IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 330 MD 2012

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

Petitioners,

v.

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

Respondents.

# POSTHEARING MEMORANDUM ON REMAND OF RESPONDENTS COMMONWEALTH OF PENNSYLVANIA, THOMAS W. CORBETT IN HIS CAPACITY AS GOVERNOR, AND CAROL AICHELE IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH


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Yesterday, in closing, petitioners argued that the six requirements for a preliminary injunction are "out the window." And they argued that the respondents could not satisfy the insurmountable burden placed on them by the supposedly narrow mandate of the Supreme Court. Only one of those propositions is correct: the directive of the Supreme Court – while not a mandate – was narrow.[1] But the narrowness of the directive did not erase the posture of the case before this Court, and it did not transform the law governing injunctive relief. The Court is being asked to determine the constitutionality of an incremental step – a task it can accomplish only by placing the requested remedy within the framework of the petitioners' claims.

For a decade, everyone in the Commonwealth who has moved into a new home has had to show certain kinds of proofs of identity the first time he or she voted at a new polling place. Act 18 amended the list of what forms of identification were acceptable and asked everyone -- and not just people who move – to make that showing at the polls. That decade-old regime is what the petitioners argue is the last constitutional status of the parties. In other words, petitioners cannot argue that it is unconstitutional to require people to bring evidence of their identity to the polls. That is already part of our law. It follows that they bear the burden to show that Act 18 is different from the prior statute in kind and not in degree – that the new statute

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[1] At the beginning of this hearing on remand, the petitioners insisted that it was their right to go first and control the presentation of the evidence; a right that is accorded to plaintiffs precisely because plaintiffs bear the burden of proof. This is particularly true because "any party challenging the constitutionality of a statute must meet a heavy burden, for we presume legislation to be constitutional absent a demonstration that the statute 'clearly, palpably, and plainly' violates the Constitution." *Konidaris v. Portnoff Law Assoc., Ltd.*, 598 Pa. 55, 69, 953 A.2d 1231, 1239 (2008) (internal citation omitted); *cf Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009) ("The NAACP and voters argue that the district court erred by not requiring Georgia to prove both that in-person voter fraud existed and that requiring photo identification is an effective remedy, but Georgia did not have that burden of proof. Anderson requires a state to 'identif[y the] . . . interests that it seeks to further by its' regulation, but Anderson does not require any evidentiary showing or burden of proof to be satisfied by the state government.") (internal citation omitted).

places an unconstitutional burden on the right to vote, while the old statute did not. This Court correctly rejected that contention in August.

Distilled to its essence, what the Supreme Court found was that the General Assembly had set up a statutory scheme that counterbalanced the need for everyone to have photographic ID when they come to the polls with 25 P.S. § 2626, the statutory provision that the Supreme Court found embodied the General Assembly's intended "liberal access" to photographic ID for voting. In full, the pertinent portion of the opinion reads:

> PennDOT shall issue them at no cost: to any registered elector who has made application therefor and has included with the completed application a statement signed by the elector declaring under oath or affirmation that the elector does not possess proof of identification . . . and requires proof of identification for voting purposes. Act of Mar. 14, 2012, P.L. 195, No. 18, § 2; see 25 P.S. § 2626(b). As such, the Law establishes a policy of liberal access to Section 1510(b) identification cards.

Majority Op. at 2-3. The Supreme Court concluded that it could not glean from the record before it whether the legislative intent had been satisfied, because the DOS ID – the one that was to satisfy the requirements of the statute – was not yet in production at the time of the original hearing. Accordingly, the Court remanded with direction to make a record as to whether the implementation of Act 18 satisfied the statute's requirements, namely that (1) a card be available (2) to registered electors (3) from PennDOT (4) upon application (5) for free – something that the Supreme Court recognized would require an assessment of the DOS card's implementation.

