

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 330 CD 2012

VIVIETTE APPLEWHITE; WILOLA SHINHOLSTER LEE; GLORIA CUTTINO; NADINE MARSH; 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’ POST-HEARING BRIEF

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SUMMARY OF THE ARGUMENT

The Supreme Court directed this Court to issue a preliminary injunction barring enforcement of the Act of March 14, 2012, P.L. 195, No. 18 (“Photo ID Law”), unless: (1) “the procedures being used for deployment of the [Department of State identification (“DOS ID”)] cards comport with the requirement of liberal access which the General Assembly attached to the issuance of [Department of Transportation (“PennDOT”)] identification cards,” and (2) this Court is “convinced . . . that there will be no voter disenfranchisement arising out of the Commonwealth’s implementation of a voter identification requirement for purposes of the upcoming election.” *Applewhite v. Commonwealth*, No. 71 MAP 2012, 2012 WL 4075899, at *3 (Pa. Sept. 18, 2012). The evidence demonstrates that neither condition is satisfied. This Court accordingly “is obliged to enter a preliminary injunction” barring enforcement of the photo identification requirement at the upcoming election. *Id.*¹

On the first prong, it is undisputed that from the passage of the Photo ID Law until at least September 25, 2012 (and probably beyond), the Commonwealth has been in violation of the liberal access requirement. *See* Section I, *infra*. On the second prong, contrary to the Court’s predictive judgment following the July hearing, *see Applewhite*, 2012 WL 4075899, at *3, the Commonwealth has succeeded in getting identification into the hands of no more than a tenth of the registered voters who lack acceptable identification. Whatever predictions may be made about whether the Commonwealth’s most recent procedural changes to the DOS ID card might eventually comport with liberal access or might over an extended period get identification to

¹ Unless otherwise specified, Respondents will be referred to collectively as the Commonwealth.

many or all voters who need it, such predictive judgments are insufficient to avoid a preliminary injunction now. *See* Section II, *infra*.

The only real question then is the scope of the injunction that the Court must enter, which is discussed in Section III. The only acceptable injunction that will preserve the integrity of the election and not cause severe administrative burdens for election officials across the state is to enjoin any type of enforcement of the photo identification requirement at the upcoming election for in-person voters.² Following the November election, the Court can determine the appropriate next steps. Such an injunction would not prevent the Commonwealth from issuing free DOS ID cards because those cards are not authorized by the Photo ID Law. However, the Commonwealth must be ordered to stop all advertising or other “educational” efforts in whatever form that tell voters they “are required to show an acceptable photo ID before casting their ballot.”³ To do otherwise would mean that the Commonwealth would be distributing false information to voters about what is required to vote, which at best would cause confusion and at worst tells voters that they cannot vote without photo ID, an invitation to stay home.

Finally, any proposal to enjoin only the law’s provisional ballot provisions would be inadequate and inconsistent with the Supreme Court’s mandate. Unlike regular ballots, many provisional ballots cast by registered voters are not counted due to technical defects in the paper provisional ballots. Requiring people to vote by provisional ballot based solely on their lack of photo identification would unnecessarily burden the electoral system, invite chaos on and

² Petitioners do not seek to enjoin the absentee ballot provisions of the Photo ID Law.

³ Pa. Dep’t of State, VotesPA, <http://www.votespa.com/portal/server.pt/community/home/13514>.

following election day, threaten the integrity of the election, and lead to the very disenfranchisement that the injunction is intended to prevent.

ARGUMENT

I. A PRELIMINARY INJUNCTION IS REQUIRED BECAUSE THE COMMONWEALTH HAS FAILED TO PROVIDE “LIBERAL ACCESS” TO DOS ID CARDS

A. The Commonwealth’s Exhaustion Requirement for DOS ID Cards Violated the General Assembly’s Liberal Access Requirement

The Supreme Court held that it is “contrary to the [Photo ID] Law’s liberal access requirement” to require “applicants for a Department of State identification card [to] be initially vetted through the rigorous application process for a secure PennDOT identification card before being considered for a Department of State card.” *Applewhite*, 2012 WL 4075899, at *2. In other words, the Commonwealth cannot offer the DOS ID card as “only a ‘safety net.’” *Id.* The Commonwealth concedes that its procedures for issuing DOS ID cards did exactly that for at least the four weeks from August 27, 2012, through 8:15 a.m. on September 24, 2012. *See, e.g.*, Hr’g Tr. 25:20-28:15, Sept. 25, 2012 (testimony of K. Myers); Hr’g Tr. 266:23-267:5, Sept. 25, 2012 (argument of Respondents’ counsel).

In order to even apply for a DOS ID card since it became available, voters have been required to sign an affirmation declaring under threat of criminal penalties that “I am unable to obtain a [PennDOT card] because I do not possess all of the documentation required to obtain a PennDOT ID card and cannot obtain the needed documentation, or cannot obtain the documentation without payment of a fee.” Pet’rs’ Ex. 220 (DOS Initial ID Form 08/14/12). The application was worded to make clear that before voters may qualify for the DOS card, it must first be determined that they cannot obtain a PennDOT card and cannot obtain the documentation to get the PennDOT card. This was no accident; the wording of the application reflected

precisely the Commonwealth's goal that "[t]his DOS ID process will be used for customers as a 'last resort' when all other options have been exhausted and then only when customers cannot be issued a PennDOT SECURE Photo ID." Pet'rs' Ex 107; *see also* Hr'g Tr. 25-24-26:4, 27:19-28:1, Sept. 25, 2012 (testimony of K. Myers). Even if a voter did sign the affirmation that he or she could not obtain documentation for a PennDOT card, it was left to an individual PennDOT clerk to decide whether "[b]ased on the documentation and information provided, the voter identified above cannot be issued a PennDOT ID card." Pet'rs' Ex. 220.

