

Pursuant to 42 Pa.C.S. § 702(b) and Chapter 13 of the Pennsylvania Rules of Appellate Procedure, Pedro A. Cortés, Secretary of the Commonwealth (“Secretary”), through his undersigned counsel, petitions this Honorable Court for permission to appeal the April 12, 2007 Order of the Commonwealth Court, as amended by the Commonwealth Court’s April 30, 2007 Order.

INTRODUCTION

This case originated below as a “Petition for Review” (“Banfield Petition”) filed in the Commonwealth Court by 25 individuals (the “Banfield Petitioners”). The Banfield Petition challenges, in ten separate counts, the Secretary’s discretionary certification of seven Direct Recording Electronic voting systems (“DREs”). If the Banfield Petitioners’ requests for relief were granted, those DREs would be decertified and rendered illegal for use in Pennsylvania elections, with the result that the vast majority of Pennsylvania’s county boards of elections would be left without a certified voting system to use in the conduct of Pennsylvania elections and, at present, without allocated resources to replace those systems with the hypothetical systems that the Banfield Petitioners imagine would satisfy the requirements of Pennsylvania law and the additional requirements of the Help America Vote Act of 2002 (“HAVA”).¹

¹ The Banfield Petitioners’ action risks causing Pennsylvania to fall out of full compliance with the requirements of HAVA, including the requirement to use in elections for Federal office voting systems that are accessible to voters with disabilities. As a consequence, the requested relief might also subject the Commonwealth and many of its counties to an enforcement action by the United States of America. If the HAVA-compliant DREs used by nearly all counties in the Commonwealth were decertified by order of a court, the counties undoubtedly would struggle to obtain alternative HAVA-compliant voting systems. Pursuant to HAVA, when a jurisdiction is out of compliance with Section 301 of HAVA, 42 U.S.C. § 15481 (which sets forth certain requirements for voting systems), the United States Attorney General “may bring a civil action against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief (including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under,” *inter alia*, Section 301 of HAVA. 42 U.S.C. § 15511.

Just six days after the Banfield Petition was filed, the Secretary filed preliminary objections raising several substantive and jurisprudential grounds for dismissing the Banfield Petition, including that the suit improperly challenges actions committed to the discretion of the Secretary. Those objections were argued before an *en banc* panel of the Commonwealth Court in November 2006. Less than one month ago, on April 12, 2007, a narrowly divided Commonwealth Court issued a 4-3 decision overruling the Secretary's preliminary objections.² (The Order ("April 12 Order") is attached as Exhibit A.) The Court's Order was accompanied by an Opinion authored by the Honorable Rochelle S. Friedman and joined by Judges Smith-Ribner, Pellegrini and Simpson. (The Opinion is attached as Exhibit B.)

Judge Mary Hannah Leavitt, joined by now-President Judge Leadbetter and Judge Cohn-Jubelirer, authored a dissenting opinion. The three dissenting judges would have sustained the Secretary's demurrer as to all but one Count. (The dissenting opinion ("Dissent") is attached as Exhibit C.)

Just eight days after the Commonwealth Court's 4-3 decision issued, the Secretary filed an application in the Commonwealth Court requesting that the April 12 Order be amended to include language, pursuant to 42 Pa.C.S. § 702(b), to allow the Secretary to file the instant petition for permission to appeal in the Supreme Court. The Secretary there presented six questions to the Commonwealth Court that involve controlling issues of law, for which there are substantial grounds for difference of opinion, and as to which an interlocutory appeal may

² There was one issue on which the Commonwealth Court was not divided 4-3. That sole issue on which all seven judges agreed is that the Banfield Petitioners' case may proceed as to Count VI, which seeks an order directing the Secretary to re-examine four of the challenged DREs in light of requests for re-examination that some of the Banfield Petitioners presented to him. However, the Commonwealth Court erred in not sustaining the Secretary's Preliminary Objection to Count VI because, as described herein, the relief requested in Count VI would command the Secretary to do more than re-examine the four challenged DREs in compliance with the Election Code.

materially advance the ultimate termination of the case. On April 30, 2007, the Commonwealth Court granted that requested relief and amended its order accordingly. (That April 30 Order is attached as Exhibit D.³)

Those six questions are raised again in this Petition for Permission to Appeal and are discussed below. Several of the six questions concern the intrusion into the Secretary's discretion that the relief requested by the Banfield Petitioners requires, in violation of various legal doctrines. Another question centers on whether the Banfield Petitioners' improperly construe the Pennsylvania Election Code as requiring a "voter verified" independent record of each vote cast, a question that permeates all aspects of this dispute and which, if resolved, would materially advance the case. Another question involves the absence of the affected counties in this action even though their rights are directly affected, as they have procured the challenged DREs and have significant responsibilities for the administration of elections. Finally, the Secretary raises a question regarding the ripeness of the claims brought pursuant to the Pennsylvania Constitution in light of the speculative allegations of the Banfield Petition. An immediate appeal of the order overruling preliminary objections, focusing on the six controlling questions that are discussed further below, may materially advance the litigation and may conserve judicial resources as well as the resources of the parties.⁴

³ The April 30, 2007 Order denied the Secretary's separate request for a stay of proceedings pending the filing and disposition of the Secretary's petition for permission to appeal. However, on May 4, 2007, the parties agreed to stay the Commonwealth Court's action pending this Honorable Court's disposition of the instant Petition on the condition that the Secretary provide agreed upon discovery materials. On May 8, 2007, the Secretary filed an unopposed application in the Commonwealth Court requesting a stay of proceedings consistent with the parties' agreement.

⁴ The Banfield Petitioners have propounded burdensome discovery requests in the form of interrogatories and requests for production. Because the Secretary will contend, if this appeal is granted, that the entire case is due to be dismissed, much of those discovery obligations and attendant discovery motions practice may be avoided via an immediate appeal.

