

efforts of the Department of State (hereafter “Department”) and the 67 counties, which work tirelessly to ensure that each election is fair and just.

Secretary Cortés has contended from the outset that this case is a street fight between Petitioners and ACORN, and that he was invited to the rumble only to permit Petitioners to voice their allegations in a statewide court. Secretary Cortés asserts that is still the case for the following three reasons.

First, Petitioners’ Emergency Motion for Expedited Discovery made no request for documents or depositions of Department personnel – it was not until the hearing on that motion that the Secretary learned that, as a seeming afterthought, Petitioners desired to depose Jonathan Marks, Chief of the Department’s Division of the Statewide Uniform Registry of Electors (hereafter “SURE”).

Second, although it appears that Petitioners’ prayer for relief may be a moving target, the initial iteration requested three things from the Secretary:

1. Preliminarily, and after a final hearing, permanently directing the Secretary to ensure that the SURE system provides to Election Officials, in timely and efficient manner, data about registrants ineligible to vote, as required by state and federal law;
2. Preliminarily, and after a final hearing, permanently directing the Secretary to ensure that all Election Officials will require identification from all first-time registrants, as required by state and federal law; and
3. Preliminarily, and after a final hearing, permanently directing the Secretary to ensure that all Election Officials provide a significantly larger amount of provisional ballots at each polling place so that voters whose voter registration applications have not

been timely processed by Election Officials on or before the day of the 2008 General Election or in which questions exist can vote provisionally.

The Secretary has essentially been doing all of this since the inception of the SURE system and the passage of the federal Help America Vote Act of 2002 (HAVA). Perhaps to make that connection, Petitioners have morphed the second item in the prayer for relief to include an allegation that the Secretary has misinterpreted the Pennsylvania Election Code with respect to first-time absentee voters; but, as more fully set forth in the Discussion, this is not the case. For the purpose of demonstrating the lack of any real gripe against the Secretary, the Court should note that in the 143 paragraphs of the Verified Complaint, there was no reference to “absentee voters” – it is suggested that the Secretary should be similarly absent from this case.

Third, as noted during the argument on the Emergency Motion for Expedited Discovery, not only was there no emergency, but Election Day is almost upon us. Most, if not all, county boards of elections have completed the following tasks in preparation for the 2008 General Election: the testing of voting machines; ordering ballots; advertising ballots; and training poll workers. More significant for this litigation is the fact that, thanks to the hard work of the county voter registration commissions and the Department’s support, the processing of all registrations will be substantially finished and most poll books will have been printed before this Honorable Court convenes its hearing to consider Petitioners’ application for special relief. Knowing that, Petitioners have continued to press their action, not to get anything from the Secretary, but to get the data, lists, *etc*, from ACORN.

The Secretary will not speculate on what Petitioners intend to do with the data they seek, nor will he defend any actions by ACORN or its employees – that is their fight, not the Secretary’s. As in the world of professional wrestling, this match may be full of entertainment as

far as the main attraction between ACORN and the Petitioners; however, it is sorely lacking in substance in so far as it seeks to include the Secretary in the charade. Regardless, this memorandum of law will address the issues surrounding the relief requested in the Verified Complaint and briefly note where and how Petitioners falls short in their request for injunctive relief.

DISCUSSION

I. The Secretary of the Commonwealth has fulfilled his duty to ensure that the SURE system provides data about registrants to Election Officials, in timely and efficient manner.

The Statewide Uniform Registry of Electors (SURE), established by 25 Pa.C.S. § 1222 (enacted by Act 3 of 2002), is designed to be a centralized, uniform statewide voter registry that supports every critical function of the election system. For the past three years, all counties have been using the system to, among other things, determine voter eligibility, assign precincts and produce district registers (commonly known as poll books). As noted in the Department's website (<http://www.dos.state.pa.us/sure>), by placing all Pennsylvania counties on a common software platform:

- Duplicate registrations among county files will be presented to county election officials for resolution;
- When registered voters move across county lines, their existing records and voting history will be identified to election officials for transfer to the new county of residence;
- External agency transactions which affect voter eligibility, from PENNDOT and the Department of Health (DOH), will be centrally integrated with SURE and electronically forwarded to county officials; and
- Voter roll maintenance programs will operate on a consistent statewide basis to remove "deadwood", keeping the registry up to date, protecting against potential voter fraud, and promoting consistency among counties in their data management practices

As the evidence will demonstrate, the Secretary has fulfilled these obligations. Petitioners make much ado about the few times that the system has been “down” temporarily (and the Secretary does not dispute that that has occurred on several occasions due to heavy usage). However, in our technological age, the Court could almost take judicial notice of the fact that all computer systems experience slowdowns and times of inoperability. The real issue is not whether the SURE system has been constantly accessible on an uninterrupted basis for the past three years; rather, the test is whether it has been consistently available so as to allow county elections officials to access records, input data, search for duplicate records and ultimately generate a list of electors that can be used in over 9,300 precincts on Election Day. The answer to that question is “yes.”

Moreover, when the SURE system has become inoperable for short periods of time, due to technical difficulties caused primarily by heavy usage, voter registration officials do not continue to process voter registration applications without using the SURE system. Rather, elections officials wait until system operability has been restored to resume processing applications. Thus, short periods of SURE inoperability do not permit the approval of voter registration applications without being subject to the procedural checks established within the SURE system to maintain the integrity and accuracy of voter registration records. Rather, all applications are subject to the same rigorous process.

