IN THE TENNESSEE COURT OF APPEALS
MIDDLE DIVISION

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CITY OF MEMPHIS, TENNESSEE, DAPHNE TURNER-GOLDEN, And SULLISTINE BELL, Citizens and Residents Of Memphis, Tennessee,

Plaintiffs/Appellants,

v.

TRE HARGETT, Secretary of State; ROBERT COOPER, JR., Attorney General; MARK GOINS, Director of Elections, all in their official capacity,

Defendants/Appellees.

Case No. M2012-02141-COA-R3-CV

Appeal from the Final Judgment of the Chancery Court for Davidson County, Case No. 12-1269-II

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

"[A]nd there shall be no other qualifications attached to the right of suffrage." TENN. CONST. art. IV § 1. This absolute constitutional command limits the qualifications for the right to vote in Tennessee to four. A voter must be:

1) At least 18 years of age;
2) A citizen of the United States;
3) A resident of Tennessee for a prescribed period; and
4) Duly registered in the county of residence for a prescribed period.

Despite this express limitation on the State's power to impose further qualifications, the State of Tennessee has sought to do just that. By its express terms, Tenn. Code Ann. § 2-7-112(c) grafts a fifth qualification onto the right of suffrage: possession of a state or Federal identification card bearing a photograph of the holder. The statute also creates two classifications of constitutionally qualified voters: those with and those without the requisite photo identification. Without such a card, voters who meet all four of the constitutional qualifications to vote are denied — and have been denied — that fundamental right.

In response to this extra qualification, the City of Memphis has tried to ease the burden on its constitutionally qualified residents by making photo library cards available at no cost. But the State, through Defendant Mark Goins, expressly instructed the Shelby County Election Commission not to accept such cards as proof of identity for voting, even though they meet all of the statutory requirements. The State's message throughout this process has been clear: the fundamental right to vote, granted Tennesseans by their Constitution, must yield to the State's efforts to stifle a non-existent threat.

Accordingly, Plaintiffs — Ms. Daphne Turner-Golden; Ms. Sullistine Bell; and the City of Memphis, Tennessee — brought this action on behalf of themselves, and for the sake of thousands of other similarly situated Tennesseans, to ensure that the State honors its

Constitutional restraints and is not simply permitted to add additional qualifications on the right to vote with impunity.

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I. REFERENCES TO THE PARTIES

The Plaintiffs below, the appellants here, will either be identified as Plaintiffs or, where necessary to distinguish one from another, by name. Likewise, the Defendants below, the appellees here, will either be identified as the Defendants or, where necessary to distinguish one from another, by name.

II. ISSUES PRESENTED FOR REVIEW

Appellants, Plaintiffs below, present the following issues for review by the Court of Appeals:

1. Do Plaintiffs Bell, Turner-Golden, and/or City of Memphis, Tennessee have standing to seek a declaratory judgment that Tennessee's photo ID requirement for voting, Tenn. Code Ann. § 2-7-112(c), is unconstitutional?

2. Do Plaintiffs Bell, Turner-Golden and/or City of Memphis have standing to seek injunctive relief challenging Tennessee's photo ID requirement for voting contained in Tenn. Code Ann. § 2-7-112(c)?

3. Does Tennessee's photo ID requirement facially violate the Tennessee Constitution, specifically Article I, Section 5; Article IV, Section 1; and/or Article XI, Sec. 8?

4. Does Tennessee's photo ID requirement, as applied by Defendants, violate the Tennessee Constitution — specifically Article I, Section 5; Article IV, Section 1; or Article XI, Sec. 8 — when the State knows that enforcement will disenfranchise constitutionally qualified voters?

5. Is the City of Memphis a "branch, department, agency or entity of this State," capable of issuing "evidence of identification" for voting under Tenn. Code Ann. § 2-7-112(c)?

III. STANDARD OF REVIEW

Both Constitutional interpretation and construction of a statute and its application to the facts of a case are issues of law, therefore, the standard of review is de novo without any presumption of correctness given to the trial court's conclusions of law. *State v. Burns,* 205 S.W.3d 412, 414 (Tenn. 2006); *Daron v. Dept. of Correction,* 44 S.W.3d 478, 480 (Tenn. 2001).

IV. STATEMENT OF THE CASE

This is an action, pursuant to Tennessee's Declaratory Judgment Act, Tenn. Code Ann. § 29-14-10, to have Tennessee's photo ID requirement for voting declared unconstitutional under Article I, Section 5; Article IV, Section 1; and Article XI, Section 8 of the Tennessee Constitution. Plaintiffs assert that this photo ID requirement, which is codified as Tenn. Code Ann. § 2-7-112(c), unconstitutionally establishes an additional qualification on the right to vote, acts to deny the right of suffrage to persons entitled thereto, and unconstitutionally classifies Tennesseans on the basis of their possession of acceptable photo identification, making the statute unconstitutional on its face. In the alternative, Plaintiffs assert that, even if the Photo ID requirement is not facially unconstitutional, it is unconstitutional as Defendants have applied it to Plaintiffs Bell, Turner-Golden, and other economically disadvantaged State residents. Additionally, Defendants have unlawfully rejected photo identification cards issued by the Memphis Public Library System as acceptable proof of identification for voting, despite the fact that the City of Memphis falls within the statute's definition of a "branch, department, agency or entity of this State," capable of issuing "evidence of identification" for voting under Tenn. Code Ann. § 2-7-112(c).

Plaintiffs City of Memphis and Daphne Turner-Golden first filed suit in federal court — in the Middle District of Tennessee — on July 24, 2012, seeking declaratory judgment that the

City of Memphis' library cards are a valid form of identification for voting and a preliminary and permanent injunction to prevent Defendants from refusing such cards as proof of identification at the polling place. Ms. Sullistine Bell joined the case as an additional plaintiff on July 30, 2012. The court conducted a hearing on Plaintiffs' motion for preliminary injunction, and ultimately denied that motion on July 31, 2012.

Plaintiffs then submitted a motion for leave to file a second amended complaint, raising a facial challenge to the Voter ID statute under the Tennessee Constitution. The court indicated to the parties that it was inclined to deny such an amendment, and questioned why Plaintiffs had not filed in chancery court. Plaintiffs then voluntarily dismissed their federal complaint on August 8, 2012, and filed a verified complaint in Davidson County Chancery Court on August 31, 2012. This verified complaint sought declaratory and injunctive relief against Defendants on grounds that the Tennessee voter ID requirement violates Art. I, Sec. 5; Art. IV, Sec. 1; and Art. XI, Sec. 8 of the Tennessee Constitution — both facially and as applied — and that the City of Memphis is a branch, department, agency, or entity of this State capable of issuing "evidence of identification" for voting.

In light of the upcoming Presidential Election on November 6, 2012, and the limited need for discovery, Plaintiffs filed a motion for an expedited temporary injunction hearing on September 7, 2012, which the court granted on September 13, 2012, setting a hearing date of September 26, 2012. Between September 13 and September 26, Plaintiffs moved the court to make the September 26, 2012 hearing a final hearing on the merits, rather than limiting it to the issue of temporary injunction. The court declined to rule on this question prior to the hearing, but determined during the hearing itself that the hearing was to be a final hearing on the merits.

The Chancellor ultimately ruled that none of the Plaintiffs had standing to challenge Tennessee's photo ID requirement for voting, and further ruled that, even if Plaintiffs did have standing, their facial and as-applied challenges failed to establish any violation of the Tennessee Constitution. It is from these rulings that Plaintiffs currently appeal.

V. STATEMENT OF THE FACTS

A. The 2011 Voter ID Act

There is no meaningful dispute as to the underlying facts in the litigation.

During the 2011 legislative session, the Tennessee General Assembly enacted certain amendments to Tenn. Code Ann. § 2-7-112, related to the verification of a voter's identity at the polling place. As a result, as of January 1, 2012, most Tennessee voters are required to present at their polling places a state or federal identification card bearing a photograph of the voter and that otherwise satisfies the requirements of Tenn. Code Ann. § 2-7-112(c).

Tenn. Code Ann. § 2-7-112(c) states in its entirety:

> **(c)** For purposes of verifying the person's identification on the application for ballot, "evidence of identification" shall be:
>
> **(1)** A Tennessee driver license;
>
> **(2) (A)** Except as provided in subdivision (c)(2)(B) a valid identification card issued by a branch, department, agency or entity of this state, any other state, or the United States authorized by law to issue personal identification; provided, that such identification card contains a photograph of the voter;
> **(B)** An identification card issued to a student by an institution of higher education containing a photograph of a student shall not be evidence of identification purposes of verifying the person's identification on the application for ballot;
>
> **(3)** A valid identification card issued pursuant to § 55-50-336;
>
> **(4)** A valid United States passport;
>
> **(5)** A valid employee identification card issued by a branch, department, agency or entity of this state, any other state, of the United States authorized

> by law to issue employee identification; provided, that such identification card contains a photograph of the voter; or
>
> **(6)** A valid United States military identification card; provided, that such identification card contains a photograph of the voter.

Any voter who fails to present such an identification card at the polling place is prohibited from casting a regular ballot, and is instead permitted to cast only a provisional ballot. Then, within two business days after the election, the provisional voter will be required to present, at the voter's local Election Commission office, a valid photo identification, as specified in the statute, in order to have that provisional ballot counted. Any voter who fails to do so will not have his or her vote counted.

Pursuant to this statute, a photo ID card will be accepted by state election officials as valid voter identification so long as it is issued by a "branch, department, agency, or entity of this state," of ***any other*** state, or the United States. Additionally, the Tennessee Secretary of State and State Coordinator of Elections have interpreted this law to include not only "current" photo identification cards but "expired" photo identification cards from ANY state.

As a result, the State of Tennessee will accept expired New York real estate licenses as proof of identity for voting. There are no specific requirements for proving residency or identity or legal presence for the issuance of such identification. (Affidavit of Regina Morrison Newman (Hereinafter "Newman Affidavit") ¶ 6).[1] Similarly, the State of Tennessee will accept expired Alabama boating licenses as proof of identity for voting, even though Alabama does not require

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[1] On Friday, October 12, at approximately 4:00 p.m. Plaintiffs' counsel phoned the Court of Appeals Clerk's office to ask whether the chancery court record was available to be checked out. The clerk responded that although the record had been submitted, it had not been formally filed yet, and would not be available until Monday or Tuesday. Accordingly, since Plaintiffs are unable to cite to the appellate record, all record citations in this brief employ the same citation format that Plaintiffs used in chancery court.

applicants to submit any proof of identity, residency, legal presence, or even competence as a boat operator. (Newman Affidavit ¶ 5).

The state law would even include an emergency medical service provider's card issued by the State of North Dakota, even though there is no requirement for proof of residency and the applicant can simply upload his or her own picture to be included on the card. (*Id.* ¶ 7).

On the other hand, the State specifically ***excludes*** photo identification cards issued by Tennessee institutions of higher education to their students. The legislature's only stated justification for this exclusion was the unproven contention that students could easily "alter" them, for some unknown and unstated reason.

B. "Free" Photo IDs

In April, 2011, the Tennessee Attorney General issued an opinion, concluding that House Bill 0007/ Senate Bill 0016 — the bill that the general assembly would ultimately enact as the 2011 Voter ID Act — was probably unconstitutional as written. Tenn. Op. Atty. Gen. No. 11-34 (2011). In particular, the Attorney General noted the fact that the Tennessee statute did not make any provision for issuing free photo IDs, and that in the absence of such a provision, the photo ID requirement would amount to an unconstitutional poll tax. (*Id.*)

In response, the General Assembly enacted a separate provision, Public Law Chapter 423, providing for free photo IDs to any person willing to affirm in writing that the individual: (1) does not have a valid government-issued photo ID; (2) is a registered voter in the state; and (3) needs the photo ID for voting purposes.[2] Tenn. Code Ann. § 55-50-336.

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[2] Unless the applicant affirmatively states that the photo identification card is ONLY for voting, the Department of Driver Services will charge the applicant $7.50, per Tenn. Code Ann. § 55-50-323(a)(2)(J)(i).

This new law, however, did not change the existing requirement that an applicant provide acceptable proof of residency and identity. In particular, an applicant for a "free" photo ID must still provide (1) primary and secondary proof of identity and legal presence — typically a certified birth certificate — and (2) two proofs of Tennessee residency, such as an original utility bill, vehicle registration or bank statement. In Tennessee, the Department of Health issues such birth certificates, at a cost of $15. And the Department of Safety is the only agency authorized to issue these "free" photo IDs, through its Driver Service Centers. At present, there are only five Driver Service Centers in Shelby County, *see* Tennessee Dep't of Safety and Homeland Security, Driver Service Locations by County, http://www.tn.gov/safety/driverlicense/dllocationdev.shtml#shelby, and only four of these issue photo IDs for voting. Fifty-three counties in Tennessee have no full service Driver Service Centers at all. *See* Tennessee Dep't of Safety and Homeland Security, Driver Service Center Locations, http://www.tn.gov/safety/driverlicense/dlmap2.shtml.

C. Plaintiffs' Experiences with the 2011 Photo ID Requirement

1. City of Memphis

Plaintiff, City of Memphis, has a deep and abiding interest in helping its citizens to vote. That interest, unfortunately, has not always been shared by the State of Tennessee. Given its role as a center of African-American political and economic power,[3] Memphis was disproportionately burdened by the State's discriminatory voting laws in the late Nineteenth and early Twentieth centuries. *See, e.g., Kuntz v. Davidson County*, 74 Tenn. 65, 67 (Tenn. 1880) ("By art. 4, sec. 1, the Constitution further provides again for the payment of poll taxes by all

[3] According to the United States Census Bureau, the non-white population of Memphis was 70.4%, compared to 22.4% for Tennessee as a whole. (*See* Memphis QuickFacts from the U.S. Census Bureau, *available at* http://quickfacts.census.gov/qfd/states/47/4748000.html).

males citizens of the State within such ages as may be prescribed by law . . . ."). While such explicit forms of discrimination have been abolished, many of Memphis' residents remain socially and economically disadvantaged,[4] and therefore remain susceptible to more subtle forms of discrimination and voter suppression. One of these more subtle forms is the State's recently-enacted photo ID requirement for voting. (*See* Deposition of Herman Morris, Jr., Sept. 18, 2012 (hereinafter "Morris Depo.") at 8:12-15) ("It [the statute] deprives them or puts an additional barrier between the citizens of Memphis and the exercise of their constitutional right to cast their vote.").

In light of this history, and concerned that Tennessee's voter ID law would effectively disenfranchise many of its disadvantaged residents, Memphis city officials began searching for ways to facilitate its citizens' access to valid photo identification, so as to maximize those citizens' constitutionally protected right to vote. (*Id.* at 12:16-13:16). Ultimately, the City implemented a plan through its library system and began issuing free photo identification cards to city residents aged 18 and over who requested them. (*Id.* at 24:7-24:17). The cards issued through this program contain a photograph of the owner, along with the owner's name and address. The back of the card contains a space for the signature of the owner and contains a bar code which identifies the card holder. (Affidavit of Elisabeth McCloy ¶ 7).

While the State Driver Service Centers have only four locations in Shelby County capable of issuing free photo identification cards for voting, the Memphis Public Library has 18 different branch locations within the County. (Deposition of Elisabeth McCloy, Sept. 18, 2012 (hereinafter "McCloy Depo.") at 46:14-15). The City of Memphis estimates it has issued such

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[4] Between 2006 and 2010, 25.4% of Memphis residents lived below the poverty level, compared to 16.5% statewide. (*See* Memphis QuickFacts from the U.S. Census Bureau)

cards to over 1750 of its citizens. (McCloy Depo. at 39:16-23).[5] For at least some of those card holders, the Memphis photo library card is the only form of photographic identification they possess. (McCloy Depo. at 40:19-41:4).

However, on or about July 10, 2012, Defendant Mark Goins, State Coordinator of Elections, declared that Tennessee would not recognize the City of Memphis' library cards as a valid form of voter identification, and he issued instructions to that effect to the Shelby County Election Commission. (Morris Depo. at 33:4-16).

Later, in response to a letter from several members of the General Assembly, Defendant Goins acknowledged that during the August 2012 primary election, 277 Tennesseans who met all the qualifications for exercise of the franchise according to Article IV, Section 1 of the Tennessee Constitution were allowed to cast only provisional ballots. Of those 277, 162, over fifty-eight percent, were unable to present acceptable photo ID by the required deadline and their votes were never counted. (*See* Aug. 14, 2012 Letter of Mark Goins).

Plaintiffs Daphne Turner-Golden and Sullistine Bell are among those 162 disenfranchised voters who were constitutionally qualified to vote in the August 2012 Election. Plaintiffs Turner-Golden and Bell both possess photo library cards issued by the City of Memphis, and neither one possesses any other form of photo identification that would have permitted them to vote under Tenn. Code Ann. § 2-7-112(c).

2. Daphne Turner-Golden

Plaintiff Daphne Turner-Golden is a lifelong resident of the City of Memphis, and has been voting regularly for over 30 years. (Deposition of Daphne Turner-Golden, Sept. 18, 2012 (hereinafter "Turner-Golden Depo.") at 6:23-7:3, 30:9-14). She is also the holder of a

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[5] Ms. McCloy, in her deposition, estimated around 1730. That number has increased during the intervening period.

photo library card from the Memphis Public Library. (*Id.* at 21:19-21). Ms. Turner-Golden previously possessed a Tennessee non-driver's photo ID, but that ID was stolen, along with her purse, in June of 2012, and she has not had the chance to obtain a new one. (*Id.* at 17:17-23, 31:8-11). Ms. Turner-Golden attends a career training course during the day, and is also responsible for two young grandchildren over whom she has custody, one of whom is a special needs child. (*Id.* at 9:15-20, 11:5-7).

On July 23, 2012, Plaintiff Turner-Golden went to the early voting precinct at Mississippi Blvd. Church. (*Id.* 29:23-30:4); (Deposition of Robert White, Sept. 18, 2012) (hereinafter "White Depo.") at 8:22-9:4). When she arrived at the voting precinct she completed and signed an application for a ballot and presented the application, along with her photo library card, to the precinct register in order to receive her ballot to vote. (White Depo. at 14:11-14). The precinct register refused to give the Plaintiff a ballot on the basis that the Plaintiff did not have an "appropriate" Photo ID card and was therefore unqualified to vote in that election. (*Id.* at 15:1-7). Ms. Turner-Golden was not offered a provisional ballot. (*Id.* at 16:22-17:3). After going to the Greater Lewis Church precinct and again being refused a ballot, an election official did finally give Ms. Turner-Golden a provisional ballot, but only after that election official tried to discourage Ms. Turner-Golden from voting provisionally several different times. In fact, Ms. Turner-Golden had to insist on a provisional ballot for 30 to 40 minutes before she was finally offered one. (*Id.* at 18:15-20). Plaintiff Turner-Golden was unable to present other photographic identification to the Shelby County Election Commission by August 6, 2012 — since she had none — and, as a result, her ballot was never counted.

3. Sullistine Bell

Plaintiff Sullistine Bell is a 70 year old Memphis resident and is also a holder of a photo library card from the Memphis Public Library. Plaintiff Bell has a Tennessee driver's license, but it does not contain her photograph. (Affidavit of Sullistine Bell ¶¶ 1-3).

On July 28, 2012, Plaintiff Bell was able to secure a ride to the South Memphis branch of the Memphis Library System in order to obtain a photo identification card. (White Depo. at 25:4-10). Plaintiff Bell obtained this photo identification from the library by showing her Tennessee non-photo driver's license, two bills identifying her residence, and providing her Social Security number. (Bell Affidavit ¶ 3). The entire process took only a few minutes. (*Id.*) Plaintiff Bell then secured transportation to the Mt. Zion Church, an early voting location in Memphis, in order to cast her vote. (White Depo. at 28:18-28). Upon attempting to vote, Plaintiff Bell was informed by Shelby County Election Commission officials that her library photo identification card was not sufficient to allow her to vote. (*Id.* at 29:19-24). She was informed by these officials that she would only be able to vote a provisional paper ballot. She was also informed that she needed to obtain valid identification before August 6, 2012 and provide such identification to the Shelby County Election Commission in order to have her provisionally cast ballot counted. (*Id.* at 30:21-24). Because of the difficulty in doing so, Plaintiff Bell was unable to obtain such identification prior to August 6, 2012, and her ballot was not counted.

4. Other Tennesseans Harmed by the Law

Though the named individual Plaintiffs in this suit are both residents of Memphis, it is important to note that qualified voters across the State have been and will continue to be harmed by Tennessee's Photo ID requirement for voting.

For example, on September 14, 2012, the Knoxville News Sentinel reported that Libby Miller, a "mentally challenged" 60 year-old who had voted in every election since registering at age 18, was turned away from the polls in the August, 2012 election for lack of a state-issued photo ID. Tom Humphrey, *Rejected as Voter, Knox Woman has "Wild-Goose Chase" to get Photo ID*, KNOXVILLE NEWS SENTINEL, Sept. 14, 2012, *available at* http://www.knoxnews.com/news/2012/sep/14/rejected-as-voter-knox-woman-has-wild-goose-to/?partner=RSS. Like Plaintiffs Bell and Turner-Golden, Ms. Miller ***did*** possess a photo-ID — issued by the Knoxville Transportation Authority — but poll workers refused to accept this ID as proof of identity, even though they knew Ms. Miller personally. (*Id.*) Subsequent attempts to obtain an ostensibly free Photo ID from the State, to ensure that Ms. Miller would not be disenfranchised again in November, cost Ms. Miller $13, for an authorized birth certificate, and required her and her family to make separate trips to a state office, the Knoxville Social Security Office, and a local Driver Service Center. (*Id.*)

For constitutionally qualified voters such as Ms. Miller, who must pay money in order to acquire the underlying documents necessary to apply for a "free" photo ID, Tennessee's voter ID requirement is nothing more and nothing less than a poll tax, which is expressly prohibited under Amendment XXIV of the U.S. Constitution.

Furthermore, many elderly voters — who have voted in person all their lives without ever needing a photo ID — have and will continue to be disenfranchised by the law. Ms. Ada Mitchell, for example, did not have any State or Federal photo identification in time for the August, 2012 Tennessee election. Knowing that her ballot would not be counted, she simply stayed home on Election Day. (Ada Mitchell Affidavit ¶ 5). Although Ms. Mitchell was eligible to vote absentee, she did not learn of that option until ***after*** the August election. (*Id.* ¶ 6). In that

respect, Ms. Mitchell's experience shines a light on yet another class of disenfranchised voters — those frustrated or confused by the new law, who give up even attempting to vote.

VI. SUMMARY OF THE ARGUMENT

The trial court wrongly concluded that the Plaintiffs lack standing to seek either declaratory or injunctive relief. Both Ms. Daphne Turner-Golden and Sullistine Bell were injured when they were denied their fundamental right to vote because of the new statutory requirement of certain limited forms of photographic identification which they lacked. Declaratory and injunctive relief will redress that injury, and are the only forms of relief that will.

Pursuant to the express terms of the Declaratory Judgment Act, and specifically Tenn. Code Ann. § 29-14-107(b), the City of Memphis has standing to seek the declaratory relief it seeks as the Defendants have challenged the validity of a municipal franchise, i.e., the issuance of photographic library cards by the City's library system for the purpose of satisfying "evidence of identification" in accord with Tenn. Code Ann. § 2-7-112(c).

The trial court also wrongly concluded that the Plaintiffs were not entitled to declaratory relief, holding that Tenn. Code Ann. § 2-7-112(c) was constitutional. The trial court overlooked or ignored the plain language of the Tennessee Constitution's powerful protections of the right to vote as contained in Article I, Section 5, Article IV, Section 1, and Article XI, Section 8.

Tenn. Code Ann. § 2-7-112(c) unconstitutionally grafts a fifth qualification onto the right to vote. A qualification is anything that is legally necessary to make one eligible to perform a public function. Since possession of an acceptable photo identification card is necessary to make one eligible to perform the public function of voting, it is a qualification, and is therefore

unconstitutional under Article IV, Section 1 which spells out four qualifications and then declares there shall be no *other* qualification.

It is unconstitutional under Article I, Section 5 because it acts to deny the right of suffrage to those who are constitutionally qualified, and thus entitled to vote.

The statute is unconstitutional as well because it creates qualifications of constitutionally qualified voters based on the possession, or lack thereof, of a photographic id. Because it creates these classification the court must apply the strict scrutiny standard to its review. The State cannot, and has not, met its burden of showing a clear, present, and grave danger of voter fraud, or that the statutory "solution" is narrowly tailored to meet any such danger.

Even if the statute could pass constitutional muster in a facial challenge, it is unconstitutional as applied to these Plaintiffs. The State should be enjoined from enforcing it unless and until it can make an affirmative showing that no constitutionally qualified voters will be disenfranchised.

This court should also declare that the photographic library cards issued to adult Memphis citizens through the City's library system are valid "evidence of identification" because the statute expressly declares that any "agency or entity of this State" is legally able to issue such cards and the Tennessee Supreme Court has held that municipalities are "agencies of the state."

The State's argument that municipalities are excluded is belied by the fact that the statute contains an exclusion which does not address municipalities at all, but merely excludes student IDs issued by institutions of higher learning.

VII. ARGUMENT

A. PLAINTIFFS CITY OF MEMPHIS, SULLISTINE BELL, AND DAPHNE-TURNER GOLDEN ALL HAVE STANDING TO PURSUE THE RELIEF THEY SEEK

In her Final Order of October 9, 2012, Chancellor McCoy specifically held that Plaintiffs did not have standing to challenge the facial constitutionality of Tennessee's photo ID requirement for voting, and that they further lacked standing to seek declaratory or injunctive relief on any partial or as-applied basis. (*See* Chancery Court's Oct. 9, 2012 Order, ¶¶ 3-7).

Tennessee courts have long recognized that private citizens "cannot maintain an action complaining of the wrongful acts of public officials unless such private citizens aver special interest or a special injury not common to the public generally." *Bennett v. Stutts*, 521 S.W.2d 575, 576 (Tenn. 1975). Accordingly, the plaintiff must demonstrate that he or she has standing to pursue the desired relief. This requirement, in turn, has three distinct prongs. The plaintiff must show (1) that the plaintiff has "sustained a distinct and palpable injury;" (2) that the injury "was caused by the challenged conduct;" and (3) that the injury "is apt to be redressed by a remedy that the court is prepared to give." *City of Chattanooga v. Davis*, 54, S.W.3d 248, 280 (Tenn. 2011).

In Tennessee, a trial court's decision on whether a particular party has standing is considered a conclusion of law. *Dossett v. City of Kingsport*, 258 S.W.3d 139, 143 (Tenn. Ct. App. 2007). Accordingly, the appropriate standard of review on appeal is "de novo upon the record with no presumption of correctness accompanying the trial court's conclusions of law." *Id.*; *Cox v. Shell Oil Co.*, 196 S.W.3d 747, 758 (Tenn. Ct. App. 2005).

As the following analysis will show, the trial court erred in its conclusion that Plaintiffs Turner-Golden, Bell, and City of Memphis lack standing. Because the positions and interests of

Ms. Bell and Ms. Turner-Golden are somewhat different from those of the City of Memphis, Plaintiffs will address the two separately, starting with Ms. Bell and Ms. Turner Golden.