I. Statement of the Basis for the Jurisdiction of the Supreme Court of Pennsylvania

The Secretary is seeking interlocutory appellate review of an order that Commonwealth Court issued in connection with a matter originally commenced in that court. “[P]etitions for permission to appeal from an interlocutory order in a matter shall be filed in . . . the appellate court having jurisdiction of final orders in such matters.” Pa. R.A.P. 701. The Supreme Court has “exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter which was originally commenced in the Commonwealth Court” 42 Pa.C.S. § 723. Finally, 42 Pa.C.S. § 702 provides for appeals by permission of an interlocutory order. Thus, this Court has jurisdiction to permit the Secretary to appeal immediately the Commonwealth Court’s Order overruling the Secretary’s preliminary objections.

II. Text of the Order in Question

As amended by the April 30, 2007 Order of the Commonwealth Court, the April 12, 2007 *per curiam* Order states:

AND NOW, this 12th day of April 2007, the preliminary objections filed by Pedro A. Cortes [*sic*], Secretary of the Commonwealth, are hereby overruled. This order involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from this order may materially advance the ultimate termination of the matter.

III. Concise Statement of the Case Containing Facts Necessary to an Understanding of the Controlling Questions of Law Determined by the Order of the Commonwealth Court⁵

A. An Overview of the Banfield Petition

Direct recording electronic voting systems (or DREs) are, according to the Banfield Petition, voting systems that “display ballots . . . and allow a voter to select his choices either with a push button, a dial or a touch screen and then cast his vote.” Banfield Petition ¶ 39. (A copy of the Banfield Petition is attached as Exhibit E.) Through this action, the Banfield Petitioners seek to interfere with the Secretary’s discretion to certify DREs, accusing the Secretary of wrongfully approving the use of seven such systems on the grounds that they are not sufficiently reliable and secure. Banfield Petition ¶¶ 4, 40.⁶ The case has wide-ranging implications: According to the Banfield Petition, “fifty-six out of sixty-seven counties in the

⁵ Because the Petition seeks review of an order overruling preliminary objections, the pertinent facts are drawn from the allegations set forth in the Banfield Petition. For the purposes of this Petition, the truth of the well-pleaded averments set forth in the Banfield Petition are assumed. See *Commonwealth v. Parisi*, 873 A.2d 3, 6 n.4 (Pa. Commw. Ct. 2005). However, in considering preliminary objections, a reviewing court examines “the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred.” *Philadelphia Const. Services, LLC v. Domb*, 903 A.2d 1262, 1266 (Pa Super. Ct. 2006) (emphasis added). Neither the Secretary nor this Honorable Court, however, is required to accept as true averments that are conclusions of law, assertions that are inherently speculative, unwarranted inferences from facts, argumentative allegations, the expressions of opinion, or those averments that conflict with the terms of the documents attached to the Banfield Petition. *Bowers v. T-Netix*, 837 A.2d 608, 611 (Pa. Commw. Ct. 2003); *South Union Twp. v. Pa. Dep’t of Env’tl. Prot.*, 839 A.2d 1179, 1189 n.16 (Pa. Commw. Ct. 2003) (citing *Pennsylvania State Spiritualist Assoc. v. First Church of Spiritual Research and Healing*, 430 Pa. 527, 244 A.2d 31 (1968)), *aff’d*, 578 Pa. 564, 854 A.2d 476 (2004).

⁶ The instant matter is the latest in a string of recent lawsuits seeking to interfere with Pennsylvania’s implementation of electronic voting systems in compliance with Title III of HAVA, 42 U.S.C § 15301 *et seq.* Two of those actions gave rise to reported decisions, one from this Honorable Court, and the other from the United States District Court for the Western District of Pennsylvania. See *Kuznik v. Westmoreland County Bd. of Comm’rs*, 588 Pa. 95, 902 A.2d 476 (2006) (reversing and vacating Commonwealth Court’s grant of injunctive relief that would have required Westmoreland County to abandon plan to use a direct recording electronic (“DRE”) voting system); and *Taylor v. Onorato*, 428 F. Supp. 2d 384 (W.D. Pa. 2006) (denying request for preliminary injunction where such request was based in part on contention that use of DRE voting system would likely lead to Federal constitutional violations).

Commonwealth will use one or more” of the seven challenged DREs in their elections. Banfield Petition ¶ 103. None of the counties have been named as respondents in Commonwealth Court.

Notwithstanding the commonsense observation in *Taylor v. Onorato*, 428 F. Supp. 2d 384, 387-88 (W.D. Pa. 2006), that “[v]oting machine malfunction has been, and probably always will be, a potential problem in every election,” Banfield Petitioners--like the plaintiffs in *Taylor*--rely on anecdotal evidence of machine malfunction at other times, largely in other states--some from as many as five years ago, and mostly regarding systems other than those at issue--and conclude that the Secretary’s certifications of DREs must therefore have been illegal. Banfield Petition ¶¶ 53-94 and Counts I - IV.

As acknowledged by the Banfield Petitioners, however, the Secretary “is charged with the general supervision and administration of Pennsylvania’s elections laws, including among other things, the duty ‘to examine and re-examine voting machines, and to approve or disapprove them for use in this State, in accordance with the provisions of [the Election Code]’, 25 P.S. § 2621.” Banfield Petition ¶ 38 (brackets in original). Pursuant to the Election Code, the Secretary must analyze whether the voting system presented for examination: is “*suitably designed* for the purpose used. . . .” Election Code § 1107-A(11), 25 P.S. § 3031.7(11) (emphasis added); is “*safely and efficiently useable* in the conduct of elections,” *id.* (emphasis added); and “[p]rovides *acceptable* ballot security procedures” *Id.* § 1107-A(12), 25 P.S. § 3031.7(12) (emphasis added). The Election Code authorizes the Secretary to be assisted by expert examiners when needed. Election Code § 1105-A(a), 25 P.S. § 3031.5(a) (providing for examination by Secretary of Commonwealth); and *id.* § 1107-A, 25 P.S. § 3031.7 (noting Secretary may appoint an examiner). A main focus of the Secretary’s preliminary objections in this action is whether mandamus is an appropriate vehicle to revise these inherently discretionary

determinations. (A copy of the Preliminary Objections, without its attachments, is attached as Exhibit F.)

