

IN THE SUPREME COURT OF PENNSYLVANIA

No. 71 MAP 2012

Viviette Applewhite; Wilola Shinholtser Lee; Grover Freeland; Gloria Cuttino; Nadine Marsh; Dorothy Barksdale; Bea Bookler; Joyce Block; Henrietta Kay Dickerson; Devra Mirel (“Asher”) Schor; The League of Woman Voters of Pennsylvania; National Association for the Advancement of Colored People, Pennsylvania State Conference; Homeless Advocacy Project,

Petitioners/Appellants,

v.

The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carole Aichele, in her capacity as Secretary of the Commonwealth,

Respondents/Appellees.

BRIEF OF *AMICI CURIAE* PENNSYLVANIA LAW PROFESSORS CAITLIN BARRY, SUSAN L. BROOKS, JILL C. ENGLE, T. KEITH FOGG, RICHARD FRANKEL, BETH LYON, CATHRYN MILLER-WILSON, ROSALIND M. PLUMMER, SPENCER RAND, DVEERA SEGAL, JENNIFER H. SPERLING, MARK C. RAHDERT IN SUPPORT OF APPELLANTS

On Appeal from the order of the Commonwealth Court of Pennsylvania, Entered in No. 330 M.D.2012 on August 15, 2012, which denied a preliminary injunction.

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Certain professors of law in various Pennsylvania law schools (“Law Professors” or “*Amici*”)¹ respectfully submit this brief as *Amici Curiae*, pursuant to Pa. R.A.P. 531, in support of Appellants Applewhite, *et al.*

INTEREST OF LAW PROFESSORS AS *AMICI CURIAE*

Amici are clinical law professors and one constitutional election law expert working in law schools in the state of Pennsylvania. As more particularly indicated in Appendix A attached hereto, each year *Amici* collectively supervise law students handling cases for indigent people in counties throughout Pennsylvania, in state and federal courts and administrative fora. *Amici* have direct experience with assisting people who struggle to secure government documentation. With an understanding of this central dynamic underlying all the election laws described in the instant brief, *Amici* are uniquely qualified to assist the Court in this case. Through scholarship, *Amici* also have contributed to the development of jurisprudence on various questions related to the pending matter and are uniquely qualified to assist the Court in the instant case.

Amici therefore seek leave to present their views to the Supreme Court of Pennsylvania, focusing on a comparison of the Pennsylvania voter identification law with the voter laws of other states, in the context of the present application for a preliminary injunction.

SUMMARY OF ARGUMENT

The Commonwealth Court incorrectly sustained Pennsylvania’s Voter Identification Law, Act of March 14, 2012, P.L. 195, No. 18 (“Act 18”). In upholding Act 18, the Commonwealth Court prominently relied on voter identification (“Voter ID”) statutes, municipal ordinances and case law from several jurisdictions that *Amici* respectfully submit are readily

¹ The Law Professors submitting this brief to the Court as *amici* are identified, along with their law school affiliations, in Appendix A attached hereto. *Amici* are submitting this brief in their individual capacities and providing their institutional affiliations for identification purposes only.

distinguishable and inapplicable, while disregarding far more instructive and relevant voter ID statutes and case law rejecting the constitutionality of Voter ID statutes from other jurisdictions.

This *Amici* Brief addresses: (1) Voter ID laws in states where courts have struck the laws down and why Act 18 is even more objectionable and should be similarly struck down; and (2) Voter ID laws in states where courts have upheld the laws and why Act 18 is either significantly more burdensome than such statutes or the situation is factually quite distinguishable.²

ARGUMENT

I. Introduction

The right to vote is a fundamental right to be individually exercised in accordance with the laws of the Commonwealth. *Bergdoll v. Kane*, 557 Pa. 72, 85, 731 A.2d 1261, 1269 (Pa. 1999) (citations omitted). Voting must be vigorously protected and any infringement carefully scrutinized. *Id.* Appellants contend, and *Amici* agree, that Act 18 improperly restricts Pennsylvanians fundamental right to vote, requiring strict scrutiny.

In analyzing Act 18, it is appropriate for this Court to consider other states' statutes and case law for guidance. 2B Sutherland Statutory Construction § 52:1 (7th ed.) (noting that “[d]ifferent states have separate and independent legal systems, yet much is similar in the statutory enactments and common law of the sister states [so] statutes frequently are copied from state to state”). Legislation pertaining to the same subject matter, persons, things, or relations from other states may help guide the interpretation of a contested statute. *Id.* In the interests of uniformity and to determine the objectives and rationale of a particular course of legislation “[c]ourts look to the phraseology and language of similar legislation.” *Id.* Thus, while “it is a truism that decisions of sister states are not binding precedent on [the Pennsylvania Supreme

² As noted above, this *Amicus* brief maintains a narrow focus and, accordingly, *Amici* will not address all of the other bases for reversal of the Commonwealth Court’s ruling, which *Amici* anticipate, will be addressed separately by Appellants and other *Amici*.

Court], they may be persuasive authority.” *Koken v. Reliance Ins. Co.*, 893 A.2d 70, 83 (Pa. 2006); *AMP Inc. v. AlliedSignal Corp.*, 168 F.3d 649, 653 n. 2 (3d Cir. 1999) (holding that under Pennsylvania law, courts “may consider similar statutes of other jurisdictions in construing its own statute”).

The Commonwealth Court, in its ruling denying Appellants’ preliminary injunction, recognized the importance of considering Voter ID statutes from other jurisdictions, but erroneously focused on judicial review of three Voter ID statutes and one municipal ordinance fundamentally different than Act 18: (1) Indiana--Senate Enrolled Act No. 483, 2005 Ind. Acts p. 2005 (“Indiana Voter ID Law” or “SEA 483”), discussed in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (analyzing the Indiana statute under Federal and U.S. Constitutional law and upholding the statute in a case factually distinct from the instant case) and *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010) (to same effect, but analyzing the Indiana statute under Indiana law); (2) Michigan--2005 PA 71, MCL 168.523 (“Michigan Voter ID Law” or “MCL 168.523”), discussed in *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1 (MI 2007) (upholding a substantially less burdensome Michigan Voter ID statute that allows for in-person voting without a photo ID); (3) Georgia--OCGA § 21-2-417 (“Georgia Voter ID Law” or “OCGA § 21-2-417”), discussed in *Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720 (Ga. 2011) (upholding a substantively less burdensome Georgia Voter ID statute that allowed any registered voter to vote using an absentee ballot, which did not require a photo ID); and (4) Albuquerque, N.M.--City Charter, art. XIII, § 14 (“Ordinance” or Art 13, Section 14”), discussed in *ACLU of N.M. v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008) (sustaining a less burdensome Voter ID municipal ordinance analyzed under the Federal, rather than a state, Constitution). *See generally*, *Applewhite v. Com.*, No. 330

M.D.2012, 2012 WL 3332376, at *7-8, 14-24, 26, 28-31 (Pa. Commw. Ct. Aug. 15, 2012).³ Meanwhile, the Commonwealth Court briefly recognized, but ultimately relegated to a footnote, without pertinent analysis, three considerably more instructive cases, concerning Voter ID statutes similar to Act 18: (1) *Milwaukee Branch of the NAACP, et al. v. Scott Walker, et al.*, 2012 WL 739553 (Wis. Ct. App. Mar. 28, 2012) (granting petitioners a temporary injunction after comparing the Wisconsin Photo ID statute, Act 23, to the federal constitution under strict scrutiny to find that it unconstitutionally burdened the individuals' ability to vote); (2) *League of Women Voters of Wisconsin Education Network, Inc., et al. v. Scott Walker, et al.*, 2012 WL 763586 at *2 (Wis. 2012) (also analyzing Wisconsin's Act 23 and granting petitioners a permanent injunction in finding Act 23's strict Voter ID requirement unconstitutional because it was an action going beyond the powers granted to the legislature in the constitution); and (3) *Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. 2006). *Id.*, at *7, 26, 30, n. 26 (finding the Missouri Photo ID law unconstitutional as it placed a substantial burden upon the fundamental right to vote under the Missouri Constitution).

