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admission forthcoming

Counsel for Intervenor-Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

THE COMMONWEALTH OF
PENNSYLVANIA; THOMAS V. CORBETT,
in his capacity as Governor; and CAROL
AICHELE, in her capacity as Secretary of the
Commonwealth,

Respondents.

Docket No. 330 MD 2012

**VERIFIED PETITION FOR LEAVE TO
INTERVENE PURSUANT TO PA. R.A.P. 1531**

Putative Intervenor Dana Mason, Joseph Costello, Marise Stillman, Robert Nusbaum,
Luis Vega, Paul Geibler, Kathryn J. Imler, and Thomas Killian respectfully petition this Court

for leave to intervene in this case pursuant to Pa. R.A.P. No. 1531(b). Intervenors are a bipartisan group of electors (*i.e.*, duly qualified and validly registered and enrolled voters of the Commonwealth of Pennsylvania)—including members of both the Democratic and Republican parties—as well as a candidate for the Pennsylvania House of Representatives in the November 6, 2012 general election.

Intervenors’ fundamental constitutional rights are protected by the voter identification statute that Petitioners challenge in this case, *see* Act of March 14, 2012, Pub. L. 195-18, No. 18, *codified at* 25 P.S. §§ 2602, 2626, 3050 (hereafter, “Voter Identification Law”); this Court’s judgment will substantially impact their legal rights and interests in a variety of ways. Because this Petition has been timely filed only a few days after this case was initiated, and Intervenors’ participation will not unfairly prejudice the parties, this Court should grant the Petition and permit Intervenors to participate in this case.

INTERVENORS

1. Two classes of Petitioners seek to intervene in this matter as a single, unified group:
(i) electors and (ii) a candidate for public office.

Electors

2. Intervenor Dana Mason is a duly qualified and validly registered and enrolled elector of the Commonwealth of Pennsylvania and a member of the Pennsylvania Democratic Party. He has voted in several previous general elections, and intends to vote in the Commonwealth’s November 6, 2012 general election.

3. Intervenor Joseph Costello is a duly qualified and validly registered and enrolled elector of the Commonwealth of Pennsylvania and a member of the Pennsylvania Republican Party. He

is 80 years old, has voted in several previous general elections, and intends to vote in the Commonwealth's November 6, 2012 general election.

4. Intervenor Marise Stillman is a duly qualified and validly registered and enrolled elector of the Commonwealth of Pennsylvania and a member of the Pennsylvania Republican Party. She has voted in several previous general elections, and intends to vote in the Commonwealth's November 6, 2012 general election.

5. Intervenor Robert Nusbaum is a duly qualified and validly registered and enrolled elector of the Commonwealth of Pennsylvania and a member of the Pennsylvania Republican Party. He has voted in several previous general elections, and intends to vote in the Commonwealth's November 6, 2012 general election.

6. Intervenor Luis Vega is a duly qualified and validly registered and enrolled elector of the Commonwealth of Pennsylvania and a member of the Pennsylvania Republican Party. He has voted in several previous general elections, and intends to vote in the Commonwealth's November 6, 2012 general election.

7. Intervenor Paul Geibler is a duly qualified and validly registered and enrolled elector of the Commonwealth of Pennsylvania and a member of the Pennsylvania Democratic Party. He has voted in several previous general elections, and intends to vote in the Commonwealth's November 6, 2012 general election.

8. Intervenor Kathryn J. Imler is a duly qualified and validly registered and enrolled elector of the Commonwealth of Pennsylvania and a member of the Pennsylvania Republican Party. She has voted in several previous general elections, and intends to vote in the Commonwealth's November 6, 2012 general election.

Candidate for Public Office

9. Intervenor Thomas Killian is a duly qualified and validly registered and enrolled elector of the Commonwealth of Pennsylvania and a member of the Pennsylvania Republican Party. He represents the 168th Legislative District (Delaware and Chester Counties) in the Pennsylvania House of Representatives. He was nominated in the April 24, 2012 primary election as the Republican candidate for the office of State Representative in the November 6, 2012 general election. He has voted in several previous general elections, and intends to vote in the Commonwealth's November 6, 2012 general election.

INTERVENORS' INTERESTS AND GROUNDS FOR INTERVENTION

10. A person may seek leave to intervene in an original jurisdiction petition for review before this Court by filing a petition containing a concise statement of his interests and the grounds upon which intervention is sought. Pa. R.A.P. 1531(b).

11. A person is entitled to intervene in a pending case if "the determination of such action may affect any [of his] legally enforceable interests," regardless of whether the intervenor otherwise would be bound by the judgment. Pa. R.C.P. 2327(4).¹ If a putative intervenor satisfies this requirement, and no grounds for refusing the petition exist under Pa. R.C.P. 2329, "[a]llowance of intervention is mandatory." *T.H. Props., L.P. v. Upper Salford Twp. Bd. of Supervisors*, 970 A.2d 495, 499 (Pa. Commw. Ct. 2009); *see also In re Pa. Crime Comm'n Subpoena*, 453 Pa. 513, 524 n.11, 309 A.2d 401, 408 n.11 (1973) (holding that, if a petitioner satisfies Rule 2327, "the allowance of intervention is not discretionary, but mandatory, unless one of the grounds for refusal of intervention enumerated in Rule 2329 is present").

¹ Unless otherwise prescribed by the Pennsylvania Rules of Appellate Procedure, the practice and procedure governing original jurisdiction petitions for review "shall be in accordance with the appropriate Pennsylvania Rules of Civil Procedure, so far as they may be applied." Pa. R.A.P. 1517.

12. Intervenorors seek to participate in this lawsuit because it affects their legally enforceable interests. *See* Pa. R.C.P. 2328(a). The Petitioners in this case allege that they are challenging the Voter Identification Law to protect their fundamental right to vote, *see* Pet. ¶ 1. Intervenorors seek to participate in this litigation to protect that same right. As the U.S. Supreme Court has recognized, the constitutional right to vote necessarily includes “the right of all voters in a federal election to . . . have their expressions of choice [for candidates] given full value and effect, without being diluted or distorted by the casting of fraudulent ballots.” *Anderson v. United States*, 417 U.S. 211, 226 (1974); *accord United States v. Ehrlichmann*, 546 F.2d 910, 922 (D.C. Cir. 1976). An individual’s “right of suffrage” can be “denied by a debasement or dilution the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (quoted in *Thiemann v. Allen*, 485 Pa. 431, 447, 402 A.2d 1348, 1356 (1979) (Nix. J., dissenting), *overruled in part on other grounds*, *Mezvinsky v. Davis*, 500 Pa. 564, 566, 459 A.2d 307, 308 (1983)); *see also Hawkins v. Blunt*, No. 04-4177-CV-C-RED, 2004 U.S. Dist. LEXIS 21512, at *21 (W.D. Mo. Oct. 12, 2004) (“Individual voters have an interest in . . . [not] hav[ing] their votes offset or diluted by fraudulently cast votes.”).

13. The Commonwealth’s voter identification requirements directly protect the voter Intervenorors’ fundamental right to vote by helping to safeguard against the submission of fraudulent ballots or ballots from ineligible voters, thereby preventing the voter Intervenorors’ legitimately cast votes from improperly being diluted, cancelled out, and effectively nullified.

14. Intervenor Killian, a candidate for the Pennsylvania House of Representatives, likewise has a personalized legal interest in this lawsuit because the imposition of voter identification requirements could directly “affect[] [his] chances for success” in the election. *Ass’n of Conn.*

Lobbyists LLC v. Garfield, 241 F.R.D. 100, 103 (D. Conn. 2007); *Hoblock v. Albany Cty. Bd. of Elecs.*, 233 F.R.D. 95, 99 (N.D.N.Y. 2005) (“Candidates have certainly demonstrated an interest in the litigation and outcome of the election.”); *Hoffman v. Bucks Cty. Bd. of Elecs.*, No. 87-7246, 1987 U.S. Dist. LEXIS 10546, at *3 (E.D. Pa. Nov. 16, 1987) (holding that a candidate in “an election which may be affected” by certain votes is “an interested party” for intervention purposes); *LaCombe v. McKeithen*, 887 So. 2d 48, 49 n.1 (La. Ct. App. 2004) (holding that putative intervenors, “as candidates in the upcoming election, have an interest in the pending litigation”).

15. Courts regularly have held that voters and candidates satisfy the requirements for intervention in disputes relating to elections and voting.² See e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 571 (2000) (discussing intervention of a citizen group in a case concerning open primaries); *Cook v. Gralike*, 531 U.S. 510, 517 (2000) (holding that intervention of a candidate for Congress in a suit concerning ballot labels prevented the case from becoming moot); *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 572 (1997) (discussing the lower court’s order allowing “a group of black and Hispanic” voters to intervene in a redistricting case).

STATEMENT OF RELIEF AND DEFENSES

16. Pursuant to Pa. R.C.P. 2328(a), Intervenors seek relief from this Court through dismissal of the underlying Petition for Review.

17. Intervenors wish to raise several potential defenses on behalf of the Commonwealth’s voter identification requirements including, but not necessarily limited to, the following:

² See also *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 4 (1982) (discussing intervention by voters in a case challenging the method for filling vacancies in elected offices); *E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 637-38 (1976) (allowing intervention by a minority voter in a reapportionment case); *Bullock v. Carter*, 405 U.S. 134, 136 (1972) (allowing voters to intervene in a lawsuit concerning filing fees for candidates).

