

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

---

No. 330 CD 2012

---

VIVIETTE APPLEWHITE; WILOLA SHINHOLSTER LEE; GROVER FREELAND;  
GLORIA CUTTINO; NADINE MARSH; DOROTHY BARKSDALE; BEA BOOKLER;  
JOYCE BLOCK; HENRIETTA KAY DICKERSON; DEVRA MIREL (“ASHER”) SCHOR;  
THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; NATIONAL ASSOCIATION  
FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA STATE  
CONFERENCE; HOMELESS ADVOCACY PROJECT,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THOMAS W. CORBETT, IN HIS  
CAPACITY AS GOVERNOR; CAROL AICHELE, IN HER CAPACITY AS SECRETARY OF  
THE COMMONWEALTH,

RESPONDENTS.

---

**PETITIONERS PRE-TRIAL BRIEF AND PRE-TRIAL STATEMENT**

---

David P. Gersch  
Arnold & Porter LLP  
555 Twelfth Street, NW  
Washington, DC 20004-1206

Witold J. Walczak  
Attorney ID No. 62976  
ACLU of Pennsylvania  
313 Atwood Street  
Pittsburgh, PA 15213

Jennifer R. Clarke  
Attorney ID No. 49836  
Public Interest Law Center of Philadelphia  
1709 Benjamin Franklin Parkway, 2nd Floor  
Philadelphia, PA 19103

Marian K. Schneider  
Attorney ID No. 50337  
Pennsylvania Consulting Attorney  
Advancement Project  
295 E. Swedesford Road  
Wayne, PA 19087

Dated: July 18, 2012

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION .....	6
STATEMENT OF FACTS .....	4
I. REQUIREMENTS PRIOR TO THE PHOTO ID LAW .....	4
II. PENNSYLVANIA’S PHOTO ID LAW .....	4
A. Requirements of the Law .....	4
B. Access to Acceptable Photo IDs .....	5
C. Irrationality in the Photo ID Law .....	12
III. THE COMMONWEALTH’S INTEREST .....	14
ARGUMENT .....	16
I. A PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT IMMEDIATE AND IRREPARABLE HARM .....	17
II. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS .....	17
A. The Photo ID Law Is Unconstitutional Because It Unduly Burdens the Fundamental Right to Vote .....	18
(i) The Right to Vote is a Fundamental Right .....	18
(ii) The Photo ID Law Is Subject to Strict Scrutiny. ....	20
(iii) The Photo ID Law Cannot Satisfy Strict Scrutiny or Any Lesser Standard of Review .....	22
(iv) Crawford Does Not Control the Outcome of this Case. ....	24
B. The Photo ID Law Is Unconstitutional Because It Irrationally Imposes Different Burdens On Voters In Similar Circumstances .....	26
III. GREATER INJURY WOULD RESULT FROM REFUSING AN INJUNCTION THAN FROM GRANTING ONE, AND GRANTING AN INJUNCTION WILL NOT SUBSTANTIALLY HARM OTHER INTERESTED PARTIES NOR ADVERSELY AFFECT THE PUBLIC INTEREST .....	28

IV.	A PRELIMINARY INJUNCTION WILL PROPERLY RESTORE THE PARTIES TO THEIR STATUS IMMEDIATELY PRIOR TO THE PASSAGE OF THE PHOTO ID LAW .....	29
V.	A PRELIMINARY INJUNCTION IS REASONABLY SUITED TO ABATE THE OFFENDING ACTIVITY .....	30
	CONCLUSION.....	30

**TABLE OF AUTHORITIES**

	<b><u>Page(s)</u></b>
<b>CASES</b>	
<i>Ambrogi v. Reber</i> , 2007 PA Super 278, 932 A.2d 969 (Pa. Super Ct. 2007) .....	17
<i>Bergdoll v. Kane</i> , 557 Pa. 72, 731 A.2d 1261.....	17, 20, 23
<i>Berman v. City of Philadelphia</i> , 425 Pa. 13, 228 A.2d 189 (1967) .....	29
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	7, 14
<i>City of Philadelphia v. Commonwealth</i> , 837 A.2d 591 (Pa. Commw. Ct. 2003) .....	29
<i>City of Philadelphia v. Dist. Council</i> , 535 A.2d 231 (Pa. Commw. Ct. 1987) .....	28, 29
<i>Corbett v. Snyder</i> , 977 A.2d 28 (Pa. Commw. Ct. 2009) .....	29, 30
<i>Crawford v. Marion County Election Board</i> , 553 U.S. 181 (2008).....	24, 25, 26
<i>Denoncourt v. Commonwealth., State Ethics Comm’n</i> , 504 Pa. 191, 470 A.2d 945 (1983) .....	22, 23
<i>Fischer v. Dep’t of Pub. Welfare</i> , 497 Pa. 267, 439 A.2d 1172 (1982).....	17, 18
<i>Hill v. Dept. of Corr.</i> , 992 A.2d 933 (Pa. Commw. Ct. 2010) .....	16
<i>In re Nader</i> , 580 Pa. 22, 858 A.2d 1167 (2004) .....	20
<i>In re Nomination Papers of Rogers</i> , 908 A.2d 948 (Pa. Commw. Ct. 2006) .....	21
<i>Jubelirer v. Rendell</i> , 598 Pa. 16, 953 A.2d 514 (2008) .....	21

<i>Khan v. State Bd. of Auction Eng'rs</i> , 577 Pa. 166, 842 A.2d 936 (2004) .....	24
<i>Kuznik v. Westmoreland Cnty. Bd. of Comm'rs</i> , 588 Pa. 95, 902 A.2d 476 (2006) .....	19
<i>McCafferty v. Guyer</i> , 59 Pa. 109 (1869) .....	19, 21, 22
<i>Mixon v. Commonwealth</i> , 759 A.2d 442 (Pa. Commw. Ct. 2000) .....	24, 26, 27, 28
<i>Moore v. Shanahan</i> , 486 P.2d 506 (Kan. 1971) .....	17, 20
<i>NAACP v. Walker</i> , 2012 WL 739553 (Wis. Cir. March 6, 2012) .....	19, 21, 25, 26
<i>NAACP v. Walker</i> , Case No. 11 CV 5492 (Wis. Cir. Ct., Dane Cnty., July 17, 2012) .....	21
<i>Nixon v. Commonwealth.</i> , 576 Pa. 385, 839 A.2d 277 (2003) .....	20, 24
<i>Page v. Allen</i> , 58 Pa. 338 (1868) .....	19, 23
<i>Pap's A.M. v. City of Erie</i> , 571 Pa. 375, 812 A.2d 591 (2002) .....	20, 22
<i>Patterson v. Barlow</i> , 60 Pa. 54 (1869) .....	21
<i>Pennsylvania. State Education. Association ex rel. Wilson v. Commonwealth.</i> , <i>Department. of Community and Economic Development, Office of Open Records</i> , 981 A.2d 383 (Pa. Cmwlth. Ct. 2009) .....	17
<i>Shankey v. Staisey</i> , 436 Pa. 65, 257 A.2d 897 (1969) .....	19
<i>Shenango Valley Osteopathic Hosp. v. Dep't of Health</i> , 499 Pa. 39, 451 A.2d 434 (1982) .....	16
<i>Stenger v. Lehigh Valley Hosp. Center</i> , 530 Pa. 426, 609 A.2d 796 (1992) .....	22, 23
<i>Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.</i> , 573 Pa. 637, 828 A.2d 995 (2003) .....	17

<i>United States v. National Treasury Employees Union</i> , 513 U.S. 454 (1995).....	22
<i>Weinschenk v. State</i> , 203 S.W.3d 201 (Mo. 2006) .....	20, 21, 25, 26
<i>Winston v. Moore</i> , 244 Pa. 447, 91 A. 520 (1914) .....	20, 21, 22, 26

**STATUTES, RULES AND CONSTITUTIONAL PROVISIONS**

25 P.S. § 2602(z.5)(2)(iii) .....	13, 14, 27, 28
25 P.S. § 2602(z.5)(2)(iv) .....	5, 27, 28
25 P.S. § 2602(z.5)(3) .....	7, 8
25 P.S. § 2602(z.5)(3)(ii) .....	12, 13
25 P.S. § 3050 .....	7
67 Pa Code § 73.3 .....	14, 15, 16, 27
67 Pa Code § 91.4 .....	14, 27
Former Pennsylvania Election Code § 1210(a.1) .....	4
Pennsylvania Rule of Appellate Procedure 1532(a) .....	16
Pennsylvania Rule of Appellate Procedure 1531 .....	16
Pennsylvania Constitution, Article I, Section 5 .....	1, 2, 18, 24, 25, 26
Pennsylvania Constitution, Article I, Sections 1 and 26 .....	2, 3, 26
Pennsylvania Constitution, Article VII, Section 1 .....	1, 2
Missouri Constitution, Article. I, Section 25 .....	20
Missouri Constitution, Article VIII, Section 2 .....	20

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

Petitioners,

v.

