

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Docket 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; HENRIETTA KAY DICKERSON; DEVRA MIREL ("ASHER")  
SCHOR; THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; NATIONAL  
ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,  
PENNSYLVANIA STATE CONFERENCE; HOMELESS ADVOCACY PROJECT,

Petitioners,

V.

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

Respondents.

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BRIEF OF *AMICI CURIAE* STATE REPRESENTATIVE DARYL METCALFE  
AND 49 PENNSYLVANIA STATE REPRESENTATIVES IN SUPPORT OF  
RESPONDENTS' OPPOSITION TO PETITIONERS' APPLICATION FOR  
SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	4
I.    Under the Pennsylvania Constitution, the Legislature Possesses the Undoubted Authority to Regulate elections .....	4
II.   Courts Apply a “Gross Abuse” Standard to Election Statutes .....	5
III.  The Commonsense Regulatory Scheme Passed by the Legislature Is Clearly Constitutional .....	7
A.    HB 934 does not disenfranchise qualified electors. ....	7
B.    HB 934 secures “free and equal” elections .....	8
C.    HB 934 does not impose any additional qualifications to vote .....	9
CONCLUSION.....	10

## TABLE OF AUTHORITIES

### Cases

<i>Appeal of Cusick</i> , 136 Pa. 459 (Pa. 1890) .....	5
<i>Free Speech LLC v. Philadelphia</i> , 884 A.2d 966 (Pa. Commw. Ct. 2005) .....	2-3
<i>In Re Nomination Paper of Rogers</i> , 908 A.2d 948 (Pa. Commw. Ct. 2006) .....	6
<i>Mixon v. Com.</i> 759 A.2d 442 (Pa. Commw. Ct. 2000) .....	5-6
<i>Patterson v. Barlow</i> , 60 Pa. 54 (1869) .....	3-5, 9-10
<i>Winston v. Moore</i> , 244 Pa. 447 (1941) .....	4-6, 10

## **INTEREST OF *AMICI CURIAE***

On March 14, 2012, the Pennsylvania House of Representatives passed House Bill 934 (“HB 934”) with 104 members voting in support of the legislation.<sup>1</sup> Later that day, Governor Tom Corbett signed HB 934 into law. HB 934 requires a qualified elector (i.e., registered voter) to provide evidence when he casts his ballot to ensure that he is who he says he is. In addition, HB 934 designates the various types of documents a qualified elector may provide when he casts his ballot. The various types of documents, known as “proof of identification,” are those that: (1) were issued by the United States, the Commonwealth of Pennsylvania, a municipality of the Commonwealth to an employee of that municipality, an accredited Pennsylvania institution of higher education, or a Pennsylvania care facility; and (2) generally contain the name and photograph of the qualified elector as well as an expiration date. Also, prior to an election, if a qualified elector does not have one of the acceptable documents, HB 934 requires the Pennsylvania Department of Transportation to provide an acceptable document to the qualified elector at no cost. Moreover, if a qualified elector does not have one of the various, acceptable types of documents needed to cast a ballot, HB 934 permits that qualified elector to cast a provisional ballot, which will be counted when the qualified elector affirms by affidavit within six calendar days that he was the individual who casted the provisional ballot. Finally, the law requires the Secretary of the Commonwealth to assist the public in complying with the new requirement for voting. In other words, HB 934 is nothing more than a commonsense regulatory scheme that seeks to promote voter confidence in the election process.

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<sup>1</sup> The Pennsylvania Senate passed an earlier version of HB 934 with amendments on March 7, 2012. The March 14, 2012 vote in the Pennsylvania House of Representatives passed HB 934 with the Senate’s amendments.

The *Amici* are Representative Daryl Metcalfe – the author of, and the driving force behind, HB 934 – and 49 of the additional 103 members of the Pennsylvania House of Representatives who voted in support of HB 934.<sup>2</sup> *Amici* therefore have a direct interest in this matter.

