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.	:	No. 330 M.D. 2012
The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carole Aichele, in her capacity as Secretary of the Commonwealth, Respondents	:	HEARD: July 25, 2012

BEFORE: HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED**: August 15, 2012

DETERMINATION on APPLICATION for PRELIMINARY INJUNCTION

Presently before this Court is a request for preliminary injunctive relief filed by several individuals[1] and organizations[2] (collectively, Petitioners),

[1] When Petitioners filed their complaint, the individual Petitioners were Viviette Applewhite, Wilola Shinholster Lee, Grover Freeland, Gloria Cuttino, Nadine Marsh, Dorothy
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supported by various friends of the court,[3] seeking to enjoin Respondents,[4] the Commonwealth of Pennsylvania, Governor Thomas W. Corbett and Secretary of the Commonwealth Carol Aichele and their agents, servants, and officers, from enforcing or otherwise implementing the Act of March 14, 2012, P.L. 195, No. 18 (Act 18), which requires citizens voting in-person on election day to present one of several specified forms of photo identification (ID).

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Barksdale, Bea Bookler, Joyce Block, Henrietta Kay Dickerson, and Devra Mirel ("Asher") Schor.

By agreement of the parties, the Court entered an order granting voluntary nonsuit as to the claims of Petitioners Dorothy Barksdale and Grover Freeland during the course of the hearings on Petitioners' request for preliminary injunctive relief.

[2] The organizational Petitioners are the League of Women Voters of Pennsylvania, the National Association for the Advancement of Colored People, Pennsylvania State Conference, and the Homeless Advocacy Project.

[3] The City of Philadelphia and Stephanie Singer, Chair of the City Commissioners; Senior Law Center, AARP, Pennsylvania Association of Area Agencies on Aging, Center for Advocacy for The Rights and Interests of the Elderly, Pennsylvania Alliance for Retired Americans, the Pennsylvania Homecare Association, Eldernet of Lower Merion and Narberth, The Institute for Leadership Education, Advancement and Development, Intercommunity Action, Inc. and Jewish Social Policy Action Network; Pennsylvania AFL-CIO; Dennis Baylor; Stephen J. Shapiro, In his Capacity as Judge of Election for district 635, Tredyffrin Township, Chester County, Pennsylvania; Chelsa Wagner, Allegheny County Controller; and, State Representative Anthony H. Williams and 18 Pennsylvania State Representatives, filed briefs as *amici curiae* in support of Petitioners.

[4] State Representative Daryl Metcalfe and 49 Pennsylvania State Representatives; George W. Ellis, Pro Se; and Bipartisan Group of Electors, filed briefs as *amici curiae* in support of Respondents.

I. Background

A. Factual and Procedural History

On May 1, 2012, less than two months after the enactment of Act 18, Petitioners commenced this action by filing a 51-page "Petition for Review Addressed to the Court's Original Jurisdiction" (complaint). On the same day, Petitioners filed an application for special relief in the nature of a preliminary injunction.

Through their complaint, the individual Petitioners aver they lack an acceptable form of photo ID, which is now required to vote in-person under Act 18. As a result, the individual Petitioners allege they will be disenfranchised or severely burdened by Act 18's photo ID requirement.

For their part, the organizational Petitioners allege that the enactment of Act 18 caused them to reallocate and devote substantial resources to educating their members and the public about Act 18's requirements. Additionally, the organizational Petitioners aver they may have members whose right to vote is impermissibly burdened by Act 18.

Petitioners allege Act 18's photo ID requirement will disenfranchise and deter qualified Pennsylvanians from exercising their fundamental right to vote, which is expressly guaranteed by the Pennsylvania Constitution. They assert the crucial facts are straightforward and largely undisputed. By any count, Petitioners aver, the individual Petitioners are among hundreds of thousands of Pennsylvanians who are eligible to vote, but who lack an acceptable form of ID

required by Act 18. In contrast to the large numbers of Pennsylvanians who lack the requisite photo ID to vote, Petitioners allege, the in-person voter fraud that the Commonwealth indicates will be deterred by Act 18 is negligible to nonexistent.

Petitioners claim Act 18 violates the Pennsylvania Constitution in three respects. First, they allege Act 18 unduly burdens the fundamental right to vote in violation of Article I, Section 5 of the Pennsylvania Constitution, which states, in part: "Elections shall be free and equal ...." PA. CONST. art. I, §5. Second, Petitioners aver Act 18 imposes burdens on the right to vote that do not bear upon all voters equally under similar circumstances in violation of the equal protection guarantees of Article I, Sections 1 and 26 of the Pennsylvania Constitution. Third, they allege Act 18 imposes an additional qualification on the right to vote in violation of Article VII, Section 1 of the Pennsylvania Constitution.

After a status conference in late-May 2012, this Court issued an order scheduling a hearing on Petitioners' preliminary injunction request for July 25, 2012.

Following discovery and the submission of pre-hearing briefs, a hearing on Petitioners' preliminary injunction request began on July 25, 2012. Over the course of six days, the parties presented the testimony of more than two dozen witnesses and over 50 exhibits. After the close of the evidence, the parties presented closing arguments. Five days thereafter, the parties submitted post-hearing briefs.

B. Act 18

Act 18, which became effective March 14, 2012, made certain minor changes to the provisions of the Pennsylvania Election Code (Election Code).[5] However, it left the vast majority of the Election Code's provisions unaltered.

Prior to the enactment of Act 18, an elector voting for the first time in an election district was required to present one of several specified forms of photo ID. See former Sections 1210(a)(1)-(7) of the Election Code, 25 P.S. §3050(a)(1)-(7).[6] Where the elector did not have a required photo ID, the elector was required to present one of several specified forms of non-photo ID that contained the elector's name and address. See former Section 1210(a.1)(1)-(7) of the Election Code, 25 P.S. §3050(a.1)(1)-(7).

Pursuant to Act 18, however, each elector who appears to vote must first present "proof of identification," a newly defined term, which includes several specified forms of photo ID.[7] See Sections 102(z.5) and 1210(a) of the Election Code, 25 P.S. §§2602(z.5), 3050(a).

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[5] Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. §§2600-3591.

[6] Deleted by the Act of March 14, 2012, P.L. 195, No. 18.

[7] The term "proof of identification" is defined as follows:

> (1) In the case of an elector who has a religious objection to being photographed, a valid-without-photo driver's license or a valid-without-photo identification card issued by the Department of Transportation.
>
> (2) For an elector who appears to vote under section 1210, a document that:

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(i) shows the name of the individual to whom the document was issued and the name substantially conforms to the name of the individual as it appears in the district register;

(ii) shows a photograph of the individual to whom the document was issued;

(iii) includes an expiration date and is not expired, except;

(A) for a document issued by the Department of Transportation which is not more than twelve (12) months past the expiration date; or

(B) in the case of a document from an agency of the Armed forces of the United States or their reserve components, including the Pennsylvania National Guard, establishing that the elector is a current member of or a veteran of the United States Armed Forces or National Guard which does not designate a specific date on which the document expires, but includes a designation that the expiration date is indefinite; and

(iv) was issued by one of the following:

(A) The United States Government.

(B) The Commonwealth of Pennsylvania.

(C) A municipality of this Commonwealth to an employee of that municipality.

(D) An accredited Pennsylvania public or private institution of higher learning.

(E) A Pennsylvania care facility.

(3) For a qualified absentee elector under section 1301:

(i) in the case of an elector who has been issued a current and valid driver's license, the elector's driver's license number;

(ii) in the case of an elector who has not been issued a current and valid driver's license, the last four digits of the elector's Social Security number;

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If an elector is unable to produce "proof of identification," he or she must be permitted to cast a provisional ballot. 25 P.S. §3050(a.2)(1)(i), (ii).[8] After casting a provisional ballot, the elector is required to deliver to the county board of elections, within six calendar days after the election, proof of identification and an affirmation declaring the elector is the same individual who cast the provisional ballot. 25 P.S. §3050(a.4)(5)(ii)(E).[9] If the cause for the provisional ballot is the inability of the elector to obtain proof of identification because the elector is indigent, the elector must supply, within six calendar days after the election, an affirmation declaring the elector is the same person who cast the provisional ballot and the elector is indigent. 25 P.S. §3050(a.4)(5)(ii)(D).[10]

Act 18 also made minor modifications to the Election Code's provisions relating to absentee ballots. Among other things, Act 18 requires that, under certain instances, a qualified registered elector who applies for an absentee

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> (iii) in the case of an elector who has a religious objection to being photographed, a copy of a document that satisfies paragraph (1); or
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> (iv) in the case of an elector who has not been issued a current and valid driver's license or Social Security number, a copy of a document that satisfies paragraph (2).

Section 102(z.5) of the Election Code, 25 P.S. §2602(z.5) (footnote omitted). Subsection (z.5) was added by the Act of March 14, 2012, P.L. 195, No. 18.

[8] Subsections (a.2)(1)(i) and (ii) were added by the Act of March 14, 2012, P.L. 195, No. 18.

[9] Subsection (a.4)(5)(ii)(E) was added by the Act of March 14, 2012, P.L. 195, No. 18.

[10] Subsection (a.4)(5)(ii)(D) was added by the Act of March 14, 2012, P.L. 195, No. 18.

ballot include proof of identification with his or her application. See Sections 1302(e)(1), (2), (e.2) of the Election Code, as amended, 25 P.S. §§3146.2(e)(1), (2), (e.2).[11] In turn, the county board of elections must verify the applicant's proof of identification. See Sections 1302.2(c) of the Election Code, as amended, 25 P.S. §3146.2b(c).[12] If an applicant does not include proof of identification or the board cannot verify the proof of identification, the board must send the elector a notice requiring the elector to provide proof of identification with the absentee ballot or the ballot will not be counted. Section 1302.2(d) of the Election Code, 25 P.S. §3146.2b(d); see also Section 1305(b) of the Election Code, as amended, 25 P.S. 3146.5(b).[13] Act 18 also modified the Election Code's provision relating to the canvassing of absentee ballots. See Section 1308 of the Election Code, as amended, 25 P.S. §3146.8.[14]

Under Act 18, the Secretary of the Commonwealth is required to prepare and disseminate information to the public regarding the proof of identification requirement. Section 206(a) of the Election Code, 25 P.S. §2626(a).[15] Additionally, Act 18 requires the Department of Transportation (PennDOT) to issue a free ID card to any registered elector who applies and who includes an affirmation that he or she does not possess proof of identification and

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[11] Section 1302 was added by the Act of March 6, 1951, P.L. 3, No. 1.

[12] Section 1302.2 was added by the Act of August 13, 1963, P.L. 707.

[13] Section 1305 was added by the Act of March 6, 1951, P.L. 3, No. 1.

[14] Section 1308 was added by the Act of March 6, 1951, P.L. 3, No. 1.

[15] Section 206 was added by the Act of March 14, 2012, P.L. 195, No. 18.

requires proof of identification for voting purposes. Section 206(b) of the Election Code, 25 P.S. §2626(b).

Importantly, Act 18 contains no references to any class or group. Rather, its provisions are neutral and nondiscriminatory and apply uniformly to all voters.

