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IN THE SUPREME COURT OF PENNSYLVANIA

No. 83 MAP 2013

MARK BANFIELD, *et al.*,

Appellants,

v.

CAROL AICHELE,
Secretary of the Commonwealth,

Appellee.

Appeal from the Order of Commonwealth Court
entered on October 15, 2013, in No. 496 M.D. 2006

BRIEF OF APPELLEE

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A. Counterstatement of the Case

1. The Election Code

The Pennsylvania Election Code, enacted in 1937, was amended in 1980 to allow for the use of electronic voting systems. See 25 P.S. §§ 3031.1 - 3031.22.[1] Resolution of this appeal requires the Court to interpret only a few specific provisions included in the 1980 amendments, including:

- § 3031.1: defining an electronic voting system as one that "shall provide for a permanent physical record of each vote cast;"
- § 3031.7(16)(iii): providing that the Secretary determine that voting systems "shall preclude every person from tampering with the tabulating element;" and
- § 3031.17: providing that the counties shall conduct a "statistical recount … after each election using manual, mechanical or electronic devices of a type different than those used for the specific election."

The Appellee, the Secretary of the Commonwealth, "is charged with the general supervision and administration of Pennsylvania's election laws, including among other things, the duty 'to examine and re-examine voting machines, and to approve or disapprove them for use in this State, in accordance with the provisions of [the Election Code].'" (R.121a (¶ 38)

[1] The 1980 amendments are contained in Article XI-A of the Election Code and numbered sections 1101-A to 1122-A. To avoid confusion, the Secretary cites to these provisions (as well as other sections of the Election Code) using only the section numbers assigned in Title 25 of Purdon's Pennsylvania Statutes Annotated.

(quoting 25 P.S. § 2621(b).). See also 25 P.S. § 3031.5(b) (requiring Secretary to issue a report stating whether, "in [her] opinion," voting system can be used "safely" and "meets all of the requirements" of Code).

The Secretary certifies the voting system, but each of Pennsylvania's sixty-seven counties independently selects and purchases the certified voting system that best meets its needs. See 25 P.S. §§ 2642(c); 3031.4(a); 3031.8.

2. Pennsylvania's DREs – The Specified Voting Systems

The Election Code contemplates the certification and use of both direct-recording electronic ("DRE") and optical-scan electronic voting systems. See 25 P.S. § 3031.1 (defining "electronic voting system" broadly). A DRE uses an electronic ballot display and records votes and ballot images in multiple memory components within the DRE. Optical-scan electronic voting systems use an optical scanner to read marked paper ballots and tally the results.

At issue in this case are the Specified Voting Systems ("SVS"), six DREs certified for use in the Commonwealth (see R.121a-122a (¶ 40(a)-(f))):

- The Danaher ELECTronic 1242 was first certified on November 15, 2005. (R.1543a-1550a.) It is the standard and handicapped-accessible voting system used in six counties, including Philadelphia County. The ELECTronic 1242 retains electronic ballot images in at least six separate, physical memory chips, from which the ballot images can be printed out to ensure that the proper ballots were cast during the election. (R.1559a, 1568a.)

- The Diebold/Dominion Accuvote TSx was first certified on December 22, 2005 and was re-certified on January 17, 2006. (R.1195a-1206a.) It is the standard and handicapped-accessible voting system used in 17 counties. The Accuvote TSx system retains images of every vote cast on an internal flash memory in each voting machine and in memory on a PCMCIA card. (R.1558a, 1566a.)

- The ES&S iVotronic was first certified on April 7, 2006. (R.1063a-1068a.) It is the standard voting system used in 24 counties, including Allegheny County, and it is the handicapped-accessible system in Chester County. The iVotronic stores ballot images in four separate memories, three in each unit and one in a removable card. (R.1559a, 1567a.)

- The Hart eSlate was first certified on November 18, 2005. (R.1097a-1102a.) It is the standard voting system used in Blair County, and the handicapped-accessible system used in four other counties. A copy of each ballot cast on this system is maintained in three separate places, one on the eSlate itself, one on a flash memory device, and one at a precinct controller's booth. (R.1559a, 1567a-1568a.)

- The Sequoia/Dominion Edge 2 was first certified on February 15, 2006. (R.1103a-1110a.) It is the standard and handicapped-accessible voting system used in York County. The Edge 2 retains the images of all cast votes both on a PCMCIA card and on the unit itself. (R.1558a, 1566a.)

- The Sequoia/Dominion Advantage was first certified on May 8, 2006. (R.1135a-1142a.) It is the standard and handicapped-accessible voting system in used Montgomery and Northampton Counties. The Advantage retains election files in both the voting unit and results cartridge. (R.1559a, 1569a.)

3. The Secretary Has Certified that the SVS Comply with the Code.

The SVS were all first certified in either 2005 or 2006. In December 2011, the Secretary retained Jack Cobb, Laboratory Director of Pro V&V, Inc., to conduct independent reexaminations of the SVS. In February and March, 2012, Mr. Cobb reexamined the SVS in detail. (R.2617a-2706a.) For example, Mr. Cobb developed extensive test protocols for each of the SVS that, among other things, required execution of over 80 individual steps, the completion of complete primary and general elections, and specific findings related to each requirement of the Election Code. (See, e.g., R.2584a-2613a, 3859a (62:12-17).) After carefully considering Mr. Cobb's reexamination reports, and exercising the discretion and authority expressly given to her in the Election Code, the Secretary made an independent decision reaffirming the SVS' compliance with the Election Code. (R.2617a-2706a.)

4. The SVS Have Performed as Expected and in Accordance with the Requirements of the Code.

Petitioners[2] ground their entire case on the fact that outside testing has exposed supposed "vulnerabilities" of the SVS. See Appellants' Br. 9-13. These reports of so-called "flaws" are irrelevant for two reasons.

First, Petitioners reference attacks on DREs that were made in a classroom or laboratory environment. These "vulnerabilities" have not been replicated in the real election-day process, and there is no evidence they can be. (R.722a-724a (¶¶ 22-28).) Petitioners' experts concede that no votes have actually been lost in Pennsylvania owing to the certification and proper use of the SVS. (R.3813a (182:4-9), 3819a (208:7-209:14), 3820-3821a (213:24-214:11), 3822a-3823a (220:24-222:9), 3672a (110:25-111:6), 3673a (117:4-25), 3690a (185:21-23).)

Second, the Secretary was aware of these alleged "flaws" with the SVS. (See, e.g., R.1197a-1198a.) She was also aware that more than dozen elections and millions of votes cast since the initial certifications demonstrated that the "flaws" do not pose a substantial or real risk to voters. Applying her experience and knowledge, the Secretary determined

[2] To promote clarity, the Secretary, like the court below, refers to Appellants as "Petitioners." Pa. R. App. P. 2131.

that the SVS do not violate the Code or burden voters and, therefore, should be recertified.

B. Brief Statement of the Orders Under Review

Commonwealth Court awarded summary relief to the Secretary on the following grounds:

- Count I: (a) The SVS "provide for" proper records because they can "generate or supply the required records on demand;" (b) the records provided are "permanent" because they can "remain stable or intact and be available for" use during the requisite time periods; (c) the SVS provide for "physical" records because they "can provide vote records printed on paper;" and (d) the records generated by the SVS are of "each vote cast" because "the Code [does] not require that vote records be software independent" and the examination, certification, and voting processes required by the Code ensure that the systems are secure and accurate. Ex. A[3] at 7, 11, 15, 17;

- Counts II, III, & VII: Because Petitioners proffered "no evidence that the [SVS] fail to accurately record votes when properly used" and established "no more than … a possibility … that the [SVS] could in theory be subject to tampering or human error," the Secretary's examination and certification procedures could not be deemed inadequate. Ex. C at 6, 8;

- Count IV: "The Election Code does not require software-independent vote records" and "provides only that the statistical sample of ballots must be counted using a different method or device." Thus, the DREs meet the "statistical recount"

[3] The opinions and orders of Commonwealth Court are attached to Appellant's Brief as Exhibits A-D. For consistency and ease of reference, the Secretary cites those exhibits when referring to the lower court's decisions.

requirements by manually counting paper printouts of votes cast. Ex. A at 20;

- Counts VIII, IX, & X: Petitioners failed to present evidence (a) that the examination or certification of the SVS violated any provision of the Election Code; or (b) that the "the challenged DREs are so inaccurate and insecure as to infringe on the right to vote and the requirement for uniform election regulation." Ex. A at 22 n.34; Ex. C at 9-10.

II. SUMMARY OF ARGUMENT

Commonwealth Court correctly held that the SVS meet the definitional requirements of 25 P.S. § 3031.1 because the SVS are capable of providing reliable electronic and paper records that can be retained for any period of time necessary to allow for counting, recounting, and recanvassing votes as required under the Election Code.

Commonwealth Court correctly held that the SVS satisfy the requirements of 25 P.S. § 3031.17 because the respective county boards of elections are able to use "devices of a different type" to conduct statistical recounts of a random sample of ballots cast. A "statistical recount" is a separate and distinct procedure designed to confirm the accuracy of the initial canvassing of votes, not the voting system's ability to capture a voter's "intent."

Commonwealth Court correctly held that the SVS comply with 25 P.S. § 3031.7(16)(iii) because the Secretary has determined that all of the SVS have the "mechanisms or capabilities … to preclude … tampering with the tabulating element" during an election. Section 3031.7(16)(iii) is not violated merely by identifying hypothetical vulnerabilities or threats to the security of DREs.