It is submitted that Petitioners will not be able to establish the inability of the SURE system to perform in a timely and efficient manner. Consequently, they will not be able to demonstrate a likelihood of success on the merits of their complaint that the Secretary has failed in his duty to establish and maintain the SURE system consistent with state and federal law. As noted in the Declarations of Robert Lee, Jr., Voter Registration Administrator from Philadelphia

County, and Deborah Olivieri, Director of Elections from Berks County (attached hereto and marked, respectively, as Exhibits “A” and “B”), the SURE system is functioning and the counties are prepared. Therefore, Petitioners’ request for a preliminary injunction must fail on this point because it is unlikely that Petitioners will be able to establish that the SURE system is not in compliance with the law.

II. The Secretary has properly interpreted and implemented both state and federal law with respect to voter identification requirements.

A. State Law

The state requirement for voter identification is found in Article XII of the Pennsylvania Election Code, at section 1210 (25 P.S. § 3050). The pertinent parts of section 1210 provides as follows:

(a) At every primary and election each elector who **appears to vote in that election district** for the first time and who desires to vote shall first **present** to an election officer one of the following forms of photo identification ...

25 P.S. § 3050(a) (emphasis added).

Petitioners argue that this language requires a first-time voter to submit identification whether voting in person or by absentee ballot. The Secretary suggests that such an interpretation requires that the statute be *misread* in a vacuum. The Department has consistently read this section to apply only to voters who vote **in person**, as the plain language of the text reveals. Rules of statutory construction direct us to construe “words and phrases ... according to rules of grammar and according to their common and approved usage ...,” 1 Pa.C.S. § 1903, as the Department has done.

At its essence, the most common and approved usage of “appear” requires that one show up, be seen, or be there – it strains credulity to say that a voter “appears” by absentee ballot. When an attorney appears in court on behalf of a client, she is present and capable of being seen

and heard. Given the plain, common understanding of “appear,” it is not surprising that Petitioners do not consult any standard dictionary. The fact is that they *all* start off with a definition that requires one, for example, “to become visible,” *Webster’s II New Riverside University Edition* (1984) and *The American Heritage College Dictionary* (1997), or “to be or come in sight,” *Webster’s Ninth Collegiate Dictionary* (1986).

The Secretary suggests that the phrases that follow only serve to bolster this interpretation. The voter “presents” ID when appearing “in that election district” – you cannot present anything if you are not in there. If that is not sufficient to demonstrate the intent of the General Assembly, it should be noted that a full reading § 1210 reveals a process that contemplates people showing up at the polling place, being questioned by election officers who examine the various forms of identification as well as the signature of the voter and who ultimately sign an affidavit that the identification was presented. Nowhere in § 1210, or anywhere in Article XII of the Election Code, is there any reference to absentee voters needing to present or submit identification as part of the voting process.

The reason for the absence of absentee electors from Article XII of the Election Code is that the General Assembly has placed *everything* pertaining to absentee voting in Article XIII of the Election Code, which is titled “Voting by Qualified Absentee Electors.” In sections 1301-1308 (25 P.S. §§ 3146.1-3146.8), the Legislature has provided all of the procedures and safeguards for absentee electors, including qualifications, applications, approval of applications, lists of absentee electors, voting by absentee electors and canvassing of absentee ballots. The section on canvassing, § 1308.8, includes provisions for challenging absentee ballots. If there was to be a requirement for identification as part of that process, it would appear in Article XIII, but it does not. Curiously, and to close this loop, § 1308.8(c) notes that a third ground for

challenging an absentee voter is the “absentee elector was able to appear personally at the polling place on the day of the primary or election.”

Petitioner may say, “A ha! That section uses the word ‘personally.’” Out of a sense of candor to the tribunal and because the language is plain enough on its face, the Secretary has not tried to excise “personally” from § 1308.8. Drafting legislation is, at best, an art, not a science. Sometimes legislators use a belt, sometimes they use suspenders and every now and then, they use both. Noteworthy, is the fact that one of the most recent amendments to Article XIII involved § 1302.1 (25 P.S. § 3146.2a) wherein the legislature, in Act 2006-137, added subsection (a.2), which reads in part: “In the event any elector otherwise qualified who becomes so physically disabled or ill between five o’clock P.M. on the first Friday preceding any primary or election and eight o’clock P.M. on the day of any primary or election that he is unable to **appear** at his polling place ... the elector shall be entitled to an absentee ballot.” In short, the legislature realized in 2006 that “appear” was a sufficient belt and did not resort to suspenders.

Finally, the Department has never interpreted the requirement of § 1210 to apply to absentee voters. In a Memorandum to the counties dated April 13, 2004, the Commissioner of the Department’s Bureau of Commissions Elections and Legislation addressed the issue of Voter Identification (hereafter referred to as “Memorandum” a copy of which is attached hereto and marked as Exhibit “C”). It is clear throughout the memo that the Department did not interpret § 1210 to apply to absentee voters. Petitioners will claim that only shows that the Department has been consistently wrong, but it is axiomatic that courts give deference to an agency’s interpretation of its governing statute because they “implicitly recognize the expertise of the agency in carrying out its mission as charged by the General Assembly because the agency is generally in a better position to interpret its governing statute.” *Philadelphia Suburban Corp. v.*

Board of Finance and Revenue, 535 Pa. 298, 302, 635 A.2d 116, 118 (1993). In this case, the Department's interpretation not follows the plain language of the relevant statute, it *is* the plain language. In the case of voter identification, from the 2004 Primary Election — the earliest date at which the issue of state and federal identification was relevant — the Department has consistently interpreted § 1210 to apply only to voters who appear in the polling place. It has been said that “90% of life is just showing up” – in this case it is 100% true.

