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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 330 MD 2012

VIVIETTE APPLEWHITE; WILOLA SHINHOLSTER LEE; GLORIA CUTTINO; NADINE MARSH; BEA BOOKLER; JOYCE BLOCK; DEVRA MIREL ("ASHER") SCHOR; THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; PENNSYLVANIA STATE CONFERENCE; HOMELESS ADVOCACY PROJECT,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THOMAS W. CORBETT, IN HIS CAPACITY AS GOVERNOR; CAROL AICHELE, IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH,

Respondents.

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

After 20 days of evidence and argument, including a full trial on the merits, this Court permanently enjoined the photo ID requirement for in-person voters under the Act of March 14, 2012, P.L. 195, No. 18 ("Photo ID Law" or "Law"). In a 103-page opinion, including findings of fact and conclusions of law, the Court determined that the photo ID requirement cannot be implemented consistent with either the Law itself or the fundamental right to vote guaranteed by the Pennsylvania Constitution. Respondents challenge the Court's statutory and constitutional analysis. But they have not raised any dispositive legal arguments, much less arguments that could meet the stringent standards for post-trial relief under Pa.R.C.P. 227.1.

Respondents' post-trial motion hinges, in large part, on their flawed theory that Judge Simpson and the Supreme Court somehow upheld the facial constitutionality of the Photo ID Law at the preliminary injunction stage. Contrary to these fanciful claims, which the Court already denied in a motion *in limine*, there is no "law of the case" here that remotely undermines the Court's permanent injunction. Respondents' reliance on Judge Simpson's initial decision denying a preliminary injunction is misplaced, at a minimum, because the Supreme Court *vacated* that decision; on remand, Judge Simpson *granted* a preliminary injunction; and Judge Simpson thereafter *denied* Respondents' preliminary objections seeking dismissal of Petitioners' facial challenge to the Law. Respondents are also wrong that the Supreme Court, in vacating Judge Simpson's initial denial of a preliminary injunction, somehow implicitly rejected a facial constitutional challenge. The Supreme Court did no such thing.

Respondents' attacks on the Court's statutory analysis are also meritless. The relevant provisions of the Photo ID Law are clear on their face, and the Court correctly construed them in accordance with established principles of statutory construction. As both this Court and the Supreme Court concluded, the Law unambiguously required the Pennsylvania Department of

Transportation ("PennDOT") to provide liberal access to the PennDOT non-driver ID under 75 Pa. Cons. Stat. § 1510(b), but PennDOT refused to do so. This Court also correctly found that the Pennsylvania Department of State ID card ("DOS ID") is an *ultra vires* creation of Department of State officials, and that, in any event, the DOS ID cannot cure the defect in the Law because Respondents did not provide liberal access to the DOS ID, which remains unduly difficult, burdensome, and, for some, impossible to obtain.

Respondents' constitutional arguments likewise fail. Contrary to their claim, the Court properly applied strict scrutiny to facially invalidate a law that denies and unduly burdens the fundamental right to vote; in any event, the Court alternatively held that key aspects of the Law fail even rational basis review, and that the Law is invalid as-applied. The Court correctly found that hundreds of thousands of registered voters lack a compliant photo ID needed to vote under the Law, and that Respondents imposed "unnecessary" and "insurmountable" obstacles to obtaining ID. Against the harm of disenfranchisement, the Court found Respondents' justifications for the Law to be, at best, lacking. The Court stated: "Voting laws are designed the assure a free and fair election; the Voter ID Law does not further this goal." Determination of Decl. Relief and Permanent Inj. at 49 (Jan. 17, 2014) ("Op.").

Respondents' statutory and constitutional arguments are especially unavailing because before trial, Respondents conceded that if the DOS ID "is not liberally available to registered voters . . . , the Voter ID Law cannot be administered [1] as required by the statute itself, or [2] consistently with constitutional requirements." Resp'ts' Resp. to Pet'rs' Status Report of May 22, 2013, Concerning Discovery Issues at 13 (May 24, 2013) ("Resp'ts' Discovery Resp."). This Court found that the DOS ID is not liberally available. Under Respondents' own legal framework, the Court therefore properly invalidated the Law. Likewise, in rejecting

Respondents' preliminary objections, Judge Simpson held that Petitioners stated a viable facial challenge by alleging that implementation of the Law will result in disenfranchisement. This Court found that the Law's implementation will result in disenfranchisement, and thus properly invalidated the Law under the legal framework employed by Judge Simpson.

Respondents' motion for post-trial relief under Rule 227.1 accordingly should be denied.

RELEVANT BACKGROUND

Petitioners filed their original Petition for Review on May 1, 2012, challenging the constitutional validity of the Photo ID Law and seeking to enjoin its implementation.

On August 15, 2012, after a six-day hearing, this Court initially denied Petitioners' motion for a preliminary injunction seeking to bar implementation of the Photo ID Law pending resolution of this lawsuit. *Applewhite v. Commonwealth* ("*Applewhite I*"), No. 330 M.D. 2012, 2012 WL 3332376 (Pa. Commw. Ct. Aug. 15, 2012). The Court concluded that Petitioners were unlikely to succeed in their "facial challenge" to the Law. *Id.* at *9. As described below, that decision was based largely on the Court's predictive judgment that Respondents would successfully forestall disenfranchisement by issuing compliant photo IDs to those in need.

On September 18, 2012, the Pennsylvania Supreme Court vacated and remanded. *Applewhite v. Commonwealth* ("*Applewhite II*"), 617 Pa. 653, 54 A.3d 1 (2012). The Supreme Court held that "if a statute violates constitutional norms in the short term, a facial challenge may be sustainable even though the statute might validly be enforced at some time in the future," and that this Court erred in relying on a "predictive judgment" that Respondents' efforts to educate the voting public and issue photo ID to voters "will ultimately be sufficient to forestall the possibility of disenfranchisement." *Id.* at 4-5. The Supreme Court further held that Respondents failed to comply with the Law's mandate to provide "liberal access" to PennDOT non-driver IDs, and that Respondents' plan to offer an alternative DOS ID as a "safety net" was "still

contrary to the Law's liberal access requirement." *Id.* at 4. The Supreme Court directed this Court to enter a preliminary injunction unless: (1) "the procedures being used for deployment of the [DOS ID] cards comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards," ***and*** (2) this Court was "convinced . . . 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." *Id.* at 5.

On October 2, 2012, after a further two-day hearing on remand, this Court issued a preliminary injunction, concluding that Respondents had not satisfied either of the Supreme Court's prongs for avoiding a preliminary injunction. *Applewhite v. Commonwealth* ("*Applewhite III*"), No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012). In particular, Respondents did not "cure the deficiency in liberal access identified by the Supreme Court," *id.* at *2, and the Court was "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." *Id*. at *3. Accordingly, the Court enjoined implementation of the Photo ID Law for purposes of the November 6, 2012 election, such that photo ID could be requested by poll workers, but was not required for casting a regular ballot. *Id.* at *8. On February 19, 2013, the parties stipulated to and the Court ordered that the preliminary injunction be extended to cover the May 2013 elections as well.

On October 19, 2012, shortly after the Court entered the preliminary injunction, Petitioners sought a supplemental injunction re-directing Respondents' education efforts. Respondents successfully opposed the request as a "mandatory" injunction that the Court lacked power to issue. At that time, Respondents objected to any injunction in which the Court acted as

"'super-advertising' executives who can micro-manage and direct how public monies are spent and what is said." Resp'ts' Answer and New Matter to Pet. for Suppl. Inj. at 10 (Oct. 31, 2012). As discussed below, Respondents now ask the Court to do just that.

On February 5, 2013, Petitioners filed the First Amended Petition for Review. On May 24, 2013, this Court overruled in part and sustained in part Respondents' preliminary objections to the First Amended Petition. Mem. Op. at 2 (May 24, 2013). As relevant here, the Court held that Petitioners properly stated a facial challenge to the constitutional validity of the Photo ID Law, in part because "Petitioners aver that the implementation of [the Law] does not comport with the liberal access to a [PennDOT non-driver] ID required by [the Law]." *Id.* at 4. The Court also held that Petitioners properly stated a claim for violation of the Free and Equal Clause by alleging that the Law "will result in disenfranchisement." *Id.*

Respondents pressed to have a trial in July 2013 based on the state of implementation of the Law as it stood. Petitioners asked the Court to postpone the trial, in part because of Respondents' delays in responding to discovery, but Respondents objected, telling the Court in May 2013: "Your Honor, we definitely want this trial to go forward in July." Hr'g Tr. 14, May 17, 2013. And so it did.

The parties and the Court agreed not to duplicate the record already established during the two preliminary injunction hearings and to treat that record as part of the trial on the merits. *See* Hr'g Tr. 36-37, Dec. 13, 2012 (Status Conference) (confirming that "at the trial on the merits" parties can just rely on "what's already in the record and treat that as part of the entire record"); Mem. Op. at 6 (May 24, 2013) (recognizing that evidence from dismissed Petitioners is already in the record). Accordingly, without objection, Petitioners attached to their Pre-Trial Statement an overview of certain of the pertinent evidence from the existing record, and

repeatedly relied on that record throughout opening statements, closing arguments, and in pre- and post-trial submissions.

On August 16, 2013, after a 12-day trial on the merits, the Court further extended the preliminary injunction pending its final decision, modified to prohibit Respondents and poll workers from continuing to provide certain "inaccurate" information to voters about the Law.

On January 17, 2014, the Court permanently enjoined the Law's photo ID requirement for in-person voters, holding that the requirement cannot be implemented consistent with either the statute itself or the Pennsylvania Constitution's fundamental right to the vote.

