

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 442 M.D. 2006

MARK BANFIELD, *et al.*,

Petitioners,

v.

CAROL AICHELE,

Secretary of the Commonwealth,
Respondent.

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

**BRIEF OF RESPONDENT CAROL AICHELE, SECRETARY OF THE
COMMONWEALTH, IN OPPOSITION TO PETITIONERS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AND IN SUPPORT OF APPLICATION FOR SUMMARY
RELIEF**

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Date: October 14, 2011

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I. INTRODUCTION

More than 30 years ago, the General Assembly amended the Pennsylvania Election Code¹ to allow for the use of electronic voting machines in elections throughout the Commonwealth. The new law was permissive, leaving to the voters of each county the ultimate decision whether to pursue the advantages of the new voting technology. See Ex. 1 at 2041 (House Legislative Journal, 1980 Regular Session, No. 55, July 2, 1980). Voters in the vast majority of Pennsylvania counties elected to authorize their respective boards of elections to purchase and maintain both direct-recording electronic (“DRE”) and paper-based, optical scan systems. While trusting voters to decide for themselves their preferred method of voting, the Election Code set forth a number of measures designed to ensure the safety, reliability, and accuracy of the new systems. Included within those provisions are the two phrases upon which Petitioners’ ground their Motion: the definition of “electronic voting system” as being able to “provide for a permanent physical record of each vote cast,” 25 P.S. § 3031.1, and the requirement that county boards of elections conduct “statistical recounts” of sample ballots created and stored by such systems. Id. § 3031.17.

This case presently concerns whether, when adopting these straightforward terms, the General Assembly meant what it said. Or can a cadre of voters disregard decades of interpretation and practice, forsake the democratic process, and, by means of this litigation, amend the statutory language to include previously unknown demands. Petitioners, purportedly joined in spirit with self-interested “experts,” like-minded advocacy groups, and newspaper opinion writers, *Petrs.’ Br.* at 1-2, are dissatisfied with the Election Code’s provisions as they have been interpreted and applied by the Secretary. Their dissatisfaction does not arise from any

¹ Act of June 3, 1937 (P.L. 1333, No. 320), as amended, 25 P.S. §§ 2600-3591.

actual deficiency in DREs or any real failure to properly capture and tabulate election-day votes. Rather, Petitioners allege statutory and constitutional violations because of fanciful fears that the technology employed by these systems might not work. To salve their unease, Petitioners now move this Court, purportedly seeking summary judgment, but in reality demanding a re-write of the Election Code to include their mere policy preference for “software-independent,” paper records created the “moment [a vote] is cast.” Id. at 2.

Petitioners’ Motion is based on a wholesale disregard of the actual capabilities of DREs and a fundamental misreading of the Election Code. Petitioners spill much ink deconstructing ordinarily simple phrases like “provide for,” “permanent,” “physical,” and “recount.” But the General Assembly has tasked the Secretary with the interpretation and application of the Election Code, and, in fulfilling these duties, the Secretary has recognized that the DREs used in Pennsylvania create identical, redundant electronic records of each vote on multiple media and allow each ballot cast to be printed on paper at the close of each election; that is, DREs provide for and produce the permanent, physical records required by the Election Code’s definition of “electronic voting systems.” The Secretary has also determined that these records can readily be used to perform whatever recount or recanvass is required, including the “statistical recount” demanded of all electronic voting machines. By means of this interpretation of the Election Code, the Secretary has successfully and consistently protected the constitutional voting rights of all Pennsylvania citizens, regardless of which voting system they use.

Petitioners’ claims will be determined by this Court’s statutory construction of less than two dozen words in the Election Code. The Court should deny Petitioners’ invitation to inject new terms and meaning into the Code and should instead defer to the Secretary’s long-standing

and reasonable interpretation. In sum, Petitioners' Motion for Partial Summary Judgment should be denied, and judgment as a matter of law should instead be entered in favor of the Secretary.

II. STATEMENT OF SCOPE OF REVIEW AND STANDARD OF REVIEW

A. Standard of Review

“Summary judgment is appropriate when, after review of the record in the light most favorable to the non-moving party, it is determined that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.” Carbo v. Redstone Twp., 960 A.2d 899, 901 n.4 (Pa. Commw. Ct. 2008) (citation omitted). “In considering whether there exists a genuine issue of material fact, the court ... determines whether a reasonable jury, faced with the evidence presented, could return a verdict” for the other party. 401 Fourth St., Inc. v. Investors Ins. Group, 879 A.2d 166, 175 n.4 (Pa. 2005); see also Meier v. Maleski, 670 A.2d 755, 758 (Pa. Commw. Ct. 1996) (citations and footnote omitted), aff'd, 700 A.2d 1262 (Pa. 1997) (setting forth summary judgment standard where cases “involves a pure legal question concerning statutory construction and legislative intent”).

B. Scope of Review

This case concerns a matter of statutory construction, and the ordinary rules apply. 1 Pa. C.S. § 1901 (“In the construction of the statutes of this Commonwealth, the rules set forth in this chapter shall be observed ...”). This Court must determine what the General Assembly intended by the phrases “provide for a permanent physical record of each vote cast,” “statistical recount,” and “device of a type different” as those terms are used in the Election Code. 1 Pa. C.S. § 1921(a) (stating that “object of all interpretation ... of statutes is to ascertain and effectuate the intention of the General Assembly”). To ascertain and effectuate the intention of the General Assembly, this Court must construe these words and phrases “according to rules of grammar and according to their common and approved usage.” 1 Pa. C.S. § 1903(a). The “scope of review is

plenary,” but only to the extent this statutory language is deemed unambiguous. Reid v. City of Phila., 957 A.2d 232, 234 (Pa. 2008). If the meaning of the words is clear, the Court need not consider other factors regarding legislative intent; nor may it disregard the plain meaning in pursuit of some preferred, but undefined, policy. See 1 Pa. C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of [the law] is not to be disregarded under the pretext of pursuing [the law’s] spirit.”). When the words are “not explicit,” however, the Court may consider a variety of factors, including the “occasion and necessity” for the statute, id. § 1921(c)(1); the circumstance of the law’s enactment, id. § 1921(c)(2); and the “consequences of a particular interpretation.” Id. § 1921(c)(6).

The courts of this Commonwealth have consistently recognized one factor entitled to great weight and deference is the interpretation of a statutory provision by those charged with its execution and application. See id. § 1921(c)(8); Dechert LLP v. Commonwealth, 998 A.2d 575, 586 (Pa. 2010) (“[W]hen construing statutory language, it is this Court’s practice to afford substantial deference to the interpretation rendered by the agency charged with its administration.”) (citing Rendell v. Pa. State Ethics Comm’n, 983 A.2d 708 (Pa. 2009)); Kuznik v. Westmoreland County Board. of Comm’rs, 902 A.2d 476, 502-03 (Pa. 2006) (noting deference to testimony of State election officials “because the Secretary is empowered by the Election Code and is the ‘chief State election official of the Commonwealth ...’”). In such circumstances, the scope of review is “limited to a determination of whether the decision [of the government official] is supported by substantial evidence, is in accordance with the law and whether any constitutional rights were violated.” Episcopal Hosp. v. Commw., Dep’t of Pub. Welfare, 528 A.2d 676, 679 (Pa. Commw. Ct. 1987) (citation omitted). “The interpretation of a statute by those charged with its execution ... will not be overturned unless such construction is

clearly erroneous.” St. Elizabeth’s Child Care Ctr. v. Commw., Dep’t of Pub. Welfare, 963 A.2d 1274, 1277 (Pa. 2009) (citations omitted).

III. STATEMENT OF THE CASE

A. Procedural Background and Current Posture

Petitioners filed their ten-count Petition on August 15, 2006, challenging the Secretary’s certification of DREs for use in Pennsylvania elections on the grounds that these voting machines “do not and will not reliably record, tally and weigh the votes of Pennsylvania’s citizens or produce any permanent physical record of any elector’s actual vote.” Pet. ¶ 1.² In relevant part, the Petition asserts the following causes of action:

- Count I (25 P.S. § 3031.1) – alleging that the Secretary’s certification of certain DREs violated the Election Code “because the machines do not create a permanent physical record which can be retained.” Id. ¶¶ 112-113;
- Count IV (25 P.S. § 3031.17) – alleging that DREs cannot meet the requirements of the Election Code “because they do not retain a voter verified record that permits election officials to perform a ‘statistical recount.’” Id. ¶¶ 118-120;
- Count VI (25 P.S. § 3031.5) – alleging that the Secretary violated the Election Code by improperly denying “at least four valid requests for reexamination.” Id. ¶¶ 126-128;
- Count IX (Pa. Const. art. I, § 26) – alleging that the Secretary (a) violated voters’ equal protection rights by requiring some electors to vote in counties using DREs while “other registered voters ... may vote in precincts or counties using voting systems ... that do not suffer from the defects” allegedly associated with DREs, and (b) violated Petitioners’ civil right to vote because the DREs’ “defects and security flaws create the risk that” votes have been “rendered meaningless” or “deemed cast for” the wrong candidate. Id. ¶¶ 136-139; and
- Count X (Pa. Const. art. VII, § 6) – alleging that the Secretary violated the requirement of uniformity of law by allowing some counties to use DREs while other counties use paper-ballot based voting systems which, coupled with “the likelihood of an inaccurate tally” by

² Pursuant to Pa. R.A.P. 2111(c), the Secretary appends to this Memorandum a copy of the Petition for Review and the Answer to the Petition for Review. Exs. 2 & 3.

DREs, “threatens to create an imbalance in the weight given to the votes in the various counties.” Id. ¶¶ 140-144.³

The Petition demands relief in the nature of mandamus and requests that the Court “[d]irect the Secretary immediately to de-certify the DRE voting systems” that are used in Pennsylvania elections, the “Specified Voting Systems.”⁴ See id., Count I “Wherefore” clause, part (a).

The Secretary filed preliminary objections to every Count of the Petition. A divided panel of this Court overruled those objections by order and opinion on April 12, 2007. Banfield v. Cortés, 922 A.2d 36 (Pa. Commw. Ct. 2007). The Secretary accordingly filed an Answer to the Petition on January 15, 2009,⁵ and the parties engaged in protracted discovery for the next 25 months, during which time the voters of Pennsylvania participated in five statewide primary and general elections.⁶

³ Petitioners’ Motion addresses only these counts. The remaining five counts of the Petition generally relate to the examination and certification process required by the Election Code, as implemented by the Secretary, and are not at issue at this juncture of the proceedings.

⁴ As discussed more fully below, the Specified Voting Systems include the Danaher ELECTronic 1242, the Diebold (now Dominion) Accuvote TSx, the ES&S iVotronic, the Hart eSlate, the Sequoia (now Dominion) Edge 2, and the Sequoia/Dominion Advantage. See infra Part III.C.

⁵ The nearly two-year delay in the Secretary filing the Answer was due to the fact that this Court stayed all proceedings pending the decision of the Supreme Court whether to permit the Secretary to appeal this Court’s interlocutory order overruling the preliminary objections. The Supreme Court ultimately denied the Secretary’s petition for permission to appeal on December 16, 2008. See Banfield v. Cortés, No. 70 MM 2007 (Pa. Dec. 16, 2008)..

⁶ In fact, since the filing of the Petition, voters throughout the Commonwealth, using the Specified Voting Systems, have cast millions of votes in ten elections to elect and re-elect hundreds of county commissioners, dozens of state judges at all levels, two United States Senators, and chief executives at both the state and federal level. State-wide recounts have been conducted twice – in the November 2006 election for Superior Court Judge and the 2011 Democratic primary for Commonwealth Court Judge. In none of these elections has any reasonable doubt regarding the effectiveness of the Specified Voting Systems or the declared outcome been raised.

On June 27, 2011, the Court issued an Order, allowing the parties to depose each others' experts, establishing a summary judgment briefing and pretrial schedule, and setting a trial date of October 3, 2011. One month later, before summary judgment motions were due, the Secretary responded to the requests of some Pennsylvania voters for a re-examination of three of the Specified Voting Systems – the ELECTronic 1242, the Accuvote TSx, and the iVotronic. On July 25, 2011, the new Secretary sent three letters stating her intention to grant those requests, notwithstanding the decision by her predecessor that gave rise to Count IV of the Petition. Ex. 4 (Letters from Carol Aichele, Secretary of the Commonwealth, to Cathy Reed, Marian K. Schneider, Esq., and Ruth E. Matheny (all dated July 25, 2011)). Recognizing the Secretary's new policy regarding re-examinations, Petitioner Mark Banfield wrote to the Secretary on August 25, 2011, on behalf of himself and a number of other electors and Petitioners, to request a re-examination of the remaining Specified Voting Systems, the Hart eSlate, the Sequoia/Dominion Edge 2, and the Sequoia/Dominion Advantage. Ex. 5 The Secretary also granted this new request. Ex. 6. Accordingly, all of the Specified Voting Systems will be re-examined against the requirements of the Election Code.

Both parties filed dispositive motions for summary relief on August 8, 2011, as required by the June 27 Order. Petitioners filed their Motion for Partial Summary Judgment. The Secretary filed an Application for Summary Relief, seeking judgment in her favor on all causes of action set forth in the Petition, including those counts at issue in Petitioners' Motion. Ex. 7. The Secretary's omnibus application explained that the Petition should be dismissed in its entirety because, among other reasons, the Secretary's long-standing, consistent, and reasonable interpretation and application of the Election Code to allow for the certification and use of DREs was both correct as a matter of law and entitled to deference.

After the parties' cross-motions for summary judgment were filed, but before briefing, Petitioners moved the Court to stay all proceedings in light of the Secretary's decision to grant the original re-examination requests. The Secretary opposed this request on the grounds that the re-examinations would not materially affect her right to summary relief or alter the scope and purpose of the trial, if a trial was necessary. At an August 17, 2011 conference before Judge Pellegrini, the Court noted that certain legal issues raised in the parties' cross applications for summary judgment could be decided without a trial. The Court ordered the instant briefing on Petitioners' Motion and directed that "all other matters in this case including discovery shall be held in abeyance." Ex. 8. On September 15, Petitioners filed their Brief, supporting their motion for summary judgment on Counts I, IV, VI, IX, and X, as described above.

The Secretary respectfully submits this brief in response to Petitioners' Motion and to explain why Petitioners are not entitled to summary judgment. The Secretary also offers this memorandum in further support of her Application for Summary Relief and to demonstrate why judgment as a matter of law should be entered in her favor on the particular claims now before the Court.⁷

B. The Relevant Law

1. The Pennsylvania Election Code

The Pennsylvania Election Code was originally enacted in 1937 and subsequently amended in 1980 to allow for the use of electronic voting systems. See 25 P.S. §§ 3031.1 -

⁷ The Secretary relies on her previously submitted Application for Summary Relief as a procedurally proper and adequate request to obtain relief from the Court. Alternatively, the Secretary requests that the Court treat this memorandum as a duly filed cross-motion for summary judgment as to the claims raised in Petitioners' Motion. As fully set forth by both parties' briefs, the merits of Counts I, IV, VI, IX, and X of the Petition can be determined by this Court's resolution of certain legal issues, rather than a consideration of any factual disputes, and, for that reason, the Secretary's request presents no prejudice to either side.

3031.22. Resolution of Petitioners' Motion requires this Court to interpret language found in only a few specific provisions included in the 1980 amendments to Election Code,⁸ namely:

- Section § 3031.1: defining, in pertinent part, an electronic voting system as one that “shall provide for a permanent physical record of each vote cast;”
- Section § 3031.17: providing that the counties shall conduct a “statistical recount ... after each election using manual, mechanical or electronic devices of a type different than those used for the specific election;” and
- Section § 3031.5: requiring the Secretary to re-examine an electronic voting system upon the properly submitted request of ten electors.

The Election Code defines the term “electronic voting system” to mean “a system in which one or more voting devices are used to permit the registering or recording of votes and in which such votes are computed and tabulated by automatic tabulating equipment.” 25 P.S.

