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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

RESPONDENTS' BRIEF IN SUPPORT OF POST-TRIAL MOTION PURSUANT TO Pa.R.C.P. No. 227.1

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PRELIMINARY STATEMENT

A. The Flawed Constitutional Analysis

Petitioners have conceded that the General Assembly has the constitutional power to require all electors to show photo identification at the polls before they may vote. *See Applewhite v. Commonwealth*, 54 A.3d 1, 4-5 (Pa. 2012) (*per curiam*) (*Applewhite II*) (Petitioners acknowledge that "there is no constitutional impediment to the Commonwealth's implementation of a voter identification requirement, at least in the abstract"). In light of Judge McGinley's rejection of Petitioners' equal protection challenge under the Pennsylvania Constitution, the central question before this Court is whether the photo identification requirement that the General Assembly has enacted – Act 18 of 2012 (amending the Pennsylvania Election Code) – comports with the Pennsylvania Constitution's requirement that "[e]lections . . . be free and equal." Pa. Const. art. I, § 5.

Acting as this Court's hearing judge for preliminary injunction proceedings, Judge Simpson of this Court clearly was convinced that Act 18 is ***facially constitutional*** and capable of implementation by the Commonwealth's executive branch consistent with the legislature's design and in accordance with constitutional standards. *See Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 757 (Aug. 15, 2012) (*Applewhite I*), *order vacated by Applewhite II*, 54 A.3d 1; *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 749 (Oct. 2, 2012) (*Applewhite III*). What was needed, Judge Simpson said, was more time for proper implementation. *Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at *4-5 ("[S]tructural improvements, together with the proposed enhanced access to [photo identification] and additional time, will place the Commonwealth in a better position going forward.").

The Pennsylvania Supreme Court likewise did not find Act 18 to be facially unconstitutional. Instead, the Supreme Court remanded to this Court for further consideration of Petitioners' application for a preliminary injunction based on a factual assessment of voter education efforts, the means available for procuring photo identification, and the time allowed for implementation. *See Applewhite II*, 54 A.3d at 5. Had the Supreme Court concluded that Act 18 is facially unconstitutional or incapable of constitutional implementation as a matter of law, it simply would have directed this Court to enjoin implementation of the statute. It did not do so, instead declaring that "[g]iven reasonable voter education efforts, reasonably available means for procuring identification, and reasonable time allowed for implementation, . . . the State may require the presentation of an identification card as a precondition to casting a ballot." *Id.* at 4-5.

After trial, this Court's trial judge – Judge McGinley – issued a determination and verdict that ignored the legal conclusions that had been earlier reached explicitly by Judge Simpson and implicitly by the Supreme Court. He concluded instead that Act 18's photo identification requirement ***is facially*** unconstitutional. Making not even a nodding reference to Judge Simpson's contrary views, or to the Supreme Court's observations in *Applewhite II* reflecting Act 18's presumed constitutionality, the trial judge boldly declared that the Act 18 photo identification regime ***facially*** violates the Free and Equal Elections Clause of Pa. Const. art. I, § 5. In so doing, Judge McGinley did not try to explain the differences with his Commonwealth Court colleague, nor did he provide reasons why the Supreme Court would have done as it did in *Applewhite II* – remanding to this Court for further hearings – if the photo identification requirement were unconstitutional on its face.

Even more astonishing is this: In reaching his conclusion that the photo identification requirement is facially unconstitutional, Judge McGinley held Act 18 to the most stringent

constitutional test federal law has developed – ***strict scrutiny*** – which he determined is mandated by Pa. Const. art. I, § 5. Judge Simpson in *Applewhite I* reached ***precisely*** the ***opposite*** conclusion. *See Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *52 ("I conclude that the 'strict scrutiny' approach advocated by Petitioners is ***not*** the appropriate measure for this facial challenge. Instead, a more deferential standard should be employed." (Emphasis added)). In fact, as Judge Simpson aptly observed, "there is no clear, relevant Pennsylvania authority to support [a strict scrutiny] approach" to assessing the constitutionality of state voter identification laws. *Id.* at *83. Moreover, as Judge Simpson correctly noted, neither federal courts nor most state courts apply strict scrutiny in evaluating the constitutionality of voter identification laws. *Id.* In this regard, it is significant that, despite Judge Simpson's crystal clear statements made in *Applewhite I* about the proper constitutional analysis to apply under the Pennsylvania Constitution, and his recognition that the level of scrutiny is a substantial legal question, *id.* at *89, the Supreme Court in its instructions to this Court in *Applewhite II* said ***not one word*** that would suggest that Judge Simpson was wrong and that this Court on remand should instead apply strict scrutiny.

In reviewing the trial court's decision and verdict on post-trial motions, this Court must correct these fundamental constitutional errors. There is simply no basis under the law to conclude that Act 18 is unconstitutional on its face.

Perhaps even more critical to the proper interpretation and application of the Pennsylvania Constitution going forward is the trial judge's fundamental error in declaring that strict scrutiny is to be applied to statutes challenged under Pa. Const. art. I, § 5. As Judge Simpson correctly held in *Applewhite I* (with the Supreme Court's implicit imprimatur in *Applewhite II*), this Court should instead evaluate Act 18 and all challenges under the Free and

Equal Elections Clause with deference to the General Assembly's policy judgments. As the Pennsylvania Supreme Court has explained, the protections under that clause are no greater than the protections of either the federal or state equal protections clauses.

Because of the critical importance of the constitutional issues presented by this case, and because the mistakes that the trial judge made in his constitutional analysis go directly to the way in which courts approach constitutional questions, Respondents will address these issues first in this brief supporting their motion for post-trial relief.

B. The Fundamental Errors of Statutory Construction

This Court also must correct the flawed statutory construction that the trial judge undertook – employing an improper analysis that contributed enormously to the trial judge's erroneous conclusion that the statute is unconstitutional on its face.

Petitioners claim that the Commonwealth has failed to comply – and cannot comply – with Act 18's addition of section 206(b) to the Pennsylvania Election Code. Section 206(b) requires the Department of Transportation ("DOT") to issue an identification card – at no cost – to a registered elector who has made application for photo identification, and who has included with the completed application a signed statement declaring under oath or affirmation that the elector does not possess proof of identification required for voting purposes. *See* 25 P.S. § 2626(b). The statute directs DOT to issue photo identification under section 206(b) notwithstanding the requirements of 75 Pa.C.S. § 1510(b), but otherwise consistent with identification it issues under that provision of the Vehicle Code. *Id.*

Petitioners claim – and the trial judge held – that the photo identification program that the Department of State and DOT jointly established (*i.e.*, the so-called DOS ID) in an effort to satisfy the requirements of section 206(b) of the Election Code cannot remedy a key flaw

embedded in Act 18 – *i.e.*, the inaccessibility of the ***secure*** photo identification that DOT customarily issues under 75 Pa.C.S. § 1510(b).

In construing section 206(b) of the Election Code as mandating that the Department of Transportation do what it could not lawfully do – *i.e.*, issue ***secure*** photo identification to anyone who requested it, ***without*** requiring the applicant to establish his or her identity to the satisfaction of DOT – while declaring the DOS ID *ultra vires* and illegitimate, the trial judge effectively reversed the application of the principle that statutes are to be construed to avoid constitutional infirmity. *See Fagan v. Smith*, 615 Pa. 87, 94, 41 A.3d 816, 820 (2012). Instead of interpreting section 206(b) of the Election Code in a manner that would ***avoid*** constitutional difficulties in implementing Act 18's photo identification regime, ***the trial judge read the statute in the only way that would make it impossible for it to be implemented in a constitutional manner***. This was fundamental error.

The trial judge said this:

> 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 is difficult to obtain.

Op. at 35.[1] He then proceeded to find the statute unconstitutional on its face under Pa. Const. art. I, § 5, because the ***secure*** photo identification customarily issued by DOT was not liberally available, which he believed was required by section 206(b) of the Election Code. As described above, the trial judge conducted his analysis under an unprecedented level of strict scrutiny, but he compounded that error with an unduly aggressive reading of the statute coupled with a harsh criticism of the executive's implementation of the statute – reasoning that together they show the

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

statute to be unconstitutional. Cramped statutory interpretation of a statute and perceived flaws in its implementation are not proper measures of a statute's constitutionality.

In the process, the trial judge needlessly eviscerated the sensible manner in which two Commonwealth agencies – the Department of State and DOT – laudably had collaborated to make available a form of photo identification that ***both*** constitutes "proof of identification" as defined by Act 18 ***and*** is readily available to ***every registered elector in the Commonwealth*** at no cost to the elector. This was error.

In working together to accomplish the General Assembly's purposes, the agencies used the infrastructure that the Department of Transportation already employs to issue photo identification to 9.8 million Pennsylvanians. The proliferation of photo identification already issued by DOT (before even considering the DOS ID and other forms of widely used photo identification that meet Act 18's requirements) nearly equals the estimated number of Pennsylvania citizens (9.9 million) who are of voting age. Thus, it was eminently reasonable for the General Assembly to identify DOT as the issuer of the photo identification that all would be able to obtain, and for the Secretary of the Commonwealth – the state official responsible for the administration of elections – to partner with DOT to accomplish the General Assembly's statutory vision of the liberal availability of photo identification that could be used to vote under Act 18.

C. Other Trial Judge Errors

The fundamental statutory and constitutional errors set forth above are ones that this Court confronts and corrects regularly, and are frequently the only questions presented. Here, however, there are also threshold issues (such as standing) and issues that arise from the multiple proceedings that occurred prior to the permanent injunction hearing (such as law of the case and

coordinate jurisdiction) that independently merit reversal of the verdict before the Court even reaches the constitutional and statutory questions. The trial judge erred fundamentally in brushing past threshold issues such as these: Have Petitioners carried their burdens? Have they demonstrated that they are aggrieved? How should the record before the Court be viewed? These questions cannot be brushed aside, and Respondents ask this Court to address them properly.

D. The Excessive Remedy

With the proper constitutional framework and statutory structure erected, the final task for the Court is to review the record to determine whether the Secretary and those assisting her have established the administrative structure needed to administer the photo identification law in a manner that is consistent with the legislature's intentions and in conformity with the requisite constitutional safeguards. Respondents contend that the executive has established a proper platform for implementing the statute.

Should this Court determine otherwise upon review of the record, the statute, and the Constitution, however, the Court nonetheless would have no basis for declaring the statute facially unconstitutional or for permanently enjoining its implementation. Rather, the equitably proper response would be to declare what the law requires to be done that has not been done (or that has not been done satisfactorily), to instruct the executive in the lawful performance of its duties, to accord the Secretary time to comply with the Court's declarations and instructions, and to continue the preliminary injunction already in place (or to modify it, if need be) until such time as the executive has complied with the Court's directions.[2]

[2] Respondents would ask the Court to note that they have determined it would be administratively impractical under any circumstances at this point to implement Act 18's photo identification requirement for any election held in 2014, including the General Election to be

I. PROCEDURAL HISTORY

A. Act 18 and Its Predecessor

Act 18 was not enacted in a vacuum; it was passed in the context of an intricate backdrop of federal and state election regulations, designed to protect the integrity of the vote while strengthening the overall integrity of the process. In 1993, Congress enacted the National Voter Registration Act ("NVRA") to promote increased participation in the electoral system while protecting against fraud. 42 U.S.C. § 1973gg(b) (identifying both vote-promoting and integrity-preserving purposes of the Act). In 2002, arising out of public disaffection in response to the Bush/Gore election and follow-on litigation, Congress enacted the Help America Vote Act ("HAVA"), which included a requirement for states to maintain accurate lists of registered electors so that the states could minimize both opportunities for and incidences of fraud. Indeed, then-Senator Chris Dodd of Connecticut explained the Act's purpose as making it "easier to vote, but harder to defraud the system." 148 Cong. Rec. S2527, S2529 (2d Sess. Apr. 11, 2002) (statement of Sen. Dodd). At that time, Pennsylvania was already considering enacting new identification requirements for in-person voting. *See* 186 Pa. Legis. J. No. 52 at 1439 (June 25, 2002).

Pursuant to the new federal mandate and state legislation, Pennsylvania established the Statewide Uniform Registry of Electors ("SURE") database. *See* 25 Pa.C.S. § 1222. The database was created from legacy county databases, and was implemented pursuant to a Memorandum of Understanding between Department of State and DOT. *See* FOF 86; H.T.

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conducted in November. Consequently, the relief that Respondents seek from the permanent injunction order included in the trial court's determination and verdict is limited to elections that occur ***after*** 2014. Practically speaking, then, even if this Court were to grant post-trial relief, ***Respondents would support this Court's entry of an appropriate injunction to be in effect through the end of 2014***.

(Marks) at 658:10-13, 659:17-25, 1640:23-1641:24; R-3, Memorandum of Understanding, October 5, 2005 (Memorandum of Understanding re HAVA and SURE). Likewise, the 2004 HAVA State Plan, 69 Fed. Reg. 14002 (Mar. 24, 2004), set forth the Commonwealth's stated goal: "to guarantee that all voters of Pennsylvania have the opportunity to participate fully in the election process and to cast their votes independently and privately."

In another response to HAVA, the General Assembly enacted a statute patterned in part after the federal provisions. Act 2002-150 amended the Election Code to require qualified electors voting for the first time in an election district or precinct to present identification. Like HAVA, Act 150 favored photo identification, including:

> (1) a valid driver's license or identification card issued by the Department of Transportation;
>
> (2) a valid identification card issued by any other agency of the Commonwealth;
>
> (3) a valid identification card issued by the United States Government;
>
> (4) a valid United States passport;
>
> (5) a valid student identification card;
>
> (6) a valid employee identification card; or
>
> (7) a valid armed forces of the United States identification card.