> Faced with the above circumstances and the present litigation asserting that the Law will impinge on the right of suffrage, representatives of the state agencies have testified under oath that they are in the process of implementing several remedial measures on an expedited basis. Of these, the primary avenue lies in the issuance of a new, non-secure Department of State identification card, which is to be made available at PennDOT driver license centers. However, preparations for the issuance of Department of State identification cards were still underway as of the time of the evidentiary hearing in the Commonwealth Court in this case, and

> the cards were not slated to be made available until approximately two months before the November election. N.T. at 534, 555, 706, 784, 993. Moreover, still contrary to the Law's liberal access requirement, applicants for a Department of State identification card may be initially vetted through the rigorous application process for a secure PennDOT identification card before being considered for a Department of State card, the latter of which is considered to be only a "safety net." N.T. at 709, 711, 791-95 (testimony from the Commissioner of the Bureau of Commissions, Elections and Legislation that applicants who are unable to procure a PennDOT identification card will be given a telephone number to contact the Department of State to begin the process of obtaining the alternative card); see also N.T. at 993.

Majority Op. at 4.

In that regard, this case is somewhat like *Wilkinsburg Educ. Ass'n v. Sch. Dist. of Wilkinsburg*, 542 Pa. 335, 667 A.2d 5 (1995) (although there the court did not hold any hearing in the first instance), in that the Supreme Court's review of the propriety of an injunction was limited because key facts that were necessary to its evaluation were not in the record. *Id.* at 343-44, 667 A.2d at 9. In *Wilkinsburg*, as here, the Supreme Court provided definition and guidance, but left it to the trial court to develop the facts and apply the law to the facts. *Id.* ("In sum, on remand, the best interest of the children is the polestar."). This is most apparent from the Court's choice on remand. While the two justices in dissent would have directed the entry of an injunction, the majority expressly committed the determination of the effect of the evidence to this Court's discretion.

## I. The Record on Remand Does Not Support Imposing a Blanket Injunction.

The Supreme Court gave guidance to this Court on how to measure whether the DOS ID had achieved the General Assembly's intent:

> [A]t oral argument before this Court, counsel for Appellants acknowledged that there is no constitutional impediment to the Commonwealth's implementation of a voter identification requirement, at least in the abstract. Given reasonable voter education efforts, reasonably available means for procuring identification, and reasonable time allowed for implementation, the Appellants apparently would accept that the State may require the presentation of an identification card as a

precondition to casting a ballot. The gravamen of their challenge at this juncture lies solely in the implementation.

Majority Op. at 5. The evidence as to each of these three criteria is discussed below:

A. There Have Been Reasonable Voter Education Efforts.

Mr. Royer testified about the widespread multimedia campaign that the Department of State has undertaken. N.T. 9/25/2012 at 136-57, 165-78. This involves television, cable, print, billboard, buses and social media, reaching every market in the state. [Ex. R-2 at 2, 4, 5, 6; Ex. R-3 at 9; Ex. R-5; Ex. R-6; Ex. 179] Particular attention has been paid to reaching non-English-speaking and minority voters. [N.T. 9/25/2012 at 146, 154-55; Ex. R-1 at 1, 2; Ex. R-2 at 2-4; Ex. R-7] In addition, the Voter ID reports Mr. Royer receives regularly show the number of events and forums that he, the Secretary, and others attend, events ranging from a visit to a specific senior center or church to presentations at League of Women Voters or NAACP trainings. [Ex. R-1 at 3-7; Ex. R-2 at 2-5; Ex. R-3 at 3-8]. These efforts are now intensifying, yet – as some of petitioners' own witnesses attested – they have already been effective. *E.g.*, N.T. 9/27/12 at 329; Declaration of C. Moore at Ex. 1 at 2.

B. There Have Been Reasonably Available Means for Procuring Identification.

The record is clear that the introduction of the DOS product became a freely available alternative almost from the inception of the program. Within the first few days of the program, the two Departments recognized that the hours of the Department of State phone line matched PennDOT's posted hours – but that PennDOT's policy of turning no customer away unserved meant that those posted hours did not reflect the hours that telephone support actually needed to be available. [N.T. 9/25/2012 at 232-33; 9/27/2012 at 485-88] Also within the first few days of

the program, the Department of State recognized that its existing Tier 2 response (the more complex analysis of voter registration records prompted when an exact match is not found) was not being accessed efficiently, and the Department revised that procedure as well. [*Id.*] Although not directly pertinent to the DOS ID, PennDOT recognized that for those persons looking for the free PennDOT voter ID, the administrative obstacle was occurring with Department of Health records and those two agencies created a seamless interface to serve customers while they were at PennDOT. [N.T. 9/25/2012 at 3-38; Ex. R-3 at 3].[2] Moreover, the Department of State came alongside PennDOT in assisting with the 8th and Arch Street Center – the busiest in the Commonwealth, issuing 20 percent of all IDs. [Ex. R-3 at 2].

