IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 330 MD 2012

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

Petitioners,

v.

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

Respondents.

PETITIONERS' POST-HEARING BRIEF IN SUPPORT OF APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION

David P. Gersch
Michael A. Rubin
Arnold & Porter LLP
555 Twelfth Street, NW
Washington, DC 20004-1206

Witold J. Walczak
Attorney ID No. 62976
ACLU of Pennsylvania
313 Atwood Street
Pittsburgh, PA 15213

Jennifer R. Clarke
Attorney ID No. 49836
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103

Marian K. Schneider
Attorney ID No. 50337
Advancement Project
295 E. Swedesford Road
Wayne, PA 19087

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SUMMARY OF THE ARGUMENT

Respondents have agreed to extend the preliminary injunction through the November 2013 election. The only issues left for the Court to decide are (1) whether to permit the continued "soft rollout" whereby poll workers ask voters for a photo ID that is not required to vote, and tell voters that a photo ID will be required to vote in future elections, and (2) whether to continue revisiting the preliminary injunction election-by-election.

The continued "soft rollout" of the Act of March 14, 2012, P.L. 195, No. 18 ("Photo ID Law" or "Law") should stop. Poll workers should not be permitted to ask voters for a photo ID that is not required to vote. The uncontroverted evidence illustrates that this practice has only confused poll workers and voters, with no benefit to anyone. Poll workers also should not be permitted to tell voters that photo ID will be required to vote in future elections. As required by Section 10 of the Photo ID Law, polls workers have now given this instruction to voters at three consecutive elections, and each time it was false because voters in fact were able to vote in the next election without a photo ID. As a result of this misinformation, at least one longtime voter, Marian Baker, did not vote in May 2013. In other cases, the information that poll workers gave to voters was inconsistent, inaccurate, and incomplete. To avoid further disenfranchisement and other unnecessary confusion going forward, the "soft rollouts" must end.

Likewise, the Court should extend the preliminary injunction until a final decision on the merits of the Law. The normal practice is that a preliminary injunction remains in effect until a final decision on the merits. There is no reason to depart from that normal practice here. The Court has heard 20 days of argument and evidence in this case and considered three separate applications for preliminary relief. Continuing to revisit and re-decide the preliminary injunction before each new election, for as long as this case remains pending, is inefficient for the Court, the parties, and witnesses.

In addition, nothing has changed since last fall to justify lifting the preliminary injunction before a final decision by the courts. The Supreme Court directed that preliminary relief must be granted unless: (1) "the procedures being used for deployment of the [DOS ID] cards comport with the requirement of liberal access which the General Assembly attached to the issuance of [PennDOT non-driver ID] cards," and (2) the Court is "convinced . . . that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement for purposes of the upcoming election." *Applewhite v. Commonwealth* ("*Applewhite II*"), 54 A.3d 3, 5 (Pa. 2012). On October 2, 2012, this Court found that neither condition was satisfied for purposes of the November 2012 election. *Applewhite v. Commonwealth* ("*Applewhite III*"), No. 330 M.D. 2012, 2012 WL 4497211, at *3 (Pa. Commw. Ct. Oct. 2, 2012). That is still the case and will remain the case until a final decision on the merits.[1]

Accordingly, the Court should now enter a preliminary injunction barring enforcement of all provisions of the Photo ID Law related to in-person voting until a final decision by the Supreme Court.

ARGUMENT

I. THE PRELIMINARY INJUNCTION SHOULD END THE "SOFT ROLLOUTS"

This Court should end the so-called "soft rollouts" under Section 10 of the Photo ID Law. These "soft rollouts" have caused confusion at the polls and disenfranchisement of voters, with no apparent benefit to anyone.

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[1] For purposes of continuing the preliminary injunction, it is sufficient for the Court to find that the Supreme Court's two-prong test for avoiding preliminary relief remains unsatisfied. Petitioners address only those issues here, and will address further questions relating to a permanent injunction in their post-trial merits brief.

As background, Section 10 of the Photo ID Law originally provided for a single "soft rollout" at the April 2012 primary election, prior to the Law taking full effect in November 2012. Section 10 imposed three requirements on poll workers as part of this "soft rollout." ***First***, poll workers were required to "request that every elector show proof of identification," but an elector was permitted to "cast a ballot that shall be counted without the necessity of presenting proof of identification and without the necessity of casting a provisional ballot." Act 18 § 10(1)(i) (25 P.S. § 2602 notes). ***Second***, poll workers were required to give each elector who did not show an acceptable photo ID a handout regarding the photo ID requirement. *Id.* § 10(1)(ii). ***Third, and most important here***, poll workers were required to "inform the elector that he or she ***will be required*** to comply with that [photo ID] requirement when voting at future elections." *Id.* (emphasis added). The prior preliminary injunction orders required identical "soft rollouts" in November 2012 and May 2013. *Applewhite III*, 2012 WL 4497211, at *6 ("The injunction will have the effect of extending the express transition provisions of Act 18 through the general election."); Scheduling Order IV (Feb. 19, 2013) (enjoining "those same provisions of Act 18").

The uncontroverted evidence shows that the "soft rollouts" have caused "a tremendous amount of confusion" among both poll workers and voters. Hr'g Tr. 1193-94, July 23, 2013 (S. Carty). Some poll workers incorrectly told voters that they could not vote without photo ID. Pet'rs' Ex. 1750 at VOTE-00002213 (League of Women Voters call log). Even within a single polling place, there was confusion among poll workers as to whether photo ID was required. *Id.* at VOTE-00002214; *see also* Hr'g Tr. 1194-95, July 23, 2013 (S. Carty) ("Some people were

told they couldn't even go into the polling place without an ID. . . . It was made clear that there were a number of polling places where people were told they could not vote without their ID.").[2]

Part of the problem is that elections are not run centrally by the Department of State, but rather by each of the individual counties, which in turn must communicate with thousands of poll workers at roughly 9,300 polling places. Hr'g Tr. 1627-28, July 25, 2013 (J. Marks); Hr'g Tr. 1692, 1721-22, July 30, 2013 (J. Marks). At some polls, signs were posted stating, incorrectly, that photo ID was required to vote. Pet'rs' Ex. 1750 at VOTE-00002213, 215, 216. And poll workers were inconsistent at best in giving handouts about the Law to voters with no photo ID. *See, e.g.*, Hr'g Tr. 84, July 15, 2013 (M. Pripstein) ("Q. Did anyone at the polling place give you a pamphlet or other written information about the photo ID law? A. No."); Hr'g Tr. 976-77, July 22, 2013 (D. Proctor) (same); Pet'rs' Ex. 1427 at 13 (C. Howell video) (same).

Respondents' education campaign contributed to the atmosphere of confusion. Between March and October 2012, Respondents told voters that an acceptable photo ID would be "required" to vote in November 2012, including in a postcard mailed to 5.9 million Pennsylvania households (Resps.' Ex. 179), an insert sent to as many as 700,000 elderly Pennsylvanians (Pet'rs' Ex. 2067; Hr'g Tr. 876-77, July 19, 2013 (D. Mutz)), and television, radio, newspaper, magazine, bus, and billboard advertisements. Resps.' Exs. 217, 218, 213, 214, 160, 155, 177. All of this information was false in light of the Court's initial preliminary injunction. But Respondents did not clearly tell voters that their instructions over the prior seven months had been inaccurate. Instead, they modified their educational materials in such subtle ways that

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[2] The Court can consider hearsay and even hearsay within hearsay in connection with a preliminary injunction. Pa. R.C.P. 1531(a).

many voters likely could not recognize the difference. Hr'g Tr. 866, 922, July 19, 2013 (D. Mutz); *compare, e.g.*, Resps.' Ex. 160 (pre-injunction) *with* Resps.' Ex. 195 (post-injunction).

