IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARK BANFIELD, *et al.*, **Petitioners,** **v.** **PEDRO CORTÉS,** **Respondent.**	**Docket No. 442 M.D. 2006**

MEMORANDUM OF RESPONDENT PEDRO A. CORTÉS, SECRETARY OF THE COMMONWEALTH, IN OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

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Respondent Pedro A. Cortés, Secretary of the Commonwealth (hereinafter "Secretary"), submits this Memorandum of Law in Opposition to Petitioners' Emergency Motion for Preliminary Injunction ("Motion").[1]

I. INTRODUCTION

To be clear, the interests of security, reliability and accuracy of all votes cast are paramount to all decisions made by the Secretary regarding all elections in the Commonwealth of Pennsylvania. The General Assembly has committed to the sound discretion of the Secretary the determination of whether, in his opinion, electronic voting systems satisfy the various requirements of the Pennsylvania Election Code and the Constitution. Similarly, the General Assembly has committed to the discretion of each of the Commonwealth's sixty-seven counties the choice of what certified electronic voting systems to purchase and utilize for elections.

Petitioners' Motion would have this Court stand in the shoes of the Secretary, second guess his discretionary acts and command at least three non-party counties to take actions that the Secretary is without power to take. However, by law, this discretion is not to be disturbed in the absence of extraordinary circumstances; and Petitioners are unable to meet this extraordinary burden. Indeed, an en banc panel of this Court sharply split, 4-3, as to whether the underlying Petition for Review should even proceed beyond the pleadings stage because the Petition for Review seeks to command the Secretary to exercise his statutory discretion in certain manners and stands to substantially impact the non-party counties. Over the objections of Petitioners, this Court certified for interlocutory appeal to the Supreme Court its April 12 Order

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[1] In the interests of economy, the Secretary has not filed a formal answer to Petitioners' Motion. See Pa. R.A.P. 123(a). The Secretary provided a detailed answer to many of the same or similar averments in the Petitioners' January 25, 2008 Motion to Dissolve Stay, and strongly opposes Petitioners' Motion as more fully set forth in this Memorandum. If the Court so requests, the Secretary will provide a formal answer to Petitioners' Motion.

overruling the Secretary's Preliminary Objections and determined that the April 12 Order presents controlling issues of law as to which there is substantial disagreement and for which interlocutory appeal may assist the ultimate determination of this litigation.

With the Secretary's Petition for Permission to Appeal still pending before the Supreme Court, Petitioners now seek, on an emergency basis, to have this Court command non-party counties to purchase only the voting systems of Petitioners' preference, rather than the voting systems chosen by the counties' boards of elections and other county officials pursuant to those counties' statutory right to purchase and use a certified voting system of their choosing. Despite seeking such extraordinary relief, Petitioners' Motion presents an incomplete picture to this Court. Petitioners' Motion fails to acknowledge the very real – and unfortunate circumstance – that all voting systems suffer from imperfections implicating their reliability, security and integrity, including the very systems Petitioners would have this Court command counties to purchase. Indeed, Petitioners state that they bring this Motion because of recent acts and reports commissioned by the states of Ohio and California that question DREs. Yet, Petitioners wholly ignore that those very reports raise concerns with the same types of systems, i.e., paper-ballot optical scan systems, Petitioners would have this Court foist upon non-party counties.

No voting system has been manufactured that is always 100% accurate, that will never malfunction, that is incapable of being tampered with by malicious persons and that will provide a fool-proof method of tracing all voters' intent in voting. With this reality, the Secretary has certified a variety of systems that, after an examination conducted with the aid of professional consultants, in his opinion, sufficiently meet the requirements of the Election Code. And, as the General Assembly contemplated, the Commonwealth's counties judge for

themselves which system or systems will best serve the localized needs of those counties. Petitioners' Motion should be denied.

II. BACKGROUND

A. Relevant Factual Background

1. The Pennsylvania Election Code and the Powers and Duties of the Secretary and Pennsylvania's Sixty-seven Counties

Pursuant to the Pennsylvania Election Code, 25 P.S. § 2600, et seq. ("Election Code"), the Secretary and the Commonwealth's sixty-seven counties have very distinct roles in the process of selecting and implementing voting systems. Petitioners acknowledge that 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]'." (Petition for Review ¶ 38 (quoting 25 P.S. § 2621(b)).) If the Secretary determines, in his discretion, that a system meets the standards set forth by the Legislature in the Election Code, the system is certified; if the Secretary determines that a system does not meet those standards, it is not certified. See 25 P.S. § 3031.5(b) ("[T]he Secretary of the Commonwealth shall examine the electronic voting system and shall make and file in his office his report . . . stating whether, in his 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. If his report states that the system can be so used and meets all such requirements, such system shall be deemed approved and may be adopted for use at elections, as herein provided.").

Meanwhile, each of Pennsylvania's sixty-seven counties chooses among the systems determined by the Secretary to meet the requirements of the Code, and each county independently purchases the voting system that best meets the localized needs of that county.

See 25 P.S. § 2642(c) (listing among "[p]owers and duties of county boards" the power and duty "[t]o purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines"); id. § 3031.4(a) ("[T]he 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 of the Commonwealth."); id. § 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.")

In addition, in 2002, in the wake of the Florida recount of paper ballots cast in the 2000 Presidential Election, the United States Congress passed the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 et seq. HAVA, among other things, made illegal the use of punch cards and lever voting machines in federal elections. To assist the states in, among other things, updating their voting systems, HAVA allotted funds to the states, including more than $100 million in total funds made available to Pennsylvania pursuant to that statute. In turn, the Secretary disburses HAVA funds, pursuant to a State plan that he adopts in the manner prescribed by HAVA and applicable State law, to the Commonwealth's sixty-seven counties for, among other things, the purchase of HAVA-compliant voting systems.

2. Electronic Voting Systems Certified in the Commonwealth

Currently, eleven different electronic voting systems are certified for use in all elections in the Commonwealth. These systems may be divided into two primary categories: (1) direct recording electronic ("DRE") voting systems, which, Petitioners state, "display ballots . . . and allow a voter to select his choices either with a push button, a dial or a touch screen and then cast his vote" (Petition ¶ 39); and (2) paper-based optical scan systems, which allow a voter to mark a paper ballot that is then read by an optical scanner.

Currently, six DREs are certified for use in the Commonwealth. They include: Danaher 1242; 2 Diebold (now Premier) Accuvote TSX; ES&S iVotronic; Hart eSlate; Sequoia Edge 2; and Sequoia Advantage.

Five paper-based optical scan systems also are certified for use in the Commonwealth. They include: ES&S Automark; Diebold (now Premier); Accuvote OS Central Count; ES&S M100 precinct count; ES&S M650 Central Count; and Hart eScan.

Since the decision to purchase a specific voting system is a particularly local decision, the Commonwealth's counties have, not surprisingly, demonstrated a wide variety of choices in the systems used. Currently, approximately fifty-five counties have chosen to procure DRE voting systems, and approximately fourteen counties (including Wayne County) have chosen optical scan voting systems. Some counties use a combination of systems if that meets their needs and preferences.

3. Northampton, Lackawanna and Wayne Counties

Three counties—Northampton, Lackawanna and Wayne—in 2006 selected the DRE known as WINvote[2] to use in their conduct of elections. After successful use in the 2006 General Primary, the 2006 General Election and the 2007 Municipal Primary, the Secretary in August 2007 was compelled to suspend use of the WINvote due to an error in version 2.0.3 relating to so-called "cross-filed" candidates running in municipal elections, i.e., November elections held in odd-numbered years. (See Letter from Secretary to Mr. Howard Van Pelt, President and CEO of AVS, dated Dec. 28, 2007 (attached hereto as Exhibit 2).) Specifically, WINvote version 2.0.3 included a software error that improperly permitted a voter in a November election to cast more than one vote for a single candidate, listed as the nominee of

[2] The WINvote is manufactured by Advanced Voting Solutions, Inc. ("AVS"), of Frisco, TX.

more than one political party, in elections for offices as to which a voter is permitted to vote for more than one candidate (e.g., school board). This could be accomplished on the WINvote system by the voter selecting the name of one candidate twice—once where the candidate was listed as the nominee of one political party, and again where the candidate is shown as the nominee of another party for the same office. This software error could permit improper double voting only in Pennsylvania "municipal elections"—i.e., November elections held in odd-numbered years. The AVS WINvote was never used in an election in which the "cross-filing" issue could have arisen, as it was not certified until February 2006 and was suspended for use in the November 2007 Municipal Election.

AVS intended to fix the specific error in the next version of the software, version 2.0.4. However, under Pennsylvania law, the new version of the WINvote could be used in Pennsylvania elections only after examination and approval by both a federally-recognized independent testing authority and the Secretary of the Commonwealth. See 25 P.S. § 3031.5. Had the new version been so approved, version 2.0.4 of the WINvote could have been installed on the AVS systems that the three counties had purchased in 2006. However, on November 28, 2007, the Director of Testing and Certification for the U.S. Election Assistance Commission (EAC) terminated the testing of WINvote version 2.0.4. Based on the inability of AVS to obtain federal approval for a version of its WINvote system that would correct a software error in the certified version, see 25 P.S. § 3031.5(a) (requiring all voting systems to be approved by a "federally recognized independent testing authority"), the Secretary de-certified AVS WINvote 2.0.3 on December 28, 2007.[3]

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[3] That version 2.0.3 of WINvote was used in Pennsylvania in 2006 prior to that version's certification does not indicate a failure of the certification process. If a person, including the vendor or an election worker, sells or substitutes a different piece of equipment from the one certified, that is not an act that can be

(continued...)