B. Mandamus Relief Is Requested Throughout the Petition

All Counts of the Petition seek, in whole or in part, relief in the nature of mandamus, in that they seek to have Commonwealth Court compel the Secretary affirmatively to perform an action. Counts I-V, VIII, IX, and X demand that the court “[d]irect the Secretary immediately to de-certify the DRE voting systems identified in paragraph 40 of this Petition.”⁷ The Banfield Petition claims that the Secretary’s certifications violate the aforementioned portions of the Election Code that are clearly committed to the Secretary’s discretion, including the determinations as to whether the machines: are suitable and “safely and efficiently useable;” are “capable of absolute accuracy;” “provide[] acceptable ballot security procedures;” and, “[w]hen properly operated, “record[] correctly and compute[] and tabulate[] accurately.” Banfield Petition ¶ 115, and Count II. Similarly, in Count IV, the Banfield Petitioners second-guess the Secretary’s determination that the DREs are able to perform an appropriate statistical recount as required by the Election Code. Banfield Petition, Count IV. Generally, Counts I, II, IV and V seek decertification based on provisions of the Election Code, whereas Counts VIII, IX and X are premised on the Pennsylvania Constitution.

By way of another example, Counts III and VII would require, by mandamus, that the Secretary be ordered to “establish uniform testing criteria.” Banfield Petition, Wherefore clause (b), Count III, and Wherefore clause (a), Count VII. Finally, in Count VI, the Banfield Petitioners would have the Secretary reexamine DREs based on the submission of requests to him by some of the Banfield Petitioners, based on § 1105-A of the Election Code, 25 P.S. §

⁷ See Banfield Petition, at “Wherefore” clause (a), Count I. Identical or similar language appears in the “Wherefore” clauses of Counts II, III, IV, V, VIII, IX and X.

3031.5. Specifically, they ask the court to “[d]irect the Secretary to re-examine voting systems in accordance with the request made on him by Petitioners Brau, Reed, Fewlass and Bergquist.” Petition at “Wherefore” clause of Count VI, part (a). However, the Banfield Petitioners’ reexamination requests would require the Secretary to undertake the reexaminations in particular, burdensome ways not required by the Election Code. Banfield Petition, Count VI and *id.* at Exs. A, C, E, and G.

C. The Banfield Petitioners Contend that the Election Code Requires a Retention of a Voter-Verified “Permanent Physical Record”

The Banfield Petitioners contend that the Secretary erred in approving for use DREs that do not provide a “voter verified independent record that can be used to audit voting results.” Banfield Petition, Count I, Wherefore Clause (b). Indeed, the alleged absence of this functionality in the DREs at issue is the gravamen of the Banfield action. The Banfield Petitioners contend, “Retention of a permanent physical record that *the voter can verify* is necessary for a meaningful, independent audit or recount of the voting results” Banfield Petition ¶ 113 (emphasis added). The Banfield Petitioners claim that the DREs thereby violate § 1101-A of the Election Code, 25 P.S. § 3031.1, which defines an electronic voting system as one that “provide[s] for a permanent physical record of each vote cast.” 25 P.S. § 3031.1; Petition ¶¶ 43-48 and 113. The Banfield Petitioners are essentially asserting that they know better than the Secretary, who has already examined the systems, whether the DRE systems are in fact “electronic voting systems” and, particularly, whether the definition requires a “voter verified independent record.”

As the three dissenting Commonwealth Court judges noted, the Election Code does not require a “voter verified” record of the vote this of DREs (Dissent, at MHL-4.). Moreover, the Banfield Petitioners acknowledge that at least some of the certified DREs “contain a Ballot Image Retention (BIR) function, which purports to record electronically each individual’s vote.”

Banfield Petition ¶ 49. They simply disagree with the Secretary's conclusions, reading language into the Election Code and asserting that the BIR is not a satisfactory record of the vote, apparently because the voter does not get to see it and thereby "verify" it. Petition ¶ 49.

D. The Banfield Petitioners Request the Secretary Reexamine Some of the DREs in a Particular Manner

The Banfield Petition also alleges that four Petitioners sought re-examinations of four of the challenged DREs pursuant to § 1105-A of the Election Code, 25 P.S. § 3031.5, and that the Secretary improperly denied those requests. The Banfield Petitioners attached their reexamination requests to the Banfield Petition,⁸ and the Banfield Petition specifically requests in Count VI an order that "[d]irect[s] the Secretary to re-examine voting systems *in accordance with the request made on him by Petitioners Brau, Reed, Fewlass and Bergquist.*" Banfield Petition, Count VI, Wherefore Clause (a) (emphasis added). The reexamination requests, however, would have required the Secretary to undertake particular actions not provided for by law, such as: (a) providing information about the "specific steps" taken in the certification process and conducting "independent testing that is free of manufacturer or government influence" (Banfield Petition, Ex. A); (b) conducting the reexamination in a manner "modeled upon, and . . . at least as comprehensive and rigorous as, the Harri Hursti and RABA Technologies examination" (Banfield Petition, Exs. C and E)⁹; and (c) subjecting the system at issue to "external 'red team' testing" (Banfield Petition, Ex. G).

⁸ In considering preliminary objections, the court examines "the averments in the complaint, *together with the documents and exhibits attached thereto*, in order to evaluate the sufficiency of the facts averred." *Philadelphia Const. Services, LLC v. Domb*, 903 A.2d 1262, 1266 (Pa Super. Ct. 2006) (emphasis added).

⁹ Harri Hursti is referenced in the Banfield Petition as a computer security investigator. Banfield Petition ¶ 70 *et seq.*

E. The Speculative Nature of the Constitutional Claims

Count VIII of the Banfield Petition alleges that the Secretary's certifications, and the subsequent use in the Commonwealth, of the challenged DREs violate their suffrage rights under Article I, § 5 of the Pennsylvania Constitution.¹⁰ Banfield Petition ¶¶ 131-135. In particular, the Banfield Petitioners claim that their rights are violated because these DREs make "it *likely* that a significant number of votes will not be counted accurately or at all." *Id.* ¶ 133 (emphasis added). Additionally, the Banfield Petitioners allege that these DREs cause or are likely to cause problems that "create the *risk*" that candidates for whom a majority of the electors has not voted will take office. *Id.* ¶ 134 (emphasis added).