See Act of December 9, 2002 (P.L. 1246, No. 150), § 12.

As a failsafe, and consistent with HAVA, Act 150 permitted the use of alternative forms of identification, including:

> (1) nonphoto identification issued by the Commonwealth, or any agency thereof;
>
> (2) nonphoto identification issued by the United States government, or agency thereof;
>
> (3) a firearm permit;

(4) a current utility bill;

(5) a current bank statement;

(6) a paycheck; [or]

(7) a government check.

See id.; former 25 P.S. § 3050(a.1).

Act 150 was on the books for a decade without challenge. No one questioned that election workers must ask some electors to produce identification before casting a vote at a polling place. But in 2012, the General Assembly concluded that it had not gone far enough in securing the Commonwealth's polling places from imposters who would vote improperly in the name of another. This legislative judgment was based in part on information contained in a report of a commission jointly headed by Jimmy Carter and James Baker, recommending that a system of photo identification be established for America's polling places, and in part on testimony presented to the House State Government Committee.[3] Based on the record before it, the General Assembly enacted Act 18, amending the list of acceptable forms of identification and making the requirements of Act 150 applicable to all electors voting in person at a polling place, not just those voting there for the first time.

As amended by Act 18, section 1210(a) of the Election Code provides as follows:

> At every primary and election ***each elector*** who appears to vote and who desires to vote shall first present to an election officer proof of identification. The election officer shall examine the proof of identification presented by the elector and sign an affidavit that this has been done.

25 P.S. § 3050(a) (emphasis added).

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[3] These materials and others that were before the General Assembly were attached to the 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.

The Election Code as amended by Act 18 defines "proof of identification" as follows:

> (1) In the case of an elector who has a religious objection to being photographed, a valid-without-photo driver's license or a valid-without-photo identification card issued by the department of transportation.
>
> (2) For an elector who appears to vote under section 1210 [*i.e.*, at the polling place], a document that:
>
> (i) Shows the name of the individual to whom the document was issued and the name substantially conforms to the name of the individual as it appears in the district register;
>
> (ii) Shows a photograph of the individual to whom the document was issued;
>
> (iii) Includes an expiration date and is not expired, except:
>
> (A) For a document issued by the department of transportation which is not more than twelve (12) months past the expiration date; or
>
> (B) In the case of a document from an agency of the Armed Forces of the United States or their reserve components, including the Pennsylvania National Guard, establishing that the elector is a current member of or a veteran of the United States Armed Forces or National Guard which does not designate a specific date on which the document expires, but includes a designation that the expiration date is indefinite; and
>
> (iv) Was issued by one of the following:
>
> (A) The United States Government.
>
> (B) The Commonwealth of Pennsylvania.
>
> (C) A municipality of this Commonwealth to an employee of that municipality.
>
> (D) An accredited Pennsylvania public or private institution of higher learning.
>
> (E) A Pennsylvania care facility.

25 P.S. § 2602(z.5) (defining "proof of identification").

The Election Code is also intertwined with, and in some cases subject to, federal laws enacted for the protection, *inter alia*, of senior and disabled citizens, as well as overseas citizens (including military personnel). *See* 42 U.S.C. §§ 1973ee-1 to 1973ee-6 (Voting Accessibility for the Elderly and Handicapped Act); 42 U.S.C. §§ 12101-12213 (Americans with Disabilities Act); 42 U.S.C. §§ 1973ff to 1973ff-7 (Uniformed and Overseas Citizens Absentee Voting Act) ("UOCAVA") (protecting voting rights of military voters and their spouses and dependents as well as overseas civilian voters); *see also* H.T. (Marks) at 1632:15-19. Pennsylvania also has chosen to adopt a version of the Uniform Military and Overseas Voters Act, which is a state-initiated protection that extends UOCAVA protections to hospitalized and bedridden veterans as covered persons. H.T. (Marks) at 1632:10-19. Under state and federal law, there are absentee and alternative ballot provisions, some of which are subject to the provisions of these federal laws. Absentee voting, though relevant to the questions in this case, has not been challenged.

B. The Original Petition and the Preliminary Injunction Hearing

Two months after Act 18 was signed into law and before it was ever implemented, Petitioners filed their original petition. In it, they claimed that Act 18 violated Article I, §§ 1, 5, and 26, and Article VII, § 1 of the Pennsylvania Constitution. This Court held a hearing on Petitioners' request for a preliminary injunction beginning in July 2012, after which the hearing judge (Judge Simpson) denied the requested relief. *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757. The judge determined, *inter alia*, that: (1) certain of Petitioners' witnesses lacked credibility based on demeanor and bias; (2) Respondents' witnesses were credible and acting in good faith; and (3) Act 18 was subject to judicial review under the gross abuse of discretion standard. Applying that standard, Judge Simpson found that the General Assembly's reasons for enacting Act 18 were "relevant, neutral and non-discriminatory justifications." *Id.* at *12 n.16,

*16-18, *83, *85. In so finding, he also necessarily ruled that the testimony of Petitioners' expert Lorraine Minnite was of very limited relevance, because "the absence of proof of in-person voter fraud in Pennsylvania is not by itself dispositive." *Id.* at *86.

C. The Supreme Court Opinion and Remand

Petitioners appealed the denial of the preliminary injunction to the Pennsylvania Supreme Court. At oral argument, Petitioners conceded – and the Supreme Court found – that "there is no constitutional impediment to the Commonwealth's implementation of a voter identification requirement, at least in the abstract." *Applewhite II*, 54 A.3d at 4-5. Nevertheless, the Supreme Court expressed concern that the implementation of Act 18 "created a number of conceptual difficulties." *Id.* at 5. In particular, the Court was concerned whether Judge Simpson's prediction for the long run could adequately address implementing a new form of identification for an election only eight weeks away. *Id.* This was particularly true given that the DOS ID had become available beginning only in August 2012. *Id*. at 4, 5. The Supreme Court accordingly vacated the order denying the preliminary injunction and remanded the matter for consideration "whether the procedures being used . . . comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards." *Id.* at 5. Alternatively, this Court was to determine whether "there [would] be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement *for the purposes of the upcoming election*," *i.e.*, the then-impending November 2012 General Election. *Id.* (emphasis added).

On remand, Judge Simpson held a two-day hearing on September 25 and 27, 2012. Following that hearing, he issued a preliminary injunction limited in scope to determining whether measures were needed to abate any "offending activity." *Applewhite III*, 2012 Pa.

Commw. Unpub. LEXIS 749, at *17. Consistent with the Supreme Court's finding and Petitioners' concession, Judge Simpson concluded that the requirement to present photo identification is *not* the offending activity. *Id.* at *8-9 ("I reject the underlying assertion that the offending activity is the request to produce photo ID . . . .").

Instead, Judge Simpson preliminarily enjoined certain provisions of Act 18 relative to provisional ballots, namely those provisions that provide that a provisional ballot will not be counted if a voter has failed to show proof of identification within six days of the election. *Id.* at *11. The injunction also precluded Respondents from "[r]equiring that a registered elector must apply for a PennDOT product prior to the elector's seeking issuance of a free DOS ID," thus enjoining the so-called "exhaustion requirement," which Department of State and DOT had already rescinded in response to the Supreme Court's decision. Consistent with his finding that the request to show proof of identification was ***not*** the offending activity, Judge Simpson did not enjoin the photo ID provisions. *Id.* at *8-9. He also refused to enjoin the Secretary's education efforts given that the General Assembly had envisioned continuing education under section 206(a) of the Election Code, 25 P.S. § 2626(a). *Id.* at *8. Following the decision on remand, Petitioners challenged the steps that the Department of State was taking to educate electors in light of the injunction. Judge Simpson rejected that challenge. *See Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 856 (Nov. 1, 2012) (*Applewhite IV*) (application for supplemental injunction denied).

The preliminary injunction issued by Judge Simpson was in effect for the November 2012 General Election. The parties thereafter agreed to extend the preliminary injunction through the May 2013 Municipal Primary. The preliminary injunction thereafter expired by its own terms but it was revived by the Court based on Respondents' agreement that the preliminary

injunction should reissue for the November 2013 Municipal Election. Judge McGinley issued a new preliminary injunction order, which he declared would continue until this Court finally decides this case. In the meantime, the Department of State has continued with its efforts to educate the public about Act 18, as section 206(a) of the Election Code (25 P.S. § 2626(a)) requires.

D. The Amended Petition and the Permanent Injunction Hearing

On February 5, 2013, following the remand hearing and entry of the preliminary injunction, Petitioners amended their Petition for Review to add a new claim. In their new Count I, Petitioners assert that the Commonwealth "is not implementing [Act 18] in accordance with the statutory requirements because it has failed to provide liberal access to PennDOT ID" and the free DOS ID. *See* Am. Pet. for Review at ¶¶ 163-64. Petitioners also asserted that the free DOS ID does not comply with Act 18's requirements because it is not mandated or prescribed by statute, regulation, or other legal obligation. *Id.* at ¶¶ 164-65.

Respondents filed preliminary objections to the Amended Petition, which Judge Simpson sustained in part on May 24, 2013, dismissing the Commonwealth of Pennsylvania as immune from suit and several Petitioners who had already obtained compliant photo IDs. Judge Simpson also dismissed Count IV, in which Petitioners had alleged that Act 18 improperly adds a new elector qualification in contravention of the Pennsylvania Constitution. *See* Opinion Sustaining in Part and Overruling in Part Preliminary Objections at 5-8 (*Applewhite V*). Respondents filed an Answer with New Matter on June 24, 2013, denying the allegations. Respondents deny that Count I – a purely statutory claim – states a claim of constitutional invalidity, and they raise several defenses, including a challenge to the standing of both individual and organizational Petitioners. *See* Answer with New Matter to Am. Pet. for Review at ¶¶ 201-29.

The permanent injunction hearing began on July 15, 2013, with Judge McGinley presiding. Following the hearing, the trial judge extended the preliminary injunction with Respondents' consent (as noted above). Judge McGinley also modified the preliminary injunction, extending its duration until such time as Commonwealth Court "concludes proceedings on the merits of the permanent injunction," but he declined to extend the injunction until all appeals have been exhausted. *See* Determination on Renewed Application for Preliminary Injunction, slip op. at 5-6 & n.3 (Pa. Cmwlth. Aug. 16, 2013) (*Applewhite VI*).

Judge McGinley subsequently issued Findings of Fact, Conclusions of Law, and an Opinion in which he ruled that this Court should grant Petitioners' request for a permanent injunction. Judge McGinley's decision and verdict is now the subject of Respondents' Motion for Post-trial Relief.

II. SCOPE AND STANDARD OF REVIEW

Respondents' motion for post-trial relief is brought pursuant to Pa.R.C.P. No. 227.1(a)(1), (2), and (4). Post-trial motions may be brought seeking a modification of injunctive relief. *Taylor v. Borough of Emmaus*, 721 A.2d 388, 390 n.6 (Pa. Cmwlth. 1998). Because the relief that is sought in this regard is based on a contention that the current injunction is too broad and not reasonably tailored to abate the harm, this Court has discretion to grant relief. *Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa. Cmwlth. 2010) ("Even where the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury.").

A new trial is warranted if one or more mistakes made at trial prejudiced the moving party. *Commonwealth v. U.S. Mineral Prods. Co.*, 927 A.2d 717, 723 (Pa. Cmwlth. 2007). The Court reviews all the evidence in ruling on a motion for a new trial. *Id.*

Almost all of the errors asserted herein are requests for judgment notwithstanding the verdict ("JNOV").

> Judgment notwithstanding the verdict may be entered on two bases: where the movant is entitled to judgment as a matter of law, and/or where the evidence is such that no two reasonable persons could disagree the verdict should have been rendered for the movant. On the first basis, a court reviews the record and concludes that even with all factual inferences decided adverse to the movant, the law nonetheless requires a verdict in movant's favor. On the second basis, the court reviews the evidentiary record and concludes the evidence is such that a verdict for the movant is beyond peradventure. Judgment notwithstanding the verdict should not be entered where the evidence is conflicting on a material fact, and a reviewing court is required to consider the evidence, together with all reasonable inferences, in a light most favorable to the verdict winner.

Id. (citations omitted).

For those evidentiary errors that might lead to a new trial rather than JNOV, Respondents as the moving party must show how the error at trial caused the result to be incorrect – because a court granting a new trial must find that there is error, and that the error is a "sufficient basis for granting a new trial," *i.e*., prejudice. *Id*. In determining whether a new trial is warranted, a court "must review all the evidence." *Id*.

III. ARGUMENT

A. The Permanent Injunction Hearing Was Not a Blank Slate.

Judge Simpson and Judge McGinley are co-equal judges, sitting together on this Court. Both have presided over proceedings in this case; indeed, both have taken into account the Supreme Court's interlocutory opinion and order. And yet, the reading of the record as taken before Judge Simpson was very different in Judge McGinley's hands than it was in those of Judge Simpson. For that matter, the judges' readings of the Supreme Court's opinion are profoundly different as well. Many of the differences between the judges' findings and

conclusions arise out of different appraisals of credibility and testimony.[4] But Pennsylvania law is clear that only one judge – the judge taking the testimony – is to make those appraisals; and Pennsylvania law presupposes respect for the work of predecessor judges and courts through its application of the doctrines of the law of the case, coordinate jurisdiction, *stare decisis*, and others of that "family." *Ario v. Reliance Ins. Co*., 602 Pa. 490, 514, 980 A.2d 588, 602 (2009) (Castille, C.J., concurring).