When the Secretary decertified the WINvote voting system, Northampton, Wayne and Lackawanna Counties were left unable to conduct elections in 2008 using certified voting systems that meet the requirements of HAVA and Pennsylvania law. To assist those counties in procuring necessary and appropriate voting systems in time for use in the 2008 General Primary scheduled for April 22, 2008, and appropriate for use in the 2008 General Election, the Secretary, in his discretion, committed to the counties that the Commonwealth would subsidize their procurements by making grants of available HAVA funds. Specifically, the Secretary advised the counties that he would provide for this purpose: approximately $2 million to Northampton County; approximately $1.7 million to Lackawanna County; and approximately $294,000 to Wayne County.[4]

During a "vendor fair" in January 2008, the three counties reviewed a variety of certified voting systems, including DREs and paper-based optical scan systems. In addition, at least Northampton County conducted public meetings regarding that county's decision. According to media reports, during that public meeting or meetings, Petitioner Alan Brau lobbied Northampton County officials to purchase a paper-based optical scan system, and presumably, Petitioner Brau then raised the same or similar concerns that Petitioners raise in this litigation. See Joe Nixon, County: It's Sequoia by a landslide, The Morning Call (Jan. 18, 2008) ("Earlier in the day, Brau of Hanover Township urged the county to hold off on a decision, and

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(continued...)

prevented by the certification process. In any event, WINvote 2.0.3 was ultimately certified in April 2007 after an examination in December 2006-January 2007.

[4] These figures approximated the amounts that these counties paid AVS to purchase the WINvote system in 2006.

use hand-counted paper ballots or optically scanned paper ballots in April.") (attached as Exhibit 3).

Tellingly, on January 17, 2008, Northampton County – over the objections and lobbying efforts of Petitioner Brau – chose to purchase the AVC Advantage, a DRE voting system manufactured by Sequoia Voting Systems, Inc. ("Sequoia"), of Oakland, California. Id. Northampton County apparently has since entered into a contract with Sequoia. See Joe Nixon, No worries over voting machine challenge, The Morning Call (Jan. 28, 2008) (attached as Exhibit 4). (A version of Sequoia's AVC Advantage has been used in every election held in Montgomery County since 1996, and the Montgomery County Board of Elections plans to use that system again in 2008.)

In January, 2008, Wayne County chose to purchase a paper-based optical scan voting system, the Model 650 Central Ballot Counter (M650), manufactured by Election Systems & Software, Inc. ("ES&S"), and the AutoMARK™, also marketed by ES&S. See This Morning, The Times-Tribune.com (Feb. 2, 2008) (attached as Exhibit 5); Megan Reiter, Wayne County selects new voting machines, The-Times Tribune.com (Jan. 31, 2008) (attached as Exhibit 6). It appears that, to date, Lackawanna County has not decided which replacement voting system it will procure.

B. Relevant Procedural Background

1. The Secretary's Preliminary Objections and His Still Pending Permission to Appeal this Court's Narrowly-divided April 12 Order Overruling His Preliminary Objections

On August 15, 2006, twenty-five individuals ("Petitioners") filed a Petition for Review Addressed to the Court's Original Jurisdiction ("Petition for Review"), purporting to raise ten separate counts challenging the Secretary's discretionary certification of seven DRE voting systems. The Petition for Review seeks primarily a writ of mandamus in the form of "an

Order directing the Secretary to decertify" all certified DREs. (Petition for Review ¶ 6; see also id. (Counts I, II, III, IV, V, VIII, IX and X).)

Six days later, the Secretary filed Preliminary Objections raising several grounds for immediately dismissing the Petition for Review, including objections (1) asserting that Petitioners improperly seek to have this Court substitute its judgment for decisions statutorily committed to the discretion of the Secretary and (2) contending that since the requested de-certification of DREs would directly, immediately and substantially affect the interests of at least fifty-six counties, those counties are indispensable parties to Petitioners' action. (See, e.g., Preliminary Objections Nos. 1 (demurrer to mandamus), 2 (sovereign immunity as to mandatory injunctive relief), 3 (nonjoinder of indispensable parties).)

In an April 12, 2007 Order ("April 12 Order"), a narrowly-divided 4-3 en banc panel of this Court overruled the Secretary's Preliminary Objections. See Banfield v. Cortés, 922 A.2d 36 (Pa. Commw. Ct. 2007). (A copy of the April 12 Order is attached as Exhibit 8.) The Honorable Rochelle S. Friedman authored a supporting opinion in which Judges Smith-Ribner, Pellegrini and Simpson joined ("April 12 Majority Opinion"). (A copy of the April 12 Majority Opinion is attached as Exhibit 9.) Judge Mary Hannah Leavitt, joined by now-President Judge Leadbetter and Judge Cohn-Jubelirer, wrote a dissenting opinion ("April 12 Dissenting Opinion"). (A copy of the April 12 Dissenting Opinion is attached as Exhibit 10.)

The three dissenting judges would have sustained the Secretary's demurrer as to all but one claim, agreeing that a court order requiring the Secretary to decertify DRE voting systems does not state a proper claim in mandamus. (April 12 Dissenting Opinion at 6 ("Because the application of the standards in the Election Code and the manner of examination

requires the exercise of the Secretary's discretion, a writ of mandamus cannot issue.").)[5] The April 12 Dissenting Opinion also concluded that at least fifty-six of the Commonwealth's sixty-seven counties are indispensable parties to this action because of the direct, immediate and substantial impact that the decertification of DREs would have on their interests. (Id. at 12 ("[The County Boards of Elections] will be affected by the decision of this Court, should it decide to order the Secretary to decertify the seven DRE voting systems. Their absence leaves this Court without jurisdiction over Counts I, II, III, IV, V, VIII, IX, and X of the petition.") In other words, three dissenting judges would have dismissed nearly this entire action at the pleadings stage.

The Secretary immediately filed an application in this Court requesting that the April 12 Order be amended to include language, as required by 42 Pa. C.S. § 702(b), to allow the Secretary to file a petition for permission to appeal in the Supreme Court. The Secretary identified to this Court six questions presented by the April 12 Order that involve controlling issues of law as to which there are substantial grounds for difference of opinion and the interlocutory appeal of which might materially advance the ultimate termination of the case. Those controlling issues of law include:

> 1. Whether Counts I-V and VIII-X of the Petition, in which Petitioners seek to have this Court order the Secretary to decertify the challenged DREs, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.
>
> 2. Whether Counts III and VII of the Petition, in which Petitioners seek to have this Court order the Secretary to establish

[5] All seven judges did agree that Count VI could survive, although the dissenting judges would have restricted the relief available under that single count. Count VI of the Petition for Review, which sought a writ of mandamus requiring the Secretary to reexamine some of the certified DREs is not at issue in Petitioners' Motion for Preliminary Injunction.

> uniform testing criteria for the certification of voting systems, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.
>
> 3. Whether the approximately 56 counties that have procured the challenged DREs are indispensable parties as to Counts I, II, III, IV, V, VIII, IX and X of the Petition.

(Secretary's Application for Relief to Amend the April 12 Order (attached as Exhibit 11 (without corresponding exhibits)).) On April 30, 2007, this Court granted that requested relief and, in a per curiam order, so amended the April 12 Order ("April 30 Order"). (A copy of the April 30 Order is attached as Exhibit 12.)

On May 10, 2007, the Secretary filed in the Pennsylvania Supreme Court a Petition for Permission to Appeal the Court's April 12 Order (as amended by the April 30 Order) ("Petition for Permission to Appeal"). Petitioners filed an opposition brief to the Secretary's Petition for Permission to Appeal on May 24, 2007. The Supreme Court has not ruled on the Secretary's Petition for Permission to Appeal, which is docketed at No. 70 MM 2007.

2. Petitioners' Motion for Preliminary Injunction

On January 25, 2008, Petitioners filed with this Court a motion to dissolve the May 11, 2007 stay previously ordered by this Court so that the Court "may hear on an expedited schedule an emergency motion for preliminary injunction . . . [b]ecause three counties need to replace, in a timely manner for the April 22 primary election, a voting system decertified by the Secretary last month," (Pet'rs Mot. to Dissolve at 1) (emphasis from original omitted).[6] Petitioners simultaneously filed their Motion for Preliminary Injunction, accompanied by a memorandum of law ("Petitioners' Memorandum"). Petitioners state that they filed this Motion

[6] The Honorable Barry F. Feudale granted Petitioners' Motion to Dissolve by Order entered on February 1, 2008.

because "Wayne, Lackawanna and Northampton [Counties], must purchase new voting systems for use in the April 22, 2008 primary." (Pet'rs Mem. at 2).