Count IX of the Banfield Petition purports to bring a claim under the equal protection provisions of Article I, § 26 of the Pennsylvania Constitution.¹¹ The claim appears to stem from

¹⁰ Article I, § 5 of the Pennsylvania Constitution states, "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa Const. art. I, § 5. This Court has interpreted the language of Article I, § 5 to mean:

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

In re 1991 Pennsylvania Legislative Reapportionment Comm'n, 530 Pa. 335, 356, 609 A.2d 132, 142 (1992) (ellipses in original; citations omitted).

¹¹ Article I, § 26 of the Pennsylvania Constitution guarantees that "[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Pa Const. art. I, § 26. This Court has stated that this provision "focuses on the assertion that a person has been penalized for the exercise of a constitutional freedom." *Probst v. Commonwealth, Dep't of Transp.*, 578 Pa. 42, 54 n.14, 849 A.2d 1135, 1142 n.14 (2004) (citing *Fischer v. Department of Pub. Welfare*, 502 A.2d 114, 121 (Pa. 1985)). The equal protection provisions of Article I, § 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, supra*, 566 Pa. 128,

the fact that different voters will be voting on different systems, and, therefore, some voters allegedly will have a greater risk of being disenfranchised than other voters. Banfield Petition ¶ 139. There also appears to be duplication, in essence, of the claim under the free and equal elections provisions, Article I, § 5, of the Pennsylvania Constitution, as a claim under Art. I, § 26. See Banfield Petition ¶ 138 (purporting to allege facts that violate Petitioners' "fundamental right to vote" under Pa. Const. art. I, § 26).

Count X is brought pursuant to Article VII, § 6 of the Pennsylvania Constitution. The Banfield Petitioners claim that Article VII, § 6's provision that "all laws regulating the holding of elections by the citizens . . . shall be uniform throughout the state" is violated "when some counties of the Commonwealth use the certified DRE voting systems while other counties use, for example, paper-ballot based voting that permits election audits." Banfield Petition ¶¶ 141 (citing the quoted portion of Article VII, § 6), 143.¹² Again, the alleged constitutional violation

139, 794 A.2d 325, 332 (2002) (rejecting argument that the Pennsylvania Constitution provides broader protections for the right to vote than does the U.S. Constitution).

¹² The Banfield Petitioners ignore the part of Article VII, § 6 that 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).

is based on a speculative fear, expressed as the “*likelihood* of an inaccurate tally” that is allegedly greater on a DRE compared to other systems. Banfield Petition ¶ 144.

IV. Controlling Questions of Law Presented for Review

The following controlling questions of law are the same as those presented to the Commonwealth Court in the Secretary’s Application to Amend the Order, which the Commonwealth Court granted.

- A. Whether Counts I-V and VIII-X of the Banfield Petition, which seek to order the Secretary to decertify the challenged DREs, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.**
- B. Whether Counts III and VII of the Banfield Petition, which seek to order the Secretary to establish uniform testing criteria for the certification of voting systems, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.**
- C. Whether the approximately 56 counties that have procured the challenged DREs are indispensable parties as to Counts I, II, III, IV, V, VIII, IX and X of the Banfield Petition.**
- D. Whether the Election Code requires that the DREs provide a voter verified independent record, as Banfield Petitioners contend throughout their Petition (*see, e.g.*, Petition, Count I, ¶ 113 and Wherefore Clause (b); Count II, ¶ 115; Count IV, ¶ 119; and Count V, ¶¶ 123-24).**
- E. Whether the Pennsylvania constitutional claims set forth in Counts VIII-X are due to be dismissed because of jurisprudential considerations of standing and ripeness.**
- F. Whether the Banfield Petitioners can require the Secretary to conduct a reexamination of a DRE in a particular manner not required by the Election Code, as is requested in Count VI.**

V. Concise Statement of the Reasons Why Substantial Ground Exists for Difference of Opinion as to the Controlling Questions and Why an Immediate Appeal May Materially Advance the Termination of this Matter

A. *Whether Counts I-V and VIII-X of the Banfield Petition, which seek to order the Secretary to decertify the challenged DREs, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.*

There is substantial ground for difference of opinion as to whether the Banfield Petitioners' request to order the Secretary to decertify the challenged DREs improperly interferes with the Secretary's discretion. Three of the seven Commonwealth Court judges agreed with the Secretary that the Banfield Petitioners did not state a cause of action in mandamus to compel decertification, because "[t]he Secretary's decision to approve, or to disapprove, electronic voting systems requires the exercise of discretion and, as such, cannot be compelled by a writ of mandamus." Dissent, at MHL-2.¹³ See also *Pennsylvania Dental Ass'n v. Pennsylvania Ins. Dep't*, 512 Pa. 217, 227, 516 A.2d 647, 652 (1986) (a writ of mandamus "will only lie . . . where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy."). In contrast, the majority opinion reasons that "mandamus lies to compel proper action, *i.e.*, de-certification of the DREs." Opinion at 7.

