IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viviette Applewhite; Wilola Shinholster Lee; Gloria Cuttino; Nadine Marsh; Bea Bookler; Joyce Block; 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.	:	330 M.D. 2012
The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carole Aichele, in her capacity as Secretary of the Commonwealth, Respondents	:	HEARD: July 15, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY **FILED:** April 28, 2014

Determination on Respondents' Post-Trial Motion

Before the Court is Respondents' Post-trial Motion (Motion), alleging several legal errors and factual errors based on the law of the case, in the undersigned's Determination on Permanent Injunction filed January 17, 2014, with accompanying Findings of Fact (Appendix A) and Conclusions of Law (Appendix B) (Determination). Therein, challenged provisions of the Act of March 14, 2012, P.L. 195, No. 18 (Act 18 or "Voter ID Law") amending the Pennsylvania Election Code[1] (Election Code) to require photographic identification for in-person voting were declared invalid or enjoined. For the following reasons, the Motion is denied.

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

I. Post-trial Motions[2]

A. Legal Standard

The purpose of post-trial motions is to give the trial court an opportunity to review and reconsider its earlier rulings and correct its own errors before an appeal is taken. Lahr v. City of York, 972 A.2d 41 (Pa. Cmwlth. 2009). Post-trial motions should be granted only when the moving party has suffered prejudice as a result of the trial court's clear error. Id.

Post-trial motions are governed by Pa. R.C.P. No. 227.1(b)(2). It states:

> [P]ost-trial relief may not be granted unless the grounds therefor ... (2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

Pa. R.C.P. No. 227.1(b)(2) (emphasis added). A post-trial motion "must set forth the theories in support thereof 'so that the lower court will know what it is being asked to decide.'" 1983 Expl. Cmt. to Rule 227.1 (quoting Frank v. Peckich, 391 A.2d 624, 632-33 (Pa. Super. 1978)). Moreover, the failure to specify *how* the grounds for relief were asserted at trial or in pre-trial proceedings will result in a waiver of those issues. Hinkson v. Dep't of Transp, 871 A.2d 301 (Pa. Cmwlth. 2005). Respondents' Motion is reviewed based on these tenets.

In their Motion, Respondents seek to set aside the verdict for a judgment in their favor. In the alternative, they seek amendment of the verdict. Such relief requires stringent standards not met here. Com. v. U.S. Mineral Prods.,

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[2] The factual and procedural background from the Determination is hereby incorporated. This opinion also adopts the short forms and abbreviations from the Determination.

927 A.2d 717 (Pa. Cmwlth. 2007). Respondents submitted a brief in support of their Motion (Resp'ts' Br.), and Petitioners submitted a brief in opposition (Pet'rs' Br.).

As an initial matter, it is noted that Respondents' preservation of issues is inadequate. Hinkson. Respondents were required to cite to the place in the record where they preserved an issue. Their manner of doing so is vague, compelling the Court to sift through a substantial number of documents to discover where the issues were allegedly preserved. By way of example, Respondents state as follows in regards the alleged error by the trial judge for failure to follow established principles of statutory construction: "Places of Preservation: Respondents' Pretrial Memorandum; Respondents' Proposed Conclusions of Law; Respondents' Brief in Support of Proposed Findings of Fact and Conclusions of Law." Together, these documents are 138 pages: (Pretrial Memorandum=47 pages, plus 20 pages of appendices); Proposed Conclusions of Law=20 pages); Respondents' Brief=51 pages). Without indicating page numbers or sections, the Court submits Respondents failed to comply with Pa. R.C.P. No. 227.1(b)(2), and waived these issues. Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114 (Pa. 1974).

In Dilliplaine, our Supreme Court explained the opportunity to correct errors "advances the orderly and efficient use of our judicial resources." Id. at 116. Presuming the party filing post-trial motions specified where at trial it preserved the issue, a reviewing court should not need the entire trial court record. Here, by contrast, in one case, Respondents listed "during preliminary injunction hearing (Resp'ts' Brief at 25) and "during permanent injunction hearing" (Resp'ts' Br. at 34) as one of several places in the record that the alleged errors were preserved.

This Court recognized the onus is on the party filing post-trial motions to specify how the grounds were preserved. Hinkson; Moore v. City of Phila., 571 A.2d 518 (Pa. Cmwlth. 1990); see also Commonwealth v. TAP Pharma., 36 A.3d 1197 (Pa. Cmwlth. 2011). In analyzing the specificity required, this Court explained the burden is not on the Court "to search the record to determine if an averment was properly preserved or argued." Moore, 571 A.2d at 523.

The trial court submits that with the large record in this case, Respondents' general listing of several submissions as the place it preserved alleged errors, is wholly inadequate and does not comply with the letter or spirit of the rule. By requiring this Court to bear the burden of scouring hundreds, if not thousands of pages to find the alleged preservation of the issue, Respondents did not properly preserve any errors for review. Accordingly, they are waived.

Nonetheless, anticipating appeal, in case our Supreme Court deems the issues sufficiently preserved, the trial judge addresses the alleged errors below.

II. Alleged Errors

Respondents allege errors in 90 numbered paragraphs in their Motion. Certain themes are evident. In part A, Respondents contend the trial judge failed to adhere to statutory construction principles. In part B, they also argue the trial judge misconstrued our Supreme Court's decision in Applewhite v. Com., 54 A.3d 1 (Pa. 2012) (*per curiam*) (Applewhite II), and engaged in a flawed constitutional analysis. In part C, they claim the undersigned disregarded findings by The Honorable Robert E. Simpson, Jr., who presided over the preliminary injunction and remand hearings. Lastly, in part D, Respondents seek alternative relief in the form of a modified or amended injunction. The Court responds to these alleged errors by category, following Respondents' Motion.

A. Statutory Construction *(Regarding ¶¶1-20 of the Motion)*

Respondents allege commission of error in statutory construction. The trial judge committed no error as he presumed the constitutionality of the statute, and construed it in the public interest. See Determination at 33; C.L. 61-62. Upholding the fundamental right to vote as it exists in all qualified electors, see Applewhite II, is in the public interest.

