

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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No. 442 M.D. 2006

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**MARK BANFIELD, et al.,**

**Petitioners,**

**v.**

**CAROL AICHELE,**

**Secretary of the Commonwealth,  
Respondent.**

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*Petition for Review in the Nature of an Action for Mandamus and an Action in Equity*

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**BRIEF OF RESPONDENT CAROL AICHELE, SECRETARY OF THE  
COMMONWEALTH, IN FURTHER SUPPORT OF  
APPLICATION FOR SUMMARY RELIEF**

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**BUCHANAN, INGERSOLL & ROONEY P.C.**

**Steven E. Bizar, Esq. (PA I.D. No. 68316)  
Robert J. Fitzgerald, Esq. (PA I.D. No. 85142)  
Two Liberty Place  
50 S. 16th St., Suite 3200  
Philadelphia, Pennsylvania 19102  
(215) 665-8700**

**Shawn Gallagher, Esq. (PA I.D. No. 88524)  
One Oxford Centre  
301 Grant Street, 20th Floor  
Pittsburgh, PA 15219-1410  
(412) 562-8800**

**OFFICE OF GENERAL COUNSEL**

**Steven V. Turner, Esq.  
Chief Counsel  
Department of State**

**Kathleen M. Kotula, Esq.  
Deputy Chief Counsel  
Department of State  
301 North Office Building  
Harrisburg, PA 17120  
(717) 783-0736**

*Counsel for Respondent Carol Aichele, Secretary of the Commonwealth*

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## TABLES OF CONTENTS

<b>I.</b>	<b>INTRODUCTION</b> .....	1
<b>II.</b>	<b>STATEMENT OF STANDARD OF REVIEW AND SCOPE OF REVIEW</b> .....	4
	<b>A. Standard of Review</b> .....	4
	<b>B. Scope of Review</b> .....	4
<b>III.</b>	<b>STATEMENT OF THE CASE</b> .....	7
	<b>A. Procedural Background and Current Posture</b> .....	7
	1. Petition for Review .....	7
	2. Parties’ Motions for Summary Judgment and Summary Relief .....	9
	3. August 29, 2012 Opinion of En Banc Panel of the Commonwealth Court .....	10
	4. Reexamination and Recertification of the Specified Voting Systems .....	13
	5. January 29, 2013 Order of the Court .....	14
	<b>B. The Pennsylvania Election Code</b> .....	15
	<b>C. The Specified Voting Systems</b> .....	17
	1. The Specified Voting Systems meet the definitional requirements of the Election Code.....	19
	2. The Specified Voting Systems meet the certification requirements of the Election Code.....	20
	3. The Specified Voting Systems meet the design and performance requirements of the Election Code.....	21
	4. The Specified Voting Systems have met the design, accuracy, and security requirements of the Election Code during every Pennsylvania election.....	27
<b>IV.</b>	<b>SUMMARY OF ARGUMENT</b> .....	32
<b>V.</b>	<b>ARGUMENT</b> .....	34
	<b>A. The Secretary is Entitled to Summary Relief Because Petitioners         Cannot Demonstrate that They Have A Right to an Order Directing         the Secretary to De-Certify the Specified Voting Systems.</b> .....	34
	1. The Secretary is entitled to summary relief because the mandamus relief requested by Petitioners is not available as a matter of law. ....	34
	(a) <i>Nature of and requirements for mandamus relief</i> .....	34

(b)	<i>The Secretary’s certification process and approval of the Specified Voting Systems are discretionary, not ministerial, acts.</i>	36
(c)	<i>The Secretary has not failed to exercise her discretion.</i>	37
(d)	<i>The Secretary did not act arbitrarily.</i>	37
(e)	<i>The Secretary did not make a mistake of law.</i>	38
2.	The Secretary is entitled to summary relief because Petitioners cannot show, as a matter of fact, that the Specified Voting Systems have failed to comply with the design and performance requirements of the Election Code.	39
<b>B.</b>	<b>The Secretary is Entitled to Summary Relief Because Petitioners Cannot Demonstrate that They Have A Right to an Order Directing the Secretary to Issue Certain Criteria for Certifying Electronic Voting Systems.</b>	44
<b>C.</b>	<b>The Secretary Is Entitled To Summary Relief Because She Is Immune From Petitioners’ Claims.</b>	47
<b>D.</b>	<b>The Secretary Is Entitled To Summary Relief On Petitioners’ Constitutional Claims Because Petitioners Cannot Establish That Their Right To Vote Has Been Denied or That They Have Been Treated Differently Than Other Electors.</b>	48
1.	Petitioners cannot establish a violation of Article I, section 5 of the Pennsylvania Constitution.	48
(a)	<i>The decisions of the Secretaries are subject to the “gross abuse” standard.</i>	49
(b)	<i>The legal foundation of Petitioners claim has been resolved in the Secretary’s favor.</i>	51
(c)	<i>Petitioners’ “free and equal” claims fundamentally rest on hypothetical “threats” to voting rights, rather than actual instances of disenfranchisement or improper weighting of votes.</i>	53
2.	Petitioners cannot establish a violation of Article I, section 26 of the Pennsylvania Constitution.	55
(a)	<i>Petitioners’ assertion under Article I, section 6 that their right to vote has been denied is duplicative of their claim under Article I, section 5 and fails for the same reasons.</i>	56

(b)	<i>Petitioners’ equal protection rights are not violated by the use of the Specified Voting Systems.</i>	57
(i)	The Specified Voting Systems lack of a voter-verifiable, software-independent record does not violate Petitioners’ equal protection rights.	57
(ii)	The Specified Voting Systems do not have actual defects or security flaws that violate Petitioners’ equal protection rights.	58
3.	Petitioners cannot establish a violation of Article VII, section 6 of the Pennsylvania Constitution.	59
(a)	<i>Petitioners’ Article VII, section 6 claim is duplicative of their equal protection claim in Count IX and should be dismissed for the same reasons.</i>	59
(b)	<i>The election laws of Pennsylvania have been applied uniformly to every voter in the Commonwealth.</i>	59
<b>VI.</b>	<b>CONCLUSION</b>	62

## TABLE OF AUTHORITIES

### CASES

<u>401 Fourth St., Inc. v. Investors Insurance Group</u> , 879 A.2d 166 (Pa. 2005) .....	4
<u>Anderson v. Celebrezze</u> , 460 U.S. 780 (1983) .....	49
<u>Anderson v. Philadelphia</u> , 36 A.2d 442 (Pa. 1944) .....	35
<u>Andrade v. NAACP of Austin</u> , 345 S.W.3d 1 (Tex. 2011) .....	44
<u>Applewhite v. Commonwealth</u> , No. 330 MD 2012, 2012 WL 3332376 (Pa. Commw. Ct. Aug. 15, 2012) .....	49
<u>Banfield v. Aichele</u> , 51 A.3d 300 (Pa. Commw. Ct. 2012) .....	passim
<u>Banfield v. Cortés</u> , 922 A.2d 36 (Pa. Commw. Ct. 2007) .....	passim
<u>Banfield v. Cortés</u> , No. 70 MM 2007 (Pa. Dec. 16, 2008) .....	8
<u>Bonsavage v. Borough of Warrior Run</u> , 676 A.2d 1330 (Pa. Commw. Ct. 1996) .....	47
<u>Burdick v. Takushi</u> , 504 U.S. 428 (1992) .....	49
<u>Carbo v. Redstone Township</u> , 960 A.2d 899 (Pa. Commw. Ct. 2008).....	4
<u>Chadwick v. Dauphin County Office of the Coroner</u> , 905 A.2d 600 (Pa. Commw. Ct. 2006) .....	36, 46
<u>Dechert LLP v. Commonwealth</u> , 998 A.2d 575 (Pa. 2010).....	5
<u>Episcopal Hospital v. Commonwealth, Department of Public Welfare</u> , 528 A.2d 676 (Pa. Commw. Ct. 1987) .....	5
<u>Erfer v. Commonwealth</u> , 794 A.2d 325 (Pa. 2002) .....	57
<u>Favorito v. Handel</u> , 684 S.E.2d 257 (Ga. 2009) .....	51
<u>Finucane v. Pennsylvania Milk Marketing Board</u> , 582 A.2d 1152 (Pa. Commw. Ct. 1990) .....	48
<u>Fischer v. Department of Public Welfare</u> , 502 A.2d 114 (Pa. 1985).....	57
<u>Goree v. LaVelle</u> , 523 N.E.2d 1078 (Ill. App. Ct. 1988).....	55
<u>Groce v. Department of Environmental Protection</u> , 921 A.2d 567 (Pa. Commw. Ct. 2007) .....	6
<u>Gusciora v. Corzine</u> , No. MER–L–2691–04, 2010 WL 444173 (N.J. Super. Ct. Law Div. Feb. 1, 2010) .....	41, 44, 51
<u>Hennings v. Grafton</u> , 523 F.2d 861 (7th Cir. 1975).....	44

<u>Holt v. 2001 Legislative Reapportionment Commission</u> , 38 A.3d 711 (Pa. 2012) .....	56
<u>In re 1991 Pa. Legislative Reapportionment Commission</u> , 609 A.2d 132 (Pa. 1992).....	56
<u>In re Nomination Papers of Rogers</u> , 908 A.2d 948 (Pa. Commw. Ct. 2006).....	49
<u>In re Zulick</u> , 832 A.2d 572 (Pa. Commw. Ct. 2003).....	49
<u>In re Zulick</u> , 834 A.2d 1126 (Pa. 2003) .....	49
<u>Khan v. State Board of Auctioneer Examiners</u> , 842 A.2d 936 (Pa. 2004) .....	46
<u>Kirk v. Harmon</u> , 557 S.W.2d 220 (Ky. Ct. App. 1977).....	55
<u>Kuznik v. Westmoreland County Board of Commissioners</u> , 902 A.2d 476 (Pa. 2006).....	5, 46, 61
<u>Marks v. Stinson</u> , 19 F.3d 873 (3rd Cir. 1994).....	55
<u>Maxwell v. Board of School Directors of School District of Farrell</u> , 112 A.2d 192 (Pa. 1955).....	36
<u>McGarry v. Pa. Board of Probation &amp; Parole</u> , 819 A.2d 1211 (Pa. Commw. Ct. 2003).....	4
<u>Mills v. Shelby County Election Commission</u> , 218 S.W.3d 33 (Tenn. Ct. App. 2006).....	55
<u>Mixon v. Commonwealth</u> , 759 A.2d 442 (Pa. Commw. Ct. 2000) .....	45
<u>Nationwide Mutual Insurance Co. v. Foster</u> , 599 A.2d 267 (Pa. Commw. Ct. 1991).....	46
<u>Pennsylvania Dental Association v. Commonwealth, Insurance Department</u> , 516 A.2d 647 (Pa. 1986).....	35, 37
<u>Probst v. Commonwealth, Department of Transportation</u> , 849 A.2d 1135 (Pa. 2004) .....	57
<u>Reid v. City of Phila.</u> , 957 A.2d 232 (Pa. 2008).....	5
<u>Rendell v. Pennsylvania State Ethics Commission</u> , 983 A.2d 708 (Pa. 2009).....	5
<u>Schade v. Maryland State Board of Elections</u> , 930 A.2d 304 (Md. 2007) .....	51
<u>Seeton v. Adams</u> , 50 A.3d 268 (Pa. Commw. Ct. 2012).....	35
<u>Shankey v. Staisey</u> , 257 A.2d 897 (Pa. 1969).....	53
<u>St. Elizabeth’s Child Care Center v. Department of Public Welfare</u> , 963 A.2d 1274 (Pa. 2009).....	6, 45
<u>Stackhouse v. Commonwealth, Pennsylvania State Police</u> , 892 A.2d 54 (Pa. Commw. Ct. 2006) .....	47
<u>Sweeney v. Tucker</u> , 375 A.2d 698 (Pa. 1977) .....	46

<u>Tanenbaum v. D’Ascenzo</u> , 51 A.2d 757 (Pa. 1947) .....	35
<u>Taylor v. Onorato</u> , 428 F. Supp. 2d 384 (W.D. Pa. 2006) .....	44, 54, 58
<u>Texas Democratic Party v. Williams</u> , 285 Fed. App’x 194 (5th Cir. 2008) .....	51
<u>Texas Democratic Party v. Williams</u> , No. A–07–CA–115–SS, Slip Op. (W.D. Tex. Aug. 16, 2007) .....	50
<u>Weber v. Shelley</u> , 347 F.3d 1101 (9th Cir. 2003) .....	36, 44, 50, 58
<u>Wexler v. Anderson</u> , 452 F.3d 1226 (11th Cir. 2006) .....	44, 50, 58, 60
<u>Winston v. Moore</u> , 91 A. 520 (Pa. 1914) .....	45, 53

**STATUTES**

1 Pa. C.S. § 1901 .....	4
1 Pa. C.S. § 1903 .....	5
1 Pa. C.S. § 1921 .....	4, 5
1 Pa. C.S. § 2310 .....	47
25 P.S. § 2621 .....	6, 16, 36, 45
25 P.S. § 2642 .....	16, 27
25 P.S. § 3031.1 .....	passim
25 P.S. § 3031.10 .....	27, 52
25 P.S. § 3031.13 .....	26
25 P.S. § 3031.14 .....	27, 52
25 P.S. § 3031.17 .....	11, 12, 17, 38
25 P.S. § 3031.18 .....	52, 60
25 P.S. § 3031.2 .....	1
25 P.S. § 3031.21 .....	17, 26
25 P.S. § 3031.3 .....	1
25 P.S. § 3031.4 .....	16, 61
25 P.S. § 3031.5 .....	passim
25 P.S. § 3031.7 .....	passim

25 P.S. § 3031.8.....	17
25 P.S. § 3154.....	52
25 P.S. § 3261.....	60
25 P.S. § 3262.....	52, 60
25 P.S. § 3404.....	52
25 P.S. § 3457.....	52
25 P.S. §§ 3312-30.....	52
42 Pa. C.S. § 8522.....	47

**CONSTITUTIONAL PROVISIONS**

Pa. Const. art. I, § 26.....	8
Pa. Const. art. I, § 5.....	7, 48
Pa. Const. art. VII, § 6.....	8, 59, 60

**RULES**

Pa. R. App. P. 1532.....	4
Pa. R. App. P. 2111.....	2



## I. INTRODUCTION

When Petitioners initiated this case more than six years ago, they were motivated by a view of election systems that was essentially an article of faith; namely, that every voting system and machine must use independent, paper records created at the moment a vote is cast. Any other means of voting was, by definition, unreliable, insecure, and inaccurate. Possessed of an unbending ideology on this core belief, Petitioners filed a Petition for Review in this Court. Each count of the Petition asserted that then then-recent certification, approval, and use of certain direct-recording electronic (“DRE”) voting systems in Pennsylvania violated the Pennsylvania Election Code and the Pennsylvania Constitution because the systems lacked voter-created, voter-verified, paper-record features.

In a thorough and detailed opinion issued last summer, an en banc panel of this Court rejected Petitioners’ paper-record theory, the raison d’etre of the Petition. It is now settled that the DRE systems in Pennsylvania need not produce the type of records demanded by Petitioners and that the records that the DRE systems are able to produce satisfy the relevant requirements of the Election Code. It is equally beyond dispute that the decision by the Secretary to certify and approve these same DRE systems for use in Pennsylvania did not violate either the Code or the Constitution.

Notwithstanding the fact that Petitioners’ reading of the Election Code has been found to be fundamentally mistaken, Petitioners continue their quest to stop Pennsylvania voters from using the DRE voting systems that the voters themselves selected. 25 P.S. §§ 3031.2, 3031.3. This case now purports to concern whether the DRE systems possess other “operating defects” and “security flaws” that render them incapable of meeting the accuracy, safety, and reliability

requirements of the Election Code. Ex. 1 ¶ 115.<sup>1</sup> This fallback theory, however, fares no better than Petitioners' primary one that was denied by this Court.

