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June 17, 2013

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**Via Hand Delivery**

The Honorable Robert Simpson  
Commonwealth Court of Pennsylvania  
Justice Building  
115 South Broad Street  
Nazareth, PA 18064

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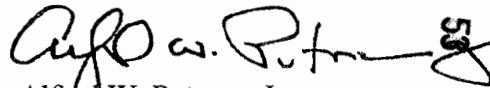
**Re: Docket No. 330 M.D. 2012  
Applewhite v. Commonwealth**

Dear Judge Simpson,

I enclose a courtesy copy of Respondents' Pretrial Memorandum in the above-captioned matter. The original is being filed today.

I also write to note the renewal of our office's active participation in this case. I wrote Your Honor on December 12, 2012 to report that my partner Alicia Hickok and I would not be participating actively on behalf of Governor and the Secretary of the Commonwealth in the pretrial or trial stage but that we were remaining of record because we expected that we might be asked to take an active role in any post-trial practice or on any appeal. As it turns out, however, the Governor and the Secretary have recently requested that we again participate actively at this stage and, indeed, Ms. Hickok has appeared at depositions over the last few weeks. Accordingly – and particularly in light of my December 12 letter – we thought it appropriate to give notice to the Court (and counsel) that we now expect that we will be appearing at trial.

Respectfully,

  
Alfred W. Putnam, Jr.

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Enclosure

cc (without enclosure) via email:

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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No. 330 MD 2012

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

Petitioners,<sup>1</sup>

v.

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

Respondents.<sup>2</sup>

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**RESPONDENTS' PRETRIAL MEMORANDUM**

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<sup>1</sup> By Order dated May 24, 2013, the Court dismissed Petitioners Viviette Applewhite, Gloria Cuttino, Nadine Marsh, Joyce Block, and Devra Mirel “Asher” Schor. The Court also granted voluntary nonsuit against Petitioners Grover Freeland and Dorothy Barksdale on July 30, 2012. However, the Court has not ordered a formal amendment to the caption.

<sup>2</sup> The Court dismissed Respondent Commonwealth of Pennsylvania in its Order dated May 24, 2013, but the caption has not been amended accordingly.

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Much of Petitioners' original argument about the statute at issue in this case has already been decided. The fact is that there is no constitutional impediment to a voter identification requirement of the type enacted by the General Assembly in Act 2012-18 ("Act 18"). The Supreme Court of the United States upheld a very similar Indiana statute against an equal protection challenge five years ago in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and it is well-settled that the Supreme Court of Pennsylvania applies an identical equal protection analysis to cases arising under the Pennsylvania Constitution, *Erfer v. Commonwealth*, 568 Pa. 128, 139, 794 A.2d 325, 332 (2002). Moreover, in this very case, relying in part on Petitioners' own concession, the Supreme Court of Pennsylvania held in September of last year that there is nothing unconstitutional about requiring voters to show identification:

[A]t oral argument before this Court, counsel for [Petitioners] 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, [Petitioners] 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.

*Applewhite v. Commonwealth*, 54 A.3d 1, 4-5 (Pa. 2012) (*per curiam*).

As a result, the narrow issue that this Court was to address on remand last September was whether the Commonwealth would be able to implement the new

identification requirement in the manner intended by the General Assembly in time for the November General Election. And there was at least a question about that. The Supreme Court, and ultimately this Court, wondered whether the changes that had taken place to ensure liberal access had been implemented soon enough so that all voters who needed (and wanted) to get photo identification before the election had time to do so.

With three soft roll-outs having come and gone since the enactment of the statute, Petitioners – notwithstanding their concession last fall – are now planning to go to trial on claims that it is impossible to implement the identification requirement of Act 18 no matter how long the Commonwealth – and the public – are given to adjust to it. That idea, of course, is plainly contrary to the law of Pennsylvania, federal law and, for that matter, the law of this case.

**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 – made it easier to add registered voters to the rolls and harder to remove them. As a consequence, in 2002, concerns about the integrity of the ballot led the General Assembly to amend section 1210 of the Pennsylvania Election Code, 25 P.S. § 3050, 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.<sup>3</sup> 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." *Id.* Where the required proof of identity was not provided, the elector could vote only by provisional ballot. *Id.*

Despite the 2002 legislation, 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 former Secretary

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<sup>3</sup> As it was amended in 2002, section 1210 allowed the voter to provide an alternative form of identification if the photographic identification listed in subsection (a) was not available. These alternative forms of identification 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.

of State 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 (emphasis added). 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 be available for those who failed to bring their identification to the polls. *Id.* at 18-19.

In 2006, no doubt impressed by the Carter-Baker Report, the General Assembly passed a voter ID bill – H.B. 1318 – requiring all voters to bring photographic ID to the polls. Then-Governor Rendell vetoed the bill. A few years later, the General Assembly revisited the question. Act 18, the statute at issue 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 2002 legislation enacted by the General Assembly, and it required every voter – as opposed to just those voting in a given election district for the first time – to produce such identification at the polls.

Two months after the Governor signed the bill into law, Petitioners filed a petition for review and an application for special relief in this Court, seeking to enjoin Act 18. Petitioners asserted three claims for relief, arguing that the statute is unconstitutional under Article I, §§ 1, 5, and 26, and under Article VII, § 1 of the Pennsylvania Constitution.

This Court held an extensive hearing to determine whether to issue a preliminary injunction against the application of the statute. Following this Court's opinion and order denying injunctive relief, *see Applewhite v. Commonwealth*, No. 330 MD 2012, 2012 Pa. Commw. Unpub. LEXIS 757 (July 25, 2012) (*Applewhite I*), *vacated*, 54 A.3d 1 (Pa. 2012) (*Applewhite II*), Petitioners appealed to the Pennsylvania Supreme Court. In that Court, however, Petitioners argued differently than they had argued the case before this Court. For example, Petitioners 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.’”<sup>4</sup> Pet’rs’ Sup. Ct.

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<sup>4</sup> 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:

Br. at 33; *see* 2012 PA S. Ct. Briefs LEXIS 53, at \*55-56. Of even greater significance, at oral argument 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.” *Applewhite II*, 54 A.3d at 4-5.

Though the Supreme Court was convinced that the Pennsylvania Constitution does not prohibit the General Assembly from adopting a voter identification requirement, the Court concluded that this Court’s predictive finding that no one would be disenfranchised by the new identification law at the November General Election did not sufficiently address the development of the alternate identification cards that have been termed “DOS ID.” This alternate card had been introduced to assure that every voter would have the opportunity to obtain proof of identification as required by the law to vote at the electors’ polling place, even if the voter did not have access to the underlying documentation that

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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.

was required for a driver's license or a non-license identification card of the sort that could be used for boarding planes and other transactions. Accordingly, 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.

*Applewhite II*, 54 A.3d at 5.

This Court held the hearing on remand on September 25 and 27, 2012. Following briefing, on October 2, 2012, this Court granted in part the request for a preliminary injunction, enjoining Respondents from “[r]equiring that a registered elector must apply for a PennDOT product prior to the elector’s seeking issuance of a free DOS ID” and from implementing or enforcing that part of Act 18 that requires voters to present compliant ID to vote in the November 6, 2012 General Election. *Applewhite v. Commonwealth*, No. 330 MD 2012, 2012 Pa. Commw. Unpub. LEXIS 749, at \*20-21 (Oct. 2, 2012) (*Applewhite III*). All other provisions of Act 18 remained in effect. *Id.* at \*21; *see also Applewhite v. Commonwealth*, No. 330 MD 2012, 2012 Pa. Commw. Unpub. LEXIS 856 (Nov. 1, 2012) (*Applewhite IV*) (application for supplemental injunction denied).

In anticipation of the trial scheduled to begin on July 15, 2013, the parties agreed to an extension of the preliminary injunction order through the May 21, 2013 municipal primary. The injunction has now expired by its terms.

On February 5, 2013, Petitioners amended their petition for review and added a new Count I, asserting that the Commonwealth “is not implementing [Act 18] in accordance with the statutory requirements because it has failed to provide liberal access to PennDOT ID” and the free DOS ID. *See* Am. Pet. for Review at ¶¶ 163-64. Petitioners also assert that the free DOS ID does not comply with Act 18’s requirements because it is not mandated or prescribed by statute, regulation, or other legal obligation. *Id.* at ¶¶ 164-65. However, when the Supreme Court was considering whether this particular identification complied with the statute’s liberal access requirement, the Supreme Court never suggested that the identification was being issued *ultra vires* or that PennDOT’s role precluded liberal access – either of which would have been determined without a remand to develop the record on whether the free ID – *i.e.* the DOS ID – had been implemented soon enough to guarantee liberal access for voters by the November General Election. In other words, the Supreme Court’s question (and the question this Court answered on remand) was about timing, not about whether the underlying identification could satisfy the requirements of the statute.



Respondents filed preliminary objections, which this Court sustained in part on May 24, 2013, dismissing the Commonwealth of Pennsylvania and several Petitioners who had already obtained compliant photo IDs. The Court also dismissed Count IV, in which Petitioners had alleged that Act 18 improperly added a new elector qualification in contravention of the state Constitution. *See* Opinion Sustaining in Part and Overruling in Part Preliminary Objections at 5-8 (*Applewhite V*).

Despite Petitioners' apparent anticipation of a lengthy trial during which all sorts of witnesses – many of whom have been disclosed only in the last week of discovery – will testify as to matters that were not fleshed out during discovery, the questions that the Court needs to address are narrow and straightforward and can be addressed in four (or fewer) days of trial.

## **II. STATEMENT OF RELIEF REQUESTED**

There are no damages sought in this matter; rather, Petitioners seek declaratory relief and a permanent injunction. In particular, Petitioners ask the Court (1) to declare that Respondents are not implementing Act 18 in a manner compliant with the Act's "liberal access" requirement; (2) to declare Act 18 unconstitutional under the Pennsylvania Constitution; and (3) to permanently enjoin Respondents from enforcing or otherwise implementing the photo ID requirement of Act 18. *See* Am. Pet. for Review at 68. Because the statute is

constitutional, and because it is being administered in a manner that is consistent with the Pennsylvania Constitution and the terms of the statute, no permanent injunction is warranted.

### **III. SETTLEMENT EFFORTS**

The parties have not engaged in any settlement discussions to date. Based on Petitioners' concession that the law is facially valid and that their concern is with its implementation, Respondents propounded a series of interrogatories focused on implementation. In so doing, Respondents sought to identify what steps Petitioners believe are necessary to implement the law in an acceptable manner. Although Petitioners' response retreated to the position that the law is facially invalid, Respondents are nonetheless open to discussions on how the efforts at implementation can be enhanced in order to resolve this matter.