Regarding alleged reversed presumptions, the trial judge's comments regarding indigence are supported in the record, based on his credibility determinations. F.F. Nos. 39, 111.

Further, the Determination was consistent with the well-established principle that an agency has only that power that is delegated, or necessarily implied. The DOS ID is an extra-statutory creation as explained in the Determination. See Determination at 19-20; C.L. Nos. 17, 22. The issue is authority to act, not the capriciousness of the action for which an agency had purported authority; these are distinct issues. Eagle Envtl. II, LP v. Dep't of Envtl. Prot., 884 A.2d 867 (Pa. 2005). Therefore, DOS is not entitled to deference, and lacks discretion to act. Respondents ignore the difference in evaluating an agency's adjudicative and regulatory authority, and this Court's review of same. Contra Slawek v. Bd. of Med. Educ. & Licensure, 586 A.2d 362 (Pa. 1991) (regarding proper scope of review of revocation decision). Respondents' thus misstate the issue and applicable law in part A.1. of their Motion.

In addition to the extra-statutory issuance, the trial judge noted the criteria DOS created as preconditions for issuance of the DOS ID also exceed the simple two-point affirmation set forth in the statute. See Determination at C.L. No. 15. Agencies' authority is interpretive, and must not exceed statutory parameters.

Nw. Youth Servs., Inc. v. Dep't of Pub. Welfare, 66 A.3d 301 (Pa. 2013) (agencies are confined to those powers expressly conferred by statute).

Additionally, to the extent Respondents are now arguing the DOS ID is within DOS' agency authority (¶5 of Motion), which is not clearly preserved, it is noted DOS did not promulgate any regulation or rule through the notice and comment process regarding the DOS ID. Contra Eagle Envtl. II (challenge to constitutionality of published regulations). Nor did PennDOT.[3]

The Voter ID Law clearly conferred the authority for issuance of IDs on PennDOT. The plain language of Section 206(b) in the statute is mandatory. Determination at 18-19; C.L. No. 14. As explained in the Determination, and supported by the evidence of record, PennDOT was not "issuing" the DOS ID. Id.; see F.F. Nos. 115, 124-27, 131, 134, 135. Respondents do not challenge any of these supported findings, which demonstrate that DOS issues the DOS ID. In addition, upon consultation of Black's Law Dictionary, (9th ed. 2009), "issue" is defined as "to put forth officially." The trial judge's analysis is consistent with this definition. Determination at 18-19. Moreover, Respondents did not previously offer an alternate definition of "issue," or cite any evidence supporting its current position.

The trial judge recognized that PennDOT and DOS coordinate in election matters, including the distribution of the DOS ID. See F.F. No. 42. That does not alter the statutory analysis in the Determination as Respondents suggest. Section 206(b) of the Election Code, 25 P.S. §2626(b) pertains to PennDOT, including reference to the Vehicle Code and provision of secure IDs thereunder.

[3] However, PennDOT did not determine any of the criteria for issuance of the DOS ID that may be the subject of proper rules or regulations, DOS did.

The trial judge did not err in construing these statutory provisions, nor in recognizing (as did our Supreme Court) that the statute is not being implemented according to its terms. Applewhite II, 54 A.3d at 3. Indeed, Respondents conceded as much. Id. (citing testimony of Secretary Aichele); F.F. No. 46.

To the extent PennDOT retained features of a secure card for the DOS ID, it did so based on the criteria DOS created, namely requiring photos to be taken at a limited number of PennDOT DLC locations. See Determination at 7, 27-29 (regarding DLC Requirement); F.F. Nos. 114-115, 127, 134, 160-174, 181. Although PennDOT issues secure IDs that may be used for voting purposes (as described in the Determination at 6-7), those IDs do not comport with the requisite liberal access, as noted by our Supreme Court, because they necessitate stringent proof of identity. See Determination at 6 (citing Applewhite II, 54 A.3d at 4). The trial judge noted that certain terms of the Voter ID Law were not defined therein, rendering it unworkable.

The trial judge did not enjoin PennDOT; rather, Section 206(b) photo ID provisions are declared invalid as they are unconstitutional. C.L. Nos. 30-31; see also C.L. No. 15. The invalidation of certain photo ID provisions of the Voter ID Law and the ordered relief necessarily impacts a non-party to the proceedings, PennDOT. The verdict does not enjoin PennDOT's activities.

Regarding the lack of adequate safety nets, the evidence was clear, and supports the findings. The Voter ID Law does not contain a safety net whereby every qualified elector, who thus possesses a fundamental right to the franchise, may exercise the franchise in person at the polls by casting a regular ballot.

Respondents mischaracterize Conclusion of Law No. 51, and the citation to Indiana law as pertaining to provisional ballots. It is clear the challenged conclusion and cite refer to absentee ballots, not provisional ones. The point being, unlike Pennsylvania, other states permit absentee voting without regard for special circumstances. *E.g.*, Michigan, Florida and Arizona (cited in Pet'rs' Proposed F.F. No. 261).[4] Those states, in contrast to Pennsylvania, have a safety net permitting exercise of the franchise, including in person.

Provisional votes do not provide an adequate safety net for the fundamental right to vote because those votes are subject to challenge. See F.F. Nos. 12-14, 111-112; C.L. No. 51. That presumes election officials at the polls would find a qualified elector eligible to cast a provisional vote, as there are no consistent standards for doing so, rendering the right to vote a matter of administrative discretion. Moreover, to the extent provisional votes are designed to be a safety net, limited to only the indigent, as Respondents suggest in their Motion, they do not adequately protect the fundamental right to vote, which is *not* limited to only those qualified electors unable to pay a fee for photo ID.

