

Transcript of Proceedings

Date: August 01, 2013

Case: APPLEWHITE, et al. vs. COMMONWEALTH OF PA, et al.



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1 IN THE COMMONWEALTH COURT OF PENNSYLVANIA

2 - - -

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

**CERTIFIED
TRANSCRIPT**

9 : C.A. No.
: :
10 Petitioners, : 330 M.D. 2012
:

11 VS. :

12 THE COMMONWEALTH OF PENNSYLVANIA; :
THOMAS W. CORBETT, in his capacity :
as Governor; CAROLE AICHELE, in her :
13 capacity as Secretary of the :
Commonwealth, :

14 Respondents. :
15 :

16 TRIAL - DAY TWELVE

17
18 Honorable Bernard L. McGinley

19 Harrisburg, Pennsylvania

20 Thursday, August 1, 2013

21 10:00 a.m.

22
23
24 REPORTED BY:

25 Marjorie Peters, RMR, CRR

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P R O C E E D I N G S

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1
2
3 THE BAILIFF: All rise. Commonwealth
4 Court is now in session. The Honorable Bernard L.
5 McGinley presiding.

6 THE COURT: Thank you. Please be
7 seated.

8 MS. CLARKE: Good morning, Your Honor.

9 MR. KEATING: Good morning, Your Honor.

10 THE COURT: Okay. Petitioners, are we
11 ready to proceed?

12 MS. CLARKE: Yes, Your Honor.

13 THE COURT: Okay.

14 MS. CLARKE: Your Honor, I'd like to
15 begin by thanking the Court, the clerks, and the
16 courtroom crier for all of your incredible patience
17 with all of us over the past few weeks.

18 I'd also like to thank very much our
19 clients, some of whom are in the courtroom, opposing
20 counsel, and my wonderful team of co-counsel: Marian
21 Schneider of the Advancement Project, Vic Walczak,
22 Mike Rubin of Arnold & Porter and his team; and Kelby
23 Bolana, who is the man behind the computer. I want to
24 thank all of you.

25 THE COURT: Thank you, Counsel.

1 MS. CLARKE: This is a case about a
2 law, Act 18, that unreasonably and unnecessarily
3 burdens the right of Pennsylvanians to vote.

4 It's a case about Marian Baker. She is
5 a former Republican committeewoman. She was told by
6 her poll workers in November that she needed to get a
7 new form of identification in order to vote in the
8 future.

9 Now, Mrs. Baker knew from experience
10 that last time she went to PennDOT, it was a four-hour
11 wait and there weren't any chairs, and she knew from
12 going by the PennDOT office that that line had not
13 gotten shorter.

14 So, she called her PennDOT office and
15 she asked them for an accommodation, and they said no,
16 you have to come in like everyone else. She said,
17 well, could I send it in by mail. They said, no, you
18 have to come in.

19 Mrs. Baker knew that she couldn't do
20 that, so she didn't vote in May because she couldn't
21 get that ID.

22 And there are hundreds of thousands of
23 people who, according to all sources, lacked the
24 identification that they need to vote.

25 Here's what the case is not about:

1 This is not about whether people have earned the right
2 to vote. This is not about a test as to whether
3 people go back multiple times, whether people learn
4 information that's not public, whether people put --
5 stress their physical stamina or put burdens on their
6 loved ones, and this is also not a case about
7 in-person voter fraud.

8 The Respondents have agreed that they
9 are not aware of any in-person voter fraud in this
10 Commonwealth.

11 No, this is a case about a law that
12 fundamentally burdens a right enshrined in the
13 Constitution, a cherished right to vote.

14 Now, Act 18 and the way it's been
15 implemented violates three separate legal protections.

16 First, the right to vote that's
17 enshrined in the Pennsylvania Constitution.

18 Second, the right to equal protection
19 enshrined in the Pennsylvania Constitution.

20 And finally, the way that the law has
21 been implemented itself violates the law.

22 I will be focusing my remarks today on
23 the way in which the law violates the Pennsylvania
24 Constitution's right to vote, and we'll be discussing
25 the equal protection and the statutory violations in

1 our brief.

2 So, to give a roadmap of my discussion
3 this morning. I'll first be discussing the law, then
4 I'll be discussing the numbers, then our facial
5 challenge, and then the evidence as it relates to our
6 as-applied challenge.

7 So, to begin with the law, Article I,
8 Section 5 of the Pennsylvania Constitution declares
9 that elections shall be free and equal; and it also
10 provides that no power, civil or military, shall at
11 any time interfere to prevent the exercise of the
12 right of suffrage.

13 Article VII, Section 1, says also that
14 every citizen to age 21 shall, subject to residency
15 requirements, be entitled to vote at all elections,
16 subject to the General Assembly's power to regulate
17 legislation.

18 Now, as the Pennsylvania Supreme Court
19 has applied and interpreted these provisions, they
20 have held that governmental restriction, like Act 18,
21 violates the Constitution if it is so difficult as to
22 amount to a denial.

23 So, in Winston versus Moore, for
24 example, the Court held that elections are free and
25 equal within the meaning of the Constitution, when the

1 regulation of the right to exercise the franchise does
2 not deny the franchise or make it so difficult as to
3 amount to a denial.

4 Similarly in DeWalt versus Bartley, the
5 Court held that the test is whether the legislation
6 regulating elections, denies the franchise, or renders
7 its exercise so difficult and inconvenient as to
8 amount to a denial.

9 So, the standard here is not
10 impossibility. It's not whether someone, if their
11 lives depended on it, could walk or crawl or suffer
12 immense pain to get an identification. The standard
13 is the difficulty and unreasonableness of the burden.

14 Now, after the Court assesses the
15 burden, the law then directs the Court to determine
16 whether the unreasonable and unnecessary burden of
17 voters outweighs the governmental interests asserted;
18 and here, as we'll show, whether the standard is
19 strict scrutiny or some intermediate standard or even
20 rational basis, the governmental interest does not
21 justify the significant burden here.

22 Now, final point on the law, we have
23 pleaded both a facial and an as-applied challenge.
24 Those aren't different legal arguments; instead, they
25 just go to whether or not the scope of the injunction

1 that the Court issues.

2 The facial challenge alleges that the
3 law on its face is flawed, and based -- if the Court
4 determines that that is the case, the Court could
5 issue an injunction enjoining the implementation of
6 the law altogether.

7 The second is an as-applied challenge.
8 That proof and that argument is that the law, as it's
9 been implemented, operates to violate the
10 Constitution; and there the Court could issue an
11 injunction that enjoins the law until all people get
12 the identification they need to vote. It could enjoin
13 the law with respect to people who don't have
14 identification.

15 So, the beginning point of any
16 challenge are the numbers. How many people lack the
17 ID necessary to vote under Act 18. All the estimates
18 in this case, no matter what the methodology and no
19 matter who the estimates came from, point to the same
20 conclusion: There are hundreds of thousands of people
21 who lack the ID necessary to vote.

22 The first estimate was the Court last
23 summer in its ruling. After hearing all of the
24 evidence, the Court ruled that the number is "somewhat
25 more than 1%." That was 89,000 at the time, and

1 "significantly less" than 9%. That was 780,000.

2 Now, the next piece of evidence is
3 Rebecca Oyler. And until recently, she was the policy
4 director at the Department of State. Last year, the
5 Court based its assessment on Rebecca Oyler's
6 testimony.

7 Now, Rebecca Oyler testified this year
8 and now she thinks the number is more like 4 to 5% of
9 registered voters, and that would be about 320,000 or
10 400,000 people.

11 The third estimate came from Secretary
12 Aichele. Secretary Aichele testified before the
13 Senate Appropriations Committee, and she was asked
14 what the State's estimate was, and she cited to a
15 study done in Philadelphia by the Committee of
16 Seventy; and in that study, the Committee of Seventy
17 found that 3.5% of the voters who showed up at the
18 polls lacked ID necessary to vote.

19 If you take that percentage and apply
20 it statewide to the people who showed up at the polls
21 in November, that would get you about 190,000 people.
22 That clip is Exhibit 1529.

23 Now, the fourth estimate was a project
24 that the Department of State did last summer, and the
25 Department of State tried to match the people in its

1 registration database, the SURE database, with the
2 people in the PennDOT database who had driver's
3 licenses or non-driver's IDs.

4 When they did that match, they found
5 that 759,000 people who are registered voters did not
6 have a form of identification in the PennDOT database.

7 Now, they took that number seriously
8 enough that they mailed letters to every one of those
9 759,000 people telling them that they better get IDs.

10 Now, this year, Deputy Secretary Royer
11 testified that 150,000 of those letters came back.
12 So, the best estimate from that exercise was 600,000
13 voters.

14 Now, in testimony last year, another
15 Department of State employee, Mr. Burgess, testified
16 that they did another exercise, and that was to look
17 at how many people had -- were in the PennDOT
18 database, but whose licenses had been expired for more
19 than a year, and therefore, they would be unable to
20 vote, too.

21 This was the number that the Court
22 asked a witness about the other day, and that number
23 was about 500,000. There were 500,000 people in the
24 registered voter database who had an ID, but it was
25 expired, and it couldn't be used for voting.

1 The fifth estimate was done by
2 Dr. David Marker. Dr. Marker is hired by foreign
3 governments and the United States government to create
4 surveys and to evaluate the surveys of other people.

5 What he did in this case was to
6 evaluate a survey implemented and presented last
7 summer by Dr. Matthew Barreto. Dr. Barreto's survey
8 was designed to find out how many people lacked any
9 kind of ID under the statute, not just -- not just
10 PennDOT IDs, but any kind of ID.

11 What Dr. Barreto found was that 710,000
12 people lacked the ID needed to vote. That excludes
13 what he found about non-conforming matches.

14 He also found significantly that of the
15 people who didn't have a PennDOT ID, only a very small
16 percentage of those people had another form of ID, a
17 military card or a student ID. Only a small
18 percentage.

19 So, what we did this year is we asked
20 Dr. Marker to look at Dr. Barreto's methodology, which
21 was criticized last year both by opposing counsel and
22 by the Court.

23 What Dr. Marker concluded was that in
24 fact Dr. Barreto's survey methodology was reliable and
25 it was -- it met regular standards for survey

1 methodologies.

2 So, based on Dr. Marker's analysis, he
3 concluded that the order of magnitude of Dr. Barreto's
4 conclusions remained valid; that is, that hundreds of
5 thousands of people lack ID.

6 The next estimate was done by
7 Dr. Siskin. Dr. Siskin is an expert in statistics and
8 mathematics. He has done work for the FBI, the CIA,
9 the Department of the Navy, and the Attorney General's
10 office.

11 What Dr. Siskin did was a refinement of
12 what the Department of State did last summer. He
13 matched to the SURE database with the PennDOT
14 database; but he went further than the Department of
15 State went last summer to be very, very conservative
16 in his conclusions.

