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 _____, 2014, upon consideration of Respondents' Post-trial Motion Pursuant to Pa.R.C.P. No. 227.1, and any response thereto, it is hereby ORDERED that the Motion is GRANTED. It is hereby Ordered that the Order & Verdict dated January 17, 2014, is set aside and judgment is directed in favor of Respondents and against Petitioners on all causes of action pursuant to Rule 227.1(a)(2).

BY THE COURT:

_____

J.

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RESPONDENTS' POST-TRIAL MOTION PURSUANT TO Pa.R.C.P. No. 227.1

In accordance with Rule 227.1 of the Pennsylvania Rules of Civil Procedure and this Court's scheduling orders as incorporated into the January 17, 2014 Order, Respondents Thomas W. Corbett, in his capacity as Governor, and Carol Aichele, in her capacity as Secretary of the Commonwealth, hereby submit the following motion pursuant to Rule 227.1(a)(1), (2), and (4).

I. INTRODUCTION

A judge of this Court (Judge McGinley) conducted the permanent injunction hearing in this case. The permanent injunction proceedings built upon the record of a lengthy preliminary injunction hearing conducted by another judge of this Court (Judge Simpson), full consideration by the Pennsylvania Supreme Court of Petitioners' appeal of this Court's denial of preliminary injunctive relief, a remand to this Court for further consideration of the preliminary injunction request based on Supreme Court instructions, and additional preliminary injunction proceedings conducted by Judge Simpson in accordance with the remand order. The trial judge's verdict and decision issued in this case is not consonant with the opinion of the Supreme Court, departs from established principles of statutory construction, and employs a flawed constitutional standard. This Court should correct those errors of law.

In its opinion in *Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012) (*per curiam*) (*Applewhite II*), the Supreme Court cited and expressed agreement with Petitioners' concession made during oral argument that "there is no constitutional impediment to the Commonwealth's implementation of a voter identification requirement, at least in the abstract." *Id.* at 4-5. It is against the backdrop of the Supreme Court's express validation of the General Assembly's constitutional power to require photo identification of voters and the manner in which it chose to do so in Act 2012-18 that Petitioners' challenge to that law must be judged by this Court.

In evaluating the evidence presented at the permanent injunction hearing, this Court properly recognized that Petitioners' claim based on the equal protection provisions of the Pennsylvania Constitution must fail. That is so because Pennsylvania's equal protection guarantees are coterminous with those granted under the Equal Protection Clause of the Fourteenth Amendment, and the U.S. Supreme Court has rejected a similar equal protection claim challenging a substantially similar state law. Nonetheless, this Court's trial judge declared void all of the photo identification provisions included in Act 18 based on the Pennsylvania Constitution's Free and Equal Elections Clause, despite the fact that the protections under the Free and Equal Clause are no greater than those under the Equal Protection Clause.

Because the trial judge so invalidated the statute without employing proper statutory or constitutional analysis and without requiring Petitioners to sustain their burden, Respondents respectfully request that this Court correct the errors of the trial judge in its final determination of this case.

Act 18 was enacted to protect the integrity of the electoral process and to better assure the people of the Commonwealth that only qualified electors are casting ballots. Toward that end, the General Assembly required that all who present themselves to vote produce proof of identification before they are able to cast a ballot. To enable all qualified electors to obtain proof of identification, the General Assembly crafted a provision designed to ensure that anyone who needs compliant ID would be able to get it from the Department of Transportation ("DOT"), an agency that already provides 9.8 million Pennsylvanians with secure identification. To make it liberally accessible and free, the General Assembly provided for exceptions to the requirements imposed by DOT and the General Assembly to obtain a secure identification.

To accommodate those who – for whatever reason – would not be able to obtain identification from DOT, the General Assembly has provided four alternatives: (1) several forms of acceptable identification that most people who do not have a DOT-issued driver's license would have or could readily obtain; (2) an indigency provision giving a person who is unable because of the costs involved in obtaining proof of identification from DOT an alternative way to qualify to vote; (3) absentee ballot provisions for those who are not sufficiently mobile to vote at a polling place or are away from their home municipality on Election Day; and (4) the right of a voter to cast a provisional ballot if he or she is unable to present proof of identification at the polling place.

Judge McGinley declared the statute to be facially invalid under the Free and Equal Elections Clause of the Pennsylvania Constitution because he found that the way in which the Department of State and DOT are (and were) implementing the law is (and was) faulty. Said another way, Judge McGinley decided that the executive agencies' implementation of the statute in a manner different than the trial judge believed the General Assembly intended is a proper measure of whether the statute itself is constitutional on its face. This conclusion was error. The statute cannot be declared facially unconstitutional based solely on flaws found in the executive's reading or administration of the statute.

Moreover, the trial judge committed error in interpreting the statute. These errors of statutory construction further undermine the trial judge's constitutional analysis. Compounding his misinterpretation of the statute, the trial judge found that there are "hundreds of thousands" of people harmed by the flawed implementation of the statute based upon a statistical assessment of DOT products and out-of-court assertions made by two Petitioners who did not even testify. If a law is to be struck down based on the harm it will cause to qualified electors, the decision should

be grounded on evidence showing harm to actual people – not arguments made by lawyers designed to make it *sound* like some people out there might be hurt by the law's application.

Judge McGinley concluded: "Like a house of cards, everything rises and falls upon the legitimacy of the [Department of State] ID [("DOS ID"] . . . . [T]he DOS ID is an unauthorized agency creation, and difficult to obtain." Op. at 35.[1] From that statement, Judge McGinley concluded that the law itself is facially unconstitutional. Using implementation as the measure of the statute itself, the trial judge found that the right to vote should be subject to a strict scrutiny standard, and that (1) the burden and inconvenience of getting photo ID from DOT amounts to a denial of the right to vote; (2) the alternatives that the General Assembly put in place are of no significance; and (3) the General Assembly did not have a compelling reason to enact the law, did not list enough forms of alternative identification, and did not mandate that the issuers provide those forms of identification.

These conclusions do not give proper deference to the role of the Secretary of the Commonwealth, the statutory authorization, or the public policy that favors agency cooperation. The DOS ID is not *ultra vires*. Because it is not, ordinary principles of statutory construction show that the General Assembly properly crafted a statute to protect the interests of its citizens while enhancing the integrity – and the perception of integrity – of elections.

The statute was intended to be, and is in practice, a regulation of the exercise of the right to vote; and it is valid as enacted. If the trial judge had employed proper constitutional analysis, he would not have seen the statute as a house of cards construct, but as a carefully integrated

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[1] The trial trial judge's decision was comprised of three documents: an Opinion ("Op."), Findings of Fact ("FOF"), and Conclusions of Law ("COL").

measure to protect the right of all to vote without having legitimate votes diluted by fraudulent votes cast by those who are not eligible to vote.

Even if, *arguendo*, there are areas of *administrative implementation* that do not fully carry forth the intent or the letter of the statute or satisfy constitutional limits, it is not the practice or proper role of courts to declare the statute at issue facially unconstitutional. Rather, a court that finds flawed implementation of a statute should declare the proper interpretation of the statute, instruct in the means of administration that are mandated by the statute and the Constitution, and require through declaratory and equitable measures that the statute be implemented and administered properly. That is precisely what the Supreme Court did in *Applewhite II* in issuing its instructions to this Court on remand for further consideration of Petitioners' request for a preliminary injunction. Indeed, the Department of State on its own initiative responded immediately following *Applewhite II* to modify its administrative procedures to comply with the Supreme Court's instruction.

In the matter before the Court now, the verdict and decision of the trial judge is replete with criticism as to how DOT and the Department of State failed to respond sufficiently to the Supreme Court's direction in *Applewhite II* and did not execute well enough their responsibilities under the law. But rather than instruct them in the proper interpretation of the statute and the required manner for its implementation, the trial judge leaped to the illogical conclusion that the statute itself is facially unconstitutional and must be permanently enjoined. This was error.

If there are ways in which the agencies have erred in their *construction* of the statute or in their efforts to *implement* the statute as mandated by the General Assembly and consistent with constitutional commands, the proper role of the Court – exercising its powers as a court of equity – is to authoritatively interpret the statute and instruct the executive as to the manner in which it

must be administered to comply with the law. As they have demonstrated throughout these proceedings, the Secretary of the Commonwealth and other executive officials are ready, willing, and able to implement the statute as required by law and for the welfare and benefit of all Pennsylvanians.

