

**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,

Docket No. 330 M.D. 2012

v.

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

**[PROPOSED] ORDER**

AND NOW, on this \_\_\_\_ day of August, 2013, upon consideration of Petitioners' Application for Special Relief in the Nature of Preliminary and Permanent Injunctions following trial, the representations and brief of Respondents in support of a limited, continued injunction, and the brief of Petitioners in support of an expanded injunction, it is hereby ORDERED that the Application is GRANTED in part and DENIED in part.

The application is GRANTED as follows:

The preliminary injunction that was entered by this Court in this action on October 2, 2012, enjoining implementation or enforcement of specified provisions of the Act of March 14, 2012 (P.L. 195, No. 18) (Act 18) for the General Election of November 6, 2012, thereafter extended on February 19, 2013, by stipulation and Order to enjoin those same provisions of Act 18 through the certification of the May 21, 2013 Municipal Primary, shall be extended to enjoin those same provisions of Act 18 to cover all elections in Pennsylvania through the certification of the November 5, 2013 Municipal Election (including any election in Pennsylvania that occurs

through that date). Accordingly, the Court issues the following preliminary injunction order as a further continuation of the preliminary injunction order first issued by the Court on October 2:

Respondents are preliminarily enjoined from implementing or enforcing that part of Act 18 which amends Section 1210(a.2) and (a.4)(5)(ii) of the Pennsylvania Election Code, 25 P.S. § 3050(a.2), (a.4)(5)(ii), for the Municipal Election to be held on November 5, 2013. It is the intent of this Preliminary Injunction to extend the transition procedures described in Section 10(1) of Act 18 beyond September 17, 2012, and through the Municipal Election of November 5, 2013. Nothing in this Preliminary Injunction shall preclude the Commonwealth from following transition procedures described in Section 10(2) of Act 18 (relating to additional education efforts to those not showing proof of identification for in-person voting) for the Municipal Election of November 5, 2013. All other provisions of Act 18 shall remain in effect.

In all other respects, Petitioners' Application for Special Relief in the Nature of Preliminary and Permanent Injunctions is DENIED at this time.

BY THE COURT:

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McGinley, J.

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

RECEIVED & FILED  
COMMONWEALTH COURT  
OF PENNSYLVANIA  
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**RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR  
SPECIAL RELIEF IN THE NATURE OF PRELIMINARY AND PERMANENT  
INJUNCTIONS, AND IN SUPPORT OF CONTINUING THE LIMITED PRELIMINARY  
INJUNCTION**

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Respondents Thomas W. Corbett, in his capacity as Governor, and Carol Aichele, in her capacity as Secretary of the Commonwealth, hereby submit the attached brief and proposed order in opposition to Petitioners' application for preliminary injunction. Respondents support instead a **continuation**, through the November 5, 2013 Municipal Election, of the **limited** preliminary injunction that was issued by this Court on October 2, 2012, and continued in effect through the May 21, 2013 General Primary by stipulated order entered February 19, 2013. In the current circumstances, equity does not warrant any broader injunction or one of longer duration. Thus, the preliminary injunction requested by Petitioners should be denied.

### **I. SALIENT FACTS AND PROCEDURAL HISTORY**

On October 2, 2012, this Court entered a preliminary injunction order containing only two prohibitions, *to wit*: (1) Respondents could not require that a registered elector apply for a product of the Pennsylvania Department of Transportation ("PennDOT") prior to seeking a free identification issued by the Department of State ("DOS ID")<sup>1</sup>; and (2) Respondents could not implement for the General Election to be held on November 6, 2012, certain amendments made to section 1210 of the Pennsylvania Election Code by Act 18 that require the use of a provisional ballot for the sole reason that a qualified elector was unable to produce "proof of identification" at the polls. *See* 25 P.S. § 3050(a.2) and (a.4). October 2, 2012 Order at 2, attached at Exhibit 1.

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<sup>1</sup> As this Court recognized, at the time that the Court entered its October 2, 2012, preliminary injunction order, the Secretary of the Commonwealth already had decided to alter the earlier policy that required an applicant for photo identification to seek a PennDOT product before being considered for a DOS ID. The Secretary decided to alter the policy immediately after the Supreme Court on September 18, 2012, issued its opinion in *Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012) (*Applewhite II*), interpreting Act 18 to have mandated a "policy of liberal access" to photo identification, *id.* at 3, and declaring it "contrary to [Act 18's] liberal access requirement" to require that applicants "be initially vetted through the rigorous application process for a secure PennDOT identification card before being considered for a [DOS ID]," *id.* at 4.

The Court's October 2 Order did not preclude elections officials from enforcing any other provision of Act 18, nor did it affect the responsibilities of elections officials to administer and enforce other provisions of the Election Code that were in existence prior to Act 18. Moreover, the Court's Order expressly permitted ongoing educational efforts under Act 18. *Id.* In reaching that conclusion, the Court recognized that asking for, but not requiring, photo ID at the polls – as Act 18 expressly provides be done before full implementation of the “proof of identification” requirement – is not disenfranchising since all qualified electors would be permitted to cast a regular ballot at the polls, irrespective of their ability to show “proof of identification.” October 2 Opinion at 7, 13-14, attached at Exhibit 2.

Shortly before the November 2012 General Election, Petitioners filed a motion for a supplemental injunction, requesting in particular restrictions on and supervision of Respondents' educational efforts. The Court denied that motion, *see* Order dated November 1, 2012, attached at Exhibit 3, recognizing that the mandatory injunctive relief sought by Petitioners was both extraordinary and likely legally improper under principles of sovereign and official immunity, November 1, 2012 Opinion at 5-6 (citing *Finn v. Rendell*, 990 A.2d 100, 105 (Pa. Cmwlth. 2010) (single judge opinion)), attached at Exhibit 4. Petitioners did not appeal either of those orders.

As the parties were preparing the case for trial in July 2013, they agreed to a stipulation inviting this Court to extend the effect of the October 2 injunction order through the general primary that was to be held on May 21, 2013, on the same terms as the October 2 order. *See* February 14, 2013 Stipulation, attached at Exhibit 5. This Court approved by Order entered February 19, 2013. Accordingly, consistent with the express provisions of Act 18,<sup>2</sup> in the three

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<sup>2</sup> Section 10 of Act 18 – the so-called “soft rollout” provision – provides as follows:

elections that have been held since Act 18 was enacted, the electors of the Commonwealth have experienced “soft rollouts” of Act 18’s photo identification requirement.

When Judge Simpson scheduled this matter for trial, he contemplated that evidence would be closed and the preliminary injunction briefed and decided by August 9, 2013. He considered that time frame adequate to allow either side to take an expedited appeal to the Supreme Court and to conclude any remand proceedings prior to the November 2013 election. That judicial expectation is not plausible under current circumstances.

As the Court is aware, trial went longer than projected; and the Court’s July 31, 2013, order reflects the reality that August 9 simply is an unrealistic time frame within which to determine whether a preliminary injunction should issue. Moreover, the Court has pending

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The following shall apply to elections held after January 1, 2012, and prior to September 17, 2012:

(1) (i) Except as provided under subparagraph (ii) and notwithstanding any law, election officials at the polling place at an election held after January 1, 2012, shall request that every elector show proof of identification.