B. Federal Law

Although Petitioners are only disputing the Secretary's interpretation of state law as it pertains to the requirement for identification, it is important to note that there is second layer of protection against voter fraud that has not been overlooked by the Department. The Memorandum from the Commissioner goes into great detail in comparing and contrasting § 1210 with HAVA § 303(b) (42 U.S.C. § 15483(b)), which concerns individuals who have registered to vote by mail. On page 1 of the Memorandum under Legal Background, the Commissioner noted that the HAVA identification requirement for individuals who have registered to vote by mail and not previously voted in a federal election in the Commonwealth affects **everyone**, with the following exceptions:

voters (1) who have already submitted proper identification as part of their voter registration; (2) are entitled to vote by absentee under the Uniformed and Overseas Absentee Voting Act (42 U.S.C. §1973ff.1 *et seq.*); or (3) are provided the right to vote otherwise than in person under section 3(b)(2)(B)(ii).

However, since 2006, another important exception under HAVA has been in effect. This exception involves a process referred to as the HAVA check or matching procedure that was not yet fully in place in 2004. In short, that procedure involves the submission by the county voter registration commission of the application containing either the driver's license number or the last four digits of the social security number to a computer match of those numbers with the

relevant agencies. If an application is matched, HAVA provides that the new registrant is exempt from the voter identification requirement that would otherwise apply. In essence, Congress has determined, the match has verified the identification of the voter. However, as noted in the Memorandum, irrespective of HAVA's exemptions, § 1210 still requires all registrants who **appear to vote** for the first time **in their polling place** to present identification to a local elections official.

Petitioners claim that the Department has failed to advise voters who register by mail of the requirement to provide identification as required by HAVA, but that is belied by the facts. First, the Pennsylvania Voter Registration Mail Application (attached hereto and marked as Exhibit "D") specifically advises that if the applicant "intend[s] to vote by absentee ballot, please include a copy of a form of identification with this voter registration mail application. Otherwise, you will be required by federal law to include a copy of a form of identification with your absentee ballot." The Department has also utilized its website, www.votespa.com (which the Pew Foundation has rated as the 4th best in the United States), to advise individuals voting by absentee ballot to provide ID (see Exhibit "E" attached hereto). And, in a belt and suspenders move, the website page that serves as a guide to first-time voters also advises people voting by absentee to provide identification (see Exhibit "F" attached hereto).

Because the Secretary has properly interpreted Pennsylvania law and has effectively implemented the voter identification requirements of HAVA, this Honorable Court should deny Petitioner's request for a preliminary injunction.

III. The Secretary has assisted the counties in making sure adequate numbers of provisional ballots will be on hand.

The Department has advised counties that they should expect an 80% turnout and that they should consider having provisional ballots totaling at least 5% of the 80% figure on hand. If

a precinct has 1000 registered voters, it should expect 800 voters and would need 40 provisional ballots. In Philadelphia, the focus of Petitioners' angst, officials are planning to have 100 in each precinct (most of which are well under the 2500 registered voters that would result in a computation of 100).

Petitioners' request for a "significantly larger" number of provisional ballots is not based on their concern for applications that may not be timely processed because Petitioners were advised last week that the processing would be all but done by October 29th. Rather, it would appear that, regardless of the processing, Petitioners desire to garner some form of extraordinary relief from the Court that would force masses of voters (processed or not) to jump through hurdles to register their votes. What that number would be, and how it would be calculated for each precinct, is not clear at all to the Department and would certainly be a problem for the counties.

And that brings the Secretary to the final argument against the preliminary injunction – the harm from granting the injunction. It is tempting to say, the Secretary is already complying with the law, and assume that no injunctive relief would burden the election system. However, if Petitioners can demonstrate an irreparable harm (which it is submitted they cannot), there could be a greater threat to the integrity of the election process depending on the relief accorded to Petitioners. For instance, if their interpretation of "appear" were accepted, they would request that the counties turn their administrative process upside down and require all absentees to be treated as if they were actually appearing for the first time under section 1210 and, as such, required to present identification. This would not only cause extensive problems for those first-time voters whose applications were successfully "matched" in the HAVA check (and who

therefore are exempt from the voter identification requirement of HAVA), but would also create an immense burden on the election officials.

At this late date, almost all of the 50,000 election officials statewide have been trained and prepared on the existing procedures and it would be next to impossible to adequately spread the word to them throughout our 9,300 precincts. Far from restoring the status quo, it would cause a seismic shift in election administration. As noted by the United States Supreme Court in *Purcell v. Gonzales*, 549 U.S. 1, 3-4 (2006), “[c]ourt orders affecting elections...can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”

The risk is real, and the relief sought by Petitioners is not suited to remedy the wrong. Rather it would be meted out on 67 counties who were not even invited to this street fight. The Secretary does not want to visit the Petitioners’ perceived ills on the counties, but submits that they are indispensable – the relief may be arguably sought from the Department, but the counties would bear the burden.

WHEREFORE, Respondent Pedro A. Cortés, Secretary of the Commonwealth, respectfully request that this Honorable Court deny Petitioners’ Motion for Special, Preliminary and Permanent Injunction.

DATE: October 29, 2008

By: 

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MONICA MOYER; et al.,

Petitioners

v.

