

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.

**PREHEARING 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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HARRISBURG

I. STATEMENT OF THE CASE

Over roughly a twenty-year period, federal legislation – specifically the National Voter Registration Act and the Help America Vote Act – had made it easier to add registered voters to the rolls and harder to remove them. Concerns about the integrity of the ballot led the General Assembly to amend section 1210 of the Pennsylvania Election Code, 25 P.S. § 3050, in 2002 to provide that when an elector appeared to vote in an election district for the first time, 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;
- (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). Where the required proof of identity was not provided, the elector could vote only by provisional ballot. *Id.*

Despite the 2002 amendments, concerns about voting fraud persisted, not only in Pennsylvania but nationwide. For example, the Commission on Federal Election Reform, chaired by former President Jimmy Carter and James E. Baker, III, issued a report in September 2005 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.” Carter-Baker Report at 18. The Commission 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. *Id.* at 18-19.

No doubt impressed by the Carter-Baker Report, the General Assembly passed a voter ID bill in 2006 – H.B. 1318 – requiring all voters to bring photographic ID to the polls. Governor Rendell vetoed the bill. A few years later, the General Assembly revisited the question. Act 18, the statute 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 time¹ – to produce such identification at the polls.

¹ See Act of December 9, 2002, § 12. It is worth emphasizing that given the mobility of the citizenry – in Pennsylvania as well as elsewhere in the nation – many persons have had to bring identification to the polls in order to vote even under the law as it stood before the present law was passed. See generally 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; see Carter-Baker Report at 18.

Two months after Governor Corbett signed the bill into law, the petitioners filed a petition for review and an application for special relief in this Court, seeking to enjoin Act 18, and asserting that “[m]any otherwise qualified voters will face great difficulty or be unable to obtain the necessary ID and will therefore be disenfranchised in the upcoming general election and future elections. As a result,” the petitions contend, “far from protecting the integrity of Pennsylvania elections, the Photo ID Law will lead to elections that are no longer free and equal.” Petition for Review at ¶ 1. Petitioners also assert that the “integrity of every election going forward will be called into question” and called the law “particularly invidious because ‘the inconveniences’ do not ‘bear upon all in the same way under similar circumstances.’” *Id.* at ¶ 8. The petitioners assert three claims for relief, arguing that the statute is unconstitutional under Article I, §§ 1, 5, and 26, and under Article VII, § 1.

This Court held a full hearing on the merits, with six days of testimony from individual petitioners, representatives of the petitioner organizations, Commonwealth officials and experts. It issued a comprehensive opinion, addressing each of the petitioners’ claims and finding that they were not likely to demonstrate the facial invalidity of the statute. From the evidence presented – including both fact and expert witnesses and exhibits – the Court concluded, *inter alia*, that

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

8/15/2012 Op. at 11.

The petitioners appealed to the Pennsylvania Supreme Court, but argued the appeal differently than they had argued before this Court. For example, they 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 by the terms of Article I, Section 5, which states that ‘[e]lections shall be free and equal.’”² Appellants’ Brief at 33. Of even greater significance, at oral argument the petitioners conceded – as the Supreme Court found – that “there is no constitutional impediment to the Commonwealth’s implementation of a voter identification requirement, at least in the abstract.” 9/18/2012 Opinion at 5.

Even as the petitioners altered their arguments, however, certain justices of the Supreme Court – notably Justice Saylor – raised a new concern that had not been the subject of the hearing

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.

before this Court.³ In their view, there was an issue regarding the Commonwealth's implementation of the Act. Act 18 had contemplated that the Department of Transportation could issue free identification cards to any registered voter who applies for one, provided that the voter declares under oath or affirms that he or she does not have the proofs of identification set forth in the statute and that he or she needs the identification card to vote. *See* 25 P.S. § 2626(b). But, as Justice Saylor noted from the bench, the Department of Transportation cannot issue an official "PennDOT ID" to persons who are unable to provide proofs of identification, because a PennDOT ID is a "secure" ID suitable for use at airports and subject to federal guidelines for issuance. The resulting question was whether the alternate Department of State ("DOS") identification was adequately implementing the General Assembly's intent that there be alternative identification for persons who lack the proofs required for the more secure ID.

To develop a record on this limited subject, the Supreme Court remanded for further development of the record:

Thus, we will return the matter to the Commonwealth Court to make a present assessment of the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available. In this regard, the court is to consider whether the procedures being used for deployment of the cards comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards.