II. Act 18 Compared to Missouri, Georgia and Wisconsin Voter ID Laws.

This Section compares Act 18 with proposed Voter ID laws in Missouri, Georgia and Wisconsin – each of which was struck down despite being less objectionable on a constitutional basis than Act 18.⁴ For a complete summary of the six voter ID laws and one voter ID municipal ordinance referenced in the Commonwealth Court's opinion, *see* the chart, annexed as Appendix B hereto.

³ *Amici* believe that each of the rulings sustaining Voter ID Laws and ordinances was wrongly decided, and that the reasoning of the courts that have stricken less burdensome Voter ID statutes, as discussed *infra*, is far more persuasive.

⁴ Whether the statutes were struck down before the Supreme Court's *Crawford* decision or after is not pertinent for this analysis because, as discussed more fully below, *Crawford* is neither controlling, nor factually similar to the present case.

1. Missouri

In 2006, the Missouri Supreme Court struck down on state constitutional grounds a Missouri Voter ID law. *See Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. 2006). As set forth herein, because of the similarity of the respective state constitutions and statutory provisions at issue, the reasoning of *Weinschenk* applies directly to Act 18, albeit with even greater force.

Like the Pennsylvania Constitution, the Missouri Constitution affords the right to vote higher protection than its federal counterpart. PA Const. ART I, § 5; Mo. Const. Art. I, § 25; *see Applewhite, et. al., v. Commonwealth of Pa, et. al.*, No. 330 CD 2012, Petitioners Pre-Trial Brief and Pre-Trial Statement (July 18, 2012) (hereinafter “Petitioners Pre-Trial Brief and Pre-Trial Statement”) at 25. Specifically, the Missouri Constitution guarantees that “all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Mo. Const. Art. I, § 25.

a. SB 1014: Missouri Voter Protection Act.

Shortly thereafter, Missouri enacted a Voter ID law, SB 1014, Section 115.427, 2006 Mo. Laws 728-32 (“SB 1014”). Under SB 1014, the only permissible forms of ID were those containing the person’s name as listed in the voter registration records, the person’s photograph, and an expiration date showing that the ID is not expired. *See* Mo. Ann. Stat. § 115.427 (West).

In 2006, Ms. Kathleen Weinschenk and a group of other taxpayers sued Missouri to thwart enforcement of SB 1014, on the grounds that it interfered with the fundamental right to vote. *See Weinschenk*, 203 S.W.3d at 212. The Missouri Supreme Court first held that although the photo ID documentation requirements were not immediately effective, SB 1014 was ripe for adjudication because voters were required to obtain the photo IDs prior to the next election. *Id.*

Applying a strict scrutiny standard, the court struck down the statute as unconstitutional on its face, finding that the statute violated the Missouri Constitution’s fundamental right to vote,

its equal protection clause, and a constitutional provision that set forth the qualifications of its electors. *Id.*; see Const. Art. I, § 25. Indeed, despite a provisional ballot specification in the statute, the Court found that voters who did not have the requisite photo IDs, consisting disproportionately of indigent, elderly, and disabled voters, were required to suffer costs prior to expiration of the statutory transitional period. *Id.* at 214.

Despite agreeing that Missouri had a compelling state interest in preventing voter fraud, the *Weinschenk* Court ultimately struck down SB 1014 because the “evidence support[ed] the trial court’s conclusion that the Photo-ID Requirement [was] not narrowly tailored to accomplish that purpose.” *Id.* at 217.

First, under SB 1014, the only permissible forms of identification as a condition of voting contained the “person's name as listed in the voter registration records, the person’s photograph, and an expiration date showing that the ID is not expired.” *Id.* at 205. According to the Missouri Supreme Court, the change in the law effectively meant that for most residents, only a state-issued driver's or non-driver's license or United States passport would be considered an acceptable form of identification. *Id.* at 206. However, approximately 3 to 4 percent of the population, some 169,000 to 240,000 Missourians, did not possess the type of photo ID required by SB 1014 to obtain a regular ballot to vote for the next election, even for those voters who were properly registered. *Id.* at 215.

Second, SB 1014 allowed voters who did not have a driver’s license or U.S. passport to obtain a non-driver’s identification card for free via “mobile processing units,” provided the voter submitted additional identifying documentation, such as a birth certificate or social security card. *Id.* at 203. The Missouri Supreme Court found that even with this no-cost provision, for many who were either born out of state, were naturalized, or lacked state birth certificates, the

costs of obtaining an ID were significant. *Id.* at 207. These documents not only cost money, but also required “time and the ability to navigate the bureaucracy” to obtain them. *Id.* at 215. Because of the “substantial planning involved” of first obtaining birth certificates or passports to acquire the requisite photo ID, the court found this “plainly a cumbersome procedure” that would eliminate a substantial number of voters who did not plan ahead. *Id.* at 214-15.

Third, SB 1014 allowed for a provisional vote provided that the voter who was “otherwise qualified to vote” executed an affidavit maintaining that they were unable to obtain a photo ID because of “disability or handicap, [a] sincerely held religious belief, [or that they were] born on or before 1941.” *Id.* at 206. Accordingly, the voter’s lack of funds or the burden imposed by obtaining a photo ID were not grounds for casting a provisional ballot, which required the voter’s affidavit signature to conform to that signature on file with the election authority (which signature may have changed over time). *Id.* at 206-7. The court found this provision burdensome due to the limited class of voters allowed to cast a provisional ballot. *Id.*

Finally, and perhaps most importantly, the *Weinschenk* Court found that SB 1014 would only prevent in-person voter fraud, and not all forms of voter fraud, the very reason behind enactment of the statute. *Id.* at 204-5. Despite witnesses testifying to a past instance of possible absentee ballot fraud since 2002, SB 1014 exempted the photo ID requirement for absentee voters entirely, thereby releasing from its reach any instances of absentee or registration fraud. *Id.* This known instance of voter fraud was not enough to sway the Court, which analyzed the statute under strict scrutiny to hold that the state's interest was insufficient to support the law in the absence of evidence of actual in-person voter fraud. *Id.* at 206.

b. Comparison between Missouri Voter ID law and Act 18.

The former Missouri ID statute and the Missouri Constitution are similar to Act 18 and the Pennsylvania Constitution. Like its Missouri counterpart, the Pennsylvania Constitution

grants a higher protection to the right to vote than the U.S. Constitution. PA Const. Art. I, § 5. Although the Pennsylvania Constitution reserves to the legislature the right to draft laws on the manner in which elections are to be conducted, Article I, Section 5 of its Constitution mandates “free and equal” elections and disallows any intrusion that “prevent[s] the free exercise of the right of suffrage.” PA Const. Art. I, § 5. Because of the similarities between SB 1014 and Act 18, the Missouri Supreme Court’s reasoning in *Weinschenk* applies with particular force to Act 18, for multiple reasons.

First, under Act 18, like SB 1014, the only permissible forms of identification as a condition of voting must contain the person's name as listed in the voter registration records, the person's photograph, and an expiration date showing that the ID is not expired. *See* 25 Pa. Stat. Ann. § 2602(z.5)(2) (West). The “individual Petitioners are among hundreds of thousands of Pennsylvanians who are eligible to vote but lack the photo ID required under the Law.” *See* Petitioners’ Pre-Trial Brief and Pre-Trial Statement at 7.⁵ Similar to SB 1014, the provision of a no-cost PennDOT ID is not entirely free, because in order to obtain the new IDs, a voter would have to take time off from work to travel significant distances to government offices, which are usually open only during select daytime hours. Even the Commonwealth estimated that “close to 10%, or three quarters of a million, registered voters lack[ed] any PennDOT ID.” *See* Press Release, *Pa. Dep’t of State, Department of State and PennDOT Confirm Most Registered Voters Have Photo ID* (July 3, 2012); *see also* Petitioners’ Pre-Trial Brief and Pre-Trial Statement at 11. According to the Commonwealth’s “understated” estimates, “more than 18% of registered voters

⁵ Given the expedited nature of the briefing to this Court, when appropriate *Amici* cite directly to submissions made to the Commonwealth Court.

in Philadelphia lack the PennDOT photo ID.”⁶ *See Pennsylvania’s Voter ID Law*, Pa. Budget & Policy Ctr. (July 6, 2012); *see also* Petitioners’ Pre-Trial Brief and Pre-Trial Statement at 11. Furthermore, Pennsylvania has “9 counties (with more than 200,000 people, according to the latest U.S Census data) without a single PennDOT center.” *See* Petitioners’ Pre-trial Brief and Pre-trial statement at 9-10. Thus, the burden of Act 18 on Pennsylvania’s voters is substantially greater than the impact of SB 1014 on Missouri’s voters, which the *Weinschenk* Court found sufficient to hold that SB 1014 unconstitutionally burdened Missouri voters.

