IN THE SUPREME COURT OF PENNSYLVANIA

No. 71 MAP 2012

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

Appellants,

v.

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

Appellees.

BRIEF OF APPELLEES CORBETT AND AICHELE

APPEAL FROM ORDER ENTERED AUGUST 15, 2012 BY THE COMMONWEALTH COURT OF PENNSYLVANIA IN NO. 330 MD 2012, DENYING A PETITION FOR A PRELIMINARY INJUNCTION

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COUNTERSTATEMENT OF THE STANDARD AND SCOPE OF REVIEW

Pennsylvania Rule of Appellate Procedure 2112 does not contemplate a counter-statement of the Standard and Scope of Review. In this case, however, the Appellants have mischaracterized what is at issue by describing the statute as if it were an assault on the fundamental constitutional right to vote. It is not. The statute does not disenfranchise any class of voters; it merely tightens the voter identification requirements applicable to all voters in order to increase public confidence that only legally registered voters are voting. This distinction – as well as the procedural posture in which this case arrived at the Commonwealth Court and now is here – establishes the standard and scope of review to be applied and it is plainly not the standard and scope for which Appellants now advocate.

As this Court has explained, the "first task in addressing the question of the constitutionality of the statute is identifying the standard of review." *Reichley by Wall v. North Penn Sch. Dist.*, 533 Pa. 519, 526, 626 A.2d 123, 126-28 (1993) (explaining that in equal protection cases federal levels of scrutiny apply and that Pennsylvania's "reasonable relation" analysis applies to other constitutional analysis). Although the Appellants asserted claims in their Petition under four different clauses of the Pennsylvania Constitution[1] – and the Commonwealth Court evaluated their claims accordingly – in their brief to this Court, they have collapsed the constitutional analysis into a single inquiry, namely, whether "[t]he right to vote based on satisfaction of these [Article VII, Section 1 qualification] requirements is safeguarded

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[1] Count I asserts rights under Article I, § 5 of the Pennsylvania Constitution; Count II asserts rights under Article I, §§ 1 and 26, and Count III asserts rights under Article VII, § 1. The Commonwealth Court analyzed Count I at pages 23-62 of its opinion, Count II at pages 62-65, and Count III at page 65. The Commonwealth Court noted that Count III was abandoned at trial. Opinion at 65.

by the terms of Article I, Section 5, which states that '[e]lections shall be free and equal.'"[2] Appellants' Brief at 33.

Once the entire case is collapsed into a single equal protection question, however, the framework in which it is properly viewed is well settled under this Court's precedents. Thus, in *In the Matter of the Nomination Petition of Phil Berg*, 552 Pa. 126, 713 A.2d 1106 (1998), the Court held that even though "voting is of the most fundamental significance under our constitutional structure," *id.* at 133, 713 A.2d at 1109, it does not follow that every challenge involving elections implicates a fundamental right or is subject to strict scrutiny. As the Court said: "[t]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest would tie the hands of states seeking to assure that elections are operated equitably and efficiently." *Id.*, *quoting Burdick v. Takushi*, 504 U.S. 428 (1992).

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[2] Article I, § 5 provides:

> Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Article VII, §1 provides:

> Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
> 2. He or she shall have resided in the State ninety (90) days immediately preceding the election.
> 3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

To avoid this settled law, Appellants construct their proposed applicable standard of review backwards: they first quote instances in which the Court has found that a voting right is fundamental and then infer that *all* rights related to voting are fundamental under Pennsylvania law. But that presumption is demonstrably false. What is at issue in this case is a policy judgment about the degree of security appropriate to *protect* a constitutional right, and it is for the General Assembly to make that policy judgment. The Commonwealth Court was right not to apply strict scrutiny, and its analysis faithfully applied this Court's precedents.

Because Appellants are challenging a not-yet-applied statute, they are asserting its facial invalidity. Accordingly, they need to establish that no valid application of the statute is possible, and that the invalid applications "are so real and substantial that they outweigh the statute's 'plainly legitimate sweep.'" *Clifton v. Allegheny Cnty.*, 600 Pa. 662, 705 n.37, 969 A.2d 1197, 1223 n.37 (2009). Appellants thus bore the burden to establish that the statute "clearly, palpably, and plainly" violates the Constitution so as to overcome the strong presumption that the legislative enactment is constitutional – particularly given that any doubts are to be resolved in favor of the constitutionality of the statute. *Estate of Fridenberg v. Commonwealth*, 33 A.3d 581, 591 (Pa. 2011).[3]

In the face of this presumption, "a party challenging a statute's constitutionality bears a heavy burden of persuasion." *In the Interest of F.C. III*, 607 Pa. 45, 68, 2 A.3d 1201, 1214

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[3] Indeed, by statute, both the Commonwealth Court and this Court are to apply certain presumptions in ascertaining legislative intent, including, *inter alia*:

That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable;

That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth;

That the General Assembly intends to favor the public interest as against any private interest.

1 Pa.C.S. § 1922.

(2010).[4] As this Court has explained, "[o]bviously, the proponent of a preliminary injunction faces a heavy burden of persuasion and, where the lower court has not been persuaded and has denied the injunction request, the proponent must also overcome the narrow scope of appellate review which will uphold that denial if there were 'any apparently reasonable grounds.'" *Singzon v. Commonwealth*, 496 Pa. 8, 11-12, 436 A.2d 125, 127 (1981). In other words, the Appellants bear the heavy burden of showing that they established all six prerequisites for issuing a preliminary injunction before the trial court and that that court had no reasonable grounds for concluding otherwise. *Brayman Constr. Corp. v. Commonwealth Dep't of Trans.*, 608 Pa. 584, 6, 13 A.3d 925, 942 n.18 (2011); *Warehime v. Warehime*, 580 Pa. 201, 860 A.2d 41 (2004) (plurality opinion). The Appellants here would prefer a lower threshold to apply – but, as discussed at greater length, *infra* – that is not the law of Pennsylvania, and the Commonwealth Court quite properly refused their invitation to craft new standards for this case.

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[4] In this respect, this case is different from *Holt v. 2011 Legislative Reapportionment Commission*, 39 A.3d 716, 733-34 (Pa. 2012), in which no presumption of constitutionality applied.

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Did the Commonwealth Court apply the proper standard of review to each of the questions posed by the Appellants?

Suggested Answer: Yes. The Commonwealth Court answered the question in the affirmative.

2. Did the Commonwealth Court properly find that the Appellants had failed to establish the six prerequisites that they had the burden to prove in order to warrant entry of a preliminary injunction?

Suggested Answer: Yes. The Commonwealth Court answered the question in the affirmative.

COUNTERSTATEMENT OF THE CASE

Previous Changes to the Law Governing the Conduct of Elections

Over the course of the past twenty years, there have been numerous federal and state statutes that have reflected an ongoing national debate about how elections should be conducted. On the one hand, it is said that many of the rules and regulations that the states apply make it harder than it should be to vote and that various reforms – such as same-day registration, Internet voting, and the like – encourage more people to participate in the election process. On the other hand, it is said that changes of that kind can also undermine ballot security and make it easier to manufacture votes.

Perhaps the best known of the statutes designed to make it easier to register is the National Voter Registration Act of 1993 ("NVRA") – with its so-called "motor voter" provisions. That statute does indeed make it easier to register, but it also makes it harder to remove voters from the rolls. While registration rolls have increased, at least some of that increase is related to the heightened standards for "purging" the rolls that were also contained in the NVRA. Thus, by 2001, Allegheny County's registered voter rolls contained approximately 12 percent more people than if the pre-NVRA law had applied and ineligible voters had been dropped. In fact, in one township, the rolls showed 1000 more persons registered to vote than there were resident adults.[5]

Problems arising out of the NVRA and public reaction to the contentious Presidential election of 2000 led both Congress and the states to try to revamp election procedures, in

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[5] Joe Mandak "Reforms to boost votes show downside; Motor-voter laws bloat cities' rolls," Chicago Tribune, June 28, 2001 at 12. This degradation of the lists of registered voters brings to mind New York elections during the Tammany Hall era, when it was not uncommon for more votes to be counted than there were citizens eligible to vote. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 n.11 (2008) (plurality opinion).

particular through the Help America Vote Act of 2002 ("HAVA") and state-enacted responsive legislation. HAVA has been described as a "compromise" – intended, in the words of its Democratic sponsor, Senator Chris Dodd of Connecticut, to "make it easier to vote, but harder to defraud the system." 148 Cong. Rec. 2527, 2529 (Apr. 11, 2002). The degree to which the statute had that effect may be debatable, but it is certainly true that the General Assembly enacted and amended several provisions of its Election Code in 2002 to achieve these two ends, including, in particular, section 1210, 25 P.S. § 3050, which was amended to provide that when an elector appeared to vote in an election district for the first time[6] he or she had to present to an election officer one of the following forms of photographic identification:

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

See Act of December 9, 2002 (P.L. 1246, No. 150), § 12. The statute went on to say: "The election officer shall examine the identification presented by the elector and sign an affidavit stating that this has been done" and that the voter could provide alternative forms of identification if the photographic identification listed in subsection (a) was not available. These alternatives were:

> (1) nonphotographic identification issued by the Commonwealth, or any agency thereof;
> (2) nonphotographic identification issued by the United States government, or agency thereof;

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[6] Appellants' shorthand reference to "first-time voters" thus understates the number of persons to whom this provision applied. Appellants' Brief at 5. The requirement also applied to all voters who had been registered and who had voted elsewhere but who were voting in a new district (presumably at a new address) for the first time.