Though the dissent did not reach the related defenses of sovereign immunity and separation of powers, there is a substantial ground for disagreement as to whether it would be

¹³ The dissent also noted that "[i]t is not for the courts, under any legal theory, to amend the General Assembly's lengthy, detailed list of standards by adding new ones," regardless of whether such implicit amendment is sought under a theory of mandamus, declaratory judgment, or equity. Dissent, at MHL-4 (footnote omitted) and MHL-4 n.3. It is worth noting that a claim for declaratory relief will not survive a dismissal of the Banfield Petitioners' claims for mandamus and affirmative injunctive relief. See *Stackhouse v. Pennsylvania State Police*, 892 A.2d 54, 62-63 & n.9 (Pa. Commw. Ct. 2006) (dismissing claims for declaratory relief: "it would seem self-evident that where a request for a declaration of rights can have no effect nor serve any purpose other than as a legal predicate for a damage or other immunity-barred claim in the same action, the demand for declaratory relief ought to fall along with the claim it serves to support."), *allocatur denied*, 903 A.2d 539 (Pa. 2006).

improper in light of those concepts for a court to order the Secretary to decertify machines as requested by the Banfield Petitioners. Suits seeking to compel affirmative action by Commonwealth officials are barred by the doctrine of sovereign immunity. See *Bonsavage v. Borough of Warrior Run*, 676 A.2d 1330 (Pa. Commw. Ct. 1996) (“[B]ecause the [Plaintiffs] seek to compel the Commonwealth . . . to take affirmative action with respect to the sewer pipes, sovereign immunity will shield them from suit”); see also *Stackhouse v. Pennsylvania State Police*, 892 A.2d 54, 59 and 61-62 (Pa. Commw. Ct. 2006) (noting the rule and determining that request for an order mandating imposition of guidelines and policies by the State Police was properly dismissed on the basis of immunity), *allocatur denied*, 903 A.2d 539 (Pa. 2006).¹⁴

Insofar as the Banfield Petition fundamentally seeks to have the Commonwealth Court substitute its judgment for that of the Secretary with respect to the process of the certification of voting systems and the results of that process, it violates the doctrine of Separation of Powers. For example, Count I is based on the definition of “[e]lectronic voting system.” The definition of “[e]lectronic voting system,” however, makes no reference to a “voter verified independent record;” and, further, there is no requirement for a “voter verified independent record” anywhere in the Election Code, including in the provisions upon which Petitioners rely in Counts I, II, IV and V. Petitioners thereby seek to have the court implement a policy choice that the Pennsylvania General Assembly has not adopted, even though the courts of the Commonwealth have acknowledged the exclusive power of the General Assembly in the area of elections regulation:

¹⁴ The majority construed the Petition as seeking mandamus relief and not relief in equity and, therefore, concluded that the doctrine of sovereign immunity does not apply. Opinion at 8. The Secretary contends that he is immune from the affirmative equitable relief requested in the Petition. Further, the overruling of a preliminary objection based on immunity may form an appropriate basis for an interlocutory appeal by permission pursuant to 42 Pa.C.S. § 702(b). See, e.g., *Helsel v. Complete Care Services, L.P.*, 797 A.2d 1051, 1054 (Pa. Commw. Ct. 2002) (reviewing, on appeal by permission, the lower court’s overruling of demurrer on grounds of governmental immunity).

The power to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government. Errors of judgment in the execution of the legislative power, or mistaken views as to the policy of the law, or the wisdom of the regulations, do not furnish grounds for declaring an election law invalid unless there is a plain violation of some constitutional requirement

Mixon v. Commonwealth, 759 A.2d 442, 449 (Pa. Commw. Ct. 2000) (quoting *Winston v. Moore*, 244 Pa. 447, 454, 91 A. 520 (1914)), *aff'd, per curiam*, 566 Pa. 616, 783 A.2d 763 (2001).

The Banfield Petitioners' concerns regarding voter verified ballots are properly brought before the Pennsylvania General Assembly.¹⁵ *Cf. First Citizens Nat'l Bank v. Sherwood*, 583 Pa. 466, 473, 879 A.2d 178, 182 (2005) (noting limited power of court to interpret unambiguous statute pertaining to constructive notice of mortgages and noting, "TO PUT IT BLUNTLY, it is not our role to disregard clear policy choices made by the Legislature merely because we may believe these choices to be poor. If the Legislature chooses to amend the applicable statutes to create a system as envisioned by First Citizens, it may do so. We, however, may not.").

This first question presents a controlling question of law. If the Secretary prevails on this question in an appeal of the April 12, 2007 Order, Counts I-V and VIII-X of the Petition for Review would be dismissed; therefore, an immediate appeal of this Court's April 12 Order may materially advance the ultimate termination of the case.

B. *Whether Counts III and VII of the Banfield Petition, which seek to order the Secretary to establish uniform testing criteria for the certification of voting systems, are improper claims for mandamus relief, or are otherwise barred by sovereign immunity and the doctrine of separation of powers.*

¹⁵ Indeed, bills have been introduced in the General Assembly that would require a "voter verified permanent paper record." *See* S.B. 247, P.N. 283; H.B. 53, P.N. 78. These bills, introduced earlier this year and pending before the Senate State Government Committee and House State Government Committee, respectively, are similar to bills that were introduced in the Legislature in 2005 (*see* S.B. 977 and H.B. 2000 from the 2005-2006 Regular Session). In addition, the United States Congress is considering a bill that would revise the Help America Vote Act, including in ways material to this dispute. For example, H.R. 811, 110th Cong. (2007), would require a voter-verified paper ballot to be used in all elections for Federal office.

There is substantial ground for difference of opinion as to whether the Banfield Petitioners' request to have this Court order the Secretary to establish uniform testing criteria interferes with the Secretary's discretion. The three dissenting Commonwealth Court judges agreed with the Secretary that a writ of mandamus could not compel the Secretary to adopt uniform testing criteria to be used in connection with the Secretary's process for certifying voting systems. Dissent, at MHL-2. The dissent argues, "Absent authority in the Election Code, we may not order the Secretary to adopt 'rational' standards by which to do his job. If the standards in Section 1107-A [of the Election Code, 25 P.S. § 3031.7] are inadequate, it is for the legislature, not this Court, to conduct hearings into how existing statutory standards might be improved." Dissent, at MHL 4-5.

In contrast, the majority reasoned that the Banfield Petitioners have a clear right under the Election Code to uniform testing criteria because "[i]t would be impossible for the Secretary to file [his statutorily required report stating whether DREs are safe for use at elections and meet other requirements] if the Secretary did not establish uniform testing criteria that comply with the Election Code." Opinion at 7.