As before, Petitioners' remaining causes of action and requests for relief disregard the applicable law. While Petitioners may have a number of ideas regarding what features and capabilities a voting system should ideally have, it is the General Assembly that is responsible for identifying what is truly necessary for the conduct of safe and efficient elections. The General Assembly has set forth its determinations in the Election Code and has tasked the Secretary with the interpretation and application of the Election Code. It has been through the fulfillment of those duties that the Secretary has concluded that the DREs used in Pennsylvania are accurate, reliable, and secure. By applying her interpretation of the Election Code, the Secretary has also successfully and consistently protected the constitutional voting rights of all Pennsylvania citizens, regardless of which voting system they use. The law does not allow Petitioners to use this litigation, rather than the democratic, legislative process to replace the Secretary's long-standing and reasonable interpretation of the Election Code with their own policy choices.

Petitioners' remaining "security" claims also ignore the unbroken string of successful elections performed on DRE systems in the Commonwealth. At the November 6, 2012 general election, for example, more than 5.7 million citizens of Pennsylvania went to their local polling place to select a president, senator, attorney general, and other federal, state, and local officials. The vast majority of these electors cast their vote on a DRE voting system. Physical features on the voting machines themselves and administrative procedures practiced by poll workers and

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<sup>1</sup> Pursuant to Pa. R. App. P. 2111(c), the Secretary appends to this Memorandum a copy of the Petition for Review and the Answer to the Petition for Review. Exs. 1 & 2.

other election officials insured that the votes and the voting process were secure and safe. The machines accurately and correctly registered, recorded, and tabulated each vote, and the Secretary of the Commonwealth certified the final results.

While the 2012 general election possessed its own unique importance, its successful use of and reliance upon DRE voting systems was not new. Since 2006, when such systems were introduced, voters throughout the Commonwealth, using DREs, have cast tens of millions of votes in thirteen primary and general elections. Each county commissioner, state judge, United States Senator, and state and federal executive now-serving Pennsylvania has been elected or re-elected using DREs. The results of every one of these elections stand without challenge. More precisely, there is no evidence that a single vote has been lost, denied, or miscounted because of a design, performance, or security defect in a DRE voting system.

By means of examinations, reexaminations, and certifications of DRE voting systems, the Secretary has concluded that such systems “can be safely used” and meet “all of the requirements” of the Election Code. 25 P.S. § 3031.5(b). With respect to Petitioners’ remaining claims, each of the Specified Voting Systems allows for efficient and safe voting, accurately registers and records votes, and possesses security features that preclude tampering. 25 P.S. § 3031.7(11), (12), (13) & (16)(iii).

In sum, the Secretary has performed her duties under the Election Code to ensure that the rights and privileges of the electors of Pennsylvania are protected. There is no basis in law or fact for a reasonable fact-finder to conclude otherwise. Accordingly, the Secretary is entitled to summary relief on all the remaining causes of action in the Petition for Review.

## **II. STATEMENT OF STANDARD OF REVIEW AND SCOPE OF REVIEW**

### **A. Standard of Review**

Under the Pennsylvania Rules of Appellate Procedure, “[a]t any time after the filing of a petition for review in an ... original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.” Pa. R. App. P. 1532(b). “An application for summary relief is properly evaluated according to the standards for summary judgment.” McGarry v. Pa. Bd. of Prob. & Parole, 819 A.2d 1211, 1214 n.7 (Pa. Commw. Ct. 2003) (citation omitted). “Summary judgment is appropriate when, after review of the record in the light most favorable to the non-moving party, it is determined that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.” Carbo v. Redstone Twp., 960 A.2d 899, 901 n.4 (Pa. Commw. Ct. 2008) (citation omitted). “In considering whether there exists a genuine issue of material fact, the court ... determines whether a reasonable jury, faced with the evidence presented, could return a verdict” for the other party. 401 Fourth St., Inc. v. Investors Ins. Group, 879 A.2d 166, 175 n.4 (Pa. 2005).

### **B. Scope of Review**

This case concerns a matter of statutory construction, and the ordinary rules apply. 1 Pa. C.S. § 1901 (“In the construction of the statutes of this Commonwealth, the rules set forth in this chapter shall be observed ...”). This Court must determine what the General Assembly intended by a number of phrases set forth in the Pennsylvania Election Code, including “suitably designed for the purpose used,” “safely and efficiently usable,” and “acceptable ballot security procedures ... to prevent tampering.” 25 P.S. § 3031.7(11) & (12); 1 Pa. C.S. § 1921(a) (stating that “object of all interpretation ... of statutes is to ascertain and effectuate the intention of the General Assembly”). To ascertain and effectuate the intention of the General Assembly, this Court must construe these words and phrases “according to rules of grammar and according to their common

and approved usage.” 1 Pa. C.S. § 1903(a). The “scope of review is plenary,” but only to the extent this statutory language is deemed unambiguous. Reid v. City of Phila., 957 A.2d 232, 234 (Pa. 2008) (citation omitted). If the meaning of the words is clear, the Court need not consider other factors regarding legislative intent; nor may it disregard the plain meaning in pursuit of some preferred, but undefined, policy. See 1 Pa. C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of [the law] is not to be disregarded under the pretext of pursuing [the law’s] spirit.”). When the words are “not explicit,” however, the Court may consider a variety of factors, including the “[l]egislative and administrative interpretations of” the statute. 1 Pa. C.S. § 1921(c)(8).

The courts of this Commonwealth have consistently recognized that the interpretation of a statutory provision by those charged with its execution and application is entitled to great weight and deference. See id.; Dechert LLP v. Commw., 998 A.2d 575, 586 (Pa. 2010) (“[W]hen construing statutory language, it is this Court’s practice to afford substantial deference to the interpretation rendered by the agency charged with its administration.”) (citing Rendell v. Pa. State Ethics Comm’n, 983 A.2d 708 (Pa. 2009)); Kuznik v. Westmoreland Cnty. Bd. of Comm’rs, 902 A.2d 476, 502-03 (Pa. 2006) (noting deference to testimony of State election officials “because the Secretary is empowered by the Election Code and is the ‘chief State election official of the Commonwealth ...’”). In such circumstances, the scope of review is “limited to a determination of whether the decision [of the government official] is supported by substantial evidence, is in accordance with the law and whether any constitutional rights were violated.” Episcopal Hosp. v. Commw., Dep’t of Pub. Welfare, 528 A.2d 676, 679 (Pa. Commw. Ct. 1987) (citation omitted). “The interpretation of a statute by those charged with its execution ... will not be overturned unless such construction is clearly erroneous.” St.

Elizabeth's Child Care Ctr. v. Dep't of Pub. Welfare, 963 A.2d 1274, 1277 (Pa. 2009) (citations omitted).

Deference is particularly warranted in this case because the charging language of the Election Code expressly gives responsibility for examining and certifying election systems to the Secretary. See 25 P.S. § 2621(b); id. at § 3031.5(b) (providing that, upon a request for examination or reexamination, the Secretary shall examine the system and file a report, “stating whether, in [her] opinion, the system so examined can be safely used by voters at elections as provided in this act and meets all of the requirements hereinafter set forth.”) (emphasis added). Moreover, the Election Code is complex, requiring, for example, that the Secretary exercise her expertise and experience to determine whether electronic voting systems meet more than seventeen requirements. 25 P.S. § 3031.7; Groce v. Dep't of Env'tl. Prot., 921 A.2d 567, 573 n.7 (Pa. Commw. Ct. 2007) (“Where a statutory scheme is technically complex, ‘a reviewing court must put aside its discretion [in favor of] the expertise of the administrative agency.’”) (citation omitted).

### **III. STATEMENT OF THE CASE**

#### **A. Procedural Background and Current Posture**

##### **1. Petition for Review**

Petitioners filed their ten-count Petition on August 15, 2006, challenging the Secretary's certification of DREs for use in Pennsylvania elections on the grounds that these voting machines "do not and will not reliably record, tally and weigh the votes of Pennsylvania's citizens or produce any permanent physical record of any elector's actual vote." Ex. 1 ¶ 1. By Order dated January 29, 2013, this Court dismissed Counts I, IV, V, and VI of the Petition. Ex. 3; see also infra Part III.A.3. In the remaining counts, the Petition asserts the following causes of action:

- Count II – violations of 25 P.S. § 3031.7 (11), (12), (13), (16)(iii), & (17)(i),<sup>2</sup> alleging that the counties' use and the Secretary's certification of certain DREs violate the Election Code "because the DREs' operating defects ... and security flaws" show that the voting systems are not "suitably designed for the purpose used;" are not "designed and equipped to be capable of absolute accuracy;" are not able to prevent "tampering with the tabulating element;" do not "record [] correctly and compute[] and tabulate[] accurately every valid vote registered;" and do not provide "acceptable ballot security procedures." Ex. 1 ¶ 115;
- Count III – violations of 25 P.S. § 3031.7, alleging that Secretary's "testing procedures were superficial and insufficient" to determine whether certain DREs met these same requirements of 25 P.S. § 3031.7(11), (12), and (13). Id. ¶ 117;
- Count VII– alleging, without reference to any particular provision of the Election Code, that the Secretary has "failed to adopt uniform, rigorous testing procedures that would address the security, reliability, and accuracy of the voting systems." Id. ¶ 130;
- Count VIII – violations of Pa. Const. art. I, § 5, alleging that the Secretary's certification of certain DREs violates and interferes with "Petitioners' suffrage rights by making it likely" that their votes and the votes of other Pennsylvania electors will not be counted properly. Id. ¶¶ 132-135;

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<sup>2</sup> Title 25 P.S. § 3031.7 is section 1107-A of the Election Code. For simplicity, the Secretary sometimes (as here) makes citation to the statutory compilation only, rather than the section of the Election Code itself.

- Count IX – violations of Pa. Const. art. I, § 26, alleging that the Secretary (a) violated Petitioners’ civil right to vote because the DREs’ “defects and security flaws create the risk that” votes have been “rendered meaningless” or “deemed cast for” the wrong candidate, and (b) violated voters’ equal protection rights by requiring some electors to vote in counties using DREs while “other registered voters ... may vote in precincts or counties using voting systems ... that do not suffer from the defects” allegedly associated with DREs. Id. ¶¶ 136-139; and
- Count X – violations of Pa. Const. art. VII, § 6, alleging that the Secretary violated the requirement of uniformity of law by allowing some counties to use DREs while other counties use paper-ballot based voting systems which, coupled with “the likelihood of an inaccurate tally” by DREs, “threatens to create an imbalance in the weight given to the votes in the various counties.” Id. ¶¶ 140-144.

The Petition demands relief in the nature of mandamus and requests that the Court “[d]irect the Secretary immediately to de-certify the DRE voting systems” that are used in Pennsylvania elections, the “Specified Voting Systems.”<sup>3</sup> See id. at 25 (Count I “Wherefore” clause, pt. (a)).

The Secretary filed preliminary objections to every Count of the Petition. A divided panel of this Court overruled those objections by order and opinion on April 12, 2007. Banfield v. Cortés, 922 A.2d 36 (Pa. Commw. Ct. 2007) (“Banfield I”). The Secretary accordingly filed an Answer to the Petition on January 15, 2009,<sup>4</sup> and the parties engaged in protracted discovery for the next 25 months, during which time the voters of Pennsylvania participated in five more statewide primary and general elections.<sup>5</sup>

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<sup>3</sup> As discussed more fully below, the Specified Voting Systems include the Danaher ELECTronic 1242, the Diebold (now Dominion) Accuvote TSx, the ES&S iVotronic, the Hart eSlate, the Sequoia (now Dominion) Edge 2, and the Sequoia/Dominion Advantage. See infra Part III.C.

<sup>4</sup> The nearly two-year delay in the Secretary filing the Answer was due to the fact that this Court stayed all proceedings pending the decision of the Supreme Court whether to permit the Secretary to appeal this Court’s interlocutory order overruling the preliminary objections. The Supreme Court ultimately denied the Secretary’s petition for permission to appeal on December 16, 2008. See Banfield v. Cortés, No. 70 MM 2007 (Pa. Dec. 16, 2008).

<sup>5</sup> No reasonable doubt regarding the effectiveness of the Specified Voting Systems or the declared outcome was raised in any of these elections. The results of these elections were



2. Parties' Motions for Summary Judgment and Summary Relief

On August 8, 2011, both Petitioners and the Secretary, pursuant to the June 27, 2011 pretrial order of then-presiding, now President Judge Pellegrini, filed dispositive motions for summary relief.

Petitioners filed a Motion for Partial Summary Judgment. Petitioners requested judgment on five of the ten counts, arguing that the certification and use of the Specified Voting Systems were illegal because the systems failed “to provide for a permanent physical record of each vote cast.” 25 P.S. § 3031.1; see also, e.g., Ex. 1 ¶¶ 113, 119.

The Secretary filed an Application for Summary Relief, seeking judgment in her favor on all causes of action set forth in the Petition, including those counts at issue in Petitioners' Partial Motion. Ex. 4. The Secretary's omnibus application explained that the Petition should be dismissed in its entirety because, among other reasons, the Secretary's long-standing, consistent, and reasonable interpretation and application of the Election Code to allow for the certification and use of DREs was both correct as a matter of law and entitled to deference. Id.

At an August 17, 2011 conference before President Judge Pellegrini, after the parties filed cross-applications for summary judgment, but before briefing, the Court noted that certain discreet legal issues almost certainly could be decided without a trial. Thus, to facilitate consideration of those issues raised in the Petitioners' Partial Motion, the Court ordered briefing on Petitioners' Motion and directed that “all other matters in this case including discovery shall be held in abeyance.” Ex. 5.

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certified by the Secretary of the Commonwealth, and the public servants elected as a result of those elections have served or are serving the people of the Commonwealth without any challenge to the legitimacy of their authority to do so by Petitioners or any other elector.

3. August 29, 2012 Opinion of En Banc Panel of the Commonwealth Court

The Petitioners' Partial Motion was argued before an en banc panel of this Court on November 16, 2011. On August 29, 2012, the Court issued its opinion. By a vote of 5-2, the Court held that "Petitioners have not demonstrated that the certifications [of the voting system] were illegal" and, therefore, denied Petitioners' motion for summary judgment as to Count I. See Banfield v. Aichele, 51 A.3d 300, 311-12, 314 n.34 (Pa. Commw. Ct. 2012) (en banc) ("Banfield II"). More specifically, the Court rejected each part of Petitioners' legal claim that section 3031.1 of the Election Code, 25 P.S. § 3031.1, requires DREs to provide a voter-verifiable, software-independent, paper record.

First, the Court held that DREs need not provide a "contemporaneous paper record when each vote is cast." Id. at 305 (holding that the unambiguous language of section 3031.1 "does not mean that such records must be generated automatically with each vote cast").

Second, by authorizing the use of electronic voting systems, the General Assembly necessarily envisioned systems that use software to "register, create and store" votes. Id. at 311. Accordingly, the Court held that to construe the Code to require "software independent" voting records, as Petitioners had urged, "would be absurd." Id.

Lastly, the Court found that the paper records provided for by DREs – the records created by the ballot-image-retention or BIR function – satisfy the definition set forth in section 3031.1. The printed vote records are physical, and allegations that such records printed on thermal paper are not permanent are "too vague and non-specific," defects in Petitioners' legal argument that cannot be cured by reference to how those records are treated by county election officials. Id. at 308-09 ("[T]he possibility that vote records printed on thermal paper may not be treated properly to ensure their stability and longevity does not require a declaration that the machines cannot provide a permanent record.").