Petitioners seek a preliminary injunction to prevent this commonsense regulatory scheme from taking effect. In deciding whether to issue a preliminary injunction, this Court must consider the following factors: (1) whether the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) whether greater injury would result from refusing the injunction than from granting it; (3) whether the injunction will restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;

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<sup>2</sup> Rep. Adam Harris, 82nd Legislative District; Rep. Brad Roae, 6th Legislative District; Rep. Brian Ellis, 11th Legislative District; Rep. Bryan Cutler, 100th Legislative District; Rep. Dan Truitt, 156th Legislative District; Rep. Dave Hickernell, 98th Legislative District; Rep. David Maloney, 130th Legislative District; Rep. Dick Hess, 78th Legislative District; Rep. Donna Oberlander, 63rd Legislative District; Rep. Doyle Heffley, 122nd Legislative District; Rep. Eli Evankovich, 54th Legislative District; Rep. Fred Keller, 85th Legislative District; Rep. Gary Day, 187th Legislative District; Rep. George Dunbar, 56th Legislative District; Rep. Gordon Denlinger, 99th Legislative District; Rep. Jeff Pyle, 60th Legislative District; Rep. Jerry Knowles, 124th Legislative District; Rep. Jim Cox, 129th Legislative District; Rep. Jim Marshall, 14th Legislative District; Rep. Joe Emrick, 137th Legislative District; Rep. Joe Hackett, 161st Legislative District; Rep. Justin Simmons, 131st Legislative District; Rep. Kathy Rapp, 65th Legislative District; Rep. Kerry Benninghoff, 171st Legislative District; Rep. Mark Gillen, 128th Legislative District; Rep. Mark Mustio, 44th Legislative District; Rep. Martin Causer, 67th Legislative District; Rep. Matt Gabler, 75th Legislative District; Rep. Mauree Gingrich, 101st Legislative District; Rep. Mike Reese, 59th Legislative District; Rep. Paul Clymer, 145th Legislative District; Rep. Randy Vulakovich, 30th Legislative District; Rep. Rick Saccone, 39th Legislative District; Rep. Rob Kauffman, 89th Legislative District; Rep. Ron Marsico, 105th Legislative District; Rep. RoseMarie Swanger, 102nd Legislative District; Rep. Ryan Aument, 41st Legislative District; Rep. Scott Boyd, 43rd Legislative District; Rep. Scott Hutchinson, 64th Legislative District; Rep. Scott Perry, 92nd Legislative District; Rep. Seth Grove, 196th Legislative District; Rep. Stan Saylor, 94th Legislative District; Rep. Stephan Barrer, 160th Legislative District; Rep. Stephen Bloom, 199th Legislative District; Rep. Sue Helm, 104th Legislative District; Rep. Tina Pickett, 110th Legislative District; Rep. Todd Rock, 90th Legislative District; Rep. Tom Killion, 168th Legislative District; and Rep. Will Tallman, 193rd Legislative District.

(4) whether Petitioners are likely to prevail on the merits; (5) whether the injunction is reasonably suited to abate the offending activity; and (6) whether the injunction will not adversely affect the public interest. *Free Speech LLC v. Philadelphia*, 884 A.2d 966, 970 (Pa. Commw. Ct. 2005). Although *Amici* believe that none of the above factors support an issuance of a preliminary injunction, this brief focuses solely on whether Petitioners are likely to prevail on the merits of their case.

In their Petition for Review, Petitioners incorrectly assert the standard of review for this Court to apply when deciding the merits of the case. Petitioners assert that this Court should employ a “balancing test” standard; however, Pennsylvania courts must utilize the “gross abuse” standard when determining whether election laws violate the “free and equal” clause of the Pennsylvania Constitution. Therefore, *Amici* submit this brief to help clarify the standard to be employed by this Court and to support the legislature’s undoubted authority to pass commonsense legislation regulating elections.

### **SUMMARY OF THE ARGUMENT**

*Amici*’s position is simple and straightforward. While the Pennsylvania Constitution requires elections to be free and equal, it does not provide the framework for how to secure such an end. Therefore, the Pennsylvania Supreme Court recognized that a “system of laws regulating the elections is only the means of securing” free and equal elections. *Patterson v. Barlow*, 60 Pa. 54, 84 (1869). In addition, “this system of regulation is the subject of legislation over which the legislature exercises a sound discretion.” *Id.* In passing HB 934, the legislature did no more than exercise its sound discretion and create a commonsense regulatory scheme to secure free and equal elections. The legislature undoubtedly had such authority and used it accordingly.

In addition, because the legislature has the discretion to enact laws regulating elections, the courts must not overturn the policy choices of the legislative branch unless the legislature acts with gross abuse. In this matter, the legislature used its undoubted authority to regulate elections. In using its authority, it has not caused anyone to be disenfranchised, it has maintained and promoted free and equal elections, and it has not expanded upon the qualifications set forth in the Pennsylvania Constitution. Because the legislature has not grossly abused its authority, HB 934 should not be preliminarily enjoined.