§ 3031.1. The Election Code requires that the Secretary shall examine electronic voting systems upon request and shall file a report, “stating whether, in [her] opinion, the system so examined can be safely used by voters at elections as provided in this act and meets all of the requirements hereinafter set forth.” 25 P.S. § 3031.5(b). Section 3031.7, in turn, clarifies those “requirements” by expressly laying out seventeen prerequisites. See 25 P.S. § 3031.7. Among other things, an electronic voting system shall not be approved unless it “[p]rovides for voting in absolute secrecy;” “[i]s suitably designed for the purpose used [and] is constructed in a neat and workmanlike manner;” and, “[w]hen properly operated, records correctly and computes and tabulates accurately every valid vote registered.” Id. §§ 3031.7(1), (11), (13).

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

The Election Code contemplates the certification and use of both DRE and optical scan electronic voting systems. See 25 P.S. § 3031.1 (defining “electronic voting system” broadly). A DRE uses an electronic ballot display and records votes and ballot images in multiple memory components within the DRE. Optical scan electronic voting systems use an optical scanner to read marked paper ballots and tally the results, either at the precinct or via a centralized counter. As explained by the Secretary’s expert, Dr. Michael Shamos, “[t]he Secretary uses exactly the same process for testing optical scan systems” as she uses for testing and certifying DREs.⁹ Ex. 9 ¶ 42 (Report of Respondent’s Expert Michael I. Shamos, Ph.D., J.D. (“Shamos Report”)).

As Petitioners acknowledge, the Secretary “is charged with the general supervision and administration of Pennsylvania’s elections laws, including among other things, the duty ‘to

⁹ Petitioners demand that this Court disregard the opinions of Dr. Shamos. *Petr.’ Br.* at 60-62. Dr. Shamos, however, is uniquely qualified to testify in this action. As an initial matter, he has a doctorate in computer science from Yale and a *juris doctorate* from Duquesne University. See Ex. 9 (Shamos Report, Ex. 1 (Resume of Michael Ian Shamos)). More to the point, Dr. Shamos has performed more than 120 statutory examinations of voting systems throughout the country. Id. ¶¶ 5-9. He began examining computerized voting systems for Pennsylvania and applying the Election Code more than 30 years ago. Id. ¶ 5. Dr. Shamos is, therefore, fully knowledgeable of the design and performance of the Specified Voting Systems. More importantly, no one single person is more familiar with provisions in the Election Code governing the Specified Voting Systems and the application of those provisions to the examination, certification, and use of these machines in Pennsylvania. As Judge Lancaster of the United States District Court for the Western District of Pennsylvania recognized in denying a similar challenge, Dr. Shamos is “certainly qualified in this area He knows the standards.” Ex. 10 (Taylor v. Onorato, No. 06-481, Trial Tr. at 63:3-10 (W.D. Pa. Apr. 27, 2006)); see also Schade v. Md. State Bd. of Elections, 930 A.2d 304, 317, 324-25 (Md. 2007) (noting, and finding no error in, trial court’s determination that Dr. Shamos presented “the true voice of reason” and was “the most credible expert” in a case challenging Maryland’s use of DREs). Moreover, Petitioners’ overwrought attack on Dr. Shamos and his role in this case is manifestly disingenuous given that their Motion rests largely on their own experts’ idiosyncratic understandings of the terms “physical,” “permanent,” and “recount.” See, e.g., *Petr.’ Br.* at 33-34, 36, 52. Thus, if it is improper to cite the opinions of putative experts, Petitioners’ are guilty of the same “offense.” In any event, this Court is more than capable of determining for itself which of Dr. Shamos’ opinions, if any, will assist it in understanding the meaning and application of the relevant portions of the Election Code. The Court is free to consider the opinions of Dr. Shamos it considers helpful and to disregard the opinions, if any, that are not.

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].” Pet. ¶ 38 (quoting 25 P.S. § 2621(b)). The Secretary, however, does not have the authority to select a particular voting system for use in any part of the Commonwealth. Rather, once the Secretary approves a voting system, each of Pennsylvania’s sixty-seven counties chooses from among the certified systems and independently purchases the voting system that best meets the localized needs of that county. See 25 P.S. § 2642(c) (requiring the counties to “purchase, preserve, store and maintain primary and election equipment of all kinds”); id. § 3031.4(a) (stating that, if a majority of electors in a county vote in favor of using an electronic voting system, “the county board of elections of that county shall purchase, lease, or otherwise procure for each election district of such county or municipality, the components of an electronic voting system of a kind approved, . . . by the Secretary”); id. § 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.”). And after the counties choose their voting systems, they alone are responsible for the safe storage and use of those machines at elections. See, e.g., id. § 3031.21(a) (requiring the counties to “designate a person or persons who shall have the custody of the county’s electronic voting system and its components . . . when the system is not in use at an election, and the board shall provide for his compensation and for the safe storage and care of the system”). The counties are also responsible for conducting a 2% recount of a random sample of ballots recorded by their machines. 25 P.S. § 3031.17.

2. The Help America Vote Act

As the Pennsylvania Supreme Court has recognized, the “debacle” of the November 2000 presidential election “cried out for comprehensive Federal reform” of the election process.

Kuznik v. Westmoreland County Bd. of Comm’rs, 902 A.2d 476, 482 & n.7 (Pa. 2006) (citation

omitted). Congress responded to that outcry in October of 2002 by adopting the Help America Vote Act (“HAVA”), 42 U.S.C. § 15301 et seq. See Ex. 11 at 1 (Commonwealth of Pennsylvania State Plan (As Amended), Sept. 15, 2005). Among other things, HAVA required or authorized the creation of “standards for all voting systems used by the States” and authorized the creation of the Election Assistance Commission to administer the Act. Id. Of particular importance here, HAVA expressly requires that each voting system, including a system that records votes electronically, “produce a permanent paper record with a manual audit capacity.” 41 U.S.C. § 15481(a)(2)(B)(i) (emphasis added). It further requires that this “permanent paper record” be “available as an official record for any recount conducted with respect to any election in which the system is used.” Id. § 15481(a)(2)(B)(iii).

C. The Specified Voting Systems

The Specified Voting Systems at issue in this litigation are the six DREs certified for use in the Commonwealth.^{10, 11} See Pet. ¶ 40(a)-(f):

- The Danaher **ELECTronic 1242** (version 5M and 5Ma) was certified for use in Pennsylvania on November 15, 2005. Ex. 12 (ELECTronic 1242 Certification Report). It is the standard and handicapped-accessible voting system in Berks, Bucks, Dauphin,

¹⁰ The Petition also challenged a seventh system, the Advanced Voting Systems WINvote. Pet. ¶ 40(g). In December 2007, however, the Secretary de-certified the WINvote system. No version of the system is in use in Pennsylvania, and no version can be used in any election in the Commonwealth. 25 P.S. § 3031.5(c) (providing that a de-certified system “shall not thereafter be used or purchased for use in this Commonwealth”). In an earlier filing, Petitioners conceded that their claims do not concern systems that have been de-certified. Petrs.’ Mot. for Temporary Stay at 2 (filed Aug. 3, 2011) (“In the event that the [remaining] DRE machines are decertified . . . then it goes without saying that any proceedings from this point on will have been unnecessary.”). Accordingly, Petitioners’ discussion in their Brief of the de-certified WINvote system is irrelevant and should be ignored by this Court.

¹¹ The Secretary has also certified five optical scan systems for use in the Commonwealth. Approximately fourteen counties use optical scan voting systems. The boards of elections of some counties, like Chester County, have elected to use a combination of optical scan and DRE systems.

Delaware, Monroe, and Philadelphia Counties. See http://www.votespa.com/portal/server.pt/community/how_to_vote/13515/voting_system_demos (“VotesPA, Voting Systems Demos”). The ELECTronic 1242 retains electronic ballot images in at least six separate, physical memory chips, from which the ballot images can be printed out to ensure that the proper ballots were cast during the election. Ex. 13 at 9, 18 (Responses and Objections of Respondent to Petitioners’ First Set of Interrogatories).

- The Diebold (now Dominion) **Accuvote TSx** (version 4.6.4) was first certified for use in Pennsylvania on December 22, 2005 and was re-certified on January 17, 2006. Ex. 14 & 15 (Accuvote TSx Certification Reports). It is the standard and handicapped-accessible voting system in Armstrong, Bradford, Carbon, Clarion, Lehigh, Lycoming, Northumberland, Pike, Potter, Schuylkill, Somerset, Sullivan, Tioga, Union, Warren, and Washington Counties. See VotesPA, Voting Systems Demos. The Accuvote TSx system retains images of every vote cast on an internal flash memory in each voting machine and in memory on a PCMCIA card. Ex. 13 at 8, 16.
- The ES&S **iVotronic** (version 9.1.4.1) was certified for use in Pennsylvania on April 7, 2006. Ex. 16 (iVotronic Certification Report). It is the standard voting system in Allegheny, Beaver, Butler, Cambria, Cameron, Clearfield, Clinton, Columbia, Crawford, Cumberland, Elk, Erie, Forest, Greene, Jefferson, Lawrence, Lebanon, Luzerne, McKean, Mercer, Perry, Venango, Westmoreland, Wyoming Counties, and it is the handicapped-accessible system in Chester County. See VotesPA, Voting Systems Demos. The iVotronic is equipped with an audit log capability, which provides a time- and date-stamped record of significant voting events, such as the casting of a vote; it also stores ballot images in four separate memories, three in each unit and one in a removable card. Ex. 13 at 9, 17.
- The Hart **eSlate** (version 4.1.3) was certified for use in Pennsylvania on November 18, 2005. Ex. 17 (eSlate Certification Report). It is the standard voting system in Blair County, and the handicapped-accessible system in Blair, Fayette, Bedford, and Lancaster Counties. See VotesPA, Voting Systems Demos. The eSlate has a transaction log that records all significant voting events on the unit. A copy of each ballot cast on this system is maintained in three separate places, one on the eSlate itself, one on a flash memory device, and one at a precinct controller’s booth. Ex. 13 at 9, 17-18.
- The Sequoia (now Dominion) **Edge 2** (version 5.0.24) was certified for use in Pennsylvania on February 15, 2006. Ex. 18 (Edge 2 Certification Report). It is the standard and handicapped-accessible voting system in York County. See VotesPA, Voting Systems Demos. The Edge 2 retains the images of all cast votes both on the PCMCIA card and on the unit itself to permit pollworkers, if necessary, to print out these images after closing the polls. Ex. 13 at 8, 16.
- The Sequoia/Dominion **Advantage** (version 10.1.5) was certified for use in Pennsylvania on May 8, 2006. Ex. 19 (Advantage Certification Report). It is the standard and handicapped-accessible voting system in Montgomery and Northampton Counties. See VotesPA, Voting Systems Demos. The Advantage retains election files in both the voting unit and results cartridge. Ex. 13 at 9, 19.

1. The Specified Voting Systems Have Been Examined and Certified as Meeting the Requirements of the Election Code.

The Secretary has examined and certified that each of the Specified Voting Systems meets all of the requirements of the Election Code.¹² See Ex. 12 at 4, 8 (“the consultant tested the [ELECTronic 1242] System for the statutory requirements specified in . . . 25 P.S. § 3031.7 . . . [and] the Secretary of the Commonwealth hereby approves” the system for use); Ex. 15 at 9-10 (certifying Accuvote TSx); Ex. 16 at 6 (certifying iVotronic); Ex. 17 at 4, 6 (certifying eSlate); Ex. 18 at 6, 7 (certifying Edge 2); Ex. 19 at 8 (certifying Advantage); see also Ex. 20 at 36:20-37:1, 43:3-4 (Dep. of Commonwealth 4007.1(e) Representatives (“Commonwealth Dep.”), July 29, 2011) (stating that “[f]or conducting an examination, [the Department of State] would actually go essentially straight to [section 3031.7],” as well as “other requirements” found elsewhere in the Election Code); Ex. 21 at 95:12-95:14 (Dep. of Dr. Michael I. Shamos, Ph.D., J.D., July 22, 2011) (stating that he, as an examiner for the Commonwealth, would refer to the seventeen requirements in section 3031.7 “when completing [his] certification examination,” as well as other “implied requirements” found in the Election Code); Ex. 22 at 134:15-21 (Dep. of M. Glenn Newkirk, CBCP, July 11, 2011) (stating that he received and reviewed Election Code before examination); Ex. 23 (checklists used during examinations, reflecting the requirements of section 3031.7).

¹² The Secretary’s certification of a particular system may have required that a vendor or the county boards of election meet some non-material conditions. For example, when certifying the Advantage, the Secretary, among other things, required the vendor to supply “a copy of all executable software and firmware currently certified for use in the Commonwealth.” Ex. 19 at 7. In regard to the iVotronic, the Secretary required the vendor “to instruct counties to change the font size for write-in votes when setting up an election.” Ex. 16 at 5.

2. The Specified Voting Systems Provide for a Permanent Physical Record.

In addition to meeting the express requirements for reliability, security, and accuracy, each of the Specified Voting Systems also “provides for a permanent physical record,” as required by section 3031.1, in two ways. First, the system electronically registers and records each vote in multiple, nonvolatile media. See supra at pp. 13-14. “Those nonvolatile media have lifetimes that normally tremendously exceed the ballot retention period mandated by state and federal law, and they are physical.” Ex. 21 at 150:21-151:1 (Shamos Dep.); see also Ex. 20 at 44:16-18 (Commonwealth Dep.) (“we would look to see that [the machine] provided a permanent, physical record of the votes cast” during an examination); Ex. 22 at 154:16 – 157:17 (Newkirk Dep.) (stating that eSlate satisfied Code requirements, including “permanent physical record of each vote case”); 254:13 – 255:19 (stating that Danaher 1242 satisfied Code requirements, including “permanent physical record of each vote case”). Dr. Douglas Jones, Petitioners’ putative expert, concedes that such memories “last perhaps up to a decade.” Ex. 24 at 50:18-22 (Dep. of Douglas Jones, Ph.D., Aug. 4, 2011); see also id. at 51:7-10 (stating that flash memory can be retained “on the order of eight to twelve years”).

Second, each Specified Voting System also “provides for a permanent physical record” through its Ballot Image Retention (“BIR”) function. BIR allows the voting system to create an electronic memory or ballot image of the recorded vote and to store these ballot images in multiple, separate, independent, permanent locations in each machine. See Ex. 9 ¶ 47 (Shamos Report). The Specified Voting Systems can then print the ballot images at the close of the election. See Ex. 25 (Report, “Permanent Manual Audit Capacity Documentation for Certified DRE Voting Systems,” Apr. 11, 2006). Since the introduction of DREs in Pennsylvania, the Secretary has consistently taken the position that DREs satisfy section 3031.1’s requirement of a “permanent physical record” through BIR and by creating these printed ballot images. Id. at 1

(“From the very beginning of Act No. 1980-128, the authorizing statute for electronic voting systems, the Department of State has interpreted [section 3031.1] to permit electronic voting systems to meet [the permanent physical record] test through electronic ballot image retention (BIR);” “DRE’s currently in use in Pennsylvania all contain some type of BIR and record electronically an image of each ballot and have the ability to print the contents of the BIR on paper for use in conducting audits.”); see also Ex. 26 at 1 (Letter from Harry A. VanSickle, Commissioner, BCEL, to Mary Vollerero (dated June 28, 2006)) (stating that requirement for provision of “permanent physical record of each vote cast ... achieved through electronic ballot retention of each vote cast through ballot image retention (BIR) and the ability to print the BIR on paper for use in conducting audits”).

IV. SUMMARY OF THE ARGUMENT

The Secretary is entitled to summary judgment on Petitioners’ claims that the Specified Voting Systems do not meet the definitional requirements of the Election Code (Count I), do not allow for “statistical recounts” (Count IV), and do not comply with the Pennsylvania Constitution (Counts IX and X). The Specified Voting Systems meet the statutory definition of “electronic voting machines” in that they all create, retain, and produce permanent physical records of each vote cast in each primary, general, and municipal election in Pennsylvania. See infra Part V.A. These records are of sufficient quality to allow each county board of election that uses one of the Specified Voting Systems to conduct a “statistical recount” of votes to insure an accurate tally. See infra Part V.B. Because the Secretary’s application of the Election Code satisfies all the statutory requirements and insures safe and fair elections, the constitutional rights of each elector are protected. See infra Part V.C. In sum, the plain meaning of the Election Code’s language and the Secretary’s reasonable, good-faith interpretation of the relevant

provisions make clear that the Secretary's construction and application of the Election Code is entirely consistent with the intent of the General Assembly.