Commonwealth Court correctly held that the Secretary's certification processes comply with 25 P.S. § 3031.5. The Secretary must decide whether, in her opinion, the SVS are safe, secure, and accurate. To that end, the Secretary conducted thorough examinations and reexaminations of the SVS and properly concluded that the SVS satisfy every requirement of the Election Code. The Secretary's determination is entitled to deference and mere disagreement with this determination – especially in the absence of any evidence that the Secretary's determination has actually harmed voters – is not a basis to grant mandamus relief.

Commonwealth Court correctly held that the SVS do not violate the Pennsylvania Constitution. The certification and use of the SVS do not directly or indirectly interfere with any voter's right to vote or equal, uniform application of the law. The repeated, successful use of the SVS proves as much. Moreover, the SVS have been approved and selected for use pursuant to express constitutional provisions, the same Election Code, and the same certification procedures as every other electronic voting system in Pennsylvania.

III. ARGUMENT FOR APPELLEE

A. Commonwealth Court Correctly Held That the SVS "Provide for a Permanent Physical Record of Each Vote Cast."

1. Electronic Records Meet the Definitional Requirements.

The SVS electronically register and record each vote in multiple, nonvolatile media. Although Commonwealth Court did not consider this point, finding that other features of the SVS meet the applicable standard, these electronic records created during the process of voting are, in fact, "physical permanent record[s] of each vote cast." 25 P.S. § 3031.1.

(a) The electronic records are permanent.

The court below held that "permanent" means "stable or intact … and available" for a period of at least 20 days for state elections and 22 months for federal elections.[4] Ex. A at 11-12.

Petitioners first question whether "permanent" can "mean different things in different elections." Appellants' Br. 30. This concern is misplaced because the terms of the Election Code "must be construed in a manner which serves the purposes of the Election Code," i.e., to create the

[4] Section 3031.1 does not require that the records be kept at all, much less for a specific period of time. Other provisions of the Code, however, make clear that the General Assembly deemed 20 days an adequate period of time to retain voting records. See, e.g., 25 P.S. §§ 3070, 3262, 3456. Federal law requires that election records be retained for twenty-two (22) months. 42 U.S.C. § 1974.

environment and processes necessary for safe, reliable, and accurate elections. Ex. A at 11. The Election Code governs all elections held in the Commonwealth (including elections for federal office). Thus, "permanent" must be understood in a way that comports with both state and federal, law. The Election Code governs all elections held in the Commonwealth (including elections for federal office). Thus, "permanent" must be understood in a way that comports with both state and federal law.

Commonwealth Court's mention of the federal time period for retention of election records is also irrelevant because, as Petitioners' experts admit, "permanent" as used in the Election Code cannot require that a record literally last forever. (R.3655a (45:22-25).) Rather, section 3031.1 requires (to the extent a definition can require anything) only that the SVS produce a record that can be retained for a sufficient period of time to permit "recounts, recanvasses, litigation, etc." Ex. A. at 11-12. There is no genuine dispute that the SVS electronically record votes on media that can be retained for many years in precisely the same state as when first registered by the voter. Thus, even if one were to adopt the longer federal statutory standard for the retention of election records, the

records created by the SVS meet (and can exceed) this requirement. (R.3656a-3657a (49:16-50:1); R.3657a (50:18-22, 51:7-10); R.742a (¶ 46).)

Petitioners also assert that a record is not "permanent" if it "can be altered." Appellants' Br. 30. Something is permanent, however, if it is merely stable; it will not change unless some other force acts upon it. See Merriam-Webster Dictionary (available at http://www.merriam-webster.com/dictionary/permanent). "Permanent" does not mean literally lasting forever in a constant, unchangeable state, or (as Petitioners would have it) a state in which loss or alteration is impossible; it simply cannot mean that. Any record, regardless of format or material, is subject to loss, damage, erosion, and tampering. For this reason, it defies common sense to interpret the Code as requiring that a record be immune to change. Rather, the Code must be understood as requiring that the record be capable of permanence in reasonably appropriate and available conditions.

(b) The electronic records are physical.

Petitioners assert that electronic records are not "physical" because they are electronic, rather than paper. The precise nature of the record of votes, however, is determined by the mechanism used to capture those votes. In this case, when providing for the use of electronic voting systems

in Pennsylvania, the General Assembly understood that it was providing for the use of voting machines that would register or record votes electronically. See, e.g., 25 P.S. §§ 3031.1, 3031.12(a). Moreover, the General Assembly envisioned and authorized the use of electronic voting systems that would register and record votes electronically without a paper component. See 25 P.S. § 3031.1; id. § 3031.7(10); id. § 3031.12.

With regard to the SVS, the vote-capturing mechanism directly and electronically records the voter's specific notations in a number of places, both within the machine and on removable media. These records can be seen and touched. They can be stored for use at a later time, and the information they contain can remain intact for many years. In short, these electronic records of each vote cast possess a "material existence" that meets the common and ordinary understanding of "physical."[5] See Merriam-Webster Dictionary (available at http://www.merriam-webster.com/dictionary/physical).

Petitioners also note that the General Assembly used the phrase "permanent physical record" instead of "permanent electronic record." This

[5] In fact, Petitioners recognize that the electronic record has a material existence. (See R.349a (38); R.3820a (210:20-23).)

observation does nothing to establish Petitioners' view that "physical" means a paper, optical-scan ballot. After all, the General Assembly also did not adopt the phrase "permanent paper record," even though "[i]t knew how to use the word [paper] when it wanted to." Appellants' Br. 29. See, e.g., 25 P.S. §§ 3031.12(b); 3031.13(a); 3031.18(1); 3154(e)(3). As a matter of logic and statutory interpretation, it is more likely that the General Assembly used the term "physical," not to exclude "electronic" or "paper," but simply to require a record that was physical in the ordinary sense of having a material existence.

(c) The electronic records are of "each vote cast."

Petitioners' argument is that the permanent and physical data created electronically are not "records of each vote cast," but are instead "software-created data that may or may not reflect" the voters' intent, Appellants' Br. 31, ignores the demands of the Election Code and the reality of Pennsylvania elections. See, e.g., Ex. A at 18.

Voters in Pennsylvania have good reason and grounds to know that the SVS are recording their votes as cast and that the electronic memory within the machine is an accurate and correct record. (See (R.803a (¶ 259); R.841a (¶ 399); R.847a (¶ 423).) For one thing, that is how

computers work. When you press a button that says "A," the computer records "A." In addition, the recording and tabulating capabilities of the SVS are examined by the Secretary before they can be certified; if any system fails, it cannot be approved for use. See 25 P.S. §§ 3031.5, 3031.7. Lastly, the Election Code contains numerous provisions that allow one to determine whether an electronic voting system is recording and tabulating votes accurately, including provisions for examining the final election results, via recounts, recanvasses, and contests. See 25 P.S. §§ 3031.10(e)(3); 3031.14(a); 3031.18; 3154(e);[6] 3154(g)(1)(i); 3262; 3401; 3404; 3457. In sum, the General Assembly adopted numerous and explicit methods to ensure that the electronic voting systems in use in the Commonwealth would accurately record "what actually happened" during an election.

[6] The recanvass procedures for electronic voting systems that do not use paper ballots, i.e., DREs, are especially enlightening. 25 P.S. § 3154(e)(4). In elections where there is an "unaccounted for" discrepancy between the returns and a recanvass, the county board "shall unlock the voting and counting mechanism of the machine, and shall proceed thoroughly to examine and test the machine to determine and reveal the true cause or causes." Id. § 3154(e)(1)(ii). It is at this point only – after the election; after the initial count; and after a recanvass (rather than a recount) – that the General Assembly thinks it necessary to test the capture and counting ability of a DRE. At all times before, the legislature "knows" that the machines work as expected.

Petitioners improperly read the Election Code to require that electronic voting systems create a "software-independent" record. See generally Appellants' Br. at 31. There is no statutory basis for this requirement. Indeed, as explained by Commonwealth Court, the General Assembly expressly authorized the use of voting systems that would use hardware and software to register and record votes electronically. Ex. A at 17. The legislature did not adopt any language that would suggest that the voting, recording, or tabulating of votes were to be done independently from that software. Indeed, to interpret the Code as requiring software-free records "would be absurd," as it would necessarily exclude the use of precisely the systems the legislature expressly approved. Id.

2. BIR Paper Records Meet the Definitional Requirements.

Each of the SVS has a Ballot Image Retention ("BIR") function that generates paper records of each vote cast. Ex. A at 8. The court below held that these paper records meet the definitional standards of section 3031.1.[7] Petitioners argue that (a) Commonwealth Court misinterpreted

[7] Notably, the Help America Vote Act ("HAVA"), 42 U.S.C. § 15301 et seq., requires that every voting system "produce a permanent paper record with a manual audit capacity," 42 U.S.C. § 15481(a)(2)(B)(i), and that this "permanent paper record" be "available as an official record for any recount." Id. § 15481(a)(2)(B)(iii). The U.S. Election Assistance Commission is responsible for approving specifications and standards for

the phrase "provide for" and (b) a paper copy of a software-created record is no more reliable than the original. Appellants' Br. 33-34.

(a) The SVS "provide for" a suitable record.

The General Assembly defined an electronic voting system as one that shall "provide for" a certain record. As Commonwealth Court observed, this requirement "denotes the ability to generate or supply the required records on demand; it does not mean that such records must be generated automatically with each vote cast." Ex. A at 7.

