

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 71 MAP 2012

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/Appellants,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THOMAS W. CORBETT, IN HIS
CAPACITY AS GOVERNOR; CAROL AICHELE, IN HER CAPACITY AS
SECRETARY OF THE COMMONWEALTH,

Respondents/Appellees.

BRIEF OF AMICUS CURIAE ANTI-DEFAMATION LEAGUE, NUEVA ESPERANZA
INC., AND LATINO JUSTICE PRLDEF IN SUPPORT OF APPELLANTS

Appeal from the August 15, 2012 Determination of the Commonwealth Court in No. 330
M.D. 2012, Denying the Petitioners’ Application for Preliminary Injunction

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STATEMENT OF INTEREST OF AMICI CURIAE

The **Anti-Defamation League** (“ADL”) was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL is vitally interested in protecting the civil rights of all persons, whether they are members of a minority or of the majority, and in ensuring that each individual receives equal treatment under the law regardless of that person’s race, ethnicity or religion. Consistent with its mission, ADL opposes ballot access requirements that disproportionately affect the voting rights of Latinos and other racial or ethnic groups.

Nueva Esperanza Inc. (“Esperanza”) is a faith-based, nonprofit community development corporation, based in the largely Hispanic community of Hunting Park in north Philadelphia, that provides direct services through a broad array of programs and institutions and also maintains a network of over 12,000 Hispanic clergy, community leaders, and nonprofit organizations throughout the country. Locally, Esperanza serves over 8,000 individuals and families every year through Esperanza Academy Charter School, Esperanza College, Esperanza Cyber Charter School, and Esperanza’s workforce development initiatives, immigration legal services, and housing counseling program. Nationally, Esperanza conducts capacity building and advocacy initiatives within the Hispanic faith community, and develops and disseminates educational resources for a variety of relevant issue areas.

Esperanza’s mission and all of its initiatives are rooted in a desire to facilitate empowerment within the Hispanic community in the United States. As such, Esperanza has a strong interest in ensuring that its community members are equipped to be citizens who are informed, engaged, and active in the political process at all levels of government. One of the most basic and fundamental expressions of our engagement with our own governance is the right

to vote – to participate in the selection of our own leadership. To impose strict voter identification standards on our citizens without a careful and thoughtful implementation plan – that provides the time, education, guidance, financial resources and other supports to historically disenfranchised populations like minority groups and the poor, so their ability to exercise their rights is not further impeded – would be a grave injustice.

Latino Justice PRLDEF (“Latino Justice”) is a national not for profit civil rights organization that has advocated for and defended the constitutional rights of all Latinos under the law. Latino Justice’s continuing mission since being founded in 1972 is to promote the civic participation of the pan-Latino community, to cultivate Latino community leaders, and to engage in impact litigation to vindicate basic civil rights in the areas of education, employment, fair housing, language, redistricting and voting rights. During its 40 year history, Latino Justice has litigated numerous voting rights cases to ensure that all Latino voters, particularly Puerto Ricans who are U.S. citizens by birth, are able to exercise their constitutional right to vote and can do so unfettered by various discriminatory barriers such as literacy tests, language access, and now voter identification requirements.

SUMMARY OF THE ARGUMENT

The Commonwealth Court’s decision upholding Act 18, if not reversed, will be another chapter in the long and unfortunate story of Pennsylvania’s restricting, and sometimes outright denying, the franchise to groups of vulnerable citizens.

The original Pennsylvania Constitution did not limit the franchise expressly on the basis of race, and some African-Americans voted in certain counties in the early nineteenth century. But instead of continuing to develop as a center of equality, Pennsylvania expressly withdrew African-Americans’ right to vote through a constitutional amendment in 1838 that added the

word “white” to the voting qualifications, which remained the law until Pennsylvania ratified the Fifteenth Amendment to the U.S. Constitution.

Women faced similar obstacles in achieving the right to vote in Pennsylvania. Despite the fact that Pennsylvania served as one of the centers of the woman’s suffrage movement in the late nineteenth and early twentieth centuries, Pennsylvania took the step to expressly deny a woman’s right to vote via a constitutional amendment that added the term “male” to the voting qualifications in the Pennsylvania Constitution in 1874. This amendment remained in effect until the ratification of the Nineteenth Amendment to the U.S. Constitution, and the term “male” was not even officially removed from the Pennsylvania Constitution until 1933.