II. Preliminary Injunction Standard

To obtain a preliminary injunction, a petitioner must establish that: (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the public interest will not be harmed if the injunction is granted. Brayman Constr. Corp. v. Dep't of Transp., 608 Pa. 584, 13 A.3d 925 (2011).

"For a preliminary injunction to issue, *every one* of these prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others." Lee Publ'ns, Inc. v. Dickinson Sch. of Law, 848 A.2d 178, 189 (Pa. Cmwlth. 2004) (en banc) (quoting Cnty. of Allegheny v. Commonwealth, 518 Pa. 556, 560, 544 A.2d 1305, 1307 (1988)) (emphasis in original).

Although I considered all the prerequisites, I will only discuss the elements which were not established.

III. Immediate and Irreparable Harm

Petitioners established that to the extent Act 18 will operate to prevent the casting or counting of in-person votes of qualified electors in the general election, those electors would suffer irreparable harm that cannot be adequately compensated by money damages.

Petitioners also proved that qualified electors may be erroneously charged a fee for a photo ID for voting. This proof is not based on the plain language of Act 18, which specifies that PennDOT "shall issue an identification card ... at no cost ...." 25 P.S. §2626. Moreover, erroneous charges of this nature can be compensated by money damages. As a result, this proof does not support injunctive relief.

Petitioners did not establish, however, that disenfranchisement was immediate or inevitable. On the contrary, the more credible evidence on this issue was that offered through Commonwealth witnesses.[16] I was convinced that efforts

[16] Specifically, testimony offered by Rebecca K. Oyler, Shannon Royer, Kurt Meyers, Jonathon Marks, David Burgess, and, to some extent, Carol Aichele, especially testimony in response to questioning by counsel for Respondents, was credible and supports my determinations on "immediacy" for preliminary injunction purposes.

Although not necessary for preliminary injunction purposes, my estimate of the percentage of registered voters who did not have photo ID as of June, 2012, is somewhat more than 1% and significantly less than 9%, based on the testimony of Rebecca K. Oyler and inferences favorable to Respondents. I rejected Petitioners' attempts to inflate the numbers in various ways.

by the Department of State (DOS), the Department of Health, PennDOT, and other Commonwealth agencies and interested groups will fully educate the public, and that DOS, PennDOT and the Secretaries of those agencies will comply with the mandates of Section 206 of the Election Code. Further, I was convinced that Act 18 will be implemented by Commonwealth agencies in a non-partisan, even-handed manner. These determinations are consistent with determinations I made in the past. See Moyer et al. v. Cortes, (Pa. Cmwlth., 497 M.D. 2008, filed Oct. 30, 2008) (order denying preliminary injunction) (Simpson, J.) (action by Republican party based on allegations of voter registration fraud by ACORN; trial court determined it was unlikely petitioners would prevail on the merits and denied request for preliminary injunction based on credible evidence offered by Secretary of the Commonwealth).

Moreover, considering the believable testimony about the pending DOS photo IDs for voting, and the enhanced availability of birth confirmation through the Department of Health for those born in Pennsylvania, I am not convinced any qualified elector need be disenfranchised by Act 18. Further, as more fully discussed below, based on the availability of absentee voting, provisional ballots, and opportunities for judicial relief for those with special hardships, I am not convinced any of the individual Petitioners or other witnesses will not have their votes counted in the general election.

During closing argument counsel for Petitioners claimed that named Petitioner Bea Bookler and witness Tyler Florio would be disenfranchised by Act 18. Ms. Bookler, who is 93 years old and lives in a senior living center, was too

infirm to attend trial in person; therefore, her videotaped testimony was offered at trial. She appeared very frail and tremulous. Her testimony needed to be stopped at one point, and she obviously struggled to answer some questions. Mr. Florio, a 21-year old high school student pursuing a special education curriculum, suffers from autism, chronic fatigue syndrome and mitochondrial dysfunction. He attended court in the company of his mother.[17] These individuals were offered as examples of an unknown number of registered voters who are so compromised as to be unable to endure the travel and process to obtain a photo ID at a PennDOT Drivers' Licensing Center, but not so infirm as to qualify for absentee voting.

As discussed below with regard to whether the requested injunction is reasonably suited to abate the offending activity, I thought it highly likely that these individuals, and others with similar obvious, profound infirmities, would qualify for absentee voting. Indeed, I would be shocked if that were not the case here. Moreover, if these individuals did appear to vote in person on Election Day, they would be able to cast provisional ballots even without photo ID. Thereafter, judicial relief is available on an individual basis to prevent an unconstitutional application of Act 18.

Counsel for Petitioners also referenced Petitioner Gloria Cuttino, asserting that she will be unable to obtain a DOS ID because of a discrepancy in

[17] Mr. Florio was not a registered voter before Act 18 was enacted. See Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 199 (2008) (plurality opinion) ("[I]f we assume, as the evidence suggests, that some members of these classes were registered voters when SEA 483 [Voter ID Law] was enacted, the new identification requirement may have imposed a special burden on their right to vote.").

the year of her birth on a certification of school records (Pet'rs' Ex. 23, Bates Number page 00000041). Counsel did not explain how this record would interfere with issuance of a DOS ID. The primary purpose of this testimony, however, was to illustrate hurdles facing those born out-of-state who have difficulty obtaining raised-seal birth certificates. That understandable difficulty will be remedied by the DOS ID, and there is no other believable reason why Ms. Cuttino cannot obtain one if she wants one.

Also, I considered testimony by Matt A. Barreto, Ph.D., whose testimony was offered by Petitioners. Parts of this testimony were believable. For the most part, however, his opinions were not credible or were given only little weight. There were numerous reasons for this, including demeanor, bias (see Pet'rs' Ex. 16), and lack of knowledge of Pennsylvania case law regarding name conformity. In addition, I had doubts about his survey design: name-conformity inquiry; oversampling; post-stratification weighting, especially with regard to age and gender; and, overarching design for "eligible" voters, as opposed to "registered" voters. Also, I had doubts about the survey execution: response rate; and timing (June 21 through July 2, 2012).

In particular, to the extent the witness offered testimony on the immediacy or inevitability of his estimated impact of Act 18 in the general election, the evidence was rejected. Further, to the extent the witness offered testimony regarding the ineffectiveness of planned efforts for public outreach and education, the evidence was rejected. Additionally, to the extent the witness offered opinions on "Public Knowledge of Voter ID Law in Pennsylvania," (see

Pet'rs' Ex. 18, Table 2), the opinions were determined to be not credible. On this last point, Dr. Barreto's opinions were contrary to testimony by most, perhaps all, of the lay witnesses who testified for Petitioners. They explained that they have been aware of Act 18 and have some idea whether their current IDs will meet the requirements of the new law.

It is also noteworthy that Dr. Barreto's survey would be of little practical use to those charged with implementing Act 18. This is because his survey is incapable of identifying individuals who need to be contacted for public outreach and education purposes, beyond the survey's 2300 respondents. For this important reason, his approach was given significantly less weight than the approach employed by the DOS and PennDOT.

In their post-hearing brief, Petitioners argue that the plan to create a new DOS photo ID is a legally insufficient basis to avoid a preliminary injunction. They rely primarily on out-of-state authority.[18] Unfortunately, none of the cases upon which Petitioners rely involved a facial challenge to a presumably constitutional statute. Moreover, believable evidence regarding the new DOS photo ID is clearly relevant here to the "immediacy" or inevitability of harm element of proof. For these reasons, Petitioners' post-hearing argument is not persuasive.

[18] Torres v. Sachs, 381 F. Supp. 309 (S.D.N.Y. 1974) (injunction necessary to compel the availability of bilingual election materials); Puerto Rican Org. for Political Action v. Kuspar, 350 F. Supp. 606 (N.D. Ill. 1972) (preliminary injunction granted to compel election commissioners to make bilingual election materials available).

IV. Greater Injury from Refusing Injunction

Petitioners request that the Court "grant their Application for Special Relief in the Nature of a Preliminary Injunction and enter an order enjoining Respondents, their agents, servants, and officers, and others from implementing, enforcing, or taking any steps toward implementing or enforcing the Photo ID Law and provide any ancillary relief needed to effectuate the Court's Order." Pet'rs' Appl. for Special Relief in the Nature of Prelim. Inj. at 8.

Petitioners did not establish that greater injury will occur from refusing to grant the injunction than from granting it. This is because the process of implementation in general, and of public outreach and education in particular, is much harder to start, or restart, than it is to stop.

A preliminary injunction entered now would interfere: with the August mailing by DOS of informational packets to all poll workers across the Commonwealth; with the August educational conference hosted by DOS for all judges of elections; with the August software installation for the new DOS IDs; with other steps to make the new DOS IDs available through designated PennDOT sites beginning in late August; with the extensive television advertising/web/automated phone calls/mobile billboard campaign to begin after Labor Day; and with the DOS mailing to approximately 5.9 million households, representing every voter household in the Commonwealth. Most of these anticipated steps were believably described by Shannon Royer, Deputy Secretary of the Commonwealth, and Kurt Myers, Deputy Secretary of Transportation.

I questioned Jonathan Marks, the Commissioner of the Bureau of Commissions, Elections and Legislation with DOS, about the effect of a preliminary injunction and the appeal process on the ability of DOS to implement Act 18. While his response in the transcript was equivocal, everyone in the courtroom could see his reaction: alarm, concern, and anxiety at the prospect of an injunction. His demeanor tells the story.

Given the foregoing, I determined that granting a preliminary injunction between now and the time an appeal is likely resolved would result in great injury. Conversely, I do not expect anyone to vote between now and the time an appeal is resolved.

V. Success on the Merits

Petitioners raised a substantial question as to the level of scrutiny to be applied. On the whole, however, they failed to persuade me that they will prevail on the merits.

A. Facial Challenge

The difference between a facial challenge and an "as applied" challenge is an important legal distinction unknown to lay persons. Indeed, it is not fully appreciated by many legal professionals, save for the avid constitutional scholars.

The starting point of my analysis is the presumption of constitutionality that all legislative enactments enjoy under both the rules of

statutory construction and the decisions of our courts. See 1 Pa. C.S. §1922(3); Mixon v. Commonwealth, 759 A.2d 442 (Pa. Cmwlth. 2000) (en banc), aff'd per curiam, 566 Pa. 616, 783 A.2d 763 (2001). Any party challenging a legislative enactment has a heavy burden, and legislation will not be invalidated unless it clearly, patently, and plainly violates the Constitution of this Commonwealth. Mixon. Any doubts are to be resolved in favor of a finding of constitutionality. 1 Pa. C.S. §1922(3); Mixon.

Constitutional challenges are of two kinds: they either assail the statute on its face, or as applied in a particular case. Lehman v. Pa. State Police, 576 Pa. 365, 839 A.2d 265 (2003).

A statute is facially unconstitutional only where no set of circumstances exist under which the statute would be valid. Clifton v. Allegheny Cnty., 600 Pa. 662, 969 A.2d 1197 (2009). Thus, a petitioner must show "the statute is unconstitutional in all of its applications." United States v. Mitchell, 652 F.3d 387, 405 (3d. Cir. 2011) (quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008)).

