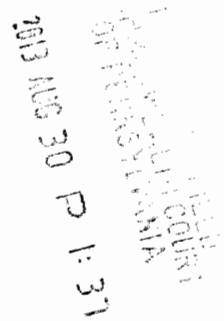
IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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' BRIEF IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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INTRODUCTION

Foreclosed from challenging Act 18 under the United States Constitution by the United States Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); , Petitioners initially filed a Petition for Review asserting claims arising solely under the Pennsylvania Constitution and seeking injunctive and declaratory relief prior to the pending November 2012 General Election. After the Supreme Court opinion in *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 757 (Aug. 15, 2012) ("*Applewhite I*"), Petitioners amended their Petition for Review to argue generally that persons will have trouble securing ID for "future elections." They also revised their assertions about the Petitioners, because most of the individuals had gotten ID before the Amended Petition was filed.

And they added a claim that the DOS ID is a creature of whim and thus cannot provide the liberal access to a proof of identification that the Pennsylvania Supreme Court found the statute to contemplate, comparing the Department of State to a prosecutor promising to exercise discretion in a reasonable way in enforcing an overbroad ban on animal cruelty. Am. Pet. at ¶ 166, citing *United States v. Stevens*, 559 U.S. 460, 480 (2010).

As the record in this case amply shows, the Department of State has not relied on whim in its implementation of Act 18. It has instead done exactly what the General Assembly and the Supreme Court instructed it to do – to administer the statute based on the language and intent of the statute and the Election Code as a whole to assure that Act 18 provides liberal access to statutorily compliant forms of identification. Petitioners' assertions to the contrary have no basis either in fact or in law.

STATEMENT OF FACTS

Respondents adopt and incorporate by reference the proposed findings of fact submitted contemporaneously with this brief.

SCOPE AND STANDARD OF REVIEW

The Petitioners seek declaratory and injunctive relief. In order to warrant declaratory relief, Petitioner must demonstrate that the statute is invalid in its effect upon their "rights, status, or other legal relations." 42 Pa.C.S. § 7533. Moreover, a declaratory judgment is at the discretion of the Court and should not be awarded unless a grant of relief would finally resolve the controversy or uncertainty that prompted the request – of particular concern 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 (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.").

A 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). 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 Commissioners*, 588 Pa. 95, 117, 902 A.2d 476, 489 (2006). The fact that the Court entered a preliminary injunction is irrelevant to the determination whether relief should issue after there has been a full hearing on the merits at which the Petitioners were to

establish a right to relief. *Humphreys v. Cain*, 83 Pa. Commw. 176, 181, 466 A.2d 32, 35 (Pa. Cmwlth. 1984).

Finally, in this case at least, an injunction against the statute as a whole is by definition overbroad, because the Petitioners have attacked only limited and severable statutory provisions, and it is well-settled that injunctions must be tailored to only the offending portions of a statute. *Bd. of Revision of Taxes v. City of Philadelphia*, 607 Pa. 104, 135, 4 A.3d 610, 627-28 (2010).

ARGUMENT

Respondents adopt and incorporate by reference the proposed conclusions of law submitted contemporaneously with this brief.

I. Petitioners Lack Standing to Bring this Action.

A Petitioner must establish standing as a pre-requisite to maintaining an action. *See Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 888 A.2d 655 (2005). Although standing is solely a prudential doctrine in Pennsylvania, it is nevertheless a threshold issue, and the burden of establishing standing still rests with the Petitioners. *E.g., Wm. Penn Parking Garage, Inc. v. Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975); *In re Hickson*, 573 Pa. 127, 821 A.2d 1238 (2003). It has not been satisfied here.

A. The Individual Petitioners Lack Standing.

On May 24, 2013, Judge Simpson entered an order sustaining in part and overruling in part Respondents' preliminary objections. He sustained the objections as to five of the seven individual Petitioners – all of whom had obtained ID that complied with the provisions of the statute during the course of the litigation (Viviette Applewhite, Gloria Cuttino, Nadine Marsh, Joyce Block and Devra Mirel "Asher" Schor) without prejudice to "future particularized as-applied claims." The two remaining individual Petitioners, Bea Bookler and Wilola Lee, have

not provided any testimony to "particularize" their claims since the Amended Petition for Review was filed.

In 2012, Ms. Lee averred that she did not have a birth certificate and could not get an ID. Now, of course, she does not need a birth certificate, a fact that she apparently concedes in Paragraph 34 of the Amended Petition ("She is, however, eligible to obtain a DOS ID since she allegedly does not need any documents to do so."). She did not come forward to testify under oath and subject to cross-examination about whether or how she has been "prevented [ ] from traveling to a PennDOT center to obtain the ID"[1] since the litigation began – and, if so, whether she has pursued other forms of ID. The mere filing of a pleading does not sustain one's burden through trial.[2] *See Smith v. Commonwealth*, No. 260 M.D. 2008, 2009 Pa. Commw. Unpub. LEXIS 563 (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 (Pa. Cmwlth. 2004) (recognizing right to vote is a generalized interest, but finding standing only upon a showing by petitioner of personal harm); *Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Cmwlth. 2000), *aff'd*, 566 Pa. 615, 703 A.2d 763 (2001) (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).

In paragraphs 48-51 of the Amended Petition for Review, Ms. Bookler avers that she lives in a care facility eligible to issue ID, has an expired drivers' license, and voted absentee in

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[1] From her address, it appears that she is between 2 and 3 miles away from the West Oak Lane Drivers' License Center, open Tuesday-Saturday 8:30-4:15.

[2] By filing the Amended Petition, Petitioners virtually withdrew their original Petition, and were required to establish the averments in the amended pleading. *Humphreys*, 83 Pa. Commw. at 181, 466 A.2d at 35; *Stilp v. General Assembly*, 596 Pa. 62, 71 n.11, 940 A.2d 1227, 1232 n.11 (2007) (admonishing trial court for failing to apply facts to standing analysis).

November 2012. Like Ms. Lee, Ms. Bookler has not testified since the averments in the Amended Petition. There was evidence about Ms. Bookler at the preliminary hearing, however, and Respondents supplemented that information at trial. As a result, the record shows that Ms. Bookler has had a Pennsylvania driver's license, which expired within the last eight years. She moved from Montgomery County to Chester County in October 2008 and under the prior statute would have had to present a proof of identification the next time she voted in-person at the polls. H.T. (Marks) 1659:20-1660:12. She voted absentee in the November 2012 General Election. Pre.T. (Bookler) 949:4-10, 957:6-958:5; H.T. (Marks) 1659:20-1660:7. She lives at Devon Senior Living, 445 Valley Forge Road, Devon, Pennsylvania. Pre.T. (Bookler) 945:1-3; P-39, a personal care home that issues Act 18-compliant ID. *See* H.T. (Sweeney) 1826:23-1827:3; *see also* R-87.

In other words, if Ms. Bookler's health improves such that she does not need to vote absentee, her residence has ID for her; and if she wants a secure ID instead, she can contact PennDOT, just as Mr. Rogoff did. It follows that her individual interests have not been adversely affected by Act 18; to the extent she wishes to vote, she has multiple means of obtaining a proof of identification to do so. *See 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."). [3]

[3] Petitioners have not pleaded that the Court should invoke the exception to the traditional standing requirement exists for taxpayer standing. *See Application of Biester*, 487 Pa. 438, 409 A.2d 848 (1979). Nor can

B. The Organizational Petitioners Lack Standing.

In *Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325 (2002), the Court concluded that the Pennsylvania State Democratic Committee did 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...." *Id.* at 136 (internal citations and quotations omitted). It follows that only electors have standing to bring claims here. Another, perhaps more traditional way of reaching the same conclusion is that the organizational Petitioners are not within the zone of interest of the claimed constitutional or statutory provisions because they cannot vote in Pennsylvania. *See Johnson v. Am. Standard*, 607 Pa. 492, 8 A.3d 318 (2010) (recognizing Pennsylvania courts should apply "zone of interests" analysis where an immediate interest is not apparent).

The averments of the organizational petitioners – only one of which presented testimony at the Hearing on the Merits – would not establish standing in any event. All that the three organizational petitioners claim is that the passage of Act 18 has led them to divert or re-allocate resources to education efforts, or has increased demand for their services. *See* Amended Petition ¶¶ 61, 64, 67. And in the case of both HAP and NAACP, the demand to which they refer is a demand for *birth certificates* – documentation that is not necessary in order to obtain compliant ID under the statute. Said another way, neither education nor the pre-existing commitment to

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they, both because this is not a statute enacted to benefit a class of persons who for that reason would not challenge the enactment and, related, any elector who is in fact aggrieved by the statute can certainly bring claims under it. *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."

assisting persons to obtain birth certificates is injury, because neither is a harm imposed by the statute. *See Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428 (D.C. Cir. 1995) (stating that unless challenged provision is in direct conflict with an organization's mission, the organization will likely be unable to establish standing).

The organizational Petitioners have offered no evidence that they were subjected to operational costs beyond those normally expended to review, challenge, and educate the public about elections and voting – educational efforts that would equally include education about Act 150 or Act 18. *See id.*; *Nat'l Ass'n of Home Builders v. EPA,* 667 F.3d 6 (D.C. Cir. 2011); Pre.T. (Jordan) 1126:3-11, 1127:3-11, 1142:14-1144:8 (mission includes education); H.T. (Carty) 1200:2-5 (mission of LWV is to educate people about the League and voting), 1217:6-12 (agreeing it would be contrary to LWV mission to oppose Act 18). Moreover, 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*, 133 S. Ct. 1138 (2013).[4]

There is nothing before the Court to suggest – much less demonstrate– representative standing; none of the organizational petitioners has identified a single member of that organization whose vote is impacted by Act 18. *See Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Cmwlth. 2012) (concluding petitioner lacked organizational standing because it failed to identify specific members who would have standing). An interest in preserving the right to vote

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[4] Pennsylvania has its own standing doctrines, but it also looks to federal decisions on standing as helpful to the analysis. *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, Inc.*, 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, 474 A.2d 1120 (1984). Accordingly, 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.

does not suffice. *Cf. id.* (finding organization's claimed interest did not suffice to confer standing).