Although both statutes presumably “give time for people to obtain an ID before the upcoming election,” the *Weinschenk* court found that the time and expense associated with obtaining the photo IDs deterred otherwise eligible voters from obtaining the required documentation. *Weinschenk*, 203 S.W.3d at 221. Furthermore, Pennsylvania makes it more difficult to obtain an ID than does Missouri. Pennsylvania does not provide any “mobile processing units” to ease the burden of obtaining such IDs for anyone, no matter their physical or mental condition. *See* Pa. Budget & Policy Ctr., *Pennsylvania’s Identity Crisis: Rushed Implementation of Voter ID Putting Voting Rights at Risk 5* (August 2012) (hereinafter “Rushed Implementation Report”); *see also* *Applewhite, et. al., v. Commonwealth of Pa., et. al.*, No. 330 MD02012, Petitioners’ Post-Hearing Brief (Aug. 7, 2012) (hereinafter “Petitioners’ Post-Hearing Brief”) at 10. Therefore, getting to PennDOT -- in some cases repeatedly -- will be a severe

⁶ Notwithstanding that the Commonwealth itself publicly conceded that “close to 10%, or three quarters of a million, registered voters lack any PennDOT ID,” the Commonwealth Court erroneously found that the percentage of registered voters without photo IDs as of June, 2012 is likely more than 1%, but less than 9%. *Applewhite*, 2012 WL 3332376, at *n.16. The Commonwealth Court based its estimate on non-expert testimony that has no credible basis in fact, and was not supported by substantial evidence and even contradicted the Commonwealth’s own public admissions. *Amici* respectfully submit that the record below compellingly establishes a significantly larger number of voters do not have a photo ID than the Commonwealth Court hypothesized.

burden for many voters, especially in counties with no drivers' license center or counties with centers having limited hours.

In *Weinschenk*, 3 to 4 % of Missouri's citizens lacked the requisite ID, and still the court struck the law down, finding the burden significant. *Id.* at 206. In Pennsylvania, and according to the Commonwealth, one million registered voters lack valid photo ID under Act 18 (and certainly, at a minimum, many hundreds of thousands), but the Commonwealth is preparing to issue only several thousand PennDOT IDs. *See* Petitioners' Pre-Trial Brief and Pre-Trial Statement at 12. The Commonwealth concedes it has no plans to provide IDs to the substantial number of people who lack it. *Id.* Therefore, if and when the DOS ID becomes available, the disparity between the number of people requiring IDs and mere weeks left to acquire them before the upcoming election "evidences that the Commonwealth is not prepared to make sure that everyone has the ID necessary to vote under the new Law in time for November's election." *See* Petitioner's Post-Trial Brief and Pre-Trial Statement at 5. This is in stark contrast to the factual circumstance surrounding the enactment of SB 1014, where voters had up to two years to obtain permissible ID cards.⁷

Act 18 also is both more onerous and violative of the constitution and voting rights with respect to absentee ballots. SB 1014 exempts absentee ballots entirely (even for voters who are not outside the state) from the restrictive photo ID requirement so that for those without photo

⁷ The Missouri General Assembly passed SB 1014 in 2006. Even prior to the 2008 general election, subsection 13 of the new section 115.427 created a "phase-in" so that voters who did not have the photo ID required by the bill but did have one of the types of identification considered acceptable prior to the amendment would be able to cast a provisional ballot in any election prior to the 2008 general election. MO. REV. STAT. § 115.427.13. *Weinschenk*, however, found such transitional period inadequate and unseverable from the rest of the unconstitutional statute. Here, Act 18 has no such transitional period, but instead requires voters to obtain the requisite photo ID within a matter of weeks before the upcoming November election

IDs, voting by absentee ballot represents a viable alternative to in-person voting. In Pennsylvania, by contrast, Act 18 requires absentee voters to swear to their absence under penalty of perjury, and to provide the last four digits of their social security numbers upon voting. 25 P.S. § 2602(z.5). This additional restriction is a clear violation of equal protection under the Pennsylvania constitution because of disparate treatment of registered voters, and imposes an additional requirement upon voters that SB 1014 did not even address. Furthermore, Pennsylvania's requirement of swearing under the penalty of perjury is also applicable to provisional ballots, which is more restrictive than the provisional ballot requirement of SB 1014. 25 P.S. § 3G50(a.2)(1)(i), (ii).

Finally, both statutes can only prevent in-person voter identification fraud, “an occurrence more rare than getting struck by lightning,” and of which there is negligible evidence in either state. Justin Levitt, *The Truth about Voter Fraud*, Brennan Center for Justice (2007), *available at* http://brennan.3cdn.net/e20e4210db075b482b_wcm6ib0hl.pdf. Similar to the facts in Missouri, there are no reports of in-person voter fraud in Pennsylvania, with concessions even by the County Commissioners in Pennsylvania and the Secretary of the Department of State. *See Petitioners' Voter ID Fraud Stipulation* (the parties stipulated that “[t]here have been no investigations or prosecutions of in-person voter fraud in Pennsylvania [and they] are not aware of any incidents of in-person voter fraud in Pennsylvania”).

2. Georgia

A Georgia federal court analyzing a state Photo ID requirement comparable to Act 18 applied strict scrutiny to strike down the statute because the state's constitutional right to vote was similarly burdened. *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1331 (N.D. Ga. 2005). As set forth herein, because of the similarity of the respective statutory provisions at issue, the reasoning of *Billups* applies directly to Act 18, albeit with even greater

force because Act 18 is significantly more restrictive than the ID statute at issue in *Billups*.

a. Georgia Statute: HB 244.

In 2005, Georgia enacted House Bill 244, or Act 53 (“HB 244”), which required all registered voters in Georgia who voted in person to present a government-issued Photo ID to election officials as a condition of being admitted to the polls in order to vote. *Billups*, 406 F. Supp. 2d at 1331. The Northern District of Georgia initially struck down HB 244, citing *Burdick v. Takushi*, 504 U.S. 428 (1992), to find HB 244 unconstitutional in part because the “State Defendants’ proffered interest [did] not justify the severe burden that [was] place[d] on the right to vote...” *Id.* at 1294.

Notably, the federal court found that HB 244 was likely to be an unconstitutional poll tax and an undue burden on the right to vote because many of the voters who lacked an acceptable Photo ID for in-person voting (as is the case in Pennsylvania) were elderly, infirm, or poor, and lacked reliable transportation to a county registrar's office so that requiring them to obtain a Voter ID card in the short period of time before the elections was unrealistic and discouraging. *Id.* at 1366. The Georgia federal court also found, in language directly apposite here, that the photo identification requirement violated the Equal Protection Clause, stating that the act was:

“most likely to prevent Georgia's elderly, poor, and African-American voters from voting [in the primary elections and subsequent run-off elections] ... [the effect of which was] undeniably demoralizing and extreme, as those citizens [were] likely to have no other realistic or effective means of protecting their rights.”

Id. Subsequent to the court’s decision, the Georgia General Assembly amended the statute to add a new Code section requiring each county to issue a free “Georgia voter identification card” to registered voters residing in the county who did not have another statutorily acceptable form of identification upon presentation of certain identifying documents. *Democratic Party of*

Georgia, Inc. v. Perdue, 707 S.E.2d 67, 69-70 (2011).