"In determining whether a law is facially invalid, a court must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." Clifton, 600 Pa. at 704, 969 A.2d at 1122 (citation omitted). A facial challenge must fail where the statute has a "plainly legitimate sweep." Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202 (2008) (citation omitted); see Clifton, 600 Pa. at 705, 969 A.2d at 1223 (observing

the U.S. Supreme Court "seems to have settled" on the "plainly legitimate sweep" standard for facial validity challenges).

By way of further explanation, the Pennsylvania Supreme Court stated:

> [U]nder the 'plainly legitimate sweep' standard, a statute is only facially invalid when its invalid applications are so real and substantial that they outweigh the statute's 'plainly legitimate sweep.' Stated differently, a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary. For this reason (as well as others), facial challenges are generally disfavored. See [Washington State Grange, 552 U.S. at 450] ("Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.' ") (quoting [Sabri v. United States, 541 U.S. 600, 609] (2004)).

Clifton, 600 at 705, 969 A.2d at 1223 n.37.

On the other hand, "[a]n as-applied attack ... does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." Mitchell, 652 F.3d at 405 (quoting United States v. Marcavage, 609 F.3d 264, 273 (3d. Cir. 2010)); see also Commonwealth v. Brown, 26 A.3d 485 (Pa. Super. 2011).

Significantly, "as-applied challenges require application of the ordinance [or statute] to be ripe, facial challenges are different, and ripe upon mere

enactment of the ordinance [or statute]." Clifton, 600 Pa. at 705, 969 A.2d at 1223 n.34 (quoting Phila. Entm't & Dev. Partners, L.P. v. City of Phila., 594 Pa. 468, 937 A.2d 385, 392 n.7 (2007)) (emphasis added) (because petitioner raised an "as applied" challenge to a zoning ordinance that had yet to be applied, the Supreme Court dismissed the challenge on ripeness grounds).

In Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), cited by the Pennsylvania Supreme Court in Philadelphia Entertainment and Development Partners, the Eleventh Circuit Court stated: "It is important first to note that [the petitioner's] challenge is an as applied challenge, not a facial challenge. In order to challenge the County's *application* of the sector plan to his property, [the petitioner] must first demonstrate that the sector plan has been *applied* to his property.") Eide, 908 F.2d at 724 (emphasis in original).

In the context of constitutional challenges to other state voter ID laws, courts generally view such challenges as facial rather than "as applied" challenges. See Crawford, 553 U.S. at 202-03 ("A facial challenge must fail where the statute has a plainly legitimate sweep. When we consider only the statute's broad application to all Indiana voters we conclude that it imposes only a limited burden on voters' rights. The precise interests advanced by the [s]tate are therefore sufficient to defeat petitioners' facial challenge to [Indiana's voter ID law]. ... [The] petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute.") (citations and quotations omitted); In Re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 449 (Mich. 2007) ("The

question presented in this original proceeding, whether [the state's voter ID law] is facially violative of the [state or federal constitutions], is purely a question of law. ... A party challenging the facial constitutionality of a statute faces an extremely rigorous standard, and must show that no set of circumstances exists under which the [a]ct would be valid.") (quotations and footnote omitted); Milwaukee Branch of NAACP v. Walker et al., No. 11 CV 5492, slip op. at 4 (Wis. Cir. Mar. 6, 2012) (unpublished), cert. denied, 811 N.W.2d 821 (Wis. 2012) ("[t]his lawsuit is a facial challenge to the constitutionality of the [state's voter ID law], and the court must focus upon the impact of the law across the entire state, rather than specific individuals."); see also Democratic Party of Georgia, Inc. v. Perdue, 707 S.E.2d 67 (Ga. 2011). Cf. League of Women Voters of Indiana, Inc. v. Rokita, 929 N.E.2d 758, 762 (Ind. 2010) (where petitioner organizations did not claim that state's voter ID law was unconstitutional as applied to them nor sought individualized exemptions from the law's requirements, the court "treat[ed] th[e] case as alleging only claims of facial unconstitutionality and [did] not address the availability of claims alleging that the [l]aw is unconstitutional as applied.")

Notably, in considering the constitutionality of its state's voter ID law, the Supreme Court of Michigan, stated: "An 'as applied' challenge is not possible at this juncture, as the statute has yet to be enforced." In re Advisory Opinion, 740 N.W.2d at 450 (emphasis added). Cf. Rokita, 929 N.E.2d at 760 (rejecting facial constitutional challenge as too broad of a remedy, "without prejudice to future as-applied challenges by any voter unlawfully prevented from exercising the right to vote.").

With the foregoing in mind, I preliminarily conclude that Petitioners are unlikely to prevail on a facial challenge to Act 18, for several reasons. First, they do not acknowledge the extremely rigorous legal standard for facial challenges requiring a demonstration that there are no set of circumstances under which the statute may be valid. Indeed, they did not mention the legal standard at all, not in the pre-hearing brief, not in the opening address, not in the closing argument, and not in the post-hearing brief.

Worse, they do not indicate what evidence meets the standard. On review, it appears that the majority of the evidence offered by Petitioners may be appropriate to an "as applied" challenge, because it relates to the impact of the law on specific individuals, but not to a facial challenge. This is not to say I ignored the testimony of any witness; rather, I carefully listened to and considered all the evidence. However, I am unsure how to assess much of the evidence offered by the parties with the burden of proof without more guidance from them.

Also, the following examples illustrate speculation about hypothetical or imaginary cases which has no place in a facial challenge:

- Possible inconsistent determinations by poll workers as to name conformity;[19]

[19] While Petitioners take issue with Act 18's language that requires an elector to present proof of identification in the nature of a document that "substantially conforms to the name of the individual as it appears in the district register," Section 102(z.5)(2)(i) of the Election Code, 25 P.S. §2602(z.5)(2)(i), issues of name conformity pre-exist Act 18. See, e.g., In Re Nomination Petition of Gales, ___ Pa.___, ___ A.3d ___ (Pa., No. 7 WAP 2012, filed July 18, 2012) (addressing issues of name conformity in the context of an elector's use of a diminutive form of his or her first name when signing a nomination petition); In re Nader, 865 A.2d 8 (Pa. Cmwlth.), aff'd per curiam, 580 Pa. 134, 860 A.2d 1 (2004) (names of married women, among
(Footnote continued on next page...)

- Possible disruption at the polls caused by inadequate training of poll workers;
- Possible inconsistent determinations by poll workers about expiration stickers on IDs;
- Possible issuance of care facility IDs to strangers who come in off the street;
- Possible inconsistencies as to which voters are indigent for purposes of counting provisional ballots for those who cannot obtain photo ID before or within six days after the general election;
- Possible failures of county election boards to have indigents' affirmations at polling locations on election day, thereby necessitating an additional trip to obtain the affirmation;
- Possible failures by county election boards to follow DOS advice and have available sufficient provisional ballots or additional space for completing them;
- Possible failure of the vendor to implement the software changes before August 27, 2012, for the DOS photo IDs to be made available at PennDOT Drivers' License Centers;
- Overworked DOS Help Desk workers causing delays for PennDOT-initiated inquiries regarding DOS photo IDs.

None of these situations are evident on the face of Act 18. Moreover, if these situations actually arise, they can be remedied on an individual basis. Speculation about these situations does not support invalidation of all lawful applications of Act 18.

On its face, Act 18 applies equally to all qualified electors: to vote in person, everyone must present a photo ID that can be obtained for free. Act 18 does not expressly disenfranchise or burden any qualified elector or group of

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(continued...)

other issues), cert. denied, Nader v. Sedony, 543 U.S. 1052 (2005). Thus, name conformity issues exist independent of the enactment and implementation of Act 18.

electors. The statute simply gives poll workers another tool to verify that the person voting is who they claim to be.

I preliminarily conclude Act 18 has a plainly legitimate sweep. As discussed below, considering the statute's broad application to all Pennsylvania voters, it imposes only a limited burden on voters' rights, and the burden does not outweigh the statute's plainly legitimate sweep. My preliminary conclusions are consistent with those of federal and state courts rejecting facial constitutional challenges to voter ID laws. Crawford (similar Ind. statute, 2008); Am. Civil Liberties Union of New Mexico v. Santillanes, 546 F.3d 1313 (10th Cir. 2008) (Albuquerque City ordinance); Perdue (similar Ga. statute, 2011); Rokita (similar Ind. statute, 2010); In re Request for Advisory Opinion (Mich. statute, 2007).

In short, Petitioners primarily proved an "as applied" case, but they are seeking a "facial" remedy. This legal disconnect is one of the reasons I determined that it is unlikely they will prevail on the merits.

B. Count I – Undue Burden on Fundamental Right

Petitioners are unlikely to prevail on Count I of their Petition for Review.

1. Pennsylvania Constitutional Provisions

Relevant Pennsylvania constitutional provisions relating to elections include Article I, Section 5 (elections) and Article VII, Sections 1 (qualifications of electors) and 14 (absentee voting). Article I, Section 5 states: "Elections shall be

free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, §5. Article VII, Section 1, entitled "Qualifications of electors" provides:

> Every citizen twenty-one years of age [lowered to 18 years of age by the twenty-sixth amendment to the U.S. Constitution], possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State ninety (90) days immediately preceding the election.
>
> 3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election.

PA. CONST. art. VII, §1. Additionally, Article VII, Section 14, relating to "Absentee voting" states:

> (a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the

> return and canvass of their votes in the election district in which they respectively reside.
>
> (b) For purposes of this section, "municipality" means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.

PA. CONST. art. VII, §14.

In Winston v. Moore, 244 Pa. 447, 91 A. 520 (1914), the Pennsylvania Supreme Court considered the validity of a 1913 election statute known as the "Nonpartisan Ballot Law," which, among other things, limited the number of names to be printed on the official ballot to the two candidates that received the highest number of votes at the primary. Various Philadelphia residents challenged the constitutionality of the law. Among other things, they claimed it interfered with the freedom and equality of elections in violation of Article I, Section 5 of the Pennsylvania Constitution.

Quoting its prior decision in Patterson v. Barlow, 60 Pa. 54, 1869 WL 7495 (Pa. July 2, 3, 1869), which addressed the meaning of the words "free and equal," in Article I, Section 5 of the Pennsylvania Constitution, the Court stated (with emphasis added):

> How shall elections be made equal? Clearly by laws which shall arrange all the qualified electors into suitable districts ... and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the commonwealth. But how shall this freedom and equality be secured? The Constitution has given no rule and furnished no guide. It has not said that the regulations to effect this shall be uniform .... It has simply enjoined the duty and left the means

> of accomplishment to the Legislature. The discretion therefore belongs to the General Assembly, is a sound one, and cannot be reviewed by any other department of the government, except in a case of plain, palpable, and clear abuse of the power which actually infringes the rights of the electors.