1. Plaintiff Bell and Plaintiff Turner-Golden both Satisfy the Requirements of Standing

Defendants have argued, and the chancery court appears to have agreed, that Plaintiffs Bell and Turner-Golden failed to show distinct or palpable injury, as neither of them were actually denied the right to vote. (*See* Hearing Transcript and Court Ruling, Sept. 26, 2012 at 9:5-9:20). This conclusion, however, is clearly mistaken.

The chancery court expressly accepted the timeline set forth in Defendants' response to Plaintiff's Motion for Temporary Injunction, (*id.* at 7:5-7:17), and that timeline, in turn, never disputed Plaintiffs' claim that Ms. Turner-Golden and Ms. Bell attempted to vote using Memphis photo library cards, were denied, and never had their ballots counted. This is ***precisely*** the type of discrete, particularized injury courts look for in determining whether a plaintiff has standing. *Wood v. Metro. Nashville & Davidson County Gov't*, 196 S.W.3d 152, 158 (Tenn. Ct. App. 2005) ("The sort of distinct and palpable injury that will create standing must be an injury to a recognized legal right or interest.").

Here, there is no dispute that the right to vote, and to have one's vote counted, are fundamental legal rights and interests. *May v. Carlton*, 245 S.W.3d 340, 346 (Tenn. 2008) ("Our federal courts have described 'the right to vote [a]s . . . a fundamental right — indeed, the most fundamental right of all.'") (quoting *Blumstein v. Ellington*, 337 F.Supp 323, 329 (M.D. Tenn. 1970). There is similarly no dispute that Tennessee's photo ID requirement creates ***some*** burden upon that right, one that injured Plaintiffs Bell and Turner-Golden by preventing them from having their ballots counted in the August 2012 election.

The chancellor concluded that these burdens did not rise to the level of outright constitutional violations. However, that conclusion improperly bootstraps the substantive merits of the case into the initial standing analysis. *See Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992) ("The primary focus of a standing inquiry is on the party, not on the merits of the claim. Thus, a party's standing does not depend on the likelihood of success of its claim on the merits."). While the parties obviously disagree about whether the photo ID requirement violates Plaintiffs' constitutional rights, there is no question that the statute has negatively impacted those rights, creating a distinct and palpable injury sufficient to confer standing. Nor is there any question that the claimed injury — denial of the right to vote — is real, and not just "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted). Plaintiffs, after all, are not relying on their status as voters, but on the fact that they were ***personally*** prevented from having their votes counted. *See, e.g.*, *Walker v. Dunn*, 498 S.W.2d 102, 104-105 (Tenn. 1972) (finding a plaintiff had standing based on his claim that an emergency session of the General Assembly deprived him of his right to "indirectly" vote on a U.S. Constitutional amendment through a vote for state legislator); *Am. Civil Liberties Union of Tennessee v. Darnell*, 195 S.W.3d 612, 624 (Tenn. 2006) ("[S]tanding in *Walker* was predicated upon a distinct, concrete injury in fact—denial of the right to vote. Standing was not predicated upon the *Walker* plaintiffs' status as voters.").

Once injury is established, the second prong of standing — causation — becomes obvious. As courts have noted, the basic question under this prong is whether "the line of causation between the illegal conduct and injury [is] too attenuated?" *Allen v. Wright*, 468 U.S. 737, 752 (1984). With respect to Ms. Bell and Ms. Turner-Golden, the answer is clearly no.

The undisputed facts in the record show that on July 23, 2012, Plaintiff Turner-Golden attempted to vote early in the August Tennessee election. (Turner-Golden Depo. at 29:23-30:4). The facts show that Ms. Turner-Golden possessed no photo ID at that time other than her Memphis photo library card. (*Id.* at 17:17-23, 31:8-11). The facts show that Ms. Turner-Golden was only permitted to cast a provisional ballot, because she had no "acceptable" proof of identity. (*Id.* at 18:15-20). And the facts show that that her provisional ballot was never counted.

Similarly, with respect to Ms. Bell, the facts show that she attempted to vote in person on July 28, 2012, possessing no photo ID but her Memphis photo library card, but was prevented from doing so, for lack of "acceptable" voter identification. (White Depo. at 29:19-24).

Defendants have never disputed that Plaintiffs Bell and Turner-Golden are constitutionally qualified voters under TENN. CONST. art. IV § 1. Accordingly, if there had not been a photo ID requirement in place for voting, or if Defendants had been willing to accept Plaintiffs' photo library cards as proof of identity, then Plaintiffs' ballots would have been counted. That makes Plaintiffs' experiences clear-cut examples of traditional, but-for causation. *See Hale v. Ostrow*, 166 S.W.3d 713, 718 (Tenn. 2005) (explaining that under but-for causation, "we must ask whether the plaintiff's injury would have happened "but-for" the defendants' act. If not, then the defendants' conduct is a cause in fact of the plaintiff's injury").

Finally, with regard to the third prong of standing, Plaintiffs Bell and Turner-Golden satisfy the requirement that their injury be redressible.

The U.S. Supreme Court addressed redressibility at some length in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *see also Marceaux v. Sundquist*, 107 S.W.3d 527, 531-32 (Tenn.

Ct. App. 2002) (specifically citing and employing *Lujan*'s formulation of standing). Specifically, the *Lujan* Court noted that

> [w]hen the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, ***there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.*** When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed.

Id. at 561-62 (emphasis supplied). Here, Plaintiffs Bell and Turner-Golden were clearly the objects of defendants' actions — namely, the enactment and enforcement of the photo ID requirement for voting. Furthermore, the burden placed upon plaintiffs has been a ***continuing one***, as there are no facts in the record suggesting that either plaintiff has acquired "acceptable" photo ID since the August 2012 Election. Accordingly, a favorable ruling from this Court would permit Plaintiffs Bell and Turner-Golden to vote in the next election without having to acquire new photo identification.

Therefore, having satisfied the requirements of (1) particularized injury, (2) causation, and (3) redressibility, Plaintiffs Bell and Turner-Golden have standing to pursue the declaratory and injunctive relief they seek.

2. Plaintiff City of Memphis has Standing to Seek a Declaratory Judgment

In addition to any standing Memphis may have to challenge the constitutionality of the Photo ID statute, under the same analysis outlined above with respect to Plaintiffs Turner-Golden and Bell, the City clearly has standing to seek declaratory judgment with respect to its own right to ***issue*** photo identification cards for voting under that statute.

Under Tenn. Code Ann. § 29-14-107(b), "in any proceeding which involves the validity of a municipal ordinance or franchise, such municipality ***shall*** be made a party, and shall be entitled to be heard" (emphasis supplied). Tennessee law further states that the Declaratory Judgment Act's purpose "is to settle and afford relief from uncertainty and insecurity with respect to rights; status; and other legal relations; ***and is to be liberally construed and administered."*** *Id.* § 29-14-113 (emphasis supplied); *see also Tennessee Farmers Mut. Ins. Co. v. Hammond*, 290 S.W.2d 860, 862 (Tenn. 1956) (noting that the Declaratory Judgment Act "should be liberally construed in favor of the person seeking relief in a proper case to the end that rights and interests be expeditiously determined").

Here, the lingering uncertainty about whether the City of Memphis is a "branch, department, agency, or entity of this state" capable of issuing photo ID for voting under Tenn. Code Ann. § 2-7-112(c)(2)(B) is more than sufficient to create standing for the City to seek declaratory judgment. The Tennessee Supreme Court has dealt with this very issue before and has ruled that public entities do have standing to determine their particular rights and responsibilities under an election statute.

Specifically, in *Wallace v. Lewallen*, residents of Anderson County sued three members of the Board of the County Elections Commission to prevent the Board from certifying results from a local election. 210 S.W.2d 684, 685 (Tenn. 1948). The plaintiffs in that case asserted that the election was invalid, as one district within the county had kept polls open until 7:00pm, pursuant to a Private Act, but in seeming defiance of the general law, which stated that polls must close at 4:00pm. *Id.* In response, one of the election commissioners filed suit for declaratory judgment, to determine whether it was the Private Act or the general law that set forth his duties with respect to voting hours on Election Day. The chancery court initially

refused to hear the Commissioner's claim, but the Tennessee Supreme Court reversed, specifically holding that "the right of J. M. Underwood, as an Election Commissioner, ***to seek a declaratory decree is unquestioned***. His right to such a decree under Code § 8845 is of vital importance to him as a guide to his official conduct in holding future elections in Anderson County." *Id.*

Here, the City of Memphis is in a similar position to the Anderson County Election Commissioner, and is similarly entitled to pursue declaratory judgment. The City believes that it is an entity or agency of this State, capable of issuing its residents photo ID cards for voting – through a franchise the City has granted to the Memphis Public Library System. Furthermore, because of its commitment to helping its residents participate in the electoral process, the City has a strong interest in advertising and publicizing the fact that Memphis photo library cards can be used for voting. Defendant Goins, in contrast, has determined that the Memphis photo library cards are ***not*** an acceptable form of identification for voting, and has ordered the Shelby County Election Commission not to accept them at the polls. The statute itself does not define the terms "branch, department, agency or entity of this state." Accordingly, the City of Memphis, like the Commissioner in *Wallace*, has standing to bring a declaratory judgment action to determine the proper scope of its rights and responsibilities with respect to helping its residents to vote.[6]

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[6] Though not directly related to the question of standing, Plaintiffs also note that the *Wallace* court specifically noted that unusual circumstances can warrant a departure from the general law in order to facilitate full participation in an election. Specifically, the Court concluded that "the Legislature was aware of the fact, due to the heavy increase in population, as well as the nature of the work in 'Atomic research,' that many citizens in the town of Oak Ridge would be deprived of voting unless the time was extended to seven o'clock p.m." *Wallace v. Lewallen*, 210 S.W.2d 684, 686 (Tenn. 1948). Similarly, since Tennessee's photo ID statute is likely to disenfranchise a greater number of Memphis residents than residents of other Tennessee counties, it is proper to resolve any doubt in the legislature's intention with respect to "entities" of this State in favor of the reading the helps to facilitate voter participation.

B. PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF

Under our form of government, the Constitution is the supreme law. Every act in violation of the Constitution is void and the judiciary has both the obligation and the power to so declare. *Williams v. Carr,* 218 Tenn. 564, 578 (Tenn. 1966).

Plaintiffs recognize that this is not a casual undertaking. There is, of course, a presumption in favor of the validity of legislative acts and the courts cannot declare them unconstitutional unless it is clearly shown that they contravene some provision of the Constitution. *Id.* at 578.

Here, the statute in question, Tenn. Code Ann. § 2-7-112(c), violates at least three provisions of the Tennessee Constitution: Article I, Section 5; Article IV, Section 1; and Article XI, Section 8.

Accordingly, in light of these violations, Plaintiffs seek the following:

1. A declaration that Tenn. Code Ann. § 2-7-112(c) is unconstitutional on its face because it denies the right of suffrage to persons entitled thereto, it creates an additional qualification on the right to vote and classifies constitutionally qualified voters on the basis of their possession or not of a "valid" photo identification card;

2. In the alternative, a declaration that enforcement of Tenn. Code Ann. § 2-7-112(c) as the exclusive means of voter identification is unconstitutional unless and until the state can affirmatively show that such enforcement will not disenfranchise constitutionally qualified voters, will not deny the right of suffrage to persons entitled thereto, and/or, will not classify voters on the basis of their possession or not of a valid photo identification card; and

3. A declaration that the photographic library cards issued to certain Memphis citizens through the City's library system meet the definition of "evidence of identification" pursuant to Tenn. Code Ann. § 2-7-112(c)(2)(A).

The words of the Constitutional provisions are powerful and incisive. Article I, Section 5 states:

> The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.
>
> Article IV, Section 1 declares:
>
> > Every person, being eighteen years of age, being a citizen of the United States, being a resident of the state for period of time as prescribed by the General Assembly, and being duly registered in the county of residence for a period of time prior to the day of any election as prescribed by the General Assembly, shall be entitled to vote in all federal, state, and local elections held in the county or district in which such person resides. All such requirements shall be equal and uniform across the state, and there shall be no other qualification attached to the right of suffrage.
> >
> > The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box.

But as powerful and incisive as those words are standing alone, they are even more so when viewed in their proper historical context.

1. The Historical Context of Article I, Section 5 & Article IV, Section 1

The Declaration of Rights in Tennessee's original Constitution of 1796 was found in Article XI. Section V of that Article read as follows: "That elections shall be free and equal." The 1834 Constitution, manifesting the primacy of the Declaration of Rights, moved it from Article XI to Article I, but did not change the language of Section V. This basic constitutional

structure remained in place for nearly 30 years, until Tennessee, like most of the American South, was rocked by the social and political upheavals accompanying the Civil War.

In 1862, nearly all of Tennessee was occupied by the Union army. President Lincoln appointed Andrew Johnson to serve as the state's military governor, which he did with complete and dictatorial power until he was nominated as Lincoln's Vice President in 1864. *Gaskins v. Collins,* 661 S.W.2d 865, 867 (Tenn. 1983).

Johnson's party, the Union party, then held a convention in 1865 during which it passed a resolution purporting to be an amendment to Tennessee's Constitution. The resolution stated, in pertinent part, "The qualification of voters and the limitation of the elective franchise may be determined by the general assembly . . ." Schedule to Amendments of 1865. This resolution had the effect of disenfranchising nearly all of Tennessee voters, as the general assembly used its newfound power to disenfranchise anyone who had voted for or served in the Confederate Government, or in the Confederate Army. Compared to the presidential election of 1860 before the war, when 145,000 votes had been cast in Tennessee, the first general election following the 1865 convention saw only 25,000 votes cast, approximately the number of Union army troops occupying Tennessee at the time. *Id.*

By 1868, however a rift had opened in the Union party, with one side favoring gradual re-enfranchisement, and the other immediate restoration of the right to vote. DeWitt Senter, the acting Governor and leader of the latter wing, won election as Governor that year by a wide margin. *Id.* at 867-868.

The most serious question was how to go about restoring the franchise to ex-Confederates. Although it was acknowledged that simple repeal of the legislative acts might more quickly have accomplished the purpose, some legislative leaders elected with Gov. Senter

believed that only a constitutional convention could adequately ensure that future abuses would be prevented. *Id.* at 868. The idea of a constitutional convention was put to a referendum, and won overwhelmingly. Accordingly, in January 1870, a constitutional convention convened in Nashville. Among the amendments that passed were the words of Article I, Section 5, which are part of our Constitution today. *Id.*

The Tennessee Supreme Court has acknowledged that the phrase "the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto . . ." was formulated by men who had known firsthand the "injustice of retroactive disenfranchisement and [who] were determined to safeguard themselves and future generations from similar acts of repression." *Id.* at 868.

Similarly, for the first time, the phrase "and there shall be no qualification attached to the right of suffrage . . ." appeared as Article IV, Section 1 of the 1870 Constitution. Furthermore, the new constitution contained express limitations on the power of the General Assembly to pass laws regarding exercise of the franchise, declaring that, "The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box." This limitation was also drafted by those with firsthand knowledge of abuse by the legislature.

The 1796 Constitution had been silent on the power of the General Assembly to restrict or manipulate the exercise of the franchise. The Constitution of 1834 included the language, "Laws may be passed excluding from the right of suffrage, persons who may be convicted of infamous crimes." As noted above, however, the 1865 "amendments" purported to give all the power to the General Assembly to prescribe qualifications for voters as well as limitations on the exercise of the right to vote.

Thus, the 1870 Constitution's language, when seen in its proper historical context, provides an express Constitutional right to suffrage which can "never be denied" and sets specific restrictions on the General Assembly's authority to alter or redefine that right.

In 1953, another Constitutional convention put an exclamation point to these limitations. Specifically, it was in 1953 that the current language of Article IV, Section 1 came into being, listing the four constitutional qualifications for voters and slightly altering the 1870 language so that it now reads "and there shall be no *other* qualification attached to the right of suffrage." (emphasis supplied). The language limiting the General Assembly's powers remained unchanged.

2. Tenn. Code Ann. § 2-7-112(c) violates Article IV Section 1

As noted above Article IV, Section 1 of the Tennessee Constitution expressly states that "there shall be no other qualification attached to the right of suffrage," but also recognizes the legislature's power to ensure the "purity of the ballot box." Accordingly, a critical question in this case is whether Defendants' Photo ID requirement constitutes a procedural safeguard for voting — which the Constitution expressly permits — or a qualification on the right to vote — which the Constitution specifically prohibits.

Under the weight of authority in this State, the answer is clearly the latter. While Defendants may argue that the statute is simply a mechanism for preventing voter fraud, such arguments fall short. As early as 1891 the Tennessee Supreme Court recognized that statutes that violate either the "letter or ***spirit*** of article 4 § 1" are a "nullity." *Cook v. State*, 16 S.W. 471, 472 (Tenn. 1891). The *Cook* Court went on to note that while the legislature may attach certain "inconveniences" to the right of suffrage — such as registering ahead of time, living in the jurisdiction for some set period of time, etc . . . — the legislature must still "be reasonable and

just; not imposing impossible or ***oppressive*** conditions, else its legislation will be void." *Id.* (emphasis supplied).

Courts have also noted that there is no bright line between a lawful inconvenience and unconstitutional qualification. In *Trammell v. Griffin*, for example, the Tennessee Supreme Court rejected a plaintiff's assertion that voter registration, by definition, was an unconstitutional qualification on the right to vote. 207 S.W. 726, 727 (Tenn. 1918). The Court further explained, however, that even registration requirements ***can*** rise to the level of qualifications if they actually "impair or abridge the elector's privilege." *Id.* (quoting 9 RULING CASE LAW at 1036).

Similarly, in *Dunn v. Blumstein*, the United States Supreme Court threw out Tennessee's requirement that would-be voters reside in Tennessee for one year, and in their respective counties for three months in order to vote. 405 U.S. 330 (1972). While the Court based its decision on the Equal Protection Clause of the U.S. Constitution, rather than Article IV of the Tennessee Constitution, its basic reasoning is still clearly applicable here. As the Court explained "[i]t is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity." *Id.* at 343. While the Court never disputed that requiring ***some*** minimal residency period would be constitutionally permissible, it went on to note that the actual residency periods established under Tennessee law "crudely exclude large numbers of fully qualified people." *Id.* at 359. It is important to note that the central issue in both *Trammell* and *Dunn* was voter registration, which is expressly provided for in Article IV, Section 1. Yet even with such an issue, the courts are vigilant, ensuring that the state does not overstep its bounds and unjustly infringe on the right of suffrage.

Tennessee's Voter ID Statute functions in much the same way as the unconstitutionally lengthy residence requirement struck down in *Dunn*. It eschews the scalpel in favor of the chainsaw, and crudely excludes large numbers of fully qualified people. While there is no dispute that the State has a genuine interest in verifying the eligibility of its potential voters, the specific mechanism they have chosen is "crudely disproportionate" to the interest involved. Specifically, Defendants' requirement that state residents present photo identification before casting their ballots places an oppressive condition on thousands of Tennesseans' ability to exercise their right to vote, including Plaintiffs Turner-Golden and Bell. As compared to the former system of verifying a voter's identity — which involved comparing signatures, and which permitted any voter whose signature did not match the signature on file to sign an affidavit of identity, Tenn. Code Ann. § 2-7-112(c) (2010) — the present system effectively limits the franchise to voters who hold or can easily obtain certain specific documents. Affluent, mobile citizens may find such requirements little more than an inconvenience. However, poor, elderly, and disabled residents may have to endure serious hardship in order to have their votes counted, or find that their votes will not be counted at all.

Black's Law Dictionary, Eighth Edition defines the term "qualification" as "[t]he possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible for a position or office, or to perform a public duty or function . . . ." Bryan Garner and the editors of the Eighth Edition, by way of example, expressly note that "voter qualification requires one to meet residency, age, and registration requirements."

Under this definition, it is undeniable that the requirement of a photo ID pursuant to Tenn. Code Ann. § 2-7-112(c) is a "qualification;" that is, its possession is "legally necessary to make one eligible . . . to perform a public duty or function," i.e., voting. As such, it is wholly

outside of, and in conflict with, the express qualifications of Article IV, Section 1. Because Section 1 also commands that "there shall be no other qualification attached to the right of suffrage," the photo ID qualification cannot stand.

3. Tenn. Code Ann. § 2-7-112(c) is not a measure to ensure the "purity of the ballot box"

The historical context of Article I, Section 5 and Article IV, Section 1 also illuminates the inadequacy of the State's contention that Tenn. Code Ann. § 2-7-112(c) is simply a measure to insure the purity of the ballot box. If the legislature is constitutionally limited as to what it may or may not do regarding the exercise of the elective franchise — as it clearly is — how do the courts ensure that the General Assembly has not overstepped its bounds?

The only way that courts can do so is to do what they always do: examine the record. Courts must examine the record, here the legislative history, to be sure that there is some actual problem related to the freedom of elections or the purity of the ballot box and that the legislative solution is narrowly tailored to address that problem.

Unfortunately there is no record of any real problem that Tenn. Code Ann. § 2-7-112(c) addresses. There is no record of in-person voter fraud, either in Tennessee, or anywhere else in the country. In the absence of any such record or evidence, the issue is whether it passes constitutional muster for the General Assembly to merely ***allege*** that the purpose of a particular act is to secure the purity of the ballot box.

It cannot be. If the General Assembly were allowed to classify its own acts in that way then the constitutional limitations contained in Article IV, Section 1 would have no meaning. Any act would be constitutional simply because the legislature says it is. That is the very definition of arbitrary. It would constitute, in effect, a return to the 1865 Constitution, giving the legislature unfettered power to determine qualifications of voters and limitations on the elective

franchise. It would also run afoul of Tenn. Const. art. XI § 16, which expressly states that the rights set forth in the Declaration of Rights "shall never be violated ***on any pretense whatever,***" and "shall forever remain inviolate."

As the Tennessee Supreme Court declared more than a century ago, regarding who is to determine the constitutionality of a legislative act:

> "Shall the legislature itself decide it? If so, then the constitution ceases to be a legal, and becomes only a moral, restraint upon the legislature. If they, and only they, are to judge whether their acts be conformable to the constitution, then the constitution is admonitory and advisory only, and not legally binding, because, if the construction of it rests wholly with them, their discretion in particular cases may be in favor of very dangerous and erroneous constructions." *McCully v. State (State Report Title: The Judges' Case),* 102 Tenn. 509 (Tenn. 1899).

4. The Voter ID law adversely impacts a fundamental right

There is no question that under Tennessee law, voting is a fundamental right. *May v. Carlton,* 245 S.W.3d 340, 349 (Tenn. 2008) (" . . . the right to vote is fundamental to the concept of liberty in this state . . ."). Rights are fundamental when they are either implicitly or explicitly protected by a constitutional provision. *State v. Tester,* 879 S.W.2d 823, 828 (Tenn. 1994). Here the right to vote is explicitly protected in both Article I, Section 5, and Article IV, Section 1 of the Constitution.

The enactment of Tenn. Code Ann. § 2-7-112(c) creates classifications of voters in two fundamental ways. First, it divides the class of voters who are qualified to exercise the elective franchise in accord with Article IV, Section 1 of the Constitution, into two classes: those who have "acceptable" photographic identification and those who do not. This is exacerbated by the fact that the statute only impinges on the right to vote in person. Voters who choose to vote absentee and who are legally qualified to do so are not impacted by this new requirement. This

fact, however, is itself unconstitutional as Article IV, Section 1 not only spells out what qualifications are necessary for the exercise of the right but also commands that "all such requirements shall be equal and uniform across the State." Clearly, where a requirement for voting is imposed only on those who choose to do so in person, but not otherwise, that requirement is neither equal nor uniform across the State.

When a legislative enactment impinges upon fundamental right, equal protection analysis requires application of a strict scrutiny standard. *Newton v. Cox,* 878 S.W.2d 105, 110 (Tenn. 1994). Under the strict scrutiny standard, the legislation in question must be justified by a compelling state interest and must be narrowly drawn to advance that interest. *Hawk v. Hauch,* 855 S.W.2d 573, 579 nn.8-9 (Tenn. 1993).

In the religious freedom context, the Tennessee Supreme Court has provided a definition of a compelling state interest: it must be substantial, the danger must be clear and present and so grave as to endanger public interest. *State ex rel Swann v. Pack,* 527 S.W.2d 99, 111 (Tenn. 1975).

It is certainly true that if in person vote fraud actually existed its elimination would be a compelling state interest. But it is virtually non-existent. The State has never attempted, either during the legislative process leading to enactment or during this lawsuit, to make even the most cursory of showings of any need. The State has never shown that any danger of in person voter fraud is clear, or that it is present, or that it is so grave as to endanger public interests. It has not done so because it cannot.

Even if it were possible for the State to have made such a showing, it could not show that the legislation is narrowly drawn. The State of Tennessee has no idea how many constitutionally qualified voters have been effectively disenfranchised by passage of the act. It has been

estimated that as many as ten percent of registered voters may not have the required photographic identification.

The State does know and has acknowledged that approximately 126,000 registered voters over the age of 60 did not have a photo drivers license. According to the testimony of Defendant Goins, the State wrote a single letter to those individuals and has made some attempt to address issues raised by those who responded, but otherwise has taken no action to ensure that the effected voters are not disenfranchised. (Deposition of Mark Goins (hereinafter "Goins Depo"), Sept. 21, 2012, at 55:1-11). The State has acknowledged that some 22,000 non-driver photo IDs have been issued, and Defendant Goins has testified that he believed there were ninety thousand plus voters remaining whose status they do not know. (*Id.* at 53:21-54:2).

Furthermore, the legislation inexplicably excludes student identification cards issued by institutions of higher education. There has never even been a ***hint*** of in person voter fraud by a college student.

In short, Tenn. Code Ann. § 2-7-112(c) has adversely effected thousands, perhaps tens of thousands of Tennessee citizens who otherwise have all the qualifications constitutionally required for exercise of the electoral franchise. The State has made only a minimal effort, at best, to redress the disenfranchisement of so many Tennesseans. At the same time the State cannot make, and has never made, any showing that this legislation addresses a problem that actually exists, much less that it is clear or present or so grave it endangers public interests.

5. Tenn. Code Ann. § 2-7-112(c) Violates Article I, Section 5

Furthermore, the act denies the right of suffrage to persons entitled thereto in violation of Article I, Section 5. Specifically, Defendants' Photo ID requirement functions in much the same way as a poll tax, in that it applies a ***seemingly*** uniform "inconvenience" on the exercise of the franchise, while in fact creating a substantive barrier to poor and disadvantaged State residents. The United States Supreme Court has expressly noted that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Harper v. Virginia State Bd. Of Elections*, 383 U.S. 663, 666 (1966).