Particularly in light of this history, Pennsylvania’s elected officials should always act with the utmost care to protect the franchise for its citizens. Unfortunately, Act 18 will have the opposite effect, as once again Pennsylvania has enacted measures to restrict the sacred right of the franchise. As statistical evidence has displayed, Latinos stand to be disparately impacted by Act 18. Latinos will particularly struggle to comply with Act 18 due to issues concerning birth certificates and intentional or unintentional discrimination by poll workers, among others. Although historically Latino voters have not endured the same hardships as African-Americans and women in Pennsylvania in gaining the right to vote, they have experienced discriminatory election practices in the past and have been the victims of voter intimidation. If Act 18 is allowed to stand, Pennsylvania will once again be taking a step backwards in the struggle to ensure that all Pennsylvanians can freely exercise the right to vote.

ARGUMENT

I. The Photo ID Law Would Serve as Another Example in Pennsylvania's Troubled History on Voting Rights

In 1776, Pennsylvania substantially expanded the right to vote by enacting a state Constitution in which “freedom of elections was expressly ensured and the right to vote was extended to virtually all free inhabitants, regardless of whether or not they were landowners.” William C. Kashatus, *William Penn's Legacy: Religious and Spiritual Diversity*, Pa. Heritage Magazine, Spring 2011¹; Pa. Const. of 1776, ch. I, § A.VII (1776). Thereafter, however, it would take many years of struggle, including several significant steps backward along the way, before African-Americans and women in Pennsylvania could freely exercise the right to vote under that Constitution. Judge Simpson's opinion upholding the Act of March 14, 2012, P.L. 195, No. 18 (Act 18) is another unjustified step backwards in the struggle to ensure that all Pennsylvanians can freely exercise one of the most important rights they have: the right to vote. *Applewhite v. Commonwealth*, 2012 WL 3332376 (Pa. Commw. Aug. 15, 2012), *appeal granted*, 71 M.A.P. 2012 (2012). This Court should right that wrong now.

The cautionary tales of the struggles for enfranchisement that both African-Americans and women have faced in this state mandate that the utmost caution be taken when considering any legislation that restricts a citizen's right to vote under the guise of regulating elections. Judge Simpson acknowledged that some citizens may find it more difficult to vote after Act 18, but concluded that this difficulty was a “limited burden,” acceptable in light of the supposed reasonableness of the state's alleged justifications for the measure. *Applewhite*, 2012 WL 3332376, at *9. However, even putting aside the question of what standard of scrutiny applies,

¹ Available at http://www.portal.state.pa.us/portal/server.pt/community/history/20018/william_penn%27s_legacy/933335.

the restrictions and the burden are patently unfair and unreasonable. This Court in *Winston v. Moore* wrote that elections are “free and equal” per the requirements of the Pennsylvania Constitution only

when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

Winston v. Moore, 244 Pa. 447, 457 (1914). Act 18 unfairly impacts, and effectively denies the franchise to some members of Pennsylvania’s Latino community (among other disparately impacted groups). The statute will thereby prevent elections from being free and equal.

A. African-Americans Endured Setbacks in Securing the Franchise in Pennsylvania

In the early nineteenth century, the state Constitution arguably granted African-American freemen the right to vote, but in reality, they were generally disenfranchised. Julie Winch, *Free Men and “Freemen”: Black Voting Rights in Pennsylvania, 1790-1870*, Pa. Legacies (Nov. 2008) [hereinafter Winch].² At the time, the Pennsylvania Constitution provided: “In elections by citizens, every freeman of the age of twenty-one years, having resided in the state two years next before the election, and within that time paid a state or county tax . . . shall enjoy the rights of an elector. Pa. Const. of 1790 art. III, § I (1790). However, the term ‘freeman’ was largely undefined. Edward Price, *The Black Voting Rights Issue in Pennsylvania, 1780-1900*, 100 Pa. Magazine of Hist. & Biography 356 (July 1976) [hereinafter Price]. Adding the term “white” to the voting qualifications had been debated at the Constitutional Convention of 1790, and was purposely left out. *Id.* at 363. This omission arguably meant that African-Americans should

² Available at <http://173.203.96.155/node/2899>.

have been allowed to vote in Pennsylvania from the start, and some counties technically allowed African-Americans to vote, including Bucks, York, Dauphin, Cumberland, Juniata, Westmoreland, and Allegheny. *Id.* at 357; Winch, *supra*. In Philadelphia, the county with the largest African-American population at the time, however, African-Americans “traditionally stayed away from the polls on election day” because “[t]hey feared the consequences if they attempted to vote.” Winch, *supra*. Alexis de Tocqueville reported being told in 1831 that though African-American men in Philadelphia might technically have the legal right to vote, they did not do so because “they would be ill-treated.” Eric Ledell Smith, *The End of Black Voting Rights in Pennsylvania: African-Americans and the Pennsylvania Constitutional Convention of 1837-1838*, 65 PA. Hist. 279, 283 (quoting Alexis de Tocqueville, *Journey to America* 224-25 (J.P. Mayer ed., George Lawrence trans., 1960) [hereinafter Smith]). This fear was well-founded in Philadelphia, as race riots occurred in both 1829 and 1834. Winch, *supra*. Thus, though arguably freemen under the Pennsylvania Constitution, many African-Americans in the early nineteenth century were largely left disenfranchised by both local practice and racial unrest.