³ The pertinent testimony at the hearing focused not on the section attracting Justice Saylor's attention, but on the steps the Department of State was taking to provide an ID that PennDOT could not: steps that petitioners challenged in the Supreme Court as outside the statute and insufficient to preclude issuance of an injunction. The Supreme Court did not agree with that argument, and certainly the definition of "proof of identification" added by Act 18 – *see* 25 P.S. § 2602(z.5) – does not limit "Commonwealth" identification to "PennDOT" but it did express a concern not raised below or in the briefs to the Supreme Court about whether the DOS ID satisfies the General Assembly's intent that identification cards be readily accessible.

Op. at 6. In dissent, Justice Todd summarized the majority's instruction to this Court as being to "predict – again – whether the Commonwealth can implement this new law without disenfranchising a substantial number of voters in November."

II. STATEMENT OF RELIEF REQUESTED

There are no damages sought in this matter; rather, the petitioners seek a preliminary injunction. The scope of the injunction to which they insist they are entitled is a bit unclear. In their most recent application for relief without an evidentiary hearing, they asked the Court to enjoin the respondents from "implementing, enforcing, or taking any steps to implement or enforce" Act 18. But it is hard to see how that injunction could be justified by anything the Supreme Court said or did. The majority opinion – and the directions on remand – focused not on whether the General Assembly acted properly in enacting the statute, but on whether the implementation was consistent with the General Assembly's intent regarding access to an alternate form of identification. Were there specific problems with the implementation of the statute, presumably any injunction would be tailored to address that problem. The Court did not question the constitutionality of the statute as a whole.

As this Court properly recognized, there are six prerequisites to a preliminary injunction:

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). All six prerequisites must be established in order for a petitioner to be entitled to relief.

Accordingly, if the Court were to conclude that the Commonwealth procedures need to be modified to carry out the intentions of the General Assembly with respect to access to the “alternate identification cards,” it could in its discretion issue an injunction directing a modification of those procedures. That would be consistent with *Brayman*’s fifth requirement – that an injunction be granted only if it is shown to be reasonably suited to abate the offending activity. 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); *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.”).

In contrast, the petitioners’ apparent desire for an injunction that prohibits “*taking any steps to implement or enforce*” Act 18 is flatly inconsistent with the requirement of tailoring, with the Supreme Court’s ruling and with petitioners’ concession that the statute could be constitutionally implemented over time – particularly given that the sweeping injunctive relief sought by petitioners seeks to reinstate a statute under which electors voting for the first time in a particular district were – and still would be – required to produce a photo ID or other proof of identity at the polls.

III. WITNESSES

The Respondents propose to call:

Kurt Myers
Pennsylvania Department of Transportation
Fourth Floor, Riverfront Office Complex
1101 South Front Street
Harrisburg, PA 17104

Shannon Royer
Pennsylvania Department of State
302 North Office Building
401 North Street
Harrisburg, PA 17120

Jonathan Marks
Pennsylvania Department of State
302 North Office Building
401 North Street
Harrisburg, PA 17120

IV. EXHIBITS

The proposed exhibits are identified as follows:

1. E-mail string August 28, 2012 C. Wolpert to R. Oyler; RE: DOS ID Card Verification Types
2. E-mail string August 30, 2012 C. Aichele to E. Walker, M. Sweeney; Fw: Issuance Numbers
3. E-mail string September 12, 2012 M. Sweeney to J. Marks, S. Shenk; RE: DOS - Has Something Changed
4. E-mail and attachment September 17, 2012 M. Sweeney to J. Riley and others; DOS Eliminates Two-Trips-to-PennDOT
5. E-mail string September 19, 2012, B. Smotherman to S. Royer; Voter ID Call Center Plan
6. Spreadsheet re Exception Letters
7. Voter ID Report: August 13-17, 2012
8. Voter ID Report: August 20-24, 2012
9. Voter ID Report: August 27-31, 2012
10. Voter ID Report: August 31-Sept. 14, 2012
11. 9/19/E-mail and attachment J Mcknight to S. Shenk and E. Alsvan; County Totals as of 9/18/2012
12. 8/22 Email from R. Ruman to C. Aichele and others; Wednesday clips
13. 8/30 Email from S. Shenk to M. Sweeney and J. Marks; Voter ID (Philadelphia)
14. 8/31 Email from M. Sweeney to Riley and S. Royer; PennDOT
15. 9/12 Email from C. Wolf to P. Gabriel and J. Snader; Bravo contract
16. 9/11 Email from C. Wolf to K. Cummings and J. Snader; FW: RFQ
17. 9/15 Email from R. Ruman to C. Aichele and Others; PennDOT Adds Thursday Evening Hours at Five Philadelphia Location
18. Undated Letter from C. Aichele to M. Nutter; PennDOT
19. Email from P. Dillon to M. Sweeney, and linked to report Philadelphia Commissioner's Report on Voting Irregularities
20. 8/13 Email from M. Sweeney to N. Winkler Re: (Spanish FAQ)
21. 8/15 Email from M. Sweeney to S. Royer, J Marks, R. Oyler; UPDATED; Mandarin Voter Registration Language
22. 8/16 Email from M. Sweeney to S. Royer, R. Oyler, J. Marks, N. Winkler; Re: Chinese Voter Registration Forms
23. 9/06 Email from D. Burgess to T. Goril and R. Trutt; FW: Voter ID Exception Letters - Bilingual
24. 9/06 Email from I. Harlow to J. Pena with attachments; FW: Voter ID Exception Letters - Bilingual
25. 9/10 Email from J. McKnight to R. Ruman with attachment; FW: Translated Forms.xlsx
26. 9/16 Email from M. Sweeney to S. Royer, R. Oyler, J. Marks; FW: Chinese Voter Registration forms
27. 9/17 Email from J. McKnight to M. Sweeney; FW: Revised Secure ID for Voting Web Page
28. 9/17 Email from M. Sweeney to S. Shenk; RE: Voter ID Activity at PennDOT 9/15/12
29. 9/10 Email from M. Sweeney to M. Grothman; RE: Update on Other Clinics
30. Letter from M. Gwynne to PA Department of Motor Vehicles
31. 9/11 Email from M. Sweeney to J. Mathis; FW: Channel 6 Coverage of LIFE, Liberty & the Pursuit of Independence Voter ID
32. 8/07 Email from I. Harlow to J. Marks and others Re: Follow up Question
33. 9/05 Email from J. Marks to D. Burgess and T. Ruppert; Re: Saturday Exception Queue
34. 7/25 Email from S. Shenk to J. Marks; RE: DOS ID
35. 9/12 Email from I. Harlow to J. Marks and others, with attachment; RE: Weekly Manager's Meeting
36. 9/10 Email from M. Sweeney to D. Lee; FW: PennDOT Adds Thursday Evening Hours at Five Philadelphia Locations
37. 9/10 Email from P. Geho to R. Oyler; FW: Conference call August 31 follow up
38. 9/14/2012 Email from S. Royer to M. Rutz; RE: Revised Ethnic Publication List: 3 Latin Papers Ceased Publication
39. 9/20 Email from C. Wolf to S. Royer; Voter ID Printed Material
40. 9/20 Email from S. Royer to B. Dupler with attachment; DOS Voter ID General Election Summary Memo
41. 9/19 Email from P. Dillon to A. Tomlins; FW: Voter ID
42. 9/19 Email from M. Ruiz to S. Royer and others with attachment; Dept. of State Voter ID: African American and Hispanic Radio Schedule