LEGAL STANDARD

The standards for post-trial relief under Rule 227.1 are demanding and difficult to meet. Respondents primarily seek the entry of judgment notwithstanding the verdict (JNOV). Resp'ts' Br. 17 ("Almost all of the errors asserted herein are requests for [JNOV]."). A court may enter a JNOV only 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." *Commonwealth v. U.S. Mineral Prods. Co.*, 927 A.2d 717, 723 (Pa. Commw. Ct. 2007). This Court must deny a JNOV unless it were to conclude that (1) "even with all factual inferences decided adverse to the movant, the law nonetheless requires a verdict in the movant's factor," or (2) "the evidence is such that a verdict for the movant in beyond peradventure." *Id.*

Alternatively, Respondents seek a new trial, though they never identify any specific issue that should be retried. A new trial may be ordered only where (1) "one or more mistakes occurred at trial" and (2) "the mistake is a sufficient basis for granting a new trial." *Id.* "The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would

have ruled differently; the moving party must demonstrate prejudice resulting from the mistake. In addition, a new trial based on weight of the evidence issues will not be granted unless the verdict is so contrary to the evidence as to shock one's sense of justice." *Id.* (citations omitted).

Respondents also purport to seek "modification" of the Court's permanent injunction. Resp'ts' Br. 61-67. But what Respondents actually seek is to eliminate any permanent injunction and replace it with some sort of indefinite preliminary injunction instructing Respondents how better to implement the Law. Respondents are not entitled to any such modification.

ARGUMENT

I. RESPONDENTS' LAW OF THE CASE ARGUMENT HAS NO MERIT

Repeating their pretrial motion *in limine*, which this Court denied, Respondents' primary contention is that the "law of the case" and "coordinate jurisdiction" doctrines foreclose Petitioners' facial challenge to the Photo ID Law and the Court's permanent injunction. They rely on Judge Simpson's decision initially denying a preliminary injunction and "the necessary implications of the Supreme Court's decision." Resp'ts' Br. 46-51; *see also id.* at 1-2, 18 ("A recurring theme throughout this brief . . . is the troubling discord between the opinions of Judge Simpson and the Supreme Court on the one hand, and Judge McGinley on the other."). But this Court's permanent injunction decision is consistent with both Judge Simpson and the Supreme Court's legal framework, as well as the legal framework advanced by Respondents before trial.

As an initial matter, Respondents' reliance on Judge Simpson's order denying a preliminary injunction is misplaced. The Supreme Court "vacate[d]" that order. *Applewhite II*, 54 A.3d at 4. "As a general rule, when a court vacates a previously entered order, the legal status of a case is the same as if the order never existed." *Reading City Dev. Auth. v. Lucabaugh*, 829 A.2d 744, 749 (Pa. Commw. Ct. 2003); *see also Reha v. DOT, Bureau of Driver Licensing*, No. 139 C.D. 2009, 2009 WL 9096469, at *3 (Pa. Commw. Ct. Oct. 15, 2009) (Simpson, J.) ("[T]he

vacated status of the January 7 Order rendered the Order as if it never existed."). This is because "[t]he term 'vacate' means 'To nullify or cancel; make void; invalidate <the court vacated the judgment>. Cf. OVERRULE.'" *Commonwealth v. Wilson*, 594 Pa. 106, 114-15, 934 A.2d 1191, 1196 (2007) (quoting Black's Law Dictionary 1584 (8th ed. 2004)). Vacated decisions thus are a "legal nullity." *Id.*; *accord Commonwealth v. Mazzetti*, 615 Pa. 555, 567 n.7, 44 A.3d 58, 66 n.7 (2012) (same); *N. Pittsburgh Drywall Co. v. Workers' Comp. Appeal Bd.*, 59 A.3d 30, 44 (Pa. Commw. Ct. 2013) ("vacated" decision is "nullified, invalidated, voided"). Here, Judge Simpson's initial denial of a preliminary injunction is particularly irrelevant because on remand from the Supreme Court, Judge Simpson changed course and *granted* a preliminary injunction. Respondents accordingly cannot rely on Judge Simpson's vacated decision.

Even if the vacated order had any continuing vitality, Respondents are wrong that Judge Simpson ultimately rejected a facial challenge to the Law. To the contrary, in granting a preliminary injunction on remand from the Supreme Court, Judge Simpson recognized that "Petitioners' preserve their facial challenge to Act 18 because the statute contains no right to a non-burdensome means of obtaining the required identification." *Applewhite III*, 2012 WL 4497211 at *7. Thereafter, Judge Simpson denied Respondents' preliminary objection on this issue; he expressly held that Petitioners stated a facial challenge by alleging that "the implementation of Act 18 does not comport with the liberal access to a Pennsylvania Department of Transportation ID required by Act 18." Mem. Op. at 2 (May 24, 2013); *see also id.* at 5 ("Given our Supreme Court's view, I cannot say with certainty Petitioners are unable to state a facial challenge based on implementation of Act 18."). Judge Simpson further held that Petitioners stated a claim for violation of the Free and Equal Clause by alleging that "implementation of Act 18 will result in disenfranchisement." *Id.* at 8. After hearing all the

evidence at trial, this Court found that (1) contrary to the Law's mandate, Respondents did not provide liberal access to either the PennDOT non-driver ID *or* the DOS ID, and that (2) implementation of the Law will result in disenfranchisement. Op. 21, 34-35, 44-45. Thus, the Court's permanent injunction decision, which is based on a fully developed factual record, is entirely consistent with Judge Simpson's legal framework for analyzing the Law at the permanent injunction stage. There is simply no conflict between the two.

Respondents also err in relying on supposed "implications" in the Supreme Court's decision reversing Judge Simpson' initial denial of a preliminary injunction. Resp'ts' Br. 47. The Supreme Court in no way upheld the facial constitutionality of the Law. While the Court did not expressly adopt a strict scrutiny approach, it remanded with a clear mandate to enter a preliminary injunction unless an exceptionally high standard of "no voter disenfranchisement" was met. *Applewhite II*, 54 A.3d at 5. In granting a preliminary injunction, Judge Simpson found that there would be disenfranchisement. *Applewhite III*, 2012 WL 4497211, at *2-3. After trial, this Court found the same. Op. 36-37, 37 nn.24-25, 39, 42-44. Again, there is no conflict with Judge Simpson or the Supreme Court.

Respondents also argue, incorrectly, that the Supreme Court somehow implicitly held that DOS ID is "(a) authorized, and (b) capable of effectuating the intent of the General Assembly." Resp'ts' Br. 32. This is the same argument Respondents made in their failed motion *in limine*. *See* Resp'ts' Mot. *in Limine* to Exclude Evidence Contrary to the Law of the Case at 2-3 (arguing that the Supreme Court found that the DOS ID, if "liberally accessible," could "satisfy the requirements of Act 18 and the Pennsylvania Constitution"). It fares no better today. The Supreme Court reviewed Judge Simpson's August 15, 2012 order denying a preliminary injunction after an evidentiary hearing from July 25 to August 1, 2012. At that

hearing, Respondents discussed their *plans* for introducing a DOS ID, but the DOS ID was not actually introduced until weeks later on August 27, 2012. The record before the Supreme Court thus contained *no* information about the actual DOS ID, which did not yet exist. That is precisely why the Supreme Court ordered a remand and, upon review of the actual evidence about the DOS ID, why this Court *granted* both the preliminary injunction and the permanent injunction.

It is especially absurd for Respondents to claim that the Supreme Court resolved whether Respondents could satisfy the relevant statutory and constitutional requirements by making the DOS ID liberally accessible. The Supreme Court's decision provides no support for that fanciful reading. The Supreme Court held only that Respondents' then-plan to offer a DOS ID as a "safety net" was "still contrary to the Law's liberal access requirement," and that this Court was "obliged to enter a preliminary injunction" on remand unless, among other things, "the procedures being used for deployment of the [DOS ID] 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 4, 5. In short, nothing in the Supreme Court's decision even addressed, much less decided, the issues that Respondents now contend are "law of the case."

Respondents also err in asserting that Petitioners "conceded" anything of substance in the Supreme Court. Resp'ts' Br. 1. As the Supreme Court recounted, Petitioners' counsel merely stated that "in the abstract," in some possible circumstances (not present here, either then or now), an ID requirement of some kind may be acceptable: "Given reasonable voter education efforts, reasonably available means for procuring identification, and reasonable time for implementation, [Petitioners] apparently would accept that the State may require the presentation of an identification card as a precondition to casting a ballot." *Applewhite II*, 54 A.3d at 5. But

this lawsuit did not challenge any "abstract" ID requirement; it challenged this specific Photo ID Law which has specific terms and specific effects. Throughout this case, Petitioners' consistent position has been that *this* Photo ID Law is facially unconstitutional. This Court rightly agreed. The Court also found that Respondents engaged in wholly unreasonable voter education efforts and did not provide reasonably available means for procuring compliant photo ID. Op. 30-33, 23-29, 39-40. Accordingly, the supposed "concession" by Petitioners only supports this Court's decision.

II. RESPONDENTS' STATUTORY ARGUMENTS HAVE NO MERIT

The Court concluded that "Respondents fail to implement the Voter ID Law to comport with the liberal access to a PennDOT ID as required by the Voter ID Law," and that the DOS ID does not and cannot cure the Law's fatal defects. Op. 17. Respondents argue that the Court misconstrued the terms of the Photo ID Law. But to no avail. Contrary to Respondents' tortuous statutory arguments, this Court correctly construed the Law in accordance with its unambiguous text. And, most importantly, this Court's interpretation follows the Supreme Court's controlling decision construing that same text.

