IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 71 MAP 2012

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

v.

THE COMMONWEALTH OF PENNSYLVANIA; THOMAS W. CORBETT, in his capacity as Governor; CAROLE AICHELE, in her capacity as Secretary of the Commonwealth

Appellees

APPEAL OF: Applewhite, Lee, Cuttino, Marsh, Bookler, Block, Dickerson, Schor, The League of Women Voters of Pennsylvania; NAACP, Pennsylvania State Conference, and Homeless Advocacy Project

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BRIEF FOR APPELLEE THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT DATED AUGUST 15, 2012, AT NO. 330 MD 2012 DENYING APPELLANTS' APPLICATION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES – CONT'D.

CASES:

PENNSYLVANIA CONSTITUTION:

STATUTES:

TABLE OF AUTHORITIES

RULES:

MISCELLANEOUS:

TABLE OF AUTHORITIES

CASES:

STATEMENT OF JURISDICTION

This is an appeal from an order of Commonwealth Court denying a request for a preliminary injunction in a matter which was originally commenced in that court. This Court has appellate jurisdiction pursuant to 42 Pa. C.S.A.§§ 702(a), 723 (a), 5105(c), and Pa.R.A.P. 311(a)(4).

STATEMENT OF STANDARD AND SCOPE OF REVIEW

Scope of review: The scope of review is plenary.

Standard of review. The appeal is from an order denying a request for preliminary injunction. In such cases the standard of review is "highly deferential." *Summit Towne Centre, Inc. v. The Show of Rocky Mount, Inc.*, 573 Pa. 637, 828 A.2d 995, 1000 (2003), *quoted in, Warehime v. Warehime*, 580 Pa. 201, 209, 860 A.2d 41, 46 (2004). This standard requires that the reviewing court "examine the record to determine if there were any apparently reasonable grounds for the actions of the court below." *Id.* If there were, the court must affirm. This Court has said that, 'We will find that a trial court had apparently reasonable grounds for its denial of injunctive relief where the trial court has properly found that any one of the . . . essential prerequisites for a preliminary injunction is not satisfied." *Warehime, id.* (internal quotation marks and citations omitted).

ORDER IN QUESTION

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 in 30 days. The RULE shall be returnable by written answer filed within 10 days of service.

/s/
ROBERT SIMPSON, Judge

STATEMENT OF THE QUESTION INVOLVED

Whether there were any reasonable grounds for the trial court to deny the request for a preliminary injunction?

STATEMENT OF THE CASE

This is a challenge, solely on state constitutional grounds, to Act 18 of 2012, which requires voters, with certain exceptions, to show an acceptable form of photo identification when they appear to vote. This appeal concerns not the merits of the challenge, but the propriety of the trial court's order denying a motion to preliminarily enjoin the law, which is being implemented, pending a final determination on the merits.

Procedural History

Appellants are individuals who claim not to have a photo ID that is acceptable under the Act as well as several associations that claim they must expend resources in order to ensure that their members have the necessary ID to vote. The appellees are the Commonwealth, and, separately represented, the Governor, and the Secretary of the Commonwealth. The Petition for Review was filed on May 1, 2012, and the application for preliminary injunction was filed at the same time. The parties engaged in discovery, and the court conducted a week-long evidentiary hearing on the motion for preliminary injunction beginning on July 25, 2012. After hearing from more than thirty witnesses, as well as hearing the arguments of the parties, both in open court and in pre- and post-hearing briefs, the trial court denied the motion. This appeal followed.

Names of the Judges Whose Decision Is To Be Reviewed

The Honorable Robert E. Simpson.

Statement of Facts

House Bill 934

The bill that became Act 18 was introduced as HB 934 and was debated extensively in the House of Representatives. During the floor debate on HB 934, the members of the House of Representatives considered a number of reasons for the legislation. The members considered

that photo ID is commonly required in many facets of everyday life, including airport security, purchasing alcoholic beverages, and purchasing certain pharmaceutical products. *See* 2012 Legislative Journal – House, March 13, 2011. Given the importance of voting as the foundation of democracy, the members considered that photo ID should be required to ensure that each voter gets one vote and that vote will not be diluted by the fraudulent voting of others. *Id.* The members specifically discussed that HB 934 was modeled after the photo ID legislation enacted in Indiana, which legislation was upheld as constitutional by the United States Supreme Court. *Id.* The members were mindful of the recommendations of the bi-partisan commission led by former President Jimmy Carter and James A. Baker, III, which called for a photo ID system for voters to ensure that each voter in a polling place is the same voter listed in the registry. *Id.* R.R. 2145a.

The members of the House of Representatives considered the impact on certain segments of the population, including senior citizens. The members considered that the Social Security Administration requires photo ID to obtain benefits and such a photo ID must be maintained in the event that a claim is made. *See* 2012 Legislative Journal – House, June 20, 2011. The members considered that photo ID is increasingly required to use credit cards or to write a check. *Id.* Photo ID is required when filing for rebates under the Pharmaceutical Assistance Contract for the Elderly program. *Id.*

Requirements of Act 18

The Governor signed this legislation into law on March 14, 2012. As enacted, the Act requires registered voters to confirm their identity as follows:

(z.5) The words "proof of identification" shall mean:

(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:

(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;

(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).