Winston, 244 Pa. at 454, 91 A. at 522 (quoting Patterson, 60 Pa. at 75, 1869 WL 7495 at *17). The Court stated the legislature possesses a "wide field" for the exercise of its discretion "in the framing of facts to meet changed conditions and to provide new remedies for such abuses as may arise from time to time. The power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of government." Id. at 455, 91 A. at 522.[20] The Court continued that the Pennsylvania Constitution's "free and equal" language "means that the voter shall not be physically restrained in the exercise of his right of franchise by either civil or military authority, and that every voter shall have the same right as any other voter." Id. After a thorough explanation of these principles, the Court stated (with emphasis added):

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[20] Additionally, in Independence Party Nomination, 208 Pa. 108, 112, 57 A. 344, 345 (1904), the Pennsylvania Supreme Court observed (with emphasis added):

> The Constitution confers the right of suffrage on every citizen possessing the qualifications named in that instrument. It is an individual right, and each elector is entitled to express his own individual will in his own way. His right cannot be denied, qualified, or restricted, and is only subject to such regulation as to the manner of exercise as is necessary for the peaceable and orderly exercise of the same right in other electors. The Constitution itself regulates the times, and, in a general way, the method, to wit, by ballot, with certain specified directions as to receiving and recording it. Beyond this the Legislature has the power to regulate the details of place, time, manner, etc., in the general interest, for the due and orderly exercise of the franchise by all electors alike. Legislative regulation has been sustained on this ground alone. ...

> [O]ur courts have never undertaken to impale legislative power on points of sharp distinction in the enactment of laws intended to safeguard the ballot and to regulate the holding of elections. Indeed, so far as we are now advised, no act dealing solely with the details of election matters has ever been declared unconstitutional by this court. This for the reason that ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government, and should never be stricken down by the courts unless in plain violation of the fundamental law.

Id. As to the specific law at issue, the Court rejected the argument that the law was discriminatory and restrictive in its operation because it limited the names of candidates on the official ballot to the two who polled highest in the primary. Rejecting a challenge premised on Article I, Section 5 of the Pennsylvania Constitution, the Court stated (with emphasis added):

> In the absence of any express constitutional limitation upon the power of the Legislature to make laws regulating elections and providing for an official ballot, nothing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government in the exercise of a power always recognized and frequently asserted.
>
> In a general way it may be said that elections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; 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; and when no constitutional right of the qualified elector is subverted or denied him. Judged by these tests, the act of 1913 cannot be attacked successfully on the ground that it offends against the 'free and equal' clause of the bill of rights. It denies no qualified elector the right to vote; it treats all voters alike; the primaries held under it are open and public to all

> those who are entitled to vote and take the trouble to exercise the right of franchise; and the inconveniences if any bear upon all in the same way under similar circumstances and are made necessary by limiting the number of names to be printed upon the official ballot, a right always recognized in our state and not very confidently disputed in the case at bar.

Id. In upholding the statute's constitutionality, the Court recognized, "the limitations imposed must not amount to a denial of the franchise itself, and this is the extremest limit to which our cases have gone." Id. at 460, 91 A. at 524. The Court concluded by noting it could not declare a statute void based on a difference in opinion as to its wisdom.

Of further significance, in Patterson, 60 Pa. at 83, 1869 WL 7495 at *22, our Supreme Court explained (with emphasis added):

> The power to legislate on the subject of elections, to provide the boards of officers, and to determine their duties, carries with it the power to prescribe the evidence of the identity and the qualifications of the voters. The error is in assuming that the true electors are excluded, because they may omit to avail themselves of the means of proving their identity and their qualifications. It might as well be argued that the old law was unconstitutional because it required a naturalized citizen to produce his certificate of the fact, and expressly forbade his vote if he did not. What injustice is done to the real electors, by making up the lists so that all persons without fixed residences shall be required to appear in person and make proof of their residence, and thus to furnish a true record of the qualified electors within the district?

More recently, in Mixon, this Court considered a state constitutional challenge to state elections laws that, among other things, excluded felons confined

in a penal institution from the definition of "qualified absentee electors." Id., 759 A.2d at 445.

The petitioners in Mixon were six convicted felons, two were registered voters who were incarcerated, two were not registered voters who were incarcerated, and two had been released from prison but were not registered voters. They challenged the statute on a variety of grounds.

Specifically, they asserted Article I, Section 5 of the Pennsylvania Constitution permitted no modification of an elector's qualifications for voting, which are age and residency, and Article I, Section 25 denied the General Assembly the right to alter these qualifications or to enact laws that interfered with, or prevented, the free exercise of the right of suffrage. The petitioners argued that only a constitutional amendment could change voting qualifications in the state. They also claimed that Article VII, Section 1 only permitted the General Assembly to enact laws governing the time and place of elections, not the qualifications for electors. The petitioners further asserted Article VII, Section 14, relating to absentee voting, did not disqualify an incarcerated felon from voting.

In addition, the petitioners alleged that a statutory provision, which required the disenfranchisement of felons, although facially neutral, had a disparate impact on African-American Pennsylvanians. They further asserted Pennsylvania lacked a compelling reason to justify disenfranchisement of felons, and the true reason for such state action was to impose a disproportionate disadvantage on African-Americans. The petitioners relied on Winston for the proposition that,

pursuant to the free and equal clause of the Pennsylvania Constitution, they could not be denied the right to vote.

Ultimately, this Court rejected the majority of the petitioners' state constitutional claims. In so doing, we recognized: "Although every citizen has a general right to vote, states have broad powers to determine the conditions under which the right of suffrage may be exercised ...." Mixon, 759 A.2d at 448.

Further, we specifically rejected the petitioners' reliance on Article I, Section 5 and our Supreme Court's decision in Winston. We stated:

> The [two incarcerated felons who are registered to vote] contend that legislative passage of portions of the Election Code and the Voters Registration Act exceed the authority of the legislature to restrict the franchise, and, as already indicated, they rely on [Winston] for support of their contention. However, Petitioners' reliance on Winston is misplaced. Justice Elkin, writing for the Supreme Court stated:
>
> > The power to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government. Errors of judgment in the execution of the legislative power, or mistaken views as to the policy of the law, or the wisdom of the regulations, do not furnish grounds for declaring an election law invalid unless there is a plain violation of some constitutional requirement.... Legislation may be enacted which regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself.
>
> Winston v. Moore, 244 Pa. at 454-55, 91 A. at 520. In addition, Justice Elkin concluded that the ... Nonpartisan Ballot Law, was constitutionally sound and indicated: "Judged by these tests, the act of 1913 cannot be attacked successfully on the

> ground that it offends against the 'free and equal' clause of the bill of rights. **It denies no qualified elector the right to vote....**" Id. at 457, 91 A. at 523 (emphasis added).
>
> Of more recent vintage, former Chief Justice Nix addressed the meaning of the "free and equal" clause when he wrote: "Elections are free and equal within the meaning of the Constitution when they are public and open to all **qualified electors** alike ... when every voter has the same right as any other voter, when each voter **under the law** has the right to cast his ballot and have it honestly counted; when the regulation of the **right to exercise the franchise** does not deny the franchise itself ... and when no constitutional right of the **qualified elector** is subverted or denied...." In re 1991 Pennsylvania Legislative Reapportionment Commission, 530 Pa. 335, 356, 609 A.2d 132, 142 (1992) (citations omitted) (emphasis added).

Mixon, 759 A.2d at 449-50.

We further explained that Article VII, Section 1 of the Pennsylvania Constitution sets forth the qualifications for electors and must be read *in pari materia* with Article I, Section 5. We then stated, that under Article VII, Section 1, "every citizen who meets the age and residency requirements is entitled to vote in all elections, subject, however, to 'such laws requiring and regulating the registration of electors as the General Assembly may enact.' The authority of the legislature to promulgate laws regulating elections was settled long ago in [Patterson]." Mixon, 759 A.2d at 450. Quoting Patterson, we explained, in part:

> But to whom are the elections free? They are free only to the *qualified* electors of the Commonwealth.... There must be a means of distinguishing the qualified from the unqualified ... and therefore the legislature must establish ... the means of ascertaining who are and who are not the qualified electors....

Mixon, 759 A.2d at 450 (quoting Patterson, 60 Pa. at 75, 1869 WL 7495 at 17) (emphasis in original).

In sum, we held the General Assembly had the power to define which electors were "qualified," and it had the power to enact legislation excluding incarcerated felons as qualified absentee electors. See also KEN GORMLEY ET AL., THE PENNSYLVANIA CONSTITUTION §8.3(f) (2004 ed.).

However, this Court found unconstitutional a statutory provision that prohibited released felons from registering to vote for five years after their release where the statute permitted individuals who were registered to vote before their incarceration to vote upon their release. We explained that, because the right of felons to vote is not a fundamental right, the state was not required to show a compelling state interest to justify excluding felons from the franchise, i.e., strict scrutiny. Thus, in analyzing this provision, we applied the rational basis test. Ultimately, we determined this restriction did not bear a rational relationship to a legitimate state interest; therefore, it was invalid.

Of further note, in Ray v. Commonwealth, 442 Pa. 606, 276 A.2d 509 (1971), which we followed in Mixon, our Supreme Court rejected state constitutional challenges to a statutory provision that excluded convicted felons from voting by absentee ballot. The petitioner based his challenges on Article I, Section 5 and Article VII, Section 14 of the Pennsylvania Constitution. The Supreme Court rejected these challenges, stating (with emphasis added):

> The right to vote guaranteed under Art. I, Sec. 5 is ... subject to the same condition as is the right to an absentee ballot guaranteed in Art. 7, Sec. 14-that the voter must be a 'qualified

> elector.' And just as the Legislature has the power to define 'qualified electors' in terms of age and residency requirements, so it also has power to except persons 'confined in a penal institution' from the class of 'qualified electors.' This Court does not sit to judge the [wisdom] of the Legislature's policies. The exception as enacted is within the permissible scope of legislative authority and we are satisfied that it does not violate any provision of either the Pennsylvania or United States Constitutions.

Id. at 608-09, 276 A.2d at 510 (citations and footnote omitted); see also Martin v. Haggerty, 548 A.2d 371 (Pa. Cmwlth. 1988) (rejecting incarcerated inmates' claims that statute denying them the right to vote violated Article VII, Section 1 of the Pennsylvania Constitution).

Notably, in rejecting an argument that its state's statutory photo ID requirement imposed an additional "qualification" on the right to vote, the Supreme Court of Indiana stated (with emphasis added):

> The plaintiffs are correct that the legislature may not by statutory enactment add a substantive qualification to the right to vote assured by Article 2 [of the Indiana Constitution]. In our view, however, the Voter ID Law's requirement that an in-person voter present a government-issued photo identification card containing an expiration date is merely regulatory in nature. The voter qualifications established in Section 2, Article 2 [of the Indiana Constitution] relate to citizenship, age, and residency. Requiring qualified voters to present a specified form of identification is not in the nature of such a personal, individual characteristic or attribute but rather functions merely as an election regulation to verify the voter's identity. When the United States Supreme Court reviewed the Indiana Voter ID Law, the lead opinion ... pointed out that Congress 'believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections

> is enhanced through improved technology.' [Crawford, 553 U.S. 181, 193 (2008).] Justice Stevens quoted with approval from the report issued by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker, III, which emphasized: 'The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo [identification cards] currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.' [Id. at 194] (quoting Building Confidence in U.S. Elections § 2.5 (Sept. 2005), App. 136–137 (Carter–Baker Report)).
>
> We conclude that the Indiana Voter ID Law's photo identification card requirements are in the nature of an election regulation and, as such, must satisfy Indiana's requirements of uniformity and reasonableness. But the requirements of the Voter ID Law are not, as the plaintiffs urge, unconstitutional as additional substantive voter qualifications.