17 He took out all of the ineligible
18 voters. He took out all of the people who had
19 out-of-state driver's licenses, or for whom that had
20 been reported; and then what he did is went through a
21 series of 12 steps to do a matching.

22 And the 12 steps started with simple
23 things like matching driver's license and Social
24 Security numbers, and then got more and more loose, I
25 would say, matching first names or addresses that were

1 near.

2 At the conclusion of the 12 steps, he
3 did an audit to determine the error rate. He took
4 account of the error rate and he came up with an
5 estimate.

6 He also went and looked at the people
7 who had driver's licenses, just like Mr. Burgess did
8 last summer, but whose driver's licenses or IDs were
9 expired for more than a year and who therefore would
10 not be able to vote with those IDs.

11 Dr. Siskin's conclusions -- and those
12 were Exhibit 2096b -- were that 251,000 registered
13 voters do not have -- are not in the PennDOT database
14 at all; that is, they don't have a PennDOT ID, a
15 driver's license or an ID.

16 He also found that 259,000 voters had a
17 PennDOT ID, but the ID was expired for more than a
18 year and can't be used for voting. So, that was
19 511,000 registered voters in all.

20 Now, the Respondents brought in
21 Dr. Wecker to criticize -- specifically to criticize
22 Dr. Siskin's methodology. Dr. Wecker was the person
23 who drew the circles around universities.

24 Now, Dr. Wecker's criticisms are not
25 credible and they're not reliable; and I don't have

1 time to go through all of them, but I'm going to talk
2 about three of the key problems with Dr. Wecker's
3 testimony.

4 First, Dr. Siskin did his work based on
5 the assumption that the number of people who lacked
6 PennDOT IDs was probative of the number of people who
7 lacked any kind of ID authorized by the statute.

8 Dr. Wecker called this the biggest leap
9 of logic I've ever seen. But this wasn't a leap of
10 logic at all. It was, in fact, the basis for Act 18;
11 and Act 18 providing that the PennDOT ID was supposed
12 to be the ID of last resort.

13 It was the basis for the Supreme
14 Court's concern and why the Supreme Court remanded the
15 case to this Court, and it was the fact that so few
16 PennDOT IDs had been issued that this Court
17 enjoined -- preliminarily enjoined the case.

18 So, it is not at all a big leap of
19 logic to say that the number of people who lack IDs is
20 probative of how many people lack IDs at all.

21 Another problem of Dr. Wecker's, the
22 second of the three that I'm going to raise today, is
23 he assumed that Dr. Siskin's purpose was to identify
24 every single person who lacks IDs; and he said, I have
25 never been in litigation where that kind of precision

1 wasn't required.

2 But that's not what Dr. Siskin set out
3 to do, and he said that. He understood that people
4 move away, people move in, people die, new people
5 register.

6 What Dr. Siskin's project was designed
7 to do was to come up with an estimate of orders of
8 magnitude. It was not to identify ever single person
9 with precision.

10 The third problem with Dr. Wecker was,
11 he criticized the match process itself. He just said
12 it can't be done; that databases don't talk; they're
13 not reliable. But unfortunately, Dr. Wecker had not
14 been given any information about any of the other
15 estimates or work that had been done.

16 In particular, he wasn't aware that
17 last summer when the Department of State did its
18 match, the reason it did it was so those databases
19 could talk to each other better. Basically, they did
20 the backfill and they did it so that they could add
21 numbers and so the databases could talk to each other.

22 Mr. Marks also testified at length in
23 this hearing about all of the efforts that he has made
24 and his office has made over the past ten years to
25 improve the quality and the amount of data in the SURE

1 database.

2 So, for these reasons and others,
3 Dr. Wecker's criticism of Dr. Siskin aren't credible
4 and shouldn't be given any weight; but there is
5 something that we can do with Dr. Wecker's numbers.

6 The one place he put numbers in was he
7 said there's some voters on the list of Dr. Siskin
8 that shouldn't be counted, and essentially what he
9 said was there's 144,465 people who shouldn't be on
10 Dr. Siskin's list. So, let's give him that.

11 And if you look at that number, if you
12 take those numbers, subtract them from Dr. Siskin, you
13 still get a very large number, 366,000.

14 So, those are the estimates from all
15 sources and all in the same order of magnitude; but
16 when one is trying to understand the magnitude of this
17 problem, the other half of the equation is how many
18 people have gotten IDs so far. That is Exhibit 2072.
19 The numbers are very small. Infinitesimal compared to
20 the huge numbers who lack ID.

21 So far, from the beginning of this --
22 when the law went into effect, there have been 3,830
23 Department of State IDs, and 2,530 of those have been
24 since September 25th, 2012. That's a very significant
25 day here, because that's the day that the Department

1 of State came in and said, we get it. We recognize
2 that our process hasn't been good so far. So this is
3 the day we're going to really do it. So, there have
4 been 2,530 since then.

5 Since the law has been in effect, there
6 have been 12,981 PennDOT free IDs for voting issued
7 and only 3,860 since September 25th.

8 Now, one has to ask why in the 16
9 months since this law was implemented, why didn't the
10 state try to figure out how many people lack ID?

11 A number of witnesses, including
12 Rebecca Oyler, said that would be a very useful
13 exercise to determine how to get people IDs; and they
14 hired Dr. Wecker, who in other circumstances, is known
15 for doing very complicated and different work, but
16 they didn't do that.

17 Secretary Aichele obviously thought it
18 was a good idea because she announced at a press
19 conference that she was going to do another match, but
20 they never did. And I believe that the Court can draw
21 an inference from the fact that this work was never
22 done.

23 Now, in Respondents' opening argument,
24 they claimed that these numbers are a small segment of
25 the population; and what are they saying? It's true

1 that this is a very small percentage, a small
2 percentage of the overall voters, but these are
3 people. These aren't segments.

4 Would we accept 100,000 people being
5 deprived of freedom of religion? Would it be okay if
6 89,000 people or even 50,000 people were deprived of
7 the right to bear arms, or subjected to unreasonable
8 search and seizure? Of course not. Of course we
9 wouldn't.

10 This is the same thing here, we're
11 talking about individuals and not segments. These are
12 rights directly bestowed on individuals, and they are
13 cherished rights.

14 So, far I have talked about all of the
15 sources that have pointed to very large numbers, but
16 next I'm going to talk about our facial challenge;
17 that is, the structural defects of Act 18 that operate
18 to impose unnecessary burdens on voters.

19 The first is -- the first structural
20 flaw has already been recognized by the Supreme Court
21 and acknowledged by the Respondents, and that is the
22 law provides that the ID of last resort would be the
23 PennDOT ID.

24 And now everyone understands that that
25 can't be the ID of last resort because of the

1 requirements of federal law and state law and security
2 issues. So, that has been acknowledged by everyone.

3 The second issue related to the first
4 is you have to go to PennDOT to get the ID. There are
5 only 71 locations throughout the Commonwealth. Nine
6 counties don't have any PennDOT location at all; 13
7 counties only open one day a week; and nine counties,
8 it's only open two days a week. This contrasts with
9 the 9,300 polling places around the Commonwealth, down
10 the street, around the block, a mile or two away.

11 Now, Act 18 imposes absolutely no duty
12 on PennDOT to increase the number of locations or
13 increase the hours of operation. As Mr. Myers told
14 us, he and his staff make that decision, and they make
15 it based on their own considerations.

16 PennDOT has shown itself to be a
17 reluctant participant in this project. Petitioners'
18 Exhibit 27 which was introduced last year showed that
19 PennDOT opposed an earlier version of this law and
20 said that it would tax -- it would burden its, quote,
21 already taxed driver's license centers.

22 Secretary Aichele testified last summer
23 that the Department of State asked the Department of
24 Transportation to use mobile units to get people IDs,
25 but PennDOT said no. That was in the transcript last

1 year at page 998.

2 Now, the Department of State knows and
3 knew that this fact that you had to get to PennDOT
4 posed a problem. And they said in Exhibit 1677,
5 "PennDOT has said that there are 71 photo centers
6 around the state. Someone may challenge the law based
7 on the fact that there are only 71 photo centers, and
8 some people may not be able to get an ID without
9 significant costs to get to a photo center."

10 They knew this was a problem. And in
11 the same document, in talking about people in care
12 facilities said that a person in a care facility might
13 not be able to get an ID. Quote, "the elector may not
14 be well enough to go to a PennDOT photo ID center to
15 get a new ID. The individual may then claim that he
16 or she has been deprived the right to vote."

17 The Department of State card, the DOS
18 card, doesn't cure these facial defects. It is
19 entirely a creation of governmental administrative
20 discretion. The Department of State created it, they
21 made the rules, they changed the rules, and there is
22 nothing guaranteeing that they won't take it away.

23 Here's how Jonathan Marks, the highest
24 ranking career official in charge of elections, put
25 it. He was asked, "the Department of State has the

1 authority to make these choices, to establish these
2 requirements" -- referring to the Department of State
3 procedures -- "correct?" Answer: "That's correct,
4 yes." "Or to eliminate the requirements, correct?"
5 Answer: "Correct." Question: "The Department of
6 State controls the requirements for how the DOS card
7 is to be issued, correct?" Answer: "I would say to
8 some extent, correct, yes." Question: "And the
9 Department of State could also eliminate the DOS ID
10 card altogether; is that right?" Answer: "Yeah,
11 theoretically, we could."

12 But this is not just a theoretical
13 problem. There is a real risk that the Department of
14 State could someday -- maybe not today, maybe not
15 tomorrow -- but could someday eliminate the DOS card.

16 Representative Darryl Metcalf is a key
17 supporter of this law, and he challenged the
18 Department of State over its decision to issue these
19 cards.

20 He claimed that it's not authorized by
21 Act 18 and Representative Steve Barrar agreed. Some
22 exhibits that were admitted at the end of this case
23 without being shown or discussed show this, and those
24 are Exhibits 1446 and 1447.

25 The third facial problem with Act 18 is

1 the list of IDs that are available for voting. This
2 is the strictest, narrowest list in the country, and
3 there are two problems with the list.

4 One is that it requires expiration
5 dates, even on IDs that don't typically have
6 expiration dates, like college and university IDs, or
7 veterans' IDs.

8 Now, when the law was being discussed,
9 the Department of State was aware of this problem, and
10 no one at the Department of State thought that there
11 was any good reason to have expiration dates.

12 Ms. Oyler, the policy director, agreed
13 during this trial that you don't really need an
14 expiration date if the purpose of an ID card is
15 identity. You just need the card to look like the
16 person. But the legislature decided to put in
17 expiration dates anyway, even though they're not
18 needed.

19 The other problem with the list is the
20 kinds of IDs is very narrow. It doesn't include IDs
21 issued by school districts at all. It doesn't include
22 IDs issued by municipalities, except IDs issued to
23 their employees, but not to other people. It doesn't
24 include lists of ID cards issued by private employers.