(3) a firearm permit;
(4) a current utility bill;
(5) a current bank statement;
(6) a paycheck; or
(7) a government check.

id.; see 25 P.S. § 3050(a) and (a.1) (2010). In each case, the election officer was to examine the identification presented by the elector and sign an affidavit stating that this has been done. *Id.*[7] While this identification requirement applied only the first time a voter voted in a new election district, it nonetheless required that the voter do something to prove that he or she was qualified to vote in that district. It thus marked an effort – consistent with HAVA – to place a check on the indiscriminate new registrations without proof of identification that had taken place since the passage of the NVRA. It was not argued then – or now – that the identification requirement imposed a new "qualification" on electors. To the contrary, it was recognized as a reasonable means of making sure that the election was fairly conducted.

Several other post-HAVA provisions were designed to achieve a similar balance between convenience and security, including the introduction of provisional ballots, improved access to polling places for disabled citizens, and changes to available voter information through materials for non-English-speaking citizens and revisions to the Department of State voter guide and website. *See* HAVA 2004 State Plan, 69 Fed. Reg. 14002 (Mar. 24, 2004). For each of these steps, the Commonwealth's stated goal was "to guarantee that all voters of Pennsylvania have the opportunity to participate fully in the election process and to cast their votes independently and privately." *Id.* at 14958.

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[7] If the proof was not provided or was unsatisfactory, the elector could not be allowed to vote, except by provisional ballot. *Id.* This makes it puzzling that Stephen Shapiro would file an *amicus* brief complaining that requiring any elector to demonstrate identity or (a) be turned away or (b) file a potentially uncounted provisional ballot would somehow be "illegal." This response to persons without satisfactory proof of identity is not a new statutory requirement.

Similarly, while 25 Pa.C.S § 1901 allows for removal of voters from the rolls only if the elector requests removal, dies, or after election officials have been notified by the Postal Service or other official means that the person has moved – and then sent notice to the elector – Pennsylvania also instituted a computerized Statewide Uniform Registry of Electors ("SURE") system to provide a means to increase accuracy of the voter rolls. The system contains voter registration data, including currently registered electors, cancelled records, signatures and applications. R. 1274a. There is a portal that enables the public and counties to verify data and that provides statistics. *Id.* SURE also has election and campaign finance components, and, as a result of HAVA, is connected to the Social Security Administration and the Pennsylvania Department of Transportation in real time. R. 1275a. The Commonwealth has used SURE in working with the counties to eliminate duplicate entries for voters. R. 1116a. Likewise, 25 Pa.C.S. § 1501 requires a voter to request removal after he or she moved but gave a contingent grace period: if the voter completes a removal notice at his or her former polling place, he or she can vote there once.

The Impetus for Act 18

One product of the 2000 election was a generalized deepening doubt as to how well the "system" worked to ensure that each vote was counted and measured. To be sure, there was no consensus as to who or what was to blame for the flaws, with some groups blaming the technology used in elections and others blaming the lack of safeguards to protect against fraud. In his book, *Stealing Elections: How Voter Fraud Threatens Our Democracy* (Encounter Books 2004), John Fund, a columnist for The Wall Street Journal, focused on a number of different kinds of fraud. One of the chapters was entitled, "The Battle for Photo ID" which he characterized as "ground zero in the fight over vote fraud and the security measures taken by

state election officials to prevent it." *Id.* at 65. To some extent, Fund said, the partisan debate over the issue began during Congress's deliberations over ballot security issues during HAVA's enactment. "Republicans wanted all voters to show a photo ID" and "Democrats did not want any ID requirements at all."[8] The "compromise" that emerged from that debate provided for only minimal federally mandated standards of voter identification – a standard Fund deemed insufficient – but permitted the states to establish stricter rules as they deemed prudent. *Id.* at 66-67.

One such stricter rule was suggested by the Commission on Federal Election Reform, chaired by former President Jimmy Carter and James E. Baker, III. In September 2005, the Commission issued a report entitled, "*Building Confidence in U.S. Elections*," ("Carter-Baker Report"), expressly addressing, *inter alia*, ballot security and voter fraud: "While the Commission is divided on the magnitude of voter fraud – with some believing the problem is widespread and others believing that it is minor – there is no doubt that it occurs." R. 2170a. The Commssion concluded that public confidence in the election system would be enhanced by requiring voters to produce photographic identification at the polls. To guard against any disenfranchisement of legitimate voters, the Commission also proposed that free cards be made available for those who do not drive and that provisional ballots available for those who failed to bring their identification to the polls. R. 2170a-2171a.[9]

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[8] Fund notes that while both parties have concerns about the integrity of the electoral process, "vote fraud" is traditionally the sort of election irregularity on which Republicans focus, while "vote theft" tends to be a Democratic concern. *Id.*

[9] The Commission observed that 40 million people move each year. R. 2170a. Pennsylvania, of course, is no different than the nation in this regard. *See* Paul J. Gough, *More Outward Migration in Pennsylvania*, survey find, available at http://www.bizjournals.com/pittsburgh/news/2012/01/04/more-outward-migration-in-pa-survey.html?page=all, last visited 9/06/2012.

Impressed by the conclusions of the Carter-Baker report – and no doubt reflecting public opinion on this subject[10] – the General Assembly in 2006 passed a voter ID bill, H.B. 1318, requiring all voters to bring photographic ID to the polls. But then-Governor Rendell vetoed the bill. A few years later, the General Assembly revisited the question. The statute now before the Court began as H.B. 934 on March 4, 2011. It substituted additional forms of photographic ID for the non-photographic alternatives approved in the legislation the General Assembly had passed in 2002, and it required every voter – as opposed to just those voting at a given polling place for the first time – to produce such identification at the polls.

On March 21, 2011, the State Government Committee held a hearing on the bill, at which five people testified: Michael Bekesha, Esquire, an attorney with Judicial Watch; Karen Buck, Esquire, the Executive Director of the SeniorLaw Center; Keesha Gaskins, Esquire, Senior Counsel for the Democracy Program at the Brennan Center for Justice at the New York University School of Law; Hans von Spakovsky, Esquire, a Senior Legal Fellow with the Heritage Foundation; and Heather S. Heidelbaugh, Esquire, an attorney with Babst, Calland, Clements and Zomnir, P.C. Mr. von Spakovsky had been a Commissioner for the Federal Election Commission, a member of county election boards in Georgia and Virginia, and a member of the Board of Advisors of the U.S. Election Assistance Commission, as well as an attorney in the Civil Rights Division of the Department of Justice, working with voting rights laws. *See Hearing on H.B. 934 (Metcalfe) and H.B. 647 (Cruz) Before the State Gov't Comm.*

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[10] At that point in time, the Rasmussen poll showed that 77 percent of likely voters favored requiring photographic ID. http://www.rasmussenreports.com/public_content/politics/top_stories/the_vote_most_agree_with_photographic_id_requirement_english_only_ballots, last visited 9/06/2012. That number has increased since. *See, e.g.*, http://www.rasmussenreports.com/public_content/politics/questions/pt_survey_questions/january_2008/toplines_voter_id_january_2_3_2008, last visited 9/06/2012.

(Pa. Mar. 21, 2011) (statement of Hans von Spakovsky), *available at* http://www.legis.state.pa.us/cfdocs/legis/tr/transcripts/2011_0054T.pdf (unpaginated transcript), last visited 9/06/2012.[11] He explained to the Committee that voter ID laws can prevent four sorts of voter fraud: impersonation fraud, fictitious voter registrations, double voting, and illegal alien voting. He also testified about jurisdictions that had recently amended their voter ID laws, observing that in Georgia less than .01 percent of votes had been cast by provisional ballots due to a lack of photo ID at the polls, and that even with the new identification requirements voter turnout had actually increased significantly in both Georgia and Indiana. He also cited studies by the University of Missouri, University of Delaware, and University of Nebraska-Lincoln that found that stricter voter ID laws did not reduce turnout either overall or when looked at by race, ethnicity, or socioeconomic levels. Approximately one year later, following amendments proposed by the Senate, both houses of the General Assembly approved H.B. 934. It was then presented to the Governor, who signed the bill. *See* http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2011&sind=0&body=H&type=B&bn=0934, last visited 9/06/2012.

