

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Viviette Applewhite; Wilola :  
Shinholster Lee; Gloria Cuttino; :  
Nadine Marsh; Bea Bookler; :  
Joyce Block; 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. : No. 330 M.D. 2012  
Submitted: May 13, 2013  
The Commonwealth of Pennsylvania; :  
Thomas W. Corbett, in his capacity :  
as Governor; Carole Aichele, in her :  
capacity as Secretary of the :  
Commonwealth, :  
Respondents :

BEFORE: HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: May 24, 2013**

Under consideration for expedited resolution<sup>1</sup> are the preliminary objections of the Commonwealth of Pennsylvania (the Commonwealth), Governor Thomas W. Corbett and Secretary of the Commonwealth Carol Aichele (collectively, Respondents) to the First Amended Petition for Review (Amended

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<sup>1</sup> Pursuant to Scheduling Order III, dated January 22, 2013, the pleadings were to be closed within 60 days, and trial on the permanent injunction is scheduled to begin July 15, 2013.

Petition) filed by several individuals and organizations<sup>2</sup> (collectively, Petitioners), challenging the validity of the Act of March 14, 2012, P.L. 195, No. 18 (Act 18) (requiring presentation of a photo identification (ID) card as a prerequisite to casting a ballot for most registered voters). Also under consideration are Petitioners' preliminary objections to Respondents' preliminary objections. Upon review, I overrule Petitioners' preliminary objections, and I sustain in part and overrule in part Respondents' preliminary objections.

In February 2013, Petitioners filed their Amended Petition. In Count I, Petitioners allege the implementation of Act 18 does not comport with the liberal access to a Pennsylvania Department of Transportation ID required by Act 18. In Count II, Petitioners aver Act 18 unduly burdens the fundamental right to vote in violation of Article I, Section 5 of the Pennsylvania Constitution (“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”). In Count III, Petitioners allege Act 18 violates the equal protection guarantees of the Pennsylvania Constitution. In Count IV, Petitioners aver Act 18 imposes an additional qualification on the right to vote in violation of Article VII, Section 1 of the Pennsylvania Constitution (qualifications of electors). Petitioners seek declaratory and injunctive relief.

In response, Respondents filed preliminary objections, asserting: (1) Petitioners do not state a viable facial challenge to the constitutionality of Act 18;

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<sup>2</sup> The individual Petitioners named in the Amended Petition are Viviette Applewhite, Wilola Shinholster Lee, Gloria Cuttino, Nadine Marsh, Bea Bookler, Joyce Block, and Devra Mirel (“Asher”) Schor.

The organizational Petitioners are the League of Women Voters of Pennsylvania, the National Association for the Advancement of Colored People, Pennsylvania State Conference, and the Homeless Advocacy Project.

(2) the individual Petitioners lack standing and/or their claims are moot; (3) this Court lacks jurisdiction over claims against the Commonwealth of Pennsylvania; and, (4) the Amended Petition is legally insufficient to state claims under Article I, Section 5, and Article VII, Section 1 of the Pennsylvania Constitution.

Petitioners filed preliminary objections to Respondents' preliminary objections. Thereafter, the parties submitted written argument in support of their respective positions. The preliminary objections are now ready for disposition.

A demurrer tests the legal sufficiency of the complaint. Christ the King Manor v. Dep't of Pub. Welfare, 911 A.2d 624 (Pa. Cmwlth. 2006), aff'd per curiam, 597 Pa. 217, 951 A.2d 255 (2008). In ruling on preliminary objections, I must accept as true all well-pled material facts and all inferences reasonably deducible from those facts. Id. However, I am not required to accept as true any unwarranted factual inferences, conclusions of law or expressions of opinion. Id. For preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery. Id. Any doubt must be resolved in favor of the non-moving party. Id.

### **I. Petitioners' Preliminary Objections**

Petitioners challenge paragraphs 1 through 15 of Respondents' preliminary objections on the ground these paragraphs do not fall within any of the eight permissible grounds for preliminary objections in Pa. R.C.P. No. 1028(a).

Paragraphs 1 through 15 of Respondents' preliminary objections set forth the background to this matter as well as Respondents' allegations that the

individual Petitioners each have an acceptable photo ID or are eligible to obtain one. Because the averments in paragraphs 1 through 15 relate to Respondents' preliminary objections that the individual Petitioners lack standing (or their claims are now moot) as well as Respondents' demurrers to the Amended Petition, see Pa. R.C.P. Nos. 1028(a)(4), (5), I overrule Petitioners' preliminary objections to Respondents' preliminary objections.