**PEDRO A. CORTÉS, Secretary of the
Commonwealth; et al.,**

Respondents.

No. 497 M.D. 2008

DECLARATION OF ROBERT LEE, JR.

I, Robert Lee, Jr., Voter Registration Administrator, Philadelphia County, state as follows:

1. My duties include administering the voter registration program in the City of Philadelphia.
2. Since December 2005, when Philadelphia County connected to the Pennsylvania Department of State's Statewide Uniform Registry of Electors (SURE) system, the SURE system has been accessible to the county.
3. Philadelphia's ability to conduct a fair election is not jeopardized, as the petitioners claim. In conjunction with the Department of State, Philadelphia County is ready and able to administer a fair and honest election this year.
4. Despite earlier problems with the system from 2001 through 2003, which I expressed, the SURE system has performed well and has provided increased capabilities to our operators. The State improved the system so that Pennsylvania and the counties, including Philadelphia, could comply with the federal mandates of the Help America Vote Act, process applications accurately and maintain the accuracy and currency of the voter files, as also required by state law.
5. Philadelphia is committed and prepared to comply with its statutory duties related to voter identification. Contrary to the allegations in the Complaint, Philadelphia does require all first time voters and all first time voters in an election precinct to provide identification, as required by federal and state laws. As part of Election Day training, district election officials are instructed to check the identification for those voters noted in the poll book. Attached is the page from our Election Training Manual demonstrating this fact. The SURE system assists this process by flagging each record in the district register (poll book) when a new voter must show identification.

6. To prepare for voters who are not permitted by law to vote on a voting machine but are entitled to cast a provisional ballot, Philadelphia County plans to send 100 provisional ballots to each voting precinct. If more provisional ballots are needed, the county can quickly print additional provisional ballots and distribute them to our precincts, using 64 individuals who are available to go to precincts on Election Day to address and solve any technical or other difficulties that may arise.

I understand that this Declaration is made subject to 18 Pa.C.S. § 4903 (relating to sworn falsification to authorities).

Robert Kelly
 Name
Voter Registration Administrator
October 23, 2008
 Date

POLLBOOKS & AFFIRMATIONS

ILLUSTRATION: DISTRICT REGISTER – POLLBOOK PAGE

The illustration shows a sample of a District Register - Pollbook Page. It contains four voter records, each with a signature box, registration information, and a message box. The messages are: 'No Signature on File', 'AFFIRMATION & ID REQUIRED', 'AFFIRMATION & ID REQUIRED', and 'ID REQUIRED'. Each record includes fields for name, address, birth date, party, and registration status. The page is titled 'Philadelphia County Board of Elections' and 'Ward 35; Division 28; Book 1 of 2; Page 31 of 71; EDWA - ENGL'.

POLLBOOK REMINDERS

If an individual's name and voter record is listed in the pollbook the voter is a qualified, registered elector and you must permit the elector to vote, after following the procedures under Voter Eligibility on Page 3 of this Guide.

If the registration signature image box in the middle of the voter's record in the pollbook has "No Signature on File", the Voter Registration Office was unable to capture an image of the elector's signature from the elector's registration application; however the elector is eligible and must be permitted to vote, after you follow the procedures under Voter Eligibility on Page 3 of this Guide.

The chart below summarizes the things a voter must do for each of the messages that may appear in the voting signature box before entering the voting booth.

VOTER REQUIREMENTS CHART	
VOTING SIGNATURE BOX MESSAGE	VOTER ACTION REQUIRED
1. NO MESSAGE	VOTER SIGNS POLLBOOK
2. ID REQUIRED	1. SHOW APPROVED ID 2. VOTER SIGNS POLLBOOK
3. AFFIRMATION REQUIRED	1. COMPLETE AFFIRMATION 2. VOTER SIGNS POLLBOOK
4. AFFIRMATION & ID REQUIRED	1. COMPLETE AFFIRMATION 2. SHOW APPROVED ID 3. VOTER SIGNS POLLBOOK

The chart listing all approved Identification is on Page 3 of this Guide.

NEW - NOV. 2005 - IDENTIFICATION AFFIDAVIT

The board of elections has supplied the district board of elections with an Affidavit that must be signed, after the close of the polls, by all election officers who examined voters' identifications any time during the course of Election Day.

The Identification Affidavit is printed in the front of the District Register - Pollbook that lists all voters whose last name begins with the letter A thru M.

In signing the Affidavit, the election officer is swearing under oath that he or she examined the required identification presented by the voters beside whose names in the poll book the election officer has affixed his or her initials.

AFFIRMATION OF ELECTOR

Below is an illustration of the Affirmation of Elector form.

The illustration shows the 'AFFIRMATION OF ELECTOR' form from the Philadelphia County Board of Elections. It includes fields for voter name, date of birth, and address. There are three sections: A. CHANGE OF ADDRESS, B. NO CHANGE OF ADDRESS, and C. AFFIRMATION. Section A asks if the voter has moved and provides options for staying in the current polling place, moving to a different one in Philadelphia, or moving to another county. Section B asks if the voter has not moved and provides an option to remain registered in the current district. Section C is a sworn statement of the voter's information. The form also includes a signature line for the voter and a signature line for the election official, along with a date field. At the bottom, it says 'QUESTIONS? CALL ELECTION DAY HOTLINE AT 686-1590' and 'Affirmation Nov 17, 05'.