It follows from the fact that Petitioners cannot satisfy even the basic standing requirements that they certainly cannot satisfy the more stringent standing requirements when asserting claims 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).[5] As Judge (later Justice) Greenspan framed it: standing in actions seeking declaratory and injunctive relief requires a showing of "actual present harm or a significant possibility of future harm" that was "reasonably certain to occur." *Nat'l Rifle Assoc. v. City of Philadelphia*, No. 1472-041036, 2008 Phila. Ct. Com. Pl. LEXIS 159, at *4, 12-13 (Phila. Ct. Com. Pl. June 30, 2008), *aff'd*, 977 A.2d 78 (Pa. Cmwlth. 2009). Here, Act 18 has not caused the organizational Petitioners – or the individual Petitioners – actual or imminently threatened harm, and the failure of the Petitioners even to try to demonstrate otherwise means that their case fails on this threshold question.

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[5] In particular, injunctive relief requires an immediate personal harm, *id.*, and declaratory relief requires an actual controversy as to a person's rights, status, or other legal relations affected by a statute (or contract). 42 Pa.C.S. § 7533. "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.'" *Van Doren v. Mazurkiewicz*, 695 A.2d 967, 971 (Pa. Cmwlth. 1997); *Kozlowski*, 2008 Pa. Commw. Unpub. LEXIS 492, at *14 ("In order to sustain an action under the Declaratory Judgments Act, a party must demonstrate an 'actual controversy' indicating imminent and inevitable litigation, and a direct, substantial and present interest. The satisfaction of this burden in seeking declaratory relief is founded upon the axiom that this Court will not issue advisory opinions, which lie beyond our jurisdiction." (internal citations omitted)); *Smith*, 2009 Pa. Commw. Unpub LEXIS 563, at *11-12 & n.5.

II. Petitioners Have Failed to Establish a Right to Relief on the Merits.

A. The General Assembly Acted Within Its Legislative Authority in Amending Act 150.

It has been well-settled for more than a century that the General Assembly may prescribe rules regarding the evidence of qualifications that an elector must establish in order to have his ballot received. Indeed, as the Supreme Court explained in 1869:

> But to whom are 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 qualifications of the electors.

Patterson v. Barlow, 60 Pa. 54, 75 (1869). Even though regulations on the exercise of a right require steps to be taken in accordance with those regulations – steps that may require forethought and may even be inconvenient – the law is clear that neither deadlines nor inconveniences place a burden upon a right that amounts to a denial. *Contested Election of Owen Cusick,* 136 Pa. 459, 475, 20 A. 574, 578 (1890). The Supreme Court has held repeatedly that such evidence is a regulation to be defined by the legislature. Although there are numerous sorts of election-related challenges arising under Pennsylvania law – many of which inform the questions here – this is at its core what the *Patterson* court referred to as an "ascertainment" case. How can the electorate be confident that each ballot was cast by the only registered elector who had the right to cast that ballot?

In the 1990s, the federal government enacted the National Voting Rights Act ("NVRA") to promote increased participation in the electoral system while protecting against fraud. 42 U.S.C. § 1973gg(b) (identifying both vote-promoting and integrity-preserving purposes of the Act). This balance has informed subsequent legislation – both federal and state – including the

Help America Vote Act ("HAVA"), which responded to the tremors of public disaffection in response to the Bush/Gore election and follow-on court cases. Thus, House Report No. 107-329 (2009), identifies one of HAVA's purposes as obligating states to maintain accurate lists so that they could minimize both opportunities for and incidences of fraud.

Apart from that legislation, in 2005,James Baker and Jimmy Carter sought to establish a bipartisan framework to restore confidence in elections and the electoral process. Building Confidence in U.S. Elections, Report of the Commission on Federal Election Reform, September 2005, available at: http://www1.american.edu/ia/cfer/report/full_report.pdf. One of the recommendations in that report was that states enact legislation requiring electors to bring photographic identification with them to the polls. Some states had already taken that step. *See, e.g.*, Ky. Rev. Stat. Ann. § 117.227; La. Stat. Ann. § 18:562; La. Stat. Ann. § 40:1321; Mich. Comp. Laws Ann. § 168.523. And in the decade since the Carter-Baker report was authored, more states have followed suit.

Pennsylvania considered a photo identification statute in 2002 and again in 2006. As it happened, HAVA was enacted in 2002, and the General Assembly chose to enact a statute patterned after the federal provisions. Act 150 accordingly set forth an evidence of qualification scheme that targeted persons who would not be expected to be known to pollworkers (those voting for the first time in an election district) and identified a list of proofs of identification that favored – but were not limited to – photographic identification. Prior Section 1210 required a person appearing for the first time in an election district to present one of the following forms of photo identification:

> (1) a valid driver's license or identification card issued by the Department of Transportation;
> (2) a valid identification card issued by any other agency of the Commonwealth;
> (3) a valid identification card issued by the United States Government;

(4) a valid United States passport;
(5) a valid student identification card;
(6) a valid employe identification card; or
(7) a valid armed forces of the United States identification card] proof of identification.

25 P.S. § 3050 (2008). An election officer was to examine the proof of identification and sign an affidavit that it had been done. If the elector did not have the forms of photo identification in 25 P.S. § 3050(a.1), there was a failsafe provision; the elector could provide:

(1) nonphoto identification issued by the Commonwealth, or any agency thereof;
(2) nonphoto identification issued by the United States Government, or agency thereof;
(3) a firearm permit;
(4) a current utility bill;
(5) a current bank statement;
(6) a paycheck;
(7) a government check.

Id.

Dissatisfied, the General Assembly enacted a photographic identification law in 2006, but it was vetoed. P-2092; H.B. 1318, (2005 Reg. Sess.), vetoed 3/15/2006. It was not until Indiana's law had been upheld by both the United States and Indiana Supreme Courts that the General Assembly re-examined the efficacy of Act 150 and decided to modify the evidence of qualifications provision. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *League of Women Voters v. Rokita*, 929 N.E. 2d 758 (Ind. 2010).

The law currently before the Court modified existing law in two ways. It made certain changes to the list of acceptable proofs of identification – adding to and relaxing requirements for photographic proofs of identification while narrowing the circumstances in which a non-photographic proof of identification could be used; and it made a regulation applicable to voters moving into a new election district more broadly applicable. Although Petitioners repeatedly frame their argument in absolute terms, arguing that no burden can be imposed upon the right to

vote and no person can be deterred from the polls or have a ballot go uncounted, they have to concede that *some* burden can be constitutional; otherwise, the Petitioners could not argue for a return to the prior statute, which imposed just such a burden on some electors. And, indeed, they have conceded the constitutionality of applying such a requirement to all electors:

> Counsel 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.

Applewhite v. Commonwealth, 54 A.3d 1, 4-5 (Pa. 2012) (*Applewhite II*").

Accordingly, Petitioners' challenge comes down to a question whether *Act 18's* requirement somehow exceeded the authority of the General Assembly to "prescribe[] another method of reaching the same result" by amending a statute and thereby "exercise[ing] a power clearly contemplated by the Constitution." *Winston v. Moore*, 244 Pa. 447, 456, 91 A. 520, 522 (1914). The "precise coordinates of the resulting legislative judgment [are] virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 315-16 (1993); *see also Kariher's Petition*, 284 Pa. 455, 131 A. 265 (1925) (recognizing law is a progressive science and changes may be made over time).

Under these principles, the General Assembly had every right to "regulate[] the exercise of the elective franchise" in order "to preserve the purity of the ballot." *Contested Election of Owen Cusick*, 136 Pa. at 467, 20 A. at 575. It could have done so by amending the statute to eliminate just the firearm permit, or both the firearm permit and a current utility bill, or simply to delete the option for nonphoto identification without any further amendment. Or it could have determined to keep some or all of the forms of identification but to amend the statute to require

all electors to produce identification at every election. These choices would each be equally within the purview of legislative judgment. The fact that the General Assembly undertook two modifications at once, making the rule generally applicable *and* modifying the list of proofs of identification does not affect the analysis. *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).

Had the General Assembly simply eliminated the nonphotographic options from Act 150, as it certainly could have done, there would have been far fewer options for forms of identification. The Petitioners contend that the revisions that occurred were all somehow designed to make proofs of identification less accessible. The record presented at the hearing establishes instead that the General Assembly paid close attention from the outset to the ways in which to make identification *more* accessible, to provide for alternatives where warranted, and to avoid undue burdens on persons who might be less likely to possess a PennDOT secure ID prior to Act 18's passage.

From the outset, the General Assembly directed PennDOT to issue ID without charge, strengthened the provisional ballot provisions, and added a self-reporting indigency affirmation. Moreover, as the testimony at trial showed, there were numerous amendments to the bill between its passage in the House and its ultimate enactment. In particular, the early drafts of the bill – which had added in a composite of provisions from other states' laws – exempted only a narrow group of senior citizens (those who lived in polling places)[6] and had limited the colleges and

[6] *See* Ind. Code Ann. § 3-10-1-7.2(e) ("A voter who 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 a primary election"). As originally proposed, in Pennsylvania, such a voter would be exempt during *all* elections *after* the first time voting in that polling place. H.B. 934.

universities that could issue ID to those within the state system of higher education. H.T. (Oyler) 1127:16-1129:2.