In 1837, a further, significant setback occurred when delegates to the Constitutional Convention approved a measure that added the word “white” before “freeman” in the Pennsylvania Constitution. Pa. Const. of 1838, art. III, § 1 (1838). The measure was inspired in part by an election in Bucks County. Smith, *supra*, at 289. There a member of the Democratic Party, which was largely antagonistic to African-American equality at the time, had lost by a slim margin to a Whig candidate. Winch, *supra*. The margin, 25 votes, was small enough that the Democratic Party heads decided to challenge the result by sensationalizing the fact that 30 to 40 African-Americans had voted in the election. Smith, *supra*, at 291. The Democratic candidate sued to have the election overturned on the grounds that African-Americans were not

“freemen” as understood by the Constitution. The Judge agreed and, remarkably, overturned the result. Price, *supra*, at 359.

In the aftermath of the case, opponents of African-American suffrage used the fact that African-Americans had voted to generate support for the amendment adding “white” to the Pennsylvania Constitution’s voting qualifications. *Id.* at 358. Suffrage opponents also stoked a fear of a massive influx of African-Americans into the state if Pennsylvania were to allow them to vote. Smith, *supra*, at 288.

Amidst this atmosphere of racial tension, another case arose that squarely presented the issue of African-American suffrage, *Hobbs v. Fogg*. Eventually making it to the Pennsylvania Supreme Court, the case was brought by Fogg, an African-American taxpayer who attempted to vote in Luzerne County but was turned away by Hobbs, the election inspector. Smith, *supra*, at 294. The County Court of Appeals initially ruled in Fogg’s favor, and Hobbs appealed to the Pennsylvania Supreme Court. *Id.* The case was pending in May of 1837 as the Constitutional Convention convened. Though the inclusion of “white” in the voting qualifications was not on the agenda initially, the atmosphere and push generated by the Democrats and other opponents of African-American suffrage soon led to the offering of the amendment. *Id.* at 287-88. Ultimately, the Pennsylvania Supreme Court decided in *Hobbs v. Fogg* that African-Americans were not properly considered freemen under the Pennsylvania Constitution. *Hobbs v. Fogg*, 6 Watt’s Reports 553 (1837). A few months later in January 1838, bolstered by the Court’s decision, the Convention passed the amendment, which the white freemen of Pennsylvania approved in October of 1838. Winch, *supra*.

Opponents of the new voter qualification made multiple unsuccessful attempts to repeal it, including failed legislation in 1845 and 1855. Price, *supra*, at 364. The general tenor in the state

did not change, even through the Civil War years. In fact, as late as 1866, it was the official public position of the Democratic Party that African-Americans should not have the right to vote. Dick Cowen, *Turning Back the Pages on Lehigh Valley: Black History News Accounts Often Reflected Paradoxical Points of View*, *The Morning Call* (Feb. 19, 1987).³ It was not until the federal government began passing the Civil War Amendments to the U.S. Constitution that Pennsylvania finally acted to affirmatively protect African-Americans' right to vote. Pennsylvania ratified the Fifteenth Amendment to the U.S. Constitution on a strict party line vote in 1870, all Republicans for and all Democrats opposed. Price, *supra*, at 367 (citing *Pa. Legislative Record* 683-84 (Mar. 11, 1869), 1330 (Mar. 25, 1869)). This would not prove to be the only time that Pennsylvania refused to protect its most vulnerable citizens until the federal government forced its hand.

Unfortunately, even the passage of the Fifteenth Amendment did not bring an end to the long-running problems and resentment surrounding African-Americans' right to vote in Pennsylvania. On October 10, 1871, during the first elections held in Philadelphia after passage, violence broke out across the city at various polling places against African-American voters. All told, four African-American voters were killed, and there were reports that much of the violence and intimidation was carried out by the police charged with peacefully administering the elections. Daniel R. Biddle & Murray Dubin, *Tasting Freedom: Octavius Catto and the Battle for Equality in Civil War America* 419-23 (2010). Among the dead was Octavius Catto, a prominent civil rights leader in Philadelphia who had helped raise troops for the Union during the Civil War. Tamara Gaskell, *A Citizen's, not Woman's Right: Carrie Burnham v. The*

³ Available at http://articles.mcall.com/1987-02-19/features/2563295_1_black-history-month-white-race-freemen.