Defendants may argue that *Harper* and its progeny have no applicability here, as Tennessee law expressly provides for free photo identification for voting to residents who request them. Tenn. Code Ann. § 55-50-336. However, as the Missouri Supreme Court recognized in striking down a similar statute, such "free IDs" will never truly mitigate the burdens created by a photo ID requirement for voting. Specifically, the Missouri Supreme Court noted that the Federal REAL ID Act of 2005, Pub. L 109-13, "does not permit Missouri to issue 'free' non-driver's licenses to its citizens unless applicants first present identification such as a United States passport or birth certificate." *Weinschenk v. State*, 203 S.W.3d 201, 208 (Mo. 2006). The court went on to note that "[b]oth passports and birth certificates are themselves costly" and that "in addition to the monetary costs imposed on persons seeking to obtain the proper photo ID, the process to do so imposes additional practical costs, including navigating state and/or federal bureaucracies, and travel to and from the Department of Revenue and other government agencies." *Id.*

And these problems are just as prevalent under Tennessee's Voter ID statute as they were in Missouri. As was the case in Missouri, a Tennessee voter in need of a "free" photo ID will still have to present identification such as a United States passport or a birth certificate. *See* Department of Safety & Homeland Security, Voter ID Law, http://www.tn.gov/safety/photoids.shtml (explaining that voters must show primary and secondary proof of legal residence and two proofs of state residency in order to obtain a Photo ID for voting purposes). And qualified voters who need a birth certificate will have to pay the Department of Health Vital Records Division at least $15 per copy, plus additional money if the applicant needs to expedite the process. (*See* Department of Health, Vital Record Fees, https://health.state.tn.us/vr/Fees.htm). Furthermore, the applicant will have to expend time and money to travel to a Driver Service Center – which may, in some cases be significant, given how few Drivers Service Centers there are in Tennessee.

The basic point here is that qualifications burdening the voter's time cannot easily be disentangled — and, indeed often overlap with — qualifications burdening the voter's finances. Under either measure, Tennessee's Voter ID Act adds a qualification above and beyond those permitted under Article IV, Section 1 of the Constitution, and further has the effect of denying the right of suffrage to disadvantaged Tennesseans, in violation of Article I, Section 5.

6. Tenn. Code Ann. § 2-7-112(c) Violates Article XI, Section 8

Under Article XI, Section 8 of the Tennessee Constitution — commonly known as the "Class Legislation Clause" — the "legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land." The Tennessee Supreme Court has explained that while this provision is typically to be "treated synonymously" with the Equal Protection Clause

of the Fourteenth Amendment of the U.S. Constitution, *Mills v. Wong*, 155 S.W.3d 916, 921 (Tenn. 2005), "[i]n the interpretation of the Tennessee Constitution, this Court is always free to expand the minimum level of protection mandated by the federal constitution." *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn.1988) (citing *Miller v. State*, 584 S.W.2d 758, 760 (Tenn. 1979)).

The Court has, in fact, identified several different rights which the Tennessee Constitution protects more vigorously than the United States Constitution. *See, e.g., Planned Parenthood of Middle Tennessee v. Sundquist,* 38 S.W. 3d 1, 15 (Tenn. 2000) (applying a strict scrutiny standard to state action interfering with a woman's right to terminate her pregnancy). And, while the Court has never specifically addressed the minimum levels of voter protection mandated by the U.S. vs. Tennessee Constitutions, Plaintiffs respectfully suggest that the Tennessee Constitution, unlike the U.S. Constitution, mandates a heightened level of scrutiny in this circumstance, one which Defendants cannot possibly satisfy under the facts.

In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the United States Supreme Court upheld the State of Indiana's Photo ID requirement for voting under the Fourteenth Amendment of the United States Constitution. As part of that analysis, the Court declined to apply any of the three traditional levels of scrutiny — strict, intermediate, or rational basis — and instead applied a balancing approach, seeking to "identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.* at 189-90 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The Court then went on to analyze and balance the interests of the State of Indiana versus the burdens placed on potential voters by the State's voter ID law. Critically, the Court conceded that the record contained "***no evidence of any [in-person] fraud*** actually occurring in Indiana at any time in its history." *Id.* at 194 (emphasis supplied).

Despite that finding, however, the Court noted that:

> [i]t remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor—***though perpetrated using absentee ballots and not in-person fraud***—demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

Id. at 195-96 (emphasis supplied). As a result, the Court ultimately concluded that the State's interest in its voter ID statute was sufficient to justify the burden placed on state voters.

Opinions of the Tennessee Supreme Court, in contrast, strongly suggest a greater suspicion of such hypothetical State interests, and accordingly weigh heavily in favor of applying a heightened standard of scrutiny.

In *Hilliard v. Park*, for example, the Court emphasized that in-person voting laws should be construed more liberally, in favor of enhanced voter access, than absentee voting laws. 370 S.W.2d 829, 832 (Tenn. 1963), *rev'd in part on unrelated grounds by Southall v. Billings*, 375 S.W.2d 844 (Tenn. 1963). Favorably quoting the Supreme Court of Florida, the *Hilliard* Court explained that "[e]lection laws should be construed liberally in favor of the right to vote but this is not the rule as to absentee voting laws. Being in derogation of the common law, they should be strictly construed. The reason for the difference is that ***purity of the ballot is more difficult to preserve when voting absent than when voting in person.***" *Id.* (emphasis supplied) (quoting *State ex rel Whitley v. Rinehart*, 192 So. 819, 823 (Fla. 1939)). The *Hilliard* Court went on to note the wisdom of the Nebraska Supreme Court's statement that:

> [i]t is the policy of the law to prevent the disfranchisement of qualified electors who have cast their ballots in good faith by requiring only a substantial compliance with the election laws of the state. ***The privilege of voting, though the voter is absent from the voting precinct at the time of the election, requires a departure from the general rule governing the method of exercising the right to***

> ***vote.*** Voting by mail constitutes a special privilege and requires a stricter adherence to the legislative conditions imposed upon its exercise.

Id. (quoting *Miller et al v. Mersch*, 42 N.W.2d 652, 653 (Neb. 1950)). Later, in *Emery v. Robertson County Election Commission*, the Tennessee Supreme Court applied and re-affirmed its reasoning in *Hilliard*, once again distinguishing between absentee and in-person voting in the context of the "purity of the ballot box." 586 S.W.2d 103, 108 (Tenn. 1979).

Sadly, Tenn. Code Ann. § 2-7-112(c) turns this long-standing wisdom on its head.

There is no real question that Tennessee's Voter ID Act adds a procedural hurdle for in-person voting but excludes that hurdle for absentee voting. By the statute's own terms, absentee voters do not have to present voter identification before having their ballots counted; only in-person voters do. Tenn. Code Ann. § 2-6-202; *see also* Goins Depo., at 28:12-16 (agreeing with the statement that "the voter I.D. law that has now been enacted does not in any way address anything that may be going on or not going on with absentee voting; correct?"). Accordingly, given the Tennessee Supreme Court's findings that the purity of the ballot box is a much greater concern for absentee than for in-person voting, Defendants' attempts to burden in-person voting but not absentee voting should require greater justification than abstract, unsubstantiated concerns about alleged voter fraud.

Furthermore, even if there ***were*** evidence of in-person voter fraud in Tennessee, this statute would do little to nothing to stop it. That is because Tenn. Code Ann. § 2-7-112 contains an exception that all but swallows the rule. Specifically, under § 2-7-112(f),

> A voter who is indigent and unable to obtain proof of identification without payment of a fee or who has a religious objection to being photographed shall be required to execute an affidavit of identity on a form provided by the county election commission and then shall be allowed to vote. The affidavit shall state that:

> (1) The person executing the affidavit is the same individual who is casting the ballot; and
>
> (2) The affiant is indigent and unable to obtain proof of identification without paying a fee or has a religious objection to being photographed.

Many good-faith, constitutionally qualified voters — such as Ms. Turner-Golden and Ms. Bell — will not know of this exception when they go to the polls, as the State has not publicized it. And given that the statute does not define "indigent," law-abiding voters will also be wary of executing such an affidavit.

At the same time, however, anyone willing to commit fraud to impersonate a lawful voter will simply have to claim that he or she has a religious objection to being photographed or is indigent and cannot obtain proof of identification without paying a fee, and will then be allowed to vote without ever presenting photo identification. Accordingly, there is no reason to believe that the current statute will do any more to prevent in-person voter fraud than the prior statute did.

The Tennessee Supreme Court also appears to give somewhat less deference than the U.S. Supreme Court to seemingly uniform voting restrictions. As far back as 1869, the Court recognized, in relation to voting restrictions, that "[i]t is not the partial character of the rule so much as its ***arbitrary*** and unusual nature, which condemns as unknown to the law of the land." *State v. Staten*, 46 Tenn. 233, 245 (Tenn. 1869) (emphasis supplied) (quoting COOLEY CONST. LIM., 355).

And the requirements and classifications in Tennessee's Voter ID Act are nothing if not arbitrary. By the plain terms of the statute, for example, students of State institutions of higher education are specifically prohibited from using their student photo IDs as proof of identification. Tenn. Code Ann. § 2-7-112(c)(2)(B). This exclusion applies only to students,

meaning that faculty and staff at those same institutions can use their university IDs as proof of identity for voting.

The law also distinguishes, arbitrarily, between qualified voters age 60 and older and those below the age of 60. It does this by permitting voters 60 and older to opt of the photo ID requirement by voting absentee. In Tennessee, absentee voting is open to ***all*** voters age 60 and up. Tenn. Code Ann. § 2-6-201(5)(A), In contrast, voters under the age of 60 may only vote absentee if they fall into one of the statute's narrowly-drawn categories — *e.g.*, a person outside the county on election day, a full-time student in another state, a juror, etc. . . . Tenn. Code Ann. § 2-6-201(5).

Furthermore, and of more direct relevance to Plaintiffs, the statute — as interpreted and applied by Defendant Goins — prohibits Memphis residents from using their photo library cards as proof of identification. Defendants take this position despite the fact that libraries in Memphis demand as stringent or more stringent proof of identity then many out-of-state entities whose photo IDs are considered acceptable as evidence of identification for voting. (*See, e.g.*, Newman Affidavit ¶ 9) (noting the Memphis library system based its requirements for obtaining a photo library card on the State of Nebraska's requirements for obtaining a driver's license). Defendants cannot provide any reasonable justification for such distinctions as, indeed, there are none.

In light of these arbitrary and intrusive distinctions, it is not clear that Defendants could prevail even under a rational basis standard. *Brown v. Campbell County Bd. of Educ.*, 915 S.W.2d 407, 414 (Tenn. 1995) (explaining that under this standard "if a reasonable basis exists for the difference in treatment under the statute, or if any set of facts can reasonably be conceived to justify it, the statute is constitutional"). But, as noted above, Tennessee courts

apply a far more stringent standard when analyzing restrictions on its citizens' right to vote. Specifically, the Supreme Court of Tennessee has endorsed the view that in-person voters should not be disenfranchised when they cast their ballots "in good faith [in] substantial compliance with the election laws of this state." *Hilliard v. Park,* 370 S.W.2d 829, 832 (Tenn. 1963) (quoting *Miller et al v. Mersch*, 42 N.W.2d 652, 653 (Neb. 1950)). Because Defendants cannot identify any actual, concrete interest in fraud-prevention advanced by this law, and because the law arbitrarily classifies voters with respect to the exercise of a fundamental right — in direct opposition to the decisions of the Tennessee Supreme Court — record in this case weighs heavily in favor of enjoining the State's photo ID requirement for voting and declaring that requirement void and unconstitutional on its face.

C. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

In addition to declaratory judgment, Plaintiffs requested that the chancery court use its equitable powers to enjoin the state's enforcement of Tenn. Code Ann. §2-7-112(c). While the Court ruled against plaintiffs on the basis of standing, it also suggested, as a matter of substantive law, that Plaintiffs were not entitled to the injunctive relief they sought. The court was wrong on both counts.

1. Tenn. Code Ann. § 2-7-112(c) should be permanently enjoined as facially unconstitutional.

As Plaintiffs have set forth in detail above, Tenn. Code Ann. § 2-7-112 — on its face — violates three distinct provisions of the Tennessee Constitution: Article I Section 5; Article IV, Section 1; and Article XI, Section 8. Accordingly, the proper equitable remedy is for this Court to ***fully*** enjoin enforcement of the statute.

Plaintiffs recognize that courts in this state can and should be reticent to facially invalidate statutes, given the concern that "passing on the validity of a statute wholesale may be

efficient in the abstract, [but] any gain is often offset by losing the lessons taught by the particular." *Waters v. Farr*, 291 S.W.3d 873, 922 (Tenn. 2009) (quoting *Sabri v. United States*, 541 U.S. 600, 608-09 (2004)). However, given the clear commands of the Tennessee Constitution and how clearly this statute impairs the right to vote, the facts of this case clearly establish "that no set of circumstances exists under which the statute would be valid." *Id.* at 921 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008)).

In Tennessee, the standard of review respecting injunctive relief "is whether the trial court erred in exercising its discretion in the issuance or nonissuance of the injunction." *Medtronic, Inc. v. NuVasive, Inc.*, W2002-01642-COA-R3-CV, 2003 WL 21998480 (Tenn. Ct. App. Aug. 20, 2003); *see also King v. Elrod*, 268 S.W.2d 103, 106 (Tenn. 1953). Based on the clear constitutional violations outlined above, and the inadequacy of any remedy at law, Plaintiffs submit that the chancery court erred in exercising its discretion by failing to enjoin the enforcement of Tenn. Code Ann. § 2-7-112(c) and that its holding should accordingly be reversed.

Tennessee courts have long recognized that, in determining whether to grant a plaintiff's request for injunctive relief, "the trial court should consider such factors as the adequacy of other remedies, the danger that the plaintiff will suffer irreparable harm without the injunction, the benefit to the plaintiff, the harm to the defendant, and the public interest." *Vintage Health Res., Inc. v. Guiangan*, 309 S.W.3d 448, 467 (Tenn. Ct. App. 2009). However, the precise standards and factors to be applied vary, depending on whether plaintiffs seek ***temporary*** or ***permanent*** injunctive relief. As the U.S. Supreme Court has explained,

> a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered

> an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); *see also Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2756 (2010) (quoting *eBay* for the same proposition).[7]

Courts have further recognized that these considerations are factors to be balanced against one another, rather than mandatory prerequisites to granting injunctive relief. *U.S. v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004) ("These are factors to be balanced, not prerequisites that must be met"), *reh'g en banc denied* Dec. 7, 2004; *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000) (same).[8]

As demonstrated below, each of these factors weighs decisively in favor of the issuance of both declaratory judgment and injunctive relief.

2. Plaintiffs have Suffered Irreparable Injuries Regarding their Fundamental Right to Vote that Cannot be Compensated by any Remedy at Law

In determining whether or not to issue injunctive relief, courts must consider whether Plaintiffs have suffered irreparable harm, such that no remedy at law could ever prove sufficient. *See, e.g., Tennessee Enamel Mfg. Co. v. Hake*, 194 S.W.2d 468, 470 (Tenn. 1946) ("It is also well settled that where there is a full and adequate remedy at law for an injury, it is not irreparable."); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("The Court

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[7] Research has not revealed any Tennessee case law specifically addressing the differing standards for permanent versus temporary injunctive relief.

[8] Because of the similarity of Rule 65 of the Tennessee Rule and the Federal Rule, Tennessee Courts may rely on federal decisions of guidance on issues dealing with injunctions. *S. Cent. Tennessee R.R. Auth. v. Harakas*, 44 S.W.3d 912, 917 (Tenn. Ct. App. 2000).

has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.").[9]

As early as 1964, the United States Supreme Court emphasized that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). The Sixth Circuit has further explained that such scrutiny is necessary "because even minor infringements on the franchise can have reverberations in other contexts and throughout democratic society." *Stewart v. Blackwell*, 444 F.3d 843, 856 (6th Cir. 2006) (superseded by 473 F.3d 692 (6th Cir. 2007)).

Here, there is no question that Plaintiffs, as well as another 160 Tennessee voters, were irreparably harmed by the State's unlawful photo ID requirement. (*See* Aug. 14, 2012 Letter of Mark Goins). Specifically, by adhering to the rigid and arbitrary formalities of the Voter ID Act, Defendants deprived these Plaintiffs, and hundreds of other qualified Tennessee voters, of their right to vote, which is a "fundamental matter in a free and democratic society." *Reynolds*, 377 U.S. at 561-62. The vast majority of these voters were qualified in accord with Article IV, Section I. And there is also no real question that such injuries are irreparable. Plaintiffs Turner-Golden and Bell, for example, will never again have a chance to vote in the August, 2012 Tennessee Election, nor will the other 160 constitutionally qualified voters whose provisional ballots were not counted. *See, e.g.*, *Overstreet v. Lexington-Fayette Urban County Gov't,* 305 F.3d 566, 578 (6th Cir. 2002) (noting that irreparable harm is typically present if the harm "is not fully compensable by monetary damages").

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[9] While the U.S. Supreme Court, in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) characterized irreparable injury and inadequacy of remedies at law as two separate considerations, the case law on this issue demonstrates that these two considerations are really two sides of the same coin, as the inadequacy of remedies at law is precisely what makes a particular injury irreparable.

3. Considering the Balance of Hardships Between Plaintiffs and Defendants, A Remedy in Equity is Warranted

The second, and most important factor for courts to consider in deciding whether to grant permanent injunctive relief is whether, "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Here, given the serious and continuing burden that the voter ID statute places on Tennesseans' right to vote, there is no real question that the only proper remedy is to enjoin the statute's enforcement. Weighed against those burdens, there is virtually no "burden" on the State by the issuance of an injunction. At worst the State merely instructs poll workers not to exclude voters without photo identification, and must count any provisional ballots cast by those who voted early but did not have the requisite photo ID.

4. Public Policy Strongly Supports the Issuance of the Proposed Injunction

Finally, with respect to the requirements for injunctive relief, public policy strongly supports the proposed injunction. *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2756, (2010) (identifying the final factor for courts to consider in deciding whether to issue injunctive relief as whether plaintiff can demonstrate that "the public interest would not be disserved by a permanent injunction").

Under both Federal and Tennessee state law, the right to vote is a fundamental right. *League of Women Voters of Ohio v. Brunner,* 548 F.3d 463, 476 (6th Cir. 2008); *May v. Carlton,* 245 S.W.3d 340, 348 (Tenn. 2008). Indeed, Tennessee courts have noted that the right to vote is "'the ***most*** fundamental right of all.'" *May,* 245 S.W.3d at 346 (quoting *Blumstein v. Ellington*, 337 F.Supp. 323, 329 (M.D. Tenn. 1970)) (emphasis supplied). Consequentially, public policy in America has all but enshrined voting as a civic ritual, vigorously defending the right of

citizens to participate freely in the election process. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."). As the Sixth Circuit has made clear, "[t]here is ***a strong public interest*** in allowing ***every*** registered voter to vote freely." *Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) (emphasis added). And, as the Supreme Court has repeatedly noted, the right to vote "is too precious, too fundamental to be so burdened or conditioned." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670, (1966).

The Court, therefore, should grant the proposed injunction to ensure that Tennessee's voting system remains "fair, reasonable, and adequate, and . . . not illegal or against public policy." *Dillard v. Town of Louisville*, 730 F. Supp. 1546, 1550 (M.D. Ala. 1990). Granting this proposed injunction will ensure that citizens of Shelby County, and all of the rest of Tennessee, who attempt in good faith to cast their ballots will have those ballots counted, and such an injunction will clearly constitute good public policy.

Accordingly, the public policy factor counsels strongly in favor of granting the proposed injunction.

5. In the alternative, Tenn. Code Ann. § 2-7-112(c) should not be enforced unless and until the State can affirmatively show that doing so will not disenfranchise constitutionally qualified voters.

Again, as noted above, Plaintiffs believe that the weight of authority in this State establishes that Tennessee's voter ID requirement for voting is facially unconstitutional. However, if the Court concludes, after weighing the potential harm to Plaintiffs and Defendants, that facial invalidation is inappropriate, then Plaintiffs request, in the alternative, that the Court enjoin this statute as Defendants ***have been and are applying it***. Specifically, in light of the clear risk of voter disenfranchisement, Defendants should be enjoined from enforcing the voter ID

provisions of Tenn. Code Ann. § 2-7-112(c) until they can demonstrate that those provisions will not have the effect of disenfranchising qualified Tennessee voters. Furthermore, since Defendants cannot possibly make such a showing prior to November 6, 2012, the Court should specifically prohibit Defendants from requiring photo identification to vote in the upcoming Presidential Election.

The Tennessee Supreme Court has explained that "[i]n some circumstances, the courts can best fulfill the legislature's intent by prohibiting only the unconstitutional applications of a statute, while allowing the State to enforce the statute in other circumstances." *Waters v. Farr*, 291 S.W.3d 873, 923 (Tenn. 2009). These "as applied" challenges presume "that the statute is generally valid" and require the challenger to demonstrate only "that the statute operates unconstitutionally when applied to ***the challenger's particular circumstances.***" *Id.* (emphasis supplied).

Here, even if the photo ID requirements in Tenn. Code Ann. § 2-7-112(c) do not unduly impair the right to vote in the abstract, such requirements clearly have created, and continue to create meaningful burdens on the right of franchise as Defendants have actually applied them. Furthermore, while these requirements may not create a meaningful burden on ***every*** Tennessean's right to vote, they clearly ***do*** create meaningful burdens on Plaintiffs Turner-Golden and Bell's right to vote, along with the rights of all similarly situated Tennesseans who lack a valid photo ID for voting.

In Ms. Turner-Golden's case, for example, getting an acceptable photo ID would have required taking hours out of her day, while also balancing her career education program and caring for the two young grandchildren over whom she has custody, one of whom has special needs. (Turner-Golden Depo. at 9:15-20, 11:5-7, 14:7-17). Ms. Turner-Golden had already

dealt with that process once, in January of 2012. At that time, it took her more than two and a half hours to get a photo identification card, more than one trip to the Department of Safety, and also required a trip to the health department in order to get a "correct" copy of her birth certificate. She was forced to pay for both the birth certificate and the ID. (*Id.* at 34:19-24, 49:3-17). Given the difficulties she faced at that time — particularly since she did not, and does not have a car — Ms. Turner-Golden was, quite understandably, unable and unwilling to go through that process a second time in August.

As noted above, the Missouri Supreme Court recognized that the monetary and practical costs of obtaining a "free" ID — such as those faced by Tennesseans such as Ms. Turner-Golden — can constitute meaningful barriers to voting. *Weinschenk v. State*, 203 S.W.3d 201, 208 (Mo. 2006).

More recently, the Pennsylvania Supreme Court came to the same conclusion, overturning and remanding a trial court's decision to uphold Pennsylvania's photo ID statute. *Applewhite v. Commonwealth of Pennsylvania*, No. 71 MAP 2012 (Penn. Sept. 18, 2012). The Pennsylvania statute, unlike Tennessee's, attempted to make free photo IDs for voting available to any resident willing to submit a written application and swear under oath that the voter did not possess any acceptable photo identification. However, the Pennsylvania Department of Transportation continued to require applicants to go through a "rigorous" process — including presentation of a birth certificate [or its equivalent], social security card, and two proofs of state residency, due to the fact that the photo ID constituted a form of "secure identification," which could be used for such additional purposes as boarding airplanes. *Id.* at 3.

Critically, based on how the law was being implemented, "both state agencies involved appreciate[d] that some registered voters have been and will be unable to comply with the

requirements maintained by PennDOT to obtain identification card under [the statute]," and that, "if the law is enforced in a manner that prevents qualified and eligible electors from voting, ***the integrity of the upcoming General Election will be impaired.***" *Id.* at 3-4 (emphasis supplied). The Court went on to note that the voters most harmed by these requirements "includes members of some of the most vulnerable segments of our society (the elderly, disabled members of our community, and the financially disadvantaged)." *Id.* at 4.

Accordingly, the Pennsylvania Supreme Court remanded the case to the trial judge for further hearings on the actual burdens being imposed, specifically noting that it was not satisfied with the initial judgment, given that it was "based primarily on the assurances of government officials." *Id.* at 6. The court further emphasized that "if a statute violates constitutional norms in the short term, ***a facial challenge may be sustainable even though the statute might validly be enforced at some time in the future.***" *Id.* at 6.

On remand, the Commonwealth Court took heed of the Supreme Court's warnings and held that Pennsylvania could not enforce its voter ID requirement in the upcoming Presidential Election. *Applewhite v. Commonwealth of Pennsylvania,* No. 330 M.D. 2012 (Pa. Commw. Ct. Sept. 25, 2012). While the court recognized that the State was improving its voter access and outreach efforts, the court still questioned "whether sufficient time now remains to attain the goal of liberal access." *Id.* at 3. Ultimately, the court concluded that such liberal access ***could not*** be ensured in the short term, and accordingly enjoined enforcement of the state voter ID laws until sometime after the November 2012 Election.

Similarly, in *South Carolina v. United States*, Civ. Action No., 12-203 (BMK) (CKK) (JDB) (D.D.C. Oct. 10, 2012), the D.C. District Court granted Voting Rights Act pre-clearance to South Carolina's voter identification law starting in 2013, but expressly ***denied*** pre-clearance

for 2012. *Id.* at 37-38. The Court explained that the law, though not inherently discriminatory, was problematic in the short-term because "a large number of difficult steps would have to be completed in order for the reasonable impediment provision to be properly implemented on November 6, 2012. *Id.* at 31.

While Tennessee has had a longer time to implement its voter ID statute than South Carolina or Pennsylvania did, it has clearly not been enough to ensure that the law does not disenfranchise constitutionally qualified voters. It is, for example, inexcusable that the State demands that voters present photo ID for voting — which can ***only*** be obtained at Tennessee Driver Service Centers — without establishing at least one such Center in every Tennessee County. At present, however, fifty-three of Tennessee's ninety-five counties — 54% — have ***no*** Driver Service Center at all.[10] And even Shelby County, the largest in the state by population, has only four centers capable of issuing "acceptable" photo ID.[11]

It is similarly unreasonable for the State to demand photo ID for voting without properly training its election officials. Under Tennessee law, a registered voter who appears at the polling place without state or federally issued photo ID is supposed to be offered a provisional ballot. Tenn. Code Ann. § 2-7-112(e). However, when Plaintiff Turner-Golden tried to vote at her Mississippi Boulevard early voting precinct, she was never offered a provisional ballot. (Deposition of Robert White, Sept. 18, 2012 at 16:22-17:3). Later that same day, when Ms. Turner-Golden tried voting at the Greater Lewis Church precinct, election workers actively discouraged her from casting a provisional ballot, and only gave her one after Ms. Turner-Golden argued with them for 30-40 minutes. (*Id.* at 18:15-20). Furthermore, neither Ms.

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[10] *See* Tennessee Dep't of Safety and Homeland Security, Driver Service Center Locations, http://www.tn.gov/safety/driverlicense/dlmap2.shtml.

[11] *See* Tennessee Dep't of Safety and Homeland Security, Driver Service Locations by County, http://www.tn.gov/safety/driverlicense/dllocationdev.shtml#shelby

Turner-Golden nor Ms. Bell were ***ever*** told that they could cast a regular ballot — ***without showing photo ID*** — if they were willing to attest that they were indigent and unable to obtain such identification without paying a fee. Tenn. Code Ann. § 2-7-112(f).

Finally, and perhaps most importantly, it is unreasonable for Tennessee to require photo identification for voting when thousands of Tennessee seniors still possess non-photo driver's licenses and are accustomed to voting in person. In his September 21 deposition, Defendant Goins conceded that there are over 90,000 state residents who possess non-photo driver's licenses. (Mark Goins Sept. 21, 2012 Deposition at 54:1-2). While these citizens are legally entitled to vote absentee, many of them have voted in person all of their lives — without ever having to show photo identification — and may not know that absentee voting is an option until it is too late. (*See, e.g.*, Ada Mitchell Affidavit ¶¶ 5-6) (explaining how Ms. Mitchell simply stayed home on election day, since she did not have acceptable photo ID, and noting that "I have now heard about absentee voting but I did not hear anything about that or know about that before the August election").