Though the dissent did not reach the related defenses of sovereign immunity and separation of powers, there is a substantial ground for disagreement as to whether it is improper in light of those concepts to order the Secretary to decertify machines and create testing criteria as requested by Petitioners. *See Stackhouse v. Pennsylvania State Police*, 892 A.2d 54, 59, 61-62 (Pa. Commw. Ct.) (determining that request for an order mandating imposition of guidelines and policies by the State Police was properly dismissed on the basis of immunity), *allocatur denied*, 903 A.2d 539 (Pa. 2006).¹⁶

¹⁶ The Commonwealth Court majority construed the Banfield Petition as seeking mandamus relief and not relief in equity and, therefore, concluded that the doctrine of sovereign

Further, the overruling of a preliminary objection based on immunity may form an appropriate basis for an interlocutory appeal by permission pursuant to 42 Pa.C.S. § 702(b). *See, e.g., Helsel v. Complete Care Services, L.P.*, 797 A.2d 1051, 1054 (Pa. Commw. Ct. 2002) (reviewing, on appeal by permission, the lower court's overruling of demurrer on grounds of governmental immunity).

This second question presents a controlling question of law. If the Secretary should prevail on this question in an appeal of the April 12, 2007 Order, Counts III and VII of the Petition for Review would be dismissed; therefore, an immediate appeal of this Court's April 12 Order may materially advance the ultimate termination of the case.

C. Whether the approximately 56 counties that have procured the challenged DREs are indispensable parties as to Counts I, II, III, IV, V, VIII, IX and X of the Banfield Petition.

There is substantial ground for difference of opinion as to whether the 56 counties that procured and use the challenged DREs are indispensable parties. Each of Counts I, II, III, IV, V, VIII, IX and X of the Banfield Petition¹⁷ requests a declaration that the use of DRE voting systems violates Pennsylvania constitutional and statutory law, or asks that the Commonwealth Court direct the Secretary to de-certify the seven challenged DREs. Generally, the counties – especially the county boards of elections – have significant responsibilities when it comes to administration of federal, state and local elections; and pursuant to the Election Code, it is the county boards of elections, not the Secretary of the Commonwealth, that select, procure and maintain the type of voting machines used in elections. *See, e.g., 25 P.S. § 3031.4* (“Installation of electronic voting systems,” noting the county board of elections is responsible for purchasing,

immunity does not apply. Opinion at 8. The Secretary contends that he is immune from affirmative equitable relief requested in the Petition.

¹⁷ The relief sought in Counts VI and VII does not appear to directly implicate the counties' interests.

leasing, or procuring the “components of an electronic voting system of a kind approved . . . by the Secretary”); *see also* 25 P.S. § 3011 (“Preparation of voting machines by county election boards”); *id.* § 3012 (“Delivery of voting machines and supplies by county election boards to election officers”); *id.* § 3015 (“Instruction of voters before an election,” and requiring: “During the thirty days next preceding an election, the county election board shall place on public exhibition . . . one or more voting machines”). Therefore, these 56 counties, which have already expended significant resources in choosing and purchasing certified DREs to comply with HAVA, and which must undertake the administration of elections on approved voting machines, have a claim or interest essential to this litigation.

Three of seven Commonwealth Court judges agreed with the Secretary that the counties are indispensable parties on the grounds that the counties that “made the decision to purchase one of the seven DRE voting systems approved by the Secretary . . . will be affected by the decision of this Court, should it decide to order the Secretary to decertify the seven DRE voting systems.” Dissent, at MHL-12. In contrast, the majority opined that “the fifty-six counties will not be prejudiced by a judgment in favor of Electors.” Opinion at 9.¹⁸

Further, the overruling of a preliminary objection based on failure to join indispensable parties may form an appropriate basis for an interlocutory appeal by permission pursuant to 42 Pa.C.S. § 702(b). *See, e.g., Pennsylvania Social Services Union v. Lynn*, 677 A.2d 371, 373 (Pa.

¹⁸ The Declaratory Judgments Act requires that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” 42 Pa.C.S. § 7540(a). Further, regardless of whether declaratory relief is sought, courts traditionally apply a four-part test to determine if any absent parties are indispensable: 1) Do absent parties have a right or interest related to the claim? 2) If so, what is the nature of the right or interest? 3) Is that right or interest essential to the merits of the issue? 4) Can justice be afforded without violating due process rights of absent parties? *See, e.g., Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495, 496 n.2 (Pa. Commw. Ct. 2002) (finding court lacked jurisdiction in action by disappointed bidder because prevailing bidder was not a party to the action and the City would not adequately represent interests of prevailing bidder).

Commw. Ct. 1996) (Commonwealth Court granting permission to appeal lower court's denial of motion to dismiss where appellant had contended that Commonwealth was an indispensable party).

In addition, this third question presents a controlling question of law. As the dissenting opinion noted, the absence of the affected counties "leaves this Court without jurisdiction over Counts I-V, VIII, IX, and X" of the Petition for Review. Dissent, at MHL-12. Moreover, determining whether the counties are indispensable to this action via an immediate appeal may materially advance the ultimate termination of this litigation and conserve judicial resources.

D. Whether the Election Code requires that the DREs provide a voter verified independent record, as Banfield Petitioners contend throughout their Petition (see, e.g., Petition, Count I, ¶ 113 and Wherefore Clause (b); Count II, ¶ 115; Count IV, ¶ 119; and Count V, ¶¶ 123-24).

The Secretary contended below in support of his Preliminary Objections that the Banfield Petitioners have improperly construed the pertinent provisions of the Pennsylvania Election Code as requiring a "voter verified independent record" and that it is not possible to subject him to a mandamus action based on the Banfield Petitioners' misunderstanding of the Election Code.

As evidenced in the Opinion, there is substantial ground for difference of opinion as to whether the Election Code requires a voter verified independent record. The majority focused on a requirement set forth in § 1117-A of the Election Code, 25 P.S. § 3031.17, pertaining to methods of conducting statistical recounts (*see* Opinion at 16), a provision upon which the Banfield Petitioners rely in Count IV of the Banfield Petition. However, the Secretary respectfully submits that there is nothing in that section or anywhere else in the Election Code that requires a statistical recount of a DRE to be conducted on a "voter verified independent record." The definition has no such requirement: "'Electronic voting system' means a system in which one or more voting devices are used to permit the registering or recording of votes and in

which such votes are computed and tabulated by automatic tabulating equipment. The system shall provide for a permanent physical record of each vote cast.” 25 P.S. § 3031.1.