a. Petitioners cannot present a facial challenge to the statute based on the alleged burdens to which they purportedly are subject as a result of their highly individualized personal circumstances, because such considerations do not detract from the statute's "plainly legitimate sweep" or establish that a "'substantial number' of the challenged statute's potential applications are unconstitutional." *Clifton v. Allegheny Cty.*, 600 Pa. 662, 704-05 & n.36, 969 A.2d 1197, 1222-23 & n.36 (2009) (citations omitted);

b. Because many of the pertinent provisions of the Pennsylvania Constitution are construed *in pari materia* with equivalent provisions in the U.S. Constitution, *see, e.g., Kramer v. Workers' Comp. App. Bd.*, 584 Pa. 309, 332, 883 A.2d 518, 532 (2005) ("In evaluating equal protection claims under the Pennsylvania Constitution, this Court has employed the same standards applicable to federal equal protection claims."), and other provisions are interpreted differently only in certain narrow circumstances, *see Commonwealth v. Sam*, 597 Pa. 523, 952 A.2d 565, 585 (2008); *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991), the U.S. Supreme Court's affirmance of Indiana's substantially similar voter identification requirement in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), requires rejection of most of Petitioners' claims;

c. The relief Petitioners seek—complete invalidation of the voter identification requirements—is overbroad and inappropriate; to the extent they are entitled to relief, it should be awarded to them on an individualized basis, or focus on modification of the requirements for obtaining photo identification;

d. The availability of free photo identification for electors who lack an acceptable form of identification, *see* 25 P.S. § 2626(b), ensures that the Voter Identification Law does not unduly electors' right to vote;

e. The Pennsylvania Constitution allows the General Assembly to enact identification requirements for electors, *see Patterson v. Barlow*, 60 Pa. 54, 75-76 (1869); *see also In re Phila. Gen. Election*, 332 Pa. 457, 460, 2 A.2d 301, 303 (1938); *Appeal of Cusick*, 136 Pa. 459, 466, 20 A. 574, 574 (1890); *In re Contested Elec. of McDonough*, 105 Pa. 488, 490 (1884);

f. The voter identification requirements are supported by legitimate, and even compelling, governmental interests;

g. The voter identification requirements are appropriately tailored to achieve the Commonwealth's interests;

h. The voter identification requirements are reasonable regulations of the manner in which elections are conducted, not unduly burdensome, and will not result in the disenfranchisement of eligible voters;

i. The ability of many electors to cast an absentee ballot without presenting, or including a copy of, photo identification alleviates potential constitutional deficiencies in the voter identification requirement, and deprive many Petitioners of standing to pursue their claims;

j. The voter identification requirement does not unconstitutionally discriminate against, or place special burdens on, women, members of religious minorities, racial minorities, or members of other constitutionally protected classes;

k. The ability of indigent electors to cast provisional ballots without presenting photo identification alleviates potential constitutional deficiencies in the voter identification requirement;

l. The voter identification requirements are a valid exercise of the General Assembly's authority under Article I, § 4 of the U.S. Constitution;

m. The voter identification requirements do not violate Article I, § 5 of the Pennsylvania Constitution;

n. The voter identification requirements do not violate the Equal Protection guarantees of Article I, §§ 1, 5, and 26 of the Pennsylvania Constitution; and

o. The voter identification requirements do not add additional qualifications for electors in violation of Article VII, § 1 of the Pennsylvania Constitution.

18. Pursuant to Pa. R.C.P. 2328(a), a copy of the pleading Intervenor wish to file in this action if permitted to intervene is attached as Exhibit 1. Consistent with this Court's minute order of May 1, 2012, Intervenor have attached as Exhibit 2 their response to petitioners' request for expedited discovery, briefing, and hearing schedule.

NO GROUNDS EXIST FOR REFUSING INTERVENTION

19. Intervenor's claims and defenses are in subordination to, and in recognition of, the propriety of the action. *See* Pa. R.C.P. 2329(1). Intervenor do not seek to prevent this Court from entering a final judgment on the merits in this matter, *cf. S&T Bank v. Monsour Med. Ctr.*, No. 13471-2008, 2009 Pa. Dist. & Cnty. Dec. LEXIS 263, at *6 (Westmoreland Cty. Com. Pleas Ct. July 9, 2009), or wish to inject extraneous or irrelevant issues into the case, *cf. Northeast Pa. SMSA Ltd. P'ship v. Scott Twp. Zoning Hearing Bd.*, 18 A.3d 1272, 1277 (Pa. Commw. Ct. 2011) (holding that an intervenor may raise issues only if they are closely related to the matters the parties placed in controversy).

20. Intervenor's interests are not already adequately represented by the existing parties. *See* Pa. R.C.P. 2329(2).

a. As a threshold matter, Pennsylvania courts have held that voters generally should be permitted to intervene in election-related litigation, despite possible concerns about whether

their interests are adequately protected by the other parties to the case. *See, e.g., Zolitor v. Elec. Bd. of Cty. of Montgomery*, 48 Pa. D. & C. 3d 544, 546 (Mont. Cty. Com. Pleas Ct. 1988). Furthermore, any doubts about whether a putative intervenor's interests are being adequately represented should be resolved in favor of allowing intervention. *Wilson of Wallingford v. Nether Providence*, 85 Pa. Commw. 104, 108 (1984) (“[B]y permitting [intervenor] to intervene, we obviate any contention that his interests are not adequately represented.”).

b. . The fact that the Attorney General is representing the Commonwealth in defending the constitutionality of the Voter Identification Law does not mean that Intervenors' interests already are being represented adequately. The Commonwealth Court has held that private persons and entities may intervene on the same side as a governmental entity if they have a direct, personal interest in the lawsuit that is “distinct from the public interest already being represented by the Attorney General.” *In re Phila. Health Care Trust*, 872 A.2d 258, 262 (Pa. Commw. Ct. 2005). The interests of the governmental parties represented by the Attorney General, which are bound to promote the public interest as a whole, “may diverge from that” of private parties seeking to promote their personal rights and interests. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 314 (Pa. Commw. Ct. 1999). In this case, the Voter Intervenors are primarily concerned about their individual constitutional right to have their particular votes counted without being improperly nullified by potentially fraudulent votes. Likewise, the Candidate Intervenor is primarily concerned about his individual statutory and constitutional right to assume public office if he receives a majority of properly cast votes by eligible electors. Neither the Commonwealth nor the Attorney General seek to promote these specific, individualized private interests.

c. Intervenor also should not be presumed to be “adequately represented” in this case, because they “could provide much insightful information,” and “could have differing legal theories and facts” from the Commonwealth and Attorney General. *Sch. Dist. of Erie v. Hamot Med. Ctr.*, 4 Pa. D. & C. 4th 194, 198 (Erie Cty. Ct. Common Pleas Apr. 24, 1989).

d. Additionally, it is reasonably possible that, “at some point,” the Attorney General may determine that the interests of the Commonwealth as a whole “include settlement of the matter that would allow” Petitioners to receive some or all of the relief they seek. *Larock*, 740 A.2d at 314. Intervenor should be permitted to participate in this case to ensure that their interests are not compromised by the wide range of factors that public entities generally must take into account when litigating cases, including political concerns, pressure from special interest groups, the need to allocate limited personnel and resources to other pending cases, and the threat of adverse publicity. *See also Battista v. Buckley*, 49 Pa. D. & C. 3d 274, 279-80 (Dauphin Cty. Ct. Com. Pleas 1988) (holding that intervention should be permitted at the beginning of a case if the putative intervenor’s interests may not be adequately represented at a later point in the proceedings).

e. Furthermore, whereas the Attorney General has an interest in defending the legitimacy of all duly enacted Commonwealth statutes—including the statutory requirements for obtaining photo identification—Intervenor may argue that any relief this Court awards should be limited to modification or suspension of some of those requirements, rather than complete invalidation of the Voter Identification Law.

f. In any event, even if this Court concludes that Intervenor’s interests are adequately represented by the existing parties, it retains statutory discretion to nevertheless allow them to participate in this case. *See Grant v. Zoning Hearing Bd.*, 776 A.2d 356, 360 (Pa.

Commw. Ct. 2001) (holding that Pa. R.C.P. 2329 “does not mandate that the application [for intervention] be refused” if a putative intervenor’s interests are adequately represented by an existing party to the case); *see also Battista v. Buckley*, 49 Pa. D. & C. 3d 274, 276 (Dauphin Cty. Com. Pleas Oct. 27, 1988) (“[T]he court’s action is discretionary as the rule states that the court *may* refuse the application for intervention if it determines that the petitioner’s interests are adequately represented.”). Indeed, in *Grant*, 776 A.2d at 360, the Commonwealth Court allowed intervention despite the fact that the putative intervenors “informed the trial court that they would adopt the arguments presented by” existing parties to the case, on the grounds that they would be directly affected by the case’s outcome.

21. Intervenors have not unduly delayed in filing this Petition. *See* Pa. R.C.P. 2329(3). “Whether an application for intervention is timely is a question ‘singularly within the periphery of the trial judge’s discretionary domain.’” *Jackson v. Hendrick*, 498 Pa. 270, 275, 446 A.2d 226 (1982) (quoting 8 Goodrich-Anram 2d § 2329:4 at 408 (1977)). This Petition, filed only a few days after the commencement of this case, is timely. *See T.H. Props., L.P. v. Upper Salford Twp. Bd. of Supervisors*, 970 A.2d 495, 500 (Pa. Commw. Ct. 2009) (holding that putative intervenors should have “petitioned to intervene when the land use appeal was filed”); *cf. Marko v. Mendelowski*, 344 Pa. 665, 667, 25 A.2d 692, 693 (1942) (holding that a petition to intervene filed three years after the case commenced was “unduly delayed and for that reason should have been refused”).

22. Intervention will not unduly delay, embarrass or prejudice the trial or the adjudication of the parties’ rights. *See* Pa. R.C.P. 2329(3); *see also In re Objections of Jeffrey K. Rowan and Kimberly J. Rowan*, 763 A.2d 958, 961 (Pa. Commw. Ct. 2000) (holding that a “clear showing of prejudice to the existing parties” is necessary to deny a petition for intervention). The burden on

Petitioners will not increase substantially if the Court grants this Petition. *Hamot Med. Ctr.*, 1989 Pa. Dist. & Cnty. Dec. LEXIS 145, 198 (Erie Cty. Com. Pleas Ct. Apr. 24, 1989).

23. Intervenors request a hearing, if necessary, on this Petition. *See* Pa. R.C.P. 2329; *see also Phila. Fac. Mgmt. Corp. v. Beister*, 487 Pa. 61, 63, 408 A.2d 1095, 1096-97 (1979) (agreeing that “it was improper for Commonwealth Court to deny [a] petition to intervene without a hearing”); *Hayes v. Sch. Dist. of Pittsburgh*, 33 Pa. Commw. 71, 75, 381 A.2d 193, 195 (1977) (“It is only after a hearing, where factual matters are established and objections may properly be raised, that the trial court has the discretion to disallow [a] petition [for intervention].”).

CONCLUSION AND PRAYER FOR RELIEF

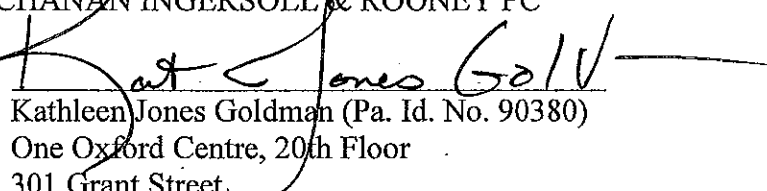
24. Intervenors respectfully ask that this Honorable Court grant their Petition to Intervene and allow them to become parties to this case.

Respectfully submitted,

Dated: May 8, 2012

BUCHANAN INGERSOLL & ROONEY PC

By:


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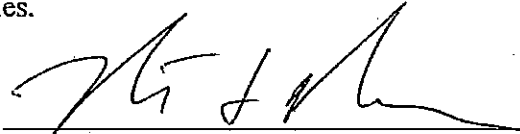
Counsel for Intervenor-Respondents

VERIFICATION

I state that I am a putative Intervenor in this matter, and that the factual averments set forth in the foregoing Petition for Review, as they relate to me personally, are true and correct to the best of my knowledge, information, and belief.

I understand that the statements herein are made subject to the penalties of 18 Pa. C.S.A., § 4904, relating to unsworn falsification to authorities.

