



COMMONWEALTH OF PENNSYLVANIA

August 17, 2012

Thomas E. Perez
Assistant Attorney General
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Office of the Assistant Attorney General, Main
Washington, D.C. 20530

Dear Mr. Perez:

I am responding on behalf of the Secretary of the Commonwealth of Pennsylvania to your correspondence dated July 23, 2012. Upon my initial review of your letter, I was optimistic that surely your inquiry marked the long overdue renewal of the Department of Justice's previously abandoned review of the 2008 voter intimidation case in Philadelphia, a review that would be particularly well-timed in this presidential election year, as I trust Attorney General Holder and the Department of Justice share the Commonwealth's commitment to ensuring that no violation of the voting rights of Pennsylvanians be tolerated. Unfortunately, my optimism proved unwarranted as I read your letter and learned that you are requesting information "concerning Pennsylvania's compliance with Section 2 of the Voting Rights Act (VRA), 42 U.S.C. § 1973, and other federal voting rights laws", making Pennsylvania the latest in the growing number of states targeted by the Department of Justice simply because they instituted legislation designed to ensure the integrity of the voting process.

With respect to our Voter ID law, the Pennsylvania General Assembly passed Act 18 of 2012 following the presentation of persuasive legislative testimony that demonstrated the need for improving voter identification requirements. The Pennsylvania Act is nearly identical to the Indiana law that was upheld by the United States Supreme Court, which concluded that "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008). Thus, as a matter of settled law, the inconvenience cited by opponents of the Pennsylvania Act is not a substantial burden on the right to vote. Further, should a citizen arrive at a polling place without proper identification, the Act provides that he or she may cast a provisional ballot and will then have six days to obtain identification and produce it or send "an electronic, facsimile or paper copy of the proof of identification" to the county board of elections.

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In addition to the statutory protections afforded by the Pennsylvania Act, the Commonwealth has also taken steps to ensure that a qualified Pennsylvania elector who does not have the proof of identification required to vote at the polling place may obtain needed identification *free of charge* from the Pennsylvania Department of Transportation. Such qualified electors lacking proof of identification to vote may also obtain a new form of photo identification, also *free of charge*, issued by the Pennsylvania Department of State that may be used exclusively for voting purposes. Accordingly, the Pennsylvania Act and the Commonwealth's additional safeguards together ensure that no eligible voter will be denied a reasonable opportunity to obtain and submit the identification necessary to cast a valid vote.

With respect to your letter, I am constrained to note the lack of authority for the Department of Justice's unprecedented attempt to compel the Commonwealth of Pennsylvania, a state not within the purview of Section 5 of the VRA, to produce information concerning compliance with Section 2 of the VRA or other federal laws relating to voting. Your invocation of 42 U.S.C. § 1974 does not remedy this defect in your request. As you are certainly aware, 42 U.S.C. § 1974 simply requires the retention of election-related records for 22 months following an election. Pennsylvania's multiple personal-identification databases that the Department of Justice has requested be infringed, including driver license information, fall well outside the scope of this statute, as do documents related to press releases issued on behalf of Governor Corbett. In light of the absence of authority for your request for information, I question whether your inquiry is truly motivated by a desire to assess compliance with federal voting rights laws, or rather is fueled by political motivation. Ironically, this renders your inquiry subject to the same criticism that opponents of Pennsylvania's voter identification law have lodged in questioning its merit.

Regardless of the true motivation for the Department of Justice's inquiry, any question as to Pennsylvania's compliance with voting rights laws, state or federal, has been resoundingly answered by the decision of the Commonwealth Court of Pennsylvania issued on August 15, 2012. As you and your colleagues are most certainly aware, Pennsylvania's voter identification law was upheld by the Commonwealth Court of Pennsylvania in the case of *Applewhite, et al. v. Commonwealth of Pennsylvania, et al.*, No. 330 M.D. 2012 (Pa. Cmwlth. August 15, 2012). This is an action initiated by Pennsylvanians before our Pennsylvania courts, the appropriate forum, I submit, in which our state law's respect for the constitutional rights of Pennsylvanians to vote should be weighed. Of particular relevance to your inquiry, the Commonwealth Court, in an opinion by the Honorable Robert E. Simpson, concluded as follows:

- In a 70-page opinion exhaustively examining both the law and the evidence, the Court concluded that the Voter ID Law (Act 18) is a constitutional exercise of the Pennsylvania General Assembly's power to regulate elections.

