IN THE SUPREME COURT OF PENNSYLVANIA

No. 71 MAP 2012

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

Appellants,

v.

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

Appellees.

BRIEF OF APPELLANTS

Appeal from the August 15, 2012 Order of the Commonwealth Court of Pennsylvania at Docket No. 330 MD 2012

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Dated: August 30, 2012

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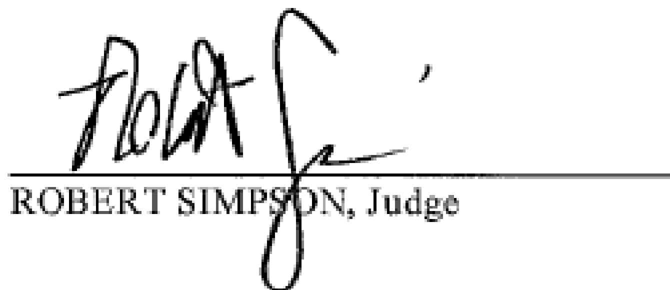
I. STATEMENT OF JURISDICTION

This action began under the original jurisdiction of Commonwealth Court of Pennsylvania. This Court has jurisdiction over this appeal pursuant to section 723(a) of the Judicial Code, 42 Pa. C.S. Section 723(a) (Appeals from Commonwealth Court), and pursuant to Article V, Section 9 (Right of appeal) of the Pennsylvania Constitution.

II. ORDER OR OTHER DETERMINATION IN QUESTION

On August 15, 2012, Commonwealth Court of Pennsylvania (Simpson, J.) entered the following order under docket No. 330 M.D. 2012:

> **AND NOW,** this 15th day of August, 2012, after hearing and after consideration of the oral and written arguments of counsel, it is **ORDERED** and **DECREED** as follows:
>
> Petioners' Application for Preliminary Injunction is **DENIED**.
>
> Upon praecipe, the Chief Clerk shall issue as of course a **RULE to SHOW CAUSE** why Respondents should not file a pleading responsive to the Petition for review within 30 days. The **RULE** shall be returnable by written answer filed within 10 days of service.



A complete copy of the Order and Determination on Application for Preliminary Injunction are attached hereto as Addendum A and also available at 2012 WL 3332376.

III. STATEMENT OF STANDARD AND SCOPE OF REVIEW

In reviewing Commonwealth Court's order denying a preliminary injunction, the scope of review is whether Commonwealth Court abused its discretion or committed an error of law. *Buffalo Twp. v. Jones*, 571 Pa. 637, 644 n. 4, 813 A.2d 659, 664 n.4 (2002), *cert denied*, 540 U.S. 821, 124 S.Ct. 134, 157 L. Ed. 2d 41 (2003). The scope of review is plenary. *Brayman Constr. Corp. v. Com., Dep't of Transp.*, 608 Pa. 584, 602, 13 A.3d 925, 935 (2011) (quoting *Roberts v. Bd. of Dirs. of Sch. Dist. of Scranton*, 462 Pa. 464, 469, 341 A.2d 475, 478 (1975)). The Court will reverse the denial of a preliminary injunction for abuse of discretion if there were no apparently reasonable grounds for the action of Commonwealth Court. *Brayman Constr. Corp.*, 608 Pa. at 602, 13 A.3d at 936. The Court also will reverse the denial of a preliminary injunction when the rule of law relied upon was palpably erroneous or misapplied. *Id.*

When examining conclusions of law or application of the law to a set of facts, the scope of review is plenary, and the standard of review is *de novo*. *Laird v. Dep't of Pub. Welfare*, 23 A.3d 1015, 1024 (Pa. 2011); *see City of Phila. v. Int'l Ass'n. of Firefighters, Local 22*, 606 Pa. 447, 461 n.11, 999 A.2d 555, 565 n.11 (2010). When examining findings of fact, the standard of review is substantial evidence. *In re Nomination Petition of Gales*, No. 7 WAP 2012, 2012 WL 2989179, at *2 (Pa. Jul. 18, 2012); *Bell v. Thornburgh*, 491 Pa. 263, 277, 420 A.2d 443, 450 (1980); *see also Parker v. City of Phila.*, 391 Pa. 242, 248, 137 A.2d 343, 346 (1958).

IV. STATEMENT OF THE QUESTIONS INVOLVED

A. Did Appellants demonstrate that disenfranchisement of hundreds of thousands of Pennsylvania voters because of the Act of March 14, 2012, P.L. 195, No. 18 ("Act 18," "Photo ID Law," or the "Law") is "immediate" harm and that greater injury would result from denying an injunction prohibiting enforcement of the Law than from granting the injunction?

Suggested answer: Yes. Commonwealth Court answered no.

B. Did Appellants show that they were likely to succeed on their claim that the right to vote is a fundamental right expressly guaranteed by the Pennsylvania Constitution and that the Photo ID Law violates that right because it is not narrowly tailored to achieve a compelling Commonwealth interest?[1]

Suggested answer: Yes. Commonwealth Court answered no.

1. Did Commonwealth Court ignore substantial evidence in the record demonstrating that hundreds of thousands of voters lack acceptable photo ID and that Pennsylvania's Photo ID Law will prevent otherwise eligible voters from voting, thereby burdening the fundamental right to vote expressly guaranteed by the Pennsylvania Constitution?

Suggested answer: Yes.

2. Was the Pennsylvania Department of State's ("DOS") belated post-lawsuit announcement of a new type of Commonwealth-issued ID insufficient as a matter of law to defeat Appellants' Application for Preliminary Injunction when no record evidence exists that the Commonwealth will be able to educate all voters or provide photo ID to every voter who needs it before the November election?

Suggested answer: Yes. Commonwealth Court answered no.

3. Is the availability of absentee voting and provisional voting and the existence of judicial avenues for post-election relief sufficient as a matter of law to mitigate the undisputed harms caused by the Photo ID Law?

Suggested answer: No. Commonwealth Court answered yes.

[1] Appellees are referred to collectively as "the Commonwealth," unless otherwise specified.

C. In a facial challenge to the constitutionality of the Photo ID Law under the Pennsylvania Constitution, is an injunction prohibiting enforcement of the Photo ID Law reasonably suited to abate the offending activity?

Suggested answer: Yes. Commonwealth Court answered no.

D. Was there substantial evidence to justify rejecting the testimony of Appellants' survey expert?

Suggested answer: No. Commonwealth Court answered yes.

V. STATEMENT OF THE CASE

A. FORM OF ACTION AND PROCEDURAL HISTORY

This is an appeal from Commonwealth Court's denial of Appellants' Application for Preliminary Injunction to enjoin implementation of the Photo ID Law. That Act imposes a photo identification requirement for in-person voters beginning with the November 2012 general election.

On May 1, 2012, Appellants commenced this action by filing a Petition for Review in Commonwealth Court's original jurisdiction pursuant to 42 Pa. C.S. Sections 761(a) and 764(2), as well as an Application for Special Relief in the Nature of a Preliminary Injunction. (R. 4a, 58a). Commonwealth Court held a seven-day hearing on the Application beginning July 25, 2012. (R. 383-1811a).

On August 15, 2012, Commonwealth Court issued an Order and Determination on Application for Preliminary Injunction denying the Application. (Addendum A). Appellants timely filed a Notice of Appeal and Motion to Expedite with this Court on August 16, 2012. This Court granted Appellants' Motion to Expedite on August 23, 2012 and provided for an expedited and abbreviated briefing schedule with no reply brief.

B. PRIOR DETERMINATIONS IN THIS CASE

The only prior determination in this case is the Order and Determination on Application for Preliminary Injunction issued on August 15, 2012, attached hereto as Addendum A and also available at 2012 WL 3332376.

C. NAME OF OFFICIAL WHOSE DETERMINATION IS TO BE REVIEWED

The Honorable Robert Simpson of Commonwealth Court issued the determination to be reviewed by this Court.

D. FACTUAL CHRONOLOGY

1. Requirements Of Pennsylvania's Photo ID Law

The Photo ID Law, enacted on March 14, 2012, effected a significant change in voting requirements in Pennsylvania by requiring for the first time that all in-person voters (with minor exceptions) provide one of a group of specified types of photo ID. (R. 1117a). Before the Photo ID Law, first-time voters established their identity by either photo or non-photo ID, including bank statements and utility bills. *See* 25 P.S. § 1210(a.1) (amended 2012). All voters were required to sign in at the polls and poll workers compared the signature to the signature in the district register that the county voter registration office had on file. *See id.* § 3050(a.3) (amended 2012).

The Photo ID Law requires Pennsylvanians who appear to vote in-person to produce photo ID that must be issued by one of the following: (1) the U.S. Government, (2) the Commonwealth of Pennsylvania, (3) a municipality of Pennsylvania to an employee of that municipality, (4) an accredited Pennsylvania public or private institution of higher learning, or (5) a Pennsylvania care facility. *Id.* § 2602(z.5)(2)(iv). The ID must show a name that "substantially conforms" to the name of the individual as it appears in voter registration records.

Id. § 2602(z.5)(2)(i). The ID must also contain an expiration date and, in most instances, it must not have expired. *Id.* § 2602(z.5)(2)(iii).[2] The Pennsylvania Department of Transportation ("PennDOT") is required to issue an identification card at no cost to any registered elector who completes an application and affirms that he does not have acceptable ID under the Photo ID Law and needs the ID for voting purposes. *Id.* § 2626(b). The Photo ID Law also requires that the Secretary of the Commonwealth "prepare and disseminate information to the public" regarding the requirements of the Photo ID Law. *Id.* § 2626(a).

The "universal ID" under the Law – the one form of ID that, in theory, all eligible voters are supposed to be able to obtain – is a PennDOT ID. (R. 1118-19a, 1352a). The Photo ID Law provides for various other photo IDs that will be acceptable, but most are not available to the vast majority of Pennsylvania voters. For example, although a college ID is acceptable under the Photo ID Law (provided that it has an expiration date), most eligible voters are not college students. 25 P.S. § 2602(z.5)(2)(iv)(D). Likewise, military ID and state employee ID are acceptable – if they have an expiration date – but most people are neither state employees nor in the military. *Id*. § 2602(z.5)(2)(iv)(A), (C).

2. Absentee Ballots

A limited group of voters may be able to avoid showing a photo ID by voting absentee. To cast an absentee ballot, a voter must provide either a current and valid driver's license number or the last four digits of his or her Social Security number; no other proof of identification is required. *Id.* § 2602(z.5)(3)(i), (ii). Unlike some other states with voter ID laws,

[2] A Pennsylvania Department of Transportation ("PennDOT") ID that is not more than twelve months past its expiration date is acceptable under the Photo ID Law, as is ID from an agency of the Armed Forces of the United States or reserve component that establishes that an individual is a current member or veteran of the Armed Forces or National Guard and that includes a designation that the expiration date is indefinite. 25 P.S. § 2602(z.5)(2)(iii)(A), (B).

however, Pennsylvania does not allow voting absentee unless the voter is actually absent from the municipality for military service, business or illness. *Id.* §§ 2602(w), 3146.1. A voter who is unable to attend his or her polling place on the day of any primary or election because of illness or physical disability may apply for an absentee ballot by executing a statement declaring the nature of his or her illness or disability, and the name, office address, and office telephone number of his or her attending physician. *Id.* § 3146.2(e)(2).[3]

3. Provisional Ballots

The Photo ID Law also provides that if a person has no acceptable photo ID at the polling place, then the voter may submit a provisional ballot. *Id.* § 3050(a.2)(1); (R. 833-34a, 943-44a). That ballot will not be counted at the time of voting. Instead, the voter has six calendar days to submit to his county board of elections the photo ID required by the Photo ID Law. 25 P.S. § 3050(a.4)(5)(ii)(E); (R. 834a, 946a, 1083-84a). Six days following the November 2012 elections falls on the date of the Veterans Day Federal holiday, so this year the deadline for provisional voters to provide photo ID will extend to seven days after the election. (R. 946a). PennDOT is closed for three of those seven days. (R. 1084a).

A voter also may be able to validate his or her provisional ballot by providing within six days to the county board of elections an affirmation that the voter (a) is indigent and (b) cannot obtain proof of identification without payment of a fee. 25 P.S. § 3050(a.4)(5)(ii)(D). The Commonwealth has not promulgated standards for determining who is indigent. (R. 836a). Since the DOS intends to make it possible for Pennsylvania-born residents to get a free birth

[3] The absentee ballot application contains the following capitalized admonition: " WARNING - IF YOU ARE ABLE TO VOTE IN PERSON ON ELECTION DAY, YOU MUST GO TO YOUR POLLING PLACE, VOID YOUR ABSENTEE BALLOT AND VOTE THERE." Pa. Dep't of State, Absentee Ballot Application, *available at* https://www.pavoterservices.state.pa.us/Pages/absenteeballotform.aspx.

certificate and there is no fee for the PennDot ID, (R. 836-37a), Pennsylvania-born voters generally could not sign the indigence affidavit. (R. 837a).[4]

The Photo ID Law will cause a dramatic increase in the need to require voters to complete provisional ballots. The Allegheny County Elections Manager projects a seventeen-fold increase in provisional ballots because of the Photo ID Law, from the 2808 cast in 2008 to a conservative estimate of over 35,000 this November. (R. 939-41a). The Philadelphia Commission projects provisional ballots to increase from 8300 in 2008 to over 200,000 this November. (R. 1563a, 1569-71a). Each voter diverted to casting a provisional ballot will prolong the line at the polling place, as the voter is likely to question and argue about the need to do so. (R. 942-45a). Completing a provisional ballot can take five minutes and occupies the time of one of the five poll workers. (R. 934-36a, 944a). People will be required to wait in line, both to vote by regular ballot and to vote provisionally. (R. 944-45a). Some voters leave without casting ballots when confronted with long waits. (R. 932-33a).

The provisional ballot is likely to be counted only for the person "who accidentally left their ID at their house or at home and is able to obtain it after the election and provide it," according to Ms. Rebecca Oyler, Director of Policy for the DOS. (R. 835a). For voters who learn for the first time on Election Day that they do not have a valid ID to vote and who must then begin the process of securing an ID to present within six days, "that will be a problem." (R. 835a).

Even if a voter provides the requisite documents to the county board of elections within six days after the election, whether a provisional ballot is counted is subject to a determination of

[4] Counties are not required to provide the indigent affirmation at polling places, so individuals seeking to cast a provisional ballot without photo ID will be left to their own devices to submit an affirmation. (R. 838-39a). Some of these provisional voters may end up making an unnecessary trip to their county board of elections in order to execute the required affirmation.

the county board of elections and a potential challenge by representatives of each candidate and from each political party. (R. 936-37a). Provisional ballots that are challenged are not counted and are set aside pending final determination of the challenge at a formal hearing held by the county board. (R. 937-38a). Once the challenged ballots are gathered, notice is required to be given only "*where possible* to all provisional electors thus challenged." 25 P.S. § 3050 (a.4)(4)(i) (emphasis added). A voter can learn after the fact whether his or her provisional ballot has been counted by viewing a website database or calling a 1-800 number. *Id.* § 3050 (a.4)(11); (R. 939a). Hearings to determine the validity of challenged ballots have no prescribed form and the rules of evidence do not apply. *See* 25 P.S. § 3050 (a.4)(4)(iii). If a voter's provisional ballot is rejected, a judicial challenge must be brought to the Court of Common Pleas within two days. *Id.* § 3050 (a.4)(4)(v); (R. 938a).

4. Burdens Of The Photo ID Law

Many eligible voters do not have PennDOT ID or any alternative form of ID permissible for voting under the Photo ID Law. There was much testimony regarding the numbers of persons lacking photo ID and all of the numbers cited were substantial. As recently as an effort undertaken in June, DOS and PennDOT were unable to match a valid PennDOT number to over 1.4 million registered voters.[5] (R. 1247a, 1258-59a). Appellants presented an independent

[5] These consist of 758,939 voters who could not be matched to a PennDOT ID, another 574,630 voters whose PennDOT ID will have been expired for more than 12 months on Election Day and therefore is invalid for voting unless renewed, (R. 1157a, 1256a, 1264a, 2060-61a), and 130,189 voters who said on their voter registration forms that they had PennDOT ID, but for whom no match could be found in the PennDOT database, (R. 1256-57a), totaling 1,463,758. Some of the approximately 758,939 registered voters in fact have a valid PennDOT ID for voting but their names in the Statewide Uniform Registry of Electors ("SURE") database of registered voters do not match their names in PennDOT's database, (R. 1152-54a, 1258-59a), and some of the 130,189 voters have valid PennDOT ID numbers which were entered incorrectly. (R. 1257a, 1279-80a). But the Commonwealth does not know how many of the over 1.4 million registered voters actually have a valid PennDOT ID. (R.1124-25a). The Commonwealth has sent out letters to the 758,959 voters it could not match to a PennDOT ID but not to any of the 130,189

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political scientist and survey expert, Professor Matt Barreto, who conducted a survey of over 2300 eligible voters. (R. 670a). The survey, conducted and compiled by a professional survey firm, (R. 672a), showed that over 1 million registered voters and over 1.3 million eligible voters lack PennDOT or any other form of acceptable ID under the Photo ID Law. (R. 711-12a, 1886a). In Philadelphia, 17.8% of eligible voters and 16.8% of registered voters do not have photo ID valid for voting in November.[6] (R. 1909-10a). In Allegheny County, the comparable rates were 18.7% and 16.8%.[7] (R. at 1909-10a). Among voters without valid photo ID, 27.6%, or 366,123 people, do not have the underlying documentation necessary to obtain a PennDOT ID. (R. 737a; 1889a).

The court below said it was unnecessary to determine the number of voters without acceptable ID, but estimated that the percentage of registered voters who did not have photo ID as of June 2012 is "somewhat more than 1% and significantly less than 9%." (Addendum A at 10 n.16). Applied to an estimated 8.2 million registered voters, (R. 1254a), the estimate of the court below is between "somewhat more than" 82,000 and "significantly less than" 738,000. There is no study or other evidence in the record that the number of registered voters or eligible voters without ID necessary to vote under the Photo ID Law in November is insubstantial or limited to the number of people testifying at the hearing.[8]

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voters whose PennDOT ID number did not match in the PennDOT database or the 574,630 voters whose PennDOT was expired. (R. 1127a).

[6] DOS similarly announced that it had identified 186,830 Philadelphia registered voters who could not be matched to a PennDOT photo ID number. (R. 2065a).

[7] DOS similarly announced that it had identified 99,218 Allegheny County registered voters who could not be matched to a PennDOT photo ID number. (R. 2064a).

[8] The court based its estimate on the testimony of Ms. Oyler, who is not an expert and conducted no study of her own, (R. 846a, 851a), but who had been asked to make a calculation on a rush basis in the summer of 2011. (R. 846-47a). Ms. Oyler subtracted the number of adults with PennDOT IDs from the adult population, used this figure to calculate a percentage of the adult

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The Commonwealth knows that not all Pennsylvanians can obtain PennDOT ID. (R. 1055a). PennDOT has been rejecting ID applications for years because applicants do not have the underlying documentation for a PennDOT ID. (R. 1055-56a, 1070a). Issuance of a PennDOT ID must be supported by rigorous documentary evidence – generally a raised-seal birth certificate, a Social Security card, and two proofs of residency. (R. 1046-47a, 1915a). PennDOT does not want to lower the requirements for obtaining its IDs because doing so would dilute the security of the IDs, which are relied on by banks, commercial airlines, and others to ensure the identity of individuals and guard against crimes, including terrorism. (R. 1070-71a, 1085-86a). PennDOT believes it must maintain its rigorous standards to comply with various federal and state concerns following 9/11. (R. 1085-86a).

Appellant Viviette Applewhite, a registered voter who has missed just one presidential election since she began voting, was born in 1919 in Philadelphia. (R. 469a, 474-75a). She does not have any ID acceptable for voting, (R. 478-81a, 1815a), and has been trying to get an ID from PennDOT for five years. (R. 482a). Her identification documents, including her Virginia non-driver ID and her Social Security card, were stolen with her purse several years ago. (R. 479-80a). Recently, she obtained a Pennsylvania birth certificate, but required a lawyer's assistance to do so. (R. 482-84a). She is still not eligible to obtain a PennDOT ID because she

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population without PennDOT ID, which she determined was roughly one percent, and then applied the same percentage to the population of registered voters. (R. 847-50a, 1926a). She was given the number of PennDOT IDs by unidentified PennDOT personnel. (R. 849a). She does not know how that figure was calculated but was told that it included noncitizens who would be ineligible voters. (R. 849-50a). Ms. Oyler made her computation long before the Commonwealth attempted to match its registered voter list to the PennDOT database, but in light of those results, she now believes the correct number is "likely greater than 1%." (R. 852-53a). Commonwealth Court indicated it rejected Appellants' efforts to "inflate" Ms. Oyler's estimate, (Addendum A at 10 n.16), presumably referring to Appellants' examination of Ms. Oyler with respect to the discrepancy between her rushed estimate and the DOS and PennDOT efforts to match registered voters with PennDOT numbers, (R. 852-53a), but the court offered no basis for its conclusion.

does not have a Social Security card and her birth certificate is in her birth name, Viviette Virene Brooks, while her Social Security records and proofs of residency are in the name Viviette Applewhite. (R. 486-91a).[9]

Appellant Nadine Marsh is a Beaver County resident who was born in Sewickley, Pennsylvania in 1928. (R. 556a, 1860a). Ms. Marsh has never had a driver's license or a photo ID. (R. 559a, 562a). She has made multiple attempts to obtain a PennDOT ID, including as recently as May 2012, but she cannot obtain a copy of her Pennsylvania birth certificate and has been told by the Pennsylvania Department of Health ("DOH") that a birth certificate does not exist for her. (R. 565-69a).

Appellant Wilola Shinholster Lee, a registered voter in Pennsylvania, was born in rural McIntyre, Georgia, in 1952. (R. 445a, 448a). Ms. Lee has not missed voting in an election since she registered at 18. (R. 448a). She does not have a PennDOT ID or any other ID acceptable under Pennsylvania's Photo ID Law. (R. 450-53a). She has been trying without success to obtain a PennDOT ID for over 12 years. (R. 456a). She is ineligible because she had not been able to provide a birth certificate. (R. 456a). Ms. Lee has tried to get her Georgia birth certificate, including with the assistance of a lawyer, but has been told that Georgia has no record of her birth. (R. 456-59a).

Appellant Bea Bookler, a registered voter in Pennsylvania, was born in Philadelphia in 1918. (R. 1294a, 1298-99a). Ms. Bookler lives in an assisted-living facility in Devon, Chester

[9] Ms. Applewhite said she would continue trying to get her PennDOT ID. (R. 495-96a). After the hearing, she went to PennDOT and was given a photo ID even though she did not have a Social Security card or documents verifying that the Viviette Virene Brooks listed on her birth certificate was the same person as the Viviette Applewhite applying for an ID. *See* Jessica Parks, *Lead plaintiff in Pa. voter ID case gets her photo ID*, THE PHILADELPHIA INQUIRER, Aug. 17, 2012, *available at* http://articles.philly.com/2012-08-17/news/33233715_1_penndot-id-new-voter-identification-law-penndot-center.

County and seldom leaves her room, but always goes to vote at the polling center next door to her assisted-living facility. (R. 1293). Ms. Bookler registered to vote when she was 21 and has voted ever since. (R. 1299a). At one time, Ms. Bookler had a birth certificate, a Pennsylvania driver's license, and a U.S. passport, but she no longer has any form of photo identification that is acceptable under the Photo ID Law. (R. 1297-98a). Ms. Bookler's assisted-living facility is not issuing photo ID. (R. 1302a). Obtaining a photo ID that would be acceptable to vote in the November 2012 election would require Ms. Bookler to endure a trip to a PennDOT Drivers License Center, which would be a strenuous physical burden for her. (R. 1301-02a, 1306-08a). Ms. Bookler is capable of voting at her next door polling place and does so regularly. (R. 1293-94a). As a result, she is not eligible to cast an absentee ballot because she cannot truthfully make the required statement that she is a "qualified registered and enrolled elector who because of illness or physical disability is unable to attend [her] polling place." 25 P.S. § 3146.1(k).