Note: If a registered elector has moved, without notifying the Commission, the voter must be permitted to vote at their former polling place where their name should remain in the pollbook. The voter should inform polling place officials of the address change by completing Sections A and C of an Affirmation of Elector form (Illustrated above). After the election, the Voter Registration Office will use the Affirmation information to update the registration record and transfer it to the elector's new Division Pollbook, if necessary.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MONICA MOYER, *et al.*,

Petitioners,

v.

PEDRO A. CORTÉS, Secretary of the
Commonwealth of Pennsylvania, *et al.*,

Respondents

Docket No. 497 M.D. 2008

DECLARATION OF DEBORAH OLIVIERI.

I, Deborah Olivieri, Director of Elections, Berks County, state as follows:

1. Due to the pressing nature of my duties as director of elections in a 3rd class county in Pennsylvania and the need to continue operations leading up to the November 4, 2008 general election, I am unable to personally appear before this Honorable Court.

2. In 2004, Berks County connected to the Pennsylvania Department of State's Statewide Uniform Registry of Electors (SURE) system.

3. Since that time, and especially during this Presidential election year, the SURE system has been accessible to the county.

4. Berks County SURE operators have processed an historically-high 34,500 paper and electronic voter registration applications for the 2008 General Election.

5. Despite the historically high volume of applications that we have received this year, our ability to conduct a fair election has not been jeopardized, as the petitioners claim.

6. The SURE system allows operators to detect and substantially reduce duplicate registrations within the county and across the Commonwealth, and to electronically alert counties to cancel prior records. The SURE system is far more effective at this function than the previous system of individual, isolated county based registration systems.

7. The SURE system provides operators the capability of detecting and rejecting applications containing invalid or non-existent addresses and to conduct canvass investigations of undeliverable voter identification cards.

8. During 2008, Berks County has experienced only three (3) instances of service interruption that lasted up to four hours and other minor disruptions that usually were corrected within 10 to 15 minutes.

9. Contrary to the allegations in the "Complaint," county election officials do require all first time voters and all first time voters in an election precinct to provide identification, as required by federal and state laws. The SURE system flags each record in the district register (poll book) when a new voter must show identification. As part of Election Day training, district election officials are instructed to check the identification for those voters noted in the poll book.

12. In conjunction with the Department of State, Berks County is ready and able to administer a fair and honest election this year.

I understand that this Declaration is made subject to 18 Pa.C.S. § 4903 (relating to sworn falsification to authorities).

Deak O'Leary
Name

Director
Title

10/28/08
Date

Sworn to and subscribed
before me this *28th* day
of *October*, 2008

Beverly A. LeVan
(Notary)

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Beverly A. LeVan, Notary Public
St. Lawrence Boro, Berks County
My Commission Expires Dec. 4, 2008
Member, Pennsylvania Association Of Notaries

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
Bureau of Commissions, Elections and Legislation
April 13, 2004

SUBJECT: Voter Identification

TO: All County Contact Persons
County Boards of Elections

FROM: Monna J. Accurti, Commissioner
Bureau of Commissions, Elections and Legislation

Please share this important memo with your commissioners and your solicitor.

On April 2, 2004, I sent you a memorandum regarding voter identification lists that we had planned to provide to you for the April 27, 2004 primary election and other instructions necessary for Pennsylvania to comply with the voter identification requirements imposed by section 303(b) of the Federal Help America Vote Act of 2002 (HAVA), which is applicable to all elections for Federal office and is effective for the first time in Pennsylvania in this year's General Primary Election. The April 2 memorandum also addressed procedures necessary to comply with the separate voter identification provisions of section 1210 of the Pennsylvania Election Code, as amended by Act 150 of 2002.

After receiving a great number of comments from you, and after substantial internal deliberation and another review of the controlling statutes, the Department of State has amended its instructions in an effort to comply with these two new laws in an administratively convenient manner.

LEGAL BACKGROUND

As you know, section 303(b) of HAVA requires individuals who have registered to vote in a county by mail after January 1, 2003, and who seek to vote for the first time in the county in an election for Federal office, must present or submit proper identification before they may vote in the normal manner. *See* 42 U.S.C. § 15483(b). The only such voters who are not required by HAVA to present or submit proper identification are voters (1) who have already submitted proper identification as part of their voter registration; (2) are entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. § 1973ff-1 *et seq.*); or (3) are provided the right to vote otherwise than in person under section 3(b)(2)(B)(ii) of the Voting Accessibility for the Elderly and Handicapped Act (42 U.S.C. § 1973ee-1(b)(2)(B)(ii)) – in Pennsylvania, by Alternative Ballot. *See* 42 U.S.C. § 15483(b)(3). An elector who cannot produce proper ID as required by HAVA is entitled to cast a provisional ballot. *See* 42 U.S.C. § 15483(b)(2)(B).

HAVA allows States to be stricter than HAVA in their administration of elections for Federal office, including the requirements for voter ID – so long as the State requirements are consistent with HAVA and do not violate other Federal laws. *See* 42 U.S.C. § 15484. As amended by Act

150 of 2002, sections 1210(a), (a.1) and (a.4)(1) of the Pennsylvania Election Code require each elector who appears to vote in an election district for the first time and who desires to vote to first present to an election officer a proper form of identification. *See* 25 P.S. §§ 3050(a), (a.1) and (a.4)(1). The law directs the election officer to examine the identification that has been presented to confirm the identification of the elector. An elector who is unable to present proper identification or whose identification is challenged by the judge of elections must be permitted to cast a provisional ballot. *See* 25 P.S. §§ 3050(a.2) & (a.4)(1).