25 P.S. § 2602(z.5).

If a voter cannot produce proof of identification at the polling place, or cannot obtain such proof of identification because of indigence, the voter is allowed to cast a provisional ballot. 25 P.S. § 3050(a.2)(1). After casting a provisional ballot, the voter must deliver to the county board of elections, within six calendar days after the election, a copy of the voter's photo ID and an affirmation declaring that the voter is the same person who cast the provisional ballot. 25 P.S. § 3050(a.4)(5)(ii)(E). If the cause for the provisional ballot was the inability to obtain photo ID because of indigence, however, the voter need only supply within six calendar days the affirmation declaring that the voter is the same person who cast the provisional ballot and that the voter is in fact indigent. 25 P.S. § 3050(a.4)(5)(ii)(D). On election day, the Department of State will ensure that each county board of elections has copies of the affirmation relating to indigent voters at the polling places, so that they can be executed and delivered on the spot.

The Act imposes certain requirements on the Secretary of the Commonwealth and the Department of Transportation. The Secretary of the Commonwealth must prepare and disseminate to the public information about the photo ID requirements in the Act. 25 P.S. § 2626(a). The Department of Transportation must issue photo ID cards free of charge to any registered voter who requests a photo ID card for voting purposes and who signs an affirmation that he or she does not possess an acceptable photo ID under the Act. 25 P.S. § 2626(b).

As appellants recognize, the Election Code required before Act 18 that first-time voters establish their identities by presenting a photo ID. R.R. 25a (Petition for Review, ¶66). In the

event that such first-time voters did not have an acceptable photo ID, the Election Code required such first-time voters to provide alternative forms of identification. *Id.*[1]

PennDOT Driver Licenses and Non-Driver Photo ID Cards

PennDOT has for many years required certain documentation to confirm a person's identity before a driver license or non-driver photo ID card could be issued. Although the documents acceptable for this purpose have varied over the years, PennDOT has always worked on a case-by-case basis with customers to confirm their identity through alternative means, if necessary. In recent years, especially after the events of September 11, 2011, PennDOT has become attuned to federal homeland security concerns that require heightened security with regard to photo ID cards that grant access to airports, federal facilities, and other secure locations. R.R. 1056a. PennDOT, therefore requires for the issuance of a driver license or non-driver photo ID card that a customer provide a completed application with certain personal data; a birth certificate with raised seal, certificate of U.S. citizenship or naturalization, or a passport; such proofs of residency as tax records, lease or mortgage documents, a firearms permit, or utility bills; and a Social Security card. R.R. 1055a-56a (Testimony of Kurt Myers).

Because the PennDOT databases have been maintained in their current form since 1990, PennDOT will issue to any person a non-driver photo ID card that can be used for voting purposes without the documentation that is typically required, as long as that person possessed a driver license or non-driver photo ID at any time from 1990 to the present. R.R. 1094a (Testimony of Kurt Myers). Such persons have already been screened for the proof of their

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[1] First time voters have been required, eve under prior law, to present a valid driver's license or another valid Commonwealth or federal identification card, or a valid United States passport, a valid student or employee identification card, or a valid military identification card. 25 P. S. § 3050(a).

residency, and PennDOT's facial recognition software will confirm that the person is the same individual who previously possessed a valid PennDOT product. *Id.*

In order to facilitate the delivery of photo ID products that are acceptable under Act 18, PennDOT has established a direct link with the Department of Health for the confirmation of birth records for people born in Pennsylvania. R.R. 1047a-1048a (Testimony of Kurt Myers). Contrary to the allegations in the petition for review, such Pennsylvania natives may obtain a photo ID for voting purposes from PennDOT free of charge without paying a fee or making a separate application to the Department of Health for a birth certificate with raised seal. In any event, PennDOT has since 2009 allowed an exception to the requirement that a birth certificate be produced for customers who are 70 years of age or older. For those customers, PennDOT will accept baptismal certificates, some type of government document (*e.g.*, tax records, military records, or Social Security documents), or medical records, as long as these documents list the customer's name and date of birth.

Department of State Efforts to Ensure that Voters Have Photo ID

In accordance with the statutory obligations imposed on the Secretary of the Commonwealth by Act 18, the Department of State is taking many steps to educate the public about Act 18 and the forms of acceptable photo ID that are available to interested and eligible voters. R.R. 865a-877a (Testimony of Shannon Royer). The Department is working with colleges and universities in Pennsylvania to ensure that their student ID cards have the required expiration date. R.R. 71a. At the time of the hearing, the Department of State had record of 542,000 students with student ID cards that have expiration dates and comply with Act 18. R.R. 871a.

Beginning in August, 2012, the Department of State began issuing through PennDOT driver license centers a Department of State voter ID card ("DOS Voter ID"). Although some

registered voters may not be able to locate or obtain the documentation required for the secure PennDOT products, the DOS Voter ID will be provided free of charge and for voting purposes only to any registered voter who does not have another acceptable form of photo ID. In order to obtain the DOS Voter ID, a person must know their Social Security number and provide at least two proofs of residency (*e.g.*, utility bills, lease or mortgage documents). R.R. 1089a-1092a (Testimony of Kurt Myers). The PennDOT driver license center will confirm that the person does not already have a PennDOT photo ID product. PennDOT will also confirm with a Department of State help desk, which will be open at any time that PennDOT driver license centers will be open, that the person is listed in the Statewide Uniform Registry of Electors ("SURE") as a registered voter. Persons qualifying for this DOS Voter ID will be able to obtain the product in a single visit to a PennDOT driver license center unless they lack the minimal proofs of identity or are not registered to vote. R.R. 1092a. The DOS Voter ID is available to the public during all of September, October, and all relevant portions of November, including the days after the general election when those casting provisional ballots may need to obtain a photo ID to ensure that their votes are counted.