This unlawful exhaustion requirement imposed significant burdens on voters seeking DOS ID cards. To cite just one example, under the procedures in effect until at least September 19, 2012, a Pennsylvania-born voter who could not obtain a secure PennDOT card for want of a birth certificate was forced to go through the Department of Health's ("DOH") birth record verification process, which required the applicant to leave PennDOT for "somewhere between 7 to 10 days" before making a second trip to PennDOT (assuming DOH verified the birth record) to complete the application process for a secure PennDOT card. Hr'g Tr. 31:4-33:19, Sept. 25, 2012 (testimony of K. Myers). Only if that application failed was the voter finally permitted to apply for a DOS ID card.⁴

⁴ On or about September 20, 2012, PennDOT apparently changed its procedures to adopt a same-day system for verifying birth records for Pennsylvania-born voters. Hr'g Tr. 33:19-38:9, Sept. 25, 2012 (testimony of K. Myers). There is no evidence of this system being tested by real applicants, and, if past is prologue, its implementation will be anything but "seamless in light of the serious operational constraints faced by the executive branch." *Applewhite*, 2012 WL 4075899, at *3; *see also* Hr'g Tr. 38:5-6, Sept. 25, 2012 (testimony of K. Myers) ("I can't state specifically how long it takes on each individual case."). This new procedure does nothing for voters who were already sent home by PennDOT and who may not be able to return. In any event, it is more than the simple affidavit required by the law's "liberal access" policy.

Even after voters demonstrated they could not satisfy the PennDOT ID requirements, PennDOT and the Department of State have erected multiple other barriers to obtaining a DOS ID card. They have required applicants, among other things, to provide two proofs of residence, a Social Security Number, authorize a Social Security verification process, and submit to facial recognition analysis. Pet'rs' Ex. 220 (DOS Initial ID Form 08/14/12). This goes beyond the simple, two-point declaration required by the General Assembly and the Supreme Court. *Applewhite*, 2012 WL 4075899, at *1.

Thus, the Commonwealth's procedures for issuing DOS ID cards "since the time the cards became available" did not – and do not – comport with the General Assembly's "liberal access" policy. *Applewhite*, 2012 WL 4075899, at *3. Under the plain terms of the Supreme Court's decision, this Court is "obliged to enter a preliminary injunction." *Id.*⁵

B. The Commonwealth's Last-Minute Effort to Comply With the Liberal Access Requirement Is Inadequate to Avoid the Preliminary Injunction

On the eve of the hearing this week, the Commonwealth changed its procedures for issuing DOS ID cards in an attempt to finally provide liberal access to those cards, albeit just five weeks before the election. Hr'g Tr. 24:22-25:1, Sept. 25, 2012 (testimony of K. Myers) (procedures were changed "last night"). Mr. Royer of the Department of State candidly agreed that the Commonwealth "could have been offering that [liberal access] since March 14th of

⁵ Wholly apart from the failure of the Commonwealth to comply with the Supreme Court's remand test, Act 18 remains facially flawed in that, as Petitioners argued on appeal, the statute contains no right to a nonburdensome means of obtaining the required identification, *See* Brief of Appellants, Aug. 30, 2012 at 39-40, 42-45. Putting aside whether the Commonwealth's untested new DOS ID program constitutes a nonburdensome means of acquiring identification, it exists entirely at the whim of the executive. It has no force of law and the Commonwealth is free to change the program or eliminate it altogether at its discretion. An unconstitutional statute cannot be saved merely by the government's promise to implement it in a responsible fashion. *See United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (Roberts, C.J.).

2012, instead of waiting until last night.” Hr’g Tr. 181:12-19, Sept. 25, 2012. But the Commonwealth declined to do so.

The Commonwealth’s new procedures for issuing DOS ID cards do not justify denying the preliminary injunction. Already once in this case, the Supreme Court has refused to accept “a mere predictive judgment based primarily on the assurances of government officials, even though [the Court had] no doubt they are proceeding in good faith.” *Applewhite*, 2012 WL 4075899, at *3. Instead of a mere prediction, the Supreme Court directed this Court to decide the preliminary injunction based on “the *actual availability* of the alternate [DOS] identification cards on a developed record in light of the experience *since the time the cards became available*.” *Id.* (emphases added). The new procedures adopted on Tuesday morning provide no evidence about voters’ actual “experience” with the DOS ID cards. Indeed, no Commonwealth witness offered any testimony about how well the new procedures may actually be working and could do no more than offer the Court more assurances that they would proceed in good faith. *See, e.g.*, Hr’g Tr. 45:24-45:2, Sept. 25, 2012 (testimony of K. Myers) (“[W]hat I can assure you is that we address [problems] quickly and effectively once we’re made aware of a situation.”).⁶ As such, the new procedures of three days ago are irrelevant to the issues before the Court,

⁶ In any event, the parties agree that implementation of the new DOS ID procedures will suffer at least initial operational setbacks over the next five weeks. The Commonwealth’s witnesses repeatedly testified that “by no means is PennDOT perfect,” and “there are always going to be things you learned in deployment that there was no way of anticipating leading up to that deployment.” Hr’g Tr. 45:20-46:8, Sept. 25, 2012 (testimony of K. Myers); *see also* Hr’g Tr. 45:22-24, Sept. 25, 2012 (testimony of K. Myers) (“[C]learly, there are going to be instances that need to be addressed.”); Hr’g Tr. 51:4-8, Sept. 25, 2012 (testimony of K. Myers) (“[F]rom an operational standpoint, as an administrator, whenever I deploy a program, while as much as I may want to think that I’ve thought about everything that needs to happen within the process, the reality is you do learn, through the deployment.”); Hr’g Tr. 215:20, Sept. 25, 2012 (testimony of S. Royer) (“[Y]ou always learn lessons.”).

except to the extent they constitute a concession by the Commonwealth that its conduct through at least September 25, 2012 was unlawful.