### **IV. STANDARD AND SCOPE OF REVIEW**

Petitioners are seeking to invalidate a statute duly enacted by the General Assembly. For their facial challenge, they bear the heavy burden of demonstrating that no valid application of the statute is possible and that the "invalid" applications are "so real and substantial that they outweigh the statute's 'plainly legitimate sweep.'" *Clifton v. Allegheny Cnty.*, 600 Pa. 662, 705 n. 37, 969 A.2d 1197, 1223 n.37 (2009). Any doubts must be resolved in favor of holding the

statute constitutional. *Estate of Fridenberg v. Commonwealth*, 613 Pa. 281, 298, 33 A.3d 581, 591 (2011).

Statutory construction is, of course, a question of law that is plenary and *de novo*. In seeking to understand the intent of the General Assembly in enacting Act 18, Pennsylvania law identifies several, non-exhaustive presumptions, including that the General Assembly: (1) does not intend a result that is absurd, impossible of execution, or unreasonable; (2) intends the entire statute to be effective and certain; and (3) does not intend to violate the Constitution of the United States or of this Commonwealth. 1 Pa.C.S. § 1922.

In addition, “the Election Code is to be construed liberally so as not to deprive an individual of his right to run for office or the voters their right to elect a candidate of their choice.” *In re Nomination Papers of Lahr*, 577 Pa. 1, 7, 842 A.2d 327, 330 (2004). Although the Court is, of course, charged with construing the statute, the interpretation placed upon statutory language by the Department of State may provide support for the Court’s conclusion. *Id.* at 11 n.7, 842 A.2d at 333 n.7.

Declaratory relief is appropriate only when it will illuminate an existing right, status, or legal relation. *See Pa. Sch. Bds. Ass’n v. Zogby*, 802 A.2d 6, 16 (Pa. Cmwlth. 2002). It is not appropriate for a court to determine rights in

anticipation of events that may never occur. *Independence Blue Cross v. Pa. Ins. Dep't*, 802 A.2d 715, 719 (Pa. Cmwlth. 2002).

To demonstrate entitlement to a permanent injunction, Petitioners must establish that (1) their right to relief is clear; (2) an injunction is necessary to avoid an injury that cannot be compensated by damages; and (3) greater injury will result from refusing rather than granting the relief requested. *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 588 Pa. 95, 117, 902 A.2d 476, 489 (2006). Of these, the most critical is whether the party seeking the injunction has established a clear right to relief as a matter of law. *See Buffalo Twp. v. Jones*, 571 Pa. 637, 644 n.4, 813 A.2d 659, 664 n.4 (2002); *Coghlan v. Borough of Darby*, 844 A.2d 624, 629 (Pa. Cmwlth. 2004) (“The *sine qua non* of an injunction is a clear right to relief.”).

The fact that the Court found a preliminary injunction warranted does not imply that a permanent injunction would be appropriate. *Berger ex rel. Berger v. W. Jefferson Hill Sch. Dist.*, 669 A.2d 1084, 1086 (Pa. Cmwlth. 1995) (observing that decision on preliminary injunction is not binding on consideration of permanent injunction). This principle is particularly important here, where the primary question giving rise to the preliminary injunction was whether there was adequate time between the enactment of Act 18 and the General Election of 2012 for the statute to be implemented lawfully – a question that has now been mooted. *See Applewhite II*, 54 A.3d at 4-5 (noting Petitioners’ concession that “there is no

constitutional impediment to the Commonwealth's implementation of a voter identification requirement, at least in the abstract"); *id.* at 5 ("The gravamen of their challenge at this juncture lies solely in the implementation."); *id.* at 9 (McCaffrey, J., dissenting) ("While I have no argument with the requirement that all Pennsylvania voters, at some reasonable point in the future, will have to present photo identification before they may cast their ballots, it is clear to me that the reason for the urgency of implementing Act 18 prior to the November 2012 election is purely political."); *id.* at 6 (Todd, J., dissenting) ("[T]he question no longer is whether the Commonwealth *can* constitutionally implement this law, but whether it *has* constitutionally implemented it.") (emphasis in original). This progression is consistent with the Pennsylvania Supreme Court's directive last September to assess "the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available." *Id.* at 5 (*per curiam*).

In addition, just as it did when determining the scope of the preliminary injunction, the Court must tailor any injunction to address only what is unlawful. *E.g., Bd. of Revision of Taxes v. City of Philadelphia*, 607 Pa. 104, 134-35, 4 A.3d 610, 627-28 (2010) (limiting scope of permanent injunction "exclusively" to the offending portions of a city ordinance); *Commonwealth ex rel. Davis v. Van Emborg*, 464 Pa. 618, 624, 347 A.2d 712, 715 (1975) (overturning injunction that

failed to “specify with particularity what materials were obscene and to limit its mandate to affect only those so designated”). In this regard, Respondents note that section 103 of the Pennsylvania Election Code expressly states that the provisions of the Code are severable, such that if any “article, section or clause of this act, or part thereof, is held to be unconstitutional” the remainder is to be unaffected. 25 P.S. § 2603(a). As the Court noted, “the essential offending activity [is] voter disenfranchisement, not a request to produce photo ID.” *Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at \*17. Contrary to Petitioners’ continued assault on the photo ID requirement, this Court recognized that the provisional ballot procedures as amended by Act 18 – not the request to produce photo ID – were the provisions that could lead to disenfranchisement in limited circumstances. *Id.* at \*8-16.

Finally, the Court should be mindful that notwithstanding the sometimes dramatic rhetoric of Petitioners, they have repeatedly affirmed the law as it stood prior to Act 18. Accordingly, they are challenging *only* the incremental effect of requiring all – rather than many – persons to show a qualifying form of identification at the polls and *only* the determination to substitute certain forms of identification (such as student identification and identification issued by a care facility) for other forms of identification (such as an utility bill).

## V. WITNESSES

Respondents propose to call the following witnesses, but reserve the right to supplement as needed to rebut Petitioners' direct testimony and to call for cross any of the witnesses identified by Petitioners in their Pretrial Memorandum:

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

Megan Sweeney  
Pennsylvania Department of State  
302 North Office Building  
401 North Street  
Harrisburg, PA 17120

Rebecca Oyler  
Pennsylvania Department of State  
302 North Office Building  
401 North Street  
Harrisburg, PA 17120

Kelly O'Donnell  
Pennsylvania Department of Aging  
555 Walnut Street  
Harrisburg, PA 17101

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

William E. Wecker  
William E. Wecker & Associates, Inc.  
505 San Marin Drive  
Novato, CA 94945  
(rebuttal expert)



## **VI. EXHIBITS**

Respondents' proposed exhibits are identified in the attached Appendix A.

This list is not exhaustive, and Respondents reserve the right to supplement the list with any documents produced in discovery by either side or by any third party prior to trial. Respondents reserve the right to supplement this list based on Petitioners' disclosures in their pretrial memorandum and based on any testimony offered by any witness that Petitioners call at trial.

Respondents also reserve the right to introduce any prior testimony or any exhibit from any deposition taken in this case and the right to use the prior testimony of any witness from or any exhibit used in any previous hearing in this case. For the Court's convenience, the depositions taken in this case are listed in Appendix B.

Respondents also reserve the right to use and introduce additional exhibits for purposes of impeachment or rebuttal, and to introduce or use any exhibit on Petitioners' exhibit list.

## **VII. EXPERT REPORT**

Respondents will be rebutting the expert testimony that has not yet been produced. They will not be offering an expert report other than in rebuttal.

## VIII. STIPULATIONS

Aside from oral stipulations, listed below are the written stipulations to date since the October 2 entry of the preliminary injunction regarding testimony at the upcoming trial.

1. Stipulation by State Representative Metcalfe regarding statements made by him concerning the Voter ID Law
2. Stipulation as to PennDOT's 2013-14 Budget Request
3. Stipulation as to certain materials related to Governor Corbett, Secretary of the Commonwealth Aichele, and State Representative Mike Turzai
4. Stipulation as to Governor Corbett related to any claims of in-person voter fraud
5. Stipulation as to the authenticity of certain PennDOT records

## IX. ARGUMENT

### A. Introduction

Any aspect of Act 18 can be found facially unconstitutional only if it necessarily leads to disenfranchisement. Indeed, as this Court framed the issue, “the essential offending activity [is] voter disenfranchisement, not a request to produce photo ID.” *Applewhite III*, 2012 Pa. Commw. Unpub. LEXIS 749, at \*17. In other words, both this Court and the Supreme Court have already held that requiring identification is not inherently unconstitutional. *Id.* at \*8-16.

It follows that there are three questions before this Court that, taken together, are dispositive of the Amended Petition for Review:

1. Is the statute drafted in such a way that people who are registered to vote and who want to vote are unable to obtain compliant identification or else vote by alternate means?

*Respondents respectfully suggest that the answer to that question is no.*

2. Is the statute drafted in such a way that it places an unconstitutionally disproportionate burden on a class or classes of individuals?

*Respondents respectfully suggest that the answer to that question is no.*

3. Has implementation of the statute – as construed by the Supreme Court – precluded liberal access to a statutorily-authorized form of identification?

*Respondents respectfully suggest that the answer to that question is no.*

Below is a brief synopsis of why the evidence at trial will show that each of the three Counts remaining in the Amended Petition is without merit.

**B. Count I Fails Because the DOT-Issued, Free DOS Voting ID Satisfies Act 18's Requirement That the Commonwealth Provide Liberal Access to Acceptable Photo ID.**

In Count I, Petitioners mix and match various arguments – but the gist of their argument rests on two false premises: (1) the Department of State, not PennDOT, is the agency issuing the statutorily-specified identification and the Department of State lacks authority to do so; and (2) the DOS ID is being issued as a gratuitous act rather than as a means to implement the statute. Because both premises are false, Count I fails.

The DOS ID is identification issued by the Commonwealth. As such, it constitutes proof of identification under Act 18. *See* 25 P.S. § 2602(z.5)(2)(iv)(B) (“proof of identification” includes a qualifying document that is “issued by . . . [t]he Commonwealth of Pennsylvania”). It is not necessary under Act 18 that PennDOT issue the proof of identification. It is mandatory only that proof of identification be made liberally available to any elector who needs one. *See Applewhite II*, 54 A.3d at 3. The DOS ID assures the required liberal availability.

