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August 2, 2012

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

Re: *Applewhite, et al. v. Commonwealth, et al.*, 330 M.D. 2012

Dear Judge Simpson:

Enclosed please find a courtesy copy of an amicus curiae brief mailed today for filing in the above-captioned action.

Respectfully Yours,



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cc:

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 330 MD 2012

VIVIETTE APPLEWHITE, ET AL.

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

Respondents.

**BRIEF OF AMICUS CURIAE STEPHEN J. SHAPIRO, IN HIS CAPACITY AS
JUDGE OF ELECTION FOR DISTRICT 635, TREDYFFERIN TOWNSHIP,
CHESTER COUNTY, PENNSYLVANIA**

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Dated: August 2, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICUS CURIAE1

SUMMARY OF ARGUMENT1

BACKGROUND2

ARGUMENT5

 I. POLL WORKERS ARE SUBJECT TO CRIMINAL PROSECUTION IF THEY
 ENFORCE ACT 18 AND IF THEY DO NOT ENFORCE ACT 18.5

 II. THE GENERAL ASSEMBLY’S FAILURE TO DEFINE THE PHRASE
 “SUBSTANTIALLY CONFORMS” IN ACT 18 EXPOSES POLL WORKERS
 TO POTENTIAL CRIMINAL LIABILITY.7

CONCLUSION.....9

TABLE OF AUTHORITIES

25 P.S. § 2602(t)5

25 P.S. § 26712

25 P.S. § 2672(a).....2

25 P.S. § 2677 2-3

25 P.S. § 26783

25 P.S. § 3510 3, 6-7, 8

25 P.S. § 35233, 5

25 P.S. § 35483-4, 6-7, 8

25 P.S. § 3550 4, 6-7, 8

25 P.S. § 35524

Act of Mar. 14, 2012, P.L. 195, No. 18 *passim*

Pennsylvania Constitution, Article VII, Section 15

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, Stephen J. Shapiro, is the Judge of Election for a voting district in Chester County, Pennsylvania. In that capacity, he is required to enforce the election laws of the Commonwealth and is subject to the criminal penalties set forth in the Election Code. Amicus curiae submits this brief to call the Court's attention to an issue on which the parties appear to have focused scant attention – the risk of criminal liability that the tens of thousands of poll workers in the Commonwealth will face when called upon to enforce Act 18.

SUMMARY OF ARGUMENT

Act 18 requires poll workers to take actions and make decisions that could subject them to criminal liability:

First, Act 18 forces poll workers into a “damned if you do, damned if you don’t” dilemma. Article VII, Section 1, of the Pennsylvania Constitution defines who is a “qualified elector” and, according to Respondents, the identification requirement of Act 18 does not add to those qualifications. Under the Election Code, a poll worker who refuses to permit a “qualified elector” to vote commits a third degree felony and can be sentenced to imprisonment and/or required to pay a fine. Therefore, a poll worker who enforces Act 18 by refusing to permit a “qualified elector” that does not present identification to vote is subject to criminal prosecution. But, at the same time, a poll worker who does not enforce Act 18 commits a misdemeanor for which he or she can be sentenced to imprisonment and/or required to pay a fine. This places poll workers in an untenable position.

Second, Act 18 requires voters to show identification before they may vote at any primary or election. Among other requirements, a document only qualifies as acceptable identification if the name on the document “substantially conforms” to the name of the voter as it appears in the poll book. Act 18 does not explain what “substantially conforms” means, leaving that decision to the discretion of poll workers. A poll worker who, in the opinion of a prosecutor, permitted an elector to vote where the name on the elector’s identification did not “substantially conform” to his or her name in the poll book, would violate Act 18 and be subject to criminal charges.

BACKGROUND

Election Boards. Pennsylvania is divided into thousands of election districts, each run by an election board. The election boards are responsible for conducting every primary and election held in their respective districts. *See* 25 P.S. § 2671. Each election board consists of a judge of election, a majority inspector, a minority inspector, clerks and machine operators, all of whom must be qualified, registered electors in the district in which they serve. *See id.*; 25 P.S. § 2672(a). The judge of election and inspectors of each district are elected by voters in the district and hold four year terms of office. *See* 25 P.S. § 2671. In November 2009, amicus curiae Stephen J. Shapiro was elected Judge of Election for District 635 in Tredyffrin Township, Chester County, Pennsylvania.