Dated: May 4, 2012



(Signature)

ROBERT F. NUSBBAUM

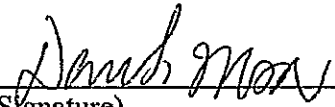
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Dated: May 4, 2012


(Signature)

Dana S. Mason
(Printed name)

EXHIBIT 1

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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VOTERS OF PENNSYLVANIA; NATIONAL
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MARISE STILLMAN, ROBERT NUSBAUM,
LUIS VEGA, PAUL GEIBLER, KATHRYN
J. IMLER, and THOMAS KILLIAN,

*Intervenor-
Respondents*

Docket No. 330 MD 2012

NOTICE TO PLEAD

TO: **Petitioners Viviette Applewhite,
Wilola Shinholster Lee
Grover Freeland
Gloria Cuttino
Nadine Marsh
Dorothy Barksdale
Bea Bookler**

**Joyce Block
Henrietta Kay Dickerson
Devra Mirel ("Asher") Schor
League of Women Voters of Pennsylvania
National Association for the Advancement of Colored People,
Pennsylvania State Conference; and
Homeless Advocacy Project,**

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You are hereby notified to file a written response to the enclosed **Preliminary Objections** within thirty (30) days from service hereof or a judgment may be entered against you.

Respectfully submitted,

Dated: May 8, 2012

BUCHANAN INGERSOLL & ROONEY PC

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Counsel for Intervenor-Respondents

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J. IMLER, and THOMAS KILLIAN,

*Intervenor-
Respondents*

Docket No. 330 MD 2012

**INTERVENOR-RESPONDENTS' PRELIMINARY
OBJECTIONS TO PETITION FOR REVIEW**

Intervenor-Respondents, by and through their attorneys, Buchanan Ingersoll & Rooney,
P.C., file these Preliminary Objections to the Petition for Review pursuant to Pa. R.A.P. 1516(b)
and 1517 and Pa. R.C.P. 1025, based on the following:

I. INTRODUCTION

1. On March 14, 2012, the General Assembly enacted a new statute generally requiring Pennsylvania voters to present photo identification in order to vote in person at a polling location. *See* Act of Mar. 14, 2012, Pub. L. 195, No. 18 (hereafter, “Voter Identification Law”). The Voter Identification Law is a constitutionally legitimate means of protecting the integrity of the electoral process and deterring certain types of voter fraud while safeguarding the opportunity to vote.

2. Photo identification cards have become a mainstay of everyday life, and are required for a wide variety of purposes, including entering most courthouses and other public buildings; traveling by air; obtaining a credit card; staying in a hotel; buying or renting a home; and purchasing alcoholic beverages or even cold medicine. The requirement that a person show valid photo identification before voting at a polling place is nondiscriminatory and reasonable, and does not unduly burden the right to vote.

3. Pennsylvania’s Voter Identification Law contains numerous safeguards to ensure that no elector (*i.e.*, qualified and properly registered voter) is excluded from the electoral process. The statute requires the Commonwealth to provide *all* electors who lack a valid form of photo identification with a *free* photo identification card. *See* 25 P.S. § 2626(b). Elderly or disabled residents also may use photo identification cards issued by their nursing homes or assisted living facilities. *Id.* §§ 2602(z.5)(2)(iv)(E), 3050(f)(1)-(2).

4. Additionally, the statute recognizes various means through which an elector who lacks a valid form of photo identification may vote. Indigent electors may cast provisional ballots at polling locations, 25 P.S. § 3050(a.2)(1)(i), (a.4)(1), (a.5)(5)(ii)(D), and electors who

are physically unable to travel (*i.e.*, the elderly and disabled) may cast absentee ballots, 25 P.S. §§ 2602(z.5)(3)(ii)-(iv), 3146.1(k), without photo identification.

5. The Petitioners in this case have not been prevented from voting in any election. Indeed, the Petition's allegations establish that several of them presently possess the identification necessary to vote in person at a polling place. *See infra* ¶¶ 25-27. They nevertheless seek to nullify a simple requirement that nearly all Pennsylvania electors already satisfy, and that most other people can fulfill with only routine administrative inconvenience. The burdens that certain Petitioners allegedly face in complying with this statute, as a result of their individualized constellations of personal circumstance, are neither sufficiently grave as to constitute a deprivation of the right to vote, nor sufficiently widespread as to require wholesale invalidation of this crucial electoral reform.

6. The Voter Identification Law is well within the General Assembly's recognized historic authority to safeguard the integrity of elections and establish identification requirements for electors. *See Patterson v. Barlow*, 60 Pa. 54, 75-76 (1869); *see also In re Phila. Gen. Election*, 332 Pa. 457, 460, 2 A.2d 301, 303 (1938); *De Walt v. Bartley*, 146 Pa. 529, 544, 24 A. 185, 187-88 (1892); *Appeal of Cusick*, 136 Pa. 459, 466, 20 A. 574, 574 (1890); *In re Contested Election of McDonough*, 105 Pa. 488, 490 (1884).

7. Numerous state and federal courts, including the U.S. Supreme Court, have upheld materially similar photo identification requirements against similar challenges. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008); *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008); *Stewart v. Marion Cty.*, No. 1:08-CV-586-LJM-TAB, 2008 U.S. Dist. LEXIS 84817 (S.D. Ind. Oct. 21, 2008), *reaff'd* 2010 U.S. Dist. LEXIS 38096 (S.D. Ind. Apr. 16, 2010); *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67 (Ga.

2011); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010); *see also* *Gonzalez v. Ariz.*, Nos. 08-17094 & 08-17115, 2012 U.S. App. LEXIS 7645, at *65-71 (9th Cir. 2012) (en banc) (rejecting Equal Protection Clause challenge to Arizona’s requirement that a person present photo identification, or two forms of identification without a photograph, in order to vote). This Court should grant Intervenors’ Preliminary Objections and dismiss the Petition with prejudice.

II. LEGAL FRAMEWORK OF THE VOTER IDENTIFICATION LAW

A. General Photo Identification Requirements

8. Under the Voter Identification Law, an elector wishing to vote in person at a polling location must present a document containing her name and a photograph. 25 P.S. §§ 2602(z.5)(2)(i)-(ii), 3050(a); *see also* Pet. ¶ 64. The document also must contain an expiration date that has not yet passed, unless it:

a. was issued by the Pennsylvania Department of Transportation (“PennDOT”) and is not more than twelve months past its expiration date, 25 P.S. § 2602(z.5)(2)(iii)(A); or

b. was issued by an agency or reserve component of the U.S. Armed Forces (including the Pennsylvania National Guard), indicates that the elector is a current or past member of the Armed Forces, and specifies that it is valid indefinitely, 25 P.S. § 2602(z.5)(2)(iii)(B). *See also* Pet. ¶ 70.

9. The photo identification card must have been issued by one of the following entities:

a. the U.S. Government;

b. the Commonwealth of Pennsylvania;

c. a municipality of the Commonwealth of Pennsylvania for which the elector works;

d. an accredited Pennsylvania public or private institution of higher learning;

or

e. a Pennsylvania care facility, 25 P.S. § 2602(z.5)(2)(iv)(A)-(E), which includes “long-term care nursing facilit[ies],” “assisted living residence[s],” and “personal care home[s],” 25 P.S. § 3050(f)(1)-(2). *See also* Pet. ¶ 69.

B. Obtaining a Photo Identification Card

10. PennDOT is statutorily required to provide a free photo identification card to any elector who affirms that he requires the card to vote and does not already possess a valid form of photo identification. 25 P.S. §§ 2626(b)-(c); *see also* Pet. ¶ 78.

11. If an elector previously possessed a Pennsylvania driver’s license or PennDOT photo identification card that expired in or after 1990, PennDOT already has records concerning his identity, and he may obtain a free identification card from PennDOT by completing a simple application form and signing the affirmation mentioned above. 25 P.S. § 2626(b)-(c); *see also* Pa. Sec’y of State, Pennsylvania’s Voter ID Law: A Guide to ACT [sic] 18 of 2012 (Apr. 18, 2012), at 2 (attached as Ex. A) (hereafter, “*PA Voter ID Guide*”).¹ The elector is not required to present either the expired card or any other supporting documentation (such as a birth certificate, Social Security card, or proof of residency). *Id.*; *see also* Pet. ¶¶ 79-80.

¹ Available at <http://tinyurl.com/88pt9ym> (redirects to Pennsylvania Secretary of State webpage). This Court may take judicial notice of policies, guidance, and other official documents and forms that Commonwealth agencies have posted on the Internet, and consider them in ruling on these Preliminary Objections. *See Nieves v. Pa. Bd. of Prob. & Parole*, 983 A.2d 236, 239 (Pa. Commw. Ct. 2009) (taking judicial notice of report posted on a Department of Corrections website in ruling on preliminary objections); *see also Murray Co. v. Commonwealth*, 42 Pa. Commw. 571, 576 (1979) (taking judicial notice of instructions for an IRS form in ruling on a petition for a review of state agency determination).

12. Depending on its records, PennDOT also may be able to verify the identity of an elector whose driver's license or identification card expired prior to 1990, and provide him with a free photo identification card without the need for supporting documentation. Ex. A, *PA Voter ID Guide*, at 2. An elector may call PennDOT's toll-free telephone number to confirm whether PennDOT has records concerning his expired license or identification card. *Id.*

13. An elector who never held a Pennsylvania driver's license or identification card, or an elector whose card expired prior to 1990 and does not appear in PennDOT's records, may obtain a free photo identification card from PennDOT by providing his name, address, date of birth, "and a document verifying [his] date of birth and identity." 67 Pa. Admin. Code § 91.4(b).² An applicant may use any of the following documents to verify date of birth and identity: birth certificate, baptismal certificate, school certificate, passport, citizenship papers, marriage record, Armed Forces ID card, immigration certificate, selective service ID card, Pennsylvania driver's license (there is no requirement that the license be current), Pennsylvania identification card (there is no requirement that the identification card be current), or Pennsylvania camera card. *Id.* § 91.4(b); *see also* Pet. ¶ 76.³

² A homeless elector with no fixed residence may specify on the application form the approximate geographic area "where the individual spends most of his or her time, which will serve as the individual's residence." Pa. Dep't of State, *Pennsylvania's Voter ID Law: FAQ—Homeless Voters—Voting in Person* (Apr. 18, 2012), at 1, available at <http://tinyurl.com/bu4rfuh> (attached as Ex. B). Instead of providing a mailing address, a homeless elector also may specify "general delivery at a post office or shelter" instead of providing a mailing address. *Id.*

³ The application form for obtaining a photo identification card requires all applicants to provide their Social Security number. *See* PennDOT, *Application for Initial Identification Card*, Form DL-54A, at 1 (attached as Ex. C), available at http://www.dmv.state.pa.us/pdotforms/dl_forms/dl-54a.pdf. An applicant who did not previously hold a Pennsylvania driver's license or identification card (or for whom PennDOT lacks any such record) also will be asked during the application process to present his Social Security card and two proofs of residency. Permissible proof of residency includes lease agreements, current utility bills, mortgage documents, W-2 forms, current weapons permits, or tax records. *Id.* These do not appear to be statutory or regulatory prerequisites, however, for obtaining a photo identification card. *See* 75 Pa. C.S. § 1510(b), 67 Pa. Admin. Code § 91.4 (setting forth the requirements for obtaining an identification card); *cf.* 75 Pa. C.S. § 1510(a), 67 Pa. Admin. Code § 73.3(a) (requiring an applicant for a driver's license to provide his social security number and proof of residency). Because none of the Petitioners allege that they lack, or are reasonably unable to obtain, a Social Security number, Social Security card, or proof of residency, these potential discrepancies are not pertinent to this case.