In order to make the problems appear more serious than they were, the petitioners frequently put two witnesses on to tell a single story. *See, e.g.*, [N.T. 9/27/2012 at 426-39 (Thompson retelling Hockenbury); N.T. 9/27/2012 at 352-56 (Purdie retelling Pannell); Declaration of Brenda Andrews and Testimony of D. Currie; Declaration of D. Sonntag retelling Declaration of M. Goldson; Declaration of E. Rebhorn retelling Statement of Jean Foreman]. They also presented witnesses whose descriptions of problems were so vague that they could not possibly be verified or rebutted. [N.T. 9/27/2012 at 361-64, 399-402, 538]. Despite these attempts to magnify the problems people experience (almost exclusively in Philadelphia – and many during those first days of implementation of the DOS ID), the statistics are telling: although many of the witnesses came from SEIU's hired activists' concerted efforts to collect evidence of problems, most of the witnesses had their IDs. [Declaration of B. Andrews; Declaration of T. Brown;

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[2] This collaboration had occurred well before the original hearing, and the streamlined communication eliminated a second trip for many people, cutting what could be a ten-day wait to a 30-minute wait. [ Ex. R-3 at 3].

Declaration of L. Flynn; Declaration of C. Moore; Declaration of J. Sharp, Jr.; Declaration of M. Sudler; N.T. 9/27/2012 at 318, 341, 369, 416].

Both the quality of the evidence presented and the fact that petitioners – despite their best efforts – could find so few people who were actually unable to secure ID demonstrate that their specter of disenfranchisement has dissipated to mere speculation. In this regard, it is telling that the Supreme Court supported this Court's discretion by reference to *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mountain, Inc.*, 573 Pa. 637, 828 A.2d 995 (2003), a case in which the Supreme Court upheld a denial of a preliminary injunction where the petitioner's evidence was speculative. *Id.* at 649, 828 A.2d at 1002-03 (affirming denial of injunction where the testimony "rested almost entirely on speculation and hypothesis" and discussing cases). Certainly, the only one of the petitioners who testified she still did not have her ID was Nadine Marsh – and she has been sent her DOS ID letter.[3] [Ex. R-14].

Moreover, most of the evidence proffered by the petitioners is colorful but not pertinent to this Court's analysis. The stories are focused on consequences attendant upon elements of the very provision that the General Assembly intended to guarantee liberal access. There were repeated complaints in support of one of two points: (1) the Department of State ID has not been available to persons who are not registered electors; and (2) some persons have had frustrating experiences while at PennDOT.[4] Although

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[3] In her declaration, it is apparent that Nadine Marsh presented the letter she sent to the Department of Health asking for her birth certificate rather than the letter from the Department of Health advising her that her birth certificate was unavailable. The former letter suggests that she was still a candidate for the PennDOT free ID, even though she in fact was not. [Ex. 232].

[4] There are two additional categories of petitioners' evidence: (1) persons who sought to renew a current (or expired less than a year) PennDOT product or exchange an out-of-state product for a PennDOT product; and (2) persons who assert they can travel to the polls but not to PennDOT. The former category arises from what is now understood to be a misconstruction of the statute to require "application to PennDOT" prior to the issuance of the

one might empathize with the stories, they do not justify entry of an injunction for three reasons.

*First*, both of these requirements – that the applicant be a registered elector and that the photographic ID be issued through PennDOT – are set forth in the text of 25 P.S. § 2626 itself, the very statutory provision that the Court found set forth the means for liberal access.