Petitioners have suggested that it would have been better to enact the bill that required persons living in care facilities that also serve as polling places to bring a proof of identification only the first time. It is an odd suggestion, given how few polling places are in care facilities and given that counties are statutorily directed to prioritize polling places in municipal or public buildings within the municipality, and schools over private establishments. H.T. (Marks) 1624:3-1625:6; *see* 25 P.S. §§ 2726-2731. The use of such private buildings is by statute disfavored, meaning that, at best, only a few Pennsylvanians would benefit from the statute as originally drafted. But as finally enacted, licensed care facilities, assisted living residences, and personal care homes were all authorized to issue IDs – an amendment that permitted facilities under the supervision of the Departments of Health, Public Welfare, and Aging to provide proofs of identification to the approximately 130,000 residents of these facilities – and others. H.T. (O'Donnell) 1255:11-14, 1257:13-23, 1296:5-7.

At the same time, the General Assembly revised the previously limited state system schools to reach 835,000 – more than eight times as many students – by including those students attending all public and private accredited colleges and universities. H.T. (Oyler) 1127:16-1129:2; H.T. (Wecker) 1572:9-23. Prior to passage, Act 18 also extended the expiration date on PennDOT-issued ID cards by twelve months and modified the requirement that a name conform to "substantially conform."[7] It was also amended to permit a person who forgot the identification to provide an affirmation and mail, fax, or email the copy of the ID after the election. And it was amended to include a soft rollout at the first election. H.T. (Oyler)

[7] Ind. Code Ann. § 3-5-2-40.5(a)(1) requires that the document "shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record."

1123:16-1125:19. Although Petitioners have argued that Respondents consistently chose to make Act 18 harder to comply with, the facts are to the contrary. Because the determination of how to modify the identification requirements was within the General Assembly's discretion, Petitioners' attempt to challenge the statute based upon their individual preferences cannot be sustained. *E.g., In re Absentee Ballots Case (No. 2),* 431 Pa. 178, 180-81, 245 A.2d 265, 266-67 (1968) (refusing to declare unconstitutional a statute that did not require ballots to be mailed earlier); *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934) ("If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone."). The General Assembly acted both within the scope of its legislative discretion and with particular care to address the needs of those that warranted special provision in the Act. Accordingly, all of Petitioners' challenges on the merits fail.

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

The Petitioners filed this suit when the statute was first passed – before any implementation had occurred. Ironically, the Petitioners have characterized Respondents' implementation of the statute as a "moving target" and have sought to recharacterize the administrative determinations that Respondents made to fulfill the terms of the statute (and, later the Supreme Court's opinion) as "reactive" to Petitioners. Moreover, the Petitioners seek to attribute the administrative challenges attendant upon Hurricane Sandy – which occasioned three Executive Orders the week before the November General Election and increased the pressures of processing voter registration applications for counties already delayed by the influx of

registration applications that occur during a presidential election year – to a flaw in the statute itself. H.T. (Marks) 1678:22-1680:5; 1680:6-18. There is no such flaw.

Instead, the course of procedure here explains why courts disfavor facial challenges, which "often rest on speculation," *Clifton v. Allegheny Cnty.*, 600 Pa. 662, 705, 969 A.2d 1197, 1223 (2009), and "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Caba v. Weaknecht*, 64 A.3d 38, 49 (Pa. Cmwlth. 2013). And, as the Supreme Court contemplated, over time the Petitioners (though perhaps not their counsel) realized that there were "reasonably available means for procuring identification" – and they took advantage of those means. *See Applewhite II*, 54 A.3d at 5. The statute as written is internally consistent and fully capable of implementation according to its terms in a way that ensures that people who want to vote are able to do so.[8] 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*, 600 Pa. at 705, 969 A.2d at 1223. As the *Crawford* Court held

> In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes "excessively burdensome requirements" on any class of voters. A facial challenge must fail where the statute has a "'plainly legitimate sweep.'" When we consider only the statute's broad application to all Indiana voters we conclude that it "imposes only a limited burden on voters'

[8] As Judge Simpson recognized in dismissing the claims of the majority of the original Petitioners, if there are narrow and fact-specific complaints, they would be properly addressed in a suit targeted at resolving "future particularized as-applied claims." May 24, 2013 Op. Granting in Part and Overruling in Part Preliminary Objections, the complaints of the Petitioners. But the Petitioners in this suit have presented nothing warranting such relief. In that regard, it is worth noting that Judge Simpson predicted that Ms. Bookler would vote by absentee ballot – and she did. *See Applewhite I* (noting that based on demeanor observed during preliminary injunction hearing, Ms. Bookler and witness Taylor Floria would likely qualify to vote by absentee ballot); H.T. (Marks) 1660:6-7. Any as-applied remedy would need to be narrowly tailored to the harm *as pleaded and proven* – and there is none here for these Petitioners. *See, e.g., Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Commw. 2012) (affirming trial court's order permanently enjoining respondent from terminating the particular petitioner's employment pursuant to statute at issue).

> rights." The "'precise interests'" advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483. Finally we note that petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute. When evaluating a neutral, nondiscriminatory regulation of voting procedure, "[w]e must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."

553 U.S. 181, 202-03 (2008) (internal citations omitted). Inasmuch as the Pennsylvania Supreme Court in this case did not find the statute facially invalid, it is surprising that Petitioners seek to invalidate the statute. It is obvious that 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. 26, 30, 451 A.2d 427, 429 (1982), *quoting Nat'l Wood Preservers, Inc. v. Commonwealth, Dep't of Envtl. Res*, 489 Pa. 221, 414 A.2d 37 (1980). Indeed, they have not even contested some portions of the statute.

It should be noted as well that Petitioners have argued that a facial and an as-applied challenge are the same thing in this case. *See* Pet'rs' Pretrial Memo. at 27. Oddly enough, they rely on *Clifton* for that proposition, even though the Supreme Court expressly reversed Judge Wettick's determination that the statute at issue there was facially invalid.

But as-applied relief needs to be warranted by and tailored to the Petitioners themselves – which is why standing requires an individual to show as a threshold matter that the act complained of caused personal aggrievement. *See Nixon v. Commonwealth*, 789 A.2d 376 (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 (Allegheny Cnty. Ct. Com. Pl. 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 (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). It does not mean "as implemented," in the sense that the Petitioners would have it read – where any challenge to the administration of the statute is perceived as a flaw in the statute itself.

The Court in *Clifton* did not undermine the basic principle that for an as-applied challenge, a court has an obligation to tailor injunctive relief to redress the harm actually demonstrated. *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Cmwlth. 2012). Instead, because of the nature of the inquiry at hand, the narrow remedy had to be one that brought the values within a taxing district (there, Allegheny County) into line with one another. *See Clifton*, 600 Pa. at 689, 969 A.2d at 1213. This was so because the challenge being raised by the taxpayers was that the failure to reassess had led to non-uniform assessments, and because the burden of demonstrating that a method of valuation violates the Pennsylvania Constitution's Uniformity Clause "is essentially the same the taxpayer must demonstrate" in an administrative proceeding challenging a "single, isolated misassessment of his own property." *Id.*

In contrast, Judge Wettick[9] had found that the failure of the Commonwealth's assessment laws to require periodic property reassessments "inevitably produces arbitrary, unjust, and unreasonably discriminatory results." *Id.* at 680, 969 A.2d at 1208. For that reason, he had found the law itself to be facially invalid, but had stayed the effect of his finding, given the implications across the 67 counties of the Commonwealth. The trial court's award of a facial remedy was *reversed*, however, because, as the Supreme Court recognized, "the assessment laws neither require nor do they prohibit periodic property reassessments." *Id.* at 669, 969 A.2d at

[9] Judge Wettick's experience with Allegheny County's taxing history is reminiscent of an Orphan Court judge's recitation of experience with decades of trust administration.

1201; *see also* 600 Pa. at 715, 969 A.2d at 1229 ("Thus, it may be that a county could ensure a constitutional base year method of assessment by requiring periodic reassessment through an ordinance or as a matter of practice) *with Clifton v. Allegheny Cnty.*, No. 20 WM 2011, 2011 Pa. LEXIS 3061 at *5 (Dec. 16, 2011) (Baer, J., dissenting) ("[W]e should now fill the legislative void concerning the demarcation between constitutionality and unconstitutionality for purposes of Pennsylvania's Uniformity Clause in real property assessment cases.").

C. The Statute Is Not Facially Invalid or Incapable of Performance.

The Supreme Court's prior determination in this case recognizes that there is no inherent flaw in Act 18. Had that Court found otherwise, it would have entered a permanent injunction at the same time that it reversed the preliminary injunction, as it did in *Kremer v. Grant*, 529 Pa. 602, 606 A.2d 433, 435 (1992), a case in which it recognized as it 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*. *Id.* at 613, 606 A.2d at 439. As a result of its findings, the Supreme Court in *Kremer* remanded for entry of a permanent injunction.

Far from finding the statute invalid, the Supreme Court recognized that sufficient time and opportunity to implement the statute might well address the concerns that had been raised. It perceived a possible "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 7-8. As a result, the Supreme Court remanded 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.* (emphasis added).

Consistent with the Supreme Court's mandate, the Department launched its media campaign in 2012 to promote public awareness of Act 18, to direct persons where to go to get more information about the law and how to obtain ID if they did not have it for voting purposes, and to encourage citizens to vote. H.T. (Royer) 719:1-9. That has been a mission of the agency for a long time. *Id.* At the Preliminary Injunction Hearing, Professor Barreto had testified – as Professor Mutz did at this hearing – that people were ignorant of the law. Judge Simpson rejected that contention outright as "contrary to testimony by most, perhaps all, of the lay witnesses who testified for Petitioners. They explained that they have been aware of Act 18 and have some idea whether their current IDs will meet the requirements of the new law." *Applewhite I*, at *17-18; *E.g.*, Pre.T. (Lee) 90:4-12; Pre.T. (Bookler) at 952:17-24; Rem.T. (Pannell) at 329:2-16; P-2100 at 6:12-7:4 (Marsh); H.T. (Baker) at 63:9-14; P-1430a at 20:10-23 (Norton); P-1427 at 14:3-9 (Howell).