In light of these serious problems and oversights in the State's implementation of its photo ID statute, Plaintiffs respectfully request, as an alternative to a declaration of facial unconstitutionality, that this Court enjoin enforcement of the photo ID requirement for voting until such time as Defendants can cure these defects and make an affirmative showing to the court that they have done so.

6. Also in the alternative, the Court should declare that the photo library cards issued by the City of Memphis' library system is an acceptable form of "evidence of identification" pursuant to Tenn. Code Ann. § 2-7-112(c).

Should the Court disagree that Tenn. Code Ann. § 2-7-112(c) unconstitutionally adds a fifth qualification on voters, or that it denies the right of suffrage or creates classifications of

qualified voters, Plaintiffs ask the Court for a determination that the photo library cards issued to the Plaintiffs by the City of Memphis meet the definition of "evidence of identification" as contained in Tenn. Code Ann. § 2-7-112(c)(2)(A). This is purely an issue of statutory interpretation, and is accordingly reviewed *de novo* on appeal with no presumption of correctness. *Tidwell v. City of Memphis*, 193 S.W.3d 555, 559 (Tenn. 2006).

The statute lays out three criteria for appropriate "evidence of identification:"

1. The identification card must include a photograph of the holder;
2. The card must be issued by an entity that is authorized by law to issue personal identification; and,
3. The card must be issued by one of the enumerated entities.

There is no dispute that the Memphis library cards include a photograph of the holder. Nor is there any real dispute that the Memphis library is authorized by law to issue personal identification. Since time immemorial, public libraries in the United States have operated by issuing identification cards to their patrons for use in accessing the library's books and other services. It is highly unlikely that one could find a public library operating in the United States that did not issue some type of card identifying the patron/holder. It is part and parcel of how libraries work and is universal.

More specifically, Tenn. Code Ann. § 10-3-103 provides authority for the establishment of a library board for a county, city or town. Tenn. Code Ann. § 10-3-104 provides for the "Powers and Duties of library board." That section reads as follows:

> The members of the library board shall organize by electing officers and adopting bylaws and regulations. The board has the power to direct all the affairs of the library, including appointment of a librarian who shall direct the internal affairs of the library, and such assistants or employees as may be necessary. It may make and enforce rules and regulations and establish branches of travel service at its discretion. It may expend funds for the special training and formal

> education of library personnel; provided, that such personnel shall agree to work in the library for at least two (2) years after completion of such training and education. It may receive donations, devises and bequests to be used by it directly for library purposes. It may hold and convey realty and personal property and negotiate leases for and on behalf of such library. The library board shall furnish to the state library agency such statistics and information as may be required, and shall make annual reports to the county legislative board and/or city governing body. [Acts 1963, ch. 370, §4; impl. Am. Acts 1978, ch. 934 §§ 7, 36; T.C.A., § 10-304].

Among the many powers and duties enumerated in that section is the power to "make and enforce rules and regulations." Pursuant to these grants of authority, a board governing the Memphis Public Library has been created. That board has made rules and regulations regarding the issuance and use of library cards identifying the individual patron/holder. These rules and regulations are contained in the library's Policies and Procedures Manual.

Generally, rules and regulations which have been promulgated pursuant to a statutory grant of authority and which are not inconsistent with such statute have the force and effect of law in the agency's area of operation. *Bean v. McWherter,* 953 S.W.2d 197, 197-199 (Tenn. 1997).

Thus, since the issuance of library cards identifying the patron/holder in Memphis was done in accord with rules promulgated by the board of the Memphis library in accord with the statutory grant of authority to do so, those rules – or policies and procedures – have the force and effect of law. Accordingly, the Memphis Public Library is an agency authorized by law to issue personal identification.

The real issue is whether the City of Memphis or its library system or both are one of the entities designated in Tenn. Code Ann. § 2-7-112(c)(2)(A) as: "a branch, department, agency or entity of this state. . . ."

Two points definitively answer this question in the affirmative. First, in *Corporation of Collierville v. Fayette County Election Commission,* 539 S.W.2d 334, 336 (Tenn. 1976), the Tennessee Supreme Court held that "[it] is beyond question that a Tennessee municipality is an *agency of the state* exercising a portion of the sovereign power of the state for the public good." (emphasis added).

Collierville involved a dispute over municipal boundaries which arose when the neighboring community of Piperton sought to incorporate. Collierville objected on the grounds that there was a statutory requirement that any such incorporation be held in abeyance due to the proximity of Piperton's boundaries to Collerville. When the statute was ignored, Collierville brought a quo warranto action, which must be brought in the name of the state. The question before the court was whether Collierville had standing to sue. The court determined that Collierville did have standing because, as a municipality it was "an agency of the state."

Regarding the case at bar, the significance is that the court expressly held that a municipality was (and is) an "agency of the state." Thus, in accord with *Collierville*, an identity card issued by a municipality is one issued by an "agency . . . of this state."

The legislature is presumed to have knowledge of the state of the law on the subject matter under consideration at the time it enacts legislation. *Neff v. Cherokee Ins. Co.,* 704 S.W.2d 1, 4 (Tenn. 1986) (quoting *Equitable Life Assurance Co. v. Odle,* 574 S.W.2d 939, 941 (Tenn. 1977)). Because this is so, where language in a statute is very similar to the language of existing case law, courts will not be inclined to concede the extreme similarity in language to mere coincidence. Here, the similarity between the language in the relevant case law and the relevant statute is so great that the legislature could easily have taken the language of Tenn. Code Ann. § 2-7-112(c)(2)(A) directly from the decision in *Collierville*.

Because the General Assembly is deemed to know that the Tennessee Supreme Court held that a municipality is an agency of the state at the time it enacted Tenn. Code Ann. § 2-7-112(c)(2)(A), and, so knowing, used the phrase "agency . . . of this state:" it must have intended to include municipalities in its list of approved issuers of photo identification cards.

Even if that were not enough, there is a second equally dispositive point. The statute itself contains an express exclusion. Tenn. Code Ann. § 2-7-112(c)(2)(B) states:

> An identification card issued to a student by an institution of higher education containing a photograph of a student shall not be evidence of identification of purposes of verifying the person's identification on the application for ballot.

Student identifications are the only type of identity cards which are excluded. The subsection does not include any language which could conceivably encompass municipalities in general, or the City of Memphis' library system in particular.

When considering the meaning of a statute courts may employ the Latin maxim, *express unius est exclusio alterius*, which translates as "the expression of one thing implies the exclusion of things not expressly mentioned." *Wells v. Tennessee Bd. Of Regents,* 231 S.W.3d 912, 917 (Tenn. 2007).

Applying the maxim of express mention implied exclusion to Tenn. Code Ann. § 2-7-112(c)(2)(B) it is clear that because the legislature did not expressly incorporate municipalities within its statutory exclusion it intended that where municipalities issue photo identification cards, those cards would be valid evidence of identification in accord with Tenn. Code Ann. § 2-7-112(c)(2)(A).

But there is still more. The Memphis Public Library is governed in part by Tenn. Code Ann. § 10-1-101 et seq., entitled "Public Libraries, Archives and Records." The Memphis library system receives a number of grants from the State of Tennessee and is, thus, answerable

to the Tennessee State Library and Archives, which is a division of the office of Defendant Tre Hargett.

One of those contracts is entitled "Grant Contract Between the State of Tennessee, Department of State, Tennessee State Library and Archives and Memphis Public Library and Information Center." This contract was executed by Memphis Mayor, A.C. Wharton and Defendant Tre Hargett.

Section D-9 of the contract establishes that the Memphis Library is providing services to citizens *on behalf* of the State. This is evidenced by the signs paragraph D-9 requires entities to post, and which are posted in accord with this provision by the Memphis library.

Even more telling is Section D-19 which declares that the Memphis public library is a political subdivision of the State. Thus, even if the city were not an "agency . . . of this state," the Memphis library system, as a political subdivision of Tennessee is an "entity of this state."

Plaintiffs respectfully suggest that any one of the above points is determinative of the question. All three in combination simply cannot be rebutted. Plaintiffs request the Court to declare that the City of Memphis, acting by and through its library system is an agency or entity of this state in accord with Tenn. Code Ann. § 2-7-112(c)(2)(A) and that, therefore, the photographic library card being issued by the library system meets the criteria for "evidence of identification."

VIII. CONCLUSION

The Tennessee Constitution's protection of fundamental, individual rights is among the strongest in the county. Article IV, Section 1 provides some of the strongest, most explicit protection in the Tennessee Constitution. Specifically, Article IV, Section 1 expressly limits the qualifications on the right of suffrage to four: (1) age, (2) U.S. citizenship, (3) state residency,

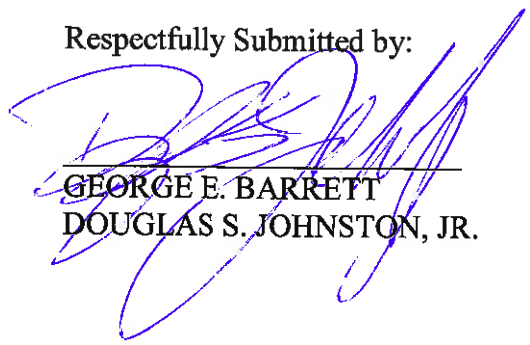
and (4) voter registration. Even under the broadest possible reading, none of these qualifications could possibly include the requirement that a voter possess a statutorily "acceptable" photo identification card. Although Defendants argue that this requirement is simply a means to ensure the "purity of the ballot box," there is no evidence that any of the impurities Defendants seek to cleanse even exist. Nor is there evidence, if such impurities do exist, that this statute will make any difference in cleansing them.

Instead, we now know that Daphne Turner-Golden and Sullistine Bell, along with 160 other Tennesseans fully qualified in accord with our Constitution to exercise the franchise were denied that right due solely to the grafting of an additional qualification into the law. Their right to exercise the electoral franchise was denied in violation of Article I, Section 5. Finally, Tenn. Code Ann. § 2-7-112(c) creates unconstitutional classifications of constitutionally qualified voters.

Accordingly, Plaintiffs respectfully urge this Court to reverse the judgment of the chancery court, declare the voter ID requirements of Tenn. Code Ann. § 2-7-112(c) unconstitutional, and permanently enjoin Defendants from enforcing those unconstitutional requirements. In the alternative, Plaintiffs ask this Court to enjoin Defendants from requiring photo identification as the ***exclusive*** means of proving a voter's identity unless and until Defendants can provide truly free ID to all constitutionally qualified Tennessee voters and to further enjoin Defendants from precluding acceptance of photo ID cards issued by the City of Memphis' library system.

Dated: October 16, 2012

Respectfully Submitted by:



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Brief of Appellants* has been sent to the following via U.S. Mail, first class postage prepaid, on this the 16th day of October, 2012:

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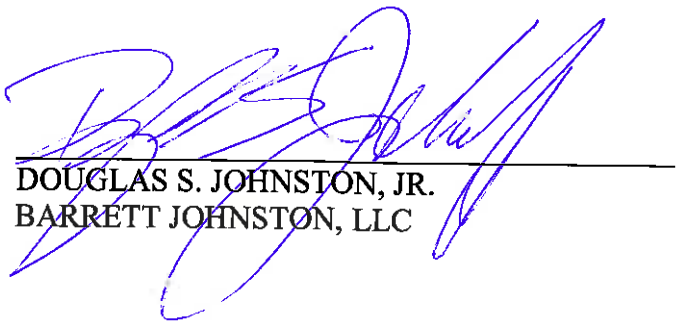

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UNREPORTED OPINIONS AND CASE LAW CITED IN BRIEF

[J-114-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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	No. 71 MAP 2012 Appeal from the Order of the Commonwealth Court dated 8/15/12 at No. 330 MD 2012, denying Appellant's Application for Preliminary Injunction ARGUED: September 13, 2012
v.	
THE COMMONWEALTH OF PENNSYLVANIA; THOMAS W. CORBETT, IN HIS CAPACITY AS GOVERNOR; CAROLE AICHELE, IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH	
APPEAL OF: VIVIETTE APPLEWHITE; WILOLA SHINHOLSTER LEE; GLORIA CUTTINO; NADINE MARSH; BEA BOOKLER; JOYCE BLOCK; HENRIETTA KAY DICKERSON; DEVRA MIREL ("ASHER") SCHOR; THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA STATE CONFERENCE; HOMELESS ADVOCACY PROJECT	

ORDER

PER CURIAM **DECIDED: September 18, 2012**

Before this Court is a direct appeal from a single-judge order of the Commonwealth Court denying preliminary injunctive relief to various individuals and organizations who filed a Petition for Review challenging the constitutional validity of Act 18 of 2012, also known as the Voter ID Law. Appellate courts review an order granting or denying a preliminary injunction for an abuse of discretion. See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1000 (Pa. 2003).

The Declaration of Rights set forth in the Pennsylvania Constitution prescribes that elections must 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. 1, § 5. The parties to this litigation have agreed that the right to vote in Pennsylvania, as vested in eligible, qualified voters, is a fundamental one.

The Voter ID Law was signed into law by the Governor of Pennsylvania in March of this year. For the General Election this November, and for succeeding elections, the legislation generally requires presentation of a photo identification card as a prerequisite to the casting of ballots by most registered voters.

In this regard, the Law contemplates that the primary form of photo identification to be used by voters is a Department of Transportation (PennDOT) driver's license or the non-driver equivalent provided under Section 1510(b) of the Vehicle Code, 75 Pa.C.S. § 1510(b). See N.T. at 770-71. Furthermore, the Law specifically requires that – notwithstanding provisions of Section 1510(b) relating to the issuance and content of the cards – PennDOT shall issue them at no cost:

> to any registered elector who has made application therefor and has included with the completed application a statement signed by the elector

> declaring under oath or affirmation that the elector does not possess proof of identification . . . and requires proof of identification for voting purposes.

Act of Mar. 14, 2012, P.L. 195, No. 18, § 2; see 25 P.S. § 2626(b). As such, the Law establishes a policy of liberal access to Section 1510(b) identification cards.

However, as implementation of the Law has proceeded, PennDOT – apparently for good reason – has refused to allow such liberal access. Instead, the Department continues to vet applicants for Section 1510(b) cards through an identification process that Commonwealth officials appear to acknowledge is a rigorous one. See N.T. at 690, 994. Generally, the process requires the applicant to present a birth certificate with a raised seal (or a document considered to be an equivalent), a social security card, and two forms of documentation showing current residency. See N.T. at 467, 690, 793.[1] The reason why PennDOT will not implement the Law as written is that the Section 1510(b) driver's license equivalent is a secure form of identification, which may be used, for example, to board commercial aircraft. See N.T. at 699-700, 728-30, 780.

The Department of State has realized, and the Commonwealth parties have candidly conceded, that the Law is not being implemented according to its terms. See, e.g., N.T. at 1010 (testimony of the Secretary of the Commonwealth that "[t]he law does not require those kinds of – the kind of identification that is now required by PennDOT for PennDOT IDs, and it's the Homeland Security issues"). Furthermore, both state agencies involved appreciate that some registered voters have been and will be unable to comply with the requirements maintained by PennDOT to obtain an identification card under Section 1510(b). See N.T. at 713 (testimony from a deputy secretary for PennDOT that "at the end of the day there will be people who will not be able to qualify for a driver's license or a PennDOT ID card"), 749, 772, 810, 995. It is also clear to

[1] Applicants whose information is already in PennDOT's database may be exempted from these requirements. See N.T. at 466.

state officials that, if the Law is enforced in a manner that prevents qualified and eligible electors from voting, the integrity of the upcoming General Election will be impaired. See, e.g., N.T. at 480.

Faced with the above circumstances and the present litigation asserting that the Law will impinge on the right of suffrage, representatives of the state agencies have testified under oath that they are in the process of implementing several remedial measures on an expedited basis. Of these, the primary avenue lies in the issuance of a new, non-secure Department of State identification card, which is to be made available at PennDOT driver license centers. However, preparations for the issuance of Department of State identification cards were still underway as of the time of the evidentiary hearing in the Commonwealth Court in this case, and the cards were not slated to be made available until approximately two months before the November election. N.T. at 534, 555, 706, 784, 993. Moreover, still contrary to the Law's liberal access requirement, applicants for a Department of State identification card may be initially vetted through the rigorous application process for a secure PennDOT identification card before being considered for a Department of State card, the latter of which is considered to be only a "safety net." N.T. at 709, 711, 791-95 (testimony from the Commissioner of the Bureau of Commissions, Elections and Legislation that applicants who are unable to procure a PennDOT identification card will be given a telephone number to contact the Department of State to begin the process of obtaining the alternative card); see also N.T. at 993.

In the above landscape, Appellants have asserted a facial constitutional challenge to the Law and seek to preliminarily enjoin its implementation. They contend, most particularly, that a number of qualified members of the Pennsylvania voting public will be disenfranchised in the upcoming General Election, because – given their

personal circumstances and the limitations associated with the infrastructure through which the Commonwealth is issuing identification cards – these voters will not have had an adequate opportunity to become educated about the Law's requirements and obtain the necessary identification cards. While there is a debate over the number of affected voters, given the substantial overlap between voter rolls and PennDOT's existing ID driver/cardholder database, it is readily understood that a minority of the population is affected by the access issue. Nevertheless, there is little disagreement with Appellants' observation that the population involved includes members of some of the most vulnerable segments of our society (the elderly, disabled members of our community, and the financially disadvantaged).

On its review, the Commonwealth Court has made a predictive judgment that the Commonwealth's efforts to educate the voting public, coupled with the remedial efforts being made to compensate for the constraints on the issuance of a PennDOT identification card, will ultimately be sufficient to forestall the possibility of disenfranchisement. This judgment runs through the Commonwealth Court's opinion, touching on all material elements of the legal analysis by which the court determined that Appellants are not entitled to the relief they seek.

As a final element of the background, at oral argument before this Court, counsel for Appellants acknowledged that there is no constitutional impediment to the Commonwealth's implementation of a voter identification requirement, at least in the abstract. Given reasonable voter education efforts, reasonably available means for procuring identification, and reasonable time allowed for implementation, the Appellants apparently would accept that the State may require the presentation of an identification card as a precondition to casting a ballot. The gravamen of their challenge at this juncture lies solely in the implementation.

Upon review, we find that the disconnect between what the Law prescribes and how it is being implemented has created a number of conceptual difficulties in addressing the legal issues raised. Initially, the focus on short-term implementation, which has become necessary given that critical terms of the statute have themselves become irrelevant, is in tension with the framing of Appellants' challenge to the Law as a facial one (or one contesting the Law's application across the widest range of circumstances). In this regard, however, we agree with Appellants' essential position that if a statute violates constitutional norms in the short term, a facial challenge may be sustainable even though the statute might validly be enforced at some time in the future. Indeed, the most judicious remedy, in such a circumstance, is the entry of a preliminary injunction, which may moot further controversy as the constitutional impediments dissipate.

Overall, we are confronted with an ambitious effort on the part of the General Assembly to bring the new identification procedure into effect within a relatively short timeframe and an implementation process which has by no means been seamless in light of the serious operational constraints faced by the executive branch. Given this state of affairs, we are not satisfied with a mere predictive judgment based primarily on the assurances of government officials, even though we have no doubt they are proceeding in good faith.

Thus, we will return the matter to the Commonwealth Court to make a present assessment of the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available. In this regard, the court is to consider whether the procedures being used for deployment of the cards comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards. If they do not, or if the

Commonwealth Court is not still convinced in its predictive judgment that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement for purposes of the upcoming election, that court is obliged to enter a preliminary injunction.

Accordingly, the order of the Commonwealth Court is VACATED, and the matter is returned to the Commonwealth Court for further proceedings consistent with this Order. The Commonwealth Court is to file its supplemental opinion on or before October 2, 2012. Any further appeals will be administered on an expedited basis.

Jurisdiction is relinquished.

Madame Justice Todd files a Dissenting Statement which Mr. Justice McCaffery joins.

Mr. Justice McCaffery files a Dissenting Statement which Madame Justice Todd joins.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viviette Applewhite; Wilola Shinholster Lee; Grover Freeland; Gloria Cuttino; Nadine Marsh; Dorothy Barksdale; Bea Bookler; Joyce Block; Henrietta Kay Dickerson; Devra Mirel ("Asher") Schor; the League of Women Voters of Pennsylvania; National Association for the Advancement of Colored People, Pennsylvania State Conference; Homeless Advocacy Project, Petitioners	:	
v.	:	No. 330 M.D. 2012
The Commonwealth of Pennsylvania; Thomas W. Corbett, in his capacity as Governor; Carole Aichele, in her capacity as Secretary of the Commonwealth, Respondents	:	HEARD: September 25, 2012

BEFORE: HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED**: October 2, 2012

SUPPLEMENTAL DETERMINATION
on APPLICATION for PRELIMINARY INJUNCTION

This request to enjoin enforcement of the Act of March 14, 2012, P.L. 195, No. 18 (Act 18), returns to me from the Supreme Court for expedited consideration of the following directive:

> Thus, we will return the matter to the Commonwealth Court to make a present assessment of the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available. In this regard, the court is to consider whether the procedures being used for deployment of the cards comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards. If they do not, or if the Commonwealth Court is not still convinced in its predictive judgment that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement for purposes of the upcoming election, that court is obliged to enter a preliminary injunction.

Applewhite v. Commonwealth, ___ Pa. ___, ___, ___ A.3d ___, ___ (Pa., No. 71 MAP 2012, filed September 18, 2012) (per curiam), slip op. at 6-7. Thus, I am to preliminarily determine: 1) whether the procedures being used for deployment of the Department of State identification cards (DOS IDs) comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards; and 2) whether I am still convinced that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement for purposes of the upcoming election.

After several phone conferences with counsel, additional discovery consisting of substantial document production, and submission of pre-hearing memoranda, I presided over an additional hearing beginning September 25, 2012. Thereafter, I received excellent post-hearing memoranda. Based on these proceedings, I make the following supplemental preliminary determinations.

Liberal Access

From the time of initial deployment on August 27, 2012, until the first day of the hearing, September 25, 2012, the DOS ID was issued as a "safety net," that is, it was issued only when the more rigorous procedures for secure PennDOT IDs could not be satisfied. The Supreme Court, however, described this situation as "still contrary to the Law's liberal access requirement ...." Applewhite, ___ Pa. at ___, ___ A.3d at ___; slip op. at 4.

The new procedure proposed the first day of the hearing will cure this deficiency if implemented as described. As believably explained by Kurt Myers, Deputy Secretary for Transportation, the new procedure will eliminate the so-called "exhaustion" requirement, will eliminate the requirement for two proofs of residency, and will result in the DOS ID no longer being a "safety net" product. Additional proposed changes credibly described by Shannon Royer, Deputy Secretary for the Commonwealth, will obviate the necessity for a second trip to a PennDOT Drivers Licensing Center to obtain the DOS ID.

I have three problems with the testimony regarding the proposed changes. First and foremost, the evidence is similar in kind to the prospective "assurances of government officials" testimony which the Supreme Court found an unsatisfactory basis for a "predictive judgment." Id. at ___, ___ A.3d at ___, slip op. at 6. Second, the proposed changes are to occur about five weeks before the general election, and I question whether sufficient time now remains to attain the goal of liberal access. Third, the proposed changes are accompanied by candid admissions by government officials that any new deployment will reveal

unforeseen problems which impede implementation. These admissions were corroborated by anecdotal evidence offered by Petitioners regarding the initial roll-out of the DOS IDs in August. For these reasons, I cannot conclude the proposed changes cure the deficiency in liberal access identified by the Supreme Court.

Nevertheless, acknowledgement should be made of improvements in system design by government officials since initial deployment of the DOS ID. These include a more streamlined procedure for validating birth dates, improved scheduling of individuals manning the DOS Help Desk, a more structured referral system for complex Help Desk inquiries, and some extended hours at PennDOT Drivers Licensing Centers, to name a few. Outreach and voter education efforts by PennDOT and DOS, believably described by Deputy Secretaries Myers and Royer, are extensive, surpassing predictions made in the earlier hearing. These existing structural improvements, together with the proposed enhanced access to the DOS ID and additional time, will place the Commonwealth in a better position going forward.

Disenfranchisement

After the first hearing, I made the following preliminary determination:

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

Applewhite v. Commonwealth, No. 330 M.D. 2012, 2012 WL 3332376, at *3, n.16 (Pa. Cmwlth. Aug. 15, 2012) (unreported).

As of the most recent hearing, between 9300 and 9500 PennDOT IDs for voting have been issued. Also, between 1300 and 1350 DOS IDs have been issued. Further, PennDOT statistics for issuance of initial drivers' licenses and initial photo IDs for the period March, 2012, through September, 2012, show a slight increase over the same period in 2011. Pet'rs' Ex. 136. The increase is in the magnitude of 1000 to 2000 a month. Id.

I expected more photo IDs to have been issued by this time. For this reason, I accept Petitioners' argument that in the remaining five weeks before the general election, the gap between the photo IDs issued and the estimated need will not be closed. I reject Respondents' argument that my initial estimate was overblown.

Consequently, I am not still convinced in my predictive judgment that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement for purposes of the upcoming election. Under these circumstances, I am obliged to enter a preliminary injunction. Applewhite, ___ Pa. at ___, ___ A.3d at ___, slip op. at 7.

Form of Preliminary Injunction

At my invitation, the parties offered argument on the form of a preliminary injunction. Importantly, Petitioners concede that parts of Act 18

(relating to proof of identification for absentee voting) do not cause injury and may be implemented. Therefore, they no longer seek a total ban on implementation of Act 18. Also, Respondents concede that procedures for deployment of the DOS IDs did not conform to the liberal access requirement as explained by the Supreme Court and that some injunction relating to that activity is appropriate. Respondents highlight changes already made and others recently proposed.

A preliminary injunction must be crafted so as to be no broader than is necessary for the petitioner's interim protection. Santoro v. Morse, 781 A.2d 1220 (Pa. Super. 2001); Anchel v. Shea, 762 A.2d 346 (Pa. Super. 2000); Langston v. Nat'l Media Corp., 617 A.2d 354 (Pa. Super. 1992); Three Cnty. Servs., Inc. v. Phila. Inquirer, 486 A.2d 997 (Pa. Super. 1985); see 15 STANDARD PENNSYLVANIA PRACTICE 2D §83:7 at 32 (2010 ed.) See also Crowe ex rel. Crowe v. Sch. Dist. of Pittsburgh, 805 A.2d 691, 694 (Pa. Cmwlth. 2002) (preliminary injunction must be "narrowly tailored to address the wrong plead [sic] and proven."). "Even if the essential prerequisites of an injunction are satisfied, the court must fashion a remedy 'reasonably suited to abate [the harm].'" The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Constr. Co., Inc., 893 A.2d 196, 207 (Pa. Cmwlth. 2006) (quoting John G. Bryant Co., Inc. v. Sling Testing & Repair Inc., 471 Pa. 1, 7, 369 A.2d 1164, 1167 (1977)); see also Big Bass Lake Cmty. Ass'n v. Warren, 950 A.2d 1137 (Pa. Cmwlth. 2008) (court must narrowly tailor its remedy to abate the injury).

