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**IN THE COMMONWEALTH COURT  
OF PENNSYLVANIA**

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MONICA MOYER, et al.,

Plaintiffs,

v.

PEDRO A. CORTES, Secretary of the Commonwealth,  
et al,

Defendants.

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Case No. 497 MD 2008

**DEFENDANTS' BRIEF  
IN OPPOSITION TO PRELIMINARY INJUNCTION**

Defendants Association of Community Organizations for Reform Now, Inc. (“ACORN”), Citizens Services, Inc. (“Citizens Services”), and Project Vote/Voting For America, Inc. (“Project Vote”) (together, the “Private Defendants”), by their counsel, Mette, Evans & Woodside, respectfully oppose the Plaintiffs’ Motion for Special and Preliminary Injunction (“Motion”), and aver as follows:

### INTRODUCTION

With eighteen days to go before a national and statewide election, various individuals associated with the Republican Party<sup>1</sup> filed suit on October 17, 2008 in the Commonwealth Court against Secretary of State Pedro A. Cortes and three private parties: ACORN, Project Vote, and Citizens Services (the “Private Defendants”). As against the Secretary of State, the Plaintiffs purport to describe various deficiencies in the Statewide Uniform Registry of Electors (“SURE”) system which—so they say—establish violations of the Pennsylvania Voter Registration Act, the Pennsylvania Election Code, the federal Help America Vote Act (“HAVA”),<sup>2</sup> and the United States Constitution. As against the Private Defendants, the Plaintiffs offer but one count. “The conduct of [these defendants] in knowingly and willfully submitting

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<sup>1</sup> The Republican Party of Pennsylvania is a plaintiff, as are a Republican congressional candidate (W. Craig Williams), the Chairman of the Pennsylvania Republican State Committee (Robert A. Gleason, Jr.), the Vice-Chairman of the Pennsylvania Republican State Committee (Joyce Haas), the Chair of the Pennsylvania Federation of Young Republicans (Adrienne Mitford), and two other individuals.

<sup>2</sup> The HAVA claim is directed only at the Secretary of State. It is noteworthy nonetheless that the Plaintiffs persist in this claim even though the United States Supreme Court, the same day this suit was filed, vacated a temporary restraining order sought by the Ohio Republican Party and others against the Ohio Secretary of State on a similar theory. *Brunner v. Ohio Republican Party*, --- S. Ct. ---, 2008 WL 4601731 (Oct. 17, 2008).

false and duplicative voter registrations,” the Plaintiffs contend, amounts to common law fraud. Complaint ¶ 139.

By way of ‘relief,’ the Plaintiffs seek a series of extraordinary injunctive measures against both the Secretary of State and the Private Defendants. With respect to the Private Defendants, the Plaintiffs demand an order:

- (a) Enjoining “all attempts to encourage voters who have submitted false or duplicative registration forms from voting or attempting to vote”;
- (b) Directing the provision to the Plaintiffs all lists of individuals for whom the Private Defendants submitted voter registration forms;<sup>3</sup>
- (c) Directing the Private Defendants to fund public service announcements regarding identification requirements for first-time voters; and
- (d) Imposing upon the Private Defendants, in essence, the same terms as a settlement agreement reached between ACORN (but not the other Private Defendants) and King County, Washington.

Complaint at 35-36.<sup>4</sup>

The Plaintiffs, through their proposed injunction, would like to shut down the Election Day efforts of the Private Defendants, use data belonging to the Private Defendants to harass and intimidate voters, compel the Private Defendants to engage in political speech dictated by the Plaintiffs, and subject the Private Defendants to unsupported legal constraints. The Court *sua sponte* should dismiss the entire action out of hand, but at a minimum, should deny this Motion.

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<sup>3</sup> The Plaintiffs ask that this information be provided to the Secretary of State as well. Motion at 4-5. Of course, the Secretary of State has not sought it.

<sup>4</sup> In a last-page footnote in their supporting brief, the Plaintiffs further request—a request which appears in neither the Complaint nor the Motion—that the Court direct the Department of State to revoke the authority of ACORN to operate in Pennsylvania. Pls.’ Br. at 21 n.15. This apparent request for relief is not properly placed before the Court and the Private Defendants therefore will not respond to it at this time.

This contrived suit has offered the Plaintiffs a tailor-made podium for splendid political theater in its less than two-week shelf life, and the Plaintiffs certainly have made the most of the opportunity. The public relations strategy that animates this action appears to be a concerted and organized practice to file suit shortly before an election, denounce and demonize the opponent in self-righteous, thunderous tones, and then quietly disappear following Election Day, having reaped the publicity benefits. Only days before Election Day 2004, for example, ACORN was sued both in Ohio and in Florida (twice) on patently baseless theories. *See Rubick, et al. v. America Coming Together, et al*, Case No. 04 CV 650 (Ohio Ct. Com. Pl. 2004); *Rousseau, et al. v. ACORN*, Case No. 04-61636 (S.D. Fla. 2004); *Stuart v. ACORN*, Case No. 04-22764-CIV-KING/O’SULLIVAN (S.D. Fla. 2004). In 2005, the *Rubick* plaintiffs dropped their suit, the *Rousseau* plaintiffs stipulated to dismissal with prejudice (expressly stipulating that “ACORN would prevail on its Motion for Summary Judgment”), and the court dismissed *Stuart* with prejudice, awarding judgment in favor of ACORN on ACORN’s counterclaims for defamation. *See Exhibits 1, 2, and 3.*