A recurring theme throughout this brief – and particularly in Section III.D – is the troubling discord between the opinions of Judge Simpson and the Supreme Court on the one hand, and Judge McGinley on the other. Another recurring theme is the trial judge's willingness to excuse Petitioners' failure to meet their burdens of proof. Sometimes, such as with standing, Judge McGinley did not ask for any showing. Other times, he improperly shifted the burden to Respondents. Typically, such errors would be set forth first, because they present threshold issues. But because the constitutional and statutory analyses before this Court are pure and compelling questions of law, those sections are set forth first in this brief.

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[4] For instance, part of the trial judge's measure of implementation was based on witnesses who were not involved with the implementation of Act 18 at the pertinent times, and whose testimony reflected their lack of knowledge. In crediting their testimony, the trial judge ignored the testimony to the contrary of persons such as Shannon Royer, Megan Sweeney, and Jonathan Marks, who were intimately involved with the implementation of Act 18. *Compare* FOF 14, 101, 112, 121, 127, 189, 216, 262 (finding facts of implementation based on Oyler), *with* FOF 37 ("In spring 2012, Sweeney took over this role from Rebecca Oyler."). Indeed, the trial judge purported to acknowledge the limited utility of David Burgess's testimony, FOF 36, but nonetheless relied on that testimony for events after Burgess's involvement had ended, FOF 133-34, 143. In addition, the trial judge mischaracterized Oyler's testimony by failing to recognize that the scope of her estimates was limited to *DOT* ID, not all forms of compliant ID. *Compare* FOF 60, 61 (crediting her number of persons lacking compliant ID), *and* Op. at 12 (one percent of qualified electors would be precluded from exercising the franchise), *with* H.T. (Oyler) at 1020:9-1023:2 (expressing non-conclusive thoughts as to the number of persons with *DOT* ID), *and* Pre.T. (Oyler) at 484:22-485:5 (number of persons lacking *DOT* ID).

B. The Trial Judge's Constitutional Analysis was Flawed.

1. There is No Basis for Applying Strict Scrutiny to Act 18 – an Election Regulation.

In his opinion, the trial judge correctly recognized that Act 18 does not violate the constitutional equal protection guarantees set forth in Article I, sections 1 and 26 of the Pennsylvania Constitution. Indeed, the analysis under those provisions is straightforward, because the Pennsylvania Supreme Court has held – as the trial judge recognized – that Pennsylvania's equal protection right is coterminous with the federal right, *see Erfer v. Commonwealth*, 568 Pa. 128, 138-39, 794 A.2d 325, 332 (2002), and the United States Supreme Court has rejected a federal Equal Protection Clause challenge on very similar facts, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197-98 (2008) (lead plurality opinion); Op. at 46, 49. But in that same case – indeed, in the very next paragraph – the Pennsylvania Supreme Court held that the analysis for the *Free and Equal Elections Clause* – the basis for Petitioners' Count II – is at the least bounded, if not controlled, by the same standards as the equal protection analysis, holding that ***there is no greater protection*** under the Free and Equal Elections Clause than under either the state or federal equal protections clauses. *Erfer*, 568 Pa. at 139, 794 A.2d at 332.

It follows that Petitioners' failure to establish a federal equal protection claim disposed of ***both*** state constitutional claims. The trial judge instead concluded that the free and equal elections claim should be assessed using a federal strict scrutiny standard. By raising the standard of scrutiny far above that applied to the equal protection claims, he reached a different conclusion; and, contrary to *Erfer*, the trial judge held the Free and Equal Elections Clause to provide greater protection than the Equal Protection Clause.

Oddly, the trial judge's decision to apply federal strict scrutiny did not address *Erfer* at all, and he rejected the concomitant *Marion County* standard in a footnote. Op. at 37 n.25.[5] Instead, the trial judge cited a single-judge opinion of this Court as support for applying a "narrowly tailored, compelling interest" test to this Pennsylvania constitutional question. COL 33 (citing *In re Petition of Berg*, 712 A.2d 340 (Pa. Cmwlth. 1998) (single-judge opinion by Doyle, J.)). But in *Berg*, in which a person challenged under the U.S. Constitution the requirement that there be 100 signatures from ten counties as placing undue value on the electors of less populous counties, this Court expressly ***rejected*** strict scrutiny, and applied a rational basis standard instead. Affirming, the Supreme Court recognized that"[t]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest would tie the hands of states seeking to assure that elections are operated equitably and efficiently." *In re Berg*, 552 Pa. 126, 133, 713 A.2d 1106, 1109 (1998).

Indeed, a strict scrutiny test has never before been held to be appropriate in a situation such as this, in which legislative deference plays a crucial role. *In re Nomination Petition of Rogers*, 908 A.2d 948, 954 (Pa. Cmwlth. 2006) (single-judge opinion by Colins, P.J.) (citing, *inter alia*, *Winston v. Moore*, 244 Pa. 447, 91 A. 520 (1914), and characterizing the proper standard as "gross abuse"). Although not labeled as "gross abuse," the Supreme Court employed the same process in *Ray v. Commonwealth*. 442 Pa. 606, 609, 276 A.2d 509, 510 (1971) ("This Court does not sit to judge the wisdom of the Legislature's policies. The exception as enacted is within the permissible scope of legislative authority and we are satisfied that it does not violate

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[5] The trial judge construed the test applied in *Marion County* as a rational basis test applied by the U.S. Supreme Court to measure a voter identification statute. As Judge Simpson recognized, the test federal courts employ in the election context is in fact more properly described as a balancing test. *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *64 ("Thus, the Court found applicable the balancing test set forth by the U.S. Supreme Court in *Anderson* and later reaffirmed in *Burdick* and *Crawford*.").

any provision of either the Pennsylvania or United States Constitutions."); *cf*. *Jubelirer v. Singel*, 162 Pa. Cmwlth. 55, 68, 638 A.2d 352, 359 (1994) (first setting forth the presumption that the legislature did not intend to violate the Constitution and then testing the alleged violation against the intended constitutional protection at issue).

One reason that legislative deference is so important in cases of this kind is that the right to vote animates both the legislation itself and the challenge to the legislation. *See Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 588 Pa. 95, 116, 902 A.2d 476, 488 (2006). Although the trial judge found that asking a person to travel to DOT was "disenfranchising," he failed to acknowledge that the General Assembly sought to protect the integrity of the vote ***in order to avoid disenfranchisement***, because electors whose votes are diluted are disenfranchised. In cases such as *Bergdoll v. Kane*, 557 Pa. 72, 85, 731 A.2d 1261, 1269 (1999), relied on by the trial judge, the right to vote was implicated only in ***one*** direction. In *Bergdoll*, for example, a challenge was raised to a ballot measure that set forth two separate constitutional amendments but without an opportunity to approve one and reject the other. *Id.* Asking whether there is one question or two is very different than weighing the relative effect of protecting the franchise through regulating its exercise.

Indeed, in *Kuznik* itself, the Supreme Court quoted a HAVA Conference Report that sets forth the very interests that were weighed by the General Assembly here:

> The right to vote is a cornerstone of our democracy, the basic and most essential expression of citizenship. When that right is put into doubt, when citizens cannot know that a ballot cast is a ballot counted and that their unique voice has not been heard, it undermines confidence of [the] entire political system . . . . People simply must have the confidence that their vote counts. That is what this legislation is about.

Id. at 116, 902 A.2d at 488 (citation omitted).

Pennsylvania law has labeled the class of legislative enactments that structure the exercise of a right to vote as "voting regulations" – measured by whether the legislative enactment is directed at the exercise of the franchise or at eliminating access to it. Said another way, is the statute directed at "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).[6] Here, the answer to those questions is indisputably "yes." Indeed, Petitioners conceded that a request to show identification at the polls is a regulation. H.T. (Pet'rs' Closing) at 1975:23-1976:13.[7]

The hallmark of a voting regulation is the fact that "[t]he power to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government." *Mixon v. Commonwealth*, 759 A.2d 442, 449 (Pa. Cmwlth. 2000), *aff'd*, 566 Pa. 616, 783 A.2d 763 (2001). The photo identification requirement fits precisely within the class of election

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[6] This is consistent with the definition of regulation in the Commonwealth Documents Law:

> "REGULATION" means any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or *prescribing the practice or procedure* before such agency.

45 P.S. § 1102(12) (emphasis added).

[7] In his decision in this case, Judge McGinley at one point stated that a regulation is impermissible if it either denies the franchise or "make[s] it so difficult as to amount to a denial." Op. at 36 (quoting *Winston*, 244 Pa. at 457, 91 A. at 523). But in the Findings of Fact and Conclusions of Law, the trial judge went further, reasoning that because not all qualified electors have compliant identification and not all have the documentation to get secure DOT identification, "[t]he effect of the Voter ID Law is *de facto* disenfranchisement of all qualified electors who lack a compliant photo ID enumerated in the statute," and "[t]he Voter ID Law is not an election regulation with which all qualified electors could comply at the polls." FOF 255; COL 44.

regulations that this Court and others have reviewed under the standards discussed above.[8] It is a regulation to ensure that the persons who come to the polls are who they say they are, and that each can be assured that the person next to him or her is as well. In such a system, votes are not diluted and electors are not discouraged. Measured against a backdrop of deference (rather than hostility) toward the General Assembly, it is apparent that this law was enacted to regulate the exercise of the right to vote.

The trial judge viewed Act 18 as outside the range of permissible regulations because he concluded that the statute denies the franchise to electors. In so holding, the judge in three separate places relied on *Perles v. Northumberland County Return Board*, 415 Pa. 154, 202 A.2d 638 (1964).[9] *See* COL 32 ("strictest scrutiny"), COL 42 (if "even one person" is disenfranchised), and COL 31 (asserting that the documentation requirement associated with the DOT secure identification "disenfranchises qualified electors, and is facially unconstitutional"). But the *Perles* Court was not applying strict scrutiny to an election regulation; indeed, the Court did not reach the merits of the case before it at all, because the appellant had waived the issues he sought to raise. *Perles*, 415 Pa. at 158, 202 A.2d at 540. The case was brought by a disgruntled candidate who challenged the commingling of challenged and unchallenged ballots. After

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[8] This is true under federal law as well. 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 v. Celebrezze*, 460 U.S. 780, 788 (1983); *Democratic Cnty. Comm. Appeal*, 415 Pa. 327, 339-40, 203 A.2d 212, 218-19 (1964); *cf. Caba v. Weaknecht*, 64 A.3d 39, 58 (Pa. Cmwlth. 2013) ("But by enacting the licensing scheme for carrying a concealed weapon, the General Assembly created a path by which Commonwealth citizens who meet certain statutory eligibility criteria are entitled to obtain *the benefit* of exercising their constitutional right to bear arms in defense of themselves in a way that is not automatically available to all Commonwealth citizens.").

[9] The trial judge also cited *James v. SEPTA*, 505 Pa. 137, 477 A.2d 1302 (1984), a Fourteenth Amendment Equal Protection challenge in another context.

explaining why it would not reach the merits, the Court commented on the plaintiff's overreaching in trying to invalidate all of the ballots cast. In that context, it observed that if it were to review the ballots, it would not strike the indisputably valid ballots, because disenfranchisement of "even one person" who had validly cast his vote was an "extremely serious matter." *Id*. at 158, 202 A.2d at 540. Of course it would be an extremely serious matter; but that in no way justifies applying strict scrutiny here.

2. The Pennsylvania Supreme Court Did Not Establish a New Standard.

Ironically, the trial judge also drew on the Pennsylvania Supreme Court's opinion in this case, reasoning that the remand was a "mandate[]" that there be "'no voter disenfranchisement' as to all future elections held under the Voter ID Law, not merely the first election following enactment." Op. at 37 n.24. What the Court actually instructed this Court to examine on remand was whether the DOS ID card is liberally accessible. If not, and

> if the Commonwealth Court is not still convinced in its predictive judgment that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement *for purposes of the upcoming election*, that court is obliged to enter a preliminary injunction.

Applewhite II, 54 A.3d at 5 (emphasis added).

It is hard to read the instruction in *Applewhite II* as anything but an instruction to this Court on remand to predict what would happen in the November 2012 General Election (which is exactly how Judge Simpson read it). *See Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at *19-20. Carrying the instruction forward, however, the message would not change. If there were no assurance that the implementation had been effective, then enter a preliminary injunction (or modify an existing one) tailored to ensuring that the statute is carried into effect constitutionally. *See Applewhite II*, 54 A.3d at 5.

To be sure, the trial judge sought to insulate himself from error by disclaiming any suggestion that "any increased proof of identification requirements, which may include photo IDs, cannot be constitutional." Op. 45 n.30. But as will be explained at greater length *infra* in Section III.C and D, the construct the trial judge set in place ensured precisely the result he disclaimed. The trial judge defined the injury to Petitioners as being "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,[10] a definition of injury that he later rendered self-fulfilling by discounting as meaningless any other compliant form of identification or voting alternative a person might have or use – such as absentee voting (as Petitioner Bookler does, *see* H.T. (Marks) at 1659:20-1660:7), ID obtained from DOT without the need to travel there (as witness Rogoff was able to do, *see* H.T. (Rogoff) at 700:15-21, 705:3-12), or any other alternatives and safety nets set forth in Act 18.

By defining away the statutory alternatives, the trial judge left no room for any statute that does not absolutely ensure that every person actually has photo identification without incurring any cost or expending any effort that would cause inconvenience. He then concluded that the possibility that a person does not have identification already is a measure of disenfranchisement. Op. at 37; *see also id.* at 36 ("*In the majority of its applications*, the Voter ID Law renders Pennsylvania's fundamental right to vote so difficult to exercise as to cause *de facto* disenfranchisement." (First emphasis added)). This is a very different analysis than the courts employed in *Ray*, 442 Pa. at 609, 276 A.2d at 510, and *Singel*, 162 Pa. Cmwlth. at 68, 638 A.2d at 359, where the courts viewed the presumption that the General Assembly did not intend

[10] This new characterization of the right represented a remarkable departure from the trial judge's earlier position on this very issue: "[M]erely *asking* an elector to produce compliant photo ID does not cause disenfranchisement." *See Applewhite VI*, slip op. at 7.

to violate the Constitution as the first principle. Had the trial judge applied that principle, the analysis of the statute – and the verdict – would have been very different.