C. Obtaining a Birth Certificate

14. A person born in the Commonwealth of Pennsylvania may obtain a copy of his birth certificate by submitting an application form online, by mail, or in person to the Pennsylvania Division of Vital Records (“Division”), along with a copy of a government-issued photo identification card and a \$10 fee.⁴ If a person lacks any such photo identification, he may:

- a. have a spouse, parent, sibling, grandparent, or grandchild who possesses government-issued photo identification submit the request for a birth certificate on his behalf, *see* Pa. Dep’t of Health, Div. of Vital Recs., *Birth Certificates* (attached as Ex. E); Pa. Dep’t of Health, Div. of Vital Recs., *Statement from Requestors Not Possessing an Acceptable Government Issued Photo ID*, Form HD1123F (Nov. 2007) (attached as Ex. F); or
- b. sign an affirmation stating that he lacks any form of government-issued photo identification, and attach two documents establishing his name and address, including but not limited to utility bills, bank statements, car registrations, pay stubs, income tax returns, W-2 forms, or lease or rental agreements. *Id.*; *see also* Pet. ¶ 104.

15. If the Division does not have a birth record for an adult who was born in the Commonwealth, *see* 28 Pa. Admin. Code § 1.46(c), that person may request that the Division prepare a “delayed registration of birth.” 28 Pa. Admin. Code § 1.4(c)-(d); *see also* 35 P.S. §§ 450.701-450.703, 491. The application must be notarized and accompanied by one of the following documents, if available:

- a. a certified copy of a county record showing the facts of birth;
- b. a notarized statement sworn to by the doctor or midwife who delivered the child;

⁴ *See* Pa. Dep’t of Health, Div. of Vital Recs., *Application for Certified Copy of Birth Record*, Form HD1105F (Aug. 2007) (attached as Ex. D); Pa. Dep’t of Health, Div. of Vital Recs., *Birth Certificates* (attached as Ex. E); *see also* 35 P.S. §§ 450.801, 450.804; 28 Pa. Admin. Code § 1.46(a).

- c. a baptismal certificate; or
- d. an adoption decree or certificate. 28 Pa. Admin. Code § 1.4(d)(1)-(4).

16. If the applicant does not possess any of the documents identified above, he may instead provide “one recorded document at least 5 years old which conclusively establishes [his] correct name, date and place of birth.” *Id.* § 1.4(e). Other states have comparable provisions governing the issuance of delayed birth certificates for people born there.

17. For a \$65 fee, the U.S. Census Bureau offers an “age search service” to people with any available federal census records to establish their “age, citizenship, and place of birth.” U.S. Dep’t of Comm., U.S. Census Bureau, Application for Search of Census Records, Form BC-600 (2011) (attached as Ex. G).

18. In the event an applicant cannot provide any such documents, he may apply to the Orphans’ Court of the county in which he resides for equitable relief. The Orphans’ Court (or, in Philadelphia, the Family Court Division of the Court of Common Pleas, *see* 20 Pa. C.S. § 713) has jurisdiction over “all proceedings . . . with regard to issues concerning recordation of birth and birth records.” 20 Pa. C.S. § 711(9); *see also id.* § 712(3); *cf. Jones v. Dep’t of Health*, 8 Pa. Commw. 637, 638, 305 A.2d 54, 55 (1973) (“An action to correct a birth certificate is normally perfectly routine and is brought in the Orphans’ Court Division of the Court of Common Pleas in the county where the plaintiff or petitioner resides.”). Within the scope of this statutory jurisdiction, the Orphan Court’s equitable powers are “sufficient to embrace every relief necessary for a full disposition of the case.” *In re I.L.P.*, 2009 PA Super. 8, ¶ 7, 965 A.2d 251, 256 (2009) (quotation marks omitted); *see also* 42 Pa. C.S. § 323. “In the exercise of its equitable powers, and controlled by equitable principles, the orphans’ court, when invoked for

equitable relief in a case calling for it so loudly and so justly . . . will extend it independently of any statute.” *In re Yung’s Estate*, 199 Pa. 35, 38, 48 A. 692, 693 (1901).

19. As described in Section E below, if an elector lacks valid photo identification, and cannot afford to obtain the documentation necessary to obtain a free photo identification card, he may cast a provisional ballot without presenting photo identification. 25 P.S. § 3050(a.2)(1)(i), (a.4)(1), (a)(5)(ii)(D); Ex. A, *PA Voter ID Guide*, at 4.

D. Qualified Electors May Cast Absentee Ballots Without Photo Identification

20. A person is not required to possess photo identification to cast an absentee ballot. 25 P.S. § 2602(z.5)(3). Subject to certain voter registration requirements not relevant to this case, an elector may vote by absentee ballot under a wide range of circumstances, most notably if:

- a. he is expecting to be absent from his municipality “because his duties, occupation or business require him to be elsewhere” throughout the time for voting; or
- b. he is unable to travel to his polling place or operate a voting machine due to illness or physical disability, and cannot secure assistance in doing so.⁵ *Id.* § 3146.1(a)-(n); *see also* Pet. ¶¶ 83-84.

⁵ Additionally, a person may cast an absentee ballot if:

- a. he is a member of the military, regardless of location;
- b. he is a member of the U.S. Merchant Marine who is absent from the municipality of his residence throughout the time for voting;
- c. he is a member of a religious or welfare group officially attached to, and serving with, the U.S. Armed Forces who is absent from his municipality of residence throughout the time for voting;
- d. his “duties, occupation or business,” including but not limited to employment with the U.S. Government, require him to be outside of the United States” throughout the time for voting;
- e. he is a spouse or dependent of any person described above, who is residing with or accompanying that person away from their municipality;
- f. he is a war veteran elector who is away from his municipality and, because of illness or physical disability, is bedridden or hospitalized and unable to travel to his polling place;
- g. he is a spouse or dependent accompanying an employee of the Commonwealth or U.S. Government within the United States, if the “duties, profession or occupation” of that employee require him to be absent from their municipality;
- h. he is a county employee who cannot vote due to election-related duties; or

21. To apply for an absentee ballot, an elector must provide one of the following to confirm his identity:

a. his driver's license number, if he possesses a current and valid driver's license;

b. the last four digits of his Social Security number, if he does not possess a current and valid driver's license; or

c. a copy of his photo identification, if he does not possess either of the above numbers. 25 P.S. § 2602(z.5)(3)(i), (ii), (iv); *see also* Pet. ¶ 82. Thus, a person who is eligible to cast an absentee ballot may do so without possessing a driver's license or other form of photo identification by providing the last four digits of his Social Security number.

E. Qualified Electors May Cast Provisional Ballots Without Photo Identification

22. Similarly, a person is not required to possess photo identification to cast a provisional ballot. 25 P.S. § 3050(a.2)(1)(i)-(ii), (a.4)(1). An elector may cast a provisional ballot at a polling location if he is "unable to produce proof of identification," either because "the elector is indigent and unable to obtain proof of identification without the payment of a fee," or "on any other grounds." *Id.*; *see also* Pet. ¶¶ 72, 74, 86.

a. When an indigent elector lacking photo identification casts a provisional ballot, the county election board will count that vote if, within six days after the election, that elector mails, faxes, e-mails, or submits in person to the board an affirmation that he is the same person who cast the provisional ballot at issue, and is "indigent and unable to obtain proof of identification without the payment of a fee." 25 P.S. § 3050(a.4)(5)(ii)(D). This includes not only the cost of an identification card (which PennDOT would provide for free, *see id.*

i. he is unable to travel to a polling place because of a religious holiday.
25 P.S. § 3146.1(a)-(n); *see also* Pet. ¶¶ 83-84.

§ 2626(b)), but also the cost of any ancillary documents needed to obtain such a card, such as a birth certificate, *see* Ex. A, *PA Voter ID Guide*, at 2; *see also* Pet. ¶¶ 86-87.

b. A provisional ballot cast by any other person who lacked photo identification will be counted if, within six days after the election, the person mails, faxes, or e-mails a copy of a valid form of photo identification to the county election board, or presents it in person to the board. 25 P.S. § 3050(a.4)(5)(ii)(E).

F. Qualified Electors May Cast Alternative Ballots Without Photo Identification

23. A person also is not required to present photo identification to cast an alternative ballot under the Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (Sept. 28, 1984). *See* 25 P.S. §§ 3146.2(j), 3146.2b(f), 3146.5(c), 3146.8(i). A handicapped or elderly voter may cast an alternative ballot, typically submitted by mail, if his assigned polling place is not handicapped-accessible. *See* 42 U.S.C. § 1973ee-1(b)(2)(B)(ii).

III. STATEMENT OF ALLEGED FACTS

24. Petitioners contend that they are “real-life examples of long-time voters who will be disenfranchised by the Photo ID Law.” Pet. ¶ 2.

25. Petitioner Joyce Block admits that PennDOT issued her a voter identification card (which she terms a “temporary Voter ID”) and does not contend that she is ineligible to vote under the Voter Identification Law. Pet. ¶ 40. Instead, Petitioner Block alleges only that she “is left to worry”—without specifying any particular reason—that her identification “will eventually be challenged and that her vote will not be counted.” *Id.*

26. Petitioner Henrietta Kay Dickerson admits that she had a “PennDOT-issued non-driver photo ID, but it expired on May 31, 2011.” Pet. ¶ 44. She complains that PennDOT would not provide her with a free replacement card, since her previous one had expired less than

one year earlier. *Id.* ¶ 45. She therefore allegedly spent \$13.50 to obtain a replacement card. *Id.* ¶ 45. Under the Voter Identification Law, however, Petitioner Dickerson’s expired card was a valid form of identification for up to one year past its expiration date, *see* 25 P.S. § 2602(z.5)(2)(iii)(A), which was the reason PennDOT would not issue her a replacement at the time she sought it, *id.* § 2626(b). In any event, Petitioner Dickerson does not dispute the fact that she presently possesses a valid form of photo identification that will enable her to vote in person at a polling location on Election Day.

27. Petitioner Devra Mirel (“Asher”) Schor admits that he “has two forms of photo ID acceptable under the new Photo ID Law—a current U.S. passport and a Pennsylvania driver’s license.” Pet. ¶ 47. He is concerned, however, that because he is in the midst of female-to-male gender reassignment procedures, he “looks significantly different” from the pictures on his identification cards, which also still specify that he is a woman. *Id.* Petitioner Schor does not allege, however, that he is unable to obtain an updated identification card to reflect his change in appearance, as any other person whose appearance has substantially changed reasonably might do. *Id.*

28. Petitioners Wilola Shinholster Lee (59 years old), Pet. ¶ 15; Gloria Cuttino (61 years old), *id.* ¶ 23; Nadine Marsh (84 years old), *id.* ¶ 26; and Dorothy Barksdale (86 years old), *id.* ¶ 30, allege that they do not possess valid forms of photo identification, and cannot obtain birth certificates to get free photo identification cards from PennDOT, because their states of birth do not have records of their births, *see also id.* ¶ 100. These Petitioners (with the possible exception of Gloria Cuttino, *see id.* ¶ 23) do not allege that any of the 15 attorneys ostensibly representing them in this case are attempting to help them obtain a delayed birth certificate so that they can obtain free photo identification cards.