Pennsylvania Supreme Court, Pennsylvania Legacies (Nov. 2008) [hereinafter Gaskell]⁴;
Christopher Munden, *Octavius Catto: Philadelphia's "Forgotten Hero"* (Feb. 8, 2012).⁵

B. Women Also Experienced Hardship in Gaining the Franchise

Like African-Americans in Pennsylvania, women in Pennsylvania had setbacks in their quest for the right to vote, and had to wait for the federal government to take action before the state recognized that right.

In the late nineteenth century, many events in the woman's suffrage movement occurred in Pennsylvania. Only four years after the famed Seneca Falls Convention, a woman's rights convention was held in West Chester, Pennsylvania in 1852. *Women's Suffrage*, Pennsylvania Historical & Museum Commission [hereinafter *Women's Suffrage*].⁶ A convention regarding women's suffrage occurred in 1869, and Susan B. Anthony read a Suffragettes Declaration of Independence at the centennial celebration in Philadelphia in 1876. *Id.* Pennsylvania remained a central battleground in the movement throughout the remainder of the nineteenth century, and this atmosphere helped inspire a direct challenge to the ban on women's suffrage in Pennsylvania. Jennie Bradley Roessing, *The Equal Suffrage Campaign in Pennsylvania*, 56 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 153-160 [hereinafter Roessing].

On the same day that four African-Americans lost their lives in Philadelphia for simply trying to exercise their Constitutional right to vote, a women's suffrage activist, Carrie Burnham, was turned away from the polls. Gaskell, *supra*. Burnham maintained that she fit the

⁴ Available at <http://173.203.96.155/node/2901>.

⁵ Available at <http://blog.constitutioncenter.org/2012/02/octavius-catto-philadelphia%E2%80%99s-%E2%80%9Cforgotten-hero%E2%80%9D/>.

⁶ Available at http://www.portal.state.pa.us/portal/server.pt/community/documents_from_1865_-_1945/20425/women%27s_suffrage/998887 (last visited Aug. 30, 2012).

qualifications of the Pennsylvania Constitution of 1838. *Id.* She sued over her denial and, after losing on the trial level, brought her argument to the Pennsylvania Supreme Court. On April 3 and 4, 1873, Ms. Burnham argued before the Court that “citizen” and “freeman” were interchangeable, and that because women were citizens (as even the lower court hearing Burnham’s case had admitted), their right to vote could no more be abridged on the basis of sex than on race. *Woman Suffrage: The Argument of Carrie S. Burnham*, Pa. Legacies (Nov. 2008).⁷ She also appealed to the fundamental nature of the right to vote, saying of voting that

if not a privilege, then it is a right, the birthright of citizenship It could not have originated in governments, for by its exercise they were created and continue to exist; neither did it spring from constitution or laws, for it was the hand of that sovereignty by which they were made. It has its origins in the nature and constitution of humanity.

Id. As it had done in *Hobbs v. Fogg*, this Court denied a vulnerable population the right to vote, dismissing Burnham’s case without even hearing argument from the other side. Gaskell, *supra*. Delegates at the Pennsylvania Constitutional Convention of 1873 further frustrated Burnham’s attempts to extend voting rights to women. The delegates reprised the 1837 amendment that added “white” to the voting qualifications, this time adding the word “male”. *Id.*; Pa. Const. of 1874, art.VIII, § 1.

Undaunted, the Suffragist movement in Pennsylvania began an effort to amend the Pennsylvania Constitution to directly secure the franchise for women. The first legislative efforts occurred in 1911, and resulted in the approval of a Constitutional amendment by both houses of the Pennsylvania legislature in 1914. Roessing, *supra*, at 154. Despite this support, the measure narrowly failed the popular vote in 1915, and no amendment to the Pennsylvania Constitution was enacted. *Women’s Suffrage, supra*. Thus, Pennsylvania remained behind nine

⁷ Available at <http://173.203.96.155/node/2902>.

states that gave women suffrage, and 21 that allowed partial suffrage, as of 1914. Roessing, *supra*, at 154. As with African-American suffrage, it was not until the U.S. Constitution was amended, in this case by the Nineteenth Amendment in 1920, that women were finally able to vote in Pennsylvania. In fact, the word “male” remained in the Pennsylvania Constitution until 1933 in what was then Article VIII, Section 1. Pa. Const. of 1874, art.VIII, § 1 (1933). The similarities between women’s struggle and African-Americans’ struggle for suffrage in Pennsylvania are striking—in both cases, the state pushed back against the tide of granting suffrage by adding specific language barring the right to vote. And in both cases, Pennsylvania did not act to repeal these restrictions until the issues took the national stage through amendments to the U.S. Constitution.

