

IN THE SUPREME COURT OF PENNSYLVANIA

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,

Appellants,

v.

The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as
Governor; Carol Aichele, in her capacity as Secretary of the Commonwealth,

Appellees.

AMICUS CURIAE BRIEF OF COMMON CAUSE OF PENNSYLVANIA
IN SUPPORT OF REVERSAL

Appeal from the August 15, 2012 Order of the Commonwealth Court in 330
MD 2012, Denying Petitioners' Application for Preliminary Injunction.

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Common Cause of Pennsylvania is the statewide organization of Common Cause, a nonpartisan, nonprofit advocacy organization founded in 1970 as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. Today, Common Cause is one of the most active, effective, and respected nonprofit organizations working for accountability and reform in America. With nearly 400,000 members and supporters and 36 state organizations, Common Cause fights for honest, open, and accountable government at all levels.

Common Cause's primary goal is governmental accountability and responsiveness, which it promotes through lobbying, oversight, education, outreach, and litigation programs. Common Cause of Pennsylvania is a leader in Pennsylvania on reform of state elections and is actively involved in promoting open records, open public meetings, campaign finance reform, lobbyist disclosure, reform of judicial selection and discipline, public officials' ethics, and improvements to the Commonwealth's election policies and procedures. Common Cause of Pennsylvania has over 4,000 members and affiliates in Pennsylvania – all of whom have a substantial interest in the Petitioner's constitutional challenge to the Voter ID Law.

II. SUMMARY OF ARGUMENT

By enforcing a law that will result in eligible voters not being able to vote, the decision below diminishes our Commonwealth's clear constitutional mandate that elections shall be "free and equal" without any interference that "prevent[s] the free exercise of the right of suffrage." PA CONST. ART. I, § 5. This strong constitutional language places Pennsylvania, with its history of expansive democracy, in the class of states that treat as fundamental the right to vote. *See Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006) (holding that Missouri's constitution requires that legislative restrictions on the right to vote must withstand strict scrutiny); *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker, et al.*, No. 11 CV 4669 (Wis. Cir. Mar. 12, 2012).

Common Cause of Pennsylvania requests that this Court clarify that the right to vote is fundamental under Article I, Section 5, and that legislative efforts that affect that right are to be construed strictly. As the Court below recognized, if Act 18 of 2012 (the "Voter ID Law") were judged under these strict standards, it would likely be found unconstitutional. *See Order Below*, at 62 ("the appropriate level of scrutiny raises a substantial legal question. Indeed, if strict scrutiny is to be employed, I might reach a different determination . . .").

But even if the lesser standard the Commonwealth Court applied controlled the question (and it should not), the Court should still invalidate the law because the record makes clear that the law was not passed to address a substantive problem. The Voter ID Law will either have no effect or will make worse the

problems its supporters claim it will ameliorate: in-person voter fraud and a lack of public confidence in elections. As the Commonwealth Court found, there is *no* evidence of in-person voter fraud in Pennsylvania. *See* Opinion Below, at 60. Public fear about the integrity of elections has been stoked by partisan rhetoric, and the Voter ID Law will likely *increase* voters' fears by making them believe that in-person voter fraud is rampant when, in fact, it is nonexistent.

The Voter ID Law is also expensive. At a time when Pennsylvania faces severe budget cuts, implementation of the Voter ID Law will drain millions from the public coffers. The lack of evidence for the Voter ID Law's justifications coupled with its high costs—costs the sponsors of the bill would otherwise be anxious to avoid—reveals the true, and sole, purpose of the law: vote suppression of the elderly, the poor, and other individuals that typically cast votes for the Democratic Party.

By allowing this law to stand, the Commonwealth Court opened the door to evermore politically-motivated legislation that will weaken the right to vote. If a majority party may pass a law that is aimed at suppressing the vote of the other, nothing stands in the way of the other party doing the same when it comes into power.