43. 9/18 Email from M. Gallagher to J. Riley; Re. Wednesday even
44. 9/17 Email from M. Sweeney to J. Riley; FW: Request PennDOT and STate Reps at Asbury AME Church
45. 9/14 Biweekly Report September 3-14, 2012
46. 9/14 Email R. Ruman to M. Keeler weekly report
47. 9/12 Email C. Mehrholz to B. Dupler RE: Voter ID at West Chester University
48. 9/11 Email L. Hernandez to A. Brown and others
49. 9/11 Email from H. Gold to B. Dupler RE: Training sessions for League of Women Voters of Philadelphia
Voter Advocates Project
50. 9/11 Email from S. Royer to M. Rutz and R. Ruman RE: Wilkes Barre/Scranton TV Schedule Change
51. 9/6 Letter from C. Aichele to College/University Presidents
52. 9/6 Email from J. DOLan to E. Kaplan FW: PennDOT and Facebook
53. 9/05 Email from S. Royer to B. Dupler FW: Speaker for Rep. Micozzie Senior Breakfast
54. 9/05 Email from G. McDermott to M. Sweeney RE: Voter ID events
55. 9/04 Email from M. Sweeney to B. Dupler List of Events
56. 9/04 Email from M. Rutz to S. Royer and R. Ruman, with attachment Voter ID TV & Cable Impressions
and Spots
57. 8/30 Email from S. Royer to M. Rutz RE: DOS Voter ID Traffic Instructions and Radio Spot
58. 8/29 Email from S. Royer to M. Rutz and R. Ruman RE: Fox News Spots and Mobile Billboard Follow-
up
59. 8/27 Email from M. Rutz to S. Royer, R. Ruman, M. Sweeney, with attachment DOS Voter ID TV&Cable
Schedule.pdf; DOS Voter ID TV & Cable Schedule Non-DMA.pdf
60. 8/24 Email from M. Rutz to R. Ruman Updated AA & Hispanic Radio Impressions
61. Willie Adams Application Package
62. Willie Adams Letter dated 9/04/2012
63. Edith Bason Application Package
64. Edith Bason Letter dated 9/18/2012
65. Angela Bizzell Application Package
66. Tracey Brantley Application Package
67. Shirley Brooks Application Package
68. Johnathan Brooks-Brown, Jr. Letter dated 9/05/2012
69. Johnathan Brooks-Brown, Jr. Application Package
70. Angelene Brown Letter dated 9/05/2012
71. Angelene Brown Application Package
72. Tunizia Brown Letter dated 9/18/2012
73. Ernestine Burton Application Package
74. Erick Carney Letter dated 9/05/2012
75. Erick Carney Application Package
76. Alyce Chandler Letter dated 9/04/2012
77. Alyce Chandler Application Package
78. Nicole Chang Letter dated 9/05/2012
79. John Cherry, Jr. Application Package
80. Earl Clemmons, Jr. Application Package
81. Bruce Cotton Letter dated 9/18/2012
82. Eddie Cyrus Application Package
83. Richard Dandridge Application Package
84. Caroline Davis Application Package
85. Jimmy Davis Letter dated 9/04/2012
86. Jimmy Davis Application Package
87. Milagros Delvalle Letter dated 9/04/2012
88. Suzette Dorvil Application Package
89. Noble Wahabit Shabazz Edwards-El Application Package
90. Dorothy Ely Letter dated 9/19/2012
91. Mona Gaddy Application Package
92. Alphonzo Gamble Application Package
93. Harold Gardner Letter dated 9/18/2012
94. James Gellion Application Package

95. Jerry Golla	Application Package
96. Maguilla Graham	Application Package
97. Carolyn Green	Application Package
98. Chester Green	Letter dated 9/05/2012
99. Chester Green	Application Package
100. John Green	Letter dated 9/04/2012
101. Robertha Green	Application Package
102. Walter Gregg	Letter dated 9/05/2012
103. Clifford Hale	Application Package
104. Ethel Hannah	Application Package
105. Shakara Holly	Letter dated 9/04/2012
106. Mary Howard	Application Package
107. Maureen Hurley	Application Package
108. Marion Jackson	Letter dated 9/05/2012
109. Marion Jackson	Application Package
110. Mary Jackson	Letter dated 9/18/2012
111. Mary Jackson	Application Package
112. Anthony Jacobs	Letter dated 9/18/2012
113. George James	Application Package
114. Eric Johnson	Application Package
115. Jeffrey Johnson	Application Package
116. Anthony Jordan	Application Package
117. Avenel Kolivoski	Application Package
118. Joseph Lane	Application Package
119. Kishona Lattie	Application Package
120. Tyler Linder	Application Package
121. John Middleton	Application Package
122. Naim Mikell	Application Package
123. Tiffany Miller-Wells	Application Package
124. Yvette Minor	Application Package
125. Aleks Moci	Letter dated 9/04/2012
126. Aleks Moci	Application Package
127. Antonio Moreno	Letter dated 9/18/2012
128. John Morris	Application Package
129. Marguerite Munsell	Application Package
130. Robert Neuner	Letter dated 9/05/2012
131. Daisy Ortiz	Application Package
132. Emmanuel Osekre	Application Package
133. Lakeisha Pannell	Letter dated 9/04/2012
134. David Parker	Application Package
135. Gregory Parker	Application Package
136. Ronald Polk	Application Package
137. DeHaven Pollard	Application Package
138. Shae Price	Application Package
139. Noble Ivy David Prosser-El	Application Package
140. Laura Revel	Letter dated 9/19/2012
141. Laura Revel	Application Package
142. Dave Rodriguez	Letter dated 9/05/2012
143. Domenca Rodriguez	Application Package
144. Luz Rodriguez	Application Package
145. Manuel Rolon	Application Package
146. Benny Scott	Application Package
147. Timothy Sharpe	Letter dated 9/05/2012
148. Ulise Sharpless	Application Package
149. Toyba Shknevsky	Letter dated 9/05/2012
150. Christopher Shoatz	Application Package