While there are numerous constitutional flaws in the current Georgia Photo ID statute, it is the initial version of the unconstitutional Georgia ID law that is most similar to Act 18.

Under the initial version of the law, the court found that HB 244 created an unconstitutional burden on the fundamental right to vote in violation of due process, particularly for indigent, elderly, and disabled voters for whom it was difficult to travel. This was especially so given Georgia's license centers, which (as here in Pennsylvania) were spaced widely apart and were not found in every county. *Billups*, 406 F. Supp. 2d. at 1363. In Georgia, there was one mobile photo ID unit, which the court found insufficient to ensure that voters without access to transportation would be able to secure the required documentation. *Id.* at 1334. The court found that requiring someone who was otherwise fully qualified to vote to present a government issued picture ID at the polls as a condition of voting placed a real burden on many people, and especially upon the poor and elderly who do not have drivers' licenses because they do not own or cannot drive a car. *Id.* According to Georgia Secretary of State Cox, the "League of Women Voters and the AARP estimated that 152,664 individuals over the age of 60 who voted in the 2004 presidential election did not have a Georgia driver's license and were likely not to have other photo identification," and "[f]or such voters to obtain identification [would be] often an unnecessarily burdensome task." *Id.*

The court found that limiting the permissible identification required to only five forms of government-issued photo identification cards amounted to a poll tax, because it required people to pay for voter identification cards. *Id.* at 1367. This provision, according to the court, violated the Georgia Constitution by adding a new requirement for voting. *Id.* at 1362. Georgia then modified its law to require every county registrar of voters to provide at least one place where a

free ID could be obtained. *Perdue*, 707 S.E.2d at 69.

Similar to the facts here in Pennsylvania and in Missouri, Georgia's secretary of state reported “no documented cases of fraudulent voting” by individuals who “misrepresent[ed] their identities.”⁸ Joel A. Heller, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote*, 62 Vand. L. Rev. 1871, 1911 (2009). Despite this undisputed statistic, and despite (by contrast) a documented instance of fraud in absentee voting in Georgia, HB 244 did nothing to protect against absentee voting fraud. For example, under the law, all voters in Georgia were permitted to vote and have their votes count without a photo ID by voting absentee. Ga. Code Ann. §§ 21-2-380(b), 381(a)(1). The Georgia court found that such a lax provision highlighted the State’s inability to “draw the Photo ID law narrowly to prevent the most prevalent type of voter fraud.” *Billups*, 406 F. Supp. 2d at 1361.

b. Comparisons between HB 244 (prior and current) and Act 18.

Act 18 is similar to the former Georgia statute, but significantly more burdensome. Subsequent to the amendment, Georgia now offers more than three times the number of locations to obtain a free ID, which amounts to more locations than in the Commonwealth, even though Georgia’s voting population is far smaller than Pennsylvania’s. *See* Rushed Implementation Report at Risk 5; *see also* Petitioners’ Post-Hearing Brief at 7. Conversely, Pennsylvania’s license centers, of which 9 counties are completely lacking, are sparse and spaced widely apart, and are not even in operation five days a week. *Id.* at 9-10.

Furthermore, not all PennDOT workers are familiar with the new procedures, resulting in certain voter confusion, delay, and complication. *See* Rushed Implementation Report at 7-8.

⁸ “Evidence of in-person voter fraud, the only type of fraud that photo ID requirements would squarely address, is notoriously scant. Indiana, Georgia, and Missouri all failed to produce any evidence of such fraud in support of their respective photo ID laws.” Joel A. Heller, *Fearing Fear Itself: Photo Identification Law, Fear of Fraud, and the Fundamental Right to Vote*, 62 Vand. L. Rev. 1871, 1887-88 (2009) (internal citation omitted).

Even “the primary form required to process a non-driver photo ID, the DL-54A, has not been altered to indicate to PennDOT staff or customers that an ID could be available for free to registered voters.” Petitioners Post- Hearing Brief at 10.

Even though the PennDOT ID is to be free, there are, as noted above, significant burdens (particularly to the indigent, elderly and others without access to transportation) attached with obtaining the PennDOT ID. Under the current version of HB 244, the free ID that can be obtained at any of the county registrar of voters requires far less documentation than the PennDOT ID requires. Ga. Comp. R. & Regs. § 183-1-20-.01(4); *see also* Petitioners Post-Hearing Brief at 11. Specifically, under the amended Georgia law, the card can be obtained by showing any card accepted for the provision of benefits, a voter registration application, a paycheck or paystub, or a Medicare, Medicaid, or social security statement. *Id.*

Finally, in contrast to, and more burdensome than, the prior Georgia statute which exempted absentee voters on its face, Pennsylvania has strict limits on absentee voting. For example, voters who are unable to make it to the polls for medical reasons must provide detailed explanations and a doctor’s phone number. *Id.* at 11. In Georgia, however, under the prior version of HB 244, any person was allowed, “at any time within 45 days before an election, to vote an absentee ballot by mail—with no ID requirement and no requirement to state one of the current conditions for voting absentee ((O.C.G.A. § 21–2–380)—such as being out of town on election day, having a disability, being over 75 years old, etc).” *Billups*, 406 F. Supp. 2d at 1332. Even under the current version of the statute, Georgia allows “no-excuse” absentee voting, allowing any registered voter to request an absentee ballot without requiring that the voter state a reason for his or her desire to vote absentee. OCGA § 21–2–380. Thus, both statutes, similar to Missouri, only prevent in-person voter identification fraud, which as noted above, is an

extremely rare occurrence.

Thus, not only is Act 18 similar to the prior iteration of HB 244, but also it is more restrictive than both versions of the Georgia voter ID statute and as such, should be struck down.

3. Wisconsin

In 2012, two state courts enjoined the state of Wisconsin from enforcing a new restrictive Voter ID law on state constitutional grounds. On March 6, 2012, the Wisconsin Circuit Court in *Milwaukee Branch of the NAACP, et al. v. Scott Walker, et al.*, granted a temporary injunction preventing the state from enforcing Act 23, the state's Voter ID law, in the upcoming primary election on April 3. 2012 WL 739553 (Wis. Ct. App. Mar. 28, 2012) (using strict scrutiny in distinguishing *Crawford* and differentiating Voter ID cases brought under the federal constitution from those brought under a state constitution and holding that Act 23 unconstitutionally burdened individuals' ability to vote). Then, on March 13, 2012, a second judge struck down the same voter ID law in *League of Women Voters of Wisconsin Education Network, Inc., et al. v. Scott Walker, et al.*, 2012 WL 763586 at *2 (Wis. 2012) (finding that Act 23's strict Voter ID requirement was unconstitutional because it went beyond the powers granted to the legislature in the state constitution). In both cases, Act 23 was ruled unconstitutional based on the Wisconsin Constitution's affirmative right to vote. Though the Wisconsin Department of Justice has appealed these decisions to the state Supreme Court,⁹ the analysis in these court rulings underscores the inherent conflict between voting rights and regressive forms of Voter ID laws

As set forth herein, because of the similarity of the respective state constitutions and statutory provisions at issue, the reasoning of both the recent Wisconsin state court rulings

⁹ Currently, the Wisconsin Department of Justice filed a Petition to Bypass the Court of Appeals and a Motion for Stay in the Wisconsin Supreme Court on August 21, 2012. The petitioners have 14 days to file a response.

applies directly to Act 18, albeit with even greater force. Like the Pennsylvania Constitution, the Wisconsin Constitution protects citizens' right to vote in free and equal elections. *See* Wis. Const. art. III.

a. Wisconsin Statute: 2011 Wisconsin Act 23.