In fact, operational difficulties are likely because, in contrast to the original DOS ID procedures, PennDOT and Department of State employees have received little or no training on the new procedures. Hr’g Tr. 93:11-99:21, Sept. 25, 2012 (testimony of K. Myers). In advance of the August 27, 2012 launch of the DOS ID card, PennDOT customer service representatives and managers participated in online Webinar trainings and received detailed training materials. Hr’g Tr. 93:11-98:8, Sept. 25, 2012 (testimony of K. Myers); Pet’rs’ Ex. 107 (Voter ID Process Refresher and DOS ID Training). But on Tuesday morning, a limited set of PennDOT staff received a single, twelve-page document, had a conference call at 8 a.m., and then were expected to begin applying all of the new procedures immediately when PennDOT locations opened their doors minutes later. Hr’g Tr. 94:5-95:14, Sept. 25, 2012 (testimony of K. Myers). One of the people responsible for implementing the new DOS ID procedures will not even be available until “next week.” Hr’g Tr. 198:5-24, Sept. 25, 2012 (testimony of J. Marks). Mr. Myers’s assurance that the limited same-day training would be sufficient is not enough. Hr’g Tr. 96:9-12, 98:13-19, 104:11-21, Sept. 25, 2012.

II. THE COMMONWEALTH HAS NOT FORESTALLED THE POSSIBILITY OF DISENFRANCHISEMENT

Even if, *arguendo*, the Commonwealth could satisfy the foregoing test, the Supreme Court directed this Court to grant the preliminary injunction unless it is “convinced . . . that there will be no voter disenfranchisement arising out of the Commonwealth’s implementation of the voter identification requirement for purposes of the upcoming election.” *Applewhite*, 2012 WL 4075899, at *3. This Court must determine whether the Commonwealth’s “efforts to educate the voting public, coupled with the remedial efforts being made to compensate for the constraints on

the issuance of a PennDOT identification card, will ultimately be sufficient to forestall the possibility of disenfranchisement,” such that “there will be *no* voter disenfranchisement” in November. *Id.* (emphases added).⁷ The Supreme Court expressed special concern about the disenfranchisement of “some of the most vulnerable segments of our society (the elderly, disabled members of our community, and the financially disadvantaged).” *Id.* at *2. The evidence shows that disenfranchisement of these and other voters at the upcoming election is more than possible. It is certain.

Limited Number of Cards Issued. From the time the Photo ID Law was passed on March 14, 2012 through this week, the Commonwealth succeeded in issuing only approximately 9,300 free secure PennDOT identification cards. Hr’g Tr. 66:9-10, Sept. 25, 2012 (testimony of K. Myers). And the Commonwealth has issued fewer than 1,300 DOS ID cards. Hr’g Tr. 156:23-157:2, Sept. 25, 2012 (testimony of J. Marks) (“I think it’s closer to 1300 by now.”). As the Court observed during closing arguments, these figures pale in comparison to the Court’s previous estimate that “somewhat more than 1% and significantly less than 9%” of registered voters did not have photo ID as of June, 2012.” *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 3332376, at *3 n.16 (Pa. Cmwlth. Aug. 15, 2012). Even at the lowest end of the Court’s estimate, close to 100,000 registered voters lack acceptable photo identification; the Commonwealth has managed to get cards to only about ten percent of them. Even if the Commonwealth were to issue two or three times the current number of cards in the thirty-nine

⁷ The Commonwealth contests that the Supreme Court adopted a standard of “no voter disenfranchisement.” Resp’ts’ Pre-Hr’g Mem. on Remand 22, Sept. 24, 2012. But the Supreme Court’s decision unequivocally mandates that the preliminary injunction must issue unless this Court is convinced that there will be “no voter disenfranchisement,” and that the Commonwealth’s action have been “sufficient to forestall the possibility of voter disenfranchisement.” *Applewhite*, 2012 WL 4075899, at *3.

days before the election, the total number of identification cards issues would still not have met nearly the entire need. In fact, Mr. Marks testified that the Commonwealth does not expect its educational efforts will result in even that many more cards being issued before November 6. Hr'g Tr. 238:11-240:20, Sept. 25, 2012.

Obtaining a DOS Card is Not Easy or Assured. The evidence shows that numerous voters have faced substantial obstacles to obtaining DOS ID cards, and that many have been unable to do so. The following is just a sample of these problems:

- Voters have been forced to wait unreasonably long wait times at PennDOT locations, and some have left before receiving any service. Hr'g Tr. 315:21-23, 317:2-4, Sept. 27, 2012 (testimony of D. Clark); Hr'g Tr. 332:8-21, Sept. 27, 2012 (testimony of L. Pannell); Hr'g Tr. 348:11-17, 357:20-358:1, Sept. 27, 2012 (testimony of L. Purdie); Hr'g Tr. 371:5-8, Sept. 27, 2012 (testimony of P. Cobb); Hr'g Tr. 391:3-392:5, Sept. 27, 2012 (testimony of D. Bellisle); Hr'g Tr. 453:17-24, Sept. 27, 2012 (testimony of S. Lipowicz); Hr'g Tr. 473:16-20, 475:2-16, Sept. 27, 2012 (testimony of A. Maxton); Hr'g Tr. 539:8-21, 545:22-549:9, 552:8-555:8, Sept. 27, 2012 (testimony of K. Myers); *see also* Pet'rs' Ex. 139 (showing that almost 75% of customers at the Arch Street location in Philadelphia waited over 30 minutes to be serviced).
- Voters have been forced to make multiple trips to PennDOT in order to try to obtain an ID card. Hr'g Tr. 310:20-24, 317:22-318:18, Sept. 27, 2012 (testimony of D. Clark), Hr'g Tr. 336:3-6, Sept. 27, 2012 (testimony of L. Pannell); Hr'g Tr. 355:23-356:12, Sept. 27, 2012 (testimony of L. Purdie); Hr'g Tr. 390:23-391:2, Sept. 27, 2012 (testimony of D. Bellisle); Hr'g Tr. 408:23-24, Sept. 27, 2012 (testimony of J. Hockenbury); Hr'g Tr. 446:10-12, Sept. 27, 2012 (testimony of A. Thompson); Hr'g Tr. 451:4-6, 451:18-452:3, 453:10-12, Sept. 27, 2012 (testimony of S. Lipowicz); Hr'g Tr. 473:12-22, Sept. 27, 2012 (testimony of A. Maxton).
- Less than half of PennDOT centers are open five days per week, and even for those centers that are open five days a week, some do not have the capacity to issue photo IDs on each day. Hr'g Tr. 555:19-559:15, Sept. 27, 2012 (testimony of K. Myers); Hr'g Tr. 451:22-452:3, Sept. 27, 2012 (testimony of S. Lipowicz).
- PennDOT has not created any mobile ID units or made plans to get elderly, disabled or financially disadvantaged voters to PennDOT facilities without charging them a fee. Hr'g Tr. 72:18-75:64, 113:10-114:8 Sept. 25, 2012 (testimony of K. Myers).
- Voters have been forced to pay for an ID card that should have been provided at no charge. Hr'g Tr. 371:18-372:17, Sept. 27, 2012 (testimony of P. Cobb); Hr'g Tr. 450:4-16, Sept. 27, 2012 (testimony of L. Purdie); Hr'g Tr. 443:12-444:22, Sept. 27, 2012