Respondents similarly mischaracterize the trial judge's conclusions and findings regarding the limited types of compliant IDs that are available. The trial judge noted some of the compliant IDs the legislature described did not, and still do not exist (*e.g.*, care facility IDs and student IDs with expiration dates). This was in the context of assessing statutory deficiencies under rational basis review. However, based on the fundamental rights analysis, requiring strict scrutiny, the discussion was informative so as to guide readers, including our esteemed

[4] The references to laws in other states are illustrative only, as DOS analyzed and considered laws of other states when determining its course of action in administering the statute.

legislature. By no means did the trial judge mandate legislative action or imply that alternative forms of ID must be mandatory. To the contrary, the discussion illuminates the incongruence of a statutory requirement to produce certain limited photo IDs to exercise a fundamental constitutional right, and yet the absence of any assured mechanism to do so. The trial judge thus pointed out the lack of assurances amongst the IDs listed, particularly when Section 206(b) did not entail issuance of compliant ID to every qualified elector.

When analyzing the validity of the statute, the trial judge was mindful of the principles of statutory construction, including: "When words of a statute are not explicit, but ambiguous, a reviewing court looks to other principles of statutory construction, among them: the occasion and necessity for the statute; the circumstances under which the statute was enacted; the mischief to be remedied; the object to be attained; the consequences of a particular interpretation; and the legislative and administrative interpretations of such statute." Bowling v. Office of Open Records, 75 A.3d 453, 466 (Pa. 2013) (citing 1 Pa. C.S. §1921(c)).

For these reasons, and as explained in more detail in the Determination, the trial judge did not err in construing the Voter ID Law, particularly those provisions regarding agency authority in Section 206(b), 25 P.S. §2626.

B. Constitutionality *(Regarding ¶¶21-49 of the Motion)*

Respondents repeatedly mis-cite our Supreme Court's decision in Applewhite II as though it upheld the constitutionality of the Voter ID Law. Therein, our Supreme Court evaluated the decision denying injunctive relief according to the appellate standard applicable to preliminary injunctions. Notably, the trial judge's decision complained of pertains to permanent injunctive and declaratory relief. These remedies, while equitable, involve different legal

standards. Appeal of Little Britain Twp., 651 A.2d 606 (Pa. Cmwlth. 1994); Crestwood Sch. Dist. v. Topito, 463 A.2d 1247 (Pa. Cmwlth. 1983); see also Determination on Preliminary Injunction, (filed Aug. 16, 2013) (single judge op., McGinley, J.) at 4. Respondents overlook this distinction.

The trial judge construed Applewhite II within its limited confines, appreciating that it did not ordain a specific holding as to facial constitutionality of the Voter ID Law. Moreover, the conclusions of law support the holding of facial unconstitutionality. C.L. Nos. 27-55. Further, the trial judge recognized:

> In the event our Supreme Court deems the challenge more akin to an "as applied" challenge as to the hundreds of thousands of electors who lack compliant photo ID, this Court holds the photo ID provisions of the statute are unconstitutional as to all qualified electors who lack compliant photo ID, and enjoins their application. This approach was declined as such an interpretation of "as applied" challenge seems nonsensical when the statute would be enjoined as to all of those persons to whom it was directed, *i.e.*, those who lack compliant photo ID as defined in the Voter ID Law.

See Determination at 45 n.31; see also C.L. No. 55. Certain provisions of a statute may be unconstitutional both facially and as applied, and are properly invalidated on either basis. DePaul v. Com., 969 A.2d 536 (Pa. 2009).

Pursuant to our precedent, voter disenfranchisement for any election cannot stand. A statute that *de facto* denies the fundamental right to vote is thus properly invalidated as unconstitutional. The trial judge did not err in so concluding.

Implementation of the law may affect constitutionality; however, the trial judge did not evaluate the statute based on implementation alone. The point being that implementation may not cure unconstitutionality, nor may the courts. Heller v. Frankston, 475 A.2d 1291 (Pa. 1984); see Determination at 35.

The Court rejects Respondents' narrow interpretation of Clifton v. Allegheny County, 969 A.2d 1197 (Pa. 2009). That the trial judge deemed a statute unconstitutional based on the analysis in Clifton, when our Supreme Court did not so conclude does not render the analysis unsound. A law is facially unconstitutional when "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" Id. at 1223 n.35 (2009); C.L. No. 40. The challenged provisions here qualify.

Because compliant photo ID must be valid, and unexpired, anyone whose ID may expire,[5] leaving electors without ID, faces the unconstitutionality of the in-person photo ID provisions of the Voter ID Law in all of its applications. United States v. Salerno, 481 U.S. 739 (1987). The challenged provisions also fail the "plainly legitimate sweep" test because they categorically deny the fundamental right to vote to anyone who lacks compliant ID. Act 18 thus entails the *de facto* denial of the right to vote possessed by electors who meet the qualifications in Article VII, Section 1 of our state constitution.

Respondents explain their failure to come forth with any evidence regarding deprivation of the franchise by denying they had any burden of proof. Hence, Respondents disregard that fundamental rights, like the one to vote vested in every qualified elector, are entitled to strict scrutiny analysis. See Determination at 37-40; C.L. Nos. 28, 32-35, 46. In such cases, the burden of proving a compelling governmental interest falls squarely on Respondents, as does the burden of showing that the challenged law is narrowly tailored so as not to infringe on fundamental constitutional rights. Id. Respondents wholly failed to meet this burden.

[5] Pursuant to Act 18, as a result of the expiration date requirement, all compliant IDs must expire, with the exception of Veterans' IDs that state they are "indefinite" on their face.

Respondents next challenge the trial judge's finding that Dr. Bernard Siskin (Dr. Siskin), Petitioners' primary statistics expert, was credible. Specifically, Respondents assert the trial judge failed to place Dr. Siskin's testimony in context of the unrebutted testimony of public officials about whether the matching of the PennDOT and SURE databases at one point in time could accurately portray who lacked a current and valid PennDOT ID.

At trial, Dr. Siskin, assessed the number of registered electors who lacked a compliant photo ID to be obtained at PennDOT. See Determination at 8. As a result of the review of the 2013 Match, Dr. Siskin determined 511,415[6] of registered voters lacked a valid photo ID. See Determination at 9; F.F Nos. 63, 65.

Although Respondents contest the trial judge's findings that hundreds of thousands of registered electors lacked compliant photo ID (Resp'ts' Br. at 56-61), Dr. Siskin's opinions are supported by Respondents' own witnesses and documentary evidence. See F.F. Nos. 53-56, and 62 (regarding Respondents' database match in 2012); F.F. No. 57 (regarding Secretary Aichele's testimony); F.F. Nos. 59-60 (regarding Oyler's trial testimony that four to five percent or 320,000 to 400,000 registered voters lacked compliant photo ID).