## ARGUMENT

### **I. Under the Pennsylvania Constitution, the Legislature Possesses the Undoubted Authority to Regulate Elections.**

The Pennsylvania Constitution “appoints the time of the general election, prescribes the qualifications of voters, and enjoins the ballot.” *Patterson*, 60 Pa. at 75. In addition, it requires that elections “be free and equal.” It says nothing more. The Constitution does not establish any rules or provide any guides to ensure free and equal elections. *Id.* at 75. The manner in which elections are to be conducted is left solely to statute. *Id.* The legislature therefore must pass legislation to provide a framework for conducting elections. *Id.* (“[T]he power to regulate elections is a legislative one, which has always been exercised by the General Assembly since the foundation of the government.”).

As the Pennsylvania Supreme Court has stated, “Who makes the law? The legislature.” *Winston v. Moore*, 244 Pa. 447, 454 (1914). The question, therefore, becomes what laws the legislature has the authority to pass. This question too has been answered by the Court. The legislature may pass laws “to regulate elections” in an effort to “preserve the purity of the ballot.” *Appeal of Cusick*, 136 Pa. 459, 467 (1890). Such regulations include “designat[ing] the evidence which shall identify and prove . . . the persons and the qualifications of the electors.”

*Patterson*, 60 Pa. at 75; *see also id.* at 76 (It is the duty of the legislature “to secure freedom and equality by such regulations as will exclude the unqualified and allow the qualified to vote.”).

In sum, it has been settled for well over 100 years that the legislature has the authority to pass legislation that regulates elections. In 1890, the Pennsylvania Supreme Court succinctly declared:

While the constitution has thus defined the rights of voters, it is silent in many respects as to how those rights shall be exercised. It prescribes very clearly the qualifications which a voter must possess, but it provides no machinery by which to ascertain whether a particular voter possesses such qualifications. All this has been wisely left to the legislature. It would be out of place in the fundamental law.

*Appeal of Cusick*, 136 Pa. at 466. As stated above, HB 934 is a commonsense regulatory scheme regulating how electors may exercise their right to vote. It creates rules and provides guides to ensure free and equal elections. Therefore, it was well within the legislature’s authority to pass such legislation.

## **II. Courts Apply a “Gross Abuse” Standard to Election Statutes.**

As stated above, laws regulating elections “have always been regarded as peculiarly within the province of the legislative branch of government.” *Winston*, 244 Pa. at 455.

Therefore, the Pennsylvania Supreme Court has held that such laws “should never be stricken down by the courts unless in plain violation of the fundamental law.” *Id.* “When the legislature possesses an undoubted authority to regulate . . . its discretion is not the subject of review.”

*Patterson*, 60 Pa. at 79. Similarly, the Court explained that because the discretion belongs to the legislature, any laws regulating elections “cannot be reviewed by any other department of the government, except in a case of plain, palpable and clear abuse of the power which actually infringes the rights of the electors.” *Id.* at 75; *see also* *Mixon v. Com.* 759 A.2d 442, 447 (Pa.



Commw. Ct. 2000), *aff'd*, 783 A.2d 763 (Pa. 2001) (“Any party challenging a legislative enactment has a heavy burden, and legislation will not be invalidated unless it clearly, patently, and plainly violates the Constitution of this Commonwealth. Any doubts are to be resolved in favor of a finding of constitutionality.” (internal citations omitted)).

In addition, the Pennsylvania Supreme Court has defined the standard of review for laws regulating elections as follows:

In the absence of any express constitutional limitation upon the power of the legislature to make laws regulating elections and providing for an official ballot, nothing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the law-making branch of government in the exercise of a power always recognized and frequently asserted.

*Winston*, 244 Pa. at 457 (1914): This “gross abuse” standard remains the standard to this day.

This Court recently reiterated:

From *Winston v. Moore*, we find that our Supreme Court has applied a “gross abuse” standard to determine whether election statutes violate the “free and equal” clause, thereby giving substantial deference to the judgment of the legislature. This stands in stark contrast to the standard utilized under the federal constitution, which employs a “balancing test.”