The key differences between the requirements of section 303(b) of HAVA and section 1210 of the Election Code as amended by Act 150 are these:

- Section 303(b) of HAVA applies only in elections that include Federal offices (such as the 2004 primary and general elections). Section 1210 of the Election Code applies in *all* elections.
- Section 303(b) of HAVA affects only voters who have registered to vote by mail or voter registration drive. Section 1210 of the Election Code applies to voters who have registered to vote *by any means*.
- Section 303(b) of HAVA applies only to voters who have registered to vote *in a county* for the first time on or after January 1, 2003. Section 1210 of the Election Code, by contrast, applies to all persons who appear to vote for the first time *in an election district*, if the voter registered to vote in the county or changed his/her address within the county on or after January 1, 2003. Unlike HAVA, a voter is *not* exempt under section 1210's voter identification requirement solely because he was registered to vote in the county before January 1, 2003. Under section 1210, the voter is exempt from presenting identification only if he was registered in the county before January 1, 2003, to vote *at the election district where he is currently assigned to vote*.
- Section 303(b) of HAVA enables voters to exempt themselves from the need to produce identification at the polling place or to submit identification with their absentee ballot by submitting proper identification as part of their voter registration application. By contrast, section 1210 of the Election Code requires *all* individuals appearing for the first time to vote in their election district to present identification at the polling place.
- Section 303(b) of HAVA requires voters who by mail or registration drive have registered to vote in their county on or after January 1, 2003 (unless exempted), to present or submit identification when they seek to vote for the first time in the county *in an election that includes a Federal office*. By contrast, section 1210 of the Election Code requires voters to present identification at the polling place only when they appear in the election district for the first time to vote in *any* election, irrespective of whether the election includes an election for a Federal office. Thus, if a voter cast a vote in his election district in the 2003 primary or municipal election or in a special election held after January 1, 2003, the voter would not be required by section 1210 of the Election Code to produce identification to vote in

that election district. However, if that voter registered to vote by mail or registration drive in the county after January 1, 2003, and has not previously presented identification to elections officials either at the county office or at the polling place, he or she will be required by HAVA to present or submit identification the first time he seeks to vote in an election for Federal office. *Because no Federal election has occurred since January 1, 2003, the April 27, 2004 primary will be the first Federal election in which these registrants have voted – irrespective of whether they voted in the primary or November election in 2003 or in a special election held since January 1, 2003.*

- Section 303(b) of HAVA requires identification (unless an exemption applies) whether the voter appears to vote at the polls or casts an absentee ballot. Section 1210 of the Election Code, by contrast, applies only to voters who appear at the polling place to vote. *Section 1210 does not apply to absentee voters.*

ADMINISTRATIVE BACKGROUND

To assist county boards of elections to comply with section 303(b) of HAVA and section 1210 of the Election Code, the Department has been working with Accenture (the Department's contract vendor for the development and maintenance of the Statewide Uniform Registry of Electors) to develop for each election district within each county that is LIVE in SURE for the April primary a list of voters who are required to produce identification under these two laws.

Because HAVA set January 1, 2003, as the date for applicants to begin including identification with voter registration application forms and is the relevant date for determining the voters who would be subject to identification requirements under Federal law, the Department interpreted and applied the new voter identification requirements imposed by section 1210 of the Election Code using a consistent date. Thus, as with HAVA, the Department has concluded that only individuals who have registered *after January 1, 2003*, to vote at the election district to which they are assigned by the county must show ID at the polling place – if that is the first time that the registrant will have appeared to vote at the election district. **In other words, an elector who was registered before January 1, 2003, to vote at the election district to which he/she is assigned, but who has not previously appeared to vote in the election district, would not be required to present identification.**

In discussing these issues with Accenture, the Department initially understood that the SURE system would be able to produce for each county that is LIVE on SURE a comprehensive list of all voters who are required by section 303(b) of HAVA or section 1210 of the Election Code to present or submit identification. Unfortunately, due largely to the varying comprehensiveness of the county data provided to SURE to track voter histories and registrant precinct residency, the SURE system does *not* contain all the necessary data from January 1, 2003 until the March 29, 2004 deadline for voter registration for the April 27 Primary Election for all 56 counties that are LIVE in SURE.

Our April 2, 2004 memorandum outlined a proposed solution to the tall challenge that we face – complying, *in a uniform and nondiscriminatory manner across the Commonwealth as required by HAVA and constitutional principles of equal protection*, with two new laws using various voter registration systems and databases that are not consistent with one another. After hearing your concerns and substantial discussion within the Department, we have determined that the procedure that we outlined in the April 2 memorandum should be revised to strive, as best as possible, for administratively convenient compliance with the Voter ID requirements of HAVA and the Election Code.