The Oath of Office. Before each primary or election, each judge of election and inspector must take an oath of office pursuant to which he or she swears to enforce the Pennsylvania Constitution and the laws of the Commonwealth. Specifically, judges of election must take an oath that includes the following affirmation: “I will not give my consent to the

admission of any person to vote, except such as I firmly believe to be registered and entitled to vote at such election (or primary), according to the provisions of the Constitution and laws of this Commonwealth” 25 P.S. § 2677; *see also* 25 P.S. § 2678 (similar oath for inspectors).

Penalties. The Election Code contains several provisions authorizing criminal penalties against poll workers who violate various portions of the Code. A poll worker who denies a “qualified elector” the ability to vote is subject to criminal liability:

Any judge or inspector of election who . . . refuses to permit any duly registered and qualified elector to vote at any primary or election, with knowledge that such elector is entitled to vote, shall be guilty of a felony of the third degree, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding fifteen thousand (\$15,000) dollars, and to undergo an imprisonment of not more than seven (7) years, or both.

25 P.S. § 3523. A poll worker who violates his or her oath of office is subject to criminal liability:

Any judge of election, inspector of election, clerk of election, or machine inspector who shall willfully violate any of the provisions of his oath of office, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand (\$1,000) dollars, or to undergo an imprisonment not exceeding one (1) year, or both, in the discretion of the court.

25 P.S. § 3510. A poll worker who fails to perform the duties imposed on him or her by the Election Code is subject to criminal liability:

Any . . . judge of election, inspector of election, clerk of election, [or] machine inspector . . . on whom a duty is laid by this act who shall willfully neglect or refuse to perform his duty, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand (\$1,000) dollars, or to undergo an imprisonment of not more than two (2) years, or both, in the discretion of the court.

25 P.S. § 3548. A poll worker who violates any provision of the Election Code for which a penalty is not otherwise specified is subject to criminal liability:

Any person who shall violate any of the provisions of this act, for which a penalty is not herein specifically provided, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand (\$1,000) dollars, or to undergo an imprisonment of not more than one (1) year, or both, in the discretion of the court.

25 P.S. § 3550. In addition to the penalties described above, any poll worker who violates the Election Code can be stripped of his or her right to vote for four years. *See* 25 P.S. § 3552 (“Any person convicted of the willful violation of any provision of this act shall, in addition to any of the penalties herein provided for, be deprived of the right of suffrage absolutely for a term of four years from the date of his conviction . . .”).

Act 18. On March 14, 2012, the Commonwealth enacted the Act of Mar. 14, 2012, P.L. 195, No. 18 (“Act 18”). Act 18 requires voters to present one of several forms of identification in order to vote. Among other requirements, a document only qualifies as acceptable voter identification if it “shows the name of the individual to whom the document was issued and the name substantially conforms to the name of the individual as it appears in the district register.” Act 18, § 102 (z.5)(2)(i).¹ Act 18 gives the Attorney General and the county district attorneys prosecutorial jurisdiction over any violations of the Election Code. *See* Act 18, § 1854.

¹ A flowchart illustrating the analysis a poll worker must conduct to determine whether an identification document meets the requirements of Act 18 is attached as Exhibit A.

ARGUMENT

I. POLL WORKERS ARE SUBJECT TO CRIMINAL PROSECUTION IF THEY ENFORCE ACT 18 AND IF THEY DO NOT ENFORCE ACT 18.

Section 1823 of the Election Code makes it a felony, punishable by imprisonment for as many as seven years and/or a fine of as much as \$15,000, for a judge of election or inspector to prohibit a “duly registered and qualified elector” from voting. 25 P.S. § 3523. The Code defines a “qualified elector” as “any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth” 25 P.S. § 2602(t). Article VII, Section 1, of the Pennsylvania Constitution sets forth the qualifications for voting:

Every citizen 21 years of age,² 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.

² The 26th Amendment to the United States Constitution changed the voting age to 18.

In other words, a “duly registered and qualified elector” is one who is 18 years of age or older, has been a citizen of United States and a resident of Pennsylvania for the prescribed number of days before an election and has registered to vote.