The ads directed people to the hotline, the email address, and the website – all of which were very busy during the months leading up to the November 2012 General Election. The VotesPA number had been in effect before the November 2012 election cycle. H.T. (Royer) 725:8-11. Just prior to the election, there were several thousand calls to the hotline in some weeks and over a million hits on the VotesPa.com website. R-42; H.T. (Mutz) 949:1-17; H.T. (Royer) 725:25-726:6. People emailed the Department via the website, and the Department responded. H.T. (Royer) 724:24-725:7. Extra personnel were hired to handle the phone calls and emails. H.T. (Royer) 725:25:726:12. The Department also engaged in social media outreach through Facebook and Twitter, as well as the website. H.T. (Royer) 732:1-7.

In addition, the Secretary, Mr. Royer, and others spent a great deal of time traveling around the Commonwealth in 2011 and 2012, visiting senior facilities, churches, community

centers and township buildings – even a funeral parlor. H.T. (Royer) 753:1-22. As many as 300 people attended these events, some of which were co-sponsored by legislators. H.T. (Royer) 753:13-17. Others were held in conjunction with well-known civic organizations. H.T. (Royer) 753:23-756:14. At least one was recorded and later shown on an in-house cable channel. H.T. (Royer) 756:12-14. The fact that so many people interacted with the Department about Voter ID shows the reasonableness of the Department's education efforts.[10]

1. The Statute's Terms Cover the Population.

And, as set forth above, that is precisely what has happened. The implementation of the statute has alleviated the concerns that Petitioners raised when the case was in a different procedural posture. In addition to the increase in the number of care facilities and universities issuing compliant ID, the forms of identification available from PennDOT have given people a choice of accessible ID; with the DOS ID, PennDOT is issuing three free proofs of identification. For those who cannot – or do not wish to – produce documentation, the DOS ID is available at the same place as the two (photo and non-photo) secure forms of free non-driver's ID. From August 2012 through early July 2013, 3,830 persons have obtained a no-charge DOS ID. P-2072; H.T. (Myers) at 1325:4-1327:2. At the same time as the DOS ID has been available, other forms of identification have become increasingly available and more readily accessible. Indeed, for those persons who already have records on file with PennDOT, including expired records, documentation is not an issue, and as the testimony at the hearings showed, the demand for secure identification is high. Adam Bruckner, the founder of Philly Restart, testified that he helps obtain identification for people who need it for "anything that they need it for," including

[10] The Petitioners brought in an expert who criticized the " effectiveness" of the media campaign – which Professor Mutz defined as knowing "how many people got the message, how many people understood it, how many people responded the way that, you know, they had hoped and went and called or went to the website and so forth." H.T. (Mutz) 840:18-23. While "effective" is not the same standard as "reasonable," Mr. Royer explained that, in fact, many people did call, did go to the website, and did interact with the Department in person, through social media, and through email.

getting a job, finding shelter, entering rehabilitation, and voting. H.T. (Bruckner) 484:22-485:22; 486:17-20. Others testified to the same effect. *E.g.*, Pre.T. (Lee) 87:17-24; Pre.T. (Gonzalez) 147:16-148:25; Pre.T. (Ludt) 250:11-251:14; Pre.T. (Cuttino) 629:15-21, 632:1-7, 633:17-22; Pre.T. (Schor) 675:12-676:25; Pre.T. (Rosa) 866:17-21; Pre.T. (Gray) 1033:18-25.

Indeed, as established at the hearing and before, PennDOT issues approximately 18,000-45,000 new PennDOT IDs each month. Rem.T. (Myers) 66:22-68:18; *see also* P-136. Every year 200,000 of the non-driver's license identification cards are renewed. H.T. (Myers) 1311:19-22. Since Act 18 has gone into effect, PennDOT has issued 12,981 free PennDOT identification cards (*i.e.*, secure IDs for those persons who have affirmed that they need the card for voting purposes – as opposed to the majority of persons who want the card because they want a secure ID for other reasons). P-2072; H.T. (Myers) 1325:4-1327:2. And if an individual did want the secure ID for voting purposes but was mistakenly charged for it, PennDOT has issued and will issue refunds. H.T. (Myers) 1416:23-1417:5; Rem.T. (Myers) 55:14-56:21, 58:21-59:21; Pre.T. (Myers) 742:18-743:15.

In addition, as Mr. Rogoff illustrated, a person whose record is on file – and PennDOT has 38 million digital photos on file dating back to 1994 – can surrender a drivers' license for a secure non-driver's ID by mail. H.T. (Myers) 1345:12-1346:20; *see* H.T. (Rogoff) 694:2-5 (describing PennDOT's confirmation that father-in-law would not need to come in because his photo was on file). The Pennsylvania Vehicle Code entitles individuals with a driver's license to voluntarily surrender their driver's license in exchange for a free non-driver's license identification card. H.T. (Myers) 1305:18-24; *see* 75 Pa.C.S. § 1510(b); 67 Pa. Code § 91.7(a)(1). Accordingly, the number of customers who have access to a free secure PennDOT ID is not limited to those who are getting the non-driver's license for voting purposes. This is

particularly important for senior citizens, the population most likely to stop driving and wish an alternative form of proof of identification. For those persons who are not in PennDOT's system and who are unable to (or who choose not to) produce the documentation to obtain a secure non-driver's ID, the DOS ID is an available alternative.

From the record, it is apparent that the Petitioners have identified senior citizens as the group they believe to be most vulnerable under the statute. Certainly, the two remaining individual Petitioners and almost every one of their fact witnesses was a senior citizen or was relating an experience that an older adult had.[11] The record established at the hearing shows that for these persons, the General Assembly took special efforts to ensure that – to the extent they were voting in person at the polls – they would have access to proofs of identification for voting purposes.

Using census data – as Dr. Siskin did in calculating his demographic information – there are 2,042,166[12] persons over the age of 65 in Pennsylvania. Approximately 1.7 million individuals over the age of 65 have an active Pennsylvania driver's license and another approximately 200,000 individuals over the age of 65 have an active Pennsylvania non-driver's license identification card. H.T. (Myers) at 1304:10-1305:1. In other words, even among senior citizen Pennsylvanians – the ones Petitioners believe are the least likely to have a PennDOT secure ID or to be able to get a PennDOT secure ID, the Petitioners' own expert identified only 140,000 (less than 7 percent) who – based on his faulty analysis – he contended did not already have a current secure PennDOT ID. Even if he were correct – and he is not – the question that

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[11] At closing, counsel suggested that they had put on a college student to provide prior testimony, but the only student who testified at the prior hearing was Taylor Floria, a high school student with a disability, who will be attending his high school until he reaches 21. Pre.T. (Floria) at 599:2-9. The only other young Pennsylvanians who testified at any of the three hearings either already had or obtained ID. Rem.T. (Hockenbury) 416:6-10 (DOS ID); Pre.T. (Schor) 674:12-14; P-24.

[12] Kelly O'Donnell testified that the numbers of persons over the age of **60** was 2.7 million. H.T. (O'Donnell) at 1255:11-14.

the General Assembly asked (and that this Court will as well) is whether the statute provides adequate assurance that they will be able to vote? Or, said another way, would the General Assembly have been reasonable in concluding that 140,000 senior citizens had access to other statutorily compliant forms of ID or did not need it because they voted by absentee ballot?

Even by the most conservative calculations, that question must be answered in the affirmative. When the General Assembly amended Act 18 prior to its passage, it extended to three different classes of care facilities the ability to issue ID, bringing within their sweep **130,000 residents** – in addition to others who are customers or employees of the facilities. H.T. (O'Donnell) 1257:13-19, 1296:5-7, 1257:20-23; H.T. (Oyler) 1125:20-1127:10; R-149. There are also **12,000** permanent absentee and permanent alternative voters who receive ballots automatically for four years. H.T. (Marks) 1658:22-1659:19. Overall, almost 5 percent of electors voted absentee, 241,656 of whom voted by domestic civilian ballots. R-233, Tab EAC-F.[13] In other words, without probing into the extent to which senior citizens have military ID or passports, or another form of compliant ID – or can sign an indigency affirmation – the statute made provision for senior citizens.