*In re Nomination Paper of Rogers*, 908 A.2d 948, 954 (Pa. Commw. Ct. 2006). In other words, contrary to the standard utilized under the federal constitution, Pennsylvania courts do not weigh the potential burdens to electors against the Commonwealth’s interests in enacting such legislation. Therefore, the Petitioners’ argument (that the Commonwealth has not presented any evidence that there is a compelling or legitimate state interest that exists to justify HB 934 or that HB 934 is narrowly tailored) is incorrect.<sup>3</sup> The only question before this Court is whether the

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<sup>3</sup> Similarly, the Members of the Democratic Caucus of the Pennsylvania House of Representatives also incorrectly argue that HB 934 should be stricken because they “believe that the respondents in this case will be unable to show that [HB 934] was strictly necessary or

legislature acted with gross abuse when it passed HB 934 and created a commonsense regulatory scheme to secure free and equal elections.

### **III. The Commonsense Regulatory Scheme Passed by the Legislature Is Clearly Constitutional.**

#### **A. HB 934 does not disenfranchise qualified electors.**

Petitioners assert that HB 934 “imposes a heavy burden on the fundamental right of qualified electors in Pennsylvania to vote, and it violates the Pennsylvania Constitution by preventing elections from being ‘free and equal’ because, for many registered voters, these burdens will either deny the franchise itself or make it so difficult as to amount to a denial.” Petition for Review at ¶ 135. In addition, they complain that in some instances HB 934 imposes “onerous burdens in terms of time, effort, travel, and expense.” *Id.* at ¶ 136.

First, *Amici* dispute as a factual matter that HB 934 places onerous burdens on qualified electors. HB 934 only requires a qualified elector to present one of several types of documents when he casts his ballot. If a qualified elector does not have an acceptable document, the Pennsylvania Department of Transportation will provide one to the qualified elector at no cost. In addition, executive agencies have sought to decrease any bureaucratic inconveniences that may have been associated with obtaining an acceptable document. For example, Secretary of the Commonwealth Carol Aichele recently announced a simplified process that allows qualified electors to obtain the acceptable, free document. *See* Press Release, *Secretary of Commonwealth Announces Simplified Method to Obtain Photo ID for Pennsylvania-Born Voters*, Pennsylvania Department of State (May 23, 2012), available at <http://www.portal.state.pa.us>. Because HB 934

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narrowly tailored to meet” a compelling state interest. Brief of *Amici Curiae* at 12. Just because the courts in Missouri utilize a “balancing test” standard, does not mean that this Court should employ one. This Court must apply the “gross abuse” standard set forth by the Pennsylvania Supreme Court.

does no more than designate various documents that may be presented when a qualified elector casts his ballot, *Amici* dispute that the law places a heavy burden to vote.

Second, Pennsylvania courts have recognized that “hardship is not the test of the constitutionality of a law.” *Patterson*, 60 Pa. at 83. Courts should not declare laws regulating elections unconstitutional “on grounds of mere hardship, or for defects of regulation, which are not clear and palpable violations of the letter or very spirit of the Constitution.” *Id.* at 85. A law can only be pronounced unconstitutional “when the law itself subverts the true electors' rights.” *Id.*

Petitioners do not assert that the law itself disenfranchises qualified electors. Petitioners instead assert that the legislature’s policy decision to require a qualified elector to submit evidence to identify and prove that the qualified elector is who he says he is may burden a qualified elector. However, laws requiring a qualified elector to demonstrate his identity are nothing new. For example, a first-time qualified elector or a qualified elector voting for the first time at a new polling place must provide a form of identification such as a document containing a photograph or a Pennsylvania tax bill. In other words, laws that some qualified electors may find burdensome already exist and are constitutional. Inherent in any requirement that evidence be presented will lead some individuals to have difficulty presenting such evidence. However, that is not a legitimate reason to overturn a commonsense policy choice of the legislature.

**B. HB 934 secures “free and equal elections.”**

Petitioners assert that HB 934 “imposes burdens on the right to vote that do not bear upon all voters equally under similar circumstances.” Petition for Review at ¶ 145. In addition, they complain that the law imposes different burdens on different electors. *Id.* at ¶¶ 147-48. Finally, Petitioners assert that because different electors may provide different evidence proving their

identity, HB 934 violates the “equal” requirement of the Pennsylvania Constitution. *Id.* at ¶¶ 145-148.