II. POST-TRIAL MOTION

A. The Trial Judge Erred in His Approach to Statutory Construction and in the Conclusions He Reached Based Upon that Flawed Approach.

1. At page 35 of his decision, the trial judge summarized his opinion thusly:

> Like a house of cards, everything rises and falls upon the legitimacy of the DOS ID. As analyzed above, the DOS ID is an unauthorized agency creation, and difficult to obtain.

From that statement, the trial judge concluded that the law itself is facially unconstitutional. Op. at 35.

2. To reach these conclusions, the trial judge construed Act 18 without actually applying or adhering to statutory construction principles and by ignoring well-established presumptions regarding the way in which courts review executive and legislative action. Accordingly, Respondents are entitled to have the verdict set aside and judgment directed in their favor pursuant to Rule 227.1(a)(2). The following sections explain in greater depth the trial judge's statutory construction errors and their effects.

1. The Trial Judge Erred in Ignoring Established Principles of Statutory Construction.

Places of Preservation: Respondents' Pretrial Memorandum; Respondents' Proposed Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

3. First and foremost, the principles of statutory construction do not ask a court to find everything that could be construed as problematic in a statute and then identify the

problematic construction as controlling and indicative of unconstitutionality. Instead, the Statutory Construction Act of 1972 is clear that courts are to presume that the General Assembly "does not intend a result that is absurd, impossible of execution, or unreasonable"; that it "intends the entire statute to be effective and certain"; that it does not intend to violate the Pennsylvania or United States Constitution; that the same construction is to be placed on language as the Supreme Court has employed in predecessor statutes; and that it "intends to favor the public interest as against any private interest." 1 Pa.C.S. § 1922.

4. The trial judge's decision is replete with reversed presumptions, ranging from its condemnation of indigency as "[un]defined" in the statute, to its conclusion that indigence is "a difficult, if not impossible status to profess, much less affirm under criminal penalties, when Respondents ostensibly provide 'free' compliant photo ID." Op. at 43; COL 25.

5. In general, "[a]n administrative agency has 'wide discretion in establishing rules, regulations and standards, and also in the performance of its administrative duties and functions. Where an agency has not abused its discretion in the exercise of its duties or functions, we must defer to its expertise and cannot substitute judicial discretion for administrative discretion.'" *Daneker v. State Emps.' Ret. Bd.*, 156 Pa. Cmwlth. 511, 520-21, 628 A.2d 491, 496 (1993) (citations omitted). Indeed, the Supreme Court has defined the measure of whether an agency acts "in accordance with law" as whether the decision "was made in bad faith, and whether it was fraudulent or capricious." *Slawek v. Cmwlth. Bd. of Med. Educ. & Licensure*, 526 Pa. 316, 321, 586 A.2d 362, 365 (1991).

2. The Trial Judge Erred in Concluding that the DOS ID was *Ultra Vires*.

Places of Preservation: Respondents' Answer to Amended Petition for Review with New Matter; Respondents' Pretrial Memorandum; Respondents' Proposed Findings of Fact and Conclusions of Law; Respondents' Brief in Support of their Proposed Findings of Fact and Conclusions of Law

6. The trial judge's conclusion that the "DOS ID" card is "unauthorized" and thus incapable of satisfying the statutory requirements is grounded in three incorrect constructions of the statute: the misapprehension of the breadth of the Secretary's role; the meaning of the word "issue"; and the requirements placed on DOT by section 206(b) of the Election Code, 25 P.S. § 2626(b). These are legal errors that separately and together warrant overturning the verdict and entering judgment in Respondents' favor.

7. Section 206 of the Election Code (25 P.S. § 2626) is part of Article II, titled "The Secretary of the Commonwealth." The Secretary's authority includes, *inter alia*, "prescrib[ing] suitable rules and regulations to carry out the provisions of the [Election Code]," 25 P.S. § 3260(2), and "exercis[ing] in the manner provided by [Election Code] all powers granted," 25 P.S. § 2621.

8. The Supreme Court has recognized that the Secretary has great discretion in carrying out her responsibilities, including the implementation of applicable federal and state law. *See Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 588 Pa. 95, 149, 902 A.2d 476, 508 (2006); *see also id.* at 143, 902 A.2d at 504.

9. Both DOT and the Department of State are specifically referenced in section 206(b) of the Election Code, 25 P.S. § 2626(b). Since the 1990s, the Department of Transportation and the Department of State have worked together to fulfill obligations under federal and state election law. FOF 42; R-2 (Memorandum of Understanding re Voter Registration Applications), June 10, 2002; R-3 (Memorandum of Understanding re HAVA and

SURE), October 5, 2005; R-4 (Memorandum of Understanding re issuance, replacement, and updating of Voter IDs), August 15, 2012; R-5 (Memorandum of Understanding, amended) September 24, 2012.

3. The Trial Judge Erred in Concluding that the Department of State Usurped DOT's Role as Issuer of the ID under Section 206(b) of the Election Code.

Places of Preservation: Respondents' Answer to Amended Petition for Review with New Matter; Respondents' Pretrial Memorandum; Respondents' Proposed Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

10. DOT is issuing the "DOS ID" card, and the trial judge erred as a matter of law in characterizing the card as *issued by* the Department of State. Indeed, at note 19 of his decision, the trial judge candidly credited the testimony that "the DOS ID must be issued through PennDOT in order to comport with the statute," but then turned this statement on its head, reasoning that if the DOS ID were just another form of a Commonwealth ID, it could be distributed anywhere – *e.g.*, "at any county election office or polling place, and truly address the liberal access criticism." Op. at 21 n.19. The August 2012 Memorandum of Understanding states: "PennDOT shall issue a DOS Voter ID . . . ." R-3.

11. The ordinary meaning of "issue" includes, *inter alia*, "to send out or distribute officially." *Stas v. Pa. Sec. Comm'n*, 910 A.2d 125, 130 (Pa. Cmwlth. 2006) (citation omitted). Here, the distributor of the card is DOT. To be issued by DOT the identification need not be generated solely based on DOT records. *Office of the Governor v. Raffle*, 65 A.3d 1105, 1110-11 (Pa. Cmwlth. 2013) (*en banc*). In the same way, DOT issues the DOS ID based on Department of State records, which is consistent with section 206(b) of the Election Code, 25 P.S. § 2626(b).

4. The Trial Judge Erred in Concluding that DOT had no Flexibility under Section 206(b) of the Election Code.

Places of Preservation: Respondents' Pretrial Memorandum; Respondents' Proposed Findings of Fact and Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

12. Section 206(b) of the Election Code provides that,"*[n]otwithstanding the provisions of 75 Pa.C.S. § 1510(b)*," DOT shall "issue *an identification card* described in 75 Pa.C.S. § 1510(b) at no cost to any registered elector who . . . sign[s] . . . [an] oath or affirmation." 25 P.S. § 2626(b) (emphasis added). In his decision, the trial judge simply concluded that DOT is not "'issuing' the free ID." Op. at 18; *see* FOF 46. The judge put an entirely different gloss on that finding in his findings of fact, however, characterizing DOT as having "refused to implement . . . the Voter ID Law in accordance with its terms," FOF 114, and considering that to have prompted the Department of State to act in an *ultra vires* manner.

13. The first question that the trial judge needed to ask – but did not – is how the exception – the "notwithstanding" language in section 206(b) of the Election Code (25 P.S. § 2626(b)) – affects the general practice in 75 Pa.C.S. § 1510(b). Given that the remainder of section 206(b) calls for "a" card "described," it is clear that the General Assembly intended DOT to issue a card to registered electors, that the card be free, that the only documentation be an oath or affirmation, and that whatever requirements in 75 Pa.C.S. § 1510(b) stand in the way of such a card be removed. *See also Commonwealth v. Ramos*, No. 11 MAP 2013, 2013 Pa. LEXIS 3246, at *4 n.3 (Dec. 27, 2013).

14. DOT retained many of the features (including facial recognition software – *see* Op. at 7 n.11) of a secure card issued under 75 Pa.C.S. § 1510(b), and eliminated only those features that were inconsistent with the specific requirements in section 206(b) of the Election

Code, 25 P.S. § 2626(b). One of the features that needed to be eliminated was the "look" and "name" that a conventional 75 Pa.C.S. § 1510(b) card has.

5. The Trial Judge Erred in Making Findings about 75 Pa.C.S. § 1510(b) and its Implementing Regulations – And in Enjoining DOT.