As the divergent testimony before the House suggested, there has long been a significant amount of public discourse on the subject of the extent to which voter fraud is actually infecting elections. *Compare, e.g.*, John R. Lott, Jr., *Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud have on Voter Participation Rates*, Social Science Research Network (Aug. 18, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925611 (Dep't. of Economics, SUNY Binghamton, August 2006) (acknowledging that photographic ID requirements were too new to

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[11] The testimony discussed appears at roughly pages 39-41.

assess in the United States but recognizing that over 100 nations required photographic ID and had seen an increase in voter participation – as had "fraud hot spots" (including Philadelphia) when other measures were adopted),[12] *with* Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 Harvard Law & Policy Review 185 (Winter 2009) (reviewing studies reaching conflicting conclusions about the effect of voter ID laws). The intensity of those opposing views came out at the hearing on the preliminary injunction. *E.g.*, R. 1676a-1679a (Dr. Minette's strong disagreement with former Federal Election Commissioner von Spakovsky's conclusions that voter fraud was a significant issue).

The disagreement about the extent of voter fraud has included debate over whether prosecutorial efforts (and authority) to address the issue were properly being allocated and executed. In a few states, there have been concerted efforts to understand the difference in statistics between reports of wrongdoing at the polls and convictions. In Virginia, for example, where state police work with Commonwealth attorneys, over 250 cases were opened following the 2008 election, but the Commonwealth attorneys declined to prosecute 194 of them, citing factual inconsistencies that "could not justify the manpower and the resources."[13] Similar prosecutorial reluctance was found by a group in Minnesota ("Minnesota Majority"), which has been tracking the simplest form of voter fraud to detect – felon voting – despite official skepticism. That group identified 2,903 suspected ineligible felons voting in the 2008 election and referred 1,359 to county attorneys with supporting evidence. As of August 2011, only 113

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12 Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925611, last visited 9/06/2012.

13 Mark Bowes, *Virginia investigates voter fraud*, Richmond Times-Dispatch, April 22, 2012, available at http://www2.timesdispatch.com/news/2012/apr/22/tdmain01-va-investigates-voter-fraud-ar-1859666/, last visited 9/06/2012.

had been pursued to conviction.[14] Minnesota Majority expressed its concern "that it required the research of a non-governmental agency to detect and prompt investigation and prosecution of ineligible felon voters" and noted that it had not appeared that any agency had ever tried to detect that form of voter fraud. *Supra* n.14 at 2. It also said that while there was evidence of other kinds of voter fraud in the 2008 election, "prosecutions are unlikely because identifying a perpetrator voting with a false name is impossible after the fact."

Even when prosecutors are eager to uncover fraud, difficulties with developing a record and the need to prove intent make convictions difficult. For example, following the 2004 election, a joint task force between the Milwaukee Police Department, Milwaukee County District Attorney's Office, Federal Bureau of Investigation and the United States Attorney found that Milwaukee counted 4,609 more votes than persons who registered at the polls. *Preliminary Findings of Joint Task Force Investigating Possible Election Fraud* at 5, May 10, 2005, available at http://www.wispolitics.com/1006/electionfraud.pdf, last visited 9/06/2012. The task force identified over 100 instances in which people voted more than once, people from outside Milwaukee voted in Milwaukee, people used false names or addresses (including using the identity of people who did not vote), or people voted using the name and address of a deceased person. As in Minnesota, there were also felons who voted while ineligible. *Id.* Writing for the Court of Appeals for the Seventh Circuit in upholding Indiana's voter ID law in 2007, Judge Posner analogized voter fraud to littering – a crime that is difficult to detect and to interest law enforcement officials in prosecuting. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) (plurality opinion).

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[14] *Felon Voter Fraud Convictions Stemming from Minnesota's 2008 General Election*, Oct. 13, 2011, available at http://www.electionintegritywatch.com/documents/2011-Report-Voter-Fraud-Convictions.pdf, last visited 9/06/2012.

The Injunction Action

Shortly after the enactment of Act 18, Appellants filed their Petition for Review and Application for Special Relief. During six days of testimony, the Commonwealth Court heard from individual petitioners, representatives of the petitioner organizations, Commonwealth officials and experts. Appellants asserted that those who expressed concerns about instances of or opportunities for voting fraud were misinformed, and that the General Assembly had been wrong to address their concerns. The official respondents – both of whom are part of the executive branch who are not (as, for example, county district attorneys are) charged with prosecuting voter fraud – stipulated that they were unaware of any incidents of in-person voter fraud in Pennsylvania (or elsewhere) and would not introduce evidence of voter fraud, relying instead on the rationale for the statute that they had set forth in their Interrogatory Responses:

> Without waiving this objection, and responding only to the extent that the Governor's Office and the Department of State participated in the legislative process that led to the enactment of Act 18 of 2012, Respondents answer that requiring a photo ID improves the security and integrity of elections in Pennsylvania in a manner that is in keeping with the photo ID requirements of many other secure institutions and processes. Respondents are aware of reports indicating that lists of registered voters contain the names of persons who are deceased, no longer residents of Pennsylvania, or no longer residents of the locations at which their names appear on the list of registered electors. Respondents are aware of reports indicating that votes have been cast in the name of registered electors who are deceased, who no longer reside in Pennsylvania, or who no longer reside in the jurisdiction where the vote is cast. Absent proof of identification presented to elections officials at the polling place, there is a risk that votes may be cast in the names of registered electors who are dead or have left the Commonwealth or jurisdiction of the elections district by a person other than the registered elector. Respondents are aware of reports questioning the integrity of elections based on a variety of incidents. Requiring a photo ID is one way to ensure that every elector who presents himself to vote at a polling place is in fact a registered elector and the person that he purports to be, and to ensure that

> the public has confidence in the electoral process. The requirement of a photographic ID is a tool to detect and deter voter fraud.[15]

Opinion at 58-59 (The opinion is properly appended to Appellants' brief, but the opinion page is cited, because there is no record pagination).

The Conflicting Data

Earlier this year, the Department of State sought to fill in the data in its SURE system by running a comparison against the Department of Transportation database and, where there were precise matches for names and dates of birth, using the Department of Transportation data to fill in missing driver's license and social security information in the SURE database. R. 1151a-1152a; R. 1246a-1248a. What the Department of State learned was that the Department of Transportation database (originally a mainframe) had reporting inconsistencies with SURE. It did not register apostrophes or spaces (so that O'Neill or McDonald would be a "non-match" even though the names were identical). R. 1362a. In addition, when the SURE database was set up, some counties did not have birth dates when data were entered, and the database shows "1/1/1800" in such cases – a birthdate that obviously did not match any PennDOT birthdate. R. 1279a-1280a.

In the SURE database, there are records for 8,232,928 registered voters. R. 1254a. Of those, 4,573,848 correlated precisely with the PennDOT database when the two databases were compared, and another 2,769,952 were statistical matches. R. 1255a. Of the remaining 889,128 persons, 130,189 had provided driver's license numbers as part of their voter registration, but the numbers in the SURE database did not accurately reflect PennDOT's identification – probably because the person entering the data either hit two keys at once or hit the wrong key. R. 1256a,

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[15] The Commonwealth parties did not bear the burden of proof in the Commonwealth Court to demonstrate that the General Assembly properly weighed the credibility of the information it had before it when it enacted the statute.

R. 1279a. Another 574,630 persons in the registered voter database had expired PennDOT ID. R. 1264a. For 758,959 voters (of whom 167,566 had not voted since at least 2007), the name and date information in the SURE database did not match a PennDOT entry, either because of the reporting inconsistencies discussed above or because there was no PennDOT entry.

Professor Barreto, a social scientist from the University of Washington, testified on behalf of the Appellants that, based upon a telephone survey, roughly 1.4 million persons in Pennsylvania are eligible to vote but do not currently have a photo ID that would allow them to vote at the polls in November. R. 709a-710a. At the same time, he acknowledged in his report that 5,511,646 – or roughly 92 percent – of the persons who had voted in the 2008 election have driver's licenses. R. 1888a.[16] Of those persons who voted in the last election and did *not* have a driver's license, he said, 516,905 have a different form of valid photographic ID. *Id.* For some reason – unexplained at the hearing – adding those two numbers together yields a number that is *higher* than the total number of people who voted in the 2008 election.

Interestingly, Professor Barreto's data are close to the Department's data on a key point: the number of persons who have *expired* licenses/PennDOT IDs. Although his table does not break out "expired licenses," it does provide information sufficient to calculate that number: 522,915.[17] When questioned about his decision to treat all persons with expired licenses as persons who instead needed (and perhaps lacked) other forms of documentation in order to secure *alternate* photographic ID even though it was easy to renew the license, he said only:

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[16] That percentage is slightly lower (90.2 percent) for registered voters as a whole, and is 88.5 percent of the population eligible to register to vote. *Id.*

[17] One can simply subtract the number of non-expired licenses (which he defines as having expired before November 6, 2011, R. 1886a n.4) from the number of persons who have driver's licenses, to find that his survey suggests 522,915 persons who voted in 2008 have licenses that expired before November 6, 2011 – a number that increases to 651,256 of registered voters and 758,019 of all eligible voters.

> It's possible that people who have an expired ID could return and go through the process to renew it. In my opinion, it's extremely unlikely. That's not something that is common practice that people are going to be doing.

R. 803a; *see also* R. 802a.[18] He went on to say, "typically we always see about the same rate within a population which carries an expired ID card." R. 803a.