This understanding of the "provide for" requirement is entirely consistent with the plain meaning and ordinary usage of the phrase. When, as here, the phrase is used in a "law or agreement," "provide for" possesses an anticipatory meaning; it concerns something that might happen or be available in the future. See Oxford Advanced Learners Dictionary ("provide for something (formal); 2 (of a law, rule, etc.) to make it

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determining whether electronic voting systems, including DREs like those at issue here, meet these federal requirements. The Commission has explained that an electronic voting system meets HAVA's "permanent paper record" requirement when it "conforms and complies with Sections 2.2.5.2.1 and 2.5.3.1 of the 2002 Voting System Standards." (R.1627a-1630a); see also 42 U.S.C. § 15481(a)(2)(B)(i). Each of the SVS meets these standards. (See R.751a (¶ 77), 817a (¶ 303), 818a (¶ 305).)

possible for something to be done") (emphasis added).[8] Applying that correct and directly-on-point understanding to the phrase used in the Election Code, it is clear that the General Assembly merely requires that electronic voting systems make the production of a record possible for future use by the county boards of elections.

As a practical matter, given the Secretary's duties under the Election Code, this interpretation of "provide for," requiring only that electronic machines be capable of producing records, rather than (as Petitioners contend) "actually supply" records, is the only possible understanding. The county boards of elections purchase and install voting systems at their discretion. 25 P.S. § 3031.4(b). The boards maintain, test, and operate the machines during the elections. The actual creation and use of voting records are entirely the responsibility of these local election officials.[9]

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[8] See also English Collins Dictionary (available at http://www.collinslanguage.com/ (search for "provide")) ("5. (Formal) provide for (of a law, treaty, etc.) to make possible …."); Macmillan Dictionary ("provide for something FORMAL to make it possible for something to happen in the future") (emphasis added; capitalization in original); Merriam-Webster's Advanced Learner's Dictionary (provide; provide for; 1 provide for (something): to cause (something) to be available or to happen in the future")).

[9] County boards and other local election officials are responsible for the "process of voting" and all election-day and post-election procedures. 25 P.S. § 3031.12. Indeed, the original tabulation of votes, certification of the official returns, the computation and canvassing of returns, and the recounts are performed by local officials, not the Secretary. Id. § 3031.14; id. § 3154(a); id. § 3154(e). Even discrepancies and "palpable

In contrast, the Secretary is merely required to examine and approve the voting systems; that is, to certify that the systems meet the definition of "electronic voting systems" and that they are safe, reliable, and accurate as measured against the Code's standards. The Secretary does not and cannot select, procure, or test individually each of the thousands of machines that are actually used in the election districts. Given her limited role, the Secretary can do no more than determine whether each system, as a system, "provides for" a record in the sense that it "supplies what is needed" to produce those records. In short, she is not required to (and, as a practical matter, cannot) determine if each fielded machine actually produces a permanent physical record. (Cf. R.748a (¶ 65).)

Without a hint of irony, Petitioners suggest that, in interpreting section 3031.1 to require only that an EVS possess the capacity to generate records, Commonwealth Court "unnecessarily supplies words that are not part" of the Code. Appellants' Br. 32. On the contrary, Commonwealth Court considered the language of the Code as written. It is Petitioners who ignore the actual wording of the law and seek to replace the phrase

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error" are to be investigated by local return boards, not the Department of State. See, e.g., id. § 3154(b). But see id. § 3154(f) (authorizing Secretary to order nondiscretionary recount in close elections).

"provide for" with the term "provide." See Ex. A. at 7-8 ("If the phrase is construed as Petitioners advocate, the word 'for' in the phrase 'provide for' is superfluous.") Consistent with the ordinary meaning of the term and the practical considerations of voting, the lower court's opinion should stand.

(b) The BIR paper records are of "each vote cast."

Petitioners argue that the printed ballot images are not "meaningful" records of each vote cast because they are "[a]t best" merely "identical copies" of the original electronic record, which, being computer-generated, is per se unreliable. Appellants' Br. 34. This indirect attack on electronic-recording votes systems suffers from the same errors in statutory construction and logic as Petitioners' direct attack.

Printed ballots that are "identical copies" of electronic records cannot be deemed deficient when, as explained above, the General Assembly specifically authorized the use of electronic voting machines that would use software to register or record votes electronically. The Secretary does not dispute that a true and correct copy of something reflects precisely the information in the original. If the original is damaged, corrupted, or tampered with, the subsequent copy will reflect the altered information. Without any actual evidence that the original is, in fact, "unreliable,"

however, no reason exists to doubt the accuracy and usefulness of the true copy.[10] In this case, Petitioners fail to introduce such evidence. They also fail to acknowledge the safeguards against fraud and tampering that exist in both the Election Code and in the physical protections and administrative practices of the Secretary and the county boards of election that explain why such evidence is unavailable. See infra Part III.C.1.

3. Even if the Language in the Election Code Were Ambiguous, the General Assembly's Intent Regarding the Provision of Permanent, Physical Records by the SVS Is Clear.

The phrase "provide for a permanent physical record of each vote cast," despite Petitioners' tortuous attempts to add new meaning to each term, is clear in its requirement that electronic voting systems be able to produce a reviewable, retainable record of each elector's selection. The SVS meet this explicit requirement. Yet, even if the meaning of the terms were ambiguous and their ordinary, everyday meanings did not obviously apply, the intention of the General Assembly to allow for the use of the SVS

[10] For this reason, Pennsylvania law freely recognizes exact duplicates and copies as useful and accurate records. See, e.g., Pa. R. Evid. 1003 & comment (citing 42 Pa. C.S. § 6104); 42 Pa. C.S. §§ 5328, 6106, 6109 , 6151-59. If "copies" can be admitted into evidence in a court of law, where truth and accuracy hold no less a sacred position than in the voting tabulation process, printed ballot images, which all parties agree are "exact cop[ies] of the original data," can be used to count (and statistically recount) votes.

is clear, as shown in the Secretary's long-standing interpretation of the Election Code, the "occasion and necessity" and "circumstances" surrounding the enactment of the 1980 amendments to the Code, and the consequences facing the Commonwealth's voters if Petitioners' logic and common sense-stretching interpretations were to apply.

(a) The Secretary has consistently interpreted "provide for permanent physical record of each vote cast" to permit the use of DREs.

When seeking to determine the intent of the General Assembly for the purpose of giving meaning to inexplicit statutory language, a court is to consider and give great weight to the interpretation of the government agency or officer charged with applying that particular law. 1 Pa. C.S. § 1921(c)(8). The charging language of the Election Code adopted by the General Assembly gave the authority and discretion to the Secretary to examine whether electronic voting systems fulfill the requirements of the Code and to approve the systems for use in Pennsylvania. See, e.g., 25 P.S. §§ 2621(b), 3031.5(b).

Since the introduction of direct-recording electronic voting systems in Pennsylvania, the Secretary has interpreted (and still interprets) the "permanent physical record" requirement to be satisfied at least by the

systems' ballot-image retention or BIR function, which allows each DRE machine to print individual copies of each vote. (R.1589a.) The General Assembly has not disturbed this interpretation of the Code, see St. Elizabeth's Child Care Ctr. v. Commw., Dep't Pub. Welfare, 963 A.2d 1274, 1278 (Pa. 2009) (citation omitted), and Petitioners cannot establish any "bad faith, fraud, capricious action or abuse of power" by the Secretary that would justify judicial interference with the exercise of her delegated authority. Khan v. State Bd. of Auctioneer Exam'rs, 842 A.2d 936, 944-45 (Pa. 2004) (citation omitted).

(b) The circumstances surrounding the enactment of the relevant part of the Election Code favor application of the Secretary's interpretation of the "permanent physical record" definition.

Petitioners appeal to the legislative history of the Code. See 1 Pa. C.S. § 1921(c)(1)-(2) (providing that reasons for and circumstances surrounding adoption of the legislation may be relevant to the meaning of a statute). There, Petitioners claim to find a requirement for a contemporaneous paper record in the General Assembly's desire to avoid the "same defect as the lever machines." Appellants' Br. 33. But Petitioners' misunderstand the relevant history. In fact, a review of the

voting systems in use in Pennsylvania at the time the General Assembly adopted section 3031.1 shows that the legislature did not intend the "permanent physical record" language to require each electronic voting system to produce, simultaneously with the registering of the vote, a voter-verified paper record.

The lever machines used for years in Pennsylvania admittedly maintained vote totals only. If it were discovered at the close of an election that the lever machines' counting mechanism had failed, there would be no way to reconstruct what the total vote should have been because there was no separate record – paper or electronic – of each voter's specific choices. (R.763a-764a (¶ 115).) In deciding to allow the use of electronic voting systems and the ability to "provide for a permanent physical record of each vote cast," the General Assembly sought to take advantage of new technology to address this deficiency.

When making amendments to the Election Code, however, the General Assembly did not reject the use of lever machines in Pennsylvania; it expected that some election districts would choose to use electronic voting systems and some would continue to use lever machines, notwithstanding their inability to produce physical records of each,

individual vote. By allowing the continued use of lever machines, the General Assembly clearly indicated that elections in Pennsylvania need not produce paper records to be deemed fair and legal. It also showed that the other provisions of the Code could be effectively and "meaningfully" utilized without such a record. For example, a recount would be valid and meaningful even if the only available record were the total amount of votes registered by a machine's counter. Given that the Election Code allows for such machines and the other provisions of the Code (like the full recount provisions) must account for such use, the Code cannot now be read to require the very thing – paper records – these other machines did not produce.

The key to understanding the "permanent physical record of each vote cast" requirement is to read all of the terms together. The deficiency in the lever machines was not the absence of a "permanent physical record." Even without that feature, the General Assembly accepted the safety, accuracy, and effectiveness of lever machines and continued to allow their use in Pennsylvania. Rather, the problem that the General Assembly sought to address by allowing for the use of electronic voting machines was the lack of a record of each vote cast. It was the creation of

a separate, individual record that was the great advancement of the electronic voting system, and it is an advancement that each of the SVS performs.