3. The Trial Judge Erred in His "Plainly Legitimate Sweep" Analysis.

As explained *infra* in Section III.D.1, by establishing the threshold for harm so low, the trial judge set forth an interest that gave anyone standing – even someone who did not provide any testimony. The trial judge then sought to justify this result by reasoning 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 to answer only whether there are a substantial number of applications in which the statute would be unconstitutional. Op. at 33, 36. If the fact that "a substantial number" of persons are perceived as needing to get ID to vote can – without more – render a statute facially invalid, no statute could ever limit or channel – *i.e.*, regulate – a person's exercise of his rights.

Yet it is precisely the "without more" that separates Judge McGinley's analysis from that of Judge Simpson – and of the Supreme Court – *i.e.*, holdings that the harm was ***not*** the request to show ID at the polling place. Indeed, when the Supreme Court considered the case at the preliminary injunction stage, it credited Petitioners' concession that there was no "impediment to the Commonwealth's implementation of a voter identification requirement, at least in the abstract . . . . The gravamen of their challenge lies solely in the implementation." *Applewhite II*, 54 A.3d at 4-5; *Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at *8-9 (rejecting Petitioners' "underlying assertion that the offending activity is the request to produce photo ID"); *cf. Foti v. McHugh*, 247 F. App'x 899, 901 (9th Cir. 2007) (courthouses may require persons to show identification; the right of access to courts is not a "constitutional right to enter the federal building anonymously"); *Caba*, 64 A.3d at 58 ("But by enacting the licensing scheme for carrying a concealed weapon, the General Assembly created a path by which Commonwealth

citizens who meet certain statutory eligibility criteria are entitled to obtain the benefit of exercising their constitutional right to bear arms in defense of themselves in a way that is not *automatically* available to all Commonwealth citizens." (Emphasis added)). Petitioners are judicially estopped from contending otherwise at this stage. *See In re Adoption of S.A.J. (In re S.S.)*, 575 Pa. 624, 631 n.3, 838 A.2d 616, 620 n.3 (2003) (recognizing that the fact that the party prevailed in the proceeding in question meant that the Court did not need to resolve the conflict in authorities as to whether judicial estoppel requires that the contrary assertion be successful).

Even though the trial judge attributed his "plainly legitimate sweep" standard to *Clifton*, his approach cannot be squared with that case – nor, for that matter, with the opinion of the U.S. Supreme Court in *Marion County*. As Judge Simpson explained in *Applewhite I*:

> With the foregoing in mind, I preliminarily conclude that Petitioners are unlikely to prevail on a facial challenge to Act 18, for several reasons. First, they do not acknowledge the extremely rigorous legal standard for facial challenges requiring a demonstration that there are *no set of circumstances* under which the statute may be valid. Indeed, they did not mention the legal standard at all, not in the pre-hearing brief, not in the opening address, not in the closing argument, and not in the post-hearing brief.

Applewhite I, 2012 Pa. Commw. Unpub. LEXIS 757, at *27 (emphasis added). It is obvious that "no set of circumstances" is not the same as "affects a substantial number of persons." The trial judge misapprehended the scope of "plainly legitimate sweep."

"Plainly legitimate sweep" is, of course, a federal constitutional analysis that began with First Amendment jurisprudence but also was discussed in *Marion County*, 553 U.S. at 202-03 (lead plurality opinion) ("A facial challenge must fail where the statute has a 'plainly legitimate sweep.' When considering SEA 483's broad application to all Indiana voters, it 'imposes only a limited burden on voters' rights.'" (citations omitted)). Read in the context of the *Marion County* decision, it is obvious that the question the U.S. Supreme Court was addressing was

simple: Looking at the entirety of the population and the persons affected, is there pervasive invalidity? In *Marion County*, the answer was no; and the Court honored the presumption that the statute was valid.

In any event, it makes no sense to read *Clifton* as support for finding Act 18 facially invalid. In *Clifton*, the Supreme Court twice rejected the invitation to find facial invalidity. *See* 600 Pa. at 669-70, 969 A.2d at 1201 ("For the reasons that follow, we disagree with the trial court's holding that the statutes are unconstitutional on their face. Nevertheless, for many of the same reasons cited by the trial court, we hold that the base year method of property valuation, as applied in Allegheny County, violates the Uniformity Clause."); *id*. at 703, 969 A.2d at 1222 ("Preliminarily, however, we make clear that, unlike the trial court, we are not prepared to hold the statutory base year provisions facially unconstitutional. *A statute is facially unconstitutional only where no set of circumstances exist under which the statute would be valid*." (Emphasis added)).

The trial judge here never asked if there was any set of circumstances under which the statute would be valid. Instead, and as discussed at greater length below, he found that the legislative enactment was unconstitutional by evaluating whether the implementation was flawed. Nowhere is this conflation clearer than at page 44 of his 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: "These 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."

C. The Trial Judge's Statutory Analysis was Flawed.

1. The Trial Judge Failed to Heed Established Statutory Construction Principles.

Statutory construction applies the presumptions in 1 Pa.C.S. § 1922:

> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.
>
> (2) That the General Assembly intends the entire statute to be effective and certain.
>
> (3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.
>
> (4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.
>
> (5) That the General Assembly intends to favor the public interest as against any private interest.

1 Pa.C.S. § 1922.

Rather than apply those presumptions and tools of construction, the trial judge engaged in the opposite exercise. He identified every aspect of the statute that he thought was weak, and he used those "weaknesses" as evidence that the statute was flawed. Thus, for example, he found fault with the General Assembly for failing to mandate alternate forms of identification and for failing to define "substantially conform" and "indigency" within the statute. COL 18, 25. But the failure to define terms is neither uncommon nor unprovided for. The statutory construction rules instruct what to do when a term is undefined. *See* 1 Pa.C.S. § 1921(c) ("[w]hen the words of a statute are not explicit"). Moreover, the General Assembly was not legislating in a vacuum; it *amended* the list of acceptable forms of identification that had been in place for a decade under Act 150 – forms of identification the issuance of which was never mandated and never questioned.

Although neither the Supreme Court nor Judge Simpson found the above terms problematic, the trial judge denigrated the terms as undefined to minimize the protections that the General Assembly had built into the statute. He went on to characterize indigency as "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. The reading of the term in that way violates several principles of statutory construction: it does not give effect to all statutory provisions; it does not read the provision with reference to the entire statute; and it turns the term "indigency" into at least a superfluous, if not an absurd term. 1 Pa.C.S. § 1922(a); 1 Pa.C.S. § 1921(a); *see Commonwealth v. McCoy*, 599 Pa. 599, 613, 962 A.2d 1160, 1167-68 (2009) ("We are not permitted to ignore the language of a statute, nor may we deem any language to be superfluous.").

Nor was this a necessary – or even the natural – reading of the term. The cost of securing ID is not necessarily limited to the charge for the card itself. In *Prudential Property & Casualty Insurance Co. v. Sartno*, the Supreme Court explained that while one could say that a person was not carrying property for a fee because there was no delivery charge, that was a narrow interpretation; the broader interpretation was that he *did* carry property for a fee, because his deliveries occurred during the course of his wage-earning employment. 588 Pa. 205, 216-17, 903 A.2d 1170, 1177 (2006). Likewise, indigency has been understood in the case law to apply to persons with limited resources, as well as those with no resources. "'Indigent' includes, but is not limited to, those who are completely destitute and helpless. It also encompasses those persons who have some limited means, but whose means are not sufficient to adequately provide for their maintenance and support." *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); *cf.* 35 P.S. §

449.3 (Health Care Cost Containment Act) (defining indigent care as "[t]he actual costs, as determined by the council, for the provision of appropriate health care, on an inpatient or outpatient basis, given to individuals who cannot pay for their care because they are above the medical assistance eligibility levels and have no health insurance or other financial resources which can cover their health care").

Construing the term in line with *Pittas* and *Sartno*, the indigency provision is a robust safety net: Any person who, because it would be so costly as to impose a burden to get to DOT, whether because of the cost of transportation or the loss of work time, can execute the indigency affirmation instead. And because the affirmation is self-executing, and can be made at the polling place, it is a very real "safety net" of the very sort that the trial judge said was lacking.

Of the twenty or so states that have enacted photo ID laws, the trial judge identified specific provisions from a handful that he said would have made the statute better. Op. at 42-44. But several of even the handful of statutes he cited differ in significant ways from his portrayal of them.[11] Perhaps most significantly, the General Assembly had established provisional ballots as an additional safety net. The trial judge found that provisional ballots are not the same as regular ballots and that Pennsylvania is in stark contrast to Indiana. "Indiana permits electors to affirm registered status at the polls and cast a regular ballot based on the affirmation. Such a safety net prevents disenfranchisement." Op. at 43; *see also id.* at 44. In fact, however, Ind. Code Ann. § 3-10-1-7.2 states the following:

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[11] For example, Tennessee – listed in the opinion as allowing photographic identification issued by any "branch, department, agency or other entity of the State of Tennessee, any other state, or the United States" – was amended in 2013 to truncate the list to the State of Tennessee and the United States. Op. at 42-43 (citing Tenn. Code Ann. § 2-6-201). Kansas – identified as permitting expired licenses – permits them only if the bearer is over 65 years of age. *Id.* at 43; *see* Kan. Stat. Ann. § 25-2908(h).

(c) If:

(1) the voter is unable or declines to present the proof of identification; or

(2) a member of the precinct election board determines that the proof of identification presented by the voter does not qualify as proof of identification under IC 3-5-2-40.5; a member of the precinct election board shall challenge the voter as prescribed by IC 3-11-8.

(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:

(1) sign the poll list; and

(2) *receive a provisional ballot*.

Id. (emphasis added). This makes sense, of course, because in *Marion County* – the U.S. Supreme Court case construing Indiana's statute – the lead plurality opinion expressly found that provisional ballots *are* "an adequate remedy" for persons who do not bring compliant identification to the polls. *Marion Cnty.*, 553 U.S. at 197-98 (lead plurality opinion).

Pennsylvania offers the same protection.

But the heart of the trial judge's statutory analysis is the one alluded to at the start of this brief: his conclusion that the DOS ID is a "house of cards" that collapses under the weight of the *ultra vires* acts of the Department of State. The Supreme Court's remand definitively disposed of the trial judge's conclusion: "[Commonwealth Court] is to consider whether the procedures being used for deployment of the cards comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards." *Applewhite II*, 54 A.3d at 5. The Supreme Court's mandate makes no sense unless the Court was satisfied that the DOS ID card was (a) authorized, and (b) capable of effectuating the intent of the General Assembly. That is the law of the case. *Commonwealth v. Starr*, 541 Pa. 564, 577, 664 A.2d 1326, 1332 (1995) ("The determination of those questions which led to its appellate judgment

constitute a 'final' adjudication which may not be lightly disturbed in later stages of the litigation.").

Nevertheless, the trial judge impermissibly came to the precisely opposite conclusion – that the DOS ID card is "unauthorized" and, thus, incapable of satisfying the statutory requirements. He did so through three incorrect constructions of the statute: he misapprehended the breadth of the Secretary's role; he misconstrued the word "issue"; and he misstated 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.

2. The Authority of the Secretary in Administering Elections is Broad.

Section 206 of the Election Code (25 P.S. § 2626) is contained in Article II of the Election Code, entitled "The Secretary of the Commonwealth." Her authority includes, *inter alia*, "prescrib[ing] suitable rules and regulations to carry out the provisions of this Act," 25 P.S. § 3260(2), and "exercis[ing] in the manner provided by this act all powers granted," 25 P.S. § 2621; and her responsibilities extend from chairing a board charged with developing voting standards, 25 P.S. § 2624, and receiving the advice of the State Plan Advisory Board on the development of the state plan for conforming with federal law, 25 P.S. § 2625, to establishing a system to remedy complaints for HAVA Title III, 25 P.S. § 2621(h).

It follows that the authority – and discretion – of the Secretary is not nearly as circumscribed as the trial judge portrays it. Her authority to administer the Election Code is well-settled. *Kuznik*, 588 Pa. at 149, 902 A.2d at 508 ("Because it is within the purview of the Secretary to determine that the use of a dual system of voting would be injurious to the conduct of the Spring Primary Election and would lead to the disenfranchisement of voters, we accord

deference to that decision."); *see also id*. at 143, 902 A.2d at 504 (noting that where there was no evidence to rebut the Department's testimony about confusion, disenfranchisement, and voting irregularities, "the determination of the Secretary that a referendum is not required is correct, as the conduct of such would act as an obstacle to the underlying goals of HAVA").

There is nothing *ultra vires* about working with another Commonwealth agency so that both play roles in carrying out a statutory mandate. Both agencies are specifically referenced in section 206(b) of the Election Code (25 P.S. § 2626(b)), and DOT and the Department of State have worked together to fulfill obligations under federal and state election law since the 1990s. 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. The memoranda expressly incorporate by reference section 502 of The Administrative Code of 1929:

> Whenever, in this act, power is vested in a department, board, or commission, to inspect, examine, secure data or information, or to procure assistance, from any other department, board, or commission, a duty is hereby imposed upon the department, board, or commission, upon which demand is made, to render such power effective.

71 P.S. § 182; *see also* 71 P.S. § 181. Accordingly, the Department of State has an express statutory duty to render effective DOT's statutory powers under section 206(b) of the Election Code, 25 P.S. § 2626(b), just as DOT has an express statutory duty to render the Secretary of the Commonwealth's powers effective.