League of Women Voters of Indiana, Inc. v. Rokita, 929 N.E.2d 758, 767 (Ind. 2010) (footnote omitted).

In their pre-hearing brief, Petitioners quote extensively from our Supreme Court's decision in McCafferty v. Guyer, 59 Pa. 109, 1868 WL 6998 (Pa. May 18, 1868), essentially for the proposition that the legislature may not interfere with an individual's fundamental right to vote. In McCafferty, the Pennsylvania Supreme Court declared unconstitutional a statute that *expressly* disenfranchised individuals registered as military deserters. In so doing, the Court stated (with emphasis added):

> Can then the legislature take away from an elector his right to vote, while he possesses all the qualifications required by the Constitution? This is the question now before us. 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. If it were not so, there would be nothing stable; there would be no security for any right. It is in the nature of a constitutional grant of power or of privileges that it cannot be taken away by any authority known to the government. ... [T]he 3d article of the [Pennsylvania] Constitution is positive and affirmative. It declares that the persons described shall have the rights of an elector. An Act of Assembly that enacts that they shall not, is therefore directly in conflict with it. It is plain, then, that the 3d article of the Constitution is not, as it has been argued, merely a general provision defining the indispensable requisites to the rights of an elector, leaving to the legislature to determine who may be excluded. On the contrary, it is a description of those who shall not be excluded. Undoubtedly power might have been conferred upon the legislature to restrict the right of suffrage. Such power has been given by the Constitutions of some other states, and the debates in the Convention that formed that under which we now live, show that it was contemplated by some of the members to introduce such a provision into ours. But it was not done, and therefore the right of suffrage is with us indefeasible.

Id. at 111, 1868 WL 6998 at *2.

Unlike the statute at issue in McCafferty, which expressly disenfranchised certain otherwise qualified voters, however, Act 18 does not attempt to alter or amend the Pennsylvania Constitution's substantive voter qualifications, but rather is merely an election regulation to verify a voter's

identity. See, e.g., Rokita. Further, and perhaps more importantly, the legislature has the power to define which electors are "qualified." Mixon.

Also distinguishable is Page v. Allen, 58 Pa. 338, 1868 WL 7243 (Jun. 3, 1868) (plurality opinion), cited by Petitioners. There, a majority of our Supreme Court held unconstitutional a statute that attempted to alter the state constitution's prescribed period for residency in an election district prior to an election. In so doing, the Court explained (with emphasis added):

> For the orderly exercise of the right resulting from these [constitutional] qualifications [to vote], it is admitted that the legislature must prescribe necessary regulations, as to the places, mode and manner, and whatever else may be required, to insure its full and free exercise. But this duty and right, inherently imply, that such regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely exscinded under the name or pretence of regulation, and thus would the natural order of things be subverted by making the principle subordinate to the accessory. To state is to prove this position. As a corrollary [sic] of this, no constitutional qualification of an elector can in the least be abridged, added to, or altered, by legislation or the pretence of legislation. Any such action would necessarily be absolutely void and of no effect. ...

Id. at 347, 1868 WL 7243 at *8.

Unlike the statute at issue in Page, however, Act 18 does not attempt to alter the state constitution's substantive voter qualifications. Instead, it is an election regulation designed to verify a voter's identity. See Rokita.

2. Legal Standard for Challenge

Based on the following analysis, I conclude that the "strict scrutiny" approach advocated by Petitioners is not the appropriate measure for this facial challenge. Instead, a more deferential standard should be employed.

I start my analysis with the United States Supreme Court. In Crawford, the United States Supreme Court rejected a constitutional challenge to an Indiana statute that required a citizen voting in-person to present a government issued photo ID. The photo ID requirement did not apply to electors filing absentee ballots, and the statute contained provisions that allowed eligible voters to cast provisional ballots.[21] The state also offered free photo ID to qualified voters able to establish their residence and identity.

Shortly after its enactment, various plaintiffs, including nonprofit organizations representing groups of elderly, disabled, poor and minority voters, challenged the validity of the statute. After discovery, a federal trial court granted summary judgment against the plaintiffs, and the Seventh Circuit Court of Appeals affirmed. Agreeing with the courts below that the record was not sufficient to support a facial attack on the validity of the entire statute, a divided Supreme Court affirmed.

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[21] Specifically, the statute allowed indigent voters or voters with a religious objection to being photographed to cast provisional ballots that would be counted only if the individual executed an appropriate affidavit before a circuit court clerk within 10 days of the election. Also, a voter who had photo ID but was unable to present it on election day could file a provisional ballot and that vote would be counted if the individual brought his photo ID to a circuit county clerk's office within 10 days.

In the lead opinion, authored by Justice Stevens, and joined by Chief Justice Roberts and Justice Kennedy, the Court first outlined the appropriate standard by which to evaluate the statute. The Court initially distinguished between voting laws that were "invidious" because they were unrelated a voter's qualifications, see Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (invalidating provision that imposed an annual poll tax of $1.50 as a precondition for voting on equal protection grounds), and "evenhanded restrictions that protect the integrity and reliability of the electoral process itself," which are not "invidious." Crawford, 553 U.S. at 189-90 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788, n.9 (1983)).

Rather than applying a "litmus test" to separate valid from invalid restrictions, the Court stated that a court evaluating a constitutional challenge to an election regulation must "weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule." Crawford, 553 U.S. at 190 (quoting Burdick v. Takushi, 504 U.S. 428, 434, 439 (1992) (upholding Hawaii's ban on write-in voting because the state's interests in "avoiding unrestrained factionalism" at the general election and in guarding against "party raiding" during primaries outweighed the "slight" burden on voters' rights); Anderson, 460 U.S. at 789). Further, "however slight th[e] burden may appear ... it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." Crawford, 553 U.S. at 191 (citation omitted). Significantly, the Court also noted that in Burdick, it rejected an argument that strict scrutiny applies to all laws imposing a burden on the right to

vote, instead choosing to apply the "flexible standard" set forth in Anderson. Crawford, 553 U.S. at 190 n.8.

Applying this standard, the Court first evaluated and accepted the state's asserted interests in requiring photo ID. Specifically, the Court deemed the state's interests in deterrence and detection of voter fraud, modernization of election procedures and protection of voter confidence "unquestionably relevant." Id. at 191.

As to the burdens imposed by the photo ID requirement, the Court first observed that burdens such as voters losing their IDs or no longer resembling the photo in their IDs were neither so serious nor so frequent as to raise any question about the constitutionality of the statute. The Court stated the availability of the right to cast a provisional ballot provided an adequate remedy for problems of that nature.

The Court then examined the burdens on individuals who are eligible to vote, but who do not possess valid photo ID that complies with applicable statutory requirements. To that end, the Court observed that, like other states, Indiana, through its bureau or motor vehicles, provided free photo ID cards. The Court further stated, "[f]or most voters who need them, 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 ...." Id. at 198. The Court then explained (with emphasis added):

> Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier

burden may be placed on a limited number of persons. They include elderly persons born out of state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. If we assume, as the evidence suggests, that some members of these classes were registered voters when [the statute] was enacted, the new identification requirement may have imposed a special burden on their right to vote.

The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation. ...

Given the fact that petitioners have advanced a broad attack on the constitutionality of [the statute], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.

Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity. Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified. ...

> In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes excessively burdensome requirements on any class of voters. A facial challenge must fail where the statute has a plainly legitimate sweep. When we consider only the statute's broad application to all Indiana voters we conclude that it imposes only a limited burden on voters' rights. The precise interests advanced by the State are therefore sufficient to defeat petitioners' facial challenge to [the statute].

Id. at 199-200, 202 (citations and quotations omitted). Also, in its discussion of the insufficiency of the record made by the plaintiffs, the Court observed, "although it may not be a completely acceptable alternative, the elderly in Indiana are able to vote absentee without presenting photo identification." Id. at 201. Additionally, the Court stated, even assuming the statute imposed an unjustified burden on some voters, the plaintiffs did not show the proper remedy would be to invalidate the statute in its entirety.

As a final point, the Court noted, even if partisan considerations played a significant role in the decision to enact the statute, the valid neutral justifications advanced by the state in protecting the integrity and reliability of the electoral process, warranted rejection of the plaintiffs' facial challenge.

In a concurring opinion, Justice Scalia, joined by Justices Thomas and Alito, agreed the applicable analysis was set forth in Burdick, which calls for application of a deferential "important regulatory interests" standard for "nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote. Crawford, 553 U.S. at 204 (Scalia, J., concurring) (quoting Burdick, 504 U.S. at 433-34). Justice Scalia determined the

Indiana law was a generally-applicable, nondiscriminatory voting regulation, and the Court's decisions refuted the view that individual impacts were relevant to determining the severity of the burdens imposed by the law. Thus, Justice Scalia did not believe the lead opinion's individual-focused approach to determining the statute's burden on voters was appropriate. Justice Scalia stated:

> The lead opinion's record-based resolution of these cases, which neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned. There is no good reason to prefer that course.
>
> The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not even represent a significant increase over the usual burdens of voting. And the State's interests are sufficient to sustain that minimal burden. That should end the matter. That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.

Id. at 209 (Scalia, J., concurring) (citations and quotations omitted).[22]

About six months after Crawford, the Tenth Circuit Court of Appeals followed the lead opinion in Crawford in upholding the City of Albuquerque's photo ID requirement for in-person voting. See Santillanes. As in Crawford and Burdick, the Tenth Circuit balanced the burdens imposed by the law against the City's interests in preventing voter fraud, and it determined the City's interest was a sufficient justification for the photo ID requirement. The Court also observed

[22] Justice Souter wrote a dissenting opinion, joined by Justice Ginsburg. Justice Breyer wrote a separate dissent.

that the City allowed voters to obtain valid photo ID cards for free, and provided alternatives to the photo ID requirement. Specifically, the City law allowed a voter without photo ID to cast a provisional ballot, which would be counted if the voter provided valid photo ID within 10 days of the election. Additionally, all registered voters had the option of voting by absentee ballot.

Of further note, in Santillanes, the Tenth Circuit rejected the argument that the City's photo ID law created an arbitrary distinction between in-person and absentee voters by only requiring in-person voters to present photo ID. The Court observed that absentee voting is "a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures." Id. at 1320. Additionally, the Court noted the City's absentee ballot procedure provided its own way of confirming a voter's identity.

More recently, the lead opinion in Crawford was followed by the State Supreme Court of Georgia in Perdue. There, the Georgia Supreme Court considered a state constitutional challenge to a Georgia statute, similar to Act 18, that required in-person voters to present a photo ID verifying their identity. The Georgia statute allowed for a provisional ballot if a voter did not have or could not obtain an approved form of photo ID, if the voter executed a sworn affidavit attesting to his or her identity and appeared at a county office and presented a photo ID within two days of the election. Also, an amended version of the Georgia law required issuance of a Georgia voter ID card containing a photograph of the voter free of charge.

The Democratic Party of Georgia, Inc. challenged the law on the grounds that it violated the state constitution by imposing a new qualification or condition on the right to vote, and that it denied equal protection of the law under the state constitution because it unduly burdened the right to vote.