(ii) Notwithstanding subparagraph (i), prior to September 17, 2012, if the elector does not provide proof of identification and the elector is otherwise qualified, the elector may cast a ballot that shall be counted without the necessity of presenting proof of identification and without the necessity of casting a provisional ballot, except as required by the act.

(2) Beginning January 1, 2012, if any elector votes at a polling place at an election and does not provide proof of identification and will be required to provide proof of identification beginning September 17, 2012, the election official that requested the proof of identification shall provide to the elector written information prescribed by the Secretary of the Commonwealth briefly describing the voter identification requirement created by this act and inform the elector that he or she will be required to comply with that requirement when voting at future elections beginning September 17, 2012, unless an exemption applies.

*See* 25 P.S. § 3050 (Editor’s Notes). The only difference between the direction of section 10 of Act 18 and this Court’s preliminary injunction orders is that section 10’s September 17, 2012 expiration date effectively has been extended by court order.

before it a motion for compulsory nonsuit or, in the alternative, for a directed verdict. Accordingly, the Court now has before it a complete record on which to determine whether Petitioners are entitled to any relief on any of their claims, but there is limited time before the November 2013 election.

In recognition of the relatively short time before the November 2013 election and to allow this Court time for full deliberation on the merits, including consideration of post-trial motions, Respondents respectfully request (as they did during closing statement) that this Court extend the terms of the prior preliminary injunction orders through the November 2013 Municipal Election. A limited injunction also would obviate any plausible claim made by Petitioners that Act 18 would prevent any qualified elector from voting at the polls on November 5, 2013.

## II. ARGUMENT

On October 2, 2012, the Court entered a preliminary injunction, narrowly tailored to prevent enforcement of the amended provisional ballot terms in Act 18 – especially the provision that prevents an elector from casting a regular ballot absent “proof of identification,” *see* 25 P.S. § 3050(a.4)(1) (“Individuals who appear to vote shall be required to produce proof of identification ... and if unable to do so shall be permitted to cast a provisional ballot.”) – and the Court determined that those were the *only* terms of the statute that could be viewed as potentially “disenfranchising.” Exhibit 2 at 9-10. In reaching that conclusion, the Court recognized that under section 103(a) of the Election Code (25 P.S. § 2603(a)) and the Statutory Construction Act of 1972, 1 Pa.C.S. § 1925, the statutory provisions are severable. Consequently, consistent with principles of equity, the Court drew its injunction narrowly. *See Three Cnty. Servs., Inc. v. Philadelphia Inquirer*, 337 Pa. Super. 241, 245-46, 486 A.2d 997, 999-1000 (1985) (explaining

that a preliminary injunction operates until the final adjudication on the merits of the controversy and is to be narrowly crafted to preserve the status quo, and thus should be “no broader than necessary for the petitioner’s interim protection”).

Petitioners have refused to agree to extend the injunction on its prior terms, raising two arguments in opposition. *First*, Petitioners do not want an injunction to last only until a final adjudication has been made by this Court (likely well before the May 2014 General Primary), as contemplated by the law. Instead, Petitioners insist that this Court immediately enter an injunction that would last through all appeals and any other proceedings, irrespective of how this Court might finally decide the merits of Petitioners’ claims.

*Second*, Petitioners want this Court to enjoin elections officials even from continuing to implement the provisions of Act 18 that this Court previously refused to enjoin, in deference to the General Assembly’s direction that all electors be asked (but not required) to show proof of identification when they appear to vote. Nothing presented in the trial of this case would justify altering the Court’s previous judgment that the Department of State should be permitted to continue voter education efforts as directed by the General Assembly while this Court considers Petitioners’ constitutional challenges to Act 18.

Until the Court has finally determined the merits of the case, it will not be clear what standard the Court would apply to a request to extend an injunction beyond the time of this Court’s final adjudication. *See Tri-State Asphalt Corp. v. Commonwealth Dep’t of Transp.*, 135 Pa. Commw. 410, 421, 582 A.2d 55, 60 (1990) (holding that a party seeking an injunction pending appellate review must satisfy both *Process Gas* and the six preliminary injunction factors, and that such relief would be “highly extraordinary” and one as to which an applicant bears “a heavy burden of proof”) (citing *Pa. Pub. Util. Comm’n v. Process Gas Consumers Grp.*,



502 Pa. 545, 467 A.2d 805 (1983)). There is no reason or need for the Court to consider post-adjudication relief at this juncture. The only election that is imminent is the November 2013 election, and that election would be properly addressed by simply continuing the terms of the prior injunction.

If there was a basis for a modification of the injunction for the November 2012 General Election, Petitioners could have appealed the October 2 or November 1 order (or both). Instead, Petitioners *agreed* three months later – in February 2013 – that the terms of the two orders could be extended through the May 2013 Municipal Primary. As Deputy Secretary Royer testified, even though there are mechanisms that are provided for complaints during the elections, there were no incidents reported during these “soft rollouts.” 7/18/2013 at 727:16-728:20.<sup>3</sup> It follows that there is no basis to modify the terms of the injunction.

In fact, this Court specifically denied Petitioners’ earlier request to enjoin educational efforts because (1) the request to show photo identification is not offending activity; (2) outreach satisfies a different statutory requirement than the one being challenged, *see* 25 P.S. § 2626(a) (“The Secretary of the Commonwealth shall prepare and disseminate information to the public regarding the proof of identification requirements established under [the Election Code].”); and (3) the General Assembly wanted to have educational efforts during the transition. Exhibit 2 at 7-8; *see also id.* at 7, 13-14 (a request to produce photo ID is not in itself disenfranchising).

Although Professor Mutz asked the Court to evaluate the educational efforts by a higher standard – whether they were effective at communicating all information that a person needed to

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<sup>3</sup> Petitioners’ Exhibit 1750 sets forth a couple of telephone calls received by the League of Women Voters for the November 2012 General Election, during which persons complained that outdated literature was initially posted at a polling place; but some of the calls reflect that the information was modified when the pollworkers’ attention was called to it, and the remainder are too indefinite to infer that there were actual problems. None of the callers provided testimony. *See* Pet’rs’ Exhibit 1750 at 6-9.

know in order to bring ID and get compliant ID – counsel for Petitioners admitted at closing that the standard is actually the one the Supreme Court set in place: have Respondents made reasonable efforts at education? 8/01/2013 at 2052:24. Given that education has been defined as the “impartation or acquisition of knowledge, skill or discipline of character,” *Girard Sch. Dist. v. Pittenger*, 481 Pa. 91, 98, 392 A.2d 261, 264 (1978), it certainly has been reasonable for the Department to emphasize both that people will be asked but not required to show ID,<sup>4</sup> and that there are answers available to individuals’ questions about what sorts of ID are available to them (and whether they have it already) both by telephone and through the website. While most people will get their ID at PennDOT and the educational materials emphasize that a free proof of identification is available there, PennDOT is not the only source of a free proof of identification; and Respondents, therefore, can assist those customers best by communicating with them individually.