The Plaintiffs’ media blitz surrounding this suit is what it is. There is not much the Court, let alone the Defendants, can do about it. But at a minimum, the Court should be attuned to the use of its venue for political exploitation. The suit before the Court is more stunt than civil action. It patently fails to state a claim against the Private Defendants, and substitutes fiery rhetoric for substance in its factual allegations. This in itself is grounds to deny the Motion. “A court may deprive a party of equitable relief where, to the detriment of the other party, the party applying for such relief is guilty of bad conduct relating to the matter at issue.” *County of Luzerne v. Luzerne County Ret. Bd.*, 882 A.2d 531, 536 (Pa. Commw. 2005). “The doctrine of

unclean hands requires that one seeking equity act fairly and without fraud or deceit as to the controversy in issue.” *Id.*

### ARGUMENT

An injunction is summary, peculiar and extraordinary and ought not to be granted except for where necessary to prevent great and irreparable mischief. *Rick v. Cramp*, 53 A.2d 84, 88 (Pa. 1947). *See also Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1283 (Pa. 1992); *Credit Alliance Corp. v. Phila. Minit-Man Car Wash Corp.*, 301 A.2d 816, 818 (Pa. 1973) (preliminary injunction is a “harsh remedy” and should only be issued when essential prerequisites are met).

The Pennsylvania Supreme Court has explained the test to determine whether a preliminary injunction should be granted as follows:

There are six essential prerequisites that a party must establish prior to obtaining preliminary injunctive relief. The party must show:

- (1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages;
- (2) that the greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings;
- (3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;
- (4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits;

(5) that the injunction it seeks is reasonably suited to abate the offending activity; and,

(6) that a preliminary injunction will not adversely affect the public interest. The burden is on the party who requested preliminary injunctive relief.

*Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004) (citations and internal quotations omitted). See also *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995, 1001 (Pa. 2003). It is the Plaintiffs' burden to satisfy this test. *Free Speech, LLC v. City of Philadelphia*, 884 A.2d 966, 970 (Pa. Commw. 2005) (affirming denial of injunction). The Plaintiffs must establish that they have a "clear right" to the extraordinary relief that they seek. *Soja v. Factoryville Sportsmen's Club*, 522 A.2d 1129, 1131 (Pa. Super. 1987). Each and every element must be fully and completely satisfied for a preliminary injunction to issue. *McCluskey v. Washington Twp.*, 700 A.2d 573, 576 (Pa. Commw. 1997). Indeed, "failure to meet any *one* requirement is enough to deny the preliminary injunction." *County of Luzerne*, 882 A.2d at 535 n.5 (reversing grant of injunction).

*None* of the prerequisite elements are satisfied in this frivolous case. The Plaintiffs can show no irreparable harm, let alone harm of the magnitude that would justify the sweeping injunctive relief they demand. While the Plaintiffs characterize their relief as preliminary, in actuality, the requested injunction is permanent in nature—if the Private Defendants are enjoined from their Election Day "Get Out The Vote" activity, or compelled to run pre-election public service announcements, that cannot be undone. And far from restoring a *status quo ante*, the proposed injunction would threaten to shut down the Election Day activities of only one side, and would place mountains of data in the hands of the Plaintiffs that—as history and experience elsewhere indicate—will be used as a tool for harassment, intimidation, and voter suppression.

Plaintiffs have failed even to state a claim, let alone to have established that they are likely to prevail on the merits. Because the Plaintiffs have failed to establish any *prima facie* case for relief, *any* injunctive order against the Private Defendants, and to be sure an order of the magnitude Plaintiffs propose, is not reasonably tailored. Finally, considerations of the public interest uniformly cut against the issuance of this injunction.

**I. THERE IS NO IMMEDIATE AND IRREPARABLE HARM.**

The Plaintiffs cannot obtain preliminary injunctive relief unless they can satisfactorily demonstrate that without an injunction, they will suffer urgent and irreparable harm. *Herman v. Dixon*, 141 A.2d 576, 577 (Pa. 1958). Yet as the Secretary of State already has argued—and will demonstrate at the hearing on this Motion—“the SURE system is designed to do what state and federal law requires it to do,” and “as a matter of fact and law, there is no basis for Petitioners’ complaints about the integrity and accuracy of the SURE system.” Commonwealth Answer to Pets.’ Emergency Application for Expedited Discovery at 2, 4.

At last week’s argument on the Plaintiffs’ Motion for Expedited Discovery, counsel for the Plaintiffs’ displayed and distributed a chart which purportedly demonstrated that voter fraud is a pervasive and endemic problem. *See* Exhibit 4. This chart, which appears to reflect the Plaintiffs’ full panoply of voter fraud prosecutions in Pennsylvania since 1979, contains a grand total of *thirteen* entries over nearly *thirty years*. The Brennan Center for Justice, in an extensive analysis of the widespread misconceptions about voter fraud, emphasized that “[i]t is more likely that an individual will be struck by lightning than that he will impersonate another voter at the polls.” Justin Levitt, Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law, *The Truth About Voter Fraud* at 4 (2007), available at [http://brennan.3cdn.net/e20e4210db075b482b\\_wcm6ib0hl.pdf](http://brennan.3cdn.net/e20e4210db075b482b_wcm6ib0hl.pdf). And even with respect to absentee ballots, the report finds only a “handful of known cases” of

fraud, and concludes that such conduct is “extremely rare.” *Id.* at 12. “[T]he scarcity is expected, given the severity of the penalty (criminal prosecution), and the meager nature of the payoff (one incremental vote).” *Id.* Plaintiffs’ contrived alarmism aside, there is little basis to believe that the upcoming election will be marred by large-scale fraud, and certainly no basis to issue the sweeping and chilling injunctive remedies the Plaintiffs demand.