The Court first rejected the petitioner's argument that the statute violated the state constitution by imposing a new qualification or condition on the right to vote. Specifically, the Court observed that the statute did not impact voter registration (for which no photo ID is required) nor did it condition the right to vote on presenting a photo ID because a registered voter could choose a manner of voting for which no photo ID was required. The Court determined the photo ID requirement for in-person voting was a reasonable procedure for verifying that the individual appearing to vote in person is actually the same person who registered to vote.

The Court further stated the photo ID requirement was not an impermissible qualification on voting as it did not deprive any voter from casting a ballot. In particular, the state provided for a free photo ID in the county of the person's residence, and, in the alternative, it permitted an individual to cast a provisional ballot and have the vote counted upon presentation of an acceptable photo ID within 48 hours. Finally, any eligible voter had the option to vote by absentee ballot. To that end, the Court observed that the state constitution did not guarantee a qualified citizen the right to vote in any particular manner. Rather, a qualified elector was guaranteed the "fundamental" right to vote if he availed

himself of one of the procedures set forth by the legislature. Perdue, 707 S.E.2d at 73.

The Court next rejected the argument that the statute violated the state constitution by making failure to present a photo ID at the polls or within two days thereafter, a ground for denying a registered voter the right to vote. The Court reiterated that the state legislature had authority to adopt procedures for the conduct of elections, including methods by which voters were required to prove their identity. The Court concluded no voter was disenfranchised by the statute.

In addition, the Court rejected a contention that the statute violated the state constitution's equal protection clause. It first observed that its state constitution's equal protection clause is "coextensive with" and "substantially equivalent" to the federal equal protection clause, and that it applies these clauses as one. Id. at 74. Thus, the Court found applicable the balancing test set forth by the U.S. Supreme Court in Anderson and later reaffirmed in Burdick and Crawford.

Balancing the state's asserted interests in ensuring that only those persons who are lawfully registered to vote may do so and in preventing voter fraud, against the burden of the photo ID requirement, the Court stated: "As did virtually every other court that considered this issue, we find the photo ID requirement ... to be a minimal, reasonable, and nondiscriminatory restriction

which is warranted by the important regulatory interests of preventing voter fraud." Perdue, 707 S.E.2d at 75.[23, 24]

In a case decided before the U.S. Supreme Court's decision in Crawford, the Supreme Court of Michigan considered the constitutionality of its state's voter ID law. See In Re Request for Advisory Opinion. The Michigan law provided that, before being given a ballot, registered electors were required to present an acceptable form of photo ID, and execute an application bearing the elector's signature and address in the presence of an election official. For electors without photo ID, the law allowed an elector to sign an affidavit averring that he lacked photo ID before voting. However, an elector voting without photo ID was subject to challenge.

The Court began by explaining that a facial constitutional challenge presented a pure question of law. The Court further explained its prior decisions deemed the state constitution's equal protection provision to be "coextensive" with the Equal Protection Clause to the federal constitution. Id. at 449. The Court also stated a party challenging the facial constitutionality of a statute "faces an

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[23] As to the record before it, the Court noted the petitioner relied on the testimony of only one voter who did not possess a statutorily authorized photo ID and who was unable to travel to obtain a free ID, but who was not prevented from voting because she voted by absentee ballot. On the other hand, the defendants submitted evidence that the state embarked on a comprehensive education program regarding the photo ID requirement, and that the statute was implemented without issue in 15 elections.

[24] I also reviewed Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005), cited for the first time by Petitioners in their post-hearing brief. However, Billups is clearly distinguishable from the current case.

extremely rigorous standard," and must show "no set of circumstances exists under which the act would be valid." Id. at 450 (footnotes omitted). Additionally, the Court observed that an "as applied" challenge was not possible at that time as the statute had yet to be enforced.

With regard to voting laws generally, the Court explained, while a citizen's right to vote is an "implicit fundamental right," a citizen's "equal right to vote" is not absolute. Id. at 452. Rather, it competes with the state's interest in preserving the integrity of its elections and guarding against abuses of the elective franchise. The Court also observed that under state and federal decisions, its state legislature possessed the authority to regulate elections.

The Court then explained that the U.S. Supreme Court previously rejected the notion that all voting laws are subject to strict scrutiny analysis. Rather, the U.S. Supreme Court in Burdick, opted for a "flexible standard," involving an examination of the nature and magnitude of the claimed restriction on the right to vote against the precise interest advanced by the state as justification for the burden, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's right. In Re Request for Advisory Opinion, 740 N.W.2d at 455. To that end, although "severe restrictions" require that the regulation is narrowly drawn to advance a compelling state interest, when laws place "reasonable, nondiscriminatory restrictions" on voters' First and Fourteenth Amendment rights, "the State's important regulatory interests are generally sufficient to justify" the restrictions. Id. at 455 (quoting Burdick, 504 U.S. at 434).

Applying this standard, the Court first considered the nature and magnitude of the claimed restriction inflicted by the statute. The Court stated the statute's photo ID requirement did not impose a severe burden on the "overwhelming majority of registered voters."[25]

The Court also rejected the argument that the law placed a "severe burden" on electors who lacked the required photo ID because it allowed those electors to sign an affidavit in lieu of presenting photo ID. The Court stated the affidavit alternative imposed *less* of a burden than that imposed on voters who were required to execute a sworn statement before casting provisional ballots (which were used by those individuals who were not listed on the voter registration list but sought to cast a ballot). Under the law, a provisional ballot was not tabulated on election day; rather, it was not tabulated until the provisional voter's eligibility was verified within six days after the election. Concluding the law imposed only a reasonable, nondiscriminatory restriction on the right to vote, the Court held that application of the strict scrutiny standard was inappropriate. Instead, the statute's "evenhanded" photo ID provision, which applied to every voter in the state of Michigan without distinctions as to class or characteristic, was justified by the precise interest the state identified.

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[25] Interestingly, in a footnote, the Court stated: "According to an affidavit submitted by the Director of the Bureau of Driver and Vehicle Records for the Michigan Department of State, approximately 95 percent of registered voters in the state of Michigan already possess either a driver's license or a state identification card. Of the remaining five percent of registered voters, it is unknown how many possess "other generally recognized picture identification ...." In Re Request for Advisory Opinion, 740 N.W.2d 444, 456 n.50 (Mich. 2007).

To that end, the Court found the statute was a reasonable means of preventing the occurrence of in-person voter fraud. The Court also rejected the argument that the state's interest in preventing voter fraud was "illusory" because there was no significant evidence of such fraud. The state legislature was not required to "prove" that significant in-person voter fraud existed before it could permissibly act to prevent it. Id. at 458. "The United States Supreme Court has explicitly stated that 'elaborate, empirical verification of the weightiness of the State's asserted justification is *not required.* Rather, a state is permitted to take prophylactic action to respond to potential electoral problems ...." Id. (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997)) (emphasis in original).

For these reasons, the Court determined the statutory requirement of either presenting photo ID or signing an affidavit was facially constitutional under the flexible standard articulated in Burdick. The Court also rejected arguments that the statute was invalid under its state constitutional provisions, including the contention that the flexible standard set forth in Burdick was not consistent with its state constitution.

In addition, the Court rejected arguments that the statute was tantamount to a poll tax. The Court stated the statute did not condition the right to vote on the payment of any fee because a voter who did not possess adequate photo ID was not required to incur the costs of obtaining photo ID as a condition of voting. Instead, the voter could simply sign an affidavit, at no fee. In any event, the statute provided that any voter who elected to obtain photo ID for use at the

polls was entitled to have the fee waived if he was elderly, disabled or presented good cause for waiver. The Court also noted that elderly and disabled voters could cast absentee ballots, thus alleviating the need to appear at the precinct and show photo ID or execute an affidavit.

Of further note, the Court rejected the argument that alleged "secondary costs" such as "time, transportation, and the expense of procuring supporting documentation [necessary to obtain a state-issued photo ID]" amounted to a poll tax. In Re Request for Advisory Opinion, 740 N.W.2d at 465. In so doing, the Court relied on the underlying federal trial court decision in Crawford, which rejected similar contentions.[26]

In Rokita, the Supreme Court of Indiana affirmed the dismissal of a complaint filed by the Indiana State and Indianapolis chapters of the League of Women Voters, which raised a facial state constitutional challenge to Indiana's voter ID law. Specifically, the Court rejected the argument that the voter ID law

[26] Although the majority of cases uphold the constitutionality of voter photo ID statutes, two states (one before and one after the U.S. Supreme Court's decision in Crawford) struck down their state voter photo ID statutes as unconstitutional based on their state constitutions. See Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (state voter ID law violated state constitution's equal protection clause and constitutional provision that set forth qualifications of electors; court applied strict scrutiny standard); Milwaukee Branch of NAACP v. Walker et al., No. 11 CV 5492 (Wis. Cir. Mar. 6, 2012) (unpublished), cert. denied, 811 N.W.2d 821 (Wis. 2012) (granting temporary injunction enjoining enforcement of voter ID law; employing strict scrutiny standard and distinguishing Crawford on state constitutional grounds); League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker et al., No. 11 CV 4669 (Wis. Cir. Mar. 12, 2012) (unreported), cert. denied, 811 N.W.2d 821 (Wis. 2012) (permanently enjoining enforcement of state's voter ID law based on determination that law imposed additional condition on right to vote, which was beyond the power of the state legislature).

violated its state constitution by impermissibly imposing an additional qualification on the right to vote beyond those qualifications expressed in the state constitution (i.e., age, residency). The Court also rejected claims that the voter ID law violated its state constitution's equal protection clause by requiring photo ID for in-person, but not mail-in absentee voters, and by exempting from the photo ID requirement those voters who reside in state licensed care facilities. Although the Court rejected a facial constitutional challenge as essentially too broad of a remedy, it did so "without prejudice to future as-applied challenges by any voter unlawfully prevented from exercising the right to vote." Rokita, 929 N.E.2d at 760. In that regard, the Court stated (with emphasis added):

> No individual voter has alleged that the Voter ID Law has prevented him or her from voting or inhibited his or her ability to vote in any way. Our decision today does not prevent any such voter from challenging the Law in the future. ...
>
> The plaintiffs' complaint makes the following allegations: (1) the Voter ID Law prevented or discouraged an indeterminate number of citizens from voting; (2) the votes of 32 persons who did not produce the requisite photo ID were not counted in the 2007 municipal election in Marion County; (3) the votes of 12 nuns who did not produce the requisite photo ID were not counted in the 2008 primary election in St. Joseph County; (4) the Law has prevented an indeterminate number of citizens from voting whose requisite photo ID was lost or stolen or who for got [sic] to bring their requisite photo ID to the polls; and (5) the Law has discouraged or dissuaded an indeterminate number of citizens from voting because of its "extra-constitutional requirements." Complaint ¶¶ 17–20; Appellants' App'x at 13–14. None of these allegations creates any basis for a declaration that the State may not require any voters to identify themselves at the polls using photo ID. Some of these allegations, if substantiated, may entitle specific voters

> to more tailored relief, but none has been sought in the plaintiffs' complaint.

Id. at 761, 762 n.3.