However, the “free and equal” provision of the Pennsylvania Constitution does not require uniformity. *Patterson*, 60 Pa. at 75 (“[The Constitution] has not said that the regulations to effect this shall be uniform.”). As the Pennsylvania Supreme Court explained:

If uniformity of regulation be unsuited to different localities, the end must be attained by diversity. If in one part of the state a system secures to electors a free and equal election, but fails to secure it in another part because of the difference of circumstances, what principle of constitutional law makes it unlawful to enact other provisions to counteract the circumstances, and secure the true purpose of the Constitution? Good sense, good order and sound morality require this diversity of regulation when it secures the end; and it is a great fallacy to substitute uniformity of regulation for a free and equal election.

*Id.* at 75-76. The legislature passed a commonsense regulatory scheme to secure free and equal elections. By designating numerous types of acceptable documents, HB 934 attempts to ensure that all qualified electors, if they so desire, have the opportunity and ability to cast a ballot. Although allowing for the possibility that qualified electors will provide different evidence to prove their identity is not “equal” in its means, the scheme passed by the legislature seeks to ensure that each vote cast by a qualified elector is counted. In other words, the law, in the end, secures free and equal elections. HB 934 therefore is constitutional under the Pennsylvania Supreme Court’s holding in *Patterson*.

**C. HB 934 does not impose any additional qualifications to vote.**

Petitioners assert that HB 934 “imposes an unconstitutional qualification to vote.” Petition for Review at ¶ 156. Article VII, Section 1 of the Pennsylvania Constitution sets forth the four qualifications required of an individual to vote in the Commonwealth. These

qualifications are conditions that must be possessed for an individual to be entitled to vote. HB 934 does not alter these conditions. Nor does it expand them.

Instead, HB 934 creates a framework in which a qualified elector who casts a ballot presents evidence that he, in fact, is the qualified elector he claims to be. The evidence as determined by the legislature is a document that: (1) was issued by the United States, the Commonwealth of Pennsylvania, a municipality of the Commonwealth to an employee of that municipality, an accredited Pennsylvania institution of higher education, or a Pennsylvania care facility; and (2) generally contains the name and photograph of the qualified elector as well as an expiration date. In addition, if a qualified elector does not have one of the various, acceptable types of documents needed to cast a ballot, HB 934 permits that qualified elector to cast a provisional ballot, which will be counted when the qualified elector affirms by affidavit within six calendar days that he was the individual who casted the provisional ballot.

In other words, HB 934 “designates . . . the evidence which shall identify and prove . . . the persons and the qualifications of the electors.” *Patterson*, 60 Pa. at 75. It does not entitle individuals to vote who are not qualified electors. Nor does it preclude individuals who are qualified electors from being entitled to vote. HB 934 simply creates a commonsense regulatory scheme to ensure that only qualified electors participate in elections.

## CONCLUSION

As the Pennsylvania Supreme Court declared, “The power to regulate elections is legislative, and has always been exercised by the law-making branch of the government.” *Winston*, 244 Pa. at 454. In this matter, the legislature utilized its undoubted authority to pass a law regulating elections. To promote voter confidence in the election process, the legislature decided that a qualified elector must provide evidence of his identity when he casts his ballot. In

addition, to ensure “free and equal elections,” the legislature designated numerous types of documents a qualified elector may provide when he casts his ballot. This commonsense policy choice of the legislature was not a gross abuse of its authority. Therefore, for the foregoing reasons, *Amici* respectfully requests that this Court deny Petitioners’ request for a preliminary injunction.

Dated: July 17, 2012

Respectfully Submitted,



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THE COMMONWEALTH OF PENNSYLVANIA; )  
THOMAS W. CORBETT, In His Capacity As )  
Governor; CAROL AICHELE, In Her Capacity As )  
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CERTIFICATE OF SERVICE

I certify that I am this day, July 17, 2012, serving the foregoing **BRIEF OF AMICI CURIAE** upon the persons below via first-class, U.S. mail, postage prepaid, which service satisfies the requirement Pa. R.A.P. 121:

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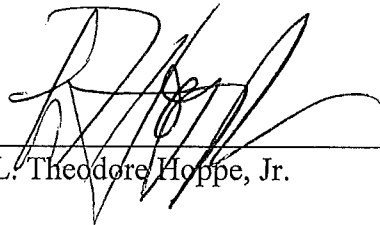
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