The request to modify the injunction must be denied unless “the situation and circumstances of the parties or the law are shown to have so changed as to make it just and equitable to do so.” *Trappe v. Longaker*, 59 Pa. Commw. 572, 576, 430 A.2d 713, 715-16 (1981). The testimony at the hearing does not show changed circumstances; indeed, the only testimony about the experiences at the May 2013 election came from Respondents’ witnesses and showed that there were no problems.

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<sup>4</sup> Professor Mutz found that even under her higher standard she could not say that Respondents had not effectively transmitted that message. *E.g.*, 7/19/2013 at 917:2-9: “With respect to that first goal, they probably did inform some of those people. Without any kind of pretesting of the message or effectiveness metric, I can’t tell you how successful they were; but you know, it’s conceivable that people got the message. Q: That message would be that you need ID? A: That you need ID. Bring your driver’s license to the polling place. That message.”

To the extent there was any confusion in November 2012, that surely was attributable primarily to the very brief time between the issuance of the preliminary injunction on October 2, 2012, and the election on November 6, 2012. During the hearing, Petitioners provided deposition testimony from one woman, Marion Baker, who said that she did not vote in May 2013 because of the message in November 2012 – accurate at the time – that photo ID would be required in future elections.<sup>5</sup> Maintaining that message now – a message that would be reinforced through a consistent media campaign in the months leading up to November 2013 – would allow for the development and dissemination of a clear and unchanging voter education message, far in advance of the election, that should not be confusing to any voter as to whether photo ID will be required at the polls in November. If there were instead to be a message in November 2013 that Act 18 is not in effect and no one will need to get ID now or in the foreseeable future, the mixed messages almost certainly would engender confusion – a principle inconsistent with a narrowly tailored injunction that targets only the activity sought to be abated.

Indeed, part of the reason Judge Simpson wanted electors to be asked for ID, but not required to show it in order to vote, was to encourage voters to associate showing ID and voting and to motivate voters to get proofs of identification if they did not already have them. In this regard, it is significant that Mrs. Baker testified that when she thought she would be waiting for four hours at a driver license center with no seats, she decided not to go to PennDOT. She also testified that she contacted only the Reading driver license center before deciding not to go there, even though the PennDOT website directs persons clearly (at [http://www.dot3.state.pa.us/contact\\_us/index.shtml](http://www.dot3.state.pa.us/contact_us/index.shtml)):

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<sup>5</sup> Mrs. Baker testified that she never followed up in any way to determine whether the law had gone into full effect by May 2013.

## **Driver License Center Contact Information**

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PennDOT does not publish individual Driver License Center phone numbers. If you need assistance with a particular PennDOT Driver License Center, our Driver and Vehicle Services Customer Call Center staff will gladly assist you. Please call 1-800-932-4600 for assistance.

## **Driver and Vehicle Services Customer Call Center**

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PennDOT operates a state-of-the-art call center where customer inquiries concerning driver and vehicle services may be directed. Inquiries concerning directions to PennDOT locations and their hours of operation along with information on the status of vehicle registration and driver license renewals can be obtained 24 hours a day, 7 days a week from the automated voice response system. In addition, extensively trained customer service representatives are at your disposal Monday through Friday (except holidays), from 8 a.m. until 5 p.m. ET.

Please note: All phone numbers marked with a red asterisk (\*) will only accept phone calls that come from TTY/TDD equipment.

### **Driver and Vehicle Services Customer Call Center**

<b>If you are calling from...</b>	<b>Phone</b>
In-State (if calling from a # with a PA area code)	1-800-932-4600
Out-of-State	1-717-412-5300
Hearing Impaired (In-State)*	1-800-228-0676 (TDD)
Hearing Impaired (Out-of-State)*	1-717-412-5380 (TDD)

*See also 7/24/2013 at 1317:11-1319:17.*

The fact that Ms. Baker disregarded this information and called the center directly led her to misapprehend her options: she based her assumption that she would have to wait for four hours for service on misinformation (*see* Pet'rs' Exhibit 1460, showing that if she had traveled to the Reading Center in December 2012, which is during the time frame following the November election when she said she was contemplating renewing her license, almost 98 percent of customers were served in 30 minutes or less), and she was not able to find out what options PennDOT could offer her because she called the center instead of PennDOT itself. Because the purpose of Judge Simpson's ruling in October was to encourage persons to get ID, including by

telling them that they would need it in the future, Mrs. Baker's experience cannot serve as a reason to impose a more stringent injunction.

If Petitioners' "broader" relief reiterates the request made and rejected in November 2012, Petitioners are not seeking just the extraordinary relief of a mandatory injunction; they are seeking to impose a mandatory injunction *upon the government and its officials* and to direct the expenditure of *public monies*. As this Court has explained, requiring affirmative action – and, in particular affirmative action directing the allocation of funds – would offend sovereign immunity and is beyond the scope of relief that this Court could direct. *See* Exhibit 4 at 5-6 (recognizing the "strong possibility" that Respondents are immune from the relief sought (citing *Finn*, 990 A.2d at 105)). To the extent that Petitioners renew their attempt to control the amount, type, and message of the Commonwealth's educational messages, their request cannot be granted.

### **III. CONCLUSION**


For all of the reasons set forth above, Respondents respectfully request that this Court continue in effect for the November 2013 Municipal Election the terms of the preliminary injunction set forth in the October 2, 2012, and November 1, 2012 orders, as well as the February 19, 2013 order issued by this Court based on the parties' stipulation, and deny in all other respects Petitioners' Application for Special Relief in the Nature of Preliminary and Permanent Injunctions at this time.

Dated: August 5, 2013

Respectfully submitted,

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# **EXHIBIT 1**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

v.

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

Respondents

No. 330 M.D. 2012

**ORDER**

**AND NOW**, this 2<sup>nd</sup> day of October, 2012, after supplemental hearing and after consideration of the oral and written arguments of counsel, it is **ORDERED** and **DECREED** as follows:

Petitioners' Application for Preliminary Injunction is **GRANTED in part**. Based on the foregoing Supplemental Determination, the Respondents and their agents, servants and officers are hereby **PRELIMINARILY ENJOINED** from:



1) Requiring that a registered elector must apply for a PennDOT product prior to the elector's seeking issuance of a free DOS ID; and

2) Implementing or enforcing that part of Act 18 which amends Section 1210(a.2) of the Election Code, 25 P.S. §3050(a.2), and Section 1210(a.4)(5)(ii) of the Election Code, 25 P.S. §3050(a.4), for the general election of November 6, 2012. It is the intent of this Preliminary Injunction to extend the transition procedures described in Section 10(1) of Act 18 beyond September 17, 2012, and through the general election of November 6, 2012. Nothing in this Preliminary Injunction shall preclude the Commonwealth from following transition procedures described in Section 10(2) of Act 18 (relating to additional education efforts to those not showing proof of identification for in-person voting) for the general election of November 6, 2012. All other provisions of Act 18 remain in effect.