151. Mankeisha Simms	Application Package
152. Catherine Smith	Application Package
153. Linnea Smith	Application Package
154. Richard Snowden	Application Package
155. George Speller	Application Package
156. Inez Starks	Application Package
157. Monique Steans	Application Package
158. Gertrude Swain	Application Package
159. Thelma Taggart	Application Package
160. Kevin Thomas	Letter dated 9/06/2012
161. Grace Tully	Application Package
162. Teresa Vanderwande	Application Package
163. Lynette Wade	Application Package
164. Katrina Walker	Application Package
165. Katrina Walker	Application Package
166. Muhammad Watford	Letter dated 9/18/2012
167. Phillip Watts	Application Package
168. Nicola Welch	Application Package
169. Brian Wilson	Application Package
170. Geraldine Wilson	screenshot
171. Geraldine Wilson	Application Package
172. Alexis Williams	Letter dated 9/18/2012
173. Lavon Williams	Application Package
174. Tommie Williams	Application Package
175. Tyrone Williams	Application Package
176. Philbert Wiltshire	Application Package
177. Philbert Wiltshire	Letter dated 9/5/2012
178. Beatrice Wilson Wines	Application Package
179. Beatrice Wilson Wines	Letter dated 9/4/2012
180. David Woods	Application Package
181. Memorandum From Red House Communications to S. Royer; 9/20/12; Re: Voter ID Education Campaign	

V. EXPERT REPORT

The Commonwealth is not proffering an expert report, and it respectfully submits that the narrow issue before the Court does not lend itself to expert testimony.

VI. ARGUMENT PERTINENT TO THE SUPREME COURT'S DIRECTIVE TO MAKE A PRESENT ASSESSMENT OF THE ACTUAL AVAILABILITY OF THE ALTERNATE IDENTIFICATION CARDS ON A DEVELOPED RECORD IN LIGHT OF THE EXPERIENCE SINCE THE TIME THE CARDS BECAME AVAILABLE.

The petitioners in this matter have acted as though the remand is a mere technicality.

That is not at all the case. The petitioners were not entitled to an injunction as of Monday morning, September 17. And they were not entitled to an injunction on Tuesday afternoon, September 18. It was only the dissenters who thought they were.

The majority believed that there was an open question whether an injunction of some kind was warranted, and that it could not answer that question on the record before it. That is so because the question whether the Department of State ID complied with the General Assembly's intent in enacting the statute was something the Commonwealth Court had not addressed in its original opinion. That is not surprising given that the question had not been raised by petitioners in that way. But even if it had been, the Court could not have "developed" the record the Supreme Court has asked for – because the Department of State ID was not yet available at the time of the first hearing. As the Supreme Court recognized, the Department of State ID now is available, and it is now possible to develop a record on whether the implementation is – or can be made to be – consistent with the General Assembly's intent.

In the majority opinion in this case, the Supreme Court observed:

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.

Op. at 4. It follows that the Court did *not* find that the requirements of the statute itself were unconstitutional. Nor did it find that the statute could not be applied in a constitutional manner. Instead, it remanded to this Court,⁴ asking that the Court evaluate whether the DOS identification card (a) is actually available; and (b) is being issued in a manner that comports with the General Assembly's expressed intentions:

Thus, we will return the matter to the Commonwealth Court to make a present assessment of the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available. In this regard, the court is to consider whether the procedures being used for deployment of the cards comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards.

Op. at 6.

A. The Supreme Court Held That the Test This Court Should Apply is Whether Access to the DOS ID Reflects the Access Intended by the General Assembly in Enacting Section 206(b) of the Election Code (25 P.S. § 2626(b)).

As the Supreme Court observed in its opinion⁵, the identification issued by PennDOT is a secure identification, complying with standards so that it can be used for travel – and, in

⁴ The remand is consistent with the Supreme Court's recognition that it does not find facts in the first instance. See *Commonwealth v. Michael*, 562 Pa. 356, 375, 755 A.2d 1274, 1284 (2000) ("This Court, however, is not a fact-finding body.").