Petitioners' Motion did not initially include a wherefore clause or a proposed order. However, at the direction of the Court's Prothonotary, Petitioners, on January 28, 2008, filed an amended final page of their Motion and a proposed order. The proposed order seeks the following relief:

> [T]he [Secretary] shall suspend the acquisition, purchase, lease or otherwise, of the certified versions of the following six (6) DRE voting systems at issue in this litigation until the final disposition of this case on the merits:
>
> 1. AVC Edge II manufactured by Sequoia Voting Systems, Inc.;
> 2. AVC Advantage manufactured by Sequoia Voting Systems, Inc.;
> 3. AccuVote TSX manufactured by Premier Election Systems (formerly Diebold Election Systems);
> 4. iVotronic manufactured by Election Systems and Software, Inc.;
> 5. eSlate, manufactured by Hart Intercivic, Inc.;
> 6. ELECTronic 1242 manufactured by Danaher Controls, Inc.
>
> AND IT IS FURTHER ORDERED that the Secretary shall not use state funds to assist county boards of elections from acquiring, by purchase, lease or otherwise, such voting systems.

(Pet'rs Proposed Order at 1-2.) Unlike the Petition for Review, Petitioners' Motion does not seek to have this Court order the de-certification of any DREs. (Id.) In fact, Petitioners state expressly that they do not seek an injunction order that would preclude any county board of elections from using a voting system that it has been using. (Pet'rs Mem. ¶ 26) ("Petitioners do not seek to open this case at this time to prevent the use of any machines currently certified and already purchased, but merely seek to prevent the state from permitting counties to spend $4 million of state money on purchasing new [DREs] . . . .").)

III. ARGUMENT

A. The Court Should Summarily Deny Petitioners' Motion for Preliminary Injunction Because it Seeks Relief that is Not Legally Cognizable.

As a threshold matter, the Court should summarily deny Petitioners' Motion because (1) it seeks relief that this Court simply may not issue under the law; and (2) it will immediately, directly and substantially impact at least three non-party counties that are indispensable parties to this Motion, if not this action.

Petitioners are clear on one thing: the Motion does not seek the same relief as the Petition for Review. Petitioners state that "[t]hey do not, by this motion, seek to decertify and require replacement of all DREs currently in use in Pennsylvania." (Pet'rs Mem. at 6; see also Motion to Dissolve at ¶ 13 ("Petitioners do not seek to open this case at this time to prevent the use of any machines currently certified and already purchased . . . .").) Instead, they only "seek a moratorium on county-wide new purchases of DREs," (Pet'rs Mem. at 6), which they describe as "preventing the Secretary from allowing the electronic voting machines challenged in this case [to] be purchased by three counties seeking new machines because of the recent decertification by the Secretary of the DRE used by them." (Pet'rs Mem. Supp. of Motion to Dissolve at 1.) In addition, Petitioners' Motion seeks to enjoin the Secretary from using "state funds to assist county boards of elections from acquiring, by purchase, lease or otherwise, such voting systems." (Pet'rs Proposed Order.)

1. Petitioners' Motion Seeks an Improper Mandatory Injunction and/or Mandamus Relief that is Not Legally Cognizable

First, Petitioners improperly seek a mandatory injunction requiring the Secretary to take affirmative steps to preclude counties from purchasing DREs. It is axiomatic that this Court may not issue a mandatory injunction against the Secretary. See 1 Pa. C.S. § 2310

(sovereign immunity);[7] 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. Pennsylvania State Police, 892 A.2d 54, 59, 61-62 (Pa. Commw. Ct.) (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), allocatur denied, 588 Pa. 760, 903 A.2d 539 (2006).

Second, to the extent Petitioners seek a preliminary injunction in the nature of mandamus relief, this Court could only order the Secretary to take nondiscretionary, ministerial actions that the Secretary is both duty-bound and empowered to take pursuant to Commonwealth law. See Pennsylvania Dental Ass'n v. Pennsylvania Ins. Dept., 512 Pa. 217, 227, 516 A.2d 647, 652 (1987). Nothing in the Election Code empowers the Secretary to take the action Petitioners request this Court to mandate the Secretary to take: dictating to the counties which certified voting systems they may purchase.

Pursuant to the Election Code, the Secretary examines voting systems to determine if they meet the criteria set forth in the Code. See 25 P.S. § 2621(b) (listing among the "[p]owers and duties of the [S]ecretary of the [C]ommonwealth" the duty "[t]o examine and reexamine voting machines, and to approve or disapprove them for use in this State, in accordance with the provisions of this act").[8] The Secretary does not purchase any voting

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[7] None of the limited, specified instances where the General Assembly has waived sovereign immunity apply here. See 42 Pa. C.S. §§ 8521, 8522.

[8] If the Secretary determines, in his discretion, that a system meets the standards set forth by the General Assembly in the Election Code, the system is certified; if the Secretary determines that a system does not meet those criteria, it is not certified. See 25 P.S. § 3031.5(b) ("[T]he Secretary of the Commonwealth shall examine the electronic voting system and shall make and file in his office his report . . . stating whether, in his opinion, the system so examined can be safely used by voters at elections as provided in this act and meets all of the

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systems. Rather each of Pennsylvania's sixty-seven counties chooses among the systems that the Secretary, has determined, in his opinion, meet the requirements of the Code, and each county independently purchases the voting system that best meets the needs of that county. See 25 P.S. § 2642(c) (listing among "[p]owers and duties of county boards" the power and duty "[t]o purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines"); id. § 3031.4(a) ("[T]he 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 of the Commonwealth."); id. § 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.")[9]

Accordingly, this Court should summarily dismiss Petitioners' Motion because it seeks to have this Court order the Secretary affirmatively to take an action that the Secretary is not empowered (let alone duty-bound) to take.

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requirements hereinafter set forth. If his report states that the system can be so used and meets all such requirements, such system shall be deemed approved and may be adopted for use at elections, as herein provided.")

[9] Failing to find any support in the Election Code for their notion that "[t]he Secretary has the power to order that no new purchases of DREs at issue in this litigation shall be made during the pendency of the litigation," (Pet'rs Mem. at 6), Petitioners infer that the Secretary has such a power because "[i]n August 2007, the Secretary suspended the certification of the AVS WINvote," id. As detailed in the Relevant Factual Background section of this Memorandum, the circumstances underlying the Secretary's revocation of the AVS WINvote are entirely inapposite, and nothing in the history of the AVS WINvote demonstrates that the Secretary has the power to prevent or direct the purchase of any certified voting system. The history of the AVS WINvote's certification revocation demonstrates only that the Secretary acted in accordance with his powers to certify machines (and revoke certifications), and not in the exercise of any purported power to bar purchases of certified voting systems or any other power not provided for in the Election Code.

2. Petitioners' Motion Should Be Summarily Denied for Failure to Join At Least Three Indispensable Parties: Northampton, Lackawanna and Wayne Counties

A party is indispensable when "his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." Polydyne, Inc. v. City of Philadelphia, 795 A.2d 495, 496 n.2 (Pa. Commw. Ct. 2002). The Supreme Court has defined the "indispensable party consideration" as involving at least the following: "1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?" CRY, Inc. v. Mill Service, Inc., 536 Pa. 462, 468-69, 640 A.2d 372, 375 (1994). In addition, "[w]hether a court lacks jurisdiction due to the failure to join an indispensable party may be raised at any time or sua sponte." Polydyne, 795 A.2d at 496 n.2.

At the time of the Court's April 12 Order overruling the Secretary's Preliminary Objections, the primary relief sought by the Petitioners impacting the Commonwealth's counties was the court-ordered de-certification of DREs. (See, e.g., Petition for Review at 26 (demanding an order "[d]irect[ing] the Secretary to immediately de-certify the DRE systems").) The Court overruled the Secretary's Preliminary Objection that the counties are indispensable parties to the Petition for Review (and its requested form of relief) in large part because the Secretary always "could de-certify a DRE at any time based solely on the statutory requirements for certification, and counties using certified DREs must be prepared for that possibility." (April 12 Majority Opinion at 10.)[10]

[10] The dissent would have found these counties to be indispensable parties based on the relief sought in the Petition (April 12 Dissenting Opinion at 12-13), and that issue remains pending before the Supreme Court as one of the questions presented in the Secretary's Petition for Permission to Appeal.

Now, Petitioners' Motion seeks relief different than the relief sought in the Petition for Review: Petitioners' Motion does not seek an order de-certifying the DREs, but actually an order requiring the Secretary to deny to the counties their statutory right to acquire a certified system of their choice and an order preventing the Secretary from using "state funds to assist county boards of elections [in] acquiring [DREs], by purchase, lease or otherwise." (Pet'rs Prop. Order at 2).) In short, these counties have a statutory right to chose among all certified voting systems, that right is essential to Petitioners' Motion – if not this case – and justice cannot be afforded without those counties' joinder, at least for the purposes of responding to this Motion. There can be no argument that the non-party counties, including at least Lackawanna, Northampton and Wayne Counties, "must be prepared for the possibility" (April 12 Majority Opinion at 10) that the Secretary would prevent those counties from exercising their statutory right to procure otherwise certified and available voting systems. See, e.g., Waksmunski v. Delginis, 391 Pa. Super. 37, 44-45, 570 A.2d 88, 92-93 (1990) (holding that township was an indispensable party to an action to declare a roadway public because it would be responsible for maintaining the road); Borough of Wilkinsburg v. Horner, 88 Pa. Commw. 594, 490 A.2d 964 (1985) (reversing order granting preliminary injunction where sanitation company that had entered into contract with borough was an indispensable party to taxpayer's suit against borough to enjoin performance of contract that allegedly was in violation of borough's code).