The Court shall conduct a status conference with counsel on Thursday, December 13, 2012, at 10:00 a.m. in Courtroom 3001, third floor, Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, Pennsylvania. Petitioners shall arrange for a court reporter to be present. After the conference, the Court shall issue a scheduling order pertaining to the close of pleadings, completion of discovery, and trial on the application for a permanent injunction.



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ROBERT SIMPSON, Judge

# **EXHIBIT 2**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Viviette Applewhite; Wilola  
Shinholster Lee; Grover  
Freeland; Gloria Cuttino;  
Nadine Marsh; Dorothy  
Barksdale; Bea Bookler;  
Joyce Block; Henrietta Kay  
Dickerson; Devra Mirel ("Asher")  
Schor; the League of Women Voters  
of Pennsylvania; National Association  
for the Advancement of Colored  
People, Pennsylvania State Conference;  
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v.

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

Respondents

No. 330 M.D. 2012

HEARD: September 25, 2012

BEFORE: HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: October 2, 2012**

**SUPPLEMENTAL DETERMINATION**  
**on APPLICATION for PRELIMINARY INJUNCTION**

This request to enjoin enforcement of the Act of March 14, 2012, P.L.  
195, No. 18 (Act 18), returns to me from the Supreme Court for expedited  
consideration of the following directive:

Thus, we will return the matter to the Commonwealth Court to make a present assessment of the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available. In this regard, the court is to consider whether the procedures being used for deployment of the cards comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards. If they do not, or if the Commonwealth Court is not still convinced in its predictive judgment that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement for purposes of the upcoming election, that court is obliged to enter a preliminary injunction.

Applewhite v. Commonwealth, \_\_\_ Pa. \_\_\_, \_\_\_, \_\_\_ A.3d \_\_\_, \_\_\_ (Pa., No. 71 MAP 2012, filed September 18, 2012) (per curiam), slip op. at 6-7. Thus, I am to preliminarily determine: 1) whether the procedures being used for deployment of the Department of State identification cards (DOS IDs) comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards; and 2) whether I am still convinced that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement for purposes of the upcoming election.

After several phone conferences with counsel, additional discovery consisting of substantial document production, and submission of pre-hearing memoranda, I presided over an additional hearing beginning September 25, 2012. Thereafter, I received excellent post-hearing memoranda. Based on these proceedings, I make the following supplemental preliminary determinations.

### **Liberal Access**

From the time of initial deployment on August 27, 2012, until the first day of the hearing, September 25, 2012, the DOS ID was issued as a “safety net,” that is, it was issued only when the more rigorous procedures for secure PennDOT IDs could not be satisfied. The Supreme Court, however, described this situation as “still contrary to the Law’s liberal access requirement ....” Applewhite, \_\_\_ Pa. at \_\_\_, \_\_\_ A.3d at \_\_\_; slip op. at 4.

The new procedure proposed the first day of the hearing will cure this deficiency if implemented as described. As believably explained by Kurt Myers, Deputy Secretary for Transportation, the new procedure will eliminate the so-called “exhaustion” requirement, will eliminate the requirement for two proofs of residency, and will result in the DOS ID no longer being a “safety net” product. Additional proposed changes credibly described by Shannon Royer, Deputy Secretary for the Commonwealth, will obviate the necessity for a second trip to a PennDOT Drivers Licensing Center to obtain the DOS ID.

I have three problems with the testimony regarding the proposed changes. First and foremost, the evidence is similar in kind to the prospective “assurances of government officials” testimony which the Supreme Court found an unsatisfactory basis for a “predictive judgment.” Id. at \_\_\_, \_\_\_ A.3d at \_\_\_, slip op. at 6. Second, the proposed changes are to occur about five weeks before the general election, and I question whether sufficient time now remains to attain the goal of liberal access. Third, the proposed changes are accompanied by candid admissions by government officials that any new deployment will reveal

unforeseen problems which impede implementation. These admissions were corroborated by anecdotal evidence offered by Petitioners regarding the initial roll-out of the DOS IDs in August. For these reasons, I cannot conclude the proposed changes cure the deficiency in liberal access identified by the Supreme Court.

Nevertheless, acknowledgement should be made of improvements in system design by government officials since initial deployment of the DOS ID. These include a more streamlined procedure for validating birth dates, improved scheduling of individuals manning the DOS Help Desk, a more structured referral system for complex Help Desk inquiries, and some extended hours at PennDOT Drivers Licensing Centers, to name a few. Outreach and voter education efforts by PennDOT and DOS, believably described by Deputy Secretaries Myers and Royer, are extensive, surpassing predictions made in the earlier hearing. These existing structural improvements, together with the proposed enhanced access to the DOS ID and additional time, will place the Commonwealth in a better position going forward.

### **Disenfranchisement**

After the first hearing, I made the following preliminary determination:

Although not necessary for preliminary injunction purposes, my estimate of the percentage of registered voters who did not have photo ID as of June, 2012, is somewhat more than 1% and significantly less than 9%, based on the testimony of Rebecca K. Oyler and inferences favorable to Respondents. I rejected Petitioners' attempts to inflate the numbers in various ways.

Applewhite v. Commonwealth, No. 330 M.D. 2012, 2012 WL 3332376, at \*3, n.16 (Pa. Cmwlth. Aug. 15, 2012) (unreported).

As of the most recent hearing, between 9300 and 9500 PennDOT IDs for voting have been issued. Also, between 1300 and 1350 DOS IDs have been issued. Further, PennDOT statistics for issuance of initial drivers' licenses and initial photo IDs for the period March, 2012, through September, 2012, show a slight increase over the same period in 2011. Pet'rs' Ex. 136. The increase is in the magnitude of 1000 to 2000 a month. Id.

I expected more photo IDs to have been issued by this time. For this reason, I accept Petitioners' argument that in the remaining five weeks before the general election, the gap between the photo IDs issued and the estimated need will not be closed. I reject Respondents' argument that my initial estimate was overblown.

Consequently, I am not still convinced in my predictive judgment that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement for purposes of the upcoming election. Under these circumstances, I am obliged to enter a preliminary injunction. Applewhite, \_\_\_ Pa. at \_\_\_, \_\_\_ A.3d at \_\_\_, slip op. at 7.

#### **Form of Preliminary Injunction**

At my invitation, the parties offered argument on the form of a preliminary injunction. Importantly, Petitioners concede that parts of Act 18

(relating to proof of identification for absentee voting) do not cause injury and may be implemented. Therefore, they no longer seek a total ban on implementation of Act 18. Also, Respondents concede that procedures for deployment of the DOS IDs did not conform to the liberal access requirement as explained by the Supreme Court and that some injunction relating to that activity is appropriate. Respondents highlight changes already made and others recently proposed.