Building on this confusion and misinformation, poll workers at three consecutive elections have been required to tell voters that they would not be allowed to vote in future elections without an acceptable photo ID. Act 18 § 10(1)(ii). At the time of each election, this information was technically accurate: Section 10 of the Law originally applied only to the April 2012 primary; the Court's initial preliminary injunction applied only in November 2012; and the stipulated continuation of the preliminary injunction applied only in May 2013. *Id.* § 10; *Applewhite III*, 2012 WL 4497211, at *3 ("[T]he duration of the current preliminary injunction is limited to the upcoming election."); Scheduling Order IV at *1-2 (Feb. 19, 2013) (same). But in the end, the information that poll workers gave to voters was incorrect, as voters without photo ID were allowed to cast regular ballots in November 2012 and May 2013, and – now by agreement of Respondents – they will be allowed to do so again at least in November 2013. Yet, after the February 2013 preliminary injunction, Respondents did virtually nothing to get the word out that ID was not required in May 2013. Hr'g Tr. 63-64, July 15, 2013 (M. Baker) ("Q. Have you seen any advertisements since the November 2012, election? A. No."); Pet'rs' Ex. 1427 at 21-22 (C. Howell video) (same); *see generally* Resps.' Ex. 51.

This misinformation already has led to voter disenfranchisement. In November 2012, Marian Baker, a longtime Berks County voter and former elected official, was asked to show photo ID which she did not have, and was told by poll workers – as required by Section 10 of the Law – that she would not be able to vote in future elections without a photo ID. Hr'g Tr. 51-57, July 15, 2013. Knowing she could not endure the long line and extended wait at PennDOT, Mrs. Baker requested a disability accommodation, but she was told no. *Id.* at 60. Accordingly, based

on what she had been told in November 2012, she believed she could not vote in the May 2013 election, and so she did not vote for the first time in her adult life. *Id.* at 57-58 ("It's the first time in my life since I could vote that I did not vote. I voted every election except for that."); *see also* Pet'rs Ex. 1442 (video). Such disenfranchisement should not be allowed to happen again.[3]

Yet, if the "soft rollout" is repeated, Section 10 will require poll workers again to tell voters that they will be unable to vote in future election without a photo ID.[4] Respondents offered no evidence or argument at trial that another "soft rollout" would provide any benefit. At the September 2012 hearing, the Court suggested that Respondents potentially could use another "soft rollout" to study how many people did not have an acceptable photo ID at the polls. Hr'g Tr. 601-02, Sept. 27, 2012. But this was not done. Hr'g Tr. 790, July 18, 2013 (S. Royer). Thus, the repetition of the "soft rollouts" has served no purpose.

To prevent further disenfranchisement, avoid further confusion, and protect the integrity of Pennsylvania elections while the fate of the Photo ID Law is being finally decided by the courts, the preliminary injunction should end the "soft rollouts" and bar enforcement of all provisions of the Law related to in-person voting.

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[3] Allowing poll workers to continue disseminating information that is likely to be inaccurate is contrary to the Commonwealth's public policy reflected in criminal statutes prohibiting the dissemination of false or misleading information about voting. 25 P.S. § 3527 (barring the use of "any . . . fraudulent device" that "impedes, prevents, or otherwise interferes with the free exercise of the elective franchise by any voter").

[4] It is not a solution for this Court to carve out this component of the "soft rollout" by rewriting Section 10 of the Law. The Pennsylvania Supreme Court long has held that courts "have no power to . . . rewrite Legislative Acts or Charters, desirable as that sometimes would be." *Mt. Lebanon v. Cnty. Bd. of Elections of Allegheny Cnty.*, 368 A.2d 648, 649-50 (Pa. 1977) (quoting *Cali v. Philadelphia*, 177 A.2d 824, 835 (Pa. 1962)). This is because "under our basic form and system of Constitutional Government the power and duty of [the courts] is interpretative, not legislative." *Id.* at 649 (quoting *Cali*, 177 A.2d at 835).

II. THE PRELIMINARY INJUNCTION SHOULD REMAIN IN PLACE UNTIL A FINAL DECISION ON THE MERITS

A. There Is No Reason to Depart From the Normal Practice That a Preliminary Injunction Remains in Effect Until a Final Decision on the Merits

As the Court recognized in its October 2, 2012 decision, "[n]ormally, a preliminary injunction will remain in place until a decision is reached on a permanent injunction." *Applewhite III*, 2012 WL 4497211, at *7. There is no reason to depart from that normal practice here. After 20 days of evidence and argument and three separate applications for preliminary relief, it would be entirely wasteful for the Court, the parties, and witnesses to continue revisiting the preliminary injunction before every election for as long as this case remains pending.

Respondents' counsel acknowledged that "the issues that are before [this Court] are issues of great magnitude, and they are issues that require deliberation" and "deserve full briefing." Hr'g Tr. 2042, Aug. 1, 2013 (Respondents' closing argument). Respondents' counsel further acknowledged the "chaos that ensued in trying to accommodate an expedited proceeding before the Supreme Court." *Id.* The preliminary injunction should remain in place until a final decision by the Supreme Court precisely to avoid such chaos.

Nothing has changed since last fall, or is likely to change in the future, that would justify lifting the preliminary injunction before the end of this case. As described below, Respondents still have not provided even the access to ID that the Supreme Court held was required by the Photo ID Law itself. *Applewhite II*, 54 A.3d at 5. Nor is there any reason to believe that "there will be no voter disenfranchisement" if the Photo ID Law were enforced in upcoming elections. *Id*. Indeed, as described below, Respondents have issued only about 6,130 voter IDs since the September 2012 hearing. *See* Section II.C.1, *infra*.

B. The DOS ID Has Not Been Accessible to All Voters Who Are Able Get to PennDOT

As construed by the Supreme Court, the Photo ID Law requires PennDOT to give a free PennDOT non-driver ID to any voter who signs a declaration "that [1] the elector does not possess proof of identification . . . and [2] requires proof of identification for voting purposes." *Applewhite II*, 54 A.2d at 3 (quoting 25 P.S. § 2626(b)). The Supreme Court held that, as a threshold matter, a preliminary injunction is required unless the DOS ID is issued on identical terms. *Id.* In other words, this Court must grant preliminary relief unless PennDOT makes available a DOS ID to any voter who signs the simple, two-point declaration set out in the Photo ID Law.[5]

Respondents conceded – and the Court found – that "from the time of initial deployment on August 27, 2012, until the first day of the hearing, September 25, 2012," Respondents imposed on DOS ID applicants an "exhaustion" requirement that exceeded the simple, two-point declaration set out in the Law. *Applewhite III*, 2012 WL 4497211, at *1. During that period, Respondents offered the DOS ID only "as a 'last resort' when all other options are exhausted and then only when customers cannot be issued a PennDOT SECURE Photo ID." Pet'rs' Ex. 107; *see also* Hr'g Tr. 25-28, Sept. 25, 2012 (K. Myers). As a result, many voters were unable to

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[5] As this Court recognized in denying Respondents' Motion in Limine concerning the supposed "law of the case," the Supreme Court did not address, much less decide, whether Respondents could satisfy the Pennsylvania Constitution and the Photo ID Law itself by making available a DOS ID to every voter who signs the two-point declaration. As Petitioners explained in their Pre-Trial Statement, the Law is facially invalid irrespective of Respondents' DOS ID procedures, because (among other reasons) the Law requires voters to show photo ID to vote, but not all voters have one of the forms of acceptable ID and the Law guarantees no form of photo ID that all voters can obtain. Voters are thus forced to depend on the discretion of government officials to make available an acceptable photo ID that they can actually obtain in order to vote. Petitioners will address this issue more fully in their post-trial merits brief. For purposes of the preliminary injunction, it is enough for the Court to find that PennDOT has not made available the DOS ID to every voter who signs the simple, two-point declaration set out in the Law.

obtain a DOS ID even though they went to PennDOT and were willing and able to sign the simple, two-point declaration set out in the Photo ID Law.