The aim of any election should be to accurately capture the will of all eligible voters who wish to cast a legitimate ballot. The Voter ID Law undermines this aim. It does not address an actual problem, it lessens voter confidence, and it imposes undue burdens that will make it harder to capture the will of the electorate.

Common Cause submits that the Voter ID Law is a “plain, palpable, and clear abuse of the [legislature’s] power which actually infringes the rights of electors.” *Winston v. Moore*, 244 Pa. 447, 454 (1914) (internal quotation omitted). Given the unconstitutional purpose and effects of the law, Common Cause respectfully asks the Court to find that the Voter ID Law is an unconstitutional violation of the fundamental right to vote.

III. ARGUMENT

A. The Stated Rationales for the Voter ID Law Are Not Supported By the Facts.

The Commonwealth Court held that the lack of evidence of in-person voting fraud was not dispositive of the law’s constitutionality. *See* Order Below, at 60. The Court reached this conclusion by relying on *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). *Id.* But *Crawford* actually holds that the law *should* be found unconstitutional if the sole rationale for the law was vote suppression. The Supreme Court held: “If . . . [partisan] considerations had provided the *only* justification for a photo identification requirement, we may also assume that SEA 483 would suffer the same fate as the poll tax at issue in *Harper*.” *Id.* at 1624.¹

¹ *Crawford*, moreover, was assessing the law under the U.S. Constitution. Pennsylvania’s Constitution is more explicit than the U.S. Constitution in embracing the right to vote as fundamental. *See* PA CONST. ART. I, § 5. Common Cause of Pennsylvania fully supports the Petitioners’ persuasive analysis as to why the right to vote is fundamental in Pennsylvania and why the Voter ID Law should be subject to strict scrutiny. As this Court held nearly a 150 years ago: “A right conferred by the Constitution is beyond the reach of legislative influence. If it were not so, there would be nothing stable; there would be no security for any right.” *McCafferty v. Guyer*, 59 Pa. 109, 1868 WL 6998 (Pa May 18, 1868), at *2.

Here, the Legislature offered two rationales for the Voter ID Law: (1) That it will minimize in-person voter fraud and (2) that it will increase confidence in the electoral process. But, as shown below, these rationales do not correspond with the facts. First, as the Commonwealth Court concluded, there is an “absence of proof of in-person voter fraud in Pennsylvania.” Order Below, at 60. Second, the Voter ID law will actually *diminish* voter confidence. All that is left then is a partisan motive to suppress the vote of certain groups – a rationale that the U.S. Supreme Court has held cannot justify a voter identification law.

1. The Commonwealth’s Claim That the Voter ID Law Will Combat Voter Impersonation Fraud Was Not Its True Rationale Because There is No Evidence of Voter Impersonation Fraud in Pennsylvania.

The County Commissioners Association of Pennsylvania (“CCAP”)—the entity representing the people who actually carry out Pennsylvania elections—has stated that voter-impersonation fraud is *not* a problem the County Commissioners confront when they administer elections. “Were the question of fraudulent voting an issue,” the CCAP wrote in a 2011 letter, “we would be calling for legislation . . . to deal with the problem.” March 18, 2011 Letter from Douglas E. Hill, Executive Director of CCAP. “But we find no evidence—substantiated by a search of case records and anecdotal information from the counties—that it is an issue. And so we believe a requirement to present ID at all elections is a solution to a problem that does not exist.” *Id.*

Similarly, the Secretary of the Department of State, Carol Aichele, conceded in front of the Senate Appropriations Committee that “we don’t have reports” of any

in-person voter fraud. Transcript of Proceedings, Senate Appropriations Comm., March 1, 2012, at 22 (Secretary Aichele's answer was in response to Senator Wozniak's question: "In your time as Secretary, have we had any documented voter IDs at the voting precinct, have we had any illegal immigrants that were trying to vote in our precincts; and if we had any of the above, did it change an election?").