This shameful pattern should never be forgotten, and never repeated. The struggle to achieve a most fundamental right, and the systematic and official disenfranchisement of entire blocks of the population in the name of political expediency are antithetical to the ideals propounded in the very first Pennsylvania Constitution. Our legislators should make it their primary focus in considering voting laws that this history never be repeated. With Act 18, however, the Legislature has instead attempted to repeat Pennsylvania’s historical pattern of halting and reversing progress instead of protecting it. Pennsylvania should heed the warnings from its own history and take care to safeguard universal suffrage. The disenfranchisement of even a single voter, particularly a minority, is a step backwards from the universal suffrage so many fought for so long to achieve.

II. The Voter ID Law Will Have an Adverse Disparate Impact on Latino Voters

The effect of Act 18 on Latinos is a critical component of the law’s true impact on Pennsylvanian voters. Latinos represent a large and growing portion of Pennsylvania’s population. According to the 2010 U.S. Census, approximately 720,000 Latinos live in

Pennsylvania, an 83 percent rise from the 394,000 population in 2000. *See* U.S. Census Bureau, *2010 Census Interactive Population Search: Pennsylvania*⁸; U.S. Census Bureau, Table DP-1: Profile of General Demographic Characteristics: 2000: Geographic Area: Pennsylvania.⁹ As of 2008, approximately 49 percent of Latinos in Pennsylvania were eligible to vote, compared with 41 percent of Latinos nationwide. *See* Pew Hispanic Center, *Fact Sheet: Latinos in the 2010 Elections: Pennsylvania* (Oct. 15, 2010) [hereinafter *Pew Fact Sheet*].¹⁰ The fact that a higher proportion of Pennsylvanian Latinos are eligible voters than in the United States as a whole only heightens the urgency of looking at the effect of Act 18 on Latinos.

A. Latino Voters Are More Likely to Lack Acceptable ID

Latinos are significantly more likely than the average Pennsylvanian to lack the photo ID that Act 18 requires for voting.

The Commonwealth's own list of Pennsylvanians who likely lack acceptable ID provides the foundation for that conclusion. The Commonwealth has released two lists of those who appear to lack such ID: first, a list of almost 759,000 voters (or 9.2 percent of the electorate) who have no identification issued by the Pennsylvania Department of Transportation (PennDOT) (*see* R. 2063a-66a); and second, a mutually exclusive list of 906,000 people who have ID that will be expired for more than one year by Election Day 2012. *See* Tamara Manik-Perlman, *Does PA's New Voter ID Law Impact Groups Differently by Ethnicity*, Azavea (Aug. 2, 2012).¹¹

⁸ <http://2010.census.gov/2010census/popmap/ipmtext.php?fl=42> (last visited Aug. 30, 2012).

⁹ Available at <http://censtats.census.gov/data/PA/04042.pdf> (last visited Aug. 30, 2012).

¹⁰ Available at <http://www.pewhispanic.org/2010/10/15/latinos-in-the-2010-elections-pennsylvania/> (citing the U.S. Census Bureau's 2008 American Community Survey).

¹¹ Available at www.azavea.com/blogs/atlas/tag/spatial-analysis. This study was not available early enough to become part of the trial record in this case. Azavea obtained

Using these Commonwealth-generated lists and U.S. Census information on the racial composition of Philadelphia's electoral wards, Tamara Manik-Perlman of the geographic data firm Azavea analyzed whether or not wards' concentrations of voters who lacked ID correlated with those same wards' concentrations of ethnic minorities. *Id.* Manik-Perlman concluded that "African-American and Latino communities are disproportionately affected by the voter ID law," finding that wards with larger Latino populations were more likely to have a high proportion of voters who lacked acceptable ID. *Id.* In particular, Manik-Perlman found that wards' concentration of Latino voters was correlated with wards' concentration of voters who, by Election Day, would have IDs that were invalid for voting because they had expired more than a year earlier. *Id.*

Studies have also shown that it is particularly difficult for Latinos to acquire the photo ID required by Act 18. For instance, the Brennan Center for Justice at the New York University School of Law concluded that, in the ten states including Pennsylvania with restrictive photo ID laws, 1.2 million eligible black voters and 500,000 eligible Hispanic voters live more than 10 miles from the nearest ID-issuing office that is open more than twice a week. *See* Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, Brennan Center for Justice at New York University School of Law at 1 (July 29, 2012).¹²