A preliminary injunction must be crafted so as to be no broader than is necessary for the petitioner's interim protection. Santoro v. Morse, 781 A.2d 1220 (Pa. Super. 2001); Anchel v. Shea, 762 A.2d 346 (Pa. Super. 2000); Langston v. Nat'l Media Corp., 617 A.2d 354 (Pa. Super. 1992); Three Cnty. Servs., Inc. v. Phila. Inquirer, 486 A.2d 997 (Pa. Super. 1985); see 15 STANDARD PENNSYLVANIA PRACTICE 2D §83:7 at 32 (2010 ed.) See also Crowe ex rel. Crowe v. Sch. Dist. of Pittsburgh, 805 A.2d 691, 694 (Pa. Cmwlth. 2002) (preliminary injunction must be "narrowly tailored to address the wrong plead [sic] and proven."). "Even if the essential prerequisites of an injunction are satisfied, the court must fashion a remedy 'reasonably suited to abate [the harm].'" The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Constr. Co., Inc., 893 A.2d 196, 207 (Pa. Cmwlth. 2006) (quoting John G. Bryant Co., Inc. v. Sling Testing & Repair Inc., 471 Pa. 1, 7, 369 A.2d 1164, 1167 (1977)); see also Big Bass Lake Cmty. Ass'n v. Warren, 950 A.2d 1137 (Pa. Cmwlth. 2008) (court must narrowly tailor its remedy to abate the injury).



Our Supreme Court identified the possibly offending conduct which is the focus of my current attention: procedures for deployment of the DOS IDs which fail to comport with the requirement of liberal access found in Section 206(b) of the Pennsylvania Election Code (Election Code),<sup>1</sup> 25 P.S. §2626(b); and voter disenfranchisement. Applewhite, \_\_\_ Pa. at \_\_\_, \_\_\_ A.3d at \_\_\_, slip op. at 2-3, 6-7. Consistent with this Court's responsibility to narrowly tailor the remedy to abate the harm, I will enter a preliminary injunction addressing the conduct identified by the Supreme Court.

Regarding the liberal access requirement, I adopt most of the language proposed by Respondents.

For several reasons, I reject Petitioners' request to enjoin all outreach and education efforts required by Section 206(a) of the Election Code, 25 P.S. §2626(a). Petitioners assert that those efforts will mislead the public if election officials are enjoined from asking for photo ID at the polls.

First, as discussed below, I reject the premise upon which Petitioners' argument is based. That is, I reject the underlying assertion that the offending activity is the request to produce photo ID; instead, I conclude that the salient offending conduct is voter disenfranchisement. As a result, I will not restrain election officials from asking for photo ID at the polls; rather, I will enjoin enforcement of those parts of Act 18 which directly result in disenfranchisement.

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<sup>1</sup> Act of June 3, 1937, P.L. 1333, as amended. Section 206 was added by the Act of March 14, 2012, P.L. 195, No. 18.

Second, Petitioners' outreach/education request is aimed at a different statutory provision, Section 206(a) of the Election Code, which was not cited by the Supreme Court and was not clearly part of its "liberal access" analysis.

Finally, Petitioners' request is made without reference to the General Assembly's express intent that during the transition into full implementation of Act 18, education efforts at the polls continue. This is set forth in Section 10(2) of Act 18, 25 P.S. §3050 (Historical and Statutory Notes), quoted below.

As to voter disenfranchisement, I carefully reviewed the language of the Election Code after amendment by Act 18. The language of disenfranchisement is found in the part of the Election Code dealing with provisional ballots: "A provisional ballot shall not be counted if ...." Section 1210(a.4)(5)(ii), 25 P.S. §3050(a.4)(5)(ii). This language pre-existed Act 18, but Act 18 added two new circumstances when a provisional vote will not be counted. Both of these new circumstances relate to electors who are unable to produce proof of identification.

More specifically, the relevant subsection of Section 1210 of the Election Code, 25 P.S. §3050(a.4)(5)(ii), provides as follows (with deletions and additions by Act 18 highlighted by strikethrough and underline, respectively):

- (ii) A provisional ballot shall not be counted if:
  - (A) either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual;

(B) the signature required under clause (3) and the signature required under clause (2) are either not genuine or are not executed by the same individual; or

(C) a provisional ballot envelope does not contain a secrecy envelope;

(D) in the case of a provisional ballot that was cast under subsection (a.2)(1)(i), within six calendar days following the election the elector fails to appear before the county board of elections to execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot and that the elector is indigent and unable to obtain proof of identification without the payment of a fee; or

(E) in the case of a provisional ballot that was cast under subsection (a.2)(1)(ii), within six calendar days following the election, the elector fails to appear before the county board of elections to present proof of identification and execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of the proof of identification and an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot.

Thus, disenfranchisement expressly occurs during the provisional ballot part of the in-person voting process, which is addressed in subsections (a.2)<sup>2</sup> and (a.4) of

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<sup>2</sup> This subsection of the Election Code, 25 P.S. §3050(a.2), provides as follows (with deletions and additions by Act 18 highlighted by strikethrough and underline, respectively):

~~(a.2) If the elector is unable to produce identification or the elector's identification is challenged by the judge of elections, the~~

**(Footnote continued on next page...)**

Section 1210. It is this part of the process which must be enjoined to prevent disenfranchisement.

The public policy of this Commonwealth favors severability. PPG Indus., Inc. v. Bd. of Finance & Revenue, 567 Pa. 580, 790 A.2d 261 (2001); Lebanon Valley Farmers Bank v. Commonwealth, 27 A.3d 288 (Pa. Cmwlth. 2011).

The provisions of every statute shall be severable. Section 1925 of the Statutory Construction Act of 1972, 1 Pa. C.S. §1925. Further,

If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void

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(continued...)

~~elector shall be permitted to cast a provisional ballot in accordance with subsection (a.4).~~ If any of the following apply, the elector shall be permitted to cast a provisional ballot in accordance with subsection (a.4):

(1) The elector is unable to produce proof of identification:

(i) on the grounds that the elector is indigent and unable to obtain proof of identification without the payment of a fee; or

(ii) on any other grounds.

(2) The elector's proof of identification is challenged by the judge of elections.

provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Id.

As our Supreme Court explains:

In addition to applying to 'every' statute and employing mandatory terms, Section 1925 is notable because it is not merely boilerplate. Thus, Section 1925 does not mandate severance in all instances, but only in those circumstances where a statute can stand alone absent the invalid provision. Section 1925 sets forth a specific, cogent standard, one which both emphasizes the logical and essential interrelationship of the void and valid provisions, and also recognizes the essential role of the Judiciary in undertaking the required analysis.

Stilp v. Commonwealth, 588 Pa. 539, 626-27, 905 A.2d 918, 970 (2006) (citation omitted).

Significant for current purposes, Section 103(a) of the Election Code, 25 P.S. §2603(a), provides (with emphasis added):

The provisions of this act are severable, and if any article, section or clause of this act, or part thereof, is held to be unconstitutional, the decision shall not be construed to affect or invalidate any other provisions of this act, or the act as a whole. It is hereby declared as the legislative intent that this act would have been adopted had such unconstitutional provision not been included therein.

Although not addressed by the parties, the General Assembly expressed its intentions about how Act 18 was to operate during its initial implementation, described as the "soft run" during the first hearing. In Section 10 of Act 18, the General Assembly explained that during the first elections after its passage, an otherwise qualified elector who does not provide proof of identification may cast a ballot that shall be counted without the necessity of casting a provisional ballot.