PROCEDURES TO IDENTIFY ELECTORS WHO MUST PRESENT OR SUBMIT IDENTIFICATION

Phase I SURE Counties

Because the four Phase I SURE counties -- Adams, Beaver, Butler and Cumberland – were LIVE in SURE for both the primary and November election in 2003, the SURE system *will* be able to produce a list of registered voters who are required by section 303(b) of HAVA and/or section 1210 of the Election Code to present or submit voter identification in connection with the April 27, 2004 primary. Consequently, the Phase I counties should be able to rely entirely upon the voter ID list provided to them by the SURE system to identify all voters who are required to produce identification (subject to the HAVA exemptions for UOCAVA and Alternative Ballot voters). *For those voters who are voting by absentee ballot, it will be the responsibility of the county board of elections to identify those who are exempt from submitting voter ID because they are casting an Alternative Ballot under the Voting Accessibility for the Elderly and Handicapped Act or who are entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act.*

Phases II and III Counties

Voter ID Required by HAVA

We are pleased to report that the SURE system *will* be able to produce for *all* Phase II and Phase III SURE counties a report that will identify the registered voters who are required *under section 303(b) of HAVA* to produce identification. Consequently, the Phase II and III counties should be able to rely entirely upon the voter ID list provided to them by the SURE system to identify all voters who are required *by section 303(b) of HAVA* to produce identification (subject to the HAVA exemptions). *Like the Phase I counties, Phase II and III counties will be responsible to identify those voters who are exempt from submitting voter ID because they are casting an Alternative Ballot under the Voting Accessibility for the Elderly and Handicapped Act or who*

are entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act.

Voter ID Required by Act 150

Despite concerted efforts by the professional and technical staffs of the Department of State and Accenture, the Department regrets to report that the SURE system cannot, in a reasonably uniform and nondiscriminatory manner consistent with the requirements of HAVA and constitutional principles of equal protection of the laws, produce a comprehensive list of voters who are required by section 1210 of the Election Code to present identification to elections officials at the polling place. Consequently, the SURE system will not be providing to Phase II and III counties a list of voters who are required by State law (Act 150) – as opposed to the Federal law – to present identification at the polling place.

In our April 2, 2004, memorandum, we had directed poll workers to ask *every voter* whether this is “the first time that you appeared to vote in this election district (or division or precinct).” *Based on your comments (including those concerning the requirements and limitations of section 2 of the Voting Rights Act of 1965), and upon further analysis of Act 150, it is the opinion of this office that the “ask every voter” procedure announced in the April 2 memorandum is neither absolutely necessary nor the exclusive means to seek to comply with section 1210 of the Election Code consistent with HAVA and other laws.*

In light of the current limitations of technological solutions to the Act 150 voter ID requirements, and because section 1210(a) of the Election Code explicitly imposes only upon *the elector* the duty to present appropriate identification to an election officer, the Department believes that – until such time that technology allows us reliably and uniformly to identify first time voters under section 1210 of the Election Code, counties should rely upon the self-disclosure of an elector as one who has registered to vote in the election district since January 1, 2003, and who is appearing for the first time in the election district to cast a vote.

To aid electors in fulfilling their duty to disclose their status as a voter who must produce identification under section 1210 of the Election Code, the Department has prepared a notice (see attached) that must be posted in all polling places on the top of the table where the individual first presents himself to vote. The elections official at that location must direct the voter to read the notice so that he/she might determine whether the law requires the voter to present proper identification to an elections official. This notice should be posted in addition to the notices we have already provided the counties for posting in the polling place.

Non-SURE Counties

For those counties that are *not yet* LIVE in SURE, it is the responsibility of county officials to use their voter registration systems to identify those voters who must produce identification under section 303(b) of HAVA and/or section 1210 of the Election Code. The Department of State is working with NTS to enable that system to produce for the counties that use it the same type of list that the SURE system is preparing to produce for the Phase I SURE counties – that is, *a comprehensive list of voters who must produce ID under either HAVA or Act 150.*

For non-NTS counties that are not yet LIVE in SURE and who are unable to identify voters who must produce identification under Act 150, they will need (as the Phase II and III counties will) to rely upon *the self-disclosure of an elector* as one who has registered to vote in the election district since January 1, 2003, and who is appearing for the first time in the election district to cast a vote.

UNIFORMITY

The Department sincerely regrets that facts and circumstances have necessitated a change in policies and procedures so near to the Primary Election. As difficult as it is for the Department and the county governments to implement these new procedures at the same time that our voter registration system is evolving into a true statewide uniform system, we nevertheless have an immediate obligation under HAVA and principles of equal protection to administer this year's elections *in a uniform and nondiscriminatory manner.*

TO BEST ACCOMPLISH UNIFORMITY, WE DIRECT ALL COUNTIES (INCLUDING THE SURE PHASE I COUNTIES AND COUNTIES SERVED BY NTS) TO POST THE ATTACHED NOTICE INFORMING VOTERS DIRECTLY OF THEIR OBLIGATIONS UNDER ACT 150.

TO ASSURE THAT ALL VOTERS ARE AWARE OF THEIR OBLIGATIONS UNDER THE LAW, YOU MUST DIRECT YOUR JUDGES OF ELECTIONS TO POST THIS NOTICE ON TOP OF THE TABLE WHERE THE VOTERS FIRST PRESENT THEMSELVES TO VOTE. PLEASE ALSO INSTRUCT YOUR POLL WORKERS TO ASK EACH VOTER TO FIRST READ THE NOTICE BEFORE PROCEEDING.

We believe that that the procedures outlined in this memo will enable Pennsylvania counties to conduct the 2004 Primary Election in a reasonably uniform and nondiscriminatory manner, in conformity with the new requirements of HAVA and Act 150. With the experiences that we will have in the primary and the expected continuing development of the SURE system, the Department of State looks forward to working with all of you to revise and improve these procedures for the General Election to make them as efficient and effective as we can consistent with our mutual duties and obligations.