⁵ See Op. at 3 ("However, as implementation of the Law has proceeded, PennDOT – apparently for good reason – has refused to allow such liberal access. Instead, the Department continues to vet applicants for Section 1510(b) cards through an identification process that

Pennsylvania – for certain financial transactions, such as cashing checks.⁶ For that reason, the Secretary of the Commonwealth prepared the form of statement contemplated in section 206(c) of the Election Code, 25 P.S. § 2626(c),⁷ and prepared a form of identification for the Department of Transportation to disseminate that met the requirements of section 206(b), 25 P.S. § 2626(b) – which is to say, that it (1) is available at no cost; (2) to any registered elector; (3) when that elector has completed an application and signed a statement declaring under oath or affirmation that the elector does not have any of the proofs of identification set forth in section 102(z.5) of the Election Code, 25 P.S. § 2602(z.5)⁸; and (4) requires the identification for voting purposes.

Commonwealth officials appear to acknowledge is a rigorous one. See N.T. at 690, 994. Generally, the process requires the applicant to present a birth certificate with a raised seal (or a document considered to be an equivalent), a social security card, and two forms of documentation showing current residency. See N.T. at 467, 690, 793.1. The reason why PennDOT will not implement the Law as written is that the Section 1510(b) driver's license equivalent is a secure form of identification, which may be used, for example, to board commercial aircraft. See N.T. at 699-700, 728-30, 780.

⁶ Title 75 Pa.C.S. § 1510 (e) *Use of identification cards*.— If a person has an established policy of accepting a driver's license issued pursuant to subsection (a) for the purpose of identification for the acceptance of a check given for payment of purchase or for the cashing of a check, the person shall also accept an identification card issued pursuant to subsection (b) for the same purpose. It shall be a defense to a prosecution under this subsection that the person was not presented with notice of the provisions of this subsection.

⁷ The Secretary of the Commonwealth shall prepare the form of the statement described in subsection (b) and shall distribute the form to the counties and the Department of Transportation. The Secretary of the Commonwealth, the Secretary of Transportation and the county boards of election shall disseminate information to the public regarding the availability of identification cards under subsection (b). 25 P.S. § 2626(c).

⁸ The words “PROOF OF IDENTIFICATION” shall mean:

(1) In the case of an elector who has a religious objection to being photographed, a valid-without-photo driver's license or a valid-without-photo identification card issued by the Department of Transportation.

(2) For an elector who appears to vote under section 1210, a document that:

In full, section 206 of the Election Code provides:

(a) The Secretary of the Commonwealth shall prepare and disseminate information to the public regarding the proof of identification requirements established under sections 1210 and 1302.

(b) Notwithstanding the provisions of 75 Pa.C.S. § 1510(b) (relating to issuance and content of driver's license) to the contrary, the Department of Transportation shall issue an identification card described in 75 Pa.C.S. § 1510(b) 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 as defined in section 102(z.5)(2) and requires proof of identification for voting purposes.

(c) The Secretary of the Commonwealth shall prepare the form of the statement described in subsection (b) and shall distribute the form to the counties

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- (i) shows the name of the individual to whom the document was issued and the name substantially conforms to the name of the individual as it appears in the district register;
 - (ii) shows a photograph of the individual to whom the document was issued;
 - (iii) includes an expiration date and is not expired, except:
 - (A) for a document issued by the Department of Transportation which is not more than twelve (12) months past the expiration date; or
 - (B) in the case of a document from an agency of the Armed forces of the United States or their reserve components, including the Pennsylvania National Guard, establishing that the elector is a current member of or a veteran of the United States Armed Forces or National Guard which does not designate a specific date on which the document expires, but includes a designation that the expiration date is indefinite; and
 - (iv) was issued by one of the following:
 - (A) The United States Government.
 - (B) The Commonwealth of Pennsylvania.
 - (C) A municipality of this Commonwealth to an employee of that municipality.
 - (D) An accredited Pennsylvania public or private institution of higher learning.
 - (E) A Pennsylvania care facility.
- (3) For a qualified absentee elector under section 1301:
- (i) in the case of an elector who has been issued a current and valid driver's license, the elector's driver's license number;
 - (ii) in the case of an elector who has not been issued a current and valid driver's license, the last four digits of the elector's Social Security number;
 - (iii) in the case of an elector who has a religious objection to being photographed, a copy of a document that satisfies paragraph (1); or
 - (iv) in the case of an elector who has not been issued a current and valid driver's license or Social Security number, a copy of a document that satisfies paragraph (2).

25 P.S. § 2602(z.5).

and the Department of Transportation. The Secretary of the Commonwealth, the Secretary of Transportation and the county boards of election shall disseminate information to the public regarding the availability of identification cards under subsection (b).