25 These are ID cards that are used

1 commonly, every day, in every other transaction; but
2 they're not included here.

3 The Department of State again was so
4 concerned about this issue, they were concerned about
5 the possibility of -- here's what my quote,
6 "disenfranchisement through happenstance beyond the
7 control of the elector" -- that was Petitioners'
8 Exhibit 1562 -- "that they recommended a change in the
9 Bill that everybody be allowed to vote absentee."

10 The legislature didn't do that.

11 The fourth and final issue with --
12 fundamental problem with Act 18 is that there's no
13 safety net. There's no real safety net that allows
14 people who don't have ID to come to the polls and cast
15 a regular ballot.

16 Michigan and New Mexico have those
17 kinds of safety nets. If you go to the polls and you
18 don't have an ID, you can sign a declaration or an
19 affirmation saying that you are who you say you are,
20 and they will allow you to vote, to cast a regular
21 ballot.

22 Georgia allows people to -- everyone to
23 vote absentee; and Indiana, everyone over 65 or with a
24 disability can vote absentee.

25 Pennsylvania doesn't have those rules.

1 In Pennsylvania, it's -- there is already a very
2 narrow and restricted list of the kinds of times that
3 people can vote absentee; and Act 18 actually made it
4 harder by requiring you to put a Social Security
5 number or a driver's license in your absentee ballot.

6 So, these four provisions of Act 18 are
7 fundamental and foundational. They can't be changed.
8 They can't be changed by assurances that something new
9 will happen. So, it's for this reason that we have a
10 facial challenge, and we're asking the Court to enter
11 a permanent injunction enjoining the enforcement of
12 this law.

13 But in addition to the structural
14 defects, the manner in which Act 18 has been
15 implemented also has resulted in a public
16 overwhelmingly unaware of the fact that there is a
17 free identification card available for voting; and it
18 also, when people get to PennDOT, has resulted in
19 unnecessary and unreasonable burdens and people unable
20 to get IDs.

21 So, I want to first start with the
22 education. The state spent \$4 million last fall on
23 its "show it" campaign on radio, TV and billboards.
24 Dr. Diana Mutz, who is a Professor at the University
25 of Pennsylvania and a Fellow at the American Academy

1 of Arts and Sciences, came and explained graphically
2 why the "show it" campaign -- what was the matter with
3 the "show it" campaign.

4 The issue was it didn't tell people
5 that there was an ID that's available for free without
6 documentation, let alone telling people where they
7 could go to get it or how they could get it.

8 Now, instead what she testified was the
9 focus of that campaign was telling people who already
10 had IDs that they needed to bring them.

11 Now, the State did have a 1-800 number
12 and a website, and Dr. Mutz testified again
13 graphically how difficult -- she testified and showed
14 how difficult it was for even her to navigate that
15 website or deal with that 1-800 number.

16 Now, the fact that there was no
17 education about the Department of State ID was not an
18 accident. It was intentional, and Deputy Secretary
19 Royer admitted this in the trial.

20 What he said -- he was questioned about
21 why there was no -- no advertising about the
22 Department of State ID; and he said, we didn't want to
23 confuse voters by putting out that the ID that most
24 people have never heard of, would someday would be
25 needed for voting, and therefore, cause confusion.

1 So, the Department of State's
2 information campaign reveals the wide divide between
3 what the Department of State issued from Harrisburg
4 and what actually made it into the hands of the
5 voters.

6 It's the distinction between theory and
7 practice, and it's the distinction between quantity
8 and quality.

9 With all of the flyers, all of the
10 pamphlets, all of the informational bulletins, most of
11 them that are in evidence in this court do not mention
12 the Department of State ID. If they do, they don't
13 explain what it is, where you can go to get it, that
14 you don't need documents.

15 Another example of this difference
16 between theory and practice is libraries. Respondents
17 mentioned libraries, but in testimony by Ron Ruman
18 which we put in without reading, Mr. Ruman said really
19 all they did was ask the Library Association if they
20 could send a PDF and a link to libraries.

21 There's no evidence that anyone got
22 information from a library and the evidence that there
23 is, Mr. Rogoff and Ms. Carty went to libraries, and
24 they didn't find anything.

25 The fact that poll workers went to the

1 poll to circulate -- the fact that the Department of
2 Information [SIC] sent information to the poll workers
3 is also a good example of the distinction between
4 theory and practice.

5 They didn't do any survey to see if the
6 poll workers were already using it. Mr. Royer talked
7 about going to a handful of polling places and said
8 everything was fine. But the proof is in the pudding.
9 The witnesses who testified here overwhelmingly said
10 that they didn't see anything, they didn't hear
11 anything.

12 Mrs. Norton testified that she asked
13 when they told her that she would need a driver's
14 license or a passport.

15 Now, I want to say here that the point
16 is not to blame the government officials. They worked
17 hard. This isn't a question of blame or gotcha, or
18 you have got the wrong information out there.

19 The point here is it's the very
20 government officials who are putting out this
21 information that are getting it wrong. They're not
22 getting it right.

23 And the other point is that it doesn't
24 matter, from the point of view of the voter, if they
25 don't get the information. It doesn't matter whether

1 the people are operating in good faith or bad faith.

2 Now, Mr. Myers referred throughout his
3 testimony to this idea of shared responsibility; but
4 if the information isn't there, if there's not
5 information that there is a card that's free, that you
6 don't need documents for, or where you can go to get
7 it or how can you get it, how can we expect registered
8 voters to take that responsibility that Mr. Myers
9 talked about?

10 Now, education wasn't the only problem.
11 The process that unfolded over the last 16 months has
12 been chaotic and unpredictable and unnecessarily
13 burdensome.

14 Some of the problems are getting to
15 PennDOT, and others are what happened when you get
16 there. The voters' stories illustrated both of these
17 problems.

18 Patricia Norton lives in Wamelsdorf,
19 Pennsylvania, Berks County. She has voted in the same
20 municipal borough for 48 years. She gets around in a
21 wheelchair and travelling in a car is painful for her
22 and difficult because most cars don't have
23 wheelchairs.

24 Mrs. Norton wanted to get an ID, so in
25 October, she called her friends in Reading who drove

1 20 miles to get her and then they drove 45 minutes to
2 Shillington. When Mrs. Norton got there, and got in,
3 they told her, you have to pay \$13.50. She said no, I
4 think it's free. They said, no, you have to pay.

5 So, now there was another problem.
6 Mrs. Norton pulled out her wallet to give them the
7 \$13.50; but they said, no, we don't take cash. We
8 only take checks or money orders.

9 To get a money order, you have to get
10 back in your car, and you have to go to another
11 location. You have to get out of the car, and then
12 you have to get the money order and come back.

13 Mrs. Norton couldn't do that. Here's
14 how you -- here's how she explained it:

15 Xx VIDEO PLAYED AS FOLLOWS:

16 THE WITNESS: "The people who can
17 drive, when you can drive, you don't think about it.
18 You just do it. You hop in and you go. And you don't
19 understand the problems it creates when you can't do
20 that."

21 MS. CLARKE: We had many other
22 witnesses testify about similar stories. We had
23 Mrs. Marsh. We had Andrew Rogoff, who was a partner
24 of one of Philadelphia's largest law firms, who spent
25 two to three hours over the course of six months

1 making multiple calls, on hold, arguing, getting
2 different answers.

3 If it takes a lawyer with 35 years
4 experience to get his father-in-law -- his
5 father-in-law an ID, how can we expect the rest of
6 Pennsylvania voters to navigate the system without an
7 advocate like him?

8 Respondents' counsel has suggested in
9 cross-examination questions that somehow people don't
10 have to go to PennDOT ID, but Mr. Myers, who knows,
11 said this was not true. You have to go to PennDOT.

12 He said you have to go to PennDOT in
13 99% -- 99.9% of the situations; that the situations
14 where people don't have to go to PennDOT, he said,
15 were very rare.

16 Sure, you can use online if you want to
17 renew your driver's license, but that costs money.
18 You need a credit card and your driver's license can't
19 have been expired for more than six months.

20 And yes, you can use the mail for part
21 of renewing your driver's license; but according to
22 Mr. Myers, you still have to come in to PennDOT.

23 There was also a suggestion in
24 questions by Respondents' counsel that somehow if you
25 called PennDOT, they would get a ride for you. But

1 the evidence in this case shows that is not true.

2 Exhibit 1591 was an example.

3 Mr. Myers said only that PennDOT
4 occasionally would allow people to make appointments
5 to bring in groups.

6 Once you've gotten to PennDOT, the
7 testimony is that the application is inconsistent and
8 erratic. There are long lines, people are being
9 charged. Even Secretary Aichele last summer called on
10 PennDOT to put its best people on the line, citing bad
11 experiences she had had in other states. But she knew
12 there were no best people. There were no other
13 people. They had the people that they had.

14 She testified to this at pages 1001 and
15 1003. There's no better example of how this system
16 did not work than the story of the people who got
17 themselves to PennDOT; waited in line to try to get a
18 Department of State, a DOS ID; and were turned away.

19 One of those hundreds, there were
20 dozens who were registered to vote, and dozens who
21 didn't get the ID in time to vote. The evidence of
22 this is the database created by the Department of
23 State. This was the SharePoint database. That was
24 Petitioners' Exhibit 71.

25 People who went to PennDOT to get an

1 ID, a DOS ID, and couldn't get one were recorded in
2 that database. Mr. Marks explained it in detail the
3 first time he came.

4 Now, Mr. Niederberger testified about
5 the data. He crunched the numbers and he testified
6 what the data in the database showed, and here's what
7 it showed: There were 613 people who came to PennDOT
8 to get the new DOS ID, who were put into this
9 exceptions process, 613 people.

10 Now, of that, 473 people came on or
11 after September 23 -- September 25th. Those were the
12 people that that was an important date because that's
13 when now the Department of State's going to get it
14 right; but 473 people who came to PennDOT on or after
15 that date went home without a DOS ID.

16 Now, the database also shows what
17 happened with these people. 146 of them were
18 registered to vote, but turned away anyway; and 130 of
19 them were actually registered before the deadline --
20 that was October 9th -- but they didn't get their IDs
21 before Election Day.

22 Now, on cross-examination yesterday
23 Mr. Niederberger conceded that two of those people --
24 well, on cross-examination he was shown data to see
25 that -- to show that the Department of State database

1 was wrong, so he conceded that two of those people
2 shouldn't be in there, so that would take it down to
3 128.

4 Now, during this trial, Respondents'
5 counsel claimed that the Department of State database
6 was wrong. It was inaccurate, and that there were 144
7 people whose names shouldn't be on there. So, we
8 didn't necessarily agree with them; but we said, okay,
9 let's just take those 144 people out and let's see
10 what happens.