(c) The consequences of Petitioners' interpretation of the "permanent physical record" requirement militate against its adoption.

This Court may consider the "consequences of a particular interpretation" of ambiguous language. 1 Pa. C.S. § 1921(c)(6). If Petitioners' interpretation of the "permanent physical record" language (with its "software independence" requirement) governed, each of the SVS would have to be de-certified; and the vast majority of counties in the Commonwealth would be left without a voting system.

Petitioners would have the counties rectify that problem by purchasing new optical-scan systems for thousands of voting precincts. This "solution," however, would neither satisfy the new understanding of the Election Code nor be economically feasible.

First, because the standards proposed by Petitioners are impossibly strict – for example, every record is subject to alteration and, in Petitioners' view, is therefore not "permanent" – then no electronic voting system, including the optical scans Petitioners favor, could be used. Second, even

if (for reasons unexplained by Petitioners) optical scans were exempt from the Code's heightened demands, Petitioners do not address the tens of millions of dollars it would cost to procure the new machines. Nor do Petitioners concern themselves with the almost certain inability of the counties to be able to afford such an extravagance when their current systems have performed reliably, safely, and accurately in 15 state-wide elections and numerous special elections.

B. The SVS Can Be Used to Conduct "Statistical Recounts" Under Section 3031.17.

Count IV of the Petition for Review asserts that, because the SVS do not produce software-independent, voter-verified records, a "statistical recount" under section 3031.17 is not possible.[11] (R.140a.) The court below disagreed for three reasons.

First, repudiating the philosophical foundation of Petitioners' claim, the court held that section 3031.17 "contemplates nothing more than a recount or retally" of sample ballots and not verification that DREs "correctly captured voter intent." Ex. A at 20-21. Second, section 3031.17

[11] Section 3031.17 requires that "county board of elections … conduct a statistical recount of a random sample of ballots after each election using manual, mechanical or electronic devices of a type different than those used for the specific election."

requires only that a different method or device be used to count the sample of ballots; a separate device need not generate the ballots. Id. at 20. Lastly, the court reiterated its holding that "the Election Code does not require software-independent vote records." Id. Petitioners appeal each of these conclusions.

1. The "Statistical Recount" Is Intended to Confirm the Vote Count, Not Verify Voter Intent.

Neither the "plain language" nor the legislative history of the Election Code support Petitioners' claim that the automatic "statistical recount" in section 3031.17 is designed to measure "voter intent."

(a) The plain language of the Election Code establishes that the statistical recount is designed to confirm only the accuracy of the original count.

Petitioners cite eight other, separate and distinct provisions within the Election Code and conclude that "recount" (a) means consideration of paper ballots, which, in turn, requires (b) "check[ing] whether votes were correctly captured in the first place." Appellants' Br. 16. Petitioners then assume that because section 3031.17 also uses the term "recount," it must require the same process for the same purpose. In fact, the plain language of the Election Code establishes that the "statistical recount" in section

3031.17 is different from the "recounts" provided for in other sections of the law.

First, Petitioners ignore that section 3031.17 requires a statistical recount of only a "random sample of ballots." This is clearly a different process than is expected under an ordinary recount, which (at least under Pennsylvania law) requires the "entire vote," not a subset of ballots, to be "correctly counted." 25 P.S. §§ 3261(a); 3154(e)(2). Moreover, unlike these full-recount procedures, the "statistical recount" is an automatic procedure. It is not triggered by any discrepancy, confusion, or credible charge that something has gone wrong with the voting.

The different processes for a "statistical recount" evidence a different purpose. By requiring that the county boards of election count again only a small sampling of votes cast, the "statistical recount" seeks merely to determine whether the original tabulation was performed correctly. It is not designed to be a forensic examination into whether a voter's intent was properly recorded by the machine. (R.722a (¶ 18) ("A recount is not a 're-vote.' Its purpose is to verify the integrity of the tabulation (counting) process, not the original vote recording process.").)

Second, Petitioners purport to find within the Code a sharp delineation between a "recount" (to determine whether votes were "captured in the first place") and a "recanvass" (to determine whether "votes were accurately counted"). They disregard that difference, however, when reading section 3031.17, which expressly states that the "statistical recount" is to be conducted "as part of the computation and canvass of returns." 25 P.S. § 3031.17. Thus, by its own terms, the "statistical recount" is simply part of the original counting.

Lastly, the Election Code contains other "recount" provisions that provide for the additional examinations and specific testing of the electronic voting systems that Petitioners demand from the "statistical recount." See 25 P.S. § 3031.18.[12] Petitioners do not explain why separate recount provisions would be necessary if the "statistical recount" were intended to perform as Petitioners suggest. Nor do Petitioners explain why completely different and non-applicable recount provisions applying to full recounts

[12] Section 3031.18 provides that initial recounts are conducted under section 3154, which contains methods for testing the "capture" ability of voting machines when necessary. See, e.g., 25 P.S. § 3154(e)(1)(iii). Section 3031.18 also states that, in instances where "fraud or error" is alleged, section 3261 governs the complete recounts of paper-ballot-based electronic voting systems and section 3262 governs recounts of systems that like the each of the SVS. Id. § 3031.18(1) & (2). The "statistical recount" provision contains no language even hinting at the detailed processes included in these other sections.

and allegations of fraud should be used to understand the meaning of "statistical recount."

(b) The legislative history does not establish that the "statistical recount" measures voters' intent.

With regard to legislative history, Petitioners first find meaning of the phrase "statistical recount" in the words and voting history of Representative Lee Taddonio. Appellants' Br. 18-19. However, while Mr. Taddonio expressly understood the "statistical recount" as a "safeguard," there is nothing in the record to suggest he understood the process to require review of software-independent, voter-verifiable paper ballots.[13]

Petitioners next suggest that the "statistical recount" requires review of paper ballots because "every [electronic voting system] in existence" at the time used paper ballots; the General Assembly could not have "had something else in mind." Appellants' Br. 19. In fact, DRE technology was available in 1980. Indeed, the 1980 amendments clearly indicate that the General Assembly knew of and considered both paper-ballot and non-paper-ballot electronic voting systems. See, e.g., 25 P.S. § 3031.1

[13] Petitioners leave the impression that Rep. Taddonio's opposition to the introduction of electronic voting systems in Pennsylvania evaporated once the "statistical recount" provision was introduced. Appellants' Br. 18. In fact, for whatever reason, Mr. Taddonio did not support the 1980 amendments to the Election Code.

(defining "voting device" as "apparatus [with] paper ballots or ballot cards" … or "apparatus by which such votes are registered electronically") (emphasis added); compare id. § 3031.12(a) with § 3031.12(b). What the General Assembly had "in mind" is further elucidated in the 2004 amendments to the Election Code, which added recount provisions exclusively applicable to DREs. See 25 P.S. § 3154(e)(4); id. § 3262. Clearly, the Election Code is not directed entirely at optical scans and punch cards.

2. The Voting Records of the SVS Meet the "Different Device" Requirement of Section 3031.17.

Petitioners challenge the ability of the SVS voting records to satisfy the "devices of a different type" requirement. Each of the SVS is capable of printing out 2% of the ballots registered and recorded on the machines. Ex. A at 19. County election officials can count these printed copies manually, an obviously different tabulation method than is used in the initial counting of votes. (Alternatively, a county board can insert either the electronic record or the BIR printout into a separate device and recount a random sampling using different software. Ex. A at 19.) There is no

evidence that the county boards of elections are unable to conduct a "statistical recount" of the SVS using these methods.

Petitioners, however, assert that, because DREs use the same software to generate both the electronic record and the paper printout, it is "impossible to generate election data with a device other than the one that created it." Appellants' Br. 21. This argument merely restates Petitioners' insistence that the Election Code requires the production of a "software independent" record, and it fails for the reasons discussed above: the Election Code simply does not demand, or otherwise provide for, records of votes that are independent from the system that created them.

Petitioners also complain that comparing "computer-generated data" with "computer-generated election results" is the "intellectual equivalent of comparing photocopies." Appellants' Br. 21-22. Petitioners' analogy, however accurate, is irrelevant. Without evidence that the original is false, there is no reason to doubt the accuracy of the copy. In any event, it is no criticism to claim that the "statistical recount" process merely compares copies to the original because that is exactly what it is supposed to do. Ex. A at 21 ("Section [3031.17] contemplates nothing more than a recount or retally of a specified number of ballots recorded during an election.")

3. The 2004 Amendments to the Election Code Do Not Require "Software-Independent Vote Records."

Petitioners deconstruct the 2004 amendments to inject "software-independent" language and requirements into section 3031.17, Appellants' Br. 22-26, notwithstanding the lower court's opinion to the contrary. Ex. A at 20.

Among other things, the 2004 amendments changed the "recount" provisions (but not the "statistical recount" requirement) for voting systems throughout the Commonwealth. Specifically, the General Assembly re-wrote section 3031.18 to require (a) that initial "recounts" of all electronic voting systems be conducted under section 3154 and (b) that "fraud" recounts be conducted under sections 3261 or 3262, depending on whether the voting system used paper ballots.[14] 25 P.S. § 3031.18. The 2004 Amendments also further clarified the scope and application of section 3154. Where that provision initially provided for only recanvasses of voting systems, the amended statute provides directions for recounts

[14] On this point, the 2004 amendment made explicit what had been already implied. Prior to 2004, section 3031.18 provided that "[s]hould a recount of votes be ordered as provided by law, the ballots shall be recounted in accordance with the provisions of Article XVII." Article XVII includes sections 3261 and 3262. These provisions have always made a distinction between recounts of paper ballots and recanvasses of other voting systems.

and recanvasses and expressly dictates which procedures apply to which systems. Compare, e.g., 25 P.S. § 3154(e)(3) with § 3154(e)(4). Most importantly, the General Assembly adopted recount provisions explicitly directed toward the use of non-paper-ballot voting systems. Id.