Even though Act 18 does not mandate that PennDOT be the sole source of Commonwealth-issued identification that is liberally available for voting purposes, it so happens – as a matter of fact – that PennDOT *is* the agency (in conjunction

with the Department of State) that is issuing the liberally available DOS ID. Thus, even if the General Assembly had intended that any and all Commonwealth ID issued for voting purposes be issued only by PennDOT, the DOS ID would comport with that intention.

To be issued by PennDOT, the identification need not be generated solely based on PennDOT records. In *Office of the Governor v. Raffle*, No. 1168 C.D. 2012, 2013 Pa. Commw. LEXIS 124 (April 24, 2013) (*en banc*), for example, this Court was asked whether government-issued telephone numbers were personal for purposes of Right-to-Know Law analysis (this Court held that they were). Certainly the service provider had access to telephone service and the underlying data necessary in order for the agencies to issue specific cell phone numbers to individual employees. But the physical assignment of the numbers came from the agencies themselves. That is, the agencies performed the function that the service provider's records enabled. In the same way, the DOS ID is issued by PennDOT (physically), with the Department of State as the issuing authority.

The DOS identification card program is consistent with the statutory provision that requires PennDOT to "issue an identification card . . . 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 by

[Act 18] and requires proof of identification for voting purposes.” 25 P.S. § 2626(b). Through section 206(b) of the Election Code, the General Assembly directed PennDOT to issue an ID for voting purposes, at no cost, and notwithstanding the provisions of 75 Pa.C.S. § 1510. It was this statutory directive that caused the Supreme Court to conclude in *Applewhite II* that the General Assembly intended that responsible Commonwealth agencies must assure that registered electors have “liberal access” to proof of identification for voting purposes.

The overall responsibility to assure that registered electors have liberal access to proof of identification is not imposed on PennDOT exclusively – or even principally. After all, section 206 (relating to requirements for voter identification) appears in Article II of the Election Code – the article that provides directives *to the Secretary of the Commonwealth* as the chief election officer of the Commonwealth. Accordingly, she is empowered and authorized generally to administer and effectuate the provisions of Act 18 – including the requirement that proof of identification be liberally available to all registered electors who need it.

The particular provision of the statute at issue references an identification card as described in 75 Pa.C.S. § 1510(b) (issuance and content of driver’s license—identification card) – but *that* identification card is not to be issued to any registered elector who makes application for the card for voting purposes, which is

why the statute goes on to state: *notwithstanding the provisions set forth in that statute*. Identification cards issued under 75 Pa.C.S. § 1510(b) are PennDOT's responsibility; the duty to assure liberal availability of identification cards to registered electors, however, rests overall with the Secretary of the Commonwealth.

Nevertheless, it follows from the specific legislative directive found in section 206(b) of the Election Code that the General Assembly expected any identification cards that might be issued under the direction of the Secretary of the Commonwealth to share the characteristics of identification cards issued by PennDOT under 75 Pa.C.S. § 1510(b). But the statute excepted any requirements or restrictions normally imposed by PennDOT in the issuance of identification cards under section 1510(b) that are not consistent with the mandate of liberal availability implied by section 206 of the Election Code. Accordingly, certain of the limitations PennDOT has needed to impose on driver's licenses, for example, were not to apply to identification cards issued to registered electors who seek them for voting purposes.

Therefore, to implement Act 18 as contemplated by the General Assembly, it was necessary and appropriate for the Secretary of the Commonwealth, working with PennDOT, (a) to identify any requirements and those "restrictions" under 75 Pa.C.S. § 1510 that might be incompatible with liberal access as required by Act

18; and (b) to modify the process for registered electors to obtain identification cards to the extent necessary to ensure that all registered electors would have liberal access to identification cards issued through PennDOT to be used solely for voting purposes.

Based on these principles derived from the statute and its assurance of liberal availability, the Departments of State and Transportation entered into a Memorandum of Understanding on August 15, 2012, amended on September 24, 2012, to assure that PennDOT would be able to issue identifications (designated as a “DOS ID”) that satisfy the requirements of Act 18, including section 206(b) of the Election Code. 25 P.S. § 2626(b).<sup>5</sup>

The product issued by PennDOT on behalf of the Department of State plainly fulfills the provisions of section 206(b) (25 P.S. § 2626(b)), as those provisions have been elucidated in the opinions of this Court and the Supreme Court. Because it is within the Secretary’s authority and obligation to work with PennDOT to see that the liberal access requirement of the statute is satisfied, her actions are in conformance with and for the purposes of implementation of the statute and are not some kind of “whim.”

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<sup>5</sup> It should be noted that a Memorandum of Understanding of this type is not unique to this statute. For instance, on June 10, 2002, the Departments of State and Transportation entered into a Memorandum of Understanding to enable the two agencies to implement certain HAVA provisions and related provisions of Pennsylvania law. Indeed, the authority for such interagency coordination goes back to the inception of The Administrative Code of 1929. *See* 71 P.S. §§ 181, 182.



Petitioners conflate the Secretary's obligation to implement the statutes within her authority – and the concomitant discretion to do so in ways that are increasingly efficient and protective of the rights of individual voters – with “whim” and a right to “abolish the DOS ID at any time and at [her] discretion.” *See* Am. Pet. for Review at ¶ 165. Petitioners' position fundamentally misapprehends the role of the Secretary in administering the programs that are authorized by the Election Code.

It is apparent even from section 201 of the Election Code (25 P.S. § 2621) that it is the Secretary of the Commonwealth who is vested with both the power *and the obligation* to administer the Election Code. Her actions in fulfilling those responsibilities are not at “whim,” and there is no evidence from which it can be shown that any of her actions to date have been motivated by bad faith or that they had to do with anything other than the fulfillment of her responsibility to effectuate the statute.

As the Supreme Court explained in *Borough of Pottstown v. Pennsylvania Municipal Retirement Board*, because the Court is the ultimate articulator of the meaning of a statute, it may look to an agency that has created a broadly applicable standard – an interpretive rule – to effectuate the intent underlying a statute and that is binding to the extent it tracks the meaning of the statute. 551 Pa. 605, 610-11, 712 A.2d 741, 743-44 (1998).

As well, among the principles of statutory construction a court applies when the words of a statute are not explicit are administrative interpretations of the statute in question. *See* 1 Pa.C.S. § 1921. Moreover, the Election Code is “steeped with requirements phrased in the imperative,” even though “it is widely accepted that most statutory provisions for the conduct of elections may be regarded as directory, and not mandatory” – “unless the statute expressly declares that the particular requirement is essential to the validity of the election, or the violation as such impacts on the election result.” *Shambach v. Bickhart*, 577 Pa. 384, 404, 845 A.2d 793, 806 (2004) (Saylor, J., concurring). Indeed, in liberally construing the Election Code in favor of a person’s right to vote – and in favor of a lawful exercise of authority – the Supreme Court in *Kuznik* upheld the Secretary’s determination that the principle of uniformity and compliance with federal law trumped the apparently contradictory provision in the Election Code (and in the Pennsylvania Constitution itself) requiring a voter referendum prior to the use of new voting machines. 588 Pa. at 148-49, 902 A.2d at 507-08.

It follows, as the Supreme Court recognized in its prior opinion in this case,<sup>6</sup> that the Secretary did not err in working with PennDOT to ensure that a form of

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<sup>6</sup> *See Applewhite II*, 54 A.3d 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 Commonwealth officials appear to acknowledge is a rigorous one. 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

identification for voting purposes that is both consistent with the identification that is “described in 75 Pa.C.S § 1510(b),” and liberally available “[n]otwithstanding the provisions [of that statute] to the contrary.” 25 P.S. § 2626(b). The DOS ID card satisfies the statutory requirement of liberal availability that the secure identification cards typically issued by PennDOT do not, while at the same time otherwise matching the characteristics of identification issued under 75 Pa.C.S. § 1510(b). More to the point, the Supreme Court never suggested that PennDOT and the Department of State were operating beyond the scope of their respective authority or the statute by issuing the DOS ID or that PennDOT’s role precluded liberal access. Otherwise, there would have been no need to remand to this Court to determine the availability of the PennDOT-issued, free DOS ID.

While the Secretary of the Commonwealth and PennDOT might make appropriate revisions to their joint program over time, those changes must be in furtherance of the proper implementation of the statute, and consistent with the Secretary’s duties and authority. The program must continue to assure liberal access.

Petitioners’ suggestion that because the Secretary has authority and some measure of discretion in her administration of the statute, the statute is rendered

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current residency. 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.” (citations omitted)).

unlawful (and the statute as a whole should therefore be enjoined) is absurd. The law presumes that Commonwealth officials will carry out their duties lawfully, and that presumption must apply to the Secretary of the Commonwealth in this instance. Petitioners' contention that the Secretary could make revisions to the DOS ID program that would undermine the liberal availability required by the statute is the kind of rank speculation that is never sufficient in any court to warrant an injunction. See *In re Condemnation Proceeding by the Redevelopment Auth. of Phila.*, 595 Pa. 241, 247, 938 A.2d 341, 345 (2007), quoting *Robinson v. Philadelphia*, 400 Pa. 80, 86-87, 161 A.2d 1, 5 (1960) (“Public officials are presumed to have acted lawfully and in good faith until facts showing the contrary are averred, or in a proper case are averred and proved.”); see also *Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976) (refusing to find equitable relief warranted where plaintiff's theory was that there was a constitutional duty – and plaintiffs had a right – to an injunction that would “eliminate” the prospect of future police misconduct).

Petitioners' error in this regard appears to arise from their false conclusion that the DOS ID is not within the statute merely because the statute did not “prescribe” the details of the card. The Secretary of the Commonwealth and PennDOT were both directed by the statute to see to it that a card that meets the above criteria – issued by PennDOT but free from those restrictions that could

curtail liberal access – is available and distributed, at no cost, to voters. And that is precisely what the agencies have done.

One final note deserves mention. Given that Count I is entirely statutory, it is unclear why Petitioners argue in Paragraph 166 that “[a]n unconstitutional statute cannot be saved merely by the government’s promise to implement it in a responsible fashion,” citing *United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577, 1591 (2010), a case in which the federal government had argued that it would prosecute only the most egregious violations of an animal cruelty statute that criminalized behavior protected by the First Amendment. Count I does not assert any constitutional violation. More to the point, the Secretary of the Commonwealth is not arguing that she will enforce the statute with a light hand: she is implementing the statute in accordance with its terms as those terms have been construed by the Pennsylvania Supreme Court – and by this Court. There is nothing unconstitutional about that.