*Second*, the choices that the General Assembly has made are not made in a vacuum, but are instead a balancing of alternatives. *See, e.g., DePaul v. Commonwealth*, 600 Pa. 573, 607, 969 A.2d 536, 557 (2009) ("In other words, we are required to presume the General Assembly knew exactly what it was doing when it promulgated Section 1513, notwithstanding any articulated public policy provision that superficially seems to be in conflict with the actual legislation").

This is evident in the General Assembly's deliberate choice of the term "registered elector" in 25 P.S. § 2626. This is a defined term. 25 Pa.C.S. § 1102 differentiates between "applicants" and "registered electors" because only registered electors have gone through the approval process required by 25 Pa.C.S. § 1328. Moreover, the petitioners' insinuation that the Department of State should somehow take responsibility for the approval of voter registrations is precluded by the registration statute itself. 25 Pa.C.S. § 1328 reads:

> (a) Examination. --Upon receiving a voter registration application, **a commissioner, clerk or registrar of a commission shall do all of the following:**
>
> (1) Initial and date the receipt of the application.

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DOS card – the "exhaustion" requirement. The Commonwealth acknowledges that its construction conflicted with the Supreme Court's, and it recognizes that this Court may well enter an injunction prohibiting that offending construction. Its change in policy was an effort to bring it into compliance with the Supreme Court's construction of the statute, not an attempt to circumvent this Court's authority and obligation to enter such an injunction.

(2) Examine the application to determine all of the following:

(i) Whether the application is complete.

(ii) Whether the applicant is a qualified elector.

(iii) Whether the applicant has an existing registration record. After the commission is connected to the SURE system, the commissioner, clerk or registrar shall search the SURE system on a Statewide basis to determine if the applicant has an existing registration record.

(iv) Whether the applicant is entitled or qualified to receive the requested transfer or change, if applicable.

(b) Decision. --**A commission shall do one of the following**:

(1) Record and forward a voter registration application to the proper commission **if the commission finds during its examination** under subsection (a) that the applicant does not reside within the commission's county but resides elsewhere in this Commonwealth.

(2) Reject a voter registration application, indicate the rejection and the reasons for the rejection on the application and notify the applicant by first class nonforwardable mail, return postage guaranteed of the rejection and the reason **if the commission finds** during its examination under subsection (a) any of the following:

* * *

(1) **When a commission has accepted a voter registration application under subsection (b)(3), the commission shall assign each applicant a unique identification number in the SURE system.** The commission shall mail a wallet-sized voter's identification card to the individual by first class nonforwardable mail, return postage guaranteed, which shall serve as notice of the acceptance of the application. The card shall contain all of the following:

(i) Name and address of the individual.

(ii) Name of municipality of residence.

(iii) Identification of the individual's ward and district.

(iv) The effective date of registration.

(v) Designation of party enrollment and date of enrollment.

(vi) A space for the individual's signature or mark.

(vii) The unique identification number of the individual.

(viii) A statement that the individual must notify the commission within ten days from the date it was mailed if any information on the card is incorrect; otherwise, the information shall be deemed correct for voter registration purposes.

(2) **When a commission has accepted a voter registration application under subsection (b)(4), (5), (6), (7) or (8), the commission shall mail** a wallet-sized voter's identification card to the individual by first class nonforwardable mail, return postage guaranteed, which shall serve as notice of the acceptance of the application. The card shall contain all of the following:

(i) Name and address of the individual.

(ii) Name of municipality of residence.

(iii) Identification of the individual's ward and district.

(iv) The effective date of registration.

(v) Designation of party enrollment and date of enrollment.

(vi) A space for the individual's signature or mark.

(vii) The SURE registration number of the individual.

(viii) A statement that the individual must notify the commission within ten days from the date it was mailed if any information on the card is incorrect; otherwise, the information shall be deemed correct for voter registration purposes.

(3) An envelope containing a voter identification card shall be marked on the outside with a request to the postmaster to return it within five days if it cannot be delivered to the addressee at the address given.

(i) **If an envelope containing a voter identification card has been mailed in accordance with paragraphs (1) and (3) and has not been returned to the commission by the postmaster within ten days from the date it was mailed, the individual shall be deemed a registered elector of the county and the commission shall enter the individual's registration information in the general register.** The unique identification number shall be entered as the registered elector's SURE registration number. No person shall be deemed a registered elector of the county until ten days after the voter identification card has been mailed.