Latino voters, as a group, are also more likely than other voters to face particular difficulties in presenting a birth certificate or other forms of acceptable documentation to obtain photo identification. PennDOT requires voters to provide a birth certificate with a raised seal, a Certificate of Naturalization, a Certificate of U.S. Citizenship, or a U.S. passport in order to

the names on these lists from the Philadelphia City Commissioner's Office, which in turn received them from the Pennsylvania Department of State. *See id.*

¹² Available at http://brennan.3cdn.net/f5f28dd844a143d303_i36m6lyhy.pdf.

obtain photo identification. According to the 2000 U.S. Census, 17.5 percent of Latino Pennsylvanians were born outside the United States and therefore would lack a U.S. birth certificate. Migration Information Source, *Hispanic Population By Nativity, for the United States: 1990 and 2000*.¹³ As the record shows, obtaining birth certificates from other states, let alone other countries, is burdensome in terms of both money and time. (See R. 209a, 217a, 219a, 234a-35a, 646a, 649a-52a, 655a-56a, 660a.) Documents that prove that a person has been naturalized are even more cost prohibitive. For example, the application fee for a replacement Naturalization Certificate or Certificate of Citizenship is \$345. U.S. Citizenship & Immigration Servs., *N-565, Application for Replacement Naturalization/Citizenship Document* (Aug. 7, 2012).¹⁴ Approximately 13 percent of Latinos in Pennsylvania who are eligible to vote are naturalized U.S. citizens, compared with just 3 percent of eligible Pennsylvania voters as a whole. See Pew Fact Sheet (citing the U.S. Census Bureau's 2008 American Community Survey), *supra*.

Compounding the problem, Latino voters face a poverty rate of 33.5 percent in Pennsylvania (compared to 28.4 percent for African-Americans and just under 10 percent for whites). Pennsylvania Budget & Policy Center, *Local Census Data: Poverty Rises Sharply in Most Parts of Pennsylvania* (Sept. 22, 2011).¹⁵ Many cannot afford to obtain their birth certificates, Naturalization Certificates, or Certificates of Citizenship.

Thus, not only are Latino Pennsylvanians less likely to have acceptable ID than the voting population as a whole, but Latinos are likely to find the burdens of obtaining acceptable ID particularly difficult to overcome.

¹³ Available at http://www.migrationinformation.org/feb03_spotlight_table.cfm (last visited Aug. 30, 2012).

¹⁴ Available at <http://www.uscis.gov/n-565>.

¹⁵ Available at <http://pennbpc.org/local-census-data-poverty-rises-sharply-most-parts-pennsylvania>.

B. The Voter ID Law Uniquely Burdens Puerto Ricans Because Puerto Rico Recently Revoked All Birth Certificates Issued Before July 1, 2010

Puerto Ricans face yet another hurdle: The Government of Puerto Rico has revoked any birth certificates issued by Puerto Rico prior to July 1, 2010 as of October 30, 2010. U.S. Dep't of State, *New Requirement for Puerto Rican Birth Certificates*.¹⁶ In order to obtain a replacement birth certificate, citizens born in Puerto Rico must provide a government-issued photo ID. See Commonwealth of Puerto Rico, Dep't of Health, Demographic Registry, *Birth Certificate Application by Mail*.¹⁷ This presents a perfect Catch-22 to Puerto Rican voters, who cannot obtain necessary government-issued photo identification to vote under Act 18 without a birth certificate, but cannot receive a birth certificate without first presenting government-issued photo identification. As of 2010, Philadelphia's Puerto Rican population numbered 121,175, or 8.1 percent of the city's total population; and Pennsylvania's Puerto Rican population was 351,084, or 2.8 percent of total state population. U.S. Census Bureau, 2010 American Community Survey, Phila. County, Pa.¹⁸ More than half of all Latinos in Pennsylvania are Puerto Rican. Pennsylvania State Data Center, *2010 Census Summary File 2 Released for Pennsylvania: Puerto Ricans Make Up the Largest Hispanic Group* (Apr. 26, 2012).¹⁹ Those Puerto Ricans who do not already have acceptable photo ID face additional burdens in obtaining their birth certificates in order to obtain such ID.

¹⁶ Available at http://www.travel.state.gov/passport/passport_4807.html (last updated Nov. 23, 2010).

¹⁷ Available at <http://www.salud.gov.pr/Programas/RegistroDemografico/Documents/Birth%20Certificate%20Application.pdf> (last visited Aug. 29, 2012).