(testimony of A. Thompson); Hr'g Tr. 458:15-461:15, Sept. 27, 2012 (testimony of D. Curry); Hr'g Tr. 567:13-574:4, Sept. 27, 2012 (testimony of K. Myers).

- PennDOT locations have not always had the necessary documentation to obtain an ID card, have not understood what documentation was required, and in at least one instance created a new affidavit on its own and in another instance informed voters that PennDOT is no longer issuing free DOS ID cards. Hr'g Tr. 315:24-318:22, Sept. 27, 2012 (testimony of D. Clark); Hr'g Tr. 351:6-11, 358:5-21, 359:9-360:9, Sept. 27, 2012 (testimony of L. Purdie); Hr'g Tr. 392:15-394:9, 395:1-396:16, Sept. 27, 2012 (testimony of D. Bellisle); Hr'g Tr. 407:17-408:2, 409:23-12:3, 414:4-15, 415:11-416:5, Sept. 27, 2012 (testimony of J. Hockenbury); Hr'g Tr. 427:13-429:19, 433:23-434:24, 438:8-13, 439:15-441:16, Sept. 27, 2012 (testimony of A. Thompson); Hr'g Tr. 450:16-20, 453:13-16, Sept. 27, 2012 (testimony of S. Lipowicz); Hr'g Tr. 476:3-10, Sept. 27, 2012 (testimony of A. Maxton).
- Voters often have been sent home from PennDOT with no ID card, either because they did not have two proofs of residence or because PennDOT was unable to verify a voter's registration even though the voter is registered. Hr'g Tr. 315:24-318:1, Sept. 27, 2012 (testimony of D. Clark); Hr'g Tr. 333:10-17, 335:16-18, Sept. 27, 2012 (testimony of L. Pannell); Hr'g Tr. 352:7-355:7, Sept. 27, 2012 (testimony of L. Purdie.); Hr'g Tr. 385:19-387:10, 387:19-90:10, Sept. 27, 2012 (testimony of D. Bellisle); Hr'g Tr. 408:12-20, Sept. 27, 2012 (testimony of J. Hockenbury).

The Commonwealth produced files from 113 applicants who were initially denied DOS ID cards by PennDOT, sent home, and told to follow up with the Department of State. Pet'rs' Ex. 217-18. Given that fewer than 1,300 DOS ID cards have been issued, it appears that under the Commonwealth's procedures for deploying the DOS ID card, almost 10 percent of those allowed to apply were sent home from PennDOT without the identification needed to vote. These numbers do not include those who – between August 27, 2012 and September 25, 2012 – were not allowed to apply for a DOS ID card because they had not exhausted the secure PennDOT card process. Indeed, the Commonwealth's internal documents reflect that as many as 25% of applicants have had issues obtaining a DOS ID card. Pet'rs' Ex. 149; Hr'g Tr. 214:8-23, Sept. 25, 2012 (testimony of J. Marks).

For recently registered voters, PennDOT has regularly been denying them a DOS ID card because the Commonwealth's procedures require that their names first appear in the registration

database, and this process takes about two to four weeks, depending on the county and how busy they are processing new and address-change registrations. Decl. of Mark Wolosik (filed Sept. 26, 2012); Hr'g Tr. 501:6-503:6, Sept. 27, 2012 (testimony of J. Marks). Nothing in the Photo ID Law requires the Commonwealth to refuse "voting purposes only" identification until a person's name has actually been entered into the voter database. And there is no reason why PennDOT – which already routinely registers voters under the so-called Motor-Voter provisions of the National Voter Registration Act, 42 U.S.C. §§ 1973gg *et seq.* – should not simply have offered all of these DOS ID applicants a voter registration application on the spot, instead of simply denying them a DOS ID card. Indeed, that is precisely what PennDOT is supposed to do under the new procedures adopted earlier this week.

Even some long-time voters are being turned away because PennDOT clerks are unable to verify registration, which upon subsequent and closer scrutiny was there all along. Regardless, of the at least 113 applicants initially denied a DOS card, the Department of State eventually confirmed approximately 43 of those applicants to be qualified for the DOS card, which demonstrates that the applicants had been erroneously rejected initially.⁸

In light of these problems, the Commonwealth's witnesses readily acknowledged that the issuance of both PennDOT and DOS ID cards at least through Tuesday morning was far from seamless. Hr'g Tr. 79:5-13, Sept. 25, 2012 (testimony of K. Myers) (describing "concerns that were being expressed"); Hr'g Tr. 193:14-19, Sept. 25, 2012 (testimony of J. Marks) ("We have

⁸ Mr. Marks of the Department of State assured the Court that letters would be sent to the remaining 70 applicants in the "next few days" informing them of the status of their registration. Hr'g Tr. 210:24-213:10, Sept. 25, 2012. Such assurances are insufficient to avoid the preliminary injunction. *Applewhite*, 2012 WL 4075899, at *3.

had complaints.”); Hr’g Tr. 231:6-10, Sept. 25, 2012 (testimony of J. Marks) (describing “bumps in the road”); *see also* Pet’rs’ Ex. 239 (discussing inability initially to handle call volume).