CCAP's conclusion and Secretary Aichele's admission mirror the conclusions reached by research on voter fraud. The Brennan Center, a non-partisan public policy and legal advocacy organization, published a report in 2007 that concluded that "photo ID laws are effective *only* in preventing individuals from impersonating other voters at the polls—an occurrence more rare than getting struck by lightning." Justin Levitt, *The Truth About Voter Fraud*, Brennan Center for Justice (2007), available at http://brennan.3cdn.net/e20e4210db075b482b_wcm6ib0hl.pdf.

Mr. Levitt and his team collected and analyzed allegations of fraud cited by state and federal courts, bipartisan federal commissions, political parties, and in the press. *Id.* Their conclusion was that the few reported instances of potential fraud disappeared upon closer analysis. As Mr. Levitt later testified in the U.S. Senate:

In sum, we have reviewed many past accounts of fraud, and track contemporary accounts as they arise. Our research confirms that there are hundreds of reports of alleged fraud, in thousands of elections, with millions of ballots cast. Yet after wading through the false and irrelevant reports categorized above, only a handful of reports remain that even allege, much less substantiate, instances of in-person impersonation fraud.

In-Person Voter Fraud: Myth and Trigger for Disenfranchisement? Before the U.S. Senate Committee on Rules and Admin., March 12, 2008 ("Levitt Testimony"), available at http://brennan.3cdn.net/02f93775d26a119ad0_dam6iyw3s.pdf.

Mr. Levitt's analysis has been confirmed by others. As summarized in a 2009 article in the *Vanderbilt Law Review*:

Evidence of in-person voter fraud, the only type of fraud that photo ID requirements would squarely address, is notoriously scant. Indiana, Georgia, and Missouri all failed to produce any evidence of such fraud in support of their respective photo ID laws. As such, critics of these laws contend that they are akin to "us[ing] a sledgehammer to hit either a real or imaginary fly on a glass coffee table." If the harm was present, the solution was nonetheless disproportionate to the problem. If no harm existed, all one has accomplished is breaking a table.

Joel A. Heller, "Fearing Fear Itself: Photo Identification Law, Fear of Fraud, and the Fundamental Right to Vote," 62 *Vand. L. Rev.* 1871, 1887-88 (2009) (internal citation omitted).

The inability to identify in-person impersonation fraud should not be surprising. In-person voter fraud simply does not make sense; a single marginal vote is not worth the risk. As *The Truth About Voter Fraud* explains:

[F]raud by individual voters is a singularly foolish and ineffective way to attempt to win an election. Each act of voter fraud in connection with a federal election risks five years in prison and a \$10,000 fine, in addition to any state penalties. In return, it yields at most one incremental vote. That single extra vote is simply not worth the price.

The Truth About Voter Fraud, at 7.²

² There is absolutely no evidence—at any level—of organized voter fraud. As the *New York Times* reported in 2007, "Five years after the Bush Administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews." Eric Lipton and Ian Urbina, "In 5-Year Effort, Scant Evidence of Voter Fraud," April 12, 2007, *New York Times*, available at www.nytimes.com/2007/04/12/washington/12fraud.html.

2. The Commonwealth's Claim That the Voter ID Law Will Increase Voter Confidence Was Not Its True Rationale Because the Voter ID Law Will Decrease—Not Increase—Voter Confidence.

The Legislature has also contended that the law will ensure that the public has confidence in the electoral process. Just as is the case for the Commonwealth's primary justification (that voter-impersonation fraud is a serious problem), this claim is not supported by the academic research. The *Harvard Law Review*, for example, published an extensive study about citizens' fear of voter fraud and found that Voter ID laws do not increase voter confidence in elections. See Stephen Ansolabehere and Nathaniel Persily, "Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements," 121 *Harv. L. Rev.* 1737 (2008). The report concluded that "perceptions of fraud have no relationship to an individual's likelihood of turning out to vote [and] . . . that voters who were subject to stricter identification requirements believe fraud is just as widespread as do voters subject to less restrictive identification requirements." *Id.* at 1738.