2. Petitioners' Use of Multiple Estimates of "People Lacking ID" Confuses the Question Before the Court.

Rather than address whether there is a flaw in the statute, Petitioners have, over the course of the litigation, seized on numbers from experts and Respondents and used them indiscriminately as measures of the persons not covered by the statute. In closing argument, for example, counsel cited to Rebecca Oyler's budget estimate, to Carol Aichele's reference to a Philadelphia survey, to the summer of 2012 merging of driver's license and social security

[13] According to the EAC Report, 5,783,621 persons voted in the November 2012 General Election, 5,488,684 (94.9 percent) of whom voted in person. Election Assistance Commission Report, Exhibit R-233, Tab EAC-F. Of those voting absentee, 241,656 cast domestic civilian absentee ballots, and 18,018 cast overseas ballots under UOCAVA, for a total of 259,674 or 4.49 percent.

number data from the PennDOT database into the SURE database – and to the numbers generated by Professor Barreto in June 2012 and by Dr. Siskin this year. H.T. (closing) 1977:22-1983:19. These wildly divergent numbers were never intended to answer the question whether any of the persons covered by the statute were not provided for by the statute. When Judge Simpson heard testimony about three of the numbers, he reasoned that the number lacking current PennDOT ID was closer to Ms. Oyler's budget estimate of 89,000 than to the 759,000 records that could not be correlated across the PennDOT and SURE databases – and that Professor Barreto's numbers were altogether unreliable. *Applewhite I*, at *13-14. Here, Petitioners have re-tendered the numbers from the prior hearing and have added in others, most notably from Dr. Siskin. As Dr. Wecker explained, and as set forth below, Dr. Siskin did not answer the question that needed to be answered, and the question that he did answer, he did not answer well.

a. The Flaws in Dr. Siskin's Analysis

Dr. Siskin's analysis is seriously flawed, *first*, because he simply compared two databases, identified persons who did not appear to be in both, and inferred that those persons lacked PennDOT ID – and he looked at the persons whose PennDOT ID has expired without examining the limitations in the data; and *second*, because he identified eight older individuals whose IDs had expired and pretended that they represent challenges faced by what he portrays as a much larger group of persons lacking any PennDOT ID.[14] Other courts have rejected similarly flawed data. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) ("The data relied on by the NAACP and voters are incomplete and unreliable. The data matches

[14] As Dr. Wecker explained, H.T. (Wecker) at 1482:18-1483:2, the process that led to the identification of the eight persons in Section VI of the Report was evidence that Dr. Siskin understood that his "match" was only the first step in trying to identify persons who did not have ID. But, because the eight were all people with expired ID, they could not provide any insight into whether his twelve-step matching actually located anyone who lacked ID, and they also could not be said to represent thousands (or hundreds of thousands) of others.

fail to account for other forms of identification that are acceptable under the statute, including the free voter identification cards. The lists also contain inaccuracies. The district judge, for example, erroneously appeared on one of the data match lists as not having a driver's license.")

Dr. Wecker's criticisms of Dr. Siskin's approach show why Dr. Siskin's work is fundamentally unreliable to identify any gaps in the statute. Dr. Siskin posited a question in his report, "The question arises as to how many registered voters in the Commonwealth of Pennsylvania...currently lack such a valid photo ID." But, as Dr. Wecker explained, Dr. Siskin never even tried to answer it. H.T. (Wecker) 1487:7-17. Instead, Dr. Siskin attempted to match a record in one database to a record in another that was not designed to correlate. Yet a failure to find a record in the PennDOT database that matches a record in the SURE database is "not the same thing as if they had no PennDOT ID, and the basic and fundamental problem is that matching process that he's doing is very error-prone, unreliable undertaking." H.T. (Wecker) 1462:13-21. As a result, all of Dr. Siskin's numbers collapse, because, as Dr. Wecker explained, a person cannot generate demographic data from a bad list, and a person cannot "verify" the accuracy of suspect matching by adding a step to steps that are already no good. H.T. (Wecker) 1485:1-20. Dr. Siskin, in contrast, characterized his assignment as "fairly simple and direct," limited only to a comparison of the records in the SURE and PennDOT databases – but from that limited analysis, he purported to determine how many people who were registered to vote either were lacking a PennDOT ID or had a PennDOT ID had expired as of November 5, 2012. H.T. (Siskin) 116: 22-117: 14.

In any database, there are limitations to the data, both because of the decisions made in how the data are entered and reported and because of the limitations on the data that come from

other sources and that affect the inferences that can be drawn from the data.[15] At trial, it became apparent that for three significant groups of people, Dr. Siskin had both misapplied the record data and misunderstood the limitations of the data in the database. As a result, he had vastly overstated the numbers of persons whom he inferred were persons who would be voting but lacked a proof of identification. While Dr. Wecker explained how these problems (and others that he identified) fundamentally undermined the credibility of Dr. Siskin's findings, these three also illustrate why the statute can be seen to function precisely as it should function.

i. Dr. Siskin's Estimates Are Significantly Inflated from Deceased Persons.

Dr. Wecker pointed out – and Dr. Siskin admitted that he had erred – when Dr. Siskin ignored 17,924 persons identified by PennDOT as deceased but included by Dr. Siskin in his numbers of persons who lacked current proof of identification. H.T. (Siskin) 175-176. But adjusting for the number of persons identified as deceased in the database does not mean that the

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[15] These limitations were also apparent when PennDOT matched the database to SURE in the summer of 2012 and sent out 759,000 letters – 150,000 of which were returned and others of which prompted calls to say that the recipient had ID. H.T. (Royer) 745:5-24;746:22-747:1; 745:22-746:21. They are inherent in the fact that the PennDOT database is different from SURE, and that the SURE database was created by combining legacy voter registration systems from each of the counties, and it contains the records of roughly 8 million registered voters. H.T. (Marks) 658:10-13; 659:17-19; 659:17:19. This has had other ramifications as well. When the Department has received DOS ID cards from persons whose registration could not be verified, it has used its Sharepoint database to search the SURE database for possible matches for later human review – much the way Dr. Siskin did. H.T. (Marks) 603:4-22; 610:14-25. But because the counties enter the registration data and because sometimes the information on the voter's application for a DOS ID is different from the voter registration information, there can be delays between the application date and the receipt date. The requirement that PennDOT issue the free ID to a registered elector appears on the face of the statute. 25 P.S. § 2626. The verification process effectuates that requirement in light of the affirmation, which can be signed by persons who are not yet registered voters: "I am a registered voter of the Commonwealth of Pennsylvania or have applied to register to vote." R-76 (emphasis added). Because the exceptions process is the result of persons who are not verifiable because they are not yet registered (or because of inconsistent entries by the applicant), it should raise no concerns. Given the amount of attention the Petitioners have directed toward this process, however, the Court may ask whether it could be revised while being consistent with the statute's terms. The Court could find that an affirmation that stated that the person applying for the DOS ID is a registered voter of the Commonwealth and incorporating by reference the current affirmation in the accompanying application that all identifying facts are accurate, could (subject to challenge) serve as evidence of the elector's registration without running afoul of the principles in cases such as *In re Canvass of Absentee Ballot of Nov. 4, 2003 Gen. Election*, 577 Pa. 231, 243, 843 A.2d 1223, 1230-31 (2004); *Mohamed v. DOT, BMV*, 40 A.3d 1186, 1191 (2012); and *Big Bass Lake Community Ass'n v. Warren*, 23 A.3d 619, 626 (Pa. Cmwlth. 2011). In such a case, the affirmation would not contain the "or have applied to register to vote" provision.

other persons identified by Dr. Siskin are in fact all alive. Both PennDOT and the SURE database use data provided by the Department of Health to show when persons are deceased. The Department of Health recently informed PennDOT that approximately 38,000 additional individuals had died in 2010, 2011, and 2012 that had not been previously reported and, therefore, were not designated as deceased in PennDOT's database. H.T. (Myers) 1334:22-1335:17. PennDOT has not received *any* death data for 2013. *Id.*

Not correcting for unreported deceased persons caused Dr. Siskin's data (and particularly his data on expired PennDOT IDs) to be significantly overstated. From 2006-2010, Pennsylvania reported deaths each year of 124,460, 123,967, 126,332, 123,924 and 123,473, respectively. Commonwealth Department of Health, Health Statistics and Research, Resident Deaths by Age, Sex, Race, and Single Year State Total, 2006-2010, available at http://www.portal.state.pa.us/portal/server.pt?open=514&objID=596038&mode=2. If, as a result of the delays in the Department of Health's reporting, the death data are essentially a year short, there would be roughly 125,000 records included in Dr. Siskin's report of persons who had died but not yet been reported as dead. These people should have been identified and deducted from Dr. Siskin's report, but, because of his simplistic comparison, they were not.

ii. Dr. Siskin's Estimates Are Significantly Inflated from Persons Who Relocated.

Dr. Siskin reported that he found 157,966 persons who had an expired PennDOT drivers' license, but whom PennDOT had identified as having exchanged their PennDOT drivers' license for an out-of-state drivers' license. H.T. (Siskin) 132:11-133:18 It was proper for Dr. Siskin to exclude those persons, but he never asked whether that number was current or was expected to be comprehensive. As Kurt Myers explained, only 38 other states report exchanged licenses to Pennsylvania, and that is a practice, not a requirement. H.T. (Myers) at 1333:22-1334:21.

Accordingly, the number of persons who have moved out of state is understated by at least those who have relocated to the other 12 states and at least by whatever delays in reporting (let alone delays in a driver's exchange of the license) are experienced in the other 38 states. As Dr. Wecker testified, 250,000 people per year move out of state. H.T. (Wecker) 1460:1-7.

iii. Dr. Siskin's Estimates Are Significantly Inflated from Incarcerated Persons Who Cannot Now Vote or Must Vote Absentee.

Felons are ineligible to vote while incarcerated. Misdemeanants are eligible to vote while incarcerated, but they must vote absentee. (H.T.) Marks 1665:14-1668:5. As Dr. Wecker looked through the persons identified by Dr. Siskin, he encountered incarcerated felons. H.T. (Wecker) 1460:16-1461:19. In addition, although the SURE database is supposed to show that persons who cannot vote because they are incarcerated felons are ineligible to vote, those numbers have been vastly underreported to the counties. Indeed, there are currently *no* felons on hold from Philadelphia. *See* R-255; H.T. (Marks) 1664:4-1665:6.

Certainly, it would not be surprising to find that a person who is incarcerated is without identification or has an expired proof of identification. Of course, when prisoners are released, proof of identification will be necessary for them to get a job, apply for services, or find shelter. In fact, it is precisely for this reason that PennDOT has been working with the Pennsylvania Department of Corrections to issue photo identification to prisoners being released from state prisons. H.T. (Myers) 1322:22-1324:25. Since the program became mandatory a year ago, PennDOT has issued approximately 8,600 IDs to released inmates. PennDOT has been asked about expanding the program to federal prisons in Pennsylvania and to Philadelphia County. H.T. (Myers) 1322:22-1324:25.

iv. The Inflated Numbers Overstate the Number of Persons Lacking ID Who Need It to Vote.