**C. Count II Fails Because the Photo ID Requirement Regulates the Conduct of Elections in Pennsylvania and Treats All Voters Alike.**

Article I, Section 5, of the Pennsylvania Constitution 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.

Pa. Const., art. I, § 5.<sup>7</sup> In order to protect this right, the General Assembly is permitted to provide safeguards against attempts to vote when a person is not a qualified elector or is otherwise attempting to abuse the right of suffrage. *In re New Britain Borough Sch. Dist.*, 295 Pa. 478, 483, 145 A. 597, 598-99 (1929); *Winston v. Moore*, 244 Pa. 447, 457, 91 A. 520, 523 (1914) (noting elections are free and equal when open to all *qualified* electors alike); *Mixon v. Commonwealth*, 759 A.2d 442, 448 (Pa. Cmwlth. 2000) (*en banc*) (“Although every citizen has a general right to vote, states have broad powers to determine the conditions under which the right of suffrage may be exercised . . . .”), *aff’d per curiam*, 566 Pa. 616, 783 A.2d 763 (2001).

When the General Assembly acts in this fashion, “absen[t] any express constitutional limitation upon the power of the legislature to make laws regulating elections, . . . nothing short of a gross abuse would justify” finding the law unconstitutional, even if other alternatives were available and not even considered. *Winston*, 244 Pa. at 457, 91 A. at 523; *see Oughton v. Black*, 212 Pa. 1, 9, 61 A. 346, 349 (1905); *Mixon*, 759 A.2d at 447 (“Any party challenging a legislative

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<sup>7</sup> “[F]ree and equal means that the voter shall not be physically restrained in the exercise of his right of franchise . . . and that every voter shall have the same right as any other voter.” *Winston v. Moore*, 244 Pa. 447, 455, 91 A. 520, 522 (1914), *citing Commonwealth ex rel. McCormick v. Reeder*, 171 Pa. 505, 33 A. 67 (1895). Elections are made equal by “arrang[ing] all the qualified electors into suitable districts . . . and mak[ing] their votes equally potent in the election.” *Id.* at 454, 91 A. at 522, *quoting Patterson v. Barlow*, 60 Pa. 54, 75 (1869).

enactment has a heavy burden, and legislation will not be invalidated unless it clearly, patently, and plainly violates the Constitution of this Commonwealth.”).

Under the Pennsylvania Constitution, an election is “free and equal” when qualified electors are “carefully distinguished” from unqualified, and ballots are unprejudiced by fraud. *Patterson v. Barlow*, 60 Pa. 54, 76 (1869). It follows that “[t]he power to legislate on the subject of elections . . . carries with it the power to prescribe the *evidence of the identity and qualifications* of the voters.” *Id.* at 83 (emphasis added); *id.* at 75 (“the evidence of persons and qualifications must all be prescribed by law”). So long as the legislation imposes inconveniences that burden voters alike and bear upon all in the same way, a court may not find them unconstitutional absent a gross abuse of discretion. *See Winston*, 244 Pa. at 457, 91 A. at 523; *Patterson*, 60 Pa. at 75; *see also Contested Election of Owen Cusick*, 136 Pa. 459, 473, 20 A. 574, 577 (1890) (recognizing there is nothing unreasonable or unconstitutional in requiring an elector to “establish[] his qualifications, in the manner pointed out by law”).

In this case, Act 18 requires a voter to establish his or her qualification by showing one of several different types of photo ID at the polls or by providing verifiable identification data on an absentee ballot.<sup>8</sup> The requirement to provide verifying data applies equally to all qualified electors. That some may experience

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<sup>8</sup> Petitioners do not challenge the constitutionality of the amended absentee ballot provisions.

more inconvenience than others in meeting those requirements does not render the election not “equal.” See, e.g., *Oughton*, 212 Pa. at 5-6, 61 A. at 347-48 (concluding that, although straight-line ballot option may inconvenience some voters, such inconvenience does not render the option not “equal”); *DeWalt v. Bartley*, 146 Pa. 529, 544, 24 A. 185, 187-88 (1892) (holding that although limiting the number of candidates on a ballot may inconvenience some voters by requiring them to write-in their selection, the inconvenience does not make it “practically impossible” to vote); *Cusick*, 136 Pa. at 468, 473, 20 A. at 575, 577 (rejecting claim that in-person registration by affidavit denied the right to vote or “clog[ged] its exercise with such conditions as to render it unreasonably inconvenient”); *Patterson*, 60 Pa. at 82-83 (upholding various provisions of registration requirement even though some voters were forced to exercise “greater vigilance to secure their suffrage”).

Disenfranchisement – the wrong that is sought to be avoided – results from systemic and insurmountable impediments to exercising the right to vote. See *Rosario v. Rockefeller*, 410 U.S. 752, 757-58 (1973) (“there was no way in which the members of that class could have made themselves eligible to vote”); *In re New Britain Borough Sch. Dist.*, 295 Pa. at 485, 145 A. at 599 (depriving residents of right to vote by adopting conflicting district classification); *Mixon*, 759 A.2d at 448 n.11. Here, Act 18 and the system it creates is intended to assure that every person



who wishes to vote is able to do so – while at the same time giving voters confidence that only qualified electors will vote and each voter will have his or her vote counted *once*. See *Kuznik*, 588 Pa. at 116, 902 A.2d at 488 (recognizing that both principles sought to be upheld involved the fundamental right to vote). In furtherance of the fundamental right to vote, a regulation may cause some more difficulty in compliance than others: “[i]ndividuals may experience difficulties, and some may even lose their suffrages by the imperfection of the system; but this is no ground to pronounce a law unconstitutional unless it is a clear and palpable abuse.” *Patterson*, 60 Pa. at 76.<sup>9</sup>

Viewed in the context of this precedent, Petitioners’ claim that the photo ID requirement imposes unconstitutional burdens is of no avail. Moreover, there has been no gross abuse of discretion and heightened scrutiny is not warranted in this context. See *In re Nomination Papers of Rogers*, 908 A.2d 948, 954-55 (Pa. Cmwlth. 2006) (“[O]ur Supreme Court has applied a ‘gross abuse’ standard to determine whether election statutes violate the ‘free and equal’ clause . . . . This stands in sharp contrast to the standard utilized under the federal constitution . . . . [W]e view the state standard as considerably less than that employed by the federal courts.”); see also *In re Municipal Reapportionment of Twp. of Haverford*, 873

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<sup>9</sup> The *Patterson* Court reviewed a law that added a level of security to the vote by requiring electors to register and to prove they were qualified to register. Act 18 adds a second level of security – by requiring the person who appears at the poll to prove that he or she is the person registered – consistent with concerns recognized as valid by the United States and Pennsylvania Supreme Courts.

A.2d 821, 829 (Pa. Cmwlth. 2005) (stating that protection of right to vote under Pennsylvania Constitution is no greater than under U.S. Constitution).

In this case, the General Assembly – and the Secretary – were cognizant of and took steps to help those who might find compliance with the law difficult and to ensure that none of them was disenfranchised. As just one example, the list of acceptable IDs was amended between the bill that originally passed the House and the one that was signed into law, to assure that persons who lived in care facilities could use identification issued by those facilities. By taking steps of this kind, the General Assembly sought to accommodate – rather than affording unequal, preferential treatment to – those persons who were identified as potentially vulnerable. *See Shankey v. Staisey*, 436 Pa. 65, 69-70, 257 A.2d 897, 899 (1969) (*per curiam*) (upholding minimal public support requirement because holding otherwise would excuse minority party candidate from showing the same public support as majority party candidates and would render election unequal); *see also* Pa. Const., art. I, § 5 (“Elections shall be free and *equal*.” (emphasis added)).

**D. Count III Fails Because the Act Provides Equal Protection to All Qualified Voters.**

Count III of the Amended Petition alleges that Act 18 violates the “guarantee of equal protection” provided by Article I, Sections 1 and 26 of the Pennsylvania Constitution. *See* Am. Pet. for Review at ¶¶ 181-85. Section 1 of the Pennsylvania Constitution provides:

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Pa. Const., art. I, § 1. Section 26 provides:

Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

Pa. Const., art. I, § 26.<sup>10</sup>

Although the Pennsylvania Constitution “protects all voters and not just historically protected classes,” Am. Pet. for Review at ¶ 185, Petitioners attempt to identify specific groups that they claim should be “protected” from implementation of Act 18. They draw their list from the Supreme Court’s statement in its opinion of September 18, 2012 that “there is little disagreement . . . that the population [affected by the access issue] includes members of some of the most vulnerable segments of society (the elderly, disabled members of our community, and the financially disadvantaged).” *Applewhite II*, 54 A.3d at 4.

Of course, the concern that the Supreme Court expressed in mid-September of 2012 was whether those who lacked a compliant form of identification would be able to get one in time for the November General Election. No justice suggested

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<sup>10</sup> Count III also invokes and relies on the same constitutional provision as Count II, Article I, Section 5, which, again, provides that “[e]lections 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.” See Am. Pet. for Review at ¶¶ 184, 185

that there was a question whether such person could *ever* obtain a compliant form of identification no matter how much time they were given to do so. And the evidence is already persuasive that people can and do obtain the identification they need.