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

Respondents.

Docket No. 330 MD 2012

**PETITIONERS’ PRE-HEARING BRIEF AND PRE-TRIAL STATEMENT**

**INTRODUCTION**

Pennsylvania’s new Photo ID Law (or, the “Law”) impermissibly burdens the right to vote by imposing requirements that will disenfranchise and deter qualified Pennsylvanians from exercising their express and fundamental right to vote, which is guaranteed by Article VII, Section 1 and Article I, Section 5 of the Pennsylvania Constitution. The essential facts are straightforward and largely undisputed. By any count, the individual Petitioners in this case are among hundreds of thousands of Pennsylvanians who are eligible to vote but lack the photo ID required under the Law. Most recently, even the Commonwealth estimated that over three quarters of a million registered voters lack Pennsylvania Department of Transportation (“PennDOT”) photo ID -- the primary form of identification expected to be used to satisfy the Law’s requirements. According to the Commonwealth’s own estimates, more than 18% of

registered voters in Philadelphia lack PennDOT photo ID. Petitioners will submit evidence that these calculations are understated.<sup>1</sup>

In contrast to the large numbers of Pennsylvanians who lack the requisite photo ID to vote, the in-person voter fraud that the Commonwealth says will be deterred by the Photo ID Law is negligible to nonexistent. The Commonwealth now admits that it knows of not even a single case of in-person voter fraud -- the only kind of election fraud that is addressed by the Photo ID Law -- in Pennsylvania. The Commonwealth also claims that the Law can be justified by the desire to ensure public confidence in the election process, however, the integrity of elections cannot be enhanced by burdening the franchise for so many qualified citizens, and this is especially so when the fraud to be deterred by the Law is so minimal.

The Photo ID Law is not a rational and legitimate means of addressing a real problem. Still less can it meet the exacting scrutiny required to justify interference with a fundamental right under the Pennsylvania Constitution. Indeed, under the case law and the express terms of the Pennsylvania Constitution, it is doubtful that there is any governmental interest that can justify depriving voters of their constitutional right to the franchise; certainly the empty goal of deterring non-existent fraud is not that.

In addition, and as an independent basis for prevailing, the Photo ID Law breaches the free and equal clause of Article I, Section 5, as well as the equal protection provisions of Article I, Sections 1 and 26, of the Pennsylvania Constitution by imposing a series of irrational distinctions among voters. For example, persons voting in person must show photo ID that is difficult to obtain whereas absentee voters are not required to have, much less produce, a copy of

---

<sup>1</sup> Respondents are referred to collectively as “the Commonwealth,” unless otherwise specified.



any photo ID, as long as they know the last four digits of their social security number. If it is sufficiently secure for absentee voters to vote without photo ID, it is no less secure for in-person voters.

In any event, it is not necessary for the Court to resolve the ultimate merits of this case to issue the requested preliminary injunction. For purposes of the preliminary injunction hearing, as set forth in greater detail below, Petitioners will demonstrate that:

- A preliminary injunction is necessary to prevent the immediate and irreparable harm of denying citizens their fundamental right to vote.
- Petitioners are likely to prevail on the merits and in any event have raised substantial legal questions that must be resolved to determine the rights of Petitioners to complete relief -- the standard required when the other elements of a preliminary injunction are met.
- Greater injury will result from denying the requested preliminary injunction because it will deny many qualified Pennsylvanians the right to vote; in contrast, granting the injunction will not harm the public interest because the Commonwealth will not present any evidence that voter fraud is likely to occur in the absence of the Photo ID Law and because the public interest is in making sure that all eligible voters have an opportunity to vote.
- A preliminary injunction will restore the parties to the status quo by preserving the election law as it stood before the Photo ID Law.
- A preliminary injunction is reasonably suited to abate the challenged activity as it will ensure that Petitioners and other Pennsylvanians will be able to exercise the franchise as they have done in the past.

In support of their case, Petitioners will offer testimony from individuals whose own rights are violated by the Law, from experts who will testify about the magnitude of the harm threatened by the Law, from experts who assist poor people in obtaining photo ID and in the difficulties of obtaining appropriate documentation, and from an expert on election fraud.

Petitioners will also offer testimony and documents from state officials regarding the process of obtaining photo ID and the justification for the Law.

Attached as Exhibit 1 is the list of Petitioners' Witnesses. Attached as Exhibit 2 is the list of Petitioners' Exhibits. Attached as Exhibit 3 is a stipulation of the parties.

## **STATEMENT OF FACTS**

### **I. REQUIREMENTS PRIOR TO THE PHOTO ID LAW**

Before the Photo ID Law, the Election Code contained a simple and effective means for poll workers to ascertain that the person appearing to vote was, in fact, the registered voter: First-time voters established their identity by photo or non-photo ID including bank statements and utility bills. *See* former Section 1210(a.1) of the Pennsylvania Election Code. All voters were required to sign in at the polls and the poll workers compared the signature to the signature in the district register that the county voter registration office had on file when the voter registered. These provisions for verifying voter identity were successful by any measure. It was relatively easy to administer for poll workers, it did not require forms of identification that large numbers of people did not have, and, most important, it worked.

Notwithstanding its proponents' assertions that the Photo ID Law supposedly prevents fraud, the Commonwealth largely abandoned this position in discovery. The Commonwealth now admits that it cannot identify even a single instance in which a person voted improperly in Pennsylvania because they were able to impersonate someone else at the polling place. July 12, 2012 Stipulation at ¶ 2. As a result, the Commonwealth also stipulates that it will not present any evidence or argument that in-person voter fraud is likely to occur in the November election in the absence of the Photo ID Law. *Id.* at ¶ 3.

### **II. PENNSYLVANIA'S PHOTO ID LAW**

#### **A. Requirements of the Law**

The Photo ID Law requires virtually all Pennsylvanians to produce specific types of photo ID that as many as a million Pennsylvania voters lack. The requisite photo ID must be

issued by only one of the following: (1) the U.S. Government, (2) the Commonwealth of Pennsylvania, (3) a municipality of Pennsylvania to an employee of that municipality, (4) an accredited Pennsylvania public or private institution of higher learning, or (5) a Pennsylvania care facility. 25 P.S. § 2602(z.5)(2)(iv). The ID must also contain an expiration date and, in most instances, it must not have expired. *Id.* § 2602(z.5)(2)(iii).

#### **B. Access to Acceptable Photo IDs**

Many Pennsylvanians do not hold any ID that would comply with the Photo ID Law. The Commonwealth expects that the primary form of ID used to satisfy the Law will be a PennDOT driver's license or non-driver photo ID. Yet, contrary to repeated assertions by the Commonwealth that 99% of voting age adults held a PennDOT ID, *e.g.*, H.R., 196-15, 196th Sess., at 339 (Pa. 2012); Press Release, Pa. Dep't of State, Pennsylvania Secretary of Commonwealth: Photo ID Protects Integrity of Every Vote (Aug. 23, 2011), during the course of this litigation the Commonwealth issued new estimates that close to 10%, or three quarters of a million, registered voters lack any PennDOT ID. *See* Press Release, Pa. Dep't of State, Department of State and PennDOT Confirm Most Registered Voters Have Photo ID (July 3, 2012). In Philadelphia, the Department of State estimates that more than 18% of registered voters have no PennDOT ID. *See New Data Suggests Hundreds of Thousands Could be Disenfranchised by Pennsylvania's Voter ID Law*, Pa. Budget & Policy Ctr. (July 6, 2012), <http://pennbpc.org/new-data-suggest-hundreds-thousands-could-be-disenfranchised-pennsylvania%E2%80%99s-voter-id-law>.