Commonwealth Court rightly understood the 2004 amendments to evidence the legislature's understanding that the SVS could be fairly, safely, and reliably used in Pennsylvania, even under the existing provisions of the Election Code. Petitioners inexplicably contend that this common-sense holding effects a "repeal" of the "statistical recount." Appellants' Br. 23. They then proceed to try to explain why a repeal is unwarranted by arguing, for example, that section 3154, as amended, did not create an "irreconcilable conflict" with the "statistical recount" requirements in section 3031.17. Id. at 24. Neither Commonwealth Court nor the Secretary, of course, suggests that it did. In fact, there is no conflict at all; as explained above, the sections outline different processes for different purposes.

Petitioners offer an alternative explanation: there is no conflict because section 3154 "simply creates a process for auditing [a DRE] if it happens to be used." Appellants' Br. 24. Since DREs allegedly cannot be

used legitimately, section 3154 is instead a "dormant" provision with no applicable content. Id. Whatever this interpretation may mean for Petitioners' "implied repeal" analysis, it is an invalid interpretation of the Election Code. Provisions of the Code cannot be read to be meaningless. Nor can an amendment to the Code be rendered "dormant" by an already existing provision. Such an interpretation would reduce the legislative process of changing the law to an act of complete futility.

Petitioners also appeal to the legislative history of the 2004 amendments to show that the General Assembly did not intend to repeal the statistical recount requirement. As an initial matter, this Court should not consider Petitioners' argument concerning the meaning of the 2004 amendments, which are based on citations to the Legislative Journal that are not a part of the record on appeal. Commonwealth v. Rios, 684 A.2d 1025, 1035-36 (Pa. 1996) (citing Pa. R. App. P. 1921 note; Commonwealth v. Bracalielly, 658 A.2d 755, 763 (Pa. 1995)).

More to the point, even if many legislators were seeking to add processes and procedures to increase confidence that votes "will be reflected accurately in the final count," the amendments as passed expressly require that systems like the SVS be "recanvassed" in the event

of a "recount." House Legislative Journal, 2004 Regular Session, No. 58, October 6, 2004, at 1732. Thus, the General Assembly accepted that the recanvass procedure was sufficient to achieve that very confidence when applied to a voting system that electronically recorded votes, that had been certified as being safe, accurate, and secure, and that had been pre-tested by local officials for use.

In sum, the 2004 amendments were intended to ensure that votes were counted and counted accurately. The recanvass procedure specifically adopted for DREs systems was deemed adequate to safeguard that right.

C. Commonwealth Court Correctly Held That the SVS Preclude Tampering as Required by Section 3031.7(16)(iii).

1. Petitioners Rely on *Hypothetical* Tampering.

Petitioners claim that the use of DREs is illegal because "it is possible to tamper with DRE tabulating elements." Appellants' Br. 35. The critical flaw in Petitioners' argument is the purported hacks and attacks upon which they rely are, in fact, merely possible.

The "tampering" cited by Petitioners is hypothetical in two senses. First, a vulnerability that has never been exploited remains nothing more than a theoretical insecurity. Petitioners' experts admit as much. (R.3690a

(185:21-23); R.903a (¶ 95).) Every one of the alleged vulnerabilities of the SVS has been created and demonstrated only in the carefully controlled environment of a laboratory. None has been shown to "work effectively under real election conditions." (R.740a (¶ 33); see also R.809a, 850a (¶¶ 276 436); R.722a-724a (¶¶ 22-28); R.3673a (117:4-25); R.3813a, 3820a-3821a (182:4-9, 213:24 – 214:11).)

In fact, Petitioners have not identified a single, meaningful security breach of any of the SVS. (R.844a-845a (¶ 416(d)).) They cannot. (R.801a-802a (¶ 256).) Petitioners' own experts, upon whom they rely to raise doubts about software-run systems, acknowledge that there is no evidence of tampering of the SVS in Pennsylvania elections. (R.3814a (187:22-188:1), 3815a (190:1-7), 3819a (206:4-20), 3820a (211:15-212:13); R.3675a (125:10-18), 3687a (170:10-171:23, 172:21-24).)

Second, the "tampering" is merely hypothetical because the SVS have been tested, examined, and certified as secure for reliable and accurate voting. For example, independent federal laboratories conducted security testing, especially time consuming and expensive tests like source-

code review.[15] Additionally, while the Secretary is required to rely on federal security testing, see 25 P.S. § 3031.5(a) (R.757a (¶ 95); R.724a-725a (¶ 31)), the Code-mandated examinations of the SVS also include separate consideration of the systems' security features. The most recent reexaminations, for example, included "penetration analyses" that looked at the systems' locks, seals, and password management functions. (See, e.g., R.2296a.) The reexaminer also conducted detailed "system integration" tests that consisted of two elections, a general and a primary. (See, e.g., R.2296a-2297a.) During that voting process, the reexaminer specifically confirmed that a voter would not have access to ballots or other internal components of the system. (See, e.g., R.2392a.)

Lastly, the Election Code requires certain administrative and procedural protections for security. Section 3031.7(16)(iii) itself, for example, explicitly requires the Secretary to consider whether the voting system can be "controlled" in such a way to preclude tampering. See also 25 P.S. § 3031.13 (requiring that "automatic tabulating equipment … shall be locked and sealed"); id. § 3031.21 (requiring that county board of

[15] The Election Code requires that the Secretary rely on the results and conclusions reached by federal testing laboratories. 25 P.S. § 3031.5(a.) (See R.757a (¶ 95); R.724a-725a (¶ 31).)

elections provide machines and keys be secured "in a security vault" and that all electronic voting systems "shall be properly boxed or covered and stored in a suitable place or places"). As Commonwealth Court explained, the Secretary is entitled to consider these physical and administrative protections when determining whether a SVS precludes tampering. Ex. C at 7. (See also R.788a (¶ 210).)

2. *Hypothetical* Tampering Does Not Violate Section 3031.7(16)(iii).

(a) The actual language of the Election Code does not demand absolute security.

Petitioners argue that the "plain language" of section 3031.7(16)(iii) is "obligatory" and "absolute." From this, they conclude that the Election Code requires the SVS to preclude all tampering, no matter how theoretical. Appellants' Br. 37. Petitioners, however, misread the Code, the actual language of which does not require absolute security.

First, section 3031.7(16) is not a standalone security requirement. Petitioners ignore that this provision is but one paragraph of section 3031.7, the first paragraph of which expressly states that whether a voting system properly precludes tampering is to be determined "at the time of [the] examination or reexamination." This requirement has two effects.

First, it demonstrates that the Code only requires the Secretary to conduct an examination and consider all the information available to her at a given point in time. It does not establish a standard of perfection that would require decertification if some means of tampering were later discovered. Second, it squarely places the determination regarding whether a given system "precludes tampering" within the discretionary powers of the Secretary. See infra Part D. Matters of discretion and opinion are, by definition, not absolute. They necessarily require an exercise of judgment by those to whom responsibility has been given. The General Assembly considered the Secretary to be capable of exercising that judgment, and there is no legal or factual basis to challenge that determination. Cf. Weber v. Shelley, 347 F.3d 1101, 1106-07 (9th Cir. 2003) (holding that "reasonable and neutral" consideration of "pros and cons of various balloting systems" should "free from judicial second-guessing").

Petitioners also attempt to find a perfect-security requirement in the comparison of section 3031.7(16)(iii)'s "absolute" language with the "qualifying language" in other subsections of the Code. For example, Petitioners argue that section 3031.7(16)(iii) was intended to be an "unqualified" requirement because the General Assembly did not use the

phrase “when properly operated” – language found in section 3031.7(13). Appellants’ Br. 39-40. Section 3031.7(16)(iii), however, expressly precludes tampering “during the progress of voting.” (Emphasis added). That is, section 3031.7(16)(iii) seeks to prevent actual attacks taking place during the proper operation of the system on voting day. Petitioners and their experts consistently ignore this directly relevant language and instead insist on a standard of security that is not actually required under the Code. (R.782a-783a (¶ 189), 787a (¶ 207), 794a (¶ 232), 809a (¶ 276), 845a (¶ 417(f)), 856a (¶ 470).)

Petitioners also note that, while section 3031.7(11) questions whether a voting system is “capable of” accurate tabulation, that term or concept appears “nowhere” in section 3031.7(16)(iii). Appellants’ Br. 40. The first paragraph of section 3031.7(16), however, expressly requires that an electronic voting system “shall include the following mechanisms or capabilities….” (Emphasis added). Thus, the “plain language” of the Code provides precisely what Commonwealth Court required – that a voting system be capable only of precluding tampering, not that it absolutely and perfectly stop all possible attacks on the tabulating element. Ex. C at 6.

Lastly, Petitioners argue that, because section 3031.7(16)(iii) does not use the term "acceptable" to describe the required security, in contrast, for example, to section 3031.7(12), no degree of discretion is allowed and absolute security against all tampering is required. When the General Assembly intends to make requirements "absolute," it uses the term "absolute." See 25 P.S. § 3031.7(1); id. § 3031.7(11). In short, Petitioners cannot read into their preferred sections of the Code terms like "absolute" that the General Assembly knew how, but elected not to use.

(b) The legislative history upon which Petitioners rely does not establish an absolute security requirement.