Because the SURE system works, and because voter fraud is far more potent as a rallying cry than it is manifested as a true election issue, the Plaintiffs fail to show the necessary irreparable harm to justify the equitable relief they seek.

**II. THIS INJUNCTION WOULD INFLICT GREATER HARM THAN IT WOULD PREVENT AND WOULD SUBSTANTIALLY HARM OTHER INTERESTED PARTIES.**

A preliminary injunction “should in no event ever be issued unless greater injury will be done by refusing it than in granting it.” *Herman v. Dixon*, 141 A.2d at 577. *See also Reed v. Harrisburg City Council*, 927 A.2d 698, 704 (Pa. Commw. 2007) (same). Yet in the present case, the injunction sought would inflict devastating harm to the Private Defendants with little legitimate benefit to the Plaintiffs (though, to be sure, the potential for tremendous illegitimate benefit). Moreover, the Plaintiffs must show that “no other interested parties would be harmed by the proceedings,” *County of Luzerne*, 882 A.2d at 535. This they cannot do: the injunction they seek would significantly harm not only the Private Defendants, but countless others.

**A. The Proposed Injunction Would Stifle All Election Day Activity For The Private Defendants.**

In their supporting brief, the Plaintiffs attempt to minimize the impact of this injunction on the Private Defendants. “[A]n injunction would simply forbid [ACORN] from perpetrating its fraudulent activities,” they say. Pls.’ Br. at 11. Of course, since the Private Defendants

already are bound to obey the law, no useful purpose would be served by enjoining lawbreaking. What the Plaintiffs actually have in mind, as is clear from the Complaint, is an injunction that would chill far greater conduct by the Private Defendants. The Plaintiffs have asked that the Private Defendants be enjoined from “all attempts to encourage voters who have submitted false or duplicative registration forms from voting or attempting to vote.” Complaint at 35.

As the Plaintiffs know, the Private Defendants have extensive and well-coordinated “Get Out The Vote” programs scheduled for Election Day. The Republican Party of Pennsylvania, a Plaintiff in this case, undoubtedly will operate similar programs. Yet the Plaintiffs request an injunction that in effect would impose a strict liability standard upon the Private Defendants, holding the Private Defendants accountable for the conduct of *any* person “encouraged” by the Private Defendants to vote. The artful phrasing of this request is no accident, and the real objective here is clear—through incendiary, hysterical and exaggerated attacks on political opponents, the Plaintiffs hope to connive an injunction that would freeze the ability of one side to muster its constituency to the polls, while leaving the other free to do as it wishes.

**B. The Plaintiffs Or Their Allies Will Use Data Provided By The Private Defendants To Harass And Intimidate Voters.**

The Plaintiffs next demand “copies of any and all lists identifying the names of individuals whom [the Private Defendants] submitted voter registration forms, as well as any copies of all underlying documents and forms.” Motion at 4-5. The Plaintiffs also ask that the Private Defendants be compelled to share the same information with the Secretary of State and with election officials, but that is a *non sequitur*. The Secretary of State has not requested this information. If he wants it, the Private Defendants will provide it, just as they have promptly and fully provided whatever supporting information has been requested of them by election officials

throughout the Commonwealth. The Private Defendants have a long track record of cooperative engagement with local Boards of Election, and have responded and will continue to respond with full and forthcoming detail to any inquiries from such sources.

The real ballgame here, therefore, is that the Plaintiffs want the Private Defendants' data. Yet there is an ugly and disturbing history of groups and organizations working in concert with both the national Republican Party and state Republican Parties to use lists of voters gathered by their political opponents to harass and intimidate those voters. Last week, press accounts from New Mexico reported that a "private investigator" hired by prominent Republican attorney Pat Rogers showed up at the homes of elderly Latino voters and demanded to see documents to verify that they were legitimate voters.<sup>5</sup> See Exhibit 5 (complaint filed against Rogers and the private investigator). The Private Defendants are justifiably fearful of similar activity in Pennsylvania. Such activity will cause substantial harm to those voters—third parties, but undoubtedly interested parties in this action—and the legitimate concern that such activities will take place cuts against issuance of an injunction.