Inadequate Voter Education Efforts. The Commonwealth’s assurances at the July hearing regarding its planned voter education efforts have not come to fruition. Most of the advertisements that the Commonwealth has created make no mention whatsoever of the DOS ID card or the fact that free identifications cards are available at all, nor do they provide any information about how to obtain an acceptable identification beyond telling people to contact “VotesPA.” Pet’rs’ Ex. 179 (TV scripts); Pet’rs’ Ex. 178 (radio scripts); Pet’rs’ Exs. 172, 174 (transit/bus advertisements); Pet’rs’ Ex. 173 (billboards). Many of the advertisement show only a picture of a driver’s license. The advertisements, however, do tell voters expressly that “to vote in Pennsylvania on Election Day, you need an acceptable photo ID with a valid expiration date,” Pet’rs’ Ex. 179, and the very slogan of the campaign is that they must “Show It” to be permitted to vote. *E.g.*, Hr’g Tr. 141:5-7, Sept. 25, 2012 (testimony of S. Royer).

The mailing to 5.9 million households discussed in July consists of a postcard that (i) provides no information – other than telling people to “get one . . . with supporting documentation” – about how to obtain an acceptable identification; (ii) shows only a driver’s license and does not explain that there is a new, supposedly easier-to-obtain form of acceptable identification available at PennDOT; and (iii) was sent out only in English. Pet’rs’ Ex. 115 (postcard); Hr’g Tr. 151:22-24, Sept. 25, 2012 (testimony of S. Royer).⁹ The small print on the

⁹ In contrast to what has actually happened, Mr. Marks predicted in July that this mailing would “provide information about what you need [to vote], and if you want it, here’s how you get it,” and that it would be in both English and Spanish. Hr’g Tr. 823:5-11, July 30, 2012.

postcard with a buried mention of the DOS ID card contains no explanation of what it is or that is supposed to be easier to obtain.

In addition, the Commonwealth intentionally limited nearly all of its voter education activities to roughly two months before the November election. Hr’g Tr. 244:3-5, Sept. 25, 2012 (testimony of S. Royer) (“[T]he majority of that push is occurring now and will occur into the future; that’s correct.”); Hr’g Tr. 247:5-7, Sept. 25, 2012 (testimony of S. Royer) (“I believe the majority of the ad buy is occurring – is ramping up now and will continue over the next several weeks.”); Hr’g Tr. 247:8-10, Sept. 25, 2012 (testimony of S. Royer) (“Q. And that’s entirely intentional on the part of the Department of State; right? A. Right.”). That approach is at odds with the General Assembly’s design in enacting the law. As the House Republican Caucus’s *amicus* brief explains, the General Assembly “purposefully” provided an “extended implementation period of 237 days – from March 14 until the general election” – to allow the Commonwealth time to “educate voters as the requirements of Act 18 and to help individual voting locations adapt to its changes.” Brief for *Amicus Curiae* Republic Caucus of the Pennsylvania House of Representatives in Opposition to the Application for Preliminary Injunction 11. Now that most of the extended period has elapsed and so many voters still lack ID, it is impossible to say with any confidence that future efforts will “forestall the possibility of disenfranchisement.” *Applewhite*, 2012 WL 4075899, at *3.

The Commonwealth also has taken no active steps to measure the effectiveness of its campaign to educate voters about the Photo ID Law. Hr’g Tr. 156:7-13, Sept. 25, 2012 (testimony of S. Royer). Mr. Royer testified that the Commonwealth instead plans to do so “at the end of [the] campaign, not during [the] campaign. We still have six weeks to go until Election Day.” Hr’g Tr. 156:7-16, Sept. 25, 2012.

III. THE SCOPE OF THE INJUNCTION

The Court asked the parties to address the scope of the preliminary injunction. In order to comply with the Supreme Court's mandate, the injunction must bar enforcement of the Photo ID Law's requirement that in person voters show photo identification in order to vote. The injunction also must order the Commonwealth to stop all advertising or other "educational" efforts in whatever form that tell voters they are required to show an acceptable photo ID in order to vote. The provisions of the law related to absentee ballots do not need to be enjoined. Following the November election, the Court can determine the appropriate next steps. But any proposal to enjoin only the provisional ballot provisions is unjustifiable and would unlawfully disenfranchise voters based on their lack of acceptable photo identification.

A. The Preliminary Injunction Should Bar Enforcement of the Photo ID Law

(i) The Requirement to Show Photo ID to Vote Must Be Enjoined

The Supreme Court's decision represents a common sense judgment that the Commonwealth *cannot* require voters to show ID in order to vote if the Commonwealth has not provided those voters with liberal access to ID that forestalls the possibility of disenfranchisement. The General Assembly intended that the requirement that voters show ID in order to vote be accompanied by liberal access to that ID. These are flipsides of the same coin, and the central thrust of the Supreme Court's decision is that you cannot have one without the other.

Having failed to provide the required liberal access to DOS ID cards for any period covered by the two hearings, the Commonwealth cannot now require voters to show photo identification in order to vote on November 6. The Commonwealth thus cannot enforce Section 3 of the law which expressly and unambiguously mandates that "At every primary and election

each elector who appears to vote and who desires to vote *shall* first present to an election officer proof of identification.” Photo ID Law, § 3 (codified at 25 P.S. § 3050(a)) (emphasis added).¹⁰

Enjoining this photo identification requirement is directly and narrowly targeted at the “offending activity” in this case. That offending activity is the Commonwealth’s attempt to impose on voters a photo ID requirement without providing liberal access to photo ID that can be used to vote. In this context, the preliminary injunction must bar enforcement of the requirement to show photo identification to vote.¹¹ Indeed, this has been the remedy in similar cases involving challenges to voter ID requirements. *See, e.g., Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006); *Milwaukee Branch of NAACP v. Walker*, 2012 WL 739553 (Wis. Cir. Ct. March 6, 2012). Even in Georgia, where the initial concern was with implementation of the ID requirement, the remedy was to enjoin enforcement of that requirement. *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1369-1370, 1377 (N.D. Ga. 2005).

¹⁰ Petitioners do not seek to enjoin the absentee ballot provisions of the Photo ID Law.