On September 25, 2012, with the Supreme Court's decision in hand, Respondents attempted to do the bare minimum by eliminating the unlawful "exhaustion" requirement and a requirement that DOS ID applicants provide two proofs of residency. *Applewhite III*, 2012 WL 4497211, at *1. Those changes, however, were insufficient to avoid a preliminary injunction. If the Supreme Court's decision has any real world meaning, it stands for the proposition that the DOS ID must actually be accessible to all voters who get to PennDOT and, at a minimum, must be given to any voter who signs the two-point declaration set out in the Law. *Id.* at *3. The evidence shows that the DOS ID has not been accessible to all voters at PennDOT.

Since September 25, 2012, numerous voters have left PennDOT without a DOS ID even though they signed the two-point declaration set out in the Law. This is primarily because PennDOT will not issue a DOS ID unless the Department of State first can verify that the applicant's name appears in the Department of State's registration database, known as SURE. Hr'g Tr. 564-65, July 17, 2013 (J. Marks). Applying this "verification" requirement, the Department of State and PennDOT regularly deny DOS IDs to recently registered voters, because the process of entering a voter's name in the SURE database takes about two to three weeks (and sometimes longer), depending on the county and how busy they are processing registrations. *Id.* at 566-69. Many longtime voters likewise have been turned away by PennDOT without a DOS ID because the Department of State could not verify their registration in the SURE database, even though upon subsequent and closer scrutiny, the voter was there all along. *Id.* at 637-38. As discussed below, somewhere from 56 to 128 of the valid voters who applied

for a DOS ID at PennDOT before the November 2012 election did not receive the ID, if at all, until after the election.

1. The SURE Verification Requirement Is Not Part of the Photo ID Law

The Photo ID Law says nothing about verifying voters' registration in the SURE database before issuing them ID. The entire "verification" requirement – like the DOS ID itself – is a discretionary creation of Department of State officials. It transforms the right to vote into a privilege that depends on the speed with which county election officials process registration forms and enter information into SURE, and the ability of Department of State employees to find voters in SURE while on the phone with PennDOT. Nothing in the Photo ID Law requires PennDOT to withhold an ID that is good ***only*** for voting purposes until the county has entered a voter's information into the SURE database. The Law certainly does not justify denying voting-purposes-only ID to a voter whose name ***is*** in the SURE database but simply cannot be found there by a Department of State employee during a telephone call with a PennDOT employee (and often for several months after that). Yet, that is exactly what often happens.

Respondents incorrectly argue that the Photo ID Law itself somehow requires verification in the SURE database before PennDOT can give a free DOS ID to a voter. Hr'g Tr. 2044, Aug. 1, 2013; Resps.' Pre-Trial Mem. at 26-27 (June 17, 2013). They cite the provision that requires PennDOT to give a free PennDOT Section 1510(b) non-driver ID to "any registered elector." 25 P.S. § 2626(b). But when people apply for the free PennDOT ID for voting purposes, PennDOT does not deny applicants based on an inability to verify registration. Hr'g Tr. 1727-28, July 30,

2013 (J. Marks).[6] If free PennDOT IDs can be issued without verification from the SURE database, there is no reason for Respondents to subject DOS ID applicants to this burdensome, inaccurate, inefficient, and unworkable process. At a minimum, the absence of a "verification" requirement for applicants for a free PennDOT ID refutes Respondents' position that the Law authorizes free photo ID only for applicants whose names can be found in the SURE database.

The absurdity of the "verification" requirement is further highlighted by the fact that Respondents already require every applicant for either a DOS ID or a free PennDOT ID to affirm, under penalty of perjury, that "I am a registered voter of the Commonwealth of Pennsylvania ***or have applied to register to vote.***" Pet'rs' Ex. 1515 (02/14/13 Affirmation) (emphasis added); *see also* Pet'rs' Ex. 30 (07/20/12 Affirmation) (same). Thus, the voter is asked to affirm that they have ***applied*** to register to vote, and is able to receive a free PennDOT ID – but not a DOS ID – before that registration is fully processed and entered into SURE.

In sum, the Supreme Court construed the Photo ID Law's free ID provision as requiring nothing more than a voter to sign a simple, two-point declaration. *Applewhite II*, 54 A.3d at 3. Neither the Law nor the Supreme Court said anything about a verification process that – as discussed below – far too often does not work, is not accurate, and cannot be implemented in a way to assure that voters obtain the ID they would need to vote if the Law were enforced.

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[6] Lest there be any doubt, PennDOT's processing of PennDOT ID applicants suffers from its own problems, including that the ID is only available with a raised seal birth certificate, Social Security card, and two proofs of residence. Likewise, PennDOT clerks do not regularly ask if applicants want the ID for voting, have a track record of wrongfully charging for the ID, and have frequently provided inaccurate information. Thus, for the reasons already found by the Supreme Court, the PennDOT ID is not a cure for the Photo ID Law's constitutional infirmities.

2. The SURE Verification Requirement Is Deeply Flawed in Practice and Unavoidably Leads to Disenfranchisement

The Supreme Court long has held that denying the franchise to "even one person validly exercising his right to vote is an extremely serious matter." *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 415 Pa. 154, 158, 202 A.2d 538, 540 (1964). So, while there was much quibbling at trial over the precise number of voters who were wrongfully denied a DOS ID at PennDOT based on the Department of State's "verification" requirement, the exact number is immaterial. The bottom line is that PennDOT has turned away far too many voters for the ID that is supposed to be accessible to all voters who can get to PennDOT.

At the one extreme, accepting the Department of State's SharePoint database on its face as a log of DOS ID "exceptions," roughly 20% of applicants have been unable to obtain a DOS ID at PennDOT since September 25, 2012. Hr'g Tr. 615-16, July 18, 2013 (J. Marks) (506 "exceptions" out of about 2,530 applicants); Pet'rs' Ex. 2136 ¶ 1. This failure rate reflects, at best, a moderate improvement over Respondents' old procedures from before September 25, 2012, when PennDOT was turning away as many as 25% of applicants with no DOS ID. Pet'rs' Ex. 149. As the Department of State's Jonathan Marks testified at the September 2012 hearing, this is an "inordinate amount of exceptions." Hr'g Tr. 214, Sept. 25, 2012 (J. Marks).

At the other extreme, even excluding all of Respondents' mysterious 144 voters from the Department of State's SharePoint database (which, as discussed below, is unwarranted by the evidence), roughly 13% of DOS ID applicants – more than one in eight – have been unable to obtain a DOS ID at PennDOT since September 25, 2012. Pet'rs' Ex. 2136 ¶ 5 (330 "exceptions" out of about 2,530 applicants). Nearly a third of these "exception" applicants still have not received a DOS ID, either because PennDOT did not mail the ID to the Department of State, the

Department of State has not mailed it to the voter, or the ID was mailed to the voter but was returned to sender. *Id.* ¶ 5.a; *see also* Pet'rs' Ex. 2071.

Most importantly, Respondents concede that if the Photo ID Law had been in effect for the November 2012 election, a number of duly registered voters would have lost their right to vote because they were wrongfully refused a DOS ID at PennDOT. Hr'g Tr. 2015, Aug. 1, 2013 (Respondents' counsel stating "yes, there are records that it took time to find, ways that it took effort to validate; and yes, some of those crossed over the time period of the November election"). Depending on the accuracy of the SharePoint database, somewhere from 56 to 128 valid voters (*i.e.*, registered in time to vote in November 2012) went to PennDOT to get a DOS ID *before* the November 2012 election, but received the ID either *after* election day or not at all. Pet'rs' Ex. 2136 ¶¶ 6, 10. As Mr. Marks candidly admitted, "if the photo ID law had in fact been in effect last year, those . . . duly registered voters would not have been able to cast a regular ballot on Election Day." Hr'g Tr. 646, July 18, 2013. This is not what the Supreme Court envisioned when it mandated that, to avoid a preliminary injunction, the DOS ID must be available based on a simple, two-point declaration and that implementation of the DOS ID must "forestall the possibility of disenfranchisement." *Applewhite II*, 54 A.3d at 5.