Looking only at those three "big picture" groups of significant numbers of persons who should have been excluded from Dr. Siskin's calculations, it is apparent that Dr. Siskin's estimate of persons who lack a current PennDOT ID are vastly overstated. Three other pieces of information that came out at the trial further substantiate this. Dr. Wecker testified that many of the records identified by Siskin as "expired" had been expired for decades – and in some cases for four decades. H.T. (Wecker) 1457:22-1458:5. For a person to have had a PennDOT ID but now to have it expired that long suggests that the person is now in a different circumstance -- such as death, relocation, or incarceration. When looking at what Dr. Siskin found when he looked at persons who had shown recent activity – *i.e.*, those who had voted in the November 2012 General Election, the numbers of persons affected dropped significantly.

	At the Polls	Absentee	Provisionally
Not Matched	79,322	8,197	2,231
Expired	36,456	16,142	698
Total	115,778	24,339	2,929

H.T. (Siskin) 138:20-22; P-2096a at 6; P-2096b, Table1; H.T. (Siskin) 139:13-24; 140:16-17. This is significant because, as Mr. Royer testified, there was almost 68 percent turnout in the General Election in November 2012. H.T. (Royer) 717:11-21, R-229. Yet only 35.6 percent of the supposedly mismatched persons voted in the 2012 General Election, and only 20.5 percent of persons supposedly eligible to vote but possessing an expired license voted in the 2012 General Election. This is further evidence that the numbers reported by Dr. Siskin are significantly overstated.

Of course, even the 116,000 persons Dr. Siskin identified still suffer from the other matching problems Dr. Wecker identified and thus overstate the number of persons who lacked a current PennDOT ID at the November 2012 General Election – 2 percent of the 5,783,521 voters reported in the EAC report, R-233, Tab EAC-F – but one would expect the number of persons lacking PennDOT ID to be much smaller for other elections – such as the May 21, 2013 primary – where turnout was only 11 percent. *Id.* Moreover, because Dr. Siskin derived his demographic tables from his overall data, the unreliability of his overall numbers renders his demographic detail unreliable as well. H.T. (Wecker) 1485:1-20.

v. The Second Part of Dr. Siskin's Inference – That Persons Lacking a PennDOT ID Need One – Is Also Demonstrably False.

As Dr. Wecker explained, it is impossible to address the question whether someone needs a PennDOT ID to vote without knowing that (a) the person is voting in-person at the polls, and (b) the person needs a PennDOT ID, because the person does not otherwise have a statutorily compliant ID. Dr. Siskin did not try to answer this question using his "fairly simple" comparison technique – although, as Dr. Wecker pointed out, at several points in his report, he uses "current PennDOT ID" and statutorily compliant ID interchangeably. *E.g.*, H.T. (Wecker) 1486:7-23.

Petitioners suggested that Dr. Siskin answered the question how many people lack current PennDOT ID and Professor Barreto answered the question how many people lack other forms of ID, but that not only is not the case; it cannot be the case. *First*, Professor Barreto's testimony has already been rejected as not credible. *Applewhite I*, 2012 Pa. Commw. Unpub. LEXIS 757, at *16-18. *Second*, Professor Barreto conducted his survey prior to the introduction of the DOS ID and prior to the time most care facilities and colleges and universities began issuing compliant ID. H.T. (Marker) 434:5-435:5. Although Dr. Marker acknowledged that it is Petitioners' burden to show the lack of available ID, he said that there has been no consideration

to whether the survey should be redone (though it could be) to take into account the changes that have occurred. H.T. (Marker) 439:12-440:4.[16] *Third*, and even more fundamentally, Dr. Siskin calculated that only 2 percent of persons who voted in the high turnout November 2012 General Election lacked current PennDOT ID. This number is less than *any* of the following: the number who voted absentee in November 2012, the number of residents in care facilities, or the number of college students at colleges and universities issuing compliant ID – a figure that includes the 90,000 Penn State students. H.T. (Sweeney) 1819:7-11; R-123.

It is a mathematical impossibility for a person who has current PennDOT ID not to have any compliant ID, but Professor Barreto's testimony was that almost 13 percent of the population lacked *any* form of statutorily compliant ID. Rather than correcting those data, Dr. Marker simply dismissed any precise numbers: "it might be a 1% reduction. You know, so, instead of 10% without, there's 9% without. Those kinds of numbers." H.T. (Marker) 407:9-410:14. Dr. Marker also attempted to address the Court's concern over Barreto's emphasis on eligible voters rather than registered voters by explaining that the data were reported separately, and the numbers of persons surveyed (1100 of the 1280 were registered) had very little difference in the overall rates, 12.8 percent of registered voters lacking ID, while 12.4 percent of eligible voters lacked ID. H.T. (Marker) 403:23-405:10. He concluded that taking the above considerations into account, "probably about between 600 and 800,000" lack ID. H.T. (Marker) 405:11-406:25. *See also* H.T. (Marker) 391:1-392:20 (Professor Barreto did not need the level of accuracy a government standard would demand); H.T. (Marker) 393:13-395:2 (reducing the non-responders to the rate of the wealthy responders reduces the overall rate of lacking ID from 12.8 percent to

[16] He implied, as Petitioners have throughout the litigation, that it was somehow Respondents' burden to disprove the outdated numbers, rather than his burden to prove them. That is not Respondent's burden, but, in any event, the testimony at the hearing about the increased availability of college and care facility IDs – as well as the changes that have made secure IDs more readily available and the DOS ID available – all demonstrate that a survey taken in June 2012 has no bearing on an assessment of how liberally accessible IDs are in September 2013.

7.9 percent). Thus, neither Professor Barreto's July 2012 report nor Dr. Marker's "review" of that report can say anything about what forms of ID persons lacking current PennDOT ID have or whether those persons are voting at the polls. Yet, as Dr. Wecker explained, the statute contemplates liberally accessible PennDOT ID, *and* provides many other alternatives to satisfy the statute's requirements. When those alternatives are added in, there is more than sufficient assurance that the General Assembly sought to include means for all persons to vote.

First, According to the EAC Report, 5,783,621 persons voted in the November 2012 General Election, 5,488,684 (94.9 percent) of whom voted in person. Election Assistance Commission Report, Exhibit R-233, Tab EAC-F. Of those voting absentee, 241,656 cast domestic civilian absentee ballots, and 18,018 cast overseas ballots under UOCAVA, for a total of 259,674 or 4.49 percent. Dr. Siskin did not account for the fact that many persons – as Judge Simpson recognized in observing Bea Bookler – who would have trouble getting PennDOT ID would be persons who would qualify to vote absentee (or by alternative ballot) – and could well be among the 12,000 permanent absentee voters. But even Dr. Siskin recognized that 24,339 of the persons he estimated to be without current PennDOT ID voted absentee at the November 2012 General Election.

Second, as stated above, Dr. Siskin contends that 140,000 senior citizens lack a current PennDOT ID,[17] but ignores entirely the fact that there are 130,000 care facility residents with identification available at their residence, and there are 12,000 permanent absentee voters. Thus, without even measuring the other types of proofs of identification that senior citizens have, there is no basis for concern that large numbers of senior citizens have been unduly burdened by Act 18.

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[17] Although a different population, Dr. Wecker found that Dr. Siskin had captured a significant number of college students as lacking current PennDOT ID. The statute provides for them as well, enabling private and public colleges and universities to issue compliant identification to the 835,000 college students in Pennsylvania.

Third, None of Petitioners' experts has given consideration to the indigency affirmation. Because Petitioners secured a preliminary injunction before the statute had a chance to take effect, the indigency affirmation has not yet been fully implemented. Petitioners argue that it should be ignored, because – in their minds, it would cover only those persons who had to pay for a proof of identification – although the statute itself requires that identification be available for free. Their hypothesis would contradict two presumptions set forth in the Statutory Construction Act, first that statutes are construed if possible to give effect to all of their provisions, 1 Pa.C.S. § 1921(a), and second that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable, 1 Pa.C.S. § 1922. The presumptions of the Statutory Construction Act are rebuttable – but it is Petitioners' burden to do so; for example, "the presumption of constitutionality is not conclusive but the requirements for rebutting it are indeed exacting." *Rubin v. Bailey*, 398 Pa. 271, 275-76, 157 A.2d 882, 884 (1960). Here, Petitioners have provided no basis for rebutting the presumption that the indigency affirmation has significance and should be taken into account when assessing the efficacy of the statute. Instead, the testimony at trial showed that the General Assembly consciously chose to incorporate the indigency affirmation and its protections into Act 18. H.T. (Royer) 777:7-778:15; H.T. (Oyler) 1095:25-1096:5 ("[U]ltimately the bill included an indigency exemption which would allow a person who would have to pay to get to a driver's license center to vote and be exempt from the ID requirement."); *id.* at 1098:10-1100:3. The indigency affirmation is to be made available at the polling places to make it easier for the voter. H.T. (Oyler) 1105:6-1107:13.

The term "fee" can mean more than the cost of a single item, such as the ID card itself. In this regard, the Supreme Court has found the term "fee" to be 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, the statutory construction presumptions apply, and the term "fee" should be construed in its broad sense, so that the statutory provision has meaning.