In 2011, the Wisconsin Legislature enacted Wisconsin Act 23 (hereinafter "Act 23"), which required, as a condition to voting, that qualified electors under the Wisconsin Constitution display acceptable government-sanctioned photo identification either at the polls or to election officials by 4:00 p.m. on the Friday following the election. 2011 Wis. Act. 23, § 90. On March 6, 2012, the Court of Appeals of Wisconsin granted the plaintiff, the Milwaukee Branch of the NAACP, temporary injunctive relief from enforcement of the Photo Identification requirement portion of Act 23. *Milwaukee Branch of the NAACP*, 2012 WL 739553 at *3. The Court, finding the right to vote "fundamental," employed a strict scrutiny standard and distinguished the United States Supreme Court ruling in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), discussed more fully below, based on a "flawed factual record." *Id.*

On March 12, The League of Women Voters of Wisconsin Educational Network and other co-plaintiffs similarly sought declaratory and injunctive relief under the Wisconsin Constitution, seeking to enjoin the further implementation and enforcement of Act 23's photo ID provisions. *League of Women Voters of Wisconsin*, 2012 WL 763586 at *2. The Circuit Court of Wisconsin thereafter permanently enjoined enforcement of Act 23, determining that the law imposed additional conditions on the right to vote, which was beyond the power of the state legislature. *Id.* Noting that the Wisconsin Constitution expressly empowers the legislature and the governor to enact laws regulating elections, the Court found that Act 23 did not fall within the specifically enumerated powers listed in Wis. Const. Art. III, and thus violated Wis. Const. Art III, §§ 1 and 2. *Id.* Basing its decision on the "clear language of the state constitutional

precedent and prior precedent, the court concluded that requiring photo identification as a precondition to voting was unconstitutional” on its face because it did not satisfy additional statutorily-created qualifications not contained in Article III, and thus abridged the right to vote. *Id.*; see also *Applewhite, et. al., v. Commonwealth of Pa, et. al.*, No. 330 MD, 2012 WL 3332376.

The Court of Appeals in its ruling found that Act 23 was restrictive and burdensome, as the only permissible forms of ID under Act 23 included unexpired (or expired after the date of the most recent election) government-sanctioned photo identification, where the name of the individual conformed to the individual’s voter registration form. 2011 Wis. Act 23, § 2. As a result, a “significant proportion of constitutionally eligible voters in Wisconsin—approximately 221,975 individuals—[did] not possess acceptable photo identification” that would permit them to vote under Act 23. *Milwaukee Branch of NAACP*, 2012 WL 1020254 at *3. The Circuit Court similarly found this sacrifice of a qualified elector’s right to vote by the Act was not, “as a matter of law under the Wisconsin Constitution,...reasonable exercise of the government’s prerogative to regulate elections.” *League of Women Voters*, 2012 WL 763586 at *2.

Furthermore, although Department of Transportation-issued identification cards could be obtained for free (both as initial issuances or renewal) under Act 23 if the voter was a U.S. citizen who would be at least 18 on the date of the next election, and the voter requested that the card be provided without charge for voting purposes, the Court of Appeals found the burden imposed upon otherwise eligible voters “substantial” in several respects. *Milwaukee Branch of NAACP*, 2012 WL 1020254 at *3. First, the Act, which affected a disproportionately larger number of voters who were elderly, indigent, disabled, or members of a racial minority, was similar to Missouri and Georgia in that it imposed a financial burden in having to pay a fee to

acquire documents necessary to obtain free DOT-identification. *Id.* The Act also imposed a general burden in having to deal with multiple visits to government offices, delay, dysfunctional computer systems, misinformation, and a significant investment of time to avoid being turned away at the ballot box. *Id.*

Act 23 would also not deter any instances of in-person voter fraud unique to Wisconsin. The Milwaukee Police Department, “after having identified election administration inefficiencies and poor record keeping, investigated 67 allegations of incidents of multiple voting and could not confirm any of them,” finding that “[m]ost of the multiple voting problems were revealed as recordkeeping mistakes and [the] ‘birthday problem,’ where a sufficiently large population is likely to include individuals with the same name and birth date.” *See Milwaukee Branch of the NAACP, et. al. v. Walker, et. al.*, Case No. 11-CV-5492, Plaintiffs’ Proposed Findings of Facts at 26 (Wis. Cir. Ct. May 16, 2012).

b. Comparison between Wisconsin Act 23 and Act 18.

The Wisconsin Circuit Court highlighted the difficulties inherent in obtaining only certain categories of permissible Photo IDs, and in doing so, shed further light on the insurmountable burdens facing many constitutionally-qualified electors if Act 23 were to stand. *See generally Milwaukee Branch of NAACP*, 2012 WL 1020254.¹⁰ Given the similarities between Act 23 and Pennsylvania’s Act 18, these insurmountable burdens will be a reality if Act 18 is upheld. Similar to Pennsylvania, the disenfranchised citizens would “consist of those struggling souls who, unlike the vast majority of Wisconsin voters, for whatever reason will lack the financial, physical, mental, or emotional resources to comply with Act 23, but are otherwise constitutionally entitled to vote.” *League of Women Voters*, 2012 WL 763586 at *2. Because

¹⁰ Also addressed in Brief of Amicus Curiae Pennsylvania AFL-CIO in Support of Petitioners’ Petition (July 18, 2012) at 41.

Act 18, similar to Act 23, would not deter instances of fraud, but instead would suppress voter participation, the Wisconsin circuit court dubbed this as “two heads on the same monster.” *League of Women Voters*, 2012 WL 763586 at *2. Act 18 should similarly be struck down.

III. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

Amici further respectfully submit that the U.S. Supreme Court’s ruling in *Crawford v. Marion Cnty. Election Board* is of limited relevance here, for at least two fundamental reasons: (1) it involved the application of a different constitution, with different provisions, than that which applies here; and (2) it involved a less burdensome statute and a significantly different factual underpinning.

1. *Crawford* focuses on purported violations under the U.S. Constitution, not a state constitution.

In *Crawford*, the Indiana Democratic Party, the Marion County Democratic Party, two elected officials, and certain non-profit organizations (“*Crawford* Plaintiffs”) brought suit against public officials charged with enforcing Indiana’s Voter ID Law, alleging that the law violated the Fourteenth Amendment of the U.S. Constitution by burdening citizens’ right to vote. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 186-87 (2008).

Here, Appellants allege violations of at least three provisions of the Pennsylvania Constitution, including (1) Article I, Section 5, requiring free and equal elections; (2) Article VII, Section 1, setting forth the exclusive election qualifications; and (3) Article 1, Section 26, prohibiting Pennsylvania from harming the civil rights of citizens of the Commonwealth. *See* Pa. Const. Art. I, § 5; Pa. Const. Art. VII, § 1; Pa. Const. Art. 1, § 26; *see also* Petitioners’ Pre-trial Brief and Pre-trial statement at 18-26; *see generally* Brief of Amicus Curiae PA AFL-CIO. The U.S. Constitution does not contain these provisions. Moreover, this Court in the past has made clear that when interpreting analogous or similar provisions of the Pennsylvania

Constitution, Pennsylvania courts are not bound by U.S. Supreme Court decisions construing the U.S. Constitution. *See Com. v. Edmunds*, 526 Pa. 374, 388, 586 A.2d 887, 894 (Pa. 1991). Pennsylvania courts recognize that state constitutions may provide more expansive standards and emphasize the importance of independent analysis when assessing Pennsylvania Constitutional provisions. *Id.* Thus, while Pennsylvania courts may consider federal case law, “it is essential that courts in Pennsylvania undertake an independent analysis under the Pennsylvania Constitution.” *Id.*

Indeed, the courts of other states have applied this very principle in the voting rights context, specifically declining to apply U.S. Constitutional doctrine in the course of construing similar provisions of a state constitution. *See Weinschenk*, 203 S.W.3d at 212 (holding that where the Missouri Constitution provided more expansive protections than the U.S. Constitution, U.S. Supreme Court precedent, such as *Crawford*, was less applicable); *see also Walker*, 2012 WL 739553 (declining to be guided by *Crawford* because, *inter alia*, *Crawford* implicated the Federal, not the Wisconsin, Constitution).

With its focus on U.S. Constitutional provisions, *Crawford* is readily distinguishable and does not control the outcome of Appellants’ case.

