

The statute upheld by the Supreme Court of the United States in *Crawford* was similar to Act 18 in that it required

> citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government.

553 U.S. 181, 185 (2008). More specifically,

> the statute applies to in-person voting at both primary and general elections. The requirement does not apply to absentee ballots submitted by mail, and the statute contains an exception for persons living and voting in a state-licensed facility

> such as a nursing home. A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit county clerk's office within 10 days. No photo identification is required in order to register to vote and the State offers free photo identification to qualified voters able to establish their residence and identity.

Id. at 185–86 (internal citations omitted).

Notably, the statute at issue in *Crawford* has many similarities to specific provisions in Act 18. For example, the Indiana Statute provides an exception for indigent voters and those who religiously object to having their photo taken. Senate Enrolled Act 483 (2005), Ind. Code § 3-11.7-5-2.5 (2010), 2005 Ind. Acts 1963 ("SEA 483"). Act 18 also provides exceptions for indigent voters and those who religiously object to having their photo taken. Pennsylvania Election Code—Omnibus Amendments, Act of March 14, 2012, P.L. 195, No. 2012–18, §§ 1, 3. The Indiana statute allows a voter to file a provisional ballot in certain circumstances. SEA 483, Ind. Code § 3-11.7-5-2.5 (2010). Act 18 also permits this type of provisional ballot. 2012 P.L. 195, No. 2012–18, § 3. The Indiana statute offers free photo identification to qualified voters. SEA 483, Ind. Code § 9-24-16-10 (2010). Act 18 also offers free photo identification. 2012 P.L. 195, No. 2012–18, § 2(b).

Like the upheld Voter ID statute in *Crawford*, Act 18 "does not attempt to alter or amend the Pennsylvania Constitution's substantive voter qualifications, but rather is merely an election regulation to verify a voter's identity." *Applewhite*, 2012 WL 3332376, at *16. Moreover, Pennsylvania's legitimate interests in enacting Act 18 were considered by the lower court to be "relevant, neutral and non-discriminatory." *Id.* at *28. Thus, given the legitimate, non-discriminatory sweep of Act 18, Appellants' claims fail to meet the facial challenge burden.

In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71 provides another example of a court's rejecting a facial challenge to a voter ID requirement because the prospective challengers did not meet the heavy burden of proof necessary to invalidate a legislative enactment. 740 N.W.2d 444 (Mich. 2007). The Michigan Supreme Court ruled that a

> statute challenged on a constitutional basis is clothed in a presumption of constitutionality, and the burden of proving that a statute is unconstitutional rests with the party challenging it. A party challenging the facial constitutionality of a statute *faces an extremely rigorous standard*. . . .

Id. 740 N.W.2d at 450 (emphasis added) (internal quotations omitted).

The challenged statutory provisions required that a

> registered elector perform two distinct acts before being given a ballot. First, the elector must present photo identification in the form of a driver's license, state identification card, or other generally recognized picture identification card. Second, the elector must execute, in the presence of an election official, an application bearing the elector's signature and address. The statute specifically provides that in the event that an elector does not have the necessary photo identification, an elector need only sign an affidavit to that effect before the elector shall be allowed to vote.

Id. at 451 (internal quotations omitted). The Supreme Court of Michigan held that the

> identification requirement is a reasonable, nondiscriminatory restriction designed to preserve the purity of elections and to prevent abuses of the electoral franchise, as demanded by art. 2, § 4 of the Michigan Constitution, thereby preventing lawful voters from having their votes diluted by those cast by fraudulent voters.

Id. at 448.

Similarly, in this case, the Commonwealth has asserted that the photo ID requirement "is a tool to detect and deter voter fraud." *Applewhite*, 2012 WL 3332376, at *27. Moreover, the lower court recognized that "Act 18 contains no references to any class or group. Rather, its provisions are neutral and nondiscriminatory and apply uniformly to all voters." *Id.* at *3.

As with the court rulings concerning the Indiana and Michigan statutes, the lower court in this case correctly concluded that Act 18 is facially constitutional. Moreover, as this Court held in *Clifton*, "a statute is facially invalid when its *constitutional deficiency is so evident* that proof of actual unconstitutional applications is unnecessary." 600 Pa. at 705 n.37, 969 A.2d at 1223 n.37 (emphasis added). No such *evident constitutional deficiency* exists in this case. Appellants have attempted to allege hypothetical and conjectural as-applied harms, but such uncertain predictions are 1) insufficient to establish ripeness, and 2) precluded from consideration in a facial challenge. *Id.* at 703, 969 A.2d at 1222. Appellants have not, and cannot, overcome the presumption of constitutionality that Pennsylvania law provides to a facially neutral statute.

CONCLUSION

For the foregoing reasons this Court should deny Appellant's motion for a preliminary injunction and affirm the Commonwealth Court's holding.

Respectfully submitted September 5, 2012.

Peter M. Rogers

Peter M. Rogers
Counsel of Record
Rogers & Rogers, P.C.
1806 Frick Building
437 Grant Street
Pittsburgh, PA 15219
T: 412-434-7500; F: 412-434-7544

Jay Alan Sekulow*
Stuart J. Roth*
American Center for Law & Justice
201 Maryland Avenue, NE
Washington, DC 20002
T: 202-546-8890; F: 202-546-9309

Robert W. Ash*
CeCe Heil*
Erik Zimmerman*
Marshall H. Goldman*
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent University Drive
Virginia Beach, VA 23464
T: 757-226-2489; F: 757-226-2836

Counsel for Amicus
* - not admitted to this Court's bar

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two copies each of the foregoing document upon the persons listed below at the addresses listed below via First Class United States mail, postage prepaid, which satisfies the requirements of Pa. R.A.P. § 121:

Jennifer R. Clarke, Esq.
(215) 627–7100
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
Counsel for Appellants

Patrick Schaffner Cawley, Esq.
(717) 783–3146
PA Office of Attorney General
Strawberry Sq. 15th Floor
Harrisburg, PA 17120
Counsel for Appellees

Dated: September 5, 2012

Peter M. Rogers
Counsel of Record