An even more fundamental question is how the Commonwealth *should* address Voters' fears. "If fear is not reasonable, the state is unlikely to have a compelling interest in addressing it. When the public fears something that does not exist, the state arguably has a greater interest in combating the false perception, not in catering to it." Heller, "Fearing Fear Itself," 62 *Vand. L. Rev.* at 1901 (internal citation omitted).

One commentator has insisted that voter fear must be “warranted” and “grounded in something besides merely the feeling []” itself before it can serve as the basis for lawmaking. Even Professors Pildes and Niemi, in their discussion of the expressive harm theory, recognized that courts should only credit “relevant social perceptions.” In order to be relevant, perceptions must reflect “acceptance of governing law” and “awareness of relevant general facts.” In the election context, the governing law is the right to vote; the franchise simply cannot be taken away arbitrarily. The relevant general facts for evaluating fear of fraud would certainly include whether fraud is actually occurring. And . . . evidence of in-person voter fraud is rare.

Id. at 1901-2.

Rather than alleviating citizens’ concerns about the integrity of the electoral process, the Commonwealth is increasing it by claiming that fraud is far more prevalent than it actually is.

B. The True Rationale for the Voter ID Law was to Suppress the Votes of the Certain Demographic Groups.

Having stripped the stated rationales away, only one rationale remains: vote suppression of certain groups that typically cast votes for the Democratic party. In stark contrast with the stated rationales, there *is* evidence that shows this was indeed the Legislature’s goal.

First, the champions of the Voter-ID Law are very same individuals that have stressed that the Commonwealth should prioritize state spending on truly necessary expenditures. *See, e.g.*, Mike Turzai, “Statement from House Majority Leader Turzai Regarding Governor Corbett’s 2012-13 State Budget Proposal,” February 7, 2012 available at <http://www.repturzai.com/NewsItem.aspx?NewsID=13541> (“The fact is, what we have accomplished, living within our means

and prioritizing how we spend tax dollars, is a refreshing approach to budgeting.”). But, as shown above, the Voter ID Law is not necessary to address in-person voter impersonation fraud because such fraud does not exist.

The Voter ID Law is expensive, and represents an ongoing unfunded mandate for counties. The Pennsylvania Budget and Policy Center—a nonpartisan research group that provides independent analysis on Commonwealth’s finances—estimated that the Voter ID law would cost Pennsylvania taxpayers more than \$11 million in its first year alone. See “Voter Mandates Costly to Taxpayer,” Pennsylvania Budget and Policy Center, May 10, 2011, available at <http://pennbpc.org/voter-mandates-costly-taxpayer>. This amount includes—among other expenses—the costs of free Voter ID cards, the cost of public education campaign, and additional election-day staff. *Id.* While only an initial estimate, these costs are in line with the estimates from other states that have implemented or proposed Voter ID laws. See Vishal Agraharkar, Wendy Weiser, and Adam Skaggs, “The Cost of Voter ID Laws: What the Courts Say,” Brennan Center for Justice at NYU Law School, March 2011, at 1-2 available at http://brennan.3cdn.net/2f0860fb73fd559359_zzm6bhnld.pdf (noting that Missouri estimated a cost of \$6 million the first year, followed by \$4 million in yearly recurring costs and that Indiana estimated the law would result in over \$3.5 million in expenses and revenue loss.).

Indeed, the stated costs may be far greater than initially estimated given that the Department of State and PennDOT have now concluded that over 750,000

individuals do not have valid PennDOT IDs. Warner, *Philadelphia Inquirer*, "Voter ID law may affect more Pennsylvanians than previously estimated," July 5, 2012, available tinyurl.com/7ggtv5m. "The figures - representing 9.2 percent of the state's 8.2 million voters - are significantly higher than prior estimates by the Corbett administration. Secretary of the Commonwealth Carol Aichele has repeatedly said that 99 percent of Pennsylvania's voters already had the photo ID they will need at the polls in November." *Id.* Merely mailing notice to these 750,000 individuals will entail significant additional costs in printing and postage.