Commonwealth documents show that even its three quarters of a million estimate is understated. The Commonwealth excluded from its three quarters of a million estimate approximately 130,000 registered voters who could not be matched to any record in PennDOT's database but who submitted a PennDOT ID number when they registered. The Commonwealth

also excluded from its three quarters of a million estimate more than 500,000 registered voters who have a PennDOT ID that is expired and will not be valid for voting in the November election. Thus, the universe of registered voters who lack a valid PennDOT ID is closer to 1.4 million voters according to the Commonwealth's own records.

Petitioners will present independent evidence from Professor Matt Barreto, a political scientist who will show using survey data that there are approximately one million registered voters without PennDOT ID or any other ID required by the law to vote. Not surprisingly, these persons tend to be poor, elderly, and minorities, particularly Latino citizens. If one looks at the larger population of persons eligible to vote under the Pennsylvania Constitution, the number of persons without the requisite ID tops 1.3 million.

The Commonwealth has issued repeated assurances that notwithstanding that many qualified and registered voters lack the ID required under the Photo ID Law, all eligible citizens will be able to vote. *E.g.*, Press Release, Pa. Dep't of State, Department of State and PennDOT Confirm Most Registered Voters Have Photo ID (July 3, 2012); Press Release, Pa. Dep't of State, Secretary of Commonwealth Announces Simplified Process for Obtaining Voter ID, Reminds Voters Photo ID Not Required for April 24 Primary (Apr. 18, 2012). The Commonwealth advances several arguments in support of these assurances but the evidence at trial will demonstrate that the Commonwealth's assertions are groundless.

The Commonwealth initially points to the fact that the Photo ID Law contains three exceptions to the photo ID requirement. But these are extremely narrow. *First*, persons voting absentee may vote without a photo ID and using only the last four digits of their social security number. Pennsylvania, however, does not have "no excuse" absentee voting, so that to qualify the voter must be truly absent from his or her resident municipality or satisfy other limited

criteria for being unable to vote in person. 25 P.S. §§ 2602(z.5)(3), 3146.1. **Second**, a person who has no acceptable photo ID may submit a provisional ballot, but in order for his or her vote to count, the voter must produce to their county board of elections within six days of the election (two of which fall on the weekend) the photo ID required by the Law thereby creating a kind of “catch 22” that provides no relief for most voters who are having difficulty obtaining ID in the first place. *Id.* § 3050 (a.4)(5)(ii)(E).<sup>2</sup> **Third**, registered voters who have a religious objection to being photographed may vote by presenting a valid-without-photo ID, provided they are able to answer a series of invasive questions regarding the sincerity of their beliefs. *Id.* § 2602(z.5)(1); Affidavit in Support of Exemption for Sincerely Held Religious Beliefs.

The Commonwealth next points to forms of photo ID in addition to PennDOT IDs that are acceptable, but these are unlikely to be held in large numbers by the groups of persons who lack PennDOT IDs. Professor Barreto’s survey found that less than 1% of voters who do not have a PennDOT-issued ID have some other form of photo ID valid under the Law. Thus, college IDs are acceptable but many poor, elderly, disabled, and minorities will not have college IDs. Likewise, military IDs are acceptable under the Law but many, including the U.S. Department of Veterans Affairs IDs used for healthcare and other benefits that are the most

---

<sup>2</sup> The provisional ballot may also count for voters able to affirm that that they are indigent and unable to obtain an acceptable photo ID without the payment of a fee. 25 P.S. § 3050 (a.4)(5)(ii)(D). This provision affords some relief but it is more apparent than real. First, the Commonwealth has provided no regulation defining what “indigent,” means. It also leaves each County to develop its own definition and it leaves people subject to the individual poll worker’s application of such definition, a violation of *Bush v. Gore*, 531 U.S. 98, 105-06 (2000) (“absence of specific standards to ensure . . . equal application” of recount rule based on “intent of the voter” violated Equal Protection Clause of United States Constitution). Second, since both birth certificate and voter ID card fees are waivable for Pennsylvanians, few voters will be able to lawfully make such an affirmation.

numerous, do not have the expiration date required under the Law. Petitioners' own experience illustrates that many Pennsylvanians hold no photo ID acceptable under the Law.

The Commonwealth's final argument that eligible voters who have no acceptable form of ID will be able to obtain PennDOT IDs before the election, even if they do not have it today, *e.g.*, Press Release, Pa. Dep't of State, Secretary of Commonwealth Announces Simplified Process for Obtaining Voter ID, Reminds Voters Photo ID Not Required for April 24 Primary (Apr. 18, 2012), is also an empty promise. While there are many ways to obtain a PennDOT ID, they typically require a birth certificate and a Social Security Card, forms of identification that many people lack. Indeed, nearly every one of the Commonwealth's 120,000 citizens born in Puerto Rico currently lacks a birth certificate following the Puerto Rican government's decision to invalidate all birth certificates issued before 2010. In addition, PennDOT requires that the names on all of these predicate forms of ID be the same as the citizen's current name, or that the person provide documentation that connects the current and prior names. *See* Application for Initial Photo Identification Card DL-54A, Pa. Dep't of Transp., <http://www.dmv.state.pa.us/forms/driversLicenseForms.shtml>. This requirement will often be an added obstacle as, for example, many married women will have different names on their birth certificate and Social Security Cards than their current name.<sup>3</sup>

At trial, the individual Petitioners, all of whom are qualified to vote under the express terms of the Pennsylvania Constitution, will describe their ongoing difficulties in obtaining ID. Lifelong voter, Petitioner Viviette Applewhite, will testify that after much trying, she was only

---

<sup>3</sup> Professor Barreto's survey evidence also shows that far more women lack an acceptable photo ID than do men (17.2% compared to 11.5%), largely because so many women have name changes that result in non-conformity of names between voter registrations and their photo ID.

able to obtain her birth certificate with the assistance of a pro bono attorney but she is still unable to obtain a Social Security Card because the name on her birth certificate does not match her current name, or the name on her voter registration. Petitioner Nadine Marsh, who voted in the past two presidential elections, will testify that she and her family have tried for years to get her birth certificate including going in person to the Pittsburgh office of the Division of Vital Records, only to be told that no birth record exists for her. Petitioner Gloria Cuttino will testify that despite repeated efforts she has been unable to obtain her birth certificate from her native state of South Carolina, which advises that she has no birth certificate. She has worked with a pro bono lawyer, who determined that the only way to get a “delayed” birth certificate is to seek census and other records, which will cost approximately \$100 and require a petition to the Court of Common Pleas of Philadelphia County. Petitioner Wilola Shinholster Lee will testify that she has spent many years trying to obtain a birth certificate from Georgia but without success. Petitioners will present other witnesses who have experienced similar problems.<sup>4</sup>

The difficulties in obtaining the documents necessary to get a PennDOT photo ID are compounded by burdensome travel, expense, and confusion. For example, many of the offices voters must visit to obtain photo ID are not designed for easy or efficient access. PennDOT Driver’s License and Photo Centers only exist in 58 out of the 67 counties in the Commonwealth, leaving 9 counties (with more than 200,000 people, according to the latest U.S.

---

<sup>4</sup> Lack of a birth certificate, which has resulted in several Petitioners being unable to obtain acceptable photo ID, may be an issue for many other voters as well. A number of United States citizens were born without birth certificates, even through the 1940s and 1950s. *See* Dep’t of Health & Human Servs., Ctrs. for Disease Control & Prevention/Nat’l Ctr. for Health Statistics, U.S. Vital Statistics System: Major Activities and Developments, 1950-95 10-11 (1997) (summarizing nationwide studies estimating that 7% of those born in the United States in 1940 and 2% of those born in the United States in 1950 do not have birth certificates on file).

Census data) without a single PennDOT center. Moreover, some of these centers are only open a few days a week, and may be closed on weekends or holidays. *See, e.g.*, Locations Information Center, Pa. Dep't of Transp., available at <http://www.dmv.state.pa.us/centers/locationsCenter.shtml>. Voters trying to obtain a PennDOT ID must arrange for private transportation or, if they live near mass transportation facilities, they must find the fare.