Places of Preservation: Answer to Amended Petition for Review with New Matter

15. As the trial judge saw it, if there is no DOS ID, there is only the secure DOT ID. And although DOT is not a party and there is no challenge to 75 Pa.C.S. § 1510(b), the trial judge found: "The rigorous documentation requirement PennDOT imposes for issuance of its secure IDs disenfranchises qualified electors, and is facially unconstitutional." COL 31. It was error for the trial judge to so conclude. *Commonwealth v. Alessi*, 119 Pa. Cmwlth. 160, 163-64, 546 A.2d 157, 158-59 (1988); *Consulting Eng'rs Council v. State Architects Licensure Bd*., 522 Pa. 204, 211-12, 560 A.2d 1375, 1378-79 (1989).

6. The Trial Judge Erred in Holding that the Statute was Deficient because Certain Terms were Undefined.

Places of Preservation: Respondents' Proposed Findings of Fact and Proposed Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law; during the preliminary injunction and permanent injunction hearings

16. The trial judge also erred when he took the General Assembly to task for failing to define "indigency" and "substantially conform[]" within the statute. *See* COL 25. If every term in every statute had to be defined before any law could be implemented, 1 Pa.C.S. § 1921(c) – the statutory construction principles "[w]hen the words of a statute are not explicit" – would themselves be superfluous.

7. The Trial Judge Erred in Holding that the Statute Did Not Provide Safety Nets.

Places of Preservation: Respondents' Answer to Amended Petition for Review with New Matter; Respondents' Proposed Findings of Fact and Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

17. It was particularly problematic for the trial judge to disregard indigency by using the fact that it was undefined as evidence that the General Assembly had failed to incorporate safety nets, and then to conclude that the lack of such a safety net rendered the statute infirm. *See* COL 25; FOF 112. The judge conceded that the General Assembly included the indigency and provisional ballot provisions, but he considered indigency "a difficult, if not impossible status to profess, much less affirm under criminal penalties, when Respondents ostensibly provide 'free' compliant photo ID." Op. at 43.

18. Indigency has been defined in Pennsylvania law. *Health Care & Ret. Corp. v. Pittas*, 46 A.3d 719, 723-24 (Pa. Super. 2012), *pet. for allowance of appeal denied*, 63 A.3d 1248 (Pa. 2013) (citations omitted); *cf.* 35 P.S. § 449.3 (Health Care Cost Containment Act); *Prudential Prop. & Cas. Ins. Co. v. Sartno*, 588 Pa. 205, 903 A.2d 1170 (2006).

19. The trial judge erred when he faulted the General Assembly for failing to enact safety nets as broad as those in other states. Op. at 42-43. But the trial judge cited only to Indiana for the proposition that there is no provisional ballot. Only there is. *Compare id.*, *and* COL 51, *with* Ind. Code Ann. § 3-10-1-7.2(d) ("If the voter executes a challenged voter's affidavit under section 9 [IC 3-10-1-9] of this chapter or IC 3-11-8-22.1, the voter may: . . . *receive a provisional ballot*." (emphasis added)).

8. The Trial Judge Erred in Finding that Alternate Forms of Identification Must be Mandatory to be Meaningful.

Places of Preservation: Respondents' Pretrial Memorandum; Respondents; Proposed Findings of Fact and Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

20. The trial judge also found fault in the General Assembly's failure to *mandate* other forms of identification. COL 18, 49; FOF 253. In so doing, however, the trial judge erred as a matter of law. What the judge was asking for here – that even Petitioners did not request – is that the General Assembly require other governmental and private entities to issue forms of identification before they can be counted. But the forms of identification in the prior statute – many of which were carried over into the current statute – were likewise issued by various private and public entities, and *they* were not mandated. Petitioners and the trial judge agreed that there was nothing problematic about that prior statutory provision – indeed, the judge ordered the return to that law. *See* FOF 7; Order & Verdict. If the General Assembly acted within its authority to adopt a list of identification in the prior law without mandating the issuance of the alternate forms, there is no basis to forego that principle here and now require the General Assembly to mandate issuance of alternate forms of identification. *See Everhart v. PMA Ins. Grp.*, 595 Pa. 172, 182, 938 A.2d 301, 307 (2007).

B. The Trial Judge Erred in His Constitutional Analysis.

1. The Trial Judge Erred by Using Implementation as a Proxy for Facial Constitutionality.

Places of Preservation: Respondents' Answer to Amended Petition for Review with New Matter; Respondents' Pretrial Memorandum; Respondents' Proposed Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

21. In his analysis, the trial judge concluded that the statute was unconstitutional, but he did so by conflating an analysis of the constitutionality of implementation with the

constitutionality of the statute itself. This was legal error that this Court reviews *de novo*. *See In re F.C. III*, 607 Pa. 45, 66 n.8, 2 A.3d 1201, 1213 n.8 (2010).

22. The constitutionality of a statute is measured against legislative authority; the constitutionality of implementation is measured by legislative intent and administrative action.

23. The trial judge appears to have misread what the Supreme Court said when it explained that because "there is no constitutional impediment to the Commonwealth's implementation of a voter identification requirement, at least in the abstract . . . the gravamen of [Petitioners'] challenge lies ***solely*** in the implementation." *Applewhite II*, 54 A.3d at 4-5 (emphasis added). The trial judge also misread the Supreme Court's opinion when he determined it was appropriate to apply a "no voter disenfranchisement" standard at this stage of the litigation. COL 37, FOF 148. The Supreme Court expressly limited that standard to the "upcoming election," *i.e.*, the November 2012 General Election. *See id.* 54 A.3d at 5; *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 749, at *19-20 (Oct. 2, 2012) (*Applewhite III*).

24. The Supreme Court thus presupposed that a constitutional enactment might have unconstitutional aspects or be implemented unconstitutionally – and that the question of which would become clearer when measured against the implementation while the preliminary injunction was in place. That was certainly what prompted the Supreme Court to explain that, at the least, the exhaustion requirement needed to change – a message that the Department of State heeded immediately. Rather than focus on how any issues of implementation might be cured, the trial judge simply declared the underlying requirement to show photographic identification at the polls facially unconstitutional. That was an error of law.

25. Nowhere is the conflation clearer than at page 44 of the Opinion: "The statute as intended assures entitlement to ID so that no one will be disenfranchised if they complete a simple, two-point self-effectuating affirmation. The statute as implemented, imperfectly and inaccurately, does not assure the franchise, it *de facto* denies it." Likewise, at page 37, the trial judge found that "[t]hese electors are subjected to the burdens *Respondents erected* to obtaining it at limited locations and during limited times, and run the real risk of improper denial of free voting ID given database inconsistencies and deficiencies." (Emphasis added).

26. The trial judge here found that the *legislative enactment* was unconstitutional, but he did so by evaluating the *implementation*. In so doing, the judge ignored basic principles of jurisprudence.

2. The Trial Judge Erred in Failing to Accord Deference to the General Assembly.

Places of Preservation: Respondents' Preliminary Objections to Amended Petition for Review; Respondents' Pretrial Memorandum; Respondents' Proposed Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

27. The trial judge erred in holding the statute to be facially unconstitutional because he failed to accord proper deference to the General Assembly.

28. In analyzing a statute's constitutionality, courts begin with the presumption that legislation is constitutional.

> When faced with any constitutional challenge to legislation, we proceed to our task by presuming constitutionality in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths. *See* 1 Pa.C.S. § 1922(3) ("In ascertaining the intention of the General Assembly in the enactment of a statute . . . the presumption [is] [t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth."[).] Indeed, a legislative enactment will not be deemed unconstitutional unless it clearly, palpably, and plainly violates the Constitution. "Any doubts are to be resolved in favor of a finding of constitutionality."

Pa. State Ass'n of Jury Comm'rs v. Commonwealth, 78 A.3d 1020, 1031-32 (Pa. 2013) (quoting *Stilp v. Commonwealth*, 588 Pa. 539, 573-74, 905 A.2d 918, 938-39 (2006)) (additional citations omitted).

29. From this presumption, the first question is whether the language of the statute itself violates the Constitution (and, if so, whether that language is severable). If it is not, the court looks at whether the construction of the statute and the conduct that results from that conduct is unconstitutional. The remedy in the latter case is to correct the construction of the statute and to direct the course of those charged with its implementation.