- The Court specifically held that the Commonwealth's reasons for enacting the law (to deter and detect fraud, as well as maintain voter confidence) are relevant, neutral and non-discriminatory justifications.
- Based on the credible testimony of the Commonwealth's witnesses, the Court determined that Pennsylvania will educate the public and administer the law in a non-partisan and even-handed manner.
- The Court found that the expert testimony alleging wide-spread disenfranchisement was not credible. The Court specifically rejected the expert testimony that opined that Act 18 would impact the General Election and that questioned the ineffectiveness of the Commonwealth's education and outreach efforts.
- The Court cited the easy availability of the recently-announced Department of State Voter ID, opining, "I am not convinced that any qualified elector need be disenfranchised by Act 18," especially given the availability of provisional and absentee balloting. Slip op. at 11.
- Consistent with the U.S. Supreme Court's decision in *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008), upholding the nearly-identical Indiana Voter ID law (and the clear majority of other courts that have considered the issue), the Commonwealth Court discounted the alleged extent and severity of the burden on voters who do not currently possess photo identification. Indeed, echoing the U.S. Supreme Court, Judge Simpson held that "the inconvenience of going to PennDOT, gathering the required documents, and posing for a photograph does not qualify as a substantial burden on the vast supermajority of registered voters." Slip op. at 60-61.
- The Court noted that in cases of actual hardship, the law provides a number of opportunities for particularized judicial relief in various forms.

It is plain that the decision of the Commonwealth Court of Pennsylvania provides all the assessment necessary to evaluate Pennsylvania's compliance with voting rights laws. Thus, further efforts by the Department of Justice to assess "Pennsylvania's compliance with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and other federal voting rights laws" in the wake of the *Applewhite* decision will only serve to validate my suspicions as to the true motivation for your inquiry.

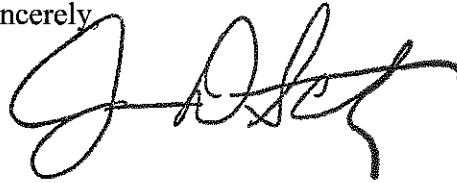
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Despite the lack of any authority for the Department of Justice's unprecedented request for information as set forth in your letter, and notwithstanding the constitutional validation of Pennsylvania's voter identification law by the decision in the *Applewhite* case, the Commonwealth would be willing to voluntarily produce to the Department of Justice all documents it produced in the aforesaid *Applewhite* litigation, provided the Department executes the same confidentiality agreements executed by the lawyers for the *Applewhite* petitioners. In defense of the *Applewhite* challenge to our voter identification law, and in support of the constitutional strength of our law, the Commonwealth has produced tens of thousands of non-privileged documents to the *Applewhite* petitioners, subject to appropriate confidentiality agreements designed to protect the privacy of Pennsylvanians whose voter identification information was necessarily disclosed in the course of discovery. You can appreciate our desire to ensure the professional handling of this confidential information, particularly here, where unlike the petitioners in the Commonwealth Court litigation, you are without authority to request or compel the production of the requested information.

The confidentiality agreement is enclosed herein for your review and execution. I have also enclosed a copy of the *Applewhite* decision for your review. Upon my receipt of the executed confidentiality agreement, the Commonwealth will promptly forward the *Applewhite* records to the Department of Justice for its review.

Thank you for your kind attention.

Sincerely



James D. Schultz
General Counsel

- c: The Honorable Carol Aichele, Secretary of the Commonwealth of Pennsylvania
The Honorable Linda L. Kelly, Attorney General of the Commonwealth of Pennsylvania
Peter J. Smith, U.S. Attorney
David J. Hickton, U.S. Attorney
Zane Memeger, U.S. Attorney
Daniel Freeman, U.S. Attorney