Once at PennDOT, voters must navigate a process that is poorly communicated with inconspicuous or no signage and also encounter employees who have been given inconsistent and inadequate training and are often uneducated as to the requirements for obtaining an acceptable photo ID under the Law. As a result, voters are given conflicting information when attempting to obtain a photo ID. Voters have been told they must pay for an ID, even when they assert that they need the ID for voting purposes, and some, like Petitioner Henrietta Dickerson actually did pay to get an ID.

Finally, even if voters obtain the necessary photo ID, the Law still creates obstacles to voting. The Photo ID Law is a significant change to election administration. Petitioners will present evidence that, at a minimum, there will be confusion, challenges, and increased delay at the polls as poll workers spend time determining whether IDs are acceptable, and assisting voters who learn for the first time that they do not have the requisite ID and therefore have to fill out provisional ballots.

Petitioners will offer testimony on the foregoing issues from fact and expert witnesses including: Niki Ludt, an attorney for Face-to-Face who specializes in assisting poor people in obtaining ID; Michele Levy, a representative of organizational Petitioner Homeless Advocacy Project; Amanda Bergson-Shilcock, the Director of Outreach and Program Evaluation at the



nonprofit Welcoming Center for New Pennsylvanians; Mark Wolosik, Elections Division Manager for Allegheny County; and Jorge Santana, Deputy Commissioner at the Philadelphia City Commissioner's Office. Of course, voters will only be able to get the photo ID they need (assuming they can in fact get it) if they know they lack the means to vote. Here, the evidence will be that the Commonwealth has not adequately informed the public that they need to undertake a time-consuming task simply in order to vote as they have in years past. In this regard, Petitioners' survey expert Matt Barreto's study shows that that an estimated 37% of eligible voters and 34% of registered voters are not even aware of the Photo ID Law or believe there is no Photo ID Law. An even bigger problem is that approximately 13% of eligible voters and 12% of registered voters *mistakenly* believe that they have an ID that is acceptable under the Law. These results are unremarkable, given that the information the Commonwealth has provided to date on how to obtain acceptable photo ID is incomplete and continues to change. For example, until recently, the PennDOT website did not inform individuals that an expired driver's license could be used to obtain a new PennDOT ID. The Department of State's website, votespa.com, has a Spanish language option, but clicking on it previously linked to a page with no content and, on the day of this filing, it appears to be inoperative.

Notwithstanding its prior assurances, recent discovery has revealed that even the Commonwealth knows that the Photo ID Law will restrict the franchise. At trial, Petitioners will show that the Commonwealth's lawyers have urged the creation of an entirely new form of Department of State photo ID, precisely because it is too difficult to obtain the PennDOT ID that is supposed to be the primary ID used by voters. The Commonwealth's internal documents show that people born in other states or countries will have difficulty obtaining a birth certificate and that PennDOT will not be able to verify a birth record for some Pennsylvanians. The

Commonwealth's internal documents likewise concede that there will be persons who cannot obtain their Social Security Card.

The Commonwealth's latest concessions confirm what Petitioners have said all along -- that they and others like them are having a very difficult time obtaining ID that complies with the Photo ID Law. As of this writing, however, the Commonwealth has not yet decided whether to issue the new form of ID and, if so, how it will work. The Commonwealth's internal documents say that the new card will be announced on July 24, the day before trial, although none of the state officials deposed by Petitioners claim to know where this date came from. In any event, state officials now say that there are important decisions to be made before any new photo ID card can be approved. Finally, the Commonwealth has no plan whatsoever for how it could issue enough of any new photo ID card in time for the November election for the over 1 million citizens who need them.

### **C. Irrationality in the Photo ID Law**

As a tool to ensure the identity of voters, the Photo ID Law is riddled with irrational distinctions. On the one hand, the PennDOT ID that is expected to be the primary ID used for voting requires all of the rigor and security necessary for obtaining a driver's license (which will also allow you to board an airplane). On the other, the Law both on its face and as applied authorizes a host of other forms of identification which have far fewer safeguards, but which are not available to all Pennsylvanians.

Perhaps the most significant example is the absentee voting provision, which, as noted above, allows absentee voters to identify themselves simply by providing the last four digits of their Social Security number. 25 P.S. § 2602(z.5)(3)(ii). The standards for alternative ballots are even more lax: elderly and disabled voters who are assigned to a polling place deemed

inaccessible<sup>5</sup> can vote without providing any form of identification. *Id.* §§ 3146.2(j); 3146.2b(f); 3146.5(c); 3146.8(i).

Similarly, the Law also does not specify the individuals to whom entities such as colleges and nursing facilities can issue photo IDs, nor does it set security standards for those IDs. *Id.* § 2602(z.5)(2); Letter from Robert Melusky, Dir., Adult Residential Licensing, Pa. Dep't of Public Welfare, to Personal Care Home Operators (June 1, 2012). Thus, nursing facilities can permissibly issue an ID to a stranger who walks in from the street, and they can create IDs that are easily faked. Likewise, college IDs have been faked for generations.

The Law also requires that most forms of ID have an expiration date, without any apparent rationale for how the expiration date makes the ID a better guarantee of identity. 25 P.S. § 2602(z.5)(2)(iii). Confirming its irrelevance, the expiration date requirement has been repeatedly undermined in practice. Individuals who have expired PennDOT IDs can use those expired cards to obtain a new PennDOT ID for voting purposes, without any additional documentation. *See* Press Release, Pa. Dep't of State, Secretary of Commonwealth Announces Simplified Process for Obtaining Voter ID, Reminds Voters Photo ID Not Required for April 24 Primary (April 18, 2012). The Department of State has also advised that entities issuing IDs can simply put sticker expiration dates on them to comply with the Photo ID Law, despite the fact that poll workers will not be able to confirm where the stickers came from. Press Release, Pa.

---

<sup>5</sup> Except for Philadelphia County, very few polling places in Pennsylvania are inaccessible. Pittsburgh, for example has more than 1,300 polling places and only 8 are inaccessible. *See generally* Voting by Alternative Ballot, Pa. Dep't of State, <http://www.portal.state.pa.us/portal/server.pt?open=514&objID=1174089&parentname=ObjMgr&parentid=194&mode=2>.

Dep't of State, Secretary of Commonwealth Announces Simplified Process for Obtaining Voter ID, Reminds Voters Photo ID Not Required for April 24 Primary (April 18, 2012).

Even among holders of PennDOT IDs, there are irrational distinctions. In the past, PennDOT required significantly less documentation, so many persons have PennDOT IDs and are therefore permitted to vote without ever having had to present a birth certificate or Social Security Card. *See* 67 Pa Code § 91.4 (the current through July 7, 2012 Pennsylvania Regulations providing the list of requirements to obtain a PennDOT non-driver photo ID); 67 Pa Code § 73.3 (the current through July 7, 2012 Pennsylvania Regulations providing the list of requirements to obtain a PennDOT driver's license). PennDOT also has, but does not publicize, certain exceptions to its documentation requirements, which are applied on a case-by-case basis at PennDOT officials' discretion.<sup>6</sup> In sum, the Photo ID Law subjects certain voters to onerous documentation requirements in the name of ensuring their identities, while allowing other voters to vote with little if any regard to the very same concern.

### **III. THE COMMONWEALTH'S INTEREST**

The Commonwealth's asserted interest is to prevent fraud and ensure public confidence in the electoral process.<sup>7</sup> The fraud rationale is a particularly weak reed to support the Law.

---

<sup>6</sup> In addition to undermining the security requirements of the ID, these exceptions, like the indigency exception noted *supra* note 2, improperly confer absolute discretion on PennDOT officials to determine who will be able to vote. *See Bush v. Gore*, 531 U.S. at 105-06.

<sup>7</sup> The Commonwealth identified the interest justifying the Photo ID Law as:

Requiring a photo ID is one way to ensure that every elector who presents himself to vote at a polling place is in fact a registered elector and the person that he purports to be, and to ensure that the public has confidence in the electoral process. The requirement of a photo ID is a tool to detect and deter voter fraud.

Am. Answers of Resp'ts to Pet'ers' First Set of Interrogs. 2 June 7, 2012.