In addition, the indigency affirmation of Act 18 is a self-reporting affirmation, a factor that was considered by the District Court for the District of Columbia in reversing the denial of preclearance for the South Carolina photo identification statute. *South Carolina v. United States*, 898 F. Supp. 2d 30, 36-37 & n.5 (D.D.C. 2012) ("If the affidavit is challenged before the county board, the county board may not second-guess the reasonableness of the asserted reason, only its truthfulness" – an assessment that was not undermined by "[t]he ability of county boards to police the outermost boundaries of the expansive reasonable impediment provision in [a] commonsense way." (emphasis removed)). Because Pennsylvania law has traditionally defined indigency broadly, looking to the common law, the self-reporting provision would – like South Carolina's be subject to challenge only at the outermost boundaries. *Health Care & Retirement Corp. v. Pittas*. 46 A 3d 719, 723-24 (Pa. Super 2012) ("[T]he 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."

Accordingly, 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.

3. Petitioners' Challenge to the DOS ID as Not Provided for Is Meritless.

25 P.S. § 2626, one of the statutory provisions set forth in Article II of the Election Code entrusted to the Secretary for implementation, provides that the Department of Transportation "shall issue an identification card described in 75 Pa.C.S. § 1510(b) at no cost – but it recognizes, *first*, that such cards are to be issued to "any registered elector" and, *second*, that the issuance is *notwithstanding* the provisions of 75 Pa.C.S. § 1510(b); *see* 25 P.S. § 2626 (emphasis added). In turn, 75 Pa.C.S. § 1510(b) provides:

> (b) 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."

75 Pa.C.S. § 1510(b) (emphasis added).

As noted above, if the statute had been flatly unconstitutional or internally contradictory there would have been no reason for the Supreme Court to remand the matter for further findings – particularly given that the Court did not instruct the Commonwealth Court to determine whether the DOS ID *could be used* to meet the liberal access requirement but asked instead whether, with the the no-cost DOS ID, the liberal access requirement was being satisfied. *Kremer* 529 Pa. at 613, 606 A.2d at 439; *Applewhite II*, 54 A.3d at 5.

The provision that Petitioners challenge is in the section of the statute that sets forth the responsibilities of the Secretary. Notwithstanding the fact that the Department of State and the Department of Transportation have a long history of working together to implement federal and state election requirements, H.T. (Royer) 711:22-712:23, 713:1-17, 742:2-12, Petitioners have decided that without an express statutory mandate that the DOS ID be created, the DOS ID is an unprovided-for extra-statutory device that cannot be used to measure liberal access and that can be revised or eliminated at whim. The testimony at the hearing directly contradicted this supposition. H.T. (Royer) 800:14-802:14; 803:23-804:1; 805:1-8; 807:2-9. Such supposition is, in any event, inconsistent with the deference that a court affords to the Secretary in administration of statutes within her ambit. Given that her interpretation of Act 18 is (a) in good faith, (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.

The challenge giving rise to the DOS ID is the result of longstanding regulation that governs the secure identification cards in 75 Pa.C.S. § 1510 and requires documentation to verify the individual's date of birth and identity. *See* 67 Pa. Code § 91.4. In order to ensure liberal access, PennDOT needed to issue a card that was "notwithstanding" both the fee and the application process – which included documentation. The DOS ID is a "Commonwealth" form of identification, but it is also issued by PennDOT and available for anyone who came to PennDOT to get a free ID but chose not to or could not take the steps needed to get a secure proof of identification.

In assessing the approach taken by the Secretary and the Department of Transportation, it is clear that the choice to create the DOS ID is "reasonable because it is not so at odds with [the statute's] 'fundamental principles as to be the expression of a whim rather than an exercise of

judgment.'" *Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Review*, 603 Pa. 374, 393, 983 A.2d 1231, 1243 (2009).

The DOS ID does not render the statute impossible of performance, because it cannot be said that the DOS ID renders the statutory protection illusory or the statute superfluous; or that the need for the statute could not be served and the mischief it seeks to avoid would not be remedied (flaws that courts found in cases such as *Frazier v. Workers' Comp. Appeal Bd.*, __ Pa. __, 52 A.3d 241 (2012); *Swick v. Sch. Dist.*, 141 Pa. Super. 246, 14 A.2d 898 (1940); *Wilkes-Barre Area Vocational Sch. v. Greater Nanticoke Area Sch. Dist.*, 115 Pa. Commw. 73, 539 A.2d 902 (1988); *Sundstrom's License*, 47 Pa. D. & C.2d 1 (Chester Cnty. Ct. Com. Pl. 1969)). Nor does the statute create an "insurmountable" administrative obstacle. *Yeager Unemployment Compensation Case*, 196 Pa. Super. 162, 173 A.2d 802 (1961). Instead, the DOS ID is one element – a document-free, non-secure, no-charge proof of identification available to all residents who need it for voting – of a liberally accessible collection of proofs of identification.

D. Act 18 Does Not Violate the Equal Protection Clause or the Free and Equal Clause of the Pennsylvania Constitution.

The Equal Protection Clause guarantee under the Pennsylvania Constitution is coterminous with the protections provided by the United States Constitution, and, as a consequence, federal Equal Protection Clause analysis informs Pennsylvania constitutional jurisprudence. *See Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325 (2002). Under that federal constitutional standard, a photo identification requirement such as is at issue here does not violate equal protection. *See Crawford*, 553 U.S. at 200 (rejecting the request "to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity); *Billups*, 554 F.3d at 1355 ("The district court did not

err when it determined that the legitimate interest of Georgia in preventing voter fraud justified the insignificant burden of requiring voters to present photo identification before they vote in person.").

The same is true here.

Indeed, Pennsylvania has applied the same *Burdick* 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. *Burdick v. Takushi*, 504 U.S. 428 (1992). 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. *Id.*"); *see also In re Nomination Papers of Nader*, 588 Pa. 450, 465, 905 A.2d 450, 459(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, 257 A.2d 897 (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). Applying that test here, the statute is plainly constitutional, just as Indiana's was.

1. The Purposes to Be Promoted Are Core Election Code Values That Are Consonant with the Purposes of Federal Election Laws and the Laws of Other States.

In conducting the *Burdick* balancing test, the Court looks to the purpose to be promoted. Here, Act 18 is one of several federal and state statutes aimed at encouraging people to register to vote and vote while preserving the integrity of elections and voter registration rolls – including ensuring that the information about electors is accurate – which in turn is critical to assuring electors that their signatures on nomination petitions are counted, *see In re Nomination Petition*

of Gales, 54 A.3d 855, 859-60 (Pa. 2012), that their own vote is counted – and that their vote is not diluted by other persons' misuse of the electoral system. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. '[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'").

The Pennsylvania General Assembly furthered these goals by enacting Act 18 with the purpose of providing a protective measure designed to deter, detect, and prevent in-person voter fraud, and to preserve public confidence in the election process. *See* P-1618. The United States Supreme Court has affirmed the importance of fraud prevention and protection of the integrity of the electoral system.

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Crawford, 553 U.S. at 196. It is enough that the General Assembly – and Respondents – articulate the legislative purpose of the Act; no evidence of the facts underlying those purposes needs to be adduced. *Id.* at 191, 202; *ACLU of N.M. v. Santillanes*, 546 F.3d 1313 (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").

As the United States Supreme Court has explained,

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Purcell, 549 U.S. at 4-5. In addition, the Supreme Court recognized the danger in applying an injunction to a statute just prior to an election – "conflicting orders can themselves result in voter confusion and consequent incentive to remain away from the polls" – a risk that increases as each election draws closer. *Id.* Certainly that has had a role here, where Respondents sought to educate the public after prevailing before Judge Simpson, only to have an injunction imposed a month before the General Election.

Act 18 is consistent with the Department's goal in administering elections: to ensure that people have confidence in elections and to encourage participation in the election process. H.T. (Royer) 715:15-18. As Mr. Marks explained, ensuring uniformity has been a challenge since the 67 legacy databases were used to build the SURE database, but ensuring uniformity is critical to the confidence that people have in the integrity of the voter registration rolls and in the status and maintenance of their own voter record. H.T. (Marks) 1686:19-1689:9. Thus, even the anomalies that have come to light as a result of conforming to the requirements of Act 18 have served to foster the integrity of the system.

Petitioners called two witnesses who provided additional information consistent with the above purposes. First, when Act 18 was passed, it contained several options for proofs of identification and represented the General Assembly's balancing of the availability of certain ID cards against the security and integrity of the election process. H.T. (Oyler) 1079:18-1080:5.

Likewise, in determining to have PennDOT issue the cards, the General Assembly had to "balance benefits against other constituencies and against other concerns." *Id.* at 1080:16-21. Second, Professor Mutz explained that in 2008, a nationwide survey was done that found that 1/10 of one percent of the nation had identified voter fraud as a reason why a specific candidate won. H.T. (Mutz) 923:4-924:2. There were three factors that received more responses (that money has too much influence; that candidates lie; and that a particular group of people had high turnout). H.T. (Mutz) 923:22-925:2; 954:12-19. This study, which was not designed to elicit information about people's confidence in an electoral system, shows that even when questions are asked about specific candidates, voter fraud is one of the voiced concerns.

Here, the federal and state statutes that predate Act 18 reflect the same dual values: protection of the value of a person's vote by ensuring the integrity of the electoral process while encouraging persons to register and to vote. This can be seen at least as early as 1993, with the enactment of the NVRA. *See* 42 U.S.C. § 1973gg(b) ("The purposes of this [Act] are--(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; (3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained). HAVA strengthened anti-fraud measures while protecting this purpose; Act 150 did the same; and Act 18 continued this process. As the United States Supreme Court recognized, while "neither HAVA nor NVRA required Indiana to enact SEA 483, [] they do indicate that Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology." *Crawford*, 553 U.S. at 193.