These voters are more than just entries in a database. One of them is Helen, a 94-year-old Schuylkill County voter who applied for a DOS ID at PennDOT more than a month before the November 2012 election. Hr'g Tr. 637-38, July 18, 2013 (J. Marks) (discussing Pet'rs' Ex. 2071, ID # 12). Helen has been registered to vote in Pennsylvania *since 1944*, but PennDOT refused to give her a DOS ID because the Department of State could not verify her registration in the SURE database and thus – in the discretion of the Department of State employee who answered the phone – decided that she did not deserve the ID she needed to vote. *Id.* To explain

this error, Respondents pointed to the fact that during World War II, Helen registered using "Mrs." plus her husband's first name, as was common for women at that time. *Id.* at 657-58, 680-81. As a result, the Department of State did not send Helen her DOS ID until March 9, 2013, with delivery confirmed on March 14, four months after the election. Pet'rs' Ex. 2071. If the Photo ID Law had been in effect in November 2012, Helen would have lost her right to vote, even though she followed all the rules and did everything Respondents asked her to do. Hr'g Tr. 637-38, July 18, 2013 (J. Marks).

Respondents may be able to *explain* why their convoluted DOS ID procedures did not work in Helen's case, but there is no *excuse* for disenfranchising a 94-year-old woman who has been registered for six decades and who managed to get to PennDOT before the election to obtain a voter ID. All of the excuses in the world would not have helped Helen vote if the Photo ID Law had been in effect in November 2012. For Helen and others, the Department of State's "verification" process assures disenfranchisement.[7]

Given the much larger number of DOS ID "exceptions," any dispute over the 144 is immaterial, except to the extent it highlights Respondents' overly complex, unworkable, and ineffective procedures for issuing DOS IDs. According to Respondent witnesses at trial and unsubstantiated assertions based on the work of PennDOT employees who did not testify, the Department of State's SharePoint database is wrong with respect to as many as 144 people who supposedly may already have had an acceptable photo ID from PennDOT and perhaps never

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[7] Even now that Helen has a DOS ID, she is still at risk of being turned away at the polls. This is because, as Mr. Marks explained, the name on her DOS ID ("Helen") likely does not substantially conform to the name in the SURE database ("Mrs." plus her husband's first name). Hr'g Tr. 1797-98, July 31, 2013. Thus, by the terms of the Photo ID Law, a poll worker is required to deny her the right to cast a regular ballot if he or she determines that the name on the ID does not substantially conform. *Id.*; *see also* 25 P.S. § 2602(z.5).

applied for a DOS ID, but were mistakenly treated as DOS ID "exceptions" based on miscommunication between PennDOT and the Department of State. Hr'g Tr. 614-15, 624, July 18, 2013 (J. Marks); Hr'g Tr. 1349-50, July 24, 2013 (K. Myers).

As Respondents apparently now recognize, their theory is incorrect as to at least some of the 144. The supplemental information that Respondents' counsel provided during trial shows that at least 7 of those 144 people conclusively did ***not*** have other acceptable photo ID from PennDOT. *See* Ex. 4 to Resps.' Answer to Pet'rs' Mot. to Exclude Evidence (July 24, 2013) (sealed). Moreover, accepting the representations of Respondents' counsel at face value, for more than a third of the 144, there is no information suggesting that they had an acceptable photo ID or that they went to PennDOT for some reason other than to get a DOS ID. *Id.*; Pet'rs' Ex. 2136 at 3. Regardless, as shown above, even excluding all of the 144 from the exceptions data, far too many voters were wrongfully denied DOS IDs at PennDOT and therefore faced disenfranchisement on election day.

The level of dysfunction in Respondents' DOS ID process is illustrated by their attempt to resolve this claimed mix-up over the 144. Based on supposed confidentiality concerns, PennDOT refused to release these individuals' identities even to its sister agency, causing the Department of State to send letters in April 2013 to all 144 individuals instructing them to return to PennDOT to get the DOS ID for which they supposedly never applied. Hr'g Tr. 624, July 18, 2013 (J. Marks); Pet'rs' Ex. 2071. That makes no sense and belies any suggestion that this Court should assume these individuals did not want or need a DOS ID to be able to vote.

In sum, Respondents' attempt to discredit the Department of State's SharePoint database only underscores the dysfunction in their procedures for issuing DOS IDs. Respondents have shown that they are not even capable of accurately tracking who has and has not applied for a

DOS ID, much less provide assurance that the DOS ID is accessible to all voters who apply and sign the two-point declaration set out in the Photo ID Law. The Court, Petitioners, and Pennsylvania citizens are left to wonder precisely how many people went to PennDOT seeking a DOS ID and were refused. What is clear is that the number of voters tied up in the Department of State's "exceptions" process – and therefore at risk of disenfranchisement – far surpasses what the Supreme Court would consider "an extremely serious matter." *Perles*, 202 A.2d at 540.

To put the experience to date in context, all of these problems occurred when only about 2,530 voters applied for a DOS ID at PennDOT under Respondents' new procedures since September 25, 2012. So few voters applied in large part because, as discussed below, Respondents deliberately did not tell voters about the DOS ID, what it is, or where to get it. Respondents have known for 16 months that they were in the "red zone," and that their every action would be scrutinized under the microscope of this lawsuit. Hr'g Tr. 678-79, July, 18, 2013 (J. Marks); *see also* Hr'g Tr. 1108, July 22, 2013 (R. Oyler). Yet, even with a minimal number of applicants and this Court's attention focused on the DOS ID process, Respondents' procedures for issuing DOS IDs remain far from "seamless." The bottom line for purposes of preliminary relief is that the DOS ID has not been accessible to all voters who were able to get to PennDOT, and there is no reason to believe it ever will be. A preliminary injunction through the end of this case is therefore obligatory under the standards set forth by the Supreme Court.[8]

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[8] Until February 2013, Respondents also imposed another unreasonable obstacle to obtaining a DOS ID. If a voter had a PennDOT driver's license or PennDOT ID that was expired less than a year, but that would be expired more than a year by the date of the next election (and so unusable for voting), PennDOT would not give the voter a DOS ID on the theory he or she still had an ID that could be used to vote. Hr'g Tr. 573-74, July 17, 2013 (J. Marks). These voters were required to wait until their ID was expired more than a year and then return to PennDOT. *Id.* This practice effectively punished proactive voters who took steps to ensure that they would have an acceptable photo ID for purposes of the next election. While Respondents eliminated

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C. Respondents Have Not Otherwise Forestalled the Possibility of Disenfranchisement

Even if, *arguendo*, Respondents had made the DOS ID accessible to all voters who got to PennDOT, the preliminary injunction must nonetheless remain in place unless and until this Court is "convinced . . . that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of the voter identification requirement for purposes of the upcoming election." *Applewhite II*, 54 A.3d at 5. The Court must determine whether Respondents' "efforts to educate the voting public, coupled with the remedial efforts being made to compensate for the constraints on the issuance of a PennDOT identification card, will ultimately be sufficient to forestall the possibility of disenfranchisement," such that "there will be no voter disenfranchisement" in upcoming elections. *Id*. The Supreme Court expressed special concern about disenfranchisement of "some of the most vulnerable segments of our society (the elderly, disabled members of our community, and the financially disadvantaged)." *Id*. at 2. The evidence shows that disenfranchisement of these and other voters is more than possible. It is certain.