Citing In re Nader, 580 Pa. 22, 858 A.2d 1167 (2004), Petitioners assert the appropriate standard by which to review Pennsylvania's voter ID law under the Pennsylvania Constitution is strict scrutiny. The issue in Nader was whether two individuals could appear on the 2004 Pennsylvania General Election ballot as Independent Political Body candidates for the respective offices of President and Vice President of the United States. In setting aside the candidates' nomination papers, this Court determined the candidates were disqualified under the Pennsylvania Election Code's "sore loser" provisions because they filed nomination papers as candidates of the Reform Party in another state.

Before the Supreme Court, the candidates argued, as applied to them, the Election Code's "sore loser" provisions violated their federal First Amendment rights of association and Fourteenth Amendment rights to equal protection to run in Pennsylvania as independent candidates regardless of their nomination as Reform Party candidates in another state. In resolving this issue, the Pennsylvania Supreme Court looked to the U.S. Supreme Court's decision in Anderson as setting forth the test to be applied in deciding whether a state election law violates First and Fourteenth Amendment associational rights.[27] Specifically, the Court noted (with emphasis added):

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[27] At the outset of its analysis, the Court explained (with emphasis added): "We are mindful of the unusual factual predicate involved in the case before us and that neither the parties nor the Commonwealth Court have cited any case that is analogous to the one *sub judice*, i.e., **(Footnote continued on next page...)**

> i]t must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.
>
> Anderson, 460 U.S. at 789. ...
>
> In the matter before us, the Commonwealth has not intervened or appeared, and, therefore, has not offered any reason, let alone one that is 'compelling,' to justify its interest in prohibiting [c]andidates who have been nominated by the Reform Party in other states from running as independents in this Commonwealth. 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.' [Williams v. Rhodes, 393 U.S. 23, 31 (1968)] (internal citations and footnote omitted). The Commonwealth Court's references to other cases describing state interests regarding various restrictive provisions in the Election Code cannot substitute for the requirement that where a precious freedom such as voting is involved, a compelling state interest must be demonstrated. This is certainly paramount given that the application of [the Election Code provision] here completely precludes [the] [c]andidates from running for national office in Pennsylvania:

(continued...)

one where a state law has been applied to prohibit a candidate nominated by a different party in a different state from running for office in the state imposing the restriction." In re Nader, 580 Pa. 22, 41, 858 A.2d 1167, 1178 (2004).

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all of the voters in the Nation.... Thus in a presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders.
>
> [Anderson, 460 U.S. at 794-95.]
>
> Due to the complete absence of any evidence with respect to the state's interest here, we hold that the Commonwealth Court erred in applying [the Election Code provision] to disqualify the [c]andidates from running as independents in Pennsylvania because of their nomination by the Reform Party, in Michigan, and other states.

Nader, 580 Pa. at 43-44, 858 A.2d at 1179-80. Additionally, in addressing another issue that implicated one of the candidate's First Amendment associational rights, the Nader Court again emphasized that the Commonwealth had not intervened and thus did not supply any reason to justify its interest in prohibiting candidates who are members of a party in another state from running as independents in Pennsylvania. The Court then stated: "We opine that, where the fundamental right to vote is at issue, a strong state interest must be demonstrated." Id. at 46, 858 A.2d at 1181. However, it is noteworthy that the Court did not consider the candidates' equal protection claims because it agreed the statute, as applied, deprived the candidates of their First Amendment associational rights.

Of further note, in rejecting a separate federal equal protection challenge raised by the candidates, the Court in Nader explained (with emphasis added):

> [T]he United States Supreme Court has stated that where there had been an allegation that an election code provision violated the Equal Protection Clause of the United States Constitution, 'the Equal Protection Clause allows States considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally.'

Id. at 46, 858 A.2d at 1181 (quoting Clements v. Fashing, 457 U.S. 957, 962 (1982)).

Petitioners' reliance on Nader for the proposition that Act 18 should be subject to strict scrutiny under the Pennsylvania Constitution is misplaced for several reasons.

First, Nader involved an interpretation of the First Amendment of the U.S. Constitution and accompanying U.S. Supreme Court cases, rather than provisions of the Pennsylvania Constitution.

Second, almost four years after Nader, the U.S. Supreme Court clarified that strict scrutiny does not apply to all laws that impose a burden on the right to vote. See Crawford. Instead, in considering the constitutionality of another state's voter ID law, the U.S. Supreme Court opted to apply the "flexible standard," explained more fully above. Id.

Third, Pennsylvania courts considering state constitutional challenges to state election laws, afford a substantial degree of deference to the judgment of the legislature. See Winston (rejecting state constitutional challenge to nonpartisan ballot law; recognizing "wide discretion which the Legislature has always

exercised in the enactment of election laws ...."); Patterson (rejecting state constitutional challenge to law requiring registration of voters; stating "[t]he discretion ... belongs to the General Assembly, is a sound one, and cannot be reviewed by any other department of the government, except in a case of plain, palpable, and clear abuse of the power which actually infringes the rights of the electors."); In re Nomination Petition of Rogers, 908 A.2d 948 (Pa. Cmwlth. 2006) (single judge opinion by Colins, P.J.) (rejecting state constitutional challenge to election code provision setting forth formula for number of signatures required on nomination papers for minor party candidates; stating, "our Supreme Court has applied a 'gross abuse' standard to determine whether election statutes violate the 'free and equal' clause ....") See also Mixon (rejecting state constitutional challenge to state elections laws that, among other things, excluded felons confined in a penal institution from the definition of "qualified absentee electors;" discussing Winston and Patterson).

Indeed, in Rogers, former President Judge (and now Senior Judge) Colins explained: "From [Winston], we find that our Supreme Court has applied a 'gross abuse' standard to determine whether election statutes violate the 'free and equal' clause, thereby giving substantial deference to the judgment of the legislature. This stands in stark contrast to the standard utilized under the federal constitution, which employs a 'balancing test.'" Id. at 954.

This line of Pennsylvania authority distinguishes Pennsylvania from those states that declared their respective voter ID laws unconstitutional on state constitutional grounds, utilizing a strict scrutiny analysis. See Weinschenk v.

State, 203 S.W.3d 201 (Mo. 2006) (state voter ID law violated state constitution's equal protection clause and constitutional provision that set forth qualifications of electors; court applied strict scrutiny standard); Milwaukee Branch of NAACP v. Walker et al., No. 11 CV 5492 (Wis. Cir. Mar. 6, 2012) (unpublished), cert. denied, 811 N.W.2d 821 (Wis. 2012) (granting temporary injunction enjoining enforcement of voter ID law; employing strict scrutiny standard and distinguishing Crawford); League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker et al., No. 11 CV 4669 (Wis. Cir. Mar. 12, 2012) (unreported), cert. denied, 811 N.W.2d 821 (Wis. 2012) (permanently enjoining enforcement of state's voter ID law based on determination that law imposed additional condition on right to vote, which was beyond the power of the state legislature).

Of further note, in Nader, the Commonwealth did not intervene or appear in the litigation, and, therefore, did not offer any reason to justify its interest in applying the Election Code provision at issue there in the manner in which it did. Here, however, the Commonwealth is a party to the litigation, and it advances its interest in protecting public confidence in elections as justification for the enactment of Act 18.

Additionally, the candidates in Nader raised an "as applied" challenge to the statutory provision at issue there rather than the broad, more difficult to prove, facial challenge advanced by Petitioners here.

In sum, the federal courts, and most state courts, do not employ a strict scrutiny analysis to assess the constitutionality of state voter ID laws. More

importantly, this Court applies a very deferential standard to assess Election Code and voter qualification challenges. Despite the initial appeal of a strict scrutiny methodology based on the right to vote, there is no clear, relevant Pennsylvania authority to support that approach.

3. Preliminary Determinations

a. Stated Commonwealth Interests Supporting Act 18

Respondents set forth the rationale for Act 18 in an amended answer to Petitioners' First Set of Interrogatories (Petitioners' Exhibit 46), averring in pertinent part as follows:

> 1. What is the Commonwealth's justification for the Photo ID Law?
>
> **ANSWER:**
>
> ***
>
> Without waiving this objection, and responding only to the extent that the Governor's Office and the Department of State participated in the legislative process that led to the enactment of Act 18 of 2012, Respondents answer that requiring a photo ID improves the security and integrity of elections in Pennsylvania in a manner that is in keeping with the photo ID requirements of many other secure institutions and processes. Respondents are aware of reports indicating that lists of registered voters contain the names of persons who are deceased, no longer residents of Pennsylvania, or no longer residents of the locations at which their names appear on the list of registered electors. Respondents are aware of reports indicating that votes have been cast in the name of registered electors who are deceased, who no longer reside in Pennsylvania, or who no longer reside in the jurisdiction where the vote is cast. Absent proof of identification presented to elections officials at the polling place, there is a risk that votes may be cast in the names of registered electors who are dead or

> have left the Commonwealth or jurisdiction of the election district by a person other than the registered elector. Respondents are aware of reports questioning the integrity of elections based on a variety of incidents. 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.

These asserted interests are relevant, neutral and non-discriminatory justifications for Act 18. See Crawford.

> In addition, the parties stipulated in pertinent part as follows:
>
> 1. There have been no investigations or prosecutions of in-person voter fraud in Pennsylvania; and the parties do not have direct personal knowledge of any such investigations or prosecutions in other states;
>
> 2. The parties are not aware of any incidents of in-person voter fraud in Pennsylvania and do not have direct personal knowledge of in person voter fraud elsewhere;
>
> 3. Respondents will not offer any evidence in this action that in-person voter fraud has in fact occurred in Pennsylvania or elsewhere;
>
> 4. The sole rationale for the Photo ID law that will be introduced by Respondents is that contained in Respondents' Amended answer to Interrogatory 1, served June 7, 2012.
>
> 5. Respondents will not offer any evidence or argument that in person voter fraud is likely to occur in November 2012 in the absence of the Photo ID law.

Pet'rs' Ex. 15. Respondents' efforts to minimize these stipulated facts were not convincing.

Nevertheless, in Crawford the United States Supreme Court upheld a nearly identical Indiana voter ID law despite the absence of any evidence of in-person voter fraud occurring in that state. Id., 553 U.S. at 196. Accordingly, I conclude that the absence of proof of in-person voter fraud in Pennsylvania is not by itself dispositive.

I also considered allegations of partisan motivation for Act 18 in general, and the disturbing, tendentious statements by House Majority Leader Michael Turzai to a Republican party gathering in particular (Pet'rs' Ex. 42). Ultimately, however, I determined that this evidence did not invalidate the interests supporting Act 18, for factual and legal reasons. Factually, I declined to infer that other members of the General Assembly shared the boastful views of Representative Turzai without proof that other members were present at the time the statements were made. Also, the statements were made away from the chamber floor. Legally, the United States Supreme Court stated in Crawford that "if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators." Id. at 204.

b. Burdens

The relevant burdens are those imposed on qualified electors who lack photo IDs required by Act 18. Because under the plain language of Act 18 the photo IDs are free, and under new procedures birth certificates with raised seals are no longer required for those born in Pennsylvania, the inconvenience of going to

PennDOT, gathering required documents, and posing for a photograph does not qualify as a substantial burden on the vast supermajority of registered voters.