Our Supreme Court identified the possibly offending conduct which is the focus of my current attention: procedures for deployment of the DOS IDs which fail to comport with the requirement of liberal access found in Section 206(b) of the Pennsylvania Election Code (Election Code),[1] 25 P.S. §2626(b); and voter disenfranchisement. Applewhite, ___ Pa. at ___, ___ A.3d at ___, slip op. at 2-3, 6-7. Consistent with this Court's responsibility to narrowly tailor the remedy to abate the harm, I will enter a preliminary injunction addressing the conduct identified by the Supreme Court.

Regarding the liberal access requirement, I adopt most of the language proposed by Respondents.

For several reasons, I reject Petitioners' request to enjoin all outreach and education efforts required by Section 206(a) of the Election Code, 25 P.S. §2626(a). Petitioners assert that those efforts will mislead the public if election officials are enjoined from asking for photo ID at the polls.

First, as discussed below, I reject the premise upon which Petitioners' argument is based. That is, I reject the underlying assertion that the offending activity is the request to produce photo ID; instead, I conclude that the salient offending conduct is voter disenfranchisement. As a result, I will not restrain election officials from asking for photo ID at the polls; rather, I will enjoin enforcement of those parts of Act 18 which directly result in disenfranchisement.

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[1] Act of June 3, 1937, P.L. 1333, as amended. Section 206 was added by the Act of March 14, 2012, P.L. 195, No. 18.

Second, Petitioners' outreach/education request is aimed at a different statutory provision, Section 206(a) of the Election Code, which was not cited by the Supreme Court and was not clearly part of its "liberal access" analysis.

Finally, Petitioners' request is made without reference to the General Assembly's express intent that during the transition into full implementation of Act 18, education efforts at the polls continue. This is set forth in Section 10(2) of Act 18, 25 P.S. §3050 (Historical and Statutory Notes), quoted below.

As to voter disenfranchisement, I carefully reviewed the language of the Election Code after amendment by Act 18. The language of disenfranchisement is found in the part of the Election Code dealing with provisional ballots: "A provisional ballot shall not be counted if …." Section 1210(a.4)(5)(ii), 25 P.S. §3050(a.4)(5)(ii). This language pre-existed Act 18, but Act 18 added two new circumstances when a provisional vote will not be counted. Both of these new circumstances relate to electors who are unable to produce proof of identification.

More specifically, the relevant subsection of Section 1210 of the Election Code, 25 P.S. §3050(a.4)(5)(ii), provides as follows (with deletions and additions by Act 18 highlighted by strikethrough and underline, respectively):

> (ii) A provisional ballot shall not be counted if:
>
> (A) either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual;

(B) the signature required under clause (3) and the signature required under clause (2) are either not genuine or are not executed by the same individual; ~~or~~

(C) a provisional ballot envelope does not contain a secrecy envelope;

(D) in the case of a provisional ballot that was cast under subsection (a.2)(1)(i), within six calendar days following the election the elector fails to appear before the county board of elections to execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot and that the elector is indigent and unable to obtain proof of identification without the payment of a fee; or

(E) in the case of a provisional ballot that was cast under subsection (a.2)(1)(ii), within six calendar days following the election, the elector fails to appear before the county board of elections to present proof of identification and execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of the proof of identification and an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot.

Thus, disenfranchisement expressly occurs during the provisional ballot part of the in-person voting process, which is addressed in subsections (a.2)[2] and (a.4) of

---

[2] This subsection of the Election Code, 25 P.S. §3050(a.2), provides as follows (with deletions and additions by Act 18 highlighted by strikethrough and underline, respectively):

(a.2) ~~If the elector is unable to produce identification or the elector's identification is challenged by the judge of elections, the~~

(Footnote continued on next page...)

Section 1210. It is this part of the process which must be enjoined to prevent disenfranchisement.

The public policy of this Commonwealth favors severability. PPG Indus., Inc. v. Bd. of Finance & Revenue, 567 Pa. 580, 790 A.2d 261 (2001); Lebanon Valley Farmers Bank v. Commonwealth, 27 A.3d 288 (Pa. Cmwlth. 2011).

The provisions of every statute shall be severable. Section 1925 of the Statutory Construction Act of 1972, 1 Pa. C.S. §1925. Further,

> If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void

(continued...)

> ~~elector shall be permitted to cast a provisional ballot in accordance with subsection (a.4).~~ If any of the following apply, the elector shall be permitted to cast a provisional ballot in accordance with subsection (a.4):
>
> (1) The elector is unable to produce proof of identification:
>
> (i) on the grounds that the elector is indigent and unable to obtain proof of identification without the payment of a fee; or
>
> (ii) on any other grounds.
>
> (2) The elector's proof of identification is challenged by the judge of elections.

> provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Id.

As our Supreme Court explains:

> In addition to applying to 'every' statute and employing mandatory terms, Section 1925 is notable because it is not merely boilerplate. Thus, Section 1925 does not mandate severance in all instances, but only in those circumstances where a statute can stand alone absent the invalid provision. Section 1925 sets forth a specific, cogent standard, one which both emphasizes the logical and essential interrelationship of the void and valid provisions, and also recognizes the essential role of the Judiciary in undertaking the required analysis.

Stilp v. Commonwealth, 588 Pa. 539, 626-27, 905 A.2d 918, 970 (2006) (citation omitted).

Significant for current purposes, Section 103(a) of the Election Code, 25 P.S. §2603(a), provides (with emphasis added):

> The provisions of this act are severable, and if any article, section or clause of this act, or part thereof, is held to be unconstitutional, the decision shall not be construed to affect or invalidate any other provisions of this act, or the act as a whole. It is hereby declared as the legislative intent that this act would have been adopted had such unconstitutional provision not been included therein.

Although not addressed by the parties, the General Assembly expressed its intentions about how Act 18 was to operate during its initial implementation, described as the "soft run" during the first hearing. In Section 10 of Act 18, the General Assembly explained that during the first elections after its passage, an otherwise qualified elector who does not provide proof of identification may cast a ballot that shall be counted without the necessity of casting a provisional ballot.

In particular, Section 10 of Act 18, which appears as a note to 25 P.S. §3050, provides in its entirety (with emphasis added):

> Section 10. The following shall apply to elections held after January 1, 2012, and prior to September 17, 2012:
>
> (1)(i) Except as provided under subparagraph (ii) and notwithstanding any law, <u>election officials at the polling place at an election held after January 1, 2012, shall request that every elector show proof of identification</u>.
>
> (ii) Notwithstanding subparagraph (i), prior to September 17, 2012, <u>if the elector does not provide proof of identification and the elector is otherwise qualified, the elector may cast a ballot that shall be counted without the necessity of presenting proof of identification and without the necessity of casting a provisional ballot</u>, except as required by the act.
>
> (2) Beginning January 1, 2012, if any elector votes at a polling place at an election and does not provide proof of identification and will be required to provide proof of identification beginning September 17, 2012, <u>the election official that requested the proof of identification shall provide to the elector written information prescribed by the Secretary of the Commonwealth briefly describing the voter identification</u>

> requirement created by this act and inform the elector that he or she will be required to comply with that requirement when voting at future elections beginning September 17, 2012, unless an exemption applies.

Consistent with this expressed intent, and consistent with principles of severability, I will enjoin enforcement of those provisions of Act 18 which amend the provisional ballot procedures of the Election Code and cause disenfranchisement based on failure to present photo ID for in-person voting. The injunction will have the effect of extending the express transition provisions of Act 18 through the general election.

For several reasons, I decline Petitioners' post-hearing invitation to enjoin Act 18's requirement that election officials request that an in-person voter show photo ID. First, Petitioner's invitation is made without reference to the General Assembly's express intent that during the transition period a request for photo ID be made even though the vote will be counted regardless of compliance with the request.

Second, I disagree with Petitioners' premise for their invitation. They assert that the "offending activity is the Commonwealth's attempt to impose on voters a photo ID requirement without providing liberal access to photo ID that can be used to vote." Pet'rs' Post-Hearing Br. at 15. This assertion is not consistent with that part of our Supreme Court's direction that I revisit my prior predictive judgment "that there will be no voter disenfranchisement ...." Applewhite, ___ Pa. at ___, ___ A.3d at ___, slip op. at 7. I understand the Supreme Court's language to identify the essential offending activity as voter disenfranchisement, not a

request to produce photo ID. The injunction is tailored to address that offending activity.

Third, the cases cited by Petitioners do not compel the result they seek. I reviewed the decisions in Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (Billups 2005), Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006), and Milwaukee Branch of NAACP v. Walker et al., No. 11 CV 5492 (Wis. Cir. Ct. Mar. 6, 2012) (unpublished), cert. denied, 811 N.W.2d 821 (Wis. 2012), cited by Petitioners in their post-hearing brief. I also reviewed the decision in Common Cause/Georgia, League of Women Voters of Georgia, Inc. v. Billups, 439 F. Supp.2d 1294 (N.D. Ga. 2006) (Billups 2006). However, these decisions do not alter my analysis. None of them provide a legal basis for me to ignore our Supreme Court's language of "no voter disenfranchisement," or the General Assembly's description of procedures to be used during the transition to full implementation of Act 18. Moreover, a careful reading of the entire injunctions in Billups 2005 and Billups 2006 reveals that the district court's primary focus was on voter disenfranchisement rather than on a request to show photo ID.

Similarly, I reject the Respondents' post-hearing argument that a possible remedy is to enjoin only operation of the disenfranchisement language added by Act 18 to Section 1210(a.4)(5)(ii) of the Election Code, discussed above. Thus, Respondents suggest that a qualified elector be asked to produce proof of identification, but be allowed to cast a provisional ballot. This argument fails to acknowledge the General Assembly's express intent that during the transition into

full implementation of Act 18, an otherwise qualified elector need not cast a provisional ballot.

Normally, a preliminary injunction will remain in place until a decision is reached on a permanent injunction. However, the Supreme Court's per curiam order directed me to reassess my "predictive judgment that there will be no voter disenfranchisement ... for purposes of the upcoming election ...." Applewhite, ___ Pa. at ___, ___ A.3d at ___, slip op. at 7. Based on this language, the duration of the current preliminary injunction is limited to the upcoming election. This is consistent with an injunction entered by another court in a photo ID challenge. Billups 2006.

Permanent Injunction

Petitioners' preserve their facial challenge to Act 18 because the statute contains no right to a non-burdensome means of obtaining the required identification. Pet'rs' Post-Hearing Br. at 5, n.5. Thus, I will begin planning for trial on a permanent injunction.

In this regard, my understanding of the Supreme Court's per curiam order is that I was to address certain discrete aspects of the case on remand, not that the burden of proof shifted to the Commonwealth. The parties have strongly divergent views on this point. If my understanding is incorrect, the Court's guidance will be needed.

Relatedly, the Supreme Court's reference to "no voter disenfranchisement … for purposes of the upcoming election," Applewhite, ___ Pa. at ___, ___ A.3d at ___, slip op. at 7, has sparked debate between the parties. I understand the phrase to be focused on the preliminary injunction for purposes of the upcoming election. I do not understand the phrase to define the test for a facial validity challenge in the context of a permanent injunction. If that understanding is not correct, the Court's guidance will be necessary.

For all these reasons, I enter the following order.

ROBERT SIMPSON, Judge

2003 WL 21998480

SEE COURT OF APPEALS RULES 11 AND 12
Court of Appeals of Tennessee.

MEDTRONIC, INC., et al.
v.
NuVASIVE, INC., et al.

No. W2002-01642-COA-R3-CV. | April 25, 2003 Session. | Aug. 20, 2003.

A Direct Appeal from the Circuit Court for Shelby County, No. CT-001579-01; Robert L. Childers, Judge.

Attorneys and Law Firms

Glen G. Reid, Jr., Memphis, For Appellants, Nuvasive, Inc., Rufus L. Bennett, Keith Valentine and Pat Miles.

William Z. Pentelovitch and Mary R. Vasaly, Minneapolis, Minnesota; Sam B. Blair, Jr., Memphis, For Appellees, Medtronic, Inc. and Medtronic Sofamor Danek, Inc.

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J. and HOLLY M. KIRBY, J., joined.

Opinion

OPINION

W. FRANK CRAWFORD, P.J., W.S.

*1 This is an appeal from a Final Order enjoining Appellant from indemnifying its employees in their lawsuit against Appellees. Appellant's employees were previously employed by Appellee. Appellee and Appellant are competing corporations who, prior to this lawsuit, entered into a Settlement Agreement with a forum selection clause forbidding Appellant from suing Appellee outside Tennessee for an eighteen month period. In a lawsuit instigated in California by Appellees' former employees, Appellant agreed to fund the litigation and to indemnify those employees against any attorney fees incurred by the employees. Appellees' suit seeks to enjoin Appellants from further funding of the employees' action. The trial court granted the injunction and Appellants appeal. We affirm.

Medtronic, Inc. ("Medtronic") is a Minnesota corporation with its principal place of business in Fridley, Minnesota. [1] Medtronic Sofamor Danek, Inc. ("MSD," and together with Medtronic "Plaintiffs," or "Appellees") is an Indiana corporation with its principal place of business in Memphis, Tennessee. MSD is a wholly owned subsidiary of Medtronic. [2] MSD is a leader in spinal and cranial surgical products and an innovator in technology associated with these surgeries. Because the products offered by MSD are sophisticated, sales of these products require the company's representatives to develop networks of spine surgeon contacts and to nurture these relationships in order to influence the surgeon's decision to choose MSD's spine surgery products. [3] In order to keep their sales representatives up to date, MSD must share with them confidential marketing and business information. [4]

NuVasive, Inc. ("NuVasive") is a Delaware corporation with its principal place of business in San Diego, California. NuVasive is a direct competitor of MSD in the business of the design, marketing, and sale of medical devices used in connection with spinal surgery. Since the summer of 1999, NuVasive has been led by Alex Lukianov, a former senior executive of MSD. The Appellees allege that, since Lukianov took control of NuVasive, NuVasive has targeted MSD's employees for hiring in an attempt to acquire confidential information.

The Bird Litigation and Resulting Settlement Agreement

During 1999, Edward Bird, Jr. ("Bird") lived in Tennessee and worked for MSD as Vice President of Global Medical Education and Emerging Technologies. In late 1999, Lukianov hired Bird to be NuVasive's Vice President of Sales and Marketing. MSD asserted that this hiring was in violation of Bird's contractual and common law duties to MSD. Before notifying MSD that he was quitting, Bird joined NuVasive in suing MSD in California. [5] MSD sued Bird in the Chancery Court of Tennessee to enforce its contractual covenants and protect its confidential information. Bird removed the Tennessee Suit to federal court. The federal court refused to transfer the lawsuit to California. (These lawsuits are referred to collectively as the "Bird Litigation").

*2 After intensive litigation, NuVasive and MSD ended the Bird Litigation by executing a Settlement Agreement (the "Settlement Agreement") in February 2000. This agreement was executed by NuVasive's CEO, Lukianov, by

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Medtronic's counsel, Jean Forneris, and by MSD's counsel, Karl Dahlquist. The Settlement Agreement reads, in relevant part, as follows:

> This Settlement Agreement, Waiver and Release of Claims ("Settlement Agreement") is made by and between MEDTRONIC, INC. and MEDTRONIC SOFAMOR DANEK, INC. (Collectively, "Medtronic"), and NUVASIVE, INC. ("NuVasive"). For purposes of this Agreement, the term "NuVasive" shall include NuVasive, Inc. and its stockholders, officers, directors, agents, representatives, attorneys, servants, employees, predecessor, successors, subsidiaries, parents, divisions, other corporate affiliates, assigns, and all persons or entities acting by, through, under, or in concert with any of them. For purposes of this Agreement, the term "Medtronic" shall include Medtronic, Inc. and its stockholders, officers, directors, agents, representatives, attorneys, servants, employees, predecessors, successors, subsidiaries, parents, divisions, other corporate affiliates, assigns, and all persons or entities acting by, through, under, or in concert with any of them.
>
> * * *
>
> 6. The parties agree that for a period of eighteen (18) months, from February 7, 2000 through August 6, 2001, they shall litigate certain disputes in a chosen forum. This specified eighteen (18) month period shall hereinafter be referred to as the "Forum Selection Period". The parties agree that the types of disputes that shall be litigated in the pre-selected forum pursuant to this paragraph shall be any disputes or actions involving or related to (1) any dispute concerning the enforceability of a current or former Medtronic employee's non-compete agreement; (2) any contention that a current of former Medtronic employee's employment with NuVasive violates such a non-compete agreement.... If any such disputes arise between or among the parties during the Forum Selection Period, the parties agree that any actions or proceedings relating to such disputes shall be brought and maintained exclusively in the Court in a county in which the Medtronic employee was last employed by Medtronic, so long as such actions or proceedings are initiated prior to the expiration of the Forum Selection Period. NuVasive agrees that this provision of the Settlement Agreement is binding and enforceable, and hereby waives any right to seek to declare this provision void or unenforceable.

Rufus L. Bennett

At the time of this Settlement Agreement, Rufus L. Bennett ("Bennett") was employed by MSD as a Senior Vice President of Sales and Marketing.[6] Bennett executed an Employment Agreement (the "Bennett Agreement") with MSD, which was effective January 1, 1994.[7] The Bennett Agreement is governed by Tennessee law and provides, in pertinent part, as follows:

> ***3** 8. *Confidentiality.* Employer possesses and will continue to possess information which has been created, discovered, developed by or otherwise become known to Employer (including information discovered or made available by subsidiaries, affiliates or joint venturers of Employer or in which property rights have been assigned or otherwise conveyed to Employer), which information has commercial value to Employer, including but not limited to trade secrets, innovations, processes, computer codes, data, know-how, improvements, discoveries, developments, techniques, marketing plans, strategies, costs, customer and client lists, or any information the Employee has reason to know Employer would treat as confidential for any purpose, whether or not developed by the Employee (hereinafter referred to as "Confidential Information"). Unless previously authorized in writing or instructed in writing by the Employer, the Employee will not, at any time, disclose to others, or use, or allow anyone else to disclose or use any Confidential Information (except as may be necessary in the performance of the Employee's employment with Employer), unless, until and then only to the extent that such Confidential Information has become ascertainable or obtained from public or published sources or was available to Employee on a non-confidential basis prior to any such disclosure or use, provided that the source of such material is or was not bound by an obligation of confidentiality to Employer.
>
> 9. *Restrictive Covenants.* ... The Employee acknowledges that because of his skills, the Employee's position with Employer and the Confidential Information to which the Employee shall have access or be provided on account of such employment with Employer, competition by the Employee with Employer could damage Employer in a manner which cannot adequately be compensated by damages or an action at law. In view of such circumstances, because of the Confidential Information obtained by, or disclosed to the Employee, and as a material inducement to Employer to enter into this Agreement and to compensate the Employee, ... as well as provide him with additional

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benefits as provided herein and other good and valuable consideration, the Employee covenants and agrees that:

(a) *Noncompetition.* During the Employee's employment with Employer and for a period of one (1) year thereafter, the Employee shall not, directly or indirectly, in any geographic area in which Employer is engaged in Business, participate or assist any other person or entity in any manner or capacity in performing any services or work similar to the business conducted by Employer at the time of termination of the Employee's employment with Employer.

(b) *Nonsolicitation of Customers.* During the Employee's employment with Employer and for a period of one (1) year thereafter, the Employee shall not, directly or indirectly solicit, divert or accept any work or services which competes with Employer's Business from any customer of Employer or seek to cause any such customer to refrain from doing business with or patronizing Employer.

***4** (c) *Nonsolicitation of Employees.* During the Employee's employment with Employer and for a period of one (1) year thereafter, the Employee shall not, directly or indirectly, solicit for employment or employ any employee of Employer.

On August 15, 2000, Bennett resigned from MSD to accept a position with NuVasive. MSD contends that this employment violates the Bennett Agreement.

Keith Valentine

Keith Valentine ("Valentine") began his career at MSD in 1992. His initial position was as International Marketing Manager. In 1994, he became Director of Sales and Marketing-Asia Pacific; and, in February 1997, he became Group Director of Sales and Marketing-Asia Pacific. In 1999, Valentine was promoted to Vice President of Marketing for MSD's Thoracolumbar Group. Valentine also entered into an Employment Agreement (the "Valentine Agreement"), which is also governed by Tennessee law and reads, in relevant part, as follows:

> 1. Unless previously authorized in writing or instructed in writing by Company, I will not, during or after my employment, disclose to any third party or use for the benefit of any third party or for my personal benefit any information, knowledge or data, which I may obtain during my employment with Company (including information discovered or made available by subsidiaries or joint ventures of Company), including but not limited to, information obtained to keep confidential, documents, drawings, blueprints, formulas, patterns, compilations, programs, devices, techniques, business or other methods, customer information, processes, machines, manufacturers, compositions of matter and figures, whether or not developed by me, unless and until, and then only to the extent, such information, knowledge or data has already become available to the public in a printed publication otherwise than by my act or omission.

Effective February 29, 2000, Valentine resigned from MSD. Valentine initially took the position of director of marketing for arthroscopy products for ORATEC Interventions, Inc. Although ORATEC is a direct competitor of MSD, MSD agreed to grant Valentine a limited release from his obligations under the Valentine Agreement. According to MSD, this release was applicable solely with respect to Valentine's position with ORATEC and did not release him from the covenant of nonsolicitation of MSD's employees. According to MSD, Valentine breached the condition upon which the limited release was granted by soliciting Pat Miles ("Miles," and together with NuVasive, and Messrs. Bennett and Valentine, "Defendants," or "Appellants"), an employee of MSD, to leave MSD and join ORATEC.

As a result of Valentine's breach, MSD notified Valentine that it would pursue any and all available action to protect MSD's interests. Valentine thereafter left ORATEC and became an employee of NuVasive.

Pat Miles

Miles joined MSD in 1997. He held senior product management and marketing positions before resigning from MSD effective April 24, 2000. Throughout his tenure at MSD, Miles was responsible for marketing MSD's MicroEndoscopic Discectomy System, and its successor the Metrx MicroEndoscopic Discectomy System ("Metrx"). In relation to his employment with MSD, Miles also executed

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an Employment Agreement (the "Miles Agreement"). The Miles Agreement is governed by Tennessee law and reads, in pertinent part, as follows:

2. DEFINITIONS

*5 (a) Medtronic means Medtronic, Inc. and all of its parent, subsidiary or affiliated corporations and the operating divisions of any of them.

(b) Confidential Information means any information or compilation of information that the Employee learns or develops during the course of his/her employment that derives independent economic value from not being generally known, or readily ascertainable by proper means, by other persons who can obtain economic value from its disclosure or use. It includes but is not limited to trade secrets and may relate to such matters as research and development, manufacturing processes, management systems and techniques and sales and marketing plans and information.

* * *

(d) Medtronic Product means any product, product line or service (including any component thereof or research to develop information useful in connection with a product or service) that is being designed, developed, manufactured, marketed or sold by Medtronic or with respect to which Medtronic has acquired Confidential Information which it intends to use in the design, development, manufacture, marketing or sale of a product or service.

(e) Competitive Product means any product, product line or service (including any component thereof or research to develop information useful in connection with a product or service) that is being designed, developed, manufactured, marketed or sold by anyone other than Medtronic and is of the same general type, performs similar functions, or is used for the same purposes as a Medtronic Product on which the employee worked during the last two years of employment or about which he/she received or had knowledge of Confidential Information.

* * *

5. CONFIDENTIAL INFORMATION

Employee agrees not to directly or indirectly use or disclose Confidential Information for the benefit of anyone other than Medtronic, either during or after employment, for as long as the information retains the characteristics described in paragraph 2(b) above.

* * *

7. POST-EMPLOYMENT RESTRICTION

Employee agrees that for two (2) years after termination of employment he/she will not directly or indirectly render services (including services in research) to any person or entity in connection with the design, development, manufacture, marketing, or sale of a Competitive Product that is sold or intended for use or sale in any geographic area in which Medtronic actively markets a Medtronic Product or intends to actively market a Medtronic Product of the same general type or function. It is expressly understood that the employee is free to work for a competitor of Medtronic provided that such employment does not include any responsibilities for, or in connections with, a Competitive Product ... for the two year period of the restriction.

If the Employee's only responsibilities for Medtronic during the last two years of employment have been in [the] field [of] sales or field sales management capacity, this provision shall only prohibit for one (1) year the rendition of services in connection with the sale of a Competitive Product to persons or entities located in any sales territory the Employee covered or supervised for Medtronic during the last year of employment.

*6 As stated above, Miles was recruited by Valentine to leave MSD and join ORATEC. Miles subsequently left the employ of ORATEC to join NuVasive.

After NuVasive hired Bennett, Valentine, and Miles, Medtronic and MSD commenced this action against NuVasive on March 12, 2001 in the Circuit Court of Shelby County (the "Tennessee Suit"). In their Complaint, Medtronic and MSD alleged tortious interference by NuVasive with Bennett, Valentine, and Mile's respective employment agreements and sought temporary and permanent injunctions to enjoin continuing and further breaches by NuVasive. On April 20, 2001, Medtronic and MSD filed its First Amended Complaint for Injunctive and Other Relief, which added Bennett, Valentine, and Miles as Defendants and lists the following causes of action: (1) Declaratory relief against NuVasive, (2) Injunctive relief against NuVasive, (3) Breach of settlement agreement against all Defendants, (4) Breach of implied covenant of good faith and fair dealing against

all Defendants, (5) Inducing breach of settlement agreement against Bennett, Valentine, and Miles, and (6) Breach of employment agreements against Bennett, Valentine, and Miles.

On April 13, 2001, Bennett, Valentine and Miles filed a Complaint for: 1) Declaratory Relief, 2) Unfair Competition, and 3) Injunctive Relief against Medtronic and MSD in the Superior Court of the State of California, San Diego County (the "California Suit"). The California Complaint seeks, *inter alia,* a declaration that the NuVasive employees' Tennessee employment contracts are unenforceable, an injunction against the Tennessee Suit, an injunction against MSD prohibiting it from commencing any other lawsuit outside California against Bennett, Valentine, Miles, or NuVasive, and damages for "unfair competition" based on MSD's filing the Tennessee Suit. Medtronic and MSD moved the California court to dismiss or transfer the California Suit in favor of the first-filed Tennessee Suit, but the request was denied. On April 18, 2001, Bennett, Valentine, and Miles also filed Plaintiff's Application for Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction, seeking to stop Medtronic and MSD from proceeding in the Tennessee Suit. The California Court denied this Motion.

According to the deposition testimony of NuVasive CEO, Lukianov, NuVasive agreed to pay the legal fees incurred by Bennett, Valentine, and Miles in conjunction with the California Suit, to wit:

> Q [to Lukianov] ... Specifically, is NuVasive paying the legal fees for Mr. Miles, Mr. Bennett, and Mr. Valentine for-in connection with the lawsuit filed in San Diego?
>
> A [by Lukianov]. Yes.
>
> Q. Did NuVasive agree to pay those fees before the lawsuit was filed?
>
> A. Yes.
>
> Q. Did NuVasive participate in selecting the counsel to represent Mr. Miles, Mr. Bennett, and Mr. Valentine?
>
> A. Yes.