In particular, Section 10 of Act 18, which appears as a note to 25 P.S. §3050, provides in its entirety (with emphasis added):

Section 10. The following shall apply to elections held after January 1, 2012, and prior to September 17, 2012:

(1)(i) Except as provided under subparagraph (ii) and notwithstanding any law, election officials at the polling place at an election held after January 1, 2012, shall request that every elector show proof of identification.

(ii) Notwithstanding subparagraph (i), prior to September 17, 2012, if the elector does not provide proof of identification and the elector is otherwise qualified, the elector may cast a ballot that shall be counted without the necessity of presenting proof of identification and without the necessity of casting a provisional ballot, except as required by the act.

(2) Beginning January 1, 2012, if any elector votes at a polling place at an election and does not provide proof of identification and will be required to provide proof of identification beginning September 17, 2012, the election official that requested the proof of identification shall provide to the elector written information prescribed by the Secretary of the Commonwealth briefly describing the voter identification

requirement created by this act and inform the elector that he or she will be required to comply with that requirement when voting at future elections beginning September 17, 2012, unless an exemption applies.

Consistent with this expressed intent, and consistent with principles of severability, I will enjoin enforcement of those provisions of Act 18 which amend the provisional ballot procedures of the Election Code and cause disenfranchisement based on failure to present photo ID for in-person voting. The injunction will have the effect of extending the express transition provisions of Act 18 through the general election.

For several reasons, I decline Petitioners' post-hearing invitation to enjoin Act 18's requirement that election officials request that an in-person voter show photo ID. First, Petitioner's invitation is made without reference to the General Assembly's express intent that during the transition period a request for photo ID be made even though the vote will be counted regardless of compliance with the request.

Second, I disagree with Petitioners' premise for their invitation. They assert that the "offending activity is the Commonwealth's attempt to impose on voters a photo ID requirement without providing liberal access to photo ID that can be used to vote." Pet'rs' Post-Hearing Br. at 15. This assertion is not consistent with that part of our Supreme Court's direction that I revisit my prior predictive judgment "that there will be no voter disenfranchisement ...." Applewhite, \_\_\_ Pa. at \_\_\_, \_\_\_ A.3d at \_\_\_, slip op. at 7. I understand the Supreme Court's language to identify the essential offending activity as voter disenfranchisement, not a

request to produce photo ID. The injunction is tailored to address that offending activity.

Third, the cases cited by Petitioners do not compel the result they seek. I reviewed the decisions in Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (Billups 2005), Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006), and Milwaukee Branch of NAACP v. Walker et al., No. 11 CV 5492 (Wis. Cir. Ct. Mar. 6, 2012) (unpublished), cert. denied, 811 N.W.2d 821 (Wis. 2012), cited by Petitioners in their post-hearing brief. I also reviewed the decision in Common Cause/Georgia, League of Women Voters of Georgia, Inc. v. Billups, 439 F. Supp.2d 1294 (N.D. Ga. 2006) (Billups 2006). However, these decisions do not alter my analysis. None of them provide a legal basis for me to ignore our Supreme Court's language of "no voter disenfranchisement," or the General Assembly's description of procedures to be used during the transition to full implementation of Act 18. Moreover, a careful reading of the entire injunctions in Billups 2005 and Billups 2006 reveals that the district court's primary focus was on voter disenfranchisement rather than on a request to show photo ID.

Similarly, I reject the Respondents' post-hearing argument that a possible remedy is to enjoin only operation of the disenfranchisement language added by Act 18 to Section 1210(a.4)(5)(ii) of the Election Code, discussed above. Thus, Respondents suggest that a qualified elector be asked to produce proof of identification, but be allowed to cast a provisional ballot. This argument fails to acknowledge the General Assembly's express intent that during the transition into



full implementation of Act 18, an otherwise qualified elector need not cast a provisional ballot.

Normally, a preliminary injunction will remain in place until a decision is reached on a permanent injunction. However, the Supreme Court's per curiam order directed me to reassess my "predictive judgment that there will be no voter disenfranchisement ... for purposes of the upcoming election ...." Applewhite, \_\_\_ Pa. at \_\_\_, \_\_\_ A.3d at \_\_\_, slip op. at 7. Based on this language, the duration of the current preliminary injunction is limited to the upcoming election. This is consistent with an injunction entered by another court in a photo ID challenge. Billups 2006.

### **Permanent Injunction**

Petitioners' preserve their facial challenge to Act 18 because the statute contains no right to a non-burdensome means of obtaining the required identification. Pet'rs' Post-Hearing Br. at 5, n.5. Thus, I will begin planning for trial on a permanent injunction.

In this regard, my understanding of the Supreme Court's per curiam order is that I was to address certain discrete aspects of the case on remand, not that the burden of proof shifted to the Commonwealth. The parties have strongly divergent views on this point. If my understanding is incorrect, the Court's guidance will be needed.

Relatedly, the Supreme Court's reference to "no voter disenfranchisement ... for purposes of the upcoming election," Applewhite, \_\_\_ Pa. at \_\_\_, \_\_\_ A.3d at \_\_\_, slip op. at 7, has sparked debate between the parties. I understand the phrase to be focused on the preliminary injunction for purposes of the upcoming election. I do not understand the phrase to define the test for a facial validity challenge in the context of a permanent injunction. If that understanding is not correct, the Court's guidance will be necessary.

For all these reasons, I enter the following order.



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ROBERT SIMPSON, Judge

# **EXHIBIT 3**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

v.

No. 330 M.D. 2012

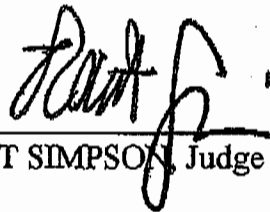
The Commonwealth of Pennsylvania;  
 Thomas W. Corbett, in his capacity  
 as Governor; Carole Aichele, in her  
 capacity as Secretary of the  
 Commonwealth,

Respondents

**ORDER**

**AND NOW**, this 1<sup>st</sup> day of November, 2012, it is **ORDERED** and **DECREED** as follows:

Petitioners' Petition for Supplemental Injunction to Enforce Court's October 2, 2012, Order is **DENIED**.



ROBERT SIMPSON, Judge

# **EXHIBIT 4**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

v.

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

Respondents

No. 330 M.D. 2012

SUBMITTED: October 31, 2012

BEFORE: HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: November 1, 2012**

**DETERMINATION on PETITION  
for SUPPLEMENTAL INJUNCTION  
to ENFORCE COURT'S OCTOBER 2, 2012 ORDER**

On October 2, 2012, I entered a preliminary injunction restraining the  
Respondents from:

1) Requiring that a registered elector must apply for a PennDOT product prior to the elector's seeking issuance of a free DOS ID; and

2) Implementing or enforcing that part of Act 18 which amends Section 1210(a.2) of the Election Code, 25 P.S. §3050(a.2), and Section 1210(a.4)(5)(ii) of the Election Code, 25 P.S. §3050(a.4), for the general election of November 6, 2012. It is the intent of this Preliminary Injunction to extend the transition procedures described in Section 10(1) of Act 18 beyond September 17, 2012, and through the general election of November 6, 2012. Nothing in this Preliminary Injunction shall preclude the Commonwealth from following transition procedures described in Section 10(2) of Act 18 (relating to additional education efforts to those not showing proof of identification for in-person voting) for the general election of November 6, 2012. All other provisions of Act 18 remain in effect.