¹⁸ Census data generated on <http://quickfacts.census.gov/qfd/states/42/42101lk.html>. Pennsylvania has the fourth largest Puerto Rican population in the United States. 2010 Census Briefs, *The Hispanic Population: 2010*, at 8 tbl. 4 (May 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

¹⁹ Available at http://pasdc.hbg.psu.edu/sdc/pasdc_files/researchbriefs/SF-2_RB.pdf.

The Commonwealth will likely point to the newly-established DOS card system (initiated on August 27, 2012) as ameliorating any issues regarding birth certificates, but as Appellants have explained in their brief, this measure is insufficient. *See* Brief of Appellants at 42-44, *Applewhite v. Commonwealth*, No. 71 MAP 2012 (Aug. 30, 2012) (explaining that the DOS card is problematic at best because, among other reasons, transportation to PennDOT centers is still difficult for many (and two trips would be required to procure the ID) and the state does not plan to issue the cards in sufficient numbers).

C. The Voter ID Law Gives Poll Workers Unfettered Discretion in the Voter Identification Process, Rendering Latino Voters Especially Vulnerable to Intentional or Unintentional Discrimination

Act 18 gives poll workers discretion in determining whether to accept a voter's ID and, by extension, provides poll workers with the power to disenfranchise particular voters. The law tasks poll workers with determining whether the name on the voter's identification card "substantially conforms" to the name on the voter rolls. *See* 25 Pa. Cons. Stat. § 2602(z.5)(2)(i). The law does not define "substantially conform," giving poll workers infinite latitude in deciding whether a given identification card conforms.

Traditional Latino naming conventions render Latino voters particularly vulnerable to disenfranchisement. Latinos often have compound surnames, with their father's surname preceding their mother's surname. U.S. Dep't of State Foreign Affairs Manual Volume 7 Consular Affairs, 7 *Fam 1300 Appendix C Names to Be Used in Passports*.²⁰ The surnames may or may not be hyphenated. They may also be joined together by "de." When a Latina woman marries, she may hyphenate one of her surnames with her husband's surname, join her husband's surname to her own with "de," keep her own patronymic name but drop her matronymic name,

²⁰ Available at <http://www.state.gov/documents/organization/94676.pdf> (last visited Aug. 29, 2012).

or keep or drop both the patronymic and matronymic names. *Id.* The Department of State included a specific section on how to address Latino surnames in its instructions on names to be used in passports because this naming construct is unique. *Id.* The complex naming conventions mean that many Latino voters could have one version of their name on the voter rolls but a different version of that same name on their voter identification card.

Discrimination against Latino voters because of their surnames has already emerged in Pennsylvania, even before voter ID requirements. In 2003 a judge in the Eastern District of Pennsylvania, in a case challenging discriminatory voting practices in Reading, Pennsylvania under the Voting Rights Act (VRA), found that “poll workers turned Hispanic voters away because they could not understand their names, or refused to ‘deal’ with Hispanic surnames.” *United States v. Berks County, Pa.*, 250 F. Supp. 2d 525, 529 (E.D. Pa. 2003). The evidence showed that poll workers made discriminatory comments about Latino voters, including making statements about their surnames, such as, “This is the U.S.A.—Hispanics should not be allowed to have two last names. They should learn to speak the language and we should make them take only one last name.” *Id.* The voter ID law renders Latino voters uniquely vulnerable to discrimination from poll workers, who have the unfettered ability under the law to determine whether voters’ names on their identification cards “substantially conform” to the name on the voter rolls.

D. Language Barriers Have Historically Burdened Latino Pennsylvanians’ Voting Rights

Although Latino voters have not suffered from the explicit constitutional disenfranchisement African-Americans and women have experienced in Pennsylvania, Latinos have nevertheless faced substantial obstacles to their right to vote. This history is all the more salient in the face of the fact that as of mid-July, the link to Spanish-language information on

Pennsylvania's official voter ID information website, www.votespa.com, "use[d] English to describe the new voter-identification law." Associated Press, *Pa. Spanish Website Covers Voter ID Law in English* (July 11, 2012).²¹ Only 23 percent of Latino immigrants report feeling that they can speak English very well. Shirin Hakimzadeh & D'Vera Cohn, *English Usage Among Hispanics in the United States* (Nov. 29, 2007).²² The initial lack of Spanish-language guidance posed a particularly significant barrier for Puerto Rican voters. Puerto Ricans are United States citizens. 8 U.S.C. § 1402 (2012). Unlike naturalized citizens, who must demonstrate some proficiency with English in order to acquire citizenship, Puerto Ricans in the United States have full citizenship rights, no matter their English proficiency level. *See Berks County*, 250 F. Supp. 2d at 529. American flag schools in Puerto Rico are conducted in Spanish, and Spanish is the primary language for most Puerto Ricans. *Id.* Pennsylvania's initial failure to provide easy access to Spanish-language information about the voter ID law disproportionately affected Latinos, particularly Puerto Ricans.