A. Respondents Refused to Provide Liberal Access to PennDOT Non-Driver ID

Respondents contest the Court's conclusion that they failed to comply with the Law's requirement to provide liberal access to PennDOT non-driver IDs. Resp'ts' Br. 32-40. According to Respondents, the DOS ID satisfied this requirement. That position is groundless.

As the Supreme Court explained, the Photo ID Law "contemplates that the primary form of photo identification to be used by voters is a [PennDOT] driver's license or *the non-driver equivalent provided under Section 1510(b) of the Vehicle Code*." *Applewhite II*, 54 A.3d at 3 (emphasis added). As construed by the Supreme Court, Section 206(b) of the Law requires PennDOT to issue a Section 1510(b) PennDOT non-driver ID "at no cost" to "any registered

elector" who signs an affirmation "that [1] the elector does not possess proof of identification [as defined in the Photo ID Law] and [2] requires proof of identification for voting purposes." *Id.* at 3 (quoting 25 P.S. § 2626(b)). If a voter signs this affirmation, PennDOT must give the voter the free PennDOT non-driver ID for voting purposes, "[n]otwithstanding" that under Section 1510(b) of the Vehicle Code, PennDOT normally requires applicants to provide certain supporting documentation and pay a fee of $13.50. *Id.* (quoting same). The Supreme Court described this requirement as "a policy of liberal access to Section 1510(b) identification cards," *i.e.*, PennDOT non-driver IDs under Section 1510(b) of the Vehicle Code. *Id.* In these circumstances, Respondents' scattershot discussion of various canons of statutory construction adds nothing. None of those canons changes the meaning of a statute that is both clear on its face and already has been authoritatively construed by the Supreme Court.

Section 206(b) cannot be read to refer to the DOS ID. The relevant statutory language expressly refers only to the Section 1510(b) PennDOT non-driver ID: "the Department of Transportation shall issue an identification card described in 75 Pa. C.S. § 1510(b) at no cost." 25 P.S. § 2626(b). The Law makes no mention of the DOS ID, which did not even exist when the Law was enacted. Respondents point to the "notwithstanding" clause in Section 206(b), Resp'ts' Br. 39-40, but that refers to the fact that under Section 1510(b), there is ordinarily a cost ($13.50) and other documentation requirements for the PennDOT non-driver ID, whereas Section 206(b) mandates that it be issued "at no cost" and without other supporting documents.

Respondents should not be heard now to argue that they properly implemented Section 206(b) of the Law in accordance with its terms. As the Supreme Court explained, "[t]he Department of State has realized, *and the Commonwealth parties have candidly conceded*, that the Law is not being implemented according to its terms." *Applewhite II*, 54 A.3d at 3 (emphasis

added). This is because "PennDOT will not implement the Law as written." *Id.* Citing security concerns, PennDOT refused to relax the documentation requirements for voters to obtain a free PennDOT non-driver ID for voting purposes, as Section 206(b) of the Law unequivocally mandates. *Id.* The Supreme Court accepted PennDOT's security concerns, which are unrelated to voting, as a "good reason" for PennDOT not to comply with the Law's mandate of "liberal access" to a free PennDOT non-driver ID for voting purposes. *Id.* However, because PennDOT refuses to provide "liberal access" to a free PennDOT non-driver ID for voting purposes, those "critical terms of statute have themselves become irrelevant." *Id.* at 5.

In sum, this Court correctly concluded – as did the Supreme Court – that the Law expressly requires liberal access to Section 1510(b) PennDOT non-driver IDs, and that Respondents refused to comply with this requirement, albeit for a legitimate reason.

B. The DOS ID Cannot Cure the Defects in the Photo ID Law

Respondents also dispute the Court's analysis of the DOS ID. But the Court correctly determined that the DOS ID is an *ultra vires* creation of Department of State officials. Without any statute, regulation, or other law supporting its existence, Respondents' reliance on the DOS ID transforms suffrage from a right with which "no power" may "interfere" into a privilege that depends on the continued largesse of the Department of State and its employees.

As the Court explained, "[a]gency authority is limited to the powers granted by legislative enactment, either explicitly conferred or necessarily implied." Op. 19 (citation omitted). Here, neither the Photo ID Law nor any other statute or regulation even mentions, much less mandates, the DOS ID. *Id.* at 19-20. The Photo ID Law requires the Department of State to educate voters, but imposes no duty on the Department of State actually to issue IDs to voters or otherwise. *Id.* at 20. Even if the DOS ID were authorized, the card is an inadequate substitute for the PennDOT non-driver ID. Unlike the PennDOT non-driver ID, for which the

Photo ID Law expressly mandates liberal access, no voter has any legal right to a DOS ID and thus it provides no guaranteed protection of the right to vote. F.F. Nos. 125, 153.

Respondents also are wrong that PennDOT, and not the Department of State, "issues" the DOS ID. Resp'ts' Br. 35-37. The Court correctly found that the Department of State is the de facto issuer of the DOS ID and PennDOT is the mere distributor. As the Court explained (and Respondents' witnesses conceded), the Department of State establishes all of the standards for issuing the DOS ID. Op. 18. Thus, "DOS created and collects the application form; DOS developed and changed the criteria for issuing the DOS ID; DOS dictates the criteria to PennDOT, and directs issuance; DOS decide[d] to whom DOS IDs are issued; DOS decided the DOS ID must be issued at DLC locations; and, DOS advertises the DOS ID (albeit minimally)." *Id. see also* Hr'g Tr. 575-76, July 17, 2013 (J. Marks); Hr'g Tr. 1329, July 24, 2013 (K. Myers). Indeed, without prior authorization from the Department of State, PennDOT cannot give a DOS ID to any applicant, but rather must send the card to the Department of State, which, after further investigation, might eventually send the card to the applicant. F.F. Nos. 133-37; Hr'g Tr. 564-65, 570-72, July 17, 2013 (J. Marks).

Regardless, any debate over which agency technically "issues" the DOS ID is academic, because Respondents did not provide liberal access to the DOS ID. Critically, Respondents conceded before trial that if the DOS ID "is not liberally available to registered voters . . . , the Voter ID Law cannot be administered as required by the statute itself." Resp'ts' Discovery Resp. at 13. Based on all of the evidence, this Court found that "Respondents' issuance of DOS IDs limits rather than liberalizes access." Op. 21. The DOS ID is "difficult" to obtain because Respondents imposed "unreasonable," "unwieldy," and "insurmountable" obstacles. Op. 44, 7, 28. Respondents' concession and the Court's findings regarding liberal access to the DOS ID

preclude Respondents from meeting the stringent standards for JNOV or a new trial. Indeed, the Court was correct in invalidating the Law under Respondents' own framework for evaluating it. Respondents have not preserved any argument to the contrary.

The Court also correctly found that Respondents failed to comply with Section 206(a) and 206(c) by failing accurately to educate voters. Their education campaign was "inaccurate," "confusing," and "inconsistent." Op. 29, 32, 50. In other words, "Respondents created a culture of misinformation" about the Photo ID Law, and thereby violated the Law. *Id.* at 30.

In sum, the Court was right to grant relief on Petitioners' Count I. "In light of the unfairness engendered by misinformation and the extra-statutory barriers erected, Respondents' implementation is not in accordance with liberal access. The DOS ID does not remedy or excuse PennDOT's refusal to follow statutory mandates, and fails to satisfy liberal access." Op. 33.[1]

C. Respondents' Other Statutory Arguments Fail

Under the Photo ID Law, if a voter has no compliant photo ID at the polling place, the voter may only submit a provisional ballot. 25 P.S. § 3050(a.2)(1). That ballot, like any other provisional ballot, will not be counted on election day. Hr'g Tr. 576, July 27, 2012 (M. Wolosik). Instead, within six calendar days, the voter must submit to his or her county election board either (1) a photo ID that would be acceptable for voting in person under the Law, or (2) an affirmation that the voter is (a) "indigent" and (b) "unable to obtain [a compliant photo ID]

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[1] Petitioners already notified Respondents of certain online materials that should be withdrawn based on the Court's permanent injunction decision. Letter from J. Clarke (Feb. 7, 2014) (attached as **Exhibit 1**). Respondents removed some of the misleading materials, but refused to remove all of them, claiming they are not required to do so and giving no indication that they would do so even once judgment is entered. Letter from T. Keating (Feb. 18, 2014) (attached as **Exhibit 2**). Petitioners will return to Court for relief if ongoing education efforts remain misleading and/or inaccurate, and Respondents refuse to withdraw or amend them.

without the payment of a fee." 25 P.S. § 3050(a.4)(5)(ii)(D), (E). This Court properly held that provision does not adequately protect voters, in part because "[i]ndigence is a difficult, if not impossible status to profess, much less affirm under penalty of criminal penalties, when Respondents ostensibly provide 'free' compliant photo ID." Op. 43; *accord* F.F. No. 111.