During its discussion of the electronic records created by the Specified Voting Systems and of particular importance to the current status of this case, the Court made clear that the Election Code and voting practices within the Commonwealth adequately provide for the accuracy and security of the Specified Voting Systems. Id. at 311-12. It held that the certification process used by the Secretary of the Commonwealth “is designed to provide security” from the attacks hypothesized by Petitioners. The Court cited its agreement with the Secretary and her expert that “[i]t is possible to determine easily whether a system is recording, computing and tabulating votes accurately.” Id. (quoting Report of Respondent’s Expert Michael I. Shamos, Ph.D., J.D. (“Shamos Report”) ¶ 259 (attached as Exhibit 7 to this Brief)). The Court noted finally that pre-vote testing verifies the ability of the DREs to correctly capture votes. Id. at 312 (citing Shamos Report ¶ 423).

The Court unanimously denied Petitioners’ request for summary judgment on Counts IV, VI, IX, and X. See id. at 312-14. Petitioners grounded Count IV on essentially the same legal claim as Count I, i.e., that the Election Code requires DREs to provide software-independent, voter-verified records. Without such records, a “statistical recount” under section 1117-A of the Election Code (25 P.S. § 3031.17) allegedly was not possible.<sup>6</sup> This Court disagreed, reiterating its holding that “the Election Code does not require software-independent vote records.” Id. at 312. It also held that section 3031.17 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 313.

Importantly, the Court did not simply reject Petitioners’ reading of the specific language in the

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<sup>6</sup> See Ex. 1 ¶ 119 (alleging that DREs violate section 3031.17 because “they do not retain a voter verified record”); Mot. Partial Summ. J. ¶ 13 (arguing that DREs preclude a statistical recount because the same software generates all voting records); ¶ 14 (asserting that paper ballots in optical-scan systems satisfy the Code requirements because they are “software independent” records of voters’ intent).

Code. Rather, the Court repudiated the philosophical underpinning of Petitioners' claim, holding that section 3031.17 "contemplates nothing more than a recount or retally" of sample ballots and not verification that DREs "correctly captured voter intent." *Id.* at 313-14.

Petitioners moved for summary judgment on Counts IX and X on the sole ground that DRE voting systems do not comply with section 3031.17. *See* Mot. Partial Summ. J. ¶¶ 25-26, 28 (arguing that, by failing to provide records sufficient for a statistical recount, DREs "create an imbalance in the weight given to votes in the various counties," depriving citizens of "uniformity rights and equal protection rights"). Having determined that DREs meet the requirements of section 3031.17, the Court denied Petitioners' motion in a single footnote. 51 A.3d at 314 n.34 ("Because we have concluded that Petitioners have not demonstrated that the certifications were illegal ..., we also deny Petitioners' motion for judgment regarding Counts IX and X.").

Count VI, seeking summary judgment for the Secretary's refusal to grant certain electors' requests for reexamination of some of the Specified Voting Systems,<sup>7</sup> was differently situated than the other causes of action addressed in the Court's Opinion. The Court did not grant Petitioners any relief; but it also refused to dismiss Count VI as moot, notwithstanding the representation by the Secretary that the requests had been reconsidered and that reexaminations would take place, because it was "not clear whether the examinations [of the DREs] have been

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<sup>7</sup> Prior to the filing of summary judgment motions in August 2011, the Secretary responded to the requests of some Pennsylvania voters for a reexamination of three of the Specified Voting Systems – the ELECTronic 1242, the Accuvote TSx, and the iVotronic. On July 25, 2011, the then new Secretary made clear her intention to grant those requests, notwithstanding the decision by her predecessor that gave rise to Count IV of the Petition. Ex. 48 (Letters from Carol Aichele, Secretary of the Commonwealth, to Cathy Reed, Marian K. Schneider, Esq., and Ruth E. Matheny (all dated July 25, 2011)). Recognizing the Secretary's new policy regarding reexaminations, Petitioner Mark Banfield wrote to the Secretary on August 25, 2011, on behalf of himself and a number of other electors and Petitioners, to request a re-examination of the remaining Specified Voting Systems, the Hart eSlate, the Sequoia/Dominion Edge 2, and the Sequoia/Dominion Advantage. Ex. 49 The Secretary also granted this new request. Ex. 50.

completed.” Id. at 314. The Court directed the parties to submit a report addressing whether the requested reexaminations had been completed. Id. On September 13, 2011, the parties submitted a Joint Status Report Regarding Reexamination of the DRE Voting Systems. Ex. 6.

4. Reexamination and Recertification of the Specified Voting Systems

As explained in the Joint Status Report, reexamination of each of the Specified Voting Systems began on August 16, 2011, with the initiation of the process necessary under state law to retain a consultant capable of performing satisfactory examinations. In December 2011, the Secretary, acting through the Department of State, Bureau of Commissions, Elections and Legislation, retained Jack Cobb (“Examiner”), Laboratory Director of Pro V&V, Inc., to conduct the reexaminations.

Prior to the actual reexaminations, the Department of State and the Examiner, with the cooperation of the vendors of each of the DREs, obtained all necessary hardware, firmware, and software, as well as relevant testing reports from federally approved laboratories. The Examiner developed written test protocols for each reexamination. The test protocols were designed to examine the voting systems against each of the measurable requirements of the Election Code. The Secretary published these test protocols, as well as the time and place of each reexamination, on the Department of State website. Pa. Dep’t. of State, Voting and Elections, Voting Systems, [http://www.dos.state.pa.us/portal/server.pt/community/voting\\_systems/20707](http://www.dos.state.pa.us/portal/server.pt/community/voting_systems/20707) (lasted visited March 18, 2013) (“Voting Systems Webpage”).

The Examiner conducted detailed and rigorous reexaminations of the Specified Voting Systems between February 27 and March 6, 2012. Members of the public attended each reexamination. Staff members of the Department of State video-recorded the reexaminations.

On August 21, 2012, the Examiner issued written reports relating to his reexaminations of the eSlate, iVotronic, TSx, Edge 2, and Advantage voting systems. Exs. 10-14. He issued a

report for the Danaher system on September 7, 2012. Ex. 9. For reasons fully set forth in his reports, the Examiner concluded that each of the DRE voting systems that he examined meets the requirements of Article XI-A of the Election Code, section 1101-A to 1122-A, 25 P.S. §§ 3031.1 – 3022. The Examiner also recommended that each voting system remain certified for use in Pennsylvania elections.

The Secretary reviewed the Examiner’s reports and recommendations. Pursuant to Section 1105-A(b) of the Election Code, she made and filed reports for each of the relevant voting systems. See 25 P.S. § 3031.5(b); Exs. 15-20. The Secretary provided copies of the appropriate report to the electors (or their representatives) who had requested the reexamination for the respective DRE system and made the reports available on the Department of State website. See Voting Systems Webpage. For the reasons fully explained in each of her reports, the Secretary concluded that, in her opinion, each of the Specified Voting Systems can be safely used by voters at elections in Pennsylvania. Moreover, each system meets all of the requirements set forth in the Election Code. Accordingly, the Secretary reapproved and recertified each of the DRE voting systems. Exs. 15-20.

5. January 29, 2013 Order of the Court

On January 4, 2013, the Secretary filed an application requesting that a scheduling conference be conducted to discuss the status and case management for whatever remained of the Petition for Review. The Court held a conference on January 29, 2013, and issued an order later that day. The Order formally dismissed Counts I, IV, and V “[f]or the reasons stated” in the Court’s August 29, 2012 opinion, and dismissed Count VI as moot. Ex. 3 ¶¶ 1, 2. The Order also permitted Petitioners to supplement their discovery requests, but required discovery to be closed on March 7, 2013. Id. at ¶¶ 5, 6. Lastly, the Order allowed the Secretary to “supplement her Motion for Summary Relief on the remaining counts” of the Petition. Id. at ¶ 7. Pursuant to

this last instruction, the Secretary respectfully submits this Brief in Further Support of her Motion for Summary Relief.

**B. The Pennsylvania Election Code**

The Pennsylvania Election Code was originally enacted in 1937 and subsequently amended in 1980 to allow for the use of electronic voting systems. See 25 P.S. §§ 3031.1 - 3031.22. Resolution of the Secretary’s Motion to summarily dismiss Petitioners’ remaining claims requires this Court to consider language found in only a few specific provisions included in the 1980 amendments to Election Code,<sup>8</sup> namely:

- Section 3031.7(11): conditioning approval of electronic voting system on establishment that “such system, at the time of such examination or reexamination ... [i]s suitably designed for the purpose used, ... is safely and efficiently useable in the conduct of elections and, with respect to the counting of ballots cast at each district, is suitably designed and equipped to be capable of absolute accuracy, which accuracy shall be demonstrated to the Secretary of the Commonwealth;”
- Section 3031.7(12): conditioning approval of electronic voting system on establishment that system “[p]rovides acceptable ballot security procedures and impoundment of ballots to prevent tampering with or substitution of any ballots or ballot cards;”
- Section 3031.7(13): conditioning approval of electronic voting system on establishment that system, “[w]hen properly operated, records correctly and computes and tabulates accurately every valid vote registered;” and
- Section 3031.7(16)(iii): conditioning approval of electronic voting system on establishment that system “be so constructed and controlled that, during the progress of voting, ... it shall preclude every person from tampering with the tabulating element.”

The Election Code defines the term “electronic voting system” to mean “a system in which one or more voting devices are used to permit the registering or recording of votes and in which such votes are computed and tabulated by automatic tabulating equipment.” Id. at

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<sup>8</sup> The provisions relating to electronic voting systems added in 1980 are contained in Article XI-A of the Election Code and are numbered sections 1101-A to 1122-A. However, to avoid confusion, the Secretary in this memorandum cites to Article XI-A of the Election Code (as well as other sections of the Election Code) using only the section numbers that are assigned in Title 25 of Purdon’s Pennsylvania Statutes Annotated; i.e., 25 P.S. §§ 3031.1-3031.22.

§ 3031.1. The Election Code requires the Secretary to examine electronic voting systems upon request and to file a report, “stating whether, in [her] opinion, the system so examined can be safely used by voters at elections as provided in this act and meets all of the requirements hereinafter set forth.” Id. at § 3031.5(b). Section 3031.7, in turn, clarifies those “requirements” by expressly laying out seventeen prerequisites, including those listed above. See id. at § 3031.7.

The Election Code contemplates the certification and use of both DRE and optical-scan electronic voting systems. See id. at § 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 optical scanners to read marked paper ballots and tally the results, either at the precinct or via a centralized counter. As explained by the Secretary’s expert, Dr. Michael Shamos, “[t]he Secretary uses exactly the same process for testing optical scan systems” as she uses for testing and certifying DREs. Ex. 7 (Shamos Report) ¶ 42.

As Petitioners acknowledge, the Secretary “is charged with the general supervision and administration of Pennsylvania’s elections 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].’” Ex. 1 ¶ 38 (quoting 25 P.S. § 2621 (b)). The Secretary, however, does not have the authority to select a particular voting system for use in any part of the Commonwealth. Rather, once the Secretary approves a voting system, each of Pennsylvania’s sixty-seven counties chooses from among the certified systems and independently purchases the voting system that best meets the localized needs of that county. See 25 P.S. § 2642(c) (requiring the counties to “purchase, preserve, store and maintain primary and election equipment of all kinds”); id. at § 3031.4(a) (stating that, if a majority of electors in a



county vote in favor of using an electronic voting system, “the county board of elections of that county shall purchase, lease, or otherwise procure for each election district of such county or municipality, the components of an electronic voting system of a kind approved, . . . by the Secretary”); *id.* at § 3031.8 (“The county commissioners . . . of any county which adopts an electronic voting system shall, upon the purchase, lease or other procurement thereof, provide for payment therefor by the county.”). Additionally, after the counties choose their voting systems, they alone are responsible for the safe storage and use of those machines at elections. See, e.g., *id.* at § 3031.21(a) (requiring the counties to “designate a person or persons who shall have the custody of the county’s electronic voting system and its components . . . when the system is not in use at an election, and the board shall provide for his compensation and for the safe storage and care of the system”). The counties are also responsible for conducting a 2% recount of a random sample of ballots recorded by their machines. *Id.* at § 3031.17.

### **C. The Specified Voting Systems**

The Specified Voting Systems at issue in this litigation are the six DREs certified for use in the Commonwealth.<sup>9, 10</sup> See Ex. 1 ¶ 40(a)-(f).

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<sup>9</sup> The Petition also challenged a seventh system, the Advanced Voting Systems WINvote. Ex. 1 ¶ 40(g). The Secretary, however, de-certified the WINvote system more than five years ago. No version of the system is in use in Pennsylvania, and no version can be used in any election in the Commonwealth. 25 P.S. § 3031.5(c) (providing that a de-certified system “shall not thereafter be used or purchased for use in this Commonwealth”). In an earlier filing, Petitioners conceded that their claims do not concern systems that have been de-certified. Pet’rs’ Mot. for Temporary Stay at 2 (filed Aug. 3, 2011) (“In the event that the [remaining] DRE machines are decertified . . . then it goes without saying that any proceedings from this point on will have been unnecessary.”).

<sup>10</sup> The Secretary has also certified five optical scan systems for use in the Commonwealth. Approximately fourteen counties use optical scan voting systems. The boards of elections of some counties, like Chester County, have elected to use a combination of optical scan and DRE systems.

- The Danaher **ELECTronic 1242** (“Danaher”) was certified for use in Pennsylvania on November 15, 2005. Ex. 27. It was re-certified on September 12, 2012. Ex. 15. The Danaher is the standard and handicapped-accessible voting system in Berks, Bucks, Dauphin, Delaware, Monroe, and Philadelphia Counties. See <http://www.votespa.com/portal/server.pt?open=514&objID=1174145&parentname=ObjMgr&parentid=4&mode=2> (“VotesPA, Voting Systems Demos”) (last visited March 20, 2013).
- The Diebold (now Dominion) **Accuvote TSx** (“TSx”) was first certified for use in Pennsylvania on December 22, 2005. Ex. 29. It was re-certified on January 17, 2006 and again on September 11, 2012. Exs. 30 & 16. The TSx is the standard and handicapped-accessible voting system in Armstrong, Bradford, Carbon, Clarion, Lehigh, Lycoming, Northumberland, Pike, Potter, Schuylkill, Somerset, Sullivan, Tioga, Union, Warren, and Washington Counties. See VotesPA, Voting Systems Demos.
- The ES&S **iVotronic** (“iVotronic”) was certified for use in Pennsylvania on April 7, 2006. Ex. 31. It was re-certified on September 11, 2012. Ex. 17. The iVotronic is the standard voting system in Allegheny, Beaver, Butler, Cambria, Cameron, Clearfield, Clinton, Columbia, Crawford, Cumberland, Elk, Erie, Forest, Greene, Jefferson, Lawrence, Lebanon, Luzerne, McKean, Mercer, Perry, Venango, Westmoreland, Wyoming Counties, and it is the handicapped-accessible system in Chester County. See VotesPA, Voting Systems Demos.
- The Hart InterCivic **eSlate** (“eSlate”) was certified for use in Pennsylvania on November 18, 2005. Ex. 32. It was re-certified on September 11, 2012. Ex. 18. The eSlate is the standard voting system in Blair County, and the handicapped-accessible system in Blair, Fayette, Bedford, and Lancaster Counties. See VotesPA, Voting Systems Demos.
- The Sequoia (now Dominion) **Edge 2** (“Edge 2”) was certified for use in Pennsylvania on February 15, 2006. Ex. 33. It was re-certified on September 11, 2012. Ex. 19. The Edge 2 is the standard and handicapped-accessible voting system in York County. See VotesPA, Voting Systems Demos.
- The Sequoia/Dominion **Advantage** (“Advantage”) was certified for use in Pennsylvania on May 8, 2006. Ex. 35. It was re-certified on September 11, 2012. Ex. 20. The Advantage is the standard and handicapped-accessible voting system in Montgomery and Northampton Counties. See VotesPA, Voting Systems Demos.