As the Commonwealth witnesses explained at the hearing, the persons who merely need to update or renew their PennDOT IDs have ready access either to a PennDOT ID or driver's license, and the Department of State and PennDOT are communicating that throughout the Commonwealth. R. 1281a. The Department of State has already sent letters to each of the 758,959 non-matches to determine whether they were persons who needed to get a photographic ID before the election. A large number came back undeliverable, suggesting that the intended recipient was no longer at the address at which he or she was registered to vote. Others contacted the Department to confirm that they had valid driver's licenses, which meant that the "no match" was due to the reporting inconsistencies noted above. R. 1363a-1364a (explaining that letters had been sent to Senator Yaw, Jimmy Tayoun, and Justice McCaffery, all of whom were among the "non-matched" persons).[19]

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[18] This was not the only statement by Professor Barreto that was demonstrably baseless. When asked about his testimony that people did not have Social Security cards, he said that the survey inquired only whether they possessed an actual physical copy of their Social Security card. He then said "But my inclination would be that most people who don't have a card are less likely to know their Social Security number." R. 819a. Although several of the plaintiff witnesses testified that they did not have a physical copy of their Social Security cards, they also testified that they knew their Social Security numbers. R. 500a-501a; R. 552a; R. 988a; R. 1304a.

[19] Ironically, perhaps, two new reports about voting irregularities were released during July and August – right around the time of the hearing. First, the Administrative Office of Pennsylvania Courts and several counties responded to Right-to-Know Law requests from the News21 Database, documenting 23 cases of Election Code prosecutions opened (some later dismissed) from 2002-2012. Many of the counties said that they did not track data by violation and were unable to respond. *See* http://votingrights.news21.com/interactive/election-fraud-database/ (and underlying data), last visited 9/06/2012. The News21 Database was posted in

In a comprehensive 68-page opinion, the Commonwealth Court's hearing judge (the Honorable Robert Simpson), determined that the petitioners had failed to establish all six requirements for a preliminary injunction. In reaching that conclusion, the court expressly declined to credit most of the findings of Professor Barreto.

This appeal followed.

August. The second report, released in July, came from Philadelphia City Commissioner Al Schmidt, who reviewed the 2012 primary election results and discussed specific instances of fraud found. Al Schmidt, City Commissioner, *Voting Irregularities in Philadelphia County, 2012 Primary Election* 4-19 (2012).

SUMMARY OF THE ARGUMENT

Contrary to the Appellants' argument, the statute at issue in this case does not "disqualify" or disenfranchise anyone – much less an identifiable class of people. It is simply an incremental change from the existing law; instead of requiring voters to present one of a series of forms of identification each time they vote in a new district, it requires voters to present one of a series of forms of identification each time they vote. Its purpose is to ensure that only legally registered voters cast ballots. Passing such a statute was within the authority of the General Assembly. This Court has held as much when looking at similar regulations on the conditions of voting.

This case is before the Court to review a refusal to enter a preliminary injunction. The fact that it comes before the Court in that manner means that the Court will examine what the Commonwealth Court did to see if there was "any apparently reasonable ground" for refusing the injunction. The Appellants asked the Commonwealth Court to invalidate a presumptively valid statute on its face – before it had ever been applied. In order to warrant such relief, Appellants had to establish the six well-known prerequisites – and had to prove that there was no set of circumstances in which the statute would be valid.

To prove their case, the Appellants asserted that the General Assembly's expressed concern about the integrity of the electoral process was pretextual – or at the least, vastly overstated. To Appellants' mind, there is no such thing as election fraud, and the real purpose of the law is to disenfranchise almost one and a half million Pennsylvanians who would likely vote for candidates that the majority of the General Assembly does not support. This perception of the likely harm failed to persuade the Commonwealth Court, which concluded that Appellants' speculation on this subject was unreliable.

The Commonwealth Court also concluded that Appellants' equal protection claim under the Pennsylvania Constitution did not warrant "strict scrutiny." Given the nature of the regulation at issue, and given the reality (recognized both by this Court and the federal courts) that laws such as this weigh one policy about protecting a right to vote against another policy protecting a right to vote, the Commonwealth Court was clearly correct in its analysis.

At the end of the day, the question the Appellants want this Court to answer is: which policy is better? This Court has held on numerous occasions, however, that *that* question is one for the General Assembly, not the courts, to answer. It follows that the Commonwealth Court's denial of the preliminary injunction should be affirmed.

ARGUMENT

In their brief, Appellants intermingle their arguments about the proper standard of review, the requirements for a preliminary injunction, and the merits. A more logical analysis starts with the two constitutional provisions at issue and the way that this Court has construed those provisions. In the context of that framework, it then measures the facts found by the Commonwealth Court against the requirements for issuing a preliminary injunction.

I. THE VOTER IDENTIFICATION PROVISIONS CHALLENGED HERE DO NOT IMPINGE UPON EITHER ARTICLE VII, SECTION 1 OR ARTICLE I, SECTION 5.

A. THE VOTER IDENTIFICATION PROVISIONS CHALLENGED HERE ARE INCREMENTAL STEPS, CONSISTENT WITH HISTORICAL AND CURRENT LEGISLATIVE AUTHORIZATION AND WITH THE 2002 LEGISLATION.

Appellants fault the Commonwealth Court for its historical analysis, suggesting that it led the court mistakenly to apply a "gross abuse of discretion" standard to a fundamental right. Brief at 35-37. That is simply wrong. In fact, the Commonwealth Court quite correctly drew the distinction between what the Constitution treats as a right (the right to vote) and what the Constitution entrusts to the General Assembly (the rules and regulations governing the conduct of an election). The starting point of that analysis is the text of Article VII, §1, which reads:

> Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
> 2. He or she shall have resided in the State ninety (90) days immediately preceding the election.
> 3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

According to Appellants, the statute attempts to impose an additional qualification: "possessed of a photographic ID." But that is not so. The statute is a means of verifying that the person voting is a person possessing the constitutionally-required qualifications to vote. The gist of the third clause – discussing the election district residence requirement – was added in the Constitution of 1838, following the first registry laws. *Chase v. Miller*, 41 Pa. 403, 419 (1862). This Court in *Chase* explained that the addition was an "element of suffrage for a two-fold purpose." *Id.*

> Without the district residence no man shall vote, but having had the district residence, the right it confers is to vote in *that district*. Such is the voice of the constitution. The test and the rule are equally obligatory. We have no power to dispense with either. Whoever would claim the franchise which the constitution grants, must exercise it in the manner the constitution prescribes.

Id. (emphasis in original). The purpose of the test *and* the rule was to safeguard "honest suffrage" by ensuring that the "voter, *in propria persona*, should offer his vote in an appropriate election district, in order that his neighbors might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful." *Id.*[20]

It may well be that there was a time in history "where everyone kn[ew] each other [and] voters did not need to identify themselves." R. 2170a. But even in the nineteenth century, this Court regularly upheld legislative requirements of various proofs of qualification, so long as they "prescribe[d] the mode of ascertaining who are the qualified electors; their rights are conserved

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[20] This is why the AFL-CIO creates a red herring by saying that the legislative authority is limited to "registration" – and nothing else. AFL-CIO Brief at 20. The authority to regulate encompasses the process whereby someone is determined to be qualified to vote. To follow the AFL-CIO's reasoning to its logical conclusion, it would be unconstitutional to require any of the assurances the General Assembly has put into place over the years – proof of identity when voting in a new electoral district, comparison of signatures at the polling place, requiring the use of blue or black ink to sign, specifying the number of hours a polling place must be open -- or any of the myriad other provisions of the law that Appellants recognize as constitutional, and which no one suggests unconstitutionally burden the right to vote.

by the exclusion of the votes of other persons, and the interests of the state demand exclusion of all who are unqualified." *In re Contested Election of Martin McDonough*, 105 Pa. 488, 490 (1884). Toward that end, the Constitution "contemplates legislation to provide the mode of ascertaining who are the electors, and directs that all laws *for that purpose* shall be uniform. . . ." *Id.* (emphasis added).

As is evident from the Preamble itself, it is up to the General Assembly to make certain that only qualified electors vote. *See Contested Election of Owen Cusick*, 136 Pa. 459, 20 A. 574 (1890). As here, the challenger in *Owen Cusick* complained that the requirement that a voter who turned out not to be registered *provide at the poll* an extensive affidavit as the person seeking to vote and an affidavit by a witness to his residence – "if they do not deny the right to vote, at least clog its exercise with such conditions as to render it unreasonably inconvenient." *Id.* at 468, 20 A. at 575. This Court rejected that argument, upholding instead the right of the legislature to secure "an honest, unbought, and unintimidated ballot; to prevent the lawfully-expressed will of the duly-qualified elector from being set aside by the corrupt practices which have in so many instances defeated the will of the people." *Id.* at 473, 20 A. at 577.