Applewhite v. Commonwealth, No. 330 M.D. 2012, 2012 WL 4497211, at \*8 (Pa. Cmwlth. Oct. 2, 2012) (unreported). The intent of the preliminary injunction was to allow poll workers to ask for photo ID at the polls on Election Day, consistent with Act 18, but to permit qualified electors to cast a ballot that would be counted even if the electors did not display a photo ID. Significantly, no appeal was taken from this order.

In the afternoon on Friday, October 19, 2012, Petitioners filed a Petition for Supplemental Injunction to Enforce Court's October 2, 2012, Order (Pet. for Supplemental Inj.). Petitioners averred that an October 10 "PACE/PACENET [agencies of the Pennsylvania Department of Aging] mailing falsely inform[ed] voters that they must have a photo ID to vote on Election Day[.]" and that "[t]he Commonwealth has continued to publicize other outdated

information advising voters that they need Photo ID on Election Day.” Pet. for Supplemental Inj. at ¶¶4, 5. Petitioners seek an Order Directing Supplemental Relief ordering Respondents to immediately cease running any broadcast, print, electronic, Internet or other advertisements or displays that still tell voters they must have photo ID to vote, and to take other affirmative “corrective measures to remediate the misinformation [the Commonwealth] has spread since this Court’s injunction ....” *Id.* at 1. They did not request a hearing.

By Rule filed October 24, I ordered Respondents to answer the Petition by October 30, 2012. In the interim, Superstorm Sandy hit Pennsylvania, forcing the closing of the Pennsylvania Judicial Center and the Court’s filing offices on October 29 and October 30. Respondents filed an answer and new matter before the close of business on October 31, 2012.

In their answer and new matter, Respondents addressed the PACE/PACENET mailing, indicating that a corrective letter and flyer were sent to each of the 5,272 recipients of the mailing on October 26. Respondents’ Answer and New Matter to Pet. for Supplemental Inj. and Resp. to Court’s October 24 Rule to Show Cause (Respondents’ Answer and New Matter), Ex. 1, Decl. of Shannon Royer at ¶5, Ex. 8. With the exception of two other incidents which were investigated and corrected, *see id.*, Respondents denied that information generated since the injunction fails to accurately reflect the law and the Court’s October 2, 2012, order. Respondents’ Answer and New Matter at ¶7. They further explained steps taken to comply with the Court’s October 2, 2012, order. *Id.* at ¶5; Ex. 1,



Decl. of Shannon Royer at ¶¶1-5, Exs. 2-8. In addition, they denied that the educational efforts are reasonably likely to disenfranchise voters. Respondents' Answer and New Matter at ¶13. Finally, Respondents challenged the current request as an improper mandatory injunction, raised sovereign immunity, and challenged Petitioners' invocation of certain sections of the Pennsylvania Election Code (Election Code).<sup>1</sup> Respondents' Answer and New Matter at ¶¶6, 24, 27-29. The matter is now ready for disposition.

There are several significant problems with Petitioners' current Petition. Among these is the styling of the petition as one seeking to enforce the Court's October 2, 2012, order. Petitioners do not specify what language in the October 2, 2012, order they seek to enforce. Indeed, the order does not speak at all to the type of education efforts of which Petitioners complain.

Further, as can be discerned from a review of the opinion accompanying the October 2, 2012, order, I considered and expressly rejected Petitioners' request to restrain ongoing education efforts. Applewhite v. Commonwealth, 2012 WL 4497211, at \*3-\*4. Thus, the current petition is essentially a request that I reconsider this part of the unappealed order of October 2, 2012. Because there is nothing about Respondents' ongoing efforts to encourage voters to obtain and use photo IDs in the upcoming election which violates the terms of the October 2, 2012, order, I would deny reconsideration.

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<sup>1</sup> Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. §§2600-3591.

To the extent that the current petition should be viewed as a request for a new injunction, rather than a request for reconsideration, a material impediment is the nature of much of the relief Petitioners request. For the most part, they seek affirmative corrective measures. As such, they seek a mandatory injunction to compel action by Commonwealth actors.

There is a distinction between mandatory and prohibitory injunctions. Mandatory injunctions command the performance of some positive act to preserve the status quo, and prohibitory injunctions enjoin a party from doing an act that will change it. Greater Nanticoke Educ. Ass'n v. Greater Nanticoke Area Sch. Dist., 938 A.2d 1177 (Pa. Cmwlth. 2007). A mandatory injunction requires a "much stronger case." Crowe ex rel. Crowe v. Sch. Dist. of Pittsburgh, 805 A.2d 691, 694 (Pa. Cmwlth. 2002); see also Wyland v. W. Shore Sch. Dist., \_\_\_ A.3d \_\_\_, \_\_\_, slip op. at 17 (Pa. Cmwlth., No. 27 C.D. 2012, filed September 14, 2012) ("The case for a mandatory injunction must be made by a very strong showing, one stronger than that required for a restraining-type injunction.") A mandatory preliminary injunction is "an extraordinary remedy that should be utilized only in the rarest of cases." Summit Towne Centre, Inc. v. Shoe Show of Rocky Mt., Inc., 573 Pa. 637, 653, 828 A.2d 995, 1005, n.13 (2004); see also Shanaman v. Yellow Cab Co. of Phila., 491 Pa. 516, 519, 421 A.2d 664, 666 (1980) ("[A] mandatory preliminary injunction ... should be used only in rare cases and certainly more sparingly than one which is merely prohibitory.") (Citation and quotation omitted).

Further, in Department of Public Welfare v. Portnoy, 566 A.2d 336, 341 (Pa. Cmwlth. 1989) (*en banc*), *aff'd per curiam*, 531 Pa. 320, 612 A.2d 1349 (1992) (DPW), this Court agreed that “a mandatory injunction should not be granted when its enforcement will require too great an amount of supervision by the court.” (Citation omitted). Similarly, our Supreme Court explains: “A mandatory injunction should never be granted when its enforcement will require too great an amount of supervision by the court. It needs no citation of authorities to sustain this proposition. It is a fundamental principle, and of general application in this and other jurisdictions. ...” Cameron v. City of Carbondale, 227 Pa. 473, 475-76, 76 A. 198, 199 (1910) (quoting McCabe v. Watt, 224 Pa. 253, 258, 73 A. 453, 455 (1909)).