As discussed above, voter fraud simply is not nearly the pervasive epidemic that the Plaintiffs claim. Voter suppression, and particularly the purging of qualified voters from the

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<sup>5</sup> Pat Rogers, the Republican lawyer behind last week's intimidation efforts in New Mexico, features prominently in the recent report issued by the United States Department of Justice regarding the politically-motivated firing of nine United States Attorneys. See U. S. Dep't of Justice, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* (Sept. 2008), *passim*, available at <http://www.usdoj.gov/oig/special/s0809a/final.pdf>. Among other things, the federal report quotes a September 29, 2004 email from Rogers to then-United States Attorney David Iglesias and others saying "*I believe the [voter] ID issue should be used (now) at all levels – federal, state legislative races and Heather [Wilson's] race . . . . You are not going to find a better wedge issue. . . . Today we expect to file a new Public Records lawsuit, by 3 Republican legislators, demanding the Bernalillo county clerk locate and produce (before Oct*

rolls, on the other hand, *are* a frequent, insidious and odious component of election strategy by certain political actors, and have increased in recent years. “When purges go wrong, eligible voters often discover they have been knocked off voter rolls only when they show up at the polls to vote—and can’t.” Myrna Perez, Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law, *Voter Purges* at 6 (2008), available at [http://brennan.3cdn.net/5de1bb5cbe2c40cb0c\\_s0m6bqskv.pdf](http://brennan.3cdn.net/5de1bb5cbe2c40cb0c_s0m6bqskv.pdf). The Private Defendants legitimately fear that the Plaintiffs, if granted unfettered access to voter registration lists compiled by the Private Defendants, will use that data not merely to intimidate and harass individual voters, but also to press for large-scale vote suppression measures.

Ordering this relief would harm the Private Defendants by imposing on them a tremendous burden immediately before the election, when the Private Defendants—like the Plaintiffs—are devoted to countless other pressing tasks. The Private Defendants submitted thousands of voter registration applications to various Boards of Elections throughout the Commonwealth. Virtually all of these applications contain confidential information. Requiring the Private Defendants to copy and redact files in the short time span demanded—let alone searching for, retrieving, and producing “copies of all underlying documents and forms,” as the Plaintiffs seek, Motion at 5—would be an onerous and unfair burden at this late hour. The Plaintiffs were well able to file suit before the eleventh hour, and should not be rewarded with an injunction that distracts and preoccupies the Private Defendants from the very sorts of “Get Out The Vote” activities that undoubtedly will engage the Plaintiffs themselves over the upcoming few days.

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15) *ALL of the registrations signed by the ACORN employee . . . .*” *Id.* at 162 (emphasis added). The Plaintiffs in the present case are simply borrowing Rogers’ dirty tricks from 2004.

It is clear that the Private Defendants realistically cannot provide this information to the Plaintiffs without jeopardizing the personal information of thousands of voters. The Plaintiffs suggest that “[a]ny confidential information can be cured through redaction or an appropriate protective order.” Pls.’ Br. at 21. Redaction of the entire set of documents before Election Day is not a realistic option. And a protective order could not possibly guarantee the security of voter information where the express purpose of the exercise according to the Plaintiffs themselves is to permit the Plaintiffs (and undoubtedly many others, considering the magnitude of the project) to challenge the bona fides of specific voters, and where the Private Defendants fear the Plaintiffs intend to use this information to harass and intimidate those voters.

**C. Plaintiffs’ Proposed Public Service Announcements Are Unconstitutional.**

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). More recently, the Supreme Court has reiterated the principle: “At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

The Plaintiffs nonetheless have asked the Court to direct the Private Defendants to fund public service announcements on the subject of voter identification requirements. Of course, the term ‘freedom of speech’ “necessarily compris[es] the decision of both what to say and what *not* to say.” *Riley v. Nat’l Fed’n of the Blind, Inc.*, 487 U.S. 781, 796-97 (1988). And

“[g]overnment action that . . . requires the utterance of a particular message favored by the Government, contravenes th[e] essential right” to refrain from speaking. *Turner Broad.*, 512 U.S. at 641. *See also Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (government interest in disseminating political speech “cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message”). Nor do *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997) or *United States v. Bell*, 414 F.3d 474, 484-85 (3d Cir. 2005) offer the Plaintiffs an opening by characterizing the proposed compelled speech as commercial. After all, this Court plainly has distinguished “public service announcements” from “paid ads” in its own jurisprudence. *Cortel v. Dep’t of Transp.*, 821 A.2d 173, 177 (Pa. Commw. 2003).

The injunctive relief Plaintiffs seek is not commercial advertising of the type in *Glickman* or commercial information of the type in *Bell*, but core political speech, protected by the First Amendment and not constitutionally susceptible to compulsion. “Political speech, of course, ‘is at the core of what the First Amendment is designed to protect.’” *Morse v. Frederick*, 127 S. Ct. 2618, 2626 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)). *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Core political speech occupies the highest, most protected position; commercial speech [is] regarded as a sort of second-class expression . . .”).

In conjunction with the principle that a mandatory injunction “should be granted even more sparingly than those which are merely prohibitory,” *McMullan v. Wohlgemuth*, 281 A.2d 836, 841 (Pa. 1971), it is clear that the relief sought is far from merited.

**D. Neither The Plaintiffs Nor The Court Have Any Basis To Impose On The Private Defendants The Terms Of A Settlement Agreement Reached By Different Parties In A Different Jurisdiction.**

Bizarrely, the Plaintiffs demand that the Court direct the Private Defendants, “and all persons acting in concert with them, to comply with similar mandates and requirements” to those set forth in a 2007 settlement agreement between King County, Washington and ACORN, one of the Private Defendants. No Pennsylvania prosecutor has sought such terms. The other Private Defendants are not subject to that agreement. The Plaintiffs have no evidence whatsoever to substantiate the circumstances underlying that settlement (entered into voluntarily by ACORN), and therefore no basis to draw any analogy between even their distorted portrayal of events in Pennsylvania and the events that underlie that agreement. Yet the Plaintiffs would like the Court to impose terms ranging from fines to management and training requirements to quality control procedures. While the Private Defendants strive to meet similar objectives in all voter registration drives, this request would harm the Private Defendants by placing various Court-directed but unmerited strictures upon their Pennsylvania operations, would subject the Private Defendants to substantial fines for minor infractions, and would unduly burden the Private Defendants’ First Amendment associational rights. *See, e.g., League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1331-39 (S.D. Fla. 2006). It should not be granted.