Appellant Joyce Block was born in Brooklyn, New York, in 1923. (R. 1218a). At birth her name was Joyce Altman and she took the name Block upon marriage, and only has her Jewish marriage contract (ketubah) in Hebrew as proof of her marriage. (R. 1219-21a). After the Photo ID Law was passed, Ms. Block went to PennDOT to get a photo ID. (R. 1226a-27a). She brought her birth certificate, ketubah, Social Security card, and several bills with her as proof of residency to obtain a PennDOT ID. (R. 1226-27a). PennDOT rejected her application because her birth certificate and Social Security card were in her maiden name while her voter registration was in her married name, and the mismatch precluded issuance of an ID. (R. 1229-31a). Her ketubah was not accepted as proof of a name change because it was in Hebrew. (R. 1230a). Ms. Block was also told that she would be charged for the photo ID card, even though she had requested a card for voting purposes and was entitled to a card for free. (R. 1230-31a).

Ultimately, a family member contacted State Senator Charles T. McIlhinney, Chair of the State Government Committee, who made phone calls to PennDOT on Ms. Block's behalf and arranged for her to receive her PennDOT ID after a second trip to PennDOT, notwithstanding that PennDOT could not match her documentation to her voter registration data and thus should not have issued the ID under its own policies and practices. (R. 1226-28a, 1231-32a).

Third-party witness Danny Rosa is a registered voter in Pennsylvania. (R. 1209a). He was born in New York City in 1949 as Danny Guerra and received the name Rosa from his stepfather. (R. 1201-03a). Mr. Rosa does not have any acceptable ID under the Photo ID Law. (R. 1207-08a). Mr. Rosa, who served as a sergeant in the United States Air Force and was honorably discharged, has a veterans card, but it is not acceptable ID for voting because it lacks an expiration date. (R. 1204-06a, 1208). After learning about the Photo ID Law, Mr. Rosa went to PennDOT twice to try get a photo ID but was rejected both times. (R. 1210-14a). Mr. Rosa cannot obtain a PennDOT ID because his name on his raised-seal New York birth certificate is Guerra (the name with which he was born) but his Social Security card and his voter registration record are in the name he has used virtually his entire life, Rosa. (R. 1202a, 2039a, 2042a, 2044a).

Ana Gonzalez, a third-party witness, is a registered voter in Pennsylvania. (R. 516a). She was born in Puerto Rico in 1949 and was adopted. (R. 512-13a). Ms. Gonzalez has tried but could not obtain a PennDOT ID because she did not have a birth certificate. (R. 524a). For the past five years, Ms. Gonzalez has been trying to obtain a birth certificate from Puerto Rico, but could not obtain a certificate because she needs a Photo ID to do so and because she does not know the names of her birth parents. (R. 521-22a).

Third-party witness Leila Stones, a registered voter in Pennsylvania, was born at home in Virginia in 1959. (R. 541a, 548a). She has no forms of acceptable ID under the Photo ID Law. (R. 545-47a). Although Ms. Stones knows her Social Security number, she lost her Social Security card and other important documents several years ago when her purse was stolen. (R. 547a, 552a). Ms. Stones has made several attempts to obtain a copy of her birth certificate from Virginia, but to date has not had any success, even with the help of an attorney. (R. 543-45a). She is thus not eligible for a PennDOT ID. After she learned about the Photo ID Law, Ms. Stones called DOS about her situation, but the individuals she spoke with gave her "the run around" and did not provide her with information to help her obtain a Photo ID for voting purposes. (R. 549-50a).

Third-party witness Stanley Garrett, a registered voter in Pennsylvania, was born in North Carolina in 1948. (R. 527a, 531a). Mr. Garrett is a former Marine who was honorably discharged and now receives veterans benefits. (R. 528-29a, 532-33a). He has a veterans photo identification card that is not acceptable for voting under the Photo ID Law because it lacks an expiration date. (R. 532-33a, 1843a). Mr. Garrett had a Pennsylvania drivers license in 1973, but has not renewed his license since then. (R. 533a). He cannot obtain a PennDOT ID because, although he has a Social Security card and two proofs of residency, he does not have and has not been able to obtain his birth certificate from North Carolina. (R. 533-37a).

Third-party witness Taylor Floria, a registered voter in Pennsylvania, is a 19-year-old student with autism and other disabilities who wants to vote for the first time in the November 2012 election. (R. 955-57a, 959-60a, 966-67a). Because of his disabilities, however, travelling to and visiting a PennDOT Driver's License Center to obtain a PennDOT ID places an extreme burden on him. (R. 961-62a). In an attempt to obtain a PennDOT ID for voting, Mr. Floria's

mother, Sandra Carroll, drove him approximately 35 miles from their home to a PennDOT Driver's License Center, but the lengthy car ride took a toll and the sensory overload of the PennDOT center was too much for Mr. Floria to handle; he left the PennDOT center without obtaining a PennDOT ID. (R. 961-62a, 969-71a). Mr. Floria has no other ID that would allow him to vote. (R. 958-59a).[10]

Third-party witness Christine "Tia" Sutter, a registered voter in Pennsylvania, was born in New York in 1951. (R. 1178a, 1181a). Ms. Sutter, a former Philadelphia Assistant District Attorney, does not have and has been unable to obtain acceptable ID under the Photo ID Law. (R. 1179a, 1182-88a). Ms. Sutter tried to obtain a PennDOT ID, but did not have a birth certificate with a raised seal and therefore could not obtain the ID. (R. 1184-85a). She tried to obtain a new birth certificate with a raised seal from New York, but New York would not issue her a birth certificate without a matching Social Security record; Ms. Sutter's birth record is in the name Christine Sutter, while her Social Security record is in the name Tia Sutter. (R. 1185-88a). Ms. Sutter tried to obtain a replacement Social Security card, but she could not get a Social Security card because she does not have a photo ID. (R. 1188-91a). Ms. Sutter looked into legally changing her name to Tia, but it would have cost her more than $400 and she would have been required to provide proofs of identification that she did not have. (R. 1191-92a).

Appellant Gloria Cuttino, a registered voter in Pennsylvania, was born in Summerville, South Carolina, in 1951. (R. 976a, 985a). She has no photo ID acceptable under the Photo ID Law. (R. 977-78a). She has tried for years to get her South Carolina birth certificate, even working with a lawyer, but has been told that the state has no record of her birth. (R. 978-82a,

[10] After the hearing, Mr. Floria attended a one week summer program from West Chester University, at which he received a University identification card with his name, photo and an expiration date of June 2017 that will allow him to vote on Election Day.

1933a). Ms. Cuttino has a Social Security number, but not her card, and has been unable to get a replacement card because she does not have the required photo identification. (R. 983-84a). Without a birth certificate or a Social Security card, Ms. Cuttino cannot obtain a PennDOT ID.[11]

PennDOT rejects applicants for PennDOT ID because they are unable to provide a raised-seal birth certificate, Social Security card, or two proofs of residency. (R. 1055-56a). Obtaining the underlying documentary evidence required to receive a PennDOT ID is a confusing process that can cost money, take years, and is difficult even for lawyers to navigate. (R. 582-85a, 593a, 599-600a, 623a, 1008a). Expert witness attorneys who try to assist poor and homeless persons in getting ID, (R. 574-79a, 991-1000a), testified that birth certificates can be difficult to obtain because individuals are stuck in a "catch-22" of needing a birth certificate to obtain a photo ID and needing a photo ID to obtain a birth certificate. (R. 581-83a, 1002-03a). Individuals born outside of Pennsylvania often do not know where to write to obtain a copy of their birth records. (R. 581-82a). Some individuals – both those born out-of-state and in Pennsylvania – go through the process and, even with the assistance of a lawyer, never receive a birth certificate. (R. 579a, 586-87a, 1008a). In some instances, a state may not have a birth record because the individual was born at home or because hospital records were destroyed. (R. 586-87a).

Birth certificates can also be difficult to obtain because of discrepancies in names. (R. 587-88a). When a birth record is not immediately available, applicants are required to look to secondary sources like decades-old school records and census records that cost time and money

[11] To replace a Social Security card individuals must provide documents proving U.S. citizenship and identity. Acceptable photo ID to obtain a replacement Social Security card include a current, unexpired U.S. driver's license, state-issued nondriver ID, or U.S. passport. If individuals do not have one of those forms of ID, the Social Security Administration will ask to see other documents, including: employee ID card, school card, health insurance card (not a Medicare card), or a U.S. military card. (R. 1864a).

to obtain. (R. 589-92a). Even when individuals are able to obtain birth certificates from their states of birth, the certificates can be rejected by PennDOT clerks who are unfamiliar with out-of-state records. (R. 603-04a). In addition to difficulties obtaining birth records, there are difficulties obtaining Social Security cards because clients lack ID or the other documents required to obtain replacement cards. (R. 594-98a, 1014a, 1864a). Some persons also have difficulty providing the proofs of residency necessary to obtain a PennDOT ID. (R. 598a). The Commonwealth knows that it is difficult for some individuals to obtain a raised-seal birth certificate and Social Security card as required to obtain a PennDOT ID. (R. 843-45a, 1070-71a, 1921a).[12]

Apart from difficulties in qualifying for PennDOT ID, simply getting to PennDOT is a burden because individuals without drivers' licenses – by definition – do not drive. Nine counties have no PennDOT facility that issues photo ID. (R. 1060a, 1950-2028a). Another thirteen counties have PennDOT facilities issuing IDs open only one day a week, and 10 counties have PennDOT facilities open only two days a week. (R. 1950-2028a). Mass transit options for getting to PennDOT facilities are limited or non-existent in some locations, especially rural locations. (R. 1420a, 1432-33a, 1444-46a). Getting to PennDOT therefore necessarily involves a cost, whether it be mass transit fare or gas. (R. 1432-33a). The Secretary of the Commonwealth asked PennDOT to create a mobile ID center that could travel to those without IDs, but PennDOT refused. (R. 1337-38a).

[12] The difficulties relating to obtaining birth certificates apply to every Pennsylvanian born in Puerto Rico. In 2010, the government of Puerto Rico announced that all birth certificates issued before then were invalid. (R. 1017-19a).

Finally, PennDOT is set up principally to issue driver's licenses, which are a privilege[13] rather than a right, and is in certain respects inhospitable or indifferent to the affirmative need to ensure that voters obtain the ID they need to vote. Witnesses testified that visits to PennDOT facilities for information about the Photo ID Law and obtaining free IDs involved standing and waiting in line from 25 minutes to up to an hour. (R. 1399a, 1421-22a, 1450a). Signage, brochures, and other information about the Photo ID Law were non-existent in some locations and difficult to locate in others, and individuals working at PennDOT centers were not always equipped to answer questions about obtaining free ID under the Photo ID Law. (R. 1395-96a, 1421a, 1434-35a). As recently as July – more than three months after the passage of the Photo ID Law – PennDOT was wrongly telling people that they would be charged for ID for voting purposes. (R. 2081-82a, 1230-31a, 1338-39a, 1392-93a, 1395a, 1399-1400a, 1419a, 1422-23a, 1443-44a, 1448-50a).

5. Post-Lawsuit Attempts To Remedy The Law's Deficiencies

Since the Photo ID Law was passed, approximately 3,000 persons have obtained free PennDOT photo IDs for voting purposes. (R. 1082a, 1149a). After this lawsuit was filed, the Commonwealth announced on May 23, 2012 that it would allow PennDOT to check with the DOH for the latter to locate birth records electronically for native-born Pennsylvania residents.[14] If DOH can locate the birth records, then an applicant can avoid having to produce a raised-seal birth certificate. To take advantage of this process, an applicant must make two separate trips to PennDOT: once to complete an application, and again after a 10-day wait while PennDOT

[13] *See* Pa. Dep't of Transp., PA Driver's Manual, at i, http://www.dmv.state.pa.us/pdotforms/pa_driversmanual/introduction.pdf.

[14] Press Release, Pa. Dep't of State, "Secretary of Commonwealth Announces Simplified Method to Obtain Photo ID for Pennsylvania-Born Voters" (May 23, 2012).

checks with DOH and notifies the applicant to return. (R. 1047-52a). For some native-born Pennsylvanians, DOH will not be able to locate a birth record. (R. 845a, 1921-22a). In addition, this procedure is not available for persons not born in Pennsylvania – approximately 25% of the population.[15] Only 73 IDs have been issued under this method; 13 applicants have been rejected. (R. 1073a).

After this lawsuit was brought, on June 1, 2012, at least five lawyers representing the Governor, DOS, and PennDOT, the lead lawyer defending this case and other Commonwealth officials met to discuss this litigation. (R. 1068-70a). At that meeting, it was suggested that DOS issue a new kind of photo ID that would have less rigorous requirements than the secure PennDOT ID. (R. 1070-71a). The purpose was to "mitigate" concerns raised by this lawsuit. (R. 1131a). The work would be done principally by PennDOT, but DOS would be the official issuer because PennDOT did not wish to create a non-secure ID. (R. 1070-72a). A week and a half after that meeting, Commonwealth lawyers urged that PennDOT and DOS confer with respect to creation of the new card. (R. 1921-23a, 843a). The DOS photo ID card ("DOS card") was not available when the law was passed, during discovery, or even during the hearing. (R. 1333a). Initially, PennDOT and DOS targeted July 24, 2012 as the launch date for the new ID. (R. at 911-12a). The new ID did not launch on that date. (R. at 912a). PennDOT then targeted August 27, 2012 for the first issuance of a DOS card. (R. 1063-64a). PennDOT announced that the DOS card was available on August 27, 2012.

DOS officials say their proposal will allow them to issue a photo ID for voting that will not require production of a birth certificate or a Social Security card. (R. 1138-39a, 1159a).

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[15] U.S. Census Bureau, 2006-2010 American Community Survey 5-Year Estimates for Pennsylvania, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP02.

Applicants will first have to try to obtain a PennDOT ID, including, if they are Pennsylvania citizens, making two trips to PennDOT if they do not have a raised-seal birth certificate. (R. at 1141-42a). If a voter is unable to obtain a PennDOT ID, then PennDOT will have the applicant fill out a form and take certain steps necessary to issue a DOS card, including checking the applicant's name and date of birth against the Statewide Uniform Registry of Electors ("SURE") database through a telephone call to DOS, confirming that the applicant's address is a valid mailing address, and, if the citizen has a Social Security number, verifying that the applicant's name matches the Social Security number. (R. 1146-47a, 1265-66a).

If the voter's name in the SURE database does not match the name associated with the voter's Social Security card – for example if a woman received a Social Security card in her birth name but registered to vote with a married name – that may raise a "flag" that will prevent an ID from being issued by PennDOT until DOS later contacts the voter to try to resolve the "flag" before the voter can return to PennDOT (for perhaps the third time) to perhaps obtain a DOS card. (R. 1136-39a, 2091a). Similarly, if an applicant does not have proofs of residency, his Social Security number cannot be verified, or his date of birth does not match, then a DOS card will not be issued to an applicant. (R. 2091a). Resolving this problem may require sending the applicant home – for what may be the second time (the first time would be for PennDOT to try to locate the applicant's birth record) – and it may or may not be possible to issue that person a DOS card. (R. 1139-41a). In that event, applicants would have to come to PennDOT a third time to get their photo ID.

The DOS card's existence and eligibility requirements are not secured by any statute or regulation. If the Commonwealth wanted to discontinue the card it could do so without any review process. If the Commonwealth wanted to change the eligibility rules for the card it could

do so with no review. (R. 1172-74a). A voter has no entitlement to a DOS card and would have no way to enforce a right to receive the card.

The Commonwealth does not know how many people will need a DOS card to vote. (R. 1073-74a, 1126-27a, 1148-49a). The Commonwealth has no plans to issue it on a mass scale. (R. 1073-74a, 1148-49a). It anticipates issuing no more than "several thousand." (R. 1073-74a, 1148-49a). Issuing more cards than that would strain an already burdened PennDOT system. There are just over two months from August 27, 2012 until the election. PennDOT currently issues 45,000 IDs a month and is "taxed" at that level. (R. 1074-79a, 1100a, 2029-30a). If even 10,000 additional people applied for a photo ID for voting in a month, that would increase PennDOT's workload by more than 20%. In addition, in counties where the PennDOT facility is open just one day per week, there will be only 10 days between now and the election in which to obtain a card. Those 10 days do not account for the time for voters applying for an ID card to be sent home while PennDOT searches for a birth record or resolves "flags" identified during the application process. PennDOT is not extending its hours or adding any new personnel or mobile units to handle applications for the card. (R. 1074a, 1107a, 1338a).

6. Commonwealth's Interest

The Commonwealth's asserted justifications for the Photo ID Law are to prevent fraud and ensure public confidence in the electoral process.[16] (R. 2084a). The only type of fraud

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[16] The Commonwealth identified the interest justifying the Photo ID Law as:

> 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.

(R. 2084a).

addressed by the photo requirement is in-person fraud: someone trying to impersonate a voter at the polling place. The Commonwealth knows of no instances of in-person voter fraud in Pennsylvania and does not claim that such fraud is likely to occur in the November 2012 election. (R. 1865a). The DOS's Director of Policy conceded that if the Photo ID Law prevented eligible, qualified voters from voting, it would reduce the integrity of elections. (R. 846a). No evidence or testimony was presented at the hearing to show how Act 18 will enhance public confidence in elections.

Commonwealth witnesses repeatedly conceded that it is unnecessary to have a secure ID to vote. (R. 1129a, 1334-35a). Thus, the nursing home ID – which has virtually no safeguards and is not a secure ID – permits one to vote. (R. 1129a, 1319-23a). Similarly, if one is eligible to vote absentee, one need not produce a PennDOT or other secure ID. (R. 1129a, 1323-25a). Likewise, one can vote with a valid PennDOT ID obtained before 9/11 even though the requirements for obtaining ID were less rigorous then. (R. 1129a). A college ID can be used to vote if it has an expiration date, but it is not a secure ID. (R. 1119a, 1326-27a).

Finally, there was unrebutted evidence that the asserted justifications for the Photo ID Law are pretextual. In Republican State Committee meetings on or about June 23, 2012, House Majority leader Mike Turzai boasted to his colleagues that the Law is "gonna allow Governor Romney to win the state of Pennsylvania."[17] (R. 1312-13a, 2072-73a).

E. STATEMENT OF THE DETERMINATION UNDER REVIEW

The determination under review is Commonwealth Court's Order and Determination on Application for Preliminary Injunction. Commonwealth Court held that Appellants presented a

[17] Kelly Cemetich, *Turzai: Voter ID Law Means Romney Can Win PA*, PoliticsPA, http://www.politicspa.com/turzai-voter-id-law-means-romney-can-win-pa/37153/; GOP Turzai: Voter ID Allows Romney to Win PA, YouTube.com, http://www.youtube.com/watch?v=87NN5sdqNt8.

substantial legal question about the level of constitutional scrutiny to which the Photo ID Law should be subject. (Addendum A at 16). The court also held that Appellants demonstrated that the alleged harm from the Photo ID Law was irreparable and that an injunction would restore the status quo. (*Id.* at 10). The court refused to enjoin the Photo ID Law because Appellants had not demonstrated that the alleged harm was "inevitable" and because no Pennsylvanian would vote between the time of his decision and resolution of this appeal, so the harm from denying the injunction would not be greater than the harm from granting it. (*Id.* at 10-11, 16).

The court below also ruled that Appellants were unlikely to succeed on the merits of their claim that the Photo ID Law infringes the right to vote guaranteed by the Pennsylvania Constitution, a claim that the court assessed using a "substantial deference/gross abuse" standard and a federal constitutional standard. (*Id.* at 23, 37-62).

The court below held that the injunction sought was not reasonably suited to abate the offending activity. (*Id.* at 65-68).

Finally, the court below found that parts of the testimony of Appellants' survey expert were believable, but that more were not. The court did not identify the credible parts of the expert's testimony. (*Id.* at 13-14).

VI. SUMMARY OF THE ARGUMENT

1. Under the standard set out in *Fischer v. Department of Public Welfare*, 497 Pa. 267, 271, 439 A.2d 1172, 1174 (1982), Appellants were entitled to a preliminary injunction. *Fischer* holds that if a petitioner shows that "substantial legal questions must be resolved to determine the rights of the respective parties," the petitioner must show only that "the threat of immediate and irreparable harm … is evident, that the injunction does not more than restore the status quo and that the greater injury would result by refusing the requested injunction than by granting it." *Id.* at 271, 439 A.2d at 1175. Here, Commonwealth Court found that Appellants raised a substantial legal question, that a preliminary injunction would restore the status quo, and that the alleged harm would be irreparable. Thus, the only legal determinations remaining were whether the harm threatened is immediate, and whether the greater harm will result from denying the injunction.

The court below committed legal error by requiring the alleged irreparable harm to be "inevitable." The standard is "immediate," and not "inevitable." The court below abdicated its duty to assess whether the greater harm would result from granting or denying the injunction. It limited its analysis to the time between when its opinion issued and when the appeal is likely to be resolved – a novel approach unsupported by any case law. Under a correct application of *Fischer*'s principles, Appellants were entitled to a preliminary injunction.

2. Even if *Fischer* does not apply – and Appellants are required to demonstrate a likelihood of success on the merits (rather than that "substantial legal questions must be resolved to determine the rights of the respective parties") – Commonwealth Court also erred as a matter of law in holding that Appellants had not established a likelihood of succeeding on their claim that the Pennsylvania Photo ID Law violates the right to vote guaranteed by Article I, Section 5 and Article VII, Section 1 of the Pennsylvania Constitution. Voting is a fundamental right. The

challenged law imposes significant burdens on the exercise of that right. The law must be assessed with strict scrutiny, under which it cannot survive a constitutional challenge because it is not narrowly tailored to serve any compelling Commonwealth interest. Even under the Federal flexible standard applied in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), or Pennsylvania intermediate scrutiny standard, the Photo ID Law is unconstitutional because the burden on the right to vote is not justified by legitimate governmental interests.

3. A preliminary injunction barring enforcement of the Photo ID Law is reasonably suited to abate the application of a facially unconstitutional statute to Pennsylvania voters.

4. Commonwealth Court's rejection of testimony by Appellants' survey expert was unsupported by substantial evidence.

VII. ARGUMENT

A. DISENFRANCHISEMENT OF PENNSYLVANIA VOTERS IS AN IMMEDIATE HARM AND GREATER INJURY WOULD RESULT FROM DENYING A PRELIMINARY INJUNCTION TO BAR ENFORCEMENT OF THE PHOTO ID LAW THAN WOULD RESULT FROM GRANTING AN INJUNCTION

1. *Fischer* Applies When, As Here, Appellants Present A Substantial Legal Question

Commonwealth Court erred in denying Appellants' requested preliminary injunction. ***First***, given that the court below found that Appellants met certain elements for a preliminary injunction, *Fischer* required only a balancing of the harms of granting or denying an injunction. ***Second***, the lower court applied a new legal standard for determining harm; it required "inevitable," not "immediate," harm. ***Third***, the court below used a legally unsupported time period in which to measure the relative harms from granting or denying an injunction; it considered only the period up until a resolution by this Court, and not a time period which includes the next election at which people will be required to show identification to vote.

Appellants are entitled to a preliminary injunction under a correct application of these three legal principles.

A party seeking a preliminary injunction typically must show six elements: (1) relief is necessary to prevent immediate and irreparable harm; (2) petitioners are likely to prevail on the merits; (3) greater injury will occur from refusing to grant the injunction than from granting it; (4) the injunction will not adversely affect the public interest; (5) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; and (6) the injunction is reasonably suited to abate the offending activity. *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.,* 573 Pa. 637, 646-47, 828 A.2d 995, 1001 (2003). Under *Fischer*, however, it is not necessary to show a likelihood of success on the merits. If a petitioner shows that "substantial legal questions must be resolved to determine the rights of the respective parties," the petitioner must show only that "the threat of immediate and irreparable harm . . . is evident, that the injunction does no more than restore the status quo and the greater injury would result by refusing the requested injunction than granting it." 497 Pa. at 271, 439 A.2d at 1175.

Commonwealth Court found that "the appropriate level of scrutiny raises a substantial legal question," and one that may have been outcome-determinative. (Addendum A at 62 ("[I]f strict scrutiny is to be employed, I might reach a different determination")). Commonwealth Court also found that a preliminary injunction would restore the status quo, (*id.* at 10), and that the alleged harm – potential disenfranchisement – was irreparable. (*Id.*). Given these findings, Appellants needed to show only two balance-of-the-harm factors to entitle them to a preliminary injunction: (1) that the alleged harm was "immediate" and (2) that greater injury would arise

from denying the preliminary injunction than from granting it. Appellants made both showings.[18]

2. Under The Correct Legal Test, Appellants Demonstrated The Threat Of Immediate Injury

Commonwealth Court agreed with Appellants that "to the extent [the Photo ID Law] will operate to prevent the casting or counting of in-person votes of qualified electors in the general election, those electors would suffer irreparable harm that cannot be adequately compensated by money damages." (Addendum A at 10). The court nevertheless concluded Appellants had not established that this harm is "immediate" because it is not "inevitable." (*Id.* at 10; *see also id.* at 11 ("I am not convinced any qualified elector need be disenfranchised by Act 18.")). The court below used "immediacy" and "inevitability" interchangeably in its analysis, (*id.* at 10, 14), but those standards are not interchangeable as a matter of law.

Under Pennsylvania law, the harm necessary to warrant a preliminary injunction must be "immediate" in the sense that it must be "imminent." *Keystone Guild, Inc. v. Pappas*, 399 Pa. 46, 48, 159 A.2d 681, 683 (1960). The harm must also be based on "concrete evidence" and not mere "speculation and hypothesis." *Summit Towne Ctr., Inc.,* 573 Pa. at 649, 828 A.2d at 1002.

As to the effect of an event that has not yet occurred, it is frequently impossible to establish that the harm is "inevitable," nor does the law demand such proof. For example, in *John G. Bryant Co. v. Sling Testing and Repair, Inc.*, 471 Pa. 1, 8-9, 369 A.2d 1164, 1167-68 (1977), this Court held that "the *possible consequences* of . . . unwarranted interference with customer relationships" was a "threatened harm" that was sufficiently immediate and irreparable

[18] The court below stated it would discuss only those elements of the preliminary injunction standard that Appellants had *not* established, and the opinion did not discuss the "status quo" element. (Addendum A at 10). The court below also did not discuss the "public interest" element of the traditional preliminary injunction inquiry, but possibly its "greater injury" discussion was intended to encompass this element.

to justify a preliminary injunction. (emphasis added). Similarly, this Court affirmed a finding of immediate and irreparable harm in a trade secrets case where there was an "immediate *threat* of injury" because a former employee "was in a position to pass on . . . secret formulas" and was "in the position to draw customers away from" his former employer. *Ala. Binder & Chem. Corp. v. Pa. Indus. Chem. Corp.*, 410 Pa. 214, 220-21, 189 A.2d 180, 184 (1963) (emphasis added). And in *Valley Forge Historical Society v. Washington Memorial Chapel*, 493 Pa. 491, 501, 426 A.2d 1123, 1128 (1981) this Court again affirmed a finding of immediate and irreparable harm because it was "clear that removal and storage of . . . artifacts *could expose them to risk* of loss or destruction." (emphasis added). In each of these cases, a threatened, non-speculative harm was sufficient to warrant a preliminary injunction.

At the preliminary injunction stage, Appellants thus were not required to prove that it was "inevitable" that the Photo ID Law would lead to disenfranchisement. Appellants presented unrebutted evidence that the Photo ID Law creates a non-speculative threat that a substantial number of Pennsylvania voters will be disenfranchised in the upcoming elections. The court below found that as many as hundreds of thousands of registered voters do not have the photo ID mandated by the Law, *supra* at 10, and Professor Barreto found over 1 million. *Supra* at 10. There was no evidence that the Commonwealth will get IDs to all persons who need it. To the contrary, the evidence uniformly showed that the Commonwealth is assuming that it need not distribute more than a few thousand IDs for voting. *Supra* at 22. "The 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, 158-59, 202 A.2d 538, 540 (1964). The evidence here comfortably demonstrates a non-speculative threat of immediate injury.

3. Under The Correct Legal Test, Appellants Demonstrated Greater Injury Would Result From Denying The Injunction

Commonwealth Court limited its balancing of the injury resulting from a preliminary injunction to the time period between its decision and resolution of this appeal. It concluded that "granting a preliminary injunction *between now and the time an appeal is likely resolved* would result in great injury." (Addendum A at 16 (emphasis added)). In the view of the court below, its role was merely to "tee this up for the Supreme Court to make a decision well in advance of the election." (R. 388a). Whether or not such a novel approach was warranted, this Court now must resolve the ultimate question ignored below: whether greater injury will result from refusing the requested injunction and allowing the Photo ID Law to be implemented for the November 2012 elections. The answer to that question is clearly yes.

With an injunction, the parties will return to the status quo, specifically the sign-in system for verifying the identity of voters on Election Day and the proof-of-identification requirement for first-time voters, which allows such voters to show broader categories of identification that most voters have. *Supra* at 5 (describing system); (Addendum A at 9-10). That status quo system protected the public's interest in deterring in-person voter fraud, as the Commonwealth stipulated that it is not aware of any incidents of in-person voter fraud in Pennsylvania. *Supra* at 23. There is also no evidence that any in-person fraud would occur in the November election. *Supra* at 23.

The only harm from granting an injunction the court below identified was the difficulty for Commonwealth agencies that would have to stop and restart education efforts if a preliminary injunction were granted and then reversed on appeal. (*See* Addendum A at 15-16). This harm is no longer relevant because this Court will make the final determination of the Photo ID Law's status for the November election. The Commissioner of the Bureau of Commissions, Elections

and Legislation within DOS, confirmed that the Commonwealth will be able to comply with an injunction even if the Court does not rule until October. (*See* R. 1175-76a).[19]

By contrast, the threatened harm of disenfranchisement to voters – which Commonwealth Court did not consider because it "d[id] not expect anyone to vote between now and the time an appeal is resolved" (Addendum A at 16) – is, as the court found, irreparable. (*Id.* at 10). The greater injury element weighs in favor of issuing a preliminary injunction.

B. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE RIGHT TO VOTE IS A FUNDAMENTAL RIGHT UNDER THE PENNSYLVANIA CONSTITUTION AND THAT THE PHOTO ID LAW VIOLATES THAT RIGHT BECAUSE IT IS NOT NARROWLY TAILORED TO ACHIEVE A COMPELLING COMMONWEALTH INTEREST

As discussed above, a likelihood of success on the merits need not be demonstrated where the court below finds that "substantial legal questions must be resolved to determine the rights of the respective parties." *Fischer*, 497 Pa. at 271, 439 A.2d at 1174. Here, however, Appellants demonstrated that they were likely to succeed on the merits of their claim. Thus, regardless of whether this Court applies the standard as applied in *Fischer*, or requires Appellants to demonstrate all six elements set forth in *Summit Towne Center, Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. at 646-47, 828 A.2d at 1001, Appellants have established the necessary factors.

In analyzing the "likelihood of success" element of the test for a preliminary injunction, the court below failed to follow Pennsylvania law governing the standard to assess the constitutionality of an act alleged to impair a fundamental right. It did not address whether the

[19] The Commissioner of the Bureau of Commissions, Elections and Legislation separately testified that the Commonwealth would be able to restart implementation of the Photo ID Law if Commonwealth Court enjoined the law and that decision were reversed on appeal. (*See* R. 1175-76a). Commonwealth Court rejected this testimony based entirely on demeanor, (Addendum A at 16,) although it elsewhere found the Commonwealth witnesses credible. (*Id.* at 10-11 & n.16).

right to vote is fundamental in Pennsylvania. The court also misapplied federal standards of scrutiny.

1. Pennsylvania Law Requires More Exacting Scrutiny Of The Photo ID Law Than Commonwealth Court Applied

a. Commonwealth Court Applied The Wrong Standards To Judge The Photo ID Law

Commonwealth Court held that "[d]espite the initial appeal of a strict scrutiny methodology based on the right to vote, there is no clear, relevant Pennsylvania authority to support that approach." (Addendum A at 58). The court below first gleaned that under Pennsylvania law, the Photo ID Law should be assessed using a "substantial degree of deference/gross abuse" standard. (*Id.* at 61, 64). Using this standard, the court held that under Pennsylvania law, because the Photo ID Law does not *expressly* disenfranchise voters and "does not attempt to alter the state constitution's substantive voter qualifications," it is merely "an election regulation designed to verify a voter's identity" and therefore required no level of real scrutiny. (*Id.* at 35, 36; *see also id*. at 22 (focusing on express terms of the Photo ID Law, namely that "none of these situations are evident on the face of Act 18" and that "on its face, Act 18 applies equally to all qualified electors"); *id.* at 34-35 (distinguishing *McCafferty v. Guyer*, 59 Pa. 109, 1868 WL 6998 (May 18, 1868), because challenged statute there *"expressly"* disenfranchised individuals)).

Having determined that Pennsylvania law required applying a "gross abuse" standard, the court below then switched its mode of analysis and stated that to determine the standard of scrutiny for a challenge under the Pennsylvania Constitution: "I start my analysis with the United States Supreme Court." (Addendum A at 37). The court proceeded to apply the so-called "flexible" approach the Supreme Court adopted in *Crawford,* 553 U.S. 181, a federal constitutional challenge to Indiana's voter ID law.

Neither the "gross abuse" nor federal "flexible" standard is applicable here.

b. Voting Is A Fundamental Right And Burdens On That Right Must Be Examined With Strict Scrutiny

The Commonwealth contended that the "right to vote is not a fundamental one." (R. 199a). Appellants argued that voting is a fundamental right. (R. 131a). The court below avoided a ruling on this threshold question by characterizing the Photo ID Law as one that merely regulates the time, place, or manner of elections. To determine the appropriate level of scrutiny to which the Photo ID Law should be subject, however, the court below should have resolved that threshold dispute.

The Pennsylvania Constitution contains two separate provisions protecting the right to vote. Article VII, Section 1 sets forth an exhaustive list of the "qualifications" needed in order to "be entitled to vote at all elections":

- Citizen of the United States;
- Over the age of eighteen (as modified by the Twenty-Sixth Amendment to the United States Constitution);
- Resident of the Commonwealth of Pennsylvania;
- Resident of the election district in which the person offers to vote.

PA. CONST. Art. VII, § 1. The right to vote based on satisfaction of these requirements is safeguarded by the terms of Article I, Section 5, which states that "[e]lections shall be free and equal." PA. CONST. Art. I, § 5. It also provides without exception that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." *Id.*

There can be no question that the right to vote is a fundamental right guaranteed to all Pennsylvania citizens by the Pennsylvania Constitution, which explicitly addresses the right, unlike the U.S. Constitution. This court has consistently confirmed that voting is a "sacred right" whose "enjoyment . . . must not be impaired by . . . regulation." *Page v. Allen*, 58 Pa. 338, 347 (1868); *see Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 588 Pa. 95, 116, 902 A.2d 476, 488

(2006) (resolution of voting machine issued "involve[d] the fundamental right to vote"); *In re Nader*, 580 Pa. 22, 39, 858 A.2d 1167, 1177 (2004) ("the longstanding and overriding policy in our Commonwealth to protect the elective franchise"). As the Court said in *Norwood Election Contest Case*, 382 Pa. 547, 549, 116 A.2d 552, 553 (1955), it is "commonplace" to recognize that "the right of suffrage is the most treasured prerogative of citizenship. . . . [It] may not be impaired or infringed upon in any way except through the fault of the voter himself."

Consistent with the importance of the right to vote, this Court has stated that "[t]he disfranchisement of even one person validly exercising his right to vote is an extremely serious matter. . . . [E]ither an individual voter or group of voters are not to be disenfranchised at an election except for compelling reasons." *Perles*, 415 Pa. at 158-59, 202 A.2d at 540 (internal quotation marks omitted); *see also In re Canvass of Absentee Ballots of 1967 Gen. Election*, 431 Pa. 165, 172, 245 A.2d 258, 262 (1968) (disenfranchisement of 5,506 citizens would be "unconscionable"). The failure of the court below to address whether the right to vote is fundamental led it to ignore or distinguish Pennsylvania case law holding that a strict level of scrutiny is required in cases involving fundamental rights.

In any hierarchy of rights in Pennsylvania, the right to vote is most appropriately placed at least alongside, and possibly above, the right of free expression guaranteed by Article I, Section 7 of the Pennsylvania Constitution. *See Bergdoll v. Kane*, 557 Pa. 72, 85, 731 A.2d 1261, 1269 (1999) (right to vote is "pervasive of other basic civil and political rights, and is the bedrock of our free political system") (quotation omitted). In cases involving the right of free expression, the Pennsylvania Supreme Court applies strict scrutiny. For instance, *DePaul v. Commonwealth*, 600 Pa. 573, 590, 969 A.2d 536, 546 (2009), was a facial and as-applied challenge to a law banning political contributions by a class of individuals affiliated with

licensed gaming. This Court held that "when protected expression is at issue, strict scrutiny is the appropriate measure of governmental restriction." Similarly, in *Pap's A.M. v. City of Erie*, 571 Pa. 375, 410, 812 A.2d 591, 612 (2002), this Court held that under the Pennsylvania Constitution, an intermediate level of scrutiny "is inappropriate where expressive conduct such as the nude dancing at issue here is involved," and instead applied a strict scrutiny standard. This Court also applies strict scrutiny in cases dealing with non-speech fundamental rights. *See Nixon v. Commonwealth*, 576 Pa. 385, 399-400, 839 A.2d 277, 286-87 (2003) (rights to privacy, to marry, to procreate); *Stenger v. Lehigh Valley Hosp. Ctr.*, 530 Pa. 426, 438, 609 A.2d 796, 802 (1992) (right to privacy). The right to vote deserves no less protection. As the Court explained in *Perles v. County Return Board of Northumberland County*, "either an individual voter or a group of voters are not to be disenfranchised at an election except for *compelling* reasons." 415 Pa. at 158-59, 202 A.2d at 540 (emphasis added) (quotations omitted).

The cases from which the court below divined that the appropriate standard is "gross abuse," (*see* Addendum A at 23-36), do not support its conclusion. In *Winston v. Moore*, 244 Pa. 447, 91 A. 520 (1914), the right to exercise the suffrage was not at issue; the law at issue permitted an elector to "vote for the name . . . printed upon the ballot, or he may write in the name of any person for whom he may choose to vote." *Id.* at 460, 91 A. at 524. *Independence Party Nomination*, 208 Pa. 108, 57 A. 344 (1904), likewise did not address directly the rights of electors to exercise the suffrage. The court below quoted from *Independence Party*, (Addendum A. at 26 n.20), but omitted the very next lines of the quoted paragraph, which are:

> Anything beyond this [details of time, place, manner, etc.] is not regulation, but unconstitutional restriction. It is never to be overlooked, therefore, that the requirement of the use of an official ballot is a questionable exercise of legislative power, and, even in the most favorable view, treads closely on the border of a void interference with the individual elector. **Every doubt, therefore,**

> **in the construction of the statute must be resolved in favor of the elector.**

208 Pa. at 112, 57 A. at 345 (emphasis added). This case hardly supports application of the "gross abuse" standard.

In *Ray v. Commonwealth*, 442 Pa. 606, 276 A.2d 509 (1971) and *Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Cmwlth. Ct. 2000), *aff'd per curiam*, 556 Pa. 616, 783 A.2d 763 (2001), this Court and Commonwealth Court, respectively, held, without using a strict scrutiny analysis, that it is constitutional for the legislature to disenfranchise felons. These cases are inapplicable. Felons are *sui generis* in American jurisprudence. Appellants are unaware of any other case in which this Court has permitted a class of persons to be disenfranchised. *Cf. McCafferty*, 59 Pa. 109 (impermissible to disenfranchise deserters). Appellants are not felons and cases applying the unique rules for felons are inapplicable here.

Finally, the court below relied on *Patterson v. Barlow*, 60 Pa. 54 (1869). *Patterson* was a challenge to the Registry Law of 1869, which created more demanding voter qualification procedures for the City of Philadelphia than the rest of the Commonwealth, including payment of a "special election tax" of 50 cents. The Court upheld the law citing, *inter alia*, the unsavory nature of some Philadelphians as opposed to the "simple rural population."[20] *Id.* at 78-80, 84-85.

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[20] According to the Court,

> A simple rural population needs no night police, and no lock-up. Rogues and strumpets do not nightly traverse the deserted highways of the farmer. Low inns, restaurants, sailors' boarding-houses, and houses of ill fame do not abound in rural precincts, ready to pour out on election day their pestilent hordes of imported bullies and vagabonds, and to cast them multiplied upon the polls as voters. In large cities such things exist, and its proper population therefore needs greater protections, and local legislation must come to their relief…. [To say otherwise would be] to place the vicious vagrant, the wandering Arabs, the Tartar hordes of our

Footnote continued on next page

Patterson is an anachronism, predating the modern framework of differing levels of scrutiny by more than half a century[21] and based on outright prejudice. *Patterson* is no guide to a current construction of the constitutional rights of Pennsylvanians.[22]

The court below also erred in applying the "flexible" standard the U.S. Supreme Court set out in *Crawford*, with no analysis of whether this Court would adopt that standard. *Crawford* dealt with the U.S. Constitution. This case is about the Pennsylvania Constitution. Amicus Curiae Pennsylvania AFL-CIO submitted to the court below a brief reviewing the history and background of Article I, Section 5 of the Pennsylvania Constitution, which has no counterpart in the U.S. Constitution. As the AFL-CIO pointed out, under *Commonwealth v. Edmunds*, 562 Pa. 374, 586 A.2d 887 (1997), courts in Pennsylvania must undertake independent analyses of the Pennsylvania Constitution. (R. 238a (quoting *Edmunds*)). This Court has forged its own path construing the Pennsylvania Constitution, independent from federal constitutional law.[23] Because voting is a fundamental, expressly-guaranteed right under the Pennsylvania Constitution, and because this Court historically applies more exacting scrutiny than the U.S.

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> large cities, on a level with the virtuous and good man - on a level with the industrious, the poor and the rich.

60 Pa. at 78 (quotations omitted).

[21] *See United States v. Carolene Prods. Co.*, 304 U.S. 144 n.4 (1938) (discussing appropriate levels of scrutiny in equal protection cases).

[22] The other case Commonwealth Court relied on in its discussion of Pennsylvania law was *League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010), a challenge brought under provisions of the Indiana Constitution different from those of the Pennsylvania Constitution and decided under Indiana cases that differ from those in Pennsylvania, is of limited value to determining the correct Pennsylvania standard of scrutiny.

[23] *See DePaul*, 600 Pa. at 589, 969 A.2d at 546 ("Article I, Section 7 provides broader protections of expression than the related First Amendment guarantee in a number of different contexts."); *Nixon*, 576 Pa. at 399-400, 839 A.2d at 286-87; *Stenger*, 530 Pa. at 438, 609 A.2d at 802; *see also Pa. State Bd. of Pharm. v. Pastor*, 441 Pa. 186, 191, 272 A.2d 487, 490 (1971) (Pennsylvania "has scrutinized regulatory legislation perhaps more closely than would the Supreme Court of the United States.").

Supreme Court in assessing impairments of an equivalent right (to free expression), the court below erred in adopting the *Crawford* standard.

2. Under Pennsylvania Law, The Photo ID Law Impermissibly Burdens The Fundamental Right To Vote Without Sufficient Justification

Winston teaches that "elections are free and equal within the meaning of the Constitution . . . when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial." 244 Pa. at 457, 91 A. at 523. This is consistent with Pennsylvania law requiring strict scrutiny of laws that burden – not merely extinguish – fundamental rights. *See James v. Se. Pa. Transp. Auth.*, 505 Pa. 137, 145, 477 A.2d 1302, 1305-06 (1984) ("[W]here . . . a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny").[24]

a. *The Photo ID Law Imposes Substantial Burdens On Voters*

The logical starting point for any analysis of burden in a photo ID case is how many people lack the ID necessary to vote. By any measure, the number here is large. Professor Barreto's survey found over 1 million registered voters and over 1.3 million eligible voters lacked the required ID. *Supra* at 10. The Commonwealth's most recent exercise found over 1.4 million registered voters for whom it could not find a valid PennDOT ID. *Supra* at 9. The court below inexplicably stated it was unnecessary for preliminary injunction purposes even to estimate the number of people without photo ID, (Addendum A at 10 n.16), but nonetheless did

[24] *See also, e.g.*, *Schmehl v. Wegelin*, 592 Pa. 581, 585, 589, 927 A.2d 183, 185, 188 (2007) (applying strict scrutiny to classification that "burdened a parent's fundamental right to make decisions regarding the upbringing of his or her children" by providing for mandatory grandparent visitation); *Pa. Bar Ass'n v. Commonwealth*, 147 Pa. Cmwlth. 351, 366, 607 A.2d 850, 857 (1992) (applying strict scrutiny to law "impos[ing] a burden upon" attorneys' "reputation" rights by providing for the maintenance of reports that would damage the reputations of attorneys listed).

so, arriving at a range of between approximately one hundred thousand and several hundred thousand. *Supra* at 10.[25]

In addition to the sheer numbers of voters without acceptable ID, the unrebutted testimony was that it is difficult for many voters to obtain PennDOT ID, which is the universal ID that, in theory, everyone is supposed to be able to obtain in order to vote. *Supra* at 6. In reality, the PennDOT ID is a secure form of ID that imposes hurdles for applicants that are wholly unnecessary to verify one's identity to vote. *Supra* at 11, 23. Witness after witness described multiple, unsuccessful efforts to obtain PennDOT ID and the underlying documents necessary to obtain that ID. *Supra* at 9-19. This unchallenged testimony was confirmed by PennDOT's admission that it has always known that there are people who do not qualify for PennDOT ID and that it regularly rejects such applications. *Supra* at 11; *see also* (R. 1921-23a). Professor Baretto's survey estimated that 379,009 eligible voters lack both a valid photo ID and the underlying documents to obtain PennDOT ID. (R. 735a, 1886a, 1889a).

Wholly apart from the unnecessary documentation hurdles required to obtain PennDOT ID, simply getting to PennDOT is a burden for people who by definition are not drivers; these people may have little or no local access to PennDOT, which has a limited or nonexistent presence in many parts of the Commonwealth. *Supra* at 18-19. This problem is compounded by procedures that require multiple trips to PennDOT to permit verification of a birth record – a step which may be necessary for a secure ID but Commonwealth witnesses agreed was unnecessary

[25] Other photo ID decisions identify the number of persons lacking the requisite ID as a key fact. *See Crawford*, 555 U.S. at 200 ("the evidence in the record does not provide us with the number of registered voters without photo identification"); *Mil. Branch of NAACP v. Walker*, 11 CV 5492, slip op. at 17-18 (Wis. Cir. Ct. July 17, 2012) (unpublished); *Mil. Branch of NAACP v. Walker,* No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. March 6, 2012); *Weinschenk v. State*, 203 S.W.3d 201, 206 (Mo. 2006) (percent and number of Missouri citizens who lack requisite photo ID).

for voting. *Supra* at 19-20, 23. Perhaps due to the unnecessary difficulties attendant to obtaining PennDOT ID, the Commonwealth has only issued 3,000 free PennDOT ID for voting since the Photo ID Law was enacted. *Supra* at 19.

The substantial burden on the right to vote is underscored by the lack of any plan by the Commonwealth to realistically give large numbers of voters the ID they need to vote. Not one Commonwealth witness testified how they would make photo ID available to up to several hundred thousand persons who need it in a very limited period of time. Indeed, it is the position of the Commonwealth witnesses that they do not know how many people lack ID to vote and they have not done the work to find out. *Supra* at 22. (R. 1126-27a, 1346a). Nor has the Commonwealth provided the funding or personnel to distribute photo ID on a wide scale basis. *Supra* at 22; (R. 1349a). Pennsylvania's lack of planning stands in sharp contrast to the Commonwealth of Virginia, which, simultaneous with its adoption of a voter ID law in May of this year, took affirmative steps to ensure that all voters would have ID to vote by mailing an acceptable form of ID to all voters. *See* VA Exec. Order No. 45 (May 18, 2012) (Executive Order implementing Virginia voter identification law).[26] A similar approach is illustrated by Rhode Island's photo ID law. Enacted on July 2, 2011, Rhode Island's law is phased in to take effect more than two years later on January 2014. R.I. Gen. Laws § 17-19-24.2 (2011). During the interim, Rhode Island will issue free photo ID for voting if the applicant shows one of 27 different types of identification including a utility bill or bank statement or absent having those forms of ID by providing a signature matching the signature in the voter registration files. *See id.*; R.I. Sec'y of State, "Rules & Regulations Adopted by the Office of the Rhode Island Secretary of State Establishing the Procedure for the Issuance of Rhode Island Voter

[26] The Virginia voter ID law allows for a broader selection of ID to be used for voting, including voter registration cards without photographs. VA. Code Ann. § 24.2-643 (2012).

Identification Cards Pursuant to R.I.G.L. Section 17-19-24.2c," *available at* http://sos.ri.gov/elections/voterid/card/.

The court below found that the "Commonwealth agencies and interested groups will fully educate the public," (Addendum A at 11), but this is different than saying all people will be educated. To the extent the court below intended to convey that all citizens would be fully educated as to the existence of the law, as to whether they had the needed ID, and as to what to do if they did not have the needed ID, there was no competent, much less substantial, evidence to support such a conclusion. The Commonwealth offered evidence only about what it would do. (R. 866-68a, 872-75a, 905a). It offered no expert or other evidence regarding how well the public would be educated by its efforts.[27]

Ultimately, Commonwealth Court's opinion avoids analyzing the substantial burdens imposed by the Photo ID Law by citing to (1) the plan to issue a nonsecure ID that would not require the same documentation as a PennDOT ID; (2) the process for electronically checking birth records for people born in Pennsylvania; (3) absentee ballot provisions; (4) provisional ballot provisions; and (5) opportunities for judicial relief. (Addendum A at 11, 60-61). None of these factors, however, remedies the constitutional flaws in the Photo ID Law.

b. *The Burdens Are Not Alleviated By The "Pending" DOS Card Or Enhanced Availability Of Birth Confirmation For Pennsylvania Natives*

The court below was "not convinced any qualified elector need be disenfranchised by Act 18" because of "the pending DOS photo IDs for voting, and the enhanced availability of birth

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[27] The evidence was that the education would be timed to increase closer to the election, (R. 879a), but telling people who do not drive that they need to go to a PennDOT location two weeks before the election in a county in which PennDOT is open only one day a week hardly ensures their ability to get ID, especially since some people will need to get to PennDOT two and possibly three times to procure ID. *Supra* at 20-22.

confirmation through the Department of Health for those born in Pennsylvania." (Addendum A at 11). These measures are legally and factually insufficient to alleviate the burdens imposed on a substantial number of voters.

(i) The DOS Card

The DOS card is not designed to alleviate the burden on the right to vote created by the Photo ID Law. Appellants presented evidence of limitations in the DOS card that Commonwealth Court neither rejected nor discredited. In particular, it was established that any applicant for a DOS card will first have to try to obtain a PennDOT ID, including, if he or she is a Pennsylvania native, by making two trips to PennDOT and complying with a 10-day waiting period if a raised-seal birth certificate is not available. *See supra* at 20. The Commonwealth admits that it has no plan to issue these cards on a mass scale between late August, when the DOS card is to first be available, and the November election. *See supra* at 19, 22. It is planning to issue only several thousand. *Supra* at 22. The DOS card is thus by the Commonwealth's own assessment, not a remedy for the large numbers of persons who have no acceptable ID under the Photo ID law. No Commonwealth witness claimed otherwise.

The DOS card is also not legally sufficient to render the Photo ID Law constitutional. No statute, regulation, or other legally binding and enforceable enactment mandates creation of the DOS card. The reliance by the court below on the pending DOS card is therefore equivalent to a determination that unconstitutionality can be remedied by the government's stated intention to apply a statute only in a constitutional manner. This Court has not directly decided the issue, but persuasive precedent from other jurisdictions suggest that this should not be the law. In *United States v. Stevens*, 130 S. Ct. 1577 (2010), the Supreme Court considered the constitutionality of a criminal statute prohibiting depictions of animal cruelty. The Court characterized the government's position as: "Not to worry . . . . The Executive Branch construes [the statute] to

reach only ‘extreme’ cruelty, and it ‘neither has brought nor will bring a prosecution for anything less.’” *Id.* at 1591 (internal citation omitted). The Court rejected that argument: “[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige.* We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” *Id.* The Third Circuit interpreted *Stevens* “as concluding that a promise by the government that it will interpret statutory language in a narrow, constitutional manner cannot, without more, save a potentially unconstitutionally overbroad statute.” *Free Speech Coalition, Inc. v. Attorney Gen.*, 677 F.3d 519, 539 n.15 (3d Cir. 2012). In *Free Speech Coalition Inc. v. Attorney General*, the Third Circuit held facially unconstitutional under the First Amendment a criminal statute regulating producers of certain sexually explicit depictions. The government pointed to a regulatory preamble that appeared to narrow the scope of the statute’s application. The court rejected reliance on that regulatory preamble:

> The manner in which the government made such a promise – e.g., prosecutorial discretion as opposed to a regulatory pronouncement – is not in our opinion, dispositive. After all, there is no guarantee that the government's current interpretation of the Statutes will remain unchanged. The government's interpretation . . . was made in the preamble to the regulations. . . Limiting statements in regulatory preambles, like assurances of prosecutorial discretion, may one day be modified by the executive branch to permit the exercise of the Statutes' full authority, which is the very concern at the heart of *Stevens*.

Id. (internal citation omitted)*; cf. Commonwealth v. Omar*, 602 Pa. 595, 609, 981 A.2d 179, 187 (2009) (facially overbroad unconstitutional statute could not be saved by proposed amendment to statute until the proposed amendatory language is enacted into law).

The clear principle to be drawn from these decisions is that the Commonwealth cannot immunize an unconstitutional statute from challenge by nonbinding agency pronouncement. This conclusion is reinforced by decisions holding that a party cannot avoid a preliminary

injunction based upon a mere promise to remedy a violation. For instance, in reversing a denial of a preliminary injunction that was based upon a landowner's promise to comply with zoning requirements, Commonwealth Court explained why it is both unfounded and impractical to rely upon a party's assurances: "We know of no case which holds that a promise to comply with a zoning ordinance at sometime in the future can form the basis to deny a preliminary injunction to obtain such compliance. Further, we refuse to so hold in this case." *Twp. of Upper St. Clair v. N.R. Porter & Assocs.*, 127 Pa. Cmwlth. 313, 316 (1989).[28]

Commonwealth Court summarily rejected such decisions as not "involv[ing] a facial challenge to a presumably constitutional statute." (Addendum A at 14). The fact that a constitutional right is at stake, however, only highlights the importance of holding the Commonwealth to the strictest standards in a preliminary injunction analysis. As one court has put it, "[t]he fact that [a] defendant[] ha[s] resolved to take some steps in the direction of giving [impacted] citizens an effective vote is an inadequate assurance for such a fundamental right in a free society." *Torres v. Sachs*, 381 F. Supp. 309, 312 (S.D.N.Y. 1974).

The DOS card, as a post-lawsuit, unenforceable effort to remedy the unconstitutionality of the Photo ID Law, is thus insufficient as a matter of law. The voters of Pennsylvania should

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[28] *See also, e.g.*, *B & D Land & Livestock Co. v. Conner*, 534 F. Supp. 2d 891, 908 (N.D. Iowa 2008) (finding assurances of attorneys that Secretary of USDA would stop alleged misconduct during pendency of lawsuit insufficient since, "[i]n the absence of a preliminary injunction, nothing will preclude the Secretary from overruling his attorneys and, for that matter, nothing will preclude the Secretary's attorneys from changing their minds"); *Cal. Oak Found. v. U.S. Forest Serv.*, No. CV-F-05-1395, 2006 WL 2454438, at *2 (E.D. Cal. Aug. 23, 2006) (granting preliminary injunction and explaining "Defendants' undertaking presently to refrain from implementing the challenged action affords only partial assurance that the law will not be violated"); *P.R. Org. for Political Action v. Kusper*, 350 F. Supp. 606, 611 (N.D. Ill. 1972) (granting preliminary injunction because "absent an injunction, [the government] would be free to decide at any time before or during the election not to carry out all or any part of the contemplated program").

not be forced to depend on the unbridled discretion of state agencies – subject to political pressure, changing personnel, and shifting views – to exercise their right to vote. If, as should be the case, it has become so apparent that the Photo ID Law is unconstitutional that changes are warranted, the changes should be made in a legally binding fashion. In Georgia, for instance, during the pendency of a lawsuit challenging that state's 2005 voter ID law, the legislature repealed the challenged legislation and passed new legislation to attempt to remedy some of the constitutional deficiencies that had been brought to light in the lawsuit. *See Common Cause v. Billups,* 554 F.3d 1340 (11th Cir. 2009) (procedural history of case and statute). The voters of Pennsylvania are no less entitled than those in Georgia to have their legislature reexamine the Photo ID Law and make changes to comply with the Pennsylvania Constitution.

(ii) The Enhanced Availability Of Birth Confirmation For Pennsylvania Natives

Commonwealth Court's conclusions with respect to the enhanced availability of birth confirmation for native Pennsylvanians, even if accepted in full, are simply too narrow to alleviate the burdens the Photo ID Law imposes on a substantial number of voters. Most obviously, removal of the raised-seal birth certificate requirement for native Pennsylvanians does not assist the 25% of the population born elsewhere. *See supra* at 19-20. It also does not assist those who cannot obtain a PennDOT ID because they do not have a Social Security card, or do not have documentation with matching names or who have no Pennsylvania birth record. *See supra* at 11, 17, 19-20. Finally, the new process brings with it additional procedural hurdles, including a 10-day waiting period and second trip to PennDOT. *See supra* at 20. Somewhat enhancing availability of birth confirmation for some voters cannot remedy the significant and widespread burdens of the Photo ID Law.

c. *The Burdens Are Not Alleviated By The Provisions For Absentee And Provisional Ballots Or By A Disenfranchised Voter's Right To Seek Judicial Relief*

The availability of absentee ballots similarly does not cure the deficiencies in the Photo ID Law. Pennsylvania only permits a voter to file an absentee ballot in limited, carefully-delineated circumstances. *See supra* at 6-7. In this respect, Pennsylvania's Photo ID Law is more restrictive than the voter laws in New Mexico and Georgia, which were upheld in cases upon which the court below relied. (Addendum at 23). *See Am. Civil Liberties Union of N.M. v. Santillanes,* 546 F.3d 1313, 1320 (10th Cir. 2008) (all registered voters have option of voting by absentee ballot without photo ID); *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67, 73 (Ga. 2011) (every voter is eligible for voting absentee in Georgia without a photo ID).[29]

Provisional ballots also do not cure the problems with the Photo ID Law. A Pennsylvania voter without a photo ID cannot simply sign an affidavit at the polling place and have his vote count as a regular ballot, unlike in Michigan, another state whose voter ID requirements were upheld in a case cited by the court below. (Addendum A. at 23 (citing *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444 (Mich. 2007)). Moreover, unlike in Michigan, a Pennsylvania provisional ballot cast by a voter without a photo ID will not be counted while subject to a pending challenge. In Michigan, even if a voter without proper ID is challenged at the polls, that voter, upon answering qualification questions satisfactorily, is entitled to cast a regular ballot. *Id.* at 451 n.24 (citing M.C.L.A. §§ 168.727, 168.729, 168.745-

[29] The court below made no finding as to what percentage of voters without acceptable photo ID would be able to vote absentee. As to two individual Appellants, the court below erroneously found that it was "highly likely" that they "and others with similar, obvious profound infirmities," "would qualify for absentee voting." (Addendum A at 12). The court did not explain how those Appellants or persons like them would be able truthfully to say that they are unable to attend their polling place as required by the law when they are in fact able to vote in person.

748). By contrast, if a provisional ballot is challenged in Pennsylvania, the ballot is set aside pending final determination of the challenge at a formal hearing. *Supra* at 9. In Pennsylvania, provisional ballots help the person who accidentally left his ID at home or who can easily obtain an ID in a short period of time. They do not help the person who is unable to obtain acceptable ID. *See supra* at 8.

Moreover, there is no guarantee that a provisional ballot will be counted, in part because of the avenues that are provided to candidates to challenge those ballots. *See supra* at 9. The Supreme Court of Indiana noted an academic study showing that only about 13% of provisional ballots cast because of an absence of photo ID in Indiana's November 2008 election actually qualified and were counted. *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 768 n.10 (Ind. 2010).

Finally, the court below relied on "opportunities for judicial relief." (Addendum A at 11, 67-68). The court did not, however, cite a single voter ID case in which the opportunity to sue after the election based on the handling of provisional ballots sufficed to remedy an unconstitutional statute. (Addendum A. at 23 (citing *Crawford*, 553 U.S. 181; *Santillanes,* 546 F.3d 1313; *Perdue*, 707 S.E.2d 67; *Rokita*, 929 N.E.2d 758; *In re Request for Advisory Opinion*, 740 N.W.2d 444)). Even the Commonwealth did not argue below that judicial relief to challenge rejection of a provisional ballot would be a realistic alternative to protect their right to vote. Indeed, a provisional elector may not even be notified when his or her ballot has been challenged; notice must be given only "*where possible*." 25 P.S. § 3050(a.4)(4)(i) (emphasis added). And consistent with the generally short shrift it accorded the key issue of burden, the

court below made no findings about the difficulty attendant to having to institute a judicial challenge to enforce one's right to vote. [30]

d. *The Law Is Not Narrowly Tailored To Achieve The Commonwealth's Purpose*

No court applying strict scrutiny to a voter ID law has found that the statute passed the strict scrutiny test, and with good reason; those laws, like the Pennsylvania Photo ID Law, were not narrowly drawn to accomplish a compelling government interest. *See Mil. Branch of NAACP*, slip op at 17-20; *Mil. Branch of NAACP,* 2012 WL 739553 at *6-8*; Weinschenk*, 203 S.W.3d at 217-18.[31]

The Commonwealth claims that its interests in passing the statute were to detect and deter voter fraud and to "ensure that the public has confidence in the electoral process." (Addendum A at 59) (quoting Appellants' Answers to Respondents' First Set of Interrogatories, R. 2084a). As a theoretical matter these interests sound compelling. "Without question, where it exists, voter fraud corrupts elections and undermines our form of government. The legislature and governor may certainly take aggressive action to prevent its occurrence. But voter fraud is no more poisonous to our democracy than voter suppression." *League of Women Voters of Wis.*

[30] Commonwealth Court's novel conclusion that the burdens imposed by the Photo ID Law are more suitably abated through judicial review of individual provisional ballots and of disputes that arise on Election Day, *see* Addendum A at 67-68, is unsupported by other photo ID law decisions, *see supra* at 47-48, and erroneous. *Clifton v. Allegheny County,* 600 Pa. 662, 969 A.2d 1197 (2009), is instructive. There, this Court rejected the argument that an appeals process for aggrieved property taxpayers can remedy an unconstitutional law. *Id.* at 712-13, 969 A.2d at 1227-28 Accepting that the appeals system could correct the inequity in individual cases, the Court nevertheless explained that "[t]he County cannot satisfy the [requirements of the Uniformity Clause] by shifting the burden … to the taxpayer … whom the county would task with correcting its own constitutional deficiency." *Id.* at 712, 969 A.2d at 1228. The Court further observed that "[t]he successful appeals of over-assessed property owners do not decrease the values of other over-assessed properties whose owners may not have the awareness, time, or wherewithal to appeal." *Id.* at 713, 969 A.2d at 1228.

[31] Commonwealth Court indicated that if strict scrutiny were required, he "might reach a different determination" on the likelihood that Appellants would succeed on the merits. (Addendum A. at 62).

Educ. Network, Inc. v. Walker, No. 11 CV 4669, 2012 WL 783586 at *6 (Wis. Cir. Ct. March 12, 2012).

This Court has explained that "[w]hether there is a significant state interest will depend, in part, on whether the state's intrusion will effect its purpose; for if the intrusion does not effect the state's purpose, it is a gratuitous intrusion, not a purposeful one." *Denoncourt v. Comm., State Ethics Comm'n,* 504 Pa. 191, 200, 470 A.2d 945, 949 (1983); *see also Stenger*, 530 Pa. at 438, 609 A.2d at 802 (same). The purpose of deterring fraud is undermined by the absence of any evidence of the only type of fraud that the law could address. The only insurance that a photo ID provides is "that the person standing at the poll is not actually another person." *Mil. Branch of NAACP*, 2012 WL 739553. A photo ID does not assure that the person is qualified to vote or that the person did not also vote absentee. *Id.* But the Commonwealth conceded that it is not aware of any incidents of this type (or indeed, any type) of in-person voter fraud in Pennsylvania, and its "efforts to minimize [that] fact[] were not convincing" to the court below. (Addendum A at 59). The Commonwealth cannot argue that a photo ID is necessary to deter fraud, because the Commonwealth is continuing to permit absentee voters to vote without photo ID, despite the fact that, unlike in-person voting, there are cases of fraud occurring with absentee ballots. (R. 1163-64a). Moreover, DOS's unlegislated and unregulated decision to issue "nonsecure" photo IDs is a stark concession that fraud prevention does not require the hoops that voters have to go through to get a PennDOT ID. The Photo ID Law is therefore not narrowly tailored to achieve the Commonwealth's interest in deterring and detecting voter fraud.

As to the Commonwealth's avowed interest in ensuring that "the public has confidence in the electoral process," the court below made no finding that this interest will be achieved through the Photo ID Law, and the Commonwealth put on no evidence demonstrating that the law would

ensure or even bolster the public's confidence. If the significance of the state's interest depends, as *Denoncourt* indicated it does, on "whether the state's intrusion will effect its purpose," and there is no evidence on that point, then this interest should be entitled to little, if any, weight. 504 Pa. at 200, 470 A.2d at 949. As the Missouri Supreme Court put it:

> While the State does have an interest in combating those perceptions, where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement. Perceptions are malleable. While it is agreed here that the State's concern about the perception of fraud is real, if this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.. . . The protection of our most precious state constitutional rights must not founder the tumultuous tides of public misperception.

Weinschenk, 203 S.W.3d at 218 (footnote omitted).[32]

Finally, it is noteworthy that Pennsylvania's Photo ID Law is among the strictest voter ID laws in the nation. The Pennsylvania law permits voters to use only a few kinds of unexpired photo ID at the polls.[33] The Pennsylvania law leaves no way for an ordinary voter who lacks ID to cast a regular ballot at the polls.[34] And the Pennsylvania law does not have "no reason" or "no excuse" absentee voting so voters who lack ID may not avoid the photo ID requirement by

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[32] Another court has pointed out that "a comprehensive study of voter attitudes has found that state photo ID requirements appear to have no effect upon public confidence in the process." *Mil Branch of NAACP*, slip op. at 17-18.

[33] *Cf.* Ga. Code Ann § 21-2-417 (2011) (acceptable identification includes identification issued by other states; no expiration date required; also includes broader category of government-issued IDs.).

[34] *See* Mich. Comp. Laws § 168.523 (2012) (voter without identification permitted to execute an affidavit that the voter does not have identification and given a regular ballot).

voting absentee if they do not meet one of the criteria for voting absentee.[35] Thus, Pennsylvania has failed to tailor its Photo ID Law even to the degree that other states have in the name of the same interests.

3. Even Under The Federal "Flexible" Standard Or A Pennsylvania Intermediate Scrutiny Standard, The Photo ID Law Is Unconstitutional

Even if this Court were to adopt the *Crawford* "flexible" approach or some other form of scrutiny less than "strict," the Photo ID Law would still fail. The *Crawford* "flexible" approach "weigh[s] the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule." 553 U.S. at 190 (quotations omitted). The burden "must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Id.* at 191 (quotations omitted). A majority of Justices (those who joined the opinion of the Court and the three dissenters) deemed it important to be able to review record evidence about the nature and magnitude of the burden. *See id.* at 202, 218, 237.[36]

In *Crawford*, however, there was little evidence in the record concerning the magnitude of the burden. For example, *Crawford* found there was no estimate establishing the number of voters who lacked photo ID. *Id.* at 200. Here there were several estimates, the lowest of which, made by the court, ranged from about 100,000 to several hundred thousand. *Supra* at 10. In *Crawford*, the Court pointed out that whatever estimates had been made when the Indiana statute was enacted, there was no evidence about the number of identifications for voting issued since

[35] *Cf.* Ga. Code Ann. § 21-2-380(b) (establishing "no reason" absentee voter for all voters); Ind. Code § 3-11-10-1.2 (2012) (any voter age 65 years of age or older may vote by absentee by mail and does not need to show proof of identification).

[36] Three Justices found sufficient evidence of the burden in the record, *see generally Crawford,* 533 U.S. at 209, 237, but the three Justices who joined the opinion of the Court stated that "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Id.* at 200.

then. 553 U.S. at 202, n.20. Here, only approximately 3,000 photo IDs for voting have been issued since the Photo ID Law passed. *Supra* at 19. In *Crawford* there was no evidence that any voter was disenfranchised by the ID requirement. 553 U.S. at 200. Here, no fewer than 12 witnesses testified that they had tried and failed to get acceptable ID for voting. *Supra* at 11-17. In *Crawford*, the record contained no evidence of any voter whose right to vote had been unduly burdened by the photo ID. 553 U.S. at 201. Here, witnesses testified of making multiple efforts, including over a period of years, to get PennDOT ID and the underlying documents necessary to get that ID. *Supra* at 11-17. Finally, in *Crawford*, the law at issue had passed some three years before the next Presidential general election, affording a long lead-up for people to obtain ID. 533 U.S. at 185-86. Here, it is less than three months before the election, there are even by the Commonwealth Court's estimate up to several hundred thousand persons without acceptable ID for voting and no concrete plans or the means to distribute ID on a mass basis. *See supra* at 10, 22.

Given the significance of the burdens shown here, and the lack of any strong connection between the Commonwealth's avowed interests and the means chosen to achieve those interests, Appellants satisfied even the *Crawford* standard.[37]

[37] For similar reasons, appellants satisfied the form of intermediate scrutiny this Court has adopted in cases like *Khan v. State Board of Auctioneer Examiners,* 577 Pa. 166, 184, 842 A.2d 936, 946 (2004) (law must have a real and substantial relationship to the object sought to be obtained) and *Pennsylvania State Board of Pharmacy v. Pastor*, 441 Pa. 186, 191-92, 272 A.2d 487, 491 (1971) ("a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained") (quotation omitted).

C. IN A FACIAL CHALLENGE TO THE CONSTITUTIONALITY OF THE PHOTO ID LAW, AN INJUNCTION BARRING ENFORCEMENT OF THE LAW IS REASONABLY SUITED TO ABATING THE OFFENDING ACTIVITY

Commonwealth Court erred in concluding that Appellants' requested relief is too broad because it seeks a "facial remedy," namely, enjoining the Photo ID Law. (Addendum A at 65-68). The conclusion of the court below rested upon the legal premise that, "even assuming the burden imposed by a voter ID law may not be justified as to a few voters, that conclusion is by no means sufficient to establish the challengers' right to total avoidance of the law." (Addendum A at 66). This legal premise is incorrect as a matter of law. A statute is facially invalid when its "invalid applications . . . [are] real and substantial, and are judged in relation to the statute's plainly legitimate sweep." *Clifton*, 600 Pa. at 704-705 nn.35-37, 969 A.2d at 1222 nn.35-37 (internal quotation marks omitted). In election law cases, a statute that impermissibly burdens a "real and substantial" number of voters – even if that is only a fraction of the population – is facially invalid. *See Dunn v. Blumstein*, 405 U.S. 330, 345, 360 (1972) (holding state's durational residence requirement facially unconstitutional because it "bar[red] newly arrived residents from the franchise").

Each of the other federal voter ID cases the court below cited, (Addendum A. at 23), permitted a facial challenge. *See Crawford*, 553 U.S. 181; *Santillanes,* 546 F.3d 1313; *Perdue*, 707 S.E.2d 67; *Rokita*, 29 N.E.2d 758; *In re Request for Advisory Opinion*, 740 N.W.2d 444. When plaintiffs prevail in such cases, application of the law is enjoined across the board. *See, e.g.*, *Weinschenk*, 203 S.W.3d 201; *Mil. Branch of NAACP*, 2012 WL 739553. In this case, where the estimate of the court below is that even now there are up to several hundred thousand registered voters without the ID required to vote, and where individual Appellants have repeatedly and unsuccessfully tried to obtain PennDOT ID or documents necessary to get that

ID, Appellants, like plaintiffs in other such suits, are permitted to bring a facial challenge and if they prevail, an injunction will be the reasonable remedy to abate the offending activity.

D. THERE WAS NOT SUBSTANTIAL EVIDENCE TO JUSTIFY REJECTING THE TESTIMONY OF APPELLANTS' SURVEY EXPERT

Appellants introduced the testimony of Professor Barreto to demonstrate the true magnitude of the burden imposed on Pennsylvanians' right to vote. His survey showed that over 1 million registered voters and over 1.3 million eligible voters lack photo ID needed to vote under the Law. *Supra* at 10. Professor Barreto's survey also showed that approximately 280,000 registered voters and 379,000 eligible voters do not have one of the acceptable ID and lack the underlying documentation needed to get it. *Supra* at 40 (R. 1889a). Professor Barreto's results are comparable to the data yielded by the Commonwealth's recent effort to match registered voters to PennDOT photo ID, which showed over 1.4 million registered voters without valid PennDOT ID. *Supra* at 9. The higher Commonwealth figures can be explained by the fact that the Commonwealth could not match some voters to their PennDOT ID because of inconsistent name spellings or misentry of PennDOT ID number, *supra* at 9 n.5, and because some voters without PennDOT ID have other acceptable forms of ID.[38]

The court below stated that it was not necessary to determine a correct estimate for purposes of a preliminary injunction. (Addendum A at 10 n.16). Nevertheless, it went on to estimate the number of registered voters without ID ranging from slightly more than 1% of registered voters to significantly less than 9% of registered voters – a range of about 100,000 to perhaps 500,000. The court below thus may have rejected the estimates provided by Professor

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[38] Professor Barreto found that only 0.6% of registered voters or about 49,462 persons without PennDOT ID had some other form of acceptable ID for voting. (R. 1887a). Notably, Professor Barreto and the Commonwealth had similar findings for registered voters with expired ID: 717,207 for Professor Barreto and 574,630 for the Commonwealth. (R. 728-29a, 732a, 1888a, 1257-58a).

Barreto although it did not specifically say so. The lower court said that "parts of [Barreto's] testimony were believable," and more parts were not. (*Id.* at 13). But the court did not say whether Professor Barreto's estimates of persons without acceptable ID fell into the believable parts or the unbelievable parts.

If this Court determines that the Commonwealth Court below rejected Professor Barreto's estimates, there is no substantial evidence to support that rejection. The parts of his testimony that the court below specifically rejected did not relate to the foregoing data. (*Id.*). The court below expressed "doubts" about survey design and execution but these concerns were either erroneous or do not affect Professor Barreto's data.

Survey design. Here, with no explanations, the court below merely listed "name conformity inquiry; oversampling; post-stratification weighting . . . ; and, overarching design for 'eligible' voters, as opposed to 'registered' voters." (*Id.*). The oversampling and post-stratification weighting techniques the court below had "doubts" about are standard survey techniques. (R. 701a); *see* Jelke Bethlehem, APPLIED SURVEY METHODS: A STATISTICAL PERSPECTIVE 250 (John Wiley & Sons, Inc. 2009) ("Poststratification is a well-known and often used weighting method"); H. Asher, POLLING AND THE PUBLIC: WHAT EVERY CITIZEN SHOULD KNOW 105, 112, 113 (8th ed. CQ Press, 2011). There is no evidence or finding that these standard techniques rendered the survey results unreliable. There is also no ground for the doubts of the court below over a design for eligible as opposed to registered voters; Professor Barreto reported results for both groups. (R. 653-55a, 1885-1912a).

"Name conformity inquiry" presumably refers to the Commonwealth's cross examination regarding whether Professor Barreto's survey failed adequately to prove whether the survey respondents could tell whether the names on their identifications "substantially conformed" to

their voter registration names as required by the Law. (R. 794-801a). Since there is no standard for how to interpret the Photo ID Law's "substantially conforms" language, this would be an issue for anyone studying the question. Professor Barreto acknowledged this problem on direct and reported separately the percentage of people whom he classified as not having valid ID for voting because they reported that their ID did not match their registration. (R. 688-92a, 718a, 728-33a, 1887-88a). If the court below were concerned that such people should not be included in the totals, it was necessary only to back them out from the calculation.[39]

Survey execution. The court listed "response rate" but did not indicate what was wrong with the response rate and there was no evidence suggesting that the rate was too low. (R. 673-74a). As to the "timing" of the survey, in the early summer, an earlier study would have missed the Commonwealth's outreach efforts leading up to the hearing, and a later study would have come too late for the hearing. In any event, surveys are routinely conducted throughout the summer. *See, e.g.*, Real Clear Politics, "Pennsylvania: Romney vs. Obama," http://www.realclearpolitics.com/epolls/2012/president/pa/pennsylvania_romney_vs_obama-1891.html#polls (last visited Aug. 22, 2012).

Demeanor and Bias. The court below cited demeanor as a basis for its decision but did not say to which parts of Professor Barreto's testimony this concern applied. Generally, demeanor does not relate to the validity of the expert's data, and is a particularly suspect basis on which to reject an expert's evidence. *See, e.g., Consumer Prot. Div. v. Morgan*, 874 A.2d 919, 964-65 (Md. 2005) ("Ordinarily, demeanor has been held to be of little consequences in

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[39] Thus, Professor Barreto found that 14.4% of eligible voters lacked valid ID and 4.3% of eligible voters had non-expired ID with a nonconforming name. If the court was concerned that the 4.3% was unreliable, that still leaves 11.1% of eligible voters (14.4% - 4.3%) without valid identification, or 956,998 persons. (R. 1887a). The figure for registered voters lacking acceptable ID subtracting those with nonconforming names is 717,207. (R. 1887a).

evaluating the credibility of experts"); *Gonzales v. Galvin*, 151 F.3d 526, 535 (6th Cir. 1998) ("experts provide factual information in the form of data compilations, statistical analyses, and reports expressing and explaining their opinions. These core facts are statistical in nature, and, unlike the case where two eyewitnesses to an event present different stories, the court's need to assess the expert witness's demeanor is peripheral at best.") In addition, Professor Barreto's demeanor does not relate to the validity of the data in his survey, which was collected by a professional survey firm, not by Professor Barreto. *Supra* at 10. The court below also cited bias but gave no explanation of ways in which Professor Barreto was biased, or how that bias might have affected his survey results. The "bias" conclusion was supported only by an opaque citation to Professor Barreto's resume. In any event, the court does not identify which opinions, some of which the court says were believable, were tainted by bias.[40]

To the extent the court rejected Professor Barreto's testimony, it was not supported by substantial evidence.

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[40] It is striking that the more explicit the court below was about its grounds, the more clear that the reasoning of the court below was deficient. Thus, the court below rejected Professor Barreto's opinions showing the lack of public knowledge about the Photo ID Law because Appellants' witnesses "explained that they have been aware of Act 18 and have some idea whether their current IDs will meet the requirements of the new law." (Addendum A at 13-14). This overlooks the elementary: the witnesses who testified in court are suing the Commonwealth to invalidate the Photo ID Law or are third parties testifying in support of that lawsuit and therefore, by definition, know about the law. The reasoning of the court below is akin to hearing testimony from survivors of the Titanic and concluding that no one drowned because all the people heard from had survived.

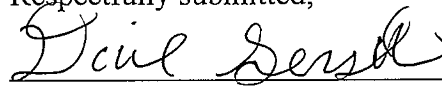
Likewise, the court said an "important reason" why it gave Professor Barreto's study "less weight" was because it was of little practical use since his survey is "incapable of identifying individuals who need to be contacted for public outreach and education purposes, beyond the survey's 2300 respondents." (*Id.* at 14). This was not a function of the survey; what the court says was an "important" reason to reject Professor Barreto's testimony is no reason at all.

CONCLUSION

At stake in this case is the fundamental right to vote, which is "pervasive of other basic civil and political rights" and is the "bedrock of our free political system," *Bergdoll*, 557 Pa. at 85, 731 A.2d at 1269, for up to 1 million Pennsylvania voters on November 6, 2012. Even Commonwealth Court agreed that as many as several hundred thousand voters without valid ID are at risk for disenfranchisement. Yet this grave risk to the legitimacy of Pennsylvania's election is counterbalanced by *no* governmental interest because the Commonwealth stipulated that the only form of fraud prevented by requiring photo ID is not "likely to occur in November 2012 in the absence of the Photo ID law." (R. 1865a). This Court has previously held that depriving even one person of the right to vote is an "extremely serious matter," and that disenfranchising 5,506 voters would be "unconscionable." *Perles*, 415 Pa. at 158-59, 202 A.2d at 540. The substantial and immediate risk that far more voters than that will be denied the franchise on November 6 warrants relief. For the foregoing reasons, Appellants respectfully request that this Court reverse Commonwealth Court's denial of a preliminary injunction, and direct Commonwealth Court to enter a preliminary injunction.

Dated: August 30, 2012

Respectfully submitted,



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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Viviette Applewhite; Wilola Shinholtser Lee; Gloria Cuttino; Nadine Marsh; Bea Bookler; Joyce Block; Henrietta Kay Dickerson; Devra Mirel ("Asher") Schor; League of Women Voters of Pennsylvania; National Association for the Advancement of Colored People, Pennsylvania State Conference; Homeless Advocacy Project, Appellants, v. The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carol Aichele, in her capacity as Secretary of the Commonwealth, Appellees.	:	No. 71 MAP 2012

CERTIFICATE OF SERVICE

I certify that I am this 30th day of August, 2012, serving the foregoing Appellants' Brief and Reproduced Record, upon the persons and in the manner indicated below, which service satisfies the requirement of Pa. R.A.P. 121:

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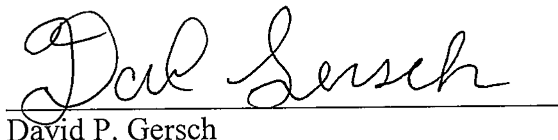

David P. Gersch

ADDENDUM A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viviette Applewhite; Wilola Shinholster Lee; Grover Freeland; Gloria Cuttino; Nadine Marsh; Dorothy Barksdale; Bea Bookler; Joyce Block; Henrietta Kay Dickerson; Devra Mirel ("Asher") Schor; the League of Women Voters of Pennsylvania; National Association for the Advancement of Colored People, Pennsylvania State Conference; Homeless Advocacy Project, Petitioners	:	
v.	:	No. 330 M.D. 2012
The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carole Aichele, in her capacity as Secretary of the Commonwealth, Respondents	:	HEARD: July 25, 2012

BEFORE: HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED**: August 15, 2012

DETERMINATION on APPLICATION for PRELIMINARY INJUNCTION

Presently before this Court is a request for preliminary injunctive relief filed by several individuals[1] and organizations[2] (collectively, Petitioners),

[1] When Petitioners filed their complaint, the individual Petitioners were Viviette Applewhite, Wilola Shinholster Lee, Grover Freeland, Gloria Cuttino, Nadine Marsh, Dorothy

(Footnote continued on next page…)

supported by various friends of the court,[3] seeking to enjoin Respondents,[4] the Commonwealth of Pennsylvania, Governor Thomas W. Corbett and Secretary of the Commonwealth Carol Aichele and their agents, servants, and officers, from enforcing or otherwise implementing the Act of March 14, 2012, P.L. 195, No. 18 (Act 18), which requires citizens voting in-person on election day to present one of several specified forms of photo identification (ID).

(continued...)

Barksdale, Bea Bookler, Joyce Block, Henrietta Kay Dickerson, and Devra Mirel ("Asher") Schor.

By agreement of the parties, the Court entered an order granting voluntary nonsuit as to the claims of Petitioners Dorothy Barksdale and Grover Freeland during the course of the hearings on Petitioners' request for preliminary injunctive relief.

[2] The organizational Petitioners are the League of Women Voters of Pennsylvania, the National Association for the Advancement of Colored People, Pennsylvania State Conference, and the Homeless Advocacy Project.

[3] The City of Philadelphia and Stephanie Singer, Chair of the City Commissioners; Senior Law Center, AARP, Pennsylvania Association of Area Agencies on Aging, Center for Advocacy for The Rights and Interests of the Elderly, Pennsylvania Alliance for Retired Americans, the Pennsylvania Homecare Association, Eldernet of Lower Merion and Narberth, The Institute for Leadership Education, Advancement and Development, Intercommunity Action, Inc. and Jewish Social Policy Action Network; Pennsylvania AFL-CIO; Dennis Baylor; Stephen J. Shapiro, In his Capacity as Judge of Election for district 635, Tredyffrin Township, Chester County, Pennsylvania; Chelsa Wagner, Allegheny County Controller; and, State Representative Anthony H. Williams and 18 Pennsylvania State Representatives, filed briefs as *amici curiae* in support of Petitioners.

[4] State Representative Daryl Metcalfe and 49 Pennsylvania State Representatives; George W. Ellis, Pro Se; and Bipartisan Group of Electors, filed briefs as *amici curiae* in support of Respondents.

I. Background

A. Factual and Procedural History

On May 1, 2012, less than two months after the enactment of Act 18, Petitioners commenced this action by filing a 51-page "Petition for Review Addressed to the Court's Original Jurisdiction" (complaint). On the same day, Petitioners filed an application for special relief in the nature of a preliminary injunction.

Through their complaint, the individual Petitioners aver they lack an acceptable form of photo ID, which is now required to vote in-person under Act 18. As a result, the individual Petitioners allege they will be disenfranchised or severely burdened by Act 18's photo ID requirement.

For their part, the organizational Petitioners allege that the enactment of Act 18 caused them to reallocate and devote substantial resources to educating their members and the public about Act 18's requirements. Additionally, the organizational Petitioners aver they may have members whose right to vote is impermissibly burdened by Act 18.

Petitioners allege Act 18's photo ID requirement will disenfranchise and deter qualified Pennsylvanians from exercising their fundamental right to vote, which is expressly guaranteed by the Pennsylvania Constitution. They assert the crucial facts are straightforward and largely undisputed. By any count, Petitioners aver, the individual Petitioners are among hundreds of thousands of Pennsylvanians who are eligible to vote, but who lack an acceptable form of ID

required by Act 18. In contrast to the large numbers of Pennsylvanians who lack the requisite photo ID to vote, Petitioners allege, the in-person voter fraud that the Commonwealth indicates will be deterred by Act 18 is negligible to nonexistent.

Petitioners claim Act 18 violates the Pennsylvania Constitution in three respects. First, they allege Act 18 unduly burdens the fundamental right to vote in violation of Article I, Section 5 of the Pennsylvania Constitution, which states, in part: "Elections shall be free and equal …." PA. CONST. art. I, §5. Second, Petitioners aver Act 18 imposes burdens on the right to vote that do not bear upon all voters equally under similar circumstances in violation of the equal protection guarantees of Article I, Sections 1 and 26 of the Pennsylvania Constitution. Third, they allege Act 18 imposes an additional qualification on the right to vote in violation of Article VII, Section 1 of the Pennsylvania Constitution.

After a status conference in late-May 2012, this Court issued an order scheduling a hearing on Petitioners' preliminary injunction request for July 25, 2012.

Following discovery and the submission of pre-hearing briefs, a hearing on Petitioners' preliminary injunction request began on July 25, 2012. Over the course of six days, the parties presented the testimony of more than two dozen witnesses and over 50 exhibits. After the close of the evidence, the parties presented closing arguments. Five days thereafter, the parties submitted post-hearing briefs.

B. Act 18

Act 18, which became effective March 14, 2012, made certain minor changes to the provisions of the Pennsylvania Election Code (Election Code).[5] However, it left the vast majority of the Election Code's provisions unaltered.

Prior to the enactment of Act 18, an elector voting for the first time in an election district was required to present one of several specified forms of photo ID. See former Sections 1210(a)(1)-(7) of the Election Code, 25 P.S. §3050(a)(1)-(7).[6] Where the elector did not have a required photo ID, the elector was required to present one of several specified forms of non-photo ID that contained the elector's name and address. See former Section 1210(a.1)(1)-(7) of the Election Code, 25 P.S. §3050(a.1)(1)-(7).

Pursuant to Act 18, however, each elector who appears to vote must first present "proof of identification," a newly defined term, which includes several specified forms of photo ID.[7] See Sections 102(z.5) and 1210(a) of the Election Code, 25 P.S. §§2602(z.5), 3050(a).

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[5] Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. §§2600-3591.

[6] Deleted by the Act of March 14, 2012, P.L. 195, No. 18.

[7] The term "proof of identification" is defined 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, a document that:

(Footnote continued on next page...)

(continued...)

(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.

(3) For a qualified absentee elector under section 1301:

(i) in the case of an elector who has been issued a current and valid driver's license, the elector's driver's license number;

(ii) in the case of an elector who has not been issued a current and valid driver's license, the last four digits of the elector's Social Security number;

(Footnote continued on next page...)

If an elector is unable to produce "proof of identification," he or she must be permitted to cast a provisional ballot. 25 P.S. §3050(a.2)(1)(i), (ii).[8] After casting a provisional ballot, the elector is required to deliver to the county board of elections, within six calendar days after the election, proof of identification and an affirmation declaring the elector is the same individual who cast the provisional ballot. 25 P.S. §3050(a.4)(5)(ii)(E).[9] If the cause for the provisional ballot is the inability of the elector to obtain proof of identification because the elector is indigent, the elector must supply, within six calendar days after the election, an affirmation declaring the elector is the same person who cast the provisional ballot and the elector is indigent. 25 P.S. §3050(a.4)(5)(ii)(D).[10]

Act 18 also made minor modifications to the Election Code's provisions relating to absentee ballots. Among other things, Act 18 requires that, under certain instances, a qualified registered elector who applies for an absentee

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(continued...)

> (iii) in the case of an elector who has a religious objection to being photographed, a copy of a document that satisfies paragraph (1); or
>
> (iv) in the case of an elector who has not been issued a current and valid driver's license or Social Security number, a copy of a document that satisfies paragraph (2).

Section 102(z.5) of the Election Code, 25 P.S. §2602(z.5) (footnote omitted). Subsection (z.5) was added by the Act of March 14, 2012, P.L. 195, No. 18.

[8] Subsections (a.2)(1)(i) and (ii) were added by the Act of March 14, 2012, P.L. 195, No. 18.

[9] Subsection (a.4)(5)(ii)(E) was added by the Act of March 14, 2012, P.L. 195, No. 18.

[10] Subsection (a.4)(5)(ii)(D) was added by the Act of March 14, 2012, P.L. 195, No. 18.

ballot include proof of identification with his or her application. See Sections 1302(e)(1), (2), (e.2) of the Election Code, as amended, 25 P.S. §§3146.2(e)(1), (2), (e.2).[11] In turn, the county board of elections must verify the applicant's proof of identification. See Sections 1302.2(c) of the Election Code, as amended, 25 P.S. §3146.2b(c).[12] If an applicant does not include proof of identification or the board cannot verify the proof of identification, the board must send the elector a notice requiring the elector to provide proof of identification with the absentee ballot or the ballot will not be counted. Section 1302.2(d) of the Election Code, 25 P.S. §3146.2b(d); see also Section 1305(b) of the Election Code, as amended, 25 P.S. 3146.5(b).[13] Act 18 also modified the Election Code's provision relating to the canvassing of absentee ballots. See Section 1308 of the Election Code, as amended, 25 P.S. §3146.8.[14]

Under Act 18, the Secretary of the Commonwealth is required to prepare and disseminate information to the public regarding the proof of identification requirement. Section 206(a) of the Election Code, 25 P.S. §2626(a).[15] Additionally, Act 18 requires the Department of Transportation (PennDOT) to issue a free ID card to any registered elector who applies and who includes an affirmation that he or she does not possess proof of identification and

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[11] Section 1302 was added by the Act of March 6, 1951, P.L. 3, No. 1.

[12] Section 1302.2 was added by the Act of August 13, 1963, P.L. 707.

[13] Section 1305 was added by the Act of March 6, 1951, P.L. 3, No. 1.

[14] Section 1308 was added by the Act of March 6, 1951, P.L. 3, No. 1.

[15] Section 206 was added by the Act of March 14, 2012, P.L. 195, No. 18.

requires proof of identification for voting purposes. Section 206(b) of the Election Code, 25 P.S. §2626(b).

Importantly, Act 18 contains no references to any class or group. Rather, its provisions are neutral and nondiscriminatory and apply uniformly to all voters.

II. Preliminary Injunction Standard

To obtain a preliminary injunction, a petitioner must establish that: (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the public interest will not be harmed if the injunction is granted. Brayman Constr. Corp. v. Dep't of Transp., 608 Pa. 584, 13 A.3d 925 (2011).

"For a preliminary injunction to issue, *every one* of these prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others." Lee Publ'ns, Inc. v. Dickinson Sch. of Law, 848 A.2d 178, 189 (Pa. Cmwlth. 2004) (en banc) (quoting Cnty. of Allegheny v. Commonwealth, 518 Pa. 556, 560, 544 A.2d 1305, 1307 (1988)) (emphasis in original).

Although I considered all the prerequisites, I will only discuss the elements which were not established.

III. Immediate and Irreparable Harm

Petitioners established that to the extent Act 18 will operate to prevent the casting or counting of in-person votes of qualified electors in the general election, those electors would suffer irreparable harm that cannot be adequately compensated by money damages.

Petitioners also proved that qualified electors may be erroneously charged a fee for a photo ID for voting. This proof is not based on the plain language of Act 18, which specifies that PennDOT "shall issue an identification card … at no cost …." 25 P.S. §2626. Moreover, erroneous charges of this nature can be compensated by money damages. As a result, this proof does not support injunctive relief.

Petitioners did not establish, however, that disenfranchisement was immediate or inevitable. On the contrary, the more credible evidence on this issue was that offered through Commonwealth witnesses.[16] I was convinced that efforts

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[16] Specifically, testimony offered by Rebecca K. Oyler, Shannon Royer, Kurt Meyers, Jonathon Marks, David Burgess, and, to some extent, Carol Aichele, especially testimony in response to questioning by counsel for Respondents, was credible and supports my determinations on "immediacy" for preliminary injunction purposes.

Although not necessary for preliminary injunction purposes, my estimate of the percentage of registered voters who did not have photo ID as of June, 2012, is somewhat more than 1% and significantly less than 9%, based on the testimony of Rebecca K. Oyler and inferences favorable to Respondents. I rejected Petitioners' attempts to inflate the numbers in various ways.

by the Department of State (DOS), the Department of Health, PennDOT, and other Commonwealth agencies and interested groups will fully educate the public, and that DOS, PennDOT and the Secretaries of those agencies will comply with the mandates of Section 206 of the Election Code. Further, I was convinced that Act 18 will be implemented by Commonwealth agencies in a non-partisan, even-handed manner. These determinations are consistent with determinations I made in the past. See Moyer et al. v. Cortes, (Pa. Cmwlth., 497 M.D. 2008, filed Oct. 30, 2008) (order denying preliminary injunction) (Simpson, J.) (action by Republican party based on allegations of voter registration fraud by ACORN; trial court determined it was unlikely petitioners would prevail on the merits and denied request for preliminary injunction based on credible evidence offered by Secretary of the Commonwealth).

Moreover, considering the believable testimony about the pending DOS photo IDs for voting, and the enhanced availability of birth confirmation through the Department of Health for those born in Pennsylvania, I am not convinced any qualified elector need be disenfranchised by Act 18. Further, as more fully discussed below, based on the availability of absentee voting, provisional ballots, and opportunities for judicial relief for those with special hardships, I am not convinced any of the individual Petitioners or other witnesses will not have their votes counted in the general election.

During closing argument counsel for Petitioners claimed that named Petitioner Bea Bookler and witness Tyler Florio would be disenfranchised by Act 18. 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. Mr. Florio, a 21-year old high school student pursuing a special education curriculum, suffers from autism, chronic fatigue syndrome and mitochondrial dysfunction. He attended court in the company of his mother.[17] These individuals were offered as examples of an unknown number of registered voters who are so compromised as to be unable to endure the travel and process to obtain a photo ID at a PennDOT Drivers' Licensing Center, but not so infirm as to qualify for absentee voting.

As discussed below with regard to whether the requested injunction is reasonably suited to abate the offending activity, 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. Moreover, if these individuals did appear to vote in person on Election Day, they would be able to cast provisional ballots even without photo ID. Thereafter, judicial relief is available on an individual basis to prevent an unconstitutional application of Act 18.

Counsel for Petitioners also referenced Petitioner Gloria Cuttino, asserting that she will be unable to obtain a DOS ID because of a discrepancy in

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[17] Mr. Florio was not a registered voter before Act 18 was enacted. See Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 199 (2008) (plurality opinion) ("[I]f we assume, as the evidence suggests, that some members of these classes were registered voters when SEA 483 [Voter ID Law] was enacted, the new identification requirement may have imposed a special burden on their right to vote.").

the year of her birth on a certification of school records (Pet'rs' Ex. 23, Bates Number page 00000041). Counsel did not explain how this record would interfere with issuance of a DOS ID. The primary purpose of this testimony, however, was to illustrate hurdles facing those born out-of-state who have difficulty obtaining raised-seal birth certificates. That understandable difficulty will be remedied by the DOS ID, and there is no other believable reason why Ms. Cuttino cannot obtain one if she wants one.

Also, I considered testimony by Matt A. Barreto, Ph.D., whose testimony was offered by Petitioners. Parts of this testimony were believable. For the most part, however, his opinions were not credible or were given only little weight. There were numerous reasons for this, including demeanor, bias (see Pet'rs' Ex. 16), and lack of knowledge of Pennsylvania case law regarding name conformity. In addition, I had doubts about his survey design: name-conformity inquiry; oversampling; post-stratification weighting, especially with regard to age and gender; and, overarching design for "eligible" voters, as opposed to "registered" voters. Also, I had doubts about the survey execution: response rate; and timing (June 21 through July 2, 2012).

In particular, to the extent the witness offered testimony on the immediacy or inevitability of his estimated impact of Act 18 in the general election, the evidence was rejected. Further, to the extent the witness offered testimony regarding the ineffectiveness of planned efforts for public outreach and education, the evidence was rejected. Additionally, to the extent the witness offered opinions on "Public Knowledge of Voter ID Law in Pennsylvania," (see

Pet'rs' Ex. 18, Table 2), the opinions were determined to be not credible. On this last point, Dr. Barreto's opinions were contrary to testimony by most, perhaps all, of the lay witnesses who testified for Petitioners. They explained that they have been aware of Act 18 and have some idea whether their current IDs will meet the requirements of the new law.

It is also noteworthy that Dr. Barreto's survey would be of little practical use to those charged with implementing Act 18. This is because his survey is incapable of identifying individuals who need to be contacted for public outreach and education purposes, beyond the survey's 2300 respondents. For this important reason, his approach was given significantly less weight than the approach employed by the DOS and PennDOT.

In their post-hearing brief, Petitioners argue that the plan to create a new DOS photo ID is a legally insufficient basis to avoid a preliminary injunction. They rely primarily on out-of-state authority.[18] Unfortunately, none of the cases upon which Petitioners rely involved a facial challenge to a presumably constitutional statute. Moreover, believable evidence regarding the new DOS photo ID is clearly relevant here to the "immediacy" or inevitability of harm element of proof. For these reasons, Petitioners' post-hearing argument is not persuasive.

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[18] Torres v. Sachs, 381 F. Supp. 309 (S.D.N.Y. 1974) (injunction necessary to compel the availability of bilingual election materials); Puerto Rican Org. for Political Action v. Kuspar, 350 F. Supp. 606 (N.D. Ill. 1972) (preliminary injunction granted to compel election commissioners to make bilingual election materials available).

IV. Greater Injury from Refusing Injunction

Petitioners request that the Court "grant their Application for Special Relief in the Nature of a Preliminary Injunction and enter an order enjoining Respondents, their agents, servants, and officers, and others from implementing, enforcing, or taking any steps toward implementing or enforcing the Photo ID Law and provide any ancillary relief needed to effectuate the Court's Order." Pet'rs' Appl. for Special Relief in the Nature of Prelim. Inj. at 8.

Petitioners did not establish that greater injury will occur from refusing to grant the injunction than from granting it. This is because the process of implementation in general, and of public outreach and education in particular, is much harder to start, or restart, than it is to stop.

A preliminary injunction entered now would interfere: with the August mailing by DOS of informational packets to all poll workers across the Commonwealth; with the August educational conference hosted by DOS for all judges of elections; with the August software installation for the new DOS IDs; with other steps to make the new DOS IDs available through designated PennDOT sites beginning in late August; with the extensive television advertising/web/automated phone calls/mobile billboard campaign to begin after Labor Day; and with the DOS mailing to approximately 5.9 million households, representing every voter household in the Commonwealth. Most of these anticipated steps were believably described by Shannon Royer, Deputy Secretary of the Commonwealth, and Kurt Myers, Deputy Secretary of Transportation.

I questioned Jonathan Marks, the Commissioner of the Bureau of Commissions, Elections and Legislation with DOS, about the effect of a preliminary injunction and the appeal process on the ability of DOS to implement Act 18. While his response in the transcript was equivocal, everyone in the courtroom could see his reaction: alarm, concern, and anxiety at the prospect of an injunction. His demeanor tells the story.

Given the foregoing, I determined that granting a preliminary injunction between now and the time an appeal is likely resolved would result in great injury. Conversely, I do not expect anyone to vote between now and the time an appeal is resolved.

V. Success on the Merits

Petitioners raised a substantial question as to the level of scrutiny to be applied. On the whole, however, they failed to persuade me that they will prevail on the merits.

A. Facial Challenge

The difference between a facial challenge and an "as applied" challenge is an important legal distinction unknown to lay persons. Indeed, it is not fully appreciated by many legal professionals, save for the avid constitutional scholars.

The starting point of my analysis is the presumption of constitutionality that all legislative enactments enjoy under both the rules of

statutory construction and the decisions of our courts. See 1 Pa. C.S. §1922(3); Mixon v. Commonwealth, 759 A.2d 442 (Pa. Cmwlth. 2000) (en banc), aff'd per curiam, 566 Pa. 616, 783 A.2d 763 (2001). Any party challenging a legislative enactment has a heavy burden, and legislation will not be invalidated unless it clearly, patently, and plainly violates the Constitution of this Commonwealth. Mixon. Any doubts are to be resolved in favor of a finding of constitutionality. 1 Pa. C.S. §1922(3); Mixon.

Constitutional challenges are of two kinds: they either assail the statute on its face, or as applied in a particular case. Lehman v. Pa. State Police, 576 Pa. 365, 839 A.2d 265 (2003).

A statute is facially unconstitutional only where no set of circumstances exist under which the statute would be valid. Clifton v. Allegheny Cnty., 600 Pa. 662, 969 A.2d 1197 (2009). Thus, a petitioner must show "the statute is unconstitutional in all of its applications." United States v. Mitchell, 652 F.3d 387, 405 (3d. Cir. 2011) (quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008)).

"In determining whether a law is facially invalid, a court must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." Clifton, 600 Pa. at 704, 969 A.2d at 1122 (citation omitted). A facial challenge must fail where the statute has a "plainly legitimate sweep." Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202 (2008) (citation omitted); see Clifton, 600 Pa. at 705, 969 A.2d at 1223 (observing

the U.S. Supreme Court "seems to have settled" on the "plainly legitimate sweep" standard for facial validity challenges).

By way of further explanation, the Pennsylvania Supreme Court stated:

> [U]nder the 'plainly legitimate sweep' standard, a statute is only facially invalid when its invalid applications are so real and substantial that they outweigh the statute's 'plainly legitimate sweep.' Stated differently, a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary. For this reason (as well as others), facial challenges are generally disfavored. See [Washington State Grange, 552 U.S. at 450] ("Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.' ") (quoting [Sabri v. United States, 541 U.S. 600, 609] (2004)).

Clifton, 600 at 705, 969 A.2d at 1223 n.37.

On the other hand, "[a]n as-applied attack ... does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." Mitchell, 652 F.3d at 405 (quoting United States v. Marcavage, 609 F.3d 264, 273 (3d. Cir. 2010)); see also Commonwealth v. Brown, 26 A.3d 485 (Pa. Super. 2011).

Significantly, "as-applied challenges require application of the ordinance [or statute] to be ripe, facial challenges are different, and ripe upon mere

enactment of the ordinance [or statute]." Clifton, 600 Pa. at 705, 969 A.2d at 1223 n.34 (quoting Phila. Entm't & Dev. Partners, L.P. v. City of Phila., 594 Pa. 468, 937 A.2d 385, 392 n.7 (2007)) (emphasis added) (because petitioner raised an "as applied" challenge to a zoning ordinance that had yet to be applied, the Supreme Court dismissed the challenge on ripeness grounds).

In Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), cited by the Pennsylvania Supreme Court in Philadelphia Entertainment and Development Partners, the Eleventh Circuit Court stated: "It is important first to note that [the petitioner's] challenge is an as applied challenge, not a facial challenge. In order to challenge the County's *application* of the sector plan to his property, [the petitioner] must first demonstrate that the sector plan has been *applied* to his property.") Eide, 908 F.2d at 724 (emphasis in original).

In the context of constitutional challenges to other state voter ID laws, courts generally view such challenges as facial rather than "as applied" challenges. See Crawford, 553 U.S. at 202-03 ("A facial challenge must fail where the statute has a plainly legitimate sweep. When we consider only the statute's broad application to all Indiana voters we conclude that it imposes only a limited burden on voters' rights. The precise interests advanced by the [s]tate are therefore sufficient to defeat petitioners' facial challenge to [Indiana's voter ID law]. ... [The] petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute.") (citations and quotations omitted); In Re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 449 (Mich. 2007) ("The

question presented in this original proceeding, whether [the state's voter ID law] is facially violative of the [state or federal constitutions], is purely a question of law. ... A party challenging the facial constitutionality of a statute faces an extremely rigorous standard, and must show that no set of circumstances exists under which the [a]ct would be valid.") (quotations and footnote omitted); Milwaukee Branch of NAACP v. Walker et al., No. 11 CV 5492, slip op. at 4 (Wis. Cir. Mar. 6, 2012) (unpublished), cert. denied, 811 N.W.2d 821 (Wis. 2012) ("[t]his lawsuit is a facial challenge to the constitutionality of the [state's voter ID law], and the court must focus upon the impact of the law across the entire state, rather than specific individuals."); see also Democratic Party of Georgia, Inc. v. Perdue, 707 S.E.2d 67 (Ga. 2011). Cf. League of Women Voters of Indiana, Inc. v. Rokita, 929 N.E.2d 758, 762 (Ind. 2010) (where petitioner organizations did not claim that state's voter ID law was unconstitutional as applied to them nor sought individualized exemptions from the law's requirements, the court "treat[ed] th[e] case as alleging only claims of facial unconstitutionality and [did] not address the availability of claims alleging that the [l]aw is unconstitutional as applied.")

Notably, in considering the constitutionality of its state's voter ID law, the Supreme Court of Michigan, stated: "An 'as applied' challenge is not possible at this juncture, as the statute has yet to be enforced." In re Advisory Opinion, 740 N.W.2d at 450 (emphasis added). Cf. Rokita, 929 N.E.2d at 760 (rejecting facial constitutional challenge as too broad of a remedy, "without prejudice to future as-applied challenges by any voter unlawfully prevented from exercising the right to vote.").

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.

Worse, they do not indicate what evidence meets the standard. On review, it appears that the majority of the evidence offered by Petitioners may be appropriate to an "as applied" challenge, because it relates to the impact of the law on specific individuals, but not to a facial challenge. This is not to say I ignored the testimony of any witness; rather, I carefully listened to and considered all the evidence. However, I am unsure how to assess much of the evidence offered by the parties with the burden of proof without more guidance from them.

Also, the following examples illustrate speculation about hypothetical or imaginary cases which has no place in a facial challenge:

- Possible inconsistent determinations by poll workers as to name conformity;[19]

[19] While Petitioners take issue with Act 18's language that requires an elector to present proof of identification in the nature of a document that "substantially conforms to the name of the individual as it appears in the district register," Section 102(z.5)(2)(i) of the Election Code, 25 P.S. §2602(z.5)(2)(i), issues of name conformity pre-exist Act 18. See, e.g., In Re Nomination Petition of Gales, ___ Pa.___, ___ A.3d ___ (Pa., No. 7 WAP 2012, filed July 18, 2012) (addressing issues of name conformity in the context of an elector's use of a diminutive form of his or her first name when signing a nomination petition); In re Nader, 865 A.2d 8 (Pa. Cmwlth.), aff'd per curiam, 580 Pa. 134, 860 A.2d 1 (2004) (names of married women, among

(Footnote continued on next page...)

- Possible disruption at the polls caused by inadequate training of poll workers;
- Possible inconsistent determinations by poll workers about expiration stickers on IDs;
- Possible issuance of care facility IDs to strangers who come in off the street;
- Possible inconsistencies as to which voters are indigent for purposes of counting provisional ballots for those who cannot obtain photo ID before or within six days after the general election;
- Possible failures of county election boards to have indigents' affirmations at polling locations on election day, thereby necessitating an additional trip to obtain the affirmation;
- Possible failures by county election boards to follow DOS advice and have available sufficient provisional ballots or additional space for completing them;
- Possible failure of the vendor to implement the software changes before August 27, 2012, for the DOS photo IDs to be made available at PennDOT Drivers' License Centers;
- Overworked DOS Help Desk workers causing delays for PennDOT-initiated inquiries regarding DOS photo IDs.

None of these situations are evident on the face of Act 18. Moreover, if these situations actually arise, they can be remedied on an individual basis. Speculation about these situations does not support invalidation of all lawful applications of Act 18.

On its face, Act 18 applies equally to all qualified electors: to vote in person, everyone must present a photo ID that can be obtained for free. Act 18 does not expressly disenfranchise or burden any qualified elector or group of

(continued...)

other issues), cert. denied, Nader v. Sedony, 543 U.S. 1052 (2005). Thus, name conformity issues exist independent of the enactment and implementation of Act 18.

electors. The statute simply gives poll workers another tool to verify that the person voting is who they claim to be.

I preliminarily conclude Act 18 has a plainly legitimate sweep. As discussed below, considering the statute's broad application to all Pennsylvania voters, it imposes only a limited burden on voters' rights, and the burden does not outweigh the statute's plainly legitimate sweep. My preliminary conclusions are consistent with those of federal and state courts rejecting facial constitutional challenges to voter ID laws. Crawford (similar Ind. statute, 2008); Am. Civil Liberties Union of New Mexico v. Santillanes, 546 F.3d 1313 (10th Cir. 2008) (Albuquerque City ordinance); Perdue (similar Ga. statute, 2011); Rokita (similar Ind. statute, 2010); In re Request for Advisory Opinion (Mich. statute, 2007).

In short, Petitioners primarily proved an "as applied" case, but they are seeking a "facial" remedy. This legal disconnect is one of the reasons I determined that it is unlikely they will prevail on the merits.

B. Count I – Undue Burden on Fundamental Right

Petitioners are unlikely to prevail on Count I of their Petition for Review.

1. Pennsylvania Constitutional Provisions

Relevant Pennsylvania constitutional provisions relating to elections include Article I, Section 5 (elections) and Article VII, Sections 1 (qualifications of electors) and 14 (absentee voting). Article I, Section 5 states: "Elections 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. Article VII, Section 1, entitled "Qualifications of electors" provides:

> Every citizen twenty-one years of age [lowered to 18 years of age by the twenty-sixth amendment to the U.S. Constitution], possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State ninety (90) days immediately preceding the election.
>
> 3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

PA. CONST. art. VII, §1. Additionally, Article VII, Section 14, relating to "Absentee voting" states:

> (a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the

> return and canvass of their votes in the election district in which they respectively reside.
>
> (b) For purposes of this section, "municipality" means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.

PA. CONST. art. VII, §14.

In Winston v. Moore, 244 Pa. 447, 91 A. 520 (1914), the Pennsylvania Supreme Court considered the validity of a 1913 election statute known as the "Nonpartisan Ballot Law," which, among other things, limited the number of names to be printed on the official ballot to the two candidates that received the highest number of votes at the primary. Various Philadelphia residents challenged the constitutionality of the law. Among other things, they claimed it interfered with the freedom and equality of elections in violation of Article I, Section 5 of the Pennsylvania Constitution.

Quoting its prior decision in Patterson v. Barlow, 60 Pa. 54, 1869 WL 7495 (Pa. July 2, 3, 1869), which addressed the meaning of the words "free and equal," in Article I, Section 5 of the Pennsylvania Constitution, the Court stated (with emphasis added):

> How shall elections be made equal? Clearly by laws which shall arrange all the qualified electors into suitable districts … and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the commonwealth. But how shall this freedom and equality be secured? The Constitution has given no rule and furnished no guide. It has not said that the regulations to effect this shall be uniform …. It has simply enjoined the duty and left the means

> of accomplishment to the Legislature. The discretion therefore belongs to the General Assembly, is a sound one, and cannot be reviewed by any other department of the government, except in a case of plain, palpable, and clear abuse of the power which actually infringes the rights of the electors.

Winston, 244 Pa. at 454, 91 A. at 522 (quoting Patterson, 60 Pa. at 75, 1869 WL 7495 at *17). The Court stated the legislature possesses a "wide field" for the exercise of its discretion "in the framing of facts to meet changed conditions and to provide new remedies for such abuses as may arise from time to time. The power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of government." Id. at 455, 91 A. at 522.[20] The Court continued that the Pennsylvania Constitution's "free and equal" language "means that the voter shall not be physically restrained in the exercise of his right of franchise by either civil or military authority, and that every voter shall have the same right as any other voter." Id. After a thorough explanation of these principles, the Court stated (with emphasis added):

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[20] Additionally, in Independence Party Nomination, 208 Pa. 108, 112, 57 A. 344, 345 (1904), the Pennsylvania Supreme Court observed (with emphasis added):

> The Constitution confers the right of suffrage on every citizen possessing the qualifications named in that instrument. It is an individual right, and each elector is entitled to express his own individual will in his own way. His right cannot be denied, qualified, or restricted, and is only subject to such regulation as to the manner of exercise as is necessary for the peaceable and orderly exercise of the same right in other electors. The Constitution itself regulates the times, and, in a general way, the method, to wit, by ballot, with certain specified directions as to receiving and recording it. Beyond this the Legislature has the power to regulate the details of place, time, manner, etc., in the general interest, for the due and orderly exercise of the franchise by all electors alike. Legislative regulation has been sustained on this ground alone. ...

> [O]ur courts have never undertaken to impale legislative power on points of sharp distinction in the enactment of laws intended to safeguard the ballot and to regulate the holding of elections. Indeed, so far as we are now advised, no act dealing solely with the details of election matters has ever been declared unconstitutional by this court. This for the reason that ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government, and should never be stricken down by the courts unless in plain violation of the fundamental law.

Id. As to the specific law at issue, the Court rejected the argument that the law was discriminatory and restrictive in its operation because it limited the names of candidates on the official ballot to the two who polled highest in the primary. Rejecting a challenge premised on Article I, Section 5 of the Pennsylvania Constitution, the Court stated (with emphasis added):

> In the absence of any express constitutional limitation upon the power of the Legislature to make laws regulating elections and providing for an official ballot, nothing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government in the exercise of a power always recognized and frequently asserted.
>
> In a general way it may be said that elections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him. Judged by these tests, the act of 1913 cannot be attacked successfully on the ground that it offends against the 'free and equal' clause of the bill of rights. It denies no qualified elector the right to vote; it treats all voters alike; the primaries held under it are open and public to all

> those who are entitled to vote and take the trouble to exercise the right of franchise; and the inconveniences if any bear upon all in the same way under similar circumstances and are made necessary by limiting the number of names to be printed upon the official ballot, a right always recognized in our state and not very confidently disputed in the case at bar.

Id. In upholding the statute's constitutionality, the Court recognized, "the limitations imposed must not amount to a denial of the franchise itself, and this is the extremest limit to which our cases have gone." Id. at 460, 91 A. at 524. The Court concluded by noting it could not declare a statute void based on a difference in opinion as to its wisdom.

Of further significance, in Patterson, 60 Pa. at 83, 1869 WL 7495 at *22, our Supreme Court explained (with emphasis added):

> The power to legislate on the subject of elections, to provide the boards of officers, and to determine their duties, carries with it the power to prescribe the evidence of the identity and the qualifications of the voters. The error is in assuming that the true electors are excluded, because they may omit to avail themselves of the means of proving their identity and their qualifications. It might as well be argued that the old law was unconstitutional because it required a naturalized citizen to produce his certificate of the fact, and expressly forbade his vote if he did not. What injustice is done to the real electors, by making up the lists so that all persons without fixed residences shall be required to appear in person and make proof of their residence, and thus to furnish a true record of the qualified electors within the district?

More recently, in Mixon, this Court considered a state constitutional challenge to state elections laws that, among other things, excluded felons confined

in a penal institution from the definition of "qualified absentee electors." Id., 759 A.2d at 445.

The petitioners in Mixon were six convicted felons, two were registered voters who were incarcerated, two were not registered voters who were incarcerated, and two had been released from prison but were not registered voters. They challenged the statute on a variety of grounds.

Specifically, they asserted Article I, Section 5 of the Pennsylvania Constitution permitted no modification of an elector's qualifications for voting, which are age and residency, and Article I, Section 25 denied the General Assembly the right to alter these qualifications or to enact laws that interfered with, or prevented, the free exercise of the right of suffrage. The petitioners argued that only a constitutional amendment could change voting qualifications in the state. They also claimed that Article VII, Section 1 only permitted the General Assembly to enact laws governing the time and place of elections, not the qualifications for electors. The petitioners further asserted Article VII, Section 14, relating to absentee voting, did not disqualify an incarcerated felon from voting.

In addition, the petitioners alleged that a statutory provision, which required the disenfranchisement of felons, although facially neutral, had a disparate impact on African-American Pennsylvanians. They further asserted Pennsylvania lacked a compelling reason to justify disenfranchisement of felons, and the true reason for such state action was to impose a disproportionate disadvantage on African-Americans. The petitioners relied on Winston for the proposition that,

pursuant to the free and equal clause of the Pennsylvania Constitution, they could not be denied the right to vote.

Ultimately, this Court rejected the majority of the petitioners' state constitutional claims. In so doing, we recognized: "Although every citizen has a general right to vote, states have broad powers to determine the conditions under which the right of suffrage may be exercised …." Mixon, 759 A.2d at 448.

Further, we specifically rejected the petitioners' reliance on Article I, Section 5 and our Supreme Court's decision in Winston. We stated:

> The [two incarcerated felons who are registered to vote] contend that legislative passage of portions of the Election Code and the Voters Registration Act exceed the authority of the legislature to restrict the franchise, and, as already indicated, they rely on [Winston] for support of their contention. However, Petitioners' reliance on Winston is misplaced. Justice Elkin, writing for the Supreme Court stated:
>
>> The power to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government. Errors of judgment in the execution of the legislative power, or mistaken views as to the policy of the law, or the wisdom of the regulations, do not furnish grounds for declaring an election law invalid unless there is a plain violation of some constitutional requirement.... Legislation may be enacted which regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself.
>
> Winston v. Moore, 244 Pa. at 454-55, 91 A. at 520. In addition, Justice Elkin concluded that the … Nonpartisan Ballot Law, was constitutionally sound and indicated: "Judged by these tests, the act of 1913 cannot be attacked successfully on the

> ground that it offends against the 'free and equal' clause of the bill of rights. **It denies no qualified elector the right to vote....**" Id. at 457, 91 A. at 523 (emphasis added).
>
> Of more recent vintage, former Chief Justice Nix addressed the meaning of the "free and equal" clause when he wrote: "Elections are free and equal within the meaning of the Constitution when they are public and open to all **qualified electors** alike ... when every voter has the same right as any other voter, when each voter **under the law** has the right to cast his ballot and have it honestly counted; when the regulation of the **right to exercise the franchise** does not deny the franchise itself ... and when no constitutional right of the **qualified elector** is subverted or denied...." In re 1991 Pennsylvania Legislative Reapportionment Commission, 530 Pa. 335, 356, 609 A.2d 132, 142 (1992) (citations omitted) (emphasis added).

Mixon, 759 A.2d at 449-50.

We further explained that Article VII, Section 1 of the Pennsylvania Constitution sets forth the qualifications for electors and must be read *in pari materia* with Article I, Section 5. We then stated, that under Article VII, Section 1, "every citizen who meets the age and residency requirements is entitled to vote in all elections, subject, however, to 'such laws requiring and regulating the registration of electors as the General Assembly may enact.' The authority of the legislature to promulgate laws regulating elections was settled long ago in [Patterson]." Mixon, 759 A.2d at 450. Quoting Patterson, we explained, in part:

> But to whom are the elections free? They are free only to the *qualified* electors of the Commonwealth.... There must be a means of distinguishing the qualified from the unqualified ... and therefore the legislature must establish ... the means of ascertaining who are and who are not the qualified electors....

Mixon, 759 A.2d at 450 (quoting Patterson, 60 Pa. at 75, 1869 WL 7495 at 17) (emphasis in original).

In sum, we held the General Assembly had the power to define which electors were "qualified," and it had the power to enact legislation excluding incarcerated felons as qualified absentee electors. See also KEN GORMLEY ET AL., THE PENNSYLVANIA CONSTITUTION §8.3(f) (2004 ed.).

However, this Court found unconstitutional a statutory provision that prohibited released felons from registering to vote for five years after their release where the statute permitted individuals who were registered to vote before their incarceration to vote upon their release. We explained that, because the right of felons to vote is not a fundamental right, the state was not required to show a compelling state interest to justify excluding felons from the franchise, i.e., strict scrutiny. Thus, in analyzing this provision, we applied the rational basis test. Ultimately, we determined this restriction did not bear a rational relationship to a legitimate state interest; therefore, it was invalid.

Of further note, in Ray v. Commonwealth, 442 Pa. 606, 276 A.2d 509 (1971), which we followed in Mixon, our Supreme Court rejected state constitutional challenges to a statutory provision that excluded convicted felons from voting by absentee ballot. The petitioner based his challenges on Article I, Section 5 and Article VII, Section 14 of the Pennsylvania Constitution. The Supreme Court rejected these challenges, stating (with emphasis added):

> The right to vote guaranteed under Art. I, Sec. 5 is … subject to the same condition as is the right to an absentee ballot guaranteed in Art. 7, Sec. 14-that the voter must be a 'qualified

> elector.' And just as the Legislature has the power to define 'qualified electors' in terms of age and residency requirements, so it also has power to except persons 'confined in a penal institution' from the class of 'qualified electors.' <u>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 any provision of either the Pennsylvania or United States Constitutions</u>.

<u>Id.</u> at 608-09, 276 A.2d at 510 (citations and footnote omitted); <u>see</u> <u>also</u> <u>Martin v. Haggerty</u>, 548 A.2d 371 (Pa. Cmwlth. 1988) (rejecting incarcerated inmates' claims that statute denying them the right to vote violated Article VII, Section 1 of the Pennsylvania Constitution).

Notably, in rejecting an argument that its state's statutory photo ID requirement imposed an additional "qualification" on the right to vote, the Supreme Court of Indiana stated (with emphasis added):

> The plaintiffs are correct that the legislature may not by statutory enactment add a substantive qualification to the right to vote assured by Article 2 [of the Indiana Constitution]. In our view, however, the Voter ID Law's requirement that an in-person voter present a government-issued photo identification card containing an expiration date is merely regulatory in nature. The voter qualifications established in Section 2, Article 2 [of the Indiana Constitution] relate to citizenship, age, and residency. <u>Requiring qualified voters to present a specified form of identification is not in the nature of such a personal, individual characteristic or attribute but rather functions merely as an election regulation to verify the voter's identity</u>. When the United States Supreme Court reviewed the Indiana Voter ID Law, the lead opinion ... pointed out that Congress 'believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections

> is enhanced through improved technology.' [Crawford, 553 U.S. 181, 193 (2008).] Justice Stevens quoted with approval from the report issued by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker, III, which emphasized: 'The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo [identification cards] currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.' [Id. at 194] (quoting Building Confidence in U.S. Elections § 2.5 (Sept. 2005), App. 136–137 (Carter–Baker Report)).
>
> We conclude that the Indiana Voter ID Law's photo identification card requirements are in the nature of an election regulation and, as such, must satisfy Indiana's requirements of uniformity and reasonableness. But the requirements of the Voter ID Law are not, as the plaintiffs urge, unconstitutional as additional substantive voter qualifications.

League of Women Voters of Indiana, Inc. v. Rokita, 929 N.E.2d 758, 767 (Ind. 2010) (footnote omitted).

In their pre-hearing brief, Petitioners quote extensively from our Supreme Court's decision in McCafferty v. Guyer, 59 Pa. 109, 1868 WL 6998 (Pa. May 18, 1868), essentially for the proposition that the legislature may not interfere with an individual's fundamental right to vote. In McCafferty, the Pennsylvania Supreme Court declared unconstitutional a statute that *expressly* disenfranchised individuals registered as military deserters. In so doing, the Court stated (with emphasis added):

> Can then the legislature take away from an elector his right to vote, while he possesses all the qualifications required by the Constitution? This is the question now before us. When a

> citizen goes to the polls on an election day with the Constitution in his hand, and presents it as giving him a right to vote, can he be told, 'true, you have every qualification that instrument requires. It declares you entitled to the right of an elector, but an Act of Assembly forbids your vote, and therefore it cannot be received.' If so, the legislative power is superior to the organic law of the state, and the legislature, instead of being controlled by it, may mould the Constitution at their pleasure. Such is not the law. A right conferred by the Constitution is beyond the reach of legislative interference. If it were not so, there would be nothing stable; there would be no security for any right. It is in the nature of a constitutional grant of power or of privileges that it cannot be taken away by any authority known to the government. ... [T]he 3d article of the [Pennsylvania] Constitution is positive and affirmative. It declares that the persons described shall have the rights of an elector. An Act of Assembly that enacts that they shall not, is therefore directly in conflict with it. It is plain, then, that the 3d article of the Constitution is not, as it has been argued, merely a general provision defining the indispensable requisites to the rights of an elector, leaving to the legislature to determine who may be excluded. On the contrary, it is a description of those who shall not be excluded. Undoubtedly power might have been conferred upon the legislature to restrict the right of suffrage. Such power has been given by the Constitutions of some other states, and the debates in the Convention that formed that under which we now live, show that it was contemplated by some of the members to introduce such a provision into ours. But it was not done, and therefore the right of suffrage is with us indefeasible.

Id. at 111, 1868 WL 6998 at *2.

Unlike the statute at issue in McCafferty, which expressly disenfranchised certain otherwise qualified voters, however, Act 18 does not attempt to alter or amend the Pennsylvania Constitution's substantive voter qualifications, but rather is merely an election regulation to verify a voter's

identity. See, e.g., Rokita. Further, and perhaps more importantly, the legislature has the power to define which electors are "qualified." Mixon.

Also distinguishable is Page v. Allen, 58 Pa. 338, 1868 WL 7243 (Jun. 3, 1868) (plurality opinion), cited by Petitioners. There, a majority of our Supreme Court held unconstitutional a statute that attempted to alter the state constitution's prescribed period for residency in an election district prior to an election. In so doing, the Court explained (with emphasis added):

> For the orderly exercise of the right resulting from these [constitutional] qualifications [to vote], it is admitted that the legislature must prescribe necessary regulations, as to the places, mode and manner, and whatever else may be required, to insure its full and free exercise. But this duty and right, inherently imply, that such 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 pretence of regulation, and thus would the natural order of things be subverted by making the principle subordinate to the accessory. To state is to prove this position. As a corrollary [sic] of this, no constitutional qualification of an elector can in the least be abridged, added to, or altered, by legislation or the pretence of legislation. Any such action would necessarily be absolutely void and of no effect. …

Id. at 347, 1868 WL 7243 at *8.

Unlike the statute at issue in Page, however, Act 18 does not attempt to alter the state constitution's substantive voter qualifications. Instead, it is an election regulation designed to verify a voter's identity. See Rokita.

2. Legal Standard for Challenge

Based on the following analysis, 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.

I start my analysis with the United States Supreme Court. In Crawford, the United States Supreme Court rejected a constitutional challenge to an Indiana statute that required a citizen voting in-person to present a government issued photo ID. The photo ID requirement did not apply to electors filing absentee ballots, and the statute contained provisions that allowed eligible voters to cast provisional ballots.[21] The state also offered free photo ID to qualified voters able to establish their residence and identity.

Shortly after its enactment, various plaintiffs, including nonprofit organizations representing groups of elderly, disabled, poor and minority voters, challenged the validity of the statute. After discovery, a federal trial court granted summary judgment against the plaintiffs, and the Seventh Circuit Court of Appeals affirmed. Agreeing with the courts below that the record was not sufficient to support a facial attack on the validity of the entire statute, a divided Supreme Court affirmed.

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[21] Specifically, the statute allowed indigent voters or voters with a religious objection to being photographed to cast provisional ballots that would be counted only if the individual executed an appropriate affidavit before a circuit court clerk within 10 days of the election. Also, a voter who had photo ID but was unable to present it on election day could file a provisional ballot and that vote would be counted if the individual brought his photo ID to a circuit county clerk's office within 10 days.

In the lead opinion, authored by Justice Stevens, and joined by Chief Justice Roberts and Justice Kennedy, the Court first outlined the appropriate standard by which to evaluate the statute. The Court initially distinguished between voting laws that were "invidious" because they were unrelated a voter's qualifications, see Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (invalidating provision that imposed an annual poll tax of $1.50 as a precondition for voting on equal protection grounds), and "evenhanded restrictions that protect the integrity and reliability of the electoral process itself," which are not "invidious." Crawford, 553 U.S. at 189-90 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788, n.9 (1983)).

Rather than applying a "litmus test" to separate valid from invalid restrictions, the Court stated that a court evaluating a constitutional challenge to an election regulation must "weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule." Crawford, 553 U.S. at 190 (quoting Burdick v. Takushi, 504 U.S. 428, 434, 439 (1992) (upholding Hawaii's ban on write-in voting because the state's interests in "avoiding unrestrained factionalism" at the general election and in guarding against "party raiding" during primaries outweighed the "slight" burden on voters' rights); Anderson, 460 U.S. at 789). Further, "however slight th[e] burden may appear … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." Crawford, 553 U.S. at 191 (citation omitted). Significantly, the Court also noted that in Burdick, it rejected an argument that strict scrutiny applies to all laws imposing a burden on the right to

vote, instead choosing to apply the "flexible standard" set forth in Anderson. Crawford, 553 U.S. at 190 n.8.

Applying this standard, the Court first evaluated and accepted the state's asserted interests in requiring photo ID. Specifically, the Court deemed the state's interests in deterrence and detection of voter fraud, modernization of election procedures and protection of voter confidence "unquestionably relevant." Id. at 191.

As to the burdens imposed by the photo ID requirement, the Court first observed that burdens such as voters losing their IDs or no longer resembling the photo in their IDs were neither so serious nor so frequent as to raise any question about the constitutionality of the statute. The Court stated the availability of the right to cast a provisional ballot provided an adequate remedy for problems of that nature.

The Court then examined the burdens on individuals who are eligible to vote, but who do not possess valid photo ID that complies with applicable statutory requirements. To that end, the Court observed that, like other states, Indiana, through its bureau or motor vehicles, provided free photo ID cards. The Court further stated, "[f]or most voters who need them, the inconvenience of making a trip to the [bureau of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote ...." Id. at 198. The Court then explained (with emphasis added):

> Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier

burden may be placed on a limited number of persons. They include elderly persons born out of state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when [the statute] was enacted, the new identification requirement may have imposed a special burden on their right to vote.

The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation. ...

Given the fact that petitioners have advanced a broad attack on the constitutionality of [the statute], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.

Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity. Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified. ...

> In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes excessively burdensome requirements on any class of voters. A facial challenge must fail where the statute has a plainly legitimate sweep. When we consider only the statute's broad application to all Indiana voters we conclude that it imposes only a limited burden on voters' rights. The precise interests advanced by the State are therefore sufficient to defeat petitioners' facial challenge to [the statute].

Id. at 199-200, 202 (citations and quotations omitted). Also, in its discussion of the insufficiency of the record made by the plaintiffs, the Court observed, "although it may not be a completely acceptable alternative, the elderly in Indiana are able to vote absentee without presenting photo identification." Id. at 201. Additionally, the Court stated, even assuming the statute imposed an unjustified burden on some voters, the plaintiffs did not show the proper remedy would be to invalidate the statute in its entirety.

As a final point, the Court noted, even if partisan considerations played a significant role in the decision to enact the statute, the valid neutral justifications advanced by the state in protecting the integrity and reliability of the electoral process, warranted rejection of the plaintiffs' facial challenge.

In a concurring opinion, Justice Scalia, joined by Justices Thomas and Alito, agreed the applicable analysis was set forth in Burdick, which calls for application of a deferential "important regulatory interests" standard for "nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote. Crawford, 553 U.S. at 204 (Scalia, J., concurring) (quoting Burdick, 504 U.S. at 433-34). Justice Scalia determined the

Indiana law was a generally-applicable, nondiscriminatory voting regulation, and the Court's decisions refuted the view that individual impacts were relevant to determining the severity of the burdens imposed by the law. Thus, Justice Scalia did not believe the lead opinion's individual-focused approach to determining the statute's burden on voters was appropriate. Justice Scalia stated:

> The lead opinion's record-based resolution of these cases, which neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned. There is no good reason to prefer that course.
>
> The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not even represent a significant increase over the usual burdens of voting. And the State's interests are sufficient to sustain that minimal burden. That should end the matter. That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.

Id. at 209 (Scalia, J., concurring) (citations and quotations omitted).[22]

About six months after Crawford, the Tenth Circuit Court of Appeals followed the lead opinion in Crawford in upholding the City of Albuquerque's photo ID requirement for in-person voting. See Santillanes. As in Crawford and Burdick, the Tenth Circuit balanced the burdens imposed by the law against the City's interests in preventing voter fraud, and it determined the City's interest was a sufficient justification for the photo ID requirement. The Court also observed

[22] Justice Souter wrote a dissenting opinion, joined by Justice Ginsburg. Justice Breyer wrote a separate dissent.

that the City allowed voters to obtain valid photo ID cards for free, and provided alternatives to the photo ID requirement. Specifically, the City law allowed a voter without photo ID to cast a provisional ballot, which would be counted if the voter provided valid photo ID within 10 days of the election. Additionally, all registered voters had the option of voting by absentee ballot.

Of further note, in Santillanes, the Tenth Circuit rejected the argument that the City's photo ID law created an arbitrary distinction between in-person and absentee voters by only requiring in-person voters to present photo ID. The Court observed that absentee voting is "a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures." Id. at 1320. Additionally, the Court noted the City's absentee ballot procedure provided its own way of confirming a voter's identity.

More recently, the lead opinion in Crawford was followed by the State Supreme Court of Georgia in Perdue. There, the Georgia Supreme Court considered a state constitutional challenge to a Georgia statute, similar to Act 18, that required in-person voters to present a photo ID verifying their identity. The Georgia statute allowed for a provisional ballot if a voter did not have or could not obtain an approved form of photo ID, if the voter executed a sworn affidavit attesting to his or her identity and appeared at a county office and presented a photo ID within two days of the election. Also, an amended version of the Georgia law required issuance of a Georgia voter ID card containing a photograph of the voter free of charge.

The Democratic Party of Georgia, Inc. challenged the law on the grounds that it violated the state constitution by imposing a new qualification or condition on the right to vote, and that it denied equal protection of the law under the state constitution because it unduly burdened the right to vote.

The Court first rejected the petitioner's argument that the statute violated the state constitution by imposing a new qualification or condition on the right to vote. Specifically, the Court observed that the statute did not impact voter registration (for which no photo ID is required) nor did it condition the right to vote on presenting a photo ID because a registered voter could choose a manner of voting for which no photo ID was required. The Court determined the photo ID requirement for in-person voting was a reasonable procedure for verifying that the individual appearing to vote in person is actually the same person who registered to vote.

The Court further stated the photo ID requirement was not an impermissible qualification on voting as it did not deprive any voter from casting a ballot. In particular, the state provided for a free photo ID in the county of the person's residence, and, in the alternative, it permitted an individual to cast a provisional ballot and have the vote counted upon presentation of an acceptable photo ID within 48 hours. Finally, any eligible voter had the option to vote by absentee ballot. To that end, the Court observed that the state constitution did not guarantee a qualified citizen the right to vote in any particular manner. Rather, a qualified elector was guaranteed the "fundamental" right to vote if he availed

himself of one of the procedures set forth by the legislature. Perdue, 707 S.E.2d at 73.

The Court next rejected the argument that the statute violated the state constitution by making failure to present a photo ID at the polls or within two days thereafter, a ground for denying a registered voter the right to vote. The Court reiterated that the state legislature had authority to adopt procedures for the conduct of elections, including methods by which voters were required to prove their identity. The Court concluded no voter was disenfranchised by the statute.

In addition, the Court rejected a contention that the statute violated the state constitution's equal protection clause. It first observed that its state constitution's equal protection clause is "coextensive with" and "substantially equivalent" to the federal equal protection clause, and that it applies these clauses as one. Id. at 74. 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.

Balancing the state's asserted interests in ensuring that only those persons who are lawfully registered to vote may do so and in preventing voter fraud, against the burden of the photo ID requirement, the Court stated: "As did virtually every other court that considered this issue, we find the photo ID requirement ... to be a minimal, reasonable, and nondiscriminatory restriction

which is warranted by the important regulatory interests of preventing voter fraud." Perdue, 707 S.E.2d at 75.[23, 24]

In a case decided before the U.S. Supreme Court's decision in Crawford, the Supreme Court of Michigan considered the constitutionality of its state's voter ID law. See In Re Request for Advisory Opinion. The Michigan law provided that, before being given a ballot, registered electors were required to present an acceptable form of photo ID, and execute an application bearing the elector's signature and address in the presence of an election official. For electors without photo ID, the law allowed an elector to sign an affidavit averring that he lacked photo ID before voting. However, an elector voting without photo ID was subject to challenge.

The Court began by explaining that a facial constitutional challenge presented a pure question of law. The Court further explained its prior decisions deemed the state constitution's equal protection provision to be "coextensive" with the Equal Protection Clause to the federal constitution. Id. at 449. The Court also stated a party challenging the facial constitutionality of a statute "faces an

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[23] As to the record before it, the Court noted the petitioner relied on the testimony of only one voter who did not possess a statutorily authorized photo ID and who was unable to travel to obtain a free ID, but who was not prevented from voting because she voted by absentee ballot. On the other hand, the defendants submitted evidence that the state embarked on a comprehensive education program regarding the photo ID requirement, and that the statute was implemented without issue in 15 elections.

[24] I also reviewed Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005), cited for the first time by Petitioners in their post-hearing brief. However, Billups is clearly distinguishable from the current case.

extremely rigorous standard," and must show "no set of circumstances exists under which the act would be valid." Id. at 450 (footnotes omitted). Additionally, the Court observed that an "as applied" challenge was not possible at that time as the statute had yet to be enforced.

With regard to voting laws generally, the Court explained, while a citizen's right to vote is an "implicit fundamental right," a citizen's "equal right to vote" is not absolute. Id. at 452. Rather, it competes with the state's interest in preserving the integrity of its elections and guarding against abuses of the elective franchise. The Court also observed that under state and federal decisions, its state legislature possessed the authority to regulate elections.

The Court then explained that the U.S. Supreme Court previously rejected the notion that all voting laws are subject to strict scrutiny analysis. Rather, the U.S. Supreme Court in Burdick, opted for a "flexible standard," involving an examination of the nature and magnitude of the claimed restriction on the right to vote against the precise interest advanced by the state as justification for the burden, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's right. In Re Request for Advisory Opinion, 740 N.W.2d at 455. To that end, although "severe restrictions" require that the regulation is narrowly drawn to advance a compelling state interest, when laws place "reasonable, nondiscriminatory restrictions" on voters' First and Fourteenth Amendment rights, "the State's important regulatory interests are generally sufficient to justify" the restrictions. Id. at 455 (quoting Burdick, 504 U.S. at 434).

Applying this standard, the Court first considered the nature and magnitude of the claimed restriction inflicted by the statute. The Court stated the statute's photo ID requirement did not impose a severe burden on the "overwhelming majority of registered voters."[25]

The Court also rejected the argument that the law placed a "severe burden" on electors who lacked the required photo ID because it allowed those electors to sign an affidavit in lieu of presenting photo ID. The Court stated the affidavit alternative imposed *less* of a burden than that imposed on voters who were required to execute a sworn statement before casting provisional ballots (which were used by those individuals who were not listed on the voter registration list but sought to cast a ballot). Under the law, a provisional ballot was not tabulated on election day; rather, it was not tabulated until the provisional voter's eligibility was verified within six days after the election. Concluding the law imposed only a reasonable, nondiscriminatory restriction on the right to vote, the Court held that application of the strict scrutiny standard was inappropriate. Instead, the statute's "evenhanded" photo ID provision, which applied to every voter in the state of Michigan without distinctions as to class or characteristic, was justified by the precise interest the state identified.

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[25] Interestingly, in a footnote, the Court stated: "According to an affidavit submitted by the Director of the Bureau of Driver and Vehicle Records for the Michigan Department of State, approximately 95 percent of registered voters in the state of Michigan already possess either a driver's license or a state identification card. Of the remaining five percent of registered voters, it is unknown how many possess "other generally recognized picture identification ...." In Re Request for Advisory Opinion, 740 N.W.2d 444, 456 n.50 (Mich. 2007).

To that end, the Court found the statute was a reasonable means of preventing the occurrence of in-person voter fraud. The Court also rejected the argument that the state's interest in preventing voter fraud was "illusory" because there was no significant evidence of such fraud. The state legislature was not required to "prove" that significant in-person voter fraud existed before it could permissibly act to prevent it. Id. at 458. "The United States Supreme Court has explicitly stated that 'elaborate, empirical verification of the weightiness of the State's asserted justification is *not required.* Rather, a state is permitted to take prophylactic action to respond to potential electoral problems ...." Id. (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997)) (emphasis in original).

For these reasons, the Court determined the statutory requirement of either presenting photo ID or signing an affidavit was facially constitutional under the flexible standard articulated in Burdick. The Court also rejected arguments that the statute was invalid under its state constitutional provisions, including the contention that the flexible standard set forth in Burdick was not consistent with its state constitution.

In addition, the Court rejected arguments that the statute was tantamount to a poll tax. The Court stated the statute did not condition the right to vote on the payment of any fee because a voter who did not possess adequate photo ID was not required to incur the costs of obtaining photo ID as a condition of voting. Instead, the voter could simply sign an affidavit, at no fee. In any event, the statute provided that any voter who elected to obtain photo ID for use at the

polls was entitled to have the fee waived if he was elderly, disabled or presented good cause for waiver. The Court also noted that elderly and disabled voters could cast absentee ballots, thus alleviating the need to appear at the precinct and show photo ID or execute an affidavit.

Of further note, the Court rejected the argument that alleged "secondary costs" such as "time, transportation, and the expense of procuring supporting documentation [necessary to obtain a state-issued photo ID]" amounted to a poll tax. In Re Request for Advisory Opinion, 740 N.W.2d at 465. In so doing, the Court relied on the underlying federal trial court decision in Crawford, which rejected similar contentions.[26]

In Rokita, the Supreme Court of Indiana affirmed the dismissal of a complaint filed by the Indiana State and Indianapolis chapters of the League of Women Voters, which raised a facial state constitutional challenge to Indiana's voter ID law. Specifically, the Court rejected the argument that the voter ID law

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[26] Although the majority of cases uphold the constitutionality of voter photo ID statutes, two states (one before and one after the U.S. Supreme Court's decision in Crawford) struck down their state voter photo ID statutes as unconstitutional based on their state constitutions. See Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (state voter ID law violated state constitution's equal protection clause and constitutional provision that set forth qualifications of electors; court applied strict scrutiny standard); Milwaukee Branch of NAACP v. Walker et al., No. 11 CV 5492 (Wis. Cir. Mar. 6, 2012) (unpublished), cert. denied, 811 N.W.2d 821 (Wis. 2012) (granting temporary injunction enjoining enforcement of voter ID law; employing strict scrutiny standard and distinguishing Crawford on state constitutional grounds); League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker et al., No. 11 CV 4669 (Wis. Cir. Mar. 12, 2012) (unreported), cert. denied, 811 N.W.2d 821 (Wis. 2012) (permanently enjoining enforcement of state's voter ID law based on determination that law imposed additional condition on right to vote, which was beyond the power of the state legislature).

violated its state constitution by impermissibly imposing an additional qualification on the right to vote beyond those qualifications expressed in the state constitution (i.e., age, residency). The Court also rejected claims that the voter ID law violated its state constitution's equal protection clause by requiring photo ID for in-person, but not mail-in absentee voters, and by exempting from the photo ID requirement those voters who reside in state licensed care facilities. Although the Court rejected a facial constitutional challenge as essentially too broad of a remedy, it did so "without prejudice to future as-applied challenges by any voter unlawfully prevented from exercising the right to vote." Rokita, 929 N.E.2d at 760. In that regard, the Court stated (with emphasis added):

> No individual voter has alleged that the Voter ID Law has prevented him or her from voting or inhibited his or her ability to vote in any way. Our decision today does not prevent any such voter from challenging the Law in the future. ...
>
> The plaintiffs' complaint makes the following allegations: (1) the Voter ID Law prevented or discouraged an indeterminate number of citizens from voting; (2) the votes of 32 persons who did not produce the requisite photo ID were not counted in the 2007 municipal election in Marion County; (3) the votes of 12 nuns who did not produce the requisite photo ID were not counted in the 2008 primary election in St. Joseph County; (4) the Law has prevented an indeterminate number of citizens from voting whose requisite photo ID was lost or stolen or who for got [sic] to bring their requisite photo ID to the polls; and (5) the Law has discouraged or dissuaded an indeterminate number of citizens from voting because of its "extra-constitutional requirements." Complaint ¶¶ 17–20; Appellants' App'x at 13–14. None of these allegations creates any basis for a declaration that the State may not require any voters to identify themselves at the polls using photo ID. Some of these allegations, if substantiated, may entitle specific voters

> to more tailored relief, but none has been sought in the plaintiffs' complaint.

Id. at 761, 762 n.3.

Citing In re Nader, 580 Pa. 22, 858 A.2d 1167 (2004), Petitioners assert the appropriate standard by which to review Pennsylvania's voter ID law under the Pennsylvania Constitution is strict scrutiny. The issue in Nader was whether two individuals could appear on the 2004 Pennsylvania General Election ballot as Independent Political Body candidates for the respective offices of President and Vice President of the United States. In setting aside the candidates' nomination papers, this Court determined the candidates were disqualified under the Pennsylvania Election Code's "sore loser" provisions because they filed nomination papers as candidates of the Reform Party in another state.

Before the Supreme Court, the candidates argued, as applied to them, the Election Code's "sore loser" provisions violated their federal First Amendment rights of association and Fourteenth Amendment rights to equal protection to run in Pennsylvania as independent candidates regardless of their nomination as Reform Party candidates in another state. In resolving this issue, the Pennsylvania Supreme Court looked to the U.S. Supreme Court's decision in Anderson as setting forth the test to be applied in deciding whether a state election law violates First and Fourteenth Amendment associational rights.[27] Specifically, the Court noted (with emphasis added):

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[27] At the outset of its analysis, the Court explained (with emphasis added): "We are mindful of the unusual factual predicate involved in the case before us and that neither the parties nor the Commonwealth Court have cited any case that is analogous to the one *sub judice*, i.e.,
(Footnote continued on next page...)

i]t must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. …

In the matter before us, the Commonwealth has not intervened or appeared, and, therefore, has not offered any reason, let alone one that is 'compelling,' to justify its interest in prohibiting [c]andidates who have been nominated by the Reform Party in other states from running as independents in this Commonwealth. 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.' [Williams v. Rhodes, 393 U.S. 23, 31 (1968)] (internal citations and footnote omitted). The Commonwealth Court's references to other cases describing state interests regarding various restrictive provisions in the Election Code cannot substitute for the requirement that where a precious freedom such as voting is involved, a compelling state interest must be demonstrated. This is certainly paramount given that the application of [the Election Code provision] here completely precludes [the] [c]andidates from running for national office in Pennsylvania:

(continued…)

one where a state law has been applied to prohibit a candidate nominated by a different party in a different state from running for office in the state imposing the restriction." In re Nader, 580 Pa. 22, 41, 858 A.2d 1167, 1178 (2004).

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all of the voters in the Nation.... Thus in a presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders.
>
> [Anderson, 460 U.S. at 794-95.]
>
> Due to the complete absence of any evidence with respect to the state's interest here, we hold that the Commonwealth Court erred in applying [the Election Code provision] to disqualify the [c]andidates from running as independents in Pennsylvania because of their nomination by the Reform Party, in Michigan, and other states.

Nader, 580 Pa. at 43-44, 858 A.2d at 1179-80. Additionally, in addressing another issue that implicated one of the candidate's First Amendment associational rights, the Nader Court again emphasized that the Commonwealth had not intervened and thus did not supply any reason to justify its interest in prohibiting candidates who are members of a party in another state from running as independents in Pennsylvania. The Court then stated: "We opine that, where the fundamental right to vote is at issue, a strong state interest must be demonstrated." Id. at 46, 858 A.2d at 1181. However, it is noteworthy that the Court did not consider the candidates' equal protection claims because it agreed the statute, as applied, deprived the candidates of their First Amendment associational rights.

Of further note, in rejecting a separate federal equal protection challenge raised by the candidates, the Court in Nader explained (with emphasis added):

> [T]he United States Supreme Court has stated that where there had been an allegation that an election code provision violated the Equal Protection Clause of the United States Constitution, 'the Equal Protection Clause allows States considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally.'

Id. at 46, 858 A.2d at 1181 (quoting Clements v. Fashing, 457 U.S. 957, 962 (1982)).

Petitioners' reliance on Nader for the proposition that Act 18 should be subject to strict scrutiny under the Pennsylvania Constitution is misplaced for several reasons.

First, Nader involved an interpretation of the First Amendment of the U.S. Constitution and accompanying U.S. Supreme Court cases, rather than provisions of the Pennsylvania Constitution.

Second, almost four years after Nader, the U.S. Supreme Court clarified that strict scrutiny does not apply to all laws that impose a burden on the right to vote. See Crawford. Instead, in considering the constitutionality of another state's voter ID law, the U.S. Supreme Court opted to apply the "flexible standard," explained more fully above. Id.

Third, Pennsylvania courts considering state constitutional challenges to state election laws, afford a substantial degree of deference to the judgment of the legislature. See Winston (rejecting state constitutional challenge to nonpartisan ballot law; recognizing "wide discretion which the Legislature has always

exercised in the enactment of election laws ...."); Patterson (rejecting state constitutional challenge to law requiring registration of voters; stating "[t]he discretion ... belongs to the General Assembly, is a sound one, and cannot be reviewed by any other department of the government, except in a case of plain, palpable, and clear abuse of the power which actually infringes the rights of the electors."); In re Nomination Petition of Rogers, 908 A.2d 948 (Pa. Cmwlth. 2006) (single judge opinion by Colins, P.J.) (rejecting state constitutional challenge to election code provision setting forth formula for number of signatures required on nomination papers for minor party candidates; stating, "our Supreme Court has applied a 'gross abuse' standard to determine whether election statutes violate the 'free and equal' clause ....") See also Mixon (rejecting state constitutional challenge to state elections laws that, among other things, excluded felons confined in a penal institution from the definition of "qualified absentee electors;" discussing Winston and Patterson).

Indeed, in Rogers, former President Judge (and now Senior Judge) Colins explained: "From [Winston], we find that our Supreme Court has applied a 'gross abuse' standard to determine whether election statutes violate the 'free and equal' clause, thereby giving substantial deference to the judgment of the legislature. This stands in stark contrast to the standard utilized under the federal constitution, which employs a 'balancing test.'" Id. at 954.

This line of Pennsylvania authority distinguishes Pennsylvania from those states that declared their respective voter ID laws unconstitutional on state constitutional grounds, utilizing a strict scrutiny analysis. See Weinschenk v.

State, 203 S.W.3d 201 (Mo. 2006) (state voter ID law violated state constitution's equal protection clause and constitutional provision that set forth qualifications of electors; court applied strict scrutiny standard); Milwaukee Branch of NAACP v. Walker et al., No. 11 CV 5492 (Wis. Cir. Mar. 6, 2012) (unpublished), cert. denied, 811 N.W.2d 821 (Wis. 2012) (granting temporary injunction enjoining enforcement of voter ID law; employing strict scrutiny standard and distinguishing Crawford); League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker et al., No. 11 CV 4669 (Wis. Cir. Mar. 12, 2012) (unreported), cert. denied, 811 N.W.2d 821 (Wis. 2012) (permanently enjoining enforcement of state's voter ID law based on determination that law imposed additional condition on right to vote, which was beyond the power of the state legislature).

Of further note, in Nader, the Commonwealth did not intervene or appear in the litigation, and, therefore, did not offer any reason to justify its interest in applying the Election Code provision at issue there in the manner in which it did. Here, however, the Commonwealth is a party to the litigation, and it advances its interest in protecting public confidence in elections as justification for the enactment of Act 18.

Additionally, the candidates in Nader raised an "as applied" challenge to the statutory provision at issue there rather than the broad, more difficult to prove, facial challenge advanced by Petitioners here.

In sum, the federal courts, and most state courts, do not employ a strict scrutiny analysis to assess the constitutionality of state voter ID laws. More

importantly, this Court applies a very deferential standard to assess Election Code and voter qualification challenges. Despite the initial appeal of a strict scrutiny methodology based on the right to vote, there is no clear, relevant Pennsylvania authority to support that approach.

3. Preliminary Determinations

a. Stated Commonwealth Interests Supporting Act 18

Respondents set forth the rationale for Act 18 in an amended answer to Petitioners' First Set of Interrogatories (Petitioners' Exhibit 46), averring in pertinent part as follows:

> 1. What is the Commonwealth's justification for the Photo ID Law?
>
> **ANSWER:**
>
> ***
>
> Without waiving this objection, and responding only to the extent that the Governor's Office and the Department of State participated in the legislative process that led to the enactment of Act 18 of 2012, Respondents answer that requiring 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. Respondents are aware of reports indicating that lists of registered voters contain the names of persons who are deceased, no longer residents of Pennsylvania, or no longer residents of the locations at which their names appear on the list of registered electors. Respondents are aware of reports indicating that votes have been cast in the name of registered electors who are deceased, who no longer reside in Pennsylvania, or who no longer reside in the jurisdiction where the vote is cast. Absent proof of identification presented to elections officials at the polling place, there is a risk that votes may be cast in the names of registered electors who are dead or

> have left the Commonwealth or jurisdiction of the election district by a person other than the registered elector. Respondents are aware of reports questioning the integrity of elections based on a variety of incidents. 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.

These asserted interests are relevant, neutral and non-discriminatory justifications for Act 18. See Crawford.

> In addition, the parties stipulated in pertinent part as follows:
>
> 1. There have been no investigations or prosecutions of in-person voter fraud in Pennsylvania; and the parties do not have direct personal knowledge of any such investigations or prosecutions in other states;
>
> 2. The parties are not aware of any incidents of in-person voter fraud in Pennsylvania and do not have direct personal knowledge of in person voter fraud elsewhere;
>
> 3. Respondents will not offer any evidence in this action that in-person voter fraud has in fact occurred in Pennsylvania or elsewhere;
>
> 4. The sole rationale for the Photo ID law that will be introduced by Respondents is that contained in Respondents' Amended answer to Interrogatory 1, served June 7, 2012.
>
> 5. Respondents will not offer any evidence or argument that in person voter fraud is likely to occur in November 2012 in the absence of the Photo ID law.

Pet'rs' Ex. 15. Respondents' efforts to minimize these stipulated facts were not convincing.

Nevertheless, in Crawford the United States Supreme Court upheld a nearly identical Indiana voter ID law despite the absence of any evidence of in-person voter fraud occurring in that state. Id., 553 U.S. at 196. Accordingly, I conclude that the absence of proof of in-person voter fraud in Pennsylvania is not by itself dispositive.

I also considered allegations of partisan motivation for Act 18 in general, and the disturbing, tendentious statements by House Majority Leader Michael Turzai to a Republican party gathering in particular (Pet'rs' Ex. 42). Ultimately, however, I determined that this evidence did not invalidate the interests supporting Act 18, for factual and legal reasons. Factually, I declined to infer that other members of the General Assembly shared the boastful views of Representative Turzai without proof that other members were present at the time the statements were made. Also, the statements were made away from the chamber floor. Legally, the United States Supreme Court stated in Crawford that "if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators." Id. at 204.

b. Burdens

The relevant burdens are those imposed on qualified electors who lack photo IDs required by Act 18. Because under the plain language of Act 18 the photo IDs are free, and under new procedures birth certificates with raised seals are no longer required for those born in Pennsylvania, the inconvenience of going to

PennDOT, gathering required documents, and posing for a photograph does not qualify as a substantial burden on the vast supermajority of registered voters.

A somewhat heavier burden is placed on certain individuals, such as persons born out-of-state who may have difficulty obtaining a useful birth certificate. This burden is mitigated by the pending DOS ID, which will be available without the need to produce a raised-seal birth certificate. Others, such as the elderly and infirm who have difficulty traveling to PennDOT Drivers' License Centers, and homeless persons, also face a somewhat heavier burden. As discussed elsewhere in this Determination, however, Petitioners' request for relief is not tailored to meet the groups impacted by this somewhat heavier burden.

c. Preliminary Conclusions

Employing the federal "flexible" standard discussed in Crawford in the context of a very similar state statute in Indiana, I reach the same conclusions the United States Supreme Court reached. See also Perdue; In re Request for Advisory Opinion. Thus, the photo ID requirement of Act 18 is a reasonable, non-discriminatory, non-severe burden when viewed in the broader context of the widespread use of photo ID in daily life. The Commonwealth's asserted interest in protecting public confidence in elections is a relevant and legitimate state interest sufficiently weighty to justify the burden.

Alternatively, employing a "substantial degree of deference/gross abuse" standard referenced by our Supreme Court in Winston, and by this Court in Rogers, I cannot say that a constitutional violation is evident. See also Rokita

(state constitutional challenge to very similar statute in Indiana). The burdens associated with Act 18 serve substantial interests to protect the integrity and reliability of the electoral process. The requirements of Act 18, while enhancing the procedural burdens associated with the voting process, are not sufficiently unreasonable. Id. Petitioners do not offer any analysis based on this standard.

Nevertheless, the appropriate level of scrutiny raises a substantial legal question. Indeed, if strict scrutiny is to be employed, I might reach a different determination on this prerequisite for a preliminary injunction.

C. Count II – Equal Protection

Petitioners are unlikely to prevail on Count II of their Petition to Review, which raises equal protection challenges under the Pennsylvania Constitution.

1. Equal Protection Analysis

In evaluating equal protection claims under the Pennsylvania Constitution,[28] our Supreme Court employs the same standards applicable to

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[28] Article I, Section 1 and Article I, Section 26 of the Pennsylvania Constitution provide:

> **Section 1. Inherent rights of mankind**
>
> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.
>
> **Section 26. No discrimination by Commonwealth and its political subdivisions**

(Footnote continued on next page...)

federal equal protection claims.[29] Kramer v. Workers' Comp. Appeal Bd. (Rite Aid Corp.), 584 Pa. 309, 883 A.2d 518 (2005); see also Jae v. Good, 946 A.2d 802 (Pa. Cmwlth. 2008). Indeed, our Supreme Court holds "the equal protection provisions of the Pennsylvania Constitution are analyzed ... under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution." Commonwealth v. Albert, 563 Pa. 133, 138, 758 A.2d 1149, 1151 (2000) (quoting McCusker v. Workmen's Comp. Appeal Bd. (Rushton Mining Co.), 536 Pa. 380, 384, 639 A.2d 776, 777 (1994); Love v. Borough of Stroudsburg, 528 Pa. 320, 325, 597 A.2d 1137, 1139 (1991)).

This approach is consistent with other state courts that considered and rejected challenges to their respective states' voter ID laws, which also construe their state constitutions' equal protection clauses as coextensive with the federal equal protection clause. See Perdue (Ga. 2011); In Re Request for Advisory Opinion (Mich. 2007). Cf. Rokita (Ind. 2010) (applying different standard in analyzing state constitution-based equal protection challenge to state's voter ID

(continued...)

> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

PA. CONST. art. I, Sections 1, 26.

[29] The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

law, but rejecting such a challenge and upholding state's voter ID law as constitutional).

2. Preliminary Determinations

Applying either the federal "flexible" standard or the Pennsylvania "substantial degree of deference/gross abuse" standard, the primary distinction about which Petitioners complain, the different treatment afforded absentee voters and in-person voters, has a sufficient factual explanation and does not violate the equal protection guarantee. See Santillanes; Perdue; In re Request for Advisory Opinion.

Another distinction about which Petitioners complain, the ability of those individuals who held a PennDOT driver's license at any point since 1990 to obtain a photo ID without the same rigorous documentary proofs required of others, does not appear on the face of Act 18. Moreover, the distinction is factually supported by the prior vetting and internal security checks which are part of the PennDOT system. This was credibly explained by David Burgess. As a result, the different treatment does not amount to a facial violation of equal protection.

A third highlighted distinction is the treatment of Pennsylvania care facilities under Section 102(z.5) of the Election Code. Petitioners posit these facilities are given preferential treatment because they can theoretically issue photo IDs to whomever they want. Petitioners, however, did not prove that any Pennsylvania care facilities will issue photo IDs, much less that they might issue

photo IDs more broadly than other sources. Given this lack of proof, Petitioners' challenge on this point must fail. Moreover, this distinction has been upheld against an equal protection challenge elsewhere. See Rokita.

D. Count III – Improper Additional Qualification to Vote

Petitioners claim in Count III of their Petition for Review that the requirement for photo IDs for in-person voting improperly adds a qualification to vote beyond those set forth in Article VII, Section 1 of the Pennsylvania Constitution. Based on my analysis above, this claim has no merit whatsoever. Ray (additional qualification claim under Pennsylvania constitution rejected); Mixon (same); see Perdue (additional qualification claim under Georgia constitution rejected); Rokita (additional qualification claim under Indiana constitution rejected); In re Request for Advisory Opinion (additional qualification claim under Michigan constitution rejected). Not surprisingly, Petitioners seemed to abandon this claim at trial.

VI. Injunction Reasonably Suited

The broad remedy sought by Petitioners here, invalidating and enjoining application of Act 18 in its entirety, is not reasonably suited to abate the burden imposed on some Pennsylvania voters to obtain photo IDs. A more reasonably suited remedy would seek relief for those few qualified electors on whom Act 18 imposes an enhanced burden.

As discussed at length above, the distinction between a facial challenge and an "as applied" challenge is crucial. Petitioners primarily proved an

"as applied" case, but they seek a facial remedy. This distinction has been an important part of the analysis by many courts which rejected facial challenges to voter ID laws. Crawford; In re Request for Advisory Opinion; see also Perdue; Rokita. Generally, these courts determined that even assuming the burden imposed by a voter ID law may not be justified as to a few voters, that conclusion is by no means sufficient to establish the challengers' right to total avoidance of the law.

Several provisions of the Election Code provide relief for those facing "as applied" burdens under Act 18. Among these are the provisions for absentee ballots. See Sections 1301,[30] 1302 of the Election Code, 25 P.S. §§3146.1, 3146.2. Any qualified registered and enrolled elector who because of illness or physical disability is unable to attend his polling place is entitled to vote by absentee ballot. Section 1301(k) of the Election Code, 25 P.S. §3146.1(k). Where a qualified registered elector applies for an absentee ballot based on illness or physical disability, he or she must include a declaration stating the nature of his or her disability, and provide contact information for his or her attending physician. 25 P.S. §3146.2(e)(2). Based on the demeanor of Petitioner Bea Bookler and of witness Tyler Floria, absentee balloting is probably available to them.

Another important provision of the Election Code deals with provisional voting. Generally under Act 18, if a qualified elector does not have photo ID for any reason, he or she may still cast a provisional ballot. 25 P.S. §3050(a.2)(1). The vote will be counted automatically if within six days the elector transmits to the county board of elections a sworn statement that he or she

[30] Section 1301 was added by the Act of March 6, 1951, P.L. 3, No. 1.

is the person who cast the ballot and that he or she is indigent and unable to obtain proof of identification without the payment of a fee. 25 P.S. §3050(a.4)(5)(D). Otherwise, the vote will be counted automatically if within six days the elector appears at the county board of elections with photo ID and transmits a sworn statement that he or she is the person who cast the ballot. 25 P.S. §3050(a.4)(5)(E).

The availability of the provisional ballot procedure has been an important factor to most courts which rejected a facial challenge to a voter ID law. Crawford; Santillanes; Perdue; In re Request for Advisory Opinion. Conversely, the *absence* of a provisional ballot procedure has been an important factor to a court which granted a facial challenge to a voter ID law. NAACP v. Walker (unpublished; Wis. 2012).

There are other significant provisions that contemplate judicial relief. For example, there is judicial review of a county board of elections' decision not to count a provisional ballot. 25 P.S. §3050(a.4)(4)(v). This procedure presents an opportunity for judicial intervention to avoid unconstitutional applications of Act 18 to individuals. Thus, in the event Petitioner Bea Bookler and witness Tyler Floria do not obtain photo IDs before Election Day, and they do not qualify for absentee voting, they may cast provisional in-person votes. They may seek judicial relief to have their provisional votes counted. Petitioners do not discuss this provision of the Election Code.

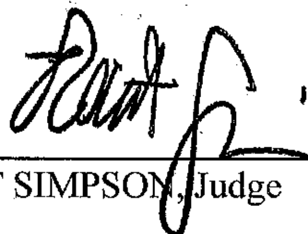
Moreover, judicial relief is also available to resolve disputes or problems which arise at polling places on Election Day. Pursuant to Section 1206 of the Election Code, 25 P.S. §3046, common pleas judges are available through the day of the general election to deal with disturbances at voting places and to issue orders permitting persons to cast provisional ballots. Petitioners do not discuss this provision of the Election Code.

These and other remedies are available for individuals who are truly burdened by obtaining photo ID. The existence of the procedures and judicial remedies for burdened individuals highlights the impropriety of the broad remedy sought by Petitioners here.

VII. Summary

Petitioners' counsel did an excellent job of "putting a face" to those burdened by the voter ID requirement. At the end of the day, however, I do not have the luxury of deciding this issue based on my sympathy for the witnesses or my esteem for counsel. Rather, I must analyze the law, and apply it to evidence of facial unconstitutionality brought forth in the courtroom, tested by our adversarial system.

For the foregoing reasons, I am constrained to deny the application for preliminary injunction, without prejudice to future particularized "as applied" claims. See Rokita.



ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viviette Applewhite; Wilola Shinholster Lee; Grover Freeland; Gloria Cuttino; Nadine Marsh; Dorothy Barksdale; Bea Bookler; Joyce Block; Henrietta Kay Dickerson; Devra Mirel ("Asher") Schor; the League of Women Voters of Pennsylvania; National Association for the Advancement of Colored People, Pennsylvania State Conference; Homeless Advocacy Project, Petitioners	:	
v.	:	No. 330 M.D. 2012
The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carole Aichele, in her capacity as Secretary of the Commonwealth, Respondents	:	

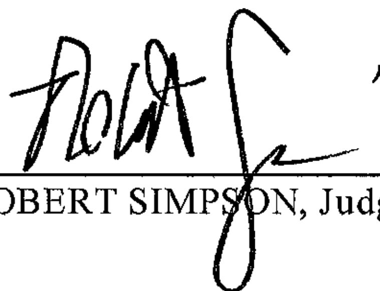
ORDER

AND NOW, this 15th day of August, 2012, after hearing and after consideration of the oral and written arguments of counsel, it is **ORDERED** and **DECREED** as follows:

Petitioners' Application for Preliminary Injunction is **DENIED.**

Upon praecipe, the Chief Clerk shall issue as of course a **RULE to SHOW CAUSE** why Respondents should not file a pleading responsive to the

Petition for Review within 30 days. The **RULE** shall be returnable by written answer filed within 10 days of service.



ROBERT SIMPSON, Judge