30. In addition, of course, both injunctive and declaratory relief by their nature need to be tailored so that only an actual controversy (declaratory relief) or offending conduct (injunction) is constrained. *Big Bass Lake Cmty. Ass'n v. Warren*, 23 A.3d 619, 626 (Pa. Cmwlth. 2011); *Kozlowski v. Dep't of Corr.*, No. 691 M.D. 2004, 2008 Pa. Commw. Unpub. LEXIS 492, at *15-16 (Sept. 24, 2008).

3. The Trial Judge Erred In Applying Strict Scrutiny.

Places of Preservation: Respondents' Answer to Amended Petition for Review with New Matter; Respondents' Pretrial Memorandum; Respondents' Proposed Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

31. In evaluating the constitutionality of this statute, it is telling the trial judge found that the state equal protection claim was not established because (a) the equal protection right is coterminous with the federal right; and (b) the U.S. Supreme Court has rejected a federal Equal Protection Clause challenge on very similar facts. In the case that established those principles, *Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325 (2002) – indeed, in the very next paragraph – the Pennsylvania Supreme Court held that the Free and Equal Elections analysis is at the least bounded, if not controlled, by the Equal Protection Clause analysis. Specifically, the Court held

that there is no greater protection under the Free and Equal Elections Clause than under the state equal protection clause. *Erfer*, 568 Pa. at 139, 794 A.2d at 332.

32. The trial judge erred as a matter of law in applying a strict scrutiny standard here. In note 25 of his decision, the trial judge construed the test applied in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), as a rational basis test applied by the U.S. Supreme Court to measure a voter identification statute. Op. at 37 n.25. In fact, however, the lead plurality applied the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which affirms the legitimacy of "evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Marion Cnty.*, 553 U.S. at 189-90 (quoting *Anderson*, 460 U.S. at 788 n.9). Assuming that under *Erfer* the state constitutional analysis follows the standard of scrutiny applicable under the Fourteenth Amendment, then this case should have been considered and decided under the same level of scrutiny as the U.S. Supreme Court applied in *Marion County*.

33. The authorities on which the trial judge relied did not allow for, much less compel, a finding of strict scrutiny. *See* COL 33 (citing *In re Petition of Berg*, 712 A.2d 340 (Pa. Cmwlth. 1998) (a single-judge opinion by Doyle, J.)). Neither the opinion cited by the trial judge nor the Supreme Court opinion in that case applied strict scrutiny. *In re Berg*, 552 Pa. 126, 133, 713 A.2d 1106, 1109 (1998).

34. That said, Pennsylvania has been reluctant to apply federal levels of scrutiny to purely state constitutional claims, instead using terms for its evaluation of voting regulations such as "gross abuse" review, which gives substantial deference to legislative judgments. *See In re Nomination Petition of Rogers*, 908 A.2d 948, 954 (Pa. Cmwlth. 2006) (a single-judge opinion by Colins, P.J.) (citing, *inter alia*, *Winston v. Moore*, 244 Pa. 447, 91 A. 520 (1914)). Although

not labeled as such, the Pennsylvania Supreme Court employed this sort of weighing of circumstances and interests. *See Ray v. Commonwealth*, 442 Pa. 606, 609, 276 A.2d 509, 510 (1971); *Jubelirer v. Singel*, 162 Pa. Cmwlth. 55, 68, 638 A.2d 352, 359 (1994).

4. Act 18 is an Election Regulation Entitled to Deference.

Places of Preservation: Respondents' Pretrial Memorandum; Respondents' Proposed Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

35. The trial judge erred in his assessment of the statute, which is an election regulation, and which should have been evaluated as such.

36. Petitioners conceded that a request to show identification at the polls is a regulation. H.T. (Pet'rs' Closing) at 1975:23-1976:13.

37. Given that "[t]he power to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government," *Mixon v. Commonwealth*, it became critical to determine whether a legislative enactment was directed at the exercise of the franchise or at eliminating access to it. 759 A.2d 442, 449 (Pa. Cmwlth. 2000), *aff'd*, 566 Pa. 616, 783 A.2d 763 (2001). To ascertain the level of interests and circumstances, Pennsylvania courts then ask whether the legislation is a regulation – *i.e.*, whether it is a means of "ascertaining who are and who are not the qualified electors, and . . . designat[ing] the evidence which shall identify and prove to this tribunal the persons and the qualifications of the electors." *Patterson v. Barlow*, 60 Pa. 54, 75 (1869).

38. Typical regulations affect registration, qualifications of voters, the selection and eligibility of candidates, and the voting process itself – all of which "inevitably affect[], at least to some degree, the individual's right to vote." *Anderson*, 460 U.S. at 788; *Democratic Cnty. Comm. Appeal*, 415 Pa. 327, 339-40, 203 A.2d 212, 218-19 (1964); *cf. Caba v. Commonwealth*, 64 A.3d 39, 59 (Pa. Cmwlth. 2013). This is just such a regulation, despite the trial judge's

conclusions to the contrary. Op. at 36 (quoting *Winston*, 244 Pa. at 457, 91 A. at 523); COL 44. In support, however, the trial judge relied on a case that discusses invalidating ballots after they have been validly cast. *Perles v. Northumberland Cnty. Return Bd.*, 415 Pa. 154, 158, 202 A.2d 538, 540 (1964).

39. Moreover, and as the Supreme Court has recognized, in cases such as this, the questions are complicated because the right to vote is at issue on both sides. *Kuznik*, 588 Pa. at 116, 902 A.2d at 488.

5. The Trial Judge Erred by Applying an Incorrect Interpretation of *Clifton v. Allegheny County* Based on a Truncated Review of the Record.

Places of Preservation: Respondents' Preliminary Objections to the Amended Petition for Review; Respondents' Answer to Amended Petition for Review with New Matter; Respondents' Proposed Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

40. Oddly, the trial judge also contended that he was applying a "lenient plainly legitimate sweep standard" under *Clifton v. Allegheny County*, 600 Pa. 662, 705 n.36, 969 A.2d 1197, 1223 n.36 (2009), whereby he needed answer only whether there are a substantial number of applications in which the statute would be unconstitutional. Op. at 36; COL 40. This is not the standard that the Pennsylvania Supreme Court applied in *Clifton*, or the one that the U.S. Supreme Court applied in *Marion County*. It is both a misconstruction of the proper standard under Pennsylvania law and a misstatement of the application of "plainly legitimate sweep." The conclusion the trial judge drew is also factually unsupported in this case.

41. "Plainly legitimate sweep" is a federal constitutional analysis that began with First Amendment jurisprudence but that was also discussed in *Marion County*. 553 U.S. at 202-03. Read in the context of the *Marion County* decision, it is obvious that the question the U.S. Supreme Court was addressing was simply this: looking at the entirety of the population and the

persons affected, are we looking at a pervasive invalidity? In *Marion County*, the answer was no, and thus the Court honored the presumption that statutes are valid.

42. For that matter, in *Clifton* itself, the Supreme Court expressly rejected the invitation to declare the statute facially invalid. 600 Pa. at 669-70, 969 A.2d at 1202; *id.* at 703, 969 A.2d at 1222.

43. In this case, the trial judge cited *Clifton* for the incorrect proposition that it could find a statement *facially* invalid merely by finding credible that there was some number in the hundreds of thousands that represented persons who did not have current DOT secure identification for voting. *See* Op. at 36-37; *see also* FOF 255. The numbers do not support this finding. R-233, Election Assistance Commission Report, Tab EAC-F (5,783,621 persons voted in the November 2012 General Election); FOF 263; *see* H.T. (Royer) at 717:11-21; R-229. At the same time, approximately 9.8 million persons hold current and valid secure identification issued by DOT.[2]

44. Indeed, in November 2012, roughly five percent of electors voted absentee, *i.e.*, almost 260,000 persons.[3] The trial judge improperly discounted these numbers and their significance. *See, e.g.*, Op. at 43; FOF 230, 232. The trial judge acknowledged that there are only approximately 142,000 people over age 65 that lack current compliant DOT secure ID. FOF 232. But he discounted any significance if those persons are among the 130,000 living in a

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[2] There are approximately 8.8 million licensed drivers in Pennsylvania with current ID. H.T. (Myers) at 1300:8-10. In addition, DOT has issued approximately 1 million current non-driver's license identification cards in Pennsylvania, for a total of approximately 9.8 million current DOT IDs. *Id*. at 1300:23-25, 1301:12-15.