## **II. Respondents' Preliminary Objections**

### **A. Demurrer to Facial Challenge**

Respondents first object that the Amended Petition does not state a viable facial challenge to the constitutionality of Act 18. They assert both the plain language of the Act, and the undisputed evidence presented at the preliminary injunction hearings reveal most people have an acceptable photo ID for voting. Thus, Respondents argue Petitioners are not entitled to the broad relief they seek, and the only viable challenge they can mount is an as-applied challenge.

I reject Respondents' demurrer to Petitioners' facial challenge because it is improperly premised on facts beyond those alleged in the Amended Petition, namely, argument and evidence related to the proceedings on Petitioners' preliminary injunction request. Torres v. Beard, 997 A.2d 1242 (Pa. Cmwlth. 2010) (when ruling on a demurrer, court must confine its analysis to the complaint).

Moreover, Petitioners aver that the implementation of Act 18 does not comport with the liberal access to a Pennsylvania Department of Transportation ID required by Act 18. Am. Pet. at ¶¶6, 7, 20, 102, 103, 138, 160-68. Generally on

this point, our Supreme Court observed that “we agree with [Petitioners’] 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.” Applewhite v. Commonwealth, \_\_\_ Pa. \_\_\_, \_\_\_, 54 A.3d 1, 5 (2012). Given our Supreme Court’s view, I cannot say with certainty Petitioners are unable to state a facial challenge based on implementation of Act 18. See, e.g., Christ the King Manor (for preliminary objections to be sustained, it must appear with certainty the law will permit no recovery).

For these reasons, I overrule Respondents’ demurrer to Petitioners’ facial challenge.

### **B. Standing/Mootness**

Respondents next object that each of the individual Petitioners admit they obtained a valid photo ID for voting under Act 18, or are eligible to obtain one. Thus, Respondents contend the individual Petitioners no longer have a substantial, direct or immediate interest in this suit and, therefore, they can no longer state viable claims. Respondents assert the claims of the individual Petitioners are moot.

In their Amended Petition, Petitioners concede that five of the seven individual Petitioners, Viviette Applewhite, Gloria Cuttino, Nadine Marsh, Joyce Block and Devra Mirel “Asher” Schor, possess a valid ID for voting under Act 18. See Am. Pet. at ¶¶25, 39, 43, 56, 60; Pet’rs’ Resps. to and Prelim. Objections to the Prelim. Objections of Resp’ts to the Am. Pet. for Review at ¶8. Thus, I sustain Respondents’ preliminary objection that these five individual Petitioners no longer

have a viable claim. Magnelli v. State Civil Serv. Comm'n, 423 A.2d 802 (Pa. Cmwlth. 1980) (citing In re Gross, 476 Pa. 203, 382 A.2d 116 (1978)) (if at any stage of the judicial process a case is rendered moot, it will be dismissed; an intervening loss of standing can render a case moot).

While Petitioners assert the claims of these individuals fall within exceptions to the mootness doctrine, I reject these arguments.<sup>3</sup> Moreover, I reject individual Petitioners' claims that sustaining these preliminary objections will result in the silencing of their voices. My order does not preclude the receipt of evidence from any witness with personal knowledge of relevant facts. Indeed, testimony from the affected individual Petitioners is already in the record.

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<sup>3</sup> Courts decide moot questions in the rare instances where a case involves issues important to the public interest, the conduct complained of is capable of repetition yet likely to evade review, or a party will suffer some detriment without the court's decision. Musheno v. Dep't of Pub. Welfare, 829 A.2d 1228 (Pa. Cmwlth. 2003).

Here, Petitioners Applewhite, Cuttino, Marsh, Block and Schor possess valid IDs for voting; thus, an actual controversy no longer exists as to these Petitioners.

Further, while I agree with Petitioners that the issues raised here are important, the remaining Petitioners will have an opportunity to fully litigate these issues. To that end, I disagree the issues are likely to be repeated yet evade review. Rather, the issues raised by Petitioners will be reviewed.

Also, in the context of this facial challenge I reject Petitioners' claim that, for those individual Petitioners who received IDs, they will again face substantial burdens when those IDs eventually expire. They also assert that, for those Petitioners who obtained Department of State IDs, there is no guarantee these IDs will continue to be made available because those IDs are "a creation of executive whim." Br. of Pet'rs in Opp'n to Prelim. Objections of Resp'ts at 28 (citation omitted). I reject these assertions because such harm is speculative at this time; therefore, the assertions fail to support a facial challenge. See Clifton v. Allegheny Cnty., 600 Pa. 662, 704, 969 A.2d 1197, 1222 (2009) ("In determining whether a law is facially invalid, a court must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.") (Citation omitted). If these events come to pass at some future time, the affected individuals are not precluded from bringing particularized as-applied challenges. See League of Women Voters of Indiana, Inc. v. Rokita, 929 N.E.2d 758 (Ind. 2010).