The trial judge properly relied on a statistical expert's opinion as to the hundreds of thousands of electors whose rights are deprived by the Voter ID Law.[7] Here, the trial judge properly found Dr. Siskin's testimony credible. Further, the trial judge may rely upon any competent admissible evidence, and

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[6] Dr. Siskin's comprehensive analysis using a nine-step process of the two databases in 2012, indicated that the 511,415 figure was likely understated. Even factoring in military ID, student ID, and care facility ID, the figure was approximately 430,000 registered electors who lacked compliant ID. See Determination at 9; F.F. No. 72.

[7] It is unclear how Respondents challenge the trial judge's findings with a report on a website without any reference to where in the record they relied on it, or admitted it as evidence.

make credibility determinations as to witnesses' testimony. Commonwealth v. Ballard, 80 A.3d 380 (Pa. 2013) (the trier of fact determines the weight given to expert testimony).

As explained in the Determination and accompanying appendices, the trial judge considered the impact of many factors, including absentee votes, upon the hundreds of thousands unable to cast a regular in-person vote due to the Voter ID Law. Respondents had the option of calling their own expert to testify as to the facts introduced to refute Dr. Bernard Siskin's opinion and supported conclusions. They elected not to do so. Instead, Respondents offered in response the limited rebuttal testimony of Dr. Wecker whose methodologies the trial judge found wanting and ineffective. F.F. Nos. 71, 72. The trial judge exercised his discretion in determining the evidentiary weight. Testimony of an expert of Dr. Siskin's caliber regarding the unmet need for photo ID is entitled to great weight; it is not undermined by Respondents submission of alternate figures taken out of context.

Therefore, Respondents failed to meet the difficult standard that they are entitled to post-trial relief.

Further, the trial judge did not rely on Bryan Neiderberger's (Neiderberger) testimony. The findings reflect Respondents' witnesses' testimony regarding the Sharepoint Database contents. The exhibit to which the trial judge referred was the printout of the Sharepoint Database as it was updated (and redacted), and relied upon by Respondents' witnesses and Neiderberger.[8] That the references are to the over-size spreadsheet is clear from F.F. No. 138, which states "Pet'rs' Ex. 2136 (excel sheet showing Sharepoint Database)." Both counsel

[8] The trial judge notes the "big rolled up spreadsheet" that is the export from the Sharepoint Database is Exhibit 2071, see description in Hr'g Tr., 7/30/13 (*in camera*), at 1885-86, which was misidentified as Exhibit 2136.

referred to the printout from the Sharepoint Database, and the testimony elicited from their examinations, particularly of Respondents' witnesses, was properly of record and reliable. F.F. Nos. 145, 147, 150, 168 (citing to Respondents' testimony).

In stating the trial judge erred in upholding a facial challenge to the constitutionality of the Voter ID Law photo ID provisions, Respondents rely on Applewhite v. Com., (Pa. Cmwlth., No. 330 M.D. 2012, filed Aug. 15, 2012) (single judge op., Simpson, J.) (Applewhite I). Our Supreme Court vacated that decision, and it does not constitute authority for that position. Reading City Dev. Auth. v. Lucabaugh, 829 A.2d 744 (Pa. Cmwlth 2003). Notably, Respondents discount Judge Simpson's statement in his opinion on remand that: "Petitioners' [sic] preserve[d] their facial challenge to Act 18 because the statute contains no right to a non-burdensome means of obtaining the required identification." See Supplemental Determination on Application for Preliminary Injunction (filed Oct. 2, 2012) (Remand Opinion), slip op. at 17-18.

In sum, the trial judge did not err in holding Respondents failed to meet their burden of proving a compelling interest for the photo ID provisions in Act 18, and that the statute was narrowly tailored to that state interest. Indeed, Respondents stipulated that voter fraud did not necessitate the Voter ID Law. See Pet'rs' Ex. 15, Stipulation; see also F.F. Nos. 245, 247, 249, 250, 252; C.L. No. 36.

The type of correction needed here is legislative, not administrative. The Court does not doubt Respondents' good faith attempts to provide liberal access; however, Respondents are not in a position to alter the statute through administrative action. Nor is this Court in a position to render the statute workable by a statutory construction that ignores that a statute shall not be absurd or impossible. 1 Pa. C.S. §1922.

C. Alleged Factual or Evidentiary Errors *(Regarding ¶¶50-77 of the Motion)*

The trial judge here was the first tribunal to consider this controversy on the merits, and address the remedies of *permanent* injunctive and declaratory relief. In so doing, he had access to additional evidence not available to Judge Simpson. That evidence allowed the trial judge to review the evidence as a whole, and make findings of fact based on a complete record. Significantly, Judge Simpson declined to make specific findings of fact. Moreover, Respondents agreed that the evidence submitted during the preliminary injunction and remand hearings became part of the entire record. However, that evidence may be viewed differently by another judge who had the benefit of hearing additional testimony from the same and additional rehabilitative witnesses.

Respondents challenge the Determination based on the coordinate jurisdiction rule. Generally, the coordinate jurisdiction rule commands that upon transfer of a matter between trial judges of coordinate jurisdiction, a transferee trial judge may not alter the resolution of a legal question previously decided by a transferor trial judge. Commonwealth v. Starr, 664 A.2d 1326 (Pa. 1995). Simply stated, judges of coordinate jurisdiction should not overrule each other's decisions. Okkerse v. Howe, 556 A.2d 827 (Pa. 1989). Furthermore, the rule serves to protect the expectations of the parties, to insure uniformity of decisions, to maintain consistency in proceedings, to effectuate the administration of justice, and to bring finality to the litigation. Starr.