[3] A total of 241,656 individuals cast domestic civilian absentee ballots, and 18,018 cast overseas ballots under UOCAVA, for a total of 259,674 – or 4.49 percent. An additional 48,711 voted provisionally statewide, 26,953 of whom were in Philadelphia. R-233, Tabs EAC-B, EAC-C, EAC-E.

care facility authorized to issue ID. FOF 233. And he never considered whether they were likely to be among the 242,000 domestic civilians that voted absentee in the November 2012 General Election. *See* R-233.

45. The trial judge did not place Siskin's testimony in the context of the unrebutted testimony from public officials about whether his "matching" of the DOT and SURE databases at a single point in time could show both who lacked a current and valid DOT proof of identification *and* were persons who still lived in Pennsylvania *and* were eligible to vote *and* were persons who had not voted absentee *and* who did not have another form of compliant ID.

46. The other sources were equally unreliable. *Compare* FOF 57-58, *with* Committee of Seventy, *Voter ID: Philadelphia County Election Day Survey* at 1 (2013), http://www.seventy.org/Downloads/Election_Report/Voter_ID_Exit_Survey_1_22_13.pdf ("The results of this unscientific survey *should not be used to draw any conclusions* about how the Voter ID law would impact Philadelphians in future elections or how many Philadelphians are with, or without, photo identification." (emphasis added)), *and id.* at 2 ("Seventy cautions against using the results of this survey as a trustworthy indication of whether city voters, *or any particular voting constituencies*, either do or do not have photo identification . . . ." (emphasis added)).

47. In addition, the trial judge erred in shifting the burden to Respondents. In Finding of Fact 64, the judge faulted Respondents for not identifying all persons who might lack compliant identification. Because legislation is presumed to be constitutional, it was not Respondents' burden to demonstrate that every person had compliant ID; it was Petitioners' burden to come forward with persons who are actually aggrieved by the statute and to quantify

that harm. *See Kuznik*, 588 Pa. at 117, 902 A.2d at 489; *Erfer*, 568 Pa. at 137-38, 794 A.2d at 331.

48. Further, despite rejecting the testimony of Petitioners' witness, Bryan Niederbeger, *see* FOF 268, COL 12, the trial judge nonetheless relied on Niederbeger's "report" and analysis throughout the Findings of Fact, *see, e.g.*, FOF 139, 145, 147, 150 (all citing P-2136). This constituted legal error warranting vacating of the Court's Order and Verdict.

49. The trial judge also erred in concluding that it could reach the same result under an as-applied challenge as a facial challenge. *See* Op. at 45 n.31; COL 55. Such a result was rejected in *Clifton*, the very case upon which the judge purports to rely in other areas. And, more importantly, the remedy in an as-applied challenge should be tailored to Petitioners – it should not provide the broad relief the trial judge would have this Court effect. *See Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10, 16 (Pa. Cmwlth. 2012); *Nixon v. Commonwealth*, 789 A.2d 376, 382 (Pa. Cmwlth. 2001), *aff'd*, 576 Pa. 385, 839 A.2d 277 (2003); *Belitskus v. Pizzengrilli*, 343 F.3d 632, 650-51 (3d Cir. 2003). But the trial judge did not even rely on the individual Petitioners to justify the declaratory and injunctive relief; instead, he relied on four witnesses whom he believed would have been disenfranchised if Act 18 had taken effect before the November 2012 General Election. *See* Op. at 43. These four individuals were not Petitioners in this matter, and the only individuals asserting claims did not even appear. It was legal error to void the statute on this basis, as that is not as-applied relief. This warrants vacating the trial judge's Order and Verdict. *See also Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 757, at *30-31 (Aug. 15, 2012) (*Applewhite I*) ("This legal disconnect is one of the reasons [Judge Simpson] determined that it is unlikely [Petitioners] will prevail on the merits.").

C. The Trial Judge Erred in Ignoring the History of the Case and Exceeding the Scope of the Record.

1. The Trial Judge Ignored Explicit and Implicit Findings and Principles from the Pennsylvania Supreme Court's Opinion in *Applewhite II* and this Court's Earlier Decisions.

Places of Preservation: Respondents' Answer to Amended Petition for Review with New Matter; Respondents' Pretrial Memorandum; Respondents' Motion in Limine to Exclude Evidence Contrary to That Established by the Law of the Case; Respondents' Proposed Findings of Fact and Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

50. When the Pennsylvania Supreme Court heard Petitioners' appeal from this Court's denial of their application for a preliminary injunction, it did not invalidate the statute outright – which it has done in the past when it has found a statute to be fatally flawed on review of a preliminary injunction order. *See Kremer v. Grant*, 529 Pa. 602, 613, 606 A.2d 433, 439 (1992); *Office of the Lieutenant Governor v. Mohn*, 67 A.3d 123, 138 (Pa. Cmwlth. 2013). This Court on remand from the Supreme Court fully accepted this principle. *See Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at *5-6 (expressing concern about *implementation*, not authorization).

51. Contrary to the legal conclusions implicitly expressed by the Supreme Court in *Applewhite II* and Judge Simpson in *Applewhite III*, Judge McGinley has found that (1) the DOS ID is issued solely by the Department of State; (2) the Department of State is not authorized by law to issue any form of identification; and (3) the only photo ID that a qualified elector is entitled under Act 18 to seek is a secure DOT ID that is not – and cannot legally be – liberally accessible.

52. Respondents have discussed the statutory construction errors that underlie the trial judge's error here. But it was contrary to the law of the case and the coordinate jurisdiction rule for Judge McGinley – the *third* tribunal to consider the question – to disregard the findings and

conclusions of the Supreme Court made in *Applewhite II* and the findings and conclusions made by Judge Simpson in *Applewhite III* on remand to this Court.

53. The trial judge was not free to interpret the statute *tabula rasa*, ignoring the Supreme Court's expressed understanding of the statute in *Applewhite II*. *See Ario v. Reliance Ins. Co*., 602 Pa. 490, 505, 980 A.2d 588, 597 (2009).

54. The Supreme Court acknowledged in *Applewhite II* that DOT had good reason for not issuing a secure form of identification without requiring compliance with the supporting documentation requirements for a secure identification. 54 A.3d at 3. By contrast, Judge McGinley accused DOT, without any basis, of refusing to comply with its statutory duty because it would not ignore the regulatory requirements and standards of federal law in maintaining the security of its photo identification cards issued under 75 Pa.C.S. § 1510(b). Op. at 34.

55. Along the same lines, the Supreme Court in *Applewhite II* expressed no concern that DOT was issuing the DOS ID at driver's license centers. This statutory requirement is unremarkable, as other courts (including the U.S. Supreme Court) have found it to be. *See, e.g.*, *Marion Cnty.*, 553 U.S. at 203 n.20. The trial judge erred in considering "location" – *i.e*., the locations of the various DOT drivers' license centers – as an unconstitutional barrier to liberal access. Neither the Supreme Court in *Applewhite II* nor Judge Simpson in *Applewhite I* or *Applewhite III* found the number and locations of the DOT driver's license centers to contravene the liberal access to photo ID required by Act 18, or to imperil the constitutional implementation of the statute.

56. Even more fundamentally, the trial judge's conclusion that the photo ID requirement violates the Free and Equal Elections Clause of the Pennsylvania Constitution is predicated upon a statement that was contradicted by the Supreme Court in *Applewhite II* and,

indeed, by Petitioners' counsel. 54 A.3d at 4-5; *see also* Determination on Renewed Application for Preliminary Injunction, slip op. at 7 (Pa. Cmwlth. Aug. 16, 2013). As this Court on remand recognized, these statements belie the "underlying assertion that the offending activity is the request to produce photo ID." *Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at *8-9. *Contra* Op. 45 n.30.

57. Further, Judge McGinley recognized that Petitioners are not challenging the law as it existed before Act 18. The Court is bound by certain principles attendant to acceptance of the prior law, namely: (1) it is not unconstitutional to ask a qualified elector for identification, including photo identification, at the polls (*see* former 25 P.S. § 3050(a), (a.1)); (2) it is not unconstitutional to prescribe a list of acceptable forms of identification, which are not necessarily readily available to all qualified electors (*see* former 25 P.S. § 3050(a), (a.1)); and (3) it is not unconstitutional that this requirement may have inconvenienced some qualified electors (*i.e.*, those voting in their election district for the first time and required to show identification). The trial judge thus erred in finding that the need to obtain photo identification presents an unconstitutionally inconvenient burden. *See* Op. at 16; FOF 7.