1. Hundreds of Thousands of Voters Lack an Acceptable Photo ID and Would Be at Risk of Disenfranchisement if the Law Were Enforced

In its October 2012 decision granting the preliminary injunction, the Court concluded that Respondents had not forestalled the possibility of disenfranchisement for purposes of the November 2012 election. *Applewhite III*, 2012 WL 4497211, at *3. The Court reiterated its prior estimate that "the percentage of registered voters who did not have photo ID as of June,

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Continued from previous page
this absurd practice in February 2013, *id.* at 574, it remains emblematic of their flawed approach to making ID accessible even after the Supreme Court's decision and the September 2012 hearing. And the Court is left to wonder how many voters were wrongfully denied a free ID for this reason before February 2013 because Respondents never kept track.

2012, is somewhat more than 1% and significantly less than 9%," *id.* at *2, or roughly 89,000 to 801,000 voters. Hr'g Tr. 1751-52, July 30, 2013 (J. Marks).[9] The Court "reject[ed] Respondents' argument that [its] initial estimate was overblown." *Applewhite III*, 2012 WL 4497211, at *2. At the time of the September 2012 hearing, Respondents had issued fewer than 11,000 voter IDs, including "between 9500 PennDOT IDs" and "between 1300 and 1350 DOS IDs." *Id.* The Court "expected more photo IDs to have been issued by [that] time," and found that "the gap between the photo IDs issued and the estimated need will not be closed." *Id.*

Ten months later, the "gap" remains effectively just as large, and Respondents offered no reason to believe that it will ever "be closed." Since the September 2012 hearing, Respondents have issued only about 6,130 voter IDs, including 3,600 PennDOT IDs and 2,530 DOS IDs. Hr'g Tr. 615-16, July 18, 2013 (J. Marks); Pet'rs' Ex. 2072. Since the November 2012 election, the issuance of voter IDs has dwindled to fewer than 150 per month, including fewer than 100 PennDOT IDs and 50 DOS IDs. Pet'rs' Ex. 2072. In June 2013, Respondents issued 37 PennDOT IDs and 19 DOS IDs. *Id.* Mr. Marks testified that he expects only a small number of additional voter IDs will be issued between now and the November 2013 election. Hr'g Tr. 548-49, July 17, 2013. These figures pale in comparison to any reasonable estimate of the number of registered voters who do not have an acceptable photo ID under the Photo ID Law.

The evidence is unequivocal that hundreds of thousands of Pennsylvania voters have no acceptable photo ID under the Law:

- At trial, the Department of State's former Director of Policy, Rebecca Oyler, who provided the original 1% estimate, testified that she now understands about 4-5% of

[9] At the time, there were approximately 8.9 million registered voters. As of May 2013, there were 8.2 million registered voters as a result of the removal of invalid voters from the SURE database.

registered voters (roughly 328,000 to 410,000) have no valid ID from PennDOT. Hr'g Tr. 1019-20, July 22, 2013.

- In February 2013, Respondent Carol Aichele, the Secretary of the Commonwealth, testified that while Respondents have no estimate of their own, an "interesting study" recently found that about 3.5% of actual in-person voters in Philadelphia at the November 2012 election had no acceptable photo ID under the Law. Pet'rs' Ex. 1529; Hr'g Tr. 1137-38, July 22, 2013.

- In mid-2012, the Department of State conducted a match of the PennDOT and SURE databases and found 1,259,000 registered voters with no valid ID from PennDOT that could be used to vote in November 2012, including 759,000 voters with no ID at all and more than 500,000 with an ID that would be expired more than a year by election day (and thus unusable to vote). Hr'g Tr. 536-39, July 17, 2013 (J. Marks); Hr'g Tr. 907-10, 932-33, July 30, 2012 (D. Burgess). The Department of State sent letters to the 759,000 voters advising that they may not have an acceptable ID for voting; only 150,000 were returned as undeliverable. Hr'g Tr. 1143-44, July 22, 2013 (C. Aichele).

- Petitioners' statistics expert, Dr. Bernard Siskin, conducted a similar database match in mid-2013 and conservatively found about 511,000 registered voters with no valid PennDOT driver's license, PennDOT Section 1510(b) non-driver ID, or DOS ID for purposes of voting in the November 2013 election. Hr'g Tr. 132, July 16, 2013; Pet'rs' Ex. 2096a. This includes 251,879 voters with no ID at all from PennDOT, and another 259,536 voters with an ID that will be expired more than a year by election day. Pet'rs' Ex. 2096b at 2. Of those 511,000, 143,046 actually voted in November 2012. *Id.* Based on these findings, Dr. Siskin concluded that there are hundreds of thousands of registered voters with no valid ID from PennDOT for voting. Pet'rs' Ex. 2096a.

- Respondents' expert, Dr. William Wecker, attempted to chip away at Dr. Siskin's number, but Dr. Wecker only bolstered the conclusion that hundreds of thousands of registered voters lack an acceptable ID under the Law. Applying what he called a "circles drawing methodology," Dr. Wecker tried to estimate how many of Dr. Siskin's 511,000 *might* have some other form of valid ID for voting besides an ID from PennDOT, or could vote absentee. Hr'g Tr. 1554, July 25, 2013; *see also* Resps.' Ex. 224a ¶ 12. Even accepting all of Dr. Wecker's estimates as accurate (when in fact they are absurdly inflated), it still leaves about 381,000 registered voters without any valid ID for voting and highlights that most voters without a PennDOT ID also lack another form of acceptable photo ID. Hr'g Tr. 168-70, July 16, 2013 (B. Siskin). Thus, Dr. Wecker's testimony only serves to undermine Respondents' arguments by setting an upper bound on how many registered voters potentially could have another form of ID and that percentage remains a sliver of those who lack a PennDOT ID or DOS ID.

- Professor Matt Barreto, a political scientist and survey expert for Petitioners, conducted a survey in mid-2012 and estimated that at least 700,000 registered voters lacked acceptable ID to vote in November 2012. Pet'rs' Ex. 18 at 37-38. Importantly, Professor

Barreto's survey also found that only 0.6% of registered voters with no ID from PennDOT had some other form of acceptable ID under the Law. *Id.* at 37.

- Dr. David Marker, a world-renowned expert in survey design, testified that Dr. Barreto's methodology and results were and remain reasonable and reliable. Hr'g Tr. 386, 454, July 17, 2013; Pet'rs' Ex. 2097. Dr. Marker reviewed the underlying data and confirmed that even with the issuance of acceptable photo IDs by some colleges, the results would not change because virtually none of the voters without ID were in the age range of a college student. Hr'g Tr. 407-08, July 17, 2013.

Over the past year, Respondents have criticized the work of others, but have done no work themselves to determine how many voters lack acceptable photo ID under the Photo ID Law. Hr'g Tr. 790, July 18, 2013 (S. Royer). In October 2012, Secretary Aichele publicly proposed conducting another database match, but Respondents never did so because Deputy Secretary Shannon Royer advised Secretary Aichele that the results would be the same. *Id.* at 788-89. Respondents' never asked Dr. Wecker to do the work necessary to offer his own estimate of the number of voters without an acceptable photo ID. Hr'g Tr. 1488, July 25, 2013.

Accordingly, while there is some quibbling at the margins, the evidence overwhelmingly shows that hundreds of thousands of Pennsylvania voters lack an acceptable photo ID under the Photo ID Law. Given that Respondents have issued fewer than 17,000 voter IDs since the Law was enacted (Pet'rs' Ex. 2072), the gap still remains substantial by any measure. The preliminary injunction must be extended for this reason as well.

2. Respondents' Education Campaign Was Confusing, Ineffective, and Did Virtually Nothing To Minimize the Risk of Disenfranchisement

The Supreme Court recognized that if there was any hope of avoiding disenfranchisement, voter education about the availability of photo ID and how to obtain it was critical. *Applewhite II*, 54 A.3d at 5. Indeed, the Photo ID Law mandates two forms of public education. But Respondents failed adequately to do the first, and failed entirely to do the second.