11 Were there registered voters who still
12 tried and failed to get to IDs? We matched them
13 person by person, and the answer is yes. There were
14 still hundreds of people who went to PennDOT, and
15 there were still registered voters who were turned
16 away, and didn't get their IDs in time to vote.

17 The numbers are there are 469 people in
18 the exceptions process; 330 of them came after
19 September -- on or after September 25th; 71 of them
20 were registered voters; and 58 of them were validly
21 registered to vote before the election but didn't get
22 their IDs.

23 Again, taking -- giving credit to the
24 cross-examination, that number would go down to 56, if
25 there were two entries that were wrong.

1 Now, from our perspective the two
2 numbers are actually somewhere between what the
3 database shows and taking the 144 out, and
4 Mr. Niederberger testified about that even under, and
5 that is the third page of our Exhibit 2136.

6 But there are two conclusions that you
7 can draw from this matter. First is that there were
8 hundreds of people, even after the Department of State
9 said this would be fine, hundreds of people who were
10 turned away, dozens who were registered voters.

11 But the other point is that
12 Respondents' argument is based on -- is based on the
13 claim that their own numbers, their own database, was
14 wrong and can't be trusted, and their own system can't
15 be trusted.

16 If you can't -- and these are the very
17 agencies that are supposed to be implementing this
18 law. If they can't do it in 3,000 or 2,500 people,
19 how can they possibly do it with 10,000 or 100,000
20 people?

21 Your Honor, throughout the course of
22 this lawsuit, many, many people have come in to
23 testify about what the right to vote means to them.
24 They have come from all walks of life and all corners
25 of this Commonwealth. They are older white women,

1 middle class black women, veterans, young disabled
2 people, a Latina housewife. Every one of them spoke
3 about the right to vote. Some were articulate and
4 even lyrical. Some were more straightforward. But
5 every one of them said the same thing; there was a
6 common thread.

7 It was the pride in this common thing
8 that we share, this American magnificence that we all
9 have the right to choose our leaders.

10 Here's how Mrs. Norton put it.

11 (VIDEO PLAYED AS FOLLOWS:)

12 Q. Is voting important to you?

13 A. Yes, it is.

14 Q. Could you tell me why?

15 A. I think it should be important to all of us.
16 We all have a stake in what's going on in our life and
17 we need to respect the people who went before us, and
18 went through all kinds of grief to give us that right.
19 We need to take advantage of it.

20 (VIDEO ENDS.)

21 MS. CLARKE: 150 years ago, not so far
22 from here, President Lincoln issued a challenge:

23 "Government of the people, by the people, and for the
24 people shall not perish from this earth."

25 It's that right of self-governance that

1 people around the globe are risking their lives for
2 now. It's that right that people throughout our
3 history have given their life for. That's why we're
4 here today, and that's why we're asking this Court to
5 issue this injunction.

6 Thank you very much.

7 THE COURT: Thank you, Miss Clarke.

8 We'll take ten minutes before we go
9 into the other argument.

10 MR. KEATING: Thank you.

11 (COURT RECESSED AT 10:44 A.M. AND
12 RECONVENED AT 10:57 A.M.)

13 THE BAILIFF: Court is in session.

14 THE COURT: Thank you, Counselors.

15 MS. HICKOK: Good morning, Your Honor.

16 THE COURT: Good morning. The
17 Department of State gets an hour.

18 Arthur, we'll give the counsel an hour
19 to present her argument.

20 MS. HICKOK: Your Honor, I, too, would
21 like to thank you for the time and the effort and the
22 attention that you have paid to this case, to the
23 record that has been built before you, and to the
24 testimony that you have heard.

25 I would like to thank the attorneys

1 that I have had a privilege of working with,
2 Mr. Keating, Mr. Schmidt, Mr. Hutchison and the
3 attorneys and employees of the Respondents and of
4 non-parties who have been brought into this case, and
5 who have worked tirelessly and diligently to answer
6 the questions of this Court, of Petitioners, and of
7 us.

8 THE COURT: I thank all, Respondents,
9 Petitioners. You all have worked hard. I appreciate
10 it.

11 MS. HICKOK: Thank you, Your Honor.

12 Your Honor, I was struck by one of the
13 things that was said. The statement was made, "there
14 were no best people." And actually, Your Honor, I
15 think if you look at the record that was made over the
16 past three hearings, the record that was made in the
17 trip to the Supreme Court, what you will see is that
18 it is not true at all that there were no best people.

19 What is true is that people take the
20 responsibilities that they are given very seriously,
21 and that those responsibilities cross. They are not
22 just about doing something quickly. They are about
23 doing it right.

24 This case came before you because the
25 General Assembly wanted to enact a statute to protect

1 the integrity of the electoral process; and protecting
2 that integrity requires doing something right, and not
3 just doing something expediently, and not just doing
4 something fast.

5 As Your Honor is aware, the Secretary
6 of the Commonwealth is charged with implementing and
7 administering the Election Code; and when she does so,
8 she looks at the statutes as they are written, as they
9 are enacted, and this Court has been instructed time
10 and time again by the Supreme Court that a statute is
11 only to be found unconstitutional if it clearly,
12 palpably and plainly violates the Constitution. Act
13 18 does not fit into that category.

14 This Court has also been told through
15 the Statutory Construction Act, that when it looks at
16 a statute, it employs certain presumptions. You've
17 heard nothing about those presumptions today.

18 One of the presumptions that it employs
19 that's set forth in 1 Pa.C.S. 1922 is that the General
20 Assembly does not intend a result that is absurd,
21 impossible of execution, or unreasonable. They have
22 not overcome that presumption.

23 The second presumption is that the
24 General Assembly intends an entire statute to be
25 effective and certain. They have not overcome that

1 presumption.

2 That the General Assembly does not
3 intend to violate the Constitution of the United
4 States or of this Commonwealth, and they have not
5 overcome that presumption.

6 As well, you are to presume that the
7 General Assembly intends to favor the public interest
8 as against any private interest; and what you have
9 heard and the record that is before you demonstrates
10 absolutely that what was done here in implementing Act
11 18 was undertaken and done to favor the public
12 interest, and not just individual private interests.

13 Your Honor, in looking at a statute,
14 you begin always with the language of that statute.

15 Act 18, as enacted -- not as the Bills
16 were drafted, not as the legislative analysis was done
17 when it was before the House in one iteration or
18 another -- sets forth a list of forms of proofs of
19 identification that reflect the General Assembly's
20 concern for the very groups that you have heard
21 counsel argue about here.

22 They say that there are groups of
23 people who are less likely than others to have a
24 secure PennDOT product. That's true. That's what the
25 General Assembly recognized. That's why the General

1 Assembly set up an entire list of proofs of
2 identification.

3 Now, when you look at the people that
4 they brought before you, almost every one of them --
5 and we'll talk about Mr. Proctor separately; but all
6 of the others that they brought into this courtroom
7 are people who fit into a very specific category.

8 They are people who are moving into
9 that senior citizen process. The people that Kelly
10 O'Donnell spoke to you about who are in the process of
11 coming within the aegis of the Department of Aging,
12 because as they age, they face specific challenges,
13 some of which will cause them to live less
14 independently than they otherwise had, and the
15 Department of Aging has been reaching out specifically
16 to those people, and reflects the Commonwealth's
17 commitment to those people.

18 But Act 18 also addresses those people.
19 And Your Honor, in all of the numbers they have
20 mentioned, they have not talked about the numbers that
21 are relevant to that group. Here are those numbers.

22 There are 2,042,166 people in the
23 Commonwealth of Pennsylvania who are over the age of
24 65, if you use the 2012 census estimate of that age
25 group.

1 PennDOT has testified through Kurt
2 Myers, that there are 1,735,337 people in that age
3 bracket alone who are active drivers now.

4 In addition, there are 198,941 people
5 in that age group who are over the age of 65, who have
6 turned in their license and gotten an ID without a
7 license.

8 In addition, you heard Mr. Marks
9 testify that there are 12,379 persons who are
10 permanent absentee or permanent alternative ballots.

11 And you have heard the testimony of
12 Kelly O'Donnell, who came in here and said, when the
13 statute provided for three different kinds of licensed
14 care facilities, that reached to 130,000 residents,
15 because there were 81,000 in nursing homes, 47,000 in
16 personal care, and 1,200 in assisted living
17 facilities.

18 When you add all of those up, you can
19 see that the statute itself contemplated and carefully
20 provided for having identification and proofs of
21 identification available to the very persons that they
22 say are the persons who need a proof of identification
23 and may not be able to get it from PennDOT.

24 There is no gap that appears on the
25 face of those numbers; and if one exists, it has not

1 been established by the testimony or the evidence of
2 record in this case. Therefore, it cannot be laid at
3 the feet of the statute.

4 Moreover, it cannot be laid at the feet
5 of the Commonwealth, which has designated an entire
6 Department of Aging specifically to reach out to these
7 people, to meet their needs, to use things such as the
8 Shared-Ride and other programs, to do other things
9 including having special people who will listen to the
10 complaints of whatever nature and address them.

11 And you heard Ms. O'Donnell testify
12 that it is her responsibility as point person to
13 address the needs and questions, and those are needs
14 and questions that have not come to her.

15 It also cannot be laid at PennDOT's
16 feet. And I know that you hear complaints over and
17 over again from Petitioners' side of the table; but
18 what you also heard from Petitioners' side of the
19 table is that Mr. Rogoff went onto the internet and he
20 pulled off a form. He took that form with his
21 father-in-law's license, and he mailed it to PennDOT.

22 It was one of the 30 million pieces of
23 mail that PennDOT got, and guess what? With nothing
24 else, with no trip, with no phone call, with no prior
25 action, PennDOT processed that surrender of that

1 license for a non-photo ID.

2 Now, Mr. Rogoff says that his father
3 got an empty envelope, and then there were problems
4 with that envelope, that he then had to call and make,
5 you know, numerous phone calls.

6 But you know what? PennDOT was able to
7 say, here's the Department where that letter went,
8 here's what happened, and they gave him the substitute
9 ID.

10 In addition, Mr. Rogoff testified that
11 when he walked into his father-in-law's building he
12 saw posted on the wall the fact that that facility
13 offers compliant ID. If he had chosen to avoid the
14 phone calls and the chasing around to find out what
15 happened to the card that somehow was not in the
16 envelope, he could have simply have gone to the front
17 desk of the residence and gotten a compliant ID.

18 That is their own witness, Your Honor,
19 who sets that up.

20 They also have asked the Court to draw
21 an inference from the fact that no additional match
22 was done. But consistently, they have ignored what it
23 was that was being undertaken in order to do the match
24 in the first place.

25 As Your Honor has heard, the SURE

1 database is a collection of information about real
2 people, people who are essential to the electoral
3 process in this state. It is critically important
4 that the information in the SURE database be accurate.