2. The Trial Judge Violated the Coordinate Jurisdiction Rule in Reevaluating a Record that was Made Entirely Before Another Judge.

Places of Preservation: Respondents' Answer to Amended Petition for Review with New Matter; Respondents' Pretrial Memorandum; Respondents' Proposed Conclusions Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law; Respondents' Motion in Limine to Exclude Evidence Contrary to That Established by the Law of the Case; Respondents' Motion in Limine to Exclude Evidence or Argument on the Legislative Process for Act 18; Respondents' Motion in Limine to Exclude Testimony or Other Evidence Regarding the Prevalence of Certain Types of Voter Fraud and the Efficacy of Act 18 in Addressing Them; Respondents' Motion in Limine to Exclude Expert Testimony of David A. Marker, Ph.D.; during permanent injunction hearing

58. Judge Simpson of this Court presided over the preliminary injunction proceedings and the hearing conducted on remand. Judge Simpson had the opportunity to observe witnesses,

listen to their voices, and assess their demeanor. Aside from some witnesses for Respondents, almost none of those witnesses testified at the permanent injunction hearing held before Judge McGinley.

59. In almost every regard, the two hearing judges disagreed as to the proper resolution of the issues that faced the Court. There are many instances in which the evidence on which Judge McGinley relied to reach his conclusions was actually evidence that had been presented through witnesses who testified only in the presence of Judge Simpson. There has been no intervening change in the law. Accordingly, it was abuse of discretion *per se* for Judge McGinley to revise Judge Simpson's resolution of issues of fact based on witness testimony that was presented only to Judge Simpson, and not to Judge McGinley. *See Commonwealth v. Brown*, 485 Pa. 368, 370, 402 A.2d 1007, 1008 (1979). This error affects the Findings of Fact and Conclusions of Law, and the issues relating thereto, described below. In addition, Judge McGinley did not have the freedom to revisit the credibility of witnesses who did not appear before him, including Lorraine Minnite, Matt Barreto, Veronica Ludt, and Michelle Levy, among others. *See, e.g.*, FOF 117, 215 (accepting Ludt testimony); FOF 177 (finding testimony that Judge McGinley never heard credible); FOF 238 (accepting Ludt and Levy testimony); COL 10.

60. The trial judge relied on advertising conducted before September 25, 2012 – advertising that Judge Simpson did not find misleading – to find that the Department of State's education efforts were inaccurate, despite the fact that Judge Simpson refused to enjoin and refused to extend the preliminary injunction respecting the Department of State's outreach and education efforts. *See* FOF 192-197; *Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at *8-9; *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 856 (Nov. 1, 2012) (*Applewhite IV*) (application for supplemental injunction denied).

61. Judge Simpson found that Respondents' "asserted interests are relevant, neutral and non-discriminatory justifications for Act 18." *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *85. Further, "the absence of proof of in-person voter fraud in Pennsylvania is not by itself dispositive." *Id.* at *86. Despite these clear findings, the absence of any new authority, and Petitioners' failure to introduce any new evidence on either of these points, the trial judge purported to reach a different conclusion, rejecting the General Assembly's interests in enacting Act 18 and relying on the supposed absence of voter fraud to reject that interest. *See* COL 35-36.

62. Judge McGinley accorded great weight and credibility to the testimony of Petitioners' expert Lorraine Minnite, whom the trial judge never had the opportunity to observe because the witness did not appear at trial (though she had been listed as a witness). *See* FOF 246-48. But only Judge Simpson had the opportunity to observe Minnite (at the preliminary injunction hearing), and his decision not to rely on her testimony and to resolve the same issue differently demonstrates precisely the reason for the coordinate jurisdiction rule. *See Commonwealth v. Starr*, 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995). Although Minnite did not testify, the trial judge nevertheless relied on her prior testimony to find that there is only "a vague concern about voter fraud," which was a position Judge Simpson had rejected, to support the General Assembly's interest in enacting Act 18.[4]

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[4] The trial judge also faulted Respondents for not introducing evidence of voter fraud to support the enactment of Act 18. Op. at 38; COL 35-36. As Respondents argued in a motion *in limine* before trial, the courts are not the appropriate forum for this type of debate. The General Assembly heard from several witnesses on this issue, and it is the General Assembly that has the prerogative to make these policy decisions. *See Glenn Johnston, Inc. v. Dep't of Revenue*, 556 Pa. 22, 30, 726 A.2d 384, 388 (1999). Moreover, the trial judge admitted into evidence a supplemental interrogatory response by Respondents detailing Respondents' understanding and

63. In a similar vein, the trial judge concluded that the testimony of Dr. David Marker "rehabilitated" the discredited testimony of Professor Matt Barreto. Op. at 9-10, FOF 75-80, COL 11. This was a violation of the coordinate jurisdiction rule because Judge Simpson previously found Barreto not credible for more than just his questionable methodology. Judge Simpson relied on Barreto's demeanor and bias – which Judge Simpson personally observed while Barreto testified during the preliminary injunction hearing – as well as Barreto's lack of knowledge of Pennsylvania law to find that Barreto was not credible. *See Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *16-17. But the trial judge did not have the opportunity to observe Barreto's demeanor or bias, nor did he have the opportunity to assess Barreto's knowledge of Pennsylvania law, because Barreto did not testify at the permanent injunction trial. It was error for the trial judge to supplant Judge Simpson's credibility findings by finding Marker had "rehabilitated" Barreto.[5] In their appeal to the Supreme Court, Petitioners asked the Court to find, *inter alia*, whether there was substantial evidence to justify rejecting Barreto. Brief of Appellants at 4, 71 MAP 2012 (filed Aug. 30, 2012). Under *Gray v. Grunnagle*, 425 Pa. 403, 404, 228 A.2d 735, 735 (1967), it is of no moment that the opinion did not answer this question. The question was before the Court. Accordingly, the supposed rehabilitation of Barreto is barred by law of the case as well as the coordinate jurisdiction doctrine.

64. The trial judge exacerbated these errors by also re-evaluating – and then discrediting – the credibility and good faith conduct of Respondents' witnesses. Judge Simpson

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affirmation of the General Assembly's purposes in enacting Act 18. *See* P-1618. The judge erred in failing to consider this evidence. *See Kuznik*, 588 Pa. at 148, 902 A.2d at 507.

[5] The trial judge also suggested that Barreto's survey of voter knowledge – which Judge Simpson expressly rejected – was credited, albeit "given less weight." *Compare* FOF 222, *with Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *17-18. It was an abuse of discretion to revisit Judge Simpson's decision to reject Barreto's survey and report.

found Respondents' witnesses credible at the two prior hearings and found that they had been acting in good faith to implement Act 18. *See, e.g.*, *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *12-13 & n.16, *20; *Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at *3, *4-5; *see also Applewhite II*, 54 A.3d at 5 (expressing "no doubt [state officials] are proceeding in good faith"). Judge McGinley rejected those findings and concluded that – throughout the entire implementation period (including periods addressed in Judge Simpson's opinions) – Respondents were not acting in good faith. *See, e.g.*, FOF 40, 126, 152, 205, 214, 219. And the trial judge has relied on testimony previously held credible and supporting good faith to reach a contrary conclusion. *See, e.g.*, FOF 251 (citing, *inter alia*, testimony from preliminary injunction hearing).

3. The Court Erred in Not Requiring Petitioners to Establish Aggrievement.

Places of Preservation: Respondents' Preliminary Objections to Amended Petition for Review; Respondents' Answer to Amended Petition for Review with New Matter; Respondents' Motion for Compulsory Nonsuit or Directed Verdict; Respondents' Proposed Findings of Fact and Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

65. On February 5, 2013, Petitioners filed an Amended Petition for Review, the effect of which was to withdraw the original Petition for Review. *See Vetenshtein v. City of Philadelphia*, 755 A.2d 62, 67 (Pa. Cmwlth. 2000). Accordingly, the two remaining individual Petitioners, both of whom changed their personal averments, had to prove the new allegations.

66. "Threshold issues of standing are questions of law; thus, [the] standard of review if *de novo* and [the] scope of review is plenary." *Johnson v. Am. Std.*, 607 Pa. 492, 505, 8 A.3d 318, 326 (2010).