Respondents contend that the provision of Act 18 that requires voters to show identification at the polls does not add a qualification to those set forth in Article VII, Section 1. *See* Brief in Opposition to Petitioners’ Application for Preliminary Injunction at 30 (“The qualifications listed in Article VII, Section 1 involve personal characteristics or attributes. The photo ID requirement does not add a qualification . . .”). Put differently, Act 18, according to Respondents, does not change the definition of “qualified elector.” Therefore, a “duly registered and qualified elector” who does not present identification at the polls remains a “duly registered and qualified elector,” and poll workers are subject to criminal liability if they refuse to permit that elector to vote.³

This forces poll workers into an untenable position. If they enforce Act 18, they can be charged with a felony under Section 1823.⁴ But if they do not enforce Act 18, they

³ The availability of the provisional ballot does not cure this dilemma. Permitting a “duly registered and qualified elector” to fill out a provisional ballot does not allow that elector to cast a vote. Rather, in the case of a non-indigent voter, a provisional ballot becomes an actual vote only if the voter submits proof of identification to the appropriate county board of election within six calendar days following the election. *See* Act 18, § 1210(a.4)(5)(ii)(E). Therefore, if the provisional ballot of a “duly registered and qualified elector” is not counted as a vote because the voter does not submit identification, the poll worker who refused to permit that “duly registered and qualified elector” to vote on election day violated Section 1823 of the Code even though he or she had the voter complete a provisional ballot. Simply put, denying an elector the right to vote on election day remains a denial of the right to vote, even if the denial does not become official for another six days.

⁴ Amicus curiae understands that it is highly unlikely the current Attorney General would prosecute a poll worker for enforcing Act 18. However, that does not resolve the dilemma poll workers face. For starters, Act 18 gives the county district attorneys, some of whom may not support the law, authority to prosecute violations of the Election Code that take place in their

violate their oaths of office, fail to perform a duty imposed on them by the Election Code and violate a provision of the Code, all of which constitute misdemeanors punishable by imprisonment and fines under the Code. *See* 25 P.S. § 3510, § 3548 and § 3550.

II. THE GENERAL ASSEMBLY’S FAILURE TO DEFINE THE PHRASE “SUBSTANTIALLY CONFORMS” IN ACT 18 EXPOSES POLL WORKERS TO POTENTIAL CRIMINAL LIABILITY.

Under Act 18, poll workers only may accept an identification document from a voter if the name on the document “substantially conforms” to the voter’s name as it appears in the poll book. Act 18, § 102 (z.5)(2)(i). Act 18, however, does not define the phrase “substantially conform.” Indeed, as Rebecca Oyler, Director of Policy for the Department of State, testified: “[T]he statute gives no guidance as to what is meant by substantially conform” N.T. (7/26/12) 189:10-11. In the absence of such guidance, poll workers are left with discretion to interpret the meaning of the phrase. As Ms. Oyler testified:

Q. In fact, on election day in the absence of other guidance it’s going to be the poll workers who are interpreting the term substantially conformed?

A. Yes, on election day. Yes.

N.T. (7/26/12) 189:24-190:2.

Leaving poll workers to fend for themselves on the interpretation of the phrase “substantially conforms” exposes them to potential criminal liability. If a voter presents a poll worker with an identification document displaying a name that does not exactly match the name

counties. In addition, the identity of both the Attorney General and the county district attorneys can change every four years. Amicus curiae also understands that a poll worker could mount a strong legal defense to a prosecution under Section 1823 by relying on Act 18. However, the availability of a defense, no matter how strong, is cold comfort to a poll worker facing a felony prosecution.

in the poll book, the poll worker then must make a call as to whether the name on the identification “substantially conforms” with the name in the poll book. If the poll worker concludes that the name does substantially conform, he or she later could be faced with prosecution if the Attorney General or a district attorney disagrees with the poll worker’s assessment.⁵ Indeed, a poll worker who, in the eyes of a prosecutor, permitted an elector to vote with an identification document containing a name that does not “substantially conform” with the name in the poll book would have violated his or her oath of office, failed to perform a duty imposed on him or her by the Election Code and violated a provision of the Code, all of which are misdemeanors punishable by imprisonment and fines. *See* 25 P.S. § 3510, § 3548 and § 3550.

⁵ This scenario most likely would arise in a situation where another poll worker or poll watcher in the polling place at the time the voter presented the identification at issue disagreed with the “substantial conformity” assessment and reported that disagreement to the authorities.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests that the Court consider the risks that Act 18 will impose on the tens of thousands of poll workers who serve the Commonwealth during each election when it rules on the petitions before it.