First, Section 206(a) of the Law requires the Department of State to "prepare and disseminate information to the public regarding the proof of identification requirements" generally. 25 P.S. § 2626(a). Respondents' education campaign last year under Section 206(a) was mired in mixed messages, misinformation, and moving goalposts. Petitioners will fully address the endless problems with Respondents' education campaign under Section 206(a) in their post-trial proposed findings of fact and conclusions of law.

Second, and most relevant to the preliminary injunction, Section 206(c) requires both the Department of State and PennDOT to "disseminate information to the public regarding the availability of identification cards under subsection (b)" – *i.e.*, the free PennDOT Section 1510(b) non-driver ID for voting purposes. *Id.* § 2626(c); *see also id.* § 2626(b).[10] Each agency ignored its obligations under Section 206(c). PennDOT's Deputy Secretary, Kurt Myers, readily acknowledged that PennDOT has done nothing to educate voters about the availability of free voter IDs, relying instead on the Department of State. Hr'g Tr. 1405, July 24, 2013.

According to Deputy Secretary Royer, however, the Department of State also ***deliberately chose*** not to educate voters about the DOS ID. Hr'g Tr. 780, July 18, 2013.

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[10] Respondents' counsel argued in closing that Section 206(b) of Act 18 refers to something other than the PennDOT non-driver ID. Hr'g Tr. 2029-30, Aug. 1, 2013. That is wrong. The Supreme Court already interpreted Section 206(b) as referring to the PennDOT non-driver ID, and made clear the DOS ID is not the same ID mandated by Section 206(b). *Applewhite II*, 54 A.3d at 3-4 (citing Section 206(b) for the proposition that the Law "contemplates that the primary form of photo identification to be used by voters is a [PennDOT] driver's license or the non-driver equivalent provided under Section 1510(b) of the Vehicle Code"). The Law also makes this clear, stating that "the Department of Transportation shall issue an identification card described in 75 Pa. C.S. § 1510(b) at no cost." 25 P.S. § 2626(b). The DOS ID is not described in any way, shape or form in 75 Pa. C.S. § 1510(b), which describes only one type of ID: the PennDOT non-driver ID. The "notwithstanding" clause in Section 206(b) refers to the fact that Section 1510(b) imposes a cost for the PennDOT non-driver ID ($13.50), whereas Section 206(b) mandates that it be issued "at no cost." In short, the card referred to in Section 206(b) of Act 18 is unequivocally ***not*** the DOS ID.

Incredibly, this decision ***not*** to educate voters about the DOS ID was based on a fear that voters unfamiliar with the DOS ID would be "confused" if they were told about a new, supposedly easier-to-obtain option. *Id.* Most of Respondents' advertisements and other educational materials therefore make no mention whatsoever of the DOS ID. *Id.*; Hr'g Tr. 1858, 1861-62, July 30, 2013 (M. Sweeney). This includes both pre- and post-injunction television, radio, newspaper, and bus ads, as well as billboards, direct mailings, and other materials. *See, e.g.*, Resps.' Exs. 48, 67, 153-159, 168-190, 202-12.

In the few Department of State materials that do mention the DOS ID, it is in small print and the materials say nothing about what the ID is, that it is supposed to be easier to obtain, that a *Department of State* card can be obtained at *PennDOT*, that it can be obtained without supporting documentation, or that a voter can get one even if he or she has been refused a free PennDOT ID for voting purposes in the past. *See, e.g.*, Resps.' Ex. 160-67, 191-201. Given Respondents' decision not to tell voters about the DOS ID, it is no wonder that so few of the cards have been issued, or that so few voters have even applied.

The Supreme Court already held that failure to implement the "critical terms of the statute" in Section 206 of Act 18 as a partial means to ease the burdens on voters renders the Law infirm. *Applewhite II*, 54 A.3d at 5. The Court was analyzing Section 206(b) but the same reasoning applies to the statutory mandate in Section 206(c). Voters are not protected by a free ID that they do not know exists. A preliminary injunction is therefore required, at a minimum,

because Respondents have disregarded one of the few critical safeguards under the terms of the Law itself.[11]

3. PennDOT Is an Ineffective, Inaccessible, and Burdensome Network for Issuing Voter IDs and Cannot Forestall Disenfranchisement

Further compounding the above problems is the Photo ID Law's scheme to distribute IDs through PennDOT's 71 Driver License Centers. The record from the most recent trial as well as the prior hearings makes abundantly clear that this distribution scheme cannot forestall the possibility of disenfranchisement – a fact recognized in the Department of State's own analyses of the Law. *See* Pet'rs' Ex. 1562; Pet'rs' Ex.1677. For those lacking an acceptable photo ID, the scheme transforms the voting system from one involving 9,300 locations to just 71 places to go in order to be able to cast a regular ballot.

It is undisputed that there are only 71 PennDOT facilities statewide that offer free voter IDs. Hr'g Tr. 1305-06, July 24, 2013 (K. Myers). Nine counties have no PennDOT facility that offers voter IDs. Pet'rs' Ex. 25 (07/25/12 Stipulation). Another 13 counties have a facility that is open only one day a week. *Id.* Another nine counties have a facility that is open two days a week. *Id.*; *see also* Hr'g Tr. 1400-01, July 24, 2013 (K. Myers) (updating Pet'rs' Ex. 25). Less than half of PennDOT facilities are open five days per week, and even for those locations that are

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[11] In its August 15, 2012 decision, the Court initially denied a preliminary injunction, in part, 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." *Applewhite v. Commonwealth* ("*Applewhite I*"), No. 330 M.D. 2012, 2012 WL 33323376, at *5 (Pa. Commw. Ct. Aug. 15 2012). The Court did not want to interfere with, among other things, "the DOS mailing to approximately 5.9 million households," which informed voters – incorrectly, as it turns out – that they could not vote in November 2012 without acceptable photo ID. *Id.* There is no such concern now. Indeed, all of the information and materials of Respondents' website (votespa.com) still instruct voters that photo ID will be requested but not required.

open five days a week, some do not have the capacity to issue voter IDs on each day. Hr'g Tr. 555-59, Sept. 27, 2012 (K. Myers). This is because both the Driver License Center and the Photo Center must be open at the same time in order to get a voter ID. *Id.*

In sharp contrast, there are almost 9,300 polling places where voters in every city, town, and borough can cast their ballots. Resps.' Ex. 152; Hr'g Tr. 1692, July 30, 2013 (J. Marks). The nine counties with no Driver License Center have from nine to 33 polling places. Hr'g Tr. 1693-97, July 30, 2013 (J. Marks). Thus, rather than getting to one of 9,300 polling places, voters without an acceptable photo ID under the Photo ID Law must get to one of only 71 PennDOT Driver License Centers, often needing to leave the county where they live, before they can cast a regular ballot.