¹¹ The cases on which the Commonwealth relies bear no resemblance to this case. In *Commonwealth ex rel. Davis v. Van Emborg*, 464 Pa. 618, 347 A.2d 712 (1975), the Supreme Court reversed an *ex parte* order “enjoining the operation of [an adult bookstore] and prohibiting ‘any business activity at the premises.’” 464 Pa. at 619, 347 A.2d at 713. This injunction would have prohibited activity that is obviously lawful such as selling Bibles, baseballs, or baked goods – unrelated to any adult books or other obscene materials. The Supreme Court held that “[t]he broad prohibition of this decree, enjoining all business activity, cannot be upheld.” 464 Pa. at 624, 347 A.2d at 715. By contrast, Petitioners in this case seek a preliminary injunction to remedy precisely the constitutional problem found by the Supreme Court – *i.e.*, the problem of requiring voters to show photo ID to vote when the Commonwealth has not provided liberal access to photo ID.

(ii) The Campaign to Tell Voters They Need ID to Vote Must be Enjoined

Once this Court has entered an injunction barring the Commonwealth from requiring voters to present photo ID in order to vote in November, it would be false and misleading to tell voters that they cannot vote unless they have an acceptable form of photo identification. That is precisely what the Commonwealth's \$5 million advertising campaign says on radio, TV, billboards, print media and in mailings to all registered voters: "Under a new law, voters are required to show an acceptable photo ID with a valid expiration date when voting on November 6." Pet'rs' Ex. 115.

Even if the requirement to show photo identification to vote potentially could take effect at some date in the future, it cannot apply in November because the Commonwealth failed to provide "liberal access" and cannot meet the standard of "no voter disenfranchisement." *Applewhite*, 2012 WL 4075899, at *3. But the advertisements do not draw this distinction. Nor can this Court sit in permanent session as a kind of super-advertising executive monitoring the Commonwealth's various educational and advertising efforts. The Commonwealth cannot be permitted to falsely inform the public that they must "Show It" in order to vote. Telling citizens they cannot vote without ID, just like telling the general public that it cannot attend a play or sporting event without a ticket, is a facial instruction not to show up at the polls on election day.

Pennsylvania's voting laws prohibit dissemination of false or misleading information to the electorate about voting. 25 P.S. § 3547 (barring the use of "any . . . fraudulent device" that "impedes, prevents, or otherwise interferes with the free exercise of the elective franchise by any voter.") The Commonwealth cannot tell voters they are unable to vote without photo ID if that is not the case.

B. It Is Not Sufficient to Enjoin Only the Provisional Ballot Provisions

Enjoining only the provision of the law that requires voters who cast a provisional ballot based on lack of photo ID to return with such ID within 6 days in order to have their vote counted, *see* 25 P.S. § 3050(a.4)(5)(ii)(D), (E), is an inadequate remedy. This approach, in effect, would create a bifurcated system where voters *with* photo ID vote by regular ballot, while voters *without* photo ID vote by provisional ballot and are subject to all of the pre-existing rules governing provisional ballots. *First*, such a limited injunction – which does not address the central problem caused by requiring photo ID as a condition of voting but not providing the liberal access required by the General Assembly – is not the remedy envisioned by the Supreme Court in its remand. *Second*, while Act 18 facially disenfranchises voters who are unable to comply with the express requirement that they “shall first present to an election officer proof of identification,” *id.* § 3050(a), the provisional ballot simply offer an opportunity to “cast” a ballot, *id.* § 3050(a.2), without ensuring that the ballot will be counted and indeed few in fact are counted. This is naked disenfranchisement. *Third*, as this Court correctly recognized, the provisional ballot is a designed for a small number of exceptional cases and is not a workable solution on the mass scale described to the Court by officials charged with actually running the election process at the polls.

(i) The Supreme Court’s Remand Requires More Than the Band-Aid of an Injunction Limited to Provisional Ballot Provisions

The Supreme Court did not credit, or even mention, *any* of the Commonwealth’s arguments about provisional ballots being sufficient to cure the risk of disenfranchisement. Nothing anywhere in its decision even hints that the Supreme Court envisioned a system where voters lacking photo identification could be required to vote by provisional ballot. To the contrary, the essence of the Supreme Court’s decision is that voting rights cannot be restricted

based of the lack of photo identification if the Commonwealth has not made such identification liberally accessible. Having failed to provide the required liberal access for almost 6-1/2 of the 7-1/2 months allotted by the General Assembly, the Commonwealth cannot use a person's lack of photo identification to restrict his or her voting rights. The only injunction even referenced in the Supreme Court's decision is that requested by Petitioners to "preliminarily enjoin [the Law's] implementation." *Applewhite*, 2012 WL 4075899, at *2. Indeed, despite the fact that Petitioners' question presented was whether "an injunction prohibiting enforcement of the Photo ID Law reasonably [is] suited to abate the offending activity," Brief of Appellants 4, Aug. 30, 2012, *Applewhite v. Commonwealth*, No. 71 MAP 2012, the Supreme Court never hinted at any remedy short of enjoining the law for purposes of the upcoming election.

Moreover, the Supreme Court held that "if the Law is enforced in a manner that prevents qualified and eligible electors from voting, the integrity of the upcoming General Election will be impaired." *Applewhite*, 2012 WL 4075899, at *2. Enjoining only the provisional ballot provision would prevent qualified and eligible electors from voting and thus impair the integrity of the election.

(ii) A Provisional Ballot Is Not a Substitute For a Regular Ballot

The central problem with this approach is that all regular ballots are counted, but not nearly all provisional ballots are counted. Indeed, "the whole point of provisional balloting is that the vote may be cast but ultimately may or may not count." *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1081 (N.D. Fla. 2004).