Respondents argue that the Court misconstrued the Law's "indigency" provision and that the provision "is a robust safety net." Resp'ts' Br. 31. But Respondents' own witnesses did not agree. Rebecca Oyler, the Department of State's former Director of Policy, agreed that the Law leaves it to each county to decide what "indigent" means. Hr'g Tr. 1098-99, July 22, 2013. And Jonathan Marks, the Department of State's top non-political election official, agreed that even if a voter were indigent, it would be "very difficult" for any voter to sign the indigency affirmation based on the availability of free voter IDs at PennDOT. Hr'g Tr. 521-22, July 17, 2013. The Department of State's internal analysis of the Law likewise expressed skepticism about the utility of this affirmation: "how could an indigent elector sign the statement if he or she is able to obtain proof of identification free of charge?" Petr's Ex. 1677 at 4; *see also* Hr'g Tr. 1096-1100, July 22, 2013 (R. Oyler). The Department privately speculated that it is "possible" a voter could sign the affirmation based on having to pay for transportation to get a photo ID, Petr's Ex. 1677 at 4, but the Department never advised poll workers or voters of this possibility. *See* Resp'ts' Ex. 78 at 3; *see also* Resp'ts' Exs. 7-10, 12, 14-15, 21, 23, 27-32. The Court was more than justified in finding that the indigency exception fails to provide adequate protection to voters.[2]

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[2] Respondents also err in arguing that the Court's interpretation would render the indigency provision "superfluous." Resp'ts' Br. 30. When the Photo ID Law was passed, applicants did need to pay money to get a PennDOT non-driver ID, such as paying for a birth certificate. *See, e.g.*, Hr'g Tr. 655-56, July 27, 2012 (M. Levy).

Respondents also quibble with the Court's interpretation of safety-net provisions in other states that have enacted photo ID laws. Resp'ts' Br. 31. For instance, they point out that the Indiana statute allows voters without the required photo ID at the polls to cast only a *provisional* ballot, not a regular ballot, upon signing an affidavit. *Id.* What Respondents fail to mention – and as Petitioners explained in their proposed findings of fact – is that it is Michigan, Florida, and Arizona where voters who lack the required ID may cast a *regular* ballot by signing a simple affidavit at the polls. Pet'rs' Prop. F.F. No. 261 (collecting the relevant state statutes and cases). Respondents also do not mention that in Indiana, the key statutory protection is that *all voters with disabilities and all voters 65 and older* are automatically qualified to vote by absentee ballot without any photo identification requirement. *Id.* No. 259 (citing Ind. Code § 3-11-10-24). Pennsylvania has no comparable protection. Petitioners have no objection to the Court correcting the typographical-style error regarding Indiana's and Michigan's respective protections, though the error is immaterial. The bottom line is that other state statutes offer protections that the Photo ID Law omits. On this critical point, this Court's decision is manifestly correct.

III. RESPONDENTS' CONSTITUTIONAL ARGUMENTS HAVE NO MERIT

In addition to the statutory defects addressed above, this Court concluded that the Law cannot be implemented consistent with the fundamental right to vote guaranteed by the Pennsylvania Constitution. "Reviewing the Voter ID Law on its face, it does not pass constitutional muster because there is no legal, non-burdensome provision of a compliant photo ID to all qualified electors." Op. 34; *accord id.* at 35 (likewise stating that the Law is "facially unconstitutional" because it "does not contain, on its face, any valid non-burdensome means of providing compliant photo ID to qualified electors"). Indeed, before trial, Respondents conceded that if the DOS ID "is not liberally available to registered voters . . . , the Voter ID Law cannot

be administered . . . consistently with constitutional requirements." Resp'ts' Discovery Resp. at 13. They cannot now argue to the contrary. In any event, Respondents are not entitled to post-trial relief with respect to the Court's constitutional analysis.

A. The Pennsylvania Constitution Guarantees the Fundamental Right to Vote to All Qualified Voters Separate and Apart from the Equal Protection Clause

After initially contesting the point, Respondents conceded – and the Supreme Court and this Court both held – that the Pennsylvania Constitution guarantees all voters a fundamental right to vote. Op. 36 ("In Pennsylvania, the right of qualified electors to vote is a fundamental one."); *Applewhite II*, 54 A.3d at 3 ("[T]he right to vote in Pennsylvania, as vested in eligible, qualified voters, is a fundamental one."). This right is secured by the express terms of *two* constitutional provisions. The Free and Equal Clause provides that "[e]lections shall be free and equal; *and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage*." Pa. Const. art. I, § 5 (emphasis added). The Qualifications Clause, in turn, provides that all qualified electors "*shall be entitled to vote*." Pa. Const. art. VII, § 1 (emphasis added).

Respondents contend that the Free and Equal Clause provides no more protection than the Pennsylvania Constitution's separate equal protection guarantee in Article I, Sections 1 and 26, which, in turn, is coterminous with the federal Equal Protection Clause as well as the Pennsylvania Constitution's separate equal protection guarantee. Resp'ts' Br. 19. Under that counterintuitive theory, a party cannot establish a violation of the fundamental right to vote unless it also establishes a violation of the federal Equal Protection Clause. *Id.* If that were the case, the fundamental right to vote guaranteed by the Pennsylvania Constitution's Free and Equal Clause and Qualifications Clause would be meaningless and their words superfluous. Under Respondents' theory, these clauses – which have no parallel in the federal Constitution or in

Pennsylvania's equal protection guarantees – would effectively be read out of the Pennsylvania Constitution, contrary to the well-established canon that constitutional provisions are to be interpreted to give meaning to each. *Cavanaugh v. Davis*, 497 Pa. 351, 354, 440 A.2d 1380, 1381-82 (1982).

Respondents' central error is in focusing exclusively on the first part of the Free and Equal Clause, which requires that elections be "free and equal," while ignoring the second part of the clause that independently precludes any civil or military power from "interfer[ing] to prevent the free exercise of the right of suffrage." The first part may overlap somewhat with the equal protection guarantee, but the second part imposes a substantive prohibition separate and apart from equal protection. Respondents cannot deny or unduly burden *any* qualified voter's fundamental right to vote; to do so would violate the second part of the clause, if not the first part.

For similar reasons, Respondents err in relying on *Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325 (2002). Resp'ts' Br. 19. There, petitioners claimed that "the legislature engaged in unconstitutional political gerrymandering in drawing up Act 1 [a redistricting plan] in violation of the equal protection guarantee, Pa. Const. art. I, §§ 1 and 26, and the free and equal elections clause, Pa. Const. art. I, § 5." 568 Pa. at 133, 794 A.2d at 328; *compare* First Am. Pet. ¶ 193 (Petitioners' equal protection claim likewise asserting that the Photo ID Law violates the equal protection provisions and the "free and equal" part of the Free and Equal Clause). As *Erfer* explains, the Pennsylvania Supreme Court in 1992 first held that "a claim of political gerrymandering was cognizable under the Pennsylvania Constitution," "predicated on the U.S. Supreme Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), wherein the Court held that such claims were cognizable as a violation of the Equal Protection Clause." 568 Pa. at 138,

794 A.2d at 331 (discussing *In re 1991 Reapportionment,* 530 Pa. 335, 609 A.2d 132 (1992)). For both federal and state constitutional claims challenging alleged political gerrymander, the Court "opted to follow the test set forth by the *Bandemer* plurality," which "states that a plaintiff raising a gerrymandering claim must establish [1] that there was intentional discrimination against an identifiable political group and [2] that there was an actual discriminatory effect on that group." *Id.* at 138-39, 794 A.2d at 331-32. The Court recognized that "[t]his is unquestionably an onerous standard," but explained that "[t]he *Bandemer* plurality, aware that it was treading on ground that the judiciary had previously declared forbidden to itself, was chary about creating a test that would allow for officious interference with the state legislatures' prerogative to create reapportionment plans." *Id.* at 142, 794 A.2d at 333-34.

Solely in this specific context of political gerrymandering claims, which inherently involve concerns regarding the balance of constitutional equal protection relating to the one-person-one-vote rule with the constitutional mandate that states adjust congressional districts every ten years, the Court "reject[ed] Petitioners' claim that the Pennsylvania Constitution's free and equal elections clause provides further protection to the right to vote than does the Equal Protection Clause." *Id.* at 139, 794 A.2d at 332. The Court stated that "Petitioners provide us with no persuasive argument as to why we should, at this juncture, interpret our constitution in such a fashion that the right to vote is more expansive than the guarantee found in the federal constitution." *Id.* Based on the specific political gerrymandering context, this Court has recognized that "[i]n *Erfer*, . . . our Supreme Court established, in broad terms, the principle that *the one-person-one-vote rule* receives no greater protection under the Pennsylvania Constitution than under the United States Constitution." *In re Mun. Reapportionment of Twp. of Haverford*, 873 A.2d 821, 836 (Pa. Commw. Ct. 2005).

In sharp contrast, Petitioners' claim that the Photo ID Law violates the fundamental right to vote does not focus on the "free and equal" part of the Free and Equal Clause, but rather the clause's categorical prohibition on any power "interfer[ing] to prevent the free exercise of the right of suffrage." This prohibition applies irrespective of whether the interference also constitutes a violation of the equal protection guarantee. The Photo ID Law does not implicate the "one-person-one-vote rule" in that it is not giving certain groups of voters greater congressional representation but rather interferes with an individual's right to cast a ballot that will be counted at all.

In any event, even if some prior case law were to support Respondents' convoluted reading of the plain text of the Constitution, the Supreme Court in December 2013 instructed that "in circumstances where prior decisional law has obscured the manifest intent of a constitutional provision as expressed in its plain language, engagement and adjustment of precedent as a prudential matter is fairly implicated and salutary." *Robinson Twp., Washington Cnty. v. Commonwealth*, --- A.3d ---, 2013 WL 6687290, at *28 (Pa. Dec. 19, 2013). The Court went on to reiterate that "we are not constrained to closely and blindly re-affirm constitutional interpretations of prior decisions which have proven to be unworkable or badly reasoned." *Id.* (quoting *Holt v. Legislative Redistricting Comm'n*, 614 Pa 364, 442 n. 38, 38 A.3d 711, 759 n.38 (2012). To the extent that the Supreme Court's recent rulings on the constitutional limitations on the General Assembly's power to regulate voting and other police powers may be interpreted as conflicting with older precedent, *Robinson Township* makes clear that the Supreme Court's more recent pronouncements in this case (establishing the "no voter disenfranchisement" standard for testing the Photo ID Law) and in *Robinson Township* itself control. The Supreme Court is not constrained by prior decisions that are "unworkable," "badly reasoned," or obscured the "plain

language" of the constitution where that plain language limits the power of the General Assembly to invade rights guaranteed to individuals by the Constitution. And in this case, the Supreme Court already held that a preliminary injunction was required unless the Court was convinced that the Law's implementation would cause "no voter disenfranchisement." *Applewhite II*, 54 A.3d at 5. This Court rightly found, at both the preliminary and permanent injunction stages, that implementation of the Law would disenfranchise voters in violation of the fundamental right to vote guaranteed by the Pennsylvania Constitution.