(ii) If an envelope containing a voter identification card has been mailed in accordance with paragraphs (2) and (3) and has not been returned to the commission by the postmaster within ten days from the date it was mailed, **the individual shall be deemed a registered elector of the county and the commission shall enter the individual's registration information in the general register. No person shall be deemed a registered elector of the county until ten days after the voter identification card has been mailed.**

(5) If an envelope containing a voter identification card is returned by the postmaster because the envelope is undeliverable at the given address, **the commission shall investigate. If the commission finds that the individual is not qualified to register from the address, the commission shall reject the application and shall notify the individual by first class forwardable mail of this action.**

25 Pa.C.S. § 1328 (in pertinent part) (emphasis added). In other words, the tasks related to the approval (or disapproval) of registrations have been wholly allocated to the counties. In the same way, legislators are well aware of both the constraints upon and the powerful and pervasive distribution network available through PennDOT. It follows that any drawbacks to the General's Assembly's choice should be viewed as an intentional balancing.

*Third*, the petitioners presented testimony about similar troubles during the first hearing, and the Supreme Court nowhere suggested that this Court should have given more weight to those complaints. If the Supreme Court had believed that it was unconstitutional to ask someone to get (some forms of) acceptable photographic identification through PennDOT, there would have been no need for a remand. The Court's decision to remand in itself refutes the contention that inconveniences such as attend some people's visits to PennDOT are of constitutional significance in evaluating Act 18.

C. There Has Been Reasonable Time for Implementation.

The results are telling. The exceptions file contains 104 records[5] of "exceptions" – *i.e.*, instances when a person applying for a DOS ID was not issued that ID at the time of initial application. [Ex. 217; Ex. 218]. Of these, 22 were generated the first day, and 57 in the first three days. [*Id.*]. These first days of the DOS ID were in August – traditionally (and this year) the busiest month of the year for PennDOT. [Ex. 126; N.T. 9/25/12 at 67]. By the middle of September, there were days when only one – or no exceptions whatsoever – were generated.

Almost all of the exceptions relate to persons who are not yet registered voters, and the Department of State checks for updated registration data multiple times each day in order to get persons their ID as soon as their registration is approved.[6] [N.T. 9/27/2012 at 490; Ex. 217-218]. Of the original 104, 33 letters had been sent out to notify voters that they were authorized to get their DOS ID by the time the hearing began (and more are resolved each day). [Ex. R-8; Ex. R-9]. At the same time that the exceptions were decreasing, the numbers of DOS IDs issued were increasing. Approximately 1300 DOS IDs have been issued in the month since the DOS ID became available, in addition to the roughly 9,500 free voter IDs.[7] [Ex. R-1; Ex. R-3; N.T. 9/25/2012 at 57]. In no small part, this is attributable to the tireless dedication of the persons responsible for the implementation of the statute. [N.T. 9/25/2012 at 234; Ex. R-10].

## II. If the Court Concludes an Injunction is Proper, the Election Code Provides a Path for Crafting an Appropriate Injunction.

As is clear from the above, this Court has been entrusted with making findings with regard to three measures of the availability of the DOS ID: education, access, and degree of

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5 Three persons have duplicate files.

6 Two persons had other reasons for being denied. David Parker refused to fill out part of the application. Robert Neuner had a current PennDOT ID, which he had misplaced.

7 The fact that the free voter IDs outpace the DOS ID is likely due to the fact that the PennDOT ID has been available since March.

implementation. To the extent that this Court rejects any of the findings above, then, it will have determined that there is unlawful activity – as that term was defined in the Supreme Court's opinion.

Obviously, the way in which the Court would act to abate that activity depends on what the offending gap is. It would not make sense – and, not surprisingly, would be contrary to the law of preliminary injunctions – to require Department of State employees to increase their outreach efforts if the Court were to find that the record showed that people were being charged for the DOS ID. In this regard, an injunction prohibiting the Commonwealth from requiring persons to apply first for the PennDOT ID is required, unless the Court finds that it agrees that the steps that the Commonwealth is taking will be adequate to eliminate the practice of asking persons seeking ID to exhaust PennDOT products first.