**III. A PRELIMINARY INJUNCTION WOULD NOT RESTORE THE STATUS QUO.**

A preliminary injunction is an interim measure designed to preserve the status quo and to protect the parties until a hearing is held. *DiLucente Corp. v. Pa. Roofing Co.*, 655 A.2d 1035, 1037 (Pa. Super. 1995). The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful uncontested status which preceded the pending controversy. *Valley*

*Forge Historical Soc’y v. Wash. Mem’l Chapel*, 426 A.2d 1123, 1129 (Pa. 1981); *Slott v. Plastic Fabricators, Inc.*, 167 A.2d 306, 307 (Pa. 1961). The purpose is to maintain the status quo until the case can be investigated and adjudicated. *Lapaglia Contractors, Inc. v. Borough of Baldwin*, 115 A.2d 236, 237 (Pa. 1955); *Panther Valley Television Co. v. Borough of Summit Hill*, 94 A.2d 735, 737 (Pa. 1953) (per curiam); *Pa. Pub. Util. Comm’n v. Israel*, 52 A.2d 317, 322 (Pa. 1947) (“after a full hearing”).

The injunction sought here would put the parties in positions far removed from the *status quo ante*. The Plaintiffs would remain free to engage in whatever Election Day “Get Out The Vote” efforts they choose, while the Private Defendants would be frozen in place, unable to “encourage” any voter to vote lest that voter—for reasons entirely independent of the Private Defendants—have submitted a false or duplicate registration form. The Plaintiffs would possess reams of confidential and sensitive data which, if history is any guide, will be used to harass and intimidate voters at the polls. The Private Defendants will be forced to spend the remainder of their time before the election generating data to suit the Plaintiffs’ onerous requests and funding public service announcements crafted by the Plaintiffs. And the Private Defendants will be further chilled from perfectly lawful behavior by the imposition upon them of the terms of a settlement agreement applicable to a different jurisdiction and inappropriate under the factual scenario in Pennsylvania.

Indeed, the relief Plaintiffs demand is in the nature of a permanent injunction, not a preliminary injunction. *See Naus & Newlyn, Inc. v. Mason*, 441 A.2d 422, 424 (Pa. Super. 1982) (reversing preliminary injunction because it “went beyond merely preserving the status quo to the point where the relief granted was the final relief” and was thus permanent in nature). And it

is well-settled that a court may not treat a preliminary hearing as the basis for a final decree unless stipulated to by the parties. *Id.*

Because the proposed injunction would radically alter the positions of the parties as to each other, rather than restore a pre-existing status quo, preliminary injunctive relief is inappropriate.

#### **IV. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THE MERITS.**

A preliminary injunction should not be granted unless the rights of a plaintiff are clear and the defendant's wrong is manifest. *All-Pak, Inc. v. Johnston*, 694 A.2d 347, 350 (Pa. Super. 1997). *See also Pa. Sec. Comm'n v. Cont'l Mfg. Co.*, 350 A.2d 831, 832 (Pa. 1976). Even legitimate arguments do not satisfy this prong where they "require the trial court to engage in further fact finding and analysis." *Free Speech, LLC*, 884 A.2d at 973 (rejecting arguments for injunction where appellants failed to present sufficient evidence "establishing a likelihood that they would prevail on these arguments"). The Pennsylvania Supreme Court has emphasized that "[e]ven more essential" than the need to prevent irreparable harm, the balancing of equities, or the restoration of the status quo is "the determination that the activity sought to be restrained is actionable." *Albee Homes, Inc. v. Caddie Homes, Inc.*, 207 A.2d 768, 770-71 (Pa. 1965). *See also Reed*, 927 A.2d at 703 (same). That test falls well short here. For the Plaintiffs have not even stated a claim for relief, let alone adduced evidence sufficient to establish a likelihood of prevailing.

##### **A. The Plaintiffs Do Not Have Standing To Bring This Claim Against The Private Defendants.**

The first problem facing the Plaintiffs is that they are in no way the proper party to take legal action to confront *another private party's* alleged misconduct *vis-à-vis* the government.

The Plaintiffs argue that the conduct of the Private Defendants is calculated to deceive not only the Commonwealth of Pennsylvania, but also “its citizens, including Plaintiffs.” Complaint ¶ 139. In other words, the Plaintiffs propose that one private party may sue civilly another private party for a simple crime (in this case, voter-registration fraud) on the reasoning that such a crime impacts the entire citizenry of which they are a part.