The trial judge considered these principles when it denied Respondents' motion *in limine* raising this issue. Respondents allege that the trial judge violated the coordinate jurisdiction rule when he "used testimony from the preliminary injunction hearing but answered the questions based on that testimony

differently than Judge Simpson had." Resp'ts' Br. at 49 (emphasis in original). Specifically, Respondents assert that it was error for the trial judge to revisit Judge Simpson's resolution of facts based on witness testimony presented to him at the preliminary injunction hearing. Therefore, the trial judge lacked the freedom to reweigh the credibility of witnesses who testified before Judge Simpson such as Lorraine Minnite, Matt Barreto, Veronia Ludt, and Michelle Levy.[9] F.F. Nos. 117, 215, 177, 238. The Court shall address seriatim each of the errors raised by Respondents concerning the above-mentioned witnesses.

Lorraine Minnite, Ph.D (Dr. Minnite) previously testified as an expert on behalf Petitioners on the incidence and effect of voter fraud in American elections. F.F. No. 246. Dr. Minnite testified that the Voter ID Law could only detect in-person voter fraud where a person appears at a polling place and attempts to vote for another person. F.F. No. 247. Although found credible and competent, the trial judge "weighted" Dr. Minnite's testimony to the extent that Respondents' maintained voter fraud as the identified interest for photo ID under Voter ID Law. F.F. No. 248. However, contrary to Respondents' allegation, this is not in conflict with findings of Judge Simpson.

Further, the Court is unable to discern why Respondents would have issue with the trial judge's findings as to Dr. Minnite when Respondents stipulated that they were unaware of any in-person voter fraud and would not introduce any evidence of such fraud at trial. Determination at 38; F.F. No. 249. Therefore, this argument is without merit.

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[9] In Applewhite I, Judge Simpson found certain Petitioners' witnesses lacked credibility based on demeanor and bias while Respondents' witnesses were credible and acting in good faith, and that Act 18 was subject to judicial review under the gross abuse of discretion standard.

Professor Matt Barreto (Professor Barreto) testified at the preliminary injunction hearing held before Judge Simpson. Professor Barreto performed a telephone survey in the summer of 2012 to assess public knowledge and possession of compliant photo ID. F.F. No. 74. The trial judge found that Professor Barreto conducted the telephone survey prior to the DOS ID and the marketing blitz after Labor Day 2012, and did not account for issuance of voting IDs since the summer of 2012. F.F. No. 74. Judge Simpson voiced concerns with Professor Barreto's survey design methodology and how that may have impacted his statistical results. F.F. No. 74.

As a result, Petitioners called Dr. David Marker (Dr. Marker), an expert in surveys and statistics used in public policy, to address methodological concerns raised in Judge Simpson's August 15, 2012, decision that initially denied a preliminary injunction. F.F. 75; Applewhite I, slip op. 4-5. Dr. Marker opined that Professor Barreto's survey was reasonably designed and conducted according to reasonable standards and procedures of a public opinion survey. F.F. No. 76. Dr. Marker concluded that Dr. Barreto's use of survey techniques, which included the survey's response rates, oversampling, and stratification adjustments, was the hallmark of a well-designed and reliable survey. F.F. No. 78. The trial judge found that Dr. Marker's testimony was credible, and it was accepted to the extent that he rehabilitated Professor Barreto's survey. F.F. No. 80.

However, Respondents refer also to Judge Simpson's concerns as to Professor Barreto's demeanor during his testimony and whether his opinion was credible. This did not impair the survey methodology or results. Moreover, Dr. Marker successfully rehabilitated the survey in response to the concerns Judge Simpson raised. F.F. Nos. 75-80. Critically, the trial judge did not rely on Professor Barreto's opinion testimony to enter the permanent injunction.

Victoria Ludt (Ludt), Legal Director of Face-to-Face, a low income human services organization supervised by the Homeless Advocacy Project (HAP), testified before Judge Simpson at the preliminary injunction hearing concerning the difficulty low-income people have in order to obtain a PennDOT Secure ID. F.F. No. 117. Ludt stated this observation was premised on the fact that low income persons lacked photo ID in the first place to obtain a birth certificate and social security card as is necessary for a PennDOT Secure ID. F.F. Nos. 116, 117. Lastly, Ludt testified that low income persons have limited access to the media "learn more" technique as they do not have computers or data-unlimited telephone plans. F.F. No. 214. The trial judge's reliance on Ludt's opinion is consistent with Judge Simpson accepting her as an "expert in barriers affecting low-income people's ability to obtain legal identification." F.F. No. 117 (quoting Hr'g Tr., 7/27/12 at 205).

Michelle Levy (Levy), managing attorney for HAP, testified before Judge Simpson that she routinely assisted low-income individuals in trying to obtain identification. F.F. No. 238. Levy explained that obtaining the necessary documentation for a PennDOT Secure ID may be a confusing process. Id. Again, the trial judge's findings are not inconsistent with those of Judge Simpson.

In any event, Respondents and Petitioners confirmed at the Status Conference that during the trial on the merits the parties could rely on "what's already in the record and treat that as part of the entire record." Status Conf., Hr'g Tr., 12/13/12, at 36-37. That the trial judge did so does not violate the coordinate jurisdiction rule, and provides no cause for post-trial relief.

The trial judge did not violate the coordinate jurisdiction rule here. Neither Judge Simpson nor our Supreme Court held the DOS ID is authorized, or that Act 18 passes constitutional muster based on the DOS ID's existence. Moreover, neither our Supreme Court nor Judge Simpson made any findings on the

merits on the record before the trial judge. Further, the trial judge's opinion, which is supported by the findings and conclusions, is consistent with our Supreme Court's exhortation regarding the fundamental right to vote. Regardless, on appeal from a denial of a preliminary injunction to enjoin statutory provisions, our Supreme Court is not compelled to invalidate a statute outright on an incomplete record. None of the cases Respondents cite stands for such a proposition.

The trial judge found that even if our Supreme Court were to determine that DOS may issue the DOS ID, and set forth a number of extra-statutory criteria without promulgation of any rule or regulation, the Voter ID Law is constitutionally infirm. The trial judge considered the DLC Location Requirement (and its attendant limited locations, hours and staff availability and knowledge) as one of several impediments that rendered obtaining the DOS ID unnecessarily burdensome. See Determination at 25-27, 33-40.