During discovery, it became apparent that in-person voter fraud -- the only type of fraud addressed by the Photo ID Law as opposed to absentee voter fraud or registration fraud -- is negligible or nonexistent. As a result, the Commonwealth has stipulated that it knows of no instances of actual in-person voter fraud in Pennsylvania and that it knows of no prosecutions or investigations of in-person voter fraud in Pennsylvania. July 12, 2012 Stipulation at ¶¶ 1,2. It has also stipulated that the Commonwealth has no direct personal knowledge of investigations, prosecutions, or instances of in-person voter fraud in other states; nor will it offer evidence of such in-person voter fraud in or outside of Pennsylvania. *Id.* at ¶¶ 1-3. Petitioners' expert on voter fraud, Dr. Lori Minnite, will testify that much of what people think of as election fraud is not the in-person voter fraud supposedly addressed by the Photo ID Law, as to the absence of voter fraud nationally and in Pennsylvania, and as to why voter fraud rarely occurs.

The interest in ensuring public confidence in elections is similarly thin. A process that results in qualified Pennsylvanians not being able to vote would undermine, and not ensure, confidence in elections. This is especially so since there is no known in-person fraud to be deterred by the Law. The best antidote to voter suspicion would be for the Commonwealth to publicly acknowledge what it has confessed in its Stipulation, namely, that in-person voter fraud is non-existent in Pennsylvania.

Finally, there is clear and unambiguous evidence that the asserted justifications for the Photo ID Law are pretextual. The Law was passed by the party in power in a party line vote -- a remarkable result for a measure supposedly designed to ensure public confidence. There is a striking lack of acceptable photo ID in the opposition party's strongholds like Philadelphia and among groups likely to favor the opposition party. The evidence will also show that the Law requires substantial expenditures of money at a time when the Commonwealth is reeling from

budget cuts. Given that the incidents of real fraud to be avoided by the Law are negligible, the only fair inference is that the real purpose of the Photo ID Law is not ensuring the integrity of the electoral process but ensuring political advantage through the exclusion of qualified voters who are perceived supporters of the opposition. If there could be any doubts on this score, they were dispelled when the House Majority leader, Mike Turzai, candidly boasted to his colleagues that the Law is “gonna allow Governor Romney to win the state of Pennsylvania.”<sup>8</sup> Lawyers often tell juries that they need not check their common sense at the courthouse door. Common sense tells us that the Photo ID Law is no high-minded exercise in protecting civic values.

### ARGUMENT

Pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), this Court may order special relief, including a preliminary or special injunction “in the interest of justice and consistent with the usages and principles of law.” The purpose of a preliminary injunction is to “put and keep matters in the position in which they were before the improper conduct of the defendant commenced.” *Hill v. Dept. of Corr.*, 992 A.2d 933, 936 (Pa. Commw. Ct. 2010) (quoting *Little Britain Township Appeal*, 651 A.2d 606, 611 (Pa. Commw. Ct. 1994)).<sup>9</sup>

A preliminary injunction is warranted if: (1) it is necessary to prevent immediate and irreparable harm; (2) Petitioners are likely to prevail on the merits; (3) greater injury would result from refusing the injunction than from granting it, and granting it will not substantially harm

---

<sup>8</sup> Kelly Cemetich, *Turzai: Voter ID Law Means Romney Can Win PA*, PoliticsPA, <http://www.politicspa.com/turzai-voter-id-law-means-romney-can-win-pa/37153/>; GOP Turzai: Voter ID Allows Romney to Win PA, YouTube.com, <http://www.youtube.com/watch?v=87NN5sdqNt8>.

<sup>9</sup> The standard for obtaining a preliminary injunction under Rule 1532(a) is the same as that for a grant of a preliminary injunction pursuant to the Pennsylvania Rules of Civil Procedure. See *Shenango Valley Osteopathic Hosp. v. Dep’t of Health*, 499 Pa. 39, 51, 451 A.2d 434, 441 (1982). Hearsay is admissible in a proceeding for preliminary injunctions. See PA RCP § 1531.

other interested parties; (4) the injunction will not adversely affect the public interest; (5) the injunction will properly restore the parties to their status immediately prior to the passage of the law; and (6) the injunction is reasonably suited to abate the offending activity. See *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 573 Pa. 637, 646-47, 828 A.2d 995, 1001 (2003). Petitioners satisfy each of these elements.

## **I. A PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT IMMEDIATE AND IRREPARABLE HARM**

The Photo ID law threatens to prevent or substantially deter Petitioners and other Pennsylvania voters from exercising their rights to vote. The constitutional right at stake in this case is of the utmost importance: the right to vote “is pervasive of other basic civil and political rights, and is the bedrock of our free political system.” *Bergdoll v. Kane*, 557 Pa. 72, 85, 731 A.2d 1261, 1268-69(1999) (quoting *Moore v. Shanahan*, 486 P.2d 506, 511 (Kan. 1971)). It is well recognized that threats to a fundamental constitutional right constitute “immediate” and “irreparable” harm, warranting a preliminary injunction. Thus, in *Pennsylvania. State Education. Association ex rel. Wilson v. Commonwealth., Department. of Community and Economic Development, Office of Open Records*, 981 A.2d 383, 386 (Pa. Cmwlth. Ct. 2009), the court granted a preliminary injunction to prevent public disclosure of employees’ home addresses, a threat to constitutionally protected rights to privacy. Here, where the “bedrock” right to vote is at issue, the potential harm is no less immediate and irreparable.

## **II. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS**

To warrant relief, the party seeking an injunction is not required to “establish his or her claim absolutely,” but need only show that “substantial legal questions must be resolved to determine the rights of the respective parties.” *Fischer v. Dep’t of Pub. Welfare*, 497 Pa. 267, 271, 439 A.2d 1172, 1174 (1982); see also, e.g., *Ambrogi v. Reber*, 2007 PA Super 278, 932

A.2d 969, 976 (Pa. Super Ct. 2007) (“[T]he party seeking an injunction is not required to prove that he will prevail on his theory of liability, but only that there are substantial legal questions that the trial court must resolve to determine the rights of the parties.”). The Supreme Court of Pennsylvania has recognized that constitutional challenges to legislative enactments may “raise important questions that are deserving of serious consideration and resolution” and therefore warrant a preliminary injunction. *Fischer*, 497 Pa. at 272, 439 A.2d at 1175. In this case, there are two substantial constitutional objections to the Photo ID Law: it unduly burdens the fundamental right to vote and it irrationally imposes different burdens on voters in similar circumstances.

**A. The Photo ID Law Is Unconstitutional Because It Unduly Burdens the Fundamental Right to Vote**

*(i) The Right to Vote is a Fundamental Right.*

The Constitution of the Commonwealth of Pennsylvania contains two separate and express provisions establishing protections for the right to vote. First, Article VII, Section 1 sets forth an exhaustive list of the “qualifications” needed in order to “be entitled to vote at all elections”:

- Citizen of the United States;
- Over the age of eighteen (as modified by the Twenty-Sixth Amendment to the United States Constitution);
- Resident of the Commonwealth of Pennsylvania;
- Resident of the election district in which the person offers to vote.

The right to vote based on satisfaction of these requirements is then safeguarded by the terms of Article I, Section 5. That Article states that “[e]lections shall be free and equal.” It also provides without exception that “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”



In light of these provisions, the Pennsylvania Supreme Court has long recognized that voting is a “sacred right” whose “enjoyment . . . must not be impaired by . . . regulation.” *Page v. Allen*, 58 Pa. 338, 347 (1868); *see also NAACP v. Walker*, 2012 WL 739553 at \* 1 (Wis. Cir. Ct., Dane Cnty., March 6, 2012) (quoting *Page v. Allen*, 58 Pa. at 347) (holding that the right to vote in Wisconsin is fundamental and enjoining Wisconsin’s photo ID law). As the Pennsylvania Supreme Court has explained:

When a citizen goes to the polls on an election day with the Constitution in his hand, and presents it as giving him a right to vote, can he be told, “true, you have every qualification that instrument requires. It declares you entitled to the right of an elector, but an Act of Assembly forbids your vote, and therefore it cannot be received.” If so, the legislative power is superior to the organic law of the state, and the legislature, instead of being controlled by it, may mould the Constitution at their pleasure. Such is not the law. ***A right conferred by the Constitution is beyond the reach of legislative interference.***

*McCafferty v. Guyer*, 59 Pa. 109, 111 (1869) (emphasis added). The understanding that the right to vote is “fundamental” under Pennsylvania law has continued to the present era. *See Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 588 Pa. 95, 116, 902 A.2d 476, 488 (2006) (noting resolution of voting machine issue complicated because it “involve[d] the fundamental right to vote”).