Petitioners complain that Commonwealth Court did not consider the legislative history of the Election Code when deciding that section 3031.7(16) does not require absolute security. Appellants' Br. 37-38 (citing Ex. C at 6). Petitioners do not explain why the lower court should have – or, as a proper matter of statutory interpretation, could have – looked beyond the unambiguous words of the Election Code. See 1 Pa. C.S. §§ 1921(b), (c)(7).

In any event, Petitioners' references to statements made in 1974 about vague "possibilities of fraud" do not elucidate the meaning of the

Election Code, as amended, in 1980. Appellants' Br. 37-38. The General Assembly never adopted the electronic-voting bills that Mr. Taddonio deemed so unsafe;[16] instead, it passed a different bill in 1980, containing a number of examination requirements that were not part of the 1974 bill. The legislative record provides no explanation for why those additions were made (R.1505a-1507a (2040-42).) Thus, there is no basis to conclude, as Petitioners do, that the 1980 amendments were intended to require absolute security against all potential threats.

Additionally, the partial legislative history cited by Petitioners, including discussions from the 1974 and 1980 debates, does not explain the Code's anti-tampering provisions because the legislature did not consider the effect that federal standards and federal testing by independent testing authorities might have on the reliability and security of voting systems. See 25 P.S. § 3031.5 (amended in 2002 to require federal testing and compliance). Federal standards relating to source code, usability, durability, and security were first created in 1990. It was only in 2002 that the General Assembly required each electronic voting system to

[16] Notably, the "untested, unreliable, and unsafe" systems about which Mr. Taddonio complained in 1971 and 1974 were not DREs, but electronic voting system that used paper ballots (i.e., punch cards and optical scans). (See (R.2910a (5302).)

be tested by an ITA against these standards and be shown to have met them. In short, the few and limited concerns about security that were expressed by individual legislators in 1974 – and even 1980 – do not dictate the governing security standard under the current Election Code because those earlier concerns were directed at different machines, with different capabilities and different requirements.[17]

It is for this reason too that Petitioners' references to previous testimony from Dr. Shamos are of no avail to their attempt to redefine the Election Code. Dr. Shamos's observations shared with the Texas House Committee on Elections and The New Yorker concerning "errant programmer[s]" and "little black box[es]" were made before federal standards were developed, implemented, and required for certification in Pennsylvania. Petitioners' attempts to dragoon Dr. Shamos onto their side are not any more successful when they rip his comments out of context and misapply them to reach some unrelated conclusion.

[17] Mr. Taddonio (the legislator seemingly most concerned about security and most quoted by Petitioners) did not vote in favor of the 1980 bill. (See R.1503a-1508a) (2042).) If Petitioners are right that Rep. Taddonio did not support the 1971 and 1974 amendments to the Election Code because the amendments did not require absolute security against potential, not just actual, threats, then one might reasonably conclude that Mr. Taddonio also did not favor the 1980 bill because those amendments similarly did not impose such a standard.

For example, Dr. Shamos's concern regarding the "danger" of machines selecting "candidates that the voter himself has not voted for," see Appellants' Br. 38 (citing R.1486a), had nothing to do with tampering (real or hypothetical). Rather, the comment was made in connection with Pennsylvania's unique statutory provision regarding override of straight party votes. See 25 P.S. § 3031.7(3). The comment concerned the importance of ensuring that machines do not by themselves, without intentional input from the voter, choose a candidate. Fortunately, the Secretary and her experts specifically have examined the SVS's ability to comply with the "Pennsylvania Method" and found no issues. (See, e.g., R.2294a.)

3. The Election Code Does not Require Absolute Preclusion Of Even Hypothetical Tampering Because That Is Not Possible.

Finally, Petitioners' claim that their proposed standard of perfection is neither "uncommon nor unreasonable" cannot be correct because their standard is not even possible. The laws of physics, their accompanying limits on technology, and common sense dictate that requiring every electronic voting machine to be immune from even potential attack is impossible to meet. As explained by Dr. Shamos and recognized by courts

around the county, "[a]ll systems of all kinds, whether or not they are used for voting, exhibit security vulnerabilities. This is as true for the systems Petitioners urge Pennsylvania to buy as it is for the ones they seek to have decertified. That does not make them 'insecure' to the point of being unusable." (R.750a (¶ 75); see also R.855a (¶ 463).) Indeed, even optical-scan systems, the certification and use of which Petitioners urge upon this Court, have design and performance issues that render them at least as vulnerable to tampering as the SVS. Ex. C at 6 ("[I]n this regard the challenged systems do not differ from any other voting system."); cf. Wexler v. Anderson, 452 F.3d 1226, 1233 (11th Cir. 2006) (finding that DRE voters less likely to cast ambiguous votes than voters using, e.g., optical scan ballots, on which voter might leave stray pencil mark or circle candidate's name rather than filling in the appropriate bubble) (R.740a (¶ 39), 776a (¶ 164), 782a (¶ 188), 842a (¶ 403).)

As explained simply by a federal court considering the use of DREs in Pennsylvania, "[n]o election system is perfect and no machine built by man is infallible. Voting machine malfunction has been, and probably always will be, a potential problem in every election." Taylor v. Onorato, 428 F. Supp. 2d 384, 388 (W.D. Pa. 2006); see also Weber, 347 F.3d at 1106-07

("the possibility of electoral fraud can never be completely eliminated, no matter which type of ballot is used.") (citing Hennings v. Grafton, 523 F.2d 861, 864 (7th Cir. 1975)); Gusciora v. Corzine, No. MER–L–2691–04, 2010 WL 444173, at *87 & n.90 (N.J. Super. Ct. Law Div. Feb. 1, 2010) (rejecting "perfection standard;" stating no standard could plausibly "impose a requirement of absolute security or complete protection against tampering, which would be impossible to achieve."), aff'd, 2013 WL 5015499 (N.J. Super. Ct. App. Div. Sept. 16, 2013); Andrade v. NAACP, 345 S.W.3d 1, 14 (Tex. 2011) ("DREs are not perfect. No voting system is…. But the equal protection clause does not require infallibility."). Given this indisputable reality, the Election Code cannot be read to require from the SVS something that cannot be achieved.

D. Commonwealth Court Correctly Held That the Secretary's Certification Processes Comply With the Requirements of Section 3031.5.

Petitioners contend that the Secretary has "abused her discretion" and conducted examinations and certifications of the SVS that were "meaningless." Appellants' Br. 47. As a result, Petitioners demand mandamus relief directing the Secretary to "test for all of [the Election Code's] requirements … pertaining to security and tampering." Id.

Commonwealth Court correctly granted summary relief on Counts III and VIII because, in failing to present any evidence that the SVS "actually fall short of the statutory requirements," Petitioners were seeking to exercise "inappropriate oversight" of the Secretary. Ex. C. at 5. Noting that the SVS possess mere "vulnerabilities" does not "establish the presence of unacceptable security procedures" and is not enough to "warrant overriding the Secretary's determination." Id. at 7-8.

As a legal matter, mandamus is "designed to compel official performance of a ministerial act or mandatory duty." Banfield v. Cortés, 922 A.2d 36, 42 (Pa. Commw. Ct. 2007) (citation omitted). "Mandamus is an extraordinary remedy" that "will not lie to compel the performance of discretionary acts." Id. (citations omitted). The Secretary's decision to certify or de-certify a voting system is a deliberative and discretionary, rather than ministerial, act. The General Assembly, exercising its legislative responsibility to develop appropriate means to ensure and protect voting rights, "clothed [the Secretary] with discretionary powers" to decide the nature and extent of the certification process, as well as the ultimate results of that process. Chadwick v. Dauphin Cnty. Office of the

Coroner, 905 A.2d 600, 605 (Pa. Commw. Ct. 2006) (citation omitted); See, e.g., 25 P.S. §§ 2621(b), 3031.5(b), 3031.7(11), 3031.7(12).

A court may grant mandamus relief and order an official to perform an act ordinarily within the official's discretionary power only when that official's failure to his or her exercise discretion is arbitrary, fraudulent, or based upon a mistaken view of the law. Id. (citations omitted). In such exceptional circumstances, it can be said that there has been "no actual exercise of discretion" by the official. Seeton v. Adams, 50 A.3d 268, 274, 277 (Pa. Commw. Ct. 2012) (citations omitted).

Petitioners claim that, in relying "exclusively on the ITA qualifications" and failing to conduct her own "testing" of known vulnerabilities,[18] the Secretary effectively refused to perform her duty to examine the SVS against the Code and thereby "abused her discretion." Appellants' Br. 43.

This argument disregards the detailed and extensive certification procedures used by the Secretary.

[18] The Election Code requires the Secretary to "examine" electronic voting systems. See, e.g., 25 P.S. §§ 3031.5(b) & 3031.7. In contrast, the Election Code "expressly delegates the 'testing' function to an [ITA]." (R.797a-798a (¶ 244) (emphasis added)). The Secretary must rely upon the "testing" of the ITA, and it cannot be considered an abuse of discretion to do so.

Before this lawsuit, the Secretary, with the assistance of experienced experts, examined each of the SVS against the applicable requirements of 25 P.S. § 3031.7. (See R.1543a-1550a, 1195a-1206a, 1063a-1068a, 1097a-1102a, 1103a-1110a, 1135a-1142a.) During, and as a result of, this lawsuit, the Secretary conducted reexaminations of the SVS. She retained a reexaminer who reviewed federal test reports, created and developed extensive test protocols for each of the SVS, and made his own specific findings related to each requirement of the Election Code. (See, e.g., R.2584a-2613a, 3859a.) These examinations and reexaminations created a "complete record" sufficient to enable the Secretary to adequately determine the machines' compliance with the Election Code. See Appellants' Br. 45.

Petitioners also claim the Secretary's examination process was deficient because the Secretary and her reexaminer "relied exclusively on the ITA qualifications issued in 2005 and 2006." Appellants' Br. 44. The Secretary's examiners and reexaminer reviewed the ITA reports (see, e.g., (R.2292a-2293a) because the Election Code expressly requires them to do so. 25 P.S. § 3031.5(a). The Secretary, however, did not consider only the ITA reports. For example, the reexaminer, for example, performed

"penetration analyses" to test the security of the voting systems during the "progress of voting." Id. at 3031.7(16)(iii). (See R.1943a-2616a.) He also conducted detailed "system integration" tests that consisted of two elections, a general and a primary. (See, e.g., R.2296a-2298a.) During that voting process, the reexaminer specifically confirmed that a voter would not have access to ballots or other internal components of the system. (See, e.g., R.2393a.)

Petitioners complain that the Secretary's examination and certification processes did not include the type of testing done, for example, in Ohio, California, or Princeton's labs. This argument wrongly assumes that the Secretary's certification process is limited to results observed by her examiners. In fact, the Secretary has the discretionary authority also to apply her own experience and knowledge to determine whether, in her opinion, a voting system should be approved for use.

In this case, the Secretary was aware of the potential threats to the security of the SVS, having conducted examinations in 2005 and 2006, having been involved in this litigation since 2006, and having general knowledge of the state of electronic voting throughout the country. (See, e.g., R.1197a-1198a.) She also was aware that none of the voting

machines in Pennsylvania ever have been successfully attacked and that the attacks never have been proven to be anything other than theoretical.

Thus, contrary to Petitioners' claim, the Secretary did not ignore the "known vulnerabilities" identified by Petitioners. Rather, in an exercise of the discretion and duties placed on her by the General Assembly, the Secretary determined that the risks posed by the attacks or vulnerabilities identified in various reports were not sufficient to violate the Election Code's requirements.

Petitioners may not like the outcome of that exercise of the Secretary's discretion, but they cannot change it via this litigation. "It is the discretion and judgment of the official (who is vested with a discretionary power) which prevails and not that of a court or a jury or a person aggrieved; and a court cannot compel such official to exercise his discretion in a manner which will produce a result which the court may deem wise or desirable." Maxwell v. Bd. of Sch. Dirs. of Sch. Dist. of Farrell, 112 A.2d 192, 195 (Pa. 1955) (citations omitted); see also Pa. Dental Ass'n v. Commw., Ins. Dep't., 516 A.2d 647, 652 (Pa. 1986); Anderson v. Phila., 36 A.2d 442, 444 (Pa. 1944); Seeton, 50 A.3d at 274-

75; Chadwick, 905 A.2d at 604; cf. Weber v. Shelley, 347 F.3d 1101, 1106-07 (9th Cir. 2003).

Lastly, Commonwealth Court understood that Petitioners had made separate claims challenging the Secretary's examination and certification process and procedures, on the one hand, and the performance of the SVS, on the other. Contra Appellants' Br. 43. The court expressly addressed the merits of both claims. Ex. C at 4.

With regard to Counts III and VII, Commonwealth Court – properly applying the law of mandamus – made clear that the issue before it was not whether the Secretary's examination and certification was right or wrong per se, but whether there were sufficient grounds for the court to intervene. Ex. C at 5-6. Finding no evidence that the SVS had failed to correctly record and accurately tabulate votes or that actual votes have been (or necessarily will be) lost, miscounted, or denied an "honest count" during a real election, the court had no basis on which to conclude that the Secretary had acted arbitrarily or mistakenly in her certifications.

E. Commonwealth Court Correctly Held That the Examination, Certification, and Use of the SVS Do Not Violate the Pennsylvania Constitution.

Commonwealth Court correctly held there is no evidence that the SVS either directly or indirectly interfere with either the constitutional right to vote or equal protection of the laws. Ex. C at 9-10 (See R.144a-145a (Pet. Count VIII, asserting violation of Pa. Const. art. I, § 5); R.145a-146a (Count IX, asserting violation of Pa. Const. art. I, § 26); R.146a-147a (Count X, asserting violation of Pa. Const. art. VII, § 6).)

1. The Secretary's Decision to Certify the SVS is Subject to a "Gross Abuse" Standard.

Petitioners suggest that the Secretary's certification of the SVS should be subject to strict scrutiny. Appellants' Br. 48-50, 51-52. The Secretary agrees that the "right to vote" can fairly be described as "sacred," "treasured," "precious," and "inviolate." Appellants' Br. 48, 49 (citations omitted). Indeed, it is precisely because the right is so important that the General Assembly saw fit to entrust the Secretary with the necessary authority, responsibility, and discretion to safeguard the right. The import of the right, however, does not by itself trigger strict scrutiny. Given the context in which the right is practiced and protected, a more practical and deferential standard is appropriate and necessary. Applewhite v. Commw.,

No. 330 MD 2012, 2012 WL 3332376, at *26 (Pa. Commw. Ct. Aug. 15, 2012) (citations omitted), rev'd on other grounds, 54 A.3d 1 (Pa. 2012).

Elections are human activities that invite millions of citizens to participate in one-day events that take place in thousands of schools, churches, and libraries. As a matter of "[c]ommon sense, as well as constitutional law," courts have held that the government "must play an active role in structuring elections; as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." In re Zulick, 832 A.2d 572, 578 (Pa. Commw. Ct.) (quotation omitted), aff'd, 834 A.2d 1126 (Pa. 2003); see also Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); Wexler v. Anderson, 452 F.3d 1226, 1232 (11th Cir. 2006). Given these considerations, this Court "has applied a 'gross abuse' standard to determine whether election statutes violate the 'free and equal' clause ...." In re Nomination Papers of Rogers, 908 A.2d 948, 954 (Pa. Commw. Ct. 2006) (single judge opinion by Colins, P.J.) (citations omitted). More generally, as long as election regulations are reasonable, neutral, and do not work a "severe restriction" on the right to

vote, they are found constitutional. See, e.g., Weber v. Shelley, 347 F.3d 1101, 1106 (9th Cir. 2003); see also Wexler, 452 F.3d at 1232.

Far from restricting Petitioners' constitutional rights, the process through which the Secretary has certified the SVS is intended to protect and secure those rights. Petitioners can present no evidence to show that the Secretary's neutral implementation of the program for certifying voting machines or the use of DREs in Pennsylvania was a "gross abuse" of her discretion. Like other complainants who have unsuccessfully challenged the use of DREs, Petitioners cannot establish that the Secretary's certification of the SVS unfairly or unreasonably burdens the essential right to vote. See, e.g., Weber, 347 F.3d at 1106-07; Tex. Democratic Party v. Williams, No. A–07–CA–115–SS, slip op. at 11 (W.D. Tex. Aug. 16, 2007) (R.1797a-1810a.), aff'd, 285 Fed. App'x 194, 195 (5th Cir. 2008); Favorito v. Handel, 684 S.E.2d 257, 261-62 (Ga. 2009); Schade v. Md. State Bd. of Elections, 930 A.2d 304, 327-28 (Md. 2007); Gusciora v. Corzine, No. MER–L–2691–04, 2010 WL 444173, at *97 (N.J. Super. Ct. Law Div. Feb. 1, 2010).

2. The Certification and Use of the SVS Do Not Unconstitutionally Infringe on the Right To Vote.

(a) The SVS do not directly interfere with the right to vote.

Since this start of this case, Pennsylvania voters have used the SVS to cast tens of millions of votes in 15 primary, general, and municipal elections (and 23 special elections). They have elected and re-elected hundreds of county commissioners, dozens of state judges at all levels, United States Senators, and chief executives at both the state and federal level. Commonwealth Court, however, found that Petitioners could not proffer any proof of actual disenfranchisement.

Petitioners admit that there is no evidence that, because certain counties have elected to use the SVS, (a) votes have been, or necessarily will be, lost, miscounted, or otherwise diluted; (b) voters have been unable to vote for the candidate of their choosing; or (c) any election result has been compromised, altered, or invalidated because of tampering of software-dependent ballots. (R.1814a-1819a; R.3694a (199:24-200:7.); R.3817a (199:24-201:16); R.3819a (208:16-209:14); R.3823a (222:24-223:22).)

Absent evidence of a single actual event where any vote was denied or discounted because of a fundamental deficiency in an SVS, Petitioners cannot establish a constitutional injury. See Winston v. Moore, 91 A. 520, 523 (Pa. 1914) (finding that a law under review did not "offend" the "free and equal" clause of the constitution because it "denie[d] no qualified elector the right to vote"); Taylor v. Onorato, 428 F. Supp. 2d 384, 387 (W.D. Pa. 2006); see also Goree v. LaVelle, 523 N.E.2d 1078, 1080 (Ill. App. Ct. 1988); Kirk v. Harmon, 557 S.W.2d 220, 221 (Ky. Ct. App. 1977); cf. Marks v. Stinson, 19 F.3d 873, 888 (3rd Cir. 1994).

(b) The SVS do not indirectly interfere with the right to vote.

Without evidence of actual constitutional deprivation, Petitioners claim that the SVS "indirectly" interfere with the "right of suffrage" by making "the right more susceptible to interference by others." Appellants' Br. 50. This argument rests entirely upon Petitioners' mistaken view that, because the SVS do not use voter-verifiable, software-independent, contemporaneously generated paper ballots, they fail to meet the definitional and security requirements under the Election Code. For the reasons stated above and articulated by Commonwealth Court, however,

the very premises of Petitioners' theory are wrong. The SVS are simply not more susceptible to manipulation and vote alteration than other systems, and Petitioners have done nothing to suggest they can prove otherwise.