The Secretary is also entitled to summary judgment on Count VI of the Petition because there currently exists no case or controversy with respect to that cause of action. See infra Part V.D. The Secretary has determined to conduct a re-examination of the electronic voting systems still in use Pennsylvania, as requested by Petitioners Reed, Fewless, and Bergquist; therefore, Petitioners have received all of the relief they sought and will suffer no detriment by the dismissal of the cause of action.

Accordingly, the Secretary, not the Petitioners, is entitled to judgment as a matter of law on Counts I, IV, VI, IX, and X of the Petition.

V. ARGUMENT

A. **The Secretary, Not The Petitioners, Is Entitled To Summary Judgment on Count I Because The Specified Voting Systems Indisputably "Provide For A Permanent Physical Record Of Each Vote Cast," As Required By The Election Code.**

1. There Is No Genuine Factual Dispute That Each Of The Specified Voting Systems Provides For A Permanent Physical Record.

The capabilities of the Specified Voting Systems are not truly in dispute. As detailed above, each of the Specified Voting Systems certified by the Secretary and used by county election districts throughout the Commonwealth produces two types of records that can be handled, read, and recounted by computers or human observers and retained for an indefinite period of time.

The first type of record is the electronic data created at the very moment a voter confirms his or her specific selections on a ballot. This data is not some ephemeral bit of information existing somewhere in the ether. Rather, it is a specific notation of a voter's choice that is created and stored by the voting system. Moreover, unlike paper ballots or other voting

machines, the Specified Voting Systems create identical copies of this data in a number of places, both within the machine and on removable media like EEPROM, flash drives, and PCMCIA cards. There is no actual dispute that, if the voting system performs according to its design (which it can be expected to do after it passes pre-election testing by the Secretary and the county boards), the data created and collected will be a true and accurate record of what the voter indicated his or her choices to be. The media that record the voters' selections can be retained, and the information they contain can remain intact for many years. Ex. 9 ¶ 46 (Shamos Report); Ex. 24 at 50:18-22; 51:7-10 (Jones Dep.). In short, these electronic records of each vote cast are both permanent and physical.

The second type of record is the product of the ballot-image retention or BIR function. Every one of the six Specified Voting Systems creates and retains a "ballot image" of each vote of each elector. This ballot image can be printed on paper of various types at the close of each election. Such a piece of paper clearly showing specific votes is – as Petitioners concede – the epitome of a permanent, physical record.

The claim that a BIR printout satisfies the general requirement that voting systems be able to provide a proper record is not some bit of sophistry adopted by the Secretary for purposes of this litigation. On the contrary, it is the position taken by the U.S. Election Assistance Commission, the entity responsible for approving specifications and standards for the purpose of determining whether electronic voting systems, including DREs like those at issue here, meet the requirements of HAVA. The Election Assistance Commission has expressly explained that an electronic voting system meets HAVA's "permanent paper record" requirement when it "conforms and complies with Sections 2.2.5.2.1 and 2.5.3.1 of the 2002 Voting System

Standards.”¹³ Ex. 27 (EAC Advisory 2005-004); 41 U.S.C. § 15481(a)(2)(B)(i); see also supra Part III.B.2. Each of the Specified Voting Systems in this case has been tested against, and has been certified as meeting, these standards. See Ex. 9 ¶¶ 77, 303, 305 (Shamos Report).

In sum, the iVotronic, Danaher 1242, eSlate, TSx, Advantage, and Edge have all been found to “produce a permanent paper record” that can be used “for any recount conducted.” This alone should put an end to Petitioners’ claims that the Specified Voting Systems do not provide a “permanent physical record.” In their efforts to avoid this result, Petitioners embark on a tortuous exegesis of the Election Code’s definition of an electronic voting system and deconstruct separately each of the terms: “provide for,” “permanent,” “physical,” and “record of each vote cast.” Their efforts, however, cannot withstand scrutiny.

2. The Language In The Election Code Is Clear And Unambiguously Provides For The Certification And Use Of Voting Systems That, Like The Specified Voting Systems, Record Votes Electronically.

Petitioners’ attack on the Specified Voting Systems is based on an interpretation of the Election Code as they wish it were written, not as it is actually written. The actual language of the Election Code, however, unambiguously shows that the General Assembly knew perfectly well when it added Article XI-A that it was allowing the use of a new type of voting system different than the paper-ballot or lever-machine systems that had been used before. More specifically, the legislature understood that electronic voting machines would register or record votes electronically. That is what they were designed to do; that is what they are expected to do; and that is what the General Assembly authorized and approved them to do. It is a matter of the

¹³ Section 2.2.5.2.1 provides the “requirements for time, sequence and preservation of audit records” and section 2.5.3.1 provides the “common standards,” which include that all systems shall “[p]roduce a printed report of the number of ballots counted by each tabulator.” Ex. 28 (Voting Systems Standards, Vol. I “Performance Standards,” Apr. 2002).

most common sense, and, while it strikes Petitioners as scandalous, it would not surprise the legislature that a system that records votes electronically creates an electronic record.

This electronic record is, in some relevant ways, exactly like a paper record: it is, by itself, stable; it can be stored for a long period; it can be destroyed, damaged, tampered with, or lost if not properly protected; it can be read and counted. In other respects, however, an electronic record is different from, and, therefore, should be treated differently than, paper records.¹⁴ For example, electronic records created by and stored in DREs do not contain any ambiguity regarding a voter's intent. What the voter indicated would be his or her vote is entirely, cleanly, and automatically part of the record, without any necessity for interpretation. Ex. 9 ¶ 81 (Shamos Report) (“DREs do not exhibit this sort of inaccuracy [from ambiguous markings on paper ballots]. They are ‘binary’ in the sense that each voting position is either voted or not voted and no interpretation is required.”). Cf. Weber v. Shelley, 347 F.3d 1101, 1106 (9th Cir. 2003) (finding that “[n]o balloting system is perfect,” but DREs “remedy a number of ... problems” associated with paper ballots, including “overvotes, undervotes, ‘hanging chads,’ and other mechanical and human errors that may thwart voter intent.”). For this reason, unlike with optical scan paper ballots, there is no need to consider with DREs whether stray marks, oversized ovals, or pregnant chads can or should be counted.¹⁵

¹⁴ For this reason, Petitioners' constant analogies to shards of pottery, colored balls, and ballot boxes are misplaced. The technology of the DRE voting machine is simply different than those (literally) ancient methods. While the purpose of all the systems is the same – to capture and generate a tally of votes – it is a mistake to try to jam the square peg of electronic voting machines into the round hole of voting processes of another era.

¹⁵ See Ex. 29 (33 Pa. Bull. § 3935 (available at <http://www.pabulletin.com/secure/data/vol33/33-31/1538.html>) (setting forth standards for what constitutes a vote under HAVA, 42 U.S.C. § 15481(a)(6), and the Election Code, 25 P.S. § 2624)). To understand that DREs use different, but equally safe, accurate, and reliable technology to capture and count votes, one need

Accordingly, it cannot reasonably be disputed that the Specified Voting Systems do “provide for a permanent physical record of each vote cast” and entirely satisfy the General Assembly’s adopted definition of an electronic voting system.

(a) *The Specified Voting Systems “provide for” a record.*

The General Assembly defined an electronic voting system as one that shall “provide for” a certain record; the definition does not require the system to “provide” that record.

Nevertheless, Petitioners contend that “provide for” means that “one will *actually* supply what is needed,” citing no less than six dictionaries in support of this interpretation. Petrs.’ Br. at 44-45.

While clearly demonstrating that they at least are not “allergic” to dictionaries, id. at 44,

Petitioners’ argument does not say much for their ability to read those authorities completely or fairly. Indeed, in virtually every dictionary one can consult, including those referenced by

Petitioners, there is a definition for the phrase “provide for” that applies to this case; but, in each instance, Petitioners decline to acknowledge, much less apply, that definition.

Petitioners’ citation to the Cambridge Learner’s Dictionary is illustrative. Petitioners rightly note that this dictionary offers the following definition: “provide for sb. to give someone the things they need” Id. at 45. Petitioners do not discuss the term “sb,” shorthand for

“somebody.” Petitioners also do not mention that Cambridge Learner’s provides another

definition: “provide for sth. to make plans in order to deal with a possible future event.” See <http://dictionary.cambridge.org> (search “provide for” in “Learner’s” dictionary). The “sth” is

short for “something.” Id. (search “sth” in “Learner’s” dictionary). This second definition is

obviously more applicable in this case than the one suggested by Petitioners; the Election Code clearly states that voting systems should provide for a thing, not a person. Petitioners simply

only consider that the instructions for optical scan paper ballots run for more than 19 pages, while the instruction for reading DRE ballots requires only one page.

pretend this and similar definitions in other dictionaries do not exist. See, e.g., <http://idioms.thefreedictionary.com/provide+for> (citing Cambridge Dictionary of American Idioms (2003)) (cited by Petitioners) (making distinction between “provide for someone” and “provide for something”).¹⁶

More directly, the dictionaries provide a “formal” definition of “provide for” that applies when the phrase is used, as it is here, in a “law or agreement.” See, e.g., <http://dictionary.cambridge.org>. In such circumstances, the authorities agree that “provide for” possesses an anticipatory meaning; it concerns something that might happen or be available in future. See Oxford Advanced Learners Dictionary (“provide for something (formal); 2 (of a law, rule, etc.) to make it possible for something to be done”) (emphasis added).¹⁷ Applying that correct and directly-on-point understanding to the phrase used in the Election Code, it is clear that the General Assembly merely requires that electronic voting systems make the production of a record possible for future use by the county boards of elections.

¹⁶ See also Macmillian Dictionary (available at <http://www.macmillandictionary.com/> (search for “provide for”)); Merriam-Webster’s Advanced Learner’s English Dictionary (available at <http://www.learnersdictionary.com/search/provide%20for>); Oxford Advanced Learners Dictionary (available at <http://www.oxfordadvancedlearnersdictionary.com/dictionary/provide+for>).

¹⁷ See also <http://dictionary.cambridge.org>. (“If a law or agreement provides for something, it allows it to happen or exist.”) (emphasis added); English Collins Dictionary (available at <http://www.collinslanguage.com/> (search for “provide”)) (“5. (Formal) provide for (of a law, treaty, etc.) to make possible”) (emphasis added); Macmillian Dictionary (“provide for something FORMAL to make it possible for something to happen in the future”) (emphasis added; capitalization in original); Merriam-Webster’s Advanced Learner’s Dictionary (provide; provide for; 1 provide for (something): to cause (something) to be available or to happen in the future”) (emphasis added); <http://www.ldoceonline.com/dictionary/provide> (provide; provide for somebody/something; 2 *formal* if a law, rule, or plan provides for something, it states that something will be done and makes it possible for it to be done”) (emphasis added).

Gamely ignoring these express definitions that fit this case, but not their worldview, Petitioners purport to rely on the definition of “provide for” as “to supply the needs of someone or something.”¹⁸ Petrs.’ Br. at 45 (citing Spears, McGraw-Hill’s Dictionary of Am. Idioms and Phrasal Verbs 520 (2005)). Even if this general definition of “provide for” were to govern, the Secretary’s interpretation of that phrase, requiring only that electronic machines be capable of producing records, rather than (as Petitioners contend) “actually supply” records, is the correct understanding.¹⁹ Indeed, it is the only possible understanding given the Secretary’s duties under the Election Code.

As noted above, the county boards of elections purchase and install voting systems at their discretion. 25 P.S. § 3031.4(b). The boards take care of the machines, test the machines, and operate the machines during the elections. The actual creation and use of voting records are entirely the responsibility of these local election officials.²⁰ In contrast, the Secretary is merely

¹⁸ Petitioners archly suggest their understanding of “provide for” is the only one that “makes sense” because the Election Code’s “permanent physical record” requirement is just like the aspirational words of the Preamble to the Constitution. Petrs.’ Br. at 45-46. Petitioners’ melodramatic comparison should not be taken seriously. Petitioners, of course, do not proffer any evidence that the General Assembly, in drafting amendments to the Election Code, took literary inspiration from the Constitution. Moreover, the Preamble does not purport, by itself, to “actually supply,” for example, a “common defense.” Rather, it seeks only to pronounce that the Constitution as a whole intends to establish the conditions necessary for the institutions of the federal government to work together to protect and secure the “more perfect Union.” That is what makes it a constitution.

¹⁹ Petitioners’ expert concedes that the Election Code contains no language requiring that a voting system “actually supply” a paper record of each vote. Ex. 24 at 38:22 – 39:4 (Jones Dep.) (admitting that he is “not aware of any such requirement” that each “election district ... print out a paper record of every ballot image”).

²⁰ County boards and other local election officials are responsible for the “process of voting” and all election day and post-election procedures. 25 P.S. § 3031.12. Indeed, the original tabulation of votes, certification of the official returns, the computation and canvassing of returns, and the recounts are performed by local officials, not the Secretary. Id. § 3031.14

required to examine and approve the voting systems; that is, essentially to certify that the systems meet the definition of “electronic voting systems” and that they are safe, reliable, and accurate as measured against the standards of the Code. The Secretary does not select, procure, or test individually each of the thousands of machines that are actually used in the election districts. Given her limited role, the Secretary can do no more than determine whether each system, as a system, “provides for” a record in the sense that it “supplies what is needed” to produce those records. In short, she is not required to (and, as a practical matter, cannot) determine if each machine actually produces a permanent physical record. Cf. Ex. 9 ¶ 65 (Shamos Report) (“The purpose of certification is to verify that a particular type of system meets the mandatory requirements of the Election Code. It cannot and does not ensure that each particular machine of that type that is sold or used will work properly. It is not a substitute for acceptance testing, which needs to be performed by the purchaser of the system.”).

(b) *The two types of records provided for by the Specified Voting Systems are “permanent.”*

Both the electronic records and the BIR printouts are permanent as that term must be understood to be used in the Election Code. To be permanent means to be “continuing or enduring without fundamental or marked change.” Merriam-Webster Dictionary (available at <http://www.merriam-webster.com/dictionary/permanent>). More succinctly, something is permanent if it is stable; that is, it will not change unless some other force acts upon it.

(providing that “[a]ll proceedings at the central tabulation center shall be under the direction of the county board of elections;” requiring board of election to certify returns); id. § 3154(a) (computation and canvassing of returns); id. § 3154(e) (boards conduct recounts or recanvassing). Even discrepancies and “palpable error” are to be investigated by local return boards, not the Department of State. See, e.g., id. § 3154(b). But see id. § 3154(f) (authorizing Secretary to order nondiscretionary recount in close elections).

The votes that the Specified Voting Systems electronically record on multiple, separate, and independent media will be retained for many years in those memories in precisely the same state as when first registered by the voter. Ex. 9 ¶ 46 (Shamos Report). The printed ballot images, like all paper copies, can also last for untold periods if properly stored. Still, Petitioners contend that neither the electronic record nor the paper ballot images are permanent.

Petitioners deny the permanence of the electronic record on two grounds. First, they complain that electronic data recorded on various media is “subject to alteration and change.” *Petrs.’ Br.* at 33 (citing *Lopresti Report* at 4-5). This is not a serious objection. “Permanent” does not mean literally lasting forever in a constant, unchangeable state, or, as Petitioners would have it, a state in which loss or alteration is impossible, because it cannot mean that.²¹ Such an understanding defies reality and creates a standard that simply cannot be met by any voting device given the laws of physics that govern this universe. Certainly the paper records used in optical scan systems that Petitioners demand no more satisfy this lofty standard than do the electronic memories they so deride; paper is probably more “subject to alteration and change” than any flash card; the information on paper, through innocent or insidious means, can just as readily be lost, tampered with, or rendered incomprehensible to man or machine. Ex. 9 ¶ 49 (*Shamos Report*) (“Paper can be lost or altered. Marks made on paper can be erased. Paper can be burned or stolen. All of these things have occurred with paper ballots. However, in the normal course of proper handling, paper ballots do not become altered, nor do they decay except after long periods of time. That is why they are regarded as ‘permanent.’”). Thus, the fact that a

²¹ As Petitioners’ expert explained, things are “more permanent and less permanent,” not absolutely permanent. Ex. 24 at 45:22-25 (*Jones Dep.*). Accordingly, how long electronic records must last is a question of where the Election Code’s demand falls within the “spectrum of degrees of permanence.” *Id.* at 43:3-7.

record may be capable of alteration if someone acts upon it cannot render it impermanent within the meaning of the Election Code.

