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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILOLA SHINHOLSTER LEE; BEA BOOKLER; THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA STATE CONFERENCE; and HOMELESS ADVOCACY PROJECT,
Petitioners,

v.

THOMAS W. CORBETT, in his capacity as Governor; and CAROL AICHELE, in her capacity as Secretary of the Commonwealth,
Respondents.

Docket No. 330 M.D. 2012

RESPONDENTS' PROPOSED CONCLUSIONS OF LAW

Respondents Thomas W. Corbett, in his capacity as Governor, and Carol Aichele, in her capacity as Secretary of the Commonwealth, hereby submit the following proposed conclusions of law. Respondents have contemporaneously filed and served proposed findings of fact and a supporting brief.

I. THRESHOLD MATTERS

A. Petitioners Lack Standing to Bring this Action.

1. Although standing is a prudential doctrine in Pennsylvania, it is still a pre-requisite for a petitioner to establish to maintain the action. *See Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 203, 888 A.2d 655, 659 (2005); *In re Hickson*, 573 Pa. 127, 135, 821 A.2d 1238, 1243 (2003); *Wm. Penn Parking Garage, Inc. v. Pittsburgh*, 464 Pa. 168, 191, 346 A.2d 269, 280 (1975).

2. Only electors have standing to bring claims in cases such as this. *See Erfer v. Commonwealth*, 568 Pa. 128, 135-36, 794 A.2d 325, 330 (2002) (concluding that the Pennsylvania State Democratic Committee could not have standing to challenge a reapportionment plan because it "does not have the right, in and of itself, to vote" and it is the "right to vote and the right to have one's vote counted that is the subject matter of a reapportionment challenge").

3. The claims of five electors – Viviette Applewhite, Gloria Cuttino, Nadine Marsh, Joyce Block, and Devra Mirel "Asher" Schor – were dismissed as moot because those Petitioners obtained ID. Order Sustaining in Part and Overruling in Part Respondents' Preliminary Objections at 5, 6 n.3 (Pa. Cmwlth. May 24, 2013) (*Applewhite VI*).

4. The only two remaining electors (Bea Bookler and Wilola Lee) have not demonstrated aggrievement caused by Act 18. *Mosside Assocs., Ltd. v. Zoning Hearing Bd. of Monroeville*, 70 Pa. Commw. 555, 562, 454 A.2d 199, 203 (1982) (consolidation of cases disapproved in *Kincy v. Petro*, 606 Pa. 524, 2 A.3d 490 (2010)) ("Although the Commission members allege that they are property owners in Monroeville and, therefore, presumably have a direct interest in Council's action, we have found nothing in the record which would establish that their individual interests were adversely affected by the grant of the conditional use application.").

5. Judge Simpson afforded Ms. Bookler and Ms. Lee a full trial on the merits at which to present their claims. *Applewhite VI*, at 6 n.3. They failed to present any evidence to support standing. *In re Hickson*, 573 Pa. at 136, 821 A.2d at 1243 (noting party must demonstrate peculiar, individualized interest in outcome of litigation; with immediate harm in a particular manner; and that directly impacts a personal interest); *see also Humphreys v. Cain*, 83 Pa. Commw. 176, 181, 479 A.2d 32, 35 (1984) ("The preliminary injunction concludes no rights and is a final adjudication of nothing. The earlier determination by the court that Appellants had standing . . . [was] not binding on the chancellor in the hearing on the permanent injunction.").

- Ms. Bookler was previously issued a Pennsylvania driver's license, which expired, votes absentee, and lives in a care facility issuing compliant ID. She also moved counties in 2008 and would have needed to comply with identification requirements that pre-existed Act 18 the first time she voted in her new election district. *See* Respondents' Proposed Findings of Fact ("FOF") 1-6, 7.

- Ms. Lee has not provided any evidence to suggest she is unable to obtain a free DOS ID – and, indeed, even the averments in the Amended Petition state only that as of that date she had not had time to visit a PennDOT center. *See* FOF 13-16, 19.

6. As a consequence, neither individual Petitioner has established a particularized harm and both lack standing. *See Smith v. Commonwealth*, No. 260 M.D. 2008, 2009 Pa. Commw. Unpub. LEXIS 563, at *9-12 & n.5 (Jan. 13, 2009) (*per curiam*), *aff'd* 605 Pa. 457, 991 A.2d 306 (2010), *cert. denied sub nom.* 131 S. Ct. 90 (2010) (finding petitioners lacked standing because they would not be affected by challenged amendment); *Coghlan v. Borough of Darby*, 844 A.2d 624, 628 (Pa. Cmwlth. 2004) (suggesting petitioner's claimed personal harm sufficed to find standing from general interest as voter); *Mixon v. Commonwealth*, 759 A.2d 442, 453 (Pa. Cmwlth. 2000) (finding individual petitioner lacked standing because her desire to protect right to vote was not peculiar to her, was not direct, and was too remote and speculative), *aff'd* 566 Pa. 616, 783 A.2d 763 (2001).

7. There can be no taxpayer standing in this case because Act 18 is not a statute enacted to benefit a class of persons who, for that reason, would not challenge the enactment. Any elector who is in fact aggrieved by the statute could maintain a claim. *Application of Biester*, 487 Pa. 438, 445-46, 409 A.2d 848, 852-53 (1979); *see Fumo v. City of Philadelphia*, 601 Pa. 322, 353, 972 A.2d 487, 506 (2009) ("Further, just as the Auditor General was better situated than taxpayer Stilp, the Commonwealth executive power is better positioned than individual state legislators, as taxpayers, to challenge the City's executive action in licensing the use of Commonwealth lands. In addition, there has been no argument showing that those more directly and immediately affected are beneficially affected, and that the Commonwealth executive power would be disinclined to challenge the City's exercise of its statutory authority in an appropriate case. Surely, the fact that more appropriate governmental parties have not elected to challenge a particular governmental decision cannot be enough on its own to generate taxpayer standing – particularly where those executive authorities are not 'beneficially affected' by the decision.").

8. Because the organizational Petitioners cannot vote in Pennsylvania, they lack standing under *Erfer*, 568 Pa. at 135-36, 794 A.2d at 330, and are not within the zone of interests of the claimed constitutional or statutory provisions, *see Johnson v. Am. Standard*, 607 Pa. 492, 516-17, 8 A.3d 318, 333 (2010) (recognizing Pennsylvania courts apply "zone of interests" analysis where an immediate interest is not apparent).

9. The organizational Petitioners cannot establish standing based on claims that the passage of Act 18 has forced them to divert or re-allocate resources to education efforts,

or has increased demand for their services.[1] *See Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). They have offered no evidence that they were subjected to operational costs beyond those normally expended to review, challenge, and educate the public about Act 18. *See id.*; *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011); Pre.T. (Jordan) at 1126:3-11, 1127:3-11, 1142:14-1144:8 (mission includes education); H.T. (Carty) at 1200:2-5 (mission of League of Women Voters is to educate people about the League and voting), 1217:6-12 (in any event, it would be contrary to the League's mission to make statements in opposition to Act 18).