Following the California court's denial of the Motion to stop the Tennessee Suit, Bennett, Valentine, and Miles removed the California Suit to federal court [8] where they again sought to enjoin the Tennessee Suit. After the parties submitted briefs, the California district court heard the Motion. On June 1, 2001, the California court issued an order, enjoining MSD "from seeking to enforce the Plaintiff's non-compete agreements in any court except the federal district court in San Diego." ***See Bennett v. Medtronic, Inc.,*** 285 F.3d 801, 805 (9th Cir.2002). In its opinion, the appeals court noted, correctly, that the effect of the District Court's "granting the motion is to halt the Tennessee proceedings." *Id.* at 805.

*7 On June 8, 2001, NuVasive moved the Tennessee court to stay its action based on the California court's injunction. Although Medtronic and MSD had previously moved the Tennessee court to temporarily enjoin Bennett, Miles, and Valentine from their alleged ongoing breaches of their respective employment agreements, based on the California court's injunction, Medtronic and MSD modified their motion to request only enforcement of the employees' confidentiality agreements. On June 22, 2001, the Tennessee trial court ruled on the motions. It declined to stay the action and issued an injunction prohibiting NuVasive from disclosing MSD's confidential information and from inducing current or former MSD employees from breaching their duty not to disclose MSD's confidential information.

On March 27, 2002, the United States Court of Appeals for the Ninth Circuit reversed the district court's order granting the injunction. *Bennett,* 285 F.3d at 807. This reversal left Medtronic and MSD free to proceed in the Tennessee Suit.

On or about August 20, 2001, NuVasive Answered the First Amended Complaint of Medtronic and MSD. On or about November 8, 2001, Valentine, Bennett, and Miles filed their respective answers to the Medtronic MSD Complaint. On November 30, 2001, MSD moved the Tennessee court for an order enjoining NuVasive from continuing to fund the California Suit. The Motion was based on the grounds that NuVasive's actions violated the Settlement Agreement executed by MSD and NuVasive in connection with the Bird Litigation.

On May 24, 2002, the trial court issued an injunction prohibiting NuVasive from continuing to finance the California Suit. The trial court's Memorandum Opinion reads, in pertinent part, as follows:

> The Court has considered the Plaintiff's Motion For Temporary Injunction upon the briefs, affidavits and depositions submitted by the parties, upon statements of counsel, and from the entire record in this cause. The Court finds that the Motion for Temporary Injunction should be granted.

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Facts

Following prior litigation, Medtronic, Inc. (Medtronic) and NuVasive, Inc. (NuVasive) executed a Settlement Agreement. The Settlement Agreement, which was freely entered into by both Medtronic and NuVasive, includes a Forum Selection Clause for a period of eighteen months following the execution of the Agreement (February 7, 2000 to August 6, 2001). The Clause states that during that time any suit concerning the non-compete agreement of a former Medtronic employee must be brought in the last county the Medtronic employee worked. The Agreement defines "Medtronic" and "NuVasive" as including the employees, attorneys, and all other persons or entities acting by, through, under, or in concert with any of them.

Bennett, Valentine and Miles are former employees of Medtronic who signed non-compete agreements while working for Medtronic in Tennessee. These employees then began working for NuVasive in California, and Medtronic brought this suit against NuVasive for violation of the non-compete agreements. The former Medtronic employees, seeking relief from their non-compete agreements, then brought suit against Medtronic in April 2001, in California, a jurisdiction that does not recognize any non-compete agreement. NuVasive suggested to the employees that they retain counsel that had represented NuVasive in past suits against Medtronic and agreed to indemnify the employees for their attorneys' fees.

***8** Medtronic requests this Court to enjoin NuVasive 1) from continuing to fund the California litigation, which is in violation of the Settlement Agreement, and; 2) from indemnifying NuVasive employees Bennett, Valentine, and Miles against any attorney's fees in any action in violation of the Settlement Agreement.

Findings of Fact and Conclusions of Law

First, the actions of Nuvasive have created a situation that defeats the essential purpose of the Settlement Agreement, which was bargained for and freely entered into by both parties. NuVasive bound its employees to the terms of the Agreement by expressly defining "NuVasive" as including employees. The NuVasive employees' California lawsuit against Medtronic is of the nature described in the Agreement covered by the eighteen-month Forum Selection Period. The suit was filed within the eighteen month period, but was not brought in Shelby County, Tennessee, which was the last county in which the employees worked, a violation of the Agreement. NuVasive suggested that its employees retain counsel to prosecute their lawsuit that NuVasive had retained in the past to either sue Medtronic or to defend suits brought by Medtronic. NuVasive then indemnified its employees for attorney's fees for these attorneys. By doing so NuVasive is able to use its employees' lawsuit to circumvent its Settlement Agreement with Medtronic and reap the benefits of employing Medtronic's former employees.

Second, if Medtronic's allegations are correct, the actions of NuVasive are contrary to the covenant of good faith and fair dealing that Tennessee implies into every contract. In *Riveredge Associates v. Metropolitan Life Insurance Co.*, 774 F.Supp. 897 (D .N.J., 1991), the Court stated that the covenant is breached by "conduct such as ... asserting an interpretation contrary to one's own understanding." The Settlement Agreement was executed to assure that litigation involving the non-compete agreements would take place in Tennessee. The terms of the Settlement Agreement appear to be clear and unambiguous. It also appears that NuVasive should have recognized that by involving itself in a lawsuit outside the jurisdiction chosen by the Forum Selection Clause, it would be in violation of the Agreement. To argue otherwise would be to assert an interpretation contrary to a reasonable person's understanding of the Forum Selection Period.

Third, NuVasive relies on California Labor Code § 2802 to suggest that it must indemnify its employees for legal expenses incurred as a result of a lawsuit brought by those employees against their former employer, Medtronic. However, the clear language of the statute states that "an employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties ..." NuVasive has presented no evidence that its employees had any work-related duty to file the lawsuit against Medtronic in California. NuVasive seems to argue that it has a duty to indemnify the employees for the employees' attorneys fees in prosecuting the California lawsuit because the employees would be discharged from NuVasive if the employees did not prevail in that lawsuit. Even if the employees did have a work-related duty to bring suit

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against Medtronic, the Labor Code still does not apply here, because the employees have yet to be discharged from NuVasive. Therefore, no legal fees can be in direct consequence of their discharge.

*9 Fourth, if the Court denied this Motion for Temporary Injunction, Medtronic would suffer the irreparable harm of losing the "fruits of the Settlement Agreement" that was bargained for and freely entered into by both parties. Medtronic would lose the right to have disputes concerning non-compete agreements that arose during the Forum Selection Period litigated in Tennessee. The Court does not believe that Medtronic can receive adequate damages to compensate for NuVasive's breach of the Settlement Agreement.

For these reasons the Court will enjoin the Defendant, NuVasive: 1) from continuing to fund the California litigation, which is in violation of the Settlement Agreement, and; 2) from indemnifying NuVasive employees Bennett, Valentine, and Miles against any attorney's fees in any action in violation of the Settlement Agreement.

On June 21, 2002, the trial court entered an "Order on Memorandum Opinion Dated May 24, 2002, Granting Permanent Injunction Against NuVasive," which provides in pertinent part:

Upon request of Defendants and meeting with counsel for the parties, the Court finds that the Memorandum Opinion should be amended to require Plaintiffs, Medtronic, Inc. and Medtronic Sofamor Danek, Inc., to post an injunction bond in the amount of $5,000. Also upon the request of Defendants, the Court further amends its Memorandum Opinion and rules that the injunction granted is permanent and finds as to the specific claims for relief that are addressed by the Memorandum Opinion and this Order, there is no just reason for delay and that this Order should be entered as a Final Judgment as to the issue of Plaintiffs' entitlement to injunctive relief pursuant to the Settlement Agreement between the parties, from which Defendant, NuVasive, Inc., shall have the right to appeal.

In granting Defendants' requests, the Trial Court specifically retains jurisdiction of all remaining issues in this case, specifically including, but not limited to, all alleged breaches of the agreements between the parties.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. For the reasons set forth in the Memorandum Opinion dated May 24, 2002, which is incorporated herein by reference, Defendant NuVasive is permanently enjoined:

A. From continuing to fund the California litigation, which is in violation of the Settlement Agreement;

B. From indemnifying NuVasive employees Bennett, Valentine and Miles against any attorneys' fees in any action in violation of the Settlement Agreement;

2. Medtronic shall post a $5,000 injunction bond;

3. The Trial Court determines that there is no just reason for delay and directs the entry of this Permanent Injunction Order as a Final Judgment pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure; and

4. The Trial Court specifically retains jurisdiction of all remaining issues in this case, specifically including, but not limited to, all alleged breaches of the agreements between the parties.

*10 NuVasive, Bennett, Valentine and Miles appeal from this Order and raise one issue as stated in their brief: Whether the Trial Court erroneously enjoined NuVasive from indemnifying its Employees for legal fees incurred by the Employees in litigation between the Employees and Medtronic in California.

Review of findings of fact by the trial court is de novo on the record with a presumption of correctness "unless the preponderance of the evidence is otherwise." Tenn. R.App. P. 13(d). The presumption of correctness applies only to findings of fact and not to conclusions of law. ***See Campbell v. Florida Steel Corp.,*** 919 S.W.2d 26 (Tenn.1996). The standard of review respecting injunctive relief is whether the trial court erred in exercising its discretion in the issuance or nonissuance of the injunction. ***See Thompson v. Menefee,*** 6 Tenn.App. 118 (1927); ***Durham v. Dormer Enter., Inc.,*** No. 02A01-9105-CH-00090, 1992 WL 97075 (Tenn.Ct.App. May 12, 1992).[9]

Tenn. R. Civ. P. 65.04(2) governs the trial court's determination of whether to grant an injunction and provides as follows:

> A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

The threshold issue requires a showing that the moving party's rights are being or will be violated by the adverse party. In this case, the moving parties, Medtronic and MSD, derive their rights from the Settlement Agreement entered in the Bird Litigation.

The interpretation of a written contract is a matter of law, and thus, no presumption of correctness in its interpretation exists. ***NSA DBA Benefit Plan, v. Connecticut Gen. Life Ins. Co.,*** 968 S.W.2d 791 (Tenn.Ct.App.1997). The cardinal rule in the construction of contracts is to ascertain the intent of the parties. ***West v. Laminite Plastics Mfg. Co.,*** 674 S.W.2d 310 (Tenn.Ct . App.1984). If the contract is plain and unambiguous, the meaning thereof is a question of law, and it is the Court's function to interpret the contract as written according to its plain terms. ***Petty v. Sloan,*** 197 Tenn. 630, 277 S.W.2d 355 (Tenn.1955). The language used in a contract must be taken and understood in its plain, ordinary, and popular sense. ***Bob Pearsall Motors, Inc. v. Regal-Chrysler Plymouth, Inc.,*** 521 S.W.2d 578 (Tenn.1975). In construing contracts, the words expressing the parties' intentions should be given the usual, natural, and ordinary meaning. ***Ballard v. North American Life & Casualty Co.,*** 667 S.W.2d 79 (Tenn.Ct.App.1983). If the language of a written instrument is unambiguous, the Court must interpret it as written rather than according to the unexpressed intention of one of the parties. ***Sutton v. First Nat. Bank of Crossville,*** 620 S.W.2d 526 (Tenn.Ct.App.1981). Courts cannot make contracts for parties but can only enforce the contract which the parties themselves have made. ***McKee v. Continental Ins. Co.,*** 191 Tenn. 413, 234 S.W.2d 830 (Tenn.1950).

***11** By its plain language, the Forum Selection Clause of the Settlement Agreement requires NuVasive to litigate disputes concerning the enforceability of a current or former Medtronic employee's non-compete agreement only in the state where the employee last worked for MSD. This requirement is valid from February 7, 2000 through August 6, 2001. NuVasive asserts that the Settlement Agreement is not triggered by the California Suit. Specifically, NuVasive contends that: (1) the Settlement Agreement did not specifically mention indemnification, (2) that it is required by California law to indemnify the employees, (3) it is not a party to the California Suit, and (4) the employees are not bound by the Settlement Agreement.

We first note our agreement with the trial court's interpretation of California Labor Code § 2802, on which NuVasive relies for the proposition that its indemnification of Valentine, Bennett and Miles is mandated under California law. The trial court is correct in holding that this particular litigation, which involves the employees' contest of their respective employment agreements with MSD, is not contemplated by the California Labor Code which requires employers to indemnify their employees in litigation arising as a "direct consequence of the discharge of his or her duties." ***See*** § 2802 California Labor Code. The California Suit simply does not meet this criterion. Consequently, NuVasive is not required to embroil itself in the employees' lawsuit in any way. Absent a legislative mandate to indemnify, NuVasive's agreement to do so violates the bargained-for exchange, which lies at the crux of the Settlement Agreement.

The clear language of the Settlement Agreement indicates that Medtronic and MSD agreed to dismiss their case against Bird and NuVasive in exchange for NuVasive agreeing to litigate other disputes, involving former Medtronic employees, in Tennessee, for the eighteen-month period. In short, Medtronic and MSD exchanged settlement for the privilege of not having to defend parallel litigation outside Tennessee. The California Suit clearly falls within the scope of the Settlement Agreement in that it was brought within the Forum Selection Period, it involved the employees' non-compete agreements with Medtronic and MSD, and it was brought in California, which is outside the selected forum.

It is true that the Settlement Agreement has no bearing on the decision of Valentine, Bennett and Miles to sue Medtronic and/or MSD in a California forum. Indeed, these employees are only bound by the terms of their respective employment agreements, as set out *supra.* But while these employees are free to pursue their California litigation free of any constraints mandated by the Settlement Agreement, NuVasive is not. NuVasive is bound by the Settlement Agreement and, under its clear terms, is prohibited from engaging in the California litigation. As noted above, absent a legislative

mandate to indemnify these employees, NuVasive must refrain from any direct or indirect involvement in litigation that violates the Settlement Agreement, i.e. litigation that involves the employees' non-compete agreements, begun within the eighteen month period, and brought outside the selected forum. Because the California Suit meets all three criteria, NuVasive would have been precluded from participating in this litigation directly, i.e. bringing the suit itself or being a party to it. For NuVasive to fund the employees' litigation, absent a legal obligation to do so, embroils them in a litigation in which they are prohibited from participating. In essence, NuVasive is doing indirectly through the employees what it is prohibited from doing directly under the terms of the Settlement Agreement. ***See, e.g., Bellsouth BSE, Inc. v. Tennessee Regulatory Auth.,*** 2003 WL 354466, *7 (Tenn.Ct.App.). It is well settled that every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement, and there is an implied undertaking on the part of each party that nothing will be intentionally done which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. **Winfree v. Educators Credit Union,** 900 S.W.2d 285 (Tenn.App.1995). To allow NuVasive to fund the California Suit would violate this implied covenant of good faith and fair dealing by denying Medtronic and MSD the benefit of their bargain under the Settlement Agreement, i.e. Metronic and MSD would have to defend, outside the selected forum, parallel litigation, in which NuVasive is involved.

***12** Injunctions should only be granted if the moving party will suffer immediate and irreparable injury pending a final judgment, or the acts of the adverse party will tend to render final judgment ineffectual. Tenn. R. Civ. P. 65.04(2). As discussed above, the injury to Medtronic and MSD in allowing NuVasive to fund the California Suit would be to deny Medtronic and MSD the benefit of their bargain, i.e., to avoid parallel litigation outside of Tennessee. Injunction is the proper relief in this case in that injunction is the only way to secure the fruits of Medtronic and MSD's bargain.

For the foregoing reasons, we affirm the Order of the trial court, and this case is remanded to the trial court for such further proceedings as may be necessary. Costs of this appeal are assessed to the Appellant, NuVasive, and its surety.

Parallel Citations

20 IER Cases 572

Footnotes

1 Medtronic is a leading medical technology company, focusing its expertise in the areas of cardiac rhythm management, cardiac surgery, coronary and peripheral vascular, neurological, spinal, and ear, nose and throat, and, after the acquisition of MSD, in the areas of spinal surgery technology.

2 MSD was previously known as Danek Medical, Inc. and Danek Group, Inc. before it adopted the name, Sofamor Danek Group, Inc., in 1993. In 1999, Sofamor Danek Group, Inc. became a wholly owned subsidiary of Medtronic, and changed its name to Medtronic Sofamor Danek.

3 In order to enable its sales representatives to develop these relationships, MSD provides those representatives with substantial entertainment and travel expense accounts. MSD also encourages sales representatives to provide business management programs targeting MSD's customers, "think tank" seminars, educational retreats and "VIP" meetings, where key surgeons visit MSD for product and surgical education and training.

4 This information includes MSD's contractual relationships with key customers (including types of products purchases and prices paid for those products). In addition, MSD also circulates a large amount of confidential financial information among its manager-level employees. This financial information reflects product sales, costs, inventory levels, sales trends and other market informations.

5 The California Suit was allegedly an attempt to (1) avoid the contractual choice of Tennessee law in Bird's employment agreement with MSD, (2) to have Bird's noncompete agreement declared unenforceable under California law, and (3) to preclude MSD from attempting to enforce Bird's contract in Tennessee or anywhere else outside California.

6 Bennett had been employed by MSD since 1991.

7 Bennett had originally executed an Employment Agreement with MSD's predecessor, Danek Group, Inc. dated January 1, 1992. The January 1, 1994 Agreement contains substantially identical terms as the 1992 Agreement.

8 The action is now styled *Rufus L. ("Lew") Bennett, Keith Valentine, and Patrick Miles v. Medtronic, Inc. And Medtronic Sofamor Danek, Inc.,* Case No. 01 CV 00684 JM (JFS), United Stated District Court for the Southern District of California.

9 **See also Bd. of Comm'rs of Roane County v. Parker,** 88 S .W.3d 916, 919 (Tenn.Ct.App.2002), wherein the Court states the following in dicta: "The standard of review respecting the issuance of injunctive relief is whether the Chancellor erred in exercising his discretion to do so."

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF SOUTH CAROLINA, *Plaintiff,* v. UNITED STATES OF AMERICA, and ERIC HIMPTON HOLDER, JR. in his official capacity as Attorney General of the United States, *Defendants,* and JAMES DUBOSE, *et al.*, *Defendant-Intervenors.*	Civil Action No. 12-203 (BMK) (CKK) (JDB)

Before: KAVANAUGH, *Circuit Judge*; KOLLAR-KOTELLY, *District Judge*; and BATES, *District Judge*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH, with whom *District Judge* KOLLAR-KOTELLY and *District Judge* BATES join.

Concurring opinion filed by *District Judge* KOLLAR-KOTELLY.

Concurring opinion filed by *District Judge* BATES, with whom *District Judge* KOLLAR-KOTELLY joins.

MEMORANDUM OPINION

KAVANAUGH, *Circuit Judge*: This case concerns South Carolina's new voter ID law, Act R54. The question presented is whether that new state law is lawful under the federal Voting Rights Act. As relevant here, Section 5 of the Voting Rights Act bars state laws that have either the purpose or the effect "of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). The effects prong of Section 5 of the Voting Rights Act measures a State's proposed new voting law against the benchmark of the State's pre-existing law.

For several decades, South Carolina has had a voter ID law. Under the version of the law in effect since 1988, a voter must show a South Carolina driver's license, DMV photo ID card, or non-photo voter registration card in order to vote. Under that pre-existing South Carolina law, a voter with a non-photo voter registration card need not show a photo ID in order to vote. As we will explain, South Carolina's new law, Act R54, likewise does not require a photo ID to vote. Rather, under the expansive "reasonable impediment" provision in Act R54 – as authoritatively interpreted by the responsible South Carolina officials, an interpretation on which we base our decision today – voters with the non-photo voter registration card that sufficed to vote under pre-existing law may still vote without a photo ID. Those voters simply must sign an affidavit at the polling place and list the reason that they have not obtained a photo ID.

In addition, Act R54 expands the kinds of photo IDs that may be used to vote – adding passports, military IDs, and new photo voter registration cards to the driver's licenses and DMV photo ID cards already permitted by pre-existing law. Moreover, Act R54 minimizes the burden of obtaining a qualifying photo ID as compared to pre-existing law. The new law creates a new type of photo ID – namely, photo voter registration cards – which may be obtained for free at

each county's elections office. Also, under Act R54, DMV photo ID cards may be obtained at each county's DMV office for free; those cards cost $5 under pre-existing law.

In short, Act R54 allows citizens with non-photo voter registration cards to still vote without a photo ID so long as they state the reason for not having obtained one; it expands the list of qualifying photo IDs that may be used to vote; and it makes it far easier to obtain a qualifying photo ID than it was under pre-existing law. Therefore, we conclude that the new South Carolina law does not have a discriminatory retrogressive effect, as compared to the benchmark of South Carolina's pre-existing law. We also conclude that Act R54 was not enacted for a discriminatory purpose. Act R54 as interpreted thus satisfies Section 5 of the Voting Rights Act, and we grant pre-clearance for South Carolina to implement Act R54 for future elections beginning with any elections in 2013. As explained below, however, given the short time left before the 2012 elections, and given the numerous steps necessary to properly implement the law – particularly the new "reasonable impediment" provision – and ensure that the law would not have discriminatory retrogressive effects on African-American voters in 2012, we do not grant pre-clearance for the 2012 elections.

I. Legal and Factual Background

A. The Voting Rights Act and Act R54

The Voting Rights Act of 1965 is among the most significant and effective pieces of legislation in American history. Its simple and direct legal prohibition of racial discrimination in voting laws and practices has dramatically improved the Nation, and brought America closer to fulfilling the promise of equality espoused in the Declaration of Independence and the Fourteenth and Fifteenth Amendments to the Constitution.

Section 5 of the Voting Rights Act requires certain States and political subdivisions – including South Carolina – to obtain pre-clearance of proposed changes in state or local voting laws. Pre-clearance must be obtained from the U.S. Attorney General or from a three-judge court of the U.S. District Court for the District of Columbia. 42 U.S.C. § 1973c(a). The Section 5 pre-clearance requirement seeks to ensure that the proposed changes "neither ha[ve] the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. *Id.* The effects prong of Section 5 examines the effects of a State's proposed new law on minority voters, as compared to the benchmark of the State's pre-existing law.

Pursuant to the Voting Rights Act, South Carolina here seeks pre-clearance of Act R54, South Carolina's new voter ID law.[1]

South Carolina's pre-existing voter ID law has been in place since 1988. That law has required voters to present one of three forms of ID at the polling place: (i) a South Carolina driver's license, (ii) a South Carolina DMV photo ID card, or (iii) the non-photo voter registration card given to all registered voters in South Carolina.

On May 11, 2011, the South Carolina General Assembly passed Act R54, and Governor Nikki Haley then signed it into law. The stated purpose of the law is "to confirm the person presenting himself to vote is the elector on the poll list." Act R54, § 5. The law adds three forms of qualifying photo ID to the list of photo IDs accepted under pre-existing law. The full list of qualifying photo IDs now includes not only (i) a South Carolina driver's license and (ii) a South

[1] South Carolina seeks pre-clearance of Sections 4, 5, 7, and 8 of Act R54; the Attorney General already pre-cleared the sections of Act R54 that are independent of the voter ID requirement.

Carolina DMV photo ID card, but also (iii) a passport, (iv) a federal military photo ID, and (v) a new free photo voter registration card.[2]

Under Section 4 of Act R54, new photo voter registration cards may be obtained for free in person from county elections offices.[3] There is at least one elections office in each of South Carolina's 46 counties. The photo voter registration card may be obtained by presenting the citizen's current non-photo voter registration card. Or a citizen who is already registered to vote may verbally confirm his or her date of birth and the last four digits of his or her Social Security number. Or, consistent with the Help America Vote Act, Pub. L. No. 107-252 (2002) (codified at 42 U.S.C. §§ 15301-15545), a citizen may present any photo ID, utility bill, bank statement, government check, paycheck, or other government document that shows his or her name and address.

Under Section 6 of Act R54, DMV photo ID cards may now be acquired for free from county DMV offices. Under pre-existing law, those cards cost $5. There is at least one DMV office in all 46 counties, and more than one DMV office in some of the more populated counties. To obtain the free DMV photo ID card, the voter must go to a DMV office and present proof of South Carolina residency, U.S. citizenship, and Social Security number. Such proof typically requires a voter to present, among other things, either a birth certificate or a passport. The documents required to obtain a DMV photo ID card are not changed from pre-existing law.

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[2] Act R54 requires that the qualifying photo ID be valid and current; pre-existing law stated that it must be valid.

Under Act R54, if a voter possesses an acceptable form of photo ID but arrives at the polling place without it, the voter may of course go home and come back with the photo ID. Or the voter may cast a provisional ballot at the polling place. That provisional ballot will be counted so long as the voter presents his or her photo ID to the county board of elections before certification of the election, which occurs on a statutorily set deadline a few days after election day. Act R54, § 5.

[3] To be clear, Act R54 adds a new free photo voter registration card; it does not eliminate the non-photo voter registration card. *See* Act R54, § 4. Under Section 2 of Act R54, which has already been pre-cleared by the Department of Justice, citizens who register to vote will continue to be issued a non-photo voter registration card.

Importantly for our purposes, Act R54 still permits citizens to use their *non-photo* voter registration cards to vote, as they could under pre-existing South Carolina law. Act R54 provides that if a voter has "a reasonable impediment that prevents the elector from obtaining photographic identification," the voter may complete an affidavit at the polling place attesting to his or her identity. Act R54, § 5. To confirm the voter's identity to the notary (or, in the case of a notary's unavailability, to the poll manager) who witnesses the affidavit, the voter may show his or her non-photo voter registration card. The affidavit also must list the voter's reason for not obtaining a photo ID. Together with the affidavit, the voter may cast a provisional ballot, which the county board "shall find" valid unless it has "grounds to believe the affidavit is false." *Id.* So long as the voter does not lie about his or her identity or lie about the reason he or she has not obtained a photo ID, the reason that the voter gives must be accepted by the county board, and the ballot must be counted. As we will explain further below, state and county officials may *not* review the reasonableness of the voter's explanation (and, furthermore, may review the explanation for falsity only if someone challenges the ballot). Therefore, all voters in South Carolina who previously voted with (or want to vote with) the non-photo voter registration card may still do so, as long as they state the reason that they have not obtained a photo ID.[4]

In order to educate voters and election officials about the new law's effects, Section 7 of Act R54 requires the South Carolina State Election Commission to "establish an aggressive voter education program." Among other things, the Commission must post information at county elections offices, train poll managers and poll workers, coordinate with local and service organizations, advertise the changes in South Carolina newspapers, and disseminate information through local media outlets. The law also requires "documentation describing the changes in this

[4] Relatedly, if a voter does not produce one of the required photo IDs on election day because of "a religious objection to being photographed," the law expressly provides that the voter may fill out an affidavit to that effect and cast a provisional ballot. Act R54, § 5.

legislation to be disseminated by poll managers and poll workers" on election day. Act R54, § 7(3). In advance of the elections, the Commission must also notify each registered voter who does not currently have a driver's license or DMV photo ID card of the law's effects and of the availability of free photo IDs.

Section 8 of the Act requires the Commission to distribute a list of registered voters without a driver's license or DMV photo ID card to third parties upon request. That provision is designed to assist outside groups that want to help voters obtain the necessary IDs and educate voters about the law.