Second, the supporters of the Voter ID have explicitly stated that their goal was to assist the Republican party. Mike Turzai, the Commonwealth's House majority leader, told a meeting of the Republican State Committee that the Voter ID law was passed to help Mitt Romney win Pennsylvania in the Fall. As reported on the Philadelphia Inquirer's website: "In case you missed it, House Republican Leader Mike Turzai seems to have confirmed Democratic assertions that the state's new Voter ID law is intended to help Republican candidates win elections rather than combat voter fraud. During remarks to a Republican State Committee meeting Saturday, Turzai was ticking off GOP agenda items and said: . . . 'Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, done.'" John Baer, "Voter ID is, well, IDed," available at <http://www.philly.com/philly/blogs/growls/Voter-ID-is-well-IDed.html?cmpid=124488489>. A video of Representative Turzai's comments is available on YouTube, [http://youtu.be/Eu\)T1bRYdk8](http://youtu.be/Eu)T1bRYdk8). *See also* Brad Bumsted, "Corbett, GOP Committee Look to Election," available at

<http://triblive.com/news/2064319-74/romney-state-gleason-party-pennsylvania-committee-corbett-election-republican-county> (reporting on an interview with Republican Party Chairman Rob Gleason who stated that the Voter ID Law will increase Mitt Romney electoral chances in Pennsylvania).³

The Commonwealth Court found these statements to be “disturbing [and] tendentious.” Order Below, at 60.

Such ulterior motives are not unique to Pennsylvania. Mr. Levitt quotes Royal Masset, a former political director for the Republican Party of Texas, who candidly explained to the *Houston Chronicle* that while he does not believe that voter fraud is harming Republican candidates in Texas, he “does believe that requiring photo IDs could cause enough of a dropoff in legitimate Democratic voting to add 3 percent to the Republican vote.” *The Truth About Voting Fraud*, at 6 (quoting Kristen Mack, “In Trying to Win, Has Dewhurst Lost a Friend?,” *Houston Chron.*, May 17, 2007).⁴

The legislature passed a law that will require the Commonwealth to spend millions of dollars at precisely the same time as the Legislature is claiming that taxpayers’ dollars must be prioritized. The law perpetuates the myth of in-person impersonation voter fraud, which decreases citizens’ confidence in elections. And, worse still, the law will result in the disenfranchisement of eligible voters.

³ All but three of the House Republican Caucus voted in favor of final passage of the law while every member of the House Democratic Causes voted against final passage.

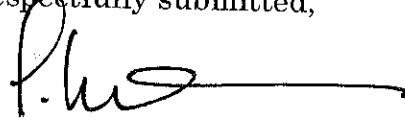
⁴ Common Cause believes the Petitioners are in the best position to show how the Voter ID law will disenfranchise Pennsylvania citizens. Common Cause fully supports those efforts.

Ultimately, after the purported justifications are stripped away, only one conclusion remains: the law was not enacted to address fraud, it was enacted to suppress voter turnout of minority, elderly and poor constituencies that predominantly vote Democratic.

IV. CONCLUSION

Common Cause is nonpartisan. If Democratic leaders had pushed through a Voter ID law that disenfranchised Republican voters, Common Cause would file a brief identical to this one. Common Cause's interest is ensuring that every eligible voter in Pennsylvania has a free and equal opportunity to exercise their right to vote. That right is essential to a democratic society because it is through the ballot box that the people choose their government and hold it accountable. It is a right no less fundamental than the right to liberty. Just as we live in a society where we would rather see a guilty man go free than an innocent one go to prison, we must ensure the franchise to all even if it means that a marginal, invalid vote slips through. The Voter ID Law will not prevent that marginal vote from slipping through, but it will eliminate the legitimate right to vote from a significant portion of Pennsylvania citizens. Common Cause respectfully requests that the Court grant the Petitioner's Application for a Preliminary Injunction.

Respectfully submitted,



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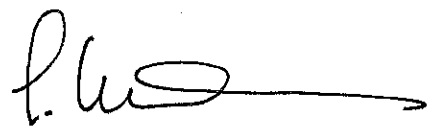
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