In addition, even if the Court were to order all of the relief sought by Petitioners' Motion and issue an order compelling the Secretary to order Northampton and Lackawanna Counties not to purchase any DREs, there are serious questions as to whether Northampton and Lackawanna Counties would be under any legal obligation to follow such an edict by the Secretary. Where such doubt exists, a party should be joined to the action. See CRY, 536 Pa. at

470, 640 A.2d at 376 (finding the non-party Department of Environmental Resources (DER) to be an indispensable party where the DER indicated it might not comply with any order resulting from the litigation).

Having failed to join at least three indispensable party counties to this Motion or action, Petitioners' Motion should be summarily denied.[11]

B. Petitioners' Motion Must Overcome an Incredibly High Burden

Even if Petitioners' Motion is not summary denied – and it should be – Petitioners' Motion must meet an extraordinary burden to obtain preliminary injunctive relief.

> First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.
>
> Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings.
>
> Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct.
>
> Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits.
>
> Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity.

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[11] The April 12 Majority Opinion determining that the Commonwealth's counties are not indispensable is not law of the case. First, whether a court lacks jurisdiction for non-joinder of an indispensable party is an issue that may be raised at any stage of proceedings. Polydyne, 795 A.2d at 496 n.2. Second, Petitioners' Motion seeks different relief than the Petition for Review; and, accordingly, the counties' indispensability to the relief sought in this Motion has not yet been decided. Third, the April 12 Opinion concerned an entirely different procedural stage, and Petitioners now must overcome a far more difficult burden than they did to survive the Secretary's Preliminary Objections. See, e.g., Mellon Bank, N.A. v. National Union Ins. Co. of Pittsburgh, 768 A.2d 865, 870-71 (Pa. Super. Ct. 2001). Finally, for whatever its persuasive effect may be, the prior ruling is not conclusively binding as the doctrine "only applies to issues decided by appellate courts upon appeal. . . . This case is heard under [the Court's] original jurisdiction." Pennsylvania Ass'n of State Mental Hospital Physicians v. State Employees Retirement Bd., 31 Pa. Commw. 151, 156, 375 A.2d 863, 865 (1977).

> Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 573 Pa. 637, 647, 828 A.2d 995, 1001 (2003). Where a party seeks a mandatory injunction requiring another party to take affirmative action, a party's burden is even more daunting. "A mandatory preliminary injunction is an extraordinary judicial act and should be issued only in rare or exceptional cases, and certainly more sparingly than a preliminary injunction that is merely prohibitory. . . . [T]he court must exercise extreme care and act in only the clearest of circumstances when a mandatory preliminary injunction is requested." Standard Pa. Prac. 83:9 (2008) (emphasis added).

Here, however, because the Secretary is immune from mandatory injunctions, Petitioners may seek court-mandated, affirmative action by the Secretary only through a writ of mandamus. See, e.g., Germantown Bus. Assoc. v. City of Phila., 111 Pa. Commw. 503, 534 A.2d 553 (1987) (dismissing plaintiffs' request for a mandatory injunction requiring the City to enforce City Code provision because the possibility of mandamus relief provided an adequate remedy at law even if plaintiffs could not meet the standards for mandamus to issue). Mandamus "will only lie . . . where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy." Pennsylvania Dental Ass'n. v. Pennsylvania Ins. Dept., 512 Pa. 217, 227, 516 A.2d 647, 652 (1987). Further, the act sought to be compelled must be ministerial or nondiscretionary; the Court may not substitute its judgment or discretion for that of the Secretary, nor, as the Pennsylvania Supreme Court has stated, may the Court undo the discretionary decision of an official merely because it was "wrong":

> [The Court, in considering mandamus,] may not specify how that discretion is to be exercised nor require the performance of a particularly discretionary act. The writ cannot be used to control the exercise of discretion or judgment by a public official . . . ; to review or compel the

> undoing of an action taken by such an official . . . in good faith and in the exercise of legitimate jurisdiction, even though the decision was wrong; to influence or coerce a particular determination of the issue involved; or to perform the function of an appeal or writ of error.

Id. at 227-28, 516 A.2d at 652 (citations omitted).[12]

C. Petitioners' Motion Does Not Satisfy the Heavy Burdens for Preliminary Injunctive or Mandamus Relief

1. Petitioners Will Suffer No Immediate and Irreparable Harm.

Petitioners' Motion argues that that there are three ways Petitioners will suffer immediate and irreparable harm without the requested relief: (a) "that approximately $4 million of taxpayer funds" will be spent by counties that "will have to discard yet a second electronic voting system after a trial on the merits in this case"; (b) that Petitioners will suffer "per se irreparable harm" by virtue of alleged violations of statute; and (c) that Petitioners supposedly "will be subjected to the unnecessary risk of the reliability and security of these machines". (Pet'rs Mem. at 4.) None of these alleged "injuries" constitute immediate and irreparable harm.

(a) The Expenditure of Public Funds Does Not Harm Petitioners

First, Petitioners should not be heard to cry foul regarding the financial impact upon the counties for their purchase of any of the voting systems that Petitioners have challenged. In opposition to the Secretary's Preliminary Objections, Petitioners specifically argued that the financial impact on the counties and their board of elections arising from a court-

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[12] It should be noted that a party cannot avoid the strict limitations of mandamus through some sort "preliminary" mandamus. Ordinarily, to obtain mandamus relief prior to a trial on the merits the party must satisfy the requirements of peremptory mandamus, which requires a demonstration that no triable issues of fact remain – a standard that Petitioners clearly cannot meet to obtain mandamus relief now. See Pa. R. Civ. P. 1098; see also Equitable Gas Co. v. City of Pittsburgh, 507 Pa. 53, 488 A.2d 270 (1985) (holding that peremptory mandamus may not issue "where there are triable issues of fact"); Kaplan v. Allegheny County Com'rs, 45 Pa. D. & C.3d 396, 410 (Pa. Com. Pl. 1986) ("The motion for peremptory judgment is the equivalent of an application for a preliminary injunction."); Goodrich-Amram. § 1098:1 ("A motion for peremptory judgment in an action of mandamus is the equivalent of an action for a preliminary injunction.").

ordered de-certification did not render the counties necessary or indispensable parties. (Pet'rs Opp. Br. to Prelim. Objs., dated October 25, 2006, at 28 ("The fact that the counties have already purchased the machines <u>and may suffer a financial consequence</u> if they purchased them in reliance on the Secretary's certification is important but not legally material to a finding on the merits of the case.") (emphasis added); <u>id.</u> ("Pennsylvania's franchise is not for sale and <u>does not depend on whether the counties will lose money</u> because the Secretary failed to comply with the Election Code.") (emphasis added). Petitioners cannot have it both ways. They cannot, on the one hand, protest against the necessity of joining the counties and then, on the other hand, demand extraordinary preliminary injunctive relief to protect those counties from suffering the financial consequences associated with their purchase of "a second electronic voting system."

<u>Second</u>, to the extent Petitioners' Motion is limited to a concern of the expenditure of federal HAVA or state funds (as opposed to county funds), Petitioners' Motion fails utterly to address the fact that money must be spent – and must be spent now – on new voting systems. Northampton, Lackawanna and Wayne Counties must procure new voting systems in time for the April 22 primary elections. If the Court grants all of the requested relief in this Motion, public funds still will be spent on voting systems. The only difference will be that, rather than those funds going toward the purchase of the certified voting system of the non-party counties' choice, the funds will be spent on Petitioners' preferred voting system against the will of the counties. <u>Cf.</u> <u>Rodes v. Anckaitis</u>, 2 Pa. Commw. 328, 330, 279 A.2d 782, 783 (1971) ("We cannot enjoin the lawful payment of these funds because of plaintiffs' fear that the recipient may put them to a use inconsistent with their desires.") Hardly demonstrating a threat of immediate and irreparable harm to the Petitioners, this actually demonstrates yet another

reason why the injunction should not issue. See infra 26-28(explaining that the balance of harms weighs against granting Petitioners' Motion).

Third, Petitioners' purported harm arising from the expenditure of public funds on the certified voting systems of the counties' choice is hardly a "substantial, direct, and immediate" injury sufficient to confer standing to sue, let alone an immediate and irreparable harm justifying preliminary injunctive relief. See Application of Biester, 487 Pa. 438, 442-43, 409 A.2d 848, 851 (1979). The Supreme Court has recognized that a purported harm based on "the prevention of a waste of tax revenue as a result of expenditures which will occur and are illegal" is "an interest which is not immediate because the detriment to the taxpayer is too remote since he is not directly or specially affected by the loss." Id.; see also Boady v. Phila. Municipal Auth., 699 A.2d 1358, 1360 (Pa. Commw. Ct. 1997) (finding injury too remote where plaintiff taxpayers challenged a "failure to provide equipment [to the City of Philadelphia] within the specifications of the . . . contract will cost . . . taxpayers more money than would otherwise be necessary to operate and maintain the system.")