Five of the seven individual Petitioners – the individuals the associational Petitioners considered emblematic of their equal protection argument – now have proof of identification and have been dismissed because their claims are moot, *see Applewhite V* at 5-7, which demonstrates that compliant photo ID is in fact accessible to these “segments of society.” These five dismissed Petitioners who were able to meet Act 18’s requirements allegedly were members of the classes Petitioners have chosen to highlight: the elderly (former Petitioners Applewhite, Marsh, and Block); individuals with disabilities (former Petitioner Cuttino); those whose names have been changed (former Petitioner Block); and those whose appearance has changed (former Petitioner Schor). The two individual Petitioners who remain with standing under the Court’s order are not alleged to be disenfranchised by Act 18.<sup>11</sup>

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<sup>11</sup> Petitioner Bookler voted absentee, and therefore did not need to present a photo ID and presumably would not need to do so in the future. Am. Pet. for Review at ¶ 48. Despite that fact, Ms. Bookler acknowledges that she is eligible to obtain a photo ID, but avers that to do so she “would have to endure a trip to the nearest PennDOT Driver’s License Center about ten miles from her home,” which would be “a strenuous physical burden.” *Id.*

Petitioner Lee apparently could have obtained a photo ID but for “[t]he demands of caring for her 99-year-old grandmother,” which “prevented her from travelling to a PennDOT

Petitioners also allege that the law imposes “different burdens” on various voters depending on their individual circumstances. Examples of these differing burdens, Petitioners say, are the lesser requirements imposed on “lucky” registered voters who had a PennDOT ID dating from the years 1990-2010, compared to the “greater burdens” imposed on those whose legal names have changed or “whose appearance no longer matches their photo ID” face. Am. Pet. for Review at ¶¶ 188-92. Petitioners, however, fail to appreciate that those who change their names or appearance are regularly required to substantiate that fact when exercising all sorts of constitutional rights, from the right to own property to the right to contract. That fact of life has never been thought to violate the equal protection clause. Indeed, the law as it previously existed, which required an elector to produce identification when appearing in an election district for the first time, could impose many of the same burdens that Petitioners claim render Act 18 unconstitutional. But Petitioners do not suggest that this prior iteration of Pennsylvania election law is unconstitutional; in fact, Petitioners urge the Court to return to that law. If Petitioners’ claimed burdens were not constitutional under the prior law, neither are they under Act 18. Indeed, for some of Petitioners’ identified sectors of the

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center to obtain the ID.” *Id.* at ¶ 34. While it is understandable that there might have been a problem in getting to PennDOT prior to the November General Election, such concerns have been alleviated by the extended period prior to the Act’s full implementation.

population, conforming identification is *less* burdensome to obtain under Act 18 than under the prior statute.

It is ironic that Petitioners complain about the fact that photographic ID is not required for absentee ballots that are offered to disabled voters (as Ms. Bookler evidences) as well as to our service people stationed away from home and others whose business does not permit them to vote in person. *See* Am. Petition for Review at ¶ 151. Absentee ballots assure that those persons who might otherwise be unable to vote are *not* disenfranchised. Act 18 adjusted the identification provisions for such absentee ballots by requiring a verifiable (both as genuine and as non-duplicative) portion of the voter's Social Security number, the full driver's license number, or a copy of a valid-without-photo card from PennDOT. Given the time between the filing of and the counting of an absentee ballot, the absentee voter identification requirements provide an assurance of genuineness comparable to the identification that an in-person voter will provide. *Compare* 25 P.S. § 2602(z.5)(1) *and* (2), *with* (3); *see also id.* § 2602(w) (qualified absentee elector).

The right to equal protection under the Pennsylvania Constitution is coterminous with its federal counterpart, and the Pennsylvania constitutional provision guaranteeing "free and equal" elections does not provide more protection than does the U.S. Constitution. *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at \*89; *see also Erfer v. Commonwealth*, 568 Pa. 128, 138-39, 794 A.2d 325,

332 (2002), citing *Love v. Borough of Stroudsburg*, 528 Pa. 320, 597 A.2d 1137 (1991).<sup>12</sup> Accordingly, this Court correctly concluded that “this approach is consistent with other state courts that considered and rejected challenges to their respective states’ voter ID laws, which also construe their state constitutions’ equal protection clauses as coextensive with the federal equal protection clause.” *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at \*90 (citing analogous decisions from Georgia, Michigan, and Indiana).<sup>13</sup>

In attempting to demonstrate a right to a preliminary injunction – and to the extent Petitioners can overcome their prior admission that the statute is not facially infirm – Petitioners bear “a heavy burden of persuasion” to show that the statute “clearly, palpably, and plainly” violates the Constitution so as to overcome the

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<sup>12</sup> On appeal, the Pennsylvania AFL-CIO, as *amicus curiae*, urged the Supreme Court to abandon these entrenched principles and to find that the equal protection guarantees of the Pennsylvania Constitution are broader than those under the federal Constitution. The AFL-CIO primarily relied on *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1987), and a treatise on the Pennsylvania Constitution by Professor Ken Gormley. This invitation was rejected in *Erfer*, 568 Pa. at 139, 794 A.2d at 332 (“Petitioners provide us with no persuasive argument as to why we should, at this juncture, interpret our constitution in such a fashion that the right to vote is more expansive than the guarantee found in the federal constitution,” citing *Edmunds*), and would be unwarranted on the claims in this case, which seek to vindicate the same rights addressed by the federal courts in construing comparable legislation. The Pennsylvania Supreme Court gave no indication that it thought otherwise.

<sup>13</sup> In fact, even express limitations on voting rights have been found to comport with the equal protection mandate. Hawaii’s ban on write-in votes was upheld in *Burdick* “despite the fact that it prevented a significant number of ‘voters from participating in Hawaii elections in a meaningful manner.’” *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 190 (2008) (lead plurality opinion), citing and quoting *Burdick v. Takushi*, 504 U.S. 428, 443 (1992) (Kennedy, J., dissenting). In addition, California’s total disenfranchisement of convicted felons (despite that they had served their sentences and completed parole) passed equal protection muster in *Richardson v. Ramirez*, 418 U.S. 24 (1974).

strong presumption that the legislative enactment is constitutional, while all doubts are to be resolved in favor of the constitutionality of the statute. *See In the Interest of F.C. III*, 607 Pa. 45, 68, 2 A.3d 1201, 1214 (2010); *Estate of Fridenberg*, 613 Pa. at 298, 33 A.3d at 591; *see also* 1 Pa.C.S. § 1922.

Rather than trying to meet their own well-established burden of proof, Petitioners suggest that it is somehow *Respondents* who must justify Act 18 with evidence of actual past in-person voter fraud in Pennsylvania. But Respondents do not need to provide “elaborate, empirical verification of the weightiness of . . . [the] asserted justifications.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997), *citing* *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (“Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.”). As *Crawford* shows, a legislature is not required to have before it empirical evidence of past voter fraud to justify enacting a voter ID law that is designed to enhance confidence in electoral integrity and in the importance of an individual’s vote – whether in response to actual fraud or to perceptions of fraud. *See Crawford*, 553 U.S. at 194 (lead plurality opinion) (noting that “[t]he record



contains no evidence of [in-person voter] fraud actually occurring in Indiana at any time in its history”).<sup>14</sup>

On the other side of the balance, the burdens asserted by Petitioners here are “[o]rdinary and widespread burdens . . . requiring ‘nominal effort’ of everyone” and therefore they “are not severe.” *Id.* at 205 (Scalia, J., concurring in the judgment), *citing* *Clingman v. Beaver*, 544 U.S. 581, 591 (2005). Voters who may have lost their photo identification or who “may not resemble the photo in the identification” merely face burdens “arising from life’s vagaries” that do not raise “any question about the constitutionality” of Indiana’s voter ID law. *Id.* at 197 (lead plurality opinion). Similarly, “the inconvenience of making a trip to [Indiana’s Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” *Id.* at 198. Moreover, “making voters travel farther than what is convenient for most and possible for some does not amount to a ‘severe’ burden under *Burdick*” to warrant stricter scrutiny. *Id.* at 215 (Souter, J., dissenting).

*Crawford* acknowledged that certain voters may face a “somewhat heavier burden,” such as

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<sup>14</sup> The lead plurality opinion observed that “flagrant examples of such fraud in other parts of the country have been documented throughout this Nation’s history by respected historians and journalists.” 553 U.S. at 195.

elderly persons born out of state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed.

*Id.* at 199 (lead plurality opinion). Indiana’s photo ID law was nonetheless upheld as constitutional, with the lead plurality concluding that even if “the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners’ right to the relief they seek [in their facial attack on the statute].” *Id.* at 199-200.

Indeed, the *Crawford* Court gave short shrift to the petitioners’ request that the Court determine whether a possible added burden on this small number of voters outweighed the state’s broad concern to protect electoral integrity, calling the request “unique.” *Id.* at 200.<sup>15</sup> “Election laws will invariably impose some burden upon individual voters. Each provision of a code, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (internal quotations and citation omitted).

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<sup>15</sup> Indeed, the lead plurality noted that even if the record had shown an *unjustified* burden on some voters, it would not have warranted invalidating that entire statute. *Crawford*, 553 U.S. at 203.

Applying the *Crawford* balancing analysis here, it is apparent that the difficulties individual members experience are not because of their membership in any protected class, but rather due to their “peculiar circumstances,” against which no “equal protection” is afforded. *See Crawford*, 553 U.S. at 206-08 (Scalia, J., concurring in the judgment). In that regard, it also is important to note that the General Assembly took very careful steps to ensure that each of the allegedly “burdened” groups be affected in as limited a way as possible by Act 18.

*First*, section 206 of the Election Code specifies that the new card envisioned by the statute will be “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.” 25 P.S. § 2626(b).

*Second*, the General Assembly expressly made identification issued by care facilities separately compliant with the statute – and it defined care facility to include long-term care nursing facilities as defined in the Health Care Facilities Act and assisted living residences and personal care homes as defined in section 1001 of the Public Welfare Code.

*Third*, three different statutory provisions on absentee ballots (25 P.S. § 3146.2b, 25 P.S. § 3146.5(c), and 25 P.S. § 3146.8(i)) were amended to eliminate

the proof of identification requirement for absentee voters who would be eligible for voting by means of an alternative ballot under the Voting Accessibility for the Elderly and Handicapped Act (“VAEH”), 42 U.S.C. § 1973ee-1, *et seq.*, a statute that is construed in conjunction with Title II of the Americans with Disabilities Act (the “ADA”), 42 U.S.C. § 12132, to ensure that neither age nor disability precludes a person’s ability to vote. Given that at the time of Act 18 the Department of State in its Procedures to Assure Compliance with the Voting Accessibility for the Elderly and Handicapped Act and Other Laws Assuring the Voting Rights of Individuals with Disabilities and Language Needs had expressly stated (in section 5(a)) that a qualified elector who was unable because of disability or illness to attend the polling place or operate the voting system without assistance had the right to vote by absentee ballot, it is clear that the General Assembly intentionally legislated to ensure that (a) the burdens on the elderly and disabled would be minimized, and (b) if those persons were still unable to obtain compliant identification – notwithstanding the enhanced list of authorized identification – they could nonetheless vote by absentee ballot.<sup>16</sup>

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<sup>16</sup> Although by its terms the VAEH applies to federal elections, the Supreme Court recognized in *Kuznik* that uniformity across and within elections was a valid goal. 588 Pa. at 120, 902 A.2d at 490-91. Additionally, the Eastern District of Pennsylvania recognized that applying the VAEH procedures more broadly was a “reasonable modification under the ADA to avoid discrimination based on disability” and that there was no “federal legal impediment to implementing the VAEH procedures in non-federal elections.” *NAACP v. Philadelphia Bd. of Elections*, No. 97-7085, 1998 U.S. Dist. LEXIS 8861, at \*16 (E.D. Pa. June 17, 1998).