Respectfully submitted,



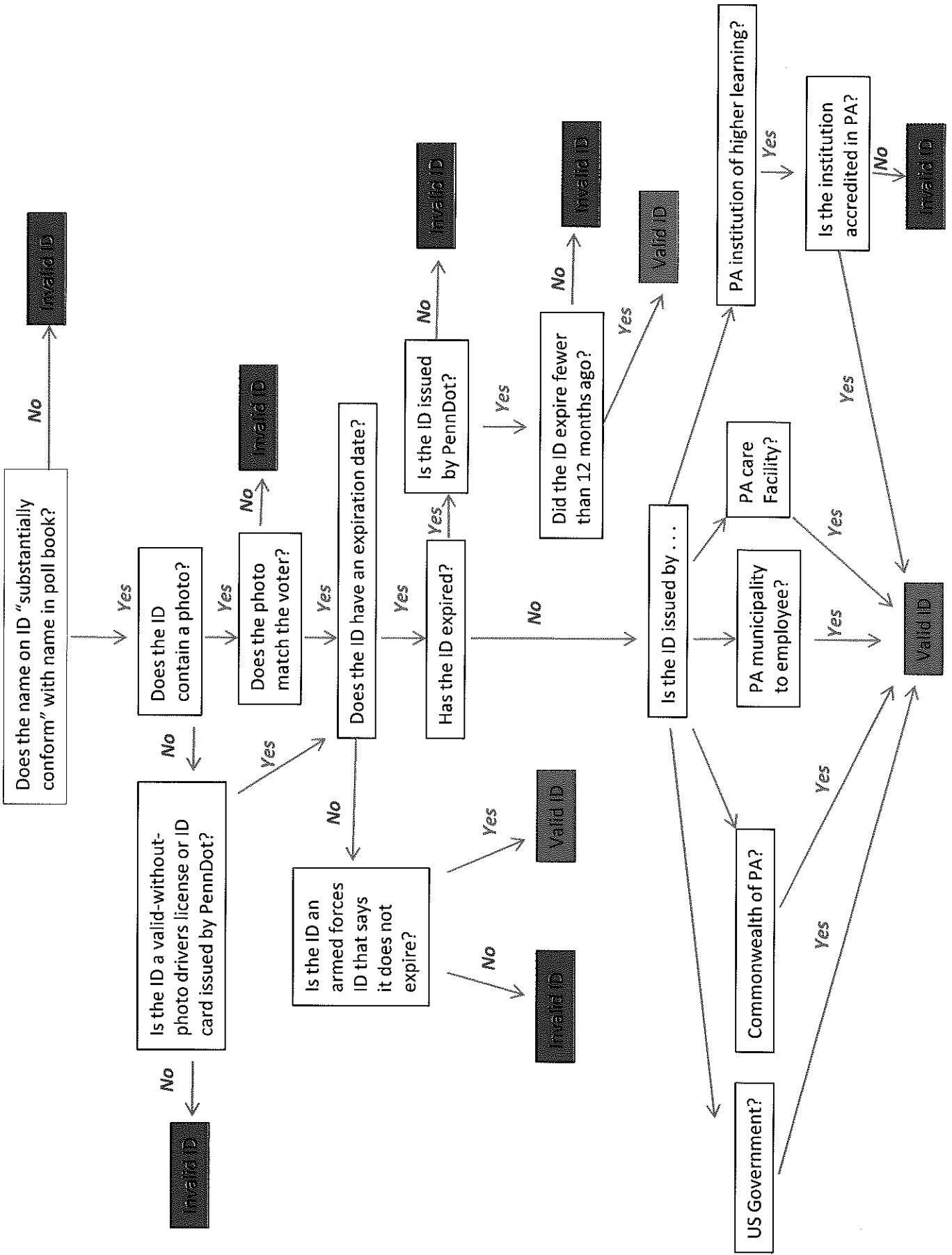
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Dated: August 2, 2012

EXHIBIT A

HOW TO DETERMINE WHETHER A PHOTO ID IS VALID UNDER PA'S VOTER ID LAW



PROOF OF SERVICE

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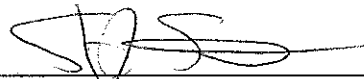
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