The Pennsylvania General Assembly amended the Election Code in 2002¹² to add the availability of provisional ballots and in 2004 added the specific canvassing and challenge procedures¹³ that apply to such ballots. The ballots are “provisional” because they are not counted at the polls on Election Day. Rather, provisional ballots are examined by the county board of elections later to determine whether, and which portions of the ballot should be counted. *See* 25 P.S. § 3050(a.4)(4). Consequently, “provisional” ballots are inferior to regular ballots because whether they will be counted or not is unclear and not guaranteed. *See* Hr’g Tr. 577:6-20, July 31, 2012 (testimony of M. Wolosik); *Hunter v. Hamilton Co. Bd. of Elections*, 635 F.3d 219, 235 (6th Cir. 2011) (“Constitutional concerns regarding the review of provisional ballots by local boards of elections are especially great. As in a recount, the review of provisional ballots occurs after the initial count of regular ballots is known. . . . This particular post-election feature makes specific standards to ensure equal application particularly necessary to protect the fundamental right of each voter to have his or her vote count on equal terms.” (citations and internal quotation marks omitted)).

The Election Code defines provisional ballot to mean “a ballot issued to an individual who claims to be a registered elector by the judge of elections on election day when the individual’s name does not appear on the general register and the individual’s registration cannot be verified.” 25 P.S. § 3050(a.4)(12). Act 18 purportedly expanded this definition to include ballots issued to voters who *were* listed in the district register and whose registration *could be* verified, but who lacked one of the accepted forms of photo ID required by the Act. Photo ID

¹² 2002, Dec. 9, P.L. 1246, No. 150, § 12.

¹³ 2004, Oct. 8, P.L. 807, No. 97, § 5.1.

Law, § 3 (codified at 25 P.S. § 3050(a.2)(1)). Thus, Act 18 relegates voters who lack photo ID to voting by provisional ballot on Election Day and applies all of the pre-existing procedures governing provisional ballots to voters who lacked ID at the polls on Election Day.

The procedures for voting by provisional ballot are time-consuming and onerous. The voter must first sign an affidavit attesting to her name, address, that this is the only ballot she cast in the election and the reason for casting a provisional ballot. 25 P.S. § 3050(a.4)(2). This affidavit must be signed by both the judge of elections and minority inspector. *Id.* After making her selections, the voter places the ballot in a secrecy envelope and places the secrecy envelope inside the provisional ballot envelope. *Id.* § 3050(a.4)(3). The voter then signs the outside of the provisional ballot envelope. *Id.* Provisional ballots cast in the election district remain sealed and are delivered to the county board of elections for canvassing later. *Id.*

Each of these procedures presents a separate opportunity for the county board of elections not to count the ballot. The Election Code mandates that the ballot “shall not be counted” if the voter failed to sign the affidavit or the outside of the envelope. *Id.* § 3050(a.4)(5)(ii)(A). The board will not count the ballot if the provisional ballot envelope does not contain a secrecy envelope. *Id.* § 3050(a.4)(5)(ii)(C). Further, the voter’s signatures are subject to scrutiny and the ballot “shall not be counted” if the board determined that the signatures are not genuine or signed by the same individual. *Id.* § 3050a.4(a.4)(5)(ii)(B). In addition, before a provisional ballot is finally counted, the board of elections examines the external envelope and compares the signature on the front with the signature in its voter registration files. *Id.* § 3050(a.4)(5)(i). The ballot is counted only “if the signatures are determined to be genuine.” *Id.* Conversely, if the board determines that the signatures are not genuine, the ballot will not be counted. Hr’g Tr. 579:13-582:13, July 27, 2012 (testimony of M. Wolosik).

The county board's examination of provisional ballots occurs within seven days after the election. 25 P.S. § 3050(a.4)(4). During the examination, representatives of candidates and political parties may be present and may challenge the ballots. *Id.* If a provisional ballot is challenged, the board must hold a hearing on the challenges, but notice is only given to the voter "where possible." *Id.* § 3050(a.4)(4)(i). The Election Code contemplates that candidates and political parties will present testimony regarding the challenge. *Id.* § 3050(a.4)(4)(iv). The board will decide whether to uphold or dismiss the challenge, and any "petitioner aggrieved by the decision" may appeal to the Court of Common Pleas within two days. *Id.* § 3050(a.4)(4)(v). None of the challenged ballots will be finally counted until the conclusion of all appeals. *Id.* § 3050(a.4)(4)(vi). None of these procedural issues that lead to disenfranchisement exist when a voter is allowed to cast a regular ballot in person.

These procedures are all part of current law and will not be affected by any injunction that removes only the requirement in 25 P.S. § 3050(a.4)(5)(ii)(D) and (E) that a voter who votes by provisional ballot because of the lack of photo ID must return to present photo ID within six days. Under these circumstances, the Commonwealth cannot provide any assurance that every provisional ballot cast by a voter who lacks photo ID will be counted because the ballot is required to undergo the same examination procedures as do all provisional ballots. In fact, in 2010, the United States Election Assistance Commission reported that 18% of provisional ballots submitted in Pennsylvania were rejected for reasons unrelated to the voter's registration status, *i.e.*, for irregularities in the ballot envelope or some other problem.¹⁴

¹⁴ United States Election Assistance Commission, 2010 Election Administration and Voting Survey, Summary of Key Findings, Tables 34 and 35a (Dec. 2011), *available at* http://www.eac.gov/research/election_administration_and_voting_survey.aspx.

Consequently, an injunction limited to striking only the provisional ballot provisions would disenfranchise all of the voters who were forced to vote by provisional ballot solely based on their lack of identification, and whose provisional ballots ultimately were not counted on some other ground. That would not remedy the constitutional defect that voters would be denied the franchise simply because they lack photo ID, even though the Commonwealth has failed to provide liberal access to photo ID that can be used to vote. Unless underlying requirement to show photo ID is enjoined, when a voter arrives at the polling place without an acceptable photo ID, the voter is relegated to the second-class status of voting by provisional ballot, and the Commonwealth cannot guarantee that the vote will count.

(iii) Provisional Ballots Are an Unworkable Remedy

Neither this Court nor the parties are in a position to rewrite the statutorily-mandated rules and procedures for casting and counting provisional ballots. Given the numbers of registered voters who still lack acceptable photo identification, it is impractical to force so many voters to use provisional ballots. To do so would impose unworkable burdens on both electors and the electoral system without any identifiable purpose, and “would cause, *inter alia*, voter confusion and increased possibility of error in casting and tabulating votes All of these factors could lead to the inexorable disenfranchisement of voters.” *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 588 Pa. 95, 127 n.19 (Pa. 2006).

As the Court heard in July, the Allegheny County Elections Manager projects a seventeen-fold increase in provisional ballots from people without acceptable identification, from 2808 cast in 2008 to a conservative estimate of over 35,000 this November. Hr’g Tr. 582:14-585:4 July 27, 2012 (testimony of M. Wolosik). The Philadelphia Commission projects provisional ballots to increase from 8300 in 2008 to over 200,000 this November if photo identification is required. Hr’g Tr. 1231:8-14, 1237:9-1239:3, Aug. 1, 2012 (testimony of J.

Santana). Each voter diverted to a provisional ballot will prolong the lines at the polling place because it takes up to five minutes to complete such ballots, voters are likely to argue with the poll workers (especially if the law has otherwise been enjoined), and only one voter can be processed through the line at a time. Hr’g Tr. 577:21-579:18, 585:5-586:12, 587:15-588:10, July 27, 2012 (testimony of M. Wolosik). Mr. Santana anticipates that relegating so many voters to provisional ballots will cause a “mess” and a “chaotic environment” on election day. Hr’g Tr. 1239:4-1240:19, Aug. 1, 2012 (testimony of J. Santana). Long lines at the polling place increases the likelihood that eligible voters, who have voter ID, will be unable to wait and will leave without voting, further increasing the number of disenfranchised voters. Such a result is contrary to the Supreme Court’s admonition that no voter disenfranchisement occur.

Pushing such large numbers of voters into the provisional ballot process would threaten the ability of the Commonwealth to comply with both state and federal deadlines for counting votes. Even if the Court were to order that provisional ballots cast for want of a photo identification ultimately must be counted, the only way to count such ballots is to use the existing and time-consuming provisional ballot procedures. Mr. Wolosik openly worried in July about how he and his staff possibly will be able to handle the 35,000 provisional ballots he expected if photo identification were required at the polls. Hr’g Tr. 588:11-590:5, July 27, 2012 (testimony of M. Wolosik). For example, “[n]o later than 5:00 P.M. on [November 13, 2012],¹⁵ the county boards of elections must submit to the **SECRETARY OF THE**

¹⁵ Under the Commonwealth’s proposal at closing argument to require voters to continue to have to prove up their provisional ballots within six days, voters would have until November 13, 2012 to do so – the same day by which the county boards are required to submit their unofficial returns. See Hr’g Tr. 615:12-15, Sept. 25, 2012 (counsel for Respondents).

COMMONWEALTH unofficial returns”¹⁶ This deadline is critical because by November 15, 2012, the Secretary of the Commonwealth must issue an order for a recount or recanvass based on the unofficial returns if the margin in certain elections is less than half a percent.¹⁷ Other key deadlines quickly follow. And Pennsylvania’s presidential electors must meet on December 17, 2012 to vote for President and Vice President. *See* 3 U.S.C. § 7; 25 P.S. § 3192. There is no reason to risk the Commonwealth’s ability to meet these deadlines when the photo identification requirement is not in effect.

CONCLUSION

Given the real difficulties that registered voters have encountered in their efforts to obtain voter identification cards – and in particular the amount of time it has frequently taken for voters to obtain the IDs – there is not enough time for the Commonwealth to ensure that no one will be disenfranchised by the Photo ID law for purposes of the upcoming elections. As the Supreme Court held, “assurances from government officials” are insufficient even if they are made in “good faith.” *Applewhite*, 2012 WL 4075899, at *3. There are now fewer than thirty business days between now and the elections. For voters who live in counties where PennDOT issues voter identification only one day per week, the number of days left to obtain identification is now in the single digits. There is no basis for believing that the implementation process – which the Supreme Court concluded has “by no means been seamless in light of the serious operational constraints faced by the executive branch,” *id.* – will become any more seamless in those few remaining days. In these circumstances, a preliminary injunction enjoining enforcement of Act

¹⁶ Pa. Dep’t of State, Secretary of State’s 2012 Election Calendar at 35, *available at* http://www.portal.state.pa.us/portal/http://www.portal.state.pa.us;80/portal/server.pt/gateway/PTARGS_0_160329_1212363_0_0_18/2012ElectionCalendar.pdf.

¹⁷ *Id.*

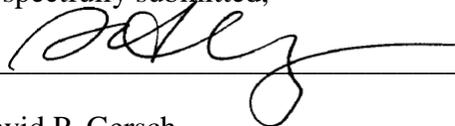
18 (with a carve out of the absentee ballot provisions) is not only “the most judicious remedy.”

Id. It is required by the Supreme Court’s ruling.

For the reasons herein and presented at the July and September hearings, Petitioners’ Application for Special Relief in the Nature of a Preliminary Injunction should be granted.

Dated: September 28, 2012

Respectfully submitted,



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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viviette Applewhite; Wilola Shinholster Lee; Gloria
Cuttino; Nadine Marsh; 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 28th day of September 2012, serving the foregoing Petitioners’
Post-Hearing Brief, upon the persons and in the manner indicated below, which service satisfies
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ORDER

AND NOW, this ____ day of _____, 2012, after considering the evidence, argument and briefing on the issues remanded to this Court by the Supreme Court in its September 18, 2012 *per curiam* opinion, it is hereby **ORDERED** that Petitioners’ Application for Special Relief in the Nature of a Preliminary Injunction is **GRANTED**. Until further order of this Court, the Respondents are enjoined from implementing Act 18, including, but not limited to the following:

1. Respondents shall not enforce Act 18’s requirement that all registered voters show photo identification as a condition of voting in person during the November 6, 2012 general election; and
2. Respondents shall withdraw, remove and otherwise cease any further public education/publicity campaign, including website pages, aimed at telling voters that they need a photo identification in order to vote on November 6, 2012.

This order does not affect the absentee ballot provisions of Act 18. This order also does not affect any of the provisions of the Election Code that were in effect prior to the enactment of Act 18.

IT IS SO ORDERED.

BY THE COURT.

Robert Simpson, Judge