*Fourth*, the General Assembly can be presumed to have been aware that PennDOT had already developed procedures to address other persons who might consider themselves burdened – such as those who have recently undergone or are undergoing a transgender procedure. Since prior to Act 18, PennDOT has had in place procedures and forms to accommodate persons changing their gender.

*Fifth*, the voter registration forms have protected the right to vote of persons who identify their place of residence as someplace other than a postal address by permitting them to mark a location (including a park bench) on a map; the “DOS ID” application echoes that accommodation. Indeed, for a person who is homeless and voting at a different polling place than in a prior election, Act 18 may have *enfranchised* that person to vote where he or she otherwise could not have, given that prior testimony established that not all of those persons had ID that would have been acceptable under the post-HAVA and pre-Act 18 statute, but now can readily secure the DOS ID.

*Finally* – to state the obvious – the fact is that Act 18 protects all qualified voters equally. It prevents the harm of voter fraud from diluting the votes of the Commonwealth’s qualified electors alike – including Petitioners – and promotes the confidence of the electorate. In conducting a balancing test, the Court should keep in mind that “the right to vote is on both sides of the ledger.” *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 24

& n.57, 740 N.W.2d 444, 457 & n.57 (2007), quoting *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007) (Posner, J.). Act 18 is fully justified by relevant, legitimate, and important interests, and the burdens that individual electors may feel beyond the general burden to have a voter ID are not severe under the Constitution. To the extent there are individual burdens, they are not due to the enactment of the law.

## **X. CONCLUSION**

There can be no question in this case that it is constitutional to require a qualified elector to show photo identification when he or she votes in person. Both the United States and Pennsylvania Supreme Courts reached this conclusion, and Petitioners conceded as much. The only remaining issues concern implementation of the requirement: whether Respondents have acted *reasonably* in implementing the law so as to ensure liberal access to compliant identification. Respondents have met these expectations and have provided liberal access to the free DOS ID to all qualified electors who do not otherwise have compliant identification and who


need such identification to vote. Each count of the Amended Petition for Review fails to state a claim, and the law as implemented should be upheld.

Dated: June 17, 2013

Respectfully submitted,

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# **APPENDIX A**



## RESPONDENTS' TRIAL EXHIBIT LIST

<b>Exhibit No.</b>	<b>Document Name/Description</b>
1	Act 18
2	June 2002 Memorandum of Understanding between PennDOT and DOS
3	October 5, 2005 Memorandum of Understanding between PennDOT and DOS
4	August 15, 2012 Memorandum of Understanding between PennDOT and DOS
5	September 24, 2012 Amendment to August 15, 2012 Memorandum of Understanding between PennDOT and DOS
6	Emails/Memoranda to County Election Directors with Voter ID Updates and Information
7	March 14, 2012 Email from Jonathan Marks to CBEs re Urgent Voter ID Legislation with Attachments
8	March 15, 2012 Email from Jonathan Marks to CBEs re Urgent Voter ID Legislation (Follow-up) with Attachment
9	April 5, 2012 Email from Jonathan Marks to CBEs re Important Information: Voter ID Law with Attachments
10	April 17, 2012 Email from Jonathan Marks to CBEs re Re: Important Information - Voter ID Law with Attachments
11	April 20, 2012 Email from Judith Holjes to BCEL re New FAQ's Finalized with Attachments
12	May 15, 2012 Email from Jonathan Marks to CBEs re Act 18 - Voter ID with Attachments
13	May 22, 2012 Email from Jessica Mathis to BCEL re Shared Ride
14	May 23, 2012 Email from Jonathan Marks to CBEs re RE: Voter ID Alert: Simplified Method for Pennsylvania-born Residents with Attachment
15	May 23, 2012 Email from Jonathan Marks to CBEs re Voter ID Discussion 1 with Attachments

<b>Exhibit No.</b>	<b>Document Name/Description</b>
16	July 3, 2012 Email from Jonathan Marks to CBEs re Press Release - DOS and PennDOT Database Comparative Analysis
17	July 17, 2012 Email from Jonathan Marks to BCEL re Important Direction Regarding Voter ID Calls with Attachment
18	July 19, 2012 Email from Judith Holjes to BCEL re Tracking Voter ID Telephone Calls
19	August 15, 2012 Email from Jessica Mathis to BCEL re Voter ID Law Upheld with Attachment
20	August 23, 2012 Email from Judith Holjes to BCEL re Message on Behalf of Deputy Commissioner Harlow - PennDOT Drivers' License Centers
21	August 28, 2012 Email from Jessica Mathis to CBEs re Poll Worker Guide with Attachment
22	September 4, 2012 Email from Judith Holjes to BCEL re BCEL Tracking of Voter ID Calls with Attachments
23	October 2, 2012 Email from Jessica Mathis to CBEs re Court Order - Voter ID with Attachment
24	October 2, 2012 Email from Jessica Mathis to BCEL re Voter ID Law Upheld
25	October 2, 2012 Email from Jonathan Marks to CBEs re Urgent Message re: Commonwealth Court Order with Attachments
26	October 3, 2012 Email from Jessica Mathis to BCEL re Voter ID Update
27	October 9, 2012 Email from Jonathan Marks to CBEs re Urgent: Follow-up regarding Voter ID with Attachments
28	October 17, 2012 Email from Jonathan Marks to CBEs re RE: Two Important Reminders with Attachments
29	November 13, 2012 Email from Jessica Mathis to CBEs re ID Verification with Attachments
30	February 15, 2013 Email from Jonathan Marks to CBEs re ALERT: Voter ID Lawsuit

<b>Exhibit No.</b>	<b>Document Name/Description</b>
31	February 20, 2013 Email from Jonathan Marks to CBEs re ALERT Voter ID - Preliminary Injunction Extended Through May Primary with Attachments
32	April 3, 2013 Email from Jessica Mathis to CBEs re Voter ID Follow-Up with Attachments
33	June 3, 2013 Email from Shannon Royer to John Guyer re Possible DOS Voter ID Educational Campaign
34	Election Day Telephone Operator Q&A Sheet
35	SURE Search Criteria
36	Voter ID Law-BCEL FAQ
37	12DOS001 - Postcard
38	Postcard Mailing
39	Voter ID Postcard Mailing Process
40	DOS Voter ID 2012 General Election Recap - Harmelin Media presentation
41	Voter ID Expenses (dated April 16, 2013)
42	Voter ID Outreach/Voter ID FAQ Sheet
43	Secretary Aichele letter sent to registered voters not located in PennDOT database
44	Polling Place Poster
45	Polling Place Poster - Spanish
46	Voter ID Handout - Basic (County)
47	Voter ID Handout - Bilingual (County)
48	Voter ID Handout - English
49	Voter ID Handout - Spanish
50	Voter ID Project Plan (dated June 4, 2013)
51	Voter ID Project Plan (dated June 12, 2013)
52	Master Event List - Bravo Group
53	Master Outreach List - Bravo Group

<b>Exhibit No.</b>	<b>Document Name/Description</b>
54	Press Calls and Events List - Bravo Group
55	Voter ID Material and Shipment Update
56	FAQ Documents
57	PA Voter ID Law - General Frequently Asked Questions
58	PA New Voter ID Law - Military Voters Frequently Asked Questions
59	PA Voter ID Law - College and University IDs Frequently Asked Questions
60	PA Voter ID Law - Employee and Local Government IDs Frequently Asked Questions
61	PA Voter ID Law - Homeless Voters Frequently Asked Questions
62	PA Voter ID Law - Care Facilities IDs Frequently Asked Questions
63	PA Voter ID Law - DOS ID Frequently Asked Questions
64	PA Voter ID Law - Substantially Conform Frequently Asked Questions
65	Voter ID Agency Poster
66	Voter ID Agency Poster - Spanish
67	Voter ID Agency Poster - Minority
68	Voter ID Law Inserts for Agency Mailings
69	DOS ID SharePoint Spreadsheet (dated June 7, 2013)
70	BCEL Verification Procedures for DOS ID
71	BCEL Verification Procedures for DOS ID Exhibits
72	Voter ID Call Volume Logs 2012
73	Voter ID Call Volume Logs 2013
74	DOS ID Forms - initial application
75	DOS ID Forms - replacement application
76	Oath/Affirmation
77	Voter ID Handout Update 10-5-12 (Bilingual)

<b>Exhibit No.</b>	<b>Document Name/Description</b>
78	Poll Worker Guide
79	Voter Registration Card for New Registrants
80	Training Materials for DOS Employees for Answering Voter ID Calls and Questions
81	SURE Database Excerpts
82	PennDOT Database Excerpts
83	List of Assisted Living Residences (English)
84	List of Assisted Living Residences (Spanish)
85	List of Long Term Care Facilities (English)
86	List of Long Term Care Facilities (Spanish)
87	List of Personal Care Homes (English)
88	List of Personal Care Homes (Spanish)
89	List of Institutions of Higher Learning (English)
90	List of Institutions of Higher Learning (Spanish)
91	BCEL Daily Call Tracking-Sample Sheet
92	April 4, 2012 BCEL Staff Training Agenda
93	April 20, 2012 BCEL Flowchart
94	September 10, 2012 BCEL Staff Training Agenda
95	September 12, 2012 BCEL Staff Training Agenda
96	Voter ID Quick Reference Sheet
97	DOS Photo ID Streamlined Process - Training Document
98	Guide for Searching Voter Records in SURE
99	PennDOT Hours
100	Tier 2SURE Search Criteria
101	Voter ID Law - BCEL Frequently Asked Questions
102	April 3, 2012 Email from Judith Holjes to BCEL re Voter ID Training- Additional Materials to Review with Attachments