However, as to the remaining two individual Petitioners, Wilola Shinholster Lee and Bea Bookler, the Amended Petition avers these Petitioners do not have the ID required under Act 18. Am. Pet. at ¶¶34, 48. Thus, I overrule Respondents' preliminary objections as to individual Petitioners Lee and Bookler.

### **C. Jurisdiction over Respondent Commonwealth**

Respondents also object that this Court lacks jurisdiction over claims against the Commonwealth itself; therefore, I should dismiss the Commonwealth as a party. See, e.g., Ballroom, LLC v. Commonwealth, 984 A.2d 582 (Pa. Cmwlth. 2009) (Commonwealth itself, as an entity separate and apart from its agencies and officers, does not necessarily have an interest in the determination of whether a statute is unconstitutional; mere fact that a challenged statute may be declared unconstitutional does not, of itself, make Commonwealth an indispensable party). In their brief in opposition to Respondents' preliminary objections, Petitioners do not object to the dismissal of the Commonwealth as a party. Br. of Pet'rs in Opp'n to Prelim. Objections of Resp'ts at 3 n.1. Thus, I sustain Respondents' preliminary objection, and I dismiss the Commonwealth as a party.

### **D. Demurrer to Claims Based on Article I, Section 5 and Article VII, Section 1 of the Pennsylvania Constitution**

Finally, Respondents challenge the legal sufficiency of Counts II and IV of the Amended Petition, which contain allegations that Act 18 violates Article I, Section 5 and Article VII, Section 1 of the Pennsylvania Constitution, respectively.

With regard to Count II, Petitioners' claim under Article I, Section 5 of the Pennsylvania Constitution, I cannot state with certainty that Petitioners are unable to state a legally sufficient claim. See, e.g., Christ the King Manor. This is particularly true in light of Petitioners' averments that implementation of Act 18 will result in disenfranchisement. Am. Pet. at ¶¶1-3, 5, 19, 20, 100, 101, 125-29, 169-80. Thus, I overrule Respondents' preliminary objection to Count II of the Amended Petition.

However, as to Count IV, I agree that under current Pennsylvania law Petitioners cannot state a claim under Article VII, Section 1 of the Pennsylvania Constitution on the ground that Act 18 improperly imposes an additional qualification on the right to vote. See *Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Cmwlth. 2000) (en banc), aff'd per curiam, 566 Pa. 616, 783 A.2d 763 (2001) (additional qualification claim under Pennsylvania constitution rejected); *Martin v. Haggerty*, 548 A.2d 371 (Pa. Cmwlth. 1988) (same); see also *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011) (additional qualification claim under Georgia constitution rejected); *Rokita*, 929 N.E.2d 758, 767 (Ind. 2010) (“[T]he requirements of the [Indiana] Voter ID Law are not, as the plaintiffs urge, unconstitutional as additional substantive voter qualifications.”); *City of Memphis v. Hargett*, No. M2012-02141-COA-R3-CV, 2012 WL 5265006 (Tenn. Ct. App. Oct. 25, 2012) (additional qualification claim under Tennessee constitution rejected). Thus, I sustain Respondents' preliminary objection to Count IV of the Amended Petition.

### **III. Conclusion**

Accordingly, I overrule Petitioners' preliminary objections to Respondents' preliminary objections.

Also, I overrule Respondents' preliminary objections to Petitioners' facial challenge to Act 18 and Count II of the Amended Petition. I sustain Respondents' preliminary objection to Count IV of the Amended Petition. I also sustain Respondents' preliminary objections to the claims of individual Petitioners Applewhite, Cuttino, Marsh, Block and Schor, without prejudice to future as-applied challenges. However, I overrule Petitioners' preliminary objection to the claims of individual Petitioners Lee and Bookler. Additionally, I sustain Respondents' preliminary objection to lack of jurisdiction over the Commonwealth.

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ROBERT SIMPSON, Judge



Respondents' preliminary objection in the nature of a demurrer to Count IV of the Amended Petition is **SUSTAINED**;

Respondents' preliminary objection to lack of standing and/or mootness is **SUSTAINED** as to individual Petitioners Viviette Applewhite, Gloria Cuttino, Nadine Marsh, Joyce Block and Devra Mirel "Asher" Schor, without prejudice to future particularized as-applied claims, and is **OVERRULED** as to individual Petitioners Wilola Shinholster Lee and Bea Bookler; and,

Respondents' preliminary objection to lack of jurisdiction over the Commonwealth of Pennsylvania is **SUSTAINED**, and the Commonwealth is **DISMISSED** as a party to this suit.

Petitioners' preliminary objections to Respondents' preliminary objections are **OVERRULED**.

Respondents Governor Thomas W. Corbett and Secretary of the Commonwealth Carole Aichele shall file an answer to the First Amended Petition for Review Addressed to the Court's Original Jurisdiction within 30 days of the date of this order.

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ROBERT SIMPSON, Judge