Similarly, at a time when payment of taxes was a qualification for voting, the Court held that the legislature could properly prohibit the payment of those taxes by another: "the Constitution requires that each elector shall pay a tax in order to qualify himself, the legislature has afforded that opportunity, at the same time hedging it around with proper and reasonable safeguards, and only payment in the manner prescribed by this legislation constitutes a payment of the tax in a legal sense, so as to give the voter the requisite constitutional qualification." *Corydon Twp. Election*, 236 Pa. 588, 591-92, 84 A.1107, 1108 (1912).

And, although Appellants are dismissive of *Ray v. Commonwealth*, 442 Pa. 606, 276 A.2d 509 (1971) and *Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Cmwlth. 2000), *aff'd per curiam*, 566 Pa. 616, 783 A.2d 763 (2001), as cases dealing merely with what Appellants term "*sui generis*" felons, Brief at 36, those two cases – *Mixon* in particular – are instructive on what an additional "qualification" is: an immutable characteristic of a person that deprives that person from ever being a qualified elector.[21] At one point in the Commonwealth's history, being female or non-white was disqualifying. Thankfully, the law has been amended to remove those disabilities. In *Mixon*, this Court affirmed legislation refusing absentee ballots to people who were in prison – a regulation regarding the use of absentee ballots, and not a straightforward disqualification of a class of electors (although it may well have had that effect). But the Court *reversed* the part of the statute that prohibited persons from registering to vote once they had been released because the Constitution does not allow the legislature to *disqualify* or disenfranchise a class of persons without a constitutional basis. Here, of course, the General Assembly has not disqualified or disenfranchised anyone; it has merely required that everyone bring proof of identity to the polls as a means of demonstrating that the person appearing to vote is the person who is registered to vote.

According to this Court's precedent, then, the photo identification in Act 18 does not add a new "qualification" to be an elector. It merely facilitates confirmation of an existing qualification and serves the precise constitutional purpose recognized in the historical cases discussed above. It is a legislative regulation to protect the votes of qualified electors by

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[21] As discussed *infra*, there are also cases in which the text of the qualifications was unconstitutionally ignored – as when Philadelphia required a twenty-day residency rather than ten. *Page v. Allen*, 58 Pa. 338, 351 (1868).

providing each citizen assurance that each person calling himself or herself "John Doe" or "Mary Smith" may properly cast a vote because the name matches *the face*.

Nor has the "free and equal" clause been construed to mean "without constraint." In fact, the Court has consistently recognized that the securing of a free and equal right to vote *requires* regulation. Indeed, *Patterson v. Barlow*, 60 Pa. 54 (1869), a case permitting different requirements for persons wishing to vote in the City of Philadelphia than elsewhere in the Commonwealth, can be read no other way:

> The precincts and places, the boards of election, the lists of the electors, whether called a list of taxables or a register of voters; *and the evidence of persons and qualifications* must all be prescribed by law. This undoubted legislative power is left by the Constitution to a discretion unfettered by rule or proviso, save the single injunction "that elections shall be free and equal." But to whom are the elections free? They are free only to the qualified electors of the Commonwealth. Clearly they are not free to the unqualified. There must be a means of distinguishing the qualified from the unqualified, and *this can be done only by a tribunal to decide, and by evidence upon which a decision can be made.* The Constitution does not provide these, and therefore the legislature must establish the tribunal, and the means of ascertaining who are and who are not the qualified electors; *and must designate the evidence which shall identify and prove to this tribunal the persons and the qualifications of the electors.* How shall elections be made equal? Clearly by laws which shall arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth. But how shall this freedom and equality be secured? The Constitution has given no rule and furnished no guide. It has not said that the regulations to effect this shall be uniform. It has simply enjoined the duty and left the means of accomplishment to the legislature. The discretion, therefore, belongs to the General Assembly, is a sound one, and cannot be reviewed by any other department of the government, except in a case of plain, palpable and clear abuse of the power which actually infringes the rights of the electors.

Id. at 76 (emphasis added and emphasis in the original removed); *see also Davidowitz v. Philadelphia Cnty.*, 324 Pa. 17, 26, 187 A. 585, 589 (1936) ("The policy of the law is to give to each voter a right of suffrage *subject to no undue hindrance or burden not imposed on every other voter.*") (Emphasis added).

Because "evidence" and "proofs" that an elector is a qualified elector are within the purview of the General Assembly to regulate, the Commonwealth Court properly found that the regulation did not violate either the "free and equal" provisions of Article I, § 5 nor establish a new qualification under Article VII, § 1.

B. THIS COURT HAS BEEN CONSISTENT IN THE WAY IT HAS VIEWED PROVISIONS LIKE THE VOTER IDENTIFICATION PROVISIONS.

The Appellants suggest that strict scrutiny is required under this Court's cases because the right is fundamental (and beyond the scope of the federal right) – and has been "consistently" found to be so. Brief at 33-34. In point of fact, this Court traditionally conducts two analyses – one of the constitutional provision itself and the second – if equal protection or due process has been asserted – to determine the level of scrutiny to apply.

Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991) and its progeny articulate the first step of this process: will the Commonwealth apply a federal rule – such as the exclusionary rule at issue in *Edmunds* or the admissibility of victim impact evidence at issue in *Commonwealth v. Means*, 565 Pa. 309, 773 A.2d 143 (2001) – given the separate scope of the Pennsylvania constitutional provision? To answer that question, the right is evaluated in light of its history within the Commonwealth and other federal and state precedent to determine whether Pennsylvania will follow the treatment of the right that federal courts propose, or whether it will instead apply the contrary rule where appropriate to effectuate its different constitutional values.

The position that *amicus* AFL-CIO advocated in the Commonwealth Court – and which Appellants have adopted here – is that this Court should transfer the evaluation whether a rule makes sense within Pennsylvania's constitutional scheme to the level of scrutiny to be applied for an equal protection or due process analysis. That would be an unwise and unwarranted change in the law. Although there have been equal protection and/or due process implications in

cases before this Court following *Edmunds*, the Court has never suggested that the Pennsylvania standard is any different than the federal standard. To the contrary, in *Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325 (2002), the Court expressly rejected the argument that the right to vote under the Pennsylvania Constitution is broader than the right under the United States Constitution. Moreover, it reiterated that the equal protection analysis under Article I, Sections 1 and 26 (raised in the original Petition here, but *not* before this Court) was "coterminous with its federal counterpart" and rejected the argument that Article I, § 5 provides more protection than the Equal Protection Clause. *Id.* at 138-39, 794 A.2d at 332.[22]

Here, the Commonwealth Court examined the underlying right under Pennsylvania precedent, in relation to other states' law and under pertinent federal precedent. By all measures, no exceptional rule was warranted. Accordingly, there is no reason to disturb this Court's holding in *Erfer* that Article I, Section 5 is subject to the same equal protection analysis as the United States Supreme Court and this Court have applied to similar questions. As the Commonwealth Court did here, this Court examines the precise right asserted, and, in circumstances comparable to this, it has concluded that what is being challenged is not the fundamental right to vote, but something that merely touches on that right and that does not warrant strict scrutiny.

Moreover, it is simply not the case that this Court has "consistently" held that each and every right implicating voting is a fundamental right. And it certainly has not held that as soon as a voter invokes the "right to vote," the standard of proof for the Commonwealth rises

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[22] Similarly, in *Magazine Publishers of Am. v. Dep't of Revenue*, 539 Pa. 563, 654 A.2d 519 (1995), where First Amendment – Article I, § 7, uniformity, and equal protection challenges were brought against removal of the sales tax exemption for magazines, the dissent would have applied *Edmunds* – but only to the underlying violation of freedom of speech and press; it did not take issue with the majority's application of a federally coterminous equal protection analysis. *Id.* at 577, 654 A.2d at 525-26.

exponentially. Instead, the Court has recognized that only in certain instances is the core constitutional right actually at issue – and that in matters relating to voting (as Judge Posner would later perhaps unconsciously echo),[23] election-related policy choices have consequences for that right whichever way the Court decides. *See Kuznik v. Westmoreland Cnty. Bd. of Commissioners*, 588 Pa. 95, 116, 902 A.2d 476, 488 (2006).

The *Nader* cases are instructive here. Although *Nader* came up to the Court at least three times, Appellants discuss only one portion of the first opinion. Brief at 34. In that opinion, this Court recognized that, while disqualification itself implicates a fundamental right, other bases for striking certain of the signatures on Nader's nomination papers did not. *See In re Nomination Papers of Nader*, 580 Pa. 22, 49-50, 858 A.2d 1167, 1183 (2004) (recognizing that requiring a signature is a means of preventing forgery and does "not concern the right of an individual to vote...[but] the steps that a candidate must take in order to be properly placed on a ballot."). Similarly, presenting a photo ID prevents a fraud akin to forgery and is nothing more than a step that a voter must take to ensure a proper ballot.

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[23] Judge Posner remarked in *Crawford* that requiring a photographic ID does not raise a question of a right to vote weighed against the deprivation of a right – but of *the right to vote* weighed against *the right to vote*. 472 F.3d at 952. In such cases, "strict scrutiny" makes no sense: when balancing two facets of the same right, the inquiry is whether the "character and magnitude of the asserted injury" outweighs the right of a state to ensure that elections are operated "equitably and efficiently." *Id.*, *quoting in part Anderson v. Celebrezze*, 460 U.S. 780, 788-90 (1983) and *quoting in part Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992).