First, the various reports and studies cited by Petitioners may illustrate the ways computer scientists have manipulated isolated DREs in their laboratories. But neither those reports nor any other evidence or argument by Petitioners address that the use of paper (in for example, optical-scan systems) is at least as susceptible as the SVS to vote fraud and loss. (R.784a (¶ 198).) This is a demonstrable fact that has been repeated in actual elections throughout the country. (R.740a (¶ 39); 759a-760a (¶¶ 103-108); 764a (¶ 116).) Thus, Petitioners do not – and cannot – establish that, as a matter of fact, DREs are less safe and secure than their preferred systems. (See, e.g., R.776a (¶ 164); 782a (¶ 188).) See also Wexler, 452 F.3d at 1233.

Equally important, "Petitioners have not demonstrated that the examination process employed by the Secretary in examining DRE voting systems is any different from the process used to examine" the other electronic voting systems used in Pennsylvania, including the optical-scan system favored by Petitioners. (R.739a (¶ 23); 741a (¶ 42); 759a (¶ 101).)

Thus, the SVS has been found to comply with the same performance, design, and security standards of the Election Code as the optical-scan systems, the certification and use of which Petitioners claim causes no constitutional concerns.

Petitioners cannot prove that the use of the SVS has directly denied any voters their right to cast and have counted a vote. Petitioners also cannot prove that the SVS are "more susceptible to interference" than any other voting system. Indeed, the successful execution of numerous state-wide elections in which no reasonable doubt regarding the effectiveness of the SVS or the declared outcome has been raised establish that the SVS are at least as safe, secure, and accurate as any alternative. Accordingly, Commonwealth Court's determination that the certification and use of the SVS do not violate the "right to vote" of Article I, sections 5 or 26 should be affirmed.

3. The Certification and Use of the SVS Do Not Violate the Right to Equal Protection or Uniform Application of the Laws.

The processes by which the SVS are examined, certified, and used are subject to the same law as every other electronic voting system in the Commonwealth. Moreover, each of the SVS complies with the Election

Code. Accordingly, Petitioners and all other Pennsylvania electors are treated equally with respect to how they vote and how their votes are counted. Nevertheless, Petitioners argue that "[l]etting some voters use unverifiable DREs," while other voters use paper-based voting systems, is a constitutional deprivation under the uniformity-of-law provision of Pa. Const. art. VII, § 6. Appellants' Br. 54. The claim that the uniformity requirement in Article VII, section 6 is violated merely because different counties use different voting systems fails for two reasons.

First, the Pennsylvania Constitution specifically provides that different voting systems may be used in different parts of the Commonwealth. Article VII, section 6 requires uniformity of law, but it also requires the General Assembly to "permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote, at all elections or primaries, in any county, city, borough, incorporated town or township …" (Emphasis added). The General Assembly fulfilled this constitutional demand by adopting an election code that does nothing to limit the number of electronic voting systems the Secretary may certify. 25 P.S. § 3031.5(a) (providing that "[a]ny person or corporation" may request certification of system). This also allows county boards of elections to

procure any system approved by the Secretary, not one particular system. 25 P.S. § 3031.4(a). It is therefore clearly anticipated that various systems could be used simultaneously throughout the Commonwealth. See, e.g., Kuznik v. Westmoreland Cnty. Board. of Comm'rs, 902 A.2d 476, 491 (Pa. 2006). Petitioners cannot establish a violation of equal protection or uniformity of law rights when the Constitution itself permits the very activity about which Petitioners complain.

Second, it cannot be disputed that the Secretary (and the county boards of elections that actually select and use the voting systems in Pennsylvania) uniformly apply the Election Code as written to both the SVS and the certified optical-scan systems. As discussed above, all of the electronic voting systems used in Pennsylvania are subject to the same Election Code, including the design, performance, security, and accuracy requirements set forth therein. Thus, for example, each system has been certified and approved by the Secretary pursuant to the same examination and certification process required by the Election Code.

Moreover, as held by Commonwealth Court, every Pennsylvania elector using an electronic voting system has statutory protections, including requirements for recanvass and recount, that help ensure the

integrity of their votes, whether that vote was cast using one of the SVS or an optical-scan system. To be sure, the different systems may require differences in the specific procedures used to perform these tasks. These differences, however, are not ad hoc creations of the Secretary or local officials, but are recognized and accounted for in the Election Code. See 25 P.S. § 3031.18; compare 25 P.S. § 3261 with id. at § 3262.

As a practical matter, these differences in process and procedure "are necessary given the differences in the technologies … and the types of errors voters are likely to make in utilizing those technologies." Wexler, 452 F.3d at 1233. Thus, while each machine presents different circumstances, none of the differences substantively interfere with the right of the elector to cast his or her ballot.

Petitioners' reliance on the federal district court's holding in Black v. McGuffage, 209 F. Supp. 2d 889 (N.D. Ill. 2002), serves to demonstrate the failings, rather than the merits, of Petitioners' constitutional claim. The court in Black considered whether plaintiffs asserting that the state's "use of different types of voting equipment with substantially different levels of accuracy" had sufficiently stated a claim under the federal Equal Protection

Clause to survive a motion to dismiss.[19] 209 F. Supp. 2d at 898, 899. The plaintiffs cited voting statistics showing that voters in jurisdictions using systems without error notification features were "statistically less likely to have their votes counted." Id. The plaintiffs alleged that these statistics established that "people in different counties have significantly different probabilities of having their voted counted." Id. (emphasis added). The court accepted these claims as indisputable fact, as it was required to do given the procedural posture of the case, and held that the alleged "debasement or dilution" of the vote, if proven, would amount to a violation of equal protection. Id.

In this case, Petitioners already have enjoyed the benefit of the doubt afforded to plaintiffs early in the litigation process. (See R.191a-228a.) The assumptions made during the preliminary objection phase, however proper then, have been superseded by the extensive record developed since 2007. It is now undisputed that the Secretary has examined and reexamined each of the SVS against every one of the applicable

[19] Importantly, Black did not concern DREs. Rather, each of the systems complained of in that case were paper-based electronic voting systems, either using optical-scan ballots or punch-card ballots. The "predictable and normal" problems giving rise to the claims there, 209 F. Supp. 2d at 892-93, are not problems associated with the SVS. See, e.g., Wexler, 452 F.3d at 1233.

requirements of the Election Code; that the SVS meet the Code's requirements for recounts and statistical recounts; and that Pennsylvania electors have good reasons to know that their voting systems are safe and secure. See generally Ex. A, Ex. C.

While the Black plaintiffs were able to state a claim because it was assumed that the voting systems in Illinois had "greatly varying accuracy rates," 209 F. Supp. 2d at 899, Petitioners here neither enjoy an assumption nor presented any evidence to demonstrate that the SVS actually differ from any other voting system. Indeed, the evidence that is available – seven years of safe, secure, and successful municipal and general elections – establishes that the SVS meet the Constitution's requirement for accuracy.

Black stands for the very principle upon which the Secretary relied and Commonwealth Court applied – namely, that a constitutional violation can be found only with evidence that real votes actually have been lost. Even with ample discovery, Petitioners fail to meet this standard. Consequently, the summary dismissal of Petitioners' constitutional claims should be affirmed.

4. Commonwealth Court Correctly Determined that Petitioners Could Not Establish a Constitutional Violation.

Petitioners contend that the court below abandoned its duty and "never addressed directly [their] constitutional claims." In its August 29, 2012 Opinion, however, the court explained that Petitioners had failed to establish an indisputable violation of the equal protection provisions because they had not "demonstrated that the certifications [of the SVS] were illegal." Ex. A. at 22 n. 34. That is, because the SVS possessed the definitional and security features required under the Election Code – like all the other certified electronic voting systems – there could be no constitutional violation. Petitioners may disagree with the court's reasoning and its conclusions, but given the court's detailed analysis regarding the specific terms and recount requirements, they cannot reasonably claim that the court "ignored" Petitioners' constitutional arguments. Appellants' Br. 15, 53.

Similarly, in its October 1, 2013 Opinion, the court made plain that Petitioners' constitutional claims rose or fell on Petitioners' "premise that the challenged DREs are so inaccurate and insecure as to infringe of the right to vote and the requirement for uniform election regulation." Ex. C at

10. The court rejected the premise, holding that Petitioners had proffered no evidence that the SVS failed to accurately record votes when properly used or, with regard to the possibility of tampering, were any different from any other voting system. Ex. C at 6. The court also made clear that, to obtain the relief sought, Petitioners would have to "establish that the DRE voting systems actually fall short of the statutory requirements for accuracy and security from tampering." Ex. C. at 5 (citing Davidowitz v. Phila. County, 324 Pa. 17 (1936)). The court later cited a number of federal circuit court opinions that applied that standard to constitutional challenges like the ones raised in this case. Id. at 8-9.

In short, Commonwealth Court did not fail to consider Petitioners' constitutional claim. Rather, it simply found them to lack merit. Just as Petitioners' disagreement with the Secretary's determinations regarding the meaning and scope of the Election Code, her application of the Code, and her decisions regarding the certification of the SVS, do not themselves justify an award of mandamus relief, so too do Petitioners' differences with Commonwealth Court fail to establish the existence of a constitutional failure.

V. CONCLUSION

For the reasons set forth above, the Secretary respectfully requests that the Court affirm the January 29, 2013 Order of Commonwealth Court, dismissing Counts I, IV, V, and VI of the Petition for Review, and the October 1, 2013 Order of Commonwealth Court, granting the Secretary's Application for Summary Relief and ordering entry of judgment in favor of the Secretary on Counts II, III, VII, VIII, IX, and X.

Respectfully submitted,

Dated: February 10, 2014

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with the 14,000 word limit established by Pa. R. App. P. 2135(a)(1).

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