The Commonwealth has a unitary system of voting, spanning both federal and state elections. *Kuznik v. Westmoreland Cnty. Bd. of Commissioners*, 588 Pa. 95, 902 A.2d 476 (2006). Indeed, the Election Code contains provisions that relate to federal elections. *Id.* at 120, 902 A.2d at 490-91. Accordingly, effectuating consistent federal and state goals is a proper legislative purpose. The Commonwealth can evince policy consistent with that of federal statutes even when it enacts statutes containing different terms and carried out in different ways. *E.g., Buffalo Twp. v. Jones*, 571 Pa. 627, 649-50, 813 A.2d, 659, 667 (2002) (comparing National and State Acts for developing railroad rights of way for other uses).

Act 18 is a statute of general application. Thus, this case is like *Ortiz v. City of Philadelphia*, 28 F.3d 306, 313-14 (1994), a Section 2 analysis, in which the Court of Appeals for the Third Circuit determined 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.

Balanced against the persistently upheld purposes of the statute are Petitioners' averments that there is a "disparate impact" on certain groups of persons. Disparate impact is a federal statutory analysis, not a constitutional equal protection analysis. *Crawford*, 553 U.S. at 207 (Scalia, J., concurring (citations omitted)) ("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."); *Meggett v. Pa. Dep't of Corr.*, 892 A.2d 872 (Pa. Cmwlth. 2006).

Moreover, Petitioners did not present fact witnesses at trial to show anything except that older adults are more likely to have expired PennDOT products. As discussed above and laid out in even more detail in the Proposed Findings and Conclusions, the expert testimony of Dr. Siskin and Professor Barreto is not credible, and is particularly not credible in this regard. H.T. (Wecker) 1467:-1468:10 (explaining that Dr. Siskin missed many thousands of names that were characterized as mismatched only because of different treatment of naming conventions within the database).

Indeed, the suggestion that the forms of proof of identification issued by PennDOT are evidence of discrimination has been rejected in other contexts. The Supreme Court and other courts have confronted such claims in jury composition challenges under 42 Pa.C.S. § 4521, and as violations of Fourteenth Amendment Equal Protection and Sixth Amendment fair jury rights.[18] *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, 838 A.2d 663 (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

[18] The AOPC currently maintains a statewide master jury list with records from voter registration lists and records maintained by the Department of Public Welfare, the Department of Transportation, and the Department of Revenue. *United States v. Savage*, No. 07-550-03, et seq., 2013 U.S. Dist. LEXIS 10822 (E.D. Pa. Jan. 28, 2013).

possession of a driver's license is such a widespread and desirable privilege"); *Commonwealth v. Smith*, 548 Pa. 65, 694 A.2d 1086 (1997).

Federal courts have reached the same conclusions. *Stukes v. Lawler*, No. 4:10-CV-024, 2011 U.S. Dist. LEXIS 54686 (M.D. Pa. May 23, 2011), adopting magistrate opinion in 2011 U.S. Dist. LEXIS 54653, at *42 (M.D. Pa. April 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), *aff'd*, 275 F.3d 331 (3d Cir. 2001) (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"); *Murray v. Schriro*, No. CV 93-775-PHX-DGC, 2005 U.S. Dist. LEXIS 22296 (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). The same is true here. The request to demonstrate one's identity is without regard to any characteristic of the person; it applies equally to all persons who vote in person at the polls (and, in another form, to persons who vote absentee).

2. Petitioners Cannot Sustain Their Free and Equal Challenge.

As the Supreme Court set forth in *Erfer*, 568 Pa. at 175, 794 A.2d at 354:

> 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.

The standard for measuring whether there is a free and equal clause violation is gross abuse. *In re Nomination Petition of Rogers*, 908 A.2d 948, 954 (Pa. Cmwlth. 2006), citing *Winston v. Moore*, 244 Pa. 447, 91 A. 520 (1914). In *In re Nomination Petition of Rogers*, the Court contrasted this standard with the federal balancing test, recognizing that in the face of a free and equal challenge a court gives substantial deference to the judgment of the legislature. Taken together with the fact that there is no greater right under the Free and Equal Clause than there is under the Equal Protection Clause, *Erfer*, 568 Pa. at 175, 794 A.2d at 353, Petitioners have a heavy burden – not satisfied here – to demonstrate that the right to vote has been so burdened as to have been denied.

Petitioners' claim that the allocation of the role of primary issuer of identification to PennDOT is an unconstitutional burden on the right to vote fails for two reasons. *First*, this statute – as other statutes do – *recognizes* that PennDOT is the primary issuer of identification in the Commonwealth; indeed, more persons of voting age possess PennDOT identification than are registered to vote. *Compare* H.T. (Myers) 1300:24-25, 1301:12-15 (9.8 million current secure PennDOT products) *with* H.T. (Marks) 658:10-13, 659:17:19 (8 million currently registered voters). Rather than impose a burden, the statute provides a benefit; it ensures that those who require such identification to vote can get it at no cost. *Second*, the Shared Ride Program and other options in addition to the widespread availability of public transportation in the urban areas make the situation in Pennsylvania less of a burden than that which the United States Supreme Court upheld in *Crawford*, observing: "the 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." *Crawford*, 553 U.S. at 203 n.20.

The *Crawford* Court likewise rejected the concerns that Petitioners raised about people's carelessness: "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." *Id.* at 197-98. That same remedy is available under Act 18.

Under federal law, disenfranchisement (and certainly actionable 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 (1973); *McDonald v. Bd. of Election Commissioners of Chicago,* 394 U.S. 802, 897-08 (1969). Pennsylvania law is the same. *E.g., Democratic Cnty. Comm. Appeal*, 415 Pa. 327, 203 A.2d 212 (1964). Because, as set forth above, the General Assembly expressly provided for *reducing* any burdens on the only groups Petitioners have identified (and as to whom they have adduced no evidence except for that put forth by their discredited experts), their challenge fails. Indeed, here, the securing and bringing of an ID requires much less forethought than the New York provision at issue in *Rosario*, which required party registration prior to a General Election in order to vote in the *following year's* primary.

As the United States Supreme Court has recognized, 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). The Pennsylvania Supreme Court has consistently upheld such regulations. Thus, for example, the qualification of an elector requires a timely notification of removal when that elector has moved. *In re Nomination Petition of Flaherty*, 564 Pa. 671, 682, 770 A.2d 327, 334 (2001). Likewise, "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 of a set number of people." *Shankey*, 436 Pa. at 69, 257 A.2d at 899, *see also Key v. Bd. of Voter Registration of Charleston Cnty*, 622 F.2d 88, (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) (internal citations and quotations omitted).

Regulations that simply limit the exercise of other foundational constitutional rights have been upheld as well. As one example, in the face of various constitutional challenges, courts have consistently held that courthouses may require persons to show identification; the right to access to courts is not a "constitutional right to enter the federal building anonymously." *E.g.*, *Foti v. McHugh*, 247 F. App'x 899, 901 (9th Cir. 2007); *Haas v. Monier*, No. 08-169, 08-047, 2009 U.S. Dist. LEXIS 128096 (D.N.H. Mar. 31, 2009), *aff'd*, 2009 U.S. Dist. LEXIS 36772 (D.N.H. Apr. 24, 2009).

Petitioners disregard these principles and instead advocate that this Court invalidate the statute by using a statutory construction principle applicable in only a limited context. This the Court cannot do. Construing a statute so as to avoid "any disenfranchisement" applies when

evaluating administrative error or voter oversight in the context of an already-cast ballot. *See* Pet'rs' Pretrial Memo. at 10, 21 (*citing Perles v. Northumberland Cnty. Return Bd.*, 415 Pa. 154, 202 A.2d 538 (1964)). In those cases, unlike here, statutory provisions are being liberally construed – but only to the extent there is no specific mandate of the Election Code and the provision is not designed to protect against fraud. *See 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).[19]

The requirement to present a proof of identification *is* for the purpose of fraud provision and *is* a specific mandate of the Election Code. "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." 25 P.S. § 3050(a). This mandate is specific and express. *See Canvass of Absentee Ballots*, 577 Pa. at 245-46, 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.").

It follows that a court is not at liberty to count a vote that is unaccompanied by the presentation of a proof of identification or one of the alternatives set forth in the statute itself; this regulation is not susceptible to a liberal construction of voter intent of the type permitted in

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[19] 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 (1965); *Upper Adams Sch. Dist. Election Contest*, 49 Pa. D. & C.2d 121, 124-25 (Adams Cnty. Ct. Com. Pl. 1969).

cases such as *Perles*. *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 ballots).

III. No Other Relief is Warranted.

As is apparent from the proposed findings of fact and conclusions of law, there is no basis for the Court to consider revisiting the prior dismissal of Count IV or to award attorneys' fees or costs. Accordingly, there is no basis for awarding any other relief to the Petitioners.

IV. Conclusion

Act 18 represents a legislative determination that one set of proofs of identification should be modified and made applicable to all in-person voters. That decision was neither constitutionally nor statutorily infirm. Petitioners have complained about the effects of the statute, even though none of them has been aggrieved by it. Accordingly, Respondents respectfully request that Petitioners' requests for declaratory and injunctive relief – and for fees and costs – be denied.

Date: 08/30/13

Respectfully submitted,

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wilola Shinholster Lee, Bea Bookler, League of Women Voters of Pennsylvania, National Association for the Advancement of Colored People, Pennsylvania State Conference, the Homeless Advocacy Project,	:	
Petitioners	:	
	:	**Case No. 330 MD 2012**
v.	:	
	:	
Thomas Corbett, in his capacity as Governor; Carol Aichele, in her capacity as Secretary of the Commonwealth,	:	
Respondents	:	

CERTIFICATE OF SERVICE

I, Timothy P. Keating, hereby certify that, on August 5, 2013, I served the foregoing document by causing a copy of the same to be sent via electronic mailing to the following:

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