Indeed, the three dissenting judges noted that a “physical paper receipt of the ballot cast so that each voter can check to see if the machine properly tallied her vote . . . is not anywhere stated in the list of seventeen standards set forth in Section 1107-A of the Election Code [25 P.S. § 3031.7],” and that “the Secretary does not have the authority to disapprove an electronic voting system for the reason that the system does not provide a ‘voter verified independent record.’” Dissent, at MHL-4. Further, as the dissenting judges noted, “What the legislature meant by ‘physical record’ is less than clear; it likely means a recording sufficient to permit a recount.” Dissent, at MHL-4.¹⁹

This fourth question presents a controlling question of law as to at least Counts I and V, if not also Counts II and IV. Were the Secretary to prevail on appeal respecting this question, at least two Counts of the Banfield Petition would be dismissed and other Counts would be substantially affected, thus materially advancing the ultimate termination of the case. Because

¹⁹ The Secretary also argued below that the definition of “electronic voting system” in the Election Code, upon which Count I of the Petition for Review is based, cannot mean, when it speaks of a “permanent physical record of each vote cast,” what the Banfield Petitioners contend it means. For example, the Election Code uses the distinct term “printed record” in the section that discusses “requirements of electronic voting systems,” 25 P.S. § 3031.7(16) & (17) (each referring, for example, to a “printed record” of various total figures). The General Assembly thereby made a distinction between “physical” and “printed” records. To construe “permanent physical record” as meaning “printed record” would be to render meaningless the phrase “permanent physical record” and would be contrary to law. *See* 1 Pa.C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions.”); *see also* *Commonwealth v. Berryman*, 437 Pa. Super. 258, 273, 649 A.2d 961, 968 (1994) (“[T]he use of different language in similar provisions of the same statute signifies a different legislative intent.”). *Cf. Nationwide Mut. Ins. Co. v. Foster*, 143 Pa. Commw. 433, 439, 599 A.2d 267, 270 (1991) (explaining that when an agency is entrusted to effectuate an entire body of law, “[a]n agency’s interpretation [of the statute] is entitled to great judicial deference”). Similarly, though not addressed by either the majority or the dissent, the Secretary argued below that the provisions of the Election Code upon which Count V is based, 25 P.S. §§ 3261, 3154, also do not require – or even speak of – a “voter verified independent record,” in part because those sections either do not apply to the DREs at issue and do not apply in the manner implicitly suggested by the Banfield Petitioners.

the Banfield Petitioners insist throughout their Petition that the DREs are due to be decertified for failure to provide a “voter verified independent record,” it would materially advance the litigation if an appeal were allowed on that issue immediately.

E. Whether the Pennsylvania constitutional claims set forth in Counts VIII-X are due to be dismissed because of jurisprudential considerations of standing and ripeness.

Counts VIII-X of the Banfield Petition assert claims pursuant to the Pennsylvania Constitution, Article I, § 5, and Article VII, § 6. These claims are largely based on speculative concerns about the challenged DREs and their potential to malfunction in alleged denial of these rights. *See, e.g.*, Banfield Petition ¶ 104 (stating that “*if*” allegedly faulty DREs are used in elections in Pennsylvania, votes “*may* be ignored, counted incorrectly, given inadequate weight and the election *may* result in the certification of winners not supported by the majority of voters”); *id.* ¶ 133 (asserting that the alleged problems associated with DREs make “it likely that a significant number of votes will not be counted accurately or at all”); *id.* ¶ 134 (alleging that the DREs cause or are “likely” to cause problems that “*create the risk*” that persons for whom a majority of the electors has not voted will take office) (emphases added). There are substantial grounds for difference of opinion as to the ripeness of the Pennsylvania constitutional claims and as to whether the Banfield Petitioners have standing, inasmuch as the Banfield Petition is concerned with abstract and remote hypothetical concerns with the performance of the DREs.

The concepts of standing and ripeness are interrelated as they both concern “whether the harm asserted has matured sufficiently to warrant judicial intervention.” *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975); *accord Town of McCandless v. McCandless Police Officers Ass’n*, 901 A.2d 991, 1002 (Pa. 2006) (“Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention.”) (citations and internal quotations omitted). To have standing, a litigant must be “aggrieved,” that is, a litigant must

“have a substantial, direct and immediate interest in the outcome of the litigation . . . , which surpasses the common interest of all citizens in procuring obedience to the law.” *In re Hickson*, 573 Pa. 127, 136, 821 A.2d 1238, 1243 (2003). In determining whether a claim for declaratory action is ripe, courts examine whether the issues are “adequately developed for judicial review” and whether delayed review would cause hardship to the parties. *Alaica v. Ridge*, 784 A.2d 837, 842 (Pa. Commw. Ct. 2001). A finding by the Court that a claim is unripe bars adjudication of the claim. *See id.* (stating that “we will not adjudicate a petition for declaratory judgment where the issues are not ripe for determination”); *see also Gulnac v. South Butler County Sch. Dist.*, 526 Pa. 483, 488, 587 A.2d 699, 701 (1991) (noting that a declaratory judgment action “must not be employed to determine rights in anticipation of events which may never occur . . . or as a medium for the rendition of an advisory opinion which may prove to be purely academic”).

The Banfield Petitioners’ allegations are contingent on events that may never come to pass, or that may not occur in the form the Banfield Petitioners have forecast and, thus, are not fit for judicial review. *See Alaica*, 784 A.2d at 843 (rejecting a pre-enforcement challenge to a statute where plaintiffs’ rights “will be affected only if several contingencies occur”).