The *Norwood Election Contest Case*, 382 Pa. 547, 116 A.2d 553 (1955) on which Appellants rely is one of several in which the Court considered whether the way in which ballots were handled meant that a ballot could not be counted (or, in other cases, whether it meant that all ballots from an election could not be counted), and the question at hand did not involve the authority of the General Assembly at all. These cases stand for the same proposition that motivated the General Assembly here: it is important that the will of the electorate be discerned and that administrative decisions are made in keeping with the principle that each vote should count, and the public should have confidence in that fact. *See also, e.g., Ayre's Contested Election*, 287 Pa. 135, 138, 134 A. 477, 478 (1926) ("To warrant throwing out the vote of an entire district the disregard of the law must be so fundamental as to render it impossible to separate the lawful from the unlawful votes.")

In fact, the *Nader* Court expressly found that the requirement that nomination papers be signed after or concurrent with registration "serves the compelling governmental interest of ensuring that only qualified electors participate in the nomination process" – an analysis that suggests that if this Court were to subject the statute here to greater scrutiny, it would nonetheless affirm the General Assembly's compelling interest in ensuring that only qualified electors participate in the voting process as well. 580 Pa. at 48, 858 A.2d at 1182. Read as a whole, then, the September 2004 *Nader* decision confirms what the Commonwealth Court found: that there is a distinction between regulations to effectuate voting (or being on a ballot) and the right itself. Where the regulation is what is at issue, the right is not "fundamental."

This was articulated even more clearly in the later *Nader* decision – not cited by Appellants – where the Court expressly applied a reasonable relation analysis. *See In re Nomination Paper of Nader*, 588 Pa. 450, 465, 905 A.2d 450, 459 (2006) ("Even if the statute did burden ballot access, which it did not, the burden would be reasonable and rationally related to the interest of the Commonwealth in ensuring honest and fair elections.").[24] The Court also quoted the United States Supreme Court's observation in *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983): "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.*

The same recognition that rules and regulations governing the conduct of elections do not burden fundamental rights was articulated in *In the Matter of the Nomination Petition of Phil Berg*:

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[24] This later decision challenged the imposition of costs after the extraordinary efforts to verify signatures revealed that approximately two-thirds were illegitimate.

> Similarly, we find that requiring a candidate to obtain 100 signatures from at least ten counties in the Commonwealth does not have a real and appreciable impact on voter's rights. The state's interest in managing the ballot size and ensuring statewide support for candidates provides a rational basis for the provision. Although voting is of the most fundamental significance under our constitutional structure, the right to associate for political purposes through the ballot is not absolute. To subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest would tie the hands of states seeking to assure that elections are operated equitably and efficiently.

552 Pa. 126, 133, 713 A.2d 1106, 1109 (1998) (internal citations omitted). These cases stand in stark contrast to *Page v. Allen*, 58 Pa. 338, 351 (1868), cited by Appellants, in which (after observing troubling aspects to a Philadelphia registry act) a majority concurred in finding unconstitutional a requirement that the act effectively extended the ten-day residency requirement that was *set forth in the text of the Constitution itself* to a twenty-day requirement by compelling ten-day affidavits to be filed ten days before the election.

The Appellants (Brief at 35) also criticize the Commonwealth Court's reliance on *Independence Party Nomination*, 208 Pa. 108, 57 A. 344 (1904) – one of the many cases referencing legislative authority to regulate how elections are conducted – because in the paragraph following the one on which the Commonwealth Court relied, the Court found that the restriction at issue went beyond such regulations and was an unconstitutional restriction. *Independence Party* involved a question about the contents of a ballot. At that time – as the portion quoted signals – the Court was of the view that "the use of an official ballot is a questionable exercise of legislative power" that "treads closely on the border of a void interference with the individual elector." Brief at 35, *quoting Independence Party*. It therefore did not look favorably upon the elimination of the Independence Party's slate of candidates. But that case did not say – as Appellants apparently read it – that the General Assembly's power to specify the evidence that an elector must provide in order to demonstrate that he or she is

qualified is somehow circumscribed. Instead, the line that the cases have drawn between "regulation" and "burden" is clear: the General Assembly has the authority to regulate "the manner in which elections shall be conducted and provide safeguards against attempts to unlawfully exercise the right to vote." *New Britain Borough School District*, 295 Pa. 478, 483, 145 A. 597, 598-99 (1929) (internal citations omitted).[25]

In sum, the Commonwealth Court conducted the appropriate analysis when it looked only to see whether the statute bore a reasonable relationship to the legislative purpose. *McCusker v. Workmen's Comp. Appeal Bd. (Rushton Mining Co.)*, 536 Pa. 380, 639 A.2d 776 (1994) (requirement that information be provided as a condition of eligibility did not burden a fundamental privacy right).

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[25] In evaluating how a court exercises its powers, a court does not focus on whether a statute might be "unwise, or of doubtful expediency, or that it may not be effective in correcting the evils intended to be remedied, or for any other reason not based upon a subversion of constitutional rights." *Winston v. Moore*, 244 Pa. 447, 451-52, 91 A. 520, 521 (1914). Accordingly, *Id.* This principle applies equally to Appellants' criticism that the General Assembly both went too far and at the same time did not go far enough by not revising the requirements for absentee ballots in the same way it did the in-person voting requirements. In upholding the constitutionality of the Political Subdivision Tort Claims Act, this Court rejected a similar argument:

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Carroll v. Cnty. of York, 496 Pa. 363, 437 A.2d 394 (1981), *quoting Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

In the case of absentee voting, the General Assembly rationally determined that photo identification would serve little purpose in matching a face to a name, because most such voting takes place outside the presence of an election official. Act 18 thus requires most absentee voters to supply his or her driver's license number or the last four digits of the voter's social security number, see 25 P.S. §§ 2602(z.5)(3), 3146.2, which the Act requires officials to match to the voter. See 25 P.S. §§ 3146.2b(c), 3146.8(h).

C. THIS COURT'S ANALYSIS IS CONSISTENT WITH FEDERAL SUPREME COURT ANALYSIS.

In finding that the statute had a legitimate sweep and in conducting its balancing test, the Commonwealth Court drew not only from this Court's cases, but also from the decisions of the United States Supreme Court and other courts. In particular, given that the analysis is so apt and so recent, the Commonwealth Court looked to *Crawford v. Marion Cnty. Election Board*, 553 U.S. 181 (2008) (plurality opinion), the case that upheld the Indiana voter ID law. The *Crawford* Court observed that both the NVRA and HAVA require states to verify voter registration data, identifying the last 4 digits of a social security number or a driver's license number as "acceptable verifications." *Id.* at 192, citing 42 U.S.C. § 15483(a)(5)(A)(i). Accordingly, the Court found, Congress has recognized that photo identification "is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology." *Id.* at 193. After reviewing anecdotal evidence of voter fraud ranging from Tammany Hall to "ghost voters" in Washington state in 2004 –and recognizing that it had been challenged as overstating the problem, the United States Supreme 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 sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Id. at 196. This echoed the Court's *per curiam* reversal of the Court of Appeals for the Ninth Circuit in *Purcell v. Gonzalez*, 549 U.S. 1 (2006):

> A State indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or

> dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Id. at 4 (internal citations omitted); *cf., Butcher v. Bloom*, 415 Pa. 438, 447, 203 A.2d 556, 561 (1964) (recognizing – in the context of districting – that when an individual's vote is diluted, that is an unconstitutional impairment of the right to vote).

The *Crawford* opinion characterized the request that the Court determine whether a possible added burden on a small number of voters outweighs the state's broad concern to protect electoral integrity as "unique." 553 U.S. at 200.[26] And it determined that the facial challenge had to fall before the "plainly legitimate sweep" of the Indiana statute. *Id.* at 202. The Court observed as well that it was not convinced that striking the entire statute would have been an appropriate remedy even if the petitioners had been able to demonstrate an unjustified burden – "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Id.* at 203 (internal citation omitted). Indeed, the three concurring justices in *Crawford* would have gone even further and found that as soon as the law was recognized as "a generally applicable, nondiscriminatory voting regulation," its impact on individuals was not relevant. *Id.* at 205; *see also id.* at 209 ("The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not 'even represent a significant increase over the usual burden of voting'") (internal citation omitted).[27] The Commonwealth Court found

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[26] The district court had found the expert's testimony about the number of voters without picture ID unreliable in *Crawford*, as the Commonwealth Court did here.

[27] It is not only federal courts that have reached this conclusion. State courts in Georgia, Indiana, and elsewhere have upheld such laws. *See, e.g., In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 17, 740 N.W.2d 444, 453 (2007) ("As this Court noted in the nineteenth century, the purpose of a law enacted pursuant to these constitutional directives "'is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. It is for the purpose of preventing fraudulent voting.' Under the Legislature's authority to 'preserve the purity of elections' and 'to guard against abuses of the

persuasive the conclusions and observations of the Supreme Court plurality – and appropriately so, given the common questions presented in the two cases, and given the fact that this Court has repeatedly applied federal equal protection analysis to cases construing Pennsylvania's constitutional provisions.