<b>Exhibit No.</b>	<b>Document Name/Description</b>
103	April 20, 2012 Jonathan Marks Email to BCEL re New FAQ's Finalized with Attachments
104	April 23, 2012 Email from Jonathan Marks to BCEL re Updated Bubble FAQ with Attachment
105	May 24, 2012 Email from Jonathan Marks to BCEL re FW: Voter ID Discussion 1 with Attachments
106	September 4, 2012 Email from Judith Holjes to BCEL re BCEL Tracking of Voter ID Calls with Attachments
107	September 17, 2012 Email from Jessica Mathis to BCEL re Postcard with Attachment
108	September 23, 2012 Email from Jessica Mathis to BCEL re Postcard mailing
109	September 23, 2012 Email from Jessica Mathis to BCEL re FW: Transportation in Philly with Attachment
110	September 25, 2012 Email from Jessica Mathis to BCEL re FW: DOS ID Press Release with Attachment
111	September 27, 2012 Email from Ian Harlow to BCEL re DOS ID - Tier 2 Search Techniques with Attachment
112	September 28, 2012 Email from Dave Burgess to Jonathan Marks and Ian Harlow re New Instructions for Voter ID Verification Calls with Attachment
113	April 12, 2012 Press Release - Voter ID Temple IDs
114	April 18, 2012 Press Release - Voter ID Simplified Process Expired Driver's License or DOT ID
115	April 18, 2012 Press Release - Voter ID Primary
116	April 24, 2012 Press Release - Primary Soft Rollout
117	May 23, 2012 Press Release - Voter ID Simplified Method PA Born Voters
118	June 6, 2012 Press Release - Voter ID Partnership Library Association

Exhibit No.	Document Name/Description
119	July 3, 2012 Press Release - Voter ID Confirm DOS and DOT Match
120	July 20, 2012 Press Release - New Voter ID Card
121	August 13, 2012 Press Release - Voter ID Votes PA Website and Social Media
122	September 25, 2012 Press Release - DOS ID Option
123	September 26, 2012 Press Release - Voter ID PSU IDs
124	November 5, 2012 Press Release - Voter ID General Election Reminder
125	May 14, 2013 Press Release - Primary Election Voter ID Reminder
126	June 7, 2013 Spreadsheet of PennDOT and DOS IDs Issued
127	Exceptions Reports
128	DL-32 Request for Gender Change on Driver's License/Identification Card
129	Voter Registration Form
130	Various Documents Showing Education Efforts including Media Coverage

# **APPENDIX B**



**LIST OF DEPOSITIONS TAKEN AND DEPOSITION EXHIBITS**

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
June 25, 2012 Deposition of Beatrice Bookler	
June 25, 2012 Videotaped Deposition of Beatrice Bookler	
Voter Registration Card	Bookler Exhibit 1
June 25, 2012 Deposition of Joyce Block	
PennDOT-issued photo ID	Block Exhibit 1
Marriage Certificate	Block Exhibit 2
June 25, 2012 Videotaped Deposition of Joyce Block	
Birth Certificate	Block Exhibit 1
Marriage Certificate	Block Exhibit 2
Medicare and health insurance	Block Exhibit 3
Social Security Card	Block Exhibit 4
documents taken to PennDOT	Block Exhibit 5
PennDOT-issued photo ID	Block Exhibit 6
June 26, 2012 Deposition of Wilola Lee	
Copies of Cards	Lee Exhibit 1
Document	Lee Exhibit 2
Document	Lee Exhibit 3
Document	Lee Exhibit 4
Document	Lee Exhibit 5
Affirmation Document	Lee Exhibit 6
Application for ID Card	Lee Exhibit 7
Document	Lee Exhibit 8
Document	Lee Exhibit 9
Copy of Photo ID	Lee Exhibit 10
June 26, 2012 Deposition of Viviette Applewhite	
Birth Certificate	Applewhite Exhibit 1

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
Affirmation that Voter Does Not Have Proof of Identification for Voting Purposes	Applewhite Exhibit 2
Applewhite CCT Connect Customized Community Transportation Card	Applewhite Exhibit 3
June 26, 2012 Videotaped Deposition of Viviette Applewhite	
Applewhite Identification Cards - Medicare, CCT, and Bravo	Applewhite Exhibit 1
Birth Certificate	Applewhite Exhibit 2
Affirmation that Voter Does Not Have Proof of Identification for Voting Purposes	Applewhite Exhibit 3
Proofs of Residence	Applewhite Exhibit 4
June 27, 2012 Deposition of Kurt Myers	
Notice of Deposition	Myers Exhibit 1
PennDOT Website New Voter ID Law Webpage	Myers Exhibit 2
Voter ID Affirmation	Myers Exhibit 3
Application for Initial Identification Card	Myers Exhibit 4
April 18, 2012 Email re Voter ID Question	Myers Exhibit 5
November 7, 2009 Birth Certificate Memorandum	Myers Exhibit 6
April 18, 2012 Department of State Article	Myers Exhibit 7
May 23, 2012 Department of State Article	Myers Exhibit 8
March 30, 2012 Emails re Conference Call	Myers Exhibit 9
June 12, 2012 Philly.com Article	Myers Exhibit 10
Votes PA New Voter ID Law	Myers Exhibit 11
April 20, 2012 Emails re Hours of Operation	Myers Exhibit 12
March 20, 2012 Emails re Hot Data Request for Kurt	Myers Exhibit 13
June 27, 2012 Deposition of Marina Matthew	
Notice of Deposition	Matthew Exhibit 1

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
Department of Health Website Birth and Death Certificate Information	Matthew Exhibit 2
Birth Certificate Information from Need a Birth Certificate Link	Matthew Exhibit 3
Getting Birth Certificate Without Photo ID	Matthew Exhibit 4
Eligible Persons Who May Request Birth Certificates	Matthew Exhibit 5
Order Instructions	Matthew Exhibit 6
Birth Certificate Request by Mail	Matthew Exhibit 7
Form for Getting Birth Certificate Without Photo ID	Matthew Exhibit 8
June 28, 2012 Continued Deposition of Marina Matthew	
Application for Certified Birth Record	Matthew Exhibit 9
Email	Matthew Exhibit 10
Bi-monthly Report from Deputy Secretary for Administration to Secretary of the Department	Matthew Exhibit 11
Email	Matthew Exhibit 12
Email	Matthew Exhibit 13
Email	Matthew Exhibit 14
Email	Matthew Exhibit 15
Email	Matthew Exhibit 16
Email	Matthew Exhibit 17
Email	Matthew Exhibit 18
Letter	Matthew Exhibit 19
FAQ	Matthew Exhibit 20
June 28, 2012 Deposition of Ian Harlow	
May 4, 2012 Email	Harlow Exhibit 1
Spreadsheet	Harlow Exhibit 2
April 18, 2012 Email	Harlow Exhibit 3

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
Spreadsheet	Harlow Exhibit 4
April 17, 2012 Email	Harlow Exhibit 5
March 15, 2012 Email	Harlow Exhibit 6
April 9, 2012 Email	Harlow Exhibit 7
April 19, 2012 Email	Harlow Exhibit 8
April 25, 2012 Email	Harlow Exhibit 9
April 30, 2012 Email	Harlow Exhibit 10
Email	Harlow Exhibit 11
June 28, 2012 Deposition of Ronald Ruman	
December 20, 2011 Email	Ruman Exhibit 1
December 22, 2011 Email	Ruman Exhibit 2
November 21, 2011 Email	Ruman Exhibit 3
March 7, 2012 Voter Turnout Information	Ruman Exhibit 4
March 8, 2012 Email	Ruman Exhibit 5
March 29, 2012 Email	Ruman Exhibit 6
Voter ID Project Plan	Ruman Exhibit 7
April 18, 2012 Email	Ruman Exhibit 8
VotesPA Webpage Printout	Ruman Exhibit 9
June 29, 2012 Deposition of Jonathan Marks	
Notice of Deposition	Marks Exhibit 1
July 9, 2012 Deposition of Rebecca Oyler	
PA Voter ID Law Guide	Oyler Exhibit 1
January 20, 2012 Email re Voter ID Implementation	Oyler Exhibit 2
March 22, 2012 Email re Voter ID	Oyler Exhibit 3
April 3, 2012 Email re Resources for Presentation	Oyler Exhibit 4
June 12, 2012 DOS ID for Voting Purposes - Discussion Items	Oyler Exhibit 5

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
Affirmation for Initial Issuance of PA Department of State ID	Oyler Exhibit 6
May 20, 2011 Email re Articles/Examples of Absentee Fraud	Oyler Exhibit 7
Amended Answers	Oyler Exhibit 8
Notice of Deposition	Oyler Exhibit 9
June 27, 2011 Email re FN on HB 934	Oyler Exhibit 10
July 3, 2012 Press Release	Oyler Exhibit 11
Letter from Carol Aichele, Secretary of the Commonwealth	Oyler Exhibit 12
February 2, 2012 Email re Photo ID, Elderly Requirement and Turnout	Oyler Exhibit 13
July 9, 2012 Deposition of Shannon Royer	
Letter about Photo ID from Secretary Aichele	Royer Exhibit 1
June 18, 2012 Emails re Voter ID Weekly Update	Royer Exhibit 2
June 12, 2012 Email from Harlow to Royer	Royer Exhibit 3
Affirmation for DOS Voting ID	Royer Exhibit 4
June 20, 2012 Email from Harlow to Royer	Royer Exhibit 5
June 22, 2012 Email from Harlow to Royer	Royer Exhibit 6
July 10, 2012 Deposition of Shannon Royer	
March 29, 2012 Email From Ruman to Royer	Royer Exhibit 7
May 4, 2012 Email from Royer to Aichele	Royer Exhibit 8
June 21, 2012 Email from Geho to Royer	Royer Exhibit 9
April 23, 2012 Email from Geho to Royer	Royer Exhibit 10
May 11, 2012 Email from Sweeney to Royer	Royer Exhibit 11
May 2, 2012 Email from Royer to Aichele	Royer Exhibit 12
May 9, 2012 Email from Geho to Royer	Royer Exhibit 13
May 4, 2012 Email from Marks to Royer	Royer Exhibit 14

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
April 19, 2012 Email from Royer to Ruman	Royer Exhibit 15
June 19, 2012 Email from Sweeney to Royer	Royer Exhibit 16
June 15, 2012 Email from Weglos to Sweeney	Royer Exhibit 17
June 15, 2012 Email from Sweeney to Royer	Royer Exhibit 18
July 10, 2012 Deposition of Carol Aichele	
Department of State Biography of Carol Aichele	Aichele Exhibit 1
Notice of Deposition	Aichele Exhibit 2
Amended Answers to First Set of Interrogatories	Aichele Exhibit 3
PA Voter ID Law Guide to Act 18 of 2012	Aichele Exhibit 4
June 22, 2012 Email from Weglos re Colleges	Aichele Exhibit 5
Affirmation of Sincere Religious Belief	Aichele Exhibit 6
Vote ID Facilities Template	Aichele Exhibit 7
June 20, 2012 Email from Aichele to Myers	Aichele Exhibit 8
June 20, 2012 Email from Aichele to Royer	Aichele Exhibit 9
July 10, 2012 Deposition of David Burgess	
April 18, 2012 Email	Burgess Exhibit 1
April 20, 2012 Email re Scope of Backfill Project	Burgess Exhibit 2
June 14, 2012 Email	Burgess Exhibit 3
Memos	Burgess Exhibit 4
Results of Match	Burgess Exhibit 5
Email chain	Burgess Exhibit 6
Memo	Burgess Exhibit 7
Email	Burgess Exhibit 8
Email Chain	Burgess Exhibit 9
June 12, 2012 Email	Burgess Exhibit 10
Handwritten Notes and Documents	Burgess Exhibit 11
Sprint 3 Test Results	Burgess Exhibit 12