B. The Court Correctly Applied Strict Scrutiny; and in Any Event the Court Properly Held That the Law Fails Even Rational Basis Review

Respondents also are wrong that strict scrutiny does not apply to statutes that deny or unduly burden the fundamental right to vote. Resp'ts' Br. 20-21. As this Court recognized, "Pennsylvania precedent does not permit regulation of the right to vote when such regulation denies the franchise, or '***make[s] it so difficult as to amount to a denial***.'" Op. 36 (quoting *Winston v. Moore*, 244 Pa. 447, 457, 91 A. 520, 523 (1914)) (emphasis by this Court). Thus, "[t]he test is whether legislation denies the franchise, or renders its exercise so difficult and inconvenient as to amount to a denial." *Id.* (quoting *DeWalt v. Bartley*, 146 Pa. 529, 540 (1892)). "Disenfranchising voters 'through [no] fault of the voter himself' is plainly unconstitutional." *Id.* at 43 (quoting *Norwood Election Contest*, 382 Pa. 547, 549, 116 A.2d 552, 553 (1955) (bracketed text added by this Court).

Applying that standard, the Court determined that "the Voter ID Law renders Pennsylvania's fundamental right to vote so difficult to exercise as to cause *de facto* disenfranchisement" by massive numbers of voters. *Id.* at 36. "Hundreds of thousands of electors in Pennsylvania lack compliant ID." *Id.* at 37 (citing F.F. No. 223). "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." *Id.* (citing F.F. Nos. 140-47). "Enforcement of the Voter ID Law as to these electors has the effect of disenfranchising them through no fault of their own." *Id.* Given these findings, the Court did not err in subjecting the Photo ID Law to strict scrutiny and concluding that "Respondents did not shoulder their heavy burden here." *Id.* at 38.

Respondents cannot avoid strict scrutiny simply by labeling the Photo ID Law a "voting regulation." Resp'ts' Br. 22. As the Supreme Court reaffirmed as recently as December 2013, voting "regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely exscinded under the name or preten[s]e of regulation, and thus would the natural order of things be subverted by making the principle subordinate to the accessory." *Robinson Twp.*, 2013 WL 6687290, at *26 n.31 (quoting *Page v. Allen*, 58 Pa. 338, 1868 WL 7243, at *8 (1868) (citing Pa. Const. art. III, § 1 (1838))). This Court properly found, based on the full factual record before it, that the Photo ID Law constituted destruction, not mere regulation.

Respondents point to no case in which the Pennsylvania Supreme Court has ever upheld an election "regulation" where otherwise qualified voters could not – without unnecessary burden or inconvenience – comply with the new regulation. The Supreme Court certainly has never upheld a supposed election "regulation" that, if enforced, could disenfranchise hundreds of thousands of voters. To the contrary, the Pennsylvania Supreme Court has declared that the disenfranchisement of 5,506 citizens would be "unconscionable," *In re Canvass of Absentee Ballots of 1967 Gen. Election*, 431 Pa. 165, 172, 245 A.2d 258, 262 (1968), and that "[t]he

disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter." *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 415 Pa. 154, 158, 202 A.2d 538, 540 (1964). And, as discussed above, to the extent any of Pennsylvania's voter regulation cases could be read as creating an absolute right on the part of the General Assembly to regulate elections to the point of interfering with the free exercise of suffrage, those decisions "obscured the manifest intent" of the Constitutional safeguards to the most fundamental of rights and today's Supreme Court will not "blindly" follow them. *Robinson Twp.*, 2013 WL 6687290, at *28.

In any event, the question of the applicable constitutional test is now irrelevant, because Respondents do not challenge – and thus have waived – the Court's alternative holding that key aspects of the Law fail even rational basis review. "Based on the comprehensive record before the Court, the provisions of the Voter ID Law as written would not in many respects survive rational basis review, *i.e.*, the expiration date, finite list of compliant IDs which excludes many photo IDs that the Commonwealth accepts as valid for other purposes and programs, and suffice to confirm identify." Op. 37 n.25. Specifically, the Court explained that "[e]xpiration dates are wholly unnecessary to the supposed purpose of requiring identification at the polls – to prove that voters are who they say they are – and thus lacks any rational basis, much less a legitimate or necessary one." C.L. No. 50. Similarly, "[w]ithout a rational basis to any demonstrated legitimate state interest, the Voter ID Law facially limits the forms of compliant IDs to exclude many forms of identification recognized by the Commonwealth, such as photo IDs issues by more than 3,000 municipalities to non-employees, and other Pennsylvania governmental entities such as school districts, as well as gun permits, benefits cards and out-of-state drivers' licenses." C.L. No. 49.

Because the Law fails under any constitutional standard of review, Respondents are not entitled to post-trial relief with respect to this issue.

C. The Court Applied the Correct Standard for Facially Invalidating the Law; and in Any Event the Court Properly Held the Law Is Invalid As-Applied

Respondents also argue, wrongly, that the Court applied an incorrect standard for facially invalidating a statute under *Clifton v. Allegheny County*, 600 Pa. 662, 969 A.2d 1197 (2009). Resp'ts' Br. 26-28. In determining whether a facial challenge to a statute is warranted, the test is whether "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Clifton*, 600 Pa. at 704 n. 35, 969 A.2d at 1222 n.35 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 n.6 (2008)); *see also id.* at 704, 969 A.2d at 1222 (explaining that to establish a facial challenge, "the invalid applications of a statute must be real and substantial, and are judged in relation to the statute's plainly legitimate sweep" (citations and internal quotation marks omitted)).

Respondents mistakenly rely on a different standard suggested in the U.S. Supreme Court's 1987 decision in *United States v. Salerno*, 481 U.S. 739 (1987). *Compare Clifton*, 600 Pa. at 705 n.36, 969 A.2d at 1223 n.36 ("Under the *Salerno* standard, the challenger must establish that there is no set of circumstances under which the Act would be valid."), *with* Resp'ts' Br. at 17-28 (similar). As the Pennsylvania Supreme Court recognized in 2009, "[r]ecently . . . the Court seems to have settled on the 'plainly legitimate sweep' standard," and has not applied the *Salerno* standard to evaluate facial challenges. *Clifton*, 600 Pa. at 705, 969 A.2d at 1223. "The difference is essentially one of the degree of burden placed on the challenger." *Id.* at 705 n.36, 969 A.2d at 1223 n.36. "Under the *Salerno* standard, the challenger must establish that there is no set of circumstances under which the Act would be valid." *Id.* By contrast, "[u]nder the more lenient 'plainly legitimate sweep' standard, the

challenger need only demonstrate that a 'substantial number' of the challenged statute's potential applications are unconstitutional." *Id.*; *accord* Op. 36 (quoting same).

Respondents also continue to place great weight on the U.S. Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Resp'ts' Br. 27-28. But Petitioners repeatedly have explained – and the Court correctly held – that *Crawford* is inapposite for multiple reasons. Respondents point to *Crawford*'s statement that Indiana's voter ID law "imposes only a limited burden on voters' rights." *Crawford*, 553 U.S. at 202-03 (plurality opinion). But as stated, in Indiana, unlike in Pennsylvania, all voters with disabilities and all voters 65 and older are automatically qualified to vote by absentee ballot without any photo identification requirement. Ind. Code § 3-11-10-24.

In any event, *Crawford* is readily distinguishable because the Supreme Court's decision was explicitly based on the lack of a factual record in that case. The three-judge plurality held only that "the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute . . . ." 553 U.S. at 189; *see also id.* at 202 (denying relief "on the basis of the record that has been made in this litigation"). Specifically, the district court "found that petitioners had 'not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements.'" *Id.* at 187 (quoting district court); *see also id.* at 201 ("[T]he deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification."). The Supreme Court further explained that "the evidence in the record does not provide us with the number of registered voters without photo identification; [the district judge] found petitioners' expert's report to be 'utterly incredible and unreliable.' Much of the argument about the numbers of such voters

comes from extrarecord, postjudgment studies, the accuracy of which has not been tested in the trial court." *Id.* at 200 (quoting district court) (citation omitted). And the record in *Crawford* told the Court "nothing about the number of free photo identification cards issued since" Indiana's voter ID law was enacted. *Id.* at 202 n.20.

In contrast to *Crawford*, this case involves an extensive factual record that was fully developed at two evidentiary hearings and a full trial on the merits. The factual record in this case overwhelmingly supports Petitioners' claim that the Photo ID Law unconstitutionally infringes the fundamental right to vote under the Pennsylvania Constitution. Similarly, *Crawford*'s statement that provisional ballots are adequate was not based on a factual record of what happens to provisional ballots in the real world. 553 U.S. at 197-98. In this case, the evidence shows that provisional ballots often are not counted. F.F. Nos. 12, 14; *see also* Hr'g Tr. 468-69, July 26, 2012 (R. Oyler).