For example, in Perry County where Mr. Marks lives, there are 32 polling places, but no PennDOT Driver License Center. *Id.* at 1696-97. Mr. Marks testified that he lives about "a city block" from his polling place, but he would need to drive almost an hour to get to the nearest PennDOT in Elizabethville, or else take "a ferry." *Id.* at 1701-05. And he would need to go on a Thursday, because that is the only day that this PennDOT issues voter IDs. *Id.* at 1703.[12]

Before the Law was enacted, the Department of State recognized that "some people may not be able to get an ID without significant costs to get to a photo center." Pet'rs' Ex. 1677; *see* Hr'g Tr. 1095-96, July 22, 2013 (R. Oyler). Many voters, like Mr. Marks, also need to travel a

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[12] The Millersburg ferry, which Mr. Marks mentioned, is an old-fashioned paddle-wheeler that runs only from May through October and "do[es] not run on a set schedule, but as traffic warrants and water levels allow also as per wind and weather conditions." Millersburg Ferry Ass'n, Operating Schedule, http://www.millersburgferry.org/2136/2199.html. Mr. Mark's former house in a different part of Perry County was only slightly better: He lived about "a mile or maybe mile-and-a-half" from his polling place, but to get to the nearest PennDOT, he would have needed to drive almost half an hour "over a mountain." Hr'g Tr. 1697-1701, July 30, 2013.

substantial distance to get to the nearest PennDOT facility. Pet'rs' Ex. 2096b. When voters arrive at PennDOT, they face notoriously long lines and wait times. Pet'rs' Ex. 1460.[13] At least one transportation service for the elderly refused to take voters to PennDOT to get ID because it was impossible to know how long they would have to wait. Hr'g Tr. 1222-23, July 23, 2013 (S. Carty). At the September 2012 hearing, Mr. Myers promised that the wait times would improve, but he now acknowledges – and concrete data shows – that they only got worse. *Compare* Hr'g Tr. 539-40, 550-51, 553-54, Sept. 27, 2012, *with* Hr'g Tr. 1409-11, July 24, 2013; Pet'rs' Ex. 1460 (showing, as the November 2012 election approached, dramatic increases in the number of customers waiting more than 30 minutes to be serviced at key locations).

Respondents' witnesses also readily acknowledged that the issuance of voter IDs through PennDOT Driver License Centers has been far from seamless. Hr'g Tr. 1416-17, July 24, 2013 (K. Myers) ("We make mistakes."); *id.* at 1427 ("I think there were certainly some misinformation that was sent out."); Hr'g Tr. 79, Sept. 25, 2012 (K. Myers) (describing "concerns that were being expressed"); Hr'g Tr. 193, Sept. 25, 2012 (J. Marks) ("We have had complaints."); *id.* at 231 (describing "bumps in the road"). Indeed, the record is filled with the evidence of confusion and misinformation among PennDOT employees responsible for issuing photo IDs to voters.[14]

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[13] *See, e.g.*, Hr'g Tr. 315, 317, Sept. 27, 2012 (D. Clark); Hr'g Tr. 332, Sept. 27, 2012 (L. Pannell); Hr'g Tr. 348, 357-58, Sept. 27, 2012 (L. Purdie); Hr'g Tr. 371, Sept. 27, 2012 (P. Cobb); Hr'g Tr. 391-92, Sept. 27, 2012 (D. Bellisle); Hr'g Tr. 453, Sept. 27, 2012 (S. Lipowicz); Hr'g Tr. 473, 475, Sept. 27, 2012 (A. Maxton); Hr'g Tr. 1058, July 31, 2012 (M. Rawley); Hr'g Tr. 1080-1082, July 31, 2012 (S. Jarrell); Hr'g Tr. 1110, July 31, 2012 (J. Tosti-Vasey).

[14] *See, e.g.*, Hr'g Tr. 315-318, Sept. 27, 2012 (D. Clark); Hr'g Tr. 351, 358, 359-60, Sept. 27, 2012 (L. Purdie); Hr'g Tr. 392-96, Sept. 27, 2012 (D. Bellisle); Hr'g Tr. 407-12, 414-16, Sept. 27, 2012 (J. Hockenbury); Hr'g Tr. 427-29, 433-34, 438-41, Sept. 27, 2012 (A. Thompson); Hr'g Tr. 450, 453, Sept. 27, 2012 (S. Lipowicz); Hr'g Tr. 476, Sept. 27, 2012 (A. Maxton).

The experience of Nadine Marsh, an 84-year-old voter and former Petitioner, illustrates these problems. Before the July 2012 hearing, Mrs. Marsh tried in vain to get an ID but was refused because Pennsylvania has no record of her birth. Hr'g Tr. 191-92, July 25, 2012. In the end, with the help of her daughter and adult granddaughter, she had to travel about an hour each way, on three separate occasions, before the Rochester PennDOT finally broke down and gave her a DOS ID. Pet'rs' Ex. 2100 (video). On her first visit, Mrs. Marsh and her family waited half an hour before being told that the facility could not issue voter IDs that day (Monday). *Id.* at 17-19. On her second visit, she and her family waited an hour and a half before being told that the staff "just did not know what [she was] even talking about" regarding a voter ID; they instructed her to "fill out a form" and wait to "hear from Harrisburg." *Id.* at 19-22. Finally, on her third visit, after her story was highlighted at the September 2012 hearing, PennDOT apparently was expecting Mrs. Marsh, and a manager came out to ensure that she would not leave without a DOS ID. *Id.* at 22-25.[15] In all, Mrs. Marsh spent about six hours traveling to and from PennDOT and two more hours waiting inside.

Not all voters are capable of Mrs. Marsh's Herculean effort to get a voter ID from PennDOT. For many elderly and disabled voters, traveling to PennDOT even one time is more than anyone could reasonably expect. Contrary to some of the suggestions, elderly voters like Mrs. Pripstein and Catherine Howell – who has Parkinson's disease and uses a wheelchair – cannot take a public bus from their home to PennDOT. Hr'g Tr. 88-90, July 15, 2013 (M. Pripstein); Pet'rs' Ex. 1427 at 6, 34-35 (C. Howell video). David Proctor, who uses a cane,

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[15] This exemplifies a pattern where virtually any voter who appears in this litigation gets an ID in some way, including by Respondents' breaking their own rules. But Respondents' desperate attempt to evade review of this Law cannot succeed because for every voter who appears here, there are literally tens of thousands more just like them.

cannot walk two miles down the river to PennDOT. Hr'g Tr. 973-74, 979, July 22, 2013. For Patricia Norton, who has pins in her back and trouble sitting or standing, going to PennDOT is literally a painful experience. Pet'rs' Ex. 1430a at 30, 33-34 (P. Norton video). Ms. Oyler kindly offered to take one elderly voter. Hr'g Tr. 1118, July 22, 2013. But neither she nor Petitioners' counsel can take hundreds of thousands of voters to PennDOT to get the photo IDs they would need to vote under the Photo ID Law.[16]

Another problem is that voters also have been forced to pay for a photo ID at PennDOT that should have been provided at no charge. Adam Bruckner, who runs a non-profit helping the homeless and others get IDs, stopped telling his clients to go to PennDOT for free voter IDs because so many of them returned to him after having been told that they would need to pay. Hr'g Tr. 467-69, July 17, 2013. Mrs. Norton likewise was told she had to pay for a voter ID, which she could not do because PennDOT only accepts check or money order, and she only had cash. Pet'rs' Ex. 1430a at 18-19. These voters' experience of being wrongfully charged by PennDOT for what should have been a free voter ID is hardly unique.[17]

The problems that people have faced trying to get voter ID from PennDOT go on and on and will be discussed fully in Petitioners' post-trial merits brief. For present purposes, all of

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[16] The Shared Ride service is an inadequate solution. Customers ordinarily must pay for at least a portion of the service. Hr'g Tr. 1164, 1167-68, July 23, 2013 (L. Collins). And there was a "glitch" or "Catch 22" where voters have been required to show ID in order to go get ID through Shared Ride. Hr'g Tr. 1272-73, July 24, 2013 (K. O'Donnell) (discussing Pet'rs' Ex. 1592). Ms. O'Donnell of the Department of Aging herself admitted that the shared ride service in Pennsylvania is inadequate, especially in rural areas. *Id.* at 1281-83.