Any legislative regulation of the manner in which elections take place must be constrained by the fundamental nature of the right to vote and the protections afforded by the Constitution. The Pennsylvania Supreme Court has held that while it is “clear that the legislature may enact laws governing the conduct of general and primary elections,” it is also “clear that no legislative enactment may contravene the requirements of the Pennsylvania or United States Constitutions.” *Shankey v. Staisey*, 436 Pa. 65, 68, 257 A.2d 897, 898 (1969). In particular, elections may be said to be “free and equal” only when the “regulation of the right to exercise the

franchise does not deny the franchise itself, or make it so difficult as to amount to a denial.”

*Winston v. Moore*, 244 Pa. 447, 457, 91 A. 520, 523 (1914).

(ii) *The Photo ID Law Is Subject to Strict Scrutiny.*

Pennsylvania courts regularly apply strict scrutiny in reviewing laws that infringe upon fundamental rights, including those implicitly protected under substantive due process, *Nixon v. Commonwealth*, 576 Pa. 385, 399-400, 839 A.2d 277, 286-87 (2003) (right to privacy, right to marry, right to procreate), as well as those explicitly identified in the Pennsylvania Constitution, *Pap's A.M. v. City of Erie*, 571 Pa. 375, 410, 812 A.2d 591, 612 (2002) (freedom of expression). The Photo ID Law should be subject to the same exacting standard because the right to vote is not only “fundamental” but also “the bedrock of our free political system.” *Bergdoll*, 557 Pa. at 85, 731 A.2d at 1268-69 (quoting *Shanahan*, 486 P.2d at 511).

Interpreting the federal Constitution, which, unlike Pennsylvania’s, does not expressly protect the right to vote, the Pennsylvania Supreme Court held that “where a precious freedom such as voting is involved, a compelling state interest must be demonstrated.” *In re Nader*, 580 Pa. 22, 46, 858 A.2d 1167, 1180 (2004). The express and specific rights afforded Pennsylvania citizens under their Constitution are entitled to no lesser protection. Faced with constitutional provisions nearly identical to Pennsylvania’s,<sup>10</sup> the Missouri Supreme Court in *Weinschenk v.*

---

<sup>10</sup> See Mo. Const. art. VIII, § 2 (“All citizens of the United States . . . over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people, if . . . they are registered within the time prescribed by law.”); Mo. Const. art. I, § 25 (providing elections shall be “free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage”).

*State*, 203 S.W.3d 201, 215 (Mo. 2006) concluded “[i]n light of the substantial burden that [a photo ID law] places upon the right to vote, the statute is subject to strict scrutiny.”<sup>11</sup>

Because the Photo ID Law directly affects the exercise of the franchise, it is distinct from legislation governing other election-related activities (such as ballot access, nomination, and voter registration), where the courts have applied a standard of deference to the legislature.<sup>12</sup> *See, e.g., In re Nomination Papers of Rogers*, 908 A.2d 948 (Pa. Commw. Ct. 2006) (applying a deferential standard of review regarding ballot access); *Winston*, 244 Pa. at 460, 91 A. at 524 (applying a deferential standard regarding nomination of candidates); *Patterson v. Barlow*, 60 Pa. 54, 76 (1869) (applying a deferential standard regarding voter registration). In addition, deference is particularly inappropriate here, where the Law not only burdens but entirely disenfranchises certain qualified voters. As the Supreme Court held in *McCafferty*, a law prohibiting military deserters from voting “is not . . . a regulation of the mode of exercise of the right to an elective franchise [but rather] . . . a deprivation of the right itself.” 59 Pa. at 111. For all of these reasons, strict scrutiny is warranted.

---

<sup>11</sup> In construing provisions of the Pennsylvania Constitution such as the election provisions, which have no counterparts in the U.S. Constitution, the “Court begins with the plain language. Further, parties obviously should argue existing decisional law under the provision, and where relevant, policy considerations. Finally, to the extent other states have identical or similar provisions, extrajurisdictional caselaw may be helpful and persuasive.” *Jubelirer v. Rendell*, 598 Pa. 16, 33 n.12, 953 A.2d 514, 525 n.12 (2008).

<sup>12</sup> The Circuit Court of Wisconsin drew the same distinction, holding that, while the Wisconsin courts defer to legislative determinations in some election matters, the courts will not defer to the legislature in matters involving “direct voter access.” *See NAACP v. Walker*, 2012 WL 739553 at \* 6 (Wis. Cir. Ct., Dane Cnty., March 6, 2012), *injunction made permanent, NAACP v. Walker*, Case No. 11 CV 5492 (Wis. Cir. Ct., Dane Cnty., July 17, 2012).

(iii) *The Photo ID Law Cannot Satisfy Strict Scrutiny or Any Lesser Standard of Review.*

Because the Photo ID Law restricts a fundamental right it is subject to strict scrutiny, meaning that it must be “narrowly drawn to accomplish a compelling governmental interest.” *Pap’s A.M.*, 571 Pa. at 410, 812 A.2d at 612. Here, there is neither a sufficiently compelling governmental interest nor is the Law narrowly tailored to meet its purported objectives.

The Commonwealth’s asserted interest in preventing fraud and ensuring “public . . . confidence in the electoral process” are insufficient bases for infringing upon the fundamental right to vote. Indeed under *McCafferty*, 59 Pa. at 111 and *Winston*, 244 Pa. at 460, 91 A. at 524, it is unlikely whether there is *any* governmental interest so compelling as to justify extinguishing the franchise.

Even if, *arguendo*, there was so compelling an interest as to permit disenfranchisement or burdens “so difficult as to amount to a denial,” *Winston*, 244 Pa. at 457, 91 A. at 523, it is not present here. To borrow from the United States Supreme Court, the government “must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995). “Whether there is a significant state interest will depend, in part, on whether the state’s intrusion will effect its purpose; for if the intrusion does not effect the state’s purpose, it is a gratuitous intrusion, not a purposeful one.” *Denoncourt v. Commonwealth, State Ethics Comm’n*, 504 Pa. 191, 200, 470 A.2d 945, 949 (1983); *see also Stenger v. Lehigh Valley Hosp. Center*, 530 Pa. 426, 438, 609 A.2d 796, 802 (1992) (same). Here, the purpose of deterring fraud is undermined by the absence of any evidence of the in-person voter fraud that is

the only fraud addressed by the Law. The purpose of ensuring the integrity of elections is likewise subverted by the Law's effect in making it so hard for so many to vote.

Moreover, the Photo ID Law's purported objectives smack of pretext. If the gaping facial dissonance between the purported goals of the Law and its effects were not plain enough, there is the unabashedly partisan nature of the Law evidenced by the party line vote, Representative Turzai's candid boast that the Law will give the election in Pennsylvania to Governor Romney, and the expense of a law that appears to accomplish so little at a time when money is so dear that it fairly raises the question: what is there of such value that the legislature thought it was buying? All in all, the purported purposes of the Photo ID Law are an unacceptably weak reed to justify so great an incursion on the rights of Pennsylvanians.