A somewhat heavier burden is placed on certain individuals, such as persons born out-of-state who may have difficulty obtaining a useful birth certificate. This burden is mitigated by the pending DOS ID, which will be available without the need to produce a raised-seal birth certificate. Others, such as the elderly and infirm who have difficulty traveling to PennDOT Drivers' License Centers, and homeless persons, also face a somewhat heavier burden. As discussed elsewhere in this Determination, however, Petitioners' request for relief is not tailored to meet the groups impacted by this somewhat heavier burden.

c. Preliminary Conclusions

Employing the federal "flexible" standard discussed in Crawford in the context of a very similar state statute in Indiana, I reach the same conclusions the United States Supreme Court reached. See also Perdue; In re Request for Advisory Opinion. Thus, the photo ID requirement of Act 18 is a reasonable, non-discriminatory, non-severe burden when viewed in the broader context of the widespread use of photo ID in daily life. The Commonwealth's asserted interest in protecting public confidence in elections is a relevant and legitimate state interest sufficiently weighty to justify the burden.

Alternatively, employing a "substantial degree of deference/gross abuse" standard referenced by our Supreme Court in Winston, and by this Court in Rogers, I cannot say that a constitutional violation is evident. See also Rokita

(state constitutional challenge to very similar statute in Indiana). The burdens associated with Act 18 serve substantial interests to protect the integrity and reliability of the electoral process. The requirements of Act 18, while enhancing the procedural burdens associated with the voting process, are not sufficiently unreasonable. Id. Petitioners do not offer any analysis based on this standard.

Nevertheless, the appropriate level of scrutiny raises a substantial legal question. Indeed, if strict scrutiny is to be employed, I might reach a different determination on this prerequisite for a preliminary injunction.

C. Count II – Equal Protection

Petitioners are unlikely to prevail on Count II of their Petition to Review, which raises equal protection challenges under the Pennsylvania Constitution.

1. Equal Protection Analysis

In evaluating equal protection claims under the Pennsylvania Constitution,[28] our Supreme Court employs the same standards applicable to

[28] Article I, Section 1 and Article I, Section 26 of the Pennsylvania Constitution provide:

> **Section 1. Inherent rights of mankind**
>
> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.
>
> **Section 26. No discrimination by Commonwealth and its political subdivisions**

(Footnote continued on next page...)

federal equal protection claims.[29] Kramer v. Workers' Comp. Appeal Bd. (Rite Aid Corp.), 584 Pa. 309, 883 A.2d 518 (2005); see also Jae v. Good, 946 A.2d 802 (Pa. Cmwlth. 2008). Indeed, our Supreme Court holds "the equal protection provisions of the Pennsylvania Constitution are analyzed ... under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution." Commonwealth v. Albert, 563 Pa. 133, 138, 758 A.2d 1149, 1151 (2000) (quoting McCusker v. Workmen's Comp. Appeal Bd. (Rushton Mining Co.), 536 Pa. 380, 384, 639 A.2d 776, 777 (1994); Love v. Borough of Stroudsburg, 528 Pa. 320, 325, 597 A.2d 1137, 1139 (1991)).

This approach is consistent with other state courts that considered and rejected challenges to their respective states' voter ID laws, which also construe their state constitutions' equal protection clauses as coextensive with the federal equal protection clause. See Perdue (Ga. 2011); In Re Request for Advisory Opinion (Mich. 2007). Cf. Rokita (Ind. 2010) (applying different standard in analyzing state constitution-based equal protection challenge to state's voter ID

(continued...)

> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

PA. CONST. art. I, Sections 1, 26.

[29] The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

law, but rejecting such a challenge and upholding state's voter ID law as constitutional).

2. Preliminary Determinations

Applying either the federal "flexible" standard or the Pennsylvania "substantial degree of deference/gross abuse" standard, the primary distinction about which Petitioners complain, the different treatment afforded absentee voters and in-person voters, has a sufficient factual explanation and does not violate the equal protection guarantee. See Santillanes; Perdue; In re Request for Advisory Opinion.

Another distinction about which Petitioners complain, the ability of those individuals who held a PennDOT driver's license at any point since 1990 to obtain a photo ID without the same rigorous documentary proofs required of others, does not appear on the face of Act 18. Moreover, the distinction is factually supported by the prior vetting and internal security checks which are part of the PennDOT system. This was credibly explained by David Burgess. As a result, the different treatment does not amount to a facial violation of equal protection.

A third highlighted distinction is the treatment of Pennsylvania care facilities under Section 102(z.5) of the Election Code. Petitioners posit these facilities are given preferential treatment because they can theoretically issue photo IDs to whomever they want. Petitioners, however, did not prove that any Pennsylvania care facilities will issue photo IDs, much less that they might issue

photo IDs more broadly than other sources. Given this lack of proof, Petitioners' challenge on this point must fail. Moreover, this distinction has been upheld against an equal protection challenge elsewhere. See Rokita.

D. Count III – Improper Additional Qualification to Vote

Petitioners claim in Count III of their Petition for Review that the requirement for photo IDs for in-person voting improperly adds a qualification to vote beyond those set forth in Article VII, Section 1 of the Pennsylvania Constitution. Based on my analysis above, this claim has no merit whatsoever. Ray (additional qualification claim under Pennsylvania constitution rejected); Mixon (same); see Perdue (additional qualification claim under Georgia constitution rejected); Rokita (additional qualification claim under Indiana constitution rejected); In re Request for Advisory Opinion (additional qualification claim under Michigan constitution rejected). Not surprisingly, Petitioners seemed to abandon this claim at trial.

VI. Injunction Reasonably Suited

The broad remedy sought by Petitioners here, invalidating and enjoining application of Act 18 in its entirety, is not reasonably suited to abate the burden imposed on some Pennsylvania voters to obtain photo IDs. A more reasonably suited remedy would seek relief for those few qualified electors on whom Act 18 imposes an enhanced burden.

As discussed at length above, the distinction between a facial challenge and an "as applied" challenge is crucial. Petitioners primarily proved an

"as applied" case, but they seek a facial remedy. This distinction has been an important part of the analysis by many courts which rejected facial challenges to voter ID laws. Crawford; In re Request for Advisory Opinion; see also Perdue; Rokita. Generally, these courts determined that even assuming the burden imposed by a voter ID law may not be justified as to a few voters, that conclusion is by no means sufficient to establish the challengers' right to total avoidance of the law.

Several provisions of the Election Code provide relief for those facing "as applied" burdens under Act 18. Among these are the provisions for absentee ballots. See Sections 1301,[30] 1302 of the Election Code, 25 P.S. §§3146.1, 3146.2. Any qualified registered and enrolled elector who because of illness or physical disability is unable to attend his polling place is entitled to vote by absentee ballot. Section 1301(k) of the Election Code, 25 P.S. §3146.1(k). Where a qualified registered elector applies for an absentee ballot based on illness or physical disability, he or she must include a declaration stating the nature of his or her disability, and provide contact information for his or her attending physician. 25 P.S. §3146.2(e)(2). Based on the demeanor of Petitioner Bea Bookler and of witness Tyler Floria, absentee balloting is probably available to them.

Another important provision of the Election Code deals with provisional voting. Generally under Act 18, if a qualified elector does not have photo ID for any reason, he or she may still cast a provisional ballot. 25 P.S. §3050(a.2)(1). The vote will be counted automatically if within six days the elector transmits to the county board of elections a sworn statement that he or she

[30] Section 1301 was added by the Act of March 6, 1951, P.L. 3, No. 1.

is the person who cast the ballot and that he or she is indigent and unable to obtain proof of identification without the payment of a fee. 25 P.S. §3050(a.4)(5)(D). Otherwise, the vote will be counted automatically if within six days the elector appears at the county board of elections with photo ID and transmits a sworn statement that he or she is the person who cast the ballot. 25 P.S. §3050(a.4)(5)(E).

The availability of the provisional ballot procedure has been an important factor to most courts which rejected a facial challenge to a voter ID law. Crawford; Santillanes; Perdue; In re Request for Advisory Opinion. Conversely, the *absence* of a provisional ballot procedure has been an important factor to a court which granted a facial challenge to a voter ID law. NAACP v. Walker (unpublished; Wis. 2012).

There are other significant provisions that contemplate judicial relief. For example, there is judicial review of a county board of elections' decision not to count a provisional ballot. 25 P.S. §3050(a.4)(4)(v). This procedure presents an opportunity for judicial intervention to avoid unconstitutional applications of Act 18 to individuals. Thus, in the event Petitioner Bea Bookler and witness Tyler Floria do not obtain photo IDs before Election Day, and they do not qualify for absentee voting, they may cast provisional in-person votes. They may seek judicial relief to have their provisional votes counted. Petitioners do not discuss this provision of the Election Code.

Moreover, judicial relief is also available to resolve disputes or problems which arise at polling places on Election Day. Pursuant to Section 1206 of the Election Code, 25 P.S. §3046, common pleas judges are available through the day of the general election to deal with disturbances at voting places and to issue orders permitting persons to cast provisional ballots. Petitioners do not discuss this provision of the Election Code.

These and other remedies are available for individuals who are truly burdened by obtaining photo ID. The existence of the procedures and judicial remedies for burdened individuals highlights the impropriety of the broad remedy sought by Petitioners here.

VII. Summary

Petitioners' counsel did an excellent job of "putting a face" to those burdened by the voter ID requirement. At the end of the day, however, I do not have the luxury of deciding this issue based on my sympathy for the witnesses or my esteem for counsel. Rather, I must analyze the law, and apply it to evidence of facial unconstitutionality brought forth in the courtroom, tested by our adversarial system.

For the foregoing reasons, I am constrained to deny the application for preliminary injunction, without prejudice to future particularized "as applied" claims. See Rokita.

ROBERT SIMPSON, Judge

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.	:	No. 330 M.D. 2012
The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carole Aichele, in her capacity as Secretary of the Commonwealth, Respondents	:	

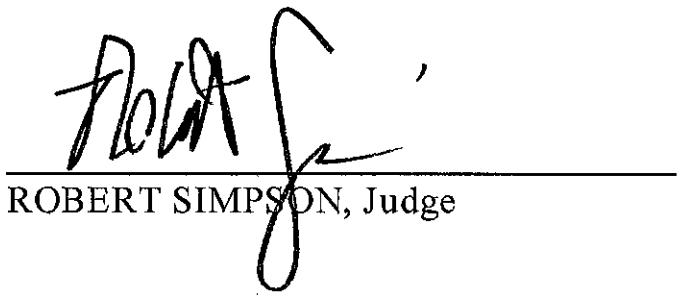
ORDER

AND NOW, this 15th day of August, 2012, after hearing and after consideration of the oral and written arguments of counsel, it is **ORDERED** and **DECREED** as follows:

Petitioners' Application for Preliminary Injunction is **DENIED.**

Upon praecipe, the Chief Clerk shall issue as of course a **RULE to SHOW CAUSE** why Respondents should not file a pleading responsive to the

Petition for Review within 30 days. The **RULE** shall be returnable by written answer filed within 10 days of service.



ROBERT SIMPSON, Judge