II. THE COMMONWEALTH COURT PROPERLY FOUND THAT THERE WAS NO EVIDENCE TO SUPPORT FACIAL INVALIDITY.

The Commonwealth Court expressly credited the testimony of the Department's employees, but it did not credit all of Professor Barreto's findings, and for good reason. First, Professor Barreto has been the ACLU "expert of choice" in fighting voter ID cases, and the Commonwealth Court was properly concerned that his conclusions were biased as well as unreliable. Opinion at 13; *see also* R. 653a; R. 770a-771a. The Court also found that Professor Barreto's estimate of persons who *cannot* vote was inflated to the extent that it included *all* persons eligible to register – and thus did not focus on those who had voted in 2008, or those likely to vote in 2012. Opinion at 13. There is also a disturbing implication in Professor Barreto's assessment that the hundreds of thousands of persons who have expired driver's licenses or PennDOT IDs should be counted as persons who are potentially disenfranchised because they will be unable to obtain appropriate ID to vote. The unrebutted testimony at the hearing was that anyone whose ID had expired after 1990 was in the PennDOT system and that that information could be readily and painlessly accessed, without any need for additional documentation, either to renew the license/ID or to generate an ID from an expired license. R. 1094a. There are strong and independent public policy reasons why any such persons should be encouraged to update their driver's license. The Commonwealth Court quite properly refused to

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elective franchise,' the Legislature may 'regulate, but cannot destroy, the enjoyment of the elective franchise.'") (internal citation omitted).

turn people's *choices* not to take advantage of a straightforward process into a measure of constitutionally significant disenfranchisement.

The Secretary and other members of the Department of State testified consistently at the hearing that the cross-run between the SURE and PennDOT databases significantly overstated the numbers of people who did not match by treating such information as a missing birthdate or missing space between Mc and Donald as a "non-match."[28] Because the Secretary and other Department representatives are speaking about a matter within their official expertise, the Court accords deference to the Secretary's testimony and the testimony of other responsible officials and employees of the Department. *Kuznik v. Westmoreland Cnty. Bd. of Commissioners*, 588 Pa. 95, 140, 902 A.2d 476, 502-03 (2006) (concluding HAVA preempted Pennsylvania's requirement of referendums prior to acquiring voting machines).

When testifying before the State Government Committee, Mr. von Spakovsky quoted surveys that showed that no one had been disenfranchised in the other states that had implemented photo ID laws. In Georgia and Indiana "virtually no voters" were turned away from the polls in 2008 – and this was true across racial lines. That, of course, is the Governor's and Secretary's goal for Pennsylvania as well. Toward that end, and as set forth above, the Secretary – and the entire Department of State – has been taking and continues to take steps to ensure that everyone who wants to vote in November can obtain proper identification.

At pages 42-44 of their brief, Appellants criticize the Commonwealth Court for taking into consideration the Department of State's introduction of an alternative photographic ID card that would allow persons who are having difficulty securing ID from PennDOT to vote this

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[28] For those persons whose names do not match because of marriage or divorce, or for some other reason, there is likewise a simple form (available online) for updating photo IDs and licenses. *See* http://www.dmv.state.pa.us/change_name/index.shtml, last visited 9/06/2012.

November. It is not clear why – if their goal truly is to see all persons who wish to vote at the polls in November – Appellants would take issue with the Department's provision of cards that do not rely on underlying documentation that a small number of voters may be delayed in obtaining. Such identification is clearly within the contemplation of the statute, *see* 25 P.S. § 2602(z.5)(2), which requires that a voter present a document that has been issued by, among others, the Commonwealth, and that contains name, expiration date, and a photograph.

Appellants nonetheless attack the Department's actions, citing mainly to cases in which various statutes proscribed conduct and the defendants tried to avoid a court's construction of the plain text of the statute by making representations about the extent to which they intend to enforce that text. An agency's assurances of leniency admittedly could not add anything to a Court's assessment of a statute's constitutionality, because an agency's authority comes from statutes, and the agency does not "have the power to redefine its authority at will." *Seeton v. Pennsylvania Game Comm'n*, 594 Pa. 563, 574, 937 A.2d 1028, 1034 (2007). In this case, however, the Secretary and the Governor are *not* seeking to convince a court that they will overlook non-compliance with Act 18; rather, the Department of State is issuing identification according to the terms of the statute. These steps are clearly relevant in a case in which the Appellants persist in accusing the Commonwealth of seeking to turn away people from the polls, despite the testimony at the hearing that the Commonwealth has no such intention.

> [T]he Governor has directed not only the Department of State, but all the agencies involved in Pennsylvania government with respect to voter ID to do all that we can to make sure that citizens are registered and citizens have photo IDs.

R. 1366a (Testimony of Secretary Aichele).

III. THE APPELLANTS DID NOT SATISFY THE SIX REQUIREMENTS TO WARRANT A PRELIMINARY INJUNCTION.

There are six prerequisites that Appellants had to satisfy in order to warrant preliminary injunctive relief in the Commonwealth Court that:

> 1. relief is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages;
> 2. greater injury will occur from refusing to grant the injunction than from granting it;
> 3. the injunction would restore the parties to their status quo as it existed before the alleged wrongful conduct;
> 4. petitioner is likely to prevail on the merits;
> 5. the injunction is reasonably suited to abate the offending activity; and
> 6. the public interest will not be harmed if the injunction is granted.

Brayman Constr. Corp. v. Commonwealth Dep't of Trans., 608 Pa. 584, 601, 13 A.3d 925, 935 (2011). Appellants urge the Court to rewrite these standards and, in particular, to substitute "raises a substantial legal question" for "likelihood of success on the merits." *See* Brief at 27. But if the extraordinary remedy of entering a preliminary injunction were warranted every time someone raised a legal question, preliminary injunctions would be commonplace, not rare. Indeed, many of the Court's cases have stressed that "likely to prevail" requires a showing both about the defendant (that it is committing a manifest wrong) and the plaintiff (that there is a clear right to relief) in order to warrant entry of a preliminary injunction. *Singzon v. Commonwealth*, 496 Pa. 8, 11, 436 A.2d 125, 127 (1981) (quoting multiple cases and concluding that plaintiffs failed to demonstrate that threatened cutbacks at a hospital – while placing a strain on available resources – created an actual threat to the health, safety, and welfare of patients). Here, the Commonwealth Court carefully and properly considered the Appellants' showing that some persons would have to take additional steps to vote in November but concluded that those steps do not constitute an actual threat to the right to vote.

Appellants point to a case from this Court, *Fischer v. Dep't of Public Welfare*, 497 Pa. 267, 439 A.2d 1172 (1982) for their contention that the standard should be relaxed for them. But *Fischer* does not stand for the proposition that invocation of the Constitution is enough to require only a "substantial legal issue." Instead, the *Fischer* Court was *affirming* a grant of a preliminary injunction – a standard of review that, as noted above, required only "any reasonable ground." Moreover, in that case, women who urgently and immediately needed medical care were threatened with deprivation of funding for that care. Consequently, the danger inherent in refusing the injunction was too high, and the threat too immediate and too one-sided to wait until the merits could be sorted out. Under those conditions, the fact that two courts in other jurisdictions had granted relief was sufficient to establish a sufficient likelihood of success to warrant preliminary relief pending a merits determination. *Id.* at 271-72, 439 A.2d at 1174-75. Here, in contrast, the trial court (rightly) has *refused* the injunction, unconvinced that there would be any – let alone irreparable or immediate – harm. Moreover, even beyond the careful analysis that the Commonwealth Court conducted, there are aspects to this case that make it particularly inappropriate for injunctive relief.

First, Appellants overstate what the Commonwealth Court did when they say that court "found" that a preliminary injunction "would restore the status quo," Brief at 27, citing Opinion at 10. The Commonwealth Court stated only that it was going to discuss the three prerequisites that it had determined not to be established – but that it had considered all six. Opinion at 10. On the other hand, nowhere did the Commonwealth Court ask – or need to ask – the question whether the "status quo" Appellants seek to restore undermines their other arguments.

For purposes of a preliminary injunction, "status quo" is "the last actual, peaceable and lawful noncontested status which preceded the controversy." *Fairview Sch. Dist. v.*

Commonwealth, 499 Pa. 539, 544, 454 A.2d 517, 520 (1982). Here, the state of the prior law was not that all citizens could vote in each election whether or not they possessed any ID. Although Appellants assiduously avoid characterizing what the General Assembly did as an "incremental" reform, that is what Act 18 is. In seeking to restore that state of the prior law, Appellants must concede that that law was perfectly constitutional and that it was appropriate for the General Assembly to require that every person *coming to an election district for the first time* present one of certain enumerated kinds of ID. In other words, they necessarily concede that requiring evidence of qualification as an elector at a polling place is properly within the authority of the General Assembly. Moreover, while it is true that these forms of ID were not all "photographic," they did all presume that a person could establish his or her identity and qualifications to vote by documents such as utility bills, paychecks, and bank statements.