29. Petitioners Viviette Applewhite (92 years old) and Grover Freeland (72 years old) allege that they do not possess valid forms of photo identification and tried unsuccessfully to get copies of their birth certificates from their states of birth, but did not specify why those states did not provide the requested documentation. *Id.* ¶¶ 11, 19, 100. Neither Petitioner alleges whether he or she has a baptismal certificate, school certificate, passport, or marriage record (or, for Petitioner Freeman, a selective service identification card)—any of which could be used instead of a birth certificate to obtain a free photo identification card. *Cf.* 67 Pa. Admin. Code § 91.4(b). Petitioner Freeland possesses a military identification card, Pet. ¶ 19, but alleges that election officials will not recognize it because it neither contains an expiration date nor expressly specifies that it does not expire, *id.* ¶ 124; *see also* 25 P.S. § 2602(z.5)(2)(iii)(B).

30. Petitioner Bea Bookler acknowledges that she previously had a driver's license, Pet. ¶ 34, but alleges neither when it expired, nor whether she contacted PennDOT to see if the agency has records concerning her expired license that would enable her to obtain a free photo identification card without any supporting documentation. *See supra* ¶ 11. Petitioner Bookler also admits that she lives in an assisted-living facility, but does not specify whether the facility makes photo identification available to its residents, which the Voter Identification Law would allow them to use at a polling location. *Cf.* 25 P.S. §§ 2602(z.5)(2)(iv)(A)-(E), 3050(f)(1)-(2). She contends that, due to her age and physical condition, it is too difficult for her to travel to a PennDOT office to obtain a photo identification card, Pet. ¶ 34, but does not mention the fact that she appears qualified to cast an absentee ballot, 25 P.S. § 3146.1.

31. Petitioner Freeland likewise alleges that he had a driver's license in the 1980s, Pet. ¶ 19, but does not specify whether he contacted PennDOT to see whether it has records

concerning his identity that would enable him to receive a free photo identification card without providing a birth certificate or other supporting documentation. *See supra* ¶ 10.

IV. PETITIONERS' ARGUMENTS

32. Petitioners contend that the Voter Identification Law is unconstitutional, both facially and as applied to them, on three grounds.

33. First, Petitioners maintain that the Voter Identification Law violates the Pennsylvania Constitution's "Free and Equal Elections" Clause, Pa. Const., art. I, § 5, because it purportedly imposes "a heavy burden on the fundamental right of qualified electors in Pennsylvania to vote," making it "so difficult" for them to vote as to completely deny them the franchise. Pet. ¶¶ 132-36.

34. Second, Petitioners maintain that the Voter Identification Law violates the various equal protection guarantees of the Pennsylvania Constitution, Pa. Const., art. I, §§ 1, 5, 26, by establishing a variety of allegedly improper distinctions, Pet. ¶¶ 141-44.

35. Finally, Petitioners maintain that the Photo Identification Statute impermissibly establishes an additional "qualification" that a person must satisfy in order to be an eligible elector, in violation of Article VII, § 1 of the Pennsylvania Constitution. *See* Pet. ¶¶ 153-56.

36. Intervenors timely file these Preliminary Objections to the Petition and seek an order dismissing the Petition in its entirety, for the reasons set forth below.

V. PRELIMINARY OBJECTIONS

A. **This Court Should Dismiss Count I Because the Pennsylvania Constitution's "Free and Equal Election" Clause Permits the Legislature to Establish Reasonable Identification Requirements for Voters.**

37. The averments in the preceding paragraphs are incorporated herein by reference.

38. Petitioners allege that the Voter Identification Law is invalid, both on its face and as applied to them, under the Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const., art. I, § 5, because it purportedly imposes “a heavy burden on the fundamental right of qualified electors in Pennsylvania to vote” and effectively amounts to a complete denial of the franchise. Pet. ¶¶ 132-36. Incongruously importing standards from the U.S. Supreme Court’s Fourteenth Amendment jurisprudence, Petitioners further maintain in this Court that the law is not supported by any compelling, or even legitimate, governmental interests. Pet. ¶¶ 89, 94-95, 98, 137-39.

39. Petitioners have failed to state a valid claim, either facially or as applied, under the Free and Equal Elections Clause.

**The Voter Identification Law is Facially Valid Because Its
Impact on the Overwhelming Majority of Voters is Minimal**

40. As a threshold matter, Petitioners’ facial challenge to the statute must fail.

a. Expressly adopting the U.S. Supreme Court’s approach from *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)—in which that Court rejected a facial challenge to Indiana’s voter identification law—the Pennsylvania Supreme Court held that a facial challenge to a statute must fail if the law has a “plainly legitimate sweep.” *Clifton v. Allegheny Cty.*, 600 Pa. 662, 704-05, 969 A.2d 1197, 1222-23 (2009).

b. It is clear and apparently undisputed that the overwhelming majority of Pennsylvania electors presently possesses valid photo identification and can vote without issue at their polling locations. The Voter Identification Law does not “raise any question of constitutionality” relating to them. *Crawford*, 553 U.S. at 197; *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353-54 (11th Cir. 2009) (holding that “the ordinary burdens of producing a photo identification to vote” do not give rise to any constitutional claims); *In re*

Request for Advisory Op. Re: Constitutionality of 2005 PA 71, 740 N.W.2d 444, 456 (Mich. 2007) (hereafter, “*In re 2005 PA 71*”) (“For the overwhelming majority of registered voters in Michigan, the statute merely requires the presentation of photo identification that the voter already possesses.”).

c. If a person lacks photo identification, and can obtain the documents necessary to obtain such identification (*i.e.*, a birth certificate), PennDOT will provide a photo identification card at no charge. 25 P.S. § 2626(b). “For most voters who need them, the inconvenience of making a trip to the BMV [*sic*], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” *Crawford*, 553 U.S. at 198; *Common Cause*, 554 F.3d at 1354 (“[T]he burden imposed on Georgia voters who lack photo identification was not undue or significant.”).⁶ The fact that a person may be required to pay to obtain the documentation necessary to confirm his identity does not render the underlying requirement for photo identification unduly burdensome. *Gonzalez*, 2012 U.S. App. LEXIS 7645, at *67 (“Requiring voters to provide documents proving their identity is not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay to obtain the documents.”).

d. If a person lacks photo identification and cannot afford the documents necessary to obtain a free photo identification card, he may cast a provisional ballot (which carries the same weight as a regular ballot) at his polling location without presenting photo identification. The only additional requirement is that he must mail, e-mail, fax, or drop off in

⁶ *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67, 73 (Ga. 2011) (upholding photo identification requirement in part because electors could obtain free photo identification cards, and noting that “requiring an additional step in the voting process in order to validate identity is not unconstitutional”); *In re 2005 PA 71*, 740 N.W.2d at 467-68 (deeming “facetious” any potential constitutional concerns about “a statutory regime that *compels* the state to issue free [state] photo identification to its disabled, its senior, and its most impecunious citizens”).

person an affidavit of indigency with the county board of elections within six days after the election. 25 P.S. § 3050(a.2)(1)(i), (a.4)(1), (a.4)(5)(ii)(D). The ability of a person without photo identification to cast a provisional ballot “mitigate[s]” any potential “constitutional” concerns about the Voter Identification Law. *Crawford*, 553 U.S. at 199; *see also Perdue*, 707 S.E.2d at 73. Moreover, the requirement that an indigent elector submit an affidavit of indigency following the election does not render the statute unconstitutional, because “the inconvenience of making a trip to [the elections office] . . . does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” *Crawford*, 553 U.S. at 198; *see also Perdue*, 707 S.E.2d at 73.

e. Thus, this lawsuit centers primarily around the tiny subset of people—particularly elderly people born in rural areas—who both lack a valid form of photo identification, and are unable to obtain one because they cannot obtain a copy of their birth certificate (most often because the state in which they were born does not have an official record of their birth). *See supra* ¶¶ 28-29 (discussing Petitioners Lee, Cuttino, Marsh, Barksdale, Applewhite, and Freeland).

f. Even such electors, however, may cast an absentee ballot if they will be away from their municipality of residence on Election Day, or are unable to travel to a polling place due to their physical condition. 25 P.S. § 3146.1. An elector’s constitutional rights generally are not violated simply because she must vote absentee, rather than in person at a polling location. *See Crawford*, 553 U.S. at 201 (upholding voter identification requirement, in part because the elderly “are able to vote absentee without presenting photo identification”); *Perdue*, 707 S.E.2d at 73.⁷

⁷ *See also Thompson v. Colorado*, 278 F.3d 1020, 1031-32 (10th Cir. 2001) (treating absentee ballots as a constitutionally sufficient alternative to in-person voting at a polling location), *overruled in part on other grounds*,

g. Electors for whom there is no official record of their birth, and who do not qualify to cast an absentee ballot, may obtain a certificate of delayed birth from their state of birth by submitting evidence concerning their birth to the proper state authorities. *See supra* ¶¶ 15-18. That, in turn, will enable them to obtain photo identification.

h. Because the photo identification requirement will have no effect on the overwhelming majority of Pennsylvania voters, the fact that it will inconvenience the tiny fraction of the electorate that lacks photo identification, and place potentially higher burdens on a small subset of that group who cannot readily obtain such identification, is insufficient to support a facial challenge. *See Crawford*, 553 U.S. at 202-03 (“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.”). Indeed, in *Crawford*, the Supreme Court expressly recognized that a voter identification requirement was facially constitutional, despite placing “a somewhat heavier burden on a limited number of persons,” including:

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.

Id. at 199.

Guttman v. Khalsa, 446 F.3d 1027, 1034 (10th Cir. 2006); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 832 (S.D. Ind. 2006) (holding that there is “no basis on which to conclude that absentee voting is an unacceptable alternative for individual voters lacking photo identification”), *aff’d sub nom. Crawford*, 553 U.S. 181; *Selph v. City of Los Angeles*, 390 F. Supp. 58, 61 (C.D. Cal. 1975) (holding that elderly and handicapped voters did not have a constitutional right to cast votes at physically accessible polling places, because they could vote through absentee ballot instead); *see also* 42 U.S.C. § 1973ee-1(b)(2)(B)(ii).

i. Thus, the Voter Identification Law has a “plainly legitimate sweep,” *Clifton v. Allegheny Cty.*, 600 Pa. 662, 704-05, 969 A.2d 1197, 1223 (2009), and should not be facially invalidated.