3. DOT Issues the DOS ID.

In this case, the way that the two agencies worked together was through the standard Memorandum of Understanding process,[12] whereby DOT issued the card in accordance with the statutory provisions of section 206(b) of the Election Code, using the Department of State name and the Department of State's access to SURE to ensure that the card went to registered electors. That is so because, after all, the statute states that DOT is 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) (emphasis added).

In his opinion, the trial judge found fault with both decisions, apparently reasoning that the Department of State name changed the "issuer" from DOT to the Department of State. But that is inconsistent with both the Memorandum of Understanding, R-4 ("Prior to issuing a DOS Voter ID, PennDOT . . ."), and the ordinary meaning of "issue," which includes, *inter alia*, "to send out or distribute officially," *Stas v. Pa. Sec. Comm'n*, 910 A.2d 125, 130 (Pa. Cmwlth. 2006).

DOT is the agency that manufactures and distributes the cards. The fact that more than one entity might contribute to the issuance of something does not undermine the issuer's status as issuer. As a recent example, in *Office of the Governor v. Raffle*, 65 A.3d 1105 (Pa. Cmwlth. 2013) (*en banc*), the question before this Court was whether government-issued telephone numbers were personal for purposes of Right-to-Know Law analysis. (This Court held that they

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[12] There are other statutes that contemplate roles for both the Secretary of the Commonwealth and other agencies, including DOT. For example, 25 Pa.C.S. § 1323 addresses voter registration at the time of driver's license applications (*i.e.*, "Motor Voter"), and contemplates that, "[t]he secretary, in consultation with the Secretary of Transportation, [] promulgate regulations for implementing th[e] section." 25 Pa.C.S. § 1323(a)(1). Another example is 25 Pa.C.S. § 1325, which places a duty on the Secretary of the Commonwealth to work with various agencies to distribute voter registration applications and assist applicants in preparing them.

were). The agencies would not have been able to issue specific cell phone numbers without access to service and underlying data that the service providers share. But that did not prevent the agencies from physically assigning the telephone numbers in the same way that DOT physically prepares and distributes the cards – as the issuer. *See Kuznik*, 588 Pa. at 148, 902 A.2d at 507 (finding legal error where trial judge fails to make an uncontradicted finding of fact).

At note 19 of his Opinion, the trial judge credited the testimony that "the DOS ID must be issued through PennDOT in order to comport with the statute." But at page 18, the judge said the opposite, listing several "facts" that are contradicted by the record and that would, in any event, not transform the Department of State into the issuer.[13]

In addition, the trial judge held the *Department of State* responsible for issuer decisions that were clearly only *DOT*'s to make. This appears to come from his assessment that the DOS ID is a Commonwealth ID within the meaning of section 102(z.5) of the Election Code (25 P.S. § 2602(z.5)), and thus can be distributed "at any county election office or polling place, and truly address the liberal access criticism." Op. at 21 n.19. But while the DOS ID certainly is a Commonwealth ID, so are the other forms of identification set forth in 75 Pa.C.S. § 1510(b), and no one complains that the others are available only at DOT's locations.

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[13] For example, despite uncontradicted testimony – and references in the opinion – to the fact that DOT personnel collect and process the applications for the DOS ID, the trial judge said that DOS "collects the application form." *Compare* Op. at 18, *with, e.g.*, FOF 137, *and* H.T. (Myers) at 1340:5-1343:15. He also said that the Department of State "decides to whom the DOS IDs are issued" despite uncontradicted testimony that the only input the Department of State has on an individual application is to advise whether the person is a registered voter in the SURE database. *Compare* Op. at 18, *with, e.g.*, Rem.T. (Myers) at 40:11-20, 46:17-22, *and* H.T. (Marks) at 564:6-566:19. And he said that it was the Department of State that decided that the DOS ID must be issued at driver's license centers, even though it is the *statute* that creates an obligation for DOT to issue a card; and DOT's cards are initially issued at driver's license centers. *Compare* Op. at 18, *with* 25 P.S. § 2626(b).

In the same vein, the trial judge appeared to have made the Department of State responsible to anticipate – and apparently to fill – DOT's *infrastructure* needs. "Despite anticipating this problem in advance, *DOS* did not engage mobile units or expand the locations for obtaining a DOS ID beyond PennDOT DLCs." Op. at 28; FOF 176. But it is the infrastructure that DOT has – the same infrastructure that has allowed it to provide 9.8 million secure ID to Pennsylvanians – that the General Assembly chose to enlist. And *DOT* did at one time have mobile units, until the funding was cut during the Rendell administration for fiscal reasons:

> A: At one time we [had] a mobile unit. So the answer is yes, we did. We had a mobile unit I believe in the late '90s all the way up to, I believe, 2008. And in 2008 we made the decision that it was not economically feasible, nor did it have the value to it from the standpoint of the cost associated. We would send it out in the field, and it would do three or four transactions in a day, in some cases. Then perhaps we would have four people committed to that site, quote/unquote, for that period of time. From a cost benefit analysis, it just made absolutely no sense to the taxpayers of the Commonwealth that we'd be spending that kind of money to maintain the system for so few transactions. So it was determined in the last administration that we would discontinue the unit.
>
> Q: So the mobile unit went away during the Rendell administration?
>
> A: That's correct.

Rem.T. (Myers) at 113:12-114:8. Petitioners did not have a single person who testified that if there had been a mobile unit that he or she could have obtained compliant ID. Constitutionality is not measured by programs that have been tried and failed.

4. The Statutory Language Allows for Flexibility.

The trial judge explained that the statute requires "a free ID to be issued through PennDOT *in accordance with Section 1510(b) of the Vehicle Code, 75 Pa.C.S. § 1510(b)*, with a simple self-proclaimed affirmation." COL 14 (emphasis added). He then found fault with the

way that 75 Pa.C.S. § 1510(b), in conjunction with its regulations, 67 Pa. Code § 91.4,[14] had been carried into practice in issuing *driver's licenses* and *non-driver's license identification* upon presentation of "rigorous supporting documentation to obtain a PennDOT-issued ID pursuant to its regulations." COL 15. This mischaracterized Respondents' adherence to section 206(b) of the Election Code (25 P.S. § 2626(b)), which specifies that DOT will, "*[n]otwithstanding the provisions of 75 Pa.C.S. § 1510(b)* . . . issue an identification card *described in* 75 Pa.C.S. § 1510 at no cost to any registered elector who signs an oath or affirmation." 25 P.S. § 2626(b) (emphasis added). The difference between the trial judge's "in accordance with" and the actual text of the statute ("notwithstanding the provisions of") is significant in two ways.

First, because exceptions are expressly contemplated by the statute – and because the remainder of section 206(b) of the Election Code calls for "a" card "described" in 75 Pa.C.S. § 1510(b) – it is clear that the General Assembly had no intention of affecting DOT's obligations relative to the secure IDs that are otherwise produced pursuant to 75 Pa.C.S. § 1510(b). DOT's secure ID satisfies Transportation Safety Administration standards, and one has to wonder how the people who rely on the security of their driver's license to travel and transact business would feel if they could no longer use their license because of the trial judge's conclusion that the documentation required is disenfranchising. COL 31.[15]

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[14] That regulation requires documentation to verify the individual's date of birth and identity. *See* 67 Pa. Code § 91.4. It was readopted and promulgated in 1988, and thus must be assumed to have been within the contemplation of the General Assembly at the time it enacted Act 18. *White Deer Twp. v. Napp*, 603 Pa. 562, 590, 985 A.2d 745, 762 (2009).

[15] The trial judge directed some of his findings against DOT and 75 Pa.C.S. § 1510 directly. It was error for the trial judge to do so. *Commonwealth v. Alessi*, 119 Pa. Cmwlth. 160, 163-64, 546 A.2d 157, 158-59 (1988) (refusing to find Department of Public Welfare in contempt for failing to comply with an order that was directed against it while a non-party); *Consulting Eng'rs Council v. State Architects Licensure Bd.*, 522 Pa. 204, 211-12, 560 A.2d 1375, 1378-79 (1989) (where challenge was brought to the validity of the regulation, the question whether the statute itself was too narrow was not before the trial judge).

Second, as the Supreme Court explained it, the "notwithstanding" proviso found in Section 206(b) of the Election Code "relat[es] to the issuance *and* content of the cards." *Applewhite II*, 54 A.3d at 3 (emphasis added). In other words, it is apparent that the General Assembly intended to remove whatever requirements in 75 Pa.C.S. § 1510(b) stand in the way of liberal access to such a card.

The Supreme Court recently reached a similar conclusion construing the "notwithstanding" language in 18 Pa.C.S. § 7508(a)(1). *See Commonwealth v. Ramos*, No. 11 MAP 2013, 2013 Pa. LEXIS 3246 (Dec. 27, 2013). In the sentencing statute at issue in *Ramos*, the "notwithstanding" clause led to what looked like an odd sentencing requirement that meant that both the minimum and maximum sentences were five years – and the trial judge had accordingly entered a sentence of five years. On appeal, the Supreme Court looked at whether the natural reading of the exception would "further the legislative intent." *Id*. at *15. Finding that it would, the Supreme Court recognized that the seeming incongruity of having a minimum and maximum sentence be the same was of "no constitutional moment." *Id*. Under general principles of statutory construction, the later-enacted special provisions trumped the otherwise-applicable general provision. *Id*. at *18-19.

In the same way here, 75 Pa.C.S. § 1510(b) sets forth the criteria for issuing a secure form of identification, acceptable to the federal Transportation Security Administration, something that – to the extent it could be harmonized with the need to provide free and readily accessible proof of identification to electors – furthered the legislative intent of protecting the integrity (and the perception of the integrity) of elections and ensuring that electors were the ones who were casting votes. In order to balance those goals, DOT retained many of the features (including facial recognition software – *see* Op. at 7 n.11) of a card conventionally issued under

75 Pa.C.S. § 1510(b), and eliminated only those features that are inconsistent with the specific requirements in section 206(b) of the Election Code, 25 P.S. § 2626(b). *Cf. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (noting that "it is for agencies, not courts, to fill statutory gaps" because "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's"). In order to protect the security of the secure IDs produced pursuant to 75 Pa.C.S. § 1510(b), DOT needed to produce a card that had a "look" and "name" that could not be mistaken as the secure ID.

Given that the Department of State is the agency most closely identified with election administration, it made sense that the Department of State would lend its name to a card to be used for voting purposes, but it is by no means essential that it be called a DOS ID. It could be a neon green card called "PA VOTES."[16] Similarly, it is possible that the affirmation – which affirms that a person is registered *or has applied to register to vote* – could be rewritten to render the verification process superfluous. How far the "notwithstanding" language can reach is a question of statutory construction that this Court has the authority to determine. *Strawn v. DOT*, 609 Pa. 482, 493-94, 17 A.3d 320, 327 (2011) (emphasizing the need 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).

This Court could thus construe the "notwithstanding" clause to extend further than the agencies have and provide guidance as to whatever change is required – whether it be changing the title of the card, or the affirmation, or some other way in which the statute is carried out – and it can do so within the express authorization of the statute. By finding that the statute was

[16] At one point, the trial judge recognized that there is nothing magical about the label on the card; but he did not acknowledge the implications of that recognition. Op. at 18.

facially invalid because DOT could not create a free, no documentation required, voting card "in accordance with" 75 Pa.C.S. § 1510(b), the trial judge read the statute too rigidly. Indeed, the trial judge went further, declaring the statute invalid upon finding fault with the way the agencies read and implemented the challenged provision.[17]

D. The Trial Judge Improperly Relied on a Record That Was Not Made.

Certainly any of the above errors – the conflation of flawed implementation with constitutional invalidity, the application of the wrong standard of scrutiny, and the failure to apply statutory construction principles – would warrant reversing the award of declaratory and injunctive relief. But these errors were interwoven with and magnified by the trial judge's view of the record as entirely open to his construction.

For example, there were three areas where Petitioners bore the burden of proof, but the trial judge either transferred the burden to Respondents or excused Petitioners' burden: (1) standing; (2) the record before the General Assembly; and (3) the extent to which persons lack statutory ID and need it. As a corollary, there were findings from the earlier phases of the case that should have been given weight but were not.

1. Standing

The right to vote is a personal right that can be exercised only individually. *Erfer*, 568 Pa. at 136, 794 A.2d at 330. In his opinion, the trial judge found that

> [t]his litigation implicates the violation of the right to vote protected in the Pennsylvania Constitution. Both the [League of Women Voters ("LWV")] and the [National Association for the Advancement of Colored People, Pennsylvania State Conference ("NAACP")] are organizations concerned with protecting the

[17] It is ironic that even though the trial judge appeared to acknowledge that a photo ID requirement could be constitutional, *see* Op. at 45 n.30, he nonetheless enjoined that and other Act 18 provisions that "pertain[] to in-person voting requirements," *see* Order & Verdict. Had the trial judge truly honored his recognition that requiring photo ID is not unconstitutional, he would not have targeted his Order & Verdict to precisely those provisions.

> right to vote of Pennsylvanians and maximize their opportunities to exercise that right. [Homeless Advocacy Project ("HAP")] also educates its clients as to voting criteria and has an interest in assisting its low-income clients to obtain compliant photo ID.

Op. at 15.

Respondents moved for nonsuit because these Petitioners did not introduce sufficient evidence of standing at the permanent injunction hearing. Indeed, no one from HAP or NAACP even testified. The trial judge's initial response was that Respondents had waived their objection to organizational standing by raising it in their Answer with New Matter rather than by preliminary objection. *Id.* at 14. But the cases on which the trial judge relied simply look to Pa.R.C.P. No. 1032, which states that a "party waives all defenses and objections which are not presented *either by* preliminary objection, *answer* or reply." Pa.R.C.P. No. 1032(a) (emphasis added). The defense was pleaded and was not waived. Answer with New Matter to Am. Pet. for Review at ¶¶ 223-25.