67. Petitioner Lee pleads that she is "eligible to obtain a DOS ID" but that "[t]he demands of caring for her 99-year-old grandmother, who is not well, have prevented her from

travelling to a PennDOT center to obtain the ID." Am. Pet. for Review at ¶ 34. Lee did not appear at trial to testify as to these averments. It follows that there is no basis for finding her aggrieved by the Act 18.

68. Petitioner Bookler's averments changed as well. She admits that she lived in an assisted living facility that "could issue photo IDs to its residents" and admits that she voted absentee in the last election. Am. Pet. for Review at ¶¶ 48-49. Bookler did not appear at trial – by video or otherwise – to support these averments. There was uncontradicted testimony at trial that her care facility was issuing compliant ID, H.T. (Sweeney) at 1826:23-1827:3), but the trial judge rejected that fact, *see* FOF 31; *Kuznik*, 588 Pa. at 148, 902 A.2d at 507. Judge Simpson had found that Bookler undoubtedly would qualify to vote absentee; and she did in fact vote absentee at the November 2012 General Election. *See* H.T. (Marks) at 1659:20-1660:7. Because Bookler did not come to trial, the *only* evidence before the Court is that she voted absentee and lives in a care facility issuing compliant ID.

69. Without evidence to substantiate Petitioners' harm, the Court cannot award relief. *See Mosside Assocs., Ltd. v. Zoning Hearing Bd. of Monroeville*, 70 Pa. Cmwlth. 555, 562, 454 A.2d 199, 203 (1982) (consolidation of cases disapproved in *Kincy v. Petro*, 606 Pa. 524, 2 A.3d 490 (2010)); *Smith v. Commonwealth*, No. 260 M.D. 2008, 2009 Pa. Commw. Unpub. LEXIS 563, at *9-12 & n.5 (Jan. 13, 2009) (*per curiam*), *aff'd*, 605 Pa. 457, 991 A.2d 306, *cert. denied*, 131 S. Ct. 90 (2010); *cf. Kauffman v. Osser*, 441 Pa. 150, 155, 271 A.2d 236, 239 (1970).

70. The trial judge also erred in finding that the organizational Petitioners could demonstrate aggrievement as a matter of law. As a preliminary point, the trial judge suggested that Respondents waived the issue. Contrary to this conclusion, Op. at 14; COL 9, such challenges may be raised in preliminary objections *or* a responsive answer, *Erie Indem. Co. v.*

Coal Operators Cas. Co., 441 Pa. 261, 265, 272 A.2d 465, 467 (1971). Respondents complied with *Erie* by asserting this affirmative defense in new matter in their answer to the Amended Petition for Review. The judge acknowledged the defense was raised in new matter. *See* Op. at 14; Answer to Am. Pet. for Review with New Matter at ¶ 224. The issue was not waived.

71. The trial judge further erred in basing his conclusion that the League of Women Voters ("LWV), the Homeless Advocacy Project ("HAP"), and the National Association for the Advancement of Colored People, Pennsylvania State Conference ("NAACP") had a sufficient interest in the right to vote to assert these claims. *E.g.*, Op. at 15 ("Both the LWV and the NAACP are organizations concerned with *protecting the right to vote* of Pennsylvanians and maximize their opportunities to exercise that right." (emphasis added)). In Pennsylvania, that is exclusively an *individual* right, and organizations cannot have standing on that basis.[6] *See Erfer*, 568 Pa. at 135-36, 794 A.2d at 330. That principle is just as true in this case.

72. The importance of having an individual assert and protect his or her own right to vote also addresses the trial judge's alternative finding to standing: that even if these Petitioners obtained compliant ID (and presumably even if they do not need it, given that at least one has been voting absentee from her care facility, itself eligible to issue ID), "the issue is too important

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[6] For this reason, it is immaterial that the organizational Petitioners, according to the trial judge, "waste[d]" resources educating electors about Act 18. Op. at 15-16; COL 8. The authority cited for this proposition is inapposite. *See Washington v. Dep't of Pub. Welfare*, 71 A.3d 1070 (Pa. Cmwlth. 2013) (*en banc*). Moreover, these organizations made voluntary choices to allocate resources. *See Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 133 S. Ct. 1138, 1148-49, 1150-52 (2013); *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). For that matter, the trial judge found that the organizational Petitioners had established member standing – but there was no testimony to establish that, as evidenced by the lack of citation to the record. *See* Op. at 14; COL 7. Because the organizational Petitioners' expenditures were made without being traceable to harm that the statute causes their non-existent right to vote, they cannot pursue these claims. *See Clapper*, 133 S. Ct. at 1151.

to evade review and the controversy remains."[7] Op. at 14 n.16. There is only a controversy if the statute itself causes harm, and for all the "facts" that Judge McGinley found, at the end of the day he did not cite a single person who can get out to manage his or her own affairs without reliance on someone else for transportation, but cannot get to DOT to obtain a photo ID. *See, e.g.*, FOF 30, 170.

73. Contrary to the trial judge's formulation, it is not enough that there be a scenario under which Act 18 "*may* result in disenfranchisement of qualified electors, including Individual Petitioners" and "Individual Petitioners are unable to exercise their right to vote without obtaining a compliant photo ID from a PennDOT DLC located in the Commonwealth." Op. at 13-14 (emphasis added). A court should not invalidate a statute unless someone is *aggrieved. In re Miller*, 611 Pa. 425, 434, 27 A.3d 987, 992 (2011).

4. The Court in this Case has Applied Inconsistent Analysis and Reached Inconsistent Conclusions that Should be Corrected.

Places of Preservation: Respondents' Motion in Limine to Exclude Evidence Contrary to That Established by the Law of the Case; Respondents' Proposed Conclusions of Law

74. A primary reason that Judge Simpson and Judge McGinley differed in their approaches to the issues before them is that Judge Simpson acknowledged that Pennsylvania courts "afford a substantial degree of deference to the judgment of the legislature" in the context of state election laws – including the election regulation at issue here. *See Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *80. Judge McGinley did not. Had the trial judge properly accorded deference to the Legislature, he would have reached the same conclusion that Judge

[7] It is not clear why the trial judge believed that mootness – which asks whether a person who is aggrieved must nonetheless stop prosecuting a case if there is nothing further to gain – substitutes for the showing of aggrievement in the first instance. *Rendell v. Pa. State Ethics Comm'n*, 603 Pa. 292, 307-08, 983 A.2d 708, 717 (2009).

Simpson reached in denying Petitioners' request for injunction. *See Erfer*, 568 Pa. at 137-38, 794 A.2d at 331.

75. Moreover, to a large extent, the trial judge relied on the record developed before Judge Simpson to come to the opposite conclusion and to award broader relief. This was error. Where the same issues arise in two proceedings in the same case, they cannot be revisited without new evidence or new authority. *See, e.g.*, *Brown*, 485 Pa. at 370, 402 A.2d at 1008.

5. The Trial Judge Erred in Ascribing to the Department of State the Views of Individuals with Limited Knowledge.

Places of Preservation: Respondents' Proposed Findings of Fact and Conclusions of Law

76. Although extensive testimony by individuals responsible for implementing the DOS ID was presented, the trial judge erroneously relied on testimony from individuals who had left the Department of State and/or were not involved in implementing the DOS ID. For example, the trial judge relied on the testimony of Rebecca Oyler, a legislative liaison at DOS, for, *inter alia*, advertising, experiences at polling places, care facility IDs, and secure DOT IDs. *See, e.g.*, FOF 14, 101, 112, 121, 127, 189, 216, 262. Oyler, however, was no longer involved with implementing Act 18 as of March 2012, well before the DOS ID became available. *See* FOF 37; *see, e.g.*, FOF 133-134, 143. The trial judge acknowledged the limited utility of David Burgess's testimony: "Primarily, his testimony pertained to the data elements in SURE and DOS' intention for implementation *as of summer 2012*." FOF 36 (emphasis added). Accordingly, the trial judge should not have treated these witnesses as the voice of the Department on implementation of Act 18. But he did.

6. The Trial Judge Erred in Admitting Testimony from Persons Contacted in Violation of a Protective Order and State and Federal Law.

Places of Preservation: Respondents' Motion in Limine to Exclude Witnesses Identified by Unauthorized Use of Confidential Data that the Court had Ordered Disclosed for a Specific and Limited Purpose and Not for the Purpose of Assisting Petitioners in Identifying and Contacting Individual Citizens in Hopes of Persuading Them to Testify in this Case; Respondents' Proposed Findings of Fact and Conclusions of Law; during permanent injunction hearing

77. The trial judge further erred in admitting and relying on the testimony of several of Petitioners' witnesses who were solicited as the result of Petitioners' violations of privacy interests. *See, e.g.*, FOF 30 (citing testimony of Pripstein, Baker, Pennington, Norton, Howell, and Proctor), 170, 190. Before trial, Petitioners' expert, Bernard Siskin, relied on confidential DOT data obtained pursuant to a strict protective order to identify prospective witnesses for Petitioners. *See* P-2096a at 24-25; *see also* 18 U.S.C. §§ 2721-2725; 75 Pa.C.S. § 6114; *Advancement Project v. Pa. Dep't of Transp.*, 60 A.3d 891, 898 (Pa. Cmwlth. 2013) (concluding existence and non-existence of driver's license or identification card records are not public records and are not subject to disclosure). Siskin's analysis identified individuals with expired DOT IDs, whom Petitioners then contacted using publicly available information to solicit the individuals' participation at trial. H.T. (Wecker) at 1495:25-1497:3 ("That seems like a charade. You are really using the original list of – the confidential list."). The trial judge erred in admitting and relying on testimony that was procured only in violation of a court order and federal and state confidentiality laws.

D. In the Alternative, Modification, or Amendment of the Verdict Pursuant to Pa.R.C.P. No. 227.1(a)(4) is Warranted.

Places of Preservation: Respondents' Post-trial Memorandum following Hearing on Remand; Respondents' Pretrial Memorandum; Respondents' Proposed Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law

78. The Supreme Court in *Applewhite II* instructed this Court as to the proper manner to address problems of implementation. The Supreme Court said that this Court should act equitably to prevent harm in the short term, even as it made clear its view that "the statute might validly be enforced at some time in the future." *Applewhite II*, 54 A.3d at 5. The Supreme Court observed that the "most judicious remedy" in a circumstance where administrative measures have been inadequate to implement a facially constitutional statute as required "is the entry of a preliminary injunction, which may moot further controversy as the constitutional impediments dissipate." *Id.*

79. This Court's trial judge has identified five potential impediments to constitutional enforcement of the statute, four of which the trial judge deemed to be "barriers to liberal access": exhaustion, documentation, verification, and location. Op. at 23. None of these, separately or in combination, warrants invalidation of the statute. *See Applewhite II*, 54 A.3d at 4; *Applewhite IV*, 2012 Pa. Commw. Unpub. LEXIS 856, at *5-10. In addition, the trial judge concluded that the Department of State had "neglected [its] statutory duties" to educate the public and thereby failed to ensure liberal access. Op. at 21.

80. The exhaustion and documentation requirements were eliminated with the DOS ID, as implemented and then as amended following the remand from the Supreme Court, and reinforced by Judge Simpson's order of October 2, 2012. *See Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at *20. Petitioners did not aver – and the trial judge did not find – that

Respondents have violated this order. Indeed, the judge himself recognized that the exhaustion process had been discontinued. *See* Op. at 24.

81. Accordingly, the trial judge identified the only two *current* "barriers" as verification and location. Both of these perceived "barriers" are a result of Respondents' reading of Act 18; but neither "barrier" was identified by the Supreme Court as a hindrance to liberal access, even though both were in place at the time of that Court's appellate review. *See Applewhite II*, 54 A.3d at 4.

82. As for those "barriers," Respondents freely acknowledge that while they are charged with the implementation of statutes, the proper construction of a statute is a question of law for the judiciary, examined in accordance with the Statutory Construction Act.

83. An important example of proper statutory construction relevant to this case is *Strawn v. PennDOT*, 609 Pa. 482, 493-94, 17 A.3d 320, 327 (2011). In that case, the Supreme Court applied 1 Pa.C.S. § 1903 and emphasized the need for courts to give effect to the intention of the General Assembly by according words and phrases their plain meaning and construing statutes to give effect to all of their provisions.

84. Respondents submit that the agencies have implemented the statute as they have understood it. Section 206(b) of the Election Code requires DOT to "issue an identification card described in 75 Pa.C.S. § 1510(b) at no cost to any registered elector." 25 P.S. § 2626(b). Electors are registered only after an application for registration has been approved. *See* 25 Pa.C.S. § 1328 (recognizing that voter registration applications may be accepted or rejected); 25 Pa.C.S. § 1323(c)(3) ("No applicant shall be deemed eligible to vote until the commission has received and approved the application."). Just as in *Strawn*, that is one possible reading of the

statute. But if the Court were to conclude that another construction is more in keeping with statutory intent, Respondents, of course, would follow the law as construed by the Court.

85. DOT undertakes the issuance of photo identification under 75 Pa.C.S. § 1510(b) largely, but not exclusively, through driver's license centers. However, Petitioners at trial presented testimony of a person who mailed in a license for his father-in-law and received a free non-driver's secure identification. H.T. (Rogoff) at 693:2-8, 700:15-18. DOT also has accommodated the elderly and disabled by using photographs on file. *Id.* at 694:2-5; H.T. (Myers) at 1345:12-1346:20. The trial judge, however, found these measures to be inconsequential because they are not publicized. FOF 182.

86. The trial judge erred in not asking whether the exception available to DOT's location requirement for those who are infirm or disabled, taken together with the availability of care facility ID, the indigency provision, provisional ballots, and absentee and alternative ballot provisions under federal and state law, 25 P.S. § 2602(w)(11), (z.5); *id.* § 3050(a.2), *id.* §§ 3146.1-3146.9; 42 U.S.C. §§ 1973ee-1 to -6; 42 U.S.C. §§ 12101-12213; 42 U.S.C. §§ 1973ff to 1973ff-7, adequately address – as the General Assembly believed it would – the needs of those unable to travel to a DOT driver's license center.

87. Moreover, the trial judge heard testimony from persons who are living independently, but who are dependent upon others to transport them for all of their ordinary life functions, such as shopping, trips to the doctors, and trips to the post office. *See, e.g.*, FOF 30, 170. The fact that a person may need to ask for the *same level* of assistance to prepare to vote that he or she does for other essential errands is not constitutionally burdensome.

88. The trial judge likewise misapprehended the Department of State's educational efforts. In reliance on companies that are approved for Commonwealth usage, the Department of

State concluded that the best ways to provide individualized and correct information was by having all education and advertising direct people to call a toll-free number and/or visit the website.

89. This is not a circumstance where the legislature lacks the *authority* to enact the statute in question. Rather, the trial judge has invalidated portions of Act 18 based on *implementation*. Thus, there is no suggestion that this Court needs to provide an "alternative for the scheme fashioned by the legislature . . . which may pass constitutional muster." *See Heller v. Frankston*, 504 Pa. 528, 537, 475 A.2d 1291, 1296 (1984).

90. However, if the efforts at implementing the statute were in any way legally insufficient, or if the Department misconstrued its obligations under section 206(a) of the Election Code, 25 P.S. § 2626(a), the remedy would not be to invalidate the statute as facially unconstitutional, but to declare the Secretary's statutory duty and to provide guidance in its execution. In this regard, it is an important principle of injunctive relief that the restriction extend only to the extent of the harm to be abated, which would also limit the scope of declaratory relief. *See Big Bass*, 23 A.3d at 626; *Kozlowski*, 2008 Pa. Commw. Unpub. LEXIS 492, at *15-16.

III. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court set aside the verdict and direct judgment in favor of Respondents and against Petitioners on all causes of action pursuant to Rule 227.1(a)(2). In the alternative, Respondents respectfully request the Court to modify or change the verdict as set forth above pursuant to Rule 227.1(a)(4), or to order a new trial if necessary pursuant to Rule 227.1(a)(1).

Dated: January 27, 2014

Respectfully submitted,

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PROOF OF SERVICE

I, Todd N. Hutchison, certify that I am this day serving by electronic mail (by agreement of the parties), the foregoing Respondents' Post-trial Motion Pursuant to Pa.R.C.P. No. 227.1, which service satisfies the requirements of Pa.R.A.P. 121.

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I, Todd N. Hutchison, certify that I have caused the foregoing Respondents' Post-trial Motion Pursuant to Pa.R.C.P. No. 227.1 to be served by overnight courier to the Harrisburg, Pennsylvania Chambers of the trial judge, the Honorable Bernard L. McGinley, which service satisfies the requirements of Pa.R.C.P. No. 227.1

Dated: January 27, 2014

/s/ Todd N. Hutchison
Todd N. Hutchison