Indeed, Respondents candidly acknowledged the Voter ID Law does not pass constitutional muster without the DOS ID. See Determination at 34 (citing Resp'ts' Resp. to Pet'rs' Status Report Concerning Discovery Issues, filed 5/24/13, at 11). Respondents stated: "If proof of identification is not liberally available to registered voters ... the Voter ID Law cannot be administered ... consistently with constitutional requirements." Id. Respondents thus conceded the necessity of a mechanism other than the secure ID described in the statute to pass constitutional muster.

In addition, the trial judge allowed that the requirement for some form of ID, even photographic ID, at the polls is not in and of itself unconstitutional. See Determination at 45 n.30. That photo ID may, in theory, be imposed in a constitutional statute does not indicate the constitutionality of photo ID in Act 18.

Regarding aggrievment, Respondents argue that the trial judge erred when he determined that Bea Bookler (Bookler) and Wiloa Shinholster Lee (Lee) (collectively, Individual Petitioners) and the Pennsylvania National Association for the Advancement of Colored People (NAACP), the League of Women Voters (LWV) and HAP, (collectively, Organizational Petitioners) established standing to challenge the Voter ID Law.

Again, to establish standing, a party's interest in the subject matter in litigation must be substantial, direct and immediate. Johnson v. Am. Standard, 8 A.3d 318 (Pa. 2010) (holding parties had standing to challenge facial constitutionality of statute). Standing is "found more readily" when the protection of the type of interest asserted is among the policies underlying the grounds relied upon by the person or entity claiming to be aggrieved. Id. at 330. Here, the interest raised is the right to vote. Individual Petitioners identified a more than speculative injury to that right. See Determination at 13-14; F.F. Nos. 18, 25-29; C.L. 5-6.

To the extent that injury in fact has not yet been suffered, as Act 18 has not yet applied to in-person exercise of the franchise, the Court notes the right to vote is in the zone of interests at issue in the challenged statute, the Voter ID Law, and is among the rights protected by the constitutional guarantee here cited, Article I, Section 5 of the Pennsylvania Constitution.

Our Supreme Court explained that to qualify under the immediacy prong, in the event an injury in fact is not obvious, the zone of interests is "merely a guideline," and not a bright-line rule. Johnson; see Application of Biester, 487 Pa. 438, 409 A.2d 848 (1979); Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). Both Individual Petitioners and Organizational Petitioners fall within the relevant zone of interests here.

Specifically, Respondents allege Petitioners failed to introduce sufficient evidence of standing at the permanent injunction hearing.

The Court disagrees that more recent testimony from Petitioners Lee and Bookler was necessary, particularly when travel imposes such a hardship on Petitioner Bookler. Respondents did not establish any change in circumstance that altered Individual Petitioners' circumstances taking them out of the zone of interests needed for aggrievement.

This Court rejects Respondents' argument that Individual Petitioners lacked standing.

First, Petitioner Lee's and Petitioner Bookler's testimony at the preliminary injunction hearing establishes their standing.[10] Second, the trial judge found that Petitioner Lee never possessed a PennDOT ID, and that Department of Public Welfare ID and her Philadelphia Board of Education ID was not acceptable under the Voter ID Law. F.F. No. 26. Third, the trial judge found that Petitioner Bookler's age and health would be an impediment to travel to a PennDOT facility to obtain a complaint photo ID. F.F. No. 28. Fourth, Respondents failed to introduce any competent evidence that Petitioner Bookler resided in a licensed care facility that issued a compliant photo ID. F.F. No. 31.

Similarly, the Court also rejects Respondents' argument that Organizational Petitioners lacked standing.[11]

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[10] In fact, Respondents conceded that the evidentiary record for the permanent injunction would include the preliminary injunction hearing testimony. At a conference attended by the undersigned, the parties confirmed "the record that exists already from the two prior hearings is incorporated and is already part of this permanent record on the permanent injunction." Respondents' counsel responded "[a]nd we would agree that any prior testimony in prior hearings is part of the evidentiary record." Pretrial Conf., Hr'g Tr., 6/24/13 at 39.

[11] Respondents also argue that there was no waiver of the issue of whether Organizational Petitioners lacked standing. See C.L. No. 9. Here, Respondents raised standing as an affirmative defense in its new matter. Although the trial judge disagrees, see Determination at 14, this argument is of no consequence because the trial judge reached the merits of whether the Organizational Petitioners had standing. See Determination at 14-16.

First, there was nothing hypothetical or conjectural concerning about the injuries suffered by HAP, NAACP, and LLW. The trial judge found Organizational Petitioners credibly testified that because of the Voter ID Law, there was "a diversion and waste of resources in voter education programs based on changing and inaccurate messaging . . . ." F.F. No. 20; see also F.F. Nos. 22, 24. The trial judge's decision regarding standing of Organizational Petitioners is well-founded and consistent with decisional law. See Determination at 14-16. Accordingly, the trial judge did not err in concluding Organizational Petitioners have standing. Id. at 14 (citing Washington v. Dep't of Pub. Welfare, 71 A.3d 1070 (Pa. Cmwlth. 2013); N.-Cent. Pa. Trial Lawyers Ass'n v. Weaver, 827 A.2d 550 (Pa. Cmwlth. 2003)).

Respondents cite Erfer v. Commonwealth, 794 A.2d 325 (Pa. 2002) in support of their position that Organizational Petitioners lack standing to assert constitutional violations. However, there, the rationale was limited to "the law of standing in reapportionment matters." Erfer, 794 A.2d at 330.

For these reasons, the trial judge's findings and conclusions regarding standing do not warrant post-trial relief.

Respondents also criticize the trial judge for not following Judge Simpson's lead, and deferring to the legislature. Significantly, Respondents cite to a quote from Applewhite I, which was vacated by our Supreme Court. As a vacated decision, Applewhite I does not retain vitality. Lucabaugh. This is particularly true when the trial judge to whom the case is remanded reaches the opposite result in response to our highest court's instructions.

Deference to the legislature is appropriate when legislative enactments pass constitutional muster. Act 18 did not. Therefore, the trial judge did not err.