There is no showing that persons who may need to make some effort to secure identification to bring to the polls would not have needed to expend that effort previously. In fact, the testimony suggested the opposite. Ms. Ludt, the expert from Face to Face, testified at the hearing and described the work that she and the others with her do to assist persons in need. Her work predates Act 18 and is intended to provide Pennsylvanians access to federal and other benefits:

> Well, it's important for clients for a number of reasons. Initially, one of the most pressing reasons was because our local Social Security office was paired with the VA center, and you had to have photo ID to enter, because there was stricter standards for security. But also, I encourage clients to open bank accounts when they get Social Security benefits, so that they can have direct deposit. There were some FEMA funds that became available. Actually my organization administered them. And one of the criteria was you have to have photo ID. And for the low-income utility programs, they also require you to submit your photo ID.

R. 580a-581a. Ms. Ludt's testimony makes it clear that her clients – whom she also described as highly transient, R. 601a – need the photographic ID that she is trying to get for them in order to

have access to the benefits and practicalities they need to survive. *Those* benefits and practicalities are in turn evidenced by even the non-photographic ID that the prior statute required to be shown when a person moved and voted in a new district for the first time. *See* prior 25 P.S. § 3050.

In other words, the assistance that Ms. Ludt is providing will enable those people to vote under the current statute and was equally vital under the prior standard. This is significant, because Appellants argue that Act 18 imposes an immediate and irreparable harm in a way that discriminates against a class of persons and adds an unconstitutional burden that deprives them of the right to vote. The burden is not measured by asking whether Pennsylvania can move from a system in which there are no prerequisites to a person's exercising a right to vote to a system in which there are. It is measured by asking whether applying identification requirements universally instead of only when a person comes to an election district for the first time is an unconstitutional burden. It is not.[29] Moreover, as the first named plaintiff, Ms. Applewhite has demonstrated,[30] the steps the Department is taking to get photographic IDs into the hands of people who want to vote and have been without it are working.

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[29] In fact, some of the forms of ID here – in particular, the option of receiving the necessary ID from a care facility – were not available in the prior statute, and are more sensitive to the needs of those senior citizens who may have retired and moved into a facility where they no longer pay for utilities. Of course, many do not need that option. According to the AARP, in 2009, 15 percent of all drivers were over the age of 65; indeed 88 percent of persons over the age of 65 drive, and almost 70 percent of those over the age of 75 do. AARP Public Policy Institute. *How the Travel Patterns of Older Adults are Changing: Highlights from the 2009 National Household Travel Survey*, available at http://assets.aarp.org/rgcenter/ppi/liv-com/fs218-transportation.pdf, at 2, 4, last visited 9/06/2012.

[30] *See* http://articles.philly.com/2012-08-18/news/33249335_1_penndot-id-new-voter-identification-law-penndot-center, last visited 9/06/2012, discussing the fact that Ms. Applewhite got her ID the day after the Commonwealth Court decided not to enjoin the statute.

All of the statutes adopted in the wake of the NVRA and HAVA provide assurances of integrity to voters, candidates (and objectors) – but they all do so by requiring some additional evidence that the person voting is the same person who registered to vote. By asking to return to those laws, Appellants are conceding that such requirements are lawful – and that concession undermines their insistence that this statute imposes new burdens that are immediately and irreparably harmful.

Second, Appellants argue that the Commonwealth Court found that the alleged harm was irreparable. Brief at 27, citing Opinion at 10. What the court found instead was that if Act 18 "operate[d] to prevent the casting or counting of in-person votes of qualified electors in the general election" the resulting harm would be irreparable. Opinion at 10. But the Commonwealth Court did not find that the statute – as applied – would have that effect. Instead – as Appellants concede – this is a facial challenge to a statute that has not yet been applied. *E.g.*, Brief at 53. Said another way, if the Commonwealth Court had found that the statute was a disenfranchising statute, the disenfranchisement would constitute irreparable harm. *Id.* But the Commonwealth Court evaluated at great length whether what the Appellants were complaining about amounted to disenfranchisement. It found that (a) Professor Barreto had inflated the numbers of people *potentially* affected; (b) when weighed against the opportunities available to secure a qualifying ID prior to the election, there was no showing that any persons would actually be prevented from voting by the law; and (c) that persons who were too infirm to secure the necessary ID would fall within the statutory qualification for an absentee ballot. Opinion at 10-14. It followed from those findings that Appellants' invocation of the term "disenfranchisement" was not substantiated in fact. This Court has used various terms to incorporate the same essential concept: an injunction cannot issue based upon speculation.

Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc., 573 Pa. 637, 649, 828 A.2d 995, 1002-03 (2003) (affirming a denial of an injunction where the evidence was predominantly hypothetical and speculative, and discussing cases in which the same requirement was referred to as a failure to provide actual proof; no showing of necessity; and a rejection of speculative considerations).

Third, Appellants unfairly impugn the Commonwealth Court's conclusion as a conflation of "immediacy" with "inevitability." Brief at 28 ("The court nevertheless concluded Appellants had not established that this harm is "immediate" because it is not "inevitable" . . . . The court below used "immediacy" and "inevitability" interchangeably in its analysis..."), citing Opinion at 10, 11, 14. In fact, the Commonwealth Court stated that "Petitioners did not establish, however, that disenfranchisement was immediate *or* inevitable" (Opinion at 10) (emphasis added); that no credible evidence showed that a Petitioner needed to be disenfranchised or would be disenfranchised in the November election (Opinion at 11); and that evidence about the new DOS ID was relevant both to immediacy and to inevitability (Opinion at 14). The Commonwealth Court was arguably being generous to the Appellants – given that, as in *Crawford*, the relief Appellants demanded was to strike the entire Act, 553 U.S. at 203 – by suggesting that they might have been able to demonstrate disenfranchisement *at this election* – *i.e.*, immediately – *even if* they failed to establish disenfranchisement from all future elections. Because they did not do either, the Commonwealth Court properly found that there was no "urgent necessity" to warrant entry of the preliminary injunction. *See New Castle Orthopedic Assoc. v. Burns*, 481 Pa. 460, 392 A.2d 1383 (1978) (plurality opinion).

Fourth, any immediacy concern here favors the Commonwealth, not Appellants. As the United States Supreme Court recognized in *Purcell*, "[c]ourt orders affecting elections,

especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S. at 4-5. The Department of State has been pressing forward and expending tremendous amounts of time and money to ensure that persons working at the polls – and voters – are both educated and prepared, so that everyone who wishes to vote in November can – just as they did in 2008 in Georgia and Indiana.

Moreover, if the preliminary injunction does not issue, the steps that will be taken in the absence of an injunction are steps everyone should agree are positive. As Ms. Ludt's testimony demonstrated, any citizen who gets photographic ID in order to vote is also opening up the ability to participate more fully in many aspects of society and to avail himself or herself of benefits otherwise foreclosed. And if the statute provides people an added impetus to make now-expired driver's licenses current, that is also positive.

CONCLUSION

In sum, the members of the General Assembly were aware of the intensity of the debate that has been raging in the courts and the press for a number of years. As it should have, the General Assembly listened to both sides and deliberated before it enacted the statute. At the end of the day, it believed that the ability to assure its constituents that their vote would be counted – and accorded its full weight – was worth taking an incremental statutory step to have every voter show photographic ID each time he or she comes to the polls. The fact that the General Assembly credited the strongly-held views of one side over the strongly-held views of the other is not pretextual; it is the essence of the democratic process. Appellants have recourse, of course. They can change their legislators and campaign for different legislation.

What they have tried to do instead is to convince the Commonwealth Court that the right at stake is so fundamental, and the encroachment upon it so devastating, that they are entitled to a preliminary injunction to stop the Act even before it has been applied. This is not the first time that people who sought to persuade the General Assembly of the wisdom of their viewpoint and failed looked to the courts for redress. But "the power of the legislature to make laws is supreme except as limited by the Constitution." *Winston v. Moore*, 244 Pa. 447, 451-52, 91 A. 520, 521 (1914). Accordingly, a court does not focus on whether a statute might be "unwise, or of doubtful expediency, or that it may not be effective in correcting the evils intended to be remedied, or for any other reason not based upon a subversion of constitutional rights." *Id.* To the contrary, the courts allow the General Assembly to make policy choices on the questions the General Assembly is supposed to address.

That is all that has happened here, and there is no legal justification for nullifying the decision the General Assembly made. Under this Court's precedents construing the relevant

Constitutional provisions, the proper standard for entry of a preliminary injunction – and the presumption of validity of legislative enactments – the Commonwealth Court's judgment deserves to be affirmed.

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Respectfully Submitted,

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PROOF OF SERVICE

I, D. Alicia Hickok, certify that I am this day serving by electronic mail and First Class Mail, postage prepaid, the foregoing Principal Brief of Appellees Thomas W. Corbett, in his capacity as Governor and Carol Aichele, in her capacity as Secretary of the Commonwealth, which service satisfies the requirements of Pa.R.A.P. 121 and this Court's orders in this matter.

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