5 The SURE database is a system from
6 which people -- from which the Commonwealth draws in
7 complying with state laws, in complying with federal
8 laws, and interacting with the county boards of
9 electors.

10 When they asked PennDOT to try to match
11 the databases, it was so that they could take
12 information, information that you have heard was
13 required by federal law to be used in registration
14 processes and in voting processes, and make certain
15 that they had as much of it as possible in the SURE
16 database without causing inconvenience to the
17 individuals.

18 What they haven't said to you is --
19 because they have focused on the 759,000 -- wait a
20 minute. That means that there were 8 million people,
21 roughly, for whom all of the information matched.

22 8 million people whose voter
23 registration record and whose PennDOT record
24 correspond, and who will have no problem with any of
25 the federal requirements or any of the state

1 requirements because they can rest in confidence that
2 all of the numbers correlate. All of the names, all
3 of the information, all of the addresses.

4 Now, they have also said, well, we can
5 look at the SharePoint database and say that the
6 SharePoint database is something that doesn't reflect
7 anything except inaccuracy; but again, they
8 misunderstand what it is that was done and why it was
9 done.

10 Your Honor heard Mr. Marks testify and
11 explain that the Department is completely committed to
12 getting voters their cards as soon as they are
13 registered and that, in order to do that, they set up
14 a system whereby every night the machine will go
15 through and it will search and it will populate.
16 Here's a match, here's a possible match, here's
17 multiple possible matches.

18 And every day personnel come in and
19 they check and they say, is what the computer found
20 really a match? Well, if what the computer found is
21 not really a match, then the person still is not
22 registered to vote. It is correct that if a person
23 still is not registered to vote, there is no card sent
24 out to that person.

25 You have also heard that in this

1 process, as people have come in and tried to get a
2 card and have done so with information that does not
3 correlate, a date of birth that does not match and an
4 address that does not correspond, or a name that is
5 not at all the name that is what they're using to
6 apply for ID, that the Department of State undertakes
7 extra research, sometimes contacting the counties,
8 sometimes contact the individual voter themselves.

9 Why would they do that? Well, they do
10 that because it is important that a person can walk
11 into the polls, or can exercise a right to sign a
12 nomination petition and know that that will be counted
13 because that name is the name by which that person
14 really goes.

15 So, yes, there are records that it took
16 time to find, ways that it took effort to validate;
17 and yes, some of those crossed over the time period of
18 the November election. An election that is, as Your
19 Honor is aware, a presidential election that occurs
20 only once every four years.

21 You have heard a great deal of talk
22 about certain other groups, but you have seen nobody
23 from them. They have talked to you about college
24 students, these supposedly disadvantaged people who
25 can't get to PennDOT.

1 And yet, Your Honor has also heard that
2 of the 835,000 college students in Pennsylvania, not
3 only did the General Assembly specifically contemplate
4 that they could use college IDs to vote, so long as
5 they had expiration dates; but that these persons also
6 in large part come from out-of-state, they travel
7 abroad, they have access to other forms of
8 identification. And no one came in here and said, I'm
9 a college student and I can't get identification to
10 vote.

11 Now, it is true that the statute does
12 not allow for out-of-state driver's licenses to be
13 used on Election Day. There's a reason for that.

14 If a person considers themselves a
15 resident of another state, then that person votes
16 absentee in that state, or travels home to vote on
17 Election Day.

18 If a person considers themselves a
19 resident of Pennsylvania, the person can either
20 exchange their driver's license, or they can get a DOS
21 ID, or they can get a student ID, but residency is a
22 requirement to vote.

23 The other thing that you have not heard
24 about today is you have not heard anything about the
25 indigency affirmation. They have told you that it is

1 burdensome for some people to get to PennDOT, and we
2 understand that, but so does the statute; and the
3 statute set in place a provision that said that if a
4 person is unable to get ID because of the costs that
5 are involved, they can have an indigency affirmation.

6 And you heard Mr. Marks testify that
7 that affirmation can be filled out at the polls and
8 the person will have to do nothing else, will not have
9 to come back, will not have to send it in, will not
10 have to do anything else.

11 Your Honor, there are statutes like the
12 Health Care Cost Containment Act that talk about
13 indigency. There's also case law that uses a common
14 law definition; and the common law definition, as the
15 Superior Court has set it, is that indigence does not
16 mean those who are completely destitute and helpless,
17 although it does include those people; but it also
18 encompasses people who have limited means, but their
19 means are not sufficient to adequately provide for
20 what they need.

21 Your Honor, that was from the Health
22 Care & Retirement Corp. versus Pittas case which is 46
23 [46] A.3d 719. That's a Pennsylvania Superior Court
24 case from 2012.

25 What that means, Your Honor, is that

1 the indigency affirmation is not available only to
2 those people who have no money. It is also available
3 to those whose money is not adequate for them to get
4 to PennDOT to get an ID that is free.

5 You have heard testimony about a lot of
6 numbers. You have heard testimony, again, in fact
7 they put up on the screen for you -- you can look at
8 any one of these numbers and pick which one you want,
9 just so long as you say that it's large; but the
10 problem with that analysis, Your Honor, is that it
11 doesn't answer the question.

12 And the question is this: If you look
13 at what the statute provides, and you look at how the
14 statute is designed, is it designed in such a way that
15 there will inevitably be large groups of people who
16 cannot fit under the provisions of the statute and
17 who, therefore, would be put into a position in which
18 they cannot vote.

19 And the testimony that you have heard
20 is exactly the opposite of that. The testimony that
21 you have heard is that there are not large groups of
22 such people, and they have played fast and loose with
23 some of their expert data.

24 For example, and probably one of the
25 most egregious things that we heard here, you heard

1 Dr. Siskin say, and you heard counsel say to
2 Dr. Wecker later, well, you know, a 15% error rate
3 isn't really a problem because there's still a 15%
4 error rate the other direction.

5 Your Honor, what that really is saying
6 is that one out of every three names that Dr. Wecker
7 has looked at -- I mean, Dr. Siskin has looked at, one
8 out of every three of those is wrong. It just might
9 be wrong in a different way.

10 That is the opposite of the standard of
11 reliability on which this Court relies when
12 determining whether it's going to accept expert
13 testimony.

14 You also heard Dr. Wecker say, when I
15 looked at these data, I was very concerned. Why am I
16 concerned? I'm concerned because the data have to be
17 looked at in the light of reality; and the reality is
18 that people die, that people move out of state, that
19 people get incarcerated. And Dr. Siskin took none of
20 those people into account.

21 In fact, after Dr. Wecker pointed out
22 that he didn't even bother to use the deceased code in
23 the PennDOT database, he said, oh, okay. I'll just
24 turn on that code and I'll find 17,000 dead people and
25 I'll say, those people can't vote, but I won't look

1 further. I won't look to the fact that according to
2 the statistics provided so far by the Department of
3 Health, no one in Pennsylvania has died in 2013.

4 Your Honor, that is an incredible
5 statement, and it's incredible because we know it's
6 not true, that there are people who have died in 2013;
7 and what is true is that the backlog is such that we
8 don't have those statistics yet.

9 Might a person who has died have an
10 expired PennDOT ID? I'm certain that happens, but can
11 you impugn and overcome the presumptions against the
12 Constitutionality of this statute based upon an
13 estimate that ignores whether a person has died?

14 You heard Kurt Myers here testifying
15 about the people who moved out of state and the fact
16 that it is optional to determine whether they're going
17 to take an out-of-state driver's license and exchange
18 it and send it back.

19 You cannot say that a person who's
20 still in the PennDOT database, who is now happily
21 living in one of the other 49 states or in any other
22 country, that the fact that that is an expired license
23 has any meaning whatsoever unless you know whether
24 those people are in Pennsylvania.

25 It is not true that a person who moves

1 to Maryland cannot vote. What is true is that a
2 person who moves to Maryland will vote in Maryland.

3 Further, you have heard how the people
4 who are in the correctional institutions, who are
5 felons cannot vote, and how those who are
6 misdemeanants can vote but they vote absentee.

7 Dr. Siskin took no account of those
8 people, no account of the fact that those people also
9 are likely to have mismatches, likely to have expired
10 licenses. Instead, he simply said, well, I wasn't
11 really looking for specifics.

12 But if you're not looking for
13 specifics, how can those numbers be of any value to
14 the Court whatsoever?

15 More troubling than that, Dr. Wecker
16 said, what Dr. Siskin did was to do the first step of
17 an analysis. Dr. Siskin found a cachement. He found
18 a universe, and a universe from which one could
19 ascertain whether there actually were people who
20 lacked a form of identification.

21 But in order to find that, you would
22 have to narrow that universe and make phone calls and
23 visit people and actually determine whether there was
24 a need; and he then pointed you to Dr. Siskin's
25 report, Section 6, where Dr. Siskin said that he took

1 a group of people, but he doesn't tell you how many,
2 and he doesn't tell you how he found them.

3 He gave that list of people to
4 Petitioners' counsel; and after he gave that list of
5 people to Petitioners' counsel, suddenly, he got back
6 eight names, and he was asked to verify that according
7 to his database match, those eight names did not have
8 a form of ID.

9 Those eight names, Your Honor, are
10 names from which the people who appeared here
11 testified. So, if you were to accept what Dr. Wecker
12 said that Dr. Siskin should do, and if you were to
13 look at the only evidence of that that has been put
14 into this record, you would then weigh the testimony
15 of those people who came from that process and ask
16 yourself, does that tell me that this is a statute
17 that cannot work? And the answer to that would be no.

18 Now, you heard today that Dr. Marker
19 supposedly came up with completely new and different
20 information; but you heard Dr. Marker, you listened to
21 him testify. He didn't come up with new or different
22 information.

23 What he did instead was to look at part
24 of what Dr. Barreto had done; and to say, well, you
25 know, I think it might be reasonable that Professor

1 Barreto acted in this way in June 2012; and I am not
2 going to comment on the fact that Judge Simpson, who
3 sat there and watched him and listened to him, found
4 him incredible.

5 He said, I'll just say that we can look
6 at these numbers and they look reasonable to me. But
7 Your Honor heard the examination that went on, heard
8 how out of all of the questions and answers he had
9 only looked at a small subset, heard how he did not
10 even bother to compare the questions to the statute
11 itself, and didn't have any clue as to whether it
12 might have confused people that Dr. Barreto had added
13 the word "official" in front of each of the sorts of
14 identification that he was asking about, words that
15 never appeared in the statute.

16 He could not comment on any of those
17 things. And to the extent that Your Honor would like
18 to second-guess what Judge Simpson did in a
19 credibility determination, and I actually think that
20 you wouldn't like to, Dr. Marker had not redone enough
21 of it in order to be able to provide you with any data
22 on which you could rely.