Fourth, Petitioners' Motion assumes without any foundation or support that a subsequent de-certification of a DRE purchased now by Northampton or Lackawanna Counties would result in those DREs being "sold for scrap." For example, as demonstrated by in the Declaration by Dr. Michael I. Shamos ("Shamos Declaration") (attached as Exhibit 1), it is possible that a de-certified DRE may be remediated and certified for use based on the installation of new software or firmware; in which case they would hardly need to be "scrapped." (Shamos Decl. ¶ 53.)

(b) Petitioners' Speculative Harm of Being "At Risk" of Losing Their Vote is Not an Immediate and Irreparable Harm

Petitioners' Motion asserts that Petitioners will have "decreased confidence in elections" and be "at risk of the reliability and security of the machines" (Pet'rs Mem. at 4). These assertions simply are not immediate and irreparable injuries for which the extraordinary relief sought in Petitioners' Motion may issue.

First, in a case of striking similarity, such arguments were rejected by the United States District Court for the Western District of Pennsylvania. See Taylor v. Onorato, 428 F. Supp. 2d 384 (W.D. Pa. 2006). In Taylor, the plaintiffs challenged Allegheny County's implementation of the ES&S iVotronic, one of the DRE voting systems challenged by Petitioners. See id., 428 F. Supp. 2d at 385. The Taylor plaintiffs sought to enjoin the use of the iVotronic, arguing, inter alia, that voters would be irreparably harmed as a result of violations of their rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution – claims analogous to those set forth in the Petition for Review. The court conducted a hearing of more than three days in which witnesses testified for both plaintiffs and defendants regarding the purported lack of security and accuracy in the iVotronic DRE, and generally, in DRE systems that do not utilize a paper voter verification feature. In denying the request for a preliminary injunction, the District Court cast doubt on whether the plaintiffs could establish an actual injury:

> Their claims are based on a potential series of events that may not happen as plaintiffs predict; indeed, may not happen at all. Principally, plaintiffs contend 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. . . .
>
> [I]t is of course possible that one or more of the electronic machines may malfunction on election day, just as the lever machines in the past have from time-to-time malfunctioned on election day. 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.

Id. at 387-88. Petitioners' theoretical injuries of having "decreased confidence in elections" and "being subjected to the unnecessary risk of the reliability and security of the machines" are simply not immediate injuries for which the relief sought may issue.

Second, this Court should reject Petitioners' attempts to sidestep the fact that their perceived harms are inherently speculative and theoretical by arguing that injunctive relief should issue now because it is possible that a DRE purchased by Northampton and Lackawanna Counties could be tampered with undetectably. All voting systems "theoretically" could be tampered with undetectably. In fact, Petitioners' requested relief could very well subject Northampton and Lackawanna County voters to a greater risk of "losing" their votes, including in extremely difficult to detect manners.

Make no mistake: far from merely temporarily enjoining the purchase of DREs, Petitioners' Motion would have this Court mandate the purchase of paper-based optical scan systems. However, Petitioners' preferred voting systems – optical scans – may be tampered with or otherwise fail in ways that would be undetectable or nearly undetectable. In fact, the Ohio EVEREST Report that Petitioners rely upon, states, among other things, that optical scan systems can be fooled into counting duplicate ballots from a single voter, i.e., accepting counterfeit ballots as well as real ones. Similarly, optical scan systems, like the DREs Petitioners attack, run on software that is subject to manipulation and thus could no more be certified pursuant to Petitioners' standards than the DREs. (See Shamos Decl. ¶ 77; see, e.g., Project Everest Report of Findings at 21.) While Petitioners put their faith in the paper ballot portion of the optical scan system, there are commonly known frauds perpetrated on paper ballot systems for which there is no known way to eliminate them. (Id. ¶ 61). Through a low-tech "sleight of

hand," one can mark a ballot to overvote it (thereby invalidating it as to the overvoted race) or slip an extra ballot into the scanner. (Id. ¶ 79). If an intruder can obtain physical access to election records, he can tamper with them whether they are in paper or electronic form. (Shamos Decl. ¶ 63).

Third, the fact that no voting system is perfect underscores the importance of permitting counties to choose the certified voting systems that, in their judgment, best suit their localized needs. Included in a locality's inquiry to purchase a voting system – DRE, optical scan or other – is a determination of what system will be most safely and reliably deployed in that locality. Tellingly, at least one of the Petitioners, Petitioner Alan Brau, lobbied Northampton County officials in January 2008 to not purchase any DRE, presumably for the same reasons Petitioners filed their Petition for Review and have now filed their Motion for Preliminary Injunction. See Joe Nixon, County: It's Sequoia by a landslide, The Morning Call (Jan. 18, 2008) (attached as Exhibit 3). Notwithstanding Petitioner Brau's protests, Northampton County still chose to purchase the Sequoia Advantage. This is a decision statutorily committed to the counties, and appropriately so.

(c) Petitioners' Reliance on Crowe is Misplaced and Petitioners Will Not Suffer *Per Se* Irreparable Harm

Unable to identify any truly immediate, particularized injury that they will suffer due to the Secretary's partial reimbursement to counties for their costs incurred in purchasing replacement, certified DREs, Petitioners seek refuge behind Crowe v. School District of Pittsburgh, 805 A.2d 691 (Pa. Commw. 2002), for the proposition that a "violation of an express provision of a statute is per se irreparable harm for purposes of a preliminary injunction." (Pet'rs Mem. at 4.) Petitioners' reliance on Crowe is misplaced. Petitioners' Motion – unlike the Petition for Review – challenges the non-party counties' planned purchases of certified voting

systems and the Secretary's provision of HAVA funds to partially subsidize those purchases. Petitioners' Motion does not seek the de-certification of any of the DREs due to any purported violation of statute. (See, e.g., Pet'rs Prop. Order.) By statute, counties have the right to buy any certified machine. See 25 P.S. § 2642(c) (listing among "[p]owers and duties of county boards [of elections]" the power and duty "[t]o purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines"); id. § 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.") Similarly, the Secretary, acting in accordance with the requirements of HAVA, see generally 42 U.S.C. §§ 15301-02, 15401-08, 15481-85, has discretion in the disbursement of HAVA funds. Simply put, none of the conduct sought to be enjoined by Petitioners' Motion constitutes a violation of statute.

2. Granting Petitioners' Motion Will Result in Substantial Harm to the Secretary and Non-party Counties

Ironically, granting Petitioners' Motion will result in the very harms that the Motion supposedly seeks to prevent: violations of statutes, waste of public funds and a requirement to vote on imperfect systems that the counties do not want and that theoretically are capable of being tampered with undetectably. Whereas Petitioners' purported harms range from the speculative to the abstract, the Secretary and the non-party counties would certainly be harmed should the injunction issue.

The Secretary will be substantially harmed in at least two manners: First, the relief sought would require the Secretary to violate the Election Code, and it is axiomatic that the Secretary will suffer "substantial harm" if compelled to violate the law. As demonstrated above, neither the Election Code nor any other law empowers the Secretary to dictate to the counties

what certified voting systems they should or should not purchase; yet, Petitioners' Motion seeks an order requiring the Secretary to order counties to purchase specific certified voting systems over other certified voting systems. Accordingly, any order granting such relief actually would constitute a judicial mandate for the Secretary to violate the law.

Second, the injunction would result in judicial micromanaging of the Secretary's discretion, whether by an "over-the-shoulder" monitoring of the Secretary's examination process or by controlling the Secretary's disbursal of federally-allotted HAVA funds. Strong, bedrock principles counsel against judicial interference in the discretionary acts of government officials. Indeed, three judges of this Court's en banc panel would have dismissed nearly this entire action at the outset because "[t]he Secretary's decision to approve, or to disapprove, electronic voting systems requires the exercise of discretion and, as such, cannot be compelled by writ of mandamus." (April 12 Dissenting Opinion at 2.) Moreover, even the majority recognizes that Petitioners will not be able to obtain relief after a trial on the merits unless Petitioners prove that "the exercise or non-exercise of discretion is arbitrary, fraudulent, or based upon a mistaken view of the law." (April 12 Majority Opinion at 6.) These same principles merit the avoidance of interference with the Secretary's discretionary acts until a full trial on the merits (if ever), as opposed to a near-sighted, expedited motion.

The non-party counties also would be substantially harmed. First, the non-party counties would be denied their statutory right to choose the certified voting systems of their choice. See, e.g., 25 P.S. § 2642(c); id. § 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.")

Second, the non-party counties would be forced to purchase machines they do not want. Regardless of whether injunctive relief is issued, the non-party counties must purchase voting systems immediately. For example, should Petitioners be unsuccessful in this action on the merits of their claims, the non-party counties would be left with voting systems that they did not want to purchase. By way of another example, even if this Court ultimately were to de-certify the very DREs purchased now by Northampton County (and Lackawanna County, should it procure a replacement DRE), it is entirely possible that relatively low-cost fixes (e.g., in-field security measures or software updates) could be employed to enable such systems to re-gain certification. (See, e.g., Shamos Decl. ¶ 53.)

Third, the paper-based optical scan voting systems that Petitioners would have this Court foist upon the non-party counties are just as susceptible – and in some ways are more susceptible – to intentional and unintentional acts causing votes to not be counted in accordance with voter intent. (See supra 24-25; see, e.g., Shamos Decl. ¶¶ 61, 73, 77, 79.)