It is fundamental that “a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens” in order to have standing. *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). Basic principles of standing require “some interest other than the abstract interest of all citizens in having others comply with the law.” *Stilp v. Commonwealth*, 927 A.2d 707, 710 (Pa. Commw. 2007) (no taxpayer standing to challenge increase in pay for district attorneys), *aff’d*, 946 A.2d 636 (Pa. 2008). *See also Oliviero v. Diven*, 908 A.2d 933, 936 (Pa. Commw. 2006) (standing requires an interest beyond “the common interest of all citizens in procuring obedience to the law”). A plaintiff may only overcome the common-interest bar to standing when the challenged action “would otherwise go unchallenged in the courts” or where the plaintiff’s interest is “substantial, direct, and immediate.” *Id.* Here, the Plaintiffs fail to overcome that bar, where the Commonwealth has the authority under the Election Code to prosecute any voter-registration fraud by an employee of the Private Defendants. *See, e.g.*, 25 Pa. Cons. Stat. § 3502 (2008).

The Plaintiffs’ far-fetched theory of standing would alter dramatically the very nature of the legal system, to say nothing of the workload of the judiciary. The Plaintiffs are neither bashful nor modest in detailing the scope of their novel theory—they claim that the fate of the national Presidential election rides on it. Complaint ¶ 4. If the Plaintiffs can bring this claim, it

would seem clear that going forward, any United States citizen, anywhere, would have standing to sue any other citizen whom the plaintiff suspects of having committed voter-registration fraud (a crime, never before a civil right of action). There is no limiting principle.

Nor is there any principled reason why this expansive extension of civil remedies to private parties for criminal wrongdoing between an individual and the state should stop at voting. A taxpayer who shortchanges the government presumably has either raised the taxes of others as a result or has deprived his or her fellow citizens of government services that the missing tax dollars would have supplied. Under the Plaintiffs' theory, any taxpayer should have standing to sue any other taxpayer for tax fraud, including injunctive relief to compel other taxpayers to pay their taxes. For that matter, perhaps any homeowner might be able to sue anyone charged nearby with criminal activity for reducing the plaintiff's property values. Any lawful registrant in the Selective Service System should have standing to sue any draft-dodger for raising the plaintiff's risk of injury. If there is a conceptual termination point to the Plaintiffs' reasoning, they surely have not articulated it. Allegations of voter-registration fraud simply are not susceptible to a private cause of action by any other voter who chooses to sue.<sup>6</sup>

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<sup>6</sup> Plaintiff Republican Party of Pennsylvania lacks standing for a second, distinct reason. Because a political party "does not have the right, in and of itself, to vote," it lacks standing to challenge a political gerrymandering claim. *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002). See also *In re Canvass of Absentee Ballots*, 839 A.2d 451, 461-62 (Pa. Commw. 2003) ("[A] political party does not enjoy standing to assert a reapportionment challenge because, lacking the right to vote, it is not aggrieved.") (Simpson, J., dissenting). Identical reasoning dictates that a political party, lacking the right to vote, lacks standing to bring a claim for voter-registration fraud.

**B. The Plaintiffs Have Not Stated A Claim Against The Private Defendants.<sup>7</sup>**

The Plaintiffs have alleged that the Private Defendants have committed actionable fraud against the entire population of Pennsylvania, “including Plaintiffs,” by “knowingly and willfully submitting false and duplicative voter registrations.” Complaint ¶ 139. To be clear, the Plaintiffs have not and cannot allege that the Private Defendants have committed *voter fraud*, *i.e.*, that they have knowingly caused others to cast illegal votes. Instead, although the Plaintiffs raise the specter of vote dilution, the Plaintiffs’ sole count of fraud and misrepresentation against the Private Defendants relies entirely on their contention that the Private Defendants committed fraud *against Plaintiffs* by passing along “problematic, incomplete, or duplicative” voter registration applications *to the Bureau of Elections*.<sup>8</sup> Complaint ¶ 47. Yet the Plaintiffs quite plainly have failed altogether to articulate allegations that satisfy the required elements for a claim of common law fraud. A common law fraud claim requires that the plaintiff, at a minimum, plead six elements with particularity:

- (1) A representation;
- (2) Which is material to the transaction at hand;
- (3) Made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- (4) With the intent of misleading another into relying on it;
- (5) Justifiable reliance on the misrepresentation; and

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<sup>7</sup> The Private Defendants will file Preliminary Objections in the Nature of Demurrer to the Plaintiffs’ Complaint.

<sup>8</sup> This house of cards is constructed on the flimsy and rhetorical assertion that any problematic, incomplete, or duplicative voter registration application “is a potential illegal vote that dilutes the votes of properly registered electors.” Complaint ¶ 74.

(6) Resulting injury proximately caused by the reliance.

*Huddleston v. Infertility Ctr.*, 700 A.2d 453, 461 (Pa. Super. 1997), *citing Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994). The complaint must provide sufficient facts to show, as a *prima facie* matter, that the defendant intended to induce the plaintiff to act based on the misrepresentation. *Bash v. Bell Tel. Co.*, 601 A.2d 825, 832 (Pa. Super. 1992).