Second, Petitioners argue that, regardless of what “permanent” might mean in some abstract, metaphysical sense, electronic records are not permanent because they are not actually retained at all. In support of this factual claim, Petitioners rely primarily on the Secretary’s 2008 Directive Concerning the Use, Implementation and Operation of Electronic Voting Systems by the County Boards, which requires that county election officials retain “ballot images for at least 20 days.”²² Petrs.’ Br. at 35. The Secretary agrees that the meaning of the term “permanent” as used in the Election Code must be considered in light of the General Assembly’s essential goal of conducting fair elections. With that as the defining standard, the electronic records, even if actually retained for only 20 days, satisfy the written requirements of the Election Code. After all, an examination of the various provisions of the Code makes clear that the General Assembly deemed 20 days an adequate period of time to retain voting records. Section 3070, for example, requires that voting machines remain locked for 20 days after a general or municipal election. Section 3262 requires that the recanvassing of votes made on electronic voting machines without paper ballots, i.e., DREs, must occur within 20 days of the general or municipal election. Section 3456 similarly requires that any petition challenging an election be filed within 20 days after the election. Accordingly, it is clear that the Secretary’s 2008 Directive, soundly grounded

²² Although Petitioners cite the relevant provision of the Directive, attached as Exhibit 42 to their Brief, they do not address the real import of the Secretary’s guidelines. By expressly requiring the county boards of elections to retain a “printed or electronic copy of the ballot images,” the Directive provides explicit insurance records will be available for meaningful recounts and recanvass as permitted under the Election Code.

in the finding of the legislature that 20 days is sufficient time to determine whether an election should be challenged, fits squarely within the definitional demands for practical permanence.²³

The only other applicable standard for actual retention of election records is twenty-two (22) months, as provided under federal law. 42 U.S.C. § 1974. There is no genuine dispute that the records created by the Specified Voting Systems meet this requirement, as well. Ex. 24 at 49:16 – 50:1 (Jones Dep.) (agreeing that nonvolatile memory “would typically be expected to last twenty-two months”); Ex. 9 ¶ 46 (Shamos Report) (“Therefore, within the context of election records, two years would be sufficient to achieve permanence. DRE voting systems commonly record ballot images ... in ‘electrically erasable programmable read-only memory,’ usually abbreviated EEPROM. A typical EEPROM data retention period is 20 years; some are as low as ten years, and some are over 100 years.”).

Petitioners challenge the permanence of the BIR printout by citing the fact that the votes are “generally” printed on thermal paper, a medium that, in the “expert” opinion of Dr. Jones, is “notorious for not being permanent.” Petrs.’ Br. 41-42. Petitioners know, but do not address the fact, that not all ballot images are printed on thermal paper. See Jones Report ¶ 34 (Petrs.’ Ex. 7) (noting that “printed ballot-image report” can be produced on “thermal paper ... or by full-page printer”). This fact alone renders Petitioners’ argument meritless, at least with respect to some of the Specified Voting Systems. More importantly, Petitioners’ contention that printed ballot

²³ Petitioners clearly consider the 20-day retention period inadequate as a matter of policy. The merits of the policy, however, are not at issue. Rather, it is the meaning and scope of the definition of “electronic voting system” that is now before the Court. The definition in section 3031.1 does not, in and of itself, actually require that the records be kept at all, much less for a specific period of time. If it requires anything – and it is not clear that it does (see, e.g., Banfield v. Commonwealth, 922 A.2d 36, 52 (Pa. Commw. Ct. 2007) (Leavitt, J., dissenting)) – it only requires that the systems be able to produce a record. The Specified Voting Systems fulfill that requirement.

images cannot be deemed “permanent” under section 3031.1 because the images can deteriorate if not properly cared for would, if taken seriously, undermine any attempt to create or retain “permanent” records of any kind. The obvious truth is that any record – a paper ballot, a verified-voter paper record, a vote printed on thermal paper, or a vote chiseled in marble – is subject to loss, damage, tampering, erosion, and degradation. For this reason, it defies common sense to interpret the Code as requiring that a record actually be permanent, i.e., lasting forever. Rather, the Code must be understood as requiring that the record be capable of permanence in reasonably appropriate and available conditions. In the real world, of course, that is all it can do. Whether these records can be maintained for a period of time sufficient to conduct fair elections is ultimately not merely a function of the type of material on which the record is made, but is equally determined by how the record is cared for by the county boards of elections (those responsible for printing and retaining the records).²⁴ If maintained properly, thermal paper, like every other paper record, is permanent as that term is used in the Election Code. Ex. 30 ¶ 41 (Shamos Rebuttal Report).

(c) *The two types of records provided for by the Specified Voting Systems are “physical.”*

As commonly understood in ordinary usage, something is “physical” if it has a “material existence” that is “perceptible through the senses.” Merriam-Webster Dictionary (available at <http://www.merriam-webster.com/dictionary/physical>). The electronic media which capture and retain each voter’s selection clearly meet this definition. They can be seen and touched; they are

²⁴ Petitioners’ putative expert admitted that the meaning of permanence must be determined by such factors. Ex. 24 at 44:4-7 (Jones Dep.) (“By the end of the universe everything will decay ... that’s why I say there is a degree – there is a spectrum of degrees of permanence”); 44:15-16 (“The degree of permanence varies depending upon how well [paper ballots] are stored.”); 51:10-11 (“Flash memory, like paper, depends on how its stored.”).

removable and can be stored for use at a later time. Ex. 9 ¶ 50 (Shamos Report). The printed ballot image is a paper record with the same characteristics.

In a refreshing application of common sense, Petitioners concede that the paper printouts of the ballot images registered and recorded on the Specified Voting Systems are physical. Petrs.’ Br. at 40 (“paper would admittedly qualify as a ‘physical’ document”). Petitioners contend, however, that the electronic record is not physical simply because it is an electronic record, rather than a vote on paper. Petrs.’ Br. at 36, 38. By tearing the term “physical” out of context and treating it as a separate requirement, Petitioners reach the odd conclusion that section 3031.1 requires that electronic voting systems produce actual votes that have a physical manifestation like the Athenian ostraca or the ballotta of the Freemasons.²⁵ The Code, however, requires a machine that provides a physical record. That is, the record must be physical, not the votes (or the data that represents the votes).²⁶

The precise nature of a record of votes is determined by the mechanism used to capture those votes. Various provisions of the Election Code make clear that, when providing for the use of electronic voting systems in Pennsylvania, the General Assembly understood that it was

²⁵ Petitioners take issue with the Luddite characterization leveled against them by prior counsel more than five years ago. Petrs.’ Br. at 1 n.1. It is not clear if, in their multiple forays into the various dictionaries available to them, Petitioners bothered to look up the term. It remains both accurate and appropriate. Indeed, Petitioners’ educational footnotes regarding ancient voting methods confirms the Secretary’s earlier conclusion. Petitioners’ refusal to appreciate that modern electronic voting employs technology that has been developed since the time of Pericles – including advances in technology relating to writing, reading, conveying, recording, and storing information – is precisely why they make the preposterous claim that DREs are not merely an inferior voting system, but per se illegal.

²⁶ For example, one need not ask whether the pencil mark used to note a voter’s selection on a paper ballot is physical. It is not relevant whether a voter’s “mark” or a vote itself has a material existence. The issue is whether there is some physical record that retains, reflects, or otherwise communicates that vote in a way that can be counted. The Specified Voting Systems, like all the voting systems in Pennsylvania, have been tested and certified as having that ability.

providing for the use of electronic voting machines that would register or record votes electronically. See, e.g., 25 P.S. § 3031.1 (defining “automatic tabulating equipment” as “apparatus which automatically examines and computes ... votes registered electronically,” defining “voting device” as “either an apparatus in which paper ballots or ballot cards are used ... or an apparatus by which such votes are registered electronically”) (emphasis added); id. § 3031.12(a) (describing election day procedures “[i]n an election district which uses an electronic voting system in which votes are registered electronically”) (emphasis added). With regard to DREs, that vote-capturing mechanism is the direct, electronic recording of votes onto multiple computer memory chips that can be readily and inexpensively retained. In sum, the material on which those votes are electronically recorded is the record of those votes, and it is not seriously disputed that that record – flash, PCMCIA, or EEPROM memory cards – is physical.²⁷

Petitioners rely on a peculiar understanding of “physical” in the hope that these records might simply vanish into nonexistence. Petitioners first appeal to the fact that the General Assembly did not use the phrase “permanent electronic record,” but used instead “permanent physical record,” thereby showing that it intended the two words “electronic” and “physical” to have different meanings. *Petr.*’ Br. at 36-37. This argument does nothing to establish Petitioners’ view that “physical” means a paper, optical scan ballot. After all, the General Assembly also did not adopt the phrase “permanent paper record,” even though “it clearly knew how to use the word [paper] elsewhere in the Election Code.” *Petr.*’ Br. at 36. See, e.g., 25 P.S.

²⁷ In fact, Petitioners recognize that the electronic record has a material existence. See *Petr.*’ Br. at 38 (“A memory card or computer chip containing electronic data is physical of course”); Ex. 31 at 210:20-23 (Dep. of Daniel Lopresti, Ph.D., Aug. 2, 2011) (“Q: And the memories are physical; right? A. The memories are physical. The chips are physical, yes.”).

§§ 3031.12(b); 3031.13(a); 3031.18(1); 3154(e)(3). As a matter of logic and statutory interpretation, it is more likely that the General Assembly used the term “physical,” not to exclude other words like “electronic” or “paper,” but simply to require a record that was physical in the ordinary sense of having a material existence.

This conclusion is supported, of course, by the fact that the General Assembly understood and expected that certain electronic voting systems would register and record votes electronically without a paper component to the voting process. For example, the Election Code often makes a distinction between systems that use paper ballots and those that do not. See, e.g., 25 P.S. § 3031.1 (defining “voting device” as “either an apparatus in which paper ballots or ballot cards are used ... or an apparatus by which such votes are registered electronically”); id. § 3031.7(10) (requiring one verification procedure for “type [of voting system] that registers the vote electronically” and another for “type that uses paper ballots ... to register the vote”); id. § 3031.12 (setting forth two different procedures for a district using an “electronic voting system in which votes are registered electronically” and a district which “utilizes paper ballots or ballot cards to register the votes”). This express recognition of two different types of electronic systems would make no sense if, as Petitioners argue, the General Assembly’s “permanent physical record” language was intended to require a paper record for all machines. The only possible interpretation of “permanent physical record” that renders the distinction meaningful is that the machine in question must be able to retain a true and correct record of a properly registered vote in or on a tangible medium that can be retrieved and recounted as needed.²⁸

²⁸ Moreover, if the General Assembly had meant “permanent physical record” to mean a “permanent paper record,” as Petitioners insist, it would have created a single, formal recount procedure for all voting systems that required local boards of elections to collect and review those paper records. It did not. Rather, the General Assembly adopted different recount procedures for electronic systems that use paper ballots and for those systems that do not.

Second, Petitioners and their experts argue by analogy, comparing the electronic record of votes cast to a “reverberating echo,” suggesting that each is of the same substance. Petrs.’ Br. at 37 (citing Jones Report ¶ 38). Because an echo is obviously not physical, neither can electronic data be. Petitioners’ analogy is helpful only if carried to its proper conclusion. An echo may or may not be physical in the strict sense, but if someone recorded that sound on a vinyl record, an audio tape, or a flash drive, she would have a record of the echo that is indisputably physical. The electronically registered vote may or may not be deemed physical, but the record of that vote – which is what the Code requires – certainly is.

Petitioners also compare electronic data to software, arguing that, if, as the Secretary’s expert has stated, software is intangible, then electronic records must be deemed immaterial. Petrs.’ Br. at 38-39 (citing Shamos Report ¶ 123). This analogy fails for exactly the same reasons as Petitioners’ “echo” argument. One need not wrestle with the metaphysical question regarding whether a computer program is physical in any sense of the word. What is clear is that, to create and possess a record of the software, one must do so on material that has a physical existence.²⁹

Section 3154, for example, pertaining to initial recounts when there is no allegation of fraud or error, but when the numbers simply do not agree, requires boards of counties that use DREs merely to look again at the machines’ counters. 25 P.S. § 3154(e)(1). In contrast, districts that use “an electronic voting system utilizing paper ballots” are required to “recount all ballots using manual, mechanical or electronic devices of a different type.” Id. § 3154(e)(3)(i). Similarly, in situations where a petition alleging fraud or error has been filed, the General Assembly thought it sufficient merely to have the board “recanvass the vote cast” on a non-paper-based electronic voting system. 25 P.S. 3031.18(2) (referencing 25 P.S. § 3262(a)(1)). If the legislature intended that same machine to create simultaneously a paper record of the vote, it would have adopted a recount process that required actual consideration of that record, as evidenced by the fact that it created just such a procedure in cases where it knew paper ballots were available. See id. § 3031.18(1) (referencing 25 P.S. § 3261).

²⁹ It is important to note that Dr. Shamos’ observations regarding software were not offered as an opinion regarding the definition of electronic voting machines in section 3031.1. Rather,

(d) *The two types of records provided for by the Specified Voting Systems are records of “each vote cast.”*

The electronic record and the printed ballot images are not only permanent and physical, but are also true, complete, and accurate records “of each vote cast.”

Petitioners contend that the electronic record created by the Specified Voting Systems is not an actual record of the vote because it is “dependent on and affected by the software the computer runs.” Petrs.’ Br. at 39. If that software is “flawed or corrupted,” both the “initial data” and any copies of that record will fail to capture the voter’s intent and, therefore, fail to “create any actual ‘record’ of any actual vote.” Id. Petitioners’ attack on the printed ballot images is also based on this argument that all computer-created information is per se unreliable. Id. (citing Lopresti Report at 5; Jones Report ¶¶ 34, 42). The printed ballot images are not “meaningful” records of each vote cast because they are “[a]t best” merely “exact cop[ies] of the original” vote cast. Petrs.’ Br. at 40.

Petitioners’ claim that the electronic and printed records do not truly capture each vote of the elector is without merit. First, Petitioners read into the Election Code a requirement that is simply not there; namely, that electronic voting systems create a “software-independent” record. There is, of course, no statutory basis for this reading of the Code. Although the General Assembly anticipated the use of voting systems that would use hardware and software to register and record votes electronically, it did not adopt any language suggesting that the voting, recording, or tabulating of votes were to be done independently from that software.

he was addressing the section 3031.7(11) requirement that each system be “constructed in a neat and workmanlike manner of durable material of good quality.” Ex. 9 ¶ 123 (Shamos Report). While doubting this “workmanlike” standard could be applied to the design and performance of software per se, he no doubt agrees that that question, as well as the related issue of “durable material,” could be asked of the disc or drive upon which the software was recorded. Ex. 30 ¶ 44 (Shamos Rebuttal Report) (“[W]hat must be ‘workmanlike’ is not the software itself, but the physical memory on which the software resides.”).