23 In addition, Dr. Marker has testified
24 that there might be times in which it might be
25 important to redo the assessment, but he did not. He

1 did not redesign the instrument. He did not go back
2 and call a new group of people. He did not say, now
3 that it has been in place a year, are there people who
4 lack forms of identification?

5 In fact, Your Honor, you heard
6 testimony that for things such as the number of
7 colleges and universities getting compliant forms of
8 identification and the number of care facilities that
9 are giving compliant forms of identification, that
10 those things have evolved since the statute was
11 enacted, and in fact are being kept track of by the
12 Department of Aging, the Department of Health, the
13 Department of Public Welfare for the care facilities,
14 and are being kept track of by the Department of State
15 for the colleges and universities.

16 So, whatever conclusions were reached
17 in June of 2012 during the two weeks in which a few
18 phone calls were made to a subset of the population,
19 those things cannot tell you whether the things
20 contemplated by the statute, the other forms of proofs
21 of identification have been effective. And they did
22 not redo that data.

23 Your Honor, you heard information about
24 the 144, and you have heard today about September
25 25th, and counsel would like to put a meaning on

1 September 25th that is different from the meaning as
2 we understand it.

3 As Your Honor is aware, this case,
4 after the initial hearing, went up to the Supreme
5 Court; and when it went up to the Supreme Court, the
6 Supreme Court said, liberal access cannot allow for an
7 exhaustion process, and liberal access cannot require
8 a person to try to provide documentation first and
9 then have those things, you know, fail before you can
10 make available the other form of identification.

11 When this case was remanded, the
12 Department had in front of it the Supreme Court's
13 opinion, and it changed its procedures to match what
14 the Supreme Court had said that the statute should do.

15 The reason that September 25th is a
16 critical date is because everybody acknowledges that
17 until the Supreme Court had spoken, the procedures
18 were what the procedures were; and that going forward,
19 the procedures were what the Supreme Court had asked
20 the Department of State to do.

21 So it is that the Department of State
22 differentiated between what it called old process
23 applicants, those who knew that they would come in,
24 that they would have to come back to PennDOT because
25 no card would be issued on the first visit, and who

1 therefore received letters.

2 Those people, those 150 people who were
3 in the old process got added to the SharePoint
4 database so that they could be tracked; but they were
5 never people who were part of the new process.

6 When Mr. Marks looked at the SharePoint
7 database back in December of 2012, he realized that
8 there were 144 other people who did not fit, and the
9 reason they did not fit is this: There had been no
10 application for a DOS ID. None of it had been
11 transmitted by PennDOT. There had been no call logs.
12 There had been no other indicia of anything other than
13 a voter registration form.

14 Mr. Marks wrote to PennDOT, and he
15 said, do you have these cards? Are there 144 people
16 sitting out there that I should put into this
17 exceptions process? And PennDOT said, no.

18 But the thing was that Mr. Marks had
19 asked not about 144. He had asked about 194. And so
20 now he had a dilemma. Does he take all 194 and remove
21 them from the database, or does he know that there are
22 144 people as to which there were no applications for
23 Department of State ID card, and simply track them,
24 monitor them, send them letters, try to make certain
25 that they are communicated with?

1 He made the decision to keep them there
2 because he could not know which people were actually
3 affected. Had it been all 194, maybe his
4 determination would have been different; but he acted
5 to protect the integrity of the people and the
6 accuracy of their information, and to make certain
7 that no one fell through the cracks.

8 They would impugn those actions and
9 that course of conduct. At the end of the day, how
10 that happened does not have any reflection on whether
11 the statute provides for people to get proper proofs
12 of identification; but it does show that Petitioners
13 are willing to take the data they are given, and to
14 make it say something else to try to impose a burden
15 that was not a burden that's inherent in the statute,
16 nor a burden that is inherent in the process.

17 If Your Honor is wondering whether
18 there are still cards at the Department of State,
19 there are. Because those are persons who have not yet
20 been -- had their applications to register to vote
21 accepted by the counties; and until they are, and
22 until they are approved by the counties to be
23 registered to vote, they are not registered voters who
24 require a voter ID for voting purposes.

25 When this Court undertakes its legal

1 analysis, this Court will have three questions that it
2 needs to answer because there are three claims that
3 have been put before it.

4 On one of them, which is their equal
5 protection claim, Pennsylvania law is coterminus with
6 the law under the Federal Constitution; but in opening
7 argument, Your Honor heard a statement that has
8 nothing to do with either the Pennsylvania or the
9 Federal Constitution, which was that you would be
10 asked to measure disparate impact, something that's
11 done under Title VII, and something that is not done
12 here. We'll talk about that more in a minute.

13 Your Honor is being asked to impose a
14 permanent injunction against the statute. And they
15 have talked to you about a permanent injunction, but
16 they have never told you what it is that you would
17 need to find in order to impose a permanent
18 injunction.

19 It's not necessary as it is for
20 preliminary injunction to have immediate or
21 irreparable harm, but it is necessary for the electors
22 to establish that greater injury would result from
23 refusing rather than granting the relief requested.

24 In order to establish, of course, what
25 they needed to do is to set in place, to build up

1 through facts and through record their entitlement to
2 each of their claims; and they needed to establish
3 that everything that they averred in their amended
4 petition was in fact true, and they have not even
5 attempted to do that, Your Honor.

6 Let's talk about the first claim, the
7 one that they say is that the statute is unlawful
8 because, it's unlawful because it doesn't match the
9 law. What they are talking about is the provision in
10 the statute -- and you heard Mr. Royer testify about
11 it -- where the list of forms of identification are in
12 one part of the statute, and then in a second part the
13 General Assembly said that notwithstanding the
14 provisions of 75 Pa.C.S. Section 1510b, the Department
15 of Transportation shall issue an identification card;
16 and they would say that that means that the statute
17 cannot be fulfilled because 75 Pa.C.S. Section 1510b
18 actually contemplates a kind of secure identification
19 that will not allow for the lack of documentation for
20 things such as the DOS ID.

21 But the statute, Act 18, says
22 notwithstanding the provisions. In other words, the
23 Department of State and PennDOT were to work together
24 in order to find a form of identification that could
25 meet the requirements of the law and still not

1 compromise PennDOT's obligations under Title 75; and
2 that they did.

3 That's in compliance with the law.
4 That is implementing the law. That is administering
5 the law. That is indubitably the task that is given
6 to the Department of State under the law.

7 Now, they stood up here today and said,
8 but, Your Honor, you don't understand. Theoretically
9 it's possible that the DOS ID could someday be done
10 away with. Well, as Your Honor knows, technology is
11 changing even before our very eyes.

12 Theoretically, it is possible that
13 there would be a form of identification that would not
14 require the DOS ID to exist; but that does not impugn
15 the fact that until such a thing is developed, if it
16 is ever developed, that the statute provides for
17 precisely what the Department of State ID does.

18 You heard nothing about whim, nothing
19 about officials who would try to undermine what the
20 statute requires, and there is no basis for making
21 such an assumption.

22 In their pretrial briefing they cited
23 to United States versus Stevens, which was a case
24 arising under the Animal Cruelty Statute, where the
25 government came into court and said, you don't

1 understand, I'm not going to prosecute, I'm just going
2 to call these people criminals.

3 Well, understandably, the Court was
4 skeptical as to those kinds of representations, but
5 you have heard nothing like that here, and in part,
6 the reason you have heard nothing like that here is
7 because this is not a case where they're looking at
8 the plain language of the statute and trying to avoid
9 it.

10 This is a case where the Department of
11 State is looking at the plain language of the statute,
12 and is implementing it.

13 You also heard statements here about
14 free and equal, and the free and equal guarantee under
15 the Pennsylvania Constitution. The Pennsylvania
16 Constitution, as case law has construed it, says that
17 "an election is free and equal when it is public and
18 open to all qualified electors alike, when every voter
19 has the same right as any other voter, and when each
20 voter under the law has the right to cast his ballot
21 and have it honestly counted, and when the regulation
22 of the right to exercise the franchise does not deny
23 the franchise itself, and the constitutional rights of
24 the qualified elector are not subverted or denied."

25 In that process, the Supreme Court has

1 said repeatedly that that right, that free and equal
2 guarantee, does not impact the evidence that's
3 required to prove the elected franchise or to say that
4 a person who comes before does not have an obligation
5 to prove that that person is who that person says that
6 that person is.

7 Those kinds of qualifying requirements
8 are reasonable classifications, and thus, it is that
9 in City Council of the City of Bethlehem versus
10 Marcincin, for example, the Court said that
11 "qualifying requirements are reasonable
12 classifications, and that things such as saying that
13 an elected Mayor can only serve two terms does not
14 deny the franchise and does not dilute the vote of any
15 segment of the constituency."

16 What the Court has before it here is
17 something that is of the same caliber. It is a way to
18 determine that the person who comes to cast a vote is
19 the person who has the right to cast a vote, because
20 it is the person who is the registered elector.

21 Your Honor, they have not talked to you
22 about equal protection, but equal protection is also a
23 guarantee under the Pennsylvania Constitution; and it
24 is not something that is demonstrated by disparate
25 impact, which is what they said in opening argument

1 that they wanted to show, and as to which they did
2 nothing other than put on Dr. Siskin's numbers, where
3 he took a portion of the statute, and said, well, the
4 elderly may be more likely not to have a PennDOT ID,
5 therefore, there's a disparate impact from the
6 statute.

7 That's not a disparate impact from the
8 statute. That's a disparate impact from his
9 assessment of PennDOT ID. He also acknowledged that
10 some of the ways in which some ethnic groups construct
11 their names might be more likely to give rise to a
12 mismatch, not because that person is affected by Act
13 18, but because that person may have a name recorded
14 as a middle name in one database and a last name in
15 another. That is not disparate impact.

16 But more importantly, Your Honor,
17 you're being called upon to apply the law as the law
18 exists; and Your Honor sat on the Meggett versus
19 Pennsylvania Department of Corrections case where a
20 party tried to bring disparate impact in to say that
21 the way that hairstyles were required under the prison
22 regulations was unconstitutional.

23 The Court said there that disparate
24 impact has no place in a constitutional equal
25 protection analysis. More to the point, the Court

1 said the same thing in Nixon in which you wrote both
2 the concurrence and the dissent; and that, of course,
3 is an election case.

4 And in the authorities that were relied
5 on in Nixon, the Court said the power to regulate
6 elections is legislative, and it has always been
7 exercised by the lawmaking branch of the government.
8 Errors of judgment in the execution of the legislative
9 power or mistaken views as to the policy of the law or
10 the wisdom of the regulations do not furnish grounds
11 for declaring an election law invalid unless there is
12 a plain violation of some constitutional requirement.
13 Legislation may be enacted which regulates the
14 exercise of the elected franchise and that does not
15 amount to a denial of the franchise itself.

16 Your Honor will recall that when you
17 sat on the Nixon en banc panel that you thought that
18 Nixon did not go far enough, and you would have gone
19 further.