10. The organizational petitioners cannot manufacture standing by voluntarily incurring costs because of their speculative fear that someone else will be aggrieved by the statute. *See Clapper v. Amnesty Int'l USA*, 568 U.S. __, 133 S. Ct. 1138, 1148-49, 1150-1152 (2013).[2]

11. None of the organizational Petitioners demonstrated representative standing; none identified a single member of their organizations who had suffered or was threatened with suffering direct, immediate, and substantial injury from Act 18. *See Robinson Twp. v. Commonwealth*, 52 A.3d 463, 476 (Pa. Cmwlth. 2012) (concluding petitioner lacked organizational standing because it failed to identify specific members who would have standing).

12. Having failed to establish standing under the traditional analyses, *a fortiori* Petitioners cannot satisfy the higher standard applicable to actions for declaratory and injunctive relief. *See Pittsburgh Palisades*, 585 Pa. at 205 n.4, 888 A.2d at 661 n.4 (rejecting the dissent's suggestion that standing in a declaratory judgment action would be subject to a reduced standard and noting that both declaratory and injunctive relief require more than an ordinary showing of standing); *Van Doren v. Mazurkiewicz*, 695 A.2d 967, 971 (Pa. Cmwlth. 1997) ("Thus, in order to have standing, a party seeking declaratory relief must establish an interest which 'must be a direct, substantial and present interest, as contrasted with a remote or speculative interest.'"); *Smith*, 2009 Pa. Commw. Unpub LEXIS 563, at *11-12 & n.5; *Nat'l*

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[1] Original birth certificates are not necessary to get any DOS ID or, for that matter, to get a secure PennDOT proof of identification if the person is already in the PennDOT or Department of Health systems.

[2] It is appropriate for this Court to consider federal case law on standing to the extent it is helpful in addressing Petitioners' lack of standing in this case. *Fumo*, 601 Pa. at 344 n.5, 972 A.2d at 500 n.5 (citing *Wilt v. Beal*, 26 Pa. Commw. 298, 363 A.2d 876 (1976)); *Rendell v. Pa. State Ethics Comm'n*, 603 Pa. 292, 307 n.10, 983 A.2d 708, 717 n.10 (2009) ("Pennsylvania courts have frequently found the extensive body of federal decisions helpful in addressing standing and other prudential considerations."). Indeed, Pennsylvania's seminal decision on standing – from which all subsequent decisions derive – relies on federal case law to develop Pennsylvania's standing jurisprudence. *See generally Wm. Penn Parking Garage*, 464 Pa. 168, 346 A.2d 269; *see, e.g., Upper Bucks Cnty. Vocational-Tech. Sch. Educ. Ass'n v. Upper Bucks Cnty. Vocational Tech. Sch. Joint Comm.*, 504 Pa. 418, 423, 474 A.2d 1120, 1122-23 (1984).

Rifle Ass'n v. City of Philadelphia, No. 1472-041036, 2008 Phila. Ct. Com. Pl. LEXIS 159, at *4, 12-13 (June 30, 2008).

B. Petitioners Cannot Satisfy the Standards for Either a Facial or As-Applied Challenge to the Constitutionality of Act 18.

13. If a statute has a "plainly legitimate sweep," it is facially invalid only "when its invalid applications are so real and substantial that they outweigh the statute's 'plainly legitimate sweep.'" *Clifton v. Allegheny County*, 600 Pa. 662, 705, 969 A.2d 1197, 1223 (2009); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202-03 (2008) (lead plurality opinion).

14. Act 18 has a "plainly legitimate sweep." *See Applewhite v. Commonwealth*, 54 A.3d 1, 4-5 (2012) (*Applewhite II*) ("[C]ounsel for Appellants acknowledged that there is no constitutional impediment to the Commonwealth's implementation of a voter identification requirement, at least in the abstract. Given reasonable voter education efforts, reasonably available means for procuring identification, and reasonable time allowed for implementation, the Appellants apparently would accept that the State may require the presentation of an identification card as a precondition to casting a ballot."); *see also Crawford*, 553 U.S. at 199-200 (lead plurality opinion).

15. Given that the law that pre-existed Act 18 – Act 150 – passed in 2002 required registered voters (albeit not all of them) to present an identification card as a precondition to casting a ballot, Petitioners' acceptance of *that* statute precludes a challenge to a requirement to show a proof of identification.

16. The Supreme Court's prior determination recognizes that there is no inherent flaw in Act 18. Had it found otherwise, the Court would have entered a permanent injunction at the time that it reversed the preliminary injunction. *See Kremer v. Grant*, 529 Pa. 602, 613, 606 A.2d 433, 439 (1992) (recognizing, as court was affirming a grant of a preliminary injunction, that the consequences of non-compliance with the amendment process was an incurable defect that *made further proceedings unnecessary*).

17. The Supreme Court in this case said only that it was troubled by the "disconnect between what the Law prescribes" and how it was being implemented *at the time of the hearing*, which "created a number of conceptual difficulties in addressing the legal issues raised." *Applewhite II*, 54 A.3d at 5. The Supreme Court recommended for the Commonwealth Court to assess whether "the most judicious remedy, in such a circumstance, is the entry of a preliminary injunction, which may moot further controversy as the constitutional impediments dissipate." *Id.*

18. Although Petitioners cite *Clifton* in contending that their requests for facial and as-applied relief will lead the Court to the same result – declaring Act 18 unconstitutional – the *Clifton* Court distinguished the two forms of relief. *Clifton*, 600 Pa. at 706, 969 A.2d at 1224 (reversing facial relief because "[t]he governing presumption of constitutionality, the high burden to show unconstitutionality in a facial challenge, and the flexibility the statutory scheme permits, combined with the fact that appellees' facial challenge relies on evidence of the provisions' inequitable application here, and the further fact that it appears there are

circumstances where the base year provisions could be constitutionally applied," and granting as-applied rather than facial relief).

19. Statutory construction does not require the invalidation of an entire statute. *See Clifton*, 600 Pa. at 714, 969 A.2d at 1229 (2009) (reversing trial court's facial invalidation of statute in favor of an as-applied remedy construing the statute).

20. Injunctive relief in an as-applied challenge must be tailored to redress the harm actually demonstrated – in other words, to craft a remedy to the extent the law as applied to a *particular* person under the *particular* circumstances of the case deprived *that person* of a constitutional right. *See, e.g., Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10, 16 (Pa. Cmwlth. 2012); *George Bussinger GN-0083 v. Dep't of Corr.*, 29 A.3d 79, 94-95 (Pa. Cmwlth. 2011) (enjoining Department from completely revoking mail privileges under policy at issue, but recognizing Department retains authority to take other action it deems appropriate for failure to comply with policy); *Nixon v. Commonwealth*, 789 A.2d 376, 382 (Pa. Cmwlth. 2001), *aff'd* 576 Pa. 385, 839 A.2d 277 (2003) (finding criminal history provision of employment statute unconstitutional as applied to particular petitioners and enjoining enforcement only as to those petitioners); *Luna v. Caliguiri*, 16 Pa. D. & C.3d 591, 602-03 (Pa. Ct. Com. Pl., Allegheny Cnty. 1980) (granting injunction, but only for representative plaintiffs, not the entire class, because representatives only established the statute was unconstitutional as applied to them); *Belitskus v. Pizzengrilli*, 343 F.3d 632, 650-51 (3d Cir. 2003) (concluding trial court that issues injunction in as-applied challenge should tailor relief to the specific plaintiffs, which should be no broader than necessary to resolve the harm they face).

21. Declaratory relief in an as-applied challenge is proper only to redress a particularized, concrete injury to the party claiming relief. *See Nat'l Rifle Ass'n*, 2008 Phila. Ct. Com. Pl. LEXIS 159, at *5-6.

22. Because only individuals have the right to vote in Pennsylvania, *see Erfer*, 568 Pa. at 135-36, 794 A.2d at 330, the scope of redress available to the individual Petitioners must be personal. They have not demonstrated personal aggrievement. *See* COL No. 5, *supra*.[3]

23. No other Petitioner has intervened.

C. Evidence, Presumptions, Law of the Case, and Related Doctrines

24. Declarations and evidence from witnesses not averred to be unavailable within the meaning of Pa.R.C.P. No. 4020 are not admissible at the permanent injunction stage. *Cf. Missett v. Hub Int'l Pa., LLC*, 6 A.3d 530, 543-45 (Pa. Super. 2010) (error to apply the

[3] This is consistent with Judge Simpson's conclusion at an earlier stage in this action that a more reasonably suited remedy would be for Petitioners to seek relief for the few qualified electors on whom Act 18 imposes an unconstitutional burden – to the extent there are such persons – so that their experience could be construed in light of the Election Code provisions that are already extant to provide relief, namely, absentee ballots, provisional ballots, and judicial remedies on or after Election Day. *Applewhite v. Commonwealth*, No. 330 MD 2012, 2012 Pa. Commw. Unpub. LEXIS 757, at *93 (Aug. 15, 2012) (*Applewhite I*).

standard set forth in Rule 1531 to admit deposition testimony of witnesses not shown to be unavailable within the meaning of Pa.R.C.P. No. 4020); *see also* Pa.R.C.P. No. 1531(a).

25. Determinations that a preliminary injunction should issue are irrelevant to the determination whether relief should issue after a full hearing on the merits at which Petitioners must establish a right to relief. *Humphreys*, 83 Pa. Commw. at 181, 466 A.2d at 35 ("The preliminary injunction concludes no rights and is a final adjudication of nothing. The earlier determination by the court that Appellants had standing and that the proposed development of Bird Park violated the Project 70 Act were determinations directed toward preserving the status quo pending a final determination on the merits and were not binding on the chancellor in the hearing on the permanent injunction.") (quotations and citations omitted).

26. Certain determinations by Judge Simpson (and the Supreme Court) warrant deference pursuant to the law of the case and coordinate jurisdiction doctrines. *See Ario v. Reliance Ins. Co.*, 602 Pa. 490, 505, 980 A.2d 588, 597 (2009) ("[A] court involved in the later phases of a litigated matter should not reopen questions decided by another judge of the same court or by a higher court in the earlier phases of that matter."); *Pa. St. Ass'n of Cnty. Comm'rs v. Commonwealth*, 52 A.3d 1213, 1230 (Pa. 2012) (discussing law of the case and *stare decisis*); *Goldey v. Trs. of Univ. of Pa.*, 544 Pa. 150, 155-56, 675 A.2d 264, 267 (1996) (observing that motions different in kind are not subject to the limitations of coordinate jurisdiction, although motions of the same kind should not be revisited "unless intervening changes in the facts or the law clearly warrant a new look at the question"). These include Judge Simpson's credibility findings and his determination that Count IV fails as a matter of law.

27. Judge Simpson already found the testimony and report of Professor Barreto not credible and unreliable. *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *16-18; *see also* FOF 543-544.

28. Dr. Marker's report and testimony should be given no weight and is not competent expert testimony because he improperly adopted the findings of Professor Barreto without conducting any independent analysis. *See Primavera v. Celotex Corp.*, 415 Pa. Super. 41, 52, 608 A.2d 515, 521 (1992) (stating that an expert is permitted to rely on another's opinion or data provided that "the expert [is] actually acting as an expert and not as a mere conduit or transmitter of the content of an extrajudicial source"); *see also Woodard v. Chatterjee*, 827 A.2d 433, 444-45 (Pa. Super. 2003) (the mere repeating of a non-testifying expert's opinions is not testimony that can be credited).

29. The Pennsylvania Rules of Evidence limit the evidence that can be judicially noticed and require that it be so reliable that its "accuracy cannot reasonably be questioned. *See* Pa.R.E. 201. An agency's policies and procedures are properly the subject of judicial notice. *E.g.*, *Hill v. Dep't of Corr.*, 64 A.3d 1159, 1165 n.3 (Pa. Cmwlth. 2013). Generalizations cannot be judicially noticed where specific and individualized evidence is required. *Kinley v. Bierly*, 876 A.2d 419, 422-23 (Pa. Super. 2005) (improper to accept an expert's characterization of horses as vicious rather than requiring a demonstration that the horse in question had vicious tendencies). Information from internet sites such as MapQuest is not properly judicially noticed because it "does not have the same inherent accuracy as do professionally accepted medical dictionaries, or encyclopedias, or other matters of common

knowledge within the community." *Commonwealth v. Brown*, 839 A.2d 433, 435-37 (2003); *see also Hoffman v. Misericordia Hosp. of Phila.*, 439 Pa. 501, 508 n.12, 267 A.2d 867, 871 n.12 (1970) (court erred in taking notice of information in opinions of other courts as to whether it was possible to detect the presence of hepatitis virus in blood); *Conchado v. Commonwealth of Pennsylvania, Dep't of Transp., Bureau of Driver Licensing*, 941 A.2d 792, 794 (Pa. Cmwlth. 2008) ("The trial court erred in taking judicial notice of information contained in an uncertified, unauthenticated photocopy of a disputed document. While a court in appropriate circumstances may take judicial notice of court records, this does not include unauthenticated photocopies which look like court records but are not stipulated to be genuine and accurate.").

30. Petitioners bear the burden of rebutting the presumptions under the Statutory Construction Act. *See, e.g.*, *Rubin v. Bailey*, 398 Pa. 271, 275-76, 157 A.2d 882, 884 (1960) ("the presumption of constitutionality is not conclusive but the requirements for rebutting it are indeed exacting").

31. The legislature is presumed to have been familiar with the law as it existed prior to an amendment and with judicial decisions construing statutes. *The Birth Ctr. v. The St. Paul Cos.*, 567 Pa. 386, 404, 787 A.2d 376, 387 (2001); *Absentee Ballots Case*, 423 Pa. 504, 512-13, 224 A.2d 197, 202 (1966) ("Finally, it must be presumed that the legislature was familiar with the prior decisions of this Court regarding the scope of review after an extensive *two-stage* election controversy and this Court's application of the rule of narrow certiorari in proceedings involving the validity of absentee ballots under the 1960 amendments. There is no evidence in the 1963 amendments which indicates any affirmative legislative purpose to change our rulings in this respect. We will not strain the legislative language to arrive at the unrealistic construction urged by appellant.") (citation omitted).

32. The persons at the Departments of State, Transportation, and Aging are presumed to have acted in good faith and in performance of their statutory obligations. *Commonwealth Office of the Governor v. Donahue*, 59 A.3d 1165, 1170 (Pa. Cmwlth. 2013) (rejecting the suggestion that an agency should be presumed to act in bad faith in complying with statutory duties); *Washington Park, Inc. Appeal*, 425 Pa. 349, 353, 229 A.2d 1, 3 (1967) (recognizing the presumption that "officials have performed their duties in good faith; the burden upon the appellant to prove the contrary, that the officials acted in a capricious, or fraudulent manner, or that their actions were based upon private motives inconsistent with the public welfare, is a heavy one").

33. The Secretary of the Commonwealth has been charged with the implementation of the Election Code and of Act 18. *See* Am. Pet. for Review ¶ 75.

34. "[A]n agency must be given deference in the administration and interpretation of its own statutory authority." *Reich v. Berks Cnty. Intermediate Unit No. 14*, 861 A.2d 1005, 1012 (Pa. Cmwlth. 2004) (*citing* 1 Pa. C.S. § 1921(c)(8)). The Court will "not disturb administrative discretion in interpreting legislation within an agency's own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action." *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 588 Pa. 95, 140, 902 A.2d 476, 503 (2006); *Piunti v. DOL & Indus.*, 933 A.2d 135, 138 (Pa. Cmwlth. 2007) (an interpretation by agency charged with administration of a particular law is normally accorded deference, unless clearly erroneous).

II. PETITIONERS CANNOT ESTABLISH A RIGHT TO EITHER REMEDY THEY SEEK FOR RELIEF ON ANY OF THEIR CLAIMS.

35. Absentee ballots are not at issue in this case. *See* Pet'rs' Pretrial Br. at 2 n.2.

36. The General Assembly has the authority to "regulate[] the exercise of the elective franchise" in order "to preserve the purity of the ballot." *Contested Election of Owen Cusick*, 136 Pa. 459, 467, 20 A. 574, 575 (1890); *see also F.C.C. v. Beach*, 508 U.S. 307, 315-16 (1993) ("precise coordinates of the resulting legislative judgment [are] virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally").

37. In weighing the interest that the General Assembly has in preventing fraud, "the terms of the Election Code must be strictly enforced." *In re 2003 Election for Jackson Twp. Supervisor*, 840 A.2d 1044, 1047 (Pa. Cmwlth. 2003).

38. Act 18 changed the preexisting law – a law Petitioners do not contest – by requiring all voters appearing at the polls in person to present identification, requiring that identification to be photo identification, and expanding the list of acceptable photo ID. *Compare* 2002 P.L. 1246, § 12, *with* 2012 P.L. 195, § 1.

39. The General Assembly was entitled to address in-person voting in a way that was different than the way it addressed absentee ballots, which do not require instant verification of identification. *See Clements v. Fashing*, 457 U.S. 957, 969-70 (1982) (upholding a statute that restricted the candidacy of some but not all officials against an Equal Protection challenge); *see also In re Absentee Ballots Case (No. 2)*, 431 Pa. 178, 184, 245 A.2d 265, 268 (1968) (refusing to declare unconstitutional a statute that did not require ballots to be mailed earlier).

40. Act 18 is within the class of statutes conditioning the exercise of a right on the demonstration of eligibility. *In re Nomination Certificate of T. Milton Street*, 499 Pa. 26, 37, 451 A.2d 427, 432 (1982); *Friedman v. Corbett*, No. 39 MAP 2013, 2013 Pa. LEXIS 1539, at *9 (July 16, 2013) ("Finally, although the right of suffrage has been recognized as 'fundamental' and 'pervasive of other basic civil and political rights,' electors do not have an inherent, inviolate, pre-constitutional right to vote for judicial candidates whose terms of office are unaffected by a constitutionally-mandated retirement age."); *Key v. Bd. of Voter Registration of Charleston Cnty*, 622 F.2d 88, 90 (4th Cir. 1980) ("a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot" – the requirement that a person take steps to register before the election is valid); *Caba v. Weaknecht*, 64 A.3d 39, 52-53 (Pa. Cmwlth. 2013) (licensing scheme enables persons to exercise their Second Amendment rights); *Foti v. McHugh*, 247 F. App'x 899, 901 (9th Cir. 2007) (a right to access to courts is not a "constitutional right to enter the federal building anonymously").

41. Provisional ballots are "an adequate remedy" for persons who do not bring compliant identification to the polls. *Crawford*, 553 U.S. at 197-98 (lead plurality opinion).

42. Under Pennsylvania common law, "indigency" means that "the indigent person need not be helpless and in extreme want, so completely destitute of property, as to require assistance from the public. Indigent persons are those who do not have sufficient means to pay for their own care and maintenance. 'Indigent' includes, but is not limited to, those who are completely destitute and helpless. It also encompasses those persons who have some limited means, but whose means are not sufficient to adequately provide for their maintenance and support." *Health Care & Retirement Corp. v. Pittas*, 46 A.3d 719, 723-24 (Pa. Super 2012), *allowance for appeal denied*, __ Pa. __, 63 A.3d 1248 (2013); *cf.* 35 P.S. § 449.3 (Health Care Cost Containment Act) (defining indigent care as "[t]he actual costs, as determined by the council, for the provision of appropriate health care, on an inpatient or outpatient basis, given to individuals who cannot pay for their care because they are above the medical assistance eligibility levels and have no health insurance or other financial resources which can cover their health care").

43. The term "fee" is ambiguous, capable of meaning either that one is charged for the transaction in question or that one incurs charges in the course of a transaction. *Prudential Prop. & Cas. Ins. Co. v. Sartno*, 588 Pa. 205, 216-17, 903 A.2d 1170, 1177 (2006) ("We find that there are at least two perspectives that are reasonable: (1) using a broad interpretation, Sartno did carry property for a fee because his deliveries occurred during the course of his employment, for which he received wages; or (2) under a narrower interpretation, Sartno did not carry property for a fee because there was no delivery charge."). Accordingly, construing the provision so that all terms have meaning, the indigency affirmation is not meaningless. 1 Pa. C.S. § 1921(a).

44. Under the broader meaning of *Sartno*, any person who cannot pay the costs associated with getting an ID for voting purposes can sign the indigency affirmation, rendering the affirmation a very real safety net. *See Sartno*, 588 Pa. at 216-17, 903 A.2d at 1177.

45. Petitioners have not met their "heavy burden of proof" to establish that Act 18 "clearly, palpably, and plainly violates the Constitution." *In re Nomination Certificate of T. Milton Street*, 499 Pa. at 30, 451 A.2d at 429 (*quoting Nat'l Wood Preservers, Inc. v. Commonwealth, Dep't of Envtl. Res.*, 489 Pa. 221, 414 A.2d 37 (1980)).

A. Petitioners Cannot Prevail on Their "Statutory" Challenge Because the Statute is Capable of Being Construed Consistent with its Purposes and in a Manner that Provides Electors with the Protections Envisioned by the General Assembly.

46. Act 18 provides that an individual appearing at the polls to vote in person must present photo identification to cast a regular ballot.

47. Any Commonwealth-issued photo identification that meets the requirements of Act 18 is acceptable ID under 25 P.S. § 2602(z.5).

48. 25 P.S. § 2626 is in Article II of the Election Code, which identifies the powers and duties of the Secretary of the Commonwealth. *See* 25 P.S. §§ 2621-2626. Section 2626 provides that PennDOT shall, notwithstanding the provisions of 75 Pa.C.S. § 1510(b), issue

an identification card described in 75 Pa.C.S. § 1510 at no cost to any registered elector who signs an oath or affirmation. *See* 25 P.S. § 2626(b).

49. Section 1510(b) provides, with emphasis added:

> Identification card. – The department shall, upon payment of the required fee, issue an identification card to any person ten years of age or older who has made application therefor *in such manner as the department shall prescribe* or whose driver's license has been surrendered to the department because of a suspension or revocation of an operating privilege under this or any other title. Program participants in the Address Confidentiality Program under 23 Pa.C.S. Ch. 67 may use a substitute address designated by the Office of Victim Advocate as their address. Except as provided in subsection (j), the identification card shall have substantially the same content as a driver's license but shall clearly indicate that it is not a driver's license. Upon failure of any person to pass any examination required under section 1514 (relating to expiration and renewal of drivers' licenses), the department shall, where appropriate, issue a complimentary identification card as an expression of gratitude for years of safe driving. The card shall only be issued upon receipt of the person's driver's license.

50. In 1988, PennDOT readopted and promulgated a regulation for identification card applications. The regulation requires documentation to verify the individual's date of birth and identity. *See* 67 Pa. Code § 91.4. The "notwithstanding" provision in Act 18 encompasses all restrictions contemplated by § 1510(b) that would impede Act 18.

51. Given the statutory presumptions, 1 Pa.C.S. §§ 1921(c), 1922, each term in Act 18 should be construed to have meaning, and the statute should not be read as having been drafted as absurd or incapable of performance.

52. The Secretary of the Commonwealth is entitled to deference and a presumption of good faith in administering the duties assigned to her by statute. Given that a Court affords deference to the Secretary in administration of statutes within her ambit, and given that her interpretation of Act 18 is (a) in good faith, and (b) consistent with the plain text of the statute and (c) intended to make it easier for electors to secure identification, the DOS ID is within the auspices of the statute. *See Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Review*, 603 Pa. 374, 394, 983 A.2d 1231, 1243 (2009); *In re Condemnation Proceeding by Redevlopment Auth. of Phila.*, 595 Pa. 241, 247, 938 A.2d 341, 345 (2007).

53. The DOS ID is a free proof of identification issued by PennDOT notwithstanding the provisions of 75 Pa.C.S. § 1510(b).

54. The DOS ID does not render Act 18 impossible of performance. It does not render the statutory protection illusory or the statute superfluous; the need for the statute

would be served and the mischief it seeks to avoid would be remedied. *See Frazier v. Workers' Comp. Appeal Bd.*, __ Pa. __, 52 A.3d 241, 249 (2012); *Swick v. Tarentum Borough Sch. Dist.*, 141 Pa. Super. 246, 255, 14 A.2d 898, 902 (1940); *Wilkes-Barre Area Vocational Sch. v. Greater Nanticoke Area Sch. Dist.*, 115 Pa. Commw. 73, 79, 539 A.2d 902, 905 (1988); *Sundstrom's License*, 47 Pa. D. & C.2d 1, 5-6 (Pa. Ct. Com. Pl., Chester Cnty. 1969). Further, Act 18 does not create an "insurmountable" administrative obstacle. *Yeager Unemployment Compensation Case*, 196 Pa. Super. 162, 172, 173 A.2d 802, 807 (1961).

55. If the DOS ID did not fall within the auspices of Act 18, there would have been no reason for the Supreme Court to remand the matter for further findings as to whether it met the liberal access requirement. *Kremer*, 529 Pa. at 613, 606 A.2d at 439; *Applewhite II*, 54 A.3d at 5.

56. The constitutional impediments to securing an ID as contemplated by the statute have dissipated: there has been reasonable time for implementation; Respondents have engaged in reasonable education efforts; and for in-person voters there is reasonable means available for gaining access a proof of identification that complies with the statute. This is demonstrated by the Petitioners who have obtained compliant ID.

57. Neither Act 18 nor the Supreme Court's decision established an "effectiveness" standard to measure the Commonwealth's voter education efforts. The Supreme Court contemplated reasonable education efforts. *Applewhite II*, 54 A.3d at 4-5; 25 P.S. § 2626(a), (c). The Commonwealth's campaign, which reached the entire Commonwealth through multiple media formats, including in-person outreach, was reasonable.

58. Act 18 requires ID to be given to registered electors. *See* 25 P.S. § 2626(b).

59. Petitioners' complaints about those applicants whose applications were delayed because registration could not be verified do not undermine the constitutionality of Act 18 because (1) the Sharepoint records were never intended to track who does or does not have ID; (2) the time it takes for registration to be processed by a county is not at issue here; and (3) inconsistencies between SURE and an individual's application form may result in delays, but those delays are caused by the legacy data and/or applicant error. *See* FOF 112-115. These delays cannot be attributed to a constitutional flaw in the statute or its provisions.

60. Information in drivers' records is subject to the protections of the Driver Privacy Protection Act, 18 U.S.C. § 2721, *et seq.*, and 75 Pa.C.S. § 6114.

61. Department of State personnel have properly been restricted from access to the PennDOT database.

62. Act 18 is not internally inconsistent.

63. Act 18 has been implemented in accordance with the purposes of the statute.

64. Act 18 is a statute to which deference is owed to the Secretary.

B. Act 18 Does Not Violate the Equal Protection Clause of the Pennsylvania Constitution.

65. The protections of the Equal Protection Clause under the Pennsylvania Constitution are coterminous with those provided by the United States Constitution, and, as a consequence, Federal Equal Protection Clause analysis informs Pennsylvania constitutional jurisprudence. *Erfer*, 568 Pa. at 138-39, 794 A.2d at 332.

66. The United States Supreme Court has already held that requiring voters to present photo identification at the polls does not violate the Federal Equal Protection Clause. *Crawford*, 553 U.S. at 199-200 (lead plurality opinion); *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354-55 (11th Cir. 2009).

67. Protection of the integrity of the electoral process and protection against fraud are legitimate goals. *See Crawford*, 553 U.S. at 191; 42 U.S.C. § 1973gg(b).

68. While the legislative purpose of a statute is to be articulated, no evidence of the facts underlying those purposes needs to be adduced. *Crawford*, 553 U.S. at 194-96; *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008) ("In requiring the City to present evidence of past instances of voting fraud, the district court imposed too high a burden on the City. Just as the Supreme Court did not require Indiana to present specific instances of past conduct to justify its photo identification requirement, we do not require Albuquerque to make such a showing.").

69. Pennsylvania applies the same balancing test that was applied in *Crawford*. *In re Berg*, 552 Pa. 126, 133, 713 A.2d 1106, 1109 (1998) ("Although voting is of the most fundamental significance under our constitutional structure, the right to associate for political purposes through the ballot is not absolute. To subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest would tie the hands of states seeking to assure that elections are operated equitably and efficiently." (*Burdick v. Takushi*, 504 U.S. 428 (1992))); *see also In re Nomination Papers of Nader*, 588 Pa. 450, 465, 905 A.2d 450, 459-60 (2006) ("Even if the statute did burden ballot access, which it did not, the burden would be reasonable and rationally related to the interest of the Commonwealth in ensuring honest and fair elections."); *Shankey v. Staisey*, 436 Pa. 65, 72, 257 A.2d 897, 900 (1969) (General Assembly had a reasonable basis in weighing the competing interests of a candidate's right to have his or her name on the ballot and the avoidance of a cluttered ballot).

70. The inconveniences and vagaries of life are not undue burdens. *Crawford*, 553 U.S. at 197-98.

71. The Pennsylvania statute is constitutional applying the balancing test of *Crawford*.

72. Petitioners presented no evidence of discriminatory intent in the passage of Act 18. *Cf. Erfer*, 568 Pa. at 139-40, 794 A.2d at 332.

73. Disparate impact is not a viable theory under equal protection analysis. *Meggett v. Pa. Dep't of Corr.*, 892 A.2d 872, 887 n.31 (Pa. Cmwlth. 2006); *see Crawford*, 553 U.S. at 207 (Scalia, J., concurring) ("Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment, weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional." (citation omitted)).

74. Petitioners did not introduce evidence of disparate impact because the groups that Petitioners claim are disadvantaged by the statute are provided for by the terms of the statute itself. Such groups include senior citizens, college students, military persons, disabled persons, and low-income persons. 25 P.S. § 2602(z.5).

75. Act 18 requires the same demonstration of identity from each in-person voter while at the same time reasonably providing different means for persons who might be differently situated to satisfy the statutory requirements. Petitioners have failed to demonstrate any unfair discrimination in Act 18. *See* FOF 628-631.

76. Petitioners have not demonstrated that Act 18 contains any classifications that are unreasonable, arbitrary or have no fair and substantial relation to the object of Act 18. *See Danson v. Casey*, 33 Pa. Commw. 614, 628-29, 382 A.2d 1238, 1245 (1978), *aff'd* 484 Pa. 415, 399 A.2d 360 (1979).

77. Act 18 reasonably distinguishes between persons voting at the polls (who need to demonstrate their identity at the time of voting) and those persons voting absentee (whose identity can be verified between the time the ballot is submitted and the time the ballot is counted). The identification requirement for absentee ballots is consistent with the requirements for voter registration forms and is more liberal than Alabama's. *See* FOF 166; Ala. Code § 17-0-30.

78. PennDOT ID has ben held in other contexts to be non-discriminatory. *Cf. Commonwealth v. Robinson*, 581 Pa. 154, 199, 864 A.2d 460, 487 (2004) (recognizing that the jury pool was drawn from the list of licensed drivers in the county and refusing to reconsider prior determination that that is a statutorily permissible basis for setting a jury pool); *Commonwealth v. Johnson*, 576 Pa. 23, 55-56, 838 A.2d 663, 682 (2003) (rejecting Sixth and Fourteenth Amendment challenge to Berks County's use of a driver's license list because the mere fact that one race may appear underrepresented does not demonstrate systematic exclusion); *Commonwealth v. Lopez*, 559 Pa. 131, 148-49 & n.14, 739 A.2d 485, 494-95 & n.14 (1999) (finding no Sixth Amendment fair cross-section violation and citing Superior Court findings that the use of a driver license registration list appears "'more representative than most' because the possession of a driver's license is such a widespread and desirable privilege" (citation omitted)); *Commonwealth v. Smith*, 548 Pa. 65, 84, 694 A.2d 1086, 1095-96 (1997); *Stukes v. Lawler*, Civ. Action No. 4:10-CV-024, 2011 U.S. Dist. LEXIS 54686, at *1 (M.D. Pa. May 23, 2011), adopting magistrate opinion in 2011 U.S. Dist. LEXIS 54653, at *42 (M.D. Pa. Apr. 19, 2011) (finding no error in the state court rejection of habeas petitioner's challenge – a

ruling "entirely consistent with federal case law which has described the use of driver license rolls as a means of establishing a jury venire list as a practice 'using facially neutral criteria [that] allow[s] no opportunity for subjective or racially motivated judgments.'"); *Blasi v. Attorney Gen.*, 120 F. Supp. 2d 451, 477 (M.D. Pa. 2000) (noting that no authority was cited for the proposition that driver's license lists are unconstitutionally exclusionary; "absent a showing that distinct groups have been hindered in attempts to obtain driver's licenses, neither the Sixth Amendment nor the Fourteenth Amendment is violated by Lackawanna County's use of a list of licensed drivers"), *aff'd w/o opinion*, 275 F.3d 33 (3d Cir. 2001); *Murray v. Schriro*, No. CV 93-775-PHX-DGC, 2005 U.S. Dist. LEXIS 22296, at *51-56 (D. Ariz. Sept. 29, 2005) (rejecting Sixth Amendment fair cross-section and Fourteenth Amendment equal protection claims when the jury pool is drawn from an 18 month old list of licensed drivers and observing that young persons and rural persons are not distinct groups for such claims).

79. The statute is generally applicable and non-discriminatory. *Cf. Ortiz v. City of Philadelphia*, 28 F.3d 306, 313-14 (1994) (determining that the fact that a significant number of the voters purged from the rolls – "a legitimate means by which the State can attempt to prevent voter fraud" – were minorities did not constitute a showing that minorities had less opportunity to participate in the political process, because the purge is based on voting behavior, not on race).

80. Under the balancing test applied in *Berg* and in *Crawford*, Petitioners have failed to demonstrate a violation of the Equal Protection guarantees of the Pennsylvania Constitution.

C. Act 18 Does Not Violate the Free and Equal Clause of the Pennsylvania Constitution.

81. As the Supreme Court set forth in *Erfer*:

> Elections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, . . . and when no constitutional right of the qualified elector is subverted or denied him.

568 Pa. at 175, 794 A.2d at 353 (citations omitted).

82. The Free and Equal Clause is subject to gross abuse review. *In re Nomination Petition of Rogers*, 908 A.2d 948, 954 (Pa. Cmwlth. 2006) (recognizing that the "Supreme Court has applied a 'gross abuse' standard to determine whether election statutes violate the 'free and equal' clause, thereby giving substantial deference to the judgment of the legislature. This stands in stark contrast to the standard utilized under the federal constitution, which employs a 'balancing test.'") (citing *Winston v. Moore*, 244 Pa. 447, 457, 91 A. 520, 523 (1914)).

83. There is no greater protection under the Free and Equal Clause than under the Equal Protection Clause.

84. Disenfranchisement does not result from a person's failure to take the steps necessary to exercise the franchise but from a state's total denial of the electoral franchise to a class of residents such that there was no way in which the members of that class could have made themselves eligible to vote. *Rosario v. Rockefeller*, 410 U.S. 752, 757-58 (1973); *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969).

85. Pennsylvania law is consistent with *Rosario*. *E.g.*, *Democratic Cnty. Comm. Appeal*, 415 Pa. 327, 339-40, 203 A.2d 212, 218-19 (1964). Indeed, in *Patterson v. Barlow*, 60 Pa. 54, 75 (1869), the Supreme Court explained:

> But to whom are the elections free? They are free only to the qualified electors of the Commonwealth. Clearly they are not free to the unqualified. There must be a means of distinguishing the qualified from the unqualified, and this can be done only by a tribunal to decide, and by evidence upon which a decision can be made. The Constitution does not provide these, and therefore, the legislature must establish the tribunal and the means of ascertaining who are and who are not the qualified electors, and must designate the evidence which shall identify and prove to this tribunal the persons and the qualifications of the electors.

86. The General Assembly is the branch of government with the power and duty to regulate the franchise. *Mixon*, 759 A.2d at 449 ("The power to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government. Errors of judgment in the execution of the legislative power, or mistaken views as to the policy of the law, or the wisdom of the regulations, do not furnish grounds for declaring an election law invalid unless there is a plain violation of some constitutional requirement. . . . Legislation may be enacted which regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself.").

87. Petitioners have conceded that a request to show identification at the polls is a regulation. H.T. (Pet'rs' Closing) at 1975:23-1976:13.

88. The Pennsylvania Supreme Court has consistently upheld regulations on elections. *See, e.g.*, *Shankey*, 436 Pa. at 69, 257 A.2d at 899 ("equal" elections were promoted by "requiring every candidate who desires to appear on the general electoral ballot to have satisfied the same condition – the show of support by a set number of people"); *Oughton v. Black*, 212 Pa. 1, 5-6, 61 A. 346, 347-48 (1905); *DeWalt v. Bartley*, 146 Pa. 529, 544, 24 A. 185, 187-88 (1892); *Contested Election of Owen Cusick*, 136 Pa. at 475, 20 A. at 578; *Patterson*, 60 Pa. at 82-83.

89. Act 18 does not deny any class of persons a right to vote. The statute expressly provides alternatives for persons to obtain identification or vote if they cannot.

90. Act 18 is designed to protect the right of electors to exercise the franchise and have a ballot cast and honestly counted within the meaning of *Patterson* and *Erfer*.

91. Reasonable requirements in the form of regulations of evidence of eligibility are constitutionally permissible. Any provision – whether addressing "registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects, at least to some degree, the individual's right to vote." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *see also Key*, 622 F.2d at 90 ("a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot" – the requirement that a person take steps to register before the election is valid); *Foti*, 247 F. App'x at 901 (courthouses may require persons to show identification; the right to access to courts is not a "constitutional right to enter the federal building anonymously"); *Caba*, 64 A.3d at 59 ("But by enacting the licensing scheme for carrying a concealed weapon, the General Assembly created a path by which Commonwealth citizens who meet certain statutory eligibility criteria are entitled to obtain the benefit of exercising their constitutional right to bear arms in defense of themselves in a way that is not automatically available to all Commonwealth citizens.").

92. Act 18 is a substantive provision of the Election Code related to fraud. *See In re Appeal of James*, 377 Pa. 405, 410, 105 A.2d 64, 66 (1954); *see also In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 577 Pa. 231, 249, 843 A.2d 1223, 1234 (2004) (holding that courts cannot ignore substantive provisions of Election Code, particularly where they are designed to protect against fraud).[4]

93. "At every primary and election each elector who appears to vote and who desires to vote shall first present to an election officer proof of identification" is a specific and express mandate. *See* 25 P.S. § 3050(a); *Canvass of Absentee Ballots*, 577 Pa. at 244-45, 843 A.2d at 1231-32 (interpreting "shall" as mandatory and imperative, and concluding an interpretation of the statute as directory "would render its limitation meaningless and, ultimately, absurd"); *cf. In re Gallagher*, 468 Pa. 19, 22, 359 A.2d 791, 792 (1976) ("While we appreciate and share the hearing court's deep concern for the rights of those seeking public office, we cannot permit a resort to sophistry in an effort to avoid the clear mandates of the Election Code.").

94. Act 18 cannot be liberally construed in contradiction of the statute. *See Canvass of Absentee Ballots*, 577 Pa. at 241, 249, 843 A.2d at 1229, 1234 (rejecting Commonwealth Court's suggestion that avoiding disenfranchisement is more important that adhering to strict language of statute); *Appeal of Yerger*, 460 Pa. 537, 544-45, 333 A.2d 902, 906 (1975) (reversing trial court for liberally construing statute designed to protect against fraud); *Democratic Cnty. Comm. Appeal*, 415 Pa. at 340, 203 A.2d at 219 (stating court cannot misinterpret or ignore clear and pertinent election laws to preserve voter errors that voided

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[4] The requirement to adhere to substantive provisions also distinguishes the class of ballot-counting cases premised on a procedural irregularity, either in the ballot count or the election administration. *See, e.g., In re Recount of Ballots*, 457 Pa. 279, 287-88, 325 A.2d 303, 308-09 (1974); *In re Absentee Ballots Case (No. 1)*, 431 Pa. 165, 173-74, 245 A.2d 258, 262-63 (1968); *Upper Adams Sch. Dist. Election Contest*, 49 Pa. D. & C.2d 121, 124-25 (Pa. Ct. Com. Pl., Adams Cnty. 1969)

ballots); *see also* Pet'rs' Pretrial Br. at 10, 21 (*citing Perles v. Northumberland Cnty. Return Bd.*, 415 Pa. 154, 202 A.2d 538 (1964)).

95. As in *Crawford*, Act 18's reliance on PennDOT to issue identification does not render the statute unconstitutional. *Crawford*, 553 U.S. at 203 n.20 ("[T]he fact that public transportation is not available in some Indiana counties tells us nothing about how often elderly and indigent citizens have an opportunity to obtain a photo identification at the BMV, either during a routine outing with family or friends or during a special visit to the BMV arranged by a civic or political group such as the League of Women Voters or a political party.").

96. Petitioners' concerns about people's carelessness or loss of identification do not render Act 18 unconstitutional: "a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of SEA 483; the availability of the right to cast a provisional ballot provides an adequate remedy for problems of that character." *Crawford*, 553 U.S. at 197-98.

D. Petitioners Have Provided No Basis to Revisit the Dismissal of Count IV (the Additional Qualification Count).

97. In the May 24, 2013 Order Sustaining in Part and Overruling in Part Respondents' Preliminary Objections, Judge Simpson (for the second time) sustained the demurrer to Petitioners' claims under Art. VII § 1 of the Pennsylvania Constitution, relying on *Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Cmwlth. 2000) (*en banc*), *aff'd per curiam*, 566 Pa. 616, 783 A.2d 763 (2001), and *Martin v. Haggerty*, 120 Pa. Commw. 134, 548 A.2d 371 (1988).

98. The coordinate jurisdiction rule is a part of the same "family" of rules as law of the case, jurisprudential doctrines that serve to promote judicial economy, protect the settled expectations of the parties, ensure uniformity of decisions, maintain consistency throughout a matter, effectuate "proper and streamlined administration of justice" and enable finality. *Commonwealth v. Starr*, 541 Pa. 564, 574, 575, 664 A.2d 1326, 1331, 1332 (1995).

99. There is no basis to revisit Judge Simpson's ruling. *See Ario*, 602 Pa. at 505, 980 A.2d at 597 ("[A] court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter.").

E. Petitioners Have Not Satisfied the Heavy Burden to Warrant Declaratory Relief.

100. Petitioners have not established that Act 18 is invalid in its effect upon their "rights, status, or other legal relations." 42 Pa.C.S. § 7533.

101. Declaratory judgment is inappropriate when the request is based on determinations that are "primarily factual." *Kozlowski v. Dep't of Corr.*, No. 691 M.D. 2004, 2008 Pa. Commw. Unpub. LEXIS 492, at *15-16 (Sept. 24, 2008) (observing that a grant of

declaratory relief would not resolve the controversy "as to whether the DOC is providing, or is able to provide, a safe and practical indoor exercise alternative under the Act").

102. Petitioners seek a factual determination that the Commonwealth's implementation of the statute does not comport with liberal access. *See* Am. Pet. for Review at 68. The Court declines to grant such relief.

103. Petitioners seek a legal determination that the "Photo ID requirement" violates Article 1, Sections 1, 5, and 26 and Article VII, Section 7 of the Pennsylvania Constitution.[5] Am. Pet. for Review at 68.

104. The requirement to show photo identification is not disenfranchising. *See* Determination on Renewed Application for Preliminary Injunction, slip op. at 7 (Pa. Cmwlth. Aug. 16, 2013) (*Applewhite VII*) ("merely *asking* an elector to produce compliant photo ID does not cause disenfranchisement"); *Applewhite v. Commonwealth*, No. 330 MD 2012, 2012 Pa. Commw. Unpub. LEXIS 749, at *8-9 (Oct. 2, 2012) (*Applewhite III*) (rejecting Petitioners' claim that requiring photo identification can cause disenfranchisement); *see also Applewhite II*, 54 A.3d at 4-5 (noting Petitioners' concession that requiring photo identification is constitutional).

105. Respondents are entitled to a declaration that Act 18 is constitutional. *See, e.g.*, *Friedman*, 2013 Pa. LEXIS 1539, at *9 (declaring that neither mandatory retirement age nor end-of-year standardization is unconstitutional); *Local 22 v. Commonwealth*, 531 Pa. 334, 347, 613 A.2d 522, 529 (1992) (rejecting challenge to Act 6 and concluding that it was constitutional and the agreement entered into between the authority and City of Philadelphia valid and lawful); *see also Pa. St. Ass'n of Cnty. Comm'rs*, 52 A.3d at 1216 (where construction of the relevant statutes and constitutional provisions will determine the rights of the parties, the declaratory action is justiciable).

F. Petitioners Have Not Satisfied the Heavy Burden of Establishing a Right to Permanent Injunctive Relief.

106. The failure to establish a right to declaratory judgment is fatal to a claim for permanent injunctive relief. *Allegheny Sportsmen's League v. Ridge*, 790 A.2d 350, 361 (Pa. Cmwlth. 2002), *aff'd*, 580 Pa. 149, 860 A.2d 10 (2004).

107. In order to obtain permanent injunctive relief, a party must establish the following elements relative to their claims: (1) the right to relief is clear, (2) the injunction is necessary to avoid an injury that cannot be compensated by damages, and (3) greater injury will result from refusing than from granting the relief requested. *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 588 Pa. 95, 117, 902 A.2d 476, 489 (2006). Petitioners have failed to establish any of these prongs.

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[5] The request for relief does not comport with the remainder of the Amended Petition. For example, there are no averments concerning Art. VII § 7; presumably, Petitioners refer instead to Art. VII § 1, addressed in § II.D *supra*.

108. Petitioners have not shown that their right to relief is clear as a matter of law, nor that an injunction is necessary "to prevent a legal wrong for which there is no adequate redress at law," *Buffalo Twp. v. Jones*, 571 Pa. 637, 644, 813 A.2d 659, 663-64 (2002), because they conceded that there is nothing inherently objectionable in a requirement to show a form of photo identification at the polls. Indeed, they seek to reinstate a requirement that electors show a form of identification – just not every elector at every election and not precisely the same forms of proof of identification. Pet'rs' Proposed Order, Post-Hearing Brief (Sept. 28, 2012) (proposed court enter an order that would have preserved provisions of the Election Code "that were in effect prior to the enactment of Act 18").

109. Petitioners have made no showing that the statutory remedies are inadequate. *See Mazin v. Bureau of Prof'l & Occupational Affairs*, 950 A.2d 382, 390 (Pa. Cmwlth. 2008) (permanent injunction improper where procedures had changed and anyone else affected had an adequate remedy at law to challenge the Board's action).

110. Petitioners did not satisfy their obligation to show that greater injury would result from refusing the relief requested rather than granting it. *See, e.g.*, FOF 1-19; *cf. Kuznik*, 588 Pa. at 146, 902 A.2d at 506.

111. An injunction against Act 18 as a whole would be overbroad, because Petitioners have attacked only limited and severable statutory provisions. Injunctions must be tailored to only the offending portions of a statute, unless – as is not the case here – the valid provisions are so inseparable that it "cannot be presumed that the legislating body 'would have enacted the remaining valid provisions without the void one' or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.'" *Bd. of Revision of Taxes v. City of Philadelphia*, 607 Pa. 104, 134, 4 A.3d 610, 627-28 (2010).

G. Petitioners Have No Basis for Seeking an Award of Fees and Costs.

112. This case was brought solely asserting claims under the Pennsylvania Constitution.

113. Absent authorization by statute or contract, or through another established exception, attorneys' fees are not recoverable. *Merlino v. Delaware County*, 556 Pa. 422, 425-26, 728 A.2d 949, 951 (1999) ("This Court has consistently followed the general, American rule that there can be no recovery of attorneys' fees from an adverse party, absent an express statutory authorization, a clear agreement by the parties or some other established exception."); *Commw. Dep't of Transp. v. Hruska*, 156 Pa. Commw. 139, 143, 625 A.2d 1339, 1341 (1993); 42 Pa.C.S. § 2503.

114. There is no contract or statute that provides for the recovery of fees or costs by Petitioners for bringing this action.

115. There is no conduct by Respondents that could warrant an imposition of fees as a sanction in this action, and none has been averred. In particular, "there is no meaningful difference between the stubbornly litigious, unreasonable, and bad faith conduct identified in Declaratory Judgment Act caselaw, and the arbitrary, vexatious, obdurate, and bad

faith conduct identified in Section 2503." *Regis Ins. Co. v. Wood*, 852 A.2d 347, 351-52 (Pa. Super. 2004); *see also Hruska*, 156 Pa. Commw. at 143-44, 625 A.2d at 1341-42.

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Respectfully submitted,

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PROOF OF SERVICE

I, Timothy Keating, certify that I am this day serving by electronic mail (by agreement of the parties), the foregoing Respondents' Proposed Conclusions of Law, which service satisfies the requirements of Pa.R.A.P. 121.

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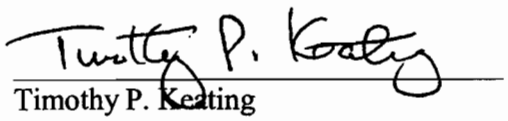
Date: August 30, 2013



Timothy P. Keating