An injunction under either education or access is likely to be both self-evident and limited in what is to be proscribed – although the Commonwealth believes that the record shows that more than the reasonable steps for education and access contemplated by the Supreme Court have been taken. The more complicated question is what the Court would do if it found that the record supported the adequacy of the educational and access efforts (at least absent exhaustion), but nonetheless concluded that the time for implementation has not been reasonable.

Were that to be this Court's conclusion, it would need – as it recognized during the closing argument – to define the unlawful activity that would be abated and to structure any injunction to avoid constraining lawful activity. But any such abatement should also be determined in light of the injury that would be avoided and balanced against the administrability of any injunction and the need to avoid both harm to the public and jeopardy to the very franchise an injunction would be designed to protect.

A. An Injunction That Would Lead to Later Chaos Should Not Be Imposed.

> Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court 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.

*Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (*per curiam*); *see also Rochester & Pittsburgh Coal Company v. Indiana County Board of Assessment and Revision of Taxes*, 438 Pa. 506, 266 A.2d 78 (1970) (discussing cases where "equity acted in haste" and an overbroad injunction was entered as a result – creating havoc down the road). In this regard, respondents note that in *Billups*, there were multiple injunctions issued, at least one of which required the suspension of all education efforts and another of which was entered because of concerns about lack of education. *Compare Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1347 (11th Cir. 2009) (suspension during 2006 state court injunction) *with id.* at 1348 (citing concerns with lack of education with regard to later injunction). With all due respect, enjoining implementation of a statute as a whole one election at a time appears inconsistent with the countervailing concerns articulated in *Purcell*. This Court's analysis that targeting the offending aspect of the statute (if the Court should find that there is one), is far preferable.

B. The Lawful Activity – Requiring a Photographic ID – Should Not Be Proscribed.

An injunction needs to enjoin only unlawful activity, and a court must take care not to enjoin lawful activity in the process. *See Crowe v. Sch. Dist. of Pittsburgh*, 805 A.2d 691, 694 (Pa. Cmwlth. 2002) (preliminary injunction should be narrowly tailored to the wrong that was pleaded and proven); *Pinebrook Found., Inc. v. Shiffer*, 416 Pa. 379, 384, 206 A.2d 314, 316 (1965) ("It is basic and salutory hornbook law which provides that '[w]here a public officer

essays to exercise the jurisdiction conferred upon him, his errors, although subject to subsequent correction, cannot be enjoined as an arbitrary exercise of his authority' and '[p]ublic officers or boards will not be restrained from acting in the fulfillment of their duties as such on the mere supposition that they will act wrongfully or will not follow the law.'") (internal citations omitted).

Courts have consistently held that the mere requirement that a voter present photographic identification – stripped of other concerns – is lawful. Indeed, even Justice McCaffrey recognized that the mere requirement of a photo identification at a poll is not an injury. *See* Dissenting Op. (McCaffery, J,) at 7. This is logical, given that even petitioners acknowledge that some voters may be required to show some identification at the polls – the statute to which they wish to return. The legality is recognized by the United States Supreme Court, the Court of Appeals for the Eleventh Circuit, and has long been recognized by the Pennsylvania Supreme Court.

> A photo identification requirement imposes some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of SEA 483; the availability of the right to cast a provisional ballot provides an adequate remedy for problems of that character.

*Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197-98 (2008).

> The Supreme Court "has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," but this right "is not absolute." "[T]he States have the power to impose voter qualifications, and to regulate access to the franchise in other ways."

*Billups*, 554 F.3d at 1352 (internal citations omitted); *Chase v. Miller*, 41 Pa. 403, 419 (1862) ("Whoever would claim the franchise which the constitution grants, must exercise it in the

manner the constitution prescribes" a test and rule 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.")

> Constitutional disenfranchisement, in contrast, is systemic and insurmountable.
>
> In each of those cases, the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote.