3. Granting Petitioners' Motion Will Adversely Affect the Public's Interest

For the same reasons that the balance of harms weighs in favor of not issuing the requested injunctive relief, it is clear that Petitioners' Motion will adversely affect the public's interest, as the Secretary and the non-party counties represent the public. In addition, it bears noting that citizens of Northampton and Lackawanna Counties have an interest in having their county boards of elections – and not Petitioners – exercise the counties' statutory right to choose a certified voting system. Moreover, to the extent a "decrease in confidence in elections" and a "risk of reliability and security" of a voting system constitute cognizable harms for preliminary injunction purposes, Petitioners' Motion would adversely impact the public by requiring the procurement and use of voting systems in which the counties may have less confidence and may believe pose greater risks to reliability and security.

4. *Petitioners' Motion Fails to Show that the Activity Sought to be Restrained By the Motion or the Petition for Review is Actionable and that Petitioners' Right to Relief Sought in the Motion or the Petition for Review is Clear*

To obtain preliminary injunctive relief, Petitioners must demonstrate that the activity they seek to restrain is actionable and that their right to relief is clear. Petitioners cannot satisfy this very tall burden. As an initial matter, Petitioners simply cannot show that the actions they seek to restrain through the Motion – i.e., the non-party counties' purchase of certified DREs or the Secretary's disbursal of federally-alloted HAVA funds – are actionable. See supra 13-18 (demonstrating that Petitioners' Motion is ripe for summary dismissal). Nor can Petitioners show that their right to relief sought in the Motion is clear. In fact, quite the contrary, Petitioners' lack of a right to the Motion's requested relief is clear. Id. For this reason alone, the Court should deny Petitioners' Motion.

Even if the Court engages in an inquiry of Petitioners' likelihood of success on the merits of the Petition for Review's – which seeks to address activity and obtain relief different than the Motion – Petitioners' Motion still fails.[13]

(a) Contrary to Petitioner's Assertions, the April 12 Order Shows that Petitioners' Right to the Relief Sought in the Petition for Review is Not Clear

Petitioners' Motion argues that their right to relief is clear in part because the Court's April 12 Order found that "Petitioners' [Petition] adequately alleged violations of the Pennsylvania Election Code and Pennsylvania Constitution." (Pet'rs Mem. at 5.) Petitioners' Motion is wrong. In fact, three of the seven judges sitting en banc found that Petitioners' right to

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[13] The lack of specificity in Petitioners' Motion, particularly regarding the elements of Counts of the Petition for Review upon which Petitioners believe they are likely to succeed on the merits (see generally Pet'rs Mem. at 5-6), underscores that Petitioners cannot demonstrate a clear right to relief.

relief is non-existent. Among other things, those judges found that the Petition for Review improperly seeks to have the Court substitute its judgment for the Secretary's through an improper writ of mandamus, and that, in any event, the Court is without jurisdiction because Petitioners failed to join the counties, which are indispensable parties to the action.

Moreover, the four-judge majority found only that the Petition for Review may survive the preliminary objection stage; it opined not at all on the likelihood that Petitioners would succeed on the merits of their claims, let alone that Petitioners would be entitled to the different relief sought in Petitioners' Motion. But perhaps more importantly, in a subsequent per curium order, this Court found, over Petitioners' objections, that the April 12 Order presented controlling issues of law as to which there are substantial grounds for difference of opinion and interlocutory appeal of which might materially advance the ultimate termination of the case. The Secretary's Petition for Permission to Appeal remains pending before the Supreme Court on such critical, threshold issues as:

> 1. Whether Counts I-V and VIII-X of the Petition, in which Petitioners seek to have this Court order the Secretary to decertify the challenged DREs, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.
>
> 2. Whether Counts III and VII of the Petition, in which Petitioners seek to have this Court order the Secretary to establish uniform testing criteria for the certification of voting systems, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.
>
> 3. Whether the approximately 56 counties that have procured the challenged DREs are indispensable parties as to Counts I, II, III, IV, V, VIII, IX and X of the Petition.

(Secretary's Application for Relief to Amend the April 12 Order (attached as Exhibit 11).) The April 12 Order, particularly in light of its amendment by the April 30 Order, thus demonstrates that Petitioners' right to the relief is far from clear.

(b) Petitioners' Motion Ignores the "Great Deference" Owed To the Secretary

Petitioners' Motion wholly ignores the deference to which the Secretary is entitled. Instead, Petitioners would have this Court conduct a de novo review of the Secretary's actions. While the question of whether this Court may issue the writ of mandamus requested by the Petition for Review remains pending before the Supreme Court, even the April 12 Majority Opinion recognized that the Court ultimately may not issue a writ of mandamus to force the Secretary to exercise (or not exercise) his discretion unless Petitioners prove that "the exercise or non-exercise of discretion is arbitrary, fraudulent, or based upon a mistaken view of the law." (April 12 Majority Opinion at 6.)

In addition, regardless of whether Petitioners seek a writ of mandamus or prohibitory injunctive relief, it does not change the fact that great deference is owed to the Secretary for his interpretations of the Election Code and his discretionary actions. "In the absence of bad faith, fraud, capricious action or abuse of power, reviewing courts will not inquire into the wisdom of [an administrative] agency's action or into the details or manner of executing agency action." Khan v. State Bd. of Auctioneer Examiners, 577 Pa. 166, 181, 842 A.2d 936, 944-945 (2004) (citations omitted) (alterations in original). Similarly, "when the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation . . . . Thus, our courts will not disturb administrative discretion in interpreting legislation within an agency's own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action." Kuznik v. Westmoreland County Bd. of Comm'rs, 588 Pa. 95, 140, 902 A.2d 476, 502 (2006) (internal quotation and citation omitted) (and giving "great deference" to testimony of Commonwealth election officials); see also Nationwide Mut. Ins. Co. v. Foster,

143 Pa. Commw. 433, 439, 599 A.2d 267, 270 (1991) (where an agency has been entrusted to effectuate an entire body of law, "[a]n agency's interpretation [of the statute] is entitled to great judicial deference. . . . [W]here the statutory scheme is complex a reviewing court must be even more cautious in substituting its discretion for the expertise of the administrative agency.").[14]

(c) Petitioners' Motion Does Not Clearly Show the Secretary Abused His Discretion By Acting Arbitrarily, Fraudulently or Misinterpreting the Law

Petitioners would have this Court cloak itself as the Secretary and second-guess numerous discretionary actions and order extraordinary (and respectfully, unlawful) relief, all on an extremely expedited basis prior to a trial on the merits. Quite simply, that Petitioners happen to believe the Secretary might have reached an incorrect result in certifying DREs is not dispositive, if even relevant, to the required showing. The Secretary has examined each DRE system, with the aid of a consulting examiner, prior to certifying it. Petitioners do not state otherwise. Petitioners' Motion simply fails to establish that the Secretary's certification process is comprised of "fraud, bad faith, abuse of discretion or clearly arbitrary action." In this section, the Secretary provides several, non-exhaustive examples demonstrating that Petitioners' Motion (and/or the corresponding declarations) are wrong.

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[14] Petitioners' Motion relies on Pleasant Hills Construction Co. v. Public Auditorium Authority, 782 A.2d 68 (Pa. Commw. Ct. 2001), as "holding clear right to relief when party raised a substantial legal question as to whether two statutes were violated." (Pet'rs Mem. at 6). What Petitioners' Motion leaves out is that the Supreme Court reversed the order granting the preliminary injunction, finding that the lower court misinterpreted the statutes at issue and that there was, in fact, no such violation. Pleasant Hills Construction Co. v. Public Auditorium Authority, 567 Pa. 38, 784 A.2d 1277 (2001). It also bears noting that raising a "substantial legal question" on its own is not the equivalent of establishing a clear right to relief. As the Supreme Court stated: "Where the threat of immediate and irreparable harm to the petitioning party is evident, that the injunction does no more than restore the status quo and the greater injury would result by refusing the requested injunction than granting it, an injunction may properly be granted where substantial legal questions must be resolved to determine the rights of the respective parties." Fischer v. Department of Public Welfare, 497 Pa. 267, 271, 439 A.2d 1172, 1174 (1982).

Of course, to obtain relief in the nature of a writ of mandamus at any stage of the litigation, a party must demonstrate, among other things, "a clear legal right in the plaintiff [and] a corresponding duty in the defendant," Pennsylvania Dental Ass'n, 512 Pa. at 227, 516 A.2d at 652.

First, the gravamen of the entire Petition for Review is Petitioners' erroneous conclusion that the Secretary's certification of DREs violates the Election Code because the DREs do not contain a "voter verified independent record." (See, e.g., Petition for Review, Counts I, II, IV, V, IX.) Petitioners assume the Secretary has misinterpreted the law he statutorily charged to execute, but Petitioners themselves find no such requirement in the Election Code. Petitioners point to the Election Code's definition of "electronic voting system" as supposedly mandating a "voter verified independent record" of a ballot cast. In actuality, the Election Code states: "'Electronic voting system' means 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. The system shall provide for a permanent physical record of each vote cast." 25 P.S. § 3031.1 (emphasis added). The definition makes no reference to a "voter verified independent record;" and, further, there is no requirement for a "voter verified independent record" anywhere in the Election Code. There is no way Petitioners can succeed on their claims; they are adding words to the Election Code that simply do not appear in the statute.