Petitioners' "software independence" argument is a mere rebranding of an argument Petitioners previously pressed, that the Election Code requires the Specified Voting Systems to produce a voter-verified, independent, paper record. Pet. ¶ 113 (alleging that section 3031.1 requires "[r]etention of a permanent physical record that the voter can verify"); Ex. 32 (Petr.' Fourth Amended Response to Respondent's Interrogatories and Requests for Production of Documents, at 34 (stating that the Specified Voting Systems do not allow for recounts because they "do not retain voter verified independent record[s]")). As is recognized by the experts on both sides, however, the Election Code is entirely silent regarding every one of these elements. The Election Code does not require what is commonly referred to as a VVPAT or voter-verified paper audit trail. Ex. 31 at 123:6-11 (Lopresti Dep.) ("I can't point you to a specific point in the Pennsylvania Code that says that a human observer should be allowed to confirm that what he or she voted is recorded correctly."); Ex. 24 at 75:12-19 (Jones Dep.) ("Q. Is there a requirement under the Pennsylvania election code for a voter-verified paper audit trail, a VVPAT? ...A. There isn't. Q. There is not? A. That's correct."); 166:9-14 ("Q. So you agree with me that there's not a provision in either federal law or the Pennsylvania election code that requires a voter to be able to confirm that what is written is, in fact, an accurate record of his or her vote? A. I agree."); Ex. 9 ¶ 423 (Shamos Report) ("[Petitioners' demand for a voter-verifiable record] describes a VVPAT [voter verified paper audit trial]. There is no requirement of a VVPAT in HAVA, the FVSS or the Election Code."); see also id. ¶ 97 ("[The Election Code] contains no explicit provision whatsoever that requires an 'independent method of verifying that the voter's vote was accurately tabulated and counted.' ... Petitioners have failed to cite any place at all in the entire Pennsylvania Statutes that such a provision might be found."); ¶ 282 ("Petitioners seem [to] have read into the Election Code a requirement for an 'independent record,' by which

they appear to mean a record that is produced by a different mechanism than the voting system itself. No such requirement can found in the Election Code”). The Court should not countenance Petitioners’ attempt to pursue their own policy preference of voter-created, paper records by ignoring the actual language of the Election Code. See 1 Pa. C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”).

Second, Petitioners’ demand for “software independence” completely disregards the fact that the technology used by the Specified Voting Systems is unexceptional in modern society. Computers and software systems like the ones used by DREs are used everyday by virtually everyone for countless tasks that require the safe, effective, and reliable communication of data. Petitioners’ offensive against the computers and software used by the Specified Voting Systems is not even based on factual allegations of software failure or vulnerability.³⁰ Rather, they read the Election Code to require “software-independent” records because of imaginary fears of tampering or dishonest counts. In fact, Petitioners’ argument is entirely conditional – *if* the software were compromised, then the record would be useless. *Petr.’ Br.* at 39.

Petitioners cannot identify a single, meaningful security breach of any of the Specified Voting Systems. *Ex. 9* ¶ 256 (Shamos Report) (“No incident of actual hacking of a machine used in an election has ever been detected or proven anywhere in the United States. Every time a forensic examination has been performed on a voting system alleged to have been hacked, no evidence of hacking has been found.”). Most tellingly, while Petitioners rely (entirely) on their

³⁰ Nor could it be for the reason set forth in the Secretary’s Application for Summary Relief. See *Ex. 7* ¶¶ 24, 34-35, 52, 56. In sum, the Commonwealth has successfully conducted ten statewide elections since the filing of the Petition without any cause to doubt the safety, reliability, and effectiveness of the Specified Voting Systems.

experts to raise doubts about software-run systems, those same experts also acknowledge that there is no evidence of tampering with any software or hardware of the Specified Voting Systems in Pennsylvania elections. Ex. 31 at 181:2-5 (Lopresti Dep.) (“Q. Now, the Hursti exploit, to your knowledge, was that ever taken advantage of in any real election? A. Not that I know.”); 187:22 – 188:1 (“I know of no incident in a Pennsylvania election where the ballot image was output improperly by one of these machines.”); 190:1-7 (admitting no knowledge of alteration of ballots in any election in Pennsylvania using DREs); 206:4-20 (admitting no evidence of votes lost in Pennsylvania and other jurisdiction “based on the attacking and compromising of software on a DRE machine.”); 211:15 – 212:13 (admitting no evidence of “verified tampering” or “verified hacking” of DREs during election in Pennsylvania); Ex. 24 at 121:1-5 (Jones Dep.) (“Q. And do you have any evidence that the Hursti [II] exploit was ever carried out on any DRE in Pennsylvania? A. I don’t believe it was ever carried out anywhere except in a laboratory”); 125:10-18 (“Q. [T]o date there’s no evidence of any such virus-based attack on voting machines in the United States? A. I’ve never seen evidence. Q. And that certainly applies to Pennsylvania as well? A. It is one of the United States.”); 170:10 – 171:23 (admitting no evidence of “alteration” of ballot images during elections); 172:21-24 (“Q. Do you have any evidence of any tampering with any software or data stored on a DRE machine that was used in Pennsylvania? A. No.”).³¹

³¹ To establish the purported “vulnerabilities” of DREs, Petitioners cite three specific incidents: the 2005 municipal primary election in Berks County (Petr. Br. at 14); the 2007 decertification of the AVS WINvote system (Petr. Br. at 21-22); and the examinations of some of the DREs by California and Ohio (Petr. Br. at 22-24). Petitioners’ reliance on these events is misplaced largely because Petitioners misstate what actually took place. Petitioners dramatically assert that, “[d]uring the course of poll worker operation ... a number of votes [in Berks County] were overwritten and erased from data packs,” Petr. Br. at 14, implying that the problem was a direct, foreseeable result of the Danaher system’s failure to utilize paper ballots. Petitioners know full well, however, that the problems in Berks County were not caused by any

deficiency of the system, but by human error: election workers mistakenly using training cartridges that were not able to record votes, rather than cartridges programmed for actual elections. Ex. 9 ¶ 252 (Shamos Report); Ex. 33 at 8-9 (Danaher ELECTronic 1242 Evaluation Report, Sept. 15, 2005). That is, the machines were not operated correctly. 25 P.S. § 3031.7(13) (requiring that an electronic voting machine “records correctly and computes and tabulates accurately,” but only when “operated correctly”) (emphasis added). Importantly, while training cartridges were used in 39 machines, votes were lost on only four because the systems’ ability to electronically record votes on redundant media allowed for recovery of the votes. Id.

With regard to the AVS Winvote, Petitioners falsely represent that the system was decertified because an inability to tally cross-filed votes was discovered during an election. Petrs.’ Br. at 22. The WINvote’s limitations, however, were discovered prior to its use in any election that allowed for cross-filed votes. Ex. 34 (Letter from Cathy Ann Hardway, Director of Voter Education, Lackawanna County, to Harry A. VanSickle, Commissioner, BCEL (dated Aug. 18, 2006)). The system was never used in an election that allowed cross-filing, and, therefore, no election was compromised by the system’s problems. In fact, the WINvote was decertified because the vendor unilaterally made unauthorized software upgrades. When the vendor subsequently refused to participate in another examination of the new system, the Secretary was required to decertify it and did so. Ex. 35 (Letter from Pedro Cortés, Secretary of the Commonwealth, to Howard Van Pelt, President, Advanced Voting Systems (dated Aug. 22, 2007)); Ex. 36 (Letter from P. Cortés to H. Van Pelt (dated Dec. 28, 2007)); see 25 P.S. § 3031.5(c) (“No electronic voting system not so approved shall be used at any election.”).

The examinations conducted and reports produced by California and Ohio concern attacks on DREs that were created and demonstrated in the academic environment of a classroom or laboratory and cannot be effectively replicated in the real world of the election-day process. Ex. 30 ¶¶ 22-28 (Shamos Rebuttal Report) (explaining that “exploits” identified by Petitioners were conducted under “laboratory conditions” and could not “possibly be carried out” in actual elections in Pennsylvania). Petitioners’ experts have conceded as much. Ex. 31 at 182:4-9 (Lopresti Dep.) (“Q. The actual [Hursti exploit] study was carried out in the laboratory. It wasn’t a study of election day events. A. My understanding is that’s correct.”); 208:7 – 209:14 (acknowledging no evidence of “loss of votes in actual election” in Pennsylvania or elsewhere due to writing incorrect data onto a DRE); 213:24 – 214:11 (admitting that “exploits” were “done in laboratory conditions;” acknowledging no evidence of “exploits occurring in a real election”); 220:24 – 222:9 (admitting no evidence that a possibly undetectable attack with “injected new code” has occurred in any election); Ex. 24 at 110:25 – 111:6 (Jones Dep.) (“Q. ... Is it your view, Dr. Jones, that we shouldn’t certify electronic voting systems because there might exist an unknown or not-yet-discovered threat? ... A. No.”); 117:4-25 (noting that exploits were performed in laboratories and not “real elections”); 185:21-23 (“Q. All of these attacks that you’re describing to your knowledge are theoretical? A. Yes.”).

In sum, Petitioners’ list of stories about isolated “malfunctions” is inadmissible evidence of ordinary mechanical breakdowns and human mistakes that can be prevented and/or detected before improper voting or vote counting takes place. It is not evidence of inherent flaws in actual voting systems that might undermine the integrity of an election and for which the Secretary is responsible. Ex. 9 ¶¶ 261-64, 266 (Shamos Report) (“Each of the Specified Voting Systems is capable of absolute accuracy. The fact that a machine malfunctions in the field does

Unable to establish actual episodes of DREs-gone-wild, Petitioners contend that, because software “does considerable translation and interpretation” in ways unseen by a human observer, “[w]e have no way of knowing” whether the voting record is accurate. Petrs.’ Br. at 41 (quoting Jones Report ¶ 42); Ex. 32 (Petrs.’ Fourth Amended Response to Respondent’s Interrogatories and Requests for Production of Documents, at 33). That is simply untrue. Voters in Pennsylvania, including Petitioners, have good reason to know that the Specified Voting Systems are recording their votes as cast and that the electronic memory within the machine is an accurate and correct record.

For one thing, that is how computers work. When you press a button that says “A,” the computer records “A.” In addition, the recording and tabulating capabilities of the Specified Voting Systems are examined by the Secretary before they can be certified; if any system fails, it cannot be approved for use. Finally, if there are doubts about the accuracy of a particular DRE after an election, the county board of elections must “examine and test” the machine. 25 P.S. § 3154(e)(1)(ii). At no time has any “flaw” or “corruption” in the software of the Specified Voting Systems been discovered.³²

not mean that that particular model of machine is not capable of absolute accuracy.”) (emphasis in original).

³² See also Ex. 9 ¶ 259 (Shamos Report) (“It is possible to determine easily whether a system is recording, computing and tabulating votes accurately. One casts a known set of ballots that have previously been tabulated manually. A totals report is then produced and the machine totals are compared with those reported by the machine. This is done on a large scale by the ITA and on a small scale during certification exams.”); ¶ 399 (“None of the Specified Voting Systems fail to ‘accurately count and weigh’ votes. It is further not true that Petitioners do not have ‘any way of knowing that their votes were accurately weighted and counted.’ If there is any allegation that a machine has been tampered with it can be subjected to forensic examination. Every time this has been done, no tampering has been detected.”); ¶ 423 (“It is not true ... [that] ‘voter has no way of knowing whether the DRE in fact recognizes his selection of “A” as a vote for “A” rather than for “B”.’ The machines are tested before each election to ensure that they are recognizing votes correctly.”).

Petitioners complain too that the printed ballots are mere copies of the original data and, because they are no more “software-independent” than the original, they are no more reliable. The logic of this mere truism is unassailable. The Secretary does not dispute that a true and correct copy of something reflects precisely the information in the original. If the original is damaged, corrupted, or tampered with, the subsequent copy will reflect the altered information.³³ Without any actual evidence that the original is, in fact, “unreliable,” however, no reason exists to doubt the accuracy and usefulness of the true copy. Indeed, Pennsylvania law freely recognizes exact duplicates and copies as useful and accurate records. See, e.g., Pa. R.E. 1003 & comment (providing for admissibility of duplicates) (citing 42 Pa. C.S. § 6104 (governmental records in the Commonwealth); id. § 5328 (domestic records outside the Commonwealth and foreign records); id. § 6106 (documents recorded or filed in a public office); id. § 6109 (photographic copies of business and public records); id. §§ 6151-59 (certified copies of medical records)). If “copies” can be admitted into evidence in a court of law, where truth and accuracy hold no less a sacred position than in the voting tabulation process, printed ballot images, which all parties agree are “exact cop[ies] of the original data,” can be used to count (and statistically recount) votes.³⁴

³³ This point applies equally to the Petitioner-favored paper ballot. If a voter-marked paper ballot is defaced or altered, any subsequent recording of that ballot will – and, if the recording mechanism is functioning correctly, should – retain that change.

³⁴ The General Assembly is not overly concerned with using copies in elections. Section 3031.14(b)(3) requires election officials to make and consider a copy of damaged or defective ballots. Such “true duplicate copies” of the original ballots are readily available in the case of electronic records where such copies are made simultaneously with the cast of the vote. Officials using the Specified Voting Systems need not be concerned with the tears, smudges, water damage, etc., that can easily deface paper ballots.

3. Even If The Language In The Election Code Were Ambiguous, The General Assembly’s Intent Regarding The Provision Of Permanent, Physical Records By The Specified Voting Systems Is Clear.

The phrase “provide for a permanent physical record of each vote cast,” despite Petitioners’ tortuous attempts to add new meaning to each term, is clear in its requirement that electronic voting systems be able to produce a reviewable, retainable record of each elector’s selection. Through the fog of Petitioners’ arguments, it remains a fact that the Specified Voting Systems meet this explicit requirement. Yet, even if the meaning of the terms were ambiguous and their ordinary, everyday meanings did not obviously apply, the intention of the General Assembly to allow for the use of voting systems that do exactly what the Specified Voting Systems do is clear, as shown in the Secretary’s long-standing interpretation of the Election Code, the “occasion and necessity” and “circumstances” surrounding the enactment of the 1980 amendments to the Code, and the consequences facing the voters of the Commonwealth if Petitioners’ logic and common sense-stretching interpretations were to apply.

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

It is well settled that, when seeking to determine the intent of the General Assembly for the purpose of giving meaning to inexplicit statutory language, a court is to consider and give great weight to the interpretation of the government agency or officer charged with applying the that particular law. 1 Pa. C.S. § 1921(c)(8). As is noted above, the charging language of the Election Code adopted by the General Assembly gave the authority and discretion to the Secretary to examine whether electronic voting systems fulfill the requirements of the Code and to approve the systems for use in Pennsylvania. See supra Part III.B.1; see also 25 P.S. § 2621(b) (“The Secretary of the Commonwealth shall exercise in the manner provided by this act all powers granted to [her] by this act, and shall perform all the duties imposed upon [her] by

this act, which shall include the following: . . . (b) To examine and reexamine voting machines, and to approve or disapprove them for use in this state, in accordance with the provisions of [the Code].”); id. § 3031.5(b) (providing that, upon a request for examination or reexamination, the Secretary shall examine the system and file a report, “stating whether, in [her] opinion, the system so examined can be safely used by voters at elections as provided in this act and meets all of the requirements hereinafter set forth”) (emphasis added).

Since the introduction of direct-recording electronic voting systems in Pennsylvania, the Secretary has interpreted (and still interprets) the “permanent physical record” requirement to be satisfied at least by the systems’ BIR function, which allows each DRE machine to print individual copies of each vote. Ex. 25 at 1 (“From the very beginning of . . . the authorizing statute for electronic voting systems, the Department of State has interpreted [section 3031.1] to permit electronic voting systems to meet this test through electronic ballot image retention (BIR);” “DRE’s currently in use in Pennsylvania all contain some type of BIR and record electronically an image of each ballot and have the ability to print the contents of the BIR on paper for use in conducting audits.”). The General Assembly has not disturbed this interpretation of the Code, see St. Elizabeth’s Child Care Ctr. v. Commw., Dep’t Pub. Welfare, 963 A.2d 1274, 1278 (Pa. 2009) (citation omitted) (finding that “lack of activity [by the General Assembly] suggests [agency’s] regulations are not inconsistent with the legislature’s intent”), and Petitioners cannot establish any “bad faith, fraud, capricious action or abuse of power” by the Secretary that would justify judicial interference with the exercise of her delegated authority. Khan v. State Bd. of Auctioneer Exam’rs, 842 A.2d 936, 944-45 (Pa. 2004) (citation omitted). Still, Petitioners would have this Court disregard the Commonwealth’s certification of six electronic voting systems, which have been examined and evaluated by the Secretary of the Commonwealth (with

the assistance of experienced experts) in accordance with the requirements of the Pennsylvania Election Code and based on the institutional experience and expertise of the Pennsylvania Department of State. The Court should decline this invitation and defer to the Secretary.

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

When seeking to “ascertain and effectuate the intention of the General Assembly,” the reasons for and circumstances surrounding the adoption of the legislation are also relevant to the meaning of the statute at issue. See 1 Pa. C.S. § 1921(c)(1)-(2). In this case, a review of the voting systems in use in Pennsylvania at the time the General Assembly adopted section 3031.1 shows that the legislature did not intend the “permanent physical record” language to require each electronic voting system to produce, simultaneously with the registering of the vote, a voter-verified paper record.