*Rosario v. Rockefeller*, 410 U.S. 752, 757-58 (1973). The United States Supreme Court went on to distinguish systemic exclusion from a voter's failure to comply with a time deadline: "Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment." *Id.*

Thus, even setting aside the concerns in *Purcell*, the photographic identification should not be enjoined in its entirety, even on a "preliminary" basis. The concern whether Act 18 is being implemented too quickly, such that its implementation now would give rise to disenfranchisement is not measured by inconvenience; but by imposition of a hurdle that cannot be overcome by the November election, such that, in Justice Todd's words, a substantial number of voters would not yet have had the ability to get ID.

C. Any Injunction Should be Specific and Narrow and Limited to the Point of Harm.

Although petitioners have previously focused on the definitions in the statute, Act 18 also sets forth a process; it provides that any voter who does not bring photographic ID to the polls is to be permitted to cast a provisional ballot. This is consistent with the post-HAVA requirements. But, under the Supreme Court's opinion, if implementation does not assure voters liberal access to the ID that is required for the vote to be counted, it is only the "not counting" of a provisional

ballot that would constitute unconstitutional injury. Accordingly, this case is within the scope of 1 Pa.C.S. § 1925, which provides:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

*Id.* As the Supreme Court has explained, "[t]he practice of severing and striking only the unconstitutional provision of a larger legislative enactment, in instances where the legislation is otherwise self-sustaining and valid, has its origins in principles of jurisprudential restraint." *Stilp v. Commonwealth*, 588 Pa. 539. 627, 905 A.2d 918, 971 (2006).

It follows that – should the Court find it warranted – it could order that, for the purposes of this election only, 25 P.S. § 3050 would not be enforced to the extent it fails to count ballots because of a lack of photographic identification. Such an injunction would be both narrow and specific. *Commonwealth ex rel. Davis v. Van Emberg*, 464 Pa. 618, 624, 347 A.2d 712, 715 (1975) (overturning an injunction that failed to "specify with particularity what materials were obscene and to limit its mandate to affect only those so designated."). Indeed, it could be accomplished by proscribing the enforcement of the bracketed language below until such date as the November 2012 election has been certified:

> (D) in the case of a provisional ballot that was cast under subsection (a.2)(1)(i), within six calendar days following the election the elector fails to appear before the county board of elections to execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election

> and cast a provisional ballot and that the elector is indigent [and unable to obtain proof of identification without the payment of a fee]; or
>
> (E) in the case of a provisional ballot that was cast under subsection (a.2)(1)(ii), within six calendar days following the election, the elector fails to appear before the county board of elections to [present proof of identification and] execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of [the proof of identification and] an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot.

25 P.S. § 3050(a.4)(5)(ii).[8] Such a step would clearly be within the contemplation of 1 Pa.C.S. § 1925, because (a) the counties would receive the same number of affirmations that they would have received had Act 18 remained fully in effect; and (b) PennDOT and the Department of State would continue to issue photographic IDs, avoiding the on-again, off-again uncertainty attendant upon the multiple injunctions (of a statute that did not give rise to the horror stories predicted for it).

The Court raised a concern at the hearing that an adjustment to the provisional ballot statute could place a greater burden on the counties. In fact, it does not. The only testimony in the record as to what burden would be placed on the counties if they were implementing Act 18 this year came from Mark Wolosik (taken at the original hearing), and was based on arithmetic using suspect data.. N.T. 579-81. He multiplied the total number of persons from the cross-run databases (759,000) by the percentage of Pennsylvania's population in Allegheny County and an estimated 1-5 minutes to check registration (something that is done at the polling place, not during provisional ballot review) and otherwise process a provisional ballot. N.T. 584. That speculation was based on demonstrably false base numbers, duration, and processes (not to mention that it fails to take into account the advanced technology in certain counties). Even if

[8] Respondents were asked to submit a proposed injunction along these lines, and it is attached as a proposed order and form of affirmation.

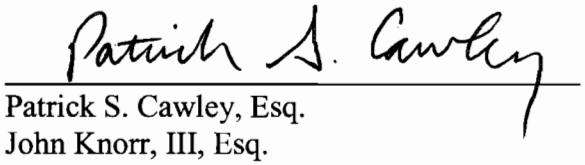
his extraordinarily high numbers were credited, however, they could be material only for Allegheny and Philadelphia counties. His conjecture would not be a reason to discount the legislative intent, which is fulfilled by having the balance of the statute be effectuated unimpeded – and that common sense dictates will be less burdensome than checking photographic identification will be.