Moreover, the issues facing the court are slightly different when considering permanent as opposed to preliminary injunctive relief. In addition, much of the testimony pertaining to the DOS ID and implementation of Act 18 post-dated Judge Simpson's handling of the case.

Respondents also criticize the trial judge's reliance on testimony of certain witnesses. Credibility remains the trial judge's prerogative. Also, the trial judge relied on a number of Respondent witnesses, including Jonathan Marks. Marks was integrally involved in administering Act 18, as was evident during his several days of testimony over a course of three different hearings. The trial judge's findings are adequately supported by witnesses presented by Respondents to support their case. The trial court is permitted make findings as to credibility, and to weigh testimony accordingly. Such criticisms do not warrant post-trial relief.

Regarding the alleged impropriety of certain witnesses' testimony based on the protective order, the trial judge previously addressed this issue consistent with the discovery orders of record.

By way of background, this Court entered an order approving the joint stipulation the parties entered as to materials deemed "confidential," exchanged during the discovery process. See Order Approving Stipulated Protective Order, 6/21/12 (J. Simpson) (Stipulated Protective Order). Previously, Respondents objected to certain discovery requests pertaining to the information contained in the SURE and PennDOT Databases. Petitioners objected to the designation of the SURE Database as confidential, and it was not designated as "confidential." Accordingly, there has been no unauthorized disclosure of any private information.

In the course of a discovery teleconference with Judge Simpson, Respondents agreed to provide information to counsel, all with the knowledge

regarding Petitioners' intentions to seek out these individuals as witnesses. Petitioners argued as much in their brief opposing Respondents' motion for protective order, and their brief in opposition to Respondents' motion in *limine* to exclude testimony of witnesses so discovered. During the teleconference, it was clear that the SURE database was being provided on a non-confidential basis. The Stipulated Protective Order was modified in Discovery Order I, filed April 29, 2013,[12] whereby any information deemed confidential would be protected.

Significantly, this Court did not designate the information in the SURE database as confidential. Importantly, Respondents agreed to voluntarily disclose the drivers' license numbers in the databases.

Neither the Drivers' Privacy Protection Act, 18 U.S.C. 18 U.S.C. §§2721-2725 (DPPA), nor the Vehicle Code absolutely prohibits disclosure of SSNs. Moreover, there was no violation of privacy interests and the witnesses testified willingly. As there was neither a violation of a court order, nor federal or state laws, the trial court did not err in permitting the testimony.

D. Alternative Relief (Amend Verdict) ***(Regarding ¶¶78-90 of the Motion)***

Respondents next assail as error the trial judge's determination that there were two potential impediments to the constitutional enforcement of Voter ID, verification and location.[13] Respondents pose that our Supreme Court in Applewhite II never identified verification and location as a hindrance to liberal access.

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[12] The unique character of discovery requires that a trial court have substantial latitude to fashion protective orders. Stenger v. Lehigh Valley Hosp. Ctr., 554 A.2d 954 (Pa. Super. 1989).

[13] Respondents reiterate that the exhaustion and documentation requirements were eliminated with the DOS ID and then amended following the remand in Applewhite II.

Our Supreme Court in Applewhite II determined that Respondents failed to comply with the Voter ID Law's mandate to provide "liberal access" to PennDOT non-driver IDs, and that the DOS ID was "still contrary to the Law's liberal access requirement." Id. at 4. Our Supreme Court vacated this Court's order denying a preliminary injunction and directed the then-trial judge to determine whether there would be no voter disenfranchisement under the voter identification requirement. Id. at 5. After a two-day hearing, Judge Simpson determined that Respondents would be unable to establish "no voter disenfranchisement" for the next election, and issued a preliminary injunction.

After a 12-day trial on the merits, the trial judge found that: (1) contrary to the statutory mandate, Respondents did not provide liberal access to either the PennDOT non-driver ID or the DOS ID; and, (2) the application of the Voter ID Law will result in the disenfranchisement of a great number of electors. See Determination at 21, 34-35, 44-45; F.F. Nos. 53-69, 81-82, 116-120, 132-145.

Respondents argue that our Supreme Court implicitly held that the DOS ID is authorized and capable of effectuating the intent of the legislature. See Resp'ts' Br. at 32. Respondents raised this argument in their Motion *in Limine* to Exclude Evidence Contrary to the Law of the Case at 2-3 (arguing that the Supreme Court found that the DOS ID, if "liberally accessible" could "satisfy the requirements of Act 18 [Voter ID Law] and the Pennsylvania Constitution"). Their position is unsupportable given the circumstances and evolution of the DOS ID.

The DOS ID was not introduced until August 27, 2013, and the record before the Supreme Court was devoid of evidence regarding the effectiveness of the DOS ID. Before the trial judge, the evidence established that the prerequisites for obtaining compliant photo ID, the Exhaustion Requirement for the PennDOT

Voting ID, the Verification and DLC Location requirements for the DOS ID, combined with the implementation issues regarding staff knowledge and consistent education regarding the statute, constituted barriers to access.

In fact, the evidence elicited at the hearing on the merits established that of 17,000 electors who received voting ID, only 4,000 comprised the DOS ID. Determination at 10 n.15. The trial judge properly found that the evidence did not reflect liberal access to the DOS ID; rather, it revealed hurdles and limitations.

Seeking this Court's guidance, Respondents claim they implemented Section 206(b) as they understood it. The trial judge clearly outlined the defects and deficiencies, and held the challenged provisions invalid based thereon. The verification process is unworkable as a means of validating elector status for the reasons set forth in the Determination. Determination at 25-27; see F.F. Nos. 55, 92, 94, 95, 98, 99, 142 (regarding SURE Database deficiencies). It is not this Court's task to offer a legislative solution, or an administrative direction.