2. Both the state statute at issue, and the facts, in *Crawford* are plainly distinguishable.

The Indiana Voter ID Law also has material differences that make it significantly less burdensome than Act 18. *See generally* Senate Enrolled Act No. 483, 2005 Ind. Acts p. 2005; *see also* Act of March 14, 2012, P.L. 195, No. 18. Indeed, the Indiana Voter ID Law does not specifically enumerate the types of photo IDs required. Senate Enrolled Act No. 483, 2005 Ind. Acts p. 2005. By contrast, Act 18 provides an exclusive, unbending list of acceptable forms of

photo ID. Act of March 14, 2012, P.L. 195, No. 18. Act 18's rigidity alone makes it substantially more burdensome than the Indiana Voter ID Law.

Additionally, the Indiana Voter ID Law, *inter alia*, provides certain exemptions that lessen the burden on certain groups, including not requiring an expiration date for military IDs. Senate Enrolled Act No. 483, 2005 Ind. Acts p. 2005. By contrast, Act 18 requires military IDs without an expiration date to specifically state that the expiration date is indefinite. Act of March 14, 2012, P.L. 195, No. 18. Such material differences render *Crawford* unpersuasive to an assessment of the specific burden that Act 18 places on Pennsylvania voters.

Moreover, in Pennsylvania, the number of people that may be affected by Act 18 is potentially seventeen times the number of Indiana residents affected by the Indiana Voter ID Law discussed in *Crawford*, or at minimum hundreds of thousands more.¹¹ This stark difference in burden is a further reason that the outcome in *Crawford* is of limited relevance here.

Central to the ruling in *Crawford* was the court's determination of the burden that the Indiana Voter ID Law placed on residents when balanced against the state's purpose in enacting the law. *See Crawford*, 553 U.S. at 190. *Crawford* relied on the test articulated in *Burdick v. Takushi*, 504 U.S. 428 (1992). *Id.* The Court acknowledged the lower court's determination that, as of the Indiana Voter ID Law's 2005 enactment, around 43,000 Indiana residents, approximately 1% of the voting age population, lacked the requisite photo ID. *Crawford*, 533 U.S. at 187-88, 219. This burden, the Court found, was minimal when balanced with Indiana's

¹¹ In *Crawford*, the Court repeatedly questioned the record as insufficient, ultimately concluding that based on "limited evidence," the Court could not agree that the statute was excessively burdensome for any particular voter class. *Crawford*, 553 U.S. at 201-02. Here, Appellants have presented a far more substantial record, providing detailed expert reports, more than a dozen witnesses, numerous exhibits, as well as receiving the benefit of many amicus briefs, and the Commonwealth's concession in public filings of the vast number of Pennsylvanians who will be negatively impacted by Act 18.

purported interests. *Id.* at 202. While strict scrutiny, not the “flexible” *Burdick* test, should apply here, even under *Burdick* the impact on Pennsylvania’s voters is materially more burdensome than on Indiana’s residents in *Crawford*. See, e.g., *Common Cause/Georgia*, 406 F. Supp. 2d at 1362-64 (finding that Georgia’s similar Photo ID requirement, which burdened far fewer residents than Act 18, imposed “‘severe’ restrictions on the right to vote” even under the *Burdick* standard).

Act 18 stands to affect—by the Commonwealth’s own admission—close to 750,000 people (with some estimates closer to 1.4 million), approximately 10% of registered voters, who lack the appropriate photo ID. See Press Release, *Pa. Dep’t of State, Department of State and PennDot Confirm Most Registered Voters Have Photo ID* (July 3, 2012); see also Petitioners’ Pre-Trial Brief and Pre-Trial Statement at 5. In some areas, such as Philadelphia, the Department of State suggests that more than 18% of registered voters do not have the requisite photo ID. See *New Data Suggests Hundreds of Thousands Could be Disenfranchised by Pennsylvania’s Voter ID Law*, Pa. Budget & Policy Ctr. (July 6, 2012), <http://pennbpc.org/new-data-suggest-hundreds-thousands-could-bedisenfranchisedpennsylvania%E2%80%99s-voter-id-law>; see also Petitioners’ Pre-Trial Brief and Pre-Trial Statement at 5.

The burden imposed by Act 18 on Pennsylvania’s registered voters is materially more significant than the burden placed on Indiana’s residents in *Crawford*.

Thus, because, *inter alia*, it construed a different constitution, involved a law that imposes a materially less significant burden than imposed by Act 18, and was based on a substantially different material facts, the outcome in *Crawford* is of limited relevance in the instant case.

IV. In States Where Voter ID Laws Have Been Upheld, The Statutes Are Less Burdensome Or The Facts Are Easily Distinguishable From This Case.

In its ruling, the Commonwealth Court relied on three voter ID statutes and one municipal ordinance where such laws have been upheld: *Rokita*, *In re Request*, *Perdue*, and *Santillanes*. See *Applewhite*, 2012 WL 3332376, at *7-8, 14-24, 26, 28-31. However, in each instance, the Voter ID statute or municipal ordinance at issue was materially less burdensome than Act 18, and the facts in each case are readily distinguishable from the facts at issue here. For a complete summary of the state Voter ID laws and municipal ordinance referenced below, see Appendix B.

1. In Re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 479 Mich. 1 (MI 2007).

In *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71* (“*In re Request*”), the Michigan Supreme Court upheld a Michigan Voter ID law, concluding that the statute did not violate either state or federal law or constitute a poll tax. See *In Re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1 (MI 2007). The Michigan Voter ID Law at issue is substantively less burdensome than Act 18. The Michigan law, MCL 168.523, requires voters to either (1) present a photo ID or (2) sign an affidavit identifying him or herself. MCL 168.523; see also *In re Request*, 479 Mich. at 13. After a voter provides a photo ID or signs the affidavit, the voter must sign an application bearing the voter’s signature and address. *Id.* Additionally, the statute provides that a vote by a voter without an ID may be subject to challenge. *Id.*

Michigan’s Voter ID law allows voters to cast a ballot without a photo ID, simply by signing an affidavit. *In re Request*, 479 Mich. at 45 (“the act of signing one’s name to an affidavit is too trivial an act to sustain...[an] overwrought burden argument.”). No such affidavit option exists in Act 18.

2. *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008).

In *ACLU of New Mexico v. Santillanes* (“*Santillanes*”), the Tenth Circuit upheld an amendment to the Albuquerque city charter, requiring a photo ID to vote. 546 F.3d 1313, 1316 (10th Cir. 2008). The Court relied heavily on *Crawford*, ultimately concluding that the ordinance did not create a substantial burden on a voter’s rights and prevention of voter fraud was a reasonable justification for the law. *Id.* at 1325. Like *Crawford*, *Santillanes* is readily distinguishable from the present case.

The amendment to the Albuquerque city charter (“the Ordinance”) is substantially less burdensome than Act 18. *See* Albuquerque, N.M., City Charter, art. XIII, § 14; Act 18. The Ordinance allows for a much wider range of photo IDs. *See* Albuquerque, N.M., City Charter, art. XIII, § 14 (requiring, “one current valid identification card containing the voter’s name and photograph,” and providing a non-exclusive list containing examples such as, “any card issued by a government agency, driver’s license, student identification card, commercial transaction card such as a credit or debit card, insurance card, union card, a professional association card or the voter identification card issued by the City Clerk.”). Additionally, the Ordinance does not, like Act 18, require an expiration date. *Santillanes*, 546 F.3d at 1324 (acknowledging that the breadth of the statute poses less restriction on voters than the law in *Crawford* because no expiration date is required).

Indeed, just as in *Crawford*, *Santillanes* concerns challenges to Federal law and the U.S. Constitution, not provisions of a state Constitution, rendering *Santillanes* substantively different from this case for this reason as well. *See generally*, *Santillanes*, 546 F.3d at 1313. Again, as described above, Pennsylvania courts stress the importance of independent analysis when assessing Pennsylvania Constitutional provisions. *Edmunds*, 526 Pa. at 388.