The Plaintiffs' absurd common law claim against the Private Defendants is doomed by common sense. First, the Private Defendants never made a material representation to the Plaintiffs. The Plaintiffs apparently would like this Court to accept that an alleged misrepresentation made to the Commonwealth has also been made to every one of "its citizens, including Plaintiffs." Complaint ¶ 139. This proposition is legally untenable. Second, the Plaintiffs fail to allege that the Private Defendants knowingly or recklessly made false statements to the Commonwealth, let alone the Plaintiffs. The Plaintiffs themselves recognize that the Private Defendants were fully forthcoming when they identified to the Commonwealth "problematic, incomplete, or duplicative" applications that their employees had submitted to them. Complaint ¶ 47. Third, the Plaintiffs have not alleged that the Private Defendants intended for the Commonwealth or the Plaintiffs to rely on the problematic, incomplete, or duplicative applications that they had identified to the Commonwealth. Fourth, the Plaintiffs unquestionably have not alleged (and could not possibly show, based on the allegations in the Complaint) that they justifiably and to their detriment relied on a misrepresentation made by the Private Defendants. And finally, the Plaintiffs cannot possibly show under the allegations in the Complaint the necessary proximate causation to satisfy the basic elements of a claim for common law fraud. The theory is novel—defraud the government, and you have defrauded all citizens—but fanciful, and lacking in any support in the law.

**C. The Plaintiffs' Claim Is Doomed On The Facts.**

The Plaintiffs contend that the Private Defendants have “knowingly and willfully submitt[ed] false and duplicative voter registrations.” Complaint ¶ 139. Yet the Complaint is deficient of any facts to support that allegation—because it is not true. The Plaintiffs attempt to leverage the fact that on rare and isolated occasion, an employee of the Private Defendants has defrauded *the Private Defendants themselves* by creating false voter registration applications.

But the Private Defendants will demonstrate:

- That they have instituted and implemented rigorous and scrupulous quality control procedures to weed out potentially invalid voter registration applications;
- That they have segregated the potentially problematic applications identified by the above procedures and presented them separately and with explanation to Boards of Elections so that those boards may more easily ascertain eligible and ineligible voters;
- That they have immediately terminated canvassers whom they have determined have defrauded the Private Defendants by engaging in voter-registration fraud;
- That they have cooperated with law enforcement in the prosecution of such individuals; and
- That fraudulent voter registration applications generated by a rogue canvasser form only a very small proportion of the voter registration applications gathered by the Private Defendants and submitted to election officials.

In short, the Private Defendants will show that even had the Plaintiffs standing, even were the common law claim of fraud against the Private Defendants legally tenable, even if the injunctive relief sought were not more harmful to the Private Defendants than beneficial to the Plaintiffs—even if all the other elements of the test for preliminary injunctive relief satisfied, which they emphatically are not—the Plaintiffs would not merit such relief because they cannot establish that the Private Defendants ever made the necessary misrepresentation to constitute fraud.

At points, the Plaintiffs appear to contend that when the Private Defendants gathered voter-registration applications, the Private Defendants should have unilaterally discarded any applications they viewed as suspect. *E.g.*, Complaint ¶ 47. In other words, the Plaintiffs propose that the Private Defendants should have acted as a private Board of Elections and made dispositive decisions as to whether any particular application was or was not valid. One imagines that had the Private Defendants in fact exercised the authority the Plaintiffs now contend was their duty, the Private Defendants might have made themselves amenable to suit by any eligible voter whose application the Private Defendants mistakenly deemed ineligible. The Private Defendants quite naturally declined to make final decisions regarding voter eligibility. Instead, they segregated and isolated potentially problematic applications cards and flagged those applications for separate submission, with full explanation and disclosure of why those cards had been segregated. The notion that this constitutes a fraud, when the Private Defendants have exerted tremendous efforts to facilitate the review and decisions of the Boards of Elections, is fanciful—and the Plaintiffs therefore cannot establish their claim.

**V. THE PROPOSED RELIEF IS NOT REASONABLY SUITED TO THE PURPORTEDLY OFFENSIVE ACTIVITY.**

The relief that the Plaintiffs seek is radically disproportionate to the magnitude of their concerns. There is no legitimate concern regarding voter fraud at the polls themselves on Election Day: the law requires identification for first-time voters, and as the Commonwealth undoubtedly will show, that law has been well publicized and will be well enforced. Even if a canvasser cheated the Private Defendants by filling out registration cards for Mickey Mouse or the Dallas Cowboys offensive line, there will be no voter fraud, because Mickey Mouse will not show up at a polling place with his drivers' license. For that matter, even assuming *arguendo* the

existence of a conspiracy by the Private Defendants (rather than what has actually occurred, which is wrongdoing by the rare and isolated employee) to commit voter registration fraud, there *still* could be no fraud at the polls, because no matter the genesis of a voter registration fraud, the identification requirement vitiates any concern about illegitimate voters attempting to vote in person. Therefore, the Plaintiffs' overwrought but underwhelming concerns about voter fraud at the polls clearly are no justification for (a) freezing the Election Day efforts of the Private Defendants, (b) compelling the Private Defendants to hand extensive personal data to the Plaintiffs, (c) mandating the Private Defendants to engage in Plaintiff-directed political speech, or (d) imposing in Pennsylvania the inapposite terms of an agreement binding elsewhere.

Grasping for a cognizable issue, the Plaintiffs profess great anxiety that absentee ballots, which may not be verified through a photo identification, will be cast by ineligible voters. (This concern appears nowhere in either the Complaint or the Motion, but features in their subsequently-filed supporting Brief.) The Secretary of State likely will address in detail why the Plaintiffs' alleged concerns are unfounded—for one thing, the large scale fraud the Plaintiffs profess would require that the Private Defendants or others go out and get utility bills for all of these fictitious voters, since some form of identification is required for absentee voters as well.