Of particular importance is the strong possibility that Respondents are immune from mandatory injunctive relief. “[A]lthough sovereign immunity does not bar a declaratory judgment action or injunction seeking to *prohibit* state parties, i.e., state agencies or employees, from acting, sovereign immunity does apply to an action seeking to *compel* state parties to act ....” Finn v. Rendell, 990 A.2d 100, 105 (Pa. Cmwlth. 2010) (single judge opinion by Leadbetter, P.J.) (citing Fawber v. Cohen, 516 Pa. 352, 532 A.2d 429 (1987); Stackhouse v. Pa. State Police, 892 A.2d 54 (Pa. Cmwlth. 2006)) (emphasis in original).

Here, it is very doubtful that I can legally compel Respondents to take most of the steps Petitioners seek. For this reason, it is unlikely Petitioners will prevail on the merits.

The parties strongly dispute whether Respondents' education efforts are misleading. However, I need not resolve this dispute now because Petitioners never offered credible proof that Respondents' education program is likely to cause disenfranchisement. Petitioners made this assertion in the most recent hearing on remand from the Supreme Court. Counsel for Petitioners argued that if voters thought they would need photo ID at the polls, "they're just going to stay home." Notes of Testimony (N.T.), 9/27/12, at 624-25. I questioned whether there was evidence to support that claim. *Id.* Counsel conceded that the evidence was offered through expert opinion, which was rejected. *Id.*; see Applewhite v. Commonwealth, 2012 WL 4497211, at \*6-\*7. For this and other reasons, Petitioners' earlier request that I enjoin education efforts was denied. Because Petitioners offer no new evidence on the "staying home" disenfranchisement claim, it is doubtful that they will now prevail on this point.

Another basis to question whether Petitioners will prevail involves their suggestion that Respondents' education campaign violates Sections 1827 and 1847 of the Election Code, 25 P.S. §§3527, 3547. Pet. for Supplemental Inj. at ¶6. These sections prohibit any "person" from taking certain fraudulent actions or interfering with the free exercise of the elective franchise. However, Commonwealth parties do not qualify as "persons" under the Election Code who can be guilty of the prohibited actions. See 1 Pa. C.S. §1991 (defining "Person" as including "a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person."). But see Commonwealth v. TAP Pharm. Prods., 36

A.3d 1197 (Pa. Cmwlth. 2011) (Commonwealth agencies qualify as “person” under consumer protection statute); Commonwealth v. TAP Pharm. Prods., 36 A.3d 1112 (Pa. Cmwlth. 2011) (same).

One of Petitioners’ principle arguments is that Respondents’ education program is misleading because disclaimers of the “need photo ID to vote” message are not sufficiently conspicuous. See Pet. for Supplemental Inj. at ¶¶10, 14-18. Also, they assert disclaimers must be comparable to all prior messaging. See Pet. for Supplemental Inj. at ¶12. However, the source for such a legal duty is unclear. For this additional reason, it is doubtful that Petitioners will prevail on the merits.

Finally, as a practical matter, a mandatory injunction should not be granted when its enforcement will require too great an amount of supervision by the court. DPW. Petitioners’ invitation to manage the conspicuity and comparability of disclaimers in all Commonwealth broadcast, print, electronic, Internet or other advertisements, displays and robocalls leading up to Election Day contemplates an endeavor for which courts are ill-suited. Because Petitioners seek too great an amount of supervision by the Court, it is unlikely they will prevail on the merits.

For all these reasons, Petitioners' current request that I restrain or supervise Respondents' education efforts is denied, and the following order is entered.



ROBERT SIMPSON, Judge

# **EXHIBIT 5**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viviette Applewhite; Wilola Shinholster Lee; Gloria  
Cuttino; Nadine Marsh; Bea Bookler; Joyce Block; Devra  
Mirel ("Asher") Schor; the League of Women Voters of  
Pennsylvania; National Association for the Advancement of  
Colored People, Pennsylvania State Conference; Homeless  
Advocacy Project,

Petitioners,

v.

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

Respondents.

Docket No. 330 MD 12

2013 FEB 14 P 3: 34

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OF PENNSYLVANIA



**STIPULATION AND PROPOSED ORDER**

Petitioners and Respondents, by and through their undersigned counsel, hereby stipulate that the preliminary injunction that was entered by the Court in this Action on October 2, 2012 enjoining implementation or enforcement of specified provisions of the Act of March 14, 2012, P.L. 195, No. 18 (Act 18) for the general election of November 6, 2012 ("the Preliminary Injunction") shall be extended to enjoin those same provisions of Act 18 to cover all elections in Pennsylvania through the certification of the May 21, 2013 elections, including the municipal primary, special elections and any other elections in Pennsylvania that occur through that date.

With respect to elections after May 21, 2013, the parties jointly propose that the Court modify paragraph 3 of Scheduling Order III entered on January 22, 2013 to provide as follows: "Any motion to further continue or modify the Preliminary Injunction to cover elections after May 21, 2013 will be decided by the trial judge apart from and prior to a final decision on the merits of the permanent injunction, but will be based on the full record of this Action as of the



close of evidence in the trial currently scheduled to begin on July 15, 2013. Any motion to continue or modify the Preliminary Injunction shall be included in the Pre-trial Briefs required by paragraph 5 of the Scheduling Order III. Any post-trial briefs related to extending or modifying the Preliminary Injunction shall be filed within 3 business days of the close of evidence in the trial currently scheduled to begin on July 15, 2013. It is the intent of the Court to try to resolve any motion to extend the Preliminary Injunction by August 9, 2013 to allow sufficient time for any appeals to be decided before the November 2013 election. This schedule is dependent on final approval by the assigned trial judge."

<p>By: </p> <hr/> <p>Patrick S. Cawley, Esq. Senior Deputy Attorney General Civil Litigation Section 15<sup>th</sup> Floor, Strawberry Square Harrisburg, PA 17120</p> <p>Attorney for Respondents</p>	<p>By: </p> <hr/> <p>Michael Rubin Arnold &amp; Porter LLP 555 Twelfth Street, NW Washington, DC 20004-1206</p> <p>Witold J. Walczak ACLU of Pennsylvania 313 Atwood Street Pittsburgh, PA 15213</p> <p>Jennifer R. Clarke Public Interest Law Center of Philadelphia 1709 Benjamin Franklin Parkway, 2nd Floor Philadelphia PA 19103</p> <p>Marian K. Schneider Advancement Project 295 E. Swedesford Road #348 Wayne, PA 19087</p> <p>Attorneys for Petitioners</p>
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Date: February 14, 2013

**SO ORDERED THIS \_\_\_ DAY OF  
FEBRUARY 2013**

\_\_\_\_\_  
Hon. Robert Simpson, Judge

**PROOF OF SERVICE**

I, Timothy Keating, certify that I am this day serving by electronic mail (by agreement of the parties), the foregoing Brief in Opposition to Petitioners' Application for Special Relief in the Nature of Preliminary and Permanent Injunctions, and in Support of Continuing the Limited Preliminary Injunction, which service satisfies the requirements of Pa.R.A.P. 121.

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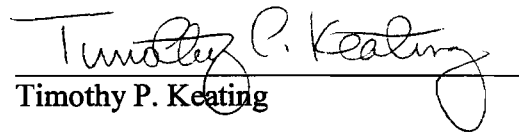
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Date: August 5, 2013

  
Timothy P. Keating