Finally, while an Equal Protection argument exists as to the disparate treatment of in-person and absentee voters, the Ordinance does not restrict a voter's ability to complete an absentee ballot, which does not require a photo ID. *See* Albuquerque, N.M., City Charter, art. XIII, § 14; *see also Santillanes*, 546 F.3d at 1320. Albuquerque does not restrict a registered voter's right to use an absentee ballot, providing an alternative to in-person voting with a photo ID. *Santillanes*, 546 F.3d at 1320. Conversely, as described above, the Commonwealth severely restricts voting absentee to an exclusive list, which includes members of the armed forces, anyone whose job requires him or her to be outside the state while the polls are open, and the physically disabled. *See* 25 P.S. § 3146.1.

3. *League of Women Voters of Indiana Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010).

In *League of Women Voters of Indiana Inc. v. Rokita* (“*Rokita*”), the Indiana Supreme Court upheld the same statute implicated in *Crawford*, concluding that the statute did not violate the Indiana Constitution. 929 N.E.2d 758, 772 (Ind. 2010). The Court reasoned that the Voter ID requirement neither imposed additional “qualifications” to vote, nor violated Indiana’s Equal Privileges and Immunities Clause. *Rokita*, 929 N.E.2d at 767, 769-71.

As described more fully above, the Indiana Voter ID Law at issue in *Crawford* and *Rokita* has material differences that make it significantly less burdensome than Act 18. Notably, the Indiana Voter ID Law does not specifically enumerate the types of photo IDs required, while Act 18 provides an exclusive, unbending list of acceptable forms of photo ID. *See* Senate Enrolled Act No. 483, 2005 Ind. Acts p. 2005; Act of March 14, 2012, P.L. 195, No. 18. Additionally, as referenced above, the Indiana Voter ID Law provides exceptions where Act 18 does not. *Id.* For these reasons alone, *Rokita*, which *Amici* respectfully submit in any event is

wrongly decided, is entirely unpersuasive in assessing the specific burden placed on Pennsylvanians by Act 18.

Moreover, in *Crawford*, the Court acknowledged that the Indiana Voter ID Law's enactment affected around 43,000 Indiana residents, approximately 1% of the voting age population. *Crawford*, 533 U.S. at 187-88, 219. Conversely, as described above, Act 18 stands to affect, by the Commonwealth's own admission, close to 750,000 people (with some estimates closer to 1.4 million), approximately 10% of registered voters, who lack the appropriate photo ID. *See* Press Release, Pa. Dep't of State, Department of State and PennDot Confirm Most Registered Voters Have Photo ID (July 3, 2012); *see also* Petitioners' Pre-Trial Brief and Pre-Trial Statement at 5.

Ultimately, *Rokita* upheld the Indiana Voter ID law on a finding that it did not impose "excessively burdensome requirements on any class of voters," but rather imposed only "a limited burden on voters' rights." *Rokita* at 768. Where the burden is the central component of the test, the disparity in both overall number and percentage of those affected by the voter ID statutes in *Rokita* and here renders *Rokita* inapposite.

4. *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. 720, 726, 707 S.E.2d 67, 73 (Ga. 2011).

In *Democratic Party of Georgia, Inc. v. Perdue* ("*Perdue*"), the Georgia Supreme Court upheld a Georgia Voter ID law, holding that statutory requirements were a reasonable procedure for preventing voter fraud and that, because any voter could vote absentee (without a photo ID), the law did not deprive any Georgia voters of the right to vote. *Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 725, 730 (Ga. 2011).

While the Appellants appropriately assert an Equal Protection argument, stemming from the disparate treatment of in-person and absentee voters, Georgia allows for unrestricted absentee

voting, which provides a key distinction between *Perdue* and the present case. *See* OCGA § 21-2-380(b); *see also Perdue*, 288 Ga. at 726. Unlike the Commonwealth, Georgia provides all registered voters with the opportunity to vote using an absentee ballot, regardless of that voter's location. *Id.* Conversely, as described above, Pennsylvania has a very restrictive absentee voting policy. *See* 25 P.S. § 3146. In *Perdue*, the Georgia Supreme Court specifically notes that a voter may choose a manner of voting that requires no photo ID. *Perdue*, 288 Ga. at 725. Pennsylvanians have no such option.

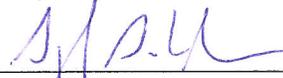
Additionally, as described more fully above, Georgia's implementation of the requirements differs greatly from Pennsylvania's ability to implement the statute with the General Election fast approaching.

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CONCLUSION

For the reasons set forth above, *Amici* urge the Court to recognize the substantive differences between the state voter ID statutes and cases interpreting them, which were relied upon by the Commonwealth Court and be guided by judicial review of statutes in Missouri, Georgia and Wisconsin. *Amici* respectfully submit that this Court should grant the Appellants' Preliminary Injunction.

Respectfully submitted,



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IN THE SUPREME COURT OF PENNSYLVANIA

No. 71 MAP 2012

Viviette Applewhite; Wilola Shinholtser Lee; Grover Freeland; Gloria Cuttino; Nadine Marsh; Dorothy Barksdale; Bea Bookler; Joyce Block; Henrietta Kay Dickerson; Devra Mirel (“Asher”) Schor; The League of Woman Voters of Pennsylvania; National Association for the Advancement of Colored People, Pennsylvania State Conference; Homeless Advocacy Project,

Petitioners/Appellants,

v.

The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carol Aichele, in her capacity as Secretary of the Commonwealth,

Respondents/Appellees.

CERTIFICATE OF SERVICE

I certify that I am this 30th day of August, 2012, serving two copies of the foregoing *Amici Curiae* Brief of Pennsylvania Law Professors in Support of Appellants, upon the persons and in the manner indicated below via first class mail, which service satisfies the requirement of Pa. R.A.P. 121:

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APPENDIX A

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APPENDIX B

Details of Voter Identification Requirements¹²

State	Requirement	Acceptable Forms of ID	Voters Without ID
<p>Georgia §21-2-417</p>	<p>Each elector shall present proper identification to a poll worker at or prior to completion of a voter's certificate at any polling place and prior to such person's admission to the enclosed space at such polling place.</p>	<ul style="list-style-type: none"> ▪ Georgia driver's license, even if expired ▪ ID card issued by the state of Georgia or the federal government ▪ Free voter ID card issued by the state or county, obtained by showing: <ul style="list-style-type: none"> ○ any card accepted for the provision of benefits ○ a voter registration application ○ a pay check or pay stub ○ a Medicare, Medicaid Statement ○ a Social Security statement ▪ U.S. passport ▪ Valid employee ID card containing a photograph from any branch, department, agency, or entity of the U.S. Government, Georgia, or any county, municipality, board, authority or other entity of this state ▪ Valid U.S. military identification card ▪ Valid tribal photo ID <p>Prior to the 2006 Amendment:</p> <ul style="list-style-type: none"> ▪ 1 mobile photo ID unit ▪ Only 5 forms of government issued ID acceptable. 	<p><u>Provisional Ballot</u></p> <p>If a voter shows up to vote without one of the acceptable forms of photo identification, he or she can still vote a provisional ballot. The voter will have up to three days after the election to present appropriate photo identification at their county registrar's office in order for their provisional ballot to be counted.</p> <p><u>No Excuse Absentee Voting:</u> All registered voters are able to vote using an absentee ballot without presenting a photo ID and without having to actually be absent from the state at any time within 45 days before an election.</p>
<p>Indiana §3-5-2-40.5, 3-10-1-7.2 and 3-11-8-25.1</p>	<p>A voter who desires to vote an official ballot at an election shall provide proof of identification.</p> <p>A voter who</p>	<p>Specific forms of ID are not listed in statute. ID must be issued by the state of Indiana or the U.S. government and must show the following:</p> <ul style="list-style-type: none"> ▪ Name of individual to whom it was issued, which must conform to the individual's registration record 	<p><u>Provisional Ballot</u></p> <p>Voters who are unable or decline to produce proof of identification may vote a provisional ballot. The ballot is counted only if</p> <ul style="list-style-type: none"> ▪ (1) the voter returns to

¹² For a broad overview of every state with a voter ID law, see <http://www.ncsl.org/legislatures-elections/elections/voterid.aspx#Details> (last accessed August 29, 2012).