**The Free and Equal Elections Clause Allows the
General Assembly to Combat the Potential for Voter
Fraud By Enacting Voter Identification Requirements**

41. Considering the substance of Petitioners’ claims, the Voter Identification Law does not violate the standard established by the Pennsylvania Supreme Court for reviewing claims under the Free and Equal Elections Clause.

a. The Pennsylvania Supreme Court has held:

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.

Winston v. Moore, 244 Pa. 447, 457, 91 A. 520, 523 (1914); accord *Erfer v. Commonwealth*, 568 Pa. 128, 175, 794 A.2d 325, 353-54 (2002); see also Pet. ¶ 133.

b. The Court repeatedly has emphasized that the Free and Equal Elections Clause does not prohibit the legislature from regulating the manner in which voters are required to identify themselves and establish their eligibility to vote. An “election is free and equal where all of the qualified electors of the precinct are carefully distinguished from the unqualified, and are protected in the right to deposit their ballots in safety, and unprejudiced by fraud.” *Patterson v. Barlow*, 60 Pa. 54, 76 (1869); see, e.g., *Comm’r ex rel. Jones v. King*, 5 Pa. D. & C. 515, 518 (Dauphin Cty. Ct. Com. Pleas 1924) (rejecting Free and Equal Elections Clause challenge to a

statute regulating nominating petitions because “[e]very voter is treated alike. Every voter has the same right as any other voter, and every voter has the right to cast his ballot and have it counted.”).

c. This Court has gone so far as to hold that Article I, § 5 is “considerably less” demanding than the standard “employed by the federal courts,” because election regulations may be “invalidated only for ‘gross abuse’” under § 5. *In re Nomin. Paper of Rogers*, 908 A.2d 948, 955 (Pa. Commw. Ct. Sept. 8, 2006).

d. The Pennsylvania Supreme Court’s ruling in *Patterson* demonstrates that the Voter Identification Law affirmatively fulfills the goal of the Free and Equal Elections Clause:

That election is not free and equal where the true electors are not separated from the false; where the ballot is not deposited in safety, or where it is supplanted by fraud. It is, therefore, the duty of the legislature to secure freedom and equality by such regulations as will exclude the unqualified, and allow the qualified only to vote.

Patterson, 60 Pa. at 76; accord *In re Moskowitz*, 26 Pa. D. & C. 567, 570 (1936).

e. The Court continued, in colorful terms:

[W]hat rule of sound reason or of constitutional law forbids the legislature from providing a means to distinguish the honest people of Philadelphia from the rogues and vagabonds who would usurp their places and rob them of their rights? I cannot understand the reasoning which would deny to the legislature this essential power to define the evidence which is necessary to distinguish the false from the true.

Patterson, 60 Pa. at 82.

f. The Court 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.” *Id.* at 83.

g. Elsewhere, the Pennsylvania Supreme Court has held that the Free and Equal Elections Clause is not violated by requiring people to produce identification cards (in that case, voter registration cards) at polling locations, even though people who lacked such identification through no fault of their own were required to go to court to establish their identities and demonstrate that they were properly registered. *In re Phila. Gen. Election*, 332 Pa. 457, 460, 2 A.2d 301, 303 (1938).

h. The fact that most people who are unable to comply with the photo identification requirement will not be permitted to cast a standard ballot in person at a polling location does not render that requirement unconstitutional under the Free and Equal Elections Clause. It is permissible to “exclude[]” from voting electors who do not “avail themselves of the means of proving their identity and their qualifications.” *Patterson*, 60 Pa. at 83; *see also id.* at 76 (“Individuals may experience difficulties, and some may even lose their suffrages by the imperfection of the system; but this is no ground to pronounce a law unconstitutional, unless it is a clear and palpable abuse of the power in its exercise.”); *McGreevy v. Wash. Cty. Comm’rs*, 42 Pa. D. & C. 143, 147 (Wash. Cty. Ct. Com. Pleas 1941) (“[I]n dealing with the practical aspect of elections it could hardly be said that if only a few were prevented from voting the election would not be free and equal in the constitutional sense.”); *accord Comm’r ex rel. Jones v. King*, 5 Pa. D. & C. 515, 516 (Dauphin Cty. Ct. Com. Pleas 1924).

i. Courts have rejected materially indistinguishable challenges to voter identification laws under other states’ “Free and Equal Election” provisions. *See, e.g., Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 831 (S.D. Ind. 2006) (holding that a photo identification requirement did not violate the Indiana Constitution’s “Free and Equal Election” provision, because “the vast majority of registered voters already possess[ed] some form of

photo identification,” and compliance with the statute was not “practically impossible”), *aff’d sub nom. Crawford v. Marion Cty. Elec. Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff’d on other grounds*, 553 U.S. 181 (2007); accord *Stewart v. Marion Cty.*, No. 1:08-CV-586-LJM-TAB, 2008 U.S. Dist. LEXIS 84817, at *11-12 (S.D. Ind. Oct. 21, 2008). Thus, this Court should dismiss Petitioner’s challenge under the Free and Equal Elections Clause in Count I.⁸

**The Voter Identification Law is a Reasonable Means of
Promoting Legitimate, Even Compelling, Governmental Interests.**

42. The Pennsylvania Supreme Court’s jurisprudence concerning the Free and Equal Elections Clause does not require this Court to consider whether the Voter Identification Law is adequately tailored to further a sufficiently weighty governmental interest. *Cf. supra* ¶ 41(a). Petitioner’s allegations concerning that issue, Pet. ¶¶ 137-39, are therefore irrelevant to this analysis.

a. Were this Court to consider the issue under the Due Process or Equal Protection Clause of the Fourteenth Amendment, however, it would not be required to apply strict scrutiny.

⁸ Petitioners also repeatedly allude to the alleged burden that the Voter Identification Law places on religious minorities whose beliefs preclude them from being photographed. Pet. ¶¶ 88, 94, 128. The law exempts such electors from the photo identification requirement, and allows them to cast a ballot in person at a polling location by presenting a “valid-without-photo” driver’s license or identification card. 25 P.S. § 2602(z.5)(1), (3)(iii). Petitioners maintain that the Commonwealth is impermissibly burdening the constitutional rights of such groups’ members, because they are required to answer a series of allegedly intrusive questions about their beliefs in order to qualify for this exemption. Pet. ¶¶ 88, 94, 128.

Despite Petitioners’ repeated references to this alleged constitutional defect, they do not actually assert a cause of action based on it. Indeed, Petitioners apparently lack standing to pursue any such claim, as none of them purport to object to being photographed on religious grounds (and none of the organizational Petitioners claim to have any members who hold such beliefs). *See Hosp. & Healthsystem Ass’n of Pa. v. Dep’t of Pub. Welfare*, 585 Pa. 106, 115, 888 A.2d 601, 607 (2005) (“[W]here a person is not adversely affected in any way by the matter challenged, he is not aggrieved and thus has no standing to obtain a judicial resolution of that challenge.”).

In any event, nothing in the Voter Identification Law requires such an allegedly invasive process. *See* 25 P.S. § 2602(z.5)(1), (3)(iii). To the extent a court were to conclude, in a proper, as-applied case, that such questioning were impermissibly burdensome or intrusive, the correct remedy would be either to impose reasonable restrictions on such inquiries or, potentially, to invalidate the exception. The Commonwealth’s allegedly overzealous or improper administration of the Voter Identification Law’s religious exemption is not a basis for invalidating the entire act.

b. The Supreme Court has recognized that, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (“States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”).

c. Election-related regulations “will invariably impose some burden upon individual voters” and “inevitably affect[]—at least to some degree—the individual’s right to vote.” *Burdick*, 504 U.S. at 433 (quotation marks omitted). Subjecting “every voting regulation to strict scrutiny,” however, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. *Id.* “[W]hen a state election law provision imposes only ‘reasonable, non-discriminatory restrictions’ upon the [constitutional] rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Burdick*, 504 U.S. at 434; *see also Crawford*, 553 U.S. at 189-90 (holding that “evenhanded restrictions” that “protect the integrity and reliability of the electoral process itself” are not indivisible). This Court echoed these rulings, affirming that the Commonwealth’s “important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions” on elections. *In re Barkman*, 726 A.2d 440, 442 (Commw. Ct. 1999) (quotation marks omitted); *see also Common Cause*, 554 F.3d at 1357.

d. The Supreme Court’s ruling in *Crawford* establishes that several legitimate, and even compelling, governmental interests support voter identification requirements.

e. **First**, “[t]he State has a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient.” *Crawford*, 553 U.S. at 191; *see also id.* at 196 (“[T]he interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.”).

f. **Second**, the State also has a compelling interest in combatting voter fraud, regardless of whether it can demonstrate that such fraud actually has occurred in the State in the past. *Crawford*, 553 U.S. at 182 (“There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.”). The U.S. Supreme Court has explained that states have a “particularly strong” interest in “efforts to root out [voter] fraud,” because it “may produce fraudulent outcomes” and “drives honest citizens out of the democratic process and breeds distrust of our government.” *Doe v. Reed*, 130 S. Ct. 2811, 2819 (2010), *quoting Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); *see also In re 2005 PA 71*, 740 N.W.2d at 25-26. Although Petitioners contend that the threat of in-person voter fraud is illusory, Pet. ¶¶ 2, 68, 90-91, the U.S. Supreme Court has held that a state need not point to actual evidence of voter fraud in order to justify election-related restrictions, because the legislature “should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.” *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986); *see also In re Nomin. Papers of Zulick*, 832 A.2d 572, 580 (Pa. Commw. Ct. 2003) (holding that there is no need for “empirical verifications of the weightiness of the State’s asserted justifications” for election regulations) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)); *see, e.g., ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008); (holding that a state could enact a photo identification requirement for voters in order to

deter and prevent voter fraud, without showing that in-person voter fraud actually had occurred in the past); *Common Cause*, 554 F.3d at 1353 (same); *In re 2005 PA 71*, 740 N.W.2d at 459 (same).

g. **Third**, the Court recognized that a state's interest in "protecting public confidence in the integrity and legitimacy of representative government . . . has independent significance" as a justification for a voter identification requirement. *Crawford*, 553 U.S. at 197. Thus, the Voter Identification Law is a reasonable means of promoting legitimate—indeed, compelling—governmental interests.

WHEREFORE, Intervenor respectfully request that this Court dismiss Count I of the Petition with prejudice, due to legal insufficiency pursuant to Pa. R.C.P. 1028(a)(4). At the very least, this Court should dismiss Petitioners' facial challenge to the statute and allow them to proceed only with their as-applied claims.

B. This Court Should Dismiss Count II, Alleging Violation of the Pennsylvania Constitution's Equal Protection Provisions, Because the Voter Identification Law Does Not Create Impermissible Distinctions Between Similarly Situated Groups of People.

43. The averments in the preceding paragraphs are incorporated herein by reference.

44. Petitioners allege that the Voter Identification Law violates the various "equal protection" guarantees set forth in Article I, Sections 1, 5, and 26 of the Pennsylvania Constitution, arguing that the statute establishes a variety of invidious and irrational distinctions among various groups of voters. Pet. ¶¶ 141-45, 150-51.⁹

⁹ Article I, § 1 provides that "[a]ll 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." Pa. Const., art. I, § 1. Section 5, discussed above, *see supra* ¶¶ 38-42, goes on to provide, "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. Finally, § 26 states, "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." *Id.*, art. I, § 26.