A lack of bilingual election materials is unfortunately nothing new in Pennsylvania. In 1974, the Eastern District of Pennsylvania ruled that Puerto Rican voters in Philadelphia were discriminated against due to the lack of a bilingual English-Spanish election system. *Arroyo v. Tucker*, 372 F. Supp. 764, 767 (E.D. Pa. 1974). The case concerned Section 4(e) of the VRA, which prohibits a state from conditioning the right to vote on a citizen's ability to speak English so long as the person completes the sixth grade in an "American Flag School." 42 U.S.C. § 1973b(e) (2012). As *Arroyo* pointed out, Section 4(e) was "enacted to protect [Puerto Ricans'] right to vote without regard to the language they speak." *Arroyo*, 372 F. Supp. at 767. Thus,

²¹ Available at http://www.ldnews.com/state/ci_21053239/pa-spanish-website-covers-voter-id-law-english.

²² Available at <http://www.pewhispanic.org/2007/11/29/english-usage-among-hispanics-in-the-united-states/>.

under the VRA, “[t]he ‘right to vote’ . . . has been interpreted broadly. . . . [to include] the ‘right to be informed’ [and] the right to an ‘effective vote.’” *Id.* (citing cases). Applying this statutory requirement, the Court ruled that Philadelphia’s election system violated Latinos’ right to vote by providing voting materials only in English, thereby improperly denying a meaningful right to vote to those who did not speak English.

More recently, there have been reports in Philadelphia of intimidation against Latino voters. For instance, “on October 30, 2008, canvassers reported that voters from the 8th Ward of Philadelphia’s 3rd District and the 10th Ward of its 1st District were receiving calls telling them that Latinos would only be allowed to vote from 2 pm to 6 pm on Election Day.” Common Cause, *Deceptive Election Practices and Voter Intimidation* 14 (July 2012).²³

Outside of Philadelphia, recent history also demonstrates that Latino voters have found it difficult to exercise the franchise. In 2003, the Eastern District of Pennsylvania issued an injunction to halt election practices in Reading, Pennsylvania, that it found to be hostile to Latino voters. The Justice Department filed suit in federal court alleging that Reading had discriminatory election conditions towards Latinos. These discriminatory practices included requiring identification from Latino voters but not others, failing to provide materials in Spanish, and refusing to allow English-speaking Latino voters to aid those that only spoke Spanish. *See Berks County*, 250 F. Supp. 2d at 529, 538. The Court ruled that the Reading practices violated the Voting Rights Act just as the lack of bilingual voting materials did in *Arroyo*. The Court stated,

The Government has presented evidence that Reading’s Hispanic voters have had less opportunity than other voters to effectively participate in Reading’s political process in past elections, and it is likely that such harm will continue if

²³ Available at <http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/DECEPTIVEPRACTICESREPORTJULY2012FINALPDF.PDF>.

Defendants continue to follow their current policies and practices. The impact of the discouragement of equal participation in the democratic system cannot be redressed by money, or any other remedy, following trial. Thus, the Court finds that the irreparable nature of the harm to Reading's Hispanic voters requires preliminary relief.

Id. at 540-41. This history gives particular weight to the statistical evidence that Act 18 is likely to impose a disparate impact on Latino voters.

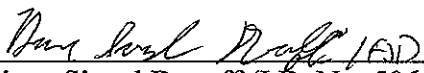
CONCLUSION

Amici urge the Court to consider the historical context of the struggle of African-Americans and women, and Act 18's potential negative impact on Latinos, and reverse the Commonwealth Court's denial of a preliminary injunction and instruct the Commonwealth Court to enter a preliminary injunction.

Dated: August 30, 2012

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IN THE SUPREME COURT OF PENNSYLVANIA

NO. 71 MAP 2012

VIVIETTE APPLEWHITE, ET AL.

**Petitioners/Appellants,
v.**

COMMONWEALTH OF PENNSYLVANIA, ET AL.

Respondents/Appellees.

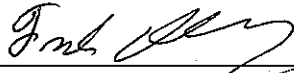
Proof of Service

I, Francis J. Dermody, Esquire, certify that on this 30th day of August 2012, I caused two copies of the foregoing Brief of Amicus Curiae Anti-Defamation League, et al., to be served upon the following attorney of record for the Appellees by U.S. Mail First Class:

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