Having these opportunities in place for eligible voters to obtain an acceptable photo ID, the Department of State has begun to educate the public about Act 18 and the acceptable forms of photo ID that are available. The Secretary of the Commonwealth and others within the Department have given interviews with various news media. The Department periodically updates a Web site devoted to voting issues and maintains a hotline for members of the public with questions about the requirements of Act 18. The Department of State and PennDOT conducted a comparison of the SURE database and PennDOT's driver license and photo ID database to identify registered voters who lack a PennDOT product. This comparison found that 91% of registered voters in Pennsylvania have a PennDOT driver license or non-driver photo

ID.[2] For the remaining 9% of registered voters, many of whom may possess one or more of the other acceptable forms of photo ID, the Secretary of the Commonwealth has sent letters to each voter to notify them of the requirements of Act 18 and the possibility that they do not have an acceptable form of photo ID. Besides the fact that voters who do not have PennDOT issued ID may have forms of ID acceptable for voting, they may be dead or inactive, or have different names on their drivers' licenses and voter registrations. The Secretary of the Commonwealth testified, for example, that the Department of State received a great many of its letters back marked address unknown, R.R. 1362a-1365a, and that even so insignificant a detail as a difference in spacing between a voter's name on the registration rolls as opposed to the drivers' license, she was informed, resulted in a mismatch. R.R. 1364a-1365a. *See also* R.R. 1153a-1154a (Testimony of Jonathan Marks).

Shannon Royer, Deputy Secretary for the Commonwealth, testified that already the Department of State has provided direct information to the counties about the Voter ID law, has issued press releases and conducted press events about it, and to date has provided over 700,000 inserts concerning the law to be mailed by Commonwealth agencies to clients. The Department has reached out to community, statewide, and regional organizations, including colleges and universities and organizations serving senior citizens and the military. Beyond this, the Department has planned an intense, $5,000,000 television, radio, and web campaign that will begin this Summer and continue through the Fall. Letters about the law will be sent to every voter household in the state, to every poll worker, and the Department will also use automated phone call, mobile billboards, as well as advertising on busses in Harrisburg, Pittsburgh,

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[2] This figure represents the percentage of registered voters for whom a statistically reliable match could be confirmed. Because the data in the SURE database and the PennDOT databases were gathered and stored in different ways, a reliable match could not be obtained for all registered voters who do in fact possess a PennDOT product.

Philadelphia, and the Lehigh Valley. In addition, witnesses from the organizational appellants have testified that they have worked to educate the populations they serve and will continue their efforts. R.R. 865a-878a.

Finally, the Department of State has been and will continue to be in constant communication with county boards of election about the requirements of Act 18. An annual conference took place in August during which the Department of State provided detailed instruction on the forms of photo ID that are acceptable under Act 18. The Department has obtained the names and addresses of all poll workers and will be sending these poll workers a packet of information about the acceptable forms of photo ID under Act 18. R.R. 1164a-1166a (Testimony of Jonathan Marks).

Statement of the Determination Under Review.

The trial court outlined this Court's statement of the requirements of granting a preliminary injunction as a framework for its legal discussion, noting that each of the requirements must be met before an injunction can issue.

In the first place, the trial court concluded that the threat of disenfranchisement of an otherwise eligible voter by Act 18, while, irreparable, was not immediate. The trial court discounted the testimony of the petitioners' expert on this subject, based on demeanor and bias, and found that "the more credible evidence on this issue was that offered through Commonwealth witnesses." P. 20 (Opinion attached to Appellants' Brief). The Court referred to the ongoing efforts by the Department of State to educate the public, and the evenhanded implementation of the law, and observed that:

> 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 . . . based on the availability of absentee voting, provisional ballots and opportunities for judicial

> relief for those with special hardships, I am not convinced that any of the individual Petitioners or other witnesses will not have their votes counted in the general election. P. 11.

The Court also found that petitioners did not prove that greater harm would result in refusing to grant the injunction than by issuing it. Detailing particular facts to support its conclusion, that an injunction would disrupt the process of education and implementation, the court said, "the process of implementation in general, and of public outreach in particular, is much harder to start, or restart, than it is to stop." P. 15.

Moving on to the probability of success on the merits, the court after an extensive discussion concluded that petitioners were unlikely to succeed. The court based its conclusion on a reading of Pennsylvania law, including law from this Court, which consistently respects the legislative power to regulate the conduct of elections, which, it said, is all that Act 18 does here. The court also surveyed the state and federal case law from other jurisdictions, including the United States Supreme Court, which upheld similar laws against similar challenges. Those cases, the court observed, rejected arguments, similar to those made here, that Act 18 addressed no immediate fraud, and imposed substantial burdens on the right to vote. The integrity of the electoral process is an important state interest, even absent proof of a history of fraud, and that interest is logically addressed by Voter ID. The decisions also reject equal protection claims, the court said, similar to those made here – that is, the law is not invalid simply because it excepts absentee voters, or nursing home residents.

Finally, the court determined that the broad injunctive relief sought was not reasonably suited to abate the burden imposed on some voters to obtain photo ID. Earlier, the court observed the disconnect between bringing a facial challenge to the statute and introducing proof only that the law could be unconstitutional as applied in certain cases. Here, it said that "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." P. 65.

SUMMARY OF ARGUMENT

This Court's only task in reviewing Commonwealth Court's refusal to issue a preliminary injunction is to decide whether any apparently reasonable basis for the conclusion that any one of the requirements for a preliminary injunction were not met. Here there were, and the judgment of the trial court must be affirmed.

First of all, the record shows that all of the individual appellants either have photo identification acceptable for voting or qualify for one should they apply. Thus, the court reasonably concluded that they failed to make the most basic showing required for preliminary injunctive relief—immediate harm. It was also reasonable for the court to conclude on this basis, that the sweeping injunction requested by the appellants was not reasonably suited to abate the harm they complained of and was not in the interest of the public. Finally, it was reasonable for the court to conclude that appellants were not likely to succeed on the merits of their case, given the deference that Pennsylvania courts show the election regulations, and given that almost every court, including the United States Supreme Court, that has reviewed similar laws have found them constitutional.

ARGUMENT

IT WAS REASONABLE FOR THE TRIAL COURT TO DENY THE REQUEST FOR A PRELIMINARY INJUNCTION.

The Court should affirm the order denying the request for preliminary injunction. The Commonwealth Court properly concluded that appellants failed to satisfy their burden of showing that preliminary injunctive relief was appropriate. Specifically, the Commonwealth Court found that the appellants did not face immediate harm, that they did not demonstrate they were likely to succeed on the merits, and that greater harm would result from issuing the injunction than by refusing it. Furthermore, it reached these conclusions after taking testimony for a week and after considering the oral and written arguments of counsel. The result was a thorough and thoughtful 68-page opinion that ought not to be disturbed on appeal, especially in light of the highly deferential standard for reviewing orders that grant or deny preliminary injunctions.

An applicant for a preliminary injunction must establish *each* of six "essential prerequisites" before it is entitled to relief. *Warehime*, 580 Pa. at 209, 860 A.2d at 46. The party must show:

> 1) "that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages"; 2) "that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings"; 3) "that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct"; 4) "that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits"; 5) "that the injunction it seeks is reasonably suited to abate the offending activity"; and, 6) "that a preliminary injunction will not adversely affect the public interest."

Id. at 209-210, 860 A.2d at 46. Appellants make much of the Court's decision in *Fischer v. Department of Public Welfare,* 497 Pa. 267, 439 A.2d 1172 (1982) , arguing that, based on

language in that decision, they need only show that a substantial question exists as to the merits, rather than that they are likely to prevail. Since *Fischer* was decided, it has been cited only once by the Court, in *Shenango Valley Osteopathic Hospital v. Department of Health*, 499 Pa. 39, 451 A.2d 434 (1982), and in that case the Court made it clear that *Fischer* does not alter the requirement that in order to merit preliminary injunctive relief, an applicant must satisfy the court that it is likely to prevail on the merits, *Id.* at 51, 451 A.2d at 440.

In reviewing an order denying a request for a preliminary injunction, it is not the business of the appellate court to take a fresh look at the record to see if it thinks the injunction should have been issued. Instead, this Court has said that appellate courts should be "highly deferential" to the decision of the trial court. *Id.*, 860 A.2d at 46. The appellate court, this Court has said, is to "examine the record to determine if there were any apparently reasonable grounds for the action of the court below." *Id.*, 860 A.2d at 46 (internal quotation marks and citations omitted). The Court went on to explain that this standard is met if the trial court properly found that *any one* of the six essential prerequisites just described was not met. *Id.*, 860, A.2d at 46.

A. Appellants Failed to Show Immediate Harm

The trial court in this case found, after listening to the witnesses, that the appellants failed to meet even the most basic of the requirements for preliminary injunctive relief: that they were subject to immediate harm. The appellants say that the court confused inevitable for immediate harm, and its conclusion is therefore wrong. The opinion does not reflect any such conclusion. In any case, whether immediate or inevitable, the harm the individual appellants claimed they would suffer is disenfranchisement, yet the trial court concluded that all of them would be able to vote in November if they wanted to. The court's conclusion is at the least "apparently reasonable" based on the record and this Court need go no further to affirm.

The Court must bear in mind that this is an action brought on behalf of individuals who claim they will be unable to vote on account of Act 18, and on behalf of several organizations which serve them. It is not a class action, yet without proving that they are entitled to a class action, the individual plaintiffs seeks, by pointing to the harm they say they will suffer, all the benefits of a class action. That is, they seek to invalidate the statute in its entirety, not just s applied to them. To this end, they proffered at trial expert testimony. Purporting to show, based on a phone survey conducted in late June and early July, how many registered voters were without the ID required by Act 18. Although the trial court discounted the testimony as largely not credible, the numbers estimated are also not relevant to the harm claimed by the individuals. The only thing relevant to their claim of immediate harm is whether Act 18, unless preliminarily enjoined, will prevent them from voting.[3]

There was certainly support in the record and in the law for the court to conclude, as it did, that nothing in the language or implementation of Act 18 would prevent the individuals from voting in November if they wanted to, either by obtaining a free, Commonwealth-issued ID, changing the name on an existing ID, casting a provisional or absentee ballot, or through other avenues available to them. Indeed the record shows that the Commonwealth has made and continues to make, considerable effort to educate the public as to the requirements of Act 18, and to make it easy to get a photo ID for voting purposes. Act 18 itself provides that numerous,

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[3] The testimony of the Appellants' expert, Dr. Matt A. Barreto, was based on the results of a phone survey conducted in June, 2012, about four months before the election. The trial court took his results for what they were worth, but mostly discounted his testimony stating that "For the most part . . . his opinions were not credible or were given only little weight." The court gave its reasons, which included the witness' demeanor on the stand, bias (based on the cross examination, it could be concluded that Dr. Barreto was ideologically opposed to Voter ID laws), the survey design as well as its focus on eligible, rather than registered voters, and its timing (June 21st – July 2nd 2012). The factfinder's conclusions regarding the witness' credibility should not be disturbed on appeal by the Court.

specified forms of identification are acceptable. Further, PennDOT is able, with respect to voters born in Pennsylvania, to communicate directly with the Department of Health, so as to issue its ID without the usual need for a birth certificate with a raised seal, and to relax the need for further identification for voters whose PennDOT ID has expired, but who had one issued within the past ten years. In addition the Department of State in August issued through PennDOT its own ID for voting purposes, that relaxes the requirements for the regular PennDOT ID. To obtain the new ID, a registered voter who does not have another acceptable form of ID need only provide his or her Social Security number and two proofs of residence. To educate the public and poll workers as to the requirements of Act 18, and the various form of acceptable IDs available, the Department of State has, as we have discussed and the trial court noted, conducted an extensive program of mailings, direct contact, meetings, press releases, and radio and television spots. Appellants make the odd argument that the court was wrong to consider the steps the Commonwealth has taken to implement the statute, specifically the new Department of State voter ID card because, they say, a party cannot avoid preliminary injunctive relief by voluntarily ceasing the activity complained of. This is not at all what is happening. The Department of State is required to implement the statute, and that is what it is doing. The new ID is clearly authorized by Act 18 which lists as acceptable identification a valid, Commonwealth issued card with an expiration date and the voter's name and photograph.

What all this means is that none of the appellants will be prevented from voting by Act 18. All will be able to obtain ID, if they choose to, and those physically unable to get a photo ID will qualify for an absentee ballot.[5] The individual appellants cannot credibly argue that they lack an acceptable photo ID or are unable to obtain one. Joyce Block and Devra Mirel Schor

[5] The Election Code contemplates, for example, that any qualified elector who is unable to attend his or her polling place on the day of an election "because of illness or physical disability" will qualify for an absentee ballot. 25 P.S. § 3146(e)(2)

obtained non-driver photo IDs from PennDOT. (RR. Vol. 1 at 1031a (Schor); Vol. 2 at 1235a-1236a (Block)). Henrietta Dickerson obtained a non-driver PennDOT photo ID, but the appellants did not present any evidence on her behalf during the hearing before the trial court. Shortly after testifying in the trial court that she would be unable to obtain an acceptable photo ID, Viviette Applewhite obtained a non-driver PennDOT photo ID. *See* Suggestion of Mootness, http://articles.philly.com/2012-08-18/news/33249336_1_penndot-id-new-voter-identification-law-penndot-center.

The remaining individual appellants have the necessary documents that will enable them to obtain an acceptable photo ID. Bea Bookler testified that she had a valid Pennsylvania driver license in the last seven years, and so her information remains in the PennDOT database. (R.R. Vol. 2 at 1297a, 1305a). The individual appellants have a social security number and two proofs of residence, thereby enabling them to obtain a Department of State Voter ID card. (R.R. Vol. 1 at 485a, 487a-490a (Applewhite), 455a-456a (Lee), 983a, 988a (Cuttino), 561a, 570a-572a (Marsh)). The individual appellants each confirmed during their testimony that they have no difficulty arranging for transportation to a PennDOT driver license center. (R.R. Vol. 1 at 465a (Lee), 987a (Cuttino), 1037a (Schor); Vol. 2 at 1308a (Bookler), 1233a (Block)).

To be sure, Act 18 may impose some inconvenience in getting the free photo ID, but then so do many aspects of in person voting, such as the location of polling places, the hours for voting, and the length of the lines to vote at any given time, at any given place, or any given election. Some of these inconveniences may actually deter an elector from voting, but no one could reasonably argue that for this reason their prospect amounts to an immediate harm that the Commonwealth must eliminate. Neither is there immediate harm here. The conclusion of the court was at least "apparently reasonable" from the record, and the Court should affirm on this basis alone.

B. Greater Harm Would Result in Issuing the Injunction Than Refusing It

The appellants' whole focus in this case is that the preliminary injunction should have issued to forestall the possibility that Act 18 will disenfranchise a single voter. Naturally, disenfranchisement is an extremely serious matter, whether this happens by legislative action or because a legitimate vote is cancelled out by an illegitimate one. As we have previously explained, the trial court reasonably concluded that, based on the evidence before it, the law would not prevent the individual parties from having their votes counted, nor those of any other registered voter who wanted to vote. In fact, based on the extensive efforts of the Department of State to educate voters and poll workers about the new law, as well as its programs to make it easy to get an ID that is acceptable under the new law, the trial court believed that any registered voter who did not have an ID and wanted one would be able to get one by Election Day or qualify for absentee voting. Against this, a preliminary injunction would without a doubt interfere with the ongoing implementation of a common sense law, of the type adopted by other states and sustained against constitutional challenges, that is designed to promote the integrity of the polling place, and preserve undiluted the vote of the qualified elector. Without a doubt, it was "apparently reasonable" for the court to decide that appellants' harm was at best highly speculative, and at worst self-inflicted, balanced against the very real harm of a preliminary injunction to the Commonwealth and its qualified voters. The trial court's judgment could be affirmed on this basis alone.

C. The Injunction is Not Suited to Abate the Harm

The record and the law support the Commonwealth Court's conclusion that the broad injunction requested by the appellants, complete invalidation of Act 18, is not reasonably suited to the harm they claim—that some Pennsylvania voters will have difficulty assembling the supporting documents necessary to get acceptable photo ID. The appellants, however, have

asked that the entire law be preliminarily enjoined, even though the vast majority of registered voters already have some form of acceptable ID, and asking them to show it at the polling place is not even an inconvenience for them. A major problem, the trial court explained here and elsewhere in its opinion that the appellants have asked for "facial" relief, but there evidence goes to show an "as applied" case. In order to prevail in a facial challenge case, a party challenging a law must show that no set of circumstances exist under which the statute would be valid. *Clifton v. Allegheny County,* 600 Pa. 662, 969 A.2d 1197 (2009). A facial challenge fails when a law has a "plainly legitimate sweep" *Id.,* at 705, 969 A.2d at 1223, and is only facially invalid "when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary. " 600 Pa. at 705, n. 37, 1223 A.2d at 1223, n. 37. Here, by contrast, appellants spent most of a week attempting to explain how the law was unconstitutional as applied to them, and speculated as to its effects in the coming election. (See trial court determination, pp. 21-22). This they may not do. This Court has warned that, with respect to facial challenges, courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.,* at 703, 969 A.2d at 1222. Plainly, the broad, preliminary injunctive relief was not appropriate.

Furthermore, in the case of the individual appellants, as we have said before, almost all of them will be able to get an acceptable form of photo ID to vote if they apply for it. In addition, as the trial court noted, some of them may be entitled to some other form of relief on an individual basis that will allow for their votes to be counted even if they do not for some reason get an ID. Two witnesses, Bea Bookler and Tyler Floria, for example, testified that physical and mental conditions respectively would make it very hard if not impossible for them to apply for identification. These voters could well be qualified for absentee ballots, provided that they include a declaration stating the nature of their disability and contact information for the

attending physician. 25 P.S. §§ 3146.1, 3146.2. In other individual cases, a registered voter unable to get an ID by reason of indigency will nevertheless be allowed to vote, 25 P.S. § 3050(a.4)(5)(D), and voters without ID who appear to vote will be allowed to cast a provisional ballot, which will be counted if the voter comes to the county board of elections within six days with photo ID and makes a sworn statement that he or she is the person who voted. 25 P.S. § 3050(a.4)(5)(E). Other provisions for judicial resolution of individual disputes that arise on the day of the election underscore the inappropriateness of the broad relief the appellants asked for. These problems can be resolved on an individual basis if they do. Just because the problems might arise, it was reasonable for the court to conclude, was not enough to preliminarily enjoin a law that only requires that all registered voters show specified forms of photo ID when they appear to vote, especially when most people already have the ID required, and are already asked to show it in a variety of less important contexts. The trial court's decision to deny the request for a preliminary injunction could be affirmed on this basis alone.

D. Appellants Will Not Likely Succeed on the Merits

Although the Court need not reach the issue, it was also apparently reasonable for the trial court to conclude that appellants were not likely to succeed on the merits. Quite simply, Act 18 is nothing more than an even handed law relating to the conduct of elections, to which the courts normally defer as a legislative matter. Further, the Supreme Court and most other courts that have considered challenges like the one raised here against photo ID laws like Act 18 have sustained the laws. This Court could affirm the judgment of the trial court for this reason alone.

In the first place, Act 18 does not, by it terms or operation disenfranchise anyone, or impose additional qualifications on registered voters. It is nothing more than an even handed law that applies to everyone which has to do with the conduct of elections. Article I, Section 1 of the Commonwealth Constitution sets forth requirements for voting; age and residency, and Article I,

Section 5 provides that every individual who meets the qualifications shall be entitled to vote, subject to "such laws requiring and regulating the registration of electors as the General Assembly may enact." The authority of the legislature to make laws regarding the conduct of elections has long been established, *Patterson v. Barlow,* 60 Pa. 54 (1869), and this Court has said, in *Winston v. Moore,* 244 Pa. 447, 91 A. 520 (1914) that:

> 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.

224 Pa. at 454-55, 91 A. at 520. More recently, the Court explained the concept of "free and equal" elections:

> "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).

Relying on federal precedent, the Court has even said that the legislature may in some cases prescribe the qualifications of electors, *see, e.g., Ray v. Commonwealth,* 442 Pa. 606, 276 A.2d 509 (1971) (persons in penal institutions may be exempted by legislature from qualified electors. This, however, is not a qualifications case. Act 18 does no more than to require that a voter prove his *identity* in a reliable, common sense way, and no more adds an additional qualification to voting than does the requirement that the signature of a voter at the poll match

one on file, or even the requirement that a voter appear at a certain time and place to cast his or her vote in person.

Appellants are wrong to compare voting regulations with those that affect the right to exercise free speech. Government regulation is not necessary for the exercise of speech or religion and indeed may be inimical to them, but it is absolutely necessary to the conduct of elections. The Election Code governs topics as diverse and sometimes minute as the dates for elections, the time and place of voting, the requirements for getting on the ballot, the manner of presenting ballot questions, the way votes are cast and counted, and the way of establishing that a voter is legitimate. Even though these regulations can be thought of as "burdening" or even denying they vote to somebody, they have not, for obvious reasons, been subject to strict scrutiny. Rather, courts have always extended a substantial level of deference to these legislative judgments. In fact, although the appellants criticize the cases relied upon by the trial court, they have failed to cite a single case applying strict scrutiny to a voting regulation.

Besides being the very type of law which Pennsylvania Courts have said is within the sphere of the legislature, most other courts that have considered laws like Act 18 against the challenges to the laws like those raised here have sustained them against Equal Protection challenges. In this regard, appellants urge this court to use strict scrutiny and conclude that the law is invalid because it is not narrowly tailored to further a compelling state interest. Because there is no direct evidence of voter fraud, and because the law includes numerous exceptions, appellants say that it must be preliminarily enjoined. Again, the trial court's conclusion to the contrary was "apparently reasonable," given that the United States Supreme Court and a majority of other courts, state and federal, that have considered the matter have reached a different conclusion than the one proposed by the appellants.

In *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008), the Supreme Court upheld against Equal Protection arguments similar to the ones made here, an Indiana photo ID law similar to Act 18. The petitioners in that case, like this one, argued that the law was invalid because there was no evidence of fraud to support it, it was passed for political reasons, imposed undue burdens on voters to assemble the documents necessary to obtain the ID, some of which cost money even though the ID itself was free, and because the law provided for various exceptions—including one for absentee voting. The Court did not use strict scrutiny in evaluating the law, but a flexible text that balanced state interests "sufficiently weighty" to justify burdens on voters, but eschewed any "litmus test" to measure the severity of the burden.[6] The Court did say that "evenhanded restrictions that protect the integrity and reliability if the electoral process itself are not invidious." *Id.* at 189-90. (Citations and internal quotation marks omitted).

Relevant to the case here, the Court began its inquiry by considering the nature of the state interest. Despite lack of direct evidence of a history of fraud, the Court said:

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

Id. at 196. The Court also stressed the "independent significance" of "public confidence in the integrity of the electoral process" as a state interest supporting photo ID. *Id.* at 197.

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[6] The concurrence, written by Justice Scalia and joined by Justices Thomas and Alito, thought this approach too demanding than justified by the Court's previous case law. That case law, he thought, "called for application of a deferential 'important regulatory interest' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote." *Id.* at 204.

These factors all support the validity of Act 18. Moreover, the legislature actually took testimony relative to these issues. The legislature had before it, for example, the Carter-Baker Report referred to by the Court in *Crawford.* That Report said, among other things, that

> A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own apartment building let alone their precinct, some form of identification is needed.
>
> There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. 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." Building Confidence in U.S. Elections 2.5 (Sept. 2005), App. 136-137 (Carter-Baker Report) (footnote omitted).

Id. at 193-194. This is more than enough to support such a common sense measure, but there is much more. The House of Representatives' State Government Committee took testimony on March 21, 2011.[7] Among the witnesses who testified in support of the law was Hans A. von Spakovsky, Senior Legal Fellow at the Heritage Foundation. Mr. von Spakovsky, whose testimony was discussed during the cross-examination of appellants' expert, Dr. Minitte, told the committee that:

> Guaranteeing the integrity of elections requires having security throughout the entire election process, from voter registration to the casting of votes to the counting of ballots at the end of the day when the polls have closed. For example, jurisdictions that use paper ballots seal their ballot boxes when all of the ballots have been deposited, and election officials have step-by-step procedures for securing election ballots and other materials throughout the election process.

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[7] A complete transcript of the hearing can be found at the General Assembly's official website: http://www.legis.state.pa.us/cfdocs/legis/transcripts/2011_00541.pdf

> I doubt anyone believes that it would be a good idea for a county to allow world-wide Internet access to the computer it uses in its election headquarters to tabulate ballots and count votes – we are a computer-literate generation and everyone understands that allowing that kind of outside access to the software used for counting votes would imperil the integrity of the election.
>
> Requiring voters to authenticate their identity at the polling place is part and parcel of the same kind of security necessary to protect the integrity of elections and access to the voting process. Every illegal vote steals the vote of a legitimate voter. Voter ID can prevent:
>
> - impersonation fraud at the polls;
> - voting under fictitious voter registrations;
> - double voting by individuals registered in more than one state or locality; and
> - voting by illegal aliens.

Mr. von Spakovsky also told the committee that voter ID does NOT historically reduce turnout and concluded his remarks by saying:

> We are one of the only democracies in the world that does not uniformly require voters to present photo ID when they vote. All of those 100 other countries administer such a requirement without any problems and without any reports that their citizens are in any way unable to vote. In fact, our southern neighbor Mexico, which has a much larger rate of poverty than Pennsylvania or the United States, requires both a photo ID and a thumbprint to vote – and turnout has increased in their elections since this requirement went into effect in the 1990's. It is also credited with greatly reducing the fraud that had prevailed in many Mexican elections.
>
> Requiring voters to authenticate their identity is a perfectly reasonable and easily met requirement. It is supported by the vast majority of voters of all races and ethnic backgrounds. As the U.S. Supreme Court said, voter ID protects the integrity and reliability of the electoral process. Pennsylvania has a valid and legitimate state interest not only in deterring and detecting voter fraud, but in maintaining the confidence of its citizens in the security of its elections.

Respondents' Exhibit 6. Petitioners disagree with Mr. von Spakovsky and question his academic credentials, but the fact is he does have practical experience in elections matters, and did testify in support of Act 18.

Against this important state interest, the Court in *Crawford* balanced the difficulty some voters might face in getting photo ID, which the Court described in terms that could describe the evidence adduced here:

> 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 SEA 483 was enacted, the new identification requirement may have imposed a special burden on their right to vote.

553 U.S. at 199.

Nevertheless, the Court rejected the arguments that the law be enjoined in its entirety because it might burden a few voters. In this regard the court said that there was no evidence of the numbers of registered voters without photo ID or "concrete evidence" of the burdens imposed on them to get ID.[8] In this case, of course, the trial court found the expert testimony regarding the number of registered voters affected not credible, and, as we have discussed earlier, also concluded that each of the individual plaintiffs would qualify for free, state issued photo ID or one of the exceptions to the statute.

The Court continued by saying that, based on the record before it, it could not say that the photo ID law imposed "excessively burdensome requirements" on any class of voters, had a "plainly legitimate sweep," and that, because the law imposed only a limited burden on voting

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[8] Justice Scalia's concurrence emphasized, correctly we think, that the law imposed only one burden on all registered voter—to show photo ID when voting in person, though that single burden may impact certain individuals differently. *Id.* at 205. The concurrence noted that "The State draws no distinction, let alone discriminatory ones, except to establish *optional* absentee and provisional balloting for certain poor, elderly, and institutionalized voters, and for religious objectors." *Id.*

rights, "the precise interests advanced by the State are therefore sufficient to defeat petitioners' facial challenge. . .". 553 U.S. at 202-203 (internal quotation marks and citations omitted). The Court went on to say that even assuming an unjustified burden on some voters (as is claimed here) the proper remedy would not be to invalidate the entire statute, since, "when evaluating a neutral, nondiscriminatory regulation of voting procedure, we must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Id.* at 203 (internal quotation marks and citations omitted). The Court also cautioned 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.

The trial court was reasonable to follow the guidance of the United States Supreme Court in *Crawford,* given that Pennsylvania courts generally follow that Court's lead in state Equal Protection matters, *Commonwealth v. Kramer,* 474 Pa. 341, 346, 378 A.2d 824, 826 (1977), given that this Court has accorded significant deference to legislative regulation of the conduct of elections, and given that every court but one that has considered photo ID laws since *Crawford* have followed it and found the laws valid. *See, Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. 720, 707 S.E.2d 67 (2011); *League of Women Voters of Indiana, Inc. v. Rokita,* 929 N.E.2d 758 (Supreme Court of Indiana, 2010); *Common Cause/Georgia v. Billups,* 554 F.3d 1340 (11th Cir. 2009); *The American Civil Liberties Union of New Mexico v. Santillanes,* 546 F.3d 1313 (10th Cir. 2008).[9] The result should be the same here.

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[9] The appellants have pointed out that courts in Wisconsin and Missouri have enjoined similar laws, through the Missouri decision was handed down before the court had the benefit of the *Crawford* decision. Most recently, a three judge panel sitting in the District of Columbia District Court enjoined the Texas Voter ID law, but that case was decided under the federal Voting Rights Act. Texas is a "pre-clearance" state., one of 16 states which, because of a history of past discrimination, must have their voting laws approved by the Justice Department. The

Appellants urge that the Court apply "strict scrutiny" to conclude that there is a reasonable likelihood that they will prevail on the merits and to reverse the order denying the preliminary injunction. In the first place, the Court should not even reach the issue of the appropriate level of scrutiny, because, as we have previously explained, the trial court was "apparently reasonable' in concluding that appellants failed to prove the other requirements for a preliminary injunction, any one of which justifies its denial. Secondly, neither the United States Supreme Court nor most other courts that have considered similar laws have applied strict scrutiny. Finally, state laws that regulate the conduct of elections have not been the subject of strict scrutiny. Pennsylvania law does not suggest a stricter standard than that used by the Court in *Crawford.* If anything, it is more in line with the more deferential approach taken by the concurrence. This Court in *Mixon v. Commonwealth,* 759 A.2d 442 (2000) (en banc), *affirmed per curiam,* 566 Pa. 616, 783 A.2d 763 (2001), said that "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 . . .". *Id.* at 448. In *Mixon*, the Court cited *Winston v. Moore*, 244 Pa. 447, 454-55, 91 A. 520, (1914), to which we have previously referred, in support of the proposition that the power to regulate elections is a legislative one. In *Mixon*, as in the earlier case of *Martin v. Haggerty*, 120 Pa. Cmwlth. 134, 548 A.2d 371 (1988), the court evaluated against equal protection challenges, the constitutionality of state election laws that disenfranchised certain classes of felons who were not disqualified from voting by the state constitution. The court did not apply strict scrutiny, but looked to see whether the law was rationally related to a legitimate state interest. Here, the law disenfranchises no one and it should certainly not be subject to a more exacting standard. It was at least apparently reasonable for the

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Department refused, and Texas sued for a declaratory judgment, and it bore the burden of proof. This alone distinguishes the case. *See, Texas v. Holder* 2012 WL 3743676 (August 30, 2012).

trial court to conclude that appellants did not have a reasonable possibility of succeeding on the merits, and the judgment denying the requested motion for preliminary injunction could be affirmed on these grounds as well.

CONCLUSION

The Court should affirm the judgments of the Commonwealth Court.

Respectfully submitted,

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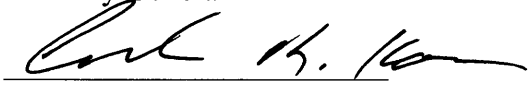
By: 

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CERTIFICATE OF SERVICE

I, Calvin R. Koons, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing **BRIEF FOR APPELLEE COMMONWEALTH OF PENNSYLVANIA** by depositing two copies of the same in the United States mail, first class, postage prepaid, and by electronic transmission to the following:

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