The trial judge made a Determination based on the evidence of record. At the time the Supreme Court reviewed the issue, the DOS ID had only just been introduced. Its criteria were not formed or formalized, thereby precluding review of the statute's constitutionality on the merits. Respondents continued to evolve the process even after our Supreme Court's decision highlighted the lack of access to photo ID that would be experienced by our most vulnerable populations. At the time the trial judge reviewed the matter, it appeared Respondents had not solidified criteria for ensuring liberal access. Yet, the trial judge made a determination without predicting Respondents' success in providing liberal access to the DOS ID. Here, again, Respondents admit that administering the statute is not without its flaws, and ask that the preliminary injunction be extended, again. See Resp'ts' Br.

at 7-8 n.2. But this dispute warrants finality, as its resolution affects our citizens and our governance. Determination at 32. Replacing a permanent injunction with an indefinite preliminary injunction only postpones the inevitable relief the trial judge granted. If the final result is imperfect, the legislature may redraft the statute so as to ensure true liberal access and provide direction to agencies seeking it. Mt. Lebanon v. Cnty. Bd. of Elections of Allegheny Cnty, 368 A.2d 648, 649-50 (Pa. 1977) (a trial judge does not "have the power to ... rewrite Legislative Acts ... desirable as that sometimes would be."); Cali v. Phila., 177 A.2d 824 (Pa. 1962).

Section 2(b) of Act 18 neither promotes nor sanctions the DOS ID. Reference to PennDOT's non-driver ID, and imposing the duty of issuance on PennDOT is clear. The word "notwithstanding" denotes the fee and attendant requirements incumbent on the secure IDs PennDOT issues. Nonetheless, our Supreme Court recognized PennDOT has valid security concerns for refusing to relax documentation requirements for issuing electors a free PennDOT non-driver ID for voting per the statute's terms. The legislature may trump any contrary regulations but the statute must be workable and may not infringe constitutional rights under the guise of electoral "regulations." The trial judge properly concluded that the Voter ID Law requires liberal access to a free PennDOT non-driver ID for voting purposes, that the DOS ID cannot cure that drafting defect, and that access to the DOS ID is not liberal.[14]

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[14] The trial judge found Respondents' measures to accommodate elderly and infirm electors inconsequential because they were not publicized (F.F. No. 182) and it is not typical for care facilities in Pennsylvania to issue photo IDs to their residents (F.F. No. 84).

Also, the trial judge did not misconstrue the "indigency" provision, and rejects that this provision "is a robust safety net" as Respondents insist. Resp'ts' Br. at 31. The trial judge discredited that provisional and absentee ballots offer feasible alternatives to those lacking compliant photo ID. See F.F. Nos. 12-14. The statute is void of a viable mechanism of providing ID to the hundreds of thousands who lack it, and who would be unable to exercise the franchise without it.

Respondents also allege as error that the trial judge "misapprehended" DOS' educational efforts. To the contrary, the trial judge found the evidence from multiple sources showed Respondents did not disseminate consistent, accurate information about obtaining DOS ID. F.F. Nos. 185-205. Even at trial, Respondent witnesses admitted they did not relay accurate information about where and how to obtain DOS ID. F.F. Nos. 203-205. Additionally, Respondents otherwise confused voters with mixed and incomplete messages, and did not correct information previously provided when it changed DOS ID criteria. F.F. Nos. 186, 192-199. Most of Respondents' advertisements and educational materials never mentioned the DOS ID or that supporting documentation was not needed. F.F. No. 188.

Although this Court may conceptualize mechanisms whereby the Voter ID Law might be administered differently, such as by issuance in mobile units available in each county on election day, or having a PennDOT representative available at the polls to provide a temporary voting ID to anyone casting an in-person vote, that would require a mandatory injunction against an agency that is not a party to this litigation: PennDOT. Accordingly, as the injunctive and declaratory relief sought by Petitioners is merited on the facts as found by the trial judge, which support the legal conclusions, there is no need to modify the remedy.

III. Conclusion

Agencies are allowed to amplify a statute, as by regulation, but not to exceed it. In this controversy, the challenged statute omits a means of providing liberal access to compliant photo ID, as is necessary to survive constitutional attack. Its patent infirmities do not survive strict scrutiny. Here, the evidence showed the photo ID provisions at issue deprive numerous electors of their fundamental right to vote, so vital to our democracy. This justifies the Determination.

This standard of review applicable to a verdict following a non-jury trial is limited to determining whether the findings of the trial court are supported by competent evidence and whether the trial judge erred in the application of law. M & D Props., Inc. v. Borough of Port Vue, 893 A.2d 858 (Pa. Cmwlth. 2006). Additionally, findings of the trial judge in a non-jury case must be given the same weight and effect on appeal as a jury verdict, and will not be disturbed absent clear legal error or abuse of discretion. Id.

Respectfully, the Court proffers that the trial judge's findings are supported by the sizeable evidentiary record generated in this case, over the course of three sets of hearings. Further, the Court poses that the trial judge did not err in applying the statutory construction principles and our state Constitution in such a manner as to protect the fundamental right to vote.

Regardless, this Court submits that Respondents failed to properly specify how they preserved the alleged errors, and thus waived these grounds. Accordingly, the appeal should be quashed. Dilliplaine.

Discerning no error necessitating post-trial relief, the Motion is denied and judgment is entered for Petitioners.

Bernard L. McGinley

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viviette Applewhite; Wilola Shinholster Lee; Grover Freeland; Gloria Cuttino; Nadine Marsh; Dorothy Barksdale; Bea Bookler; Joyce Block; Henrietta Kay Dickerson; Devra Mirel ("Asher") Schor; the League of Women Voters of Pennsylvania; National Association for the Advancement of Colored People, Pennsylvania State Conference; Homeless Advocacy Project, Petitioners	:	
v.	:	No. 330 M.D. 2012
The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carole Aichele, in her capacity as Secretary of the Commonwealth, Respondents	:	

ORDER & JUDGMENT

AND NOW, this 28th day of April, 2014, upon consideration of Respondents' Post-Trial Motion filed pursuant to Pa. R.C.P. No. 227.1, and both parties' briefing of same, Respondents' motion is **DENIED**, and judgment in Petitioners' favor is hereby **ENTERED**.

Accordingly, the preliminary injunction is **DISSOLVED**, and the permanent injunction pursuant to the order dated January 17, 2014, is in effect.

Certified from the Record

APR 2 8 2014

and Order Exit

Bernard L. McGinley

BERNARD L. McGINLEY, Judge