45. Petitioners have failed to state a valid claim for equal protection violations, however, because none of the distinctions to which they point are constitutionally suspect.¹⁰

46. Petitioners first complain that the Voter Identification Law impermissibly distinguishes between people who have a valid form of voter identification, and therefore may vote in person at their polling locations, and those who lack such identification, and are prohibited from doing so (although such persons may be able to vote via absentee or provisional ballot instead). Pet. ¶ 145. If Petitioners' theory were correct, however, virtually every election-related regulation would constitute unconstitutional discrimination against those electors who did not satisfy its requirements. Equal protection requires only that "parties similarly situated be treated alike." *Hull v. Rose, Schmidt, Hasley & Disalle, P.C.*, 700 A.2d 996, 1003 (Pa. Super. Ct. 1997); *accord Jae v. Good*, 946 A.2d 802, 808 & n.12 (Pa. Commw. Ct. 2008). A person who lacks a valid identification card is not "similarly situated" with a person who possesses such identification, which enables him to reliably and objectively confirm his identity for election

¹⁰ Petitioners reiterate throughout the Petition that the Voter Identification Law will have a disparate impact on the poor, the elderly, women, minorities, the disabled, the transgendered, and members of other such groups because they disproportionately lack photo identification, and it purportedly is especially hard for members of such groups to obtain it. See Pet. ¶¶ 95, 99, 101, 106, 108, 111, 119-23, 125, 127. Despite Petitioners' repeated insistence that the law will disenfranchise members of these groups, however, they do not actually base any of their Equal Protection claims on any such disparate impact.

Nor could they. As with the Fourteenth Amendment to the U.S. Constitution, see *Washington v. Davis*, 426 U.S. 229, 239 (1976), the equal protection provisions of the Pennsylvania Constitution are potentially implicated only when a statute imposes different requirements or restrictions upon similarly situated groups of people. See *Kramer v. Workers' Comp. Apps. Bd.*, 584 Pa. 309, 333, 883 A.2d 518, 533 (Pa. 2005); *Uniontown Newspapers, Inc. v. Roberts*, 576 Pa. 231, 257, 839 A.2d 185, 201 (2003). Such provisions are not implicated when application of a single uniform standard, such as the Voter Identification Law, to an entire group of people (*i.e.*, electors) happens to impact or affect those people differently because of their differing personal characteristics and circumstances, such as income, age, or health. See *Kramer*, 584 Pa. at 333, 883 A.2d at 533; see, e.g., *In re 2005 PA 71*, 740 N.W.2d at 457-58 (rejecting challenge to photo identification requirement based on alleged disparate impact). Likewise, the fact that more members of a particular race, ethnicity, or gender happen to be adversely affected by a facially neutral statute that does not expressly discriminate along such lines does not draw the statute's constitutionality into question. *Meggett v. Pa. Dep't of Corrs.*, 892 A.2d 872, 887 n.31 (Pa. Commw. Ct. 2006).

In any event, equal protection violations require that the challenged discrimination be intentional, see *Fratta v. Workers' Comp. App. Bd.*, 892 A.2d 888, 893 (Pa. Commw. Ct. 2006); *Correll v. Dep't of Transp.*, 726 A.2d 427, 431 (Pa. Commw. Ct. 1999), and Petitioners do not contend that the Voter Identification Law, whatever its actual effect, was enacted for the specific purpose of making it more difficult for women, minorities, the elderly, the handicapped, the poor, transgendered people, or anyone else to vote. Thus, Petitioners' repeated allusions to disparate impact are both irrelevant to the actual constitutional claims they are pursuing, see Pet. ¶¶ 145-49, and legally foreclosed.

officials. *Cf. Fla. State Conf. of the NAACP v. Browning*, 560 F. Supp. 2d 1237, 1257 (N.D. Fla. 2008) (“Because they have no driver’s license, such applicants are not similarly situated with applicants who can provide a driver’s license number.”). Thus, this equal protection argument fails. *See also Perdue*, 707 S.E.2d at 730.

47. Petitioners next contend that the statute unconstitutionally distinguishes between people who cast their votes in person, and are required to show photo identification, and those who cast absentee ballots, and are not required to do so. Again, these two groups of people are not similarly situated. Pet. ¶¶ 85, 92, 146-47.

a. Courts throughout the country have recognized that the very nature of absentee voting—which the Pennsylvania Constitution requires the General Assembly to allow, *see* Pa. Const., Art. VII, § 14(a)—sometimes requires different restrictions or procedures to be applied than for in-person voting, because applying the same standards would be impracticable or unduly burdensome for voters. “Absentee voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting.” *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008); *see also Perdue*, 707 S.E.2d at 73 (“[A]bsentee voting may be a fundamentally different process from in-person voting.”); *Horseman v. Keller*, 841 N.E.2d 164, 172 (Ind. 2006) (“[T]here are indeed inherent differences between all absentee voters and Election Day voters.”).

b. “[I]t is axiomatic that a state which allows for both in-person and absentee voting must therefore apply different requirements to these two groups of voters.” *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 831 (S.D. Ind. 2006), *aff’d sub nom. Crawford*, 553 U.S. 181; *see, e.g., State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 235 (Mo. Ct. App. 1978) (holding that the State did not violate the Equal Protection Clause by alerting

electors who voted in person at polling locations about a candidate's recent disqualification, but not electors who had requested absentee ballots, because the very nature of absentee voting required electors to "assume[] the risk of disqualification of their candidate").¹¹

c. The General Assembly properly chose to permit absentee voters to submit their ballots without presenting photo identification. Requiring absentee voters to include a copy of an identification card with their ballots (or requests for ballots) would have imposed a much greater burden than requiring people to present photo identification cards before voting in person at their polling locations. *See Santillanes*, 546 F.3d at 1320 ("[T]he unique procedures for absentee voting allow for a separate process confirming the identification of a voter"); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 767, 771 (Ind. 2010) (rejecting equal protection challenges under the state constitution to the exception in the voter identification statute for absentee voters).

d. In any event, even if the General Assembly missed an opportunity to minimize voter fraud relating to absentee ballots, that does not require invalidation of its efforts to deter in-person voting at polling locations. Even when dealing with the electoral process:

[A] Legislature traditionally has been allowed to take reform 'one step at a time,' addressing itself to the phase of the problem which seems most acute to the legislative mind . . . and a Legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.

McDonald v. Bd. of Elec. Comm'n of Chicago, 394 U.S. 802, 809 (1969); *accord In re 2005 PA 71*, 740 N.W.2d at 459.

¹¹ *See also Favorito v. Handel*, 684 S.E.2d 257, 261 (Ga. 2009) (holding that the Equal Protection Clause was not violated by employing different recount procedures for absentee ballots and votes cast on touch-screen machines at polling locations); *Andrade v. NAACP*, 345 S.W.3d 1, 25-32 & n.19 (Tex. 2011) (rejecting Equal Protection challenge under the Texas Constitution to the use of touch-screen machines for in-person voting at polling places and paper ballots for absentee voting).

48. Petitioners additionally allege that the Voter Identification Law impermissibly discriminates between those who previously had a PennDOT driver's license or identification card that expired after 1990, who may receive a new photo identification card without providing supporting documentation, and those who did not previously have such identification, who are required to provide a birth certificate or comparable document to PennDOT confirm their identity. Pet ¶¶ 79-80, 93, 148.

a. Courts have held, however, that a state may enact new voter registration requirements without applying them retroactively to previously registered voters. *See, e.g., Fla. State Conf. of the NAACP v. Browning*, 569 F. Supp. 2d at 1258 ("There is no support whatsoever for the idea that a new voter registration requirement is unconstitutional unless it applies retroactively to all previously registered voters."); *Woodward v. Marsh*, 658 F.2d 989, 993 n.4 (5th Cir. 1981) (rejecting as "frivolous" an equal protection argument that the government may not "change its rules," or must apply such changes retroactively). Likewise, a state reasonably may choose to treat people who previously satisfied its identification requirements differently from those who never did so.

b. Moreover, the Petition itself establishes that the two groups of electors at issue are not similarly situated. If the Commonwealth already has records concerning certain electors' identities, it reasonably may choose to proceed without requiring further documentation from them; it obviously cannot extend such consideration to electors for whom it lacks such records.

49. Finally, Petitioners maintain that the Voter Identification Law is discriminatory because it requires people (primarily women) whose present names do not match the names on their birth certificates "due to marriage, divorce, adoption or otherwise," to present an additional

piece of documentation, such as a marriage license, that is not required of others. Pet. ¶¶ 71, 77, 123, 149. This argument is patently frivolous on its face. If the name that a person is currently using matches the name that appears on his photo identification card, the voter registration rolls, and his birth certificate, then there is no discrepancy that additional documentation would be required to resolve. Requiring a person who chooses to change his or her name to provide documentation substantiating that name change is constitutionally permissible.

WHEREFORE, Intervenors respectfully request that this Court dismiss Count II of the Petition with prejudice, due to legal insufficiency pursuant to Pa. R.C.P. 1028(a)(4).

C. This Court Should Dismiss Count III Because the Voter Identification Law Does Not Violate the Pennsylvania Constitution's Voter Qualification Clause By Establishing an Additional Qualification for Voters.

50. The averments of the preceding paragraphs are incorporated herein by reference.

51. Finally, Petitioners maintain that the Voter Identification Law violates the Voter Qualification provision of the Pennsylvania Constitution, which provides that any person who is at least 21 years old and satisfies certain citizenship and residency requirements “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.” Pa. Const., art. I, § 7.

52. Petitioners’ argument is flatly wrong. For more than a century and a half, the Pennsylvania Supreme Court has held that Article I, § 7 does not limit the power of the General Assembly to regulate the manner in which elections are conducted, and in particular allows the General Assembly to require voters to provide evidence to election officials concerning their identity and eligibility to vote. *See Patterson*, 60 Pa. at 75, 82; *see also Indep. Party Nomin.*, 208 Pa. 108, 112, 57 A. 344, 345 (1904); *De Walt v. Bartley*, 146 Pa. 529, 544, 24 A. 185, 187-88 (1892); *Appeal of Cusick*, 136 Pa. 459, 466, 20 A. 574, 574 (1890); *In re Contested Elec. of*

McDonough, 105 Pa. 488, 490 (1884) (emphasis added). The Voter Identification Law does not purport to add additional qualifications for voting in the Commonwealth, but instead merely establishes a procedure for allowing election officials to confirm that a person attempting to vote actually is a qualified elector (and is the qualified elector who he purports to be).

53. The fact that the Pennsylvania Constitution “confers the right of suffrage on every citizen possessing the qualifications named in that instrument” does not deprive the General Assembly of “the power to regulate the details of place, time, manner, etc. [of elections], in the general interest for the due and orderly exercise of the franchise by all electors alike.” *Indep. Party Nomin.*, 208 Pa. at 112, 57 A. at 345.