Then-Secretary Pedro A. Cortés originally examined, and Secretary Aichele recently reexamined, each of the Specified Voting Systems, and certified or recertified that each meets all of the requirements of the Election Code. See Exs. 15-20, 27-35; see also Ex. 36 at 36:20-37:1, 43:3-4 (Dep. of Commonwealth 4007.1(e) Representatives (“Commonwealth Dep.”), July 29, 2011) (stating that “[f]or conducting an examination, [the Department of State] would actually go essentially straight to [section 3031.7],” as well as “other requirements” found

elsewhere in the Election Code); Ex. 37 at 95:12-95:14 (Dep. of Dr. Michael I. Shamos, Ph.D., J.D., July 22, 2011) (stating that he, as an examiner for the Commonwealth, would refer to the seventeen requirements in section 3031.7 “when completing [his] certification examination,” as well as other “implied requirements” found in the Election Code); Ex. 38 at 134:15-21 (Dep. of M. Glenn Newkirk, CBCP, July 11, 2011) (stating that he received and reviewed Election Code before examination); Ex. 39 at 46:18-23 (Dep. of Jack Cobb, March 6, 2013 (explaining that test protocols used for reexaminations are based on requirements of Election Code); Ex. 45 (checklists used during examinations, reflecting the requirements of section 3031.7).

1. The Specified Voting Systems meet the definitional requirements of the Election Code.

Each of the Specified Voting Systems “provides for a permanent physical record of each vote cast,” as required by section 3031.1. See Banfield II, 51 A.3d at 305-12. While this is no longer a question before this Court, it should be noted that the examinations and reexaminations by the Secretary of the commonwealth considered this requirement and expressly certified the Specified Voting Systems’ compliance. See Ex. 36 at 44:16-18 (Commonwealth Dep. Tr.) (stating that “we would look to see that [the machine] provided a permanent, physical record of the votes cast” during an examination); Ex. 38 at 154:16 – 157:17 (Newkirk Dep. Tr.) (stating that eSlate satisfied Code requirements, including “permanent physical record of each vote case”); id. at 254:13 – 255:19 (stating that Danaher system satisfied Code requirements, including “permanent physical record of each vote case”). Most recently, Mr. Cobb evaluated this feature and capability of the Specified Voting Systems during the 2012 reexaminations, and the Secretary confirmed that each system meets the requirements of section 3031.1.<sup>11</sup>

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<sup>11</sup> See Ex. 9 at 11; Ex. 10 at 11; Ex. 11 at 11; Ex. 12 at 11; Ex. 13 at 10; Ex. 14 at 10; Ex. 15 at 11; Ex. 16 at 11; Ex. 17 at 10; Ex. 18 at 10; Ex. 19 at 10; Ex. 20 at 10-11.

2. The Specified Voting Systems meet the certification requirements of the Election Code.

Section 3031.5 of the Election Code requires that, upon receiving a proper request from “[a]ny person or corporation owning, manufacturing or selling, or being interested in the manufacture of sale of, any electronic voting system” or from any ten or more electors, “the Secretary of the Commonwealth shall examine the electronic voting system and shall make and file ... [a] report.” 25 P.S. § 3031.5(a) & (b). The Secretary’s report must state “whether, in [her] opinion, the system so examined can be safely used by the voters at elections ... and meets all the requirements hereinafter set forth” in the Election Code. Id. at § 3031.5(b).

The Election Code permits the Secretary to engage an examiner to perform the examination or reexamination. Id. at § 3031.7. In addition to considering whether the voting systems are safe, usable, and compliant with the Code, the examination or reexamination must also confirm that “the voting system has been examined and approved by a federally recognized independent testing authority” (or “ITA”) and that it “meets any voting system performance and test standards established by the Federal Government.” Id. at § 3031.5(a).

There is no genuine dispute that, with regard to each of the Specified Voting Systems, Secretaries Cortés and Aichele and their examiners have taken proper measures to meet the Election Code’s procedural requirements for certification of electronic voting systems. That is, examinations and reexaminations have been properly performed and documented, and the Secretaries have filed and made public their reports explaining why certification and approval of the Specified Voting Systems is warranted. See Exs. 9-35 (Examination, Reexamination, and Certification Reports for Specified Voting Systems).

3. The Specified Voting Systems meet the design and performance requirements of the Election Code.

Section 3031.7 of the Election Code sets forth seventeen (17) requirements that an electronic voting system must satisfy “at the time of [the] examination or reexamination.” While only four of the seventeen requirements are relevant to the remaining causes of action in the Petition, it is important to note that the Specified Voting Systems have been examined against each of the requirements that might apply and have been found compliant. Id. With particular regard to the requirements still at issue, it has been determined that each of the DREs currently in use in Pennsylvania:

- *Meets all safety and suitability requirements*, including that the system is “suitably designed for the purpose used” (i.e., recording, registering, and tabulating votes), and is “safely and efficiently useable in the conduct of elections.” 25 P.S. § 3031.7(11).<sup>12</sup>

Both federal testing programs and the Secretary’s certification process have reached these conclusions.<sup>13</sup>

- *Meets all accuracy requirements*, including that the system is “designed and equipped to be capable of absolute accuracy,” 25 P.S. § 3031.7(11),<sup>14</sup> and,

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<sup>12</sup> See Ex. 7 (Shamos Report) ¶ 168 (“Edge is indeed suitably designed for voting.”); ¶ 192 (“iVotronic is certainly suitably designed for the purpose of voting, as has been proven in innumerable elections over many years in many jurisdictions.”); ¶ 210 (refuting claim of Petitioners’ expert that eSlate is not suitable because voters can determine ballot code of other voters); ¶¶ 227, 235 (“[Petitioners’ experts] have fallen far short of the mark needed to demonstrate that the Premier systems, which have been used successfully in many counties in Pennsylvania for many years, are somehow not suitable for voting;” “Each of the Specified Voting Systems is adequately tested to determine that the machines will be [s]afely and efficiently usable in the conduct of elections.”).

<sup>13</sup> See, e.g., Ex. 12 at 7 (“The design requirements of Section[] 3031.7(11) ... were met by a documented [ITA] Product Safety Test ....”); 11 (“The Hart 6.2.1 Voting System successfully completed both the general and primary election.”); Ex. 18 at 9, 12.

<sup>14</sup> See Ex. 7 (Shamos Report) ¶ 28 (explaining that Petitioners have not demonstrated that any of the Specified Voting Systems are not “capable of absolute accuracy”); ¶ 77 (“There is no evidence that any DRE ever used in Pennsylvania has ever failed to tally a vote correctly.”);

“[w]hen properly operated,” the system “records correctly” and “tabulates accurately every valid vote registered.” 25 P.S. § 3031.7(13).<sup>15</sup>

The accuracy of the Specified Voting Systems has been tested by the ITAs and examined and certified by the Secretary.<sup>16</sup> Petitioners own expert admits that there is no evidence that any of the Specified Voting Systems fail to record votes accurately. Ex. 40 at 169:21-25 (Dep. of Douglas Jones, Ph.D., Aug. 4, 2011) (“Q. What evidence do you have from the record in this case of any instance in Pennsylvania where electronic ballot images were recorded incorrectly? A. I neither know of such a case, nor do I expect to have heard of such a case.”).

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¶ 266 (“Each of the Specified Voting Systems is capable of absolute accuracy.”); ¶ 416(b) (“The Specified Voting Systems consistently and accurately tally each vote properly cast and Petitioners have not produced any evidence that they do not.”); ¶ 417(e) (“Petitioners have not demonstrated any way in which any of the Specified Voting Systems is not designed to be so capable [of absolute accuracy].”).

<sup>15</sup> See Ex. 7 (Shamos Report) ¶ 399 (“None of the Specified Voting Systems fail to ‘accurately count and weigh’ votes.”); ¶ 417(d) (“The Specified Voting Systems ‘routinely and consistently ‘record[ ] correctly and compute[ ] and tabulate[ ] accurately every valid vote registered’.”) Petitioners have not pointed to a single incident in which any of the Specified Voting Systems, properly configured and operated, failed to record even a single vote.”); ¶ 431 (“Contrary to Petitioners’ assertion, the [ballot-image-retention feature of the Specified Voting Systems] does ‘record electronically each individual’s vote.’ Petitioners have not identified even one instance in which the BIR of a certified voting system failed to do so.”).

<sup>16</sup> See, e.g., Ex. 16 at 6 (“The accuracy requirements of Section[] 3031.7(11) ... were met by the documented Accuracy Test submitted in the ITA reports.”); id. at 11 (comparing printed votes cast records to voting script and finding accurate match); Ex. 27 at 4 (noting that system “accurately tabulated the results” of test); id. at 9-10 (accepting recommendation of Examiner); Ex. 31 at 5 (noting that system “accurately tabulated the results” of test); Ex. 32 at 4 (noting that system “accurately tabulated the results” of test); Ex. 33 at 4 (noting that “Department representatives ran [ballot test] on the eSlate and determined that the public counter operates properly”); Ex. 34 at 3 (noting that system “accurately tabulated the results” of test); see also Ex. 7 (Shamos Report) ¶ 57 (“The purpose of the ITA structure was to avoid having the different states perform expensive, repetitive testing for a wide variety of characteristics that all voting systems should possess, e.g. ... accurate tabulation ...”) (emphasis added); ¶ 259 (“[I]t is possible to determine easily whether a system is recording, computing and tabulating votes accurately. One casts a known set of ballots that have previously been tabulated manually. A totals report is then produced and the machine totals are compared with those reported by the machine. This is done on a large scale by the ITA and on a small scale during certification exams.”).

- *Meets all security requirements*, including (1) that the system “[p]rovide acceptable ballot security procedures ... to prevent tampering with or substitution of any ballots,” 25 P.S. § 3031.7(12),<sup>17</sup> and (2) that the system is “so constructed and controlled that, during the progress of voting, ... [the system] shall preclude every person from tampering with the tabulating element.” 25 P.S. § 3031.7(16)(iii).<sup>18</sup>

Federal testing labs perform security testing, including testing that requires the most significant amount of time, money, and expertise, like source-code review. See Ex. 7 (Shamos Report) ¶ 63 (“In enacting HAVA, Congress recognized that individual states do not have the capability or resources to perform adequate certification testing, which is why the program of accredited laboratories was established.”); ¶ 457 (“Security testing is provided for in the FVSS and such testing is performed by federally qualified laboratories.”); Ex. 8 (Rebuttal Report to the Reports of Petitioners’ Experts (“Shamos Rebuttal Report”)) ¶ 31 (“[T]esting is conducted by a federal accredited laboratory and the states rely on its results. That is what the Election Code

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<sup>17</sup> See Ex. 7 (Shamos Report) ¶ 64 (“In addition, a review is made to determine whether there are security vulnerabilities that could feasibly be exploited by a person who gains access to the system during the election process, and a check is made to determine the degree to which the system resists attempts to alter its records.”); ¶ 276 (“In fact, none of the Specified Voting Systems can be tampered with during voting. The use of weak and/or publicly available passwords, even if true, does not permit any person to perform tampering during the progress of voting. The tabulating element is not accessible to any person during voting. It is locked and sealed with the machine.”); ¶ 368 (“The AccuVote TSx that was subject to the ‘Hursti II’ exploit has been remediated since 2006 and is not threat to the voters of Pennsylvania.”); ¶ 416(a) (“The Specified Voting Systems have been adequately tested for ... security through testing for compliance with the 2002 FVSS and examination for compliance with the Election Code.... The Specified Voting Systems, in actual use, provide ‘appropriate security measures to prevent tampering and vote manipulation.’”); ¶ 417(c) (“Each of the Specified Voting Systems has ‘acceptable ballot security measures.’”).

<sup>18</sup> See Ex. 7 (Shamos Report) ¶ 276; ¶ 207 (“[Petitioners’ experts] provide no scenario under which anyone could tamper with eSlate ‘during the course of its operation,’ even if the memory checking algorithm is only ‘marginally effective.’”); ¶ 232 (“There is no discussion at all in [Petitioners’ Experts’] Redacted Premier Report concerning any possibility of tampering with any tabulating element during the course of its operation.”); ¶ 470 (“They have not demonstrated that anyone is able to tamper with any tabulating element during the progress of voting.”).

provides.”); see also Ex. 7 (Shamos Report) ¶ 247 (“Computer security is a sophisticated field which the election authorities in the various states are not equipped to cope. That is why this testing function is relegated to qualified laboratories.”). Because of the high cost and amount of time required to conduct some security testing, like source-code review, the General Assembly determined that Pennsylvania, like many states, should rely on the results and conclusions reached by these federal laboratories. 25 P.S. § 3031.5(a) (requiring that Secretary examine whether “voting system has been examined and approved by a federally recognized independent testing authority and if it meets any voting system performance and test standards established by the Federal Government”); Ex. 37 at 86:10 – 86-18 (Shamos Dep. Tr.) (“Q. Are there things that the ITA tests for that you do not test for in your examination? ... A. The answer is yes. That’s the whole point of the ITA system, is to avoid having the states repetitively test the same thing 50 times that the ITA could test once.”); Ex. 8 (Shamos Rebuttal Report) ¶ 58 (“The states are not equipped to perform testing at that level, and the entire purpose of the ITA (now VSTL) system was to obviate the need for such repetitive testing. In fact, there is no state that currently conducts its own exhaustive testing of voting systems to federal standards. Both HAVA and the Election Code relegate that testing to ITAs.”); see also Ex. 7 (Shamos Report) ¶ 95 (“Security is a requirement of all states, and it is supposed to be part of Federal certification so it does not have to be replicated 50 separate times by the different states.”); ¶ 244 (“The Election Code, however, expressly delegates the ‘testing’ function not to the Secretary but to an independent testing authority.”); ¶ 283 (“The examination for malicious code occurs at the federal laboratory level. A system will not receive a federal qualification letter if malicious code is found, and it will thus be ineligible for Pennsylvania certification.”); ¶ 291 (“[T]ests such as those performed in the [California Top-To-Bottom Review], because they apply equally to all states, are to be



conducted at the federal laboratory level, not by each individual state. There is no state that performs certification testing at the level of the TTBR.”); ¶ 388 (“The Secretary does not have to conduct a code audit because such an audit is performed by a federal testing laboratory before a system is even examined for certification in Pennsylvania.”).

While the Secretary is permitted and expected to rely on federal security testing,<sup>19</sup> the examinations of the Specified Voting Systems always have included separate consideration of the systems’ security features.<sup>20</sup> Ultimately, the Secretary, exercising the discretion and

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<sup>19</sup> Ex. 7 (Shamos Report) ¶ 142 (arguing that complaints about security vulnerabilities “should be directed at the ITA that examined the systems, not at the Secretary”); ¶ 247 (“Computer security is a sophisticated field which the election authorities in the various states are not equipped to cope. That is why this testing function is relegated to qualified laboratories.”); ¶ 416 (“The Specified Voting Systems have been adequately tested for reliability, accuracy and security through testing for compliance with the 2002 FVSS and examination for compliance with the Election Code.”).

<sup>20</sup> See, e.g., Ex 13 at 12 (“During the conducting of this analysis, the Edge Model 2 Voting System provided acceptable ballot security procedures and impoundment of ballots to prevent tampering with or substitution of any ballots or ballot cards. It also provided acceptable password management and restriction of access to administrative functions. Therefore, I conclude the Edge Model 2 Voting System meets the requirements of Section 3031.7(12) of the Pennsylvania Election Code.”); id., App. A at 89 (noting results of test of access to ballots and internal during process of voting); Ex. 21 at 9 (noting that security concerns could be solved “completely” by “simple expedient”); 10 (noting that BIR feature provides that “election cannot be tampered with by simply modifying vote totals”); 15 (noting that “general requirement of security in ... 3031.7(12), (16) and (17) require” consideration of use of modems and networking); Ex. 22 at 5-6 (considering TSX compliance with § 3031.7(16)(iii)); Ex. 23 at 12 (discussing system security); 13 (discussing possible “malicious[] modif[ication]” of “election or its ballot characteristics”); 14 (discussing “security of ... data communications” on system; finding “no anomalies in [tamper-evident seals] physical security procedure”); Ex. 24 at 5 (noting that “security of Edge” is “high”); 8 (noting that efforts to tamper with system were “detected” and “not successful”); Ex. 25 at 4 (noting “unsuccessful effort was made to tamper with ... election files”); Ex. 26 at 3 (explaining that “review process is intended to discover such an attempt [to insert malicious code] and thwart it.”); 6 (noting that zero-counter function tested successfully); 7 (machine would not allow extra votes to be cast; “cast ballots to test compliance with Pennsylvania law;” describing “variety of intrusions” attempted; “No effort at tampering was successful.”); see also Ex. 7 (Shamos Report) ¶ 64 (“In addition, a review is made to determine whether there are security vulnerabilities that could feasibly be exploited by a person

authority expressly given to her in the Election Code, makes an independent decision regarding the Specified Voting Systems' compliance with sections 3031.7(12) and (16).<sup>21</sup> As part of her determination, the Secretary is entitled to rely on administrative and procedural protections for security that are, for example, expressly provided for in the Election Code. See, e.g., 25 P.S. § 3031.13 (“At the close of the election and after the tabulation of all ballots, the automatic tabulating equipment or other component of the voting system which contains ballots shall be locked and sealed [by local election officials] so that no further ballots may be deposited in or removed from any such equipment or component, and all components of the voting system, suitably packaged and secured for storage, shall be held for delivery to the county election board.”); id. at § 3031.21 (requiring that county board of elections “designate a person or persons who shall have the custody of the county’s electronic voting system and its components and of the keys therefor when the system is not in use at an election” and provide “safe storage and care of the system and placement of its keys in a security vault;” requiring that “[a]ll electronic voting systems and their components, when not in use, shall be properly boxed or covered and stored in a suitable place or places”); see also Ex. 7 (Shamos Report) ¶ 188 (“[Petitioners’ experts] assert that the machine is ‘vulnerable’ without explaining how and have not considered any physical and administrative procedures that would also have to be defeated in order to conduct tampering.”); ¶ 210 (“The hardware alone is not intended to prevent all possible frauds. A

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who gains access to the system during the election process, and a check is made to determine the degree to which the system resists attempts to alter its records.”).

<sup>21</sup> See, e.g., Ex. 34 at 11 (“[T]he AVE Edge Model 2 Voting System meets the requirements of ... 25 P.S. § 3031.7(12).”); see also Ex. 7 (Shamos Report) ¶ 461 (“The Secretary may rely on federal certification results. The Secretary may not, and does not, rely solely on such results because they do not address the unique provisions of Pennsylvania election law. It is apparent that the Secretary does not rely solely on federal certification results because the Secretary conducts certification examinations.”).

combination of hardware, software and physical and administrative procedures must be used.”) (emphasis added).

4. The Specified Voting Systems have met the design, accuracy, and security requirements of the Election Code during every Pennsylvania election.

The Secretary does not (and, as a practical matter, cannot) select, procure, and test individually each of the thousands of DRE machines that are actually used in the election districts throughout the Commonwealth. Rather, it is the responsibility of each of Pennsylvania’s sixty-seven counties to choose among the approved systems and independently purchase, maintain, and test the voting system that best meets the localized needs of that county. See 25 P.S. § 2642(c) (requiring the counties to “purchase, preserve, store and maintain primary and election equipment of all kinds”); id. at § 3031.10(e)(3) (providing that, prior to delivering tabulating equipment to an election district, county board of election “shall examine or cause to have examined such equipment” and shall certify that the “equipment has been tested to ascertain that it will accurately compute the votes cast”); id. at § 3031.14 (a) (requiring county boards of elections to perform pre- and post-election testing of “central automatic tabulating equipment ... to ascertain that it will accurately count the votes cast”). Given her limited role, the Secretary can do no more than determine whether each system, as a whole, meets the requirements set forth in section 3031.7. See Ex. 7 ¶ 65 (Shamos Report) (“The purpose of certification is to verify that a particular type of system meets the mandatory requirements of the Election Code. It cannot and does not ensure that each particular machine of that type that is sold or used will work properly. It is not a substitute for acceptance testing, which needs to be performed by the purchaser of the system.”).

The Election Code expressly requires that electronic voting systems meet the Code’s requirements only “at the time of [the] examination or reexamination.” 25 P.S. § 3031.7. It does

not require “field testing” of the Specified Voting Systems. Ex. 7 (Shamos Report) ¶ 288 (“But ‘field tests’ are not mandated by the Election Code and Petitioners do not indicate any non-compliance with the mandatory requirement that might be discovered during field tests that would not be discovered in the examination process.”). Even so, there is no evidence that any of the Specified Voting Systems fail to correctly record and accurately tabulate valid votes when being operated correctly. Most importantly, Petitioners have failed to muster any evidence that actual votes have been, or necessarily will be, lost, miscounted, or denied an “honest count” during a real election; and they admit that no such evidence exists. Ex. 44 at 4-9 (Pet’rs’ Suppl. Response to Fourth Set of Discovery Requests) (admitting no evidence of confirmed instance of an election result being compromised, altered, or invalidated because of tampering, “malicious code,” or weak passwords); see also Ex. 41 at 199:24 – 201:16 (Dep. of Daniel Lopresti, Ph.D., Aug. 2, 2011) (admitting that no evidence exists of votes being lost in Pennsylvania elections because of password structures, alteration of “log files,” the electronic or physical security, or the encryption on the systems); id. at 208:16 – 209:14 (acknowledging no evidence of “loss of votes in actual election” in Pennsylvania or elsewhere due to writing incorrect data onto DRE); 222:24 – 223:22 (admitting no evidence of votes lost due to “buffer overflow attack”); Ex. 40 at 199:24 – 200:7 (Jones Dep. Tr.) (“Q. Just so it’s clear in the record, Dr. Jones, in each of these ... source code examination reports ... [and] of all of the findings, you have no evidence of any of those findings causing the loss of votes from a DRE machine in Pennsylvania in an election, is that right? A. That’s right.”).<sup>22</sup>

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Petitioners’ own testimony makes plain that their concerns about lost or missing votes because of defective DREs exists in their imagination, not in the voting booth. See Ex. 42 (Dep. of M. Banfield, July 11, 2011, at 21:11-20; 35:18-36:1; 48:10-18; Dep. of J. Bergquist, July 11, 2011, at 108:4-10; Dep. of A. Brau, July 21, 2011, at 27:16-28:7; Dep. of L. Dailey, July 21,

The few specific incidents identified by Petitioners as evidencing inaccurate results, see e.g., Ex. 43 at 28-29 (Pet’rs’ Fourth Amended Response to Respondent’s Interrogatories and Requests for Production of Documents), do not establish that the Specified Voting Systems are not capable of correctly recording and accurately computing and tabulating every valid vote. Ex. 7 (Shamos Report) ¶ 260 (noting that Petitioners discovery responses provide a “table listing six incidents allegedly illustrating violations of 25 P.S. §3031.7(13). None of them does so.”). The isolated failures of a machine (for unknown reasons) do not prove that the system, or the certification process, is flawed or deficient. Id. at ¶¶ 261, 266 (“Each of the Specified Voting Systems is capable of absolute accuracy. The fact that a machine malfunctions in the field does not mean that that particular model of machine is not capable of absolute accuracy.”). Moreover, many of the incidents are known to have been caused by human error.<sup>23</sup> Id. at ¶¶ 262-64.

Without evidence of actual design or performance failures by the Specified Voting Systems during real voting, Petitioners must rely on a catalogue of “theoretical” vulnerabilities and potential computer “hacks.” Ex. 40 at 185:21-23 (Jones Dep. Tr.) (“Q. All of these attacks that you’re describing to your knowledge are theoretical? A. Yes.”). Every one of the alleged vulnerabilities of the Specified Voting Systems upon which Petitioners rely have been created and demonstrated only in the academic environment of a classroom or lab, and none has been shown to possibly “work effectively under real election conditions.” Ex. 7 (Shamos Report) ¶ 33; see also Ex. 7 (Shamos Report) ¶ 276 (“Petitioners have not alleged that any such tampering could be performed ‘during the progress of voting.’”); ¶ 436 (“The alleged ‘security

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2011, at 30:5-18; Dep. of P. Deutsch, July 6, 2011, at 31:21-32:9; Dep. of J. Hobbs-Pellechio, July 25, 2011, at 24:7-14; 31:6-12; 34:11-18; Dep. of C. Reed, July 22, 2011, at 11:21-24.).

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The rest of the examples refer to issues with a system that has already been de-certified. Ex. 7 (Shamos Report) ¶¶ 263-265.

problems’ did not occur in the field, but were artificially induced by experimenters under laboratory conditions and not under conditions even vaguely similar to those of an actual election.”); Ex. 8 (Shamos Rebuttal Report) ¶¶ 22-28 (explaining that “exploits” identified by Petitioners were conducted under “laboratory conditions” and could not “possibly be carried out” in actual elections in Pennsylvania); Ex. 37 at 270:20 – 272:11 (Shamos Dep. Tr.); Ex. 40 117:4-25 (Jones Dep. Tr.) (noting that exploits were performed in laboratories and not “real elections”); id. at 121:1-5 (“Q. And do you have any evidence that the Hursti [II] exploit was ever carried out on any DRE in Pennsylvania? A. I don’t believe it was ever carried out anywhere except in a laboratory ....”); Ex. 41 at 182:4-9 (Lopresti Dep. Tr.) (“Q. The actual [Hursti exploit] study was carried out in the laboratory. It wasn’t a study of election day events. A. My understanding is that’s correct.”); id. at 213:24 – 214:11 (admitting that “exploits” were “done in laboratory conditions;” acknowledging no evidence of “exploits occurring in a real election”).

In fact, Petitioners cannot identify a single, meaningful security breach of any of the Specified Voting Systems. Ex. 7 ¶ 256 (Shamos Report) (“No incident of actual hacking of a machine used in an election has ever been detected or proven anywhere in the United States. Every time a forensic examination has been performed on a voting system alleged to have been hacked, no evidence of hacking has been found.”); ¶ 416(d) (“The Specified Voting Systems, in actual use, provide ‘appropriate security measures to prevent tampering and vote manipulation.’ Petitioners have not pointed to a single incident in which tampering or vote manipulation has occurred.”). Most tellingly, while Petitioners rely (entirely) on their experts to raise doubts about software-run systems, those same experts also acknowledge that there is no evidence of tampering with any software or hardware of the Specified Voting Systems in Pennsylvania elections. Dr. Daniel Lopresti, for example, concedes that he has no knowledge of ballots being

altered during any election in Pennsylvania. Ex. 41 at 190:1-7 (Lopresti Dep. Tr.) (admitting no knowledge of alteration of ballots in any election in Pennsylvania using DREs); see also id. at 181:2-5 (“Q. Now, the Hursti exploit, to your knowledge, was that ever taken advantage of in any real election? A. Not that I know.”); id. at 187:22 – 188:1 (“I know of no incident in a Pennsylvania election where the ballot image was output improperly by one of these machines.”); 206:4-20 (admitting no evidence of votes lost in Pennsylvania and other jurisdiction “based on the attacking and compromising of software on a DRE machine.”); id. at 211:15 – 212:13 (admitting no evidence of “verified tampering” or “verified hacking” of DREs during election in Pennsylvania). Dr. Jones similarly states that he has seen no evidence of a “virus-based attack on voting machines in the United States,” including Pennsylvania. Ex. 40 at 125:10-18 (Jones Dep. Tr.); see also id. at 170:10 – 171:23 (admitting no evidence of “alteration” of ballot images during elections); id. at 172:21-24 (“Q. Do you have any evidence of any tampering with any software or data stored on a DRE machine that was used in Pennsylvania? A. No.”).

Given the hypothetical nature of these vulnerabilities and the consistent, successful performance of the Specified Voting Systems, the Secretary, in her discretion, has determined that the Specified Voting Systems possess the necessary reliability, safety, and “acceptable ballot security procedures.” 25 P.S. § 3031.7(12).

#### **IV. SUMMARY OF ARGUMENT**

The Secretary is entitled to summary relief on Counts II, III, VII, VIII, IX, and X of the Petition for Review because, as a matter of law and fact, Petitioners are not entitled to the relief they demand, namely orders from this Court directing the Secretary (a) to de-certify the Specified Voting Systems and (b) to issue certain criteria for the certification of the Specified Voting Systems. Moreover, Petitioners cannot establish that the use or certification of the Specified Voting Systems have violated any constitutional right of any Pennsylvania elector.

In every count, Petitioners seek relief in the form of mandamus that is not available as a matter of law or fact. See infra Pt. V.A.1. The Secretary has affirmatively exercised the discretion expressly given her by the General Assembly through the Election Code to examine, reexamine, approve, and certify each of the Specified Voting Systems. See infra Pt. V.A.1.(a)-(c). She has done so in non-arbitrary ways pursuant to a correct understanding of the Election Code. See infra Pt. V.A.1.(d)-(e). Accordingly, mandamus relief will not lie. Moreover, the Specified Voting Systems meet the design and performance requirements for accuracy and security as set forth in the Election Code. See infra Pt. V.A.2. Their compliance with these standards has been established during examinations and reexaminations. It has been demonstrated in more than a dozen elections. Id. No factual basis exists, therefore, to award Petitioners the relief they seek.

Additionally, the General Assembly, exercising its legislative authority to establish election law and policy, has endowed the Secretary with the responsibility to determine, in her discretion, which electronic voting systems are safe, secure, and reliable for use in Pennsylvania. See infra Pt. V.B. Petitioners are not entitled to any order directing examinations and certifications pursuant to some heretofore unknown “uniform criteria” because such an order



would interfere with the Secretary's discretionary duties and trample on the General Assembly's constitutional prerogative to create law in violation of the separation of powers doctrine. Id.

The Secretary is also entitled to summary relief because she is a Commonwealth official who is immune from each of Petitioners' claims seeking injunctive relief. See infra Pt. V.B. Neither the General Assembly nor the Secretary has waived her sovereign immunity. The mandamus exception to immunity does not apply. Accordingly, Petitioners' claims must be dismissed.

Lastly, the Secretary's interpretation and application of the Election Code to certify and approve the Specified Voting Systems satisfies all the statutory requirements and insures safe and fair elections. As a result, Petitioners cannot show that the use or certification of the Specified Voting Systems have deprived them of their right to vote, see infra Pt. V.D.1, or denied them of equal protection of the uniform election laws of the Commonwealth. See infra Pt. V.D.2-3.

## V. ARGUMENT

### A. The Secretary is Entitled to Summary Relief Because Petitioners Cannot Demonstrate that They Have A Right to an Order Directing the Secretary to De-Certify the Specified Voting Systems.

All Counts of the Petition seek, in whole or in part, explicitly or implicitly, relief in the nature of mandamus, in that Petitioners seek to have this Court “[d]irect the Secretary immediately to de-certify” the Specified Voting Systems.<sup>24</sup> That is, the Petition seeks relief that would have this Court order the Secretary to exercise her discretion as to the certification of voting systems in a certain way. This is not a proper mandamus claim. The Secretary is entitled to summary relief because, as a matter of law, Petitioners cannot show that mandamus relief is available. Nor can Petitioners show that such relief is warranted as a matter of fact.

#### 1. The Secretary is entitled to summary relief because the mandamus relief requested by Petitioners is not available as a matter of law.

##### (a) *Nature of and requirements for mandamus relief*

This Court first considered the merits of Petitioners’ request for mandamus relief almost six years ago. In considering Respondent’s Preliminary Objections, the Court explained that mandamus is “designed to compel official performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff and a corresponding duty in the defendant and where there is no other adequate remedy at law.” Banfield I, 922 A.2d 36, 42 (citation omitted). The Court made clear that “[m]andamus is an extraordinary remedy” that “will not lie to compel the performance of discretionary acts.” Id. (citations omitted).

Banfield I also briefly outlined certain exceptional circumstances when a court may grant mandamus relief and order an official to perform an act ordinarily within the official’s

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<sup>24</sup> See Ex. 1 (“Wherefore” clause of Count I, part (a). Identical or similar language appears in the “Wherefore” clauses of Counts II, III, VIII, IX and X).

discretionary power. Namely, mandamus may lie where an official's failure to exercise discretion is arbitrary, fraudulent, or based upon a mistaken view of the law. Id. (citations omitted). In its most recent opinion regarding the nature and scope of mandamus relief, this Court clarified that the "arbitrary" and "mistaken view of the law" exceptions only apply where there has been "no actual exercise of discretion" by the official. Seeton v. Adams, 50 A.3d 268, 274 (Pa. Commw. Ct. 2012) (citing Tanenbaum v. D'Ascenzo, 51 A.2d 757, 758 (Pa. 1947)) (emphasis in original); id. at 277 ("[A] writ of mandamus provides the means to compel a public official to act where he has refused to act.") (emphasis added). The Court emphasized that mandamus cannot be used as a "means to review a public official's action and correct error." Id.

Accordingly, mandamus is not available if the government official exercised his or her discretion, but did so in a way that a complainant (or, respectfully, a court) considers to be wrong. Anderson v. Phila., 36 A.2d 442, 444 (Pa. 1944) (where a public official "is clothed with discretionary powers, and has exercised those powers, mandamus will not lie to compel a revision of the decision resulting from such exercise of discretion, though in fact, the decision may be wrong.") (citations omitted); see also Pa. Dental Ass'n v. Commw., Ins. Dep't., 516 A.2d 647, 652 (Pa. 1986) ("[Mandamus] is not used to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of an action already taken.") (citations omitted); Seeton, 50 A.3d at 274-75 (holding that, under Pennsylvania law, there is no precedent for "the principle that an official's mistaken exercise of discretion can be corrected by a writ of mandamus."). As the Pennsylvania Supreme Court stated more than a half-century ago, "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 Chadwick v. Dauphin Cnty. Office of the Coroner, 905 A.2d 600, 604 (Pa. Commw. Ct. 2006) (“[M]andamus is not used to force an official to exercise his discretion toward a result that a plaintiff may believe wise or desirable.”).

(b) *The Secretary’s certification process and approval of the Specified Voting Systems are discretionary, not ministerial, acts.*

The Secretary’s decision to certify or de-certify a voting system is a deliberative and discretionary, rather than a 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, 905 A.2d at 605 (citation omitted); cf. Weber v. Shelley, 347 F.3d 1101, 1106-07 (9th Cir. 2003) (holding that it is “job of democratically-elected representatives to weigh the pros and cons of various balloting systems” and, if “reasonable and neutral, it is free from judicial second-guessing”).

The breadth of the Secretary’s discretionary authority is evidenced by the pertinent provisions of the Election Code. It includes, for example, the duty to “examine and reexamine voting machines, and to approve or disapprove them for use in this state, in accordance with the provisions of [the Code].” 25 P.S. § 2621(b). The Secretary must also file a report, “stating whether, in [her] opinion, the system so examined can be safely used by voters at elections as provided in this act and meets all of the requirements hereinafter set forth.” Id. at § 3031.5(b) (emphasis added). Most relevant to the issues raised in the Petition, it is the Secretary alone who is tasked with determining whether a voting system presented for examination: is “suitably designed for the purpose used,” id. at § 3031.7(11) (emphasis added); is “safely and efficiently useable in the conduct of elections,” id. (emphasis added); and “[p]rovides acceptable ballot

security procedures.” Id. at § 3031.7(12) (emphasis added). The Secretary cannot make findings for or against “suitability” of design or “acceptability” of security merely by connecting dots like some public functionary. Rather, she must examine each voting system against specific, detailed criteria and judge for herself whether it complies with the Election Code and protects the citizens of the Commonwealth.

(c) *The Secretary has not failed to exercise her discretion.*

Both former Secretary Cortés and Secretary Aichele properly exercised their discretion through responsible certification processes. At no point while considering whether to allow the use of the Specified Voting Systems in Pennsylvania could either Secretary be credibly accused of doing nothing. Pa. Dental Ass’n., 516 A.2d at 652 (holding that mandamus available “to compel a tribunal or administrative agency to act when that tribunal or agency has been ‘sitting on its hands’”). On the contrary, the certification procedures used by the Secretaries to approve the Specified Voting Systems, including examinations conducted with the assistance of experienced experts, adequately determined the machines’ compliance with the Election Code, including the Code provisions relating to design, safety, security, and accuracy. Ex. 7 (Shamos Report) ¶ 287 (“‘[A]ll of the things required by the Election Code’ to be performed by the Secretary are performed during examinations.”).

(d) *The Secretary did not act arbitrarily.*

The affirmative exercise of discretion alone is sufficient ground to deny Petitioners the relief they seek. None of the exceptions to this general rule apply. For example, Petitioners cannot establish that the Secretaries acted arbitrarily. As stated by Dr. Shamos, a computer scientist, lawyer, experienced voting-system examiner, and the person who examined many of the Specified Voting Systems, there was nothing superficial or indifferent about the examinations. See id. at ¶ 255 (“I have worked as an examiner and consultant for many

Secretaries of the Commonwealth over the past 30 years, and there was not one who was indifferent to the need for fair and accurate elections.”). Additionally, Mr. Cobb developed extensive test protocols for each of the Specified Voting Systems 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., Ex. 14, App. B (“Test Cases”); see also Exs. 9-13 (same); Ex. 39 at 62:12-17 (Cobb Dep. Tr.) (“The test protocol that we developed specifically looked at the statutory requirements of [Pennsylvania], but it went into some of these other areas also.”) Second-guessing of appropriately exercised discretion is improper. Petitioners may not like the outcome of that exercise of discretion, but they cannot change it via this litigation.

(e) *The Secretary did not make a mistake of law.*

From the beginning, the core assertion of every one of Petitioners’ complaints has been that the Secretary, by failing to read the Election Code to require contemporaneous, external, software-independent paper records, has made a mistake of law that entitles them to relief. See, e.g., Ex. 1 ¶ 44 (asserting that the “Election Code ... required the Secretary to certify only voting machines that can be audited ... using independent permanent records, verified by the voter as his vote is being cast”); ¶ 115 (asserting that “lack of a voter verifiable physical record of the voter’s intent” rendered DREs unable to comply with certain Election Code requirements set forth in section § 3031.7). This alleged mistake, however, is no longer part of this case. This Court has held that the Secretary’s view of the Election Code – that nothing in the law, including sections 3031.1 and 3031.17, requires voter-verifiable, independent, paper records – was (and is) correct. Banfield II, 51 A.3d at 311-14.

In sum, Petitioners are not entitled to the relief they seek because, as a matter of law, mandamus cannot lie where the Secretary performed the discretionary acts entrusted to her by

the General Assembly and did so in a non-arbitrary way entirely consistent with the Election Code.

2. The Secretary is entitled to summary relief because Petitioners cannot show, as a matter of fact, that the Specified Voting Systems have failed to comply with the design and performance requirements of the Election Code.

Petitioners are not entitled to an order requiring de-certification of any of the Specified Voting Systems because the systems' capabilities and performance in Pennsylvania elections cannot be shown to have violated any provision of the Election Code or Pennsylvania Constitution, including the "security" requirements that remain at issue. Accordingly, summary relief is warranted on all counts in the Petition that demand such relief.

Federal testing, state examinations and reexaminations, and more than thirteen (13) statewide elections in Pennsylvania demonstrate beyond dispute that the Specified Voting Systems perform properly. As detailed above, see Pts. III.C.2 & 3, each of the Specified Voting Systems has shown itself to be "suitably designed" for voting and "safely and efficiently usable." 25 P.S. § 3031.7(11). Each is "suitably designed and equipped to be capable of absolute accuracy" and, when "properly operated," does accurately record, tabulate, and compute every vote. Id.; id. at § 3031.7(13). Additionally, each has repeatedly shown that it is able to prevent tampering with the machine "during the progress of voting" or otherwise manipulating election results. Id. at § 3031.7(12) & (16)(iii).

Petitioners simply cannot produce any evidence establish that any of the Specified Voting Systems have failed to meet these requirements. Instead, Petitioners and their experts list a number of "vulnerabilities" in the Specified Voting Systems that have been discovered by computer scientists in laboratory testing and examination. These vulnerabilities are the only basis for Petitioners' speculative belief that someone, somewhere might possibly be able to

tamper with a voting machine. They are not, however, grounds for an order de-certifying any of the Specified Voting Systems for three reasons.

First, Petitioners have not explained how attacks that have been created and demonstrated only in the artificial environment of a classroom or lab could be effectively replicated in the real world of the election-day process. Ex. 7 (Shamos Report) ¶ 33 (“Petitioners have not articulated a single security attack scenario that could work effectively under real election conditions.”); ¶ 173 (“[Petitioners’ experts] did not investigate whether this exploit would be feasible in Pennsylvania .... Even assuming such attacks are feasible, the [experts] have not explained how they could result in the loss of even one vote by a voter in this Commonwealth.”); ¶ 276 (“Petitioners have not alleged that any such tampering could be performed during the progress of voting. In fact, none of the Specified Voting Systems can be tampered with during voting.”); ¶ 436 (“Pennsylvania and other states have not experienced accuracy and security problems.... The alleged ‘security problems’ did not occur in the field, but were artificially induced by experimenters under laboratory conditions and not under conditions even vaguely similar to those of an actual election.”); Ex. 8 (Shamos Rebuttal Report) ¶¶ 22-28 (explaining that “exploits” identified by Petitioners were conducted under “laboratory conditions” and could not “possibly be carried out” in actual elections in Pennsylvania). For example, even if, as Petitioners claim, some of the Specified Voting Systems employ password protocols that are “weak” or available to the public, that fact “does not permit any person to performed [sic] tampering during the progress of voting.” Ex. 7 (Shamos Report) ¶ 276. This is because the “tabulating element – the only mechanism within the Specified Voting Systems that the Code expressly seeks to protect – “is not accessible to any person during voting. It is locked and sealed with the machine.” Id.; see also Ex. 39 at 115:15 – 116:21 (Cobb Dep. Tr.) (stating that



reexaminations considered locks and seals that “disallow someone from tampering with the tabulating element” during the process of voting).

Second, not only have Petitioners failed to show that the so-called “operating defects” in the Specified Voting Systems can exist outside of a laboratory, they have also failed to identify a single breach of the systems’ security features during an election. That is, there is no evidence of tampering with any software or hardware of the DREs in Pennsylvania elections. See supra Pt. III.C.4; see also Ex. 36 at 326:1-13 (Commonwealth Dep. Tr.) (“Q. How do you know that something, either a bug or an error or a malicious code, did not interfere with the accurate capture of the voter’s choice? A. Well, first, I am not an expert on the machines, so I really can’t testify to their working. Second, what I can tell you from the Department’s standpoint is that we have received no complaints, documentation. We are not aware of any of those issues occurring in the Commonwealth of Pennsylvania.”); id. at 356:21 – 357:2 (denying any “issues with regard to the tampering, hacking, or lack of security of votes stored in DRE machines”); id. at 357:8-20 (stating that Commonwealth has not received any complaints about tampering, hacking, lack of security of votes, or “malware being installed on a machine”); Ex. 44 at 4-9 (Pet’rs’ Suppl. Response to Fourth Set of Discovery Requests); cf. Gusciora v. Corzine, No. MER–L–2691–04, 2010 WL 444173, at \*85-86 (N.J. Super. Ct. Law Div. Feb. 1, 2010) (finding no “evidence to establish that any election has ever been compromised due to the fraudulent manipulation of an AVC [Advantage] voting system;” “No AVC has ever been demonstrated to have been hacked, other than in an academic setting, in this State or any other State.”) (attached as Exhibit 47).

To be sure, Petitioners have compiled lists of things that have gone wrong during elections in the belief that even one complaint by one elector is sufficient to prove that a

Specified Voting Systems does not comply with the Election Code. See, e.g., Ex. 43 at 28-29; 53-61 (Pet’rs’ Fourth Amended Response to Respondent’s Interrogatories and Requests for Production of Documents). The vast majority of the incidents and issues identified by Petitioners, however, are irrelevant, see, e.g., Ex. 7 (Shamos Report) ¶¶ 313, 316, 326, 336 (noting that problems listed concern optical scan machines, not DREs), or are the result of human errors (or insufficiently described to know whether the alleged problem was caused by human error). See, e.g., id. at ¶¶ 317, 329, 331, 335; see also Ex. 36 at 219:21 – 220:9 (Commonwealth Dep. Tr.) (“But when properly used, we haven’t seen any errors regarding the functionality of the voting systems.”). In any event, none of the problems demonstrate that the Secretary’s certification process and decision were so deficient as to violate the Election Code. See Ex. 7 (Shamos Report) ¶ 248 (“[E]ven if malfunctions appear in deployed machines, that does not necessarily indicate any deficiencies in the certification process.... [A break] does not indicate any failure in design. Contrary to Petitioners’ contention, field malfunctions do not necessarily reflect on the adequacy of testing by the laboratories or certification by the Secretary.”); ¶ 289 (“The failure of an individual machine in the field does not mean that the certification examination was inadequate.”); ¶¶ 259-264; ¶¶ 312-364 (addressing each example of DRE “failure” cited by Petitioners).

Lastly, Petitioners’ position that an electronic voting system violates the Election Code if any possible vulnerability is discovered wrongly assumes that the Code demands absolute security. The laws of physics, their accompanying limits on technology, and common sense, however, dictate that such a standard is impossible to meet and, therefore, is not applicable to the Specified Voting Systems. Id. at ¶ 75 (“There is no such thing as absolute security.... All systems of all kinds, whether or not they are used for voting, exhibit security vulnerabilities.”);

Ex. 8 (Shamos Rebuttal Report) ¶ 60 (“There is no such thing as a ‘secure’ system because ‘secure’ has meaning only in connection with a list of enumerated threats. One may pronounce a system ‘secure’ against a given set of threats, but not against threats that have not yet been invented or articulated.”). As explained by Dr. Shamos and recognized by courts around the country that have considered the issue, “All 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.” *Id.*; see also id. at ¶ 463 (“However, there will never be a certification of any type of system, including voting machines, that can guarantee that no intruder will ever be able to subvert that system. Even systems of the highest security and importance, on which far more money is spent, such as Pentagon information systems, are the regular victims of intrusion.”). Indeed, even optical-scan systems, the certification and use of which Petitioners do not challenge, have design and performance issues that can impact, among other things, the efficiency of the voting process. Ex. 7 (Shamos Report) ¶ 39 (“There have been numerous verified incidents of tampering with optical scan elections..”); ¶ 102 (“However, numerous irregularities in optical scan elections have been reported.”); ¶ 164 (“[Petitioners’ experts] have not outlined any credible tampering scenarios and certainly have not demonstrated that the Sequoia systems are any more vulnerable to tampering than optical scan systems”); ¶ 188 (“[Petitioners’ experts] have not outlined any credible tampering scenarios and certainly have not demonstrated that the iVotronic is any more vulnerable to tampering than optical scan systems”); ¶ 198 (“I note that [Petitioners’ experts] never, not once, have addressed security vulnerabilities in ... optical scan systems.”); ¶ 403 (“There are numerous verified reports of tampering and irregularities in optical scan elections.”); see also 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); Ex. 42 (Deutsch Dep. Tr. at 82:14-84:14) ("I know some of the county officials were either directly or figuratively shaking their heads about all the headaches they have had with paper ballots in the past.").

As simply explained by a federal court considering the use of DREs in Pennsylvania, "No 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 unfortunate reality is that 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, 2010 WL 444173, at \*86-87 ("While insiders may pose a security risk, this is true of all voting systems .... Security vulnerabilities are present, to some degree, in every voting system. There is simply no such thing as a voting system that is impossible to manipulate."); id. at \*87 & n.90 (rejecting "perfection standard;" "[The standard] should never impose a requirement of absolute security or complete protection against tampering, which would be impossible to achieve."); Andrade v. NAACP of Austin, 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.").

**B. The Secretary is Entitled to Summary Relief Because Petitioners Cannot Demonstrate that They Have A Right to an Order Directing the Secretary to Issue Certain Criteria for Certifying Electronic Voting Systems.**

Counts III and VII of the Petition assert statutory claims that would have this Court direct the Secretary to promulgate specific, "uniform testing criteria for the certification of voting systems that comply with the Pennsylvania Election Code." Ex. 1 at 27 (Count III "Wherefore"

clause, pt. (b)). Petitioners, however, do not have a clear right to have examinations or reexaminations performed in a particular manner. This fact is so plain that the Banfield I court refused to even read the Petition as stating a claim for such relief. 922 A.2d at 42. Petitioners concede as much. See Ex. 43 at 35-36 (Pet'rs' Fourth Amended Response to Respondent's Interrogatories and Requests for Production of Documents).

Moreover, as already fully discussed, the General Assembly, and not the courts of Pennsylvania or the executive branch, is responsible for setting election law and policy in the first instance. Mixon v. Commw., 759 A.2d 442, 449 (Pa. Commw. Ct. 2000) (quoting Winston v. Moore, 91 A. 520, 522 (Pa. 1914)) (“The power to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government.”). Relevant to this case is the General Assembly's determination to charge the Secretary of the Commonwealth with the general supervision and administration of Pennsylvania's elections laws, including among other things, the duty “[t]o examine and re-examine voting machines, and to approve or disapprove them for use in this state” in accordance with the specifically enumerated standards set forth by the Legislature in the Election Code. 25 P.S. § 2621(b); id. at § 3031.7 (listing seventeen requirements for electronic voting systems). If the Secretary determines, in her discretion, that a system meets the express standards, the system is certified for use in Pennsylvania elections; if the Secretary determines that a system does not meet those standards, it is not certified. See 25 P.S. § 3031.5(b).

The General Assembly has not disturbed the Secretary's interpretation of the Election Code's examination requirements as applied to the Specified Voting Systems, see St. Elizabeth's Child Care Ctr. v. Dep't Pub. Welfare, 963 A.2d 1274, 1278 (Pa. 2009), 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); see supra Pts. II.B & III. Nevertheless, Petitioners' requested relief seeks to have this Court ignore the deference owed to the Secretary for her interpretations of, and discretionary actions under, the Election Code and substitute its judgment as to appropriate "testing criteria" for that of the Secretary. Such relief would violate the doctrine of Separation of Powers, under which "no branch should exercise the functions exclusively committed to another branch." Sweeney v. Tucker, 375 A.2d 698, 705 (Pa. 1977) (citations omitted); see also Kuznik v. Westmoreland Cnty. Bd.. of Comm'rs, 902 A.2d 476, 502 (Pa. 2006); Nationwide Mut. Ins. Co. v. Foster, 599 A.2d 267, 270 (Pa. Commw. Ct. 1991). It is for the legislature, not the courts, to "fashion a mechanism for lodging" a challenge to "truly discretionary" acts of a public official. Chadwick v. Dauphin Cnty. Office of the Coroner, 905 A.2d 600, 604 n.5 (Pa. Commw. Ct. 2006).

The relief requested by Petitioners also would infringe on the General Assembly's constitutional prerogative to make laws relating to the election process by requiring that the Secretary adopt new or additional requirements for electronic voting systems that have not been adopted by the legislature, including for example, a requirement that the Secretary perform source code audits. Pa. Const. art. II, § 1 (providing that the "legislative power of this Commonwealth shall be vested in a General Assembly"); Ex. 43 at 73 (stating Petitioners' claim that "unless Secretary conducts a code audit, [she] cannot know if the machines software is free of any malicious code and is capable of remaining secure"); Ex. 7 (Shamos Report) ¶ 388 ("[A code] audit is performed by a federal testing laboratory before a system is even examined for certification in Pennsylvania. Therefore, even if Petitioners are correct that a code audit is necessary to determine compliance with the Election Code, such an audit is performed."); Ex. 8

(Shamos Rebuttal Report) ¶ 31 (“Detailed review of software is not within the province of the Secretary under the Election Code. That task . . . [is] relegated to federal qualified laboratories.”). Because there is no authority in the Election Code or elsewhere that would allow the Secretary to require of electronic voting systems the features or standards Petitioners demand, the directive that Petitioners seek would amount to an unconstitutional delegation of law-making authority to the Secretary.

C. **The Secretary Is Entitled To Summary Relief Because She Is Immune From Petitioners’ Claims.**

Each Count of the Petition seeks relief in the nature of a mandatory injunction. It is axiomatic, however, that, absent an expressly stated waiver of immunity by the General Assembly, Commonwealth officials, including the Secretary, are immune from suit.<sup>25</sup> See 1 Pa. C.S. § 2310 (“[T]he Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity.”); Bonsavage v. Borough of Warrior Run, 676 A.2d 1330, 1331 (Pa. Commw. Ct. 1996) (“[B]ecause the [plaintiffs] seek to compel the Commonwealth . . . to take affirmative action . . . , sovereign immunity will shield them from suit . . . .”); see also Stackhouse v. Commw., Pa. State Police, 892 A.2d 54, 59, 61-62 (Pa. Commw. Ct. 2006) (noting the rule and determining that request for an order mandating imposition of guidelines and policies by the State Police was properly dismissed on the basis of immunity).

The Secretary asserted her immunity as a preliminary objection to the Petition, and a majority of this Court noted that the Secretary is not immune from a lawsuit seeking mandamus

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<sup>25</sup> None of the limited, specified instances where the General Assembly has waived sovereign immunity apply here. See 42 Pa. C.S. § 8522.

relief. Banfield I, 922 A.2d at 43 (“Actions in mandamus are not subject to the defense of sovereign immunity.”) (quotation omitted). While this loophole may have applied at the pre-discovery phases of this suit to prevent dismissal, it does not apply now. As noted above, Petitioners cannot show that the Secretary’s actions were purely ministerial or that her discretion was exercised arbitrarily or contrary to the law. That is, Petitioners have failed to establish the factual predicates necessary for them to proceed with this Petition as a proper action in mandamus. Accordingly, that limited exception does not apply, and the Secretary, being immune from suit, is entitled to summary relief.

**D. The Secretary Is Entitled To Summary Relief On Petitioners’ Constitutional Claims Because Petitioners Cannot Establish That Their Right To Vote Has Been Denied or That They Have Been Treated Differently Than Other Electors.**

The Election Code and the Secretary’s implementation of its demands enjoy a strong presumption of constitutionality and “should not be declared unconstitutional unless [they] clearly, palpably and plainly violate[] the constitutions of the Commonwealth or United States.” Finucane v. Pa. Milk Mktg. Bd., 582 A.2d 1152, 1154 (Pa. Commw. Ct. 1990) (citations omitted).

1. Petitioners cannot establish a violation of Article I, section 5 of the Pennsylvania Constitution.

Count VIII of the Petition asserts a violation of Article I, section 5 of the Pennsylvania Constitution, providing that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Petitioners’ claim is based on wholly speculative propositions that the Specified Voting Systems “create the risk” that votes “will not be counted accurately, or at all.” Ex. 1 ¶¶ 133, 134 (emphasis added). In fact, under the standards of review applicable to constitutional challenges to state election laws,



Petitioners cannot meet their burden of proof to establish that Pennsylvania electors have been deprived of their right to vote.

- (a) *The decisions of the Secretaries are subject to the “gross abuse” standard.*

As discussed above and recently explained by Judge Simpson, “Pennsylvania Courts considering state constitutional challenges to state election laws[] afford a substantial degree of deference to the judgment of the legislature.” 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). Indeed, with particular reference to Article I, section 5 claims, this Court has previously held that the Pennsylvania “Supreme 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.).

Courts in this Commonwealth and throughout the country, considering challenges to the federal Constitution, also have employed a deferential standard. Recognizing that 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, the courts have held that “[c]ommon sense, as well as constitutional law, compels the conclusion that 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.) (quoting Burdick v. Takushi, 504 U.S. 428, 441 (1992)), aff’d, 834 A.2d 1126 (Pa. 2003); see also Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (recognizing that states have broad leeway in “enact[ing] comprehensive and sometimes complex election codes ... [that] govern[] ... the voting process

itself”) (citation omitted); Wexler v. Anderson, 452 F.3d 1226, 1232 (11th Cir. 2006) (“[S]tates are entitled to burden that right [to vote] to ensure that elections are fair, honest, and efficient.”) (citations omitted). As long as these 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) (“[T]he question is whether using a system that brings about numerous positive changes . . . , but lacks a voter-verified paper ballot, constitutes a ‘severe’ restriction on the right to vote.”); see also Wexler, 452 F.3d at 1232 (“When a state election law imposes only ‘reasonable, nondiscriminatory restrictions’ upon voters’ rights, the ‘State’s important regulatory interests are generally sufficient’ to sustain the regulation.”) (citation omitted).

Far from restricting Petitioners’ right to vote, the process established by the General Assembly, through which the Secretary has certified the electronic voting systems at issue, is intended to protect and secure those very rights. Like so many other complainants around the country who have unsuccessfully challenged the use of DREs, 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. Nor can Petitioners establish that the Secretary’s certification of the Specified Voting Systems unfairly or unreasonably burdens the essential right to vote. See, e.g., Weber, 347 F.3d at 1106-07 (“We cannot say that use of paperless, touchscreen voting systems severely restricts the right to vote;” stating that the court will not engage in “judicial second-guessing” where the Secretary of the State of California “made a reasonable, politically neutral and non-discriminatory choice to certify touchscreen systems”); Tex. Democratic Party v. Williams, No. A-07-CA-115-SS, Slip Op., at 11 (W.D. Tex. Aug. 16, 2007) (noting that the Texas Secretary of State “made a

reasonable, politically neutral, and non-discriminatory choice to certify the eSlate voting machines for use in elections, and nothing in the Constitution forbids this choice”) (attached as Exhibit 46), aff’d, 285 Fed. App’x 194, 195 (5th Cir. 2008); Favorito v. Handel, 684 S.E.2d 257, 261-62 (Ga. 2009) (affirming judgment against voter (and others) who alleged that DRE violated equal protection); Schade v. Md. State Bd. of Elections, 930 A.2d 304, 327-28 (Md. 2007) (holding that trial court correctly denied voters’ and candidates’ requests for preliminary injunction, as state board of elections acted reasonably in certifying DREs that lacked a voter verified paper audit trail); Gusciora v. Corzine, No. MER–L–2691–04, 2010 WL 444173, at \*97 (N.J. Super. Ct. Law Div. Feb. 1, 2010) (holding that State’s certification of DREs did not violate voters’ equal protection or due process rights).

(b) *The legal foundation of Petitioners claim has been resolved in the Secretary’s favor.*

In considering the Secretary’s preliminary objections to Count VIII, this Court permitted Petitioner’s Article I, section 5 cause of action to proceed on the grounds that electors have “no way of knowing whether their votes will be honestly counted by DREs that are not reliable or secure and that provide no means for vote verification or vote audit.” Banfield I, 922 A.2d at 48. This rationale no longer applies for two reasons.

First, this case has moved beyond the preliminary stages where Petitioners’ speculative flights of imagination regarding how someone’s (in most cases, not even their) rights might be violated were sufficient to survive demurrer. At this point, Petitioners no longer can hide behind their empty mantra that they “have no way of knowing” whether the Specified Voting Systems record or count real votes. In fact, Petitioners – and all Pennsylvania voters – do have a way of knowing that the Specified Voting Systems are effective. The General Assembly has taken a number of reasonable steps to protect the voting rights of Pennsylvania electors in the event that

the hypothetical risks that Petitioners fear actually materialize at an election. For example, before any DRE is used in any Pennsylvania election, the system is tested and examined by the Secretary to determine, among other things, its accuracy, reliability, and safety. See 25 P.S. §§ 3031.5, 3031.7; see also Exs. 9-35. Having passed these tests, each system can be expected with a high degree of confidence to perform as it was intended. See Banfield II, 51 A.3d at 311-12. Additionally, county boards of election must “examine or cause to have examined” the Specified Voting Systems and certify that “the equipment has been tested to ascertain that it will accurately compute the votes cast.” 25 P.S. § 3031.10(e)(3). The county boards must also perform pre- and post-election testing of “central automatic tabulating equipment ... to ascertain that it will accurately count the votes cast.” 25 P.S. § 3031.14 (a). Lastly, the Election Code contains numerous provisions for examining the final election results, via recounts, recanvasses, and contests. See 25 P.S. § 3031.18 (cross-referencing to provisions of the Election Code that govern recounts of various types of electronic voting systems).<sup>26</sup> Rather than initiate and engage in these procedures (that would necessarily involve real-world disputes involving actual elections), Petitioners put their imagined fears before this Court and seek to use the judicial process to address their dissatisfaction with the results of the legislative process. There is

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<sup>26</sup> See also 25 P.S. § 3154(e) (providing for recount or recanvass, depending on the type of voting system at issue, upon the petition of three voters stating that an error, although not apparent on the face of the returns, has been committed); id. at § 3154(g)(1)(i) (providing for automatic recanvassing and recounting, regardless of whether there is a contest, if close election for statewide office); id. at § 3262 (providing for recanvass upon petition of three electors alleging fraud or error in the canvassing); id. at § 3401 (providing that court of common pleas is forum for determination of contested nominations and elections of members of the General Assembly); id. at § 3404 (providing broad powers to the court of common pleas in such contests, including the ability to compel production of the voting machines); id. at § 3457 (setting forth petition requirements that enable electors to challenge a primary or election, other than in an election for Governor or Lieutenant Governor, where petitioners contend such primary or election was “illegal and the return thereof not correct”); id. at §§ 3312-30 (governing contests regarding the races for Governor and Lieutenant Governor).

nothing in the Pennsylvania Constitution that allows Petitioners to ignore these statutory protections and proceed instead with this lawsuit. An en banc panel of this Court agreed. Banfield II, 51 A.3d at 311-12 (holding that “certification and approval process is designed to provide security” and that accuracy is tested before each election).

Second, Petitioners’ Article I, section 5 cause of action was grounded on the legal claim that the Election Code required the Specified Voting Systems to produce voter-verified, software-independent records, without which “audits” or counts of votes could not reliably proceed. As explained above, this legal theory was wrong. See supra Pt. III.A.3. Accordingly, the Specified Voting Systems do not violate the Election Code and cannot be deemed unreliable, unsafe, incapable of accuracy, or otherwise constitutionally suspect merely because they do not provide the certain types of records Petitioners envisioned.

(c) *Petitioners’ “free and equal” claims fundamentally rest on hypothetical “threats” to voting rights, rather than actual instances of disenfranchisement or improper weighting of votes.*

Even if Count VIII were grounded on allegations of machine flaws and malfunctions, as opposed to legal claims about “permanent physical records,” the Secretary is entitled to summary judgment. To sustain an Article 1, section 5 claim, one must show, at a minimum, that he or she has been disenfranchised. 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”). In this case, however, Petitioners have failed to muster any evidence that their votes have been, or necessarily will be, lost, miscounted, or denied an “honest count,” or that they cannot vote for the candidate of their choosing. See Shankey v. Staisey, 257 A.2d 897, 899 (Pa. 1969) (rejecting article I, section 5 challenge to law requiring county board not to certify votes cast on irregular ballots in a primary unless certain conditions

were met, because, notwithstanding the conditions, “each voter can vote for whomever he chooses,” and in general the law promoted “equal” elections).

Indeed, this fact is not even in dispute, as Petitioners have admitted that they cannot identify any confirmed instance of an election result being compromised, altered, or invalidated because of tampering, “malicious code,” or weak passwords. Ex. 44 at 4-9 (Pet’rs’ Suppl. Response to Fourth Set of Discovery Requests). Their own experts admit as much. Ex. 40 at 199:24 – 200:7 (Jones Dep. Tr.) (“Q. Just so it’s clear in the record, Dr. Jones, in each of these ... source code examination reports ... [and] of all of the findings, you have no evidence of any of those findings causing the loss of votes from a DRE machine in Pennsylvania in an election, is that right? A. That’s right.”); Ex. 41 at 199:24 – 201:16 (Lopresti Dep. Tr.) (admitting that no evidence exists of votes being lost in Pennsylvania elections because of password structures, alteration of “log files,” the electronic or physical security, or the encryption on the systems); 208:16 – 209:14 (acknowledging no evidence of “loss of votes in actual election” in Pennsylvania or elsewhere due to writing incorrect data onto DRE); 222:24 – 223:22 (admitting no evidence of votes lost due to “buffer overflow attack”).

In short, while Petitioners may be able to imagine hypothetical elections in which a DRE produces the wrong result, despite ample discovery, they have not identified one instance – not a single actual event – where their votes (or anyone else’s) were denied or discounted because of a fundamental deficiency in one of the Specified Voting Systems. Because Petitioners’ fears that the DREs at issue may not work correctly are entirely speculative, Petitioners have failed to establish a constitutional injury or constitutional violation. See Taylor v. Onorato, 428 F. Supp. 2d 384, 387 (W.D. Pa. 2006) (dismissing claims “based on a potential series of events that may not happen as plaintiffs predict; indeed, may not happen at all ... [and contention] that one or

more of the electronic machines may malfunction on election day causing delays and voter frustration or otherwise not give a correct tally”); Goree v. LaVelle, 523 N.E.2d 1078, 1080 (Ill. App. Ct. 1988) (rejecting a claim under “free and equal” elections clause of the Illinois Constitution where there was nothing in the record that any voter “was denied the right to vote, suffered any restraint or whose vote had not the same influence as any other voter”); Kirk v. Harmon, 557 S.W.2d 220, 221 (Ky. Ct. App. 1977) (finding “free and equal” elections provision of Kentucky Constitution not violated where plaintiffs pointed to “no evidence in the record that a single person was unlawfully deprived of the right to cast a vote for the candidate of his choice”); Mills v. Shelby Cnty. Election Comm’n, 218 S.W.3d 33, 40-41 (Tenn. Ct. App. 2006); cf. Marks v. Stinson, 19 F.3d 873, 888 (3rd Cir. 1994) (a due process violation occurs in the context of elections where “the election process itself reaches the point of patent and fundamental unfairness” and is not established by an “ordinary dispute over the counting and marking of ballots”) (quotation omitted).

In sum, millions of votes in thirteen Pennsylvania elections have been cast on the Specified Voting Systems. These votes can be (and repeatedly have been) recounted (or, more accurately, recanvassed, as the Code requires) and audited. There is no evidence that a single one has been lost because of a failure or flaw in the design or performance of the system. Without actual violations of Petitioners’ rights, there is no viable claim under the Pennsylvania Constitution.

2. Petitioners cannot establish a violation of Article I, section 26 of the Pennsylvania Constitution.

Count IX of the Petition purports to bring a claim under the equal protection provisions of Article I, section 26 of the Pennsylvania Constitution, guaranteeing that “[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of

any civil right, nor discriminate against any person in the exercise of any civil right.” Pa Const. art. I, § 26. Petitioners allege that the certification and use of the Specified Voting Systems “threaten[] Petitioners’ fundamental right to vote.” Ex. 1 ¶ 138. They also assert that their equal protection rights are being violated because “while they are compelled to vote in counties using the certified DRE voting systems, other registered voters in Pennsylvania may vote in precincts or counties using voting systems ... that do not suffer from the defects identified in this Petition.” Id. ¶ 139. Petitioners cannot offer any evidence in support of either claim.

- (a) *Petitioners’ assertion under Article I, section 6 that their right to vote has been denied is duplicative of their claim under Article I, section 5 and fails for the same reasons.*

Article I, section 26 prohibits the denial of “the enjoyment of any civil right.” To the extent Count IX relies on this provision of the Constitution, the claim exactly mirrors the complaint asserted in Count VIII. Compare id. at ¶ 134 (Count VIII, alleging that problems with the Specified Voting Systems “create the risk that persons for whom the majority of voters have not cast their ballots will be declared the election winner in violation of Art. I, § 5) with id. at ¶ 138 (Count IX, claiming that the Specified Voting Systems’ alleged defects and security flaws “create the risk that Petitioners, together with other Pennsylvania voters, [will] have their votes rendered meaningless or, worse yet, deemed cast for a candidate for whom they did not vote” in violation of the rights under article I, section 26). As explained above, however, Petitioners cannot establish a violation of Article I, section 5, and their claim that the Specified Voting Systems infringe upon their right to vote is not saved by reasserting it under Article I, section 26. In re 1991 Pa. Legislative Reapportionment Comm’n, 609 A.2d 132,142 (Pa. 1992) (analyzing whether voter’s “fundamental right to vote” has been subverted under Article I, section 5), abrogated on other grounds, Holt v. 2001 Legislative Reapportionment Comm’n, 38 A.3d 711 (Pa. 2012).



- (b) *Petitioners' equal protection rights are not violated by the use of the Specified Voting Systems.*

Petitioners also cannot establish a constitutional deprivation under the equal protection provisions of Article I, section 26.<sup>27</sup> The certification and use of the Specified Voting Systems are subject to the same law as every other electronic voting system in the Commonwealth. Moreover, as fully discussed above, each of the Specified Voting Systems 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.

- (i) The Specified Voting Systems lack of a voter-verifiable, software-independent record does not violate Petitioners' equal protection rights.

The crux of Petitioners' equal protection claim is that voters in counties that have elected to use voting systems with “verifiable paper ballots that are counted by hand or by optical scanners” do not experience the same “risk” as those in counties that use the Specified Voting Systems. In its August Opinion, however, the Court held that DREs like the Specified Voting Systems meet the requirements relating to the provision of permanent records and statistical recounts.<sup>28</sup> The import of the Court's opinion is that the Election Code cannot be interpreted to

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<sup>27</sup> Article I, section 26 of the Pennsylvania Constitution guarantees that “[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.” Pa Const. art. 1, § 26. The Pennsylvania Supreme Court has stated that this provision “focuses on the assertion that a person has been penalized for the exercise of a constitutional freedom.” Probst v. Commw., Dep't of Transp., 849 A.2d 1135, 1142 n.14 (Pa. 2004) (citing Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 121 (Pa. 1985)). The equal protection provisions of Article I, section 26 are coterminous with, and evaluated under, the same standards as the equal protection clause of the Fourteenth Amendment of the United States Constitution. See Erfer v. Commw., 794 A.2d 325, 332 (Pa. 2002) (rejecting argument that the Pennsylvania Constitution provides broader protections for the right to vote than does the Federal Constitution).

<sup>28</sup> Notably, the Court denied Petitioners' motion for summary judgment on Count XI in a single footnote. Banfield II, 51 A.3d at 314 n.34 (“Because we have concluded that Petitioners

require the types of records and procedures that Petitioners demand. That holding, combined with the fact that Petitioners have offered no relevant, admissible evidence of lost votes or disenfranchisement, requires judgment in favor of the Secretary.

- (ii) The Specified Voting Systems do not have actual defects or security flaws that violate Petitioners' equal protection rights.

Issues related to production of certain kinds of records and recounts are no longer part of the case. Banfield II, 51 A.3d 300. Petitioners are therefore left to argue that there must be a constitutional violation because, despite the Secretary's certification, the Specified Voting Systems suffer from "defects" that subject them to possible breakdown, malfunction, or tampering. Ex. 1 ¶ 139. As explained above, however, the Specified Voting Systems do not suffer from actual defects or flaws. The systems have not failed to register or count votes during any election; they have not been tampered with or manipulated during any election; they have not malfunctioned in such a way as to deny voters their right to vote.

Petitioners' claim rests entirely on a litany of issues that, at this point, are merely speculative, potential problems. At most, Petitioners' recitation of malfunctions caused by ordinary, human errors or software hacks created and performed in classrooms and laboratories highlights only the reality that no voting system, electronic or otherwise, has been invented that is perfect. It hardly states a constitutional violation. Cf. Weber v. Shelley, 347 F.3d 1101, 1107 (9th Cir. 2003); see also Wexler v. Anderson, 452 F.3d 1226, 1232-33 (11th Cir. 2006); Taylor, 428 F. Supp. 2d at 388.

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have not demonstrated that the certifications were illegal ..., we also deny Petitioners' motion for judgment regarding Counts IX and X.”).

3. Petitioners cannot establish a violation of Article VII, section 6 of the Pennsylvania Constitution.

Count X of the Petition asserts that Article VII, section 6's provision that "all laws regulating the holding of elections by the citizens . . . shall be uniform throughout the state" is violated "when some counties of the Commonwealth use the certified DRE voting systems while other counties use, for example, paper-ballot based voting that permits election audits." Ex. 1 ¶¶ 141 (citing the quoted portion of Article VII, section 6), 143.

- (a) *Petitioners' Article VII, section 6 claim is duplicative of their equal protection claim in Count IX and should be dismissed for the same reasons.*

Petitioners' assertion that the use of the Specified Voting Systems violates the constitutional requirement of uniform election laws and regulations is a mere repackaging of their claim that using paper-ballot-based voting systems in some counties violates the equal protection rights of electors in counties using "paperless" DREs. The demand for uniformity of the law in Article VII, section 6 confers no more merit on Petitioners' equal protection claim than the Constitution's explicit equal protection requirement in Article I, section 26. For the reasons set forth above, the Secretary is entitled to summary judgment on Petitioners' equal protection causes of action, however they are denominated.

- (b) *The election laws of Pennsylvania have been applied uniformly to every voter in the Commonwealth.*

If, as is the case here, Petitioners can no longer rely on their fundamental legal theory that the Specified Voting Systems are "flawed" because they lack Petitioner's preferred record-creating capacity, then Petitioners are left with the mundane, and equally meritless, claim that the uniformity requirement in Article VII, section 6 is violated merely because different counties use different voting systems. This alternative claim fails for two reasons.

First, each of the electronic voting systems used in Pennsylvania, including the optical-scan system favored by Petitioners, has been certified and approved by the Secretary pursuant to the process required by the Election Code. Ex. 7 (Shamos Report) ¶ 23 (“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 optical scan systems.”); ¶ 42 (“The Secretary uses exactly the same process for testing optical scan systems, yet the Petitioners do not seek the decertification of any of those systems, which they ought to do if they truly believe the certification process to be inadequate.”); ¶ 101 (“The process used in Pennsylvania to examine optical scan systems is virtually identical to that used to examine DRE systems.... Petitioners are somehow happy with the process that was used to certify the optical scan systems they favor, but claim that the process used to certify the DRE systems they oppose is deficient, despite the fact that it was the same process.”). Moreover, every Pennsylvania elector using an electronic voting system, whether it be one of the Specified Voting Systems or an optical-scan system, has statutory protections, including requirements for recanvasses and recounts, that help ensure the integrity of their votes. While there may be differences in the specific procedures used to perform these tasks, these differences are recognized and accounted for in the Election Code. See 25 P.S. § 3031.18; compare 25 P.S. § 3261 with id. at § 3262. Moreover, these differences “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. That is, each machine presents different circumstances, none of which effect the right of the elector to cast his or her ballot.

Second, the fact that different counties use different systems is expressly allowed by the Constitution. Article VII, section 6 itself expressly provides for uniformity of law “except

further, that the General Assembly shall, by general law, 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 of the Commonwealth, ...” (Emphasis added). The Election Code follows through on this exception by allowing more than one “person or corporation” to seek to have their voting system examined and certified by the Secretary. 25 P.S. § 3031.5(a). There is no restriction in the Election Code that once one system is certified, no other systems may be certified. Similarly, the county boards of elections are enabled to procure a voting system “of a kind approved . . . by the Secretary of the Commonwealth,” that is, they may 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).

**VI. CONCLUSION**

For the reasons set forth above, the Secretary respectfully requests that the Court grant her summary relief and that judgment as a matter of law be entered in the Secretary's favor on Counts II, III, VII, VIII, IX, and X of the Petition for Review.

Respectfully submitted,

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**BUCHANAN INGERSOLL & ROONEY PC**  
Steven E. Bizar, Esq. (PA I.D. No. 68316)  
Robert J. Fitzgerald, Esq. (PA I.D. No. 85142)  
Two Liberty Place  
50 S. 16th St., Suite 3200  
Philadelphia, PA 19102-2555  
Telephone: (215) 665-8700

Shawn Gallagher, Esq. (PA I.D. No. 88524)  
One Oxford Centre  
301 Grant Street, 20th Floor  
Pittsburgh, PA 15219-1410  
Telephone: (412) 562-8800

**OFFICE OF GENERAL COUNSEL**  
Steven V. Turner  
Chief Counsel, Department of State  
Kathleen M. Kotula  
Deputy Chief Counsel, Department of State  
301 North Office Building  
Harrisburg, PA 17120  
(717) 783-0736

*Attorneys for Respondent Carol Aichele,  
Secretary of the Commonwealth*

**CERTIFICATE OF SERVICE**

I, Robert J. Fitzgerald, hereby certify that, on March 21, 2013, I caused true and correct copies of the foregoing to be served by first class mail upon the following:

Michael P. Daly, Esq.  
Meredith N. Reinhardt, Esq.  
Katie L. Bailey, Esq.  
DRINKER BIDDLE & REATH LLP  
One Logan Square  
18th and Cherry Streets  
Philadelphia, PA 19103

Marian K. Schneider, Esq.  
295 East Swedesford Road, #348  
Wayne, PA 19087

Michael Churchill, Esq.  
Benjamin D. Geffen, Esq.  
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA  
United Way Building  
1709 Benjamin Franklin Parkway, 2nd Floor  
Philadelphia, PA 19103

  
\_\_\_\_\_  
Robert J. Fitzgerald