The organizational Petitioners are not electors and, therefore, under *Erfer* they are not aggrieved by Act 18. *See* 568 Pa. at 135, 794 A.2d at 329. Because their expenditures were made without being traceable to harm that the statute causes to their right to vote, the organizational Petitioners cannot prosecute these claims. *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 133 S. Ct. 1138, 1151 (2013) ("In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). In that regard, this case is very different from the case relied on by the trial judge, *Washington v. Dep't of Pub. Welfare*, 71 A.3d 1070, 1084 (Pa. Cmwlth. 2013) ("The association's interest is immediate and direct because Article XIV-B of the Public Welfare Code jeopardizes its funding by allowing counties to divert funds appropriated for mental health services to other programs."). Moreover, there was no testimony on which

member standing could be based, even if an alternate basis for standing could overcome the Supreme Court's holding in *Erfer*. *Cf*. Op. at 14.

The two individual Petitioners also failed to establish that the law injured them. They filed an Amended Petition for Review in February 2013; and in the process, they changed their personal averments, with the effect that the amendment virtually withdrew their original Petition for Review. *See Vetenshtein v. City of Philadelphia*, 755 A.2d 62, 67 (Pa. Cmwlth. 2000). Lee, for example, averred:

> Ms. Lee still does not have a birth certificate so cannot qualify to receive a PennDOT ID. She is, however, eligible to obtain a DOS ID since she allegedly does not need any documents to do so. Presently, Ms. Lee does not have either a DOS ID or any other ID allowable under the Photo ID Law. The 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.

Likewise, Bookler changed her averments to say:

> Although Mrs. Bookler's assisted-living facility could issue photo IDs to its residents, upon information and belief, it is not doing so. In order to get photo ID that would be acceptable under the Photo ID Law, she would have to endure a trip to the nearest PennDOT Driver's License Center about ten miles from her home which would require to her to arrange transportation and would be a strenuous physical burden for her.

Id. at ¶ 48. Indeed, Bookler affirmatively pleaded that she had voted by absentee ballot in the November 6, 2012 General Election, which was exactly what Judge Simpson predicted would happen when he observed her earlier that year. *Id.* at ¶ 49; *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *14-16 ("Ms. Bookler, who is 93 years old and lives in a senior living center, was too infirm to attend trial in person; therefore, her videotaped testimony was offered at trial. She appeared very frail and tremulous. Her testimony needed to be stopped at one point, and she obviously struggled to answer some questions. . . . I thought it highly likely that these individuals, and others with similar obvious, profound infirmities, would qualify for absentee

voting. Indeed, I would be shocked if that were not the case here."). Although other witnesses appeared at trial by video, neither Lee nor Bookler did. Respondents, however, presented evidence at trial that Bookler's care facility was issuing compliant ID. H.T. (Sweeney) at 1826:23-1827:3.

Despite Bookler's pleading, the uncontradicted evidence, and Judge Simpson's observations, Judge McGinley concluded that there was "no competent evidence that Petitioner Bookler resides in a licensed care facility that issues a compliant photo ID that would obviate the necessity of her traveling to, and waiting in customer lines at a PennDOT location." FOF 31. This was obviously wrong, as the undisputed record shows. *See Kuznik*, 588 Pa. at 148, 902 A.2d at 507 (finding legal error where trial judge fails to make an uncontradicted finding of fact). Without a demonstration of harm traceable to Act 18's in-person voting provisions, Bookler cannot sustain her claim. *Smith v. Commonwealth*, No. 260 M.D. 2008, 2009 Pa. Commw. Unpub. LEXIS 563, at *9-12 & n.5 (Jan. 13, 2009) (*per curiam*) (finding petitioners lacked standing because they would not be affected by challenged amendment), *aff'd*, 605 Pa. 457, 991 A.2d 306, *cert. denied sub nom*., 131 S. Ct. 90 (2010).

Lee likewise did not testify, and she thus failed to establish that there has been no opportunity in the year since the Amended Petition was filed to travel to a DOT location, or to explain how the need to make time – for she does not assert any other impediment – amounts to any "discernable adverse effect to an interest other than that of the general citizenry." *Cozen O'Connor v. City of Phila. Bd. of Ethics*, 608 Pa. 570, 579, 13 A.3d 464, 469 (2011); *cf. In re Nomination Paper of Nader*, 588 Pa. 450, 465, 905 A.2d 450, 459 (2006) (charging of costs for invalid petition signatures does not impinge on constitutional rights and is a reasonable burden "rationally related to the interest of the Commonwealth in ensuring honest and fair elections").

This was not a matter of re-proving standing; the circumstances and the allegations had changed, and Petitioners needed to present evidence proving the new allegations. *Cf. Kauffman v. Osser*, 441 Pa. 150, 155, 271 A.2d 236, 239 (1970) ("Questions of standing and justiciable interest arise not only in connection with the institution of litigation at the *nisi prius* level but also in connection with the right to challenge, at the appellate level, determinations made by subordinate courts.").

In short, although given a full and fair hearing, neither individual Petitioner showed or even attempted to show aggrievement. It was Petitioners' burden to establish a record that supports standing. *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)) ("Although the Commission members allege that they are property owners in Monroeville and, therefore, presumably have a direct interest in Council's action, we have found nothing in the record which would establish that their individual interests were adversely affected by the grant of the conditional use application.").

In his opinion, the trial judge reframed the harm in order to state an interest that anyone – even someone who does not provide any testimony – can satisfy, first reducing the need for certainty to "may" and then defining the interest as "[i]ndividual Petitioners are unable to exercise their right to vote without obtaining a compliant photo ID." *See* Op. at 13-14. That is certainly not an interest that is "greater than that of any other citizen," *Spahn v. Zoning Bd. of Adjustment*, 602 Pa. 83, 116, 977 A.2d 1132, 1151-52 (2009), and (as discussed above) cannot be reconciled with the holdings of the Supreme Court and this Court previously that the harm was *not* the request to show ID at the polling place, *Applewhite II*, 54 A.3d at 4-5; *Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at *8-9; *Applewhite VI*, slip op. at 7.

Moreover, it is not clear why the trial judge observed that mootness – which asks whether a person who is aggrieved must nonetheless stop prosecuting a case if there is nothing further to gain – and its attendant exception for important issues that evade review, substitutes for the showing of aggrievement in the first instance. Op. at 14 n.16. There is no basis in Pennsylvania law to substitute mootness for standing; they are distinct doctrines of Pennsylvania's case-or-controversy and justiciability jurisprudence. *See Rendell v. Pa. State Ethics Comm'n*, 603 Pa. 292, 307-08, 983 A.2d 708, 717 (2009).

2. Law of the Case and Coordinate Jurisdiction

Not only did the trial judge excuse Petitioners' burden, he also granted them a blank slate. It is apparent from his decision that the judge believed he was free to review *de novo* the record from earlier phases of this litigation, notwithstanding prior credibility findings and other determinations made by Judge Simpson and/or the Supreme Court. That was error.

In his concurrence in *Ario v. Reliance Ins. Co*., Chief Justice Castille concluded with this jurisprudential truism: "The Commonwealth Court's obligation to rule consistently in similarly situated cases is an institutional imperative that must be taken seriously, both by single judges and by the Commonwealth Court as a whole." 602 Pa. 490, 514, 980 A.2d 588, 602 (2009) (Castille, C.J., concurring). He found that obligation to be consistent with not only *stare decisis* but the entire "family" of the law of the case doctrine, including both the traditional principle of law of the case and the related coordinate jurisdiction rule. *Id*. at 507-14, 980 A.2d at 598-602. All of these doctrines promote certainty and stability. *Id*. at 507, 980 A.2d at 598.

As a result of these principles, a trial judge is not free to revisit issues that have been resolved previously unless (a) there is new evidence or authority, such as occurs when a trial judge revisits a preliminary objection at summary judgment; or (b) there is both a patent error

and injustice that is apparent to a trial judge at a later stage of the proceedings. *In re De Facto Condemnation & Taking of Lands of WFB Assocs., L.P.*, 588 Pa. 242, 268, 272-74, 903 A.2d 1192, 1207-08, 1210-11 (2006) (setting forth the rule and exceptions and applying it to an evidentiary ruling on highest and best use testimony). Whether an exception to the coordinate jurisdiction rule should be applied is a question of law. *Zane v. Friends Hosp.*, 575 Pa. 236, 245 n.8, 836 A.2d 25, 30 n.8 (2003). If there is no exception – and certainly none has been asserted here – it is an abuse of discretion *per se* to disregard what a prior court has done. *See Commonwealth v. Brown*, 485 Pa. 368, 370, 402 A.2d 1007, 1008 (1979).

Judge McGinley was not free to ignore the necessary implications of the Supreme Court's decision.[18] The Supreme Court understood the primary questions before it on the interlocutory appeal as twofold: Is the statute fatally flawed; and, if not, is a preliminary injunction nonetheless necessary because the implementation of the statute at that juncture could otherwise violate constitutional rights? The Supreme Court's answer to these questions is apparent both from what it did and what it did not do.

The Supreme Court did not reverse outright, as it would have if the statute had been fatally flawed by its text. *Kremer v. Grant*, 529 Pa. 602, 613, 606 A.2d 433, 439 (1992) (recognizing, as trial judge was affirming a grant of a preliminary injunction, that the consequences of non-compliance with the amendment process was an incurable defect that made further proceedings unnecessary); *Office of the Lieutenant Governor v. Mohn*, 67 A.3d 123, 138 (Pa. Cmwlth. 2013) ("Importantly, for the analysis of this case, the Supreme Court did not accept the [Office of Open Record]'s argument that Duncan had already held that home addresses are

[18] In that regard, it is telling that Judge McGinley's authority for the lack of a compelling state interest is not the majority opinion, but Justice McCaffery's dissent. Op. at 38.

not protected . . . ; had it done so, there arguably would have been no reason to remand the case for further proceedings.") (Cohn Jubelirer, J., concurring).

Thus, the Supreme Court proceeded to the second question: Given that "counsel for [Petitioners] acknowledged that there is no constitutional impediment to the Commonwealth's implementation of a voter identification requirement, at least in the abstract," the "gravamen of their challenge at this juncture lies *solely in the implementation*." *Applewhite II*, 54 A.3d at 4-5 (emphasis added). The remand was necessary because even though Judge Simpson's findings about those testifying were not questioned by the Supreme Court, his conclusion that a preliminary injunction was not warranted was based on his prediction that the law would be efficacious, not whether during the implementation process there could be "constitutional impediments" that would "dissipate" and "moot" the constitutional concerns over time. *Id*. at 5. As Judge Simpson recognized, these statements also belied 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.

But rather than start – as Judge Simpson did on remand – from the launching point of the Supreme Court's remand order and opinion, the trial judge viewed the underlying question – can Act 18 require voters to show photo identification at the polls? – as an open question, and considered himself free to use any evidence he wished *de novo* to answer that question through the prism of whether Petitioners had demonstrated that there were burdens on the franchise as a result of Respondents' implementation of the statute.[19] *See* Op. at 44 ("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,

[19] At one point Judge McGinley had seen the question the same way that Judge Simpson and the Supreme Court had, however. *Applewhite VI*, slip op. at 7.

does not assure the franchise, it *de facto* denies it."); *id.* at 37 ("These 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)).

The coordinate jurisdiction rule is implicated in the many instances in which Judge McGinley used testimony from the preliminary injunction hearing but answered the questions based *on that testimony* differently than Judge Simpson had. *Compare* FOF 246-48 (Lorraine Minnite), *with Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *85 (Respondents' "asserted interests are relevant, neutral, and non-discriminatory justifications for Act 18"). *See also* FOF 20-24, 117, 177, 215, 238 (accepting as credible testimony not heard and crediting Veronica Ludt and Michelle Levy, among others, none of whom attended the permanent injunction hearing). In addition, Judge McGinley faulted Respondents' education efforts prior to the November 2012 General Election even though Judge Simpson had repeatedly rejected Petitioners' complaints. *Compare* FOF 192, 197, *with Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at *8-9, *and Applewhite IV*, 2012 Pa. Commw. Unpub. LEXIS 856, at *5-10. Judge McGinley also revisited Judge Simpson's findings and implicitly questioned whether Respondents' witnesses were acting in good faith throughout the implementation process. *Compare, e.g.*, Op. at 29, *and* FOF 40, 126, 152, 205, 214, 219, *with, e.g.*, *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *12, *13 & n.16, *20, *Applewhite II*, 54 A.3d at 5, *and Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at *3-5.

Indeed, Petitioners' attempted rehabilitation of Matthew Barreto – not by having Barreto update his survey, or even by having him provide further testimony – but by having someone else read Judge Simpson's opinion and say that Judge Simpson's concerns were not well-

founded – implicates both the law of the case and the coordinate jurisdiction rule. *See, e.g.*, H.T. (Marker) at 393:4-405:17, 410:15-412:6; COL 11 ("The Court concludes Dr. Marker's opinion rehabilitated the testimony of Professor Matthew Barreto as to his survey methodology."). But Judge Simpson's findings started with *credibility* – based both on demeanor and bias. *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *16-17 ("For the most part, however, [Barreto's] opinions were not credible or were given only little weight. There were numerous reasons for this, including demeanor, bias (*see* [P-16]), and lack of knowledge of Pennsylvania case law regarding name conformity.").[20] Marker's testimony attacked Judge Simpson's credibility assessment and did not rehabilitate Barreto.

But this supposed rehabilitation was foreclosed by the Supreme Court appeal as well. Petitioners raised several questions in their interlocutory appeal, including, *inter alia*, whether there was substantial evidence to justify rejecting Petitioners' survey expert, 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 directly: The question was before the Court and was not open for reconsideration. Accordingly, the rehabilitation of Barreto is barred by the law of the case as well as the coordinate jurisdiction doctrine. Op. at 38; *Starr*, 541 Pa. at 577, 664 A.2d at 1332 ("The determination of those questions which led to its appellate judgment constitute a 'final' adjudication which may not be lightly disturbed in later stages of the litigation."); *Trizechahn Gateway LLC v. Titus*, 601 Pa. 637, 646, 976 A.2d 474, 479 (2009) ("As a threshold matter, the law of this case, as it comes to

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[20] This characterized Dr. Marker's testimony as well. *See, e.g.*, H.T. (Marker) at 421:10-422:11 (explaining that all he knew of the statute was what was in the parts of Judge Simpson's opinion he was asked to address); *id.* at 427:1-428:2 (no way to know what the impact was when Barreto designed his questions so that they asked for "official" identification instead of tracking the language of Act 18).

this Court, is that, if there is any release from individual liability, such release may only apply to Arbogast and Wettach. In the Superior Court, Arbogast argued that Paragraph 28(i) also released all of the remaining partners from individual liability. . . .The Superior Court rejected this contention, and we declined to review the issue." (Citation and footnote omitted)).

Barreto administered a survey shortly after the Voter ID law was enacted, asking about various forms of ID – although putting extra-statutory labels on them by asking people whether they had "official" ID. H.T. (Marker) at 426:17-428:6. This was the only evidence Petitioners put forth about the availability of alternate forms of ID. Clearly, it was important enough that they raised Judge Simpson's rejection of the evidence on interlocutory appeal. And because it was important, and they could not risk bringing back Barreto, they hired someone to vouch for Barreto and the weight of his study.

But the first – and only salient – finding is that Barreto and his work is not credible. Because Petitioners put forth no other evidence of the availability of other forms of ID – and never factored in the availability of absentee ballots, the indigency provision, or the other safety nets in the statute – they have failed to satisfy their burden.

3. The Record Before the General Assembly.

> All legislative enactments, as well as the manner in which they are enacted, enjoy a presumption that they do not violate the Pennsylvania Constitution. Accordingly, a party that challenges the constitutionality of a statute bears a heavy burden of persuasion to overcome this presumption.

Washington, 71 A.3d at 1077 (citations omitted). As a corollary, it is "[t]he legislature [that] must make the basic policy choices, but it can 'impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions' of the statute." *Id.* at 1088 (citations omitted). Accordingly, the measure of whether the General Assembly acted reasonably is what *it* heard and decided.

Prior to the permanent injunction hearing, Respondents filed two motions *in limine* to protect the record from collateral attacks on the actual record that was considered by the General Assembly when it was making its decisions on Act 18. *See* 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; Motion *in Limine* to Exclude Evidence or Argument on the Legislative Process for Act 18. The trial judge denied both and then engaged in his own version of a legislative analysis.

As it turned out, Petitioners chose not to introduce any evidence at the permanent injunction hearing from their purported "expert" on fraud, Lorraine Minnite. Minnite has a view on what and why people are concerned about fraud – and the perceptions of fraud – tainting the electoral process, but it was a view that was rejected by the General Assembly.

It follows that when the trial judge accorded more weight to Minnite's testimony than Judge Simpson had, Judge McGinley undermined not only Judge Simpson's assessment of Minnite but also the General Assembly's assessment of the evidence that it had before it when it deliberated on and enacted Act 18. The trial judge was not free to admit a collateral attack on the testimony that the General Assembly heard.

It also follows that the Court was not free to weigh only the personal knowledge of *Respondents* in evaluating the governmental interests at issue. And yet, that was precisely what the trial judge did here. He credited testimony from the preliminary injunction hearing that was viewed as having little utility[21] by the judge who heard it[22] as rendering the legislative purpose

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[21] Although Minnite testified at the preliminary injunction hearing, Judge Simpson did not give weight to her testimony because "the absence of proof of in-person voter fraud in Pennsylvania is not by itself dispositive." *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *86.

speculative and entitled to no weight. Op. at 38. He credited Minnite in finding that there was only "a vague concern about voter fraud" that cannot be a compelling interest; and he faulted Respondents for not placing evidence of voter fraud in the record, finding that, to the contrary, Respondents had stipulated that the reason for the statute was not voter fraud. *Id*. In fact, the rationale underlying the stipulation incorporated an interrogatory response, which stated:

> [R]equiring a photo ID improves the security and integrity of elections in Pennsylvania in a manner that is in keeping with the photo ID requirements of many other secure institutions and processes. . . . Requiring a photo ID is one way to ensure that every elector who presents himself to vote at a polling place is in fact a registered elector and the person that he purports to be, and to ensure that the public has confidence in the electoral process. The requirement of a photo ID is a tool to detect and deter voter fraud.

P-46.

What Judge McGinley overlooked in reaching those conclusions is that the record that is meaningful here is the record before the ***General Assembly***. Five persons testified before the House State Government Committee about fraud and about the threat to electoral integrity that it poses. Minnite was not among those testifying. Based upon the record before the General Assembly, that body concluded that the risk of fraud and the threat to the integrity of the electoral process warranted Act 18. *See* Exhibits to the 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. The trial judge had no basis for substituting his personal assessment of the risk of fraud for the assessment made by the General Assembly.

As the Supreme Court explained in *Glenn Johnston, Inc. v. Department of Revenue*, trial judges cannot

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[22] The coordinate jurisdiction principles that were violated here are discussed *supra* in Section III.D.2.

> reassess the fiscal and other policy determinations made by the legislature in the course of its drafting this statute. Such policy determinations, however, are within the exclusive purview of the legislature, and it would be a gross violation of the separation of powers doctrine for us to intrude into that arena.

556 Pa. 22, 30, 726 A.2d 384, 388 (1999).

As Respondents explained in their Supplemental Interrogatory Response, the legislative purpose was set by the General Assembly based on the record that was before it:

> Based on their reading of the Photo ID Law and the public record of legislative history leading to the enactment of the Photo ID Law (including information received at legislative hearings), Respondents do contend that the *General Assembly's* principal public purpose in enacting the law is this: To provide a protective measure well-designed to deter, detect and prevent individuals from entering a polling place on Election Day, misrepresenting themselves using the false name of a registered elector in that election district, forging the signature of the registered elector, proceeding to cast a vote using the election machinery in use at the polling place, and thereby fraudulently casting a ballot in that election. Respondents understand the General Assembly to believe that the process prescribed by the Pennsylvania Election Code without the Photo ID Law amendment does not contain protections that are reliably designed to deter, detect, or prevent an individual from committing in-person voter fraud at the polling place. The General Assembly had before it reports it could and apparently did credit that discussed as a general matter the probable and potential occurrence of such fraud and the consequential corrosive effects upon the integrity of elections. Respondents agree with the General Assembly's *legislative* judgment that the Photo ID on its face is a much more protective tool for deterring and preventing such in-person voter fraud – whenever and wherever it *might* occur in a *future* election – than the system in place before the Photo ID Law was enacted.
>
> In addition, from the public record of legislative history leading to the enactment of the Photo ID Law (including information received at legislative hearings), Respondents do contend that the *General Assembly* had concerns about *public confidence* in the integrity of the election system and that *citizens of the Commonwealth* (as well as members of the General Assembly) do not have confidence that the voting system, absent a Photo ID Law, includes adequate measures to reliably assure that those who cast ballots in the Commonwealth's polling places are who they say they are. Respondents do contend that the *General Assembly* decided to enact the Photo ID Law in part for the purpose of assuring the citizens of the Commonwealth that all who cast ballots at the polling places are properly registered electors and not imposters casting illegal votes in the name of another person. Respondents also contend that the *General Assembly* believes that any occurrence of voter fraud wrongfully dilutes votes that are lawfully cast.

> Though Respondents currently have no evidence to present to the court demonstrating *actual incidents* of in-person voter impersonation fraud that have occurred in Commonwealth elections of the past, they agree with the indisputable judgment of the General Assembly that fraud of this nature would be much more difficult to perpetrate *undetected* were the Photo ID Law in effect. Moreover, Respondents agree with the conclusion of the General Assembly (as the principal policymaking body of the Commonwealth) that the confidence of the citizens of the Commonwealth in the integrity of elections is a public interest of the highest order and that that confidence will be substantially elevated by the Photo ID Law.

P-1618.

As well, of course, the U.S. Supreme Court did not measure the importance of Indiana's interest by the magnitude of the fraud:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, ***the propriety of doing so is perfectly clear***.

Marion Cnty., 553 U.S. at 196 (lead plurality opinion) (emphasis added).

Similarly, as our Supreme Court recognized in *DePaul v. Commonwealth*, while "[t]he importance of the governmental interest in preventing [corruption of elected representatives through the creation of political debts] has never been doubted[,] . . . preventing the perception of corruption is an equally compelling state interest." 600 Pa. 573, 618, 969 A.2d 536, 564 (2009) (citation omitted). In the same way, preventing the perception of fraud and a lack of integrity in elections is as compelling as the prevention of the fraud itself.

To be sure, Minnite may have since concluded that those who shared her viewpoint were less persuasive to the General Assembly than she herself would have been, but that is immaterial. She does not get to come to court to present what should have been (and was by others)

presented to the General Assembly; and it is not the role of the judiciary to accommodate her collateral attack.

4. There Were Data Before the General Assembly – and the Court – That Were Improperly Discounted and Disregarded.

The trial judge found that a comparison of datasets yielded a list of somewhere "between 259,000 and 511,000 registered voters who lack compliant photo ID," Op. at 22, but also found only ***four*** persons who "would not have been able to cast regular ballots" at the November 2012 General Election, *id.* at 43. The way the number changed was the subject of a motion *in limine* at trial.

Petitioners' expert, Bernard Siskin – who had been granted access to the highly confidential data but was not allowed to share it – provided publicly available information based upon his computer analysis of confidential data. The attorneys and their agents then called the list of possible names to verify whether the people they called did in fact lack compliant ID. Given the privacy protections attached to the data Siskin used, as well as the terms of the Protective Order governing the secure DOT data, Respondents moved to exclude the six witnesses (only four of whom the trial judge credited) at trial. *See Advancement Project v. Pa. Dep't of Transp*., 60 A.3d 891, 898 (Pa. Cmwlth. 2013) (concluding that the fact of existence and non-existence of driver's license or identification card records is not a public record and is not subject to disclosure). The trial judge denied the motion without explanation.

Those four witnesses are the only ones the trial judge found specifically would have been disenfranchised had the law been in effect in November 2012.[23] Op. at 43.

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[23] The four all testified about limited mobility and about the fact that they depended upon others or, in one instance, took taxis, when they left their homes. But none testified that it was not possible to go to a DOT driver's license center. *See* H.T. (Baker) at 73:9-13; H.T. (Pripstein) at 81:14-16, 89:14-90:5, 93:23-94:7, 106:14-107:21; P-1427 (Howell) at 16:2-25, 18:13-21:13, 33:15-34:6, 35:10-15; P-1430a (Norton) at 14:8-15:9, 22:4-14, 31:16-32:9.

It was error to admit the witnesses' testimony, because their status with DOT was confidential data and was the only basis for their being contacted. *Advancement Project*, 60 A.3d at 898. Instead, the trial judge should have accorded significance only to the fact that after Petitioners contacted untold numbers of the persons on Siskin's list, they found only a handful who could offer possibly relevant testimony at trial – only four of whom the Court credited. That in itself showed the limited value of Siskin's analysis. Approximately 250,000 persons with data reported in SURE could not be matched to a corresponding entry in the DOT database, and roughly the same number had matches but with an expired secure DOT ID. Those data do not, in other words, provide the number (or a reliable estimate) of disenfranchised individuals – a fundamentally different question from how accurately Siskin's computer could identify what should be matching entries. That information cannot suffice to show whether any given elector is disenfranchised, because the fact that, as of a specific date, there is no perfect match of name, address, and other private identifying data between two databases cannot tell whether a person still (1) is alive, (2) in Pennsylvania, (3) voting in person, and (4) without compliant ID.

Petitioners – and the trial judge – must have recognized the inherent unreliability of those numbers because they invoked additional estimates and recited the phrase, "hundreds of thousands," rather than a specific number of persons – except for the four that testified and were credited – in an attempt to demonstrate facial invalidity.[24] *Cf. Sameric Corp. of Mkt. St. v. Goss*,

[24] This is not to say that, absent privacy protections, the data could not have been used *as a starting point*. Petitioners' experts could have taken the data as a starting point and then tested to see how many of the mismatches or expired IDs represented actual persons who were living in Pennsylvania and voting in person without ID necessary to do so. And, in fact, that was precisely what Petitioners did to find witnesses; they set in place an elaborate charade with their expert so that *they* could *identify and locate* persons potentially affected by the statute, despite the Protective Order and statutory protections of the fact (or not) of a current DOT ID. Once those persons were identified and located and contacted, the 511,000 that the trial judge views as lacking current compliant ID became only four witnesses whom the trial judge found would have

448 Pa. 497, 501, 295 A.2d 277, 280 (1972) ("While the loss of 'goodwill' may be a proper subject for injunctive relief, the proof of injury offered here is too speculative and conjectural to support a preliminary injunction."). But the trial judge's effort to resolve the unreliability – *i.e.*, that everyone who looks at the number of persons lacking secure DOT ID comes up with similar numbers – is flawed.[25]

Moreover, the trial judge ignored – or, worse, blamed Respondents for – the inherent unreliability of the underlying data on which Petitioners relied. Op. at 26-27. When the SURE database was cross-referenced with the DOT database in 2012 – the exercise that led to the awareness that the two databases had information entered differently and did not correspond precisely, and the exercise that Siskin tried to "do better" – the trial judge found the data unreliable for verification purposes but found it reliable as a measure of disenfranchisement. *Id.* at 26; FOF 92, 94, 98, 99, 142.