54. Although the Pennsylvania Constitution “prescribes the qualifications of voters,” the General Assembly may “prescribe[] by law” the evidence that is necessary for a voter to establish his “identity” and “qualifications.” *Patterson*, 60 Pa. at 75, 82.¹² The Court further explained:

There must be a means of distinguishing the qualified from the unqualified, and this can only be done by a tribunal to decide, and by evidence upon which a decision to be made. . . . [T]he legislature must establish the tribunal [*i.e.*, election personnel at polling places], and the means of ascertaining who are and who are not the qualified electors; and must designate the evidence which shall identify and prove to this tribunal the persons and the qualifications of the electors.

¹² The Pennsylvania Constitution of 1838, in effect at the time of this ruling, contained a provision concerning qualifications of electors that is materially and structurally identical to the present-day § 7 (albeit with a reprehensible racially discriminatory component):

In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the State one year, and in the election district where he offers to vote, ten days immediately proceeding such election, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector.

Pa. Const. of 1838, Art. III, § 1.

Id. at 75; *see also Cusick*, 136 Pa. at 466, 20 A. at 574 (holding that, while the Commonwealth Constitution “prescribes very clearly the qualifications which a voter must possess,” it leaves to the legislature the authority to establish “machinery by which to ascertain whether a particular voter possesses such qualifications”).¹³

55. The Court later went a step further, declaring:

Not only is it competent for, but it is the *duty* of the legislature to prescribe the mode of ascertaining who are the qualified electors; their rights are conserved by the exclusion of the votes of other persons, and the interests of the state demand exclusion of all who are unqualified. *The constitution contemplates legislation to provide the mode of ascertaining who are the electors*

McDonough, 105 Pa. at 490 (emphasis added).

56. The fact that a constitutionally qualified elector “may suffer some inconvenience, and in some instances lose his vote, not because he is not duly qualified, but for the reason that he has not the means of proof at hand to satisfy” election officials concerning his identity or eligibility to vote, does not render the underlying statute or requirement at issue unconstitutional. *McDonough*, 105 Pa. at 475, 20 A. at 578; *see also De Walt*, 146 Pa. at 544, 24 A. at 187-88 (rejecting the “argumentum ab inconvenienti,” and holding that election-related requirements are not unconstitutional simply because they inconvenience voters or incidentally make it more difficult for certain people to vote).

57. Courts have rejected materially indistinguishable challenges to voter identification statutes under other states’ “Voter Qualification” provisions. *See, e.g., Rokita*, 458 F. Supp. 2d at 843 (holding that a photo identification requirement did not “impos[e] additional substantive qualifications” for electors, because the legislature had the power to enact reasonable voting

¹³ The Pennsylvania Constitution of 1874, in effect at the time of *New Britain Borough* and *Cusick*, also contained a Voter Qualification Clause materially identical to the present-day § 7, although it contained longer residency requirements and an additional requirement concerning the elector’s payment of county taxes. Pa. Const. of 1874, Art. VIII, § 1.

regulations); *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67, 72 (Ga. 2011) (“Nor do we find the photo ID requirement to be an impermissible qualification on voting” under the Georgia Constitution.).¹⁴

WHEREFORE, Intervenor respectfully request that this Court dismiss Count III of the Petition with prejudice, due to legal insufficiency pursuant to Pa. R.C.P. 1028(a)(4).

CONCLUSION

59. For these reasons, Intervenor respectfully request that this Court sustain their Preliminary Objections and dismiss the Petition with prejudice.

Respectfully submitted,

Dated: May 8, 2012

BUCHANAN INGERSOLL & ROONEY PC

By:

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Counsel for Intervenor-Respondents

¹⁴ See also *Stewart v. Marion Cty.*, No. 1:08-CV-586-LJM-TAB, 2008 U.S. Dist. LEXIS 84817, at *10-11 (S.D. Ind. Oct. 21, 2008) (“The photographic identification requirement is no more an ‘additional qualification’ than requiring voters to . . . vote in person.”); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 767 (Ind. 2010) (“[T]he Indiana Voter ID Law’s photo identification card requirements are in the nature of an election regulation and . . . are not, as the plaintiffs urge, unconstitutional as additional substantive voter qualifications.”).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

THE COMMONWEALTH OF
PENNSYLVANIA; THOMAS V. CORBETT,
in his capacity as Governor; and CAROL
AICHELE, in her capacity as Secretary of the
Commonwealth,

Respondents.

DANA MASON, JOSEPH COSTELLO,
MARISE STILLMAN, ROBERT NUSBAUM,
LUIS VEGA, PAUL GEIBLER, KATHRYN
J. IMLER, and THOMAS KILLIAN,

*Intervenor-
Respondents*

Docket No. 330 MD 2012

ORDER

AND NOW, this ____ day of _____, 2012, upon consideration of
Intervenor-Respondents' Preliminary Objections to the Petition for Review, the memorandum of
law in support thereof, any response thereto, and for good cause shown, it is hereby:

ORDERED that Intervenor-Respondents' Preliminary Objections are GRANTED, and

FURTHER ORDERED that the Petition for Review is DISMISSED WITH
PREJUDICE.

SO ORDERED.

BY THE COURT:

EXHIBIT 2

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THOMAS V. CORBETT, in his capacity as Governor; and CAROL AICHELE, in her capacity as Secretary of the Commonwealth,

Respondents.

DANA MASON, JOSEPH COSTELLO, MARISE STILLMAN, ROBERT NUSBAUM, LUIS VEGA, PAUL GEIBLER, KATHRYN J. IMLER and THOMAS KILLIAN,

*Intervenor-
Respondents*

Docket No. 330 MD 2012

**INTERVENORS' RESPONSE TO PETITIONERS' REQUEST
TO EXPEDITE AND TRUNCATE RESPONSE TIME**

Intervenors respectfully submit this Response to Petitioners' request for expedited discovery, briefing, and hearing schedule, and to truncate response time.

1. Petitioners are not entitled to expedited treatment of this case. To the contrary, their own delay in bringing suit has directly created the circumstances that they now contend warrant a highly compressed schedule. The statute at issue, Act of March 14, 2012, Pub. L. 195-

18, No. 18, *codified at* 25 P.S. §§ 2602, 2626, 3050 (hereafter, “Voter Identification Law”), was enacted on March 14, 2012, yet Petitioners waited a month and a half, until May 1, 2012, to file this lawsuit.¹ Having chosen to wait so long before bringing this challenge, Petitioners may not seek emergency relief on an expedited basis. *Branham v. Rohn & Haas Co*, 19 A.3d 1094, 1100 (Pa. Super. 2011) (holding that a two-month delay in seeking expedited consideration “obviated the claim” that such relief was necessary).

2. In establishing a schedule, Intervenor respectfully request that this Court:

a. provide for early consideration and adjudication of their Preliminary Objections (filed concurrently with this Response), which may either limit the scope of discovery in this case or result in outright dismissal of the Petition;

b. allow sufficient time for complete discovery—including adequate time to prepare responses to any discovery requests, as well as briefs concerning any irreconcilable discovery disputes that may arise—rather than limiting it to 20 days as Petitioners propose; and

c. grant Respondents and Intervenor an adequate opportunity to prepare all necessary legal memoranda concerning the relief Petitioners seek, rather than imposing three- and six-day deadlines, as Petitioners propose.

3. Because the general election is not until November 6, 2012, and in light of Petitioners’ request for discovery, this Court should not consider entry of a preliminary injunction, but rather seek stipulation from the parties to hold a single, consolidated proceeding

¹ Such delay is especially surprising, as public press reports reveal that at least some of the Petitioner organizations have been planning to file this lawsuit well before the General Assembly even enacted the challenged statute. *See, e.g.,* Kevin Zwick, *Gov. Corbett Signs Voter ID Bill Into Law*, Capitolwire (Mar. 14, 2012) (“*Last week*, Senate Democrats and the American Civil Liberties Union said they were planning to file a lawsuit to seek an injunction to prevent the law from going into effect.”); *cf.* Pet. 1 (Petitioners’ attorney, Witold J. Walczak is the legal director of the ACLU of Pennsylvania). Then on April 10, 2012, the ACLU and Petitioner NAACP again announced plans to file the instant action. *See* Amy Worden, *ACLU, NAACP will sue over Pennsylvania voter ID law*, Inquirer (April 10, 2012). http://articles.philly.com/2012-04-10/news/31319088_1_pennsylvania-voter-id-law-voter-id.

upon the completion of discovery. *See, e.g., Big Bass Lake Cmty. Ass'n v. Warren*, 23 A.3d 619, 622 (Pa. Commw. Ct. 2011).

Respectfully submitted,

Dated: May 8, 2012

BUCHANAN INGERSOLL & ROONEY PC

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Respondents.

Docket No. 330 MD 2012

CERTIFICATE OF SERVICE

I certify that I am this day, May 8, 2012, serving the foregoing Intervenor's Response to Petitioners' Request to Expedite and Truncate Response Time, upon the persons and in the manner indicated below, which service satisfies the requirement of Pa. R.A.P. 121:

Service by first-class mail, postage prepaid:

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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J. IMLER, and THOMAS KILLIAN,

*Intervenor-
Respondents*

Docket No. 330 MD 2012

ORDER

AND NOW, this ____ day of _____, 2012, upon consideration of
Intervenor-Respondents' Verified Petition for Leave to Intervene Pursuant to Pa. R.A.P. 1531,
any response thereto, and for good cause shown, it is hereby:

ORDERED that Intervenor-Respondents' Petition is GRANTED; and

FURTHER ORDERED that Dana Mason, Joseph Costello, Marise Stillman, Robert Nusbaum, Luis Vega, Paul Geibler, Kathryn J. Imler, and Thomas Killian shall be added as Intervenor-Respondents in this case

SO ORDERED.

BY THE COURT:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

VIVIETTE APPLEWHITE; WILOLA
SHINHOLSTER LEE; GROVER FREELAND;
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Docket No. 330 MD 2012

CERTIFICATE OF SERVICE

I certify that I am this day of May 8, 2012, serving the foregoing Verified Petition for
Leave to Intervene Pursuant to Pa. R.A.P. 1531, upon the persons and in the manner indicated
below, which service satisfies the requirement of Pa. R.A.P. 121:

Service by first-class mail, postage prepaid:

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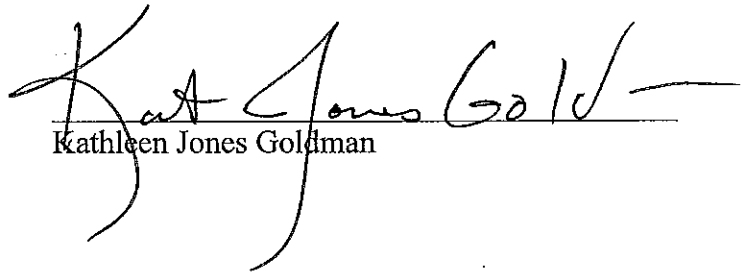
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