The parties agree that the common use of electromechanical (lever) machines in the Commonwealth's larger election districts is an important fact to consider when interpreting the 1980 amendments to the Election Code. The lever machines used for years in Pennsylvania maintained vote totals only; they were not capable of creating and keeping a separate record – paper or electronic – of each voter's specific choices. Ex. 9 ¶ 115 (Shamos Report). If it were discovered at the close of an election that the lever machines' counting mechanism had failed, there would be no way to reconstruct what the total vote should have been because there was no record of each vote cast. In deciding to allow the use of electronic voting systems, the General Assembly sought to take advantage of the newly developed technology to address this deficiency. It is for this reason that the Election Code defined an electronic voting system as one that would “provide for a permanent physical record of each vote cast.”

Importantly, when making amendments to the Election Code, the General Assembly did not reject the use of lever machines in Pennsylvania; it expected that some election districts would choose to use electronic voting systems and some would continue to use lever machines, even though they indisputably did not produce physical records of each, individual vote. By allowing the continued use of lever machines, the General Assembly clearly indicated that elections in Pennsylvania need not produce paper records to be deemed fair and legal. It also showed that the other provisions of the Code could be effectively and “meaningfully” utilized without such a record. For example, a recount would be valid and meaningful even if the only available record were the total amount of votes registered by a machine’s counter. Given that the Election Code allows for such machines and the other provisions of the Code (like the full recount provisions) must account for such use, the Code cannot now be read to require the very thing these other machines did not produce.

Thus, the key to understanding the “permanent physical record of each vote cast” requirement is to read all of the terms together. The deficiency in the lever machines was not the absence of a “permanent physical record.” Even without that feature, the General Assembly accepted the safety, accuracy, and effectiveness of lever machines and continued to allow their use in Pennsylvania. Rather, the problem that the General Assembly sought to address by allowing for the use of electronic voting machines was the lack of a record of each vote cast. It was the creation of a separate, individual record that was the great advancement of the electronic voting system, and it is an advancement that each of the Specified Voting Systems performs.

(c) *The consequences of Petitioners’ interpretation of the “permanent physical record” requirement militate against its adoption.*

Pennsylvania’s rules of statutory construction expressly provide that this Court may consider the “consequences of a particular interpretation” of ambiguous language. 1 Pa. C.S.

§ 1921(c)(6). In this case, Petitioners would foist upon Pennsylvania voters a reading of the Election Code that would violate their constitutional rights, as well as drain the public fisc.

First, Petitioners' understanding of "permanent physical record" would require that each electronic voting system produce a voter-verified, paper record. If the county boards of election chose to continue using DREs, this would essentially require that each machine be retrofitted to include the ability to produce a VVPAT. As the Secretary has long held, however, this type of record would allow for an election observer to be able to identify how each individual elector voted. That is, the use of the VVPAT would trample the right to privacy enjoyed by each voter under the Pennsylvania Constitution. Pa. Const. art. VII, § 4 ("All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved."); Ex. 37 (Letter from Harry A. VanSickle, Commissioner, BCEL, to Lorreta Irving (dated Oct. 25, 2006)); Ex. 9 ¶ 71 (Shamos Report) ("A sequential paper VVPAT violates ballot secrecy because it allows anyone with access to it to determine how every voter in a polling place voted."); see also 25 P.S. § 3031.7(1) (requiring "absolute secrecy").

Second, Petitioners' "software independence" requirement permits the use of only two types of electronic voting systems: optical scan systems or some other system that creates two separate records of votes. Optical scans meet the Code requirements, as reflected in the fact that the Secretary has approved their use. The Code, however, on its face does not require that counties only use optical scans; the separate provisions for paper-based systems and non-paper-based systems prove as much. The other, two-record system that might produce one record of a vote using the software in the voting machine and simultaneously another record by means of separate, independent device or method is problematic primarily because it does not exist; there

simply is no such thing except in Petitioners' imagination. It cannot be that the General Assembly intended the Election Code to require the use of a mythical machine.

If Petitioners' interpretation of the "permanent physical record" language governed, each of the Specified Voting Systems would have to be de-certified, and the vast majority of counties in the Commonwealth would be left without a voting system. Petitioners would have the counties rectify that problem by purchasing new optical scan systems for thousands of voting precincts. They do not address the fact that their "solution" would cost tens of millions of dollars. Nor do Petitioners concern themselves with the almost certain inability of the counties to be able to afford such an extravagance when their current systems have consistently proven to perform reliably, safely, and accurately.

B. The Secretary, Not The Petitioners, Is Entitled To Summary Judgment On Count IV Because The County Boards Of Elections Can Use The Specified Voting Systems To Conduct Statistical Recounts, As Required By The Election Code.

Count IV of the Petition asserts a violation of the requirement in section 3031.17 of the Election Code that the "county board of elections ... conduct a statistical recount of a random sample of ballots after each election using manual, mechanical or electronic devices of a type different than those used for the specific election. The sample shall include at least two (2) per centum of the votes cast or two thousand (2,000) votes whichever is the lesser." Pet. ¶ 119 (quoting 25 P.S. § 3031.17). Petitioners move for summary judgment on this claim on two grounds, both of which depend on the viability of Petitioners' assertion that the Specified Voting Systems do not produce a "permanent physical record" that is "software independent."

First, Petitioners argue that the "statistical recount" provision requires county boards of elections to determine not only the accuracy of the final tabulation of registered votes, but also the accuracy of the machines' ability to capture a voter's intent. Mot. ¶ 13; Petrs.' Br. at 54.

Without a voter-verified, independent record, Petitioners argue that the “capture” accuracy of a system cannot be measured. Second, Petitioners contend that the Specified Voting Systems violate section 3031.17 because they do not allow the county boards of elections to conduct a statistical recount using “devices of a type different” than that used in the election. Mot. ¶ 13; Petrs.’ Br. at 56. Both arguments stem from a misreading and misapplication of the plain meaning of the Election Code.

1. The Specified Voting Systems Are Capable Of Producing Records That Enable The County Boards Of Elections To Perform A “Statistical Recount.”

While Petitioners exert great effort outlining their esoteric demands for “accuracy” and “devices of a type different,” they do not actually dispute the relevant facts. First, Petitioners do not deny that each of the Specified Voting Systems is capable of printing out, on hard-copy paper, 2% of the ballots registered and recorded on the machines. See supra Part V.A.1; see also Ex. 9 ¶ 51 (Shamos Report). There is also no real dispute that county election officials can take these printed copies of the electronically recorded ballot images of the votes cast and count them manually, a mundane, but obviously different, tabulation method than is used in the initial counting of votes. Id. Alternatively, a county board can insert the record of the votes cast (either the electronic record or the BIR printout) into a separate device and recount a random sampling of the votes using different software. Id. ¶ 120 (“Or, the removable electronic media that contain the ballot images can be inserted into a different type of machine, read and tabulated separately.”); ¶ 169 (“Another [way to statistically recount random ballots] is to read the ballot images electronically and tabulate them using different software.”); ¶ 298 (“[T]he board can print out the ballot images and count them in any manner it likes, including manually, which is certainly independent of the count produced by the DRE.”). Importantly, Petitioners offer no evidence that the county boards of elections – the government officials who (rather than the

Secretary) are tasked with complying with section 3031.17 – have ever failed to employ these methods to comply with the statute or have lodged any complaints that the Specified Voting Systems prevent them from fulfilling their duties.

Not only do the Specified Voting Systems meet the technical requirements of the Election Code’s statistical recount provision, they also provide for the fulfillment of the underlying purpose of the Code. By its plain terms, the phrase “statistical recount” requires that the county boards of election count again a small sampling of votes cast in order to determine simply whether the original tabulation was performed correctly. It is not designed to be a forensic examination into whether a voter’s intent was properly recorded by the machine. Ex. 9 ¶ 51 (Shamos Report) (explaining that purpose of statistical recount is to “determine whether the original tabulation was performed accurately” and not to “determine whether election records were properly created” in the first place); Ex. 30 ¶ 18 (Shamos Rebuttal Report) (“Throughout this litigation, Petitioners and their experts have misinterpreted the entire concept of a ‘recount’ under Pennsylvania law. A recount is not a ‘re-vote.’ Its purpose is to verify the integrity of the tabulation (counting) process, not the original vote recording process.”).

If the General Assembly had wanted a statistical recount to consider whether the process used to gather votes was effective or efficient, or, as Petitioners put it, to “test the central ‘purpose of the voting machine’” rather than merely determine the accuracy of the results, it would have required a much different recount procedure. One need not guess, for example, that the General Assembly would have demanded additional examinations and specific testing of the machines during the recount. Indeed, the legislature expressly established in the full “recount” provision of section 3154 just such a detailed, specific, and thorough method to test the “capture” ability of voting machines when the situation calls for it. Section 3154 provides, first, that the

county board must conduct a recanvass of the DRE vote totals if some discrepancy in the returns has been identified or some error alleged. 25 P.S. §§ 3154(e)(1), (4). Only if the original canvass is discovered to have been accurate, but the discrepancy remains unaccounted for, shall the board then “unlock the voting and counting mechanism of the machine, and shall proceed thoroughly to examine and test the machine to determine and reveal the true cause or causes, if any, of the discrepancy in returns from such machine.” *Id.* § 3154(e)(1)(ii). That is, only if there is a problem that cannot be explained after two initial counts does the board test the “accuracy” of the machines. The “statistical recount” provision, in contrast, contains no language even hinting at the detailed process included in section 3154, and Petitioners offer no sensible explanation why the section 3031.17 should be so re-written.

2. A “Statistical Recount” Does Not Consider A System’s “Accurate” Capture Of Voters’ Intent And Does Not Require An Independent Record.

- (a) *Petitioners misinterpret the Election Code’s use of the term “recount” to imagine requirements regarding “accuracy” that do not exist.*

Petitioners contend that the term “recount” as used in section 3031.17 means more than a mere re-tabulation of the number of votes. Relying entirely on their experts’ opinion and their own sense of what a better system might look like, Petitioners proclaim that the “fundamental intent” of section 3031.17 is to “check” whether the electronic voting system being used by the county not only correctly counted a vote, but also correctly “captured ... voter intent.” *Petr.*’ Br. at 49. There is no basis in the Election Code, the relevant legislative history, or common sense for this conclusion. Nevertheless, Petitioners seek to establish their expansive meaning of “recount” by arguing (1) that the section 3031.17 “statistical recount” is really an “audit,” which, Petitioners claim, considers more than mere mathematical correctness, and (2) that section 3261

of the Election Code, a very specific final recount provision applicable when fraud or error is alleged, shows the true meaning of the term. 25 P.S. § 3261.

- (i) The “statistical recount” is not an audit, as that term is understood by Petitioners.

In yet another attempt to re-write the applicable provisions of the Election Code, Petitioners, solely on the basis of their expert’s opinion that other states have “post election audit” requirements, contend that section 3031.17 requires an “audit” that “contemplate[s] more than just mathematical correctness.” Petrs.’ Br. at 52 & n.82. They are wrong. As Petitioners acknowledge, albeit in a footnote, the “statistical recount” provision does not use the term “audit.” Petitioners also note that the General Assembly actually provided for an audit elsewhere in the Election Code when it deemed an audit necessary. Id.; 25 P.S. § 3256. At no point do they explain why the General Assembly would have silently included an “audit” requirement in section 3031.17 when it was capable of expressly providing for such a process in other provisions of the Election Code. Section 3031.17 provides for “recount,” not an “audit,” and no sleight of hand by the Petitioners can alter that fact.

Petitioners’ attempt to change the words of the Election Code would be innocuous if not for their next move, namely, infusing the term “audit” with a self-serving meaning that would wholly alter the application of section 3103.17. Petitioners contend that an “audit,” by definition, includes more than a simple determination of the accuracy of the counting involved. Petrs.’ Br. at 52 n.82 (citing In re Audit of Campaign Expenses, Statements, Election Reports, & Affidavits, 747 A.2d 1262, 1267 (Pa. Commw. Ct. 2000)). This claim is belied by looking at 25 P.S. § 3256, the audit provision set forth in the Election Code provision upon which Petitioners rely. The Secretary does not dispute that these express audit procedures are designed to consider, in addition to the math involved, the “legality” of the relevant actions. This enhanced

review, however, is not expected because the nature of an “audit” by itself demands it. Rather, it is precisely what the actual language of the statute requires. 25 P.S. § 3256(a) (providing for audit of campaign finance report for purpose of determining whether “report was false in any substantial manner” or “any expenses have been incurred in contravention of this act”); see also Appeal of Angle, 639 A.2d 875, 878 (Pa. Commw. Ct 1994) (“Electors contend that the auditor’s role is limited to financial issues requiring the expertise of an auditor. Such interpretation is contrary to the clear language of section [3256] of the Election Code.”). Thus, if the General Assembly intended section 3031.17 to require an “audit” that also considered voter intent, as Petitioners contend, it would have included explicit language in the statute to effect that intent. It did not, opting instead for a “statistical recount” designed merely to confirm the vote totals.

- (ii) Petitioners rely entirely on the non-applicable recount standards set forth in section 3261.

Petitioners contend that the Secretary’s interpretation of “statistical recount” as a means to confirm only the accuracy of the vote totals is based on a too “narrow interpretation of the word ‘recount.’” *Petr.’ Br.* at 53. Petitioners purport to have discovered support for their more fully expansive interpretation of “recount” in 25 P.S. § 3261.³⁵ Petitioners again are wrong for two reasons. First, section 3261 is an entirely different recount provision than section 3031.17.

³⁵ Section 3261 provides, in relevant part:

[T]he court of common pleas, or a judge thereof, of the county in which any election district is located in which ballots were used, shall open the ballot box of such election district used . . . , and cause the entire vote thereof to be correctly counted by persons designated by such court or judge, if three qualified electors of the election district shall file, as hereinafter provided, a petition duly verified by them, alleging that upon information which they consider reliable they believe that fraud or error . . . was committed in the computation of the votes cast . . . , or in the marking of the ballots, or otherwise in connection with such ballots. It shall not be necessary for the petitioners to specify in their petition the particular act of fraud or error which they believe to have been committed, nor to offer evidence to substantiate the allegations of their petition.

25 P.S. § 3261 (a).

The provisions are different in scope: the recount procedures set forth in section 3261 concern full recounts of every ballot; section 3031.17 is, as Petitioners themselves admit, a “statistical recount” of a “subset” of the registered votes. Petrs.’ Br. at 51. They are also different in purpose: section 3261 is expressly designed to consider allegations of “fraud or error;” section 3031.17, however, is an automatic, random-sampling procedure that is not triggered by some credible charge that something has gone wrong with the voting.

Petitioners’ reliance on section 3261 is also misplaced because the Election Code plainly provides that it does not govern DREs. Rather, recounts of electronic voting machines are governed by section 3031.18, which states that, “[i]f the election district uses any other type of electronic voting system,³⁶ section 1702 [25 P.S. § 3262] shall apply.” 25 P.S. § 3031.18(2). Section 3262 contains none of the language included in section 3261 upon which Petitioners base their conclusion that a “recount board ... is charged with deciding ... whether the ballots should be counted given the intent of the voter.” Petrs.’ Br. at 53-53. Section 3262, for example, does not even provide for a “recount board,” but requires that a judge look again at the votes. Compare 25 P.S. § 3262(a) with 25 P.S. § 3261(a). Moreover, section 3262 makes no mention of when or how a judge might review “markings on ballots,” which makes sense because there are no “markings” on DRE ballots; the records are electronic. Lastly, section 3262 only provides for a “re canvass” of the DRE machines’ “registering counters,” indicating that, even when allegations of fraud have been made, a simple second look at the vote total is sufficient to provide confidence in the final result.

³⁶ That is, a system that, like the each of the Specified Voting Systems, does not “utiliz[e] paper ballots.” 25 P.S. § 3031.18(1). Complete recounts of paper-ballot-based electronic voting systems when fraud are alleged are governed by section 3261.