Furthermore, *Crawford* dealt with the Equal Protection Clause of the U.S. Constitution,[3] which contains no express protection of the right to vote; it simply ensures that all persons are given the same rights as other persons. Because voting is a fundamental, expressly-guaranteed right under the Pennsylvania Constitution, the decision in *Crawford* is irrelevant here. *See Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. 2006) (striking down Missouri's voter ID law on

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[3] In *Robinson Township*, the Pennsylvania Supreme Court explained that Pennsylvania is moving towards a "[n]ew federalism" in which the Court will conduct its own "independent analysis of arguments premised upon the state constitution, rather than following U.S. Supreme Court precedent interpreting analogous federal constitutional provisions in lock-step, even where the state and federal constitutional language is identical or similar." 2013 WL 6687290, at *27 n.33.

state constitutional grounds, in part because "[t]he express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart").[4]

For all of the reasons described above, Respondents are wrong that Petitioners failed to establish a facial challenge to the Photo ID Law. But in any event, the point is academic, as this Court held that the Law also would be unconstitutional as-applied: "To the extent Petitioners' challenge is deemed as applied rather than facial, the same analysis renders the photo ID provisions of the Voter ID Law unconstitutional as applied to all qualified electors who lack compliant photo ID." C.L. No. 55; *accord id.* Op. 45 n.31 ("In the event our Supreme Court deems the challenge more akin to an 'as applied' challenge as to the hundreds of thousands of electors who lack compliant photo ID, this Court holds the photo ID provisions of the statute are unconstitutional as to all qualified electors who lack compliant photo ID, and enjoins their application."). Accordingly, whether the challenge is deemed facial or as-applied, there is no meaningful difference in terms of the outcome of this case.

D. The Court Ordered the Proper Relief of a Permanent Injunction

Having found that the Photo ID Law's photo ID requirement for in-person voters cannot be implemented consistent with the statute itself or the fundamental right to vote, the Court enjoined the requirement, permanently. Op. 49-50. There would be no basis to convert the

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[4] In October 2013, Judge Richard A. Posner, who wrote the decision for the Seventh Circuit majority in the *Crawford* case, stated that he "may well have" been wrong to uphold the Indiana statute, but that he does not know, because "we judges in the Crawford case did not have sufficient information about the consequences of an Indiana-type photo ID voter qualification law to make a reliable decision regarding its constitutionality." Jacob Gershman, *Judge Posner Walks Back Comments to HuffPost*, Wall St. J. LawBlog, Oct. 28, 2013, *at* http://blogs.wsj.com/law/2013/10/28/judge-posner-walks-back-comments-to-huffpost; *see also* Richard A. Posner, *I Did Not 'Recant' on Voter ID Laws*, New Republic, Oct. 27, 2013, http://www.newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id.

permanent injunction, as Respondents request, to some sort of indefinite preliminary injunction that could "guide the agencies' actions" in how to implement the Law. Resp'ts' Br. 67. Respondents ask the Court for more time as well as instructions regarding, at a minimum, (1) appropriate education efforts, (2) appropriate procedures for issuing DOS IDs, including the current SURE verification requirement, and (3) appropriate locations to issue voter IDs, *i.e.*, anywhere other than the 71 PennDOT Driver License Centers statewide. *Id.* at 61-63.

Respondents should not be heard to complain that they need more time to implement the Law. Respondents insisted to this Court that they were ready to be judged on the merits and opposed any extension of the July 2013 trial date. Hr'g Tr., May 17, 2013, at 24:8-9 (Respondents' counsel stating: "Your Honor, we definitely want this trial to go forward in July."). And so the July 2013 trial went forward, and the Law was judged on the merits and found wanting. Ms. Oyler, the former Department of State Policy Director, also testified at trial that "we have done everything that we see as being reasonable and within our means to do" to implement the Photo ID Law. Hr'g Tr., July 22, 2013, 1108; *see also id.* ("Q. Nothing else that you're aware of, at least until the time you left, that would suddenly fix any problems that remain? Nothing else in the works; right? A. Not that I'm aware of."). In these circumstances, Respondents are not entitled to any do-over and cannot reasonably assert they could do better.

Nor can Respondents reasonably complain that the Court did not attempt to micromanage how Respondents should have tried to implement the Law. When Petitioners sought a preliminary injunction re-directing Respondents' education efforts in October 2012, Respondents opposed the request, successfully, as seeking a mandatory injunction beyond the Court's power to issue. Respondents specifically objected to the Court issuing an injunction in the nature of "'super-advertising' executives who can micro-manage and direct how public monies are spent

and what is said." Resp'ts' Answer and New Matter to Pet. for Suppl. Inj. at 10 (Oct. 31, 2012.). Yet that is exactly what Respondents now ask the Court to do – to serve as their advertising executive for the Law, their ID-issuing policy director, and their supreme election law implementation officer.

As the Court already held, it is not "the task of this Court . . . to correct the Voter ID Law's obvious infirmities." Op. 35. Indeed, the Pennsylvania Supreme Court long has held that courts "have no power to . . . rewrite Legislative Acts or Charters, desirable as that sometimes would be." *Mt. Lebanon v. Cnty. Bd. of Elections of Allegheny Cnty.*, 470 Pa. 317, 320-21, 368 A.2d 648, 649-50 (1977) (quoting *Cali v. Philadelphia*, 406 Pa. 290, 312, 177 A.2d 824, 835 (1962)). This is because "under our basic form and system of Constitutional Government the power and duty of [the courts] is interpretative, not legislative." *Id.* at 320-31, 368 A.2d at 649 (quoting *Cali*, 406 Pa. at 312, 177 A.2d at 835).

IV. RESPONDENTS' STANDING ARGUMENTS HAVE NO MERIT

Respondents raise several equally unavailing arguments seeking to challenge the individual and organizational Petitioners' standing. As with the other claims discussed above, Respondents' only support for their standing arguments stem from misrepresentations of the record and the law.

Respondents suggest that Petitioners lacked standing because they did not repeat their previous testimony at the full trial on the merits. That argument is baseless, given that Respondents conceded that the evidentiary record for the permanent injunction would include the preliminary injunction hearing testimony. At the June 24, 2013 pretrial conference, Petitioners' counsel noted his understanding that, as the Court had previously instructed, "the record that exists already from the two prior hearings is incorporated and is already part of this permanent record on the permanent injunction." Respondents' counsel stated in response, "And we would

agree that any prior testimony in prior hearings is part of the evidentiary record." (Pretrial Conf. Tr., 39:6-10 and 22-24.)

Respondents further waived this argument by failing to object to the use of testimony from the preliminary injunction hearings at the full trial despite numerous other opportunities to do so. Before trial, the Court specifically requested that the parties avoid repeating previously admitted testimony. *See* Hr'g Tr. 36-37, Dec. 13, 2012 (Status Conference) (confirming that "at the trial on the merits" parties can just rely on "what's already in the record and treat that as part of the entire record"). Respondents did not object. Respondents also failed to object at any point during Petitioners' opening and closing arguments (Hr'g Tr. 17, 23-25, 28, July 15, 2013; Hr'g Tr. 1978-79, 1988, 2003-04, 2048-49, Aug. 1, 2013), which repeatedly referred to the preliminary injunction testimony, or to the pre-trial and post-trial submissions that repeatedly relied on the 2012 testimony as a basis for invalidating the Law and establishing standing. *See, e.g.*, Pet'rs Pre-Trial Br. at 21 (July 17, 2013); Pet'rs' Prop. F.F. No. 37-38. Respondents' argument also cannot be squared with their contrary argument that the record from the earlier proceedings counted and that Judge McGinley should have relied on Judge Simpson's interpretations of that record. As such, the Court properly considered testimony from both the preliminary injunction hearings and the full trial on the merits in issuing its permanent injunction and finding standing.

The Organizational Petitioners established their standing with their testimony at the preliminary injunction hearing and at trial. There was nothing hypothetical or conjectural about their injuries; as the Court found, "[m]embers of the [League of Women Voters] and the NAACP testified regarding the diversion and waste of resources in voter education programs based on

changing and inaccurate messages regarding the types of compliant photo IDs, and requirements to obtain same." F.F. No. 20.

Contrary to Respondents' contention, it is irrelevant to the organizations' standing that they themselves do not vote. The only case Respondents cite for the proposition that organizations lack standing to assert constitutional violations is *Erfer*, which by its own terms is limited to "the law of standing in reapportionment matters." 568 Pa. at 136, 794 A.2d at 330. Here, the NAACP witness testified that it had to divert significant resources away from voter registration and focused instead on educating the public about the Photo ID Law. F.F. No. 22. The League of Women Voters witness testified that it had to waste resources marketing and educating voters as to the requirements of the Photo ID Law instead of focusing on its core mission of encouraging an informed citizenry and participation in the voting process. F.F. No. 24.[5] The Court rightly found that these organizations' loss of resources as a result of the Photo ID Law was a "direct harm sufficient for standing," particularly given that Respondents forced these organizations to not only divert but to actually waste their resources by repeatedly changing the prerequisites for obtaining compliant photo identification. Op. 15.

The Individual Petitioners – Bea Bookler and Wilola Shinholster Lee – established their individual standing through their testimony, particularly at the preliminary injunction hearing. The Court found that Petitioner Bookler's age and health would make it very difficult for her to even get to PennDOT. F.F. No. 28. The Court also found that Petitioner Lee had no photo identification acceptable under the Photo ID Law. F.F. No. 26. As voters who lack ID and thus would not be able to vote without being unduly burdened, it is hard to imagine how the

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[5] The Court noted that the Homeless Advocacy Project also had a similar interest in educating clients as to voting criteria and helping its clients obtain compliant photo ID. Op. 15.