B. Act R54's Reasonable Impediment Provision

At first blush, one might have thought South Carolina had enacted a very strict photo ID law. Much of the initial rhetoric surrounding the law suggested as much. But that rhetoric was based on a misunderstanding of how the law would work. Act R54, as it has been authoritatively construed by South Carolina officials, does not have the effects that some expected and some feared. As we have outlined, Act R54 has several important components: It allows three additional forms of qualifying photo IDs; it makes it far easier to obtain qualifying photo IDs than it was under pre-existing law; and it contains a significant reasonable impediment provision that allows registered voters with non-photo voter registration cards to vote without photo IDs, so long as they fill out an affidavit at the polling place and indicate the reason that they have not obtained an R54-listed photo ID.

Of course, the initial rhetoric surrounding this case arose in part because of a key unanswered question at the time of Act R54's enactment: namely, how would the reasonable impediment provision be interpreted and enforced? Would it be interpreted restrictively and

force voters – some of whom are poor and lack transportation – to try to obtain new photo IDs? Or would it be interpreted broadly and allow voters to continue to vote with their non-photo voter registration cards so long as they state the reason for not having obtained a photo ID? We know that at least some South Carolina legislators intended the reasonable impediment provision to be interpreted broadly so as to accommodate voters currently without photo IDs. For example, Speaker of the House Robert Harrell testified that the legislature intended the reasonable impediment provision to be construed "very, very broadly." Trial Tr. 64:14-15 (Aug. 28, 2012); *see also* Trial Tr. 63:20-21 (Aug. 27, 2012) (Senator Campsen) (reasonable impediment provision "is very broad"). But those directional signals still left ultimate interpretation to the relevant administrative agencies in the South Carolina Government.

As this litigation unfolded, the responsible South Carolina officials determined, often in real time, how they would apply the broadly worded reasonable impediment provision. Two officials play critical and complementary roles in the interpretation and implementation of Act R54: the Attorney General of South Carolina and the Executive Director of the South Carolina State Election Commission. The Attorney General is the chief legal officer of the State, and the Executive Director of the State Election Commission has principal responsibility for implementing Act R54's requirements. In 2011, the Attorney General of South Carolina officially interpreted the reasonable impediment provision and listed a variety of situations that, as a matter of law, would qualify as a reasonable impediment. And at the close of trial, the South Carolina Attorney General submitted an additional memorandum to the Court addressing several issues about the reasonable impediment provision. The Court also heard testimony from the Executive Director of the State Election Commission, Marci Andino. Ms. Andino testified that she follows the interpretation of South Carolina law offered by the Attorney General of South

Carolina. Ms. Andino also furnished specific assurances about how the reasonable impediment provision would be implemented. The evidence shows that county boards and election officials, who will be implementing the law on the ground, adhere to guidance from the central State Election Commission.

The Attorney General of South Carolina and Ms. Andino have emphasized that a driving principle both at the polling place and in South Carolina state law more generally is erring in favor of the voter. *See* S.C. Responses to the Court's Questions, Aug. 31, 2012, at 8 ("Ms. Andino is also correct to resolve conflicting legal requirements in favor of the voter."); Op. S.C. Att'y Gen., Aug. 16, 2011, 2011 WL 3918168, at *4 (reasonable impediment provision must be interpreted in light of "fundamental nature of the right to vote"); Op. S.C. Att'y Gen., Oct. 11, 1996, 1996 WL 679459, at *2 ("[W]hen there is any doubt as to how a statute is to be interpreted and how that interpretation is to be applied in a given instance, it is the policy of this Office to construe such doubt in favor of the people's right to vote.").

Most importantly for present purposes, the interpretation of South Carolina law rendered by the responsible South Carolina officials has established that Act R54 will continue to permit voting by registered voters who have the non-photo voter registration card, so long as the voter states the reason for not having obtained a photo ID. As a result, Act R54 will deny *no* voters the ability to vote and have their votes counted if they have the non-photo voter registration card that could be used to vote under pre-existing South Carolina law.

As the responsible South Carolina officials have confirmed repeatedly, any reason asserted by the voter on the reasonable impediment affidavit for not having obtained a photo ID must be accepted – and his or her provisional ballot counted – unless the affidavit is "false." Thus, the reasonableness of the listed impediment is to be determined by the individual voter, not

by a poll manager or county board. The reasonable impediment affidavit simply helps to ensure that voters with non-photo voter registration cards are who they say they are. The purpose of this provision, by its plain text and as it has been administratively interpreted, is *not* to second-guess the reasons that those voters have not yet obtained photo IDs. So long as the reason given by the voter is not a lie, an individual voter may express any one of the many conceivable reasons why he or she has not obtained a photo ID.

As the South Carolina Attorney General determined, a voter may assert, for example, that he or she lacks a birth certificate, or has a disability, or does not have a car. (The example of voters who don't have a car is especially important because one of the main concerns during the legislative debates was whether citizens without cars would be required to obtain photo IDs. They are not.) So too, a voter may assert any of the myriad other reasons for not procuring one of the required photo IDs, such as: I had to work, I was unemployed and looking for work, I didn't have transportation to the county office, I didn't have enough money to make the trip, I was taking care of my children, I was helping my family, I was busy with my charitable work, and so on. Any reason that the voter *subjectively* deems reasonable will suffice, so long as it is not false.[5] If the affidavit is challenged before the county board, the county board may not second-guess the *reasonableness* of the asserted reason, only its *truthfulness*. As the Attorney

[5] Although county boards generally cannot second-guess whether the reason given was a "reasonable impediment" that prevented the voter from obtaining a photo ID, statements simply denigrating the law – such as, "I don't want to" or "I hate this law" – need not be accepted. Nor need nonsensical statements such as, to borrow an absurd example given at trial, "The moon is made of green cheese, so I didn't get a photo ID." The ability of county boards to police the outermost boundaries of the expansive reasonable impediment provision in this commonsense way does not affect our evaluation of Act R54. As the *Florida* three-judge court did, we assess the "reasonable" voter, not a voter who seeks to flout the law. *Florida v. United States*, 2012 WL 3538298, at *9 (D.D.C. 2012). That said, a county board's ability to police the outskirts of the reasonable impediment provision may not be used as a pretext for impermissible disenfranchisement or for backing away from the expansive understanding of the reasonable impediment provision articulated by the responsible South Carolina officials and adopted in this opinion.

General of South Carolina put it, "unless there is reason to believe the affidavit contains falsehoods, the vote will ultimately be deemed valid." Op. S.C. Att'y Gen., Aug. 16, 2011, 2011 WL 3918168, at *4.

That extremely broad interpretation of the reasonable impediment provision will make it far easier than some might have expected or feared for South Carolina voters with a non-photo voter registration card (and without photo ID) to vote as they could under pre-existing law. Yet the Department of Justice and the intervenors have oddly resisted that expansive interpretation of Act R54. They have insisted that the broad interpretation of the reasonable impediment provision advanced by the South Carolina Attorney General and State Election Commission contravenes the statutory language. But interpreting the law as the responsible South Carolina officials have done – to allow the voter's subjective interpretation of reasonable impediment to control – is perfectly consistent with the text of Act R54. Recall that under Act R54, a voter may cast a provisional ballot if he or she has "a reasonable impediment that prevents the elector from obtaining photographic identification." Act R54, § 5. The county board must find that provisional ballot valid "unless the board has grounds to believe the affidavit is *false*." *Id.* (emphasis added). Thus, the plain text of Act R54 provides for county-board review only of the affidavit's factual *falsity*, not of the listed impediment's *reasonableness* or *unreasonableness*. It is a sound reading of Act R54 – indeed, it could well be the best reading of the statutory text – to leave the determination of reasonableness up to the voter. Moreover, we of course owe substantial deference to a State's interpretation of state law. *Cf. Mullaney v. Wilbur*, 421 U.S. 684, 690-91 (1975). We thus accept and adopt, as a condition of pre-clearance, the expansive interpretation offered by the South Carolina Attorney General and the South Carolina State Election Commission. And as we will explain, that understanding is central to our resolution of

the case. *Cf. Florida v. United States*, 2012 WL 3538298, at *37 (D.D.C. 2012) ("Accordingly, our grant of preclearance to the inter-county mover changes is based on our express understanding that Florida will follow its laws as written and will abide by the representations it has made to this court.") (citations omitted).

What this means is that registered voters who could vote under pre-existing South Carolina law with a non-photo voter registration card – and who have not secured one of the qualifying photo IDs – will still be able to vote with the exact same non-photo voter registration card. The only additional requirement is that those voters will have to fill out an affidavit attesting to their identity and stating the reason for not having obtained a photo ID, and cast a provisional ballot.

The Department of Justice and intervenors contend that Act R54's affidavit requirement may negate the efficacy of the reasonable impediment provision. We disagree. Act R54 provides that voters who list a reasonable impediment must be permitted to vote if they complete the affidavit. *See* Act R54, § 5. Another provision of South Carolina law directs that affidavits be notarized. *See* S.C. Response to U.S. Request for Admission No. 19. As this affidavit requirement will be implemented, however, it will not burden the right to vote.

To witness the affidavits, notaries will be at the polling places. Notaries may not charge the voter, and notaries will *not* be able to require photo ID in order to notarize the affidavit (which otherwise would render the provision a circular absurdity). South Carolina election officials have determined that a current non-photo voter registration card will suffice to assure notaries of the voter's identity. *See* S.C. Code § 26-3-40 (notary must obtain "satisfactory evidence" of identity).[6] Notaries may not impose any requirement not permitted under federal

[6] It is possible that a notary would not even require the non-photo voter registration card to prove identity and would just rely on the notary's personal knowledge or on the verification of a credible

law or do anything more than confirm identity. The notary may ensure, for example, that the voter's non-photo voter registration card or other ID matches the voter's name. But as we interpret South Carolina law, including its voting laws, notaries are not permitted to screen voters based on the notaries' evaluations of voter capacity.

To implement the law, South Carolina may recruit notaries to work at the polls, and it may encourage poll managers to become notaries. Moreover, if a notary is not available at a certain polling place, the South Carolina Attorney General has determined that poll managers may witness reasonable-impediment affidavits, and county election boards will be directed to count the accompanying provisional ballots. We accept and require, as a condition of pre-clearance, the South Carolina Attorney General's reconciliation of competing South Carolina statutory provisions and the resulting interpretation of Act R54 as *not* requiring notaries to witness the affidavits, if a notary is unavailable.

II. Analysis

A. Analysis Under the Effects Test of Section 5 of the Voting Rights Act

The legal question before the Court is whether Act R54 as so interpreted satisfies Section 5 of the Voting Rights Act. South Carolina has the burden of showing that Act R54 "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). Because the law's effect will also inform our analysis of legislative purpose, we begin by assessing whether Act R54 will have a discriminatory effect. To satisfy the effects prong of Section 5 of the Voting Rights Act of 1965, South Carolina must demonstrate that implementation of Act R54 will not "lead to a retrogression in the position of

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witness. *See* S.C. Notary Public Reference Manual 3 (2012). What's important for present purposes is that the non-photo voter registration card is *sufficient* to establish identity and vote, as it was under pre-existing South Carolina law.

racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). Under Section 5, the new law must not disproportionately and materially burden racial minorities as compared to the benchmark of the State's pre-existing law.

In practice, the expansive reasonable impediment provision in Act R54 means that every South Carolina citizen who has the non-photo voter registration card that could be used under pre-existing South Carolina law may still use that card to vote. That of course includes all of the intervenor South Carolina citizens. For example, intervenor Delores Freelon does not currently possess any of the photo IDs listed in Act R54 that are now available. But like all South Carolina voters, she can vote under Act R54 at her usual polling place with her non-photo voter registration card and cite any one of the multiple reasons why she has not obtained a qualifying photo ID: that she does not have an accurate birth certificate, that she does not own a car, or that she has experienced health problems that have prevented her from traveling. Or she could cite any other reason she subjectively feels is reasonable, with any potential review by the county board only for the factual accuracy of her affidavit (and even that limited review occurs only if someone challenges her affidavit). Put simply, under Act R54, Ms. Freelon does not need to obtain any R54-listed photo ID to continue to vote in South Carolina elections.

Moreover, as compared to pre-existing South Carolina law, Act R54 *expands* the list of photo IDs that will qualify for voting. In addition to the driver's licenses and DMV photo ID cards accepted under pre-existing law, the new law adds military IDs, passports, and new free photo voter registration cards to the list of permissible IDs.

On top of that, the new law makes it far easier to obtain a photo ID than it was under pre-existing law. The law creates the new free photo voter registration card. The law also provides

for free DMV photo ID cards. The free photo voter registration card may be obtained at each county's elections office. And the DMV photo ID card may now be acquired for free at each county's DMV office. The availability of those cards makes it far easier for registered voters to obtain a qualifying photo ID than it was under pre-existing South Carolina law.

In addition, Act R54 requires the State to undertake various outreach and educational measures to encourage and make it easier for voters without an R54-listed photo ID to obtain one. The State Election Commission will advertise the law's changes and the availability of free photo IDs. To do so, the Commission will use its website and other social media platforms, newspapers of general circulation, and local media outlets. The Commission will also provide individual notice to every registered voter without a South Carolina driver's license or DMV photo ID card. And it will make a list of the registered voters without such DMV-issued photo IDs available to other organizations, so as to encourage those organizations to engage in their own mobilization efforts.

Under Act R54 as it has been interpreted, we do not find any discriminatory retrogressive effect on racial minorities under Section 5 of the Voting Rights Act. A state voting law has a discriminatory retrogressive effect if the law disproportionately and materially burdens minority voters when measured against the pre-existing state law. *See Florida v. United States*, 2012 WL 3538298, at *9 (D.D.C. 2012) ("In brief, we conclude that a change that alters the procedures or circumstances governing voting and voter registration will result in retrogression if: (1) the individuals who will be affected by the change are disproportionately likely to be members of a protected minority group; and (2) the change imposes a burden material enough that it will likely cause some reasonable minority voters not to exercise the franchise."); *Texas v. Holder*, 2012 WL 3743676, at *13 (D.D.C. 2012) ("Texas can prove that SB 14 lacks retrogressive effect even

if a disproportionate number of minority voters in the state currently lack photo ID. But to do so, Texas must prove that these would-be voters could easily obtain SB 14-qualifying ID without cost or major inconvenience.").

Here, about 95% of South Carolina registered voters possess one of the R54-listed photo IDs. But the evidence reveals an undisputed racial disparity of at least several percentage points: About 96% of whites and about 92-94% of African-Americans currently have one of the R54-listed photo IDs. That racial disparity, combined with the burdens of time and cost of transportation inherent in obtaining a new photo ID card, might have posed a problem for South Carolina's law under the strict effects test of Section 5 of the Voting Rights Act absent the reasonable impediment provision.

But even though the South Carolina law – absent the reasonable impediment provision – may have run into problems under Section 5, the sweeping reasonable impediment provision in Act R54 eliminates any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused. To repeat, under pre-existing law, citizens could vote without a photo ID only if they showed their non-photo voter registration card. Under Act R54, all citizens may still vote with that non-photo voter registration card, so long as they state the reason for not having obtained a photo ID. In addition, the new law both increases the number of qualifying photo IDs and makes it far easier to obtain a photo ID. Therefore, as so designed, Act R54 will not materially burden voters and will not have a discriminatory retrogressive effect on minority groups as compared to pre-existing South Carolina law.[7]

[7] South Carolina has represented that, as required by Act R54, it will notify voters about the law. This will include notice that voters with non-photo voter registration cards may continue to vote without photo ID so long as, at the polling place, they sign an affidavit that attests to identity and lists the reason they have not obtained a photo ID.

To ensure that the reasonable impediment provision operates as intended, there is also the question of how the voter who wishes to vote with a non-photo voter registration card will inform poll workers of the voter's reason for not obtaining a photo ID. The text of Act R54 simply requires a voter to "list the impediment" that prevented him or her from obtaining a photo ID. Act R54, § 5. State Election Commission officials have worked on a draft form that voters would complete at the polling places; the draft form has boxes that can be checked and leaves two blank lines for voters with non-photo voter registration cards to explain the reason that they have not obtained a photo ID. At the same time, South Carolina has repeatedly informed the Court that the purpose of Act R54 is to make sure that the voter is who he or she says, and not to improperly deter voters with non-photo voter registration cards from voting. In order to achieve South Carolina's stated purposes and to ensure that the reasonable impediment process does not disproportionately and materially burden minority voters in violation of the Voting Rights Act, South Carolina agrees that the process of filling out the form must not become a trap for the unwary, or a tool for intimidation or disenfranchisement of qualified voters. Therefore, consistent with the laundry list of reasons that South Carolina has told the Court will qualify as a reasonable impediment, the form at a minimum must have separate boxes that a voter may check for "religious objection"; "lack of transportation"; "disability or illness"; "lack of birth certificate"; "work schedule"; "family responsibilities"; and "other reasonable impediment." The form will require a further brief written explanation from the voter *only if* he or she checks the "other reasonable impediment" box on the form. So implemented, the process of listing the reason and filling out the form will not constitute a material burden for purposes of the Voting Rights Act. We base our decision today on that understanding of how the law will be implemented.[8]

[8] Throughout the proceedings, South Carolina has repeatedly emphasized to the Court that it will

The reasonable impediment provision thus operates similarly to a requirement that the voter without photo ID simply sign an affidavit stating that the voter is who he or she says. That's noteworthy, because the Department of Justice has concluded that requiring such affidavits does not pose a material burden on the right to vote for Section 5 pre-clearance purposes. *See* Letter from T. Christian Herren, Jr., Chief, Voting Section of Civil Rights Division of U.S. Department of Justice, to J. Gerald Hebert and Stephen B. Pershing (Sept. 4, 2012) (pre-clearing New Hampshire's voter ID law, which requires an affidavit from voters without photo IDs). Indeed, some *opponents* of strict photo voter ID laws have proposed such affidavits as an alternative to strict photo voter ID requirements. *See* America Votes Act, H.R. 6419, 112th Cong. (2012) (proposed bill permitting eligible voters to sign an affidavit if they do not have a state-required ID). It turns out that, as authoritatively interpreted, South Carolina's reasonable impediment provision strongly resembles the kind of affidavit requirement that the Department of Justice has agreed would not materially burden the right to vote.

It is true that citizens who vote with non-photo voter registration cards will cast provisional ballots, not regular ballots. But the word "provisional" is a bit of a misnomer in this instance. These ballots must be counted and will be counted, at least so long as the voter does not lie when he or she fills out and signs the reasonable impediment affidavit. Counting the reasonable impediment ballots will not differ in substance from the counting of absentee ballots. When the provisional ballot process operates in this way, casting a provisional ballot instead of a regular ballot does not burden the right to vote. *See Florida*, 2012 WL 3538298, at *33-38.

It is also true that, at the polling place, the process of filling out the reasonable impediment affidavit and casting the provisional ballot may take a few minutes more than the

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implement the reasonable impediment process in a way that alleviates material burdens, as determined by the Court. As described here, the process of completing the form at the polling place will not constitute a material burden.

regular ballot. On the other hand, in some situations this provisional ballot process might take a few minutes *less* than the regular ballot, if there are long lines for the regular voting machines and if the polling place uses additional lines for provisional ballots. In any event, under the precise circumstances of this law and this case, speculation about a few minutes more or less at polling places depending on respective times for regular ballots and provisional ballots does not rise to the level of a material burden that could render the entire law impermissible under the Voting Rights Act – as our fellow three-judge courts in this District have recently concluded in similar circumstances. *See Texas*, 2012 WL 3743676, at *10 ("some voter ID laws impose only 'minor inconvenience' and present little threat to the 'effective exercise of the electoral franchise' – and would thus be easily precleared under section 5"); *see also Florida*, 2012 WL 3538298, at *35.

In addition, a voter who shows a non-photo voter registration card and casts a provisional ballot is not required to attend the canvassing at the county office when the provisional ballots are counted. Because the reasonable impediment ballot is presumed valid and because any challenger can contest a completed affidavit based only on falsity, it would be nearly impossible for a county board to reject such a provisional ballot *as false* without first seeking to notify and hear from the voter. So long as the reasonable impediment affidavit is properly completed and actually lists a reason for not obtaining a photo ID, the affidavit generally "will be deemed to speak for itself" and the ballot must be counted. Op. S.C. Att'y Gen., Aug. 16, 2011, 2011 WL 3918168, at *4.[9]

[9] As dictated by the text of Section 5 of Act R54, the South Carolina Attorney General added an obvious caveat: "Of course, this conclusion assumes there is no basis for a challenge to the ballot other than the voter did not present a Photo ID at the polls." Op. S.C. Att'y Gen., Aug. 16, 2011, 2011 WL 3918168, at *4.

Our overall assessment of this provisional ballot process as ameliorative is strongly buttressed by the Supreme Court's evaluation of provisional ballots in *Crawford v. Marion County Election Board*. There, the Court stated that any burden created by Indiana's photo ID requirement was, "of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted." *Crawford v. Marion County Election Board*, 553 U.S. 181, 199 (2008) (binding opinion of Stevens, J.); *see also Texas*, 2012 WL 3743676, at *33 (listing provisional ballots for indigent persons as one of the ameliorative amendments "that could have made this a far closer case"). In other words, the Supreme Court characterized provisional ballots as curing problems and alleviating burdens, not as creating problems and imposing burdens.

Congress has similarly viewed provisional ballots as ameliorative. In the Help America Vote Act of 2002, known as HAVA, Congress mandated that States establish a provisional ballot process for certain voters, such as those who have recently moved or who forget to bring their state-required IDs to the polling place. *See* 42 U.S.C. § 15482(a). As in Act R54, the HAVA provisional ballot process entails both casting a provisional ballot and executing a written affirmation before an election official at the polling place. *Id.* And like Act R54, HAVA requires that, if found eligible, voters' ballots "shall be counted." *Id.* So Congress, as well as the Supreme Court, has viewed provisional ballots of this kind as a legitimate way for citizens to vote and have their votes counted.

In addition to Supreme Court and Congressional approval, the landmark Carter-Baker Report issued in 2005 also expressed a similar view of provisional ballots. A commission led by former President Jimmy Carter and Secretary James Baker issued a report that described provisional ballots as "a crucial safety net" in the current electoral system. BUILDING

CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, 16 (2005). In its proposed reforms, the Carter-Baker Report recommended that voters generally be required to present photo IDs in order to vote. But the Report maintained a role for provisional ballots, suggesting that provisional ballots be made available for those voters who fail to bring a photo ID to the polls. Those provisional ballots would be counted so long as the voter's signature was verified (for the first two federal elections after implementation) or the voter went to the appropriate election office with the required ID within 48 hours (for all future elections). This Report, too, supports South Carolina's use of provisional ballots for voters who have only their non-photo voter registration cards.

In sum, we conclude that Act R54, with its expansive reasonable impediment provision, will not have a discriminatory retrogressive effect on racial minorities in violation of Section 5 of the Voting Rights Act.

B. Analysis Under the Purpose Test of Section 5 of the Voting Rights Act

South Carolina also must demonstrate that Act R54 was not passed for "any discriminatory purpose." 42 U.S.C. § 1973c(c).

In evaluating legislative purpose, the Supreme Court has instructed that "courts should look to" the "decision in *Arlington Heights* for guidance." *Reno v. Bossier Parish School Board*, 520 U.S. 471, 488 (1997). Under *Arlington Heights*, "an important starting point" to the Section 5 purpose inquiry is the analysis we conducted above of whether the voting change bears more heavily on minorities – that is, whether the law has discriminatory retrogressive effects under the effects prong of Section 5. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Other potential sources of evidence of purpose include the historical

background of the legislative decision, the specific sequence of events leading up to the law's passage, departures from the normal legislative procedure, and legislative history, especially contemporaneous statements by legislators. *Id.* at 267-68. In order to rise to the level of discriminatory purpose, the legislature must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects" on a minority group. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

As an initial matter, the stated purpose of Act R54's voter ID provisions is "to confirm the person presenting himself to vote is the elector on the poll list." Act R54, § 5. South Carolina legislators have consistently asserted that Act R54 will thereby deter voter fraud and enhance public confidence in the electoral system. Those are the same purposes that have justified South Carolina's pre-existing voter ID law, which has been in place since 1988. And the Supreme Court has specifically recognized the legitimacy of those purposes: In upholding Indiana's stricter voter ID law, the Supreme Court stated that there "is no question about the legitimacy or importance" of the interest in deterring voter fraud and that there is "independent significance" in enhancing public confidence in the electoral system. *Crawford v. Marion County Election Board*, 553 U.S. 181, 196-97 (2008) (binding opinion of Stevens, J.); *see also id.* at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."); *id.* at 204 (those motives "are both neutral and sufficiently strong"). Notably, the Supreme Court deemed those interests valid despite the fact that the "record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* at 194; *see also Texas*, 2012 WL 3743676, at *12 ("[W]e reject the argument, urged by the United States at trial, that the absence of documented voter fraud in Texas somehow suggests that Texas's interests in protecting its ballot box and safeguarding voter confidence

were 'pretext.' A state interest that is unquestionably legitimate for Indiana – without *any* concrete evidence of a problem – is unquestionably legitimate for Texas as well."); *Florida*, 2012 WL 3538298, at *45 ("the fact that a state has acted proactively to close a loophole in its election laws . . . does not *by itself* raise an inference of discriminatory intent").

The Supreme Court's affirmation of the general legitimacy of the purpose behind a voter ID law is consistent with the fact that many States – particularly in the wake of the voting system problems exposed during the 2000 elections – have enacted stronger voter ID laws, among various other recent changes to voting laws. So too, the 2005 bipartisan Carter-Baker Report also forcefully recommended photo voter ID laws.

As the Supreme Court concluded with respect to Indiana and as a recent three-judge court in this District found with respect to Texas, we conclude that South Carolina's goals of preventing voter fraud and increasing electoral confidence are legitimate; those interests cannot be deemed pretextual merely because of an absence of recorded incidents of in-person voter fraud in South Carolina.

Act R54 pursues those goals by requiring either (i) a qualifying photo ID or (ii) a reasonable impediment affidavit from voters who continue to vote with their non-photo voter registration cards. By allowing voters with non-photo voter registration cards to continue to vote without photo IDs, South Carolina specifically sought to alleviate the burden on voters who might not have obtained one of the qualifying photo IDs. At the same time, by requiring an affidavit, South Carolina sought to enhance the solemnity of the process by which voters without photo IDs confirm their identities. *See, e.g.*, Trial Tr. 85:17-18 (Aug. 27, 2012) (Senator Campsen) (affidavits "give some sense of gravity or certainty to the statement that is being made").