Voter ID List in SURE and
Question to Ask All Voters in the April 27, 2004 Primary Election
April 13, 2004
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C: Douglas E. Hill, Executive Director, County Commissioners Association of Pennsylvania

**MANDATORY IDENTIFICATION REQUIRED FOR
FIRST-TIME VOTERS**

ANY VOTER WHO IS APPEARING AT THIS POLLING PLACE TO VOTE FOR THE FIRST TIME IN THIS ELECTION DISTRICT, PRECINCT OR DIVISION IS REQUIRED TO PRESENT PROPER IDENTIFICATION TO AN ELECTIONS OFFICIAL.*

IF YOU ARE APPEARING AT THIS POLLING PLACE TO VOTE FOR THE FIRST TIME IN THIS ELECTION DISTRICT, PRECINCT OR DIVISION AND, THEREFORE, ARE REQUIRED BY LAW TO PRESENT IDENTIFICATION BEFORE PROCEEDING TO VOTE, PLEASE NOTIFY A MEMBER OF THE DISTRICT ELECTION BOARD FOR FURTHER INSTRUCTIONS.

* The only first-time voters who are exempted from this new requirement of Federal and Pennsylvania law are those who have been continuously registered to vote in this county and election district, precinct or division since December 31, 2002. In addition, even if you voted in this county and election district in 2003 or a special election already held in 2004, Federal law requires *certain* voters who are today voting in this county for the first time *in an election for Federal office* to present proper identification. If you are one of those voters who is required by Federal law to present identification, a member of the district elections board will so inform you and provide instructions.



PENNSYLVANIA VOTER REGISTRATION MAIL APPLICATION

To Register You Must:

- Be a citizen of the United States for at least one month before the next election;
- Be a resident of Pennsylvania and your election district for at least 30 days before the next election;
- Be at least 18 years of age on the day of the next election.

www.dos.state.pa.us

GENERAL INSTRUCTIONS

1. Please provide all information on the application as required. Read all instructions carefully before you fill out the application.
2. If you are currently registered, you do not need to re-register unless you have moved or changed your name since you last registered to vote.
3. In order to vote at the next election, this application must be received by your county voter registration office 30 days before the election, or postmarked no later than the thirtieth day before the election. *Military electors may apply at any time.*
4. Write the mailing address for your county voter registration office on the reverse side of this application and place the proper postage in the designated area. Addresses for all Pennsylvania counties are listed inside.
5. You are not registered to vote until your application has been processed and accepted by the county voter registration office. If accepted, the county voter registration office will send you, via nonforwardable mail, a Voter Identification Card. If you do not receive a Voter Identification Card within 14 days of the date you submit this application, contact your county voter registration office.
6. If you decline to register to vote, your decision will remain confidential. If you register to vote, the office at which you register will remain confidential.

IDENTIFICATION WHEN YOU VOTE

Pennsylvania law requires that registered voters who appear in person to vote for the first time in an election district after December 9, 2003, must present a form of identification. 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 this voter registration mail application. Otherwise, you will be required by federal law to include a copy of a form of identification with your absentee ballot. (For information on the acceptable forms of identification and the exemptions to these identification requirements, please contact the voter registration commission in your county of resident.)

DSBE 2007-005

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PA STATE AGENCIES ONLINE SERVICES

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Guide for First-Time Voters

Congratulations on your first time voting! Below are tips to help you prepare and know what to expect going into the polls.

Find Your Polling Place

You can find your polling place online on the [Where to Vote](#) page of this Web site. Your polling place is also listed on your voter confirmation card that you received from the county after registering.

Know When Polling Places Open and Close

In Pennsylvania, polls are open from 7 a.m. to 8 p.m.

Bring Identification

All voters who appear at a polling place for the first time must show proof of identification. Approved forms of photo identification include:

- Pennsylvania driver's license or PennDOT ID card
- ID issued by any Commonwealth agency
- ID issued by the U.S. Government
- U.S. passport
- U.S. Armed Forces ID
- Student ID
- Employee ID

If you do not have a photo ID, you can use a non-photo identification that includes your name and address. Approved forms of non-photo identification include:

- Confirmation issued by the County Voter Registration Office
- Non-photo ID issued by the Commonwealth
- Non-photo ID issued by the U.S. Government
- Firearm permit
- Current utility bill
- Current bank statement
- Current paycheck
- Government check

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. Learn more about voting by [absentee ballot](#).

If you do not bring your ID on Election Day, vote with a provisional ballot. Don't leave without voting!

Confirmation

You are not registered to vote until your application has been processed and accepted by the County Voter Registration Office. If accepted, the County Voter Registration Office will send you, via nonreturnable mail, a confirmation. If you do not receive a confirmation within 14 days of the date you submit this application, contact your [County Voter Registration Office](#).

Getting Assistance While Voting

Voters who have a disability, have physical limitations or have limited English proficiency can ask for assistance at the polling place. Voters may also contact their County Voter Registration Office before Election Day to ask for assistance.

What To Do If You Have a Complaint

On Election Day, most complaints can be handled by the Judge of Elections at your polling place.

However, for some complaints concerning regulation of Election Day activities, contact your [County Board of Elections](#).

If you feel that a violation of Title III of the Help America Vote Act of 2002 has occurred, is occurring, or is about to occur, you may file a formal complaint with the Pennsylvania Department of State. Any voter who wishes to file a formal complaint may visit the [HAVA](#) (Help America Vote Act) site to download a "Title III Complaint Form" or request a complaint form at the polling place.

Finding Out More Information

Please call 1-877-VOTECPA (877-566-3772).