The dissenting opinion below notes that if the Banfield Petitioners’ rights are “abridged in a particular county or at a particular polling place, this may be redressable in equity” in an action against the counties. Dissent, at MHL-11. The dissent cited *Taylor v. Onorato*, 428 F. Supp. 2d 384, 388 (W.D. Pa. 2006), a case in which the court heard Federal constitutional claims regarding DREs parallel to the state constitutional claims of the Banfield Petitioners and denied a request for a preliminary injunction. In *Taylor*, as in the instant case, the “claims [were] based on a potential series of events that may not happen as plaintiffs predict; indeed, may not happen at all. Principally, plaintiffs contend that one or more of the electronic machines may malfunction on election day causing delays and voter frustration or otherwise not give a correct

tally.” *Taylor*, 428 F. Supp. 2d at 387. The *Taylor* court found, in pertinent part, that the plaintiffs were not likely to succeed on the merits of their constitutional claims:

[I]t is of course possible that one or more of the electronic machines may malfunction on election day, just as the lever machines in the past have from time-to-time malfunctioned on election day. No election system is perfect and no machine built by man is infallible. Voting machine malfunction has been, and probably always will be, a potential problem in every election.

Id. at 388 (and quoted in the Dissent, at MHL-12). These statements in *Taylor*, endorsed in the dissenting opinion below, raise serious questions as to the ripeness of these claims and as to whether the Banfield Petitioners have standing.

The majority opinion, on the other hand, asserted that the claims are ripe because the DREs have already been certified and provide (allegedly) “no way for Electors to know whether their votes will be recognized.” Opinion at 12. The majority also asserts that the Banfield Petitioners have standing because they allege a substantial, immediate, and direct interest in the certification of the challenged DREs, in that the Banfield Petitioners are allegedly required to vote on unreliable or insecure DREs. Opinion at 11.

The fifth question presents a controlling issue of law as to Counts VIII-X because if the Petitioners’ claims are unripe or if they do not have standing, these claims would be dismissed on appeal; and an immediate appeal as to the viability of these claims therefore may materially advance the ultimate termination of the litigation.

F. Whether the Banfield Petitioners can require the Secretary to conduct a reexamination of a DRE in a particular manner not required by the Election Code, as is requested in Count VI.

There are substantial grounds for a difference of opinion as to whether the Secretary can be compelled to “re-examine voting systems *in accordance with the request made on him*” by various Banfield Petitioners. Banfield Petition at Count VI, Wherefore clause (a) (emphasis added).

The majority opinion below erroneously states that the Banfield Petitioners “do not allege in their Petition that any Elector asked the Secretary to re-examine a DRE in a particular manner.” Opinion at p. 7. However, the Banfield Petitioners explicitly ask this Court to “[d]irect the Secretary to re-examine voting systems in accordance with the request made on him by Petitioners Brau, Reed, Fewlass and Bergquist.” Banfield Petition at Count VI, Wherefore Clause (a). Those re-examination requests, which were attached to the Banfield Petition, purport to require the Secretary to undertake particular actions not provided for by law, such as: (a) providing information about the “specific steps” taken in the certification process and conducting “independent testing that is free of manufacturer or government influence” (Banfield Petition, at Ex. A); (b) conducting the reexamination in a manner “modeled upon, and . . . at least as comprehensive and rigorous as, the Harri Hursti and RABA Technologies examination” (Banfield Petition, at Exs. C and E); and (c) subjecting the system at issue to “external ‘red team’ testing” (Petition, at Ex. G). None of these requested actions are provided for in the Election Code. Therefore, the Banfield Petitioners do not have a clear right to such re-examinations, and the Secretary has no clear duty to undertake re-examinations in the manner requested by Petitioners. See *Pennsylvania Dental Ass’n*, 512 Pa. at 227, 516 A.2d at 652 (a writ of mandamus “will only lie . . . where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy.”).

There are substantial grounds for disagreement as to whether the Commonwealth Court may compel a re-examination to be conducted *in a particular manner*. Although all seven judges below agreed that Count VI may proceed, the dissent noted that “the content of the Secretary’s reexamination reports is beyond our review in a mandamus action.” Dissent, at MHL 10-11. This implicitly raises the question as to whether the requested relief can in fact be granted. In addition, while the re-examination issues presented in Count VI are somewhat

ancillary to the core challenges of this litigation, consideration of this issue via an interlocutory appeal would advance the ultimate merits of this case and avoid undesirable and confusing piecemeal litigation. For example, even if the Banfield Petitioners prevail on Count VI and obtain an order requiring the Secretary to reexamine four DREs, the content of such reexaminations would remain subject to the substantive challenges in this litigation. Moreover, until Counts III and VII are resolved, it remains the subject of this litigation as to whether the Secretary is required to adopt uniform testing criteria. Therefore, the Secretary respectfully submits that it is more efficient to have the interlocutory appeal as to Count VI heard immediately and concurrently with the other issues cited.

The sixth question presents a controlling question of law that, if decided in the Secretary's favor, would result in dismissal of Count VI, thereby materially advancing the ultimate termination of the case.

VI. Opinions, Constitutional Provisions and Statutes

As required by Pa. R.A.P. 1312(a)(6)-(7), appended hereto are the majority and dissenting opinions of the Commonwealth Court (Exs. B and C), as well as the following pertinent provisions of the Constitution of Pennsylvania and the Pennsylvania statutes:

- Pa Const. art. I, § 5, Ex. G;
- Pa. Const. art. I, § 26, Ex. H;
- Pa. Const. art. VII, § 6, Ex. I;
- 25 P.S. § 3031 (with all subsections), Ex. J;
- Declaratory Judgments Act, 42 Pa.C.S.A. §§ 7531-7541, Ex. K.

WHEREFORE, Respondent Pedro A. Cortés, Secretary of the Commonwealth, respectfully requests this Honorable Court to grant the Petition for Permission to Appeal the amended April 12, 2007 Order of the Commonwealth Court.

HANGLEY ARONCHICK SEGAL & PUDLIN

Dated: May 10, 2007

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CERTIFICATE OF SERVICE

I, Alan C. Promer, hereby certify that on May 10, 2007, I caused true and correct copies of the foregoing Petition of Pedro A. Cortés, Secretary of the Commonwealth, for Permission to Appeal to be served by the method indicated below, on the following:

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