Details of Voter Identification Requirements¹²

State	Requirement	Acceptable Forms of ID	Voters Without ID
	votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides is not required to provide proof of identification before voting in an election.	<ul style="list-style-type: none"> ▪ Photo of the person to whom it was issued ▪ Expiration date (if it is expired, it must have an expiration date after the most recent general election; military IDs are exempted from the requirement that ID bear an expiration date) ▪ Must be issued by the United States or the state of Indiana 	<p>the election board by noon on the Monday after the election and:</p> <ul style="list-style-type: none"> ○ (A) produces proof of identification; or ○ (B) executes an affidavit stating that the voter cannot obtain proof of identification, because the voter: (i) is indigent; or (ii) has a religious objection to being photographed; and <ul style="list-style-type: none"> ▪ (2) the voter has not been challenged or required to vote a provisional ballot for any other reason.
Michigan §168.523	Each voter must show a photo ID or sign an affidavit attesting that he or she is not in possession of photo identification.	<ul style="list-style-type: none"> ▪ Michigan driver's license ▪ Michigan personal identification card <p>A voter who does not possess either of the above may show any of the following, as long as they are current:</p> <ul style="list-style-type: none"> ▪ Driver's license or personal identification card issued by another state ▪ Federal or state government-issued photo ID ▪ U.S. passport ▪ Military ID with photo ▪ Student ID with photo -- from a high school or accredited institution of higher education ▪ Tribal ID with photo 	An individual who does not possess, or did not bring to the polls, photo ID, may sign an affidavit and vote a regular ballot.
Missouri §115-427	Before receiving a ballot, voters shall establish their identity and eligibility to vote at the polling place by	<ul style="list-style-type: none"> ▪ Identification issued by the federal government, state of Missouri, an agency of the state, or a local election authority; ▪ Identification issued by Missouri institution of higher education, including a university, college, 	<p><u>Provisional Ballot</u></p> <p>If potential voters could not produce any of these forms, they could, instead, use other documents that contained the name and address of the voter,</p>

Details of Voter Identification Requirements¹²

State	Requirement	Acceptable Forms of ID	Voters Without ID
	<p>presenting a form of personal identification.</p>	<p>vocational and technical school;</p> <ul style="list-style-type: none"> ▪ A copy of a current utility bill, bank statement, paycheck, government check or other government document that contains the name and address of the voter; ▪ Driver's license or state identification card issued by another state. <p>All of the above must include a photo and a name that conforms to voter registration records and an expiration date showing the ID is not expired.</p> <p>Non-driver IDs will be provided as long as voter submitted additional identifying documentation such as birth certificate or social security card.</p>	<p>including:</p> <ul style="list-style-type: none"> ▪ bank statements, ▪ government checks, and ▪ a “[d]river’s license or state identification card issue by another state.” <p>Even if a voter was unable to provide any of these forms of identification, “personal knowledge of identity of the voter [by] two supervising election judges,” one from each party, was sufficient to allow the voter to cast a valid ballot.</p> <p><u>Absentee Ballots:</u> No Photo ID required</p>
<p>New Mexico Amendment to the Albuquerque city charter. Albuquerque, N.M., City Charter, art. XIII, § 14;</p>	<p>Each voter shall be required to present one current valid identification card containing the voter’s name and photograph, but does not need an expiration date.</p>	<ul style="list-style-type: none"> ▪ Any card issued by a government agency ▪ driver's license ▪ student identification card, ▪ commercial transaction card such as a credit or debit card ▪ insurance card ▪ union card ▪ a professional association card or ▪ voter identification card issued by the City Clerk 	<p><u>Provisional Ballot</u></p> <ul style="list-style-type: none"> ▪ A voter who is unable to provide a photo ID card shall be given a provisional ballot, but only if the voter: <ul style="list-style-type: none"> ○ affirms their identity in an affidavit and ○ provides their date of birth and ○ the last four digits of their social security number. ○ The voter must then present one of the permissible photo ID cards to the City Clerk within the ten day canvassing

Details of Voter Identification Requirements¹²

State	Requirement	Acceptable Forms of ID	Voters Without ID
			<p align="center">period.</p> <ul style="list-style-type: none"> ▪ If a voter who cast a provisional ballot swears in an affidavit under penalty of perjury that he or she has a religious objection to being photographed within the ten day canvassing period, such voter shall not be required to submit photo identification <p><u>Absentee Ballot</u></p> <ul style="list-style-type: none"> ▪ No restrictions on a registered voter's right to use an absentee ballot.
<p>Pennsylvania P.L. 195, No. 18</p>	<p>Each elector must present one form of ID from the exclusive list set forth in the statute.</p>	<ul style="list-style-type: none"> ▪ Photo ID issued by the department of transportation that is not more than twelve months past the expiration date; ▪ Unexpired photo ID issued by the U.S. government that includes an expiration date; ▪ U.S. military photo ID that does not contain an expiration date, but notes that the expiration date is indefinite; ▪ Unexpired municipal employee Photo ID that includes an expiration date; ▪ Unexpired student photo ID from an accredited public or private higher education institution that includes an expiration date; or ▪ Unexpired photo ID from certain state care facilities that includes an expiration date. <p><u>Ability to Obtain PennDOT IDs</u></p>	<p>A voter who has a religious objection to being photographed must provide a valid-without-photo driver's license or a valid-without-photo ID card issued by the department of transportation.</p> <p><u>Provisional Ballot</u></p> <ul style="list-style-type: none"> ▪ A voter who is unable to produce the required ID on the grounds that he or she is indigent and cannot obtain such ID for free must cast a provisional ballot, and ▪ provide an affirmation to the county board within six days, affirming his or her identity and indigent status, or the ballot will not count.

Details of Voter Identification Requirements¹²

State	Requirement	Acceptable Forms of ID	Voters Without ID
		<ul style="list-style-type: none"> ▪ No mobile processing units provided to obtain PennDOT IDs. ▪ Pennsylvania has 9 counties without a single PennDOT center. 	<p><u>Absentee Ballots</u></p> <ul style="list-style-type: none"> ▪ requires absentee voters to swear to their absence under penalty of perjury. ▪ to provide last 4 digits of social security numbers upon voting. ▪ if unable to make it for medical reasons, must provide detailed explanations and a doctor's phone number.
<p>Wisconsin §5.02(6m) and 6.79(2)(a) <i>NOTE: Wisconsin's voter ID law was held unconstitutional on March 12, 2012 by a state judge. It is not currently in effect.</i></p>	<p>Each elector shall be required to present government-sanctioned photo identification either at the polls or to election officials by 4:00 p.m. on the Friday following the election.</p>	<ul style="list-style-type: none"> ▪ Wisconsin driver's license ▪ ID card issued by a U.S. uniformed service ▪ Wisconsin non-driver ID (free WisDOT card) provided if: <ul style="list-style-type: none"> ○ the voter was a U.S. citizen who would be at least 18 on the date of the next election, and ○ the voter requested that the card be provided without charge for voting purposes ▪ U.S. Passport ▪ Certificate of naturalization issued not more than 2 years before the election ▪ ID card issued by a federally recognized Indian tribe in WI ▪ Student ID card with a signature, an issue date, and an expiration date no later than 2 years after the election <p>All of the above must include a photo and a name that conforms to the poll list and must be unexpired (or expired after the date of the most recent election).</p>	<p><u>Provisional Ballot</u></p> <ul style="list-style-type: none"> ▪ An elector who appears to vote at a polling place and does not have statutory ID shall be offered the opportunity to vote a provisional ballot. ▪ An elector who votes a provisional ballot may furnish statutory ID to the election inspectors before the polls close or to the municipal clerk no later than 4pm on the Friday following Election Day.

Details of Voter Identification Requirements¹²

State	Requirement	Acceptable Forms of ID	Voters Without ID
		If the ID presented is not proof of residence, the elector shall also present proof of residence.	