Wholly apart from the lack of any compelling or significant governmental interest, the Photo ID Law fails because it is not narrowly drawn to achieve its purpose. In *Denoncourt*, 504 Pa. at 200, 470 A.2d at 949, the Supreme Court overturned a financial disclosure law for public officials because it did "great damage to privacy interests [while] . . . not realistically hold[ing] out much hope for effectiveness." The same rationale controls here. On the one hand, the Photo ID Law tramples upon the most fundamental of all laws in any democracy -- the right to vote. See *Bergdoll*, 557 Pa. at 85, 731 A.2d at 1268-69; *Page*, 58 Pa. at 347. On the other, the Law offers little hope of effectiveness. The law will have little effect on in-person voter fraud because such fraud is negligible or non-existent. Likewise, the Law cannot ensure the integrity of elections by burdening the franchise for so many people. By preventing citizens who have a constitutional right to vote defined by the plain and unambiguous terms of Article VII, Section 1 from voting, the Photo ID law violates not only that provision but also the express terms of

Article I, Section 5, which provides that “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”

To be sure, the Commonwealth will argue that voting is not a fundamental right entitled to the protection of strict scrutiny. This contention is baseless, but even if the right to vote were incorrectly considered to be “important, but not fundamental,” the Photo ID Law would still have to bear a “real and substantial relation to the objects sought to be obtained,” which is “a more restrictive rational basis test” than that applied to an equal protection challenge or due process challenge under the United States Constitution. *Khan v. State Bd. of Auction Eng’rs*, 577 Pa. 166, 184 n.7, 842 A.2d 936, 947 n.7 (2004); *Nixon*, 576 Pa. at 401 & n.15, 839 A.2d at 287 & n.15.. For the same reasons set forth above, there can be no “real and substantial relationship,” between the goal of deterring fraud and the Photo ID Law, which prevents many people from voting but does little to address in-person voter fraud. Similarly, there is no “real and substantial relationship” between a law that so burdens the exercise of the franchise with so little tangible gain and the goal of ensuring confidence in elections. *See Nixon*, 576 Pa. at 402-04, 839 A.2d at 288-90 (holding law barring some convicted criminals from nursing home employment but not others who posed similar threat had no “real and substantial relationship” to interest in protecting elderly and disabled); *Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Commw. Ct. 2000) (holding law requiring some felons, but not others, to wait five years after leaving prison to vote had “no rational basis”).

(iv) *Crawford Does Not Control the Outcome of this Case.*

*Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), on which the Commonwealth can be expected to rely, does not affect Petitioners’ likelihood of prevailing on the merits here. The Court in *Crawford* rejected a challenge to an Indiana photo ID requirement raised under the United States Constitution; Petitioners in this case bring a challenge to the Photo

ID Law under the Pennsylvania Constitution. The Pennsylvania Constitution contains express provisions protecting the fundamental right to vote, specifically, the requirement that elections are to be “free and equal,” and that “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pennsylvania Constitution, Article I, Section 5. Furthermore, as the court in *Weinschenk* observed, and as Petitioners argue here, the “express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart.” *Weinschenk*, 203 S.W.3d at 211; *see also NAACP v. Walker*, 2012 WL 739553 at \* 7 (explaining that *Crawford* did not control in part because *Crawford* was based on the federal, and not Wisconsin, constitution). The presence of these express provisions requires a higher level of scrutiny than in *Crawford*, which turned on plaintiffs’ failure to develop the record in key respects:

- The record did not contain evidence of any voter who was disenfranchised by the photo ID requirement. *Crawford*, 553 U.S. at 200.
- The record did not contain evidence of any voter who had his or her right unduly burdened by the photo ID requirement. *Id.* at 187.
- The record did not include testimony from any voter who was unable to pay for the birth certificate that was required to obtain photo ID. *Id.* at 201-02.
- The record lacked evidence establishing the number of voters who lacked photo ID, and the estimates provided were unreliable. *Id.* at 200.

As shown above, Petitioners will establish a well-developed record, in stark contrast to the record in *Crawford*.

Notably, *Weinschenk* distinguished the appellate court decision that would later go to the United States Supreme Court as *Crawford* based upon precisely this issue of record support. In *Weinschenk*, the Missouri Supreme Court upheld a challenge to a photo ID law in large part because the petitioners offered specific testimony of Missouri voters who will incur costs and other burdens associated with the photo identification requirement. *Weinschenk*, 203 S.W.3d at

214-15. This stood in contrast to *Crawford*, in which the parties “simply presented theoretical arguments.” *Id.* at 214. In *NAACP v. Walker*, the Circuit Court of Wisconsin distinguished *Crawford* in a similar fashion, holding that *Crawford* did not control in part because the action was based on a “flawed factual record.” *NAACP v. Walker*, 2012 WL 739553 at \* 7. Because the Petitioners in the instant case will offer specific testimony of the costs and other burdens imposed by the Photo ID Law, and demonstrate the absence of any legitimate state interest, *Crawford* does not affect Petitioners’ likelihood of prevailing on the merits.

**B. The Photo ID Law Is Unconstitutional Because It Irrationally Imposes Different Burdens On Voters In Similar Circumstances**

The guarantee of a “free and equal” election under Article 1 Section 5 of the Pennsylvania Constitution, together with the equal protection provisions of Article 1, Sections 1 and 26, require that “inconveniences [of voting regulations] if any bear upon all in the same way under similar circumstances.” *Winston*, 244 Pa. at 457, 91 A. at 523. Thus, in *Mixon*, 759 A.2d at 451, the court invalidated a law requiring that felons, who had not been registered to vote when incarcerated, must wait five years after their release from prison before registering to vote, finding this to constitute an irrational distinction from those felons who had registered prior to incarceration who could vote immediately upon release. *Id.*<sup>13</sup>

The Photo ID Law makes similar, irrational distinctions between voters. These distinctions have evolved even in the past few months, as the Commonwealth continues to change its approach to implementing the Law. As of the date of filing, however, they include:

---

<sup>13</sup> The *Mixon* court also held, citing a long line of authority restricting the vote for convicted felons, that “the right of felons to vote is not a fundamental right.” *Mixon*, 759 A.2d at 448, 451. That reasoning is not applicable here, however, as the Photo ID Law does not disenfranchise individuals on the basis of felony status.



- In-person voters have to show qualified photo ID to vote while absentee voters and alternative ballot voters do not. *See* 25 P.S. § 2602(z.5)(2)-(3); 3146.2(j); 3146.2b(f); 3146.5(c); 3146.8(i).
- Voters who have to obtain a PennDOT ID now must show a birth certificate (or alternative such as a U.S. Passport) and Social Security Card that are often costly and difficult to obtain, while many voters who obtained PennDOT IDs in the past will have benefitted from less stringent documentation requirements when they originally obtained them, especially if it was before September 11, 2001, after which point identification requirements were tightened everywhere.<sup>14</sup>
- Voters who have changed their names, including many married women, will have to provide additional documentation, which for some will be difficult if not impossible to obtain, establishing the change from their prior to current names in order to obtain an acceptable photo ID, while voters who have never changed their names do not. *See* Application for Initial Photo Identification Card DL-54A, Pa. Dep't of Transp., <http://www.dmv.state.pa.us/forms/driversLicenseForms.shtml>.
- Voters who have certain forms of otherwise acceptable photo IDs, such as college students and nursing home residents, cannot use the ID if it is expired, while voters who have an expired PennDOT ID can use it to obtain a new PennDOT ID without any additional documentation. *See* Press Release, Pa. Dep't of State, Secretary of Commonwealth Announces Simplified Process for Obtaining Voter ID, Reminds Voters Photo ID Not Required for April 24 Primary (April 18, 2012).
- Voters who did not have a qualified photo ID on the day the Photo ID Law was passed have to, at a minimum, travel to a PennDOT center to obtain one, while voters who already had a qualified photo ID (such as certain college students, nursing home residents, and government employees) do not. *See* 25 P.S. § 2602(z.5)(2)(iii) and (iv).

---

<sup>14</sup> *Compare* New Voter ID Law, Pa. Dep't of Transp., <http://www.dmv.state.pa.us/voter/voteridlaw.shtml> (current application for PennDOT non-driver photo ID) *with* 67 Pa Code § 91.4 (the current through July 7, 2012 Pennsylvania Regulations providing the list of requirements to obtain a PennDOT non-driver photo ID); *compare* Driver's License/Photo ID/Learner's Permit Info for New Residents, Pa. Dep't of Transp., [http://www.dmv.state.pa.us/new\\_residents/driver\\_license.shtml](http://www.dmv.state.pa.us/new_residents/driver_license.shtml) *and* Obtaining Your Driver's License, Pa. Dep't of Transp., <http://www.dmv.state.pa.us/teenDriversCenter/obtainingLearnersPermit.shtml> (current applications for PennDOT driver's license) *with* 67 Pa Code § 73.3 (the current through July 7, 2012 Pennsylvania Regulations providing the list of requirements to obtain a PennDOT driver's license).