Petitioners do not explain why a completely different and non-applicable recount provision should be used to understand the meaning of “statistical recount” of the votes cast on the Specified Voting Systems. Section 3261 is not the interpretive key to section 3031.17, a self-explanatory provision that means exactly and only what it says – the county boards shall “statistically recount” sample ballots cast on electronic voting systems.

(b) *The Election Code – as actually written – does not require a different device to recount separate, “software-independent” records of votes.*

Petitioners appear to assert that the statistical recount of the ballots on the Specified Voting Systems, whether done by different computer counters or by hand, necessarily uses the same “device” as was used in the election because, in both instances, the ballots being counted are created by one system of hardware and software. That is, without a “software independent” record, there is no way to use the required device “of a type different.”

This argument primarily fails for the reasons discussed above: the Election Code simply does not demand, or otherwise provide for, records of votes that are independent from the system that created them. See supra Part V.A.2(d). Moreover, Petitioners’ reading of section 3031.17 would require county boards of elections to adopt voting systems that employ different devices to record votes in two separate places by two separate methods; after all, “software independence” cannot be achieved any other way.³⁷ But this misreads the express terms of the

³⁷ To the extent Petitioners’ attempt to read a “software independence” requirement as a stealthy attempt to import a VVPAT specification into the Election Code, it should be decisively rejected. First, Petitioners have not explained how the information included on the VVPAT record would be created independently from the software that registered the election vote. Second, if Petitioners seek to change the language of the Election Code, they should petition the legislature, not this Court.

“statistical recount” provision, which plainly state that it is the counting that must be conducted on a different device, not the recording of votes.

If a common sense reading of the Code were to be thrown out in favor of Petitioners’ imaginative interpretation, then statistical recounts of votes on all electronic systems, including optical scans, would be made impossible. No matter what the system, the “device of a type different,” i.e., the device performing the recount, is going to consider information and count data that was generated using the one particular method by which the votes were initially recorded. For example, if a county board were to perform a statistical recount of optical scan ballots using a different scan machine than was used in the initial canvass, the second device would still be counting votes as they were recorded on the ballot. If a ballot were damaged or improperly marked, the second device would be as “wrong” as the first device. In short, the electronic voting data stored by and recorded in a DRE is no more or less independent of the software that created it than the paper ballot is independent of the pen-to-paper method used to create that vote. Petitioners’ reading of the statute not only makes no sense, it would result in a recount process that would be impossible to implement, regardless of the voting methodology employed.

C. The Secretary, Not The Petitioners, Is Entitled To Summary Judgment On Petitioners’ Constitutional Claims Because Petitioners Cannot Establish That Their Right To Vote Has Been Denied.

Count IX of the Petition alleges that Petitioners’ equal protection rights under Article I, Section 26³⁸ of the Pennsylvania Constitution are “at risk” because, “while they are compelled to vote in counties using the certified DRE voting systems, other registered voters in Pennsylvania

³⁸ Article I, Section 26 provides that “[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.” Pa. Const. art. I, § 26.

may vote in precincts or counties using voting systems, such as verifiable paper ballots that are counted by hand, or by optical scanners, that do not suffer from the defects identified in this Petition.” Pet. ¶ 139. Petitioners also allege that their right to vote is threatened “because the voting systems’ defects and security flaws create the risk that Petitioners, together with other Pennsylvania voters, [sic] have their votes rendered meaningless or, worse yet, deemed cast for a candidate for whom they did not vote.” Pet. ¶ 138.

Count X of the Petition asserts that Article VII, Section 6’s provision that “[a]ll laws regulating the holding of elections by the citizens . . . shall be uniform throughout the State” is violated “when some counties of the Commonwealth use the certified DRE voting systems while other counties use, for example, paper-ballot based voting that permits election audits.” Petition ¶¶ 141 (citing the quoted portion of Article VII, § 6), 143.

Petitioners’ equal protection (and denial-of-rights) claims are based on their mistaken assertion that the Specified Voting Systems fail to comply with the “provide for a permanent physical record of each vote case” and statistical recount requirements of the Election Code. As fully discussed above, however, each of the DREs at issue in this case meets those requirements. Accordingly, Counts IX and X are factually unsupported and legally deficient. They should be dismissed, and judgment entered in the Secretary’s favor on both counts.

1. Petitioners Ignore Express, Constitutional Language Permitting The Use Of Different Devices Throughout The Commonwealth.

The equal protection elements of Article I, Section 26 are coterminous with, and evaluated under, the same standards as the equal protection clause of the Fourteenth Amendment of the United States Constitution, see Erfer v. Commonwealth, 794 A.2d 325, 332 (Pa. 2002) (citing Love v. Borough of Stroudsburg, 597 A.2d 1137 (Pa. 1991)), and “focus[] on the

assertion that a person has been penalized for the exercise of a constitutional freedom.” Probst v. Commw., Dep’t of Transp., 849 A.2d 1135, 1142 n.14 (Pa. 2004) (citation omitted).

Petitioners claim that their equal protection rights under Article I, Section 26 have been violated because they must use allegedly defective voting systems while electors in other counties do not. Pet. ¶ 139. There is, however, nothing constitutionally suspect about the use of different voting systems in different counties. Indeed, the Pennsylvania Constitution specifically provides that different voting systems may be used in different parts of the Commonwealth.³⁹ Petitioners cannot establish an equal protection violation when the Constitution itself permits the very activity about which Petitioners complain.

The General Assembly followed through with Section 6’s clear statement regarding the implementation of various methods of voting in the Commonwealth by adopting an election code that does nothing to limit the number of electronic voting systems the Secretary may certify. 25 P.S. § 3031.5(a) (providing that “[a]ny person or corporation” may request certification of system). The Code also enables the county boards of elections to procure a voting system “of a

³⁹ Article VII, Section 6 explicitly exempts from any requirement of uniformity the use of diverse voting systems throughout the Commonwealth:

All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State, except that laws regulating and requiring the registration of electors may be enacted to apply to cities only . . . , and except further, that the General Assembly shall, by general law, permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote, at all elections or primaries, in any county, city, borough, incorporated town or township of the Commonwealth, at the option of the electors of such county, city, borough, incorporated town or township, without being obliged to require the use of such voting machines or mechanical devices in any other county, city, borough, incorporated town or township, under such regulations with reference thereto as the General Assembly may from time to time prescribe.

Pa. Const. art. VII, § 6 (emphasis added).

kind approved . . . by the Secretary of the Commonwealth;” that is, they may procure any system approved by the Secretary, not one particular system.⁴⁰ 25 P.S. § 3031.4(a). It is therefore clearly anticipated that various systems could be used simultaneously throughout the Commonwealth.

2. The Election Code’s Sanctioning The Use Of DREs Is A Reasonable Regulation That Does Not Burden Equal Protection Rights.

Petitioners refer to the “bedrock significance” of the right to vote, hoping to overwhelm the Court with the import of what all accept to be a fundamental principle underpinning our democracy. They also seek to subject the Secretary to a heightened standard of review by suggesting her certification of the Specified Voting Systems “trigger[s] the strictest scrutiny.” *Petrs.’ Br.* at 58. Petitioners clearly misstate the governing law, and their attempt to intimidate the Court should be rejected.

Courts in this Commonwealth and throughout the country have repeatedly recognized that elections are human activities that invite millions of citizens to participate in one-day events that take place in thousands of schools, churches, and libraries. As a result, “[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *In re Zulick*, 832 A.2d 572, 578 (Pa. Commw. Ct.) (quoting *Burdick v. Takushi*, 504 U.S. 428, 441 (1992)), *aff’d*, 834 A.2d 1126 (Pa. 2003); *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (recognizing that “there must be a substantial regulation of

⁴⁰ Chester County, for example, uses both optical scan systems and one of the Specified Voting Systems, one system for standard voting and the other for handicapped-accessible voting. *See* http://www.votespa.com/portal/server.pt/community/how_to_vote/13515/voting_system_demos.

elections if they are to be fair and honest,” and that states have broad leeway in “enact[ing] comprehensive and sometimes complex election codes ... [that] govern[] ... the voting process itself”) (citation omitted); Wexler v. Anderson, 452 F.3d 1226, 1232 (11th Cir. 2006) (“[S]tates are entitled to burden that right [to vote] to ensure that elections are fair, honest, and efficient.”) (citations omitted). Thus, the fact that there are laws that purport to regulate elections, including laws providing for certifications of various voting systems, does not by itself violate equal protection rights.

In this case, the Secretary’s certification of various voting systems does not violate equal protection principles when it is reasonable, neutral, and does not work a “severe restriction” on the right to vote. Weber v. Shelley, 347 F.3d 1101, 1106 (9th Cir. 2003) (“[T]he question is whether using a system that brings about numerous positive changes . . . , but lacks a voter-verified paper ballot, constitutes a ‘severe’ restriction on the right to vote.”); see also Wexler, 452 F.3d at 1232 (“When a state election law imposes only ‘reasonable, nondiscriminatory restrictions’ upon voters’ rights, the ‘State’s important regulatory interests are generally sufficient’ to sustain the regulation.”) (citation omitted). Far from restricting Petitioners’ right to vote, the process established by the General Assembly, through which the Secretary has certified the electronic voting systems at issue, is intended to protect and secure those very rights. Like so many other complainants around the country who have unsuccessfully challenged the use of DREs, Petitioners can present no evidence to show that the Secretary’s neutral implementation of the scheme for certifying voting machines or the use of DREs in Pennsylvania unfairly or unreasonably burdens the essential right to vote in any way implicating Petitioners’ equal protection rights. See, e.g., Weber, 347 F.3d at 1106-07 (“We cannot say that use of paperless, touchscreen voting systems severely restricts the right to vote;” stating that the court will not

engage in “judicial second-guessing” where the Secretary of the State of California “made a reasonable, politically neutral and non-discriminatory choice to certify touchscreen systems”); Tex. Democratic Party v. Williams, No. A-07-CA-115-SS, Slip Op., at 11 (W.D. Tex. Aug. 16, 2007) (noting that the Texas Secretary of State “made a reasonable, politically neutral, and non-discriminatory choice to certify the eSlate voting machines for use in elections, and nothing in the Constitution forbids this choice”) (attached as Exhibit 38), aff’d, 285 F. App’x 194, 195 (5th Cir. 2008); Favorito v. Handel, 684 S.E.2d 257, 261-62 (Ga. 2009) (affirming judgment against voter (and others) who alleged that DRE violated equal protection); Schade v. Md. State Bd. of Elections, 930 A.2d 304, 327-28 (Md. 2007) (holding that trial court correctly denied voters’ and candidates’ requests for preliminary injunction, as state board of elections acted reasonably in certifying DREs that lacked a voter verified paper audit trail); Gusciora v. Corzine, No. MER-L-2691-04, 2010 WL 444173, at Part IV.F (N.J. Super. Ct. Law Div. Feb. 1, 2010) (holding that State’s certification of DREs did not violate voters’ equal protection or due process rights).

3. Petitioners’ Equal Protection Claims Fundamentally Rest On Hypothetical “Threats” To Voting Rights, Rather Than Actual Instances Of Disenfranchisement Or Improper Weighting Of Votes.

Petitioners also allege that the Secretary’s certification of the Specified Voting Systems “threatens Petitioners’ fundamental right to vote” under Article I, Section 26. See Pet. ¶ 138. This aspect of Count IX is nothing more than an attempt to shoehorn what is, properly understood, a claim under the “free and equal” elections provisions of Article I, Section 5 into a claim under Article I, Section 26.⁴¹ In re 1991 Pa. Legislative Reapportionment Comm’n, 609

⁴¹ In taking the kitchen-sink approach to stating claims, Petitioners also included in the Petition a denial-of-voting-rights claim expressly pursuant to Article I, Section 5. Count VIII of the Petition alleges that the Secretary’s certifications and the subsequent use of the Specified Voting Systems in the Commonwealth violate Petitioners’ suffrage rights. Pet. ¶¶ 131-135 (citing Article I, Section 5 of the Pennsylvania Constitution: “Elections shall be free and equal;

A.2d 132, 142 (Pa. 1992) (analyzing, under art. I, § 5, claim that plaintiffs’ right to vote has been subverted).

To sustain an Article 1, Section 5 claim, one must show, at a minimum, that he or she has been disenfranchised. See Winston v. Moore, 91 A. 520 (Pa. 1914) (finding that a law under review did not “offend” the “free and equal” clause of the constitution because it “denie[d] no qualified elector the right to vote”). In this case, however, Petitioners have failed to muster any evidence that their votes have been, or necessarily will be, lost, miscounted, or denied an “honest count,” or that they cannot vote for the candidate of their choosing. See Shankey v. Staisey, 257 A.2d 897, 899 (Pa. 1969) (rejecting art. I, § 5 challenge to law requiring county board not to certify votes cast on irregular ballots in a primary unless certain conditions were met, because, notwithstanding the conditions, “each voter can vote for whomever he chooses,” and in general the law promoted “equal” elections); Ex. 31 at 199:24 – 201:16 (Lopresti Dep.) (admitting that no evidence exists of votes being lost in Pennsylvania elections because of password structures, alteration of “log files,” the electronic or physical security, or the encryption on the systems); 208:16 – 209:14 (acknowledging no evidence of “loss of votes in actual election” in Pennsylvania or elsewhere due to writing incorrect data onto DRE); 222:24 – 223:22 (admitting no evidence of votes lost due to “buffer overflow attack”); Ex. 24 at 199:24 – 200:7 (Jones Dep.) (“Q. Just so it’s clear in the record, Dr. Jones, in each of these ... source code examination reports ... [and] of all of the findings, you have no evidence of any of those findings causing the loss of votes from a DRE machine in Pennsylvania in an election, is that right? A. That’s

and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”). Like Petitioners’ equal protection claims, Count VIII is based on wholly speculative propositions that the Specified Voting Systems “create the risk” that votes “will not be counted accurately or at all.” Pet. ¶¶ 133, 134. Petitioners have not moved for summary judgment on Count VIII.

right.”). Indeed, this fact is not even in dispute, as Petitioners have admitted that they cannot identify any confirmed instance of an election result being compromised, altered, or invalidated because of tampering, “malicious code,” or weak passwords. Ex. 39 at 4-9 (Petr.’ Suppl. Response to Fourth Set of Discovery Requests).

In short, while Petitioners may be able to imagine hypothetical elections in which a DRE produces the wrong result, they have not identified one instance – not a single actual event – where their votes (or anyone else’s) were denied or discounted because of a fundamental deficiency in one of the Specified Voting Systems. Because Petitioners’ fears that the DREs at issue may not work correctly are entirely speculative, Petitioners have failed to establish a constitutional injury or constitutional violation. See Taylor v. Onorato, 428 F. Supp. 2d 384, 387 (W.D. Pa. 2006) (dismissing claims “based on a potential series of events that may not happen as plaintiffs predict; indeed, may not happen at all [and contention] that one or more of the electronic machines may malfunction on election day causing delays and voter frustration or otherwise not give a correct tally”); Goree v. LaVelle, 523 N.E.2d 1078, 1080 (Ill. App. Ct. 1988) (rejecting a claim under “free and equal” elections clause of the Illinois Constitution where there was nothing in the record that any voter “was denied the right to vote, suffered any restraint or whose vote had not the same influence as any other voter”); Kirk v. Harmon, 557 S.W.2d 220, 221 (Ky. Ct. App. 1977) (finding “free and equal” elections provision of Kentucky Constitution not violated where plaintiffs pointed to “no evidence in the record that a single person was unlawfully deprived of the right to cast a vote for the candidate of his choice”); cf. Marks v. Stinson, 19 F.3d 873, 888 (3rd Cir. 1994) (a due process violation occurs in the context of elections where “the election process itself reaches the point of patent and fundamental

unfairness” and is not established by an “ordinary dispute over the counting and marking of ballots”);

Importantly, this case is now ripe for summary judgment. It has moved beyond the preliminary stages where Petitioners’ speculative flights of imagination regarding how someone’s (in most cases, not even their) rights might be violated were sufficient to survive demurrer. Petitioners can no longer hide behind their empty mantra that they “have no way of knowing” whether the Specified Voting Systems record or count real votes. As an initial matter, the Secretary is aware of no case in which a cause of action was established or relief awarded to a complainant simply declaring that he does not know if the violations he asserts actually occurred; Petitioners’ claims should not be treated any differently. More to the point, however, Petitioners – and all Pennsylvania voters – do have a way of knowing that the Specified Voting Systems are effective. In fact, the General Assembly has taken a number of reasonable steps to protect the voting rights of Pennsylvania electors in the event that the hypothetical risks that Petitioners fear actually materialize at an election. For example, before any DRE is used in any Pennsylvania election, the system is tested and examined by the Secretary to determine, among other things, its accuracy, reliability, and safety. See 25 P.S. §§ 3031.5, 3031.7; see also Exs. 12, 14-19. Having passed these tests, each system can be expected with a high degree of confidence to perform as it was intended.