20 Now, there is a reason that they want
21 to use a different equal protection analysis, and it
22 is something else that you have not heard anything
23 about. The United States Supreme Court, when it
24 decided Crawford versus Marion County Election Board,
25 considered many of the same issues that they're asking

1 to you reconsider.

2 Under the federal equal protection
3 analysis -- and of course, as Your Honor is aware, in
4 Hereford, the Supreme Court of Pennsylvania said
5 there's no reason to look beyond how the federal
6 courts construe the federal equal protection analysis
7 when looking to the way Pennsylvania would do it.

8 And in Marion County, the lead opinion
9 said, "it's true that a photo identification
10 requirement imposes some burdens on voters that other
11 methods of identification do not share. For example,
12 a voter may lose his photo identification, may have
13 his wallet stolen on the way to the polls, or may not
14 resemble the photo in the identification because he
15 recently grew a beard, but burdens of that sort arise
16 from life's vagaries, and they are neither so serious
17 nor so frequent as to raise any question about the
18 constitutionality of the underlying statute.

19 Moreover, the availability of the right to cast a
20 provisional ballot provides an adequate remedy for
21 problems of that character."

22 Your Honor has heard argument here
23 about how exactly those burdens should be used to
24 invalidate the law, how we should look at whether they
25 might have lost their ID, at whether they might have

1 forgotten their wallet; and here, as in Indiana, there
2 is a provisional ballot provision, which is an
3 adequate remedy to overcome the vagaries of life that
4 were contemplated.

5 In addition, Your Honor, the Eleventh
6 Circuit looked in Common Cause of Georgia versus
7 Billups at a similar law, and they have talked a
8 little bit about the Georgia law. It said as well
9 that the very things that they are saying violate
10 equal protection do not, that this was not a burden
11 that was undue or significant.

12 What was interesting about Billups is
13 that Billups sought to establish -- the NAACP sought
14 to establish in Billups that the way you should
15 measure the burden is by conducting a match.

16 What is interesting is that the NAACP
17 and the voters came to the Eleventh Circuit and they
18 said, we can establish from our match that there are
19 between 289,000 and 505,000 voters who lack a photo
20 identification issued by the Georgia Department of
21 Driver Safety, and it is implausible that a
22 significant number of those registered voters would
23 have another form of approved photo ID.

24 And applying the analysis from Marion
25 County, the Eleventh Circuit said, that argument

1 fails.

2 It found the data relied on by the
3 NAACP and the voters as incomplete and unreliable, as
4 failing to account for the other forms of
5 identification acceptable under the statute, and as
6 containing inaccuracies.

7 The same is true in the match that they
8 have put forth here. The numbers in Billups might
9 sound strangely familiar because 200,000 and 500,000
10 are numbers that they've asked you to take into
11 consideration there. What is interesting is that in
12 Georgia, they have had a six-year period from 2005 to
13 2011 in which they have reported their statistics, and
14 27,000 identification cards were identified during --
15 were issued during that entire six-year period, half
16 of which were issued in the presidential election year
17 2008.

18 When you look at the numbers here on P
19 2,072, there have been roughly 13,000 PennDOT IDs for
20 voting and just under 4,000 Department of State IDs
21 that have been issued, numbers that actually exceed
22 the numbers that you would have seen in Georgia during
23 a presidential election year.

24 While they call your attention to
25 September 25th for one purpose, you can also look at

1 September 25th for another; and that is this: In
2 order to vote in the November general election, a
3 person needed to be registered, to have applied to
4 register by October 9th, and so, the number of cards
5 issued before September 25th would have been very
6 significant because those would have been the people
7 who were trying to a proof of identification prior to
8 the injunction, and who were trying to get the
9 identification to vote in that November election.

10 Your Honor, the Secretary was charged
11 with working with the Department of Transportation to
12 insure that a free form of proof of identification was
13 available to anyone who needed it to vote, to prepare
14 and disseminate information to the public, and to
15 oversee a soft rollout.

16 Upon examining what the Respondents had
17 done in the first four months since Act 18 was signed
18 into law, the Supreme Court said, given reasonable
19 voter education efforts, reasonably available means
20 for procuring identification, and reasonable time
21 allowed for implementation, the appellants apparently
22 would accept that the state may require the
23 presentation of an identification card as a
24 precondition to casting a ballot; and not withstanding
25 their representation to the Supreme Court, the

1 Petitioners here have rejected reason in favor of
2 asking that the Department of State be held to be both
3 omniscient and omnipotent and in some cases
4 omnipresent as well.

5 They asked that the law be enjoined
6 unless the Department of State knows the source of
7 proofs of identification that each voter possesses or
8 does not possess, insures that there be not just
9 outreach, but that the Department of State somehow
10 assess whether everybody has understood everything
11 that has been told to them and has followed up on it
12 in a suitable way.

13 Your Honor, that's not only not the
14 law, it's also not good policy. Since at least the
15 last administration, the mission of the Department of
16 State under the leadership of the Secretary of the
17 Commonwealth, and as posted on its website, has been
18 to promote the integrity of the electoral process, to
19 provide the initial infrastructure for economic
20 development through corporate organizations and
21 transactions, and to protect the health, safety, and
22 welfare of the public.

23 Similarly, the mission of the
24 Department of Aging is to enhance the quality of life
25 of all older Pennsylvanians by empowering diverse

1 communities, the family, and the individual.

2 Both of those mission statements
3 reflect respect, and more than respect, they reflect
4 esteem for individuals. They don't reflect a
5 patronizing attempt to mandate that a person have a
6 compliant ID.

7 They instead reflect a respect that
8 says, we will do whatever is possible, whatever is
9 necessary, and whatever is legal and lawful to make
10 certain that anyone who wants ID can get it, and
11 having it, can use it to vote at an election.

12 And that, Your Honor, is exactly what
13 the Constitution requires; and that, Your Honor, is
14 exactly what Act 18 contemplates will happen.

15 Now, we started the trial with a lot of
16 lofty promises, but those lofty promises have not been
17 followed through. We gave you a motion for compulsory
18 nonsuit because there are averments in their petition
19 that they made no effort to support.

20 You have not heard from all of the
21 organizational Petitioners; and in fact, if you look
22 at the organizational Petitioners that testified in
23 the last hearing back in -- over a year ago, they were
24 talking about doing things like getting birth
25 certificates, things that are not necessary under the

1 law in the wake of the Supreme Court's opinion. They
2 have advanced nothing else.

3 You have only two individual
4 Petitioners left before you because everyone else
5 recognized that they had proof of identification; and
6 yet, where were those two?

7 You have heard as to one of them,
8 Ms. Bookler, that she lives in a facility that is
9 issuing compliant ID. You have also heard that she
10 voted absentee in the last election. But that was
11 evidence that the Department of State provided to you.
12 You heard no evidence from Petitioners.

13 Yet, Petitioners would have you grant
14 relief on behalf of somebody who has not come before
15 you, who has not substantiated the averments in their
16 petition.

17 And as Your Honor knows, you cannot
18 base a decision based upon an empty record. That
19 record was theirs to establish. It was their burden
20 to put those things in the record, and they have not
21 done so.

22 Your Honor, yesterday you issued a
23 scheduling order; and in that scheduling order, you
24 said that you wanted to look at a preliminary
25 injunction, and you wanted to make a determination by

1 August 19th.

2 Your Honor, the issues that are before
3 you are issues of great magnitude, and they are issues
4 that require deliberation, and they deserve full
5 briefing, and they deserve your ability to go back
6 through the record and to apprise what has happened
7 and what is happening and what the law requires and
8 does not require.

9 Your Honor, we all lived through last
10 year when there was not much time between August 19th,
11 or between the time that Judge Simpson came down with
12 his preliminary injunction decision and the November
13 election; and we all know about the chaos that ensued
14 in trying to accommodate an expedited proceeding
15 before the Supreme Court, and then to come back and to
16 deal with that, and to move forward.

17 Your Honor, given the timing, we know
18 that what Judge Simpson said when he came back on
19 remand is that there was only one provision that he
20 was concerned about in the statute, and that was the
21 provision -- not the one that said, you may ask for
22 ID, but you cannot require it, but was the provision
23 that said, and the ballot will not be counted.

24 He would not enjoin the educational
25 efforts, he would not enjoin the request for

1 identification; but instead, he put a soft rollout
2 into place that could extend through the November
3 election and that, by agreement of the parties,
4 extended through the May election.

5 And Your Honor, the Department would be
6 willing, the Respondents would be willing to extend
7 that through this November's election in order to give
8 you the opportunity to deliberate upon these things
9 without a time demand hanging over you.

10 Your Honor, what you have heard in this
11 record is a record of people in the Commonwealth who
12 care. People at PennDOT, people at the Department of
13 State, people at the Department of Aging, who walk out
14 their caring every day.

15 Our Supreme Court had an opportunity to
16 consider a question arising that involved the SURE
17 database recently, in In Re: Nomination petition of
18 Gales, 54 A.3d 855, 2012, in which the question arose
19 whether there was a material difference in a signature
20 on a nomination petition that was signed with Ed
21 instead of Edward.

22 The Court found that was an acceptable
23 diminutive, but there were also people who signed
24 Skippy instead of Beatrice, and the Court said, the
25 difference lies in whether the signature calls into

1 question the identity of the signatory or compromises
2 the integrity of the electoral process. And if it is
3 not obvious that the signature on the nomination
4 petition reflects the same name that appears on the
5 elector's voter registration card, absent other
6 evidence, the signature should be stricken.

7 Now, you have heard a lot of testimony,
8 and a lot of argument and a lot of disagreement as to
9 whether the Department of State should insure that the
10 information in SURE and the information used on an
11 elector's ID is accurate.

12 Your Honor, the case itself indicates
13 why that is important. Petitioners may not care.
14 They may want liberal access to be nothing other than
15 random access, and to want every name that comes in to
16 be given an ID card indiscriminately; but the SURE
17 database has meaning, and it is used so that people
18 can participate in the electoral process in many
19 different ways, and having the information in that
20 database be accurate is critical.

21 At this stage, Your Honor, the matching
22 that is critical for you to look at is the matching of
23 the Petitioners' averments and the law with the facts
24 in this record, and that's where the greatest mismatch
25 lies.

1 Thank you, Your Honor.

2 THE COURT: Thank you, Counsel.

3 Marjorie, do you want to talk a break?

4 THE REPORTER: I'm fine, Judge.

5 Thanks.

6 THE COURT: Counsel.

7 MS. CLARKE: Your Honor, if I may just
8 wait until the full 15 minutes. There it is.

9 I'd like to start with Crawford versus
10 Marion County that Counsel referred to in her closing.
11 Crawford versus Marion County is a Supreme Court case
12 that doesn't have anything to do with this case.

13 To start with, it was decided under the
14 United States Constitution, that the United States
15 Constitution does not have an express provision of the
16 right to vote that the Pennsylvania Constitution does.

17 As important, the Court in Marion
18 County repeatedly emphasized that its decision was
19 based on a lack of a factual record. For example, the
20 trial court found that the Petitioners had not
21 introduced evidence of a single Indiana resident who
22 will be unable to vote as a result of the photo ID
23 law.

24 In this case, we have shown the people
25 in the -- that the people in the DOS exception process

1 that, but for the injunction, would not have had an
2 ID.

3 Here, witnesses have explained how they
4 tried and failed to get ID. We had Mrs. Baker, who
5 was told she couldn't vote in May because -- and she
6 did not vote in May -- because she wasn't able to go
7 and get the ID.

8 So, this case is very different from
9 the Indiana case because there's a fully developed
10 factual record both from last year and this.

11 Another difference with the Crawford
12 case was it didn't have before it the multiple
13 corroborating evidence of all the hundreds of
14 thousands of people who lack ID. There the only
15 evidence was one expert who the trial court discounted
16 as being incredible, but here we have six or seven
17 different corroborating sources from different places.

18 Another difference is that there was no
19 evidence in the Indiana case about how difficult it
20 was for people to get to the Department of Motor
21 Vehicles. Justice Souter speculates about how
22 difficult it might be, but as the majority pointed
23 out, there wasn't any evidence in the record about how
24 difficult it was to get ID. That, we have here.

25 Finally, in Indiana, you have two other

1 things: All, all IDs issued by their Department of
2 Motor Vehicles are free. They're all free. So, you
3 don't have this weighing and judging about whether the
4 person really wants it for voting or wants it for
5 something else. You don't have people turned away.
6 In Pennsylvania, so far, at least, you have.

7 We talk about Georgia for a minute.
8 Georgia, too, is very different. Again, a case under
9 the United States Constitution.

10 In Georgia, everybody gets to vote
11 absentee, unlike Pennsylvania where you have to have a
12 very narrow reason.

13 In Georgia they have mobile units, so
14 they go out into the community; and most important, in
15 Georgia there's hundreds of distribution points. As
16 the case went back and forth and up and down, the law
17 was amended many times, and at the end of the day,
18 there were multiple distribution points.

19 Now, I want to talk a minute about the
20 other IDs that are available in the law.

21 There was no evidence, no evidence in
22 this trial about what care facilities are issuing IDs.
23 There was no evidence put on by the Respondents. I
24 hope that I misheard because it was -- the evidence
25 was that the Department of State has not tracked the

1 number of care facilities, they have made no effort to
2 survey the care facilities.

3 So, the numbers, whatever numbers I
4 have heard -- and I hope I misheard -- there is no
5 evidence.

6 The evidence that there is, is when the
7 law was being considered, the Department of State was
8 aware that most care facilities don't issue IDs. It's
9 very interesting that the question of why the
10 Department of State didn't do a survey. They did a
11 survey for colleges and universities, but there's
12 no -- Ms. Sweeney and Mr. Marks testified that there's
13 no corresponding survey for care facilities.

14 Now, what we do know is we know that
15 Dr. -- again, we go back to Dr. Marker and
16 Dr. Barreto's survey that, at least as of last summer,
17 only a tiny fraction of the people who had -- who
18 lacked PennDOT IDs had some other form of IDs.

19 So, the care facilities which we have
20 heard a lot about is a red herring. We have not --
21 there is no evidence that care facilities are doing
22 it; and in fact, the evidence is that we -- that they
23 have not.

24 Colleges and universities. We actually
25 did have a college student here last year, Taylor

1 Floria; but again, the evidence about colleges and
2 universities and whether they're putting stickers is
3 in Exhibit 137. Some are putting stickers on, but
4 many aren't.

5 I want to talk about why we're doing
6 this. There were a number of statutes cited to Your
7 Honor about the weight that the legislature's
8 determination should be making, but the law is here,
9 when there is a fundamental right that is burdened,
10 the Court must weigh the burden against the
11 justification.

12 What's the justification that we have
13 here? It's not fraud. We know that. What it is,
14 is -- there are two things: A tool to deter and
15 detect fraud. But what kind of tool do you need to
16 deter and detect something of which there is no
17 evidence and no one is aware?

18 And the justification was in their
19 interrogatory 1, which was Plaintiffs' Exhibit 46.

20 As far as the other justification, they
21 said, was to increase public confidence. But
22 Mr. Marks, who is the highest ranking career official
23 responsible for elections said he has confidence in
24 the integrity of the elections. He has had it for the
25 last 11 years, and we haven't had a photo ID law.

1 Dr. Mutz, who is an expert in
2 communications, testified to a nationwide survey that
3 said that the public's concern about fraud is
4 infinitesimal, about .1%. She said people are way
5 more worried about things like money and politics and
6 voter turnout and long lines.

7 Now, last summer, House Majority Leader
8 Representative Turzai gave his reason, to help
9 Governor Romney win the White House. That was
10 Petitioners' Exhibit 42. And the Representative's
11 common sense instincts about who is likely to possess
12 ID turned out to be true. As Dr. Siskin testified in
13 his report, Republicans were twice as likely to have
14 identification needed to vote than either Democrats or
15 Independents.

16 So, the governmental interest here is
17 weightless at best, or improper at worst. And when
18 Your Honor applies the standard and measures that
19 governmental interest against the solid, serious,
20 severe burden on voters here, we suggest that the --
21 that the governmental interest doesn't survive any
22 level of scrutiny.

23 Now, there was a suggestion that the
24 indigency provision in the statute is somehow the ID
25 of last resort. But the indigency provision requires

1 that people cast provisional ballots. Provisional
2 ballots means your vote might not count. It means
3 that it's subject to challenge by anyone; and you, the
4 voter, may or may not get notified; and it's up to the
5 Board of Elections, and the only way you can challenge
6 that is to go to the Court of Common Pleas, which is a
7 luxury that most people don't have.

8 In addition, the indigency provision --
9 and when I heard the closing argument -- has two
10 pieces to it. It's not just that you're indigent, but
11 it's also and you can't afford to get an ID card for
12 free -- I mean, that you can't afford to get an ID
13 card.

14 What Mr. Marks acknowledged when he
15 testified is that it would be very hard for someone to
16 swear that affirmation because now that the Department
17 of State ID card is available for free, it will be
18 very hard to tell someone that they -- for someone to
19 affirm that they can't get it for free.

20 These requirements were exactly what
21 they told the poll workers in Exhibit R78.

22 Now, we also heard a suggestion that
23 absentee might cover -- absentee balloting might cover
24 everybody; but as we have heard over and over again,
25 absentee ballots are only for a very, very narrow

1 category of voters. And in fact, last year only
2 24,000 people or so voted absentee.

3 This is not going to solve the problem
4 for hundreds of thousands.

5 Now, there is a -- there was a
6 fundamental disconnect about our view of the
7 SharePoint database. We want it to be right. We want
8 people to get IDs. The problem is, if the database is
9 wrong and if the process is wrong and the process is
10 flawed, then people won't get the IDs that they need.

11 We're very sympathetic to concerns
12 about hurricanes and checking out whether the person
13 really is who they say they are, like Helen, our voter
14 in Schuylkill County.

15 But the problem is that Helen won't be
16 able to vote; and if we didn't have Act 18, if we
17 didn't have this law at all, we wouldn't have to go
18 through all of this. That's our concern about the
19 SharePoint database.

20 Now, finally, we heard that -- we heard
21 the quote from the Pennsylvania Supreme Court that
22 said that somehow with reasonable efforts and
23 reasonable assurances that everyone would get ID,
24 maybe an ID law would be acceptable, and that's true,
25 but we haven't had -- not this law. This law is not

1 acceptable.

2 We haven't had reasonable efforts. We
3 haven't had a reasonable opportunity for people to get
4 IDs. When we have 611 out of 3,000 people who tried
5 to get a DOS ID be turned away, that is not
6 reasonable. It's time -- the
7 we're-going-to-fix-it-in-the-future defense, it's too
8 late. It doesn't work.

9 What we have got now is we have got a
10 pattern, that we have got a trial coming up and
11 there's a change and there's urgency and there's
12 rushing.

13 When we had our first trial, four days
14 before the first trial there was an announcement that
15 there would be a brand new card that would fix this
16 problem, the Department of State card. That card went
17 into effect on August 27th.

18 In the wee hours of the morning of the
19 remand trial, the process was changed again; and then
20 they assured people that this time it's going to be
21 right. This time everyone will be able to get ID.

22 But that turned out not to be true,
23 too; and that was what we saw in the SharePoint
24 database, and the exceptions.

25 During the remand trial, the

1 Respondents' counsel assured the Court that the
2 Shared-Ride Program would help everyone and we heard
3 an allusion to that today.

4 But during this year's trial, that
5 turned out not to be true. The Shared-Ride Program is
6 run by private providers who set their own hours of
7 service, their own days of operation, and people have
8 to pay. They have to pay unless someone else will pay
9 for them.

10 What PennDOT does is it offers people
11 discounts, but you need an ID to get a discount. That
12 was Petitioners' Exhibit 1592 that talked about a
13 glitch.

14 Another example of last-minute problems
15 was on the stand last week when I asked Mr. Myers
16 about this policy of not asking voters if they want an
17 ID for voting, he said, oh, we'll change it. We'll go
18 back. We'll do it. We'll do it better this time.

19 Well, that is great, but we asked him
20 the same questions last September, and that policy was
21 not changed.

22 The Respondents have had 16 months
23 since the passage of Act 18, and it was they who
24 pressed to have the trial now. It's time for an end
25 to the promises.

1 As the Supreme Court said, we are not
2 satisfied with the mere predicted judgment based
3 primarily on the assurances of government officials,
4 even though we have no doubt they are proceeding in
5 good faith.

6 We have no doubt they are proceeding in
7 good faith, too, but it is time to put an end to this,
8 and enjoin this law.

9 Thank you, Your Honor.

10 THE COURT: Thank you, Counselors.

11 We'll recess.

12 MS. HICKOK: Thank you, Your Honor.

13 THE BALIFF: Court is adjourned.

14 (THE PROCEEDINGS WERE ADJOURNED AT
15 12:13 p.m.)

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REPORTER'S CERTIFICATE

I, Marjorie Peters, a Registered Merit Reporter, Certified Realtime Reporter, and Notary Public in and for the State of Pennsylvania, that the foregoing record was taken at the time and place stated herein and was recorded stenographically by me and then reduced to typewriting under my direction, and constitutes a true record to the best of my skill and ability.

I certify that I am not a relative or employee of either counsel, and that I am in no way interested, directly or indirectly, in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office this day of 2013.

Marjorie Peters, RMR, CRR

My commission expires March 13, 2016

Original certification on file at Miller Verbano Reporting.

Adam N. Miller, Custodian



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