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been unable to vote if Act 18 had been in place during the November 2012 election. Op. at 43. Petitioners would argue that the witnesses who testified at trial were just examples. But they were instead a devastating indictment of Petitioners' constant rhetoric – adopted by the trial judge – that "hundreds of thousands" of qualified electors lack compliant ID. The trial judge never reconciled the unexplained decrease in the numbers between computer records and reality, nor the implications of the privacy violations of an unknown number of persons that enabled Petitioners to present testimony from six witnesses (four of whom the trial judge credited) at trial.

[25] There are two sources that the trial judge looked to that were not based on estimates of the numbers with current secure DOT ID. At FOF 57-58, the trial judge references a comment by Secretary Aichele during a hearing before the Senate Appropriations Committee, in which she referenced an exit poll – which on its face said it was not reliable. The trial judge nonetheless took the percentage of Philadelphians who reported that they had not brought compliant ID to the polls and multiplied that by the population of Pennsylvania to estimate that 192,000 persons statewide came to the polls without compliant photo ID. This is precisely the problem with substituting numbers for people and why the lack of testimony from anyone who truly could not get to DOT and was not otherwise provided for by the statute is the most compelling evidence in the record. The trial judge also relies on Barreto's June 2012 survey – which, as discussed in Section III.D.2, *supra*, had already been found not to be credible. Everyone else was looking at DOT data.

Siskin's analysis was no more reliable. He testified that he found a 14 percent error rate of false negatives and a 14 percent error rate of false positives, which he portrayed as netting out to no error whatsoever. H.T. (Siskin) at 154:4-162:18, 162:19-25; P-2096e. But that ignores the fact that he took a database at a moment in time, and the program he created to match the records was unreliable 28 percent of the time. Across almost 10 million records, one simply cannot conclude that any results coming from the matching process are reliable.[26] This may be why, when the Department of State did its match in 2012, and followed up with letters to every registered elector whose record did not "match" to a DOT entry, 150,000 of the letters were returned because the individual was no longer at that address, and many other letters prompted calls and letters because the people who received them did, indeed, have DOT identification. H.T. (Royer) at 745:5-747:1; *see also* FOF 53-56.

Given that "a statute will not be found unconstitutional 'unless it clearly, palpably, and plainly violates the Constitution[,]' [and] [i]f there is any doubt as to whether a challenger has met this high burden, then [courts] will resolve that doubt in favor of the statute's constitutionality," the trial judge should have rejected Petitioners' claim, because *they* bore the burden to establish disenfranchisement. *See Commonwealth v. Neiman*, No. 74 MAP 2011, 2013 Pa. LEXIS 3018, at *20-21 (Dec. 16, 2013). But the trial judge did not hold them to that burden. Instead, he faulted Respondents for not proffering data *of their own* as to how many people lack compliant ID[27] – despite the fact that they had tried and found lacking the same method that

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[26] This was one reason why the Department of State did not redo its match; the other was that the match was undertaken for the primary purpose of supplying drivers' license and social security numbers to SURE. H.T. (Royer) at 743:15-744:6; H.T. (Marks) at 1640:9-22.

[27] The trial judge went even further, though, and faulted DOT for its security measures. Federal and state statutes and regulations establish DOT's obligations and the trial judge was not free to find fault with DOT's adherence to those directives. Indeed, the trial judge went so far as to find that DOT "disenfranchised" people. *Compare* Answer with New Matter to Am. Pet. for

Petitioners employed – and for not spending the two weeks from the time Petitioners served their expert report until the permanent injunction hearing began working with a different expert to replicate the same fruitless exercise. Op. at 22; FOF 64.[28]

Further exacerbating the improper burden-shifting, the trial judge gave no credence to the structure of the statute or the specific mechanisms introduced by the General Assembly to address persons who were less likely to be able to obtain secure DOT ID. The General Assembly surely reasoned that the vast majority of Pennsylvanians already had current and compliant secure DOT ID. The fact that 9.8 million do certainly would have reassured the General Assembly of the pervasiveness of the secure IDs.

At the same time that the trial judge accepted a number of "needs ID" persons that is too high, he rejected the ways that the statute addresses such needs. Thus, for example, the trial judge concluded that "alternate IDs are not guaranteed by the Voter ID Law," Op. at 23, that absentee provisions do not "apply to all electors lacking compliant ID," *id.* at 43, and that the indigency provision is difficult to envision, *id.* The indigency provisions and alternative IDs are discussed above, in Section III.C.1.

Review at ¶ 208, *Applewhite II*, 54 A.3d at 3 (characterizing DOT's conduct as "apparently [taken] for good reason"), *and Consulting Eng'rs Council*, 522 Pa. at 211-12, 560 A.2d at 1378-79 (where challenge was brought to the validity of the regulation, the question whether the statute itself was too narrow was not before the court), *with* COL 31 ("The rigorous documentation requirement PennDOT imposes for issuance of its secure IDs disenfranchises qualified electors, and is facially unconstitutional."). In fact, DOT is not a party to the litigation, and cannot be enjoined. *See* Order & Verdict (enjoining section 206(b) of the Election Code, which provides that DOT "shall issue"); *Alessi*, 119 Pa. Cmwlth. at 163-64, 546 A.2d at 158-59 (refusing to find Department of Public Welfare in contempt for failing to comply with an order that was directed against it while a non-party).

[28] The Court had allowed only one week for Respondents to prepare and serve rebuttal reports. Pretrial Hr'g Tr. at 51:24-52:8 (June 24, 2013).

Indeed, as he examined senior citizens, the trial judge acknowledged that there are only approximately 142,000 that lack current compliant DOT secure ID. FOF 232. But the trial judge discounted any significance if those persons are among the 130,000 living in a care facility authorized to issue ID, FOF 233; and he never considered whether they were likely to be among the 242,000 domestic civilians who voted absentee in the November 2012 General Election, R-233; H.T. (Myers) at 1304:10-1305:1; H.T. (O'Donnell) at 1257:13-23, 1296:5-7. Nor did the trial judge consider whether they had or could get yet another form of compliant ID, or were indigent. As Bookler demonstrated – and Judge Simpson found – the frailty that accompanies increasing age for many is addressed by the availability of absentee ballots. And yet, while the trial judge himself pointed out that the older a person is, the less likely the person is to have current and compliant DOT ID, FOF 230, he did not recognize that those electors are more likely to be the persons who will have difficulty getting to a polling place and so have long been provided for by the federal and state guarantees of absentee and alternative ballots.

E. The Scope of Relief is Unsustainable.

Even if the verdict were not set aside (but it should be), it should be modified and amended. As discussed above, the trial judge impermissibly conflated implementation with unconstitutionality. The fact remains that the trial judge made harsh findings about the ways Act 18 had been implemented. Indeed, the trial judge identified five potential impediments to constitutional enforcement of the statute, four of which he deemed to be "barriers to liberal access": exhaustion, documentation, verification, and location. Op. at 23.

None of these, separately or in combination, warrants the invalidation of the statute. *See Applewhite II*, 54 A.3d at 4 (not striking down the statute, but holding that the exhaustion requirement was contrary to legislative intent); *Applewhite IV*, 2012 Pa. Commw. Unpub. LEXIS

856, at *5-10 (refusing to reconsider and enjoin education efforts and rejecting specific challenges to the education program). Indeed, two of them – documentation[29] and exhaustion – were addressed through the implementation procedures, as amended on remand; the trial judge even acknowledged that the exhaustion process had been discontinued. Op. at 24.[30]

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. *Id.* at 21. Education is a pure question of implementation: Did the Department of State do what section 206(a) of the Election Code (25 P.S. § 2626(a)) instructed it to do? In answering this question, the trial judge 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. If, however, that decision was in error, or if the Department of State misconstrued its obligations under section 206(a) of the Election Code (25 P.S. § 2626(a)), a separate section of the statute, the remedy would be to enter an order construing the Secretary's statutory obligations, not an order invalidating the statute as unconstitutional. *See, e.g.*, *Applewhite II*, 54 A.3d at 4.

What is left are two current "barriers" identified by the trial judge as "verification" and "location." Both of these "barriers" are the result of statutory construction, and neither was

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[29] In this regard, the trial judge seemed to say that *DOS ID* applicants were required to produce two proofs of residency. *See* Op. at 24. It appears that this may be merely a typographical error, given that he recognized in the Findings of Fact that the residency requirement had been removed prior to the remand hearing, and that finding was based on uncontradicted evidence. FOF 131; H.T. (Marks) 563:6-564:5.

[30] The trial judge contended that documentation is still an issue because the DOS ID is invalid. Because, as discussed above, the DOS ID is valid, documentation is not a current issue.

identified by the Supreme Court as a hindrance to liberal access, even though both were in place at the time. *Id.* Respondents submit that they have implemented the statute as they 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). But qualified electors are only registered when their 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."). If Respondents have read section 206(b) of the Election Code erroneously – *i.e.*, that the Department of State should not require verification of registration status before issuance – the proper role of the judiciary is to advise Respondents of the appropriate construction, not to find an entirely different provision unconstitutional.

DOT undertakes the issuance of photo identification pursuant to 75 Pa.C.S. § 1510(b) largely, but not exclusively, through driver's license centers. At trial, however, Petitioners presented testimony of a person who had 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. But publicizing, or other similar steps, is again a question of instructing the agencies as to the proper way to construe their statutory obligations, not a basis for declaring an entire statutory provision invalid.

It is in the light of the above framework that the trial judge was to construe the statute and to determine whether (a) the General Assembly had crafted a constitutional statute; and (b) the Department of State was implementing it properly. *See Strawn*, 609 Pa. at 493-94, 17 A.3d at 327 (applying 1 Pa.C.S. § 1903 and emphasizing 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). If, after proper statutory construction is employed, the Court were to find that there were portions of the statute that were in fact constitutionally infirm, the Court is to take as narrow a scalpel as possible to excise only the constitutional infirmity. *See* 25 P.S. § 2603(a) ("The provisions of this act are severable, and if any article, section or clause of this act, or part thereof, is held to be unconstitutional, the decision shall not be construed to affect or invalidate any other provisions of this act, or the act as a whole. It is hereby declared as the legislative intent that this act would have been adopted had such unconstitutional provision not been included therein.").

If there are problems of implementation, by contrast, the remedy is to construe the statute and craft a corresponding injunction. Because such a remedy would be based on the construction of the statute, it does not implicate the fear that the trial judge expressed that the Court is being asked to *design* an alternative scheme to pass constitutional muster. Op. at 35 (quoting *Heller v. Frankston*, 504 Pa. 528, 537, 475 A.2d 1291, 1296 (1984)).

In this regard, it is notable that there is no point at which the trial judge evaluated all of the ways in which the General Assembly provided for citizens' needs: *i.e.*, 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 1973ee-6; 42 U.S.C. §§ 12101-12213; 42 U.S.C. §§ 1973ff to 1973ff-7, adequately address – as the General Assembly believed they would – the needs of those unable to travel to a DOT driver's license center.

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. Indeed, as Jonathan Marks, the Director of the Bureau of Commissions, Elections, and Legislation, explained at the permanent injunction hearing, in rural counties, polling places may be 5, 6, or 7 miles from a person's residence. H.T. (Marks) at 1626:24-1627:1; FOF 39 ("This Court credits the testimony of Marks and Oyler based on their knowledge and demeanor to the extent any testimony conflicts."). If it is not unconstitutional for a person to need transportation to vote – unless one votes absentee – how can it be unconstitutional to need transportation to demonstrate one's identity for voting purposes?

In that regard, it is important just how much legislation in Pennsylvania reflects the fact that as a society we respect how sensitive it is for individuals and families to determine what level of independence a person can maintain. Toward this end, the Department of Aging has extensive outreach, including through Area Agencies on Aging, to assist with decision-making and to assist with meeting the needs of the elderly at whatever level of care they choose. H.T. (O'Donnell) at 1259:18-1260:22, 1269:8-21. Kelly O'Donnell from the Department of Aging testified at the permanent injunction hearing that she received many complaints, but no complaints that ID was not available. *See id.* at 1267:13-1268:4. That testimony was

uncontradicted. And there are other agencies that provide services to the disabled, including, *inter alia*, the Department of Public Welfare and the Department of Labor & Industry. But in all of the testimony that Petitioners proffered, no one came forward to say that he or she had contacted any of these agencies to ask for help and had been turned down.

It is important to note that the trial judge here expressly rejected the premise that there is a shared responsibility between a government and its citizens. Op. at 31; *see also* FOF 122. Respondents respectfully submit that there is a critical distinction between a government that dedicates itself to serving the people, and a government whose role it is to make people subservient. We do not live in a society in which it is mandatory to vote; but we do live in a society in which there are legal protections – both federal and state – that are designed to ensure that everyone who wishes to vote can do so, whether in person, by absentee, or through alternative ballot.

In sum, the Supreme Court addressed specifically what to do when implementation of a statute is at issue: "[E]ven though the statute might validly be enforced at some time in the future[,] the most judicious remedy, in such a circumstance, is the entry of a preliminary injunction, which may moot further controversy as the constitutional impediments dissipate." *Applewhite II*, 54 A.3d at 5. 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 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).

In either case, because the trial judge improperly declared the entirety of the photo ID provisions in the statute unconstitutional, the Court should modify the verdict, either by

declaring only the precise parts of the statute that are found to be constitutionally infirm, or by issuing a tailored injunction to guide the agencies' actions.

IV. 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: February 10, 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' Brief in Support of 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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