*See* Voting By Absentee Ballot, Penn. Dep't of State, *available at*

[http://www.votespa.com/HowtoVote/VotingbyAbsenteeBallot/tabid/78/language/en-](http://www.votespa.com/HowtoVote/VotingbyAbsenteeBallot/tabid/78/language/en-US/Default.aspx)

[US/Default.aspx](http://www.votespa.com/HowtoVote/VotingbyAbsenteeBallot/tabid/78/language/en-US/Default.aspx) (“[I]f you’re a first-time voter and plan on using an absentee ballot, you will need to provide a copy of a driver’s license or any other type of acceptable ID.”); Guide for

First-Time Voters, Penn. Dep't of State, *available at*

<http://www.votespa.com/HowtoVote/GuideforFirstTimeVoters/tabid/77/language/en->

US/Default.aspx (“If you are voting for the first time in your county and you intend to vote by absentee ballot, please include a copy of a form of identification with your voter registration application. Otherwise, you will be required by federal law to include a copy of a form of identification with your absentee ballot.”) .

But even if the Plaintiffs’ concerns regarding absentee ballots were reality-based, which they are not, there is no reason why freezing the Election Day “Get Out The Vote” efforts of the Private Defendants would remedy this purported problem. The various Boards of Election already possess all the data submitted to them by the Private Defendants regarding voters registered through the efforts of the Private Defendants, and the Plaintiffs do not require it for this red herring issue to be addressed appropriately. Public service announcements regarding identification requirements are entirely disconnected from a concern about absentee ballots, since absentee ballots must be submitted by the voter and received by the Board of Elections by the Tuesday before the election, which has already passed. *See Voting By Absentee Ballot, supra*. And the out-of-jurisdiction settlement agreement remains inapposite.

Because the injunction proposed by the Plaintiffs is not reasonably suited to abate the purportedly offensive activity, the injunction is not merited.

**VI. ISSUING THIS INJUNCTION WOULD ADVERSELY AFFECT THE PUBLIC INTEREST.**

The Court’s grant of the requested injunctive relief would have a great adverse affect on the public interest. The very nature of this hearing improperly politicizes the courtroom itself. And were the Court to grant the Plaintiffs the extraordinary prohibitory and mandatory injunctive relief that they request, the Court’s order would lead to the likelihood of voter intimidation, chill

voter participation, impinge upon the privacy rights of thousands of individuals, create chaos at the polls, and contravene the First Amendment rights of private parties.

An order enjoining the Private Defendants from attempting “to encourage voters who have submitted false or duplicative registration forms from voting or attempting to vote,” Complaint at 35, would effectively shut down the Private Defendants’ “Get Out The Vote” activity on Election Day. The relief requested would amount to imposition of strict liability for the conduct of entirely independent third-party voters who happen to get a ride to the polls, for example. The Plaintiffs would be subject to no such strict liability. Such lopsided justice hardly serves the public interest in a fair election, particularly as the Commonwealth has systems in place to ensure that no unregistered voter can vote, and that no registered voter can vote more than once.

Compelling the Private Defendants to hand the Plaintiffs “all lists of individuals for whom the Private Defendants submitted voter registration forms,” Complaint at 36, will result in harassment by the Plaintiffs’ poll challengers of scores of thousands of legitimate voters at the polls on Election Day.<sup>9</sup> Placing this private information in the Plaintiffs’ hands will permit and facilitate attempts to intimidate legitimate electors into not voting at all. The recent activity in New Mexico confirms that such a scenario is not a nightmare conjured up by the Private Defendants—it is reality. Granting this injunction will harm the compelling public interest in an

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<sup>9</sup> The Plaintiffs also request that the Private Defendants turn over the same information to “the Secretary and the Election Officials.” Complaint at 35. Such a request, of course, is farcical given that the Private Defendants have already turned over *this exact information* to election officials around the Commonwealth. Plaintiffs’ request should be seen for what it is—an attempt to gain access to private information by standing in the shoes of the Commonwealth.

orderly election and the compelling public interest in ensuring that all validly registered voters can do so without fear of intimidation or harassment.

As to the Plaintiffs' request that the Private Defendants be compelled to fund public service announcements (with content dictated by the Plaintiffs), there could hardly be a greater injury to the public interest than unconstitutionally compelled political speech. For the same reasons and more, it is wholly inappropriate to subject the Private Defendants to matching terms in an agreement reached by only one of the Private Defendants on the basis of different facts with government officials in a different jurisdiction.

Finally, awarding injunctive relief on the basis of this flimsy Complaint would encourage future litigants to engage in thinly-veiled courtroom tactics designed merely for political advantage, harming the public interest by thrusting partisan political theatre into the judicial realm.

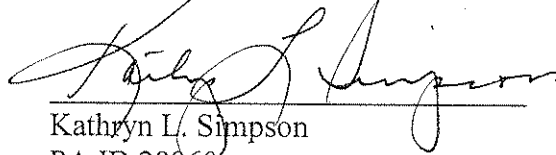
Because the public interest is not served—but rather is contravened in any number of ways—by the relief the Plaintiffs demand, the Court should deny the Motion.

CONCLUSION

For the reasons stated above, the Private Defendants respectfully request that this Honorable Court deny the Plaintiffs' Motion for Special and Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I am this day serving a copy of the foregoing document upon the persons below by U.S. First Class mail addressed as follows, which service satisfies the requirements of the Pennsylvania Rules of Civil Procedure, as well as via e-mail where noted below:

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