25 P.S. § 2626.

Title 75 Pa.C.S. § 1510 in turn provides, in pertinent part:

(b) Identification card. – The department shall, upon payment of the required fee, issue an identification card to any person ten years of age or older who has made application therefor in such manner as the department shall prescribe or whose driver's license has been surrendered to the department because of a suspension or revocation of an operating privilege under this or any other title. Program participants in the Address Confidentiality Program under 23 Pa.C.S. Ch. 67 may use a substitute address designated by the Office of Victim Advocate as their address. Except as provided in subsection (j), the identification card shall have substantially the same content as a driver's license but shall clearly indicate that it is not a driver's license. Upon failure of any person to pass any examination required under section 1514 (relating to expiration and renewal of drivers' licenses), the department shall, where appropriate, issue a complimentary identification card as an expression of gratitude for years of safe driving. The card shall only be issued upon receipt of the person's driver's license.

Prior to the appeal, neither the parties nor the Commonwealth Court had focused on whether the procedures being used to implement the DOS ID were aligned with the procedures set forth in section 206 of the Election Code, 25 P.S. § 2626. That may have been because – unlike their arguments in the Supreme Court – the petitioners here have been (and, as is apparent from their recent sweeping proposed order, still are) intent on attacking the statute as a whole. But that assault appears to be foreclosed by their concessions in the Supreme Court.

As a result, the question before this Court is limited to whether the DOS ID matches the access contemplated by section 206 (25 P.S. § 2626). Only to the extent it may be found not to match that access is this Court obligated to enter an injunction to make certain that the Commonwealth's implementation of the Act conforms to the General Assembly's intentions. Answering the question whether the card is being *implemented as the General Assembly*

intended necessarily entails looking at what is being done by the Department of State and Department of Transportation and comparing that against the requirements of the statute.

The Commonwealth believes that the record will show that (a) the DOS ID card is widely available and is being issued; (b) the DOS ID card conforms to the provisions of section 206 (25 P.S. § 2626); and (c) as to one point, the Commonwealth read the statute differently than the Supreme Court did but, since the opinion was issued, the Commonwealth has made changes in the form and process so as to assure that the procedures comply fully with the Supreme Court's reading of the General Assembly's intent.

B. Evidence Regarding the DOS ID Implementation

The evidence will show that the DOS card is currently available and has been for approximately a month. Almost 1000 cards have been issued in the first three weeks – in addition to the issuance of almost 9000 PennDOT free voter ID cards since March. Roughly 100 persons were unable to get the ID the first time they visited PennDOT. From the exception notices, it is apparent that almost all persons who did not receive IDs at the time they applied were persons who could not be verified as registered voters. This has occurred for various reasons, including, *inter alia*, the delays between persons soliciting voter registration forms, turning them in, and processing them. For other persons, the problem was attributable to an incorrect birth date or address or a misspelled name being in the database. Once the information was corrected and the voter registration number located, each of the persons is to receive (and many already have received) a follow-up letter stating that the identification is available and providing authorization numbers to facilitate receipt of the ID card.

As explained above, section 206(b) of the Election Code, 25 P.S. § 2626(b), authorizes the issuance of free identification only to persons who are registered electors and who require

proof of identification for voting purposes. Title 25 Pa.C.S. § 1102 differentiates between “applicants” and “registered electors” – a distinction that makes perfect sense, because applicants have not gone through the approval process required by 25 Pa.C.S. § 1328. As subsection (c) of the statute explains, if a person’s application for registration is found to be complete, a voter registration card is generated and mailed; if it is not returned by the postmaster within ten days from the date of mailing

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.**

25 Pa.C.S. § 1328(c)(3)(ii) (emphasis added). By statute, then, a person who has not yet been entered into the SURE database and whose card has not been sent out more than ten days earlier is not yet a registered elector and is not yet entitled to receive a DOS ID.⁹

The evidence at the hearing will also show that the information upon which the Supreme Court relied was different from the actual implementation of the DOS card in two significant respects. First, because the Department of Transportation disseminates the DOS card, applicants are not sent from the Department of Transportation to the Department of State to get the card but are, instead, issued the card while they are at a PennDOT center. Second, although state officials did ask persons to apply for a driver’s license or photo ID if they could (as, indeed, Ms. Applewhite was able to do), it was simply not the case that a person was required to produce a birth certificate and social security card only to be told that they do not qualify for the PennDOT

⁹ Though only a “registered elector” is entitled to receive a photo identification at no charge, under section 206(b) of the Election Code, the Department of State and PennDOT have developed a protocol that will enable those who have applied for registration to complete their application for a DOS ID – including having their photograph taken – in a single visit.