**Conclusion**

This Court properly predicted at the end of the first hearing that there would be no disenfranchisement from Act 18. The Supreme Court was less sure, and it gave this Court one task – to look at what had been done since. It also recognized the scope of this Court's discretion to change its mind upon consideration of the additional record: "if the Commonwealth Court is not still convinced in its predictive judgment that there will be no voter disenfranchisement . . . ." The respondents respectfully suggest that the testimony and evidence at the hearing confirm this Court's initial ruling and that any legitimate concern about voter disenfranchisement, if it merits an injunction at all, could be narrowly tailored to any threat that votes will not be counted in this election. A proposed order along those lines is attached.

Dated: September 28, 2012

Respectfully submitted,

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ORDER

AND NOW, this ____ day of September, 2012, having found that the procedures implemented by Respondents to make available to all registered electors a form of photo identification that can be used as proof of identification for voting purposes did not, until September 25, 2012, comply with the "liberal accessibility" standard that the Supreme Court of Pennsylvania concluded is mandated by Section 206(b) of the Pennsylvania Election Code (25 P.S. § 2626(b)), this Court is obliged to enter a preliminary injunction.

WHEREFORE:

(1) The Department of State and the Pennsylvania Department of Transportation are hereby prohibited from requiring that a registered elector must apply for a PennDOT product prior to the elector's seeking the issuance of a free DOS ID. The Court recognizes that the Respondents announced just such a change of policy on September 24 in order to conform their procedures to the Supreme Court's opinion of September 18;

(2) The Court credits the testimony of the Commonwealth witnesses that the processes now set in place can assure everyone an opportunity to get photographic ID before the election. The Court recognizes, however, the concerns that the statute is being implemented to this extent shortly before the presidential election. As a remedial and prophylactic measure, therefore, the Court further requires that the Department of State provide an affirmation in the form attached hereto to all counties to be available only for the November 2012 general election, which affirmation shall be provided to any registered elector who has submitted a provisional ballot but cannot obtain a photographic ID by November 6, 2012. The Court further orders that any such registered elector's vote shall be counted so long as he or she provides to the county by November 13 either photographic identification in accordance with the statute or a fully-executed affirmation. In that way, there can be no prospect of disenfranchisement.

| OFFICE USE ONLY |
| --- |
| Dist. #_____ |
| Provisional Ballot # |
| _____ |

**COUNTY OF _____**

## AFFIRMATION THAT VOTER HAS VOTED PROVISIONALLY ON ELECTION DAY AND DOES NOT HAVE AND CANNOT OBTAIN PHOTOGRAPHIC IDENTIFICATION FOR THIS ELECTION

By signing this form, I declare under oath or affirmation that (1) I am the same individual who personally appeared before the District Election Board on **Election Day** and cast a provisional ballot; and (2) I do not possess any form of **proof of identification**, as defined at section 102(z.5)(2) of the Pennsylvania Election Code (25 P.S. § 2602(z.5)), that by law must be presented before voting at a polling place, because I cannot obtain such identification prior to November 13, 2012.

_____ Date of Signing

_____ Signature of Voter

_____ Printed Name of Voter

## DIRECTIONS

**Take this Form with You**: This affirmation must be received by November 13, 2012. The affirmation may be submitted electronically, by fax, by mail or in person.

**_____County Board of Elections Contact Information:**

**Address:**

**E-Mail:**
**Fax Number:**
**Phone Number:**

**YOU MUST SUBMIT THIS AFFIRMATION WITHIN SIX DAYS AFTER THE ELECTION OR YOUR PROVISIONAL BALLOT WILL *NOT* BE COUNTED.**

Form Revised 09/26/12

**PROOF OF SERVICE**

I, Patrick Cawley, certify that I am this day serving by electronic mail (by agreement of the parties), the foregoing Pre-Hearing Memorandum which service satisfies the requirements of Pa.R.A.P. 121.

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September 28, 2012

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