Individual Petitioners could more strongly have standing to challenge the Photo ID Law. Respondents argue that they presented evidence at trial that Petitioner Bookler's care facility issues compliant IDs, but even a cursory review of the trial transcript shows that they are wrong. As the Court correctly found, Respondents offered "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." F.F. No. 31.

In any event, Respondents' standing arguments are beside the point given that the issues raised here are capable of repetition yet evading review. Even if, *arguendo*, none of the Organizational or Individual Petitioners still had standing by the time the court issued the Permanent Injunction, "the fact that a party lacks standing does not by itself deprive this Court of jurisdiction over the action, as it necessarily would under Article III of the federal Constitution." *Housing Auth. v. Pa. State Civil Serv. Comm'n*, 556 Pa. 621, 632, 730 A.2d 935, 941 (1999) (citations omitted). In particular, Pennsylvania courts recognize three exceptions to the principle that moot claims should be dismissed: "[1] where the conduct complained of is capable of repetition yet likely to evade review, [2] where the case involves issues important to the public interest or [3] where a party will suffer some detriment without the court's decision." *Pub. Defender's Office v. Venango Cnty. Court of Common Pleas*, 586 Pa. 317, 325, 893 A.2d 1275, 1279-80 (2006) (quoting *Sierra Club v. Pa. PUC*, 702 A.2d 1131, 1134 (Pa. Commw. Ct. 1997) (en banc)). All three exceptions apply here. As to the first exception, it bears noting that Respondents could easily moot any individual voter's claims by simply providing him or her with a compliant photo ID, and in fact have already proven themselves willing to do so repeatedly. But bringing individual claims on behalf of hundreds of thousands of disenfranchised or unduly burdened voters in the hopes that the Respondents would solve their

problems by mooting their claims one by one would not be an efficient or reasonable way to address the wholesale disenfranchisement and burden caused by the Photo ID Law.

The United States Supreme Court's decision in *Dunn v. Blumstein*, 405 U.S. 330 (1972), is on point. There, an individual plaintiff filed suit challenging a Tennessee statute that "authorize[d] the registration of only those persons who, at the time of the next election, will have been residents of the State for a year and residents of the county for three months." *Id.* at 331. The plaintiff attempted to register to vote shortly after moving to Nashville, but he was denied registration because he would not have lived in Tennessee for a year by the time of the next election. *Id.* Even though the plaintiff had lived in Tennessee for more than a year by the time the case reached the Supreme Court (and thus was eligible to register), the Supreme Court nonetheless rejected any "mootness argument" and reached the merits because "[a]lthough [the plaintiff] now can vote, the problem to voters posed by the Tennessee residence requirements is 'capable of repetition, yet evading review.'" *Id.* at 333 n.2 (quoting, *inter alia*, *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)). The Court further explained that "the laws in question remain on the books, and [the plaintiff] has standing to challenge them as a member of the class of people affected by the presently written statute." *Id.* Likewise, even if the Individual Petitioners here theoretically could obtain a photo ID needed to vote, the Law remains on the books, and the problem to voters posed by the Law is capable of repetition yet evading review. *See Musheno v. Dep't of Pub. Welfare*, 829 A.2d 1228, 1232 (Pa. Commw. Ct. 2003).

The Pennsylvania Supreme Court addressed the standard for standing in *Robinson Township* when it rejected the Commonwealth's standing arguments with respect to Dr. Mehernosh Khan related to Act 13's restrictions on obtaining and sharing information with other physicians. 2013 WL 6687290, at *10-11. The Court agreed that Dr. Khan's interest in the

litigation was neither remote nor speculative because Act 13 forced Dr. Khan into an "untenable and objectionable position" of having to "choos[e] between violating [the Act] . . . and violating his legal and ethical obligations to treat a patient by accepted standards, or not taking a case and refusing a patient medical care." *Id*. at *11. Both the individual and Organizational Petitioners face similar untenable and objectionable choices. The individual voters must choose between taking on burdens to their right to vote and risking losing that right to vote. The Organizational Petitioners likewise face the choice between ignoring Act 18 and sacrificing their core missions, and expending unnecessary resources to educate voters and help them comply with the threatened Law. The Supreme Court explained that "[o]ur existing jurisprudence permits pre-enforcement review of statutory provisions in cases in which petitioners must choose between equally unappealing options." *Id*. As such, the Organizational Petitioners and Individual Petitioners need not wait until the Law were actually enforced in order to have standing.[6]

V. RESPONDENTS' REMAINING ARGUMENTS HAVE NO MERIT

A. Respondents Have No Credible Argument Regarding In-Person Voter Fraud

It is difficult to follow Respondents' arguments about the supposed significance of an alleged "record" of in-person voter fraud put before the General Assembly. Resp'ts' Br. 51-56.

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[6] The Court previously sustained Respondents' preliminary objections dismissing the claims of certain individual petitioners – Viviette Applewhite, Gloria Cuttino, Nadine Marsh, Joyce Block and Devra Mirel "Asher" Schor – on the ground they supposedly lack standing because they obtained a compliant photo ID. While it does not affect the outcome here, the question of whether these petitioners have standing does affect who may enforce the final judgment. Petitioners accordingly reserve their right to appeal the Court's decision sustaining the preliminary objection with respect to these individuals' standing to challenge the Photo ID Law. Those voters all faced the same type of untenable choice as Dr. Khan in the *Robinson Township* case. That they chose to take on the undue and unnecessary burden to their right to vote by struggling to get a compliant photo ID does not undermine the fact that their right to vote has already been burdened even though the Law has now been struck down. And were the Law to have gone into effect, they all would have faced the same burdens again if they lost their ID or when they necessarily had to renew their ID when it expired.

The bottom line is that Respondents stipulated they were unaware of any in-person voter fraud that the Photo ID Law could have prevented, and that they would not introduce any evidence such fraud at trial. Op. 38; F.F. No. 249. And, indeed, they did not do so. Respondents point to a supplemental interrogatory response that they produced in this case, but that interrogatory response is not evidence, and in any event, it does not identify any incident of in-person voter fraud that was presented to the General Assembly or otherwise. *See* F.F. No. 249.

Even if the General Assembly did believe there was some voter fraud that the Photo ID Law could prevent, the Supreme Court recently recognized that "alleged good intentions of the legislative branch do not excuse non-compliance with the Constitution." *Robinson Township*, 2013 WL 668729, at *12 (internal quotation marks omitted). The Court further explained that "a statute is not exempt from a challenge brought for judicial consideration simply because it is said to be the General Assembly's expression of policy rendered in a polarized political context." *Id.* at *14. This is because "ours is a government in which the people have delegated general powers to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution." *Id.* at *29. Here, that means that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5.

B. Hundreds of Thousands of Registered Voters Lack a Compliant Photo ID

Respondents take issue with the Court's factual finding that hundreds of thousands of registered voters lack a compliant photo ID needed to vote under the Photo ID Law. Resp'ts' Br. 56-61. But this factual finding was based on overwhelming "[u]ncontested evidence submitted during two evidentiary hearings and a full trial of the merits." F.F. No. 223. As such, Respondents' arguments about Dr. Siskin's database-matching expert work barely scratches the surface. The Court also relied on Respondents' own witnesses and documentary evidence,

including (1) Respondents' own database match in June 2012, F.F. Nos. 53-56, 62; (2) Secretary Aichele's February 25, 2013 testimony before the Senate Appropriations Committee, F.F. Nos. 57-58; (3) former Department of State Policy Director Rebecca Oyler's trial testimony that the number is likely 4-5% of registered electors or 320,000-400,000, F.F. Nos. 59-60; and (4) Dr. Marker's expert work evaluating Professor Barreto's survey in 2012, F.F. Nos. 74-82. For their part, Respondents offered only the limited testimony of Dr. Wecker, whose methodologies in this case the Court rightly found wanting.

Respondents challenge the Court's finding that Dr. Marker's expert testimony rehabilitated the testimony of Professor Matthew Barreto as to his survey methodology. Resp'ts' Br. 49-51. In initially denying a preliminary injunction, Judge Simpson expressed concerns about Professor Barreto's survey design methodology and how those may have impacted his statistical results. *Applewhite I*, 2012 WL 3332376, at *4-5. In light of the methodological concerns expressed by Judge Simpson, Dr. Marker reviewed Professor Barreto's survey methodology and execution and explained why they were sound. While this Court separately had raised concerns about Professor Barreto's demeanor and whether his opinion testimony beyond his survey results was credible, Dr. Marker did not address Professor Barreto's demeanor or any potential bias that could have affected Professor Barreto's opinions distinct from the statistics that flowed from his survey methodology. Dr. Marker specifically testified that Professor Barreto's demeanor or credibility is irrelevant to the survey's methodology and results,

which themselves are sound. Hr'g Tr. 388, July 17, 2013. In any event, this Court's permanent injunction decision did not rely on Professor Barreto's opinion testimony.[7]

Respondents' argument that Petitioners supposedly violated confidentiality restrictions in contacting certain voter witnesses is frivolous, for the reasons Petitioners explained in their Opposition To Respondents' Motion In Limine To Exclude Witnesses Identified By Use Of Allegedly Confidential Data (July 10, 2013). The Court already denied Respondents' motion *in limine*. Order (July 16, 2013).