There are no rational bases for these various distinctions created within the Photo ID Law. For example, while the evidence will show that there are actual instances of absentee voter fraud whereas the Commonwealth cannot identify a single instance of in-person voter fraud in Pennsylvania, a person voting absentee need not provide any documentation proving their identity in order to vote if they have the last four digits of their Social Security number, while a person voting in-person may need to submit extensive documentation in order to obtain an acceptable ID to vote. The fact that the state would require less documentation of identity for the type of voting that is more likely to be tainted by voter fraud defies reason. Such irrational distinctions between the burdens imposed on different voters cannot withstand constitutional scrutiny. *Mixon*, 759 A.2d at 451.

**III. GREATER INJURY WOULD RESULT FROM REFUSING AN INJUNCTION THAN FROM GRANTING ONE, AND GRANTING AN INJUNCTION WILL NOT SUBSTANTIALLY HARM OTHER INTERESTED PARTIES NOR ADVERSELY AFFECT THE PUBLIC INTEREST**

Because the Commonwealth cites the public interest as the justification for the Photo ID Law, “[t]he issue of whether greater injury would result from refusing rather than granting the injunction merges . . . with the issue of possible adverse effect on the public interest.” *City of Philadelphia v. Dist. Council*, 535 A.2d 231, 237 (Pa. Commw. Ct. 1987). While both sides lay claim to the public interest in preserving the fundamental right to vote, the real balance is between the Commonwealth’s amorphous interests in preventing in-person voter fraud or the public perception thereof, which are unsupported by any evidence of such fraud, and the concrete fact that registered voters will be unable to vote in Pennsylvania.

Absent an injunction, as detailed above, each of the Petitioners and many others will have their right to vote impaired or eliminated. Those with acceptable photo ID will also be harmed because implementation of the Photo ID Law will necessarily lead to longer lines, confusion and

delays at the polling places as election officials struggle with the new and different types of ID. In addition, all citizens have an important interest in ensuring that the government acts in accordance with the Constitution. As the Pennsylvania Supreme Court held in enjoining an unconstitutional seizure of property, “the interest to be protected here, which can never be compensated for in damages, extends beyond the instant [Petitioners] to the community at large.” *Berman v. City of Philadelphia*, 425 Pa. 13, 17, 228 A.2d 189, 191 (1967).

On the other hand, with an injunction, the parties and the public will return to the time-tested methods of voter identification that have applied without detriment to the public interest for decades. *See City of Philadelphia v. Commonwealth*, 837 A.2d 591, 604 (Pa. Commw. Ct. 2003) (granting preliminary injunctive relief and noting that “the public interest lies in favor of maintaining the status quo” pending determination of the merits in the case). The Commonwealth will not present any evidence that voter fraud is likely to occur in the absence of the Photo ID Law. July 12, 2012 Stipulation at ¶ 5. The balance of the injuries thus overwhelmingly favors granting Petitioners’ injunction.

#### **IV. A PRELIMINARY INJUNCTION WILL PROPERLY RESTORE THE PARTIES TO THEIR STATUS IMMEDIATELY PRIOR TO THE PASSAGE OF THE PHOTO ID LAW**

Petitioners’ requested injunction “will properly restore the parties to their status as it existed prior to the alleged wrongful conduct.” *Corbett v. Snyder*, 977 A.2d 28, 43 (Pa. Commw. Ct. 2009). “The status quo to be maintained is the last actual and lawful uncontested status, which preceded the pending controversy.” *Id.*

The requested injunction seeks only to preserve the election process as it existed prior to the passage of the Photo ID Law. These previous registration and verification requirements would continue to be in effect, and the upcoming election would therefore be conducted under these processes. Maintaining the status quo does not impose hardship on the Commonwealth.

Further, the past processes clearly address the purported election integrity concerns in an adequate and sufficient manner, evidenced by the absence of any identifiable, past in-person voter fraud. Thus, by enjoining the enforcement of the Photo ID Law, the requested injunction will properly restore the parties to the “last actual and lawful uncontested status.” *Corbett*, 977 A.2d at 43.

**V. A PRELIMINARY INJUNCTION IS REASONABLY SUITED TO ABATE THE OFFENDING ACTIVITY**

The requested injunctive relief is reasonably suited to abate the offending activity at issue: the enforcement of the Photo ID Law and the resulting impairment or elimination of Petitioners’ and others’ rights to vote. *See Snyder*, 977 A.2d at 48-49 (granting preliminary injunction noting that the injunction was a reasonable way to preventing the possibility of future harm). Enjoining the Photo ID Law will relieve Petitioners and others of the substantial, if not insurmountable, burden of obtaining the requisite documentation to obtain a qualified photo ID solely for the purpose of being able to vote. An order enjoining enforcement of the law is the only way to safeguard Petitioners’ fundamental right to vote.

**CONCLUSION**

For the reasons herein, as well as those to be presented at the July 25, 2012 hearing in this case, Petitioners’ Application for Special Relief in the Nature of a Preliminary Injunction should be granted.

Dated: July 18, 2012

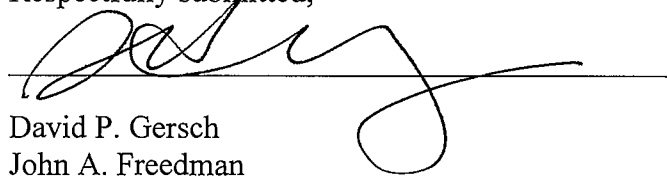
Witold J. Walczak  
Attorney ID No. 62976  
ACLU of Pennsylvania  
313 Atwood Street  
Pittsburgh, PA 15213  
Telephone: 412.681.7736  
Facsimile: 412.681.8707  
vwalczak@aclupa.org

Jennifer R. Clarke  
Attorney ID No. 49836  
Benjamin D. Geffen  
Attorney ID No. 310134  
Public Interest Law Center of  
Philadelphia  
1709 Benjamin Franklin Parkway,  
2nd Floor  
Philadelphia PA 19103  
Telephone: +1 215.627.7100  
Facsimile: +1 215.627.3183

Marian K. Schneider  
Attorney I.D. No. 50337  
Pennsylvania Consulting Attorney  
Advancement Project  
295 E. Swedesford Road # 348  
Wayne, PA 19087  
Telephone: +1 610.644.1925  
Facsimile: +1 610.722.0581

Penda Hair\*  
Denise D. Lieberman, Senior Attorney\*  
Advancement Project  
1220 L Street, NW, Suite 850  
Washington, DC 20005  
Telephone: +1 202.728.9557  
Facsimile: +1 202.728.9558  
\*Not admitted in Pennsylvania, pro hac  
motion to be filed.

Respectfully submitted,



David P. Gersch  
John A. Freedman  
Michael Rubin  
Whitney Moore  
Bassel C. Korkor  
Dawn Yamane Hewett  
Dorian Hurley  
Rachel Frankel  
Rosemary Smith  
ARNOLD & PORTER LLP  
555 Twelfth Street, NW  
Washington, DC 20004-1206  
Telephone: +1 202.942.5000  
Facsimile: +1 202.942.5999  
David.Gersch@aporter.com

Daniel Bernstein  
Arnold & Porter LLP  
399 Park Avenue  
New York, NY 10022-4690  
Telephone: +1 212.715.1000  
Facsimile: +1 212.715.1399

Attorneys for Petitioners

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

Petitioners,

v.

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

Respondents

Docket No. 330 MD 2012

**CERTIFICATE OF SERVICE**

I certify that I am this day of July 18, 2012, serving the foregoing Petitioners’ Pre-Hearing Brief and Pre-Trial Statement, upon the persons and in the manner indicated below, which service satisfies the requirement of Pa. R. A.P. 121:

Service by email per agreement with Respondents’ Counsel as follows::

Patrick S. Cawley, Esq.  
*pcawley@attorneygeneral.gov*  
Senior Deputy Attorney General


Calvin R. Koons, Esq.  
*ckoons@attorneygeneral.gov*  
Senior Deputy Attorney General

Kevin P. Schmidt  
*kevschmidt@pa.gov*  
Deputy General Counsel, Governor’s Office of General Counsel

Office of Attorney General

15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

Dated: July 18, 2012



---

Dorian L. Hurley  
Arnold & Porter LLP  
555 12<sup>th</sup> St., N.W.  
Washington, D.C. 20004  
(202) 942-6804