Moreover, the Election Code requires that, prior to delivering tabulating equipment to an election district, a county board of election “shall examine or cause to have examined such equipment” and shall certify that “the equipment has been tested to ascertain that it will accurately compute the votes cast.” 25 P.S. § 3031.10(e)(3). It also provides that county boards of elections must perform pre- and post-election testing of “central automatic tabulating

equipment ... to ascertain that it will accurately count the votes cast.” 25 P.S. § 3031.14(a). And, as discussed above, the Election Code contains numerous provisions for examining the final election results, via recounts, recanvasses, and contests. See 25 P.S. § 3031.18 (cross-referencing to provisions of the Election Code that govern recounts of various types of electronic voting systems); id. § 3154(e) (providing for recount or recanvass, depending on the type of voting system at issue, upon the petition of three voters stating that an error, although not apparent on the face of the returns, has been committed);⁴² id. § 3154(g)(1)(i) (providing for automatic recanvassing and recounting, regardless of whether there is a contest, if close election for statewide office); id. § 3262 (providing for recanvass upon petition of three electors alleging fraud or error in the canvassing); id. § 3401 (providing that court of common pleas is forum for determination of contested nominations and elections of members of the General Assembly); id. § 3404 (providing broad powers to the court of common pleas in such contests, including the ability to compel production of the voting machines); id. § 3457 (setting forth petition requirements that enable electors to challenge a primary or election, other than in an election for Governor or Lieutenant Governor, where petitioners contend such primary or election was “illegal and the return thereof not correct”); see also 25 P.S. §§ 3312-30 (governing contests regarding the races for Governor and Lieutenant Governor). Rather than initiate and engage in these procedures (that would necessarily involve real-world disputes involving actual elections),

⁴² The recanvass procedures for electronic voting systems that do not use paper ballots, i.e., DREs, are especially enlightening. 25 P.S. § 3154(e)(4). In elections where there is an “unaccounted for” discrepancy between the returns and a recanvass, the county board “shall unlock the voting and counting mechanism of the machine, and shall proceed thoroughly to examine and test the machine to determine and reveal the true cause or causes.” Id. § 3154(e)(1)(ii). It is at this point only – after the election; after the initial count; and after a recanvass (rather than a recount) – that the General Assembly thinks it necessary to test the capture and counting ability of a DRE. At all times before, the legislature “knows” that the machines work as expected.

the Petitioners put their imagined fears before this Court and seek to use the judicial process to address their dissatisfaction with the results of the legislative process. There is nothing in the Pennsylvania Constitution that allows Petitioners to ignore these statutory protections and proceed instead with this lawsuit.

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

4. Petitioners Seek Relief That Must Come From The County Boards Of Elections, Not The Secretary.

Petitioners' equal protection claim also fails because it is directed at the wrong party. The Secretary did not create the distinction about which Petitioners complain, *i.e.*, the use of one voting system in one district and different system in a second district. An equal protection claim requires that the complaint identify an action of the defendant that treats two classes differently. See *e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 438-39 (1982) (statute would not be subject to equal protection analysis because it did not make a distinction, but lower court's construction requiring classification of claims made statute subject to equal protection claim). While the Election Code requires the Secretary "[t]o examine and re-examine voting machines, and to approve or disapprove them for use in this state," 25 P.S. § 2621(b), the Secretary does not – and cannot – select the actual systems that Petitioners use to vote. Rather, it is the responsibility of each of Pennsylvania's sixty-seven counties to choose among the approved systems and independently purchase the voting system that best meets the localized needs of that county. See *supra* pp. 11-12. In short, Petitioners cannot establish a cognizable equal protection

claim because the Secretary has taken no action that distinguishes one county's residents from residents of other counties.

To illustrate the fact that Petitioners direct their equal protection claim against the wrong party, it is helpful to note that Petitioners are not seeking de-certification of optical scan voting systems. The Secretary, however, has certified optical scan systems for use in Pennsylvania elections, and some counties have elected to use these optical scan machines as their primary election system. Whether Petitioners are required to vote using DREs, therefore, is not something for which the Secretary is responsible.⁴³ Indeed, by certifying the systems Petitioners claim would satisfy their demands for paper verification, the Secretary has done all she can do.

⁴³ Importantly, some Petitioners are not now required to vote (or have never voted) on any of the Specified Voting Systems. Petitioners Banfield, Beck, Bergquist, McDowell, and Staas are alleged to be residents of Chester County, which has, since 2006, used an optical scan system as its primary voting system. See generally, Ex. 40 at 38:14-19 (Deposition of Mark J. Banfield, dated July 11, 2011) (acknowledging that, in Chester County, all but handicapped voters use “paper ballots”); Ex. 41 at 52:10 – 53:12 (Deposition of Joan Bergquist, dated July 11, 2011) (Chester County started using optical scan machines from “the very first election when we moved to electronic voting”). Petitioners Dailey and Michaels reside in Lackawanna County, which adopted optical scan systems in 2008. Ex. 42 at 16:9-23 (Deposition of Lucia Dailey, dated July 21, 2011) (stating that Lackawanna precinct uses “optical scan machines” with “paper ballots,” and not DRE machines). Petitioner Mary Vollero lives and votes in Centre County, the board of elections of which abandoned DREs in 2008 in favor of optical scan machines. Ex. 43 at 34:19 – 35:2 (Deposition of Mary Catherine Vollero, dated August 3, 2011). Other Petitioners – Mr. Sickert and Ms. Montresor – are not even Pennsylvania residents who are registered and eligible to vote in Pennsylvania elections.

To the extent they seek further relief at all, Petitioners' claims must be directed toward individual county boards of elections that have selected one of the Specified Voting Systems.⁴⁴

D. The Secretary Is Entitled To Summary Relief On Count VI Because Petitioners' Claim is Moot.

On January 20, March 24, and March 25, 2006, three groups of Pennsylvania voters, including Petitioners Bergquist, Fewlass, and Reed, formally requested that the Secretary conduct re-examinations of three DREs.⁴⁵ All three requests were denied for the prudential reason that the voters had not identified any reason why a re-examination would produce a result different from the then just recently conducted initial examinations. Count VI of the Petition seeks an order from this Court (a) directing the Secretary to re-examine the voting systems, and (b) declaring that the Secretary did not comply with her duties under the requirements of Pennsylvania Election Code. Pet. ¶¶ 126-128.

Count VI should be dismissed as moot because the factual basis for the claim – the denial of requests for re-examination of certain Pennsylvania voting systems – no longer exists. See In re Gross, 382 A.2d 116, 119 (Pa. 1978) (recognizing that an existing controversy “can become

⁴⁴ Petitioners are aware that their complaints should be addressed to “the Board of Elections since actually ... they make the decision on what happens in the elections.” Ex. 43 at 61:22 – 63:24 (Vollero Dep.). Moreover, although Petitioners have renounced the democratic process by purposing this lawsuit, that path has been proven effective to achieve the actual result Petitioners seek – the adoption of optical scan machines for use in Pennsylvania elections. See, e.g., id. at 36:6-18 (explaining that Centre County officials switched from DREs to optical scans because “many in our county requested it”); 54:20 – 55:19 (agreeing that “vote by the county commissioners to switch from a DRE to an optical scanner in 2008 came about through the political process”).

⁴⁵ The requests concerned the ES&S iVotronic, the Danaher ELECTronic 1242, and the Diebold (now Dominion) Accuvote TSx, three of the six DREs that the Petition seeks to have de-certified by Court order. A fourth request, submitted by Petitioner Brau for a re-examination of the WINvote machines, was rendered meaningless in 2007 when the Secretary de-certified that machine for use on Pennsylvania elections. Petitioners seem to concede that Mr. Brau's request is no longer at issue in this case. See Petrs.' Mot. Partial Summ. J. ¶ 17 n.1.

moot on appeal as a result of an intervening change in the facts of the case”). On July 25, 2011, the Secretary, considering, among other things, this Court’s April 27, 2007 opinions and exercising her responsibility to interpret and execute the Election Code, acknowledged that her office had a duty under section 3031.5 and, therefore, determined that a re-examination of the three DREs would be appropriate. See Ex. 4. The Secretary directed her staff to arrange those re-examinations, which will likely be completed before the 2012 primary elections.

Despite the fact that Petitioners Bergquist, Fewlass, and Reed have received all of the relief they sought (and are entitled to) and will suffer no detriment by the dismissal of the cause of action, Petitioners continue to ask this Court to enter an unnecessary and overbearing mandatory injunction that would have no practical effect. Petitioners’ insistence is based on the legal theory that a defendant’s voluntary decision to alter a course of conduct will not automatically moot a challenge to that conduct. *Petr.’ Br.* at 29 (citing Cox v. City of Chester, 464 A.2d 613 (Pa. Commw. Ct. 1983); Allen v. Colautti, 417 A.2d 1303 (Pa. Commw. Ct. 1980)).

To determine if the change in circumstances compels a finding of mootness, this Court considers “(1) the good faith of the defendant’s announced intention to discontinue the challenged activity, (2) the effectiveness of the discontinuance, and (3) the character of the past violation.” Cox, 464 A.2d at 616 (citation omitted). Based on these criteria, this matter is certainly moot.

First, in agreeing to re-examine the voting systems, the Secretary has acted in good faith. Upon assuming her new position only earlier this year, the Secretary exercised her discretion to reconsider the content of her duties under the Election Code, including her re-examination obligations under section 3031.5. As a result, the new Secretary reached a different conclusion

than that which applied in 2006 when Petitioners' requests were first denied. In deciding now to conduct re-examinations, the Secretary has concretely demonstrated that her understanding of the Election Code's requirements is the same as this Court's. Ex. 4 ("Based on an evaluation of the law, including the interpretation reflected in the Commonwealth Court's Banfield opinions, it is my judgment that the Secretary had a duty to re-examine the [voting system] in response to the form request that you filed in 2006."); see, e.g., Banfield v. Cortés, 922 A.2d 36, 55 (Pa. Commw. Ct. 2007) (Leavitt, J., dissenting). Further evidencing her good faith, the Secretary has additionally agreed to grant Petitioners' other, properly submitted re-examination requests that are not addressed in this litigation.⁴⁶ See Ex. 6. Thus, rather than, as Petitioners insinuate, merely being a convenient litigation strategy, the Secretary's position regarding the interpretation of section 3031.5 already has been implemented, without regard to the added expense to the Commonwealth or the threat of a pending lawsuit.

Second, Petitioners cannot seriously question the effectiveness of the Secretary's decision to "discontinue" her office's previous stance regarding re-examinations. By submitting new requests for re-examination of other systems, Petitioners themselves have demonstrated that the Secretary's decision to grant their requests is both meaningful and credible. Petitioners would not have asked for additional re-examinations unless they fully anticipated that the Secretary would do exactly (and entirely) what she said she would do.

Finally, as to the character of the alleged "past violation," there is no reason to conclude that earlier denials for re-examination were made in bad faith or with the intent of

⁴⁶ The Secretary's decision to grant the new requests establishes that there can be "no reasonable expectation that the past conduct will be repeated." Allen, 417 A.2d at 1306 (citation omitted). The Secretary has concretely demonstrated, not just pronounced, that she will not repeat the allegedly improper conduct.

disenfranchising any Petitioner's right to vote. To the extent that then-Secretary Cortés initially balked at what his office considered at the time to be discretionary re-examinations, he did so only in pursuit of the Department of State's duty to focus the office's resources on the important job of protecting the rights of the citizens of the Commonwealth of Pennsylvania to vote. What was a simple disagreement as to the requirements of the Election Code has been resolved (in Petitioners' favor), and any attempts to intensify the dispute by impugning the Secretary's present motives or future intent to carry through on her obligations is unavailing.

Petitioners rely on Cox v. City of Chester and Allen v. Colautti, both of which are inapposite. In Cox, the defendant had only temporarily halted its action against the plaintiffs, but the threat of future harm had not been completely withdrawn, especially in light of the defendant's "steadfast position" that it had the right to proceed as it had done in the past. 464 A.2d at 616. In contrast, the Secretary has done more than merely change her position. Rather, she has publicly announced that the Code requires re-examinations upon proper request and, in already granting new requests, has demonstrated that her statements are not just idle words. In Allen, the defendant's proposed remedy was of questionable validity and doubtful effectiveness in that it "only address[ed] one of the many issues raised by Petitioners." 417 A.2d at 1306.

In this case, the Secretary has initiated the extensive and time-consuming process of identifying and engaging examiners, obtaining the cooperation of the vendors (which will ensure receipt of the necessary hardware, software, firmware, and documentation), and scheduling the re-examinations. There is nothing more she can do at this point to address Petitioners' complaint.⁴⁷

⁴⁷ The remedy being provided by the Secretary is not a piecemeal attempt to address only some of the issues posed in Count VI, as Petitioners contend. See Petrs.' Br. at 26-32. Rather, the reexaminations being conducted by the Secretary will totally satisfy the demands of the

Lastly, Petitioners couch their demand for relief as a simple request for a “guarantee.” Petrs.’ Br. at 29. What Petitioners really want, however, is a mandatory injunction ordering the Secretary to perform the reexaminations according to their timetable and standards. See Allen, 417 A.2d at 1307 (stating that plaintiffs seeking judicial relief ordering Secretary to perform inspection duties were requesting a mandatory injunction). Given the Secretary’s recent commitment to conduct the examinations, there is no need for such harsh intervention by this Court. This is especially true because there is no evidence of injury, irreparable or otherwise, that Petitioners would suffer absent a mandatory injunction. Id. (citing Roberts v. Bd. of Directors of Sch. Dist. of City of Scranton, 341 A.2d 475, 478 (Pa. 1975); Cardamone v. Univ. of Pittsburgh, 384 A.2d 1228, 1232 (Pa. Super. Ct. 1978); Rodes v. Anckaitis, 279 A.2d 782, 783 (Pa. Commw. Ct. 1971)). The Petitioners’ specter of deceit on behalf of the Secretary is utterly unsupportable and is no basis for the issuance of an injunction. See Reed v. Harrisburg City Council, 927 A.2d 698, 704 (Pa. Commw. Ct. 2007).

There currently exists no case or controversy with respect to the request for re-examinations because the Secretary has fully acknowledged her duties under the Election Code, which recognition parallels the understanding of both this Court and the Petitioners. Moreover, Petitioners Bergquist, Fewlass, and Reed no longer have a personal stake in the outcome of this particular cause of action because the Secretary has provided all of the relief they requested and there is no reasonable possibility of any future violation of their purported rights. For these

Petitioners. It is for this reason that, even if the Court were to grant the relief requested by Petitioners – an order “directing [the Secretary] to conduct reexaminations” (Petrs.’ Br. at 29) – Petitioners would gain nothing more than they have now. Petitioners’ only real complaint at this point – that the relief they have been given is not coming fast enough – only shows how far removed they are from the reality of the examination process. Whether by agreement of the Secretary or by Court order, the reexaminations must be scheduled, set up, and performed by a number of players outside of the Secretary’s office and outside the Secretary’s control. It is this process that is now ongoing.

reasons, Petitioners' motion for summary judgment as to Count VI of the Complaint must be denied, and Count VI dismissed with prejudice.

VI. CONCLUSION

For the reasons set forth above, the Secretary respectfully requests that Petitioners' Motion for Partial Summary Judgment of Counts I, IV, VI, IX, and X be denied and that judgment as a matter of law be entered in the Secretary's favor on every one of those causes of action.

Respectfully submitted,

Dated: October 14, 2011


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CERTIFICATE OF SERVICE

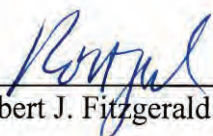
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