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
July 11, 2012 Deposition of Bryan Kendro	
Legislative Bill Analysis 2011-2012 Session	Kendro Exhibit 1
Notice of Deposition	Kendro Exhibit 2
June 21, 2011 Email Chain and Fiscal Note Back-ups	Kendro Exhibit 3
April 5, 2012 Email from Oyler to Kendro re Voter ID	Kendro Exhibit 4
2010 Election Administration and Voting Survey	Kendro Exhibit 5
May 17, 2011 Email Chain re PenDOT statistics	Kendro Exhibit 6
July 13, 2012 Deposition of Gloria Cuttino	
Documents Bates Stamped VOTE000034-47	Cuttino Exhibit 1
July 18, 2012 Deposition of Kurt Myers	
Process for Voter ID without Birth Certificate	Myers Exhibit I
Notice of Deposition	Myers Exhibit II
Process for DOS ID	Myers Exhibit III
PennDOT MorphoTrust Work Order	Myers Exhibit IV
July 13, 2002 Email chain from Templeton to Shenk	Myers Exhibit V
DOS ID Project Plan	Myers Exhibit VI
May 20, 2011 Email from Myers to Kendro	Myers Exhibit VII
April 14, 2011 Email re Legislation	Myers Exhibit VIII
June 10, 2012 Email from Cressler to Myers	Myers Exhibit IX
July 9, 2012 Email from Myers to Smith	Myers Exhibit X
March 20, 2012 Email from Gnazzo to Guyer and Myers	Myers Exhibit XI
Photographic Driver's License: Chapter 73	Myers Exhibit XII
July 19, 2012 Deposition of Jonathan Marks	
Notice of Deposition	Marks Exhibit 1

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
PA DOS ID BCEL Weekly Update - July 12, 2012- July 18, 2012	Marks Exhibit 2
June 7, 2012 Email chain from Marks to Oyler	Marks Exhibit 3
June 12, 2012 Email chain from Royer	Marks Exhibit 4
Process for DOS IDs	Marks Exhibit 5
June 27, 2012 DOS/PennDOT Conference Call Minutes	Marks Exhibit 6
Affirmation for DOS ID	Marks Exhibit 7
June 22, 2012 Email from Harlow	Marks Exhibit 8
PennDOT DOS ID Concept Design	Marks Exhibit 9
June 4, 2013 Deposition of Kurt Myers	
Kurt Myers Errata Sheet	
Amended Notice of Deposition	2013-Myers-1
Amended Notice of Deposition	2013-Myers-2
Stipulation Regarding PennDOT Web Searches	2013-Myers-3
Affirmation that Voter Does Not Have Proof of Identification for Voting Purposes	2013-Myers-4
Excerpts from Transcript of Proceedings, September 25, 2012	2013-Myers-5
Request for Initial Issuance of Free Pennsylvania Department of State ID for Voting Purposes	2013-Myers-6
July 17, 2012 Letter from J. Schultz to T. Perez	2013-Myers-7
April 3, 2013 Letter from Bureau of Driver Licensing to H. Ginensky with Attachment	2013-Myers-8
June 5, 2013 Deposition of Ronald Ruman	
June 5, 2013 Deposition of Shannon Royer	
June 7, 2011 Email	2013-Royer-1
"Show It" Postcard	2013-Royer-2



<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
Respondents' Answers to Fourth Set of Interrogatories	2013-Royer-3
November 29, 2011 Email	2013-Royer-4
Memorandum from Offices of Policy and Legislative Affairs, Departments of Aging and State	2013-Royer-5
Screen shots from Philadelphia.cbslocal.com	2013-Royer-6
Letter from T. Keating to D. Hurley with attached interrogatory answers	2013-Royer-7
Voter ID: Philadelphia County Election Day Survey	2013-Royer-8
DVD	2013-Royer-9
Spreadsheet	2013-Royer-10
Excerpt from Pennsylvania Election Code	2013-Royer-11
July 23, 2012 Email	2013-Royer-12
Respondents' Supplemental Responses to Interrogatories	2013-Royer-13
Article from PhillyTrib.com	2013-Royer-14
June 6, 2013 Deposition of Jonathan Marks	
Excerpt from July 30, 2012 Preliminary Injunction Hearing Transcript	2013-Marks-1
Spreadsheet of SharePoint Data	2013-Marks-2
July 23, 2012 Email	2013-Marks-3
March 6, 2013 Email	2013-Marks-4
November 29, 2011 Memorandum from Offices of Policy and Legislative Affairs, Departments of Aging and State	2013-Marks-5
June 7, 2013 Deposition of Megan Sweeney	
March 21, 2012 Email	2013-Sweeney-1
April 2, 2012 Email	2013-Sweeney-2
October 17, 2012 Email with Attachment	2013-Sweeney-3

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
Disciplined, Responsible and Efficient: Highlights from the Proposed FY 2013-2014 Budget	2013-Sweeney-4
June 1, 2012 Email	2013-Sweeney-5
October 2, 2012 Email with Attachments	2013-Sweeney-6
April 9, 2013 Email	2013-Sweeney-7
September 11, 2012 Email	2013-Sweeney-8
May 9, 2012 Email	2013-Sweeney-9
August 27, 2012 Email with Attachment	2013-Sweeney-10
September 19, 2012 Email with Attachments	2013-Sweeney-11
September 19, 2012 Email with Attachments	2013-Sweeney-12
August 8, 2012 Email with Attachment	2013-Sweeney-13
List of Newspapers with Harmelin Media Buys	2013-Sweeney-14
August 24, 2012 Email with Attachment	2013-Sweeney-15
June 20, 2012 Email with Attachment	2013-Sweeney-16
November 5, 2012 Email with Attachments	2013-Sweeney-17
October 2, 2012 Email with Attachments	2013-Sweeney-18
"Show It" Postcard	2013-Sweeney-19
August 3, 2012 Email with Attachments	2013-Sweeney-20
August 23, 2012 Email with Attachment	2013-Sweeney-21
June 10, 2013 Deposition of Patrick Geho	
November 17, 2011 Email	Geho-1
October 24, 2011 Email	Geho-2
December 2, 2011 Email	Geho-3
November 29, 2011 Email	Geho-4
Memorandum from Offices of Policy and Legislative Affairs, Departments of Aging and State	Geho-5
February 1, 2012 Email	Geho-6
July 23, 2012 Email	Geho-7

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
April 5, 2012 Email	Geho-8
May 13, 2011 Email	Geho-9
August 13, 2012 Email	Geho-10
June 10, 2013 Deposition of Rebecca Oyler	
December 2, 2011 Email	2013-Oyler-1
September 26, 2011 Email	2013-Oyler-2
May 13, 2011 Email	2013-Oyler-3
November 29, 2011 Email	2013-Oyler-4
Memorandum from Offices of Policy and Legislative Affairs, Departments of Aging and State	2013-Oyler-5
June 11, 2013 Deposition of Bravo Group Designee, Jennifer Riley	
May 14, 2013 Letter from Geffen to The Bravo Group	Riley-1
Request for Quotation	Riley-2
Bravo Group Proposal	Riley-3
Cost Matrix to Proposal	Riley-4
June 25, 2012 Letter from T. Rominiecki to R. Hintze	Riley-5
August 3, 2012 Email with Attachment	Riley-6
September 28, 2012 Email with Attachment	Riley-7
August 28, 2012 Email with Attachment	Riley-8
Voter ID Law Information Handout	Riley-9
September 18, 2012 Email with Attachment	Riley-10
October 9, 2012 Email with Attachment	Riley-11
June 13, 2013 Deposition of Kelly O'Donnell	
November 29, 2011 Email	O'Donnell-1
Memorandum from Offices of Policy and Legislative Affairs, Departments of Aging and State	O'Donnell-2

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
March 16, 2012 Email	O'Donnell-3
September 28, 2012 Email	O'Donnell-4
August 31, 2012 Email	O'Donnell-5
April 9, 2013 Email	O'Donnell-6
June 13, 2013 Deposition of Laverne Collins	
Amended Notice of Deposition	Collins-1
June 22, 2012 Email	Collins-2
June 21, 2012 Email	Collins-3
June 22, 2012 Email from T. Fauver to PA Public Transportation Providers	Collins-4
June 25, 2012 Email from E. Adams	Collins-5
June 25, 2012 Email	Collins-6
June 26, 2012 Email	Collins-7
September 12, 2012 Email	Collins-8
April 9, 2013 Email	Collins-9
Shared Ride Program for Seniors and Voters with Disabilities	Collins-10
June 14, 2013 Deposition of Harmelin Media Designee, Lyn Strickler	
May 14, 2013 Letter from Geffen to Harmelin Media	Strickler-1
May 4, 2012 Email	Strickler-2
August 27, 2012 Email with Attachment	Strickler-3
August 24, 2012 Email with Attachments	Strickler-4
September 19, 2012 Email with Attachment	Strickler-5
September 19, 2012 Email with Attachment	Strickler-6
August 8, 2012 Email with Attachment	Strickler-7
Harmelin Media College Newspaper Buys	Strickler-8

<b>Depositions and Exhibits</b>	<b>Exhibit No.</b>
September 20, 2012 Memorandum from M. Rutz to S. Royer	Strickler-9
June 13, 2013 Email with Attachments	Strickler-10
Harmelin Media 2012 General Election Recap, dated November 15, 2012	Strickler-11

**PROOF OF SERVICE**

I, Timothy P. Keating, certify that I am this day serving by electronic mail and First Class Mail, postage prepaid, the foregoing Pretrial Memorandum, which service satisfies the requirements of Pa.R.A.P. 121.

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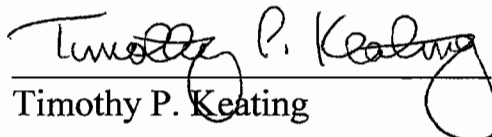
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Dated: June 17, 2013

  
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