Second, the Secretary's determination of whether a certain function or component of a given voting system "provide[s] for a permanent physical record" is entitled to great deference. See, e.g., Tritt v. Cortés, 578 Pa. 317, 321, 851 A.2d 903, 905 (2004) (noting, in upholding Secretary's understanding of statute regarding notary public law, "an interpretation of a statute by those charged with its administration and enforcement is entitled to deference [and] such consideration most appropriately pertains to circumstances in which the provision is not explicit or is ambiguous" (citation omitted)). As set forth in the Declaration of Dr. Michael I. Shamos, each of the DREs challenged by Petitioners provide for a permanent physical record of

the vote cast, by providing (1) an electronic memory or ballot image of the record that is permanent (Shamos Decl. ¶¶ 20, 63-67) or (2) by providing the capacity to produce a paper record of each vote (Id. ¶¶ 19, 64.) While Petitioners' interpretation of the Election Code is both wrong and not entitled to equal footing with the Secretary's interpretation, the issue is largely academic, because even under Petitioners' own theory that an electronic voting system must provide a "permanent physical record" that is made of paper,[15] each of the DREs provide such capability. (Id. ¶ 19.)

Third, Petitioners' contention that the DREs are not "capable of a meaningful audit as contemplated by the Election Code" (Pet'rs Mot. ¶ 4) is unavailing. It is unclear upon what provision of the Election Code Petitioners rely; but based on the declarations attached to their Motion, it appears Petitioners are attempting to assert that the DREs are incapable of complying with the statistical sampling provision in the Election Code. That provision states:

> The county board of elections, as part of the computation and canvass of returns, shall conduct a statistical recount of a random sample of ballots after each election using manual, mechanical or electronic devices of a type different than those used for the specific election. The sample shall include at least two (2) per centum of the votes cast or two thousand (2,000) votes whichever is the lesser.

25 P.S. § 3031.17. Petitioners rely upon the phrase "of a type different than those used for the specific election" and assert that the ballot images that could be printed out and counted would not be "of a type different" from that used in the election. (See Jones Decl. ¶ 27; Lopresti Decl. ¶ 13.) Petitioners' proposed experts reach this result only after misconstruing the Election Code. The Election Code is clear that it is the counting for this statistical sampling that is to be done in

[15] The Secretary by no means concedes that "permanent physical record" imposes a requirement of paper records of votes cast.

a different manner than it was done initially. The DREs can conform to this provision. By printing out a random sample of the ballot images and counting them by hand, for example, the votes would be recounted using a "manual" method different than the electronic method used to count them in the first instance. (See, e.g., Shamos Decl. ¶ 21 (explaining how this is achieved consistent with the Election Code).)

The Jones Declaration also engages in an illogical construction of the Election Code to make another argument regarding that provision. He concludes that the word "ballots" in 25 P.S. § 3031.17 can only mean a paper ballot, as one could not conduct a 2% statistical sampling of "the apparatus by which the voter registers his vote electronically," Jones Decl. ¶ 26 (quoting the definition of the word "ballot" in 25 P.S. § 3031.1). (See Jones Decl. ¶ 26.) Not only is this opinion contrary to the Secretary's interpretation of the Election Code – which is entitled to deference – it is absurd and impossible to execute in light of other sections of the Election Code that obviously contemplate electronic voting systems that do not use paper ballots.

The General Assembly provided that there could be electronic voting systems that do not use paper ballots. This is clear in the very provision upon which the Jones Declaration relies, in which the General Assembly defined the term "ballot" as being either "ballot cards or paper ballots . . . or the apparatus by which the voter registers his vote electronically." 25 P.S. § 3031.1. Similarly, in the provisions of the Election Code providing for recounts and recanvasses, the General Assembly distinguished between election districts that use "an electronic voting system utilizing paper ballots," 25 P.S. § 3154(e)(3) (emphasis added), and election districts that use "any other type of electronic voting system," [i.e., one not utilizing paper ballots] 25 P.S. § 3154(e)(4) (emphasis added). It would be an absurd result to render such provisions that contemplate electronic voting systems that do not use paper ballots as being incapable of

complying with the statistical sampling provision of the Election Code at 25 P.S. § 3031.17. As Dr. Shamos explains in his declaration, the term "ballots" in 25 P.S. § 3031.17 must mean the "voted ballots" and not the DRE apparatus itself, and as noted above, the DREs can produce printouts of the ballot images to conduct the sampling. (Shamos Decl. ¶¶ 68-69.) Given that there is a construction of the statute that enables electronic voting systems that do not use paper ballots but that are capable of otherwise complying with the statistical sampling provision, the Jones Declaration's proffered construction cannot be adopted regardless of any deference owed to the Secretary. See 1 Pa.C.S. § 1921 ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly."); id. § 1922 (It is presumed that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable

Fourth, Petitioners' Motion is wrong to the extent it argues that the DREs cannot be "audited" in accordance with the Election Code. Again, Petitioners' Motion focuses on the absence of a paper ballot, but the Election Code anticipates a recanvass for electronic voting systems that do not utilize paper ballots. See 25 P.S. § 3154(e).

Fifth, in light of sections of the Election Code that obviously empower the Secretary with the ability to make discretionary judgments, Petitioners' Motion's disagreements with the results that the Secretary has reached hardly demonstrate the kind of arbitrary, capricious and illegal conduct on the part of the Secretary that Petitioners must show. The Secretary's actions as to certification and revocation of certifications are deliberative and discretionary and not ministerial, as is evidenced by the pertinent provisions of the Election Code. For example, the Secretary must analyze whether the voting system presented for examination: is "suitably designed for the purpose used. . . ," 25 P.S. § 3031.7(11); is "safely

and efficiently useable in the conduct of elections," id.; "[p]rovides acceptable ballot security procedures . . . ." 25 P.S. § 3031.7(12); and is "constructed of material of good quality, in a neat and workmanlike manner." 25 P.S. § 3031.7(11).

The Secretary has produced in this litigation reports of the public examinations he has conducted with the aid of his examiners. See 25 P.S. § 3031.5(a) (providing for examination by Secretary of Commonwealth); and id. 25 P.S. § 3031.7 (noting Secretary may appoint an examiner); see also Lopresti Decl. ¶ 15 (noting examinations are public, and videotaped, and that they result in examiner's reports and then certification reports by the Secretary which he has reviewed in connection with this litigation). Petitioners' Motion's allegations – set forth largely only through the declarations accompanying their Motion – that the Secretary's conclusions as to these standards are infirm, are simply their improper efforts to substitute themselves for the Secretary. (See, e.g., Shamos Decl. ¶ 73 (refuting Jones's contentions regarding whether the DREs are "workmanlike); id. ¶ 75 (refuting Jones's contentions that the DREs are not "suitably designed for the purpose used").

For example, the Secretary has hardly acted arbitrarily in relying on his appointed examiners. Dr. Shamos, who performed the vast majority of the exams at issue, is a Distinguished Career Professor in the School of Computer Science at Carnegie Mellon University in Pittsburgh who has performed voting examinations for Pennsylvania from 1980-2000 and again from 2005 through the present. (Shamos Decl. ¶¶ 1-2, 5-6.) He has spoken on electronic voting extensively, including testifying on five occasions before committees of the United States House of Representatives and before one committee of the United States Senate, as well as before the legislatures of Pennsylvania, Maryland, Texas and the State Board of Elections of Virginia.

Sixth, Petitioners' contention that other states' actions, including those of California and Ohio, set the standards for voting examinations or are otherwise demonstrative of imperfections in the Secretary's examinations should be rejected. As an initial matter, while the Secretary certainly remains cognizant of and considers all informative authority that may factor into his certification of any voting system, the actions of California and Ohio do not provide for a judicial mandate. The Commonwealth conducts its own determination of voting systems' compliance (or lack of compliance) with the Pennsylvania Election Code. As Dr. Shamos notes, it is not unusual for the states to make inconsistent certification decisions, and in 2007, the Secretary of State of Colorado decertified the very system that the Secretary of State of Ohio has mandated for use in Cuyahoga County. (Shamos Decl. ¶ 45 (and further noting that "if every jurisdiction were compelled to use only voting systems that had never been decertified anywhere, we would not be able to hold elections in the United States since no voting system would qualify").)

Moreover, Petitioners actually cherry-pick portions of the Ohio and California reports and omit portions that disparage paper-based optical scan systems akin to the ones they would force the counties to purchase on a going-forward basis in the Commonwealth during the remainder of this case.[16] It is misleading to pluck facts critical of the DRE voting systems,

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[16] For instance, Petitioners do not point out that Ohio's Secretary of State examined not only DRE voting systems, but also some optical scan systems of the type that Petitioners would prefer be purchased by Pennsylvania counties. (See Motion to Dissolve, ¶ 11.) Thus Ohio's Secretary of State recommended following Ohio's investigation to "Eliminate DREs and Precinct-based Optical Scan Voting Machines that tabulate votes at polling locations." (See, e.g., Ohio Secretary of State's Recommendations, Project Everest Report of Findings, at 77 (emphasis added), available at http://www.sos.state.oh.us/sos/info/EVEREST/00-SecretarysEVERESTExecutiveReport.pdf.) While Ohio's Secretary of State therefore recommends using centrally counted optical scan systems, the report on which that recommendation is based notes concerns with such systems. See, e.g., Project Everest Report of Findings, at 28 (noting that the ES&S M650 central count optical scan could be manipulated in order to cause "errors in the tabulation mechanism, which could be used to manipulate the vote count in the tabulation process").