[17] *See also, e.g.*, Hr'g Tr. 371-72, Sept. 27, 2012 (P. Cobb); Hr'g Tr. 450, Sept. 27, 2012 (L. Purdie); Hr'g Tr. 443-44, Sept. 27, 2012 (A. Thompson); Hr'g Tr. 458-61, Sept. 27, 2012 (D. Curry); Hr'g Tr. 567-74, Sept. 27, 2012 (K. Myers); Hr'g Tr. 882-83, July 30, 2012 (J. Block); Hr'g Tr. 998-99, July 31, 2012 (C. Aichele); Hr'g Tr. 1052-53, July 31, 2012 (M. Rawley); Hr'g Tr. 1082-83, July 31, 2012 (S. Jarrell); Hr'g Tr. 1108-09, July 31, 2012 (J. Tosti-Vasey).

these experiences over the past 16 months show that PennDOT is not and never will be a place for voters to go to forestall the possibility of disenfranchisement.

4. Voters Without ID Have Not "Chosen" To Stay Home From the Polls

Patricia Norton testified that voting is "important to all of us. We all have a stake in what's going on in our life, and we need to respect the people who went before us and went through all kinds of grief to give us that right." Pet'rs' Ex. 1430a at 23. Marian Baker testified that "if you want a say in your government, you should be voting. You should let them know what you want and how you feel about things." Hr'g Tr. 64, July 15, 2013. Mina Kanter-Pripstein, a 92-year-old lifelong Pennsylvanian who cast her first ballot for Franklin Roosevelt, testified that she is not ready to give up voting: "It's what the country is based on, being able to vote. . . . [I]t is a part of my life, and it's one of the few things I thought I would always do." Hr'g Tr. 93-94, July 15, 2013.

Contrary to Respondents' suggestions, the problem here is not that citizens without photo ID lack the desire to vote. They have not "chosen" to stay home from the polls. The problem, rather, is that not all of them can do what it takes to obtain an acceptable photo ID under this Photo ID Law. Not everyone has such a committed daughter and adult granddaughter, as does Nadine Marsh, to drive them an hour each way, three separate times, just to wait in line. Pet'rs' Ex. 2100 at 14-15, 17, 19-20, 22-23. Not everyone has such a caring and good-humored law partner for a son-in-law, like Andrew Rogoff, willing and able to navigate a frustrating bureaucracy on their behalf. Hr'g Tr. 692-700, July 18, 2013. Not everyone needs to fly. But every eligible citizen who wants to vote needs to be allowed to do so. That is the only way we ensure "that government of the people, by the people, for the people, shall not perish from the

Earth."[18] And that is why it is not good enough for Respondents simply to say IDs are available at PennDOT and then throw up their hands. Voting is too fundamental. To preserve the foundational element of our experiment in self-government, the Photo ID Law must be enjoined.

CONCLUSION

Petitioners request that the Court enter a preliminary injunction barring enforcement of all sections of the Photo ID Law related to in-person voting until a final decision on the merits by the Supreme Court.

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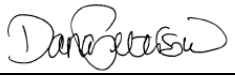
[18] President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (transcript available at http://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm).

Dated: August 5, 2013

Respectfully submitted,



David P. Gersch
Michael Rubin
Dorian Hurley
Whitney Moore
R. Stanton Jones
Rachel Frankel
Dana Peterson
Arnold & Porter LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: +1 202.942.5000
Facsimile: +1 202.942.5999
David.Gersch@aporter.com

Attorneys for Petitioners

Witold J. Walczak
Attorney ID No. 62976
ACLU of Pennsylvania
313 Atwood Street
Pittsburgh, PA 15213
Telephone: 412.681.7736
Facsimile: 412.681.8707
vwalczak@aclupa.org

Jennifer R. Clarke
Attorney ID No. 49836
Benjamin D. Geffen
Attorney ID No. 310134
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Pkwy, 2nd Floor
Philadelphia PA 19103
Telephone: +1 215.627.7100
Facsimile: +1 215.627.3183

Marian K. Schneider
Attorney ID No. 50337
Advancement Project
295 E. Swedesford Road #348
Wayne, PA 19087
Telephone: +1 610.644.1255
Facsimile: +1 610.644.1277

Penda Hair
Katherine Culliton-Gonzalez
Denise Lieberman
Katherine O'Connor
Leigh Chapman
Advancement Project
1220 L Street, NW, Suite 850
Washington, DC 20005
Telephone: +1 202.728.9557
Facsimile: +1 202.827.9558

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viviette Applewhite; Wilola Shinholster Lee; Gloria Cuttino; Nadine Marsh; Bea Bookler; Joyce Block; Devra Mirel ("Asher") Schor; the League of Women Voters of Pennsylvania; National Association for the Advancement of Colored People, Pennsylvania State Conference; Homeless Advocacy Project, Petitioners, v. The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carol Aichele, in her capacity as Secretary of the Commonwealth Respondents	Docket No. 330 MD 12

CERTIFICATE OF SERVICE

I certify that I am this 5th day of August, 2013, serving the foregoing *Petitioners' Post-Hearing Brief in Support of Application for Special Relief in the Nature of a Preliminary Injunction* upon the persons and in the manner indicated below, which service satisfies the requirement of Pa. R. A.P. 121:

Service by email per agreement with Respondents' Counsel as follows:

TIMOTHY KEATING, ESQ.
TKEATING@ATTORNEYGENERAL.GOV
SENIOR DEPUTY ATTORNEY GENERAL
OFFICE OF ATTORNEY GENERAL
CIVIL LITIGATION SECTION
15TH FLOOR, STRAWBERRY SQUARE
HARRISBURG, PA 17120

KEVIN P. SCHMIDT, ESQ.
KEVSCHMIDT@PA.GOV
DEPUTY GENERAL COUNSEL
GOVERNOR'S OFFICE OF GENERAL COUNSEL
17TH FLOOR, 333 MARKET STREET
HARRISBURG, PA 17101

D. ALICIA HICKOK, ESQ.
ALICIA.HICKOK@DBR.COM
ALFRED W. PUTNAM, JR., ESQ.
ALFRED.PUTNAM@DBR.COM
TODD N. HUTCHISON, ESQ.
TODD.HUTCHISON@DBR.COM
DRINKER BIDDLE & REATH LLP
1 LOGAN SQUARE, STE. 2000
PHILADELPHIA, PA 19103

Dated: August 5, 2013

Dana Peterson, Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viviette Applewhite; Wilola Shinholster Lee; Gloria Cuttino; Nadine Marsh; Bea Bookler; Joyce Block; Devra Mirel ("Asher") Schor; the League of Women Voters of Pennsylvania; National Association for the Advancement of Colored People, Pennsylvania State Conference; Homeless Advocacy Project, Petitioners, v. The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carol Aichele, in her capacity as Secretary of the Commonwealth Respondents	Docket No. 330 MD 12

PROPOSED ORDER

AND NOW, this ____ day of _____, 2013, upon consideration of the evidence, arguing and briefing on Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction, it is hereby **ORDERED** that said Application for Special Relief in the Nature of a Preliminary Injunction is **GRANTED**. Until further order of this Court or a decision on the merits by the Pennsylvania Supreme Court, the Respondents are **ENJOINED** from implementing, enforcing, or taking any steps to implement or enforce Act 18's photo identification requirements for in-person voters, including, but not limited to the following:

1. Respondents shall not enforce Act 18's requirement that all registered voters show photo identification as a condition of voting in person in any election;
2. Respondents shall withdraw, remove and otherwise cease any further public education/publicity campaign, including website pages, aimed at telling voters that they need a photo identification in order to vote in any election;

3. Respondents and election workers shall not ask voters for a photo identification that is not required to vote, as required by Section 10 of Act 18 in a "soft rollout;" and
4. Respondents and election workers shall not inform voters without an acceptable photo identification that such a photo identification will be required to vote in future elections, as required by Section 10 of Act 18 in a "soft rollout."

This Order does not affect the absentee ballot provisions of Act 18. This Order also does not affect any of the provisions of the Election Code that were in effect prior to the enactment of Act 18.

IT IS SO ORDERED

BY THE COURT

_____

Hon. Bernard L. McGinley, Judge