

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILOLA SHINHOLSTER LEE; BEA
BOOKLER; THE LEAGUE OF WOMEN
VOTERS OF PENNSYLVANIA;
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
PENNSYLVANIA STATE CONFERENCE;
and HOMELESS ADVOCACY PROJECT,
Petitioners,

v.

THOMAS W. CORBETT, in his capacity as
Governor; and CAROL AICHELE, in her
capacity as Secretary of the Commonwealth,
Respondents.

Docket No. 330 M.D. 2012

ORDER

AND NOW, on this ____ day of February, 2014, upon consideration of Respondents' Application for Argument Before an *En Banc* Panel made pursuant to Pa.R.A.P. 123 and 3713, and any response thereto, it is hereby ORDERED that the Application is GRANTED. Accordingly, motions for post-trial relief in this case shall be heard by an *en banc* panel established in accordance with I.O.P. §§ 111 and 112.

BY THE COURT:

J.

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RESPONDENTS' APPLICATION FOR ARGUMENT BEFORE AN *EN BANC* PANEL

Governor Corbett and Secretary of the Commonwealth Aichele, Respondents in the above-captioned matter, respectfully request that motions for post-trial relief (including Respondents' motion currently pending before the Court – a copy of which is attached to this application as an appendix – be heard by an *en banc* panel of this Court. Respondents make this application pursuant to Pennsylvania Rules of Appellate Procedure 123 and 3713 (permitting a party to request, or the Court *sua sponte* to direct, *en banc* argument after the record has been made), and in accordance with the Court's Internal Operating Procedures at §§ 111 and 112.

In support of their application, Respondents state as follows:

1. This action for declaratory judgment and equitable relief, addressed to the Court's original jurisdiction, has been pending since May 2012. Substantial proceedings – including preliminary injunction hearings and a final merits trial – have been conducted over many days before two commissioned judges of the Court. In addition, the Supreme Court in September 2012 reviewed this Court's initial order denying Petitioners' application for preliminary injunction and remanded for an additional evidentiary hearing. *See Applewhite v.*

Commonwealth, 54 A.3d 1 (Pa. 2012).

2. This matter is of tremendous public importance. Petitioners challenge the constitutionality of substantial amendments made to the Pennsylvania Election Code that the General Assembly enacted in the exercise of its unquestioned power to regulate elections and that affect millions of Pennsylvania voters. *See* Act 2012-18, §§ 2, 3 (adding to the Election Code a new § 206 [25 P.S. § 2626] and amending § 1210 [25 P.S. § 3050]).

3. After trial, the judge assigned by the Court to preside ruled in his decision and verdict that the challenged statute is unconstitutional under Pa. Const. art. I, § 5 (providing that “[e]lections shall be free and equal”). Therefore, the trial judge has determined, this Court must

enter a declaratory judgment to that effect and issue a permanent injunction against Respondents – representatives of the Executive Branch – prohibiting them from administering or enforcing the commands of the law.

4. The trial judge’s ruling includes an unprecedented holding that strict scrutiny applies to legislation regulating elections under Article I, § 5, of the Pennsylvania Constitution. Respondents’ challenge to this ruling – and the other decisions of constitutional import that the trial judge made – should be considered by the Court *en banc*.

5. In addition, Respondents have raised for review through their timely motion for post-trial relief several important issues pertaining to statutory construction and the proper weight to be given to the public policy determinations made by the Legislature, as well as the scope of administrative authority and discretion and the challenges to implementation on which the trial judge relied in concluding that the law as enacted by the General Assembly is unconstitutional and that its implementation by the executive must be permanently enjoined.

6. The foundational issues of constitutional law and the statutory construction questions that are integral to the constitutional analysis, as well as the importance to millions of Pennsylvania voters of the public policy that the statute at issue represents, deserve consideration by an *en banc* panel of this Court.

7. This Court has long demonstrated its understanding of the special jurisprudential responsibility it has over the constitutionality and proper construction of the Commonwealth’s election laws in considering such matters through an *en banc* court even when there has not yet been a hearing or opportunity for development of the record. *See, e.g., Banfield v. Aichele*, 51 A.3d 300 (Pa. Cmwlth. 2012) (consideration of application for summary relief *en banc*); *Banfield v. Cortés*, 922 A.2d 36 (Pa. Cmwlth. 2007) (consideration of preliminary objections *en banc*);

Mixon v. Commonwealth, 759 A.2d 442 (Pa. Cmwlth. 2000) (consideration of preliminary objections *en banc*). In this case, of course, there have been three hearings, and the record has been made. Thus, application of Rule 3713 is appropriate.

8. Respondents respectfully submit that this case is particularly appropriate for *en banc* consideration because it requires the Court to weigh the interests that every Pennsylvanian has in protecting the right to vote and in having his or her properly cast vote counted equally. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997).

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