(continued...)

particularly when Petitioners' Motion would have this Court mandate that the non-party counties utilize paper-based optical scan systems over the certified DREs that counties have a statutory right to chose. Petitioners do not note that the Ohio Everest report concludes that optical scan systems can be fooled into counting duplicate ballots and thereby allowing a voter to cast more than one vote, or that the optical scan systems use software that is subject to manipulation such that, if the standards Petitioners' urge were applied to optical scans, those systems would fail to be certified as well. (Shamos Decl. ¶ 77; and see, e.g., Project Everest Report of Findings at 21.) Petitioners' approach ignores the unremarkable and universal truth that every voting system is flawed in some respect, Taylor v. Onorato, 428 F. Supp. 2d 384, 387-88 (W.D. Pa. 2006) (observing that "[v]oting machine malfunction has been, and probably always will be, a potential problem in every election"), and that all kinds of voting systems are being subjected to scrutiny. Thus, the activities of other states, which are not binding on Pennsylvania's Secretary of the Commonwealth, do not in anyway demonstrate that the Secretary has abused his discretion by acting arbitrarily or fraudulently.

Seventh, the Secretary's revocation of the certification of the AVS WINvote does not show that Plaintiffs' right to relief is clear. In fact, quite the contrary, the Secretary's revocation of the AVS WINvote's certification demonstrates that the Secretary seriously and

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(continued...)

Petitioners similarly selectively allude to aspects of the "top to bottom review" conducted by California's Secretary of State. In fact, California withdrew certification for and then conditionally reapproved both DRE and optical scan systems. See August 3, 2007 Press Release of California Secretary of State (attached hereto as Exhibit 7) (noting that "[e]ach of the systems that went through the top-to-bottom review has been legally decertified, and then each of them has been recertified with the addition of a number of conditions"). Indeed, California decided that the Hart InterCivic DRE system, a system used in Pennsylvania, was "required to comply with increased security and post-election auditing procedures." Id. Petitioners do not mention that this puts the Hart InterCivic DRE on equal footing with California's Diebold, Hart and Sequoia optical scan systems, which also were recertified and, like the Hart DRE, "will be required to adopt increased security and post-election auditing procedures." Id.

faithfully executes his powers and duties provided for by the Election Code. Moreover, the AVS WINvote was never used in an election in which its defect regarding cross-filed candidates could have mattered, as the Secretary revoked its certification in August 2007 before the system could be used in the November 2007. Petitioner's Motion essentially would have this Court hold that any time the Secretary revokes a previously certified voting system due to a re-evaluation of that system's compliance with the Election Code, the Secretary has a fortiori acted arbitrarily and capriciously. Respectfully, such a conclusion is absurd.

In sum, Petitioners' Motion fails to establish that the activity sought to be restrained by either their Motion or their Petition for Review is actionable, and Petitioners cannot establish a clear right to relief through their Motion or their Petition for Review.

5. Petitioners' Motion Will Alter, Not Preserve, the Status Quo

Petitioners' Motion would not "properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct." Summit Towne Centre, 573 Pa. 637, 647, 828 A.2d 995, 1001. In fact, Petitioners' Motion would alter the status quo. The alleged offending activity is Northampton and Lackawanna Counties' purchase of replacement DREs and the Secretary's partial reimbursement, with Federal HAVA funds, of the costs those non-party counties incur in the purchase of the replacement DREs. At all times prior to the "alleged wrongful conduct" the non-party counties had the right, under the Election Code, to purchase a HAVA-compliant, Secretary-certified voting system of their choosing. Petitioners' Motion would alter the status quo by denying the non-party counties of this right (and, correspondingly, by bestowing on the Secretary powers he does not have). In addition, it appears that the parties' "status as it existed immediately prior to the alleged wrongful conduct," is either Northampton and Lackawanna Counties' use of a voting system that is now de-certified or their use of a lever voting system, which may not be used during federal elections, such as the 2008

Primary and General elections. Clearly, Petitioners' Motion may not return the parties to such status because Northampton and Lackawanna Counties must procure and use HAVA-compliant, Secretary-certified voting systems for use in the April 2008 Primary election.

6. Petitioners' Motion is Not Reasonably Suited to Abate the Offending Activity

Petitioners' Motion is not reasonably suited to abate the alleged offending activity. Petitioners' Motion would have this Court order relief that is not legally possible, interfere with the sound discretion of the Secretary on an improvidently emergency basis, deny non-party counties their statutory right to chose certified voting systems based on their localized needs and would saddle these non-party counties with voting systems that they do not want.[17]

In addition, as set forth in the Secretary's Motion in Limine, Petitioner's Proposed Order – apparently unintentionally – could conceivably have this Court address the voting system purchases of all sixty-seven counties of the Commonwealth, rather than just the purchases of Northampton, Lackawanna and Wayne Counties. Petitioners successfully petitioned this Court to dissolve a previously ordered stay of proceedings in this action on the very specific representation that "Petitioners seek to have an emergency hearing to preserve the status quo pendente lite by preventing the Secretary from allowing the electronic voting machines challenged in this case [to] be purchased <u>by three counties seeking new machines</u> because of the recent decertification by the Secretary of the DRE used by them which he had previously certified." (Pet'rs Mem. Supp. of Motion to Dissolve at 1 (opening sentence) (emphasis added).) Petitioners have not attempted to make any showing that any of the Commonwealth's other sixty-four counties are intending to engage in any "county-wide

purchases" of voting systems. (Pet'rs Mem. at 6.)Accordingly, Petitioners' Motion is not reasonably suited to abate the allegedly offending activity and, therefore, should be denied.

D. Petitioners Must Post a Bond of Approximately $ 4 Million to Obtain the Relief Sought

For a preliminary injunction to issue, the Pennsylvania Rules of Civil Procedure require the posting of a bond or cash by the Petitioners in an amount to be established by the Court. "[A] preliminary or special injunction shall be granted only if . . . the plaintiff files a bond in an amount fixed and with security approved by the court . . . conditioned that if the injunction is dissolved because improperly granted or for failure to hold a hearing, the plaintiff shall pay to any person injured all damages sustained by reason of granting the injunction and all legally taxable costs and fees." Pa. R. Civ. P. 1531(b). "The bond 'requirement is mandatory and an appellate court must invalidate a preliminary injunction if a bond is not filed by the plaintiff.'" Walter v. Stacy, 837 A.2d 1205, 1208 (Pa. Super. Ct. 2003) (quoting Soja v. Factoryville Sportsmen's Club, 522 A.2d 1129, 1131 (Pa. Super. Ct. 1987)).

In setting the amount of the bond, the trial court should "require a bond which would cover damages that are reasonably foreseeable." Greene County Citizens United by Cumpston v. Greene County Solid Waste Auth., 636 A.2d 1278, 1281 (Pa. Commw. Ct. 1994). In this case, Petitioners seek extraordinary relief in the form of forcing the counties to purchase voting machines that they do not want. According to Petitioners themselves, it will cost approximately $4 million to replace the machines the counties will be required to buy if the injunction is improperly granted. (Petitioners' Mot. to Dissolve at 1, ¶¶ 9, 12, 13.) Therefore, should the Court decide to issue the injunction – and it should not – the balance of equities dictates that it fix the amount of security required at $4 million. See Greene County Citizens United by Consumption, 636 A.2d at 1281.

IV. CONCLUSION

For the foregoing reasons, the Secretary of the Commonwealth, Pedro A. Cortés, respectfully requests the Court to deny Petitioners' Emergency Motion for Preliminary Injunction.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL & PUDLIN

Dated: February 6, 2008

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CERTIFICATE OF SERVICE

I, Alan C. Promer, hereby certify that on February 6, 2008, I caused true and correct copies of the foregoing Memorandum in Opposition to Petitioners' Emergency Motion for Preliminary Injunction to be served by the method indicated below, on the following:

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARK BANFIELD, ***et al.*****,**	
Petitioners,	
v.	**Docket No. 442 M.D. 2006**
PEDRO CORTÉS,	
Respondent.	

EXHIBITS TO MEMORANDUM OF RESPONDENT PEDRO A. CORTÉS, SECRETARY OF THE COMMONWEALTH, IN OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

1. Declaration of Dr. Michael I. Shamos

2. Letter from Secretary to Mr. Howard Van Pelt, President and CEO of AVS (Dec. 28, 2007)

3. Joe Nixon, County: It's Sequoia by a landslide, The Morning Call (Jan. 18, 2008)

4. Joe Nixon, No worries over voting machine challenge, The Morning Call (Jan. 28, 2008)

5. This Morning, The Times-Tribune.com (Feb. 2, 2008)

6. Megan Reiter, Wayne County selects new voting machines, The-Times Tribune.com (Jan. 31, 2008)

7. Press Release of California Secretary of State (August 3, 2007)

8. April 12 Order

9. April 12 Majority Opinion

10. April 12 Dissenting Opinion

11. Secretary's Application for Relief to Amend the April 12 Order (without exhibits)

12. April 30 Order