To obtain post-trial relief with respect to the factual question of how many voters lack a compliant photo ID to vote under the Photo ID Law, Respondents would need to show that the evidence refutes this Court's factual finding "beyond peradventure." *U.S. Mineral Prods.*, 927 A.2d at 723. To the contrary, the extensive, uncontested evidence overwhelmingly supports the Court's factual finding that hundreds of thousands of registered voters lack a compliant ID.[8]

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[7] Respondents argue that the Supreme Court somehow foreclosed rehabilitation of Professor Barreto's survey results by not addressing the issue. But the authority Respondents cite stands for the exact opposite position: Under *Commonwealth v. Starr*, 541 Pa. 564, 577, 664 A.2d 1326, 1332 (1995), "[t]he 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." As Respondents themselves state, the Supreme Court did not address the credibility of Professor Barreto's survey results, nor did it address the issue Petitioners raised on appeal as to whether demeanor is a legitimate basis on which to reject the validity of an expert's data.

[8] Respondents also are not entitled to any post-trial relief based on the Court's several citations to Bryan Niederberger's report. The Court did not accept his testimony and instead "relie[d] upon Respondents' witnesses' explanation for the discrepancy" with respect to 144 people who were identified in the Department of State's "SharePoint" database for logging so-called DOS ID "exceptions," but who, according to Respondents' counsel at least, never applied for a DOS ID in the first place. F.F. No. 168. In each instance where the Court cited Mr. Niederberger's report, other evidence from Respondents themselves establishes the Court's point. *See* F.F. No. 139 (Pet'rs' Ex. 2071 (spreadsheet exported from SharePoint database); F.F. No. 145 (Hr'g Tr. 646, July 18, 2013 (J. Marks)); F.F. No. 147 (already citing Hr'g Tr. 629-30, July 18, 2013 (J. Marks)); F.F. 150 (already citing Hr'g Tr. 610, July 18, 2013 (J. Marks)).

CONCLUSION

For the foregoing reasons, Respondents' post-trial motion pursuant to Pa.R.C.P. 227.1 should be denied.

Dated: February 28, 2014

Respectfully submitted,

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February 7, 2014

VIA EMAIL (tkeating@attorneygeneral.gov)
Timothy P. Keating
Senior Deputy Attorney General
Civil Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

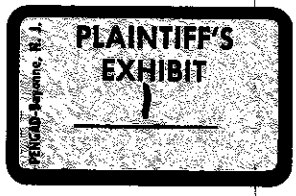
Dear Tim:

We recognize that Respondents have taken some initial steps to update publicly available information about Act 18 in light of Judge McGinley's injunction. However, our very cursory review shows that Respondents have left a large volume of incorrect and outdated information in the public domain, including numerous sources that suggest that Act 18 remains in effect for all purposes. Given that Judge McGinley has permanently enjoined implementation and enforcement of Act 18 pertaining to identification for voting, these continued publications violate the injunction and continue to mislead and confuse the public.

We request that Respondents undertake a detailed, thorough review to remove ***all*** information suggesting that all parts of Act 18 remain in effect. By way of example only:

- FAQs continue to refer to Voter ID and to treat Act 18 as if it were in effect: http://www.votespa.com/portal/server.pt/community/enlace_de_utilidad/13512/hide_-_frequently_asked_questions_-_vpa

- "I am . . . College Student" under "How to Vote" states "Familiarize yourself on how PA's Voter ID Law applies to college students" and links to the College and University ID FAQ (which discusses photo ID requirements) (same issue in Spanish version of webpage): http://www.votespa.com/portal/server.pt?open=514&objID=1174122&mode=2



- The voter registration form that is located online states that there are "identification requirements when voting." This is misleading to the extent it suggests that all voters, and not just first time voters, must have identification:
http://www.dosimages.pa.gov/pdf/OnlineVoterRegFormBlank.pdf

- The PennDOT website continues to have a Voter ID button on the homepage:
http://www.dot.state.pa.us/

- The "Driver and Vehicle Services" tab on the PennDOT website has a "Voter ID" button which links to a webpage titled "Obtaining a Free ID for Voting Purposes. This provides information about "New Department of State Voter ID, for Voting Purposes Only" and multiple links to other pages pertaining to the DOS ID:
http://www.dmv.state.pa.us/voter/voteridlaw.shtml

- The PennDOT/DMV webpages continue to include a fact page regarding "New Department of State Voter ID":
http://www.dmv.state.pa.us/pdotforms/voterid/2New%20Department%20of%20State%20ID.pdf

- ThePennDOT/ Driver & Vehicle Services webpage continue to include a tab, page and language that suggests Act 18 remains in effect for all purposes:
http://www.dmv.state.pa.us/voter/voteridlaw.shtml

- The Department of Aging homepage has a "Voter ID Law" button (similar to the one on the PennDOT homepage):
http://www.aging.state.pa.us/portal/server.pt/community/department_of_aging_home/18206

- The Department of Health homepage has a "Voter ID Law" button:
http://www.portal.state.pa.us/portal/server.pt/community/department_of_health_home/1745

- The "Birth and Death Certificates" section of the Department of Health website still has a page which describes "Applying for a birth certificate for voter ID," which discusses the issuance of birth certificates for voter ID in conjunction with Act 18:
http://www.portal.state.pa.us/portal/server.pt/community/voter_id/20978

- Various PA state agency websites still have information about Act 18 and the photo ID requirements available to anyone who searches for "voter ID" on the websites. For example:

    - A search on the Department of Aging website for "voter ID" returns links to various outdated FAQs (including military and care facilities) and a link to a Department of Aging Voter ID Fact Sheet dated April 20, 2012 that states "Act 18 of 2012 requires Pennsylvanians to produce photo ID in order to vote."
    - The PA.gov website has the DOS ID FAQ available. (The form was updated as of Sept. 2013 to state in red at the top "THE REQUIREMENT TO PRODUCE PHOTO ID AT THE POLLS IS NOT IN EFFECT AT THIS TIME. THE MATERIAL IN THIS FAQ RELATED TO VOTING IN PERSON AT THE POLLS IS FOR EDUCATIONAL PURPOSES ONLY.")
    - The PA.gov website also has various other handouts and FAQs available (e.g. a Voter ID handout that notes the law is not in effect at this time; a Military Voter FAQ that does not note that the law is no longer in effect; the March 2013 "Pennsylvania's Voter ID Law: A Guide to Act 18 of 2012" handbook)

I hope very much that we can resolve this matter among ourselves and do not have to take it to the Court for enforcement.

Sincerely,

Jennifer R. Clarke
Executive Director

cc: Alicia Hickok, Esq.

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February 18, 2014

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Re: ***Wilola Shinholster Lee, et al. v. Thomas W. Corbett, et al.***
No. 330 M.D. 2012

Dear Jennifer:

We have received your letter dated February 7, 2013, in which you describe various actions that you contend Respondents must take in response to the Order & Verdict issued by Judge Bernard McGinley on January 17, 2014. You assert that Respondents' failure to take these actions violates the permanent injunction described in the Order & Verdict. As explained below, we disagree that a permanent injunction is currently in effect.

Though we appreciate your courtesy in bringing to our attention measures that you believe Respondents would be required to undertake to comply with a permanent injunction order of the nature described in the Order & Verdict, we cannot agree with the premise of your letter that a permanent injunction is currently in effect. Rather, we believe that the only injunction order that is currently in effect is the ***preliminary*** injunction order that Commonwealth Court entered on August 16, 2013. Respondents are in full compliance with that injunction order.

In its August 16 order, Commonwealth Court enjoined Respondents from implementing or enforcing that part of Act 2012-18 that amends section 1210(a.2) of the Pennsylvania Election Code, 25 P.S. § 3050(a.2), and section 1210(a.4)(5)(ii) of the Election Code, 25 P.S. § 3050(a.4), ***until Commonwealth Court enters "a final appealable decision on the merits of the permanent injunction."*** (Emphasis added). The court also stated its intent that the preliminary injunction extend the transition procedures described in section 10(1) of Act 18 ***until proceedings before Commonwealth Court have concluded.***

The Order & Verdict issued on January 17 clearly is not a "final appealable decision on the merits." In fact, under the rules, Commonwealth Court cannot issue a final order on the merits until it decides Respondents' pending post-trial motions – which the January 17 Order & Verdict expressly contemplated – and enters judgment. Quite obviously, proceedings before Commonwealth Court have not concluded. Thus, ***by its own terms***, the preliminary injunction order remains in effect.

Nothing in Judge McGinley's Order & Verdict alters the effect of the preliminary injunction order or the court's stated intention to extend Act 18's transition procedures ***until proceedings before Commonwealth Court have concluded.*** Indeed, the Order & Verdict on its face reinforces the intention stated in the August 16 order: "[T]he preliminary injunction previously entered by this Court shall be **DISSOLVED** *upon entry of judgment.*" Order & Verdict at 3 (bolding in original; italics added).

Had the court intended to alter its August 16 preliminary injunction order, or to issue a different special injunction order having immediate effect pending disposition of post-trial motions and entry of a final order and judgment, the court would have done so explicitly. The court did not. Instead, the court's Order & Verdict, read in conjunction with the August 16 order, reflects an intention to maintain the status quo until Commonwealth Court enters a final judgment.

Please be assured that Respondents have been complying, and will continue to comply with the court's preliminary injunction order. As explained above, Respondents believe that they are doing all that the court's orders require of them. If you have any questions or concerns about this letter or about our compliance with the court's preliminary injunction order, please let us know. We are open to any discussions that would avoid involvement of the court pending its consideration and disposition of Respondents' pending post-trial motions.

Sincerely,

Timothy P. Keating

Timothy P. Keating
Senior Deputy Attorney General

cc: D. Alicia Hickok, Esquire