ID and instead needed to get a DOS ID. Accordingly, the process to receive a DOS ID was, even before the Supreme Court's decision, similar to what the General Assembly contemplated: a person who was registered to vote but who was without an ID could go to PennDOT, fill out an application and a statement saying that they did not have one of the statutorily provided-for forms of ID, and then receive a photo ID suitable for voting, at no cost.

That being said, it is true that the Commonwealth did construe the statute differently than the Supreme Court did in one respect: the Commonwealth read the provision in section 206(b), 25 P.S. § 2626(b), that an alternative voter identification needed to be made available to any "registered elector who has made application [for an identification card described in 75 Pa.C.S. § 1510(b)] and has included with the completed application ..." to mean that a person must first apply for a PennDOT identification, and, if he or she did not have the documentation to do so, he or she would then be allowed to apply for the DOS ID. As is evident from the September 18 opinion, however, the Supreme Court read the statute differently and expressed its concern that an elector need not complete a PennDOT application first. In light of the Supreme Court's opinion, the procedures have now been changed to eliminate any "exhaustion" requirement.

VII. WHAT THIS CASE IS NOT ABOUT

The law of Pennsylvania was not changed by the Supreme Court's remand. It is still the case that the petitioners bear "a heavy burden of persuasion" in demonstrating a constitutional violation here. *In the Interest of F.C. III*, 607 Pa. 45, 68, 2 A.3d 1201, 1214 (2010). Moreover, the Appellants bear the heavy burden of showing that they have established all six prerequisites for issuing a preliminary injunction. *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 record being made here is to aid the Court in making that assessment – not to replace that assessment with a lower threshold of proof.

This Court directed that the parties file pretrial memoranda with “argument pertinent to the Supreme Court’s directive to ‘make a present assessment of the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available.’” 9/20/2012 Order. The petitioners, however, seem to think that the Supreme Court has imposed some entirely new legal requirement that must be met – *i.e.*, that there be no possibility of disenfranchisement and no voter disenfranchisement in November.

That was not what the Supreme Court said. To the contrary, as noted above, even Justice Todd in dissent concluded that the majority was asking only whether the Commonwealth Court continued to believe that “the Commonwealth can implement this new law without disenfranchising a substantial number of voters.” Dissent at 1. As they have throughout, however, petitioners use the word “disenfranchise” loosely; they seem to think that any legislation that contemplates any extra step that a voter must take in order to cast a vote is unconstitutional because some voters may not take those steps. *E.g.*, N.T. 437 (Testimony of Professor Barreto) (“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.”).

But that is not the law. The principle that regulations on time and manner of establishing eligibility to vote are *not* disenfranchising is clearly set forth in both United States Supreme Court and Pennsylvania Supreme Court jurisprudence. In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), for example, the United States Supreme Court set forth what constitutional disenfranchisement was: “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” and then distinguished that from the 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.* at 757-58. In *Chase v. Miller*, 41 Pa. 403, 419 (1862), the Pennsylvania Supreme Court explained, “[w]hoever would claim the franchise which the constitution grants, must exercise it in the manner the constitution prescribes.” *Id.* 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.” Indeed, much like in this case, the challenger in *Contested Election of Owen Cusick*, 136 Pa. 459, 20 A. 574 (1890), 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. The Supreme 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.

After the initial hearing, this Court correctly predicted that there would be no “disenfranchisement” of voters who took the necessary steps to comply with the new law. The Supreme Court gave this Court one task – to look at what has been done since – and then recognized the scope of this Court’s discretion to change its mind upon consideration of that

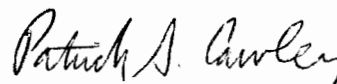
additional record if it is no longer “convinced in its predictive judgment that there will be no voter disenfranchisement” The Commonwealth respectfully suggests that the testimony and evidence that will be presented at the hearing will not undermine this Court’s prior conclusion, because the testimony and evidence will show that the DOS ID is being implemented in a way that is consistent with the intent of the General Assembly as it is expressed in the requirements of 25 P.S. § 2626, and that the imposition of such generally applicable identification requirements – which, as the Supreme Court has recognized, do not by their terms “disenfranchise” voters – cannot be deemed to be unconstitutional.

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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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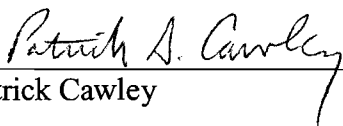
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