When they debated and enacted Act R54, South Carolina's legislators and Governor no doubt knew, given the data obtained from the State Election Commission, that photo ID possession rates varied by race in South Carolina. Under *Feeney*, legislators' knowledge of the law's potential disproportionate impact does not alone equate to discriminatory purpose. *See Feeney*, 442 U.S. at 279. But under *Arlington Heights*, ongoing legislative action with the knowledge of such an impact might be some evidence of discriminatory purpose, depending on the other facts and circumstances. *See Arlington Heights*, 429 U.S. at 266. Here, we do not need to thread that analytical needle because, critically, South Carolina legislators did not just plow ahead in the face of the data showing a racial gap. Presented with that data, South Carolina legislators did not force everyone to obtain a photo ID in order to vote. Instead, South Carolina legislators – led by Republican Senator and now Lieutenant Governor Glenn McConnell and Democratic Senator John Land, who, according to the evidence, are well-respected in the Assembly by African-American legislators and white legislators, Republicans and Democrats – made several important changes to the bill. Among those changes was the addition of the sweeping reasonable impediment provision, which as interpreted by the responsible South Carolina officials ensures that all voters of all races with non-photo voter registration cards continue to have access to the polling place to the same degree they did under pre-existing law.[10] The legislators also permitted three *new* forms of qualifying photo IDs on top of the two already permitted under pre-existing law. And the legislators made it easier to obtain a qualifying photo ID: They created a new free photo voter registration card and made DMV photo ID cards available for free. And the legislators mandated a variety of education and outreach efforts to inform voters, poll managers, and county officials about the law's effects. Those many

[10] South Carolina legislators drafted the reasonable impediment provision in order to alleviate burdens on voters without photo IDs. South Carolina did not model the reasonable impediment provision on any other State's law.

provisions significantly undermine any suggestion that Act R54 was enacted for a discriminatory purpose.

In response, the Department of Justice and the intervenors point to Act R54's proximity to the election of the country's first African-American President, a Republican legislature's refusal to accede to some of the Democratic legislators' amendments, and the bill's sometimes rancorous legislative history. But those pieces of circumstantial evidence, even in the aggregate, do not overcome the central facts that we have described, which convincingly show that Act R54 was not enacted for a discriminatory purpose. When, as here, a law is race-neutral and does not have a discriminatory effect, it is obviously difficult for a challenger to the law to show that it was enacted for a discriminatory purpose. A legislature that intended to enact a discriminatory voting law typically would enact either: (i) a race-based law or (ii) a race-neutral law with racially discriminatory effects. There is neither here; what is more, there is a lot of evidence, including in the text of the final law, that reflects legislators' efforts to avoid discriminatory retrogressive effects on African-American voters.

To be sure, we are troubled by one piece of evidence in the record: an email exchange between a South Carolina constituent and one House member in which the constituent referred disparagingly to African-American voters who do not have photo IDs. The constituent's email demonstrates something we know and do not forget: Racial insensitivity, racial bias, and indeed outright racism are still problems throughout the United States as of 2012. We see that reality on an all-too-frequent basis. *See, e.g.*, *Tweets Put Focus on Racism, Hockey and Boston*, USA TODAY, April 27, 2012 (describing outburst of racist online comments after African-American hockey player from opposing team scored winning goal). The long march for equality for African-Americans is not finished. But the views of one constituent – and one legislator's failure

to immediately denounce those views in his responsive email, as he later testified he should have done – do not speak for the two Houses of the South Carolina Legislature, or the South Carolina Governor.

Of course, we don't know what we don't know about the true motivations of every legislator. But on the record before us, which is quite extensive, that one email does not overcome key points that, under Supreme Court precedent, must inform proper evaluation of overall legislative purpose in this context, including that: Act R54 is a facially neutral law and has no discriminatory retrogressive effects; Act R54 was passed for stated nondiscriminatory purposes that have been declared valid by the Supreme Court; Act R54 creates new forms of qualifying free photo IDs and makes it far easier to obtain a qualifying photo ID than it was under pre-existing law; Act R54 requires a variety of outreach and educational efforts to help voters obtain the requisite IDs; and Act R54 contains the expansive reasonable impediment provision that was intentionally designed to relieve any potentially problematic aspects of Act R54 and allows voters with non-photo voter registration cards to vote as they could before.

Based on the entire record and the text of Act R54, we cannot conclude that Act R54 was enacted for a racially discriminatory purpose.

C. Comparison to Other States' Laws

Our conclusion that Act R54 lacks discriminatory retrogressive effect or discriminatory purpose finds further support when we compare South Carolina's law to some other recently analyzed voter ID laws, such as those in Indiana, Georgia, New Hampshire, and Texas. The Indiana, Georgia, and New Hampshire laws have passed legal muster; Texas's law has not. As

we will explain, if those laws were to be placed on a spectrum of stringency, South Carolina's clearly would fall on the less stringent end.

Like South Carolina, many States have enacted voter ID laws for the stated purposes of deterring voter fraud and enhancing citizens' confidence in elections. In some States, however, minorities disproportionately lack photo IDs. That racial gap has exacerbated concerns about voter ID laws – in particular, about the burden of obtaining a photo ID and, correspondingly, about denying voters without photo IDs the ability to vote. To address those and other concerns, some States have adopted ameliorative provisions in their voter ID laws. Two broad kinds of ameliorative provisions can reduce the burden on voters who do not possess a qualifying photo ID. First, the law can make photo IDs readily accessible to voters – for example, by eliminating fees for such IDs, by expanding the kinds of underlying documentation that may be used to obtain the IDs, or by making the IDs available at convenient locations. Second, the law can create some method by which voters without photo IDs can continue to vote on election day, typically with an affidavit of some kind.

With its new free photo voter registration card and its broad reasonable impediment provision, South Carolina's law includes *both* kinds of ameliorative provisions. Among other things, Act R54 contains both (i) a free photo ID provision that allows voters to obtain a free photo ID, with minimal documentation, in each county, and (ii) an expansive reasonable impediment exception that allows voters without qualifying photo IDs to still vote. Among recently pre-cleared or federal court-approved voter ID laws, South Carolina's law stands out for having tackled the lack of photo ID possession in *both* ways. It is not an overstatement to describe South Carolina's Act R54 as significantly more friendly to voters currently without qualifying photo IDs than the voter ID laws in Indiana, Georgia, New Hampshire, and Texas.

First, consider Indiana. In *Crawford*, the Supreme Court upheld Indiana's voter ID law against a constitutional challenge. *See Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Although Indiana is not a covered jurisdiction under Section 5 of the Voting Rights Act, that sole Supreme Court decision on voter ID laws remains instructive. Indiana had neither kind of ameliorative provision that South Carolina has. Unlike South Carolina, Indiana required many citizens seeking photo IDs to present a birth certificate – and there generally is a fee to obtain a birth certificate (between $3 and $12 in Indiana). *See id.* at 198 n.17 (binding opinion of Stevens, J.). Moreover, unlike South Carolina, Indiana did not have anything close to the expansive reasonable impediment provision contained in South Carolina's Act R54. Indiana voters without photo IDs could vote a provisional ballot only if they were indigent. And, even then, those ballots were counted only if those who claimed indigence made *a separate trip* to the county seat within 10 days after the election. *See id.* at 186, 199.

To be sure, *Crawford* was not a Section 5 pre-clearance case. But in the Section 5 context, the Department of Justice has pre-cleared two States' laws – Georgia's and New Hampshire's – that include only one of the two kinds of ameliorative provisions that South Carolina's law contains.

Take Georgia. Put simply, Georgia's voter ID law does not permit voters who lack qualifying photo IDs to vote at the polling place. There is no affidavit or reasonable impediment provision of the kind there is in South Carolina. In Georgia, if you don't have a qualifying photo ID at the polling place, you cannot vote. Georgia's law is, for that reason, significantly more stringent than South Carolina's law. Georgia's law was nonetheless pre-cleared by the Department of Justice, upheld by the Eleventh Circuit against constitutional challenge, and

recently cited by another three-judge court in this District as having been pre-cleared "probably for good reason." *Texas*, 2012 WL 3743676, at *32.[11]

Next, consider New Hampshire. During the course of this litigation, New Hampshire's voter ID law was pre-cleared by the Department of Justice. Like South Carolina, New Hampshire allows voters without qualifying photo IDs to vote: New Hampshire voters who do not have photo IDs must sign an affidavit attesting to their identity. N.H. Rev. Stat. Ann. § 659:13.[12] Unlike in South Carolina, however, New Hampshire state officials are required to do a follow-up inquiry after election day for every voter who votes without a photo ID. And unlike South Carolina, New Hampshire does not make free photo IDs readily available. Under New Hampshire law, a state photo ID card costs $10, unless the voter first obtains a voucher exempting him or her from the fee. *Id.* § 260:21(V). In South Carolina, by contrast, the new photo voter registration card is free.

Finally, there is Texas. The Texas voter ID law was recently denied pre-clearance by a three-judge court in this District. The Texas law apparently would have been the most stringent in the Nation. *See Texas*, 2012 WL 3743676, at *33 ("The State of Texas enacted a voter ID law that – at least to our knowledge – is the most stringent in the country."). Unlike South Carolina, Texas required many citizens seeking IDs to present a birth certificate – and there generally is a fee to obtain a birth certificate ($22 in Texas). *Id.* at *1-2. Moreover, unlike South Carolina, Texas has many counties that lack a place for voters to obtain qualifying photo IDs, meaning that

[11] In trying to deal with the fact that Georgia's law is more stringent than South Carolina's, the Department of Justice has pointed out that Georgia allows a variety of forms of ID to qualify for voting. That's true but beside the point for the precise issue before us. What matters for these analytical purposes are the people who *don't* have a qualifying photo ID. The number of people without qualifying photo IDs in Georgia is significant, and when Georgia's law was enacted, there was a racial gap in voters without qualifying IDs. Yet in Georgia, those without qualifying photo IDs were not permitted to vote at the polling place. In South Carolina, they can.

[12] To be sure, in New Hampshire the voter does not need to check a box identifying the reason why he or she has not obtained a photo ID, nor is the affidavit notarized.

those voters would have to travel to other counties to get one. *Id.* at *16. And, most importantly, unlike South Carolina, Texas did not have any kind of reasonable impediment or affidavit provision to accommodate those voters who had not obtained a photo ID and wanted to vote.

In short, the Indiana and Texas laws contained neither kind of ameliorative provision that the South Carolina law contains. And the Georgia and New Hampshire laws contained only one of the two kinds of ameliorative provisions that the South Carolina law contains. As a relative matter, South Carolina's law imposes less of a burden on voters currently without qualifying photo IDs than the laws of Indiana, Georgia, New Hampshire, or Texas.

In addition to comparing South Carolina to those other States' laws, it is illuminating to measure South Carolina's law against the proposed voter ID reforms in the Carter-Baker Report issued by President Carter and Secretary Baker. The comprehensive Carter-Baker Report recommended that States adopt photo voter ID laws, and proposed *less* accommodation for voters without photo IDs than South Carolina's Act R54 provides. The Carter-Baker approach would make free photo IDs available, but, unlike South Carolina, it would require many citizens to show a birth certificate in order to obtain an ID. Under the Carter-Baker approach, moreover, voters without photo IDs would have an unqualified right to vote by provisional ballot for only the first two elections after implementation; after that, however, provisional ballots would be counted only if the voters were to make a separate trip to the appropriate election office within 48 hours with a valid photo ID.

In sum, our comparison of South Carolina's Act R54 to some other States' voter ID laws – as well as to the Carter-Baker Report's proposed voter ID reforms – strongly buttresses the conclusion that South Carolina's law has neither a discriminatory effect nor a discriminatory purpose. South Carolina's new voter ID law is significantly more friendly to voters without

qualifying photo IDs than several other contemporary state laws that have passed legal muster. As a matter of precedent, the decisions upholding those other state laws, while not binding on us, support our conclusion here that South Carolina's law does not have a discriminatory retrogressive effect. Moreover, the fact that South Carolina has gone to greater lengths than those other States to alleviate the burdens of voter ID laws, while not dispositive, tends to support the conclusion that South Carolina did not act with a discriminatory purpose.

* * *

Based on the above analysis of the purpose and effect of Act R54, we conclude that Act R54 "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" for future elections beginning with any elections in 2013. 42 U.S.C. § 1973c(a). Therefore, we pre-clear Act R54 for future elections beginning with any elections in 2013.

III. The 2012 Elections

Although we pre-clear Act R54 for *future* elections, there remains the question of the 2012 elections. Those elections occur in just under four weeks. In short, the Court cannot conclude that Act R54 can be properly implemented in time for the 2012 elections. Therefore, the Court does not pre-clear the relevant provisions of Act R54 (Sections 4, 5, 7, and 8) for the 2012 elections.

We have emphasized the importance of the reasonable impediment provision to our analysis of Act R54 and to our pre-clearance of Act R54 for future elections. But a large number of difficult steps would have to be completed in order for the reasonable impediment provision to be properly implemented on November 6, 2012. In the course of just a few short weeks, the law

by its terms would require: that more than 100,000 South Carolina voters be informed of and educated about the law's new requirements; that several thousand poll workers and poll managers be educated and trained about the intricacies and nuances of the law, including about our decision here today; and that county election boards become knowledgeable of the law, including of our decision here today. New forms need to be created, and notices posted and mailed, among other things.

The text of Act R54 strongly suggests that those steps cannot be completed in the short time before the 2012 elections. The South Carolina legislature established several deadlines for education and training that indicated the legislature's belief that implementation of the law would occur over the course of about 11 months. Under the law, the State Election Commission had to provide individual notice to registered voters without a DMV-issued ID "no later than December 1, 2011." Act R54, § 7(8). The Commission had to place informational notices in South Carolina newspapers "no later than December 15, 2011." *Id.* § 7(6). And the Commission had to coordinate with county boards and conduct at least two training seminars in each county "prior to December 15, 2011." *Id.* § 7(4). Because the law had not been pre-cleared before now, South Carolina has not initiated any of those steps. The statute's own requirements that education and training begin nearly a *year* before the first elections under Act R54 strongly suggest that those steps cannot be adequately completed in just four weeks.

Furthermore, the reasonable impediment provision is new, and it will likely require some explanation to poll managers and poll workers, and to county officials. With under four weeks left to go, the potential for chaos is obvious. In that regard, we note that South Carolina officials – while gamely and admirably saying they will try to get the job done no matter what – have previously told the Court that this is far too late a date for the law to be properly implemented.

For example, Ms. Andino, the Executive Director of the State Election Commission, originally stated that pre-clearance by August 1 would be needed, while the South Carolina Attorney General previously opined that full implementation for the 2012 elections could not occur if pre-clearance came after September 15. To be clear, the Court does not rest its decision on those prior statements, as those statements may have reflected what was optimal rather than what was absolutely essential. But those prior statements do add to the overwhelming weight of the evidence that the Court has carefully sifted through. That evidence convinces the Court that South Carolina – while acting in all good faith – cannot ensure proper implementation of the multi-step training and educational process required by its new law, and in particular the critical reasonable impediment provision, in the few short weeks that remain.

In deciding not to pre-clear for the 2012 elections, the Court also considers it important that South Carolina voters without R54-listed photo IDs would have very little time before the 2012 elections to choose the option of obtaining one of the free qualifying photo IDs. For the future, the new free photo voter registration cards and the free DMV photo ID cards will be long available in at least two offices in each county. That will create an ameliorative transition period in which more voters can obtain those IDs, and leave fewer voters to rely on the reasonable impediment provision. The Supreme Court expressed a similar assumption about the law at issue in *Crawford*: "Presumably most voters casting provisional ballots will be able to obtain photo identifications before the next election." *Crawford v. Marion County Election Board*, 553 U.S. 181, 199 n.19 (2008) (binding opinion of Stevens, J.). Notably, the Supreme Court assumed as much notwithstanding that Indiana voters needed a birth certificate, passport, veterans or military ID, or certificate of naturalization in order to obtain a free ID. *Id.* at 198

n.17. By contrast to Indiana, South Carolina provides free photo voter registration cards without costly underlying documentation.

And in considering the 2012 elections, keep in mind that Act R54 may *not* have been pre-cleared for any elections without the expansive reasonable impediment provision. Again, that's because this law, without the reasonable impediment provision, could have discriminatory effects and impose material burdens on African-American voters, who in South Carolina disproportionately lack one of the R54-listed photo IDs. Without the reasonable impediment provision, the law thus would have raised difficult questions under the strict effects test of Section 5 of the Voting Rights Act. And the reasonable impediment provision carries even greater importance for the 2012 elections because South Carolina citizens will not have much time to obtain the new free photo voter registration cards. Because the voters who currently lack qualifying photo ID are disproportionately African-American, proper and smooth functioning of the reasonable impediment provision would be vital to avoid unlawful racially discriminatory effects on African-American voters in South Carolina in the 2012 elections. Even assuming the best of intentions and extraordinary efforts by all involved, achieving that goal is too much to reasonably demand or expect in a four-week period – and there is too much of a risk to African-American voters for us to roll the dice in such a fashion.

From the outset, the Court has pushed very hard to make a decision in time for the 2012 elections. We set an extremely aggressive trial schedule to accomplish that objective. Counsel for all parties have worked diligently, which the Court greatly appreciates. Unfortunately, as one might have anticipated in a case with this many entities involved, the parties ran into some discovery delays over the summer in trying to obtain relevant information. In the ordinary case, those minor and typical delays would not have been a big deal. In this case, those discovery

delays pushed back the trial date by several weeks, with the voluntary consent of all parties. And that delay has in turn pushed back our date of decision.

We need not belabor the point. At this late date, the Court is unable to conclude that South Carolina can implement Act R54 for the 2012 elections in a way that will suffice under the Voting Rights Act.[13] However, as indicated above, South Carolina has satisfied its burden for future elections and may implement Act R54 for future elections, consistent with the understandings of Act R54 articulated by the responsible state officials and reflected in this opinion.[14]

IV. Future Enforcement

In reaching our decision to pre-clear Act R54 for future elections, we emphasize that Section 5 of the Voting Rights Act provides that pre-clearance shall not "bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure." 42 U.S.C. § 1973c(a). If South Carolina were to alter its interpretation of the reasonable impediment provision, or any other relevant provision of Act R54 – as the law has been

[13] Some have contended that Section 5's intrusion on state sovereignty is unconstitutional, at least under the statutory coverage formula now in place. Invoking the constitutional avoidance doctrine, South Carolina has suggested that we should therefore construe the effects test of Section 5 of the Voting Rights Act more narrowly than the statutory text would indicate. But the text and Supreme Court precedent establish that the effects test of Section 5 is stringent and that a voting law change that disproportionately and materially burdens minority voters is unlawful. Any argument to narrow Section 5 in this way must be directed to Congress or to the Supreme Court.

[14] Enforcing the Voting Rights Act here only prevents implementation of the new voter ID law for the 2012 elections. This case thus does not raise the Equal Protection Clause issue that can arise when enforcement of the Voting Rights Act requires States to engage in race-based treatment of individual voters, as in redistricting cases. *See Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring); *Shaw v. Hunt*, 517 U.S. 899, 911-16 (1996).

This case also does not raise the question of how a Section 2 effects challenge to voter ID laws should be resolved. Section 2 applies throughout the Nation, unlike Section 5, which applies only in covered jurisdictions. Under the Section 2 effects test (known as the "results" test), the pre-existing state law is not a benchmark. *See Holder v. Hall*, 512 U.S. 874, 880-84 (1994) (binding opinion of Kennedy, J.). It therefore can be more difficult to establish a violation of the Section 2 results test than a violation of the Section 5 retrogressive effects test. *See id.* at 883-85.

interpreted by the responsible state officials and described and adopted in this opinion – the State would have to obtain pre-clearance of that change before applying that new interpretation. *See Young v. Fordice*, 520 U.S. 273, 285 (1997) (requiring pre-clearance of "new, significantly different administrative practices – practices that are not purely ministerial, but reflect the exercise of policy choice and discretion by Mississippi officials"); *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178 (1985) (holding that "the form of a change in voting procedures" is not dispositive of the need for pre-clearance, as Section 5 "reaches informal as well as formal changes"). Moreover, pre-clearance is required not just for legislative or administrative changes but also for any changes that might result from South Carolina courts' interpretations of Act R54. *See Riley v. Kennedy*, 553 U.S. 406, 421 (2008) ("the preclearance requirement encompasses voting changes mandated by order of a state court") (quotation marks omitted); *Branch v. Smith*, 538 U.S. 254, 262 (2003) (Section 5 "requires preclearance of *all* voting changes" and "there is no dispute that this includes voting changes mandated by order of a state court"); *Lockhart v. United States*, 460 U.S. 125, 133 (1983) ("Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect.").[15]

If South Carolina attempts to make such a change without pre-clearance, the Voting Rights Act authorizes the Attorney General of the United States to bring a Section 5 enforcement action in federal court. 42 U.S.C. § 1973j(d). And the Supreme Court long ago recognized a

[15] Of course, Section 5 applies only when South Carolina "enact[s] or seek[s] to administer" a voting change. 42 U.S.C. § 1973c(a). Thus, any random, unauthorized failure to follow state election law on the part of a poll manager, county board, or other individual official can be enjoined by a state court as an ordinary violation of state law. *See United States v. Saint Landry Parish School Board*, 601 F.2d 859, 864 (5th Cir. 1979) ("one would not normally conclude that a state 'enacts or administers' a new voting procedure every time a state official deviates from the state's required procedures"). If the state court does not enforce the law, as outlined and required in this opinion, that would constitute a "change" in South Carolina law. And the federal courts may act to correct and prevent any such changes in South Carolina law that occur without pre-clearance.

private right of action that permits individuals to do the same. *See Allen v. State Board of Elections*, 393 U.S. 544, 554-55 (1969). We have no doubt that the appropriate federal court would entertain complaints and issue appropriate injunctions if South Carolina were to narrow the interpretation of the reasonable impediment provision articulated here without first obtaining the required pre-clearance of any such change. *See, e.g.*, *Butler v. Columbia*, 2010 WL 1372299, at *4 (D.S.C. 2010) (requiring pre-clearance of change resulting from South Carolina Supreme Court's interpretation of election statute); *Gray v. South Carolina State Election Commission*, 2010 WL 753767, at *2-3 (D.S.C. 2010) (requiring pre-clearance of change in State Election Commission procedures for filing candidate statements).

In closing, we underscore that all South Carolina state, county, and local officials must comply with Act R54 as it has been interpreted by the responsible state officials and as it has been described and adopted in this opinion. Any change in the law as so interpreted would be unlawful, without pre-clearance from the Attorney General of the United States or from this Court. We are fully aware, moreover, that what looks good on paper may fall apart in practice. We expect and anticipate that South Carolina state, county, and local officials will endeavor to prevent such slippage. Given the concerns powerfully expressed at trial by several African-American legislators in South Carolina – namely, Representative Gilda Cobb-Hunter, Senator Gerald Malloy, and Senator John Scott – proper implementation of this law will be important, both for legal reasons and to maintain South Carolina citizens' confidence in the fair and impartial administration of elections.

* * *

In sum, we pre-clear Act R54 sections 4, 5, 7, and 8 for future elections in South Carolina beginning with any elections in 2013 on the basis of the interpretations and understandings that have been expressed by the South Carolina Attorney General and the Executive Director of the

South Carolina State Election Commission, and that we have adopted in this opinion. We deny pre-clearance for the 2012 elections.

KOLLAR-KOTELLY, *District Judge*, concurring: I concur fully in both the Court's excellent opinion and Judge Bates' thoughtful concurrence. I write separately only to emphasize the importance of the reasonable impediment provision in future elections.

Experts for both South Carolina and the Defendants agree that as of April 2012, approximately 130,000 registered voters in South Carolina lacked a photo ID acceptable under Act R54, and those voters are disproportionately likely to be members of a racial minority. Over time, this number is reasonably expected to shrink as voters have the opportunity to obtain the free photo IDs made available under Act R54. However, the photo voter registration card is unlikely to be the panacea South Carolina portrays it to be simply because this form of identification is only available if a voter registers in person at the county elections office. New voters will continue to receive non-photo voter registration cards if they register in person at any of the myriad of other locations where voter registration is available (including public libraries, social service departments, and armed forces recruitment centers, depending on the county) or if the voter registers by mail, and must make a separate trip to the county elections office to obtain the photo voter registration card. Moreover, although Act R54 eliminated the fee for the DMV photo ID, it understandably did not alter the underlying documentation requirement. While Act R54 undoubtedly made it far easier to obtain an acceptable photo ID, some portion of newly registered voters will likely be forced to rely on the reasonable impediment provision in order to vote in the 2014, 2016, and other future elections. Thus, any narrowing of South Carolina's interpretation of the reasonable impediment provision from what the Court has accepted and required in its opinion must itself be pre-cleared, not just to comply with the procedural requirements of the Voting Rights Act, but also because such narrowing may have the real effect of disenfranchising a group that is likely to be disproportionately comprised of minority voters.

BATES, *District Judge*, with whom *District Judge* KOLLAR-KOTELLY joins, concurring: I concur fully in the Court's excellent opinion. I write only to add two brief observations.

First, to state the obvious, Act R54 as now pre-cleared is not the R54 enacted in May 2011. It is understandable that the Attorney General of the United States, and then the intervenor-defendants in this case, would raise serious concerns about South Carolina's voter photo ID law as it then stood. But now, to the credit of South Carolina state officials, Act R54 as authoritatively interpreted does warrant pre-clearance. An evolutionary process has produced a law that accomplishes South Carolina's important objectives while protecting every individual's right to vote and a law that addresses the significant concerns raised about Act R54's potential impact on a group that all agree is disproportionately African-American. As the Court's opinion convincingly describes, South Carolina's voter photo ID law, as interpreted, now compares very favorably with the laws of Indiana, Georgia and New Hampshire, each of which has passed legal muster through either federal court constitutional review or pre-clearance by the Attorney General. The path to a sound South Carolina voter photo ID law has been different, given the essential role of the State's interpretation of key provisions.

Which brings me to my second observation – one cannot doubt the vital function that Section 5 of the Voting Rights Act has played here. Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive. Several legislators have commented that they were seeking to structure a law that could be pre-cleared. *See* Trial Tr. 104:18-21 (Aug. 28, 2012) (Harrell) ("I was very aware at the time that we were doing this that whatever we would have to do would have to be subject to the Voting Rights Act because that would be the basis for the Department of Justice preclearing the bill for us."); *id.* at 105:15-18 ("[I] ask[ed] the staff who drafted the bill for me to please make sure that we are

passing a bill that will withstand constitutional muster and get through DOJ or through this court."); Trial Tr. 108:23-25 (Aug. 27, 2012) (Campsen) (agreeing that he was "interested in what voter ID legislation had been precleared" in drafting R54); *id.* at 148:10-15 (discussing senators' statement that "[t]he responsible thing to do was to fix [the bill] so that it would not fail in the courts or get tripped up by the Voting Rights Act"); Trial Tr. 141:9-12 (Aug. 28, 2012) (McConnell) (discussing his efforts on behalf of a bill that "had a better chance of getting preclearance"); *id.* at 182:18-20 (on the Senate floor "[t]here was discussion about" how "to craft a bill that would comply with the voting rights amendment"). The key ameliorative provisions were added during that legislative process and were shaped by the need for pre-clearance. And the evolving interpretations of these key provisions of Act R54, particularly the reasonable impediment provision, subsequently presented to this Court were driven by South Carolina officials' efforts to satisfy the requirements of the Voting Rights Act.

Congress has recognized the importance of such a deterrent effect. *See* H.R. Rep. No. 109-478, at 24 (2006) (finding that "Section 5 encourage[s] the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters," and "that the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes" (internal quotation marks omitted)); S. Rep. No. 109-295, at 11 (2006) (finding "some reason to believe that without the Voting Rights Act's deterrent effect on potential misconduct" racial